

Fix the Court's Year-End Report on the Federal Judiciary

December 18, 2014

At the end of each year, Chief Justice of the United States John Roberts issues a report on the state of the federal judiciary. This report is not unlike the President's annual State of the Union address in that the chief justice outlines his priorities for the coming year and asks Congress for an appropriate level of funding.

With Congress' recent record of accomplishment, and with relations between the legislature and the executive at a historic low, the Supreme Court's decisions on where we can pray, who can vote and marry and how much regulation our businesses face are essentially binding and irreversible.

With this great power, we believe, should come greater accountability.

So for the first time, Fix the Court is releasing its own year-end report, reflecting on the past 12 months not in terms of cases decided or precedents set but in terms of institutional successes and failures. This is the type of report we'd like to see the chief justice write¹ but won't know until 6:00 p.m. on December 31 if he has. We hope you find it useful.



I. Increased funding, increased transparency

In recent years, the chief justice has used this platform to address growing budgetary concerns within the third branch; each year, it seems, the number of cases brought in federal courts increases, and staffing levels are not where they should be to meet this need.

Doing more with less is a theme this time of year: American families' budgets are tight, with heating bills to pay and holiday presents to buy. And as the annual budgetary process begins anew in Washington in January, members of Congress will profess a similar hardship, as they try to balance the lingering aspects of the recession and record national debt with a financial plan that will keep the country running in 2015.



Chief Justice Roberts releases his year-end report on the federal judiciary each Dec. 31.

As the chief justice is quick to point out, the judiciary's annual appropriation is two-tenths of one percent of the federal budget. *Fix the Court* agrees with Chief Justice Roberts that the federal courts should be better funded.

Increased funding for the federal judiciary, though a tiny fraction of the budget, may be a tough sell for the American people, who themselves are often asked to do more with less. So what would we get in return for a better funded courts system? And why, to this point, has Congress declined to attach terms to judicial appropriations?

The truth is, there is no good reason. Congress has broad power to legislate the size and scope of Article III courts and should use its constitutional authority to attach basic conditions to judiciary expenditures. There is a simple answer to the question

¹ Last year he mentioned Christmas parables (e.g., "A Christmas Carol" and "It's a Wonderful Life"), and two years ago he wrote of the fortitude of the USS Constitution and its sailors during the War of 1812. Given the timing, we're anticipating a reflection on the Magna Carta 800 years after its signing.

of what the American public gets in return: with greater funding should come greater transparency. Here we think Congress should raise funding levels for the courts and outline a few discrete ways to increase transparency at, and therefore trust in, the Court.

Increased funding should go to improving electronic media access in all federal district courtrooms and in all 13 U.S. Courts of Appeals, plus the Supreme Court, which would include live audio and video capabilities. It should be used to hire ethics experts to create clearer recusal guidelines and to ensure that justices' financial disclosure reports are thorough and uniform (they are currently neither), plus IT experts to post the reports online. It should be used to hire more police officers so that the justices feel comfortable allowing demonstrations on the spacious plaza in front of the building.

With Americans losing faith in their public institutions, and the court's approval rating [at or near a record low](#), the justices should use the coming year to restore some of that faith with a series of actions that will remove the veil of secrecy shrouding the court. Let citizens know when a justice is giving a speech in public. Send out a notice when a justice chooses to sit out a case. Post more information online – now and not three news cycles after the fact.

The justices have often said that theirs is the most transparent government institution because they fully explain the reasoning behind their decisions in the 70 to 75 opinions they release each year. That answer may have been acceptable in the mid-20th century, but it does not pass muster in the second decade of the 21st.

II. Demonstrations: Who's Manning the Plaza?

One of the themes the chief justice returns to each year in his annual report is the efficient use of space within federal court buildings across the country. The Judicial Conference [has adopted a policy](#) whereby “any increase in square footage within a circuit must be offset by an equivalent reduction in square footage.” But it's the space just outside the Supreme Court building that made headlines this past year, as the justices are still not allowing protests to occur in its sizeable adjacent plaza.



Allowed on plaza: men and women in black tie (pictured in Oct. 2014); not allowed: demonstrators

The plaza is a natural place for individuals to congregate; instead, demonstrators and line-standers are pushed to the sidewalk along First Street NE. The Justice Department is even prosecuting a plaza demonstrator.

In the meantime, the justices continue to hear freedom of speech and assembly cases. By an 8-1 vote in *Snyder v. Phelps* (2011), they allowed the odious Westboro Baptist Church to display their messages of hate at military funerals, and [this past June](#), in *McCullen v. Coakley*, they unanimously struck down a Massachusetts law allowing a 35-foot buffer zone around abortion clinics.

