



***Fix the Court's Term-End Report
on Supreme Court Transparency***

July 31, 2017





FTC’s Term-End Report on Supreme Court Transparency

Our Assessment on Whether the Supreme Court Opened Up During the 2016-17 Term

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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. We educate Americans about the problems plaguing the court and are building a movement to demand change.

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Executive summary

On July 28, 2017, the Supreme Court unveiled website upgrades that will permit electronic filing and will improve mobile access to the site. “**The improvements,**” the court noted, “**will better support future digitization.**”

“Future digitization” is a phrase that, if it appeared in a law, **would be struck down for being unconstitutionally vague.** Does this future include live audio of oral arguments and opinion announcements? Online financial disclosures? A justice-by-justice conflicts list, as some state supreme courts post?

Unfortunately, **we do not know what the future holds at SCOTUS** (save for a blockbuster October). We do know how the court and the federal judiciary as a whole have fared on various transparency issues since the start of October Term 2016 (OT16) 10 months ago. **This report summarizes those positives and negatives in an approachable way.**

The main takeaway this term is the story of improvement at the margins – not only with the high court’s website but also regarding **digital disclosures, stock selloffs and livestreaming.** The larger story: how **federal appeals courts not named “SCOTUS” opened up even as the one on First Street didn’t.**

Let’s get to it. Here are the transparency highlights of OT16:

- The most important thing to happen to the Supreme Court in the last 10 months was **the confirmation of Neil Gorsuch** in April to the seat left vacant by the death of Antonin Scalia. In December, Fix the Court had asked the U.S. Department of Justice to make public all non-classified Gorsuch-related material, and when **we still hadn’t received them two months later,** we sued. In March, prodded by our action, DOJ posted the bulk of them – **175,000 pages worth** – online. Our suit remains pending, as DOJ has yet to give us a good reason as to why **8,000 pages from his time in the agency remain inaccessible to the public.**
- During the hearings themselves, Gorsuch **was asked multiple times about his views on broadcast access to the courtroom and stronger ethics rules for the justices,** and though his answers left much to be desired, we were pleased that our efforts to get these issues discussed were successful.
- On the circuit court level, we knew going into the term that only one (the Ninth) released live audio of its oral arguments. This spring we were able to confirm that **another four are considering audio upgrades** (the First, Fifth, Sixth and Seventh) and a fifth (the Fourth) actually **agreed to run live audio** in a travel ban case in May.
- Thanks in part to our efforts, the **audio-only Feb. 7 travel ban hearing in the Ninth Circuit** was carried by CNN and countless online news outlets live and in its entirety. **Listenership was greater than 1.5 million people.**
- The Third Circuit started **recording video for the first time** in January, and the Eleventh Circuit started **releasing same-day argument audio** in April. On July 27, and after our prodding, the **Tenth Circuit uploaded same-day audio in a case** (without requiring a motion, which is rare).
- In a first, the justices on Nov. 4 **allowed live audio from the courtroom,** though not for an argument but for a bar meeting honoring Justice Scalia. **The website, livestream.supremecourt.gov, is still up,** and we hope it’s used as soon as next term for live dissemination of oral arguments and opinion announcements.
- We also knew going into the term that at least one circuit court (the Ninth) hosted a Judicial Wellness Committee aimed at promoting cognitive health in aging judges; this term we received confirmation that **another five have similar committees or initiatives** (the Third, Fifth, Seventh, Tenth and D.C.) and that another two were considering creating one (the First and Sixth).

- On Feb. 14, the House Judiciary Subcommittee on Courts, IP and the Internet held a hearing on judicial transparency and ethics at our behest at which a **bipartisan group of members criticized the third branch for its lack of openness**. Members from both parties suggested commonsense reforms that would counteract the declining faith in the courts system and **previewed the introduction of broadcast bills** that would cover all three levels of the federal courts system.
- For the first time, **the federal judiciary released the justices' annual financial disclosure reports via thumb drives** and at no cost. Previous years' reports had been distributed by paper at a cost of \$0.20 per page.
- Chief Justice John Roberts and Justices Stephen Breyer and Samuel Alito **sold up to \$1.045 million in stocks in 2016** and reduced the number of individual securities they own to 53, compared to 60 at the end of 2015 and 76 at the end of the 2014. (Financial disclosures are catalogued by year, not by term.)

We are pleased to have played some role in these accomplishments. In the following pages, we go into greater detail to discuss the ups and downs of OT16 and look ahead to our hope for future terms.

The Gorsuch nomination

Fix the Court suits up

The biggest story of the year at the Supreme Court was the **nomination and confirmation of Neil Gorsuch** to fill the vacancy created by the death of Antonin Scalia. Fix the Court had a **fairly significant role to play in this story**, though somewhat reluctantly.

Last spring, **in an unprecedented move**, then-candidate Donald Trump announced a list of 11 individuals he would consider for a Supreme Court nomination if he were elected president. Trump added another 10 names to the list a few months later.

In late December, **FTC submitted several federal and state open records requests** to try to learn more about the potential nominees – for example, to the U.S. Department of Justice where some had previously worked and to public universities where some had been or were currently teaching.

Gorsuch is on the court, which we're fine with, and he's not going anywhere for a while. But DOJ's inability to comply with our FOIA request is not something we're going to drop simply because a single confirmation battle is complete.

