# Explaining the Unexplained Recusals at the Supreme Court

*Cert.-stage step-asides keep a steady pace in the second half of OT15*

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The telltale sign that a Supreme Court justice has made the decision[1] to sit out a case due to a conflict of interest is an empty chair along the bench at oral argument.

In the second half of this past term, with Justice Antonin Scalia passing away before the February sitting, two seats were unoccupied a couple of times: on March 21, Justice Sonia Sotomayor sat out *RJR Nabisco v. European Commission*, a suit regarding cigarette smuggling in Europe, due to her participation in the case more than a decade ago. The next day, Justice Samuel Alito sat out *Puerto Rico v. Franklin California Tax-Free Trust*, a case on the commonwealth's debt, due to ownership of as much as $100,000 in Franklin bonds[2].

*Three justices are collectively stepping aside dozens of times from cert. determinations due to ownership stakes in companies with business before the court – thus forfeiting their "duty to sit" to hold on to relatively minor investments.*

And yet, many, many more recusals occurred at the cert. stage, or the time when the justices determine whether or not to hear a case. In OT15, there were 176 cert.-stage recusals, with 85 of them coming before Jan. 1 and the remaining 91 being revealed in orders lists since the start of 2016.

While most of these are due to two justices' previous work, at least 31 of the recusals were the result of three justices insisting on holding on to individual stocks, thereby foregoing their duty to sit in favor of holding on to securities that comprise but a small portion of their investments.

In this report, Fix the Court describes the reasons behind these second half recusals, since the justices themselves refuse to tell the public why they are stepping aside a given case. Our report on cert.-stage recusals from October to December 2015 is available at tinyurl.com/FirstHalfOT15Recusals.

## Finding a reason when none is given

The court's custom for cert.-stage recusals is to note in its weekly orders lists that the justice or justices recusing "took no part" in consideration of a petition.

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[1] The justices themselves make the determination about whether to recuse from a case. Many recusals occur due to statutory requirements – e.g., a justice owns stock in a litigant or had worked on the case previously – but the reason behind many others are less than clear.

[2] The two other recusals from cases this term happened in the fall: on Oct. 14 Alito sat out *FERC v. EPSA* due to his ownership of up to $15,000 in stock of Johnson Controls, a co-litigant; and on Dec. 9 Kagan recused herself from *Fisher v. UT-Austin*, as she had participated in an earlier version of that case when she was U.S. solicitor general.

As was the case in the first half of OT15, about two-thirds of the cert.-stage recusals since January were due to the previous work of two of the justices. Believe it or not, there are still cases that were argued in the Second Circuit more than six years ago, such as *RJR Nabisco*, that are only now reaching the high court and which require a Sotomayor recusal, and there are still active cases that crossed the desk of the U.S. Solicitor General during Justice Elena Kagan's tenure there, which ended in 2010.

The rest of the cert.-stage recusals are split among a number of reasons – stock ownership, involvement of a family member or being named in a complaint. There are even a few recusals for which we could not determine the reason, and we will give our best guesses on those later in the report.

Reluctance to explain recusals

Justices hiding their reasons for recusal is not new, yet the chorus of voices calling for explanations continues grows with each passing term.

For example, in his spring 2016 law review article titled "What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable," Judge Richard Posner of the Seventh Circuit Court of Appeals criticizes a number of institutional problems with the Supreme Court – the way in which the justices manage their docket, the timing of opinion announcements and their reliance on law clerks – and he takes aim at current high court recusal practices:

*Judge Posner adds his voice to those in Congress and across the country calling for the high court to be more open.*

> What could be changed for the better very easily would be the management, the organization, of the Supreme Court, which is inexplicably deficient. […That includes] the justices' refusal to give reasons for recusing themselves from hearing cases or for refusing to recuse themselves in the face of plausible, responsible, recusal motions […which] could be changed by an aggressive Chief Justice.

In his 11 years as chief, John Roberts has yet to be "aggressive" transparency evangelist – or a moderate transparency enthusiast, for that matter.

When asked at a 2015 congressional hearing about why the justices do not disclose their reasons for recusal, Justice Anthony Kennedy said that if a reason was publicly stated, it may indicate to the other justices that the case is of great importance to a colleague. "It's almost like lobbying," Kennedy said.

Justice Stephen Breyer, sitting next to him at the time, added, "I don't want to have to give my [reasons for recusal] if I don't want to. It's a personal decision […] and that is, I think, the best way to run this institution."

Fix the Court clearly disagrees with this sentiment.

No more oversights in second half of OT15 (probably)

Unlike in the first half of OT15, Fix the Court did not find any oversights – where a justice should have recused from a case at the cert. stage but didn't – in the second half of OT15.

*Roberts missed a conflict at the end of last year, which Fix the Court found and notified the court about. This shows that the justices need to implement a better conflict-check system.*

In December 2015, we realized that Chief Justice Roberts neglected to step aside from an October cert. determination of an Arizona Superfund case in which Texas Instruments, whose stock Roberts owns, was a litigant. The court acknowledged that error, but this episode underscores that the high court needs a better, more comprehensive system for checking for potential conflicts of interest.

