



BLUEPRINTS FOR TRANSPARENCY, PART TWO

*How States Have Limited Judicial Tenure
and Allowed Courtroom Broadcast Access*

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*Cover photos (top to bottom): Utah Supreme Court exterior,
Iowa Supreme Court interior, Minnesota Supreme Court interior*

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 state courts of last resort, themselves often called “supreme courts,” are more open and accountable than the U.S. Supreme Court in terms of **allowing broadcast media access** and **limiting justices’ tenure**.

Previously, in “[Blueprints for Transparency, Part One](#),” Fix the Court examined the high courts of **Australia, Brazil, Canada, Germany** and the **U.K.** across these two “fixes” in order to understand how those outcomes were achieved. We do the same here for the top courts of **Iowa, California, Texas, Minnesota** and **Utah**.

Analyzing state and foreign courts, we believe, is informative for those hoping to convince the justices of the U.S. Supreme Court, and the federal judiciary as a whole, **to accept the best practices in transparency and accountability** that have been implemented the world over, not to mention stateside.

The larger picture is clear: **courts in all 50 states allow greater broadcast access than the U.S. Supreme Court**, and the **top courts of 49 states** – all but Rhode Island – **have a set judicial term** (though often with the possibility of reappointment or continued service via winning a retention election), **a mandatory retirement age or some combination thereof**.

Instead of looking at all 50 state courts of last resort, here we examine five: the three states that have both their senators on the Judiciary Committee (Texas, Minnesota and Utah) and the two that are home to that committee’s majority leader and ranking member (Iowa and California, respectively). The Judiciary Committee is the committee of jurisdiction for all federal court-related matters, so any effort to change the broadcast or retirement rules would most likely start there.

How did retirement provisions come about?

- Mental decline in sitting justices
- Unpopularity of high-profile decisions propelled recall efforts
- Age limit seen as a compromise as judges sought greater retirement benefits

Why was broadcast access expanded?

- Best method for capturing an accurate record of a proceedings
- High-profile cases garnered state and national attention
- Part of strategy to demystify court for public

Two additional notes on broadcast access and judicial tenure:

1. While Fix the Court often advocates for webcasting the audio of federal appellate hearings, this report focuses on how top state courts made the decision to implement livestreamed or same-day video (which, of course, has an accompanying audio component) since **that is our ultimate goal for the U.S. Supreme Court and the other 13 federal courts of appeals**. (Several states have gone from recorded video to live or same-day video without the intermediate step of live audio.)
2. In terms of a term limit versus a mandatory retirement age: Fix the Court, as readers likely know, advocates for an 18-year term limit for U.S. Supreme Court justices. That said, **if a Supreme Court retirement age**

of 75 passed tomorrow, we would support it¹. So we also support the fact that most states employ a version of the Missouri Plan, which you will read about on the next few pages, whereby judges are either elected outright or are appointed by a governor with the help of a judicial nominating commission and then must sit for retention elections before retiring once they reach a certain age.

The Missouri Plan, by definition, means state judges and justices are more accountable than SCOTUS justices, and the plan's near-nationwide implementation is instructive to reform efforts at the federal level.

Here's how changes to broadcast and retirement policies have been implemented in the five states:

IOWA

Prohibitions against using audio- and video-recording devices in state and federal courtrooms have been in place **nearly as long as the technology has existed**. While there are as many regulations on courtroom media access as there are state court systems, the two keys dates to remember are these: in 1946, Congress passed a law banning cameras in federal criminal trials, and in 1972, the Judicial Conference of the U.S. enacted a policy banning audio- and video-recording devices in federal civil cases. State courts were, of course, free to adopt whatever rules they wanted on broadcast, yet **they often followed the model set in the federal system**.

Since the 1970s, however, as recording devices became cheaper and more prevalent, the appetite for experimenting with broadcast technology in courtrooms grew, spurred on by a combination of pioneering judges, persistent media groups and the occurrence of attention-grabbing cases.

Iowa was one of the first states to allow cameras and social media in its courtrooms, and its leadership in this area is owed to forward-thinking chief justices. In 1979 Chief Justice Ward Reynoldson appointed a committee to study whether cameras should be allowed – and if it was believed that they would enhance public awareness and understanding of the judicial process. Later that year and upon recommendation of the committee, the **Iowa Supreme Court suspended the state's age-old camera ban** and began a one-year pilot program for 1980, which was then renewed for a second year. **By the end of 1981, the high court agreed to allow expanded media coverage in all Iowa courtrooms**, subject to some basic rules in terms of who could film and when a judge could turn down a media request.