We thought that for the American people and the senators who represent them to make an informed assessment of a Supreme Court nominee, **all non-classified information regarding their prior public service should be out in the open**. (We would have done the same last year had Merrick Garland had a shot at confirmation.)

Unfortunately, by the time Gorsuch was nominated by President Trump a little more than a month later, the **Justice Department had yet to respond** to our request for “copies of complaints, correspondence and any performance reviews or reprimands” involving the judge during his time at DOJ in 2005-2006. **So we filed a lawsuit in federal court in D.C. to compel the agency to fulfill our request**. The University of Colorado, meanwhile, in whose law school Gorsuch taught, **complied with our records request without a problem**.

Soon after FTC filed suit, the Senate Judiciary Committee **released more than 175,000 pages of e-mails and memos** that Gorsuch sent, received or worked on during his DOJ tenure, but it **withheld about 8,000 pages that the**

committee deemed unfit for public consumption, though senators and staff were able to review the material in private. That smelled fishy, so FTC then decided to proceed with its FOIA lawsuit, the next step for which is DOJ producing an index of what those 8,000 pages contain later this year.

The hearings themselves covered our “fixes”

FTC also worked with several members of the Senate Judiciary Committee from both parties to **ensure that Gorsuch was asked about his views on pro-transparency fixes** at the high court during his confirmation hearings.

During the second day of questioning, Sen. Richard Blumenthal asked the judge, “Would you commit to following [the Code of Conduct for U.S. Judges],” which circuit judges must follow but from which the justices are exempted. Gorsuch responded, “Senator, what I’ve committed to do is take a look at the law, talk to my colleagues collegially and then make up my own mind, [...] but I’m not going to make any promises to anyone in this process about anything.”

When asked about cameras in the courtroom by Sens. Chuck Grassley and Amy Klobuchar, Gorsuch refused to assent to anything more than **“an open mind”** on permitting broadcast access. That puts him in good company on the court; the eight other justices were all in favor of cameras in the courtroom – or at least neutral – **before being sworn in**.

Finally, when he was asked by Sen. Pat Leahy in a [written questionnaire](#) after the hearing about **whether Congress has the authority to write laws that would bring the justices in line with congressional requirements** on ethics, stock ownership and financial disclosures, Gorsuch simply answered that it **“would not be proper”** for him to answer given that such issues “may arise in future cases and controversies.” **Well, we tried.**

“The Supreme Court Is Being Hypocritical”

The ironic thing about Gorsuch’s answer on ethics is that **each year the justices rule on issues that have parallels with how they act as stewards of their institution**. But instead of changing their own practices in light of their holdings in these cases, the justices too often carry on as before, as if they can **play by their own rules when it comes to transparency and accountability**.

FTC calls these cases the court’s “self-referential docket,” and the *New York Times* published an op-ed by Gabe Roth, titled “The Supreme Court Is Being Hypocritical” on this in October, which mentioned such cases on **public access to the court grounds and courtroom, judicial recusals, stock ownership and even term limits**.

The piece concluded, “If the court wants to regain some of the respect it has lost in recent years, the justices should consider how, by acting more consistently with their own rulings, they could help build a more open and accountable institution.”

The Self-Referential Docket

Here are some of the highlights of the self-referential docket over the past decade, including an insider trading case argued and decided this term.

Year decided: Case, issue (court of origin if SCOTUS denied review)

- 2009: *Caperton v. Massey*, judicial recusal
- 2011: *Snyder v. Phelps*, anti-protest buffer zones
- 2015: *Williams-Yulee v. Florida Bar*, judicial conflicts of interest
- 2015: *Reed v. Town of Gilbert*, anti-protest buffer zones
- 2015: *McCullen v. Coakley*, anti-protest buffer zones
- 2015: *Thayer v. City of Worcester*, anti-protest buffer zones (First Circuit)
- 2016: *Hodge v. Talkin*, anti-protest buffer zones (D.C. Circuit)
- 2016: *Williams v. Pennsylvania*, judicial recusal
- 2016: *Salman v. United States*, stock ownership

Media and public access

Same-day audio requests go unheeded

Not once during the past term did the court release audio of an oral argument on the day in which a case was heard. **That makes two terms in a row with no same-day audio.** (We're betting there won't be a third given the October docket.)

FTC requested same-day audio for two argument days and was denied both times. The first request was for *Matal v. Tam* (“*Lee v. Tam*” at the time) and *Ziglar v. Abbasi*, argued on Jan. 18. The former concerned whether offensive-sounding words or phrases – in this case, an all-Asian rock band calling itself “The Slants” – may be trademarked; the latter comprised three consolidated cases that looked at whether government officials may be held personally liable for certain post-Sept. 11 detention decisions.

FTC put a same-day audio petition online at 9:00 a.m. on Jan. 4, and **by 5:00 p.m. that day had signatories from all 50 states.** The response from First Street: “The court will follow its usual practices regarding the posting of the oral argument audio” for those cases, i.e., at the end of the week.

The second same-day audio request was for the April 17 hearings, **which included a case concerning public funding for religious institutions**, *Trinity Lutheran Church v. Comer*. (The other case argued that day had little general awareness.) “In the past,” FTC wrote in its letter to Chief Justice Roberts, “the court has released same-day audio for cases with heightened public interest. This case, granted certiorari nearly 15 months ago and comprising both Free Exercise and Establishment Clause concerns, certainly meets that bar.” That request was also rejected.