On Jan. 9, the court will decide whether to take up *Thayer v. City of Worcester*, a First Circuit case on whether a municipality can prevent panhandlers from begging in certain parts of town. The catch in *Thayer* is that a former Supreme Court justice who sits on the appeals court from time to time, David Souter, issued a pro-Worcester ruling – a ruling that now appears to conflict with the court's decision in *McCullen*.

The intrigue doesn't end there. In November, the *New York Times* discovered that plainclothes law enforcement personnel [monitor demonstrations](#) at the court. “Small teams of undercover officers,” the article stated, “dress as students at large demonstrations outside the courthouse and join the protests to look for suspicious activity.” Four days earlier, *Fix the Court's* executive director, Gabe Roth, witnessed a Supreme Court police officer [approach a](#)

[group of demonstrators](#) – three women with posters about last term’s contraception mandate case – and ask who they were and what group they were from. Then the police officer repeated that information into his walkie-talkie.

This micromanagement of gatherings coupled with the *Times* revelation that court police engage in undercover tactics seems like overkill. Just like at the other branches of government, there has to be a balance between security concerns and the First Amendment right to assembly. It’s our hope that balance is restored in 2015.

III. Disclosures: Buying Low and Selling When Convenient

It’s clear that many of the justices are big baseball fans: Justice Sonia Sotomayor threw out the first pitch at Yankee Stadium in 2009; Justice Samuel Alito did the same at a Texas Rangers home game in 2013; and Chief Justice Roberts famously compared himself to an umpire calling balls and strikes when asked during his confirmation hearings about his judicial philosophy.

Roberts even told the little-known story in his [2011 year-end report](#) of how the 1919 Black Sox scandal led five years later to the adoption of the ABA’s Canons of Judicial Ethics – ironic, of course, since the Supreme Court is not bound by a code of conduct.

Though baseball teams’ financial ledgers are about as vague as the justices’ annual disclosure reports, the sport gives us a good example of how the current system of asset-based recusals works.

Here’s the premise: on July 30, infielder Stephen Drew played his last game as a member of the Boston Red Sox. The next day, he was traded to the New York Yankees and on Aug. 1, he was inserted into the Yankees’ lineup. While Stephen Drew is no Derek Jeter or Jon Lester, that he went from the Red Sox one day to their bitter rivals the next is strange – especially since New York was playing Boston on Drew’s first day as a Yankee. (He went hitless in four at-bats.)



Justice Alito throws out a first pitch at a 2013 Rangers game.

The Supreme Court version of this type of horse-trading plays out a few times a year – and with stocks, not Bonds². Instead of putting their assets in a blind trust at the start of their tenure, as [presidential hopefuls do](#), the justices retain control of financial holdings and may actively trade them and other securities throughout the year.

Sometimes a company whose stock a justice owns has a case come before the court, and the justice will sell the shares one day to be able to sit on the case the next; it’s even allowable under the Code of Conduct for U.S. Judges. Yet the public is supposed to trust that the justices – who had until recently owned a stake in Company X³ – will be a neutral arbiter in its case.

Further, the public does not know that a justice has sold a stock until between six and 18 months after the fact, due to the lag time in which the justices’ financial disclosure reports are released. (They even get a [capital-gains tax break](#) when they sell stock in order to hear a case.)

We hope that, in the coming year, the court at least notifies the public if and when such a sale happens.

² The surname of a famous baseball family, also not known for transparency.

³ In 2014, for example, Justice Alito presumably [sold stock](#) that allowed him to sit in both the *ABC v. Aereo* and *POM Wonderful v. Coca-Cola Co.* He had initially recused himself from both cases. In 2012 Justice Breyer [reportedly](#) sold his Amgen stock right before the court heard *Amgen v. Connecticut Retirement Plans and Trust Funds*.

IV. Public Appearances: Avoiding “Sub Judice”

One is never certain about the types of cases the Supreme Court is going to hear in a given term. But those who cover the court and who have argued before it often give educated guesses through newspaper columns, public events and social media. A new Texas law (HB2) stating that abortion clinics must employ doctors with visiting privileges at local hospitals in order to stay in business, essentially closing half the clinics in the state, is one such law that was clearly going to be challenged in federal court the moment after Gov. Rick Perry signed it. Whatever the Fifth Circuit decided, that court was not likely to have the final say on this issue.

So when Justice Ruth Bader Ginsburg, during her inter-term media tour, answered direct questions posed by the National Constitution Center’s Jeffrey Rosen about HB2, it “reignited a long-simmering ethical debate [...] over when a justice ought to sit out a case,” according to the [Wall Street Journal](#). “How could you trust legislatures [to safeguard women’s health] in view of the restrictions states are imposing?” Ginsburg had said. “Think of the Texas legislation that would put most clinics out of business. The [state] courts can’t be trusted either.”



Ginsburg and Rosen talk shop in September.

