Explaining the Unexplained Recusals at the Supreme Court

A Gitmo Petition and One Case That Yielded Seven Disqualifications Stood Out in OT17

By Gabe Roth, Fix the Court Executive Director

May 3, 2018

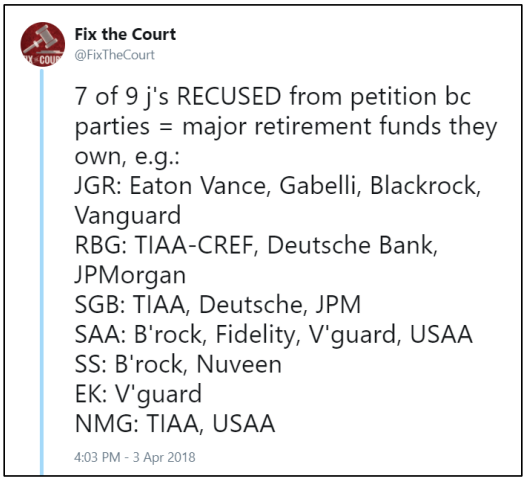
Introduction: The Seven-Justice Samba

On April 3, the Supreme Court posted a "**miscellaneous order**" that caused much consternation. These types of non-descript postings (*example at right*) can denote anything from a stay of execution to a request for the views of the solicitor general to a notice of how much argument time parties will receive in an upcoming case.

Term Year: 2017

04/30/18	Order List	04/19/18	Miscellaneous Order
04/26/18	Rules of Appellate Procedure	04/16/18	Order List
04/26/18	Rules of Bankruptcy Procedure	04/13/18	Miscellaneous Order
04/26/18	Rules of Civil Procedure	04/03/18	Miscellaneous Order
04/26/18	Rules of Criminal Procedure	04/02/18	Order List
04/25/18	Miscellaneous Order	03/27/18	Miscellaneous Order
04/23/18	Order List	03/26/18	Order List
04/19/18	Miscellaneous Order	03/20/18	Miscellaneous Order
04/19/18	Miscellaneous Order	03/19/18	Miscellaneous Order
04/19/18	Miscellaneous Order	03/19/18	Order List

That day's order was something different altogether: a short statement from Justices Anthony Kennedy and Clarence Thomas on *Deutsche Bank Trust Company Americas, et al. v. Robert R. McCormick Foundation, et al.*, a Second Circuit case stemming from the 2007 leveraged buyout of the Tribune Co. It stated, "[Lower courts] could decide whether relief from judgment is appropriate given the possibility that **there might not be a quorum** in this court."



In the SCOTUS press room and on social media, speculation went into overdrive. "Does this statement mean that seven justices are disqualified from hearing the case?" "If so, why?" "And if seven are out, **how can two stay in**?"

Within about half an hour, Fix the Court was able to determine the reasoning behind the statement (*left*): **every justice besides Kennedy and Thomas is invested in at least one of the retirement accounts and mutual funds** – such as Fidelity, Vanguard and TIAA-CREF – listed among the 154 pages of creditors, meaning the seven were, in fact, recused.

Although this was a unique case, a larger, more common principle still applies: when a case reaches the high court and the justices are unable to make a determination on it, a lower court's ruling will control. In other words, **the Supreme Court won't be supreme**, which causes all sorts of problems downstream, from the **law being applied inconsistently** in different jurisdictions to a **spate of rehearings** to a **lack of precedent**.

(Of course, no one is forcing the justices to step aside from these types of cases. If a member of the high court fails to abide by 28 U.S.C. §455(b)(4) – the recusal statute, which applies to all Article III judges – **there is no recourse or reprimand, save the high bars of impeachment and removal**. Justices' recusal decisions remain theirs and theirs alone, and institutional norms are only things stopping them from hearing these types of cases.)

This episode also raises this question: how could we find ourselves in a world in which *none* of the justices were recused from the Tribune Co. petition instead of *seven*? Unless the justices decide to put their money in gold futures, that's only possible with qualified blind trusts (QBTs). The Senate Ethics Committee recently published a comprehensive guide for helping their members and other government officials create QBTs, and **there's no reason the Supreme Court couldn't sign up**.

