BLUEPRINTS FOR TRANSPARENCY

How High Courts Everywhere But the U.S. Have Limited Judicial Tenure and Allowed Broadcast Access

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Cover photos (top to bottom): U.K. Supreme Court exterior, High Court of Australia interior, Supreme Court of Canada exterior

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

By a host of measures, numerous foreign courts of last resort, themselves often called "supreme courts," are **more open and accountable than the U.S. Supreme Court.**

Since ours is one of the oldest, and ours is often the one other countries are looking to emulate, the question that most interests Fix the Court is **how did this happen**? Why do the high courts of Australia, Brazil, Canada, Germany and the U.K., for example, allow greater broadcast access than ours and require their judges to retire after they reach a certain age or length of service?

Such an examination should be informative for those of us hoping to convince the justices and the federal judiciary as a whole to accept these best practices in transparency that have been implemented the world over.

Readers may recall that some of these points were touched on in a recent U.S. Government Accountability Office report, which in addition to examining the broadcast rules in a number of U.S. courts looked at high courts in Australia, Canada and the U.K. What the GAO report did not do, though, which we do here, is to look at the **reasons why greater broadcast access was granted in these courts, as well as why mandatory retirement ages were implemented.**

AUSTRALIA

For nearly four decades, justices of the High Court of Australia, as well as all other Australian federal judges, have been subject to a **mandatory retirement age of 70**. This provision was instituted after a 1977 national referendum on the issue passed by wide majorities in each of the country's six states and nationally by a four-to-one margin.

The impetus for a mandatory retirement age was driven, in part, by the tenure of Justice Edward McTiernan, who retired from the High Court in 1976 after 46 years there. The story goes that McTiernan, who remains the longest-serving high court judge in the Western world to this day, would have served even longer had Chief Justice Garfield Barwick granted his request to build a wheelchair-accessible ramp to the bench.

Soon after this episode, the Senate Standing Committee on Constitutional and Legal Affairs called for an amendment to the Australian Constitution that would include a retirement age for all federal judges. Such a provision, the committee said, would maintain dynamic courts and avoid the potential for having to remove a judge deemed unfit due to cognitive impairment. The Australian Constitutional Convention adopted the committee's recommendation, and the Liberal Party-led government later passed the bill that triggered the referendum.

Prior to 1977, the common law understanding that federal judges serve for life was affirmed in a 1918 High Court case, *Waterside Workers' Federation of Australia v J.W. Alexander, Ltd.,* in which the court held that federal judges may serve for life and may only be removed for "misbehavior or incapacity" after an examination from both houses of Parliament.

As a result of the referendum, the average age of Australian High Court justices in the 21st century has hovered around 65, and the average tenure of an Aussie federal jurist is around 14 years. For comparison, in the U.S. the average age of the justices is nearly 70 and the average length of a justice's tenure has nearly doubled since 1970 to more than 26 years, up from around 14 years during our nation's first 180 years.

Cameras, on the other hand, came to the High Court of Australia only a few years ago. In 1995, the Federal Court of Australia, which in the Australian judicial hierarchy is akin to one of the U.S. courts of appeals, commissioned a study on potentially televising court hearings. The study recommended "controlled and incrementally introduced broadcasting." It was not until October 2013, however, that the High Court announced that **it would film most of its oral arguments** and release video files online a few days later. Three years on, videos now tend to be posted by the end of the day.

The impetus for filming may have arisen from an incident earlier in 2013, in which a fairly public spat erupted between a judge in Western Australia, who invited cameras to film and livestream a court proceeding online, and the state's attorney general, who shut down the plan over cost concerns. Officials in the Liberal-led government supported the state AG's actions, citing privacy concerns of the parties involved, while Labor backed the judge.

"I think the public wants the courts to be more open and accountable," the head of Labor said. "The question has to be asked: why is the AG preventing that from happening?" In the end, the Western Australia proceeding wasn't filmed, yet the High Court's broadcast announcement came just five months later.

In the intervening years, the High Court has deemed its acceptance of broadcast a success, proudly reporting in 2014 and 2015 that its "Recent A/V Recordings" page of oral arguments is viewed about 30,000 times annually.

BRAZIL

Brazil has changed its policy on the retirement age of its high court justices more than any other country surveyed. Following a 1930 coup, the new president forcibly pushed six *ministros*, or justices, of the Supremo Tribunal Federal into early retirement. Brazilians liked the idea of compulsory retirement so much, they wrote it into their 1934 constitution (age 75) as well as into their 1937 (age 68), 1946 (age 70) and 1988 (again age 70) charters. Most recently, the legislature passed a constitutional amendment in May 2015 that **increased the mandatory retirement age for ministros**, from 70 to 75.

