FIX THE COURT

YEAR-END REPORT ON SUPREME COURT TRANSPARENCY

DECEMBER 2018

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Table of Contents

Introduction

Three days before the start of October Term 2017, Fix the Court settled its lawsuit with the U.S. Department of Justice over a half-filled Freedom of Information Act request for Neil Gorsuch's records at the agency.

Despite the then-missing (and still-missing) 58,968 pages of Gorsuch's record, the Colorado native had been sworn in as Supreme Court justice five months prior and was three days away from beginning his first full term on the high court.

"It's time to move on," FTC executive director Gabe Roth wrote then, adding that "since this is not the last time the Justice Department will be asked to provide documents about a Supreme Court nominee, I'm hopeful our suit has compelled the agency improve its torpid [FOIA] process with more timely releases." Uh huh.

As FTC waited for the Gorsuch documents that never came, the organization submitted open records requests for material produced by the person most likely to fill a subsequent Supreme Court vacancy, then-Judge Brett Kavanaugh of the D.C. Circuit. **Our first FOIAs, to DOJ and the Bush Library, came on May 8, 2017, with a request to the National Archives for Office of Independent Counsel records coming 10 days later.**

No one likes the kid who turns in their assignments early, but planning is the mark of adulthood. No matter, though, as the usual sluggishness ensued, and FTC was again compelled to file suit once the Kavanaugh nomination was official 13 months later.

This is supposed to be a year-end report on Supreme Court transparency, akin to the reports FTC has released at the end of terms past. Yet this year the story can't be told without remarking on the opacity of one of the other branches of government – the executive branch – whose agencies have stonewalled records requests and have made the evaluation of those nominated to lifetime posts unnecessarily difficult. It is current and former executive branch officials, in concert with the chairman of the Senate Judiciary Committee, who decided to keep Kavanaugh's staff secretary files from the public in the run up to his confirmation hearings.

No one likes the kid who turns in his assignments early, but planning is the mark of adulthood. No matter, though, as the typical FOIA torpor ensued, and I was again compelled to file suit once the Kavanaugh nomination was official.

Ultimately, the addition of Kavanaugh to the Supreme Court could have been seen as a boon for pro-transparency advocates. He hails from a court that streams the audio of all its hearings. He sat on the circuit's Judicial Wellness Committee, tasked with ensuring its judges understand the cognitive implications of aging. He never owned individual stocks during his 12 years on the bench. He has rightly recused himself from dozens of cases in which there was a credible conflict of interests (even if he "couldn't recall" the reasons for two-thirds of his D.C. Circuit recusals). He has also expressed willingness to speak in public before diverse audiences.

But a fog hung over the appointment long before the public learned about Christine Blasey Ford's allegations: the President whose tax returns you can't see nominated a justice whose memos you can't read.

The Original Introduction to The Report (Written Hours Before the Kennedy Retirement)

The most glaring problem in need of a "fix" that came to light during the high court's October Term 2017 wasn't one of our original six fixes and didn't come from the Supreme Court. It was the Dec. 8, 2017, news that Judge Alex Kozinski of the Ninth Circuit had sexually harassed more than a dozen women during his tenure on the bench.

As soon as that story broke, it was clear that Kozinski should leave the federal bench and be held accountable for his actions, and that the judiciary as a whole should take steps to eradicate this type of behavior among its ranks. In

addition, victims of harassment and other vulnerable judicial employees like law clerks needed to be assured they'd have a clear place to turn to for help.

That the scandal broke as Chief Justice John Roberts was writing his year-end report on the federal judiciary made it apparent that the time to begin lobbying for change was immediate. FTC convened a group of well-respected legal minds, most of whom themselves were once law clerks in the federal judiciary, who agreed that a letter to the Chief encouraging him to use his report to tackle this issue was appropriate.

> *Given the sexual harassment allegations that have recently surfaced, we think you should take the opportunity in this year's report to assure those considering coming forward with complaints about members of the judiciary that they will be heard and that justice will be done.*
>
> - Letter from legal scholars to Chief Justice Roberts, Dec. 14, 2018

In the letter, we wrote that Roberts should "assure those considering coming forward with complaints about members of the judiciary that they will be heard and that justice will be done." Further, we asked him to add clarity to the process whereby "victims can report incidents" of harassment.