In 2006 the Iowa Supreme Court began video-recording all of its oral arguments. **Two years later, the court embarked on its first foray into livestreaming**, as it webcasted the highly anticipated *Varnum v. Brien* hearing on the legality of a statute that restricted marriage to opposite-sex couples. In addition to streaming the *Varnum* arguments live, the court made the video available to news organizations and fed video of the hearing into an overflow room² for the public and a press room for reporters. Due to budget cuts, Iowa stopped recording supreme court hearings for a time in 2009-10, though **the practice resumed in 2011**.

¹ On May 11, 1954, the U.S. Senate adopted a resolution calling for a constitutional amendment that would impose a mandatory judicial retirement age of 75. Six days later, the high court handed down *Brown v. Board*, which changed the conversation in Congress vis-à-vis the federal courts in a profound way.

² Even some federal courts host an overflow room with a video feed. The D.C. Circuit most recently set up two overflow rooms with video for a Sept. 2016 Clean Power Plan hearing. The Second Circuit has an overflow room just outside its main courtroom into which video from the court's four wall-mounted cameras – one for each judge (3) and presenting attorney (1) – are fed.

As of May 2014, and thanks to the support of Chief Justice Mark Cady, who has testified numerous times before Congress in favor of allowing cameras in appellate courtrooms, **journalists are also allowed to text, tweet and blog from the courtroom.**

Another important Hawkeye State contribution to the story of courtroom broadcast is the 1999 bill introduced by Sen. Chuck Grassley that called for cameras in the U.S. Supreme Court. Partly as a response to the bill, it is believed, and due to the unprecedented nature of a certain hearing involving a presidential election, the high court a year later implemented a new policy in which **it would release same-day audio for cases of heightened public interest.**

Even as *Bush v. Gore* was the first given the same-day audio treatment, only 25 more times since then has the Supreme Court released same-day audio (or 26, if you count the court **mistakenly uploading same-day audio** in the first case of the 2015-16 term, which appeared online and then disappeared in a manner of minutes).

The judicial retirement age story in Iowa (and nationwide) has an even longer timeline. In the same year Iowa achieved statehood, 1846, New York became the first state to **replace judicial appointment-by-executive with direct elections.** Nearly every state implemented this reform over the next few decades, including Iowa in 1857, but by the start of the 20th century, **it became clear there were drawbacks to electing judges,** and legal scholars began studying reforms that would somewhat separate the judiciary from the political winds of the day.

In 1914, Northwestern University Law Prof. Albert Kales devised a “**nominative-elective-appointive**” plan, which called for a nonpartisan commission to assist a governor in nominating judges, who then had to stand for periodic retention elections. Endorsed by the American Bar Association in 1937, the proposal was adopted by the voters of Missouri in 1940, and thus this method of appointments is often called the “**Missouri Plan.**”

Those who read Fix the Court’s “Blueprints” report on foreign courts will remember one of its conclusions was that **the age of a democracy was the primary factor that ensured judges and justices had a limited tenure.** Countries with newer constitutions – such as Australia, Brazil, Canada and Germany – were more likely to implement terms limits or a retirement age at the time of ratification (e.g., the 1950s) than older democracies – the U.K. and the U.S. – whose policies on tenure arose from 18th century conflicts with the monarchy.

So when **Alaska decided to adopt the Missouri Plan ahead of its entrance into the Union in 1958, several states and legal groups took notice.** In 1959, the American Judicature Society – a leading nonpartisan association for judges and attorneys – organized a National Conference on Judicial Selection and Court Administration, which endorsed the main points of the Missouri Plan.

Two years later the society’s journal published a survey of judicial retirement provisions nationwide; **that prompted the ABA to draft a model plan that recommended compulsory retirement at 70** and – as an important final piece to the puzzle – **retirement benefits equal to full salary at time of departure,** plus survivor and disability (including mental incapacity) benefits.

As the ABA plan was taking shape, Supreme Court Justice Tom Clark spearheaded a national Joint Committee for the Effective Administration of Justice, which offered resources to local leaders looking to modernize their judiciaries. Despite the budding national movement in favor of retirement provisions, **Justice Clark and his committee made it clear that “in each state, the [judicial reform] project will be a local one,”** which is why, in large part, each state has, to this day, a different set of retirement and broadcast rules from the next.

Now back to Iowa: via a voter-approved amendment to its constitution, the Hawkeye State became the fourth to adopt a version of the Missouri Plan in 1962. The wording³ of the amendment was common at the time: **Iowans decided that a retirement age was wise and then let the legislature determine an ideal age.** In 1965 the General Assembly settled on judicial retirement at 72.