It is possible that one of Justice Alito's staggering 22 stock-related cert.-stage recusals was unnecessary, as he stepped aside from *Grynberg v. Kinder Morgan* this April but sold his Kinder shares, valued at up to $15,000, back in December. It is unclear why he recused himself here and technically was not required to, unless there was a mistake or another reason we failed to unearth.

Uncovering the main reasons for recusal: previous work, stock ownership, family ties, being named in suit

*Previous work (60 in second half of OT15, 115 overall)*

Sotomayor (10) and Kagan (50) were the only two justices who recused at the cert. stage due to their previous positions[3].

Sotomayor's most interesting cert.-stage recusals of her 10 so far this year was likely in *Ntsebeza et al. v. Ford Motor Co., et al.*, a decade-long case that started in the Southern District of Manhattan and centered on whether Ford and IBM could be held responsible for the work of their subsidiaries in apartheid-era South Africa.

Kagan's most interesting cert.-stage recusals of her 50 in 2016 may have been *In re: Ronnie Glenn Triplett*, a case stemming from Triplett's 2004 conviction for dealing meth out of an Oklahoma auto repair shop. Triplett, who filed both habeas and mandamus petitions before the high court (both were denied, and both were Jan. 2016 Kagan recusals), was asking the court to consider whether his sentencing under the Armed Career Criminal Act was justified in light of a 2015 Supreme Court case *Johnson v. U.S.*, which ruled that part of the ACCA was "unconstitutionally vague."

By not granting cert. in this case – a determination that the now-former U.S. Solicitor General Donald Verrilli advocated for in a Dec. 2015 brief – it looks as if the not-vague part of the statute is going to keep Triplett in jail for years to come.

[3] One Sotomayor's case-level recusals, *RJR Nabisco*, occurred due to her having heard the case in lower court back in 2004, when Roberts and Alito were themselves lower court judges. It is conceivable, then, that the two Bush appointees – who joined the court in 2005 and 2006, respectively – could have future recusals based on previous work.

*Stock ownership (21 in second half of OT15, 31 overall)*

Only one of Roberts' six OT15 stock-based cert.-stage recusals occurred since the start of the year, in *Fontanez v. Time Warner Cable* in February, due to his owning between $100,001 and $250,000 in TWC stock.

More interestingly, though, sometime between Jan. 1 and 15, 2016, Roberts sold up to $500,000 in shares of Microsoft stock. We know this because his 2015 financial disclosure report indicates that he had the shares at the end of last year, yet he did not step aside from cert. determination in *Microsoft v. Baker*, a patent case that the high court granted on Jan. 15 of this year.

Breyer had two of his three OT15 stock-based recusals occur in 2016, both last month: in *Commonwealth Scientific v. Cisco Systems*, due to his owning between $50,001 and $100,000 in Cisco stock, and in *Brown v. Lowe's Home Centers* due to his owning between $50,001 and $100,000 in Lowe's stock.

OT15's most notable stock situation, though, happened in the first half, when Justice Breyer heard Oct. 14's *FERC v. EPSA* though his wife owned $33,000 worth of stock in Johnson Controls, a co-litigant in the case. Breyer sold the shares the next day and still voted on the case, which Alito had recused from earlier in the year due to the same stock conflict.

*The most memorable recusal, or non-recusal, of the term occurred when Alito and Breyer made different determinations about whether to step aside from a case in October, even though both held the same stock.*

Speaking of Alito, the third-most junior justice has had an astounding 17 cert.-stage recusals based on his stock ownership since Jan. 1:

- *Prentiss v. Boeing*, due to owning between $15,001 and $50,000 in Boeing shares;
- *Jacobs Engineering Group v. Adkisson*, due to owning up to $15,000 in Jacobs shares;
- *Johnson & Johnson v. Reckis*, due to owning between $15,001 and $50,000 in J&J shares;
- *Ortho-McNeil-Janssen v. South Carolina*, due to owning between $15,001 and $50,000 in J&J shares, since Ortho-McNeil-Janssen is a J&J subsidiary;
- *Hall v. Du Pont*, due to owning between $15,001 and $50,000 in Du Pont shares;
- *Walsh v. PNC*[4], *PNC v. Brian*, *Breadiy v. PNC* and *Carpenter v. PNC*, due to having up to $115,000 invested in three different PNC accounts;
- *Proctor & Gamble v. Rikos*, due to owning between $15,001 and $50,000 in P&G shares;
- *Frank v. Poertner*, due to owning between $15,001 and $50,000 in P&G, as P&G owns Duracell batteries and this was a class action lawsuit over the claim that their batteries "last 30 percent longer";
- *Click-to-Call Technologies v. Oracle*, due to owning between $50,001 and $100,000 in Oracle shares;
- *Lawson v. Sun Microsystems*, due to owning between $50,001 and $100,000 in Oracle shares, as Oracle owns Sun;

[4] This case was listed twice, first in Jan. 2016 and again in March, and we count it twice in the report since each time Alito had to make a determination as to whether he would recuse.

