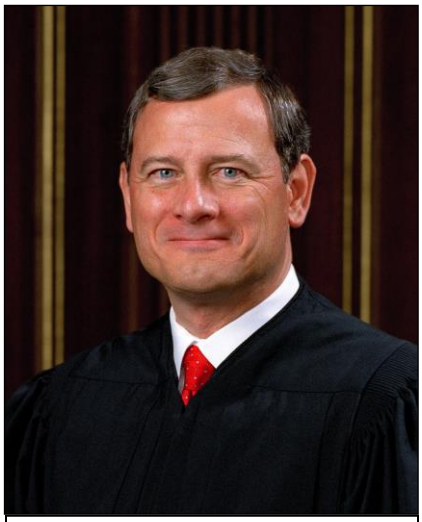
Fix the Court's Year-End Report on the Federal Judiciary

December 15, 2015

Read our year-end report from last year here.

I. Introduction



John G. Roberts, Jr., the 17th Chief Justice of the United States

Each December 31, the Chief Justice of the United States issues a report on the state of the federal judiciary. Much like the President's annual State of the Union Address, the Chief's narrative recalls accomplishments from the previous year, outlines priorities for the coming year and asks Congress for an appropriate level of funding.

The Supreme Court's 2015 docket will not soon be forgotten, with cases on marriage, health care and the death penalty gaining sustained national attention. In 2016, with a presidential election on the horizon, the justices will weigh in on abortion rights, contraception, affirmative action, labor unions and, possibly, immigration.

Though most of these issues have also been on Congress' agenda the past few years, as well, it is the Supreme Court that has articulated the final say. Contrary to the long history of interbranch relations in our republic, the decisions of "five unelected lawyers" – a phrase often muttered by those on the losing side of close cases – in 2015 carried the day over the 535 elected officials who represent 320 million Americans.

That's some serious jiggery-pokery, which makes the Chief Justice's forthcoming report – and hopefully, Fix the Court's "prebuttal" here – all the more interesting.

INSTITUTIONAL INERTIA

"The courts will often choose to be late to the harvest of American ingenuity," Chief Justice Roberts wrote in his 2014 report, noting that it took roughly four decades for the high court to begin using pneumatic tubes for transporting documents from one part of the building to another.

But looking across the landscape of public institutions, one quickly realizes that the "American ingenuity" that could bring the high court closer to the rest of the federal government in terms of openness and accountability comprises developments that have either been around for a century or ones that could be implemented by middle schoolers.

The Second and Ninth Circuit Courts of Appeals allow video coverage (invented 80 years ago), for example, and 10 of 13 federal appeals courts either release live audio (a century-old development, called the radio) or place an audio file online within 24 hours of a hearing.

The President and members of Congress, via century-old press offices, advise the media and public of their off-Pennsylvania Avenue appearances each week, and each year they scan and upload their financial disclosures online (admittedly a newer development but one that requires little technical acumen).

Further, the President, presidential candidates and members of Congress have been placing their stocks into blind trusts for roughly four decades, and since 1951 the President has been term-limited, with dozens of members of Congress every two years supporting proposals that would limit the number of terms that they may serve in the House or Senate.

In other words, the time for "late-to-the-harvest"-type excuses is over. To help usher the high court into the modern era, the report below offers examples from the past 12 months that demonstrate how the Supreme Court can catch up to the 21st century.

2015 event: End of the federal camera-in-courts pilot program (July)

2016 imperative: Judicial Conference should allow broadcast media in a greater number of federal courts

II. Expanding the Pilot Program

On July 18, 2015, the four-year cameras-in-courts pilot program conducted by the federal judiciary officially ended.

Authorized by the Judicial Conference in Sept. 2010 and begun on July 18, 2011, the program comprised 14 different district courts across the country. Filming was limited to civil proceedings in which all parties involved had given consent.

The 14 federal district courts that took part in the pilot program are:

- Middle District of Alabama
- Northern District of California
- Southern District of Florida
- District of Guam
- Northern District of Illinois
- Southern District of Iowa
- District of Kansas
- District of Massachusetts
- Eastern District of Missouri
- District of Nebraska
- Northern District of Ohio
- Southern District of Ohio
- Western District of Tennessee
- Western District of Washington

With the program at its end, the research arm of the judicial branch, the Federal Judicial Center, is now studying the results. The FJC will at the earliest make its recommendations at the March 2016 biannual session of the Judicial Conference of the United States, the judiciary's policymaking body for which Chief Justice Roberts is the principal and presiding officer.