One additional feature to the Iowa judiciary that is important to note is that **older judges are allowed to become senior judges** after they reach age 72 and may continue working until age 80 if the supreme court finds there is such a need.

Consistent with the Missouri Plan, the 1962 amendment also established a **nonpartisan, merit-based selection system for appellate and district court judges via a nominating commission**, with the governor making an appointment from the slate of nominees. Judges and justices stand for retention elections one year after appointment and again at the end of each eight-year term.

CALIFORNIA

The history of cameras being allowed in the California Supreme Court is tied to the results of a late-1980s survey conducted by a University of Southern California professor that found **state residents were dissatisfied with news coverage of state and local government proceedings.**

As a result of that survey and with a major nod to C-SPAN⁴, which had been created a decade prior, the state’s most influential think-tank in 1989 established [The California Channel](#) – “the nation’s largest satellite-fed, public affairs cable television channel” – which the California Cable Television Association in turn operated.

One of the first cases The California Channel broadcast was, oddly enough, the litigation surrounding the constitutionality of Proposition 140, a 1990 referendum approved by voters that limited the number of terms certain elected officials could serve.

High court cases would be recorded and broadcast a few days later for the better part of the next two decades until 2016 when Chief Justice Tani Cantil-Sakauye announced that **her court would begin livestreaming audio and video for all of its oral arguments.**

³ “The General Assembly shall prescribe mandatory retirement for judges of the Supreme Court and District Court at a specified age and shall provide for adequate retirement compensation. Retired judges may be subject to special assignment to temporary judicial duties by the Supreme Court, as provided by law.”

⁴ Two years before the survey was conducted, a USC graduate student in communications wrote a paper on the benefits of a creating a channel he called “Cal-SPAN” to cover state and local government.

In the announcement Cantil-Sakauye called the decision “a natural evolution” from the state’s initial foray into audio- and video-recording; however, it could also be argued that there was a prime mover that led to that decision and not an evolution – **the mover being litigation surrounding same-sex couples, of which California, like Iowa, as mentioned above, was at the forefront nationally.**

In fact, the court’s May 2005 hearing on same-sex adoption was the first case for which it allowed livestreaming audio and video. Three years later, the court allowed livestreaming for its hearing on the legality of same-sex marriage.

Interestingly enough, in the 2016 press release announcing the livestreaming policy, the court noted that the arguments that have been recorded and broadcast since 1991 were one “**of heightened public and media interest,**” which is the phrase the U.S. Supreme Court uses when announcing same-day audio and the phrase used by the Fourth Circuit when announcing its decision to livestream the audio in May 8’s *IRAP v. Trump*.

Justices on the California Supreme Court serve 12-year terms. They are initially appointed by the governor and face a retention election in the first gubernatorial election after their appointment and then face additional retention elections every 12 years after that. There is no mandatory retirement age for justices in California.

The closest the state came to implementing term limits on judges came in the mid-1980s during Gov. Jerry Brown’s first stint in office. In 1986 voters rejected three of Brown’s appointees who faced retention elections, **primarily because the justices voted to overturn death sentences,** even as most Californians remained in favor of the death penalty. Business interests that viewed the same three judges as too favorable to labor also worked to oust them. The following year, state Sens. Gary Hart and Quentin Kopp proposed a constitutional amendment that would limit a justice to a single 12-year term, but **the proposal stalled in the legislature.**

California’s primary role in the conversation over judicial accountability dates back further than the 1980s, as two decades prior, in 1960, California became one of the first states to establish a Commission on Judicial Performance, [which exists to this day](#), to **investigate complaints of judicial incapacity and misconduct and for disciplining judges.**

The commission was created via a constitutional amendment supported by California Chief Justice Phil Gibson, the State Judicial Council, the State Bar and the State Conference of Judges. **Left out of the amendment was a provision for a mandatory retirement age,** though as California Justice Louis Burke pointed out in a law review article, the creation of the Commission “indirectly [...] induced the resignation or retirement of a small number of judges who saw the handwriting on the wall” vis-à-vis their declining cognitive health.

It is unknown whether the fact that **at the time the amendment was adopted, Chief Judge Gibson was weeks shy of his 72nd birthday** had anything to do with a retirement age provision not being included in the amendment.

In the years following the creation of the CJP, a number of other states established similar bodies charged with assessing the fitness of judges.

MINNESOTA

Minnesota's experience with cameras in the courtroom is a bit different from that of the other states described in this report. According to a 1993 law review article written by Frederick Grittner, who was then the state supreme court administrator, the impetus for allowing audio- and video-recording in Minnesota courtrooms was more **to ensure "an accurate record of all [...] proceedings"** than to acknowledge any First or Sixth Amendment right to a public trial.

