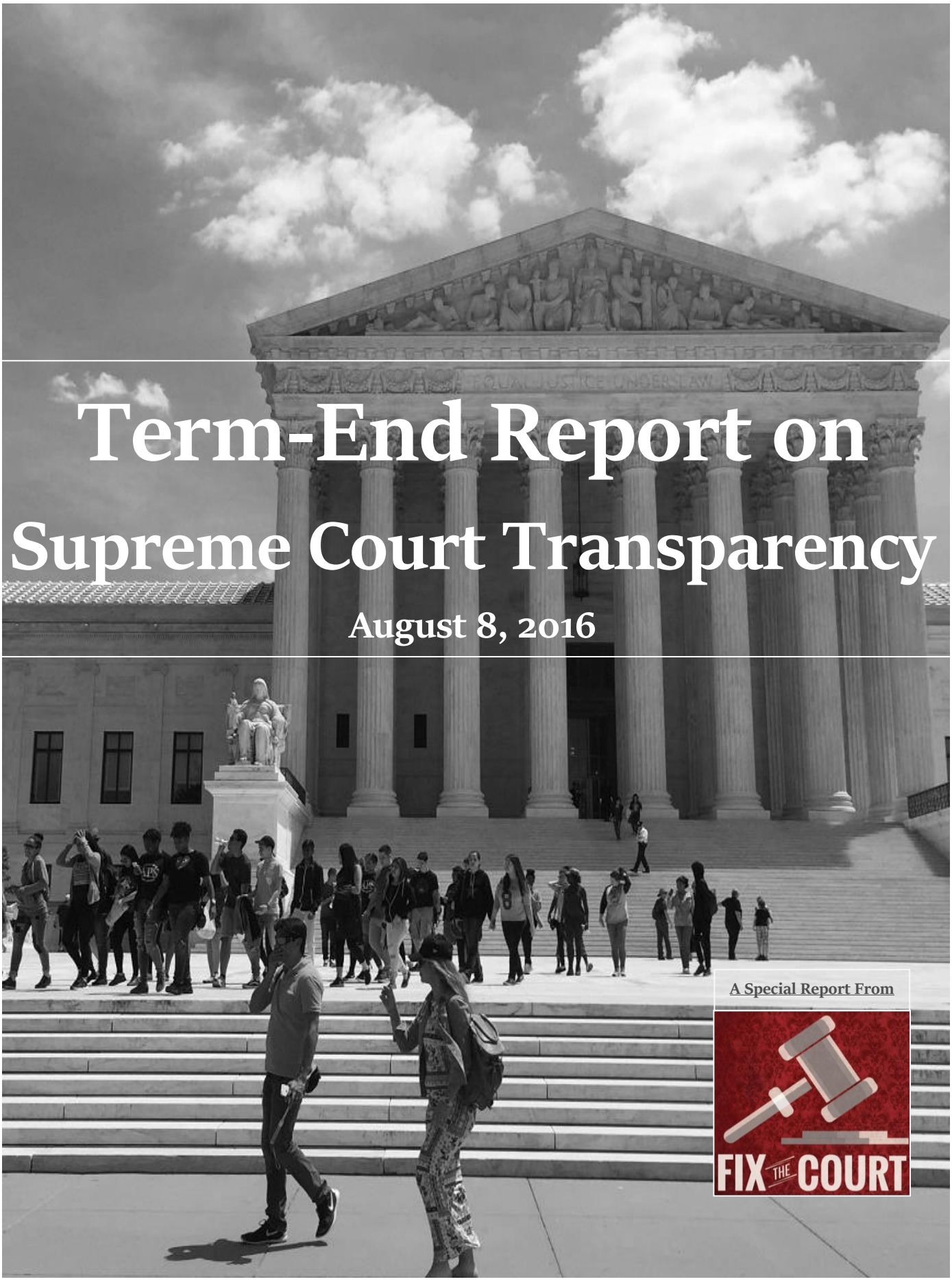
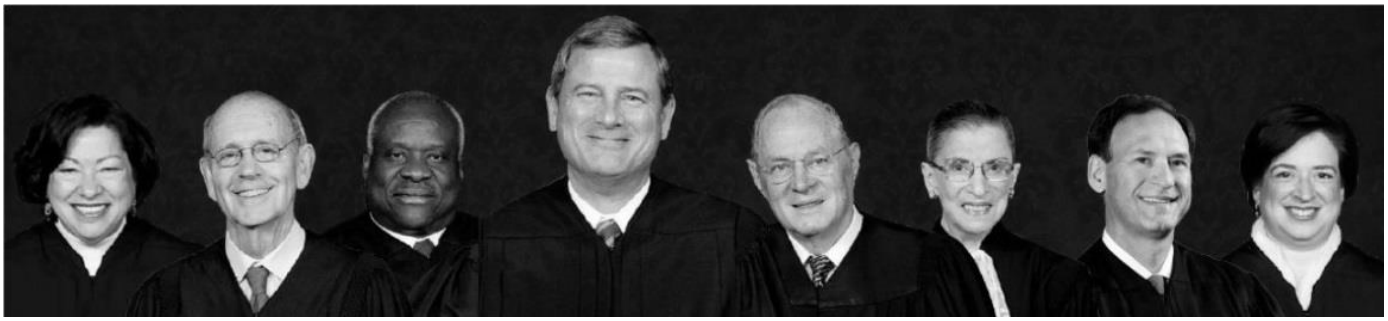


