



# OT 19 Recusal Report

July 21, 2020

## Introduction

Fix the Court has released an annual Supreme Court recusal report in each of the last five years. Some years, we've highlighted what we identified as "[missed recusals](#)" – i.e., when a justice sits on a case or petition determination despite a credible and recognizable statutory conflict. In other years, we've underscored quirks of history related to disqualifications, like [the time](#) we learned that, a century ago, the justices would occasionally explain why they were not hearing a case.

This term, though, there have been no major surprises, which, given everything else going on, comes as a relief. Since the first Monday in Oct. 2019, **the nine have generally adhered to ethics standards**. They've recused **145 times** ([listed here](#); we identified reasons for 144 of them), and **we found no missed statutory recusals**.

Our report would not be necessary if the justices issued brief explanations for their recusals in weekly orders – i.e., they "took no part in the consideration of a petition" due to a "financial conflict," a "family or personal conflict" or "because they sat on an earlier version in a previous job."

Three leading U.S. House members introduced a [bill](#) in February that would require the court to "publish timely notice of [a justice's] disqualification on the website of the court, with a brief explanation of each reason for the disqualification." But until recusal explanations are signed into law, we'll try to let you know why the 140-240 annual SCOTUS step-asides are occurring.

This term's highlights include:

1. Though we seek to uncover the reasons for every recusal each year, rarely do we bat 1.000. This year, we believe we got all of them save one, a *cert.*-stage Breyer recusal from June that we could use your help on.
2. That said, only one justice (Breyer) recused from a copyright infringement petition about an anthropomorphic Christmas tree. Since Penguin was involved, and Penguin publishes Sotomayor's and Gorsuch's book, that number could have been three.
3. We are introducing a new category into our recusal list: "current work." It turns out that when you are the Chief Justice of the United States, you have other jobs, like Smithsonian chancellor and presiding officer of the Judicial Conference. What happens when those agencies get sued? Well, you should recuse, which is what John Roberts did.
4. *More of a lowlight*: We found countless references to Justice Sonia Sotomayor's friendship with Polly Baca, the Colorado secretary of state who was a named litigant, albeit in her official capacity, in one of the faithless elector

suits. How did the justice, who's also the [circuit justice](#) for the Tenth Circuit, not decide to recuse until five months after the *cert.* petition was sent her way and two months after *cert.* was granted?

5. The number of *cert.*-stage recusals to this point in the term (141) has trended downwards, as you can see from the chart below. That's likely due to no justices leaving or joining this court this term. A year from now? That would be anyone's guess.

	OT15 Report		OT16 Report		OT17 Report		OT18 Report		OT19 Report	
	7/11/16		7/18/17		5/3/18		7/25/19		7/21/20	
Stage	<i>Cert.</i>	Merits	<i>Cert.</i>	Merits	<i>Cert.</i>	Merits	<i>Cert.</i>	Merits	<i>Cert.</i>	Merits
At time of report	176	4	200	4	194	6	198	3	141	4
Post-report to term's end	5	0	6	0	34	0	0	0	TBD	TBD
Total at each stage	181	4	206	4	228	6	198	3	141	4
Overall total	185		210		234		201		145	

## Merits-Stage Recusals (4)

This term there were four merits-stage recusals, which tracks closely with what we've seen in the last few terms. On Feb. 24, Justice Brett Kavanaugh sat out 17-1268, *Opati v. Republic of Sudan*, which arose from more than a dozen D.C. Circuit cases weighing whether Sudan could be held liable for providing material support to al Qaeda as the organization planned terror attacks that killed U.S. citizens in the 1990s. Kavanaugh had participated in some of these cases from the Prettyman Building so had to recuse.



Sotomayor with Polly Baca (r) at a 2016 event in Denver.

Two recusals occurred during the two weeks of remote arguments, meaning the round-robin questioning had one fewer robin each time. On May 5, Justice Elena Kagan recused from 19-177, *USAID v. Alliance for Open Society International*, since she likely worked on an earlier version of this litigation, dating to the mid-2000s, while she was the U.S. solicitor general. On May 13, Justice Sonia Sotomayor recused from 19-518, *Colorado Department of State v. Baca*, since she has a personal relationship with Polly Baca, one of the respondents in the case (though a different Baca than the one in the abbreviated caption). Polly Baca attended Sotomayor's 2009 confirmation hearing, and the two remain close.

Though the case was [granted cert.](#) on Jan. 17, the justice only recognized the conflict on Mar. 10, at which time the clerk of the court sent a [notice](#) to counsel that Sotomayor would no longer be participating.

We could not determine who alerted the justice to this potential conflict or if she belatedly figured it out *sua sponte*.

Finally, Justice Neil Gorsuch was disqualified from a capital case from his former court, the Tenth Circuit, 17-1107, *Sharp v. Murphy*. This case was argued last term to a draw and was supposed to be reargued this term, but it was never placed on the argument calendar and was decided on July 9, *per curiam*, based on the ruling in *McGirt v. Oklahoma*, from which Gorsuch was not only not recused but was the author of the majority opinion.

