OT19 Recusals at the Supreme Court, Explained

December 17, 2019

Each year, and sometimes twice a year, Fix the Court tries to explain each of the justices' *cert*.-stage recusals in an effort to shed some light on the Supreme Court's conflicts of interest.

In past years, we've uncovered instances in which a justice should have disqualified himself or herself at the *cert*. stage but did not and a few cases where it was the opposite – i.e., a justice recused but probably didn't need to. This year we're not breaking as much news but believe that our report does cast some doubt on the justices' impartiality in certain areas and may foreshadow future ethics concerns.

Should He Be Recused?

On Oct. 18, the Supreme Court granted *cert*. in 19-7, *Seila Law v. Consumer Financial Protection Bureau*. At issue is the constitutionality of the CFPB's single-director structure and the severability of the CFPB from Dodd-Frank should the bureau as a whole be deemed unconstitutional.

As of today, all nine justices are scheduled to hear the case[1], which came from the Ninth Circuit, on March 3. Yet recalling *Seila*'s provenance doesn't confer amnesia, as everyone reading this is familiar with Justice Brett Kavanaugh's views of the agency, which he's articulated several times. Here's his Oct. 2016 opinion in *PHH Corp. v. CFPB*[2], for example: "[I]n light of the threat to individual liberty posed by a single-Director independent agency, we […] hold that the CFPB is unconstitutionally structured."

> A complete list of the justices' OT19 *cert*.-stage recusals may be found **at this link**.

Given the lack of daylight between Kavanaugh's stated views on the CFPB's structure and Seila's petition to SCOTUS, as well as the clear text of the recusal law (a justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"), Kavanaugh should, at the very least, offer a public explanation as to why he should sit on the case, much as Justice Antonin Scalia did in *Cheney, et al., v. U.S. District Court for the District of Columbia, et al.*, and Justice William Rehnquist did in *Laird v. Tatum*.

[1] The U.S. solicitor general's office explicitly considered a potential Kavanaugh recusal in its argument opposing *cert*. in one of the D.C. Circuit's CPFB cases, 18-307, *State National Bank v. Mnuchin*, last December. Deputy SG Jeff Wall called the case a "poor vehicle" for questioning the constitutionality of the agency's single-director structure since, "it is unlikely that the case would be considered by the full Court, [as] Justice Kavanaugh previously participated."

[2] Neither PHH nor the CFPB filed a *cert*. petition after the D.C. Circuit's *en banc* ruling in 2018 that vacated Kavanaugh's holding and upheld the agency's structure.

Today's Cash Prizes Portend Trouble

Next comes the $1 million award given to Justice Ruth Bader Ginsburg Dec. 16 by the little-known Berggruen Institute for her work in "pioneering gender equality and strengthening the rule of law." The justice said she will be donating the prize money. Nevertheless, the idea that a justice would even be allowed to temporarily accept such a gift looks improper for several reasons.

First, the Judicial Conference of the U.S. has made clear that any honorarium over $2,000 may not be accepted (§1020.30). Though the federal law from which these regulations originate does not apply to the Supreme Court, ethics guidance and recent experience suggest that they may.

According to a resolution written by Chief Justice Rehnquist two years after the 1989 Ethics Reform Act was passed, the Title VI gift requirements of the law apply to SCOTUS, or at least they applied to the nine justices serving in 1991. (A recent attempt to clarify with the court if the statement remains in effect was unsuccessful.)

Justice Ginsburg accepting the Genesis Lifetime Achievement award last year, with Genesis Board Chair Stan Polovets (left) and former President of the Israel Supreme Court Aharon Barak

Further, the most recent SCOTUS honoraria we could find (in 2012 and in 2018) each comprised a gift of exactly $2,000 that was donated to charity. This suggests that justices are largely complying with the regulation.

Lastly, don't forget that Ginsburg was unable to accept a $1 million award last year from the Genesis Prize Foundation likely due to the gift rules (or diplomatic reasons, depending on which version of the story you believe). Ginsburg was instead granted the Genesis Lifetime Achievement Award (*above*), which came with no honorarium, though the prize's benefactor did take her to Petra, Jordan, in July 2018.

Even if the gift rules do not apply to the justices, it's still a bit unsettling that two different relatively young and not well-known foundations like Berggruen Institute and Genesis Prize Foundation would seek to give $1 million to a Supreme Court justice in back-to-back years. Is that the going rate to ensure a justice attends your annual event?

Also, think about who sits on these foundation's boards. The Berggruen board includes the president of the University of Pennsylvania and the Chief Economic Advisor of major insurer Allianz; UPenn signed an *amicus* brief on this term's DACA case, and Allianz is a frequent SCOTUS litigant, most recently in

2017. The intersection of high court petitions and lucrative prizes will be something to watch in the coming years.

The above-pictured blue glass sculpture, by the way, was not included in Justice Ginsburg's 2018 disclosure report, suggesting either an error, that the justice didn't take it home with her, or that it's worth less than $390.