Term-End Report on Supreme Court Transparency

August 8, 2016

A Special Report From

FIX THE COURT



Term-End Report on Supreme Court Transparency

Fix the Court's Assessment on Whether the Supreme Court Opened up in OT15

Contents

Fix the Court is a non-partisan grassroots organization created to take the Supreme Court to task for its lack of transparency and accountability and to push Chief Justice John Roberts and the court's associate justices to enact basic yet critical reforms to make the court more open. FTC educates Americans about the various problems plaguing the court and is building a national movement to demand change with a common voice.

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Executive summary

With the Supreme Court's 2015-16 term and the political conventions having all reached their ends, Fix the Court is taking this opportunity to describe how the Supreme Court fared in the last term regarding transparency and accountability improvements.

Unsurprisingly, there are still no cameras in the courtroom, but that does not mean there have not been other successes and takeaways from the past term that may be built upon in future years.

Yes, there are no cameras in the courtroom. But actual successes from the past term – on issues ranging from stock ownership to term limits – can be built upon in future years.

To start, there is little question that awareness of the transparency issues that plague the court is at an all-time high when you consider what happened over the last 10 months:

- On book tour in September, Justice Stephen Breyer stopped by "The Late Show with Steven Colbert" and was pressed by the host to allow cameras in courtroom for oral arguments;
- In February editorial writers and legal experts wrote essay after essay on the benefits of term limits for justices, given the chaos that followed the "actuarially predictable" death of Justice Antonin Scalia;
- The thousands who showed up to the court in June for decision days in *U.S. v. Texas* and *Whole Women's Health v. Hellerstedt* learned that no one is allowed to demonstrate on the court's front plaza; and
- In July the public became keenly aware about the Code of Conduct for U.S. Judges, which prohibits most federal judges from commenting on political races and from which the justices are exempt. (You know the rest.)

But OT15 was not just about raising awareness. It was about taking action.

Since the fall, Fix the Court's supporters have sent 3,876 letters to their U.S. senators asking them to push for the next Supreme Court justice, whoever he or she may be, to serve only 18 years and 3,321 letters to their U.S. representatives to advocate for expanded broadcast access to Supreme Court hearings. Between two petitions this year and last, 3,306 people told Chief Justice John Roberts and Justices Breyer and Samuel Alito to dump their stocks in individual companies and place their holdings into blind trusts. **These grassroots actions were amplified by the following**:

- In October the court announced it would publicize when slip opinions were revised, would end the practice of line-holding for members of the Supreme Court Bar and would fix link rot in its opinions. Simple fixes like these, which received great praise and have been quite useful, demonstrate that a little dose of transparency can go a long way – and that there is no reason why this trend should not continue.
- In December we found that Roberts missed a stock conflict, and we believe that the error, coupled with Breyer's similar oversight two months earlier, led to a three-justice stock selloff valued at up to $1.5 million in shares;
- A congressional hearing on "judicial efficiency" in July turned into a bipartisan, full-throated critique of the federal judiciary and how its ethics, disclosure, travel and stock ownership policies fail to comport with modern expectations of openness from government institutions; and
- In February the American Bar Association adopted a resolution that supports placing cameras in the Supreme Court, also in February the *Washington Post* endorsed ending life tenure for the justices and in July USA Today called on the court to adopt a code of conduct for the justices.