Minnesota courts were closely following Kentucky's 1984 experiment allowing the first operator-free cameras in a U.S. trial court, and after another 12 stationary cameras were installed in the Bluegrass State without incident in mid-1980s, Minnesota's judiciary decided to test out the technology. In 1989 operator-free cameras were installed in three courtrooms, yet **judiciary rules explicitly prohibited the use of these recordings by the media.**

In that same year at the appellate level, **Minnesota courts undertook a five-year video pilot program**, yet under the rules a judge or any party could veto allowing cameras, making electronic coverage "virtually non-existent," according to Grittner in the same article.

It was not until 2005 that the court routinely began video-recording its arguments, and nowadays the court records every single argument and posts online videos on the same day a case is heard, usually by 5:00 p.m.

The Minnesota Constitution was amended in 1956 to allow the legislature to set a mandatory retirement age for justices. Yet it was not until 1973 that the state enacted such a law, which required retirement at age 70.

Judges who reach 70 in the middle of their terms still must step down before beginning their eighth decade. In addition to a retirement age, Great Lakes State justices are elected to six-year terms. **This law has survived several challenges in court and was ultimately upheld by – no conflict here, right? – the Minnesota Supreme Court in 1986.**

As of this writing, a 69-year-old judge, Galen Vaa, [is suing](#) to extend his term on the bench. He turns 70 in March 2018 and wants to continue serving past his next birthday.

According to a state representative who had hoped to raise the retirement age to 75 during the legislature's 2007 session, **the 1973 law was put in place in response to the refusal of two judges to step down – despite clear signs of mental decline.**

"Someone who was present when that law was made told me that in the back of people's minds were these two bad apples who needed to be dealt with," Rep. Steve Simon told *The Minnesota Lawyer*.

Who those two bad apples were remains a mystery.

TEXAS

Citing the importance of “**the free flow of information to the public concerning the judicial system**” and to “foster better public understanding about the administration of justice,” the Texas Supreme Court – more like Iowa and California and less like Minnesota – in 1992 adopted new rules to allow electronic recording, broadcasting and photography of its proceedings.

As technology for livestreaming video became more prevalent in the last decade, Texas Supreme Court Chief Justice Wallace Jefferson (became a judge at age 38) pushed for the introduction of real-time video webcasting of arguments **as part of an effort to dramatically improve the transparency of the Texas court system**. The Lone Star State’s top court began livestreaming and archiving oral arguments in 2007.

U.S. Rep. Ted Poe, himself a former Texas judge (who began his judicial career at age 32) and now a member of the U.S. House Judiciary Committee, was one of the first jurists in his state to allow cameras in his courtroom. “We had a system that was very discrete. The jury never saw the cameras,” he [said](#) during a Feb. 14, 2017, Judiciary Subcommittee hearing on transparency and ethics. “The cameras did not film the jury, child witnesses, sexual assault witnesses or any other witness that the lawyers did not agree should be filmed.”

It’s a shame, he noted, that for the courts that do not allow broadcast access, including the U.S. Supreme Court, the public only has brief soundbites on the evening news or quotes in the paper to characterize what went on in the courtroom, since those not physically located in the courtroom are not permitted to view the proceedings themselves. “**We have the greatest judicial system in the world for determining guilt or innocence**,” he added during the hearing. “**Why would we not want the world to see it?**”

“We introduced cameras in our courtroom about eight or nine years ago,” Texas Justice Don Willett (became a judge at age 39), another judicial broadcast advocate told the *Washington Examiner* in 2016. “For us, **it’s been a tremendous way to demystify this inscrutable branch of government** with the black robes and the snooty Latin legalese, [...] and I think it’s been a terrific way for us to promote a measure of transparency, acquaint people from various walks of life with the court system.”

All of the judges mentioned above for their pro-cameras stance entered the state judiciary while in their 30s, demonstrating **there may be some (albeit hard to prove) correlation between the age of a judge and his or her views on allowing broadcast access**.

Texas Supreme Court justices must step down before they reach their 75th birthday, and the state’s retirement age provision was established similarly to how one was enacted in Minnesota.

A 1948 constitutional amendment authorized the Texas legislature to establish an age by which judges and justices were required to step down, and in 1960, the Texas Civil Judicial Council and the Board of Directors of the State Bar of Texas drafted a proposal fixing the retirement age at 75.

That proposal also created a Judicial Qualifications Commission, modeled after California’s, and established a method for disciplining judges. It was ratified as a state constitutional amendment in 1965. Texas judges face retention elections every six years.

