



OT18 Recusals at the Supreme Court, Explained¹

July 25, 2019

Introduction

On Sept. 13, 2018, 18 days before the start of the Supreme Court’s October Term 2018, the House Judiciary Committee passed the Judiciary ROOM Act ([H.R. 6755](#)), a bill that would, among other reforms, require the “clerk of the Supreme Court [to] ensure that [...] timely notice of [a justice’s] recusal is made publicly available on the website of the Supreme Court, **along with an explanation for such recusal.**”

To our knowledge, no bill requiring recusal explanations from the justices had ever gone that far in the history of the U.S. Congress. **That the legislation made it out of committee in a bipartisan fashion is also noteworthy.** Unfortunately, H.R. 6755 never reached the House floor or the Senate before the end of the session.

And that’s why, 10 months later, Fix the Court is still searching for the reasoning behind the justices’ unexplained recusals.

As of today, the justices have sat out a *cert.* determination 198 times this term due to stock ownership, being named in a suit, family ties or previous work. There have been three merits-stage recusals, all from Justice Brett Kavanaugh due to his work on the D.C. Circuit. And, **again, there were two instances of what we term “missed recusals,”** when two justices should have disqualified themselves from considering a petition but didn’t.

The Other Kind of Missed Recusals

But wait, there’s more. What’s new this term, at least to us, is that it appears the Supreme Court is not recording certain recusals in their weekly orders. In [February](#) and [March](#), petitions addressed to Chief Justice Roberts and Justice Elena Kagan, respectively, acting in their role of overseeing circuit courts, were transferred to other justices. In each case, the online docket noted that Roberts and Kagan were “recused” from reviewing the petition.

These disqualifications were not found in the Supreme Court’s orders, only in the docket.



Kagan and Roberts recused themselves from determining what to do with two cert. petitions and sent them elsewhere. (Credit: Supreme Court of the United States)

¹ The data was compiled by, and the report was primarily written by, Meghan Navar-Browder, law clerk; Tyler Cooper, senior researcher; Riley Horan, law clerk; and Dylan Hosmer-Quint, research associate.

Roberts oversees the D.C. Circuit and [recused himself](#) from considering a petition in 18-8855, *Hicks v. U.S.*, due to his previous work on that appeals court. The petition was then transferred to Justice Clarence Thomas, since Thomas is next in seniority. The case was ultimately denied *cert.* on May 28, and the [orders](#) noted that Justice Kavanaugh was recused, but Roberts' prior recusal went unmentioned.

Kagan oversees the Ninth Circuit and [recused herself](#) from considering a petition in 18-1509, *Department of Homeland Security, et al., v. Ibrahim*, due to her work as U.S. solicitor general. It was transferred to Justice Neil Gorsuch, who's one down in seniority from Kagan. **The matter remains open, and FTC will track whether Kagan's initial disqualification is noted in a future orders list.**

In the interest of transparency, we would like to see these types of recusals and petition transfers noted in the weekly orders lists in future terms.

	OT15 Report		OT16 Report		OT17 Report		OT18 Report	
	7/11/16		7/18/17		5/3/18		7/25/19	
Stage	Cert.	Merits	Cert.	Merits	Cert.	Merits	Cert.	Merits
At time of report	176	4	200	4	194	6	198	3
Summer recusals	5	0	6	0	34	0	TBD	TBD
Total at each stage	181	4	206	4	228	6	198	3
Overall total	185		210		234		201	



As you can see from the table, the number of recusals this term tracks with previous terms. (Last year's report was written in May due to concern over a justice retiring in June, hence the large number of "summer recusals.")

Recusals Caused by Stock Ownership (13)

Since Fix the Court was founded almost five years ago, the three stock-owning justices – Roberts, Justice Stephen Breyer and Justice Samuel Alito – have halved their individual stock holdings. They went from owning shares in 79 companies at the end of 2014 to owning shares in only 39 today.

Based on our analysis, there were only 13 recusals caused by stock ownership in OT18, down from 45 in OT17² and 47 in OT16. That's positive news.

This term's precipitous drop is partially due to chance – many of the companies the justices own shares in did not have SCOTUS cases – but the justices' ongoing divestments also contributed to fewer stock-based recusals. Recall from our financial disclosure [roundup](#) that Roberts owned shares in nine companies at the end of 2016 but only five at the end of 2018. Over the same period, Breyer sold shares in four companies, to drop from 12 to eight. Alito went from 29 to 27 (now 26 with his presumed 2019 Oracle sale³).