Yes, there are still no cameras in the courtroom. But this, we believe, is what momentum looks like.

Media and public access

Before the start of the term, in July 2015, the four-year cameras-in-courts pilot program reached its conclusion. A few months later, in March 2016, the Federal Judicial Center released a report on the pilot discussing its positives and negatives.

Overall, the program was a success no matter how you measure it. The FJC found that the cameras did not prove to be a major distraction in court, neither judges or nor attorneys played to the cameras and tens of thousands of Americans were able to view court proceedings no matter where in the country they lived.

Yet the Judicial Conference decided not to expand, renew or even maintain the pilot program beyond allowing three of the 14 participating courts to keep their cameras running if they so desired. Fix the Court reached out to those courts – the Northern District of California, Western District of Washington and District of Guam – in June, and they told us that since the end of the pilot, **only two hearings have been video-recorded** by those three courts combined.

Our issue with the pilot was the way it was designed. Judges were not required to participate but rather had to opt in, meaning that relative to the volume of cases argued during the four years the pilot was running, relatively few hours of hearings were recorded.

The pilot only tested recorded video and not live video or live audio, which could have given broader insights. **And it did not include circuit courts**, which are logistically much easier to film, given that federal appeals typically last only an hour and do not include the juries, witnesses or exhibits one may find in a federal trial. Plus, there are dozens fewer appeals courts across the country, so it is also more difficult to physically attend an appellate hearing – hence the need for live audio or video.

Imagine if the pilot program required more judges to participate, recorded higher-quality videos and included appeals courts. It is as if those who developed the pilot designed it to fail.

Acknowledging these facts, the most recent congressional cameras-in-courts bill, introduced at the start of OT15, was written to include only federal appellate, and not district, courts.

Looking ahead to 2017, **congressional staff from both parties** have already indicated to Fix the Court that cameras-in-courts bills will once again be introduced in the next Congress. The challenge for Democrats and Republicans who care about more open and accessible federal courts is **finding language that will move the majority of both caucuses to support the bills and will get the Judicial Conference and the Supreme Court moving on the issue**.

Does that mean proposing two cameras bills – one covering the Supreme Court and one covering the 13 other U.S. courts of appeals? Does that mean a separate bill for audio? These are questions we will try to answer in the next few months.

One guide may be the **report released in May 2016 by the U.S. Government Accountability Office**. Back in early 2015, Sens. Chuck Grassley of Iowa and Dick Durbin of Illinois and Rep. Mike Quigley of Illinois asked the GAO to study whether certain jurisdictions' more permissive video and audio policies had any effects on appellate court proceedings. (**Fix the Court was the first advocacy organization interviewed for the report**.) Coming on the heels of the FJC's pilot program study, the GAO report made similar assertions: that **audio and video had no measurable deleterious**

effect on conduct in courtrooms from California to Florida and Australia to the U.K. What made this report noteworthy, in fact, was this breadth: in studying numerous state, federal and international courts, the GAO found how various jurisdictions have worked to establish modern media policies that are uniquely theirs.

In other words, the Supreme Court (and those in Congress writing the pro-transparency bills) has **a range of options to choose from when looking to bring court media policy into the 21st century**. It could ask C-SPAN to record, broadcast and archive video of arguments like CPAC (Canadian C-SPAN) does for the Supreme Court of Canada or WFSU does for the Florida Supreme Court. It could purchase its own equipment for livestreaming audio and video as the Ninth Circuit has done. Or SCOTUS could **focus on modernizing its audio policy** by placing audio recordings of oral arguments online within 24 hours of a hearing, **as nine of the 13 U.S. courts of appeals do**.

Positive reports mixed with more of the same

This past term marked the second one in the past three in which not a single case was given the same-day audio treatment. (Audio from the first case of the term, *OBB Personenverkehr AG v. Sachs*, was accidentally posted online the day it was argued, but the audio file was quickly taken down once the court noticed the error.)