Another batch of cameras bills are proposed in Congress

Now, from audio to video. During the past term, both houses of Congress again introduced cameras-in-courts bills:

- The **Cameras in the Courtroom Act**, S. 649, introduced by Sens. Chuck Grassley, Dick Durbin, Al Franken, Dick Blumenthal and Amy Klobuchar, would require the justices to permit video coverage of oral arguments and opinion announcements unless a majority of justices objected to doing so on due process grounds. The **companion House bill**, H.R. 464, has 12 sponsors and co-sponsors, and like the Senate version, only one is a Republican.
- The **Sunshine in the Courtroom Act**, S. 643, has the same sponsors as the above bill, plus Sens. John Cornyn, Lindsey Graham, Pat Leahy and Ed Markey, and would permit video coverage of federal circuit and district court hearings with the same due process exception.
- In the House, the **Eyes on the Courts Act**, H.R. 1025, mirrors the Sunshine bill yet removes federal district courts. Its sponsors are three Democrats.

Though none of these bills has received a bill-specific committee hearing in this Congress or a vote, the issue of the broadcast blackout was **discussed in depth in a Feb. 14 House Judiciary Subcommittee hearing** (see p. 15).

Supreme Court budget gets hashed out in private again

Not only were cameras not allowed in the courtroom this term but **they were also not allowed to capture the meeting between members of the court and members of Congress discussing the former's annual budget.** This year marked the second in a row in which Justices Kennedy and Breyer met with the chairman and ranking member of a House Appropriations Subcommittee behind closed doors.

There's no justification – not even a vacancy – for the court to exempt itself from the convention that every government entity testify on its annual funding in a public hearing. With the court in 2018 scheduled to be at full strength for the first time in two springs, **it is our belief that the trend will reverse itself next year.**

That said, it is highly likely that included in the Supreme Court's FY18 budget will be **\$1.5 million for IT improvements.** While it's unclear if this sum will be used to build out the online filing system alluded to on the court's new website, improve financial disclosure distribution or implement a software-based conflict-check system, **that Congress sees the need for a more tech-savvy third branch is a positive development.**

You harangue?

During this past term two cases in federal court in D.C. touched on First Amendment issues in and around the Supreme Court (**cf., the self-referential docket, p. 5**). The first concerned five people who stood up at the beginning

Outbursts inside the courtroom put our more measured efforts back years and make the institution even more skeptical about allowing broadcast access.

of an April 2015 oral argument and harangued the justices. (A previous inside-the-courtroom protest featured a pen camera and a subsequent YouTube video.) **Outbursts like these put Fix the Court's more measured efforts back years,** and to quote Justice Scalia on the matter, we wouldn't have minded if the protestors in the latter case received "stiff, stiff sentences." Instead, they were each sentenced on July 24 to a mere one or two weekends in jail.

The second mirrored the 2011 Harold Hodge case, which concerned whether demonstrators may congregate on the high court's 20,000-sq.-ft. front plaza. (A decades-old law that has been frequently upheld says they may not.) The defendants this most recent time were religious anti-war protesters who said their prayers must take place on the grounds of the institution – i.e., its front plaza – to count. A D.C. District judge rebuffed their claim, saying **the adjacent sidewalk was a suitable enough prayer venue.**

Courts of appeals do one better – or maybe dozens better – than SCOTUS on audio and video

Even though this year was a nothingburger in terms of improving broadcast access to the Supreme Court, a number of other federal courts took positive steps to make their hearings more accessible to the press and public.

On December 5, the Eleventh Circuit announced it would soon become the 12th circuit to post audio of oral arguments online within a day, leaving the Tenth Circuit as the only holdout among federal appeals courts. The first same-day audio post was uploaded to the Eleventh's website on April 4. On January 13, the Third Circuit announced it would become the third circuit to allow video, after the Second and Ninth. The cameras started rolling two weeks later, and since then video from 10 arguments has been [posted online](#), typically within 24 hours of a hearing occurring.

In March we wrote all circuit court clerks, save the Ninth's, requesting they modernize their audio and video policies. It turned out that many federal circuits were already considering implementing real-time access for argument audio, and **others just needed a little prodding.**

The Sixth Circuit clerk told us that after she received our letter, she "asked the IT staff to give [her] technical information" on what a policy upgrade to live audio would entail. The Eighth Circuit clerk said he spoke with Chief Judge Lavenski Smith about live audio after our inquiry and that Smith "has asked for some technical information to be developed." The issue will likely be on the agenda at their next circuit-wide meeting in September.

Clerks in the First, Fifth and Tenth Circuits all said they would pass FTC's live audio recommendations to their chief judges, and the Second and Third Circuits responded to our request by simply restating via e-mail what their current broadcast policies are – **which are still more modern than that of the high court.**

Then on May 8, the Fourth Circuit became just the second one (the Ninth being the other) to livestream oral argument audio, though time will tell if this decision was merely a one-off for an *en banc* travel ban hearing or part of a new policy. Finally, on July 27, the Tenth Circuit, which usually requires a motion for argument audio to be posted online, posted audio after several press calls – **and a call from Fix the Court** – without requiring a motion. This is hopefully a sign of things to come.

Many federal circuits were already considering real-time access for argument audio, and others just needed a little prodding.

We know from experience that live audio in appellate proceedings, far from being a disturbance, **instead highlights the important role that our courts play**, and we will be working with partners to push for more of it more frequently in the coming months – **including live audio for the travel ban case** that will be argued at the high court on Oct. 10.