The number of stock-based recusals does not account for the **two instances in which we believe the justices should have recused** due to their stock holdings but didn't. On Jan. 14, 2019, Breyer and Alito [should have recused](#) from *cert.* determination in 18-6644, *Feng v. Komenda, et al.*, an employment discrimination case involving Rockwell Collins, a subsidiary of United Technologies, whose shares are owned by both justices.

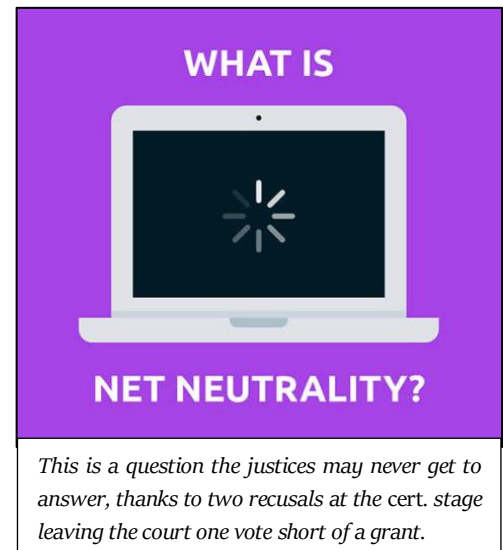
² Our OT17 recusal report only notes 37. Eight more occurred during the summer of 2018, after our report came out.

³ According to the [docket](#), Justice Alito was no longer recused in 17-1625, *Rimini Street, Inc., et al., v. Oracle USA, Inc., et al.*, on Jan. 3, 2019.

The justices [responded](#) soon after we discovered the conflict in April that “**there would be no way to find out there was a conflict**” in this case since Rockwell Collins waived its right to respond, an argument that falls flat given that we were able to identify the conflict and federal law, 28 U.S.C. §455(c), states that a judge or justice “**should inform himself about his personal and fiduciary financial interests.**”

We also believe that Roberts [should have recused](#) himself (last term, though we only found this error this term) from *cert.* determination in 17-1287, *Roberts, et al., v. AT&T Mobility*, given that the Chief Justice owned stock in Time Warner, an AT&T subsidiary, at the time the case was discussed in conference⁴. Roberts sold his AT&T shares, up to \$250,000 worth, on Nov. 15, 2018, but not before a net neutrality case from the D.C. Circuit, *Berninger v. FCC*, was discussed in conference on Nov. 2 (*cert.* denied Nov. 5).

Three justices would have granted this petition, so the recusals of Roberts, as well as Kavanaugh, may well have impacted the ultimate decision here.



Once again, Fix the Court urges the justices to sell their stocks – both to avoid the unforced errors described above and to minimize recusals in important matters like *Berninger*.

Recusals Caused by A Justice Being Named in Suit (11)

In OT18 justices were named in three cases, producing 11 recusals. *Johnson v. U.S.* (17-8910) [named](#) seven justices, who all properly stepped aside. Since the court lacked quorum, and the only justices qualified to consider the petition voted not to grant *cert.*, the decision of the lower court – essentially noting the frivolity of the suit – was affirmed.

Loren v. New York (18-5925), a [First Amendment case](#) brought against numerous individuals, was [denied cert.](#) and then was [denied a rehearing](#). The Chief Justice recused in the first petition, seemingly because of his [previous work](#) on a case involving Loren. Roberts, Ginsburg and Sotomayor were named in the rehearing petition, and they all correctly recused.

Lastly, Roberts was named in 18-7674, *Gorbey v. McCall*, a case involving a man arrested with a shotgun and sword claiming he was on his way to meet the Chief. Roberts recused, as he has in the past with this case. Justice Kagan also recused in this case due to her [work as solicitor general](#).

Recusals Caused by a Justice’s Family Ties (6)

Much like last term, five cases that involved Justice Breyer’s brother Charles, a senior district judge in San Francisco, reached the Supreme Court and led to Stephen’s recusal. The cases were 17-1602, *Pickard v. Department of Justice*; 18-8, *Cohen v. United States*; 18-5583, *Turner v. Smith*; 18-5560, *Beauchamp v. Doglietto, et al.*; 18-7687, *Lee v. Muniz*; and 18-1264, *Fleshman v. Volkswagen*. To our knowledge, no other justices recused due to family relationships this term.

⁴ The date of the conference at which that petition was discussed – June 14, 2018 – was the same date as the AT&T-Time Warner merger. The orders list in which this case was listed came out on June 18.

Recusals Caused by a Justice's Previous Work (163)

The court's newest member, Justice Kavanaugh, logged 47 *cert.*-stage recusals this term, **all of which FTC determined were due to his past work**. Kavanaugh served as a judge in the D.C. Circuit for 12 years, and previously worked in the President George W. Bush administration and in private practice.