In February Fix the Court **brought together the leading pro-transparency and media organizations[1] to request same-day audio** for *Whole Women's Health v. Hellerstedt* and *U.S. v. Texas*, two of the term's most widely followed cases. "Millions of people will be impacted by how these cases are decided," the groups wrote, "and **we believe the public should hear the justices and attorneys grapple with the subjects at the soonest available moment**."

The court's response was as predictable as it was terse. "The court will follow its usual [end-of-week] practice regarding the posting of the audio" in those cases, court spokesperson Kathy Arberg wrote back.

This term also marked the end of a closely watched case regarding plaza protest at the Supreme Court. A 1949 law makes any type of demonstrations on the court's 20,000-sq.-ft. front plaza illegal, and a Maryland man had tested the constitutionality of that law following his 2011 arrest there.

Though in 2013 a district judge called the law "**unreasonable, substantially overbroad and irreconcilable with the First Amendment**," a three-judge panel of the D.C. Circuit disagreed, unanimously upholding the law and Hodge's conviction last year. On May 16, 2016, the Supreme Court denied cert. in Hodge's case, effectively ending it. It was a disappointing decision for Fix the Court given our core belief that **a person should not be prosecuted for expressing an opinion on one of America's most important public spaces**.

Not only do Supreme Court Police go undercover and join demonstrations on the sidewalk in front of the court, but, as we learned this past year, the building also has cameras pointing outward through which security monitors the plaza.

In fact, twice in the last two years – on the night the Darren Wilson grand jury verdict was announced and on the day *Obergefell v. Hodges* was decided – **Supreme Court Police let individuals ascend to the plaza without incident**, indicating

[1] The American Society of Magazine Editors, American Society of News Editors, Association of Alternative Newsmedia, Demand Progress, National Press Photographers Association, OpenTheGovernment.org, Radio Television Digital News Association, Reporters Committee for Freedom of the Press and Society of Professional Journalists joined Fix the Court in signing the same-day audio letter.

that they can manage the area and disproving the reasonableness of the statute that bans plaza demonstrations.

Court insiders know that the justices rarely, if ever, walk through the front plaza to enter the building, and though a few can see the space from their chambers, mounting a protest there is merely a symbolic gesture. As such, the **symbolism inherent in disallowing a constitutional right** does considerably more harm to the institution than any demonstration could.

Term limits

In spite of major decisions – or non-decisions, in some cases – on abortion rights, affirmative action, contraception and immigration, the **most notable Supreme Court event of the past term was, of course, Justice Scalia's death**.

For a brief moment, it felt as if Scalia's passing **might be a turning point in the case for ending life tenure at the high court**. A Washington Post editorial titled "Rethink life tenure" asserted that if a Supreme Court term "were shorter than 'indefinitely,' the political drama over every vacancy would not be quite so fevered." One in the *Economist* stated that the justices "**should not enjoy life tenure. Rather, they should be appointed for fixed terms**, staggered so that a single president cannot pack the court." The *Christian Science Monitor* noted, "Many state courts have mandatory retirement ages for judges [and] Congress could simply pass a similar law for the federal court system." All this occurred after Breyer endorsed term limits – "if it's a long term," he said, "I'd say that was fine" – the previous month.

We believe that one of the most compelling arguments among these was one written in *Politico* by Harold Pollack. "**Fixed terms provide no specific advantage to either party**. And in the long run, neither party particularly benefits from a random political crisis of the sort we are now experiencing," he wrote. "American government depends to a remarkable extent on nine human beings, several of whom are well into their senior years. **Justice Scalia's actuarially predictable but sudden passing underscores the need to find a better way**."

For a moment, it felt as if Scalia's passing might be a turning point in the case for ending life tenure at the high court.

These and many more discussions online, in print and on TV raised the prospect for action on life tenure – whether congressional, grassroots or some combination thereof. Yet within days – maybe even hours – of Scalia's passing, the conversation was dominated by the political battle over his replacement, **a battle that continues today**.

Acknowledging the potential for cognitive decline

Another Fix the Court thread on life tenure this past term arose in November following an Associated Press article on the Ninth Circuit's Judicial Wellness Committee, which helps ensure that **federal judges remain sharp as they age**.