UTAH

The introduction of cameras in the Utah Supreme Court came as a result of a **concerted campaign undertaken by the Society of Professional Journalists**. In 1981 the SPJ petitioned the court to allow still photography and video recording, yet only the former was allowed.

Five years later, and after further lobbying, the court approved a **yearlong experiment allowing cameras in the state's top court and in its Court of Appeals**.

In 2012 the Utah Judicial Council passed a rule to allow video cameras and electronic devices into all state courtrooms. At the time the council paid special attention to keeping any potential distraction from electronic media to a minimum, **requiring a video "pool" once two or more media outlets indicated they wanted to capture the proceedings** via either audio, video or still photography.

On April 1 of the following year the state's top court began livestreaming audio and video of arguments.

In the last 31 years, Utah judges have faced two different mandatory retirement ages – **plus a decade-long period in which there was no judicial age limit**. And like Minnesota and Texas, Utah's constitution was amended in the 1960s to allow the legislature to provide standards for the mandatory retirement of justices and judges.

From 1968 until 1986, Utah judges, including those on the state supreme court, had to step down by age 72. **In 1986 the statute lapsed**. Ten years later a mandatory retirement provision was reinstated but this time for age 75. (Through this period and to this day, Utah justices must sit for retention elections every four years.)

The theory behind the new limit at the time was that few, if any, appellate judges were close to reaching that age. "The new age limit would affect few judges," Utah District Judge Stephen Roth predicted that year in the *Salt Lake Tribune*. **"I don't know too many who want to be a judge into their mid-70s."**

Another state judge, Ronald Hyde, who retired in 1992 at age 67, said, "I don't know that a mandatory retirement age would change anything. **Judges are going [to retire] well before then.**" (This prediction has proven to be false.)

At the time the bill was enacted, no state judges had reached their 75th birthday, and only two were 70 or older.

"There isn't a face on the target right now," the assistant state court administrator told the *Tribune*. Retirement age is **"just another piece of the puzzle,"** the administrator added, in **"developing a vigorous state judiciary."**

WHAT WE'VE LEARNED

Much like in our “Blueprints” report on foreign courts of last resort, there are several takeaways stateside that demonstrate what it may take to move the U.S. Supreme Court toward greater

openness and accountability.

Factors that have aided in the passage of broadcast provisions:

1. **Courts that are led by younger judges and justices** are more likely to support the use of live video in their courtrooms (TEXAS), as are **those who implemented early pilot programs**, i.e., in the 1970s and 1980s (IOWA).
2. **Strong advocacy from local media** – both from journalists and from journalism professors and membership associations – **helps convince the judiciary to allow broadcast access** (CALIFORNIA, UTAH).
3. **Major cases concerning novel areas of the law or important national controversies are likely to spark judges’ interest in allowing expanded broadcast access** (IOWA, CALIFORNIA). Five and 10 years ago it was same-sex marriage. Nowadays it may be executive orders banning immigrants from six predominantly Muslim nations.
4. **Should a cameras pilot program be implemented, judges should not be allowed an opt-out provision.** As was the case in the federal cameras-in-courts pilot program that ran 2011-2015, giving judges the option to opt out of the program will mean that few proceedings will be recorded and little data on the success of such a program will become available (MINNESOTA).

Factors that have aided in the passage of retirement age provisions:

1. **Strong advocacy from nonpartisan membership organizations** – e.g., the American Judicature Society and the American Bar Association, the latter of which was considered nonpartisan at the time – **may help convince the judiciary, and their respective state legislatures, to implement age-based reforms.**
2. **Counterintuitively, the bundling of court reforms into a reform package may make them more likely to pass than if those reforms were proposed on their own.** For example, the rash of mandatory retirement age provisions proposed in the 1960s and 1970s across the country were often a part of a larger reform package that included pro-accountability measures like stricter ethics rules for judicial officers – and were sweetened, from the judges’ perspective, by including retirement pay and other benefits. (TEXAS, UTAH). Similarly, webcasting of oral arguments is more likely to become courtroom policy if that reform is viewed as **but one part of a larger court modernization effort** (TEXAS).
3. Though mandatory retirement age provisions do not have universal support, as judges in several jurisdictions are challenging their legality to this day, **states with later retirement ages** – i.e., age 75 (TEXAS, UTAH) – **are less likely to have ongoing fights over retirement policy** than ones with earlier retirement ages – i.e., age 70 (MINNESOTA).
4. **It is sound policy** – based both on need and the fact that many older adults enjoy working in their later years – **to offer retired judges the opportunity to stay on as senior judges after they reach their mandatory retirement age** (IOWA).