> "While there are a number of ways to eliminate conflicts of interests and the appearance of them, the most comprehensive approach is to put financial assets in a Qualified Blind Trust, a special trust that is created according to guidelines established by federal law."
> – Senate Ethics Committee Handbook

It's true that no one, let alone diversified 50- to 85-year-old adults, enjoys filling out paperwork, and some constitutional scholars have (unconvincingly) stated that QBTs would contravene a rule that says judges must know what their financial holdings are in order to determine whether to disqualify themselves from a case. But the truth is **anything that reduces conflicts of interest** at the high court and increases Americans' trust in the judiciary **is worth it**. Either way, they justices can do more to minimize their potential conflicts of interest.

Turns out, **they may already be**.

Trendlines

This report – the third annual from Fix the Court – once again lays out the reasoning behind the justices' self-disqualifications. So far this term, the justices have recused themselves **200 times – 194 times at the *cert.* stage** and **six times at the merits stage.** In fact, for as long as we've been keeping track, the justices have disqualified themselves from cases at the *cert.*, or petition, stage and at the merits, or arguments, stage about 200 times each year.

Of course, the justices don't tell the public why they recuse – **hence this report** – and though we think we've found the reasons behind almost all of them, there remain **four recusals for which we could not conclusively determine a reason**, though we offer some guesses at the end.

	OT15 Report 7/11/16		OT16 Report 7/18/17		OT17 Report 5/3/18	
Stage	*Cert.*	Merits	*Cert.*	Merits	*Cert.*	Merits
At time of report	176	4	200	4	194	6
Summer recusals	5	0	6	0	TBD	TBD
Total	181	4	206	4	194	6

We should also note that **fluctuations in recusal numbers from year to year are somewhat difficult to account for**. Some terms there's a more robust business docket, and in others, the justices are for some reason named as parties in several petitions. And just when some justices' previous work is far enough in the past to reduce the prevalence of their work-based recusals, a new justice joins the court, once again increasing that number.

That said, when taking the Tribune Co. LBO recusals out of the equation –they were not due to justices' ownership of individually traded companies – the **dip in stock-based recusals from 47 in OT16 to 28 in OT17 is encouraging**. More on that below.

Recusals Caused by Previous Work

The first recusal we want to key in on here comes from Justice Gorsuch in *al Bahlul v. U.S.* on October 10. Ali Hamza Ahmad Suliman al Bahlul, a Yemeni citizen being held at Guantanamo Bay, was convicted of conspiracy and other terrorism-related charges by a military commission and challenged his conviction in federal court. After a setback in the D.C. Circuit, which said his conspiracy offenses were, in fact, "triable by military commission," al Bahlul petitioned the Supreme Court for review but was denied *cert.* **Gorsuch did not take part in that decision**.

Last year, during Gorsuch's confirmation, the public learned that the justice not only visited Guantanamo during his time in the Justice Department (2005-2006), he also suggested that **federal judges visit the facility so they'd become more sympathetic** to administration policy there. Gorsuch even pressed the White House to issue a signing statement to accompany the Detainee Treatment Act that would make it seem as if the law was "essentially codifying existing interrogation policies" and not, as was generally seen at the time, as a novel method to ensure the U.S. wasn't torturing those in its custody. Gorsuch also worked on DOJ's response to *Hamdan v. Rumsfeld*, one of several Supreme Court cases on whether war-on-terror detainees could be tried outside of Article III courts.

Also on October 10, Gorsuch recused himself from *Geo Group v. Detention Watch Network et al.*, a suit in which immigrants' rights group were looking to compel the production of contracts that ICE and the Department of Homeland Security have signed with private prisons. It is unclear if these two recusals are related.

Gorsuch did not recuse himself, however, from two other Guantanamo related-petitions that reached the court this year. First was *al-Nashiri v. Trump*, in which the court denied cert. on October 17. In that case, the alleged U.S.S. Cole bomber, held at Guantanamo since 2006, was requesting *habeas* relief.

Then came *Dalmazzi v. U.S.*, granted cert. on September 28 and argued on January 16, **with Gorsuch participating**. That case arose from an al-Nashiri mandamus petition stating that the military judges hearing one of his cases were not properly appointed. When the Obama administration "fixed" the error, it created another one, as the new appointees were also serving on other military courts. A high court decision on the legality of dual appointments is expected next month.

It is unclear why, if Gorsuch recused in the former case, he would sat in the latter cases, but we'll be looking into it.