- *WesternGeco v. Ion Geophysical Corp.*, due to owning up to $15,000 in Schlumberger stock, as WesternGeco is a subsidiary of Schlumberger;
- *Cubist v. Hospira*, due to owning between $50,001 and $100,000 in Merck shares, as Merck acquired Cubist in Jan. 2015; and
- *Grynberg v. Kinder Morgan*, possibly due to his owning up to $15,000 in Kinder shares, though he sold the shares in December 2015, and the case wasn't denied cert. until Apr. 2016.

This is an astounding number of cert.-stage recusals for something that is very preventable – and also goes to underscore our assertion that the justices should either sell their shares in individual companies or place their shares into blind trusts for the duration of their time on the bench.

*Family ties (7 in second half of OT15, 15 overall)*

Breyer was the only justice during the second half of OT15 to have a cert.-stage recusal due to a familial relationship. Breyer's brother, Charles, is a federal judge in the Northern District of California, and seven cases that crossed Charles' desk reached the high court. None was granted cert., and Stephen stepped aside each time: in *Richards v. Barnes*, *Johnson v. U.S.*, *Carozza v. U.S.*, *Bolds v. U.S.*, *Creech v. Muniz*, *Quintana v. Gipson* and *Ohayon v. U.S.* – mostly criminal proceedings covering acts ranging from bank fraud to sexual assault.

*Named in complaint (1 in second half of OT15, 10 overall)*

Only once in the last six months was a justice named in a suit. Prolific conspiracy theorist and high court gadfly Patrick Missud again had a petition rejected by the justices (he's the disbarred Nevada attorney who often switches out the letter "s" with dollar signs in his complaints), and this time, in *Missud v. the Ninth Circuit U.S. Court of Appeals*, the Chief Justice recused since he was mentioned in the grievance.

*Undetermined (3 in second half of OT15, 6 overall)*

There were six cert.-stage recusals that Fix the Court could not determine the reason behind, three of which occurred since the start of the year.

*Did Breyer recuse from the POM Wonderful case because he often speaks at a conference in Aspen or because he owns shares in a food distribution company? Or is there another possible reason we're missing?*

Breyer stepped aside in *POM Wonderful v. FTC* in May 2016, a continuation of a false advertising case of the same name from OT14. Our best guess is that the owners of POM Wonderful, Stewart and Lynda Resnick, are, like Breyer, board members of the Aspen Institute, and Breyer participated in the Aspen Ideas Festival five times in the last decade. Or, it could be because according to Breyer's 2015 financial disclosure report, he has between $100,001 and $250,000 in Sysco stock, and Sysco has distributed POM Wonderful products across the country.

In 2016 Alito recused himself from cert. determinations for *Turner v. Mahally* and *Hausler v. JPMorgan Chase*, as well as in *ABB v. Arizona Board of Regents* and *Arizona v. Ashton Co.* and *Janes v. Triborough Bridge* in the first half of OT15.

In *Turner*, none of the lawyers or judges involved in the case appears to have any connection to Alito, and we found no links between Alito's family and the litigants in the case. It's the same story with *Hausler*, though as recently as Feb. 2014, Alito owned shares in the respondent.

In the two Arizona cases – companion cases about industrial waste dumped at Superfund sites – there are two possible family connections: Alito's son used to work for the firm (Gibson Dunn) that represented Lockheed Martin, which was one of the litigants, and his daughter works for the company (Ketchum) that does PR for another litigant, Goodyear.

Finally, in *Janes*, it is possible the recusal was due to Alito knowing one of the attorneys, Steven Herzog, who once clerked for one of Alito's Third Circuit contemporaries, Judge Robert Cowen. But that does seem like a stretch.

Conclusion

Of all the institutional reforms for which Fix the Court advocates, recusal reform may be the simplest to implement.

*The current system of identifying the conflicts that require recusal is not working. Any lapses reduce the public's trust in the recusal process and in the Supreme Court as a whole. There is, of course, an easy fix: a simple explanation.*

Writing in the orders that "Justice Alito took no part in the consideration of this petition *due to a stock conflict*" would yield transparency dividends likely greater than the dividends of the very stock triggering the recusal (metaphorically, of course).

From the Kinder Morgan and Arizona Superfund cases to mention Breyer's oversight in *FERC v. EPSA* in October, we know that the current system of identifying statutorily necessary recusals is not working as intended. Lapses and unspecified recusals reduce the public's trust in the recusal process and in the institution, and there is, of course, an easy fix.

Plus, the idea that publicizing the reasons behind recusals would lead to a bevy of warrantless recusal motions is unfounded. As Breyer said last year, that while "it is logically conceivable that a lawyer might sometimes think of bringing up an issue in order to have a panel that is more favorable, I know no such lawyer" who would do that.

Neither do we, Justice Breyer. And that's the point. But if we do meet one, we'll be sure to introduce him or her to Patrick Missud.

In the meantime, and as long as the justices refuse to do so, Fix the Court will continue to inform the public of the reasons behind their recusals.