Foreign and state courts lead the way on audio and video access

By a host of measures, foreign courts of last resort 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, how did this happen?

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, so we looked at why the high courts of **Australia, Brazil, Canada, Germany and the U.K.** allowed greater broadcast access than ours. (Brazil, Canada and the U.K. livestream hearings online, Australia films hearings for broadcast within 24 hours and Germany films opinion announcements for later broadcast.)

Of the four takeaways from the study, FTC found that the U.S. only features the last two:

- *The judiciary is constitutionally subordinate to (pro-broadcast) legislatures* (in Canada, Germany and the U.K.);
- *Top judges generally favor cameras* (Australia, Brazil and Canada have very pro-cameras justices);
- *State-owned media companies have tirelessly advocated for cameras* (public media companies in Australia, Canada, Germany and the U.K. are strong advocates; the U.S. has C-SPAN, which though not technically state-owned covers civic events); and
- *High-profile federal cases have captured the nation's attention* (Canada and Germany had major euthanasia and skinhead cases, respectively; the U.S. has the travel ban cases).

We undertook the same study for the high courts of Iowa, California, Minnesota, Texas and Utah¹. All five have more permissive broadcast policies than SCOTUS, with four livestreaming their hearings online (Iowa, California, Texas and Utah) and one filming its hearings for broadcast within 24 hours (Minnesota).

¹ Instead of looking at all 50 state courts of last resort, we examined five: the three states that have both senators on the Judiciary Committee (Minnesota, Texas and Utah) and the two that are home to that committee's majority leader and ranking member (Iowa and California, respectively).

Here are the factors that have aided in the passage of their pro-broadcast provisions:

- *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);
- *Strong advocacy from local media* – both from journalists themselves and from media professors and membership associations – has helped convince state judiciaries to allow broadcast access (California, Utah);
- *Major cases concerning novel areas of law* (e.g., same-sex marriage) have sparked judges’ interest in allowing expanded broadcast access; and
- *Not having an opt-out provision should a cameras pilot program be implemented has been vital*: judges in Minnesota, for example, who participated in a cameras-in-courts pilot had the option to turn the cameras off – much like the judges in the 2011-2015 federal pilot – which meant fewer proceedings were recorded and little data was gathered.

Term limits

On June 29, Fix the Court and 21 constitutional scholars released a Supreme Court term limits proposal. While this draft legislation is similar to previous efforts, **the latest version specifically addressed what the court should do**

When there’s a vacancy due to death, retirement or removal, the court should bring the most recently retired living justice back into service until a replacement can be confirmed.

immediately after a vacancy occurs due to death, retirement or removal – e.g., bring the most recently retired living justice back into service until a replacement can be confirmed.

The crux of the proposal is that presidents would nominate a new justice in the first and third years of his or her term; **justices who have served for 18 years would be replaced by a new appointee**. After their term, justices would keep their salaries and offices, per Article III, but wouldn’t typically hear high court cases.

Instead, they could sit on lower federal courts, as several retired justices have done, and could be called back into service either via the example above or should a sitting justice recuse himself in a case of exceptional importance – **think *Bush v. Gore* with an eight-member court**.

We are now hoping a member of Congress will take up the mantle of term limits legislation. The largest obstacles to date have been two-fold: one, **many legislators and some legal scholars believe, contrary to our views, that the only way to establish term limits for the Supreme Court is via a constitutional amendment**; and two, the members who lead the committees of jurisdiction (Sens. Grassley, Hatch, Feinstein and Leahy; Reps. Goodlatte and Conyers) have, on average, served 36.3 years in Congress, or more than twice the prescribed length for the high court. In general, we have found **septuagenarians and octogenarians don’t much like talking about term limits on any government body**.

Term limits exist across the government (but not yet at SCOTUS)

Another survey we conducted this past term looked at how **top officials in all three branches must leave their leadership posts – or leave their jobs entirely – after they have served a designated amount of time**. This fact contradicts the popular notion that government jobs are yours for the keeping.

Limiting the tenure of top officials, we found, is not only common, but it’s also feasible and prudent, **so long as the terms are sufficiently long and those subject to limited tenures have guaranteed independence from the**

political winds of the day. Many term-limited federal government positions, especially those that are more apolitical, are **purposefully designed to stretch past a single presidential term.** For example, the chairman and vice-chairman of the Joint Chiefs of Staff may serve three two-year terms, or longer in times of war; FBI directors (typically) serve for 10 years; and Federal Reserve Board governors may serve for 14 years.

Though members of Congress may be reelected for decades on end, they are subject to term limits when it comes to certain leadership positions. **Senators and representatives may serve only for six years as chairman** of a committee or subcommittee. And though Supreme Court justices serve for life, hundreds of federal judges – albeit Article I judges – are subject to term limits. These jurists sit on bankruptcy, tax and military courts across the country and generally have terms in the 14- to 16-year range, though some may be reappointed.

Finally, **some Article III life-tenured judges are subject to term limits when it comes to other roles within the judiciary.** The chief judge of a U.S. district court or a U.S. court of appeals serves for a term of seven years or until age 70, whichever occurs first. Members of the U.S. Sentencing Commission serve six-year terms with the possibility of a single reappointment. And the 11 federal judges appointed to the Foreign Intelligence Surveillance Court, often called the FISA Court, serve for a single, staggered seven-year term, as do the three judges on the FISA Court of Review.