The JWC encourages jurists to undergo mental health assessments, and it hosts neurological experts to speak about the **warning signs of cognitive impairment**. Through the JWC Ninth Circuit judges have empowered their friends, family or colleagues to step in if they believe there's reason to be concerned about a judge's mental health, and **there is a hotline**, called the Private Assistance Line Service, where court staff can get advice about dealing with signs of mental decline in their colleagues.

With federal jurists serving longer than ever before, Fix the Court pressed the Judicial Conference and Administrative Office of U.S. Courts to institute such a program across the entire federal judiciary. We were told, unfortunately, that

"each federal circuit [...] formulates internal policies for its own governance" – in other words, **that the AO itself was not going to take a leadership role in ensuring the hundreds of superannuated federal judges across the country remain mentally fit to serve**.

This issue, of course, is one that affects the Supreme Court, as well. There are numerous instances throughout the history of the institution in which **a justice has been rumored to be affected by a cognitive impairment before he has made the decision to step down**. There are further stories of the other eight justices covering for him during that time. This is far from an ideal situation and one that should not repeat itself at any level of the federal judiciary.

While our democracy demands that our leading jurists have the legal knowledge and experience that would make age an asset, **there comes a point where age is no longer an advantage and cognitive decline becomes a serious issue**. While we know of no sitting judge or justice who is so weakened, the potential for such a judge to be the deciding vote on a case of national import is very real – **and quite preventable**.

In February, following the AO's disappointing response to our letter, the **leading expert on mental decline at the court** weighed in, writing a widely discussed op-ed in the *L.A. Times* that updated his thinking on this issue. "Our court system and the law benefit from the wisdom of judges with many years of experience," wrote historian David Garrow. "But the federal judiciary, especially given congressional dysfunction, **is simply too important** to leave in the hands of [the elderly]." Scalia's death 11 days after this was published changed the scope of that conversation, as mentioned above.

Once more unto the breach

Fix the Court made a few additional pushes this term on the life tenure front. We commemorated the 25th anniversary of the seminal Supreme Court case on term limits, *Gregory v. Ashcroft*, with a series of op-eds, all of which advanced the case made by the court itself: that if, as the court held, there is a "legitimate, indeed compelling, interest" for state supreme court justices to have a mandatory retirement age, **that interest would not be diminished, we added, on the federal level.**

Who would have expected that the most powerful case for ending life tenure at the Supreme Court would come from a justice herself?

Here's the key passage in the *Gregory* opinion written by Justice Sandra Day O'Connor, which was joined by Justices Scalia and Anthony Kennedy and four more of their colleagues: "It is an unfortunate fact of life that **physical and mental capacity sometimes diminish with age**. The people may therefore wish to replace some older judges. **Voluntary retirement will not always be sufficient**."

(Also important to remember: **The Constitution gives Congress wide latitude to make laws about federal courts**, and in the past, legislation that has aimed to increase accountability at the high court has passed constitutional muster. Notably, the justices declined to hear a challenge to a 1978 law requiring federal judges to disclose their finances annually, a practice they have begrudgingly maintained to this day. Fix the Court says: **why not a law that keeps justices on the federal bench for life, per Article III, yet caps SCOTUS service at 18 years?**)

Finally, we ran online ads in the D.C. area in which we called on Judge Merrick Garland to pledge to serve for a fixed term should he get a hearing before the Senate Judiciary Committee, and **we even sent him a questionnaire** in the mail pushing him toward adhering to such a pledge **in case he did not see the ads**.

Blind trusts and recusals

Speaking of Garland, the chief judge of the D.C. Circuit owns up to $765,000 in shares of six publicly traded companies – Bristol-Myers Squibb, General Electric, General Mills, Pfizer, Procter & Gamble and Smucker – all of which (besides Smucker) **have either been litigants before the Supreme Court or submitted amicus curiae briefs** on issues related to their business in the last three years.

Garland may never be a justice, but one of his former D.C. Circuit colleagues (Roberts) as well as two other justices (Breyer and Alito) have maintained investments in individual stocks despite the fact that **each year, these holdings result in dozens of recusals at the cert. stage and a few at the merits stage**. In the past 10 months alone, there were 33: Alito led the way with 24 (22 at cert. stage, 2 at merits stage), Roberts had six at the cert. stage and Breyer had three.