The previous cameras-in-courts pilot program ended sourly for transparency advocates, as the Judicial Conference voted – in secret – in September 1994 to suspend the use of cameras in federal courts. A year and a half later, in March 1996, the conference changed its mind and allowed each circuit to make its own rules on audio, video and still photography. That remains the Conference's media policy to this day.

Since then, the Second and Ninth Circuits have allowed video coverage of various proceedings, and nearly all of the 13 federal circuits post same-day audio of their hearings online, with the D.C. Circuit notably guaranteeing same-day audio by 3 p.m. the day of a hearing.

The Supreme Court, on the other hand, has allowed same-day audio only a handful of times in its entire history, most recently in OT14 for the April 28 same-sex marriage case, *Obergefell v. Hodges*, but not for the March 4 Affordable Care Act case, *King v. Burwell*. (Eagle-eyed court watchers may have noticed that the audio file of the

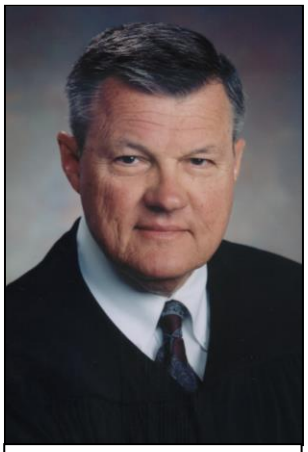
first case the court heard this term appeared online briefly on the day in which that case was argued. Within minutes, though, that file was taken down, only to be uploaded again at the end of the week.)

One noteworthy difference between the most recent cameras pilot program and the one conducted by the Judicial Conference 20 years ago is that video from the 2011-2015 program was made available online throughout its run, allowing the public the opportunity to evaluate the results for themselves as the program unfolded.

Unsurprisingly, the results were quite boring. And that's a good thing. The judges presiding over the cases whose hearings were recorded either noted the cameras and the beginning of the hearings, or they did not. The cameras were either trained at the judge or one of the attorneys or the court reporter, or sometimes various combinations in split-screen. Once the "record" button was pressed, the judges either skipped right over the fact that proceedings were being filmed or would read off a prepared script.

"'This proceeding will be video-recorded, and the video may be posted [online],'" began Chief Judge James Gritzner of the Southern District of Iowa off camera at a March 2014 First Amendment hearing, "'so please limit noise and side conversations and other disturbances.' I'm not sure what [those administering the pilot program] mean by 'other disturbances,' but I'm sure we won't have any."

Judge Gritzner's humor aside, transparency advocates are hopeful the Judicial Conference takes a serious look at the program, as a positive review may yield an expansion of the program to all 94 federal district courts in the U.S. or into a handful of the 13 federal appeals courts – and, one day, to the 14th U.S. appeals court, located on First Street NE in Washington, D.C.



Judge William Terrell Hodges, chair of the Judicial Conference committee that oversees media policy.

Just as there shouldn't be different rules of evidence in different federal jurisdictions, Fix the Court believes that federal courts in different parts of the country shouldn't have different media policies. Unfortunately, the Judicial Conference disagrees. The chair of the Judicial Conference Committee on Court Administration and Case Management, which oversees media policy for the Conference, wrote this past February: "Our committee [feels] that the courts should be allowed to develop procedures" regarding the use of broadcast media "at their own pace, taking into account individual circumstances as they exist in each of the circuits."

Though the Supreme Court is under no obligation to take the views of the Judicial Conference or the FJC into account, a vote of confidence from the judiciary's policy and research arms would be a much-needed shot in the arm to purveyors of the third branch's media policy, whose neo-Luddism seems to refresh when they cross Constitution Ave. All nine sitting justices supported cameras in courtrooms, or were at least neutral toward them, when they were on the north side of that street as nominees before the Senate Judiciary Committee. But when they crossed the street south and took their chambers at the Supreme Court, they changed their minds.

It is possible that with a bench full of social science enthusiasts, a third-party study on the benefits of cameras could go a long way towards convincing the high court to be more accepting of broadcast technology.

PARALLEL WITH THE CODE OF CONDUCT

There is a parallel between this area of potential reform and another: just like our nation's top jurists ban broadcast media from their courtroom, they are permitted to opt out of the ethics code that binds all their federal judge colleagues.