Limiting the tenure of top officials, we found, is not only common, but it's also feasible and prudent, so long as the terms are sufficiently long and those subject to limited tenures have guaranteed independence.

Term limits exist in courts of last resort abroad and in 49 states

In another study, we looked at why courts of last resort in Australia (70 years), Brazil (75), Canada (75), Germany (68) and the U.K. (70) **all have mandatory retirement ages for their justices.** (Germany also has 12-year terms for federal judges.) Here are the factors we deduced have aided in the passage of mandatory retirement age provisions:

- *The relatively young age of the democracy*, as countries with newer constitutions (Australia, Brazil, Canada and Germany) are more likely to have implemented terms limits or a retirement age at or near the time of ratification than older democracies (U.S. and U.K), which take their cues from pre-18th century edicts on judicial service;
- *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 president from nominating his or her own justices (Brazil); and
- *The relative age and frailty of sitting justices at times of political upheaval* (Australia and Canada).

We don't have any of those factors currently in the U.S., but when it comes to U.S. politics these days, all bets are off.

We found that the courts of last resort in Minnesota (70 years), Iowa (72), Texas (75) and Utah (75) **all have mandatory retirement ages for their justices** (California does not, but its justices must sit for retention elections every 12 years), and we again deduced the main factors aiding in the passage of retirement age provisions:

- Just as we found in our foreign courts report, the age of a democracy – or in this case, a state – was a primary factor in limiting judicial tenure, as Alaska's decision on its way to statehood to adopt a retirement age compelled other states to consider the reform;
- Counterintuitively, the bundling of court reforms into a reform package made 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 were often a part of a larger reform package that included pro-accountability measures, like

stricter ethics rules, which were sweetened from the judges' perspective by the inclusion of retirement pay and other benefits (Texas, Utah); and

- States with later retirement ages – i.e., age 75 (Texas, Utah) or later² – were less likely to have fights over retirement policy, as were states that offer retired judges to stay on as senior judges after they reach their retirement age (Iowa).

It was a slow year for health disclosures...

In September, following Hillary Clinton's fainting spell and Donald Trump's incoherent physical results, and spurred on by FTC, the *National Law Journal* asked each of the eight justices to disclose any "current and recent health issues [...] that could, in the near- or long-term future, affect your professional work." Chief Justice Roberts responded on his colleagues' behalf that the court's Public Information Office would "provide health information when a need to inform the public arises."

We contend that **the need is more substantial than the chief justice pronounces**, given the increasing length of Supreme Court tenures and how, according to David Garrow's seminal law review article, "[Mental Decrepitude on the](#)

We believe the federal courts should be ensuring that their judges are holding their offices while operating at full mental capacity.

[U.S. Supreme Court](#)," the last half-century "has featured at least a half-dozen instances in which serious questions were or should have been asked about whether judicial votes were being cast by a less than fully competent justice."

The justices themselves have acknowledged the general phenomenon of age-based decline. "It is an unfortunate fact of life," Justice Sandra Day O'Connor wrote in a 1991 opinion upholding a mandatory retirement age provision for state judges, "that physical and mental capacity sometimes diminish with age." Health disclosures are important both outwardly, so the public can have faith their top legal officials are working with complete competence, and inwardly, as the justices consider their own abilities to continue in their positions. The public does not need to be apprised of every judicial ailment, of course, but **there is no reason why basic information about the justices' mental and physical health can't be part of an annual disclosure.**

Later that month, we asked the House Judiciary Subcommittee on Courts, IP and the Internet to explore whether **Congress, much as it requires annual financial disclosures, may compel the justices to release rudimentary facts about their mental and physical health.** We have yet to hear a response.

Democratic congressmen have recently introduced a Presidential Capacity Act, which would establish a bipartisan board to determine, per the 25th Amendment, when a president has become incapacitated. The law won't pass, but it raises two important questions: **why is there no board within the Judicial Conference to determine the wellness of Supreme Court justices, and why does the 25th Amendment not apply to the high court?**

...But it was a good year for awareness of cognitive decline, at least at the circuit level

Much as we asked circuit court clerks about live audio in a March letter, we also asked them about **the creation of circuit-wide judicial wellness committees (JWC)** in a second letter around that time – and similarly received several positive responses.

² Maybe SCOTUS should start by heeding Judge Richard Posner's recommendation that federal judges retire at 80; Posner himself turns 80 in January 2019.

Last term, FTC sent a letter to the Judicial Conference of the U.S. requesting **the creation of a national JWC and that that request was denied**. JWCs, like the one that has existed for years in the Ninth Circuit, encourage jurists to undergo mental health assessments, host neurological experts to speak about the warning signs of cognitive impairment, empower colleagues to step in if they believe there's reason to be concerned about a judge's mental health and **host hotlines where court staff can get advice about dealing with signs of mental decline in their colleagues**.

With long-term vacancies and longer life expectancies conspiring to increase the average length of federal judicial service and, with it, the potential for cognitive impairment, we believe that the federal courts should be ensuring, via specific programming, that its judges are holding their offices **while operating at full mental capacity**.

Here's what we learned: the Third and Fifth Circuits reported that they have each recently created anti-aging programs, and **their correspondence with FTC appears to be the first time either circuit has made the programs' existence public**. Meanwhile, the First, Sixth and Seventh Circuits told us they were considering forming a wellness committee or are employing other informal methods to promote cognitive well-being.