This move came at the expense of unpopular President Dilma Rousseff, who was rendered unable to appoint new STF justices for the remainder of her term. The five justices who were approaching age 70 said at the time the amendment passed that they would continue to work until they reached the new retirement age. Rousseff herself was removed from office in Aug. 2016.

Brazil's experience with broadcast media in its highest court also differs from that of its peers. In 2002, **the STF**, with the assistance and approval of the executive and legislative branches, **established its own broadcast networks, TV Justica and Radio Justica**.

The impetus for allowing broadcast came from one of the STF justices himself, Marco Aurelio Mello, who both worked with the Brazilian legislature to pass the law that created these networks and also signed the law while acting president in May 2002. The first STF case was filmed and broadcast three months later.

Not only are oral arguments filmed, though – so, too, are the justices' deliberations, which begin as soon as a hearing ends. Upon hearing about this tradition when the head of the STF visited Washington a few years ago, Justice Samuel Alito remarked, "That can't be the real conference!" (But it really is.)

CANADA

The Supreme Court of Canada has had a **mandatory retirement age of 75** since 1927 when Parliament passed the aptly named Supreme Court of Canada Act. The law arose partly from circumstance and partly as a result of struggles between and within the two major parties at the time.

According to the definitive biography of the institution, beginning around 1920, "The [Canadian] government was convinced that age had become a negative factor for some members of the Supreme Court." One justice in particular, John Idington, was referred to as "86 & senile" in the prime minister's 1924 diary – though the justice was, in fact, only 83 at the time – and another, Louis Davies, was deemed by the justice minister as "no longer in a position to perform his duties."

At the same time, a number of deaths and retirements spawned waves of partisanship within the judiciary. Associate justices were passed over for the position of chief justice for political reasons. At one point, a 66-year-old Quebec judge, Albert Malouin, who saw a seat on the SCC as a demotion, was appointed for no other reason than to thwart the political directives of the justice minister. Malouin retired after serving a meager eight months.

Finally, in 1927, Parliament came together to pass the SCCA, which established a mandatory retirement age of 75 and applied it not only to future justices but to current ones[1], as well.

Though the SCC first allowed a camera in its courtroom in 1981 to film an opinion announcement, it **first began allowing broadcast access to hearings** in 1993 when it permitted filming of three cases – one concerning whether an individual has the right to assisted suicide, and two involving the tax deductibility of nanny expenses and spousal support payments. Most the proceedings in these cases were shown live on the Canadian Broadcasting Channel, and portions were played on other news and public affairs channels.

Around that time, the Canadian Charter of Rights and Freedoms – similar to our Bill of Rights and including "the freedom of the press and other media of communication" – was seen as a potential tool for expanding broadcast access to courts. In 1993, an Ontario Court of Appeal cited the Charter in ruling that the guarantee of an "open and public hearing [...] does not countenance distinctions being made between different forms of media."

In 1995, the SCC decided to expand broadcast access, allowing almost all of its hearings to be broadcasted on the Cable Public Affairs Channel via small, remotely operated cameras that are fed into a nearby media room. Since 2009, proceedings have also been webcast and archived on the SCC's website. David Power, the SCC's deputy registrar, tells Fix the Court, "The broadcasting and webcasting of court proceedings [...] is not a matter that stems from legislation but rather from a decision of the court itself."

Said SCC Chief Justice Beverley McLachlin in 2012: "The Supreme Court's experience with television and webcasting has been positive. [...] With our fixed cameras, there is no possibility of disrupting the decorum of the court, nor, given the nature of debate before the court, any real risk of sensationalization or trivializing the hearings. From our perspective, [...] I believe that the broadcasting of our hearings has contributed to public confidence in the Supreme Court of Canada."

[1] Idington had turned 86 by the time the SCCA had become law.

GERMANY

Germany does not have one supreme court but rather five federal courts that each deals with a specific area of law and a sixth court, the Federal Constitutional Court, that may act as a *de facto* high court to resolve certain disputes and determine the constitutionality of laws.

German **federal courts have both a mandatory retirement age of 68 and a term limit of 12 years**. Both of these provisions are part of the Law on the Federal Constitutional Court, passed in 1951, two years after the ratification of the post-war German constitution, which drew from the charters of various other Western nations. The Constitution explicitly states that the German legislature may pass laws regarding judicial tenure.

German courts have been **slow to adopt broadcast technology**. In 1995 the news channel N-TV filed a suit on constitutional grounds[2] for permission to broadcast the trials of former members of the East German Politburo. N-TV filed another suit in 1999 asking for permission to film a hearing concerning the legality of hanging a crucifix in a public school classroom.

These combined cases reached the Federal Constitutional Court in 2001, and the FCC ruled against the broadcaster, though as these cases were making their way through the justice system, the FCC decided to allow the filming of opinion announcements, which began in 1998. German federal courts are also now exempt from the 1975 law that outlaws cameras from court proceedings.