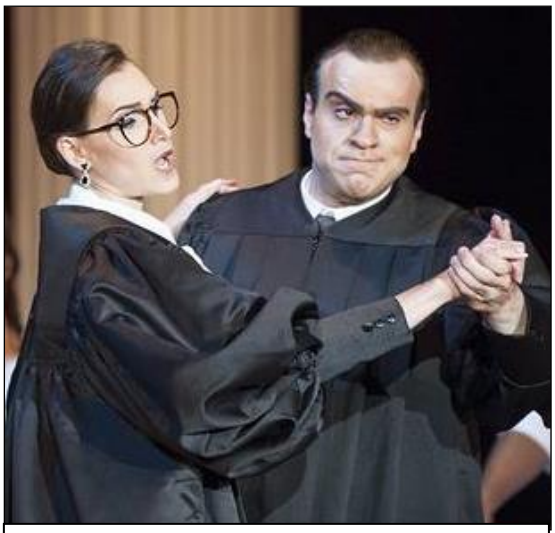
While it's true the justices are required to follow certain conflict-of-interest laws – they can't rule on a case in which they have a family member involved, for example, or a financial interest (more on that below) – that doesn't go far enough. The code of conduct prohibits justices from commenting on a case while it's before the court. It prevents them from participating in partisan events. It prevents them for engaging in activities that have even the appearance of impropriety.

To our knowledge, none of the justices has committed an impeachable offense. But research has shown that all nine have been culpable of various ethical oversights, from leaving assets off their financial disclosure reports to speaking at partisan fundraisers to ruling on cases despite credible conflicts of interest (see more at FixTheCourt.com/Justices).

To mention but one example, Justices Scalia and Ginsburg on various occasions between the 2012 decision in *U.S. v. Windsor* and the 2014 *cert.* grant in *Obergefell v. Hodges*, they offered their views on same-sex marriage at public events, even as they and the rest of the country knew the issue would return to the high court.

Justice Anthony Kennedy in 2013 responded to a question from Congress about why the justices were not bound to the code by saying, "It's potentially difficult for lower court judges to make rules" – i.e., the code of conduct – "that are binding on us" – the nine Supreme Court justices.

But that would be like Major League Baseball using the minors as a laboratory for speeding up the game and then saying, "We can't implement any changes because major leaguers haven't yet been subject to them." It's a logical fallacy.



Actors portraying Justices Scalia and Ginsburg in a new eponymous opera.

The federal judiciary's code of conduct "pilot program," if you will, has existed for more than 90 years – since 1924 when, as Chief Justice Roberts mentioned in his 2011 year-end report, the ABA's Canons of Judicial Ethics were codified. It's worked for lower court judges since then. It's time for the nine holdouts on the federal bench to adopt these rules as their own.

2015 event: Concern grows about aging Supreme Court justices and other federal judges

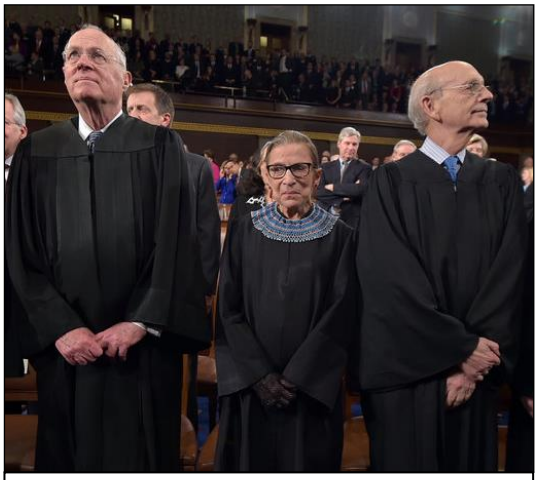
2016 imperative: The Judicial Conference should a create system-wide program aimed at mitigating cognitive decline

III. Mitigating Cognitive Decline

"Allow[ing the courts] to develop procedures in this important area at their own pace" is, unfortunately, a headline that works not only for ethics and broadcast media but also for programs that serve to mitigate cognitive decline in an aging corps of federal judges.

While the Ninth and Tenth Circuits are attempting to alleviate the problems associated with judges serving longer than ever before, there is no similar judiciary-wide program, even though every single U.S. Court of Appeals has aging judges and frequently calls in senior-status judges to hear major cases.

One of the fixes we advocate for is the end of life tenure at the high court, as we believe an individual staying in such a powerful position for 30 or 35 years – as has become the norm – is more feudal than democratic by nature and a far cry from what our founders intended. If and when term limits will be instituted is unknown but in the meantime, the Judicial Conference should implement system-wide solutions to mitigate the impacts of cognitive decline on our judicial system. The judiciary as a whole should recognize that everyone who ages experiences varying rates of physical and mental decline that would make one's job more difficult, and it should consider taking a page from the Ninth Circuit's Judicial Wellness Committee.



Justices Kennedy, Ginsburg and Breyer (l-r) attending the State of the Union. When the next President is sworn in, these three plus Justice Scalia will be between the ages of 78 and 83.