The D.C. Circuit may have been the first to act following the 2006 Breyer Committee report, which recommended **"informal efforts," like wellness committees, to "deal with difficult problems of judicial misconduct and disability,"** including mental decline. According to the clerk, "In response to the report, the circuit chief judge and district chief judge created the Advisory Committee on Judicial Conduct in 2007 to serve [...] as a vehicle for members of the bar to submit concerns anonymously. This model works well in our circuit, which is [all] located in one courthouse. Everyone sees and interacts with all the judges in our courts on almost a daily basis." **We hope to hear from the remaining circuit courts in the coming months.**

Stocks and recusals

Back in the day

In April we sent a letter to the clerk of the Supreme Court calling on him to resume a pro-transparency practice halted more than 100 years ago in which the justices would publicly explain their recusals. Between 1889 and 1904, and possibly before, the **justices would list the reasoning behind their decisions to step aside from merits cases**, stating, for example, "Mr. Justice White, not having been present at the argument, took no part in this decision" (1904) and "Mr. Justice Brewer, not having been a member of the court when this case was argued, took no part in the decision" (1889). This practice came to light in March when 1889-1992 Journals were uploaded to SupremeCourt.gov.

If periodic non-recusals undermine our faith in the court even a little bit, then simple fixes like recusal explanations are worthwhile for safeguarding the court's integrity.

We sent this letter because **we believe the public should have confidence that the justices are not overlooking their conflicts of interest**. Three times in the past year and a half, though, a justice considered a case or petition despite a statutory conflict. That erodes our faith in the court. **If the justices were more attuned to their conflict-inducing holdings and relationships**, and if they were more open about them to the public, **they would be less likely to miss a conflict** in the course of their work.

The court derives its legitimacy not only from the public's trust that it faithfully interprets our laws but that it faithfully follows them, as well. If periodic non-recusals undermine our faith in the court even a little bit, then simple fixes like recusal explanations are worthwhile for safeguarding the court's integrity.

With the court being reluctant to change its recusal practices, we did our best to discern why the justices bowed out of more than 200 cases in OT16. The reasoning behind most of them – i.e., previous work, stock ownership or family ties – was easily identified; however, **we could not determine the reasoning behind eight of the recusals**, including one each from Justice Kennedy and Thomas, who rarely recuse.

Three Chief Justice Roberts recusals, all in cases in which Verizon was involved, **seemed to be errors**, as the chief sold his Verizon stock more than two years ago. Roberts also missed a stock conflict in a case argued in December but recused from *Life Technologies Corp. v Promega Corp.* once the error was brought to his attention in January.

Some good news, though: the three justices who own individual stocks **shed up to \$1.045 million from their portfolios in 2016**:

- Roberts sold his Microsoft, Time Warner Cable and HP shares while purchasing no new individual securities and nine retirement funds or bonds;
- Breyer sold his EMC and IBM shares while buying no new stocks and three new retirement funds or bonds; and
- Alito his ITC Holdings, Johnson Controls and Apache Corp. shares while only making one individual stock purchase and buying 13 new retirement funds or bonds.

Still, the three collectively owned individual shares in 53 companies, including ones that often have cases come before the justices, such as Time Warner, which caused three Roberts recusals; Cisco, which caused two Breyer recusals; and Procter & Gamble, which caused eight Alito recusals.

Ethics and disclosures

Lots of talk and some action

Last summer, Justice Ginsburg made a series of negative comments about then-candidate Trump to the Associated Press, *New York Times* and CNN. In the days following, legal scholars, legislators and pundits of all stripes criticized the comments – **and periodically noted the unjustifiable absence of a code of conduct for the justices**. “The

Justice Ginsburg should explain to the American people why she thinks she should hear the travel ban case in spite of her perceived bias against the appellant.

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, for example, wrote on July 13.

And yet, when it came time this spring for Sens. Chris Murphy and Dick Blumenthal and Rep. Louise Slaughter to again introduce their Supreme Court Ethics Act, which would require the justices to promulgate an ethics code, **nary a Republican was on board**. No Republicans have joined either bill in the four months since, and no Republicans had signed on when similar bills were introduced in the three previous Congresses. We’d like to see this changed – **or at least get an explanation as to why this is the case**.

In addition, **we would also like to see Ginsburg explain why she is not required by law to sit out the upcoming case** in which now-President Trump is a named litigant, namely the October 10 travel ban case. Fifty-eight House GOP members sent her a letter urging recusal soon after *cert.* was granted in *Trump v. IRAP*, and they make a compelling argument. Even though there is no recourse or reprimand – save the high bar of impeachment – if Congress believes a justice’s non-recusal decision to be unlawful, **Ginsburg should take this opportunity to explain to the American**

people her views on why she should stay on the case, just as Justice Scalia in 2004 publicly rebutted calls for his recusal from a case involving hunting companion Vice President Cheney.

Another judge accused of wrongdoing whom we don't want impeached, but whose conduct has shown the importance of greater congressional oversight, is Clarence Thomas. In October, it was reported that **Thomas allegedly groped a woman at a dinner party in 1999**. Had a lower federal judge been accused of such conduct, a complaint may have been filed against him and adjudicated before a panel of judges within his or her circuit. Then, if the panel reached a finding of wrongdoing, a punishment – such as sensitivity training, removal from cases or censure – may be doled out.

