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Subcommittee on Courts, Intellectual Property and the Internet on
"The Judicial Branch and the Efficient Administration of Justice"
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Thank you to Chairman Issa and Ranking Member Nadler for the opportunity to submit testimony for the record to this subcommittee.

My name is Gabe Roth, and I am executive director of Fix the Court, a national nonprofit that advocates for a more open and accountable federal judiciary.

There are three areas in which Fix the Court's mission intersects with the topic of this hearing, and I would like to outline them here briefly and then suggest a way forward for each area.

Access to the courtroom

At a time when the legislative and executive branches have passed laws and undertaken various initiatives to improve transparency and accountability, the judicial branch has largely overlooked instituting similar reforms.

Nowhere is this gap clearer than in the way in which the work of the federal judiciary is accessible to the American people. One way to instill confidence that justice is being done is to show fair and unbiased officers of the court in action, yet at a time when the media landscape has evolved to give greater public access to our government, the courts are stuck in the past. This hearing, for example, is being broadcast on C-SPAN and being livestreamed online, yet only one federal court out of more than 100 across the country allows the same level of access.

The most recent effort to end the broadcast gap in the federal judiciary ended in disappointment for transparency advocates as the Judicial Conference of the United States voted in March not to expand a four-year pilot program that allowed video coverage in 14 federal district courtrooms.

Unfortunately, the pilot did not test video in federal courts of appeal, though they are logistically much easier to film than trial courts, given that appeals last an hour and not days 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. Video feeds of appellate proceedings, then, make more sense logistically, and members of Congress have come realize this, as the language in the most recent cameras-in-courts bill, which is co-sponsored by members of this committee, is written to include only appellate courts.

Overall, the way in which the federal judiciary approaches the use of broadcast technology is backwards, starting from the position of privacy and slowly working toward greater openness. Instead, it should begin with the presumption of openness and then, in given cases, decide when it's in the public's interest, or in the interest of the parties, to pull back. The result of improved access will be a greater sense that the federal courts are fulfilling their role of administering justice fairly and openly.

An aging judiciary

Second, the public is much more likely to trust that justice is being done knowing that all federal judges are up to the task of doing the judging. The average age of judges and justices is on the rise, as are judicial tenures, so officials who oversee court administration should examine ways to combat the negative effects of an aging cohort and the potential for cognitive decline.

Some federal circuits are already addressing the problem head on. In the U.S. Court of Appeals for the Ninth Circuit, for example, a Judicial Wellness Committee exists to encourages jurists to undergo mental health assessments and to empower their friends, family or colleagues to step in if they believe there is reason to be concerned about a judge's mental capacity. The circuit hosts neurological experts to speak about the warning signs of cognitive impairment and has a hotline in which judges and other court staff may receive advice about understanding and dealing with mental decline in colleagues.

There are numerous instances throughout the history of the judicial branch in which judges and justices have been affected by a mental decline before a decision has been made to step down. This is far from an ideal situation and one that should not repeat itself at any level of the judiciary. Our democracy demands that our leading jurists have the legal knowledge and experience that would make age an asset, but there comes a point where age is no longer a benefit and cognitive impairment becomes a serious issue.

In a case decided by the U.S. Supreme Court 25 years ago this week, Justice Sandra Day O'Connor wrote for a 7-2 majority, "The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age" (*Gregory v. Ashcroft*, 501 U.S. 452 [1991]).

While we know of no sitting judge or justice who is so diminished at the present moment, the potential is very real – and quite preventable.

Top officials in the other branches are subject to elections every two, four or six years, so an electorate concerned about the mental state of a president or member of Congress would have the ability to vote him or her out in short order. And while the Constitution keeps federal judges out of the electoral process in order to bolster their independence, the American people rightly deserve a greater assurance that those with life tenure are capable of filling their roles into their later years.

That is why Fix the Court advocates for the creation of a national Judicial Wellness Committee, either as a standalone committee or as part of the Judicial Conference's Committee on Judicial Conduct and Disability, that would work to mitigate cognitive impairment in the third branch.

Gaps in oversight

Finally, trust in the administration of justice is dependent on the character of the individuals administering that justice. Yet the federal judiciary severely lags behind the other two branches in terms of oversight.

Federal judges, for example, are not required to place their personal financial disclosure reports online or to periodically report stock transactions like members of Congress and top executive branch officials. They have weaker rules than the other branches regarding the types privately-funded travel they may take. They are not subject to an independent oversight body, such as an inspector general, and complaints about a judge's conduct are adjudicated by other judges, either in a circuit-based Judicial Council or the Committee on Judicial Conduct and Disability. With judges judging other judges, few complaints ever result in anything more than a proverbial slap on the wrist.

Even worse, should Congress propose to make any changes to this protocol, the Administrative Office will dismiss such proposals outright, as there is an internal policy that calls on the AO not to entertain congressionally-proposed rules changes, despite Article I and Article III of the Constitution giving Congress vast power over the operations of the judicial branch.

For the American people to have confidence that justice is being done within the federal court system, its judges should be subject to strict, yet reasonable, ethics, finance, travel and disclosure rules. Right now, they are not.

Conclusion

There are a number of challenges to building a court system that can properly handle the hundreds of thousands of federal cases that are filed each year. By and large, the current scheme, if compared to systems of justice in many parts of the world, is performing well. But there are a number of modern exigencies – the demand for greater public access, the urgency to mitigate cognitive decline and the need for greater oversight, to name a few – that must be confronted for the American system of justice to remain the envy of the world for the next two centuries.

I am confident that this subcommittee, and the House Judiciary Committee as a whole, is up to the task to put such a plan into action.