In total, there were 180 recusals in OT15, yet while Justices Sonia Sotomayor and Elena Kagan can't dissociate themselves from their earlier work (115 cert.-stage and two merits-stage recusals) and Alito and Breyer can't dissociate themselves from their siblings who work in law (15 cert.-stage recusals), it makes no sense that Roberts, Breyer and Alito would so often **forfeit their "duty to sit" in order to hold on to relatively minor investments** in companies with cases before the court.

"**Supreme Court justices are not fungible**," Breyer likes to say, so these three should do all they can to be sure they can consider a petition or hear a case, and that means they should not be holding a random assortment of investments that may lead to a shorthanded bench. They may have recently started in earnest down that path.

A step in the right direction

It turns out that since the start of 2015 Roberts, Breyer and Alito **have divested as much as $1.475 million worth in publicly traded individual shares** – and possible more – **while adding less than $100,000 in securities** to their portfolios, instead choosing to invest in blended instruments like mutual funds that are less likely to trigger recusals over the course of a term.

Since the start of 2015 three justices may have sold nearly $1.5 million worth of shares in publicly traded companies, many of which have appeared before the court as litigants or amici in recent years.

There is no way to know if this string of divestments is due to Fix the Court's work shining a light on the justices' financial holdings and **how they have voted with the publicly traded amici whose shares they own** more than 60 percent of the time since 2009 (and more than two-thirds of the time if you take out Roberts' and Alito's predictable votes in the five affirmative action and same-sex marriage cases argued since then).

A year ago, these three owned shares in 76 companies; now it's down to 58. Roberts most likely sold all of his Microsoft shares, as well as all of his AOL stock. He did not buy any new shares of common stock but did buy shares of nine mutual funds, six of which he previously had positions in.

Breyer sold all of his shares in six companies in 2015 and bought shares in only one publicly traded company, an industrial supplies wholesaler, while purchasing a handful of government bonds.

Alito sold all of his shares of six companies, bought shares in only three and invested in a total of 21 other blended financial investments, namely ETFs, bonds and money market accounts, that are unlikely to lead to an unnecessary recusal. **Hopefully, this trend continues – or even accelerates – in the coming years.**

Code of ethics

While Supreme Court justices are required to adhere to the various ethics and recusal laws, they are the only top government officials who do not have a separate code of conduct that goes beyond the written statute. The 112th Congress, for example, created a "Code of Official Conduct" in 2011 for its members, and in the same year the Obama administration updated the "Standards of Ethical Conduct for Employees of the Executive Branch" that was initially promulgated in 1989. No similar manual is required reading at One First Street.

In the past three Congresses, numerous Democrats from both houses of Congress have introduced legislation that would require the Supreme Court to adopt a code of ethics akin to the Code of Conduct for U.S. Judges that all other federal judges must follow. None of these single-party bills has yielded even a single committee hearing or vote.

Since 2011 Democrats have introduced three Supreme Court ethics bills, namely because some progressives believe Scalia and Thomas flouted judicial ethics. Will conservatives now feel they have a reason to join these efforts?

But that may soon change. Over the course of a few days in July, as Justice Ruth Bader Ginsburg made unfortunate comments about a certain presidential candidate to the Associated Press, *New York Times* and CNN – and much of world came to understand **what this Code of Conduct for U.S. Judges is and why it was adopted by the Judicial Conference decades ago**.

As this episode unfolded, legal scholars and legislators not only made hay over the comments themselves but also noted that absence of a code of conduct for the justices. "The Supreme Court is the only court in the land that does not have a formal ethics code, **a void that should be remedied**," the *USA Today* editorial board wrote. Can it be done so in a bipartisan way in the 115th?

Congress gets involved

On July 6, two days before the first of the Ginsburg interviews was published, the House Judiciary Subcommittee on the Courts, IP and the Internet held a hearing on "judicial efficiency" that, **in what may have been the most telling example about how Fix the Court's work has permeated the conversation around the Supreme Court**, turned into a **two-hour critique from both parties on the lack of transparency in the judicial branch**.