That men in positions of power abuse their posts is not new. That we had a national conversation on the subject leading up to a presidential election, however, is beyond precedent and may be the momentum needed to improve the laws that allow alleged sexual misconduct to go unpunished.

A disciplinary system whose foundation is judges judging their colleagues is far from perfect, as it's inevitably biased in favor of an accused judge. The benefit, though, is that **there are intermediate steps short of removal that may be taken, and the negative behavior may be ameliorated**.

In contrast, since the Judicial Conduct and Disability Act doesn't apply to Supreme Court justices, all the high court has is impeachment. **This all-or-nothing structure may act as a deterrent against bringing allegations of a justice's misconduct forward**.

That men in positions of influence abuse, or are alleged of abusing, their posts and behaving in hurtful ways is not new. That we had a national conversation on this leading up to a presidential election, however, **is beyond precedent** and may be the momentum needed to improve the laws that allow sexual misconduct in the halls of power to go unpunished.

A major victory, though we don't know what to call it (Flash drives? Thumb drives? USB drives?)

Following its biannual meeting in March, the Judicial Conference of the U.S. announced that effective immediately, financial disclosure reports for federal judges, including Supreme Court justices, **would be made available to the press and public via thumb drives at no charge**.

In announcing the change, the JCUS noted that the new policy would “reduce the costs incurred by the judiciary and by requesters and increase the speed with which the reports can be released.” Typically, **it had taken five to seven weeks** for the judges' and justices' financial disclosure reports, which are due by statute on May 15, **to be released by paper**.

It's true that the new policy is not online disclosures, which Congress is required to do and the past President has done, **but it's an important acknowledgement at the highest levels of the judiciary that its antiquated systems should change** in the interests of greater transparency and accountability.

FTC, along with about two dozen members of the press, received a thumb drive with eight of the justices' 2016 disclosures (all but Gorsuch's) on the afternoon of June 8. They were uploaded to FixTheCourt.com **within the hour**.

Congress again gets involved

Another hearing decrying judicial opacity

Last July the House Judiciary's Subcommittee on Courts, IP and the Internet [held a hearing](#) nominally on "judicial efficiency" that turned into a **two-hour critique from both parties on the lack of transparency in the federal judiciary**³.

This February, the same subcommittee held a hearing on "judicial transparency and ethics," and **again a bipartisan group of members took the opportunity to criticize the judiciary for its lack of openness** and suggest commonsense reforms that would counteract the declining faith in the courts system.

"We cannot simply, say, wait to impeach a judge from time to time," one House Judiciary leader said during the hearing. "We recognize that judges grow old and [we should] ensure every judge is capable of doing their job when they take the bench."

Though trust in government is at an all-time low, there are numerous immediate steps the judiciary could take to demonstrate that it's fulfilling its constitutional mandate with integrity. And **since the third branch has declined invitations to open up on its own**, Congress is well within its powers to pass basic reforms that would increase the judicial transparency and accountability.

Among the topics discussed was judicial wellness, where federal judges with life tenure are not getting the mental and physical checkups and support they need to stay sharp as they age. "We

cannot simply, say, wait to impeach a judge from time to time," **Subcommittee Chairman Darrell Issa said in his opening statement**. "We recognize that judges grow old and [we should] ensure every judge is capable of doing their job when they take the bench."

The committee heard testimony from Indiana Law School Prof. Charles Geyh, who noted that Supreme Court justices **are the only nine judges of the tens of thousands nationwide who are not bound to a formal code of conduct**.

Members noted how this hearing was coming soon after **the audio livestream in *Trump v. Washington* captured an unprecedented amount of national attention** for an audio-only appellate hearing.

"Clearly, there's great interest in wider access to court proceedings," **Ranking Member Jerrold Nadler** said. "I see no reason the public should be prevented from witnessing the other important cases considered in federal appellate courts."

National Press Photographers Association GC Mickey Osterreicher, who also testified, added, "It cannot be overstated that in this current political climate, when democratic principles are being tested, [...] opening courts to electronic coverage is an essential and directly deliverable medium for providing the public with the ability to see and hear that justice is being done, **renewing confidence in governmental integrity**."

Additional highlights from the hearing are noted in the appendix (p. 17).

³ That hearing took place the same day that Jim Comey testified on Capitol Hill, so you may have missed it. What happened on the day of our hearing in February? President Trump fired Gen. Flynn.

Conclusion

The work of a transparency advocate is never done so long as the institution the advocate is trying to reform continues to operate. On the flip side, an institution that for years has refused to modernize in any meaningful way is not hopeless; in this scenario, an advocate must work to **create an environment ripe for change**, so when conditions shift, **a blueprint for reform is already close at hand**.

The Supreme Court has for years stood apart in American life as the **most powerful, least accountable** public institution. The justices have had ample opportunity to allow live audio or sell off conflict-inducing investments or even retire at a reasonable age but have refused.

And though the committees of jurisdiction in Congress have reached consensus on our fixes – or at least on all but term limits – **these bodies today are monumentally distracted**, operating on the front lines in the battle over presidential legitimacy. Should the Democrats win back one or both houses next election and obtain subpoena power, circumstances in this regard are not likely to improve.

Fix the Court is working to create an environment ripe for change, so when conditions shift, a blueprint for reform will be close at hand.

So where does this leave Fix the Court?