Taking the wider view, once again this term most of the recusals, or 139 of them (133 *cert.* stage, six merits stage), occurred due to previous work, with Gorsuch expectedly leading the group with 74 (71 *cert.*, three merits), followed by Justice Elena Kagan with 33 (31 *cert.*; two merits) and Justice Sonia Sotomayor with 16 (all *cert.*).

Though a decade or three removed from their high court confirmations, we learned this term that Chief Justice John Roberts and Justices Kennedy and Samuel Alito are still stepping aside from cases due to their previous work. In

fact, two of the four Roberts OT17 work-based recusals stem from his time as the deputy solicitor general in the Bush 41 administration two-and-a-half decades ago, while the other two come from his time on the D.C. Circuit.

The prize in this category for timing, though, goes to Kennedy, whose sole work-based disqualification stemmed from an age-old dispute between the government and Native American tribes in Washington over fish and water rights, with an earlier iteration of that case ending up before then-Judge Kennedy on the Ninth Circuit in 1985. (Kennedy initially missed this fact when voting on *cert*. in January and then recused himself when this conflict came to light in March, about a month before arguments. We'll give him a pass on that.)

The six merits-stage recusals in OT17 were: Justice Kagan in *Rubin v. Islamic Republic of Iran* and *Jennings v. Rodriguez* (though it took some time for her to recall her prior involvement in the latter); Justice Kennedy in *Washington v. U.S.* (ditto on that); and Justice Gorsuch in *City of Hays v. Vogt*, *Dahda v. U.S.* and *Chavez-Mesa v. U.S.*

Recusals Caused by Stock Ownership

Sometime in June we'll learn the contents of the justices' investment portfolios as of Dec. 31, 2017. As of 2016, Roberts, Breyer and Alito owned shares in 49 companies, compared to 60 companies at the end of 2015 and 76 companies at the end of the 2014. **Fix the Court expects the trend to continue in this direction** and are encouraged by the declining numbers of stock-based recusals that have occurred thus far in OT17.

Whereas last term those three justices stepped aside from 47 cases due to their individual stocks, **they've just had 28 stock-based recusals so far this term**. Alito once again led with 25 of these recusals (details below), followed by Roberts with two, both due to his Time-Warner investment, and Breyer with one, on account of his Pearson stock. In spite of his sizeable lead in stock-based recusals, Justice Alito did sell his shares in Schlumberger, the parent company of reservoir management firm WesternGeco, on March 28, allowing him to hear arguments in *WesternGeco LLC v. ION GeoPhysical Corp.* on March 16.

Justice Gorsuch had what looks like two investment-based recusals this term (three if you count the Tribune case), as it is likely his USAA holdings caused him to recuse from the twice-listed *Tartt v. Magna Health Systems, et al.*, in which the petitioner alleges a widespread government and health care conspiracy to discriminate against him. Also listed twice this term was a suit involving Justice Ginsburg's place of residence – the Watergate Apartments in Foggy Bottom – prompting two disqualifications.

A full list of OT17 stock-based recusals follows:

Chief Justice Roberts' two cert.-stage recusals based on his stock ownership
Time-Warner (owned between $250,001 and $500,000 in stock):
Groshek v. Time Warner Cable et al.
Front Row Technologies v. MLB et al.

Justice Breyer's one cert.-stage recusals based on his stock ownership
Pearson (owned between $500,001 and $1,000,000 in stock):
Jean-Pierre v. Schwers

Justice Alito's 25 cert.-stage recusals based on his stock ownership
Boeing (owned between $15,001 and $50,000 in stock):
SolidFX v. Jeppesen Sanderson

Caterpillar (owned $15,000 or less in stock):
Mathias v. U.S. District Court for the Central District of Illinois et al.

ConocoPhillips (owned $15,000 or less in stock):
Southeast Louisiana Flood Protection v. Tennessee Gas et al.

DowDuPont (owned between $15,001 and $50,000 in stock):
Nova Chemicals v. Dow Chemical
Dow Agrosciences v. Bayer Cropscience

Johnson & Johnson (owned between $15,001 and $50,000 in stock):
Ethicon v. Huskey
Cordis Corp. v. Barber
Endo Pharmaceuticals et al. v. New Hampshire
Medical Device v. U.S.
Cotton v. Johnson & Johnson

Merck (owned between $15,001 and $50,000 in stock):
Merck Sharp & Dohme v. Albrecht
Bais Ya'akov v. FCC et al.
Rinis v. Public Employment Retirement System et al.