## Undetermined Recusals (1 at cert. stage)

This term, there was one recusal we could not explain. Breyer recused in [19-1031 \*Erin Capron et al., v. Massachusetts Attorney General\*](#). The case concerns the applicability of employment laws to the federal *au pair* program, a cultural exchange program run by the State Department that invites foreigners to visit the U.S. *au pairs*. Breyer lives in Cambridge, Massachusetts, which is also where Erin Capron is [based](#). It's possible that Breyer has a personal connection with Capron or with someone in the Massachusetts attorney general's office. It's also possible that Breyer or someone in his family has a connection to the *au pair* program – or he's still embarrassed about [not paying](#) social security taxes for his foreign housekeeper in the 1990s.

If you think that you know why Breyer recused in this petition, please let us know at [Info@FixtheCourt.com](mailto:Info@FixtheCourt.com).

## Missed Recusals (0)

Though we found no examples this term of instances in which justices failed to recuse despite a conflict, as we have in the [past](#), there is one instance in addition to the Sotomayor-Baca correction above worth noting here: on May 18, Gorsuch properly recused himself from a case, but due to an error the notation was not reflected on the original orders list. The case, 19-7810, *Eaton v. Pacheco*, was a capital appeal from the Tenth Circuit; then-Judge Gorsuch sat on an earlier version of the case, thus warranting recusal. According to the Supreme Court's public information officer, this appears to have been solely a clerical error and should not be attributed to Gorsuch.

## Current Work Recusals (2 at cert. stage)

New to us this term were recusals attributable to current and ongoing work. The Chief Justice twice recused due to responsibilities outside of his Supreme Court chambers.

As Chief Justice of the United States, Roberts sits on the Board of Regents of the Smithsonian, so he recused in a case brought against the Smithsonian, 19-6548, *Raven v. United States*.

Roberts also recused in 19-7046, *Jones v. Overstreet*, since the case involved the Judicial Conference of the United States, for which Roberts, as Chief Justice, is presiding officer.

## Stock Ownership Recusals (16 at cert. stage)

Since Fix the Court was founded five years ago, the three stock-owning justices – Roberts, Justice Stephen Breyer and Justice Samuel Alito – have nearly halved their individual stock holdings. They went from owning shares in 79 companies at the end of 2014 to owning shares in only 41 at the end of 2019<sup>1</sup>.

Neither Roberts (still has shares in five companies) nor Breyer (still has eight) nor Alito (28) bought stocks in 2019, and Alito sold Oracle shares. (A year-over-year chart of the justices' stock ownership is available [here](#).)



Roberts with Lonnie Bunch III as the latter is installed as Smithsonian Secretary on Nov. 1, 2019.

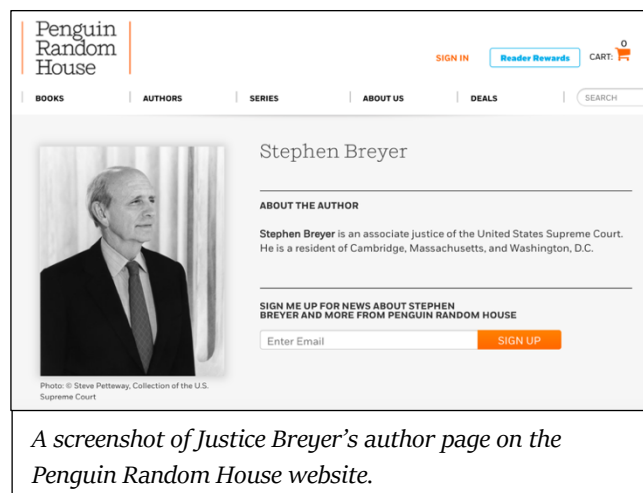
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<sup>1</sup> That second number would be even lower had there not been several stock spinoffs. Roberts' ownership of Charter Communications stock and Alito's ownership of Abbvie, CDK Global Holdings, Corteva, Dow and Phillips 66 stock came about by way of spinoffs.

Based on our analysis, there were only 16 stock-based recusals in OT19. That represents a slight increase from the 13 stock-based recusals in OT18, but both those numbers are significantly lower than the 45 in OT17 and 47 in OT16. In context, we attribute the slight increase to chance. Overall, the trend is toward the justices reducing their securities holdings, which is a good thing, as it lessens the opportunities for mistakes to be made and keeps the court at full strength for more cases and petitions.

The Chief Justice recused three times due to his stock ownership (all Charter Communications); Breyer recused six times (Lowe's, two petitions; Pearson LLC, two; United Technologies, two); and Alito recused seven times (Becton Dickinson, three petitions; ConocoPhillips, two; United Technologies, two). One of the Becton Dickinson petitions had Abbott Laboratories, which Alito also owns shares in, as a named litigant, and one of the ConocoPhillips petitions had Phillips 66, which he also owns shares in, as a named litigant.