Earlier this year, and on the recommendation of Justice Minister Heiko Maas, the German Senate proposed letting the other five federal courts to grant broadcast access to opinion announcements. The presidents, or chief judges, of the other five federal courts wasted little time voicing their opposition to the Senate proposal, though recently an FCC judge, Andreas Mosbacher, went on record to say he would support expanding broadcast to FCC hearings and to other federal courts' opinion announcements.

UNITED KINGDOM

The United Kingdom Supreme Court is a relatively new institution, as it was not established until the Constitutional Reform Act of 2005 and did not open until October 1, 2009. Prior to that, federal judicial functions were carried out by a dozen "Law Lords" who were members of the House of Lords. Judicial power has always been and remains subservient to Parliament, though, as there is no judicial review.

Mandatory retirement age has been a part of the British judicial system since the passage of the Judicial Pensions Act of 1959, which prospectively **required resignation for judges once they reached age 75**. In 1993 the statute was updated to lower the retirement age to 70, while allowing the Lord Chancellor (essentially the justice minister) to permit individual judges to remain in office until age 75.

The passage of the JPA was many decades in the making. As early as 1898 a back-bencher from Cornwall, MP Edwin Lawrence, who is best known for his attempts at proving that Francis Bacon authored Shakespeare's plays, introduced a motion in Parliament stating that "for all future appointments of judges, a limit of age shall be fixed

[2] Though the 1951 Basic Law states, "Freedom of the press [...] by means of broadcasts and films shall be guaranteed," a 1975 law governing the courts bans cameras, saying, "Audio and television or radio recordings as well as audio and film recordings intended for public presentation or for publication of their content shall be inadmissible."

for their compulsory retirement." There was no second, and that proposal was tabled for more than a decade. It was finally reconsidered in 1913 by the St. Aldwyn Commission and again in 1936 by the Royal Commission, both of which came down in favor of implementing a retirement age.

According to legal scholars[3], the ambitious Lord Chancellor appointed in 1954, David Maxwell Fyfe, made restoring power to the courts a key tenet of his office and began looking for ways to "increase the courts' capacity to respond to the social needs of the day."

At the same time, as one Oxford Law professor put it, the British bench "had more than its share of cantankerous, prejudiced, intimidating and boorish judges, constrained by no retirement age" and opposed to social change.

Introducing the JPA in the House of Lords, Lord Chancellor Fyfe said:

> I have considered long and anxiously before making up my mind about this question of a retiring age, for there can be no doubt that if a judge is called on to retire on reaching a certain age the state may well lose the services of a man at the height of his powers with several years of valuable work still ahead of them. That is true, and it is still true whatever age one takes. But I think it is equally true that it is in the best interests of the state and of the judges themselves that a judge should know clearly in advance the age at which he will have to relinquish office. What is important is that the age should be fixed sufficiently high to ensure that we do not lose too early the knowledge, experience and ripe judgment of the older judges; and it is for this reason that I think that the age of 75 is the right one.

The bill passed, even as the Lord Chancellor worked to quietly push out jurists who were past their prime.

Cameras have been a part of the UKSC since its inception in 2009, when the court was ruled exempt from a 1925 law prohibiting filming in courtrooms. The impetus behind this exemption came, at least in part, as a result of many years of lobbying from the BBC, Sky News, ITN and the U.K. Press Association.

Live footage of Supreme Court hearings is sent directly to the country's three main broadcasters and is also available online via the UKSC website. One hitch: the footage, according to the Ministry of Justice, may not be used in "light entertainment programmes, satirical programmes, party political broadcasts and advertising or promotion."

Nevertheless, the head of communications at UKSC tells Fix the Court that its live-streaming page receives a monthly average of approximately 20,000 unique viewers. Last year the court added an on-demand video archive of past proceedings that receives another 10,000 viewers monthly.

[3] Much of the information in this section comes from the work of Washington College of Law (AU) Prof. Mary Clark in "Judicial Retirement and Return to Practice," 60 Cath. U. L. Rev. 841 (2011).

UNITED STATES

Audio and video recording are, of course, not allowed in the courtroom at the Supreme Court of the United States, though the court itself records oral argument audio, which it releases at the end of the week to SupremeCourt.gov, and opinion announcement audio, which it releases to the National Archives at the start of the following term.

Of the 13 federal courts of appeals, only two allow cameras, and only three of the 94 federal district courts are currently equipped to film their proceedings. Since 2000 the Supreme Court has released same-day audio of oral arguments 26 times.

The two best-known cases[4] about filming legal proceedings that have reached the high court are *Estes v. Texas* (1965) and *Chandler v. Florida* (1981). At the time of *Estes*, the legal community was generally against allowing broadcast coverage of courtrooms, citing "physical distraction to trials, psychological distraction to trial participants and the defendant's right to due process of law." (Of course, none of these "distracting" elements are part of the federal appeals that end up at the Supreme Court, and groups like the ABA now support expanding broadcast coverage to SCOTUS.)