For example, Kavanaugh served on the circuit panel in 17-1268, *Opati v. Republic of Sudan*, that rejected the hearing *en banc*, and so he recused himself from the Supreme Court order on the case. At issue is whether the Foreign Sovereign Immunities Act, which allows recovery of punitive damages against foreign governments for terrorist activities, applies retroactively.



Guantanamo recusals have become an annual tradition at the court.

Other notable Kavanaugh recusals due to his time in the D.C. Circuit were the cases of 18-307, *State National Bank v. Mnuchin*, on the constitutionality of the Consumer Financial Protection Bureau, and 18-740, *Moath Hamza Ahmed al-Alwi v. Trump*, on whether detainees at Guantanamo may still be detained if the conflict precipitating their capture has reached its conclusion. (Gorsuch's work on Guantanamo cases while working in the Justice Department 2005-2006 triggered a recusal last year.)

Kavanaugh's [work in private practice](#) triggered disqualifications in a few cases as well, including in 18-898, *R.J. Reynolds Tobacco Co. v. Johnston*, and 18-654, *Philip Morris USA, Inc. v. Richard Boatright*. At issue in both cases, which were denied *cert.*, was the liability of tobacco companies for the harm caused by their products.

Justice Gorsuch registered 39 recusals this term, all due to his past work. The second-most junior justice served 11 years as a judge in the Tenth Circuit Court of Appeals and before that worked in private practice, though it appears as if all his recusals this term were due to his work in the Tenth Circuit, and primarily the criminal docket he presided over. *U.S. v. Salas* (18-428), for example, considered whether the definition of "crime of violence" is unconstitutionally vague, while *Lucio-Rayos v. Whitaker* (18-64) asked whether a criminal conviction bars a noncitizen from relief from removal when it's unclear as to whether his conviction is covered in the Immigration and Nationality Act.

Justice Kagan, as she's done nearly every term since joining the court in 2010, **once again outpaced her colleagues this term with 55 recusals** – 51 of which we determined were due to her prior work. Kagan served in each of the last two Democratic presidential administrations, as solicitor general under President Barack Obama and associate White House counsel under President Bill Clinton.

The Chief Justice recused in four cases due to previous work in OT18. It is noteworthy that, after 14 years on SCOTUS, there are still cases coming before the high court that at one point crossed his desk before joining the Supreme Court.

Undetermined Recusals (5)

This year, we were unable to identify the reasoning behind five recusals: one each from Breyer and Alito and three from Kagan.

Breyer's recusal in 18-210, *BATS Global Markets v. Providence, R.I.*, was somewhat mysterious. The case involved a [class action](#) lawsuit against several securities exchanges, alleging the firms misled the defendants about products and services sold.

It's possible Breyer recused because he owns stocks sold on these exchanges, but that would not be necessary under the recusal statute. If there was no other reason for his disqualification, this could be considered an error on his part.



*Must you recuse if you, a judge, own shares of stock, and the stock market on which the company is traded is sued?
We think not.*

Alito recused in 18-1468, *United Mine Workers v. Toffel*, a [case](#) from Alabama concerning a bankruptcy court's decision to terminate a debtor's obligation to pay premiums to the combined benefit fund. Given Alito's significant stock holdings and retirement accounts, **it is likely that some relationship exists here that we were unable to determine.**

We believe it's likely that Kagan's reason for recusal in these undetermined cases was related to her time as solicitor general. For example, in 18-7939, *In Re: Daniel E. Salley*, we were unable to find evidence of her involvement in the case, but Salley was in [federal court](#) during her stint as SG. **It's possible she was involved without our knowledge.** Similarly in *Robert L. James v. U.S.* (17-6271), a case related to the Armed Career Criminals Act, we could not find any court filings during Kagan's time in the Clinton White House or as Obama's SG.

In Re: Lewis Brown (18-5020) [concerned](#) a complaint against Judge Dan Polster of the Northern District of Ohio, who Brown believed should have recused himself from the case. It's possible that Kagan has a close relationship with Judge Polster, since she [served](#) as the circuit justice for the Sixth Circuit, where N.D. Ohio is located, from 2010 to 2018. It's also possible that she was involved in the case at an earlier stage.

Conclusion

Analyzing the justices' recusals reveals critical information about their professional lives, personal relationships and investments – and whether the nine are acting consistently with the strictures of federal recusal statutes.

But the bottom line is that we shouldn't be guessing. The Supreme Court has far too much power to leave us in the dark about their decisions.

Americans have a right to know when and why Supreme Court justices decide not to participate in cases and petitions. And we'll keep working to make sure they do.