First off, even if the Supreme Court had opened up to a greater extent during OT16, we would still be pushing the justices to go the extra mile on public access.

Since it did not, and even as chaos and gridlock rule Washington, **we can still, in OT17, work to create the conditions ripe for reform** down the line by raising awareness about the judiciary's opacity and focusing on achievable fixes.

That means pushing circuit courts to **implement judicial wellness initiatives** and to **livestream argument audio**⁴, encouraging the justices to **place information about their investments and reimbursed travel online** and educating Congress about why our “fixes” would **bring the court in line with modern expectations of transparency** from public institutions.

And it means **standing at the front lines of the next confirmation battle** to ensure that the American people, and the senators who represent them, have a complete picture of a nominee before a vote to confirm.

The work of a transparency advocate is never done, and while it's true we have **more work ahead of us in OT17 than we had hoped or expected**, we will neither tire nor back down from taking the Supreme Court to task for its institutional shortcomings.

⁴ Upcoming lower court cases of note include the D.C. District hearing *Public Citizen v. Trump*, on the constitutionality of the executive order directing federal agencies to repeal two regulations for every new one issued, on Aug. 10; the Fourth Circuit hearing a transgender rights case *Grimm v. Gloucester Co. Schools* on Sept. 12; and the Second Circuit hearing a workplace discrimination suit *Zarda v. Altitude Express, en banc*, on Sept. 26.

Appendix: House Panel Blasts Lack of Judicial Transparency (timestamps from [this link](#))

On the challenges of an aging corps of federal judges and the shortcomings of current judicial disability rules

Rep. Darrell Issa (22:56): **When it comes to transparency** [...], when it comes to the ethics of the judiciary, **we have an obligation**. We cannot alone simply say we'll wait to impeach a judge from time to time. [...] We recognize that judges grow old and overseeing whether or not the (judicial disability) system is properly maintained **ensures every judge is capable of doing their job when they take the bench**. (25:18): Judges grow old. Alzheimer's is real, aphasia is real, and there is no system that guarantees a judge in his or her everyday life is, in fact, being properly checked to make sure they're able to do their job.

Rep. Bob Goodlatte (33:42): It is crucial that judges have the resources and confidential programs needed to assist them **if they have any questions about their fitness to serve**. [...] (1:12:10) I'm wondering if the (judicial misconduct) process as it's laid out today puts the judiciary in an awkward situation where people who work with each other on a regular basis are called upon to pass judgment upon those same members of the circuit. Legal ethicist Charles Geyh: Yes, and the way we address that problem best is **by keeping feet to the fire** [...], by having hearings like this in which we bring the judges forward and say, 'What is the process, and **are we getting adequate transparency** in the process?'

On improving broadcast access

Rep. Jerry Nadler (31:04): **There is no reason to shield appellate courts from public view**. Public scrutiny of governmental proceedings is essential to democracy, but most courts are closed to cameras, effectively putting them off limits to the public at large. **Transcripts** [...] **are poor substitutes for the immediate visual experience**.

Rep. John Conyers (38:35): Efforts such as [the Ninth Circuit's audio livestream], which make their processes more readily available to the public, **promote even greater respect and understanding of the federal courts system and the rule of law**.

Rep. Ted Deutch (1:39:45): Policies prohibiting cameras in the courtrooms impose severe limitations on the public's ability to observe court proceedings interpreting laws that impact the daily activities of every American. These restrictive broadcasting policies **shroud the Supreme Court and federal courts in secrecy** and raise questions [...] about the administration of justice.

Rep. Ted Poe (1:45:11): We have the greatest judicial system in the world, [...so] **why would we not want the world to see it?** [...] Let the public see for themselves without having to rely on the media's 90-second sound bite as to what took place.

Rep. Issa (2:28:52): You've gotten agreement today that there's been **no** [...] **reason not to video-capture appellate activities**, which would potentially include the Supreme Court, but clearly would include all of the circuits. (2:31:35): We need to work with the courts and/or work within our constitutional powers so that no one can second guess the courts in the areas [of ethics and transparency].

On implementing a code of conduct for the Supreme Court

Rep. Nadler (30:30): My deep respect for the judiciary does not mean that there are no improvements we can make to the courts system, particularly when it comes to transparency. **This includes stronger ethics and disclosure requirements**, particularly with respect to the Supreme Court, which is not bound by the code of ethics that applies to other federal judges.

Rep. Hank Johnson (1:31:28): Is there any constitutional reason that would prevent Congress from imposing upon the Supreme Court justices a rule that they abide by the Code of Conduct for U.S. Judges or that they write a code of conduct for themselves and abide by it? Prof. Geyh: I [am] of the opinion that the 'necessary and proper' clause coupled with the power to regulate the appellate jurisdiction of the Supreme Court **gives [Congress] the power to insist on a code of conduct**.

Rep. Johnson (1:33:20): Whenever you have a justice that is solely responsible for judging an issue of recusal, then **it diminishes the respect that people have for the courts** [...] **being unbiased and impartial**.

On Congress' role in affecting change in the judiciary

Rep. Andy Biggs (2:01:04): What do you see are the real checks for the legislative branch on the judicial branch? Prof. Geyh: The checks include impeachment. You control the judiciary's budget. You control the lower courts' jurisdiction. [...] You have the discretion to establish courts; **that implies a lot of regulatory authority over things like a disciplinary process**.