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Rebutting the Judicial Conference's Objections to H.R. 6755

November 23, 2018

On November 6, the director of the Administrative Office of U.S. Courts and secretary of the Judicial Conference of the U.S., Jim Duff, **wrote a letter** to congressional leadership about why the JCUS opposes parts of the Judiciary ROOM Act, H.R. 6755. Here, Fix the Court rebuts the anti-transparency arguments Duff makes, claim by claim.

Code of conduct (section 201):

CLAIM (Duff letter, p. 3): "*The Judicial Conference opposes section 201 […] because it is inappropriate for the Conference to design or administer such a code for justices [since it] does not have expertise to craft a code for their use*."

FACTS: The public – 86% in our **May 2018 poll** – believes the country's top legal officials should have a formal ethics code. Plus, the ROOM Act as written takes into account the high Court's unique role in the judiciary by allowing for a new code that "may include provisions applicable *only to certain categories of judges or justices*."

→ The code for lower judges smartly bars judicial involvement in activities that merely "have the appearance of impropriety," such as making negative comments about then-candidate Trump (cf., Justice Ginsburg) or speaking at a Trump Hotel (cf., Justice Gorsuch)

→ Chief Justice Roberts says he and his colleagues "consult" the code for lower judges, yet there is little consistency among justices as to how they apply it. Justice Breyer, for example, has alternately said he consults seven legal ethics books and speaks with certain legal ethics professors when confronting an ethical conundrum.

→ Though justices are required to follow the recusal statute, there's no penalty when they fail to recuse in spite of a statutory conflict, as has occurred six times in the last three years. A formal code would encourage more vigilance.

⇒ **Rep. Rep. Trent Franks at a 2016 Judiciary hearing**: "Other branches have comprehensive disclosure and ethics rules, and I'm wondering if you think that the judiciary should also have [comprehensive] disclosure and ethics rules for all judges, including those on the Supreme Court?" **AO Director Jim Duff**: "We have a very robust system within the branch of overseeing and reviewing allegations of misconduct." **Franks**: "Do those apply to the Supreme Court?" **Duff**: "No, sir. The Supreme Court has its own administration."

Recusal (section 202):

CLAIM (p. 3): "*The Judicial Conference […] has no formal comment regarding this section,"* which would require the justices, via the clerk of the Court, to publicly list the reasoning behind their recusals, such as previous work, stock ownership or other relationship to a litigant or attorney.

FACTS: Each justice currently has his or her own method for determining recusals, and they are not required to use the Judicial Conference's conflict-check software that was implemented in 2006.

→ Some federal judges list their conflicts of interest online already; e.g., Chief Judge Patricia Gaughan, N.D. Ohio, lists a law firm a family member works at on her page.

→ There is no technical or statutory reason for why Supreme Court justices can't follow suit – and 82% of Americans want them to, **according to our latest polling**.

⇒ To comply with this directive, the Court would merely have to append a few words – i.e., a justice took no part in case "due to a financial investment," "due to previous work" or "due to family ties" – to its weekly orders, while doing so would increase trust that the nine aren't deciding cases in spite of conflicts.

⇒ **Rep. Darrell Issa at a 2016 Judiciary hearing**: "It is time for the judicial branch to come out of the shadows. Americans expect an open and transparency government. Americans expect disclosures of conflicts of interest along with financial disclosures."

Medical examinations (section 203):

CLAIM (p. 4): "*The Judicial Conference opposes […] legislation requiring Article III judges to undergo medical examinations […] because it would undermine judicial self-governance, discourage service by senior judges […] and undermine existing law addressing judicial disability*."

FACTS: Every year or so, the public learns about another federal judge who has experienced cognitive decline before he or she has decided to leave the bench.

→ According to a 2015 Associated Press **report**, for example, the Tenth Circuit "has [recently] addressed at least two complaints that could reflect mental decline." **Adds** Justice O'Connor in *Gregory v. Ashcroft* (1995), upholding Missouri's mandatory judicial retirement age: "It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age."

→ Regular cognitive screenings are exactly what outside experts, including the executive director of the Mass General Center for Law, Brain and Behavior, **have recommended** for the judiciary; this bill accomplishes that.

→ Plus, "judicial self-governance" is a misnomer. Given Congress' role in writing recusal statutes, requiring judges to file annual disclosures and appropriating the judiciary's budget, not to mention the Senate's work in pushing for a stronger post-Kozinski response to harassment; the legislative and judicial branches are inexorably tied.

⇒ **Pulitzer Prize-winning author David Garrow in a 2000 law review article**: "The history of the [Supreme] Court is replete with repeated instances of justices casting decisive votes or otherwise participating actively in the Court's work when their colleagues and/or families had serious doubts about their mental capacities."

⇒ **Rep. Darrell Issa at a 2017 Judiciary hearing**: "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. […] 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."

Internet streaming of video and audio (section 301):

CLAIM (pp. 4-5): Since the Judicial Conference has "*strongly urged each circuit […] to adopt an order reflecting its [own] decision [whether] to authorize […] radio and television coverage of appellate court proceedings, section 301 is thus unnecessary*."

FACTS: Most circuits do not have clear policies on audio or video broadcast of appellate arguments, which could easily be changed via statute as a way **to improve understanding of and respect for federal courts**.

→ One circuit (9th) routinely livestreams video; three others (2nd, 3rd and 7th) have allowed video ad hoc.

→ Two circuits (9th and D.C.) routinely livestream audio; one other (4th) has allowed live audio ad hoc.

→ The Supreme Court has live audio capabilities, as it plays argument and opinion announcements audio in its Lawyers' Lounge across the building, and could easily do the same online, but has been reluctant to do so.

⇒ All federal courts have had ample time – since a 1996 Judicial Conference meeting – to implement clear, consistent local rules on broadcast, but few have, even as interest in appeals courts has risen, livestreaming technology has improved and those courts that have livestreamed have experienced zero blowback.

⇒ **Rep. Ted Poe, also a former Texas judge, at 2017 House Judiciary hearing**: "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 […] as to what took place in that courtroom."

⇒ **Chairman Bob Goodlatte at a 2016 Judiciary hearing**: "Another possible way to deliver transparency is to allow Americans to watch court proceedings. Our hearing today is being broadcast […], but a hearing a few blocks away at the District Court of the District of Columbia or at the United States Supreme Court will never be seen by anyone [not in the courtroom]."

⇒ **Rep. Steve Chabot at the same hearing**: "Why should we not learn from the experience that the states have had in [allowing cameras]? Had they had a lot of problems, it would seem as if the trend of opening up the courtrooms to public would not have continued [but it has]."