While Supreme Court justices are free to give wide-ranging interviews on their life and the law,⁴ commenting on cases that are before the court – or look to be headed that way – is a faux pas. Doing so is called “sub judice,” talking about a case that is still “under judgment,” and it’s banned in dozens of countries throughout the world. In fact, the Code of Conduct for U.S. Judges states: “A judicial employee should avoid making public comment on the merits of a pending or impending action,” but the justices are exempt from following the code.

Less than two weeks after Ginsburg’s comments, she and her colleagues placed a hold on implementing a portion of HB2 until all the legal challenges had been settled. The case will resume in the Fifth Circuit the second week of January and may soon make its way back to the Supreme Court.

Until a high court opinion is handed down, mum should be the word.

V. Is Ethics the Lynchpin?

Of all the ways in which the Supreme Court does not come in line with expectations of accountability from public officials, that the justices are not bound by a code of ethics is most concerning for many court watchers. Chief Justice Roberts even said as much in his [2011 year-end report](#): “Some observers have recently questioned whether the Judicial Conference’s Code of Conduct for United States Judges should apply to the Supreme Court. I would like to use my annual report this year to address that issue” – and by “address,” he meant put down the idea.

Roberts’ arguments for why the court should not adopt the code, which he lays out on pages 3-11 of the [report](#), are not convincing. In fact, the code is so fundamental and encompasses so much that its adoption would, to an extent, assuage many of *Fix the Court*’s overall concerns about accountability at the court.

Barring that, maybe we should consider implementing Sen. Chuck Grassley’s “Soviet-style” oversight at the Supreme Court. (That’s what [Justice Ginsburg called](#) the senior senator from Iowa’s proposal to create the position of inspector general in the federal judiciary.)

⁴ Some reporters expect some of the more outspoken justices to cross the line from time to time and seem disappointed when they don’t. When Justice Scalia gave a talk at Colorado Christian University days before the start of this past term, the reporter covering the event wrote almost mournfully: “The justice made no reference to any of the pending cases before the Supreme Court.”

While in Grassley’s bill the inspector general would hold an unspecified number of four-year terms, and would serve at the pleasure of the chief justice, the idea that something or someone is holding the justices accountable – whether it be a code of conduct, watchdog groups or a person vested with statutory power to discipline federal justices (and a budget to investigate dubious practices) – is important and something we hope to see in the near term.

VI. A Bright Spot: Owning Up to a Mistake

The Supreme Court’s 2014-15 term got off to a strange start, as the justices made important decisions in cases with far-reaching consequences without offering much explanation. The nine decided not to take up any of the same-sex marriage cases that are wending their way through the federal courts system, and they also declined to hear last-minute challenges to voter ID laws that legislatures have recently passed in a number of states.

In the latter case, one Justice Ginsburg opinion contained a factual error – a relatively minor one, but an error nonetheless. For the [first time ever](#), the Supreme Court press office noted that the mistake had occurred and that Ginsburg was correcting her opinion.

That mistakes happen is only natural. The justices are charged with curating some of the nation’s oldest and most obscure laws, and each term they hear dozens of cases with hundreds, if not thousands, of possible outcomes. For years, as has been noted by Harvard Prof. Richard Lazarus, the justices [have been making small corrections](#) from the time their slip opinions (the ones issued from the bench and uploaded to [supremecourt.gov](#)) are issued until the time they’re bound in volumes for all time in the National Archives. In fact, Lazarus noted, Justice Antonin Scalia [made such a correction](#) this past year in his *EPA v. EME Homer* opinion, handed down in April, though without advisement from the court.

Few of these changes have been substantive, but until Scalia’s error, and a subsequent paper on these corrections by Lazarus, even fewer individuals had realized that *post hoc* editing was taking place.

That there was a change in October with the Ginsburg opinion is a positive sign – and demonstrates that the court is cognizant that certain institutional policy changes are beneficial. We hope they continue on this path in 2015.

VII. Conclusion

Days before the start of the current term, Justice Scalia said at [a speech in Denver](#) that he felt under no pressure in his job. “What can they do to me?” he asked. “I get life tenure!”

Reading the media account of his talk, it’s unclear which “they” Scalia is referring to.

If “they” are the American people, and we believe “they” are, there’s actually a lot we can do, from demanding ethics reform to publicizing reasons for recusals to calling the press office and asking why there’s no live audio feed of hearings. And we wouldn’t be doing this *to* Scalia and his colleagues; we’d be doing this *for* the American people and our constitutional system.

As much as we hope the chief justice reads this report and implements these changes, we’re equally hopeful that the American public will rise to the challenge and join *Fix the Court* in advocating for a more open and accountable Supreme Court.

Photo credits:

P. 1 (Roberts): Michael Conroy, Associated Press

P. 2 (Supreme Court plaza): International Network of Boutique Law Firms events page

P. 3 (Alito): Tony Gutierrez, Associated Press

P. 4 (Ginsburg): Screen grab of National Constitution Center YouTube page