"The judicial branch is the least well-known branch," remarked Rep. Darrell Issa (R-Calif.), who gaveled in the hearing. "**It has also historically lacked transparency**. It is time, however, for the judicial branch to come out of the shadows. Americans expect an open and transparent government. Americans expect disclosures of conflicts of interest along with financial disclosures."

"The American people expect transparency with respect to judicial actions," added Rep. Bob Goodlatte (R-Va.), who not only sits on the subcommittee but chairs the House Judiciary Committee. "**Transparency bolsters Americans' trust [that] fair and independent judges are above ethical reproach**."

Added Rep. Hank Johnson (D-Ga.): "Advances to court technology have taken a backseat, despite the fact that **such measures are needed to make the courts more accessible**."

It didn't end there. The members, almost methodically, went through nearly every one of Fix the Court's "fixes" and decried the current state of affairs at SCOTUS – even though the man testifying at the hearing, AO Director James Duff, has little, if any, oversight over the court's inner workings.

These exchanges should give transparency advocates a lot of hope for the coming congressional term.

On expanding broadcast access

Rep. Issa: "Americans expect to see government officials doing their job. There are cameras in this hearing room today, and citizens can judge for themselves whether or not elected officials are doing what they were sent to Washington to do."

Rep. Steve Chabot (R-Ohio): "Why should we not learn from the experience that the states have had in [allowing cameras]? Had they had a lot of problems, it would seem as if the trend of opening up the courtrooms to public would not have continued."

Rep. Steve Cohen (D-Tenn.): "I can see people being against it, thinking that in certain places that some lawyers might use it to act out and maybe increase their client base, but I don't think that's going to happen at the Supreme Court. [...] All the big issues are there, and the American public should be able to see the arguments."

On increasing judicial accountability

Rep. Issa: "Depending upon their offices, elected officials face the voters every two, four or six years. Article III federal judges have a lifetime appointment [...], and we respect that with the absence of term limits, the court is, in fact, a permanent body [that is] unaccountable, except in the case of high crimes and misdemeanors."

Rep. Goodlatte: "To investigate ethical breaches [in the judiciary], as well as to ensure that instances of fraud and waste are discovered and addressed, Rep. Sensenbrenner and Sen. Grassley have supported the creation of an inspector general for the judiciary. While the judiciary has strongly resisted the creation of such an inspector general, I look forward to exploring this idea further."

On improving judicial ethics and disclosures

Rep. Issa: "Everyone up here fills out an incredibly detailed form for financial disclosure, and it doesn't happen the same way in the judicial branch. [...] Why should we not mandate, if we cannot voluntarily get from the court, a similar level of transparency for the question of possible conflicts of interest? [...] I do not know who paid for trips by various justices and judges on a regular basis because it's not disclosed with the kind of transparency that we have, and my understanding is there is much less limitation on who can pay for [a trip]."

Rep. Trent Franks (R-Ariz.): "Other branches have comprehensive disclosure and ethics rules, and I'm wondering if you think that the judiciary should also have [equally comprehensive] disclosure and ethics rules for all judges, including those on the Supreme Court?
AO Dir. Duff: "We have a very robust system within the branch of overseeing and reviewing allegations of misconduct."
Rep. Franks: "Do those apply to the Supreme Court?"
Dir. Duff: "No, sir. The Supreme Court has its own administration."

Conclusion

For years the way in which the federal judiciary has approached transparency has been backwards, **starting from the position of privacy and slowly working toward greater openness**.

What Fix the Court has tried to show the Supreme Court and those in charge of its administration – on issues including same-day audio and the potential for cognitive decline, on promulgating a code of conduct and on divesting from individual stocks – is that **the institution and its justices should begin with the presumption of openness** and then, in given cases or instances, decide when it is in the public's interest, or in the interest of the parties, to pull back.

The result from such a change in attitude and an attendant change in policy will be a **greater sense that our highest courts are fulfilling their roles of administering justice fairly and openly**.

Getting to that point, **where transparency is less an afterthought and more a part of every institutional decision** made by the Supreme Court and federal judiciary, is where Fix the Court sees its role now and in the future.

The road to reform is long and windy. So is the line to get in to the Supreme Court on argument day.

*(*Pictured: The Supreme Court plaza on Feb. 29, 2016. Credit: Gabe Roth*)*