"...The Appearance of Impropriety…"

Speaking of ethics, as we conducted research for this report, we examined several events that have occurred since the start of the term and which, we believe, could appear improper to a neutral party or lead to a future recusal.

For example, it was not a good look for the high court when on Oct. 29, the president of the National Organization for Marriage, which submitted amicus briefs in the term's Title VII cases, met with Justices Kavanaugh and Samuel Alito. Nor was it particularly helpful to the court's image that on Dec. 4, Ginni Thomas, wife of Justice Clarence Thomas, gave out her annual Impact Awards to several individuals who are actively campaigning to overturn *Roe v. Wade* and who, as we'll learn next month, are likely to be *amici* in 18-1323, *June Medical Services v. Gee*.

Unnecessary Recusals, and Ones We Believe Were Missed

A screenshot of Justice Sotomayor's Penguin Random House author page

On Dec. 9, Justice Stephen Breyer recused himself from *cert*. determination in 19-560, *Nicassio v. Viacom International, Inc., and Penguin Random House, LLC*, presumably due to his stake in Pearson PLC, a British publishing company that owned Penguin before its 2013 merger with Random House and continues to hold a large stake in the new company.

Breyer was also paid $4,415 in royalties last year by Penguin for his most recent book, *The Court and the World*. His wife, who also wrote a book Penguin published, received royalties from them, as well, according to the justice's 2018 financial disclosure report.

Here's the rub: Justice Sonia Sotomayor, who does not own any shares of stock in individual companies, earned $33,000 in royalties from Penguin Random House in 2018, according to her disclosure. And yet, she sat on the *cert*. petition in 19-560 and has sat on petitions involving Penguin in the past.

Given the nearly $2 million Sotomayor has pocketed from the publishing giant since joining the high court, we think it best if she sits out all Penguin petitions for the time being.

Here's one on the other end of the spectrum, where we believe a justice was unnecessarily cautious in opting to recuse from a petition determination. On Nov. 25, Justice Elena Kagan stepped aside in 19-418, *Brookens v. Acting Sec. of Labor*, likely due to her being the counsel of record in 09-463, *Brookens v. Sec. of Labor*, as U.S. solicitor general. Though the litigants were the same, the issues presented in these cases a decade apart were not: the timeliness of filings in the former and employment discrimination in the latter. We believe her recusal this term was not required.

Justice Kavanaugh was also involved in multiple Brookens suits. In 2009 he joined with his D.C. Circuit colleagues to deny a motion for an *en banc* hearing in 08-5527 (09-463 at SCOTUS) and affirmed summary judgment in 09-5249 (10-17 at SCOTUS). Both D.C. Circuit cases were about employment discrimination and not timeliness of filings. Because of that difference, we deem his non-recusal in 19-418 reasonable.

Justices Kavanaugh (left) and Kagan (right) are recusing a lot due to previous work. But is it too much?

Justices are often put in a difficult position when deciding how to handle petitions of a frequent litigant like Brookens. How can you not be partial when the appellant is throwing the kitchen sink at the court?

With the recusal statute calling for disqualification over "personal bias or prejudice" and not "annoyance" (cf. 28 U.S.C. 455 (b)(1)), we feel that sitting on these cases is generally within ethical bounds, unless it's just a later iteration of case the justice had previously sat on.

To us, any differing conclusions on recusals suggest the justices are interpreting the recusal statute differently and individually, when instead, there should be a consensus understanding of their ethical obligations. (Dare we say that a SCOTUS ethics code would help fix this?)

The Recusals So Far

	OT15 Report 7/11/16		OT16 Report 7/18/17		OT17 Report 5/3/18		OT18 Report 7/25/19		OT19 Half-Term 12/17/19	
Stage	*Cert.*	Merits	*Cert.*	Merits	Cert.	Merits	*Cert.*	Merits	*Cert.*	Merits
At time of report	176	4	200	4	194	6	198	3	69	0
Post-report to term's end	5	0	6	0	34	0	0	0	N/A	N/A
Total at each stage	181	4	206	4	228	6	198	3	69	0
Overall total	185		210		234		201		69	

Recusals Caused by Stock Ownership (7)

Seven times this term a justice recused due to owning stock in a company. Despite repeated calls over the years for the justices to divest from individual stock holdings, Chief Justice Roberts, Justice Breyer and Justice Alito have declined to, so we unfortunately continue to catalog this as a category of recusal at the Supreme Court.