Justice John Marshall Harlan II's concurrence in *Estes* set the scene for what was to follow:

> [T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.

That day came 16 years later in *Chandler*, as the justices reversed course, saying "the Constitution does not prohibit a state from experimenting" with TV coverage of trials. But that experimentation has yet to reach One First Street.

U.S. Supreme Court justices and all other federal judges, according to Section III of the Constitution, "hold their offices during good behavior," which has been **understood to mean that they may serve for life** and may only be removed for egregious offenses.

Legal scholars are currently debating whether changes to that understanding would have to occur via constitutional amendment or simple legislation. (Fix the Court supports either approach but prefers the latter.)

The court's principal case on the topic was decided 25 years ago, as Justice Sandra Day O'Connor, in writing for a seven-justice majority in *Gregory v. Ashcroft*, said, "The people [...] have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform [and] it is an unfortunate fact of life that physical and mental capacity sometimes diminish with age." Though this case was about a mandatory retirement age for state judges, the themes were and remain quite relevant to the superannuated Supremes.

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[4] Much of the information in this section comes from the work of University of Oregon Prof. Kyu Ho Youm in "Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning From Abroad?", 2012 BYU L. Rev. 1989 (2012).

WHAT WE'VE LEARNED

Our comparative analysis of transparency and accountability within the courts of these five nations has yielded the following conclusions about the best pathways to effect transparency and accountability reforms at the U.S. Supreme Court and the factors may be slowing down the process.

Factors aiding the passage of mandatory retirement age provisions:

1. The **relatively young age of the democracy**. Countries with newer constitutions (Australia, Brazil, Canada and Germany) are more likely to have implemented terms limits or a retirement age at the time of ratification than older democracies (U.K), which often take their cues from pre-18th century, common law understandings of judicial tenure
2. The **ability of politicians to use the threat of retirement as a political tool**, either to convince an aging jurist to step down (Australia and Canada) or to prevent a sitting president from nominating his or her own justices (Brazil)
3. The **relative age and frailty of sitting justices** at times of crisis or political change (Australia, Canada and the U.K.)

Factors aiding the passage of pro-broadcast provisions:

1. A group of **media or legal organizations** that diligently pushes the judiciary to change its broadcast policies (Australia, Canada, Germany and the U.K.)
2. A **high-profile case** that either captures the nation's attention (Canada and Germany) or yields a pro-broadcast interpretation of a free-speech or open-trial law (also Canada)
3. A judge or number of sitting judges who **generally favor broadcast** (Australia, Brazil and Canada)
4. If lower courts have **not** had extensive experience broadcasting proceedings (**see "A Further Note on Broadcast," p. 10**)
5. **Decentralization** of the high court's power (Canada, Germany and the U.K.)

   In countries whose top court lacks judicial review (Canada has only had it since 1982, and the U.K. does not have it at all), and/or is subservient to a parliament (U.K.), or whose constitution provides for a decentralized federal court system as opposed to being a coequal branch (Germany), courts are more likely to be televised given that judicial opposition to broadcast in these places is less likely to sway parliamentarians, who hold a greater amount of power relative to those judges

Factors that may hinder the passage of both broadcast and retirement provisions:

1. If political parties disagree about the wisdom of such provisions (Australia)
2. If such a proposal is seen as potentially helpful to a single party, as opposed to both parties or to the nation as a whole (Brazil)

A FURTHER NOTE ON BROADCAST

Unexpectedly, one of the greatest predictors about whether courts of last resort will allow cameras in their courtrooms is whether lower courts – state or federal, civil or criminal – have conducted their own pilot programs for broadcast.

In the countries noted above, almost none had allowed broadcast of proceedings in their lower courts at the time in which cameras were rolled in to their high courts. For example:

- Canada's federal courts pilot program started in 1995, two years after filming began at the Canadian high court;
- A similar program in Germany's lower federal courts is about to get underway, and its top constitutional court already allows some filming of opinion announcements; and
- In the U.K., the Supreme Court began filming in 2009. Only then did other British courts follow: in 2013 criminal courts began allowing cameras and in 2016 appeals courts began a pilot.

Now take the contrasting experience of the United States. In the federal system, there have been two cameras-in-courts pilot programs (1991-1994 and 2011-2015) in the district and appeals courts, and at the conclusion of each, the Supreme Court refused to expanded broadcast access. That the two federal circuits included in the earlier pilot – the Second and the Ninth – still allow broadcast to this day has not moved SCOTUS to change its own media policies.

The presence of cameras in appeals and district courts, in spite of the success of both pilot and ongoing programs, has ironically delayed broadcast access in the highest court.