In order to ensure judges remain sharp as they age, the JWC encourages jurists to undergo mental health assessments and hosts neurological experts to speak about the warning signs of cognitive impairment. The committee asks that judges empower their friends, family or colleagues to step in if they believe there's reason to be concerned about a judge's mental health. And they have a hotline where, according to a recent news report, "court staff and judges can get advice about dealing with signs of senility in colleagues."

There are numerous instances throughout Supreme Court history in which a justice was affected by a cognitive impairment before he 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 ideal and should not happen 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 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.

"If we wish to retain the goodwill and confidence of the public in our ability to render justice," the head of the Ninth Circuit's wellness committee recently said, "we have to take steps" to ensure our judges are unimpaired.

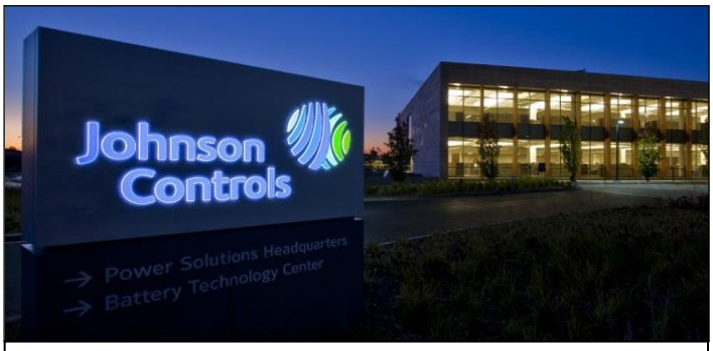
As such, Fix the Court is hopeful that Chief Justice Roberts and his Judicial Conference colleagues consider creating a national Judicial Wellness Committee – either as a standalone committee or as part of the Conference's Committee on Judicial Conduct and Disability – to study ways in which the judiciary can mitigate the potential for cognitive impairment among its members.

2015 event: Alito recused from *FERC v. EPSA* and Breyer didn't, despite owning same stock (October)

2016 imperative: Supreme Court should share internal conflicts lists, create a combined list or require blind trusts

IV. Preventing Preventable Conflicts of Interest

"No man should be judge in his own case" is a phrase that came to mind this past October when Justice Breyer failed to sit out a suit, *FERC v. Electric Power Supply Association*, wherein his wife owned stock in one of the co-litigants.



Corporate headquarters of Johnson Controls, whose shares Justice Alito owns and Justice Breyer's wife owned until October.

Typically, that would trigger a recusal or a stock selloff. In this case, however, Breyer only learned of the oversight after oral argument, at which point his wife sold her shares. Justice Alito, who owns shares in the same co-litigant, Johnson Controls, made the decision in May to sit out the *cert.* determination of the case and was absent from the bench on Oct. 14 when the case was argued.

According to the most recently available financial information, three justices – Chief Justice Roberts and Justices Alito and Breyer – own shares in roughly 70 publicly traded companies. The remaining justices' financial assets lie in retirement accounts, money market accounts or other blended or long-term financial instruments.

In July, Fix the Court sent the high court a petition signed by nearly 2,500 people (available at http://tinyurl.com/BlindTrusts) calling on the justices who own common stock to place their securities in blind trusts for the duration of their high court tenure. Doing so would bring the occurrence of stock-based conflicts at the high court to an end. Another advantage would be that cases involving a publicly traded company owned by a justice would no longer trigger a recusal and potentially yield a 4-4 tie, for which, to quote Justice Kennedy, "everyone's time is wasted."

Moreover, that Justices Breyer and Alito owned shares in the same company in *FERC v. EPSA* brings into focus the need for greater communication among the justices or their law clerks on potential conflicts. While there's no evidence any of the justices are willfully acting unethically, this incident highlighted the need for the nine to share their internal conflicts lists with their colleagues or to create a collective list. Plus, if Justice Alito had joined the *cert.* pool, it's likely Justice Breyer's clerk may have identified the issue with Johnson Controls before the *FERC* case was argued.

Overall, more needs to be done to ensure a repeat of this scenario does not occur again, and Fix the Court welcomes the implementation of the suggestions noted above or of any other creative solutions to this matter.

V. Conclusion

The Supreme Court decides who can vote, who can marry, what type of regulations our businesses face and even makes decisions over life and death, yet major shortcomings persist when it comes the way it carries itself as a public institution.

The nine should hasten to take positive steps on the path to becoming a coequal branch of government when it comes to transparency and accountability – from modernizing its policies on broadcast media and ethics to tackling cognitive decline head on.

Fix the Court is hopeful that Chief Justice Roberts addresses these issues soon – beginning December 31 at 6:00 p.m. with his own year-end report on the federal judiciary.

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