Most interestingly, Justice Alito recused in 19A368, *BP, et al., v. Mayor and City Council of Baltimore*, due to his ownership of shares in two litigants, Phillips 66 and ConocoPhillips. This is the case where Maryland city officials are suing major oil companies over the climate hazards associated with the use and production of their products. The oil companies tried to block the suit from proceeding in state court as they tried to move it to federal court, but an eight-justice court on Oct. 22 allowed it to proceed.

The Chief Justice was unable to participate in 18–1386, *Lipschultz, et al., v. Charter, et al.*, because he continues to own Charter stock. This case deals with the extent to which federal agency policy can pre-empt state law, and Justices Thomas and Neil Gorsuch filed an opinion exploring that issue in a concurrence denying *cert*.

Elsewhere, Justice Breyer's investment in Lowe's prevented him from participating in 19-5517, *Sanders v. Lowe's Home Centers.* Justice Alito's investment in Becton Dickinson necessitated his recusal in 18-1346, *Kleber v. CareFusion Corp*. (CareFusion is a subsidiary of Becton Dickinson.) The high court was down to seven justices in 19-5193, *Burrs v. United Technologies, et al.*, as both Justices Alito and Breyer own stock in United Technologies. The Breyer recusal in in 19-560, *Nicassio v. Viacom and Penguin Random House*, was discussed in a previous section.

Since we won't know for certain about the justices' stock ownership until their 2019 financial disclosure reports are released in June or July 2020, this is all speculative, albeit highly likely given our previous work in this area.

Recusals Caused by A Justice Being Named in Suit (7)

So far, justices have been named in two suits this term, producing seven recusals. In 18-9383, *Lakshmi Arunachalam v. N.D. Cal. et al.*, the petitioner named Justices Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan, and all six justices recused.

Due to the six recusals, the court lacked a quorum and thus affirmed the lower court's judgement in tossing the suit. It is notable that the justices did not recuse in denying the petition for rehearing, although as the lawsuit seems spurious, and the justices declined to respond, it hardly seems like a major breach of ethics.

The Chief Justice was named in 19-275, *Frederic Schultz v. John Roberts*, a case alleging that then-candidate Donald Trump stole the petitioner's vote because he was elected with a minority of the votes in the 2016 election. Roberts was implicated in the suit because he administered President Trump's oath of office. The petition for *cert.* was denied.

Recusals Caused by a Justice's Family/Personal Ties (1)

Only once this term did a justice recuse due to a family or personal connection. Justice Breyer has a brother serving as a judge in the Northern District of California, and so the justice has appropriately made it his practice to recuse in cases that were previously before his brother. This explains Justice Breyer's recusal in 18-1503, *Nagel Rice, LLP, et al., v. Volkswagen Group of America, Inc., et al*.

Recusals Caused by a Justice's Previous Work (53)

Previous work again accounted for the vast majority of the recusals in the first half of OT19, with justices stepping aside 53 times due to their prior involvement in cases. Kagan led the way with 16 recusals. Having served in the last two Democratic presidential administrations, as SG under President Obama and as associate White House counsel under President Clinton, these recusals are hardly surprising.

For example, Kagan recused in 18-9783, *Nasser Ghelichkhani v. U.S.*, a case concerning the petitioner's conflict with ICE over his alleged attempts to misrepresent his citizenship status and alleged mistreatment at the hands of ICE personnel. Kagan recused due to her involvement in a prior appeals of the same case as U.S. solicitor general. Kagan also recused in 18-1509, *Department of Homeland Security, et al. v. Rahinah Ibrahim*, a petition concerning a Malaysian citizen and Ph.D. candidate at Stanford University who disputed her placement on the No Fly List. The case was originally filed in 2006, and implicated the U.S. attorney general during Kagan's tenure as SG.

In addition to Kagan's 16 recusals, Justices Alito and Kavanaugh logged 12 recusals due to previous work, Justices Gorsuch had 11, and Justice Sotomayor had two. These recusals were caused by work at the circuit level − Alito was on the Third Circuit, Gorsuch was on the Tenth Circuit, Kavanaugh was on the D.C. Circuit and Sotomayor was on the Second Circuit.

For example, Justice Alito recused in 19M71, *James McIntosh v. Mark Kirby*, a *habeas* petition from the Third Circuit. Alito's disqualification was caused by his work on a related case when he was on that circuit. Likewise, Gorsuch recused in 18-9187, *Jason Brooks v. Matthew Hanson*, a habeas petition from the Tenth Circuit that Gorsuch had previously denied at the circuit level.

Recusal Caused by Not Yet Being on the Court (1)

Lastly, one recusal was caused because of the timing of a justice's appointment. Justice Kavanaugh was sworn in on Oct. 8, six days after oral arguments of 17-6086, *Gundy v. U.S*. The case was decided last term, but this term, the court denied a petition for rehearing.

Fix the Court will update this tally again toward the end of the term, likely in July.