Mondelez (owned $15,000 or less in stock):
Taft v. Nabisco

Oracle (owned between $50,001 and $100,000 in stock):
Kip CR P1 v. Oracle et al.
Kip CR P1 v. Cisco et al.
Okawaki v. Hawaiian Bank et al.

PNC (owned between $15,001 and $50,000 in stock):
Birmingham v. PNC (listed twice)
Sterba v. PNC

Schlumberger (owned $15,000 or less in stock but sold it to hear Apr. 16's WesternGeco. v. Ion Geophysical Corp.):
Oubre v. Schlumberger
M-I LLC v. Syed
WesternGeco. v. Ion Geophysical Corp. (Alito took no part in the Jan. 12 *cert.* petition determination)

United Technologies Corp. (owned between $15,001 and $50,000 in stock):
Joseph v. UTC

Recusals Caused by Being Named in Suit

Unlike last term, which included six such petitions yielding 18 recusals, OT17 featured just one case in which justices were named parties, which automatically prompts disqualification.

In a 90-page complaint that reached the high court in October, a Rapid City, S.D., man detailed several instances in which he believes that he and his wife were denied due process, and he accused eight Supreme Court justices (all but Gorsuch), as well as eight unknown law clerks, of conspiring with the justices of the South Dakota Supreme Court to deny a prior petition for relief. All eight named justices recused themselves here.

Recusals Caused by Family Ties

The only family-based recusals this term were from Justice Breyer, who stepped aside from 10 petitions that had previously been before his brother Charles, a senior judge in the Northern District of California. This is somewhat surprising given that nearly every member of the high court has family members involved in law or politics.

Undetermined Recusals

There were four cases whose recusals we could not definitively figure out. The Gorsuch recusal in *Geo Group v. Detention Watch Network et. al* was mentioned above, and the reasons for his recusals in *Opalinski v. Robert Half International*, a Fair Labor Standards Act case from the Third Circuit, and *Foot Locker v. Osberg*, an ERISA suit from the Second Circuit, could not be determined.

Why Justice Thomas, in the first orders list of the term, disqualified himself from the disbarment of Elbert Walton, Jr., is unclear. Walton is a prominent St. Louis-based lawyer and former member of the Missouri House of Representatives (1979-1992) who then became the attorney of a local fire district and got into trouble for failing to comply with subpoenas and yelling at a judge.

Thomas worked in Missouri from 1974 to 1979, first as assistant attorney general in Jefferson City and then as an attorney with Monsanto in St. Louis. It is presumed the two know each other from their time in Missouri, but Fix the Court has yet to find proof.

Anyone having a thought as to why these recusals occurred is invited to alert us at Info@FixTheCourt.com.

Conclusion: We'll Keep At It

Since its 2014 launch, Fix the Court had advocated for the justices to briefly list the reasoning behind their *cert.*- and merits-stage recusals.

The Supreme Court used to but stopped in 1904. We learned this last year when the court posted several turn-of-the-last-century journals online. An entry from the 1889 journal noted, "Mr. Justice Brewer, **not having been a member of the court when this case was argued** took no part" in a case involving elevated rail tracks and eminent domain. "Mr. Justice White, **not having been present at the argument**," a 1904 entry states, "took no part" in a decision on a Georgia waterworks contract. That practice was discontinued for some reason in 1905.

In present times, it'd be easy to dismiss all 77 of Justice Gorsuch's OT17 recusals as a result of his participation in those cases when he was serving on the Tenth Circuit. But we know the latter is not accurate.

Gorsuch's Gitmo disqualification **demonstrates the value of asking difficult questions** – and submitting and litigating FOIAs, as Fix the Court did in 2016-2017 – related to the past work of potentially life-tenured members of our government. At the same time, his participation in two other Guantanamo cases **underscore how the whole disqualification process remains shrouded in secrecy.**

If this single recusal – not to mention the private prison contracts one, whose reasoning we couldn't determine with certainty – **demonstrates that the newest justice has a self-identified bias in detention-policy cases**, then that discovery is worth the time it took to figure out the reasoning behind the other nearly 200.