Alito and Breyer's ownership of UTC shares has gotten them in trouble in the past. In 2019, the justices [failed to recuse](#) when considering petitions concerning a subsidiary of UTC. When faced with the same situation in [19-1012](#), *General Electric Co. vs. Raytheon Technologies Corp.*, Alito and Breyer both correctly recused. (Raytheon is also a subsidiary of UTC.)



A screenshot of Justice Breyer's author page on the Penguin Random House website.

Breyer twice recused from petitions in [19-560](#), *Nicassio v. Viacom and Penguin Random House*, which [concerned](#) the film adaptation of a book about a tree named Rocky "that dreams of becoming the Rockefeller Center Christmas tree." Viacom and Penguin allegedly infringed on the idea for their anthropomorphic Christmas movie and book called "Albert: The Little Tree With Big Dreams."

Breyer was disqualified since he holds stock in Pearson PLC, a publishing and education company founded by his wife's family that owned much of Penguin from 2013 until April 1, 2020. Breyer's recusal was certainly

warranted due to his stock ownership, and he was also [paid](#) royalties by Penguin in 2019, as was his wife.

Justice Sotomayor, who owns no stock but has earned nearly \$2 million in Penguin royalties since joining the high court, including more than [\\$21,000](#) in 2019, did not recuse, and neither did Justice Gorsuch, who's raked in \$555,000 from Penguin since 2018, including \$330,000 [last year](#).

FTC contends that **such large payouts from a single source** should make Breyer, Sotomayor and Gorsuch reconsider their decision to hear cases in which their book publisher is a litigant.

## Named-in-Suit Recusals (9 at cert. stage)

Three cases in OT19 named justices as parties to the suit, producing nine recusals. The first case, [18-9383](#), *Lakshmi Arunachalam v. USDC ND CA, et al.*, named six justices: Clarence Thomas, Ruth Bader Ginsburg, Breyer, Alito,

Sotomayor and Kagan. Each of the justices correctly recused themselves. Arunachalam is a [frequent petitioner](#) before the court and has had numerous petitions denied.

With six justices sitting out of the lawsuit, the court lacked quorum in this case, resulting in the court affirming the lower court's ruling. This procedure is spelled out in 28 U.S.C. §2109: "The court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."

Though the Chief Justice did not recuse in the case described above, he was named as a litigant in another suit by Arunachalam, [19-8029](#), *Arunachalam v. Lyft, Inc.*, and recused twice from the petition. Roberts was also named as a litigant in [19-275](#), *Frederic C. Schultz v. John Roberts*, and again properly recused himself.

### **Family Ties/Personal Relationships (6 at *cert.* stage + 1 at merits stage)**

As in previous years, Breyer's brother Charles serves as a senior district judge in San Francisco, so *Justice* Breyer continued to recuse from cases that came to the Supreme Court via *Judge* Breyer's court in the Northern District of California. Just as in OT18, OT19 saw five such cases cause recusal from Justice Breyer. The cases were 18-1503, *Nagel Rice LLP. v. Volkswagen*; 19-6735, *Chow v. United States*; 19-807, *Bank Melli v. Bennett*; 19-7486, *Lindsay v. United States*; and 19-958, *Mikhak v. University of Phoenix*.

This term we believe that Breyer recused from 19-8156, *Stancu v. Hyatt Corp.*, because of a different personal conflict: his relationship with the Pritzker family. Breyer sits on the jury for the Pritzker Prize for Architecture, which has paid for his travel, and he has received other reimbursements from the Pritzker organization. The Pritzker family owns Hyatt, a named party in this case.

### **Not-on-the-Court Recusals (1 at *cert.* stage)**

Justice Kavanaugh recused from the rehearing petition in [17-6086](#), *Gundy v. United States*, a case argued on the second day of OT18, presumably because the justice did not join the high court until the following week.

### **Previous Work Recusals (106 at *cert.* stage + 3 at merits stage)**

Recusals due to previous work have dropped from 163 last term to 106 this term. A decline in this category would be expected, as no new justices were added to the bench in OT19.

### **A Final Note on Friendship**

We made a big deal above about Sotomayor's decision to recuse from the Colorado faithless elector case due to her friendship with one of the respondents, Polly Baca. Relatedly, one thing to watch in this space is how Kavanaugh handles Facebook cases, as one of his closest friends is Joel Kaplan, Facebook's vice president of global public policy, who, as Baca did for Sotomayor, attended his confirmation hearing.

Kavanaugh didn't recuse from a Facebook petition that was [granted cert.](#) on July 9, and he probably doesn't need to, but it's worth considering, as the company in all likelihood will become a more frequent litigant before the high court in the coming years.