Days later, a letter signed by 480 former clerks, 83 current clerks and 120 law professors, on which FTC assisted behind the scenes, made similar and additional asks, wanting further clarification for harassment reporting procedures, an updated code of conduct for judicial employees, a confidential national reporting system and the creation of a " working group of judges, current and former law clerks and judiciary employees to further develop ways to address these issues."

Roberts created a working group, albeit with no current or former clerks, weeks later. Nevertheless, FTC worked with the ad hoc group of former clerks over the next few months to present legislative language to the chairman (on Feb. 2) and the ranking member (on May 22) of the Senate Judiciary Committee that would modernize the Judicial Conduct and Disability Act to account for harassment. This request was part of FTC's written testimony, submitted Oct. 29, on the proposed changes to the Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules.

First, our additions would end a glaring omission and call out sexual harassment by name in the statute. Second, it would ensure that all judicial council actions would be made public. Third, it would include an automatic change of venue for judicial misconduct proceedings. Though this happens in practice nowadays (e.g., the Kozinski complaints were moved from the Ninth Circuit to the Second Circuit Judicial Council), it's not in the statute. Fourth, **our proposal would give complainants the same rights and privileges as the judges accused of misconduct**, namely an opportunity to appear at proceedings conducted by the judicial council, an opportunity to present evidence and to compel the attendance of witnesses and to present argument. Finally, it would allow complainants the opportunity to petition for reimbursement for costs incurred during this process.

As this proposal was developing, FTC repeatedly petitioned the House and Senate Judiciary Committee – in person, over the phone and via e-mail – to hold a public hearing on this issue. House Judiciary whiffed, but during the Apr. 18 Appropriations Subcommittee hearing on the judiciary's FY19 budget, Director of the Administrative Office of U.S. Courts Jim Duff was questioned about the third branch's response to sexual harassment in its ranks, marking the first time since the working group was formed that a congressional panel had inquired about its work.

About halfway through the hearing, Rep. Matt Cartwright asked Duff a question he received from FTC about the differences in reporting harassment now versus when the working group was created this winter. Duff noted that though the group was still completing its work, "what we have determined clearly is that one of the barriers to filing [complaints] is the formality of our complaint process."

The working group's report came out on June 8, and though the judiciary should be commended for taking its charge to improve workplace conduct seriously – even as the other branches, with similar issues, have yet to make meaningful changes to root out harassment – FTC still believes that codifying anti-harassment proposals in an updated judicial misconduct law would better ensure that the judiciary's efforts here continue long past our memory of the scandal that prompted the change.

Senate Judiciary, whose members were also disappointed by the half-measures noted in the final report, held a hearing on June 13. Ahead of that, FTC worked with one of the witnesses on her testimony and with several senators on their questions for Jim Duff – namely, why the AO doesn't support a legislative fix and whether Duff believes it proper for the investigation into the harassment allegations made against Kozinski to have effectively ended after his resignation.

During the hearing, several senators expressed their dismay that judges who resign due to harassment allegations may keep their salaries, and they noted that the judiciary's tradition of opacity, which has long been seen as a positive, has sadly become a liability here.

Of all the proposed fixes to the third branch, a more open and robust program to combat and punish harassment, which includes safeguards for its most vulnerable employees, remains the most important one to undertake. Just because the committees of jurisdiction pivoted back toward judicial nominations and other issues this summer and fall does not mean we've reached an end.

Audio News, Audio Blues

Now on to the six fixes. Fix the Court's most important victory since its last report didn't come at the Supreme Court. Instead, it occurred in the D.C. Circuit, where on Oct. 19, 2017, Chief Judge Merrick Garland granted our request to livestream the audio of the next day's argument in *Garza v. Hargan*, a case concerning the reproductive rights on undocumented minors. The court went on to grant several other FTC live audio requests until its announcement on May 23, 2018, that it would begin automatically livestreaming all arguments the following term.

In Nov. 2017, FTC successfully worked with the NPR affiliate in Richmond, Va., to convince the Fourth Circuit to livestream its hearing on the Trump travel ban. And in May 2018, the Seventh Circuit approved a much-anticipated plan to begin videotaping oral arguments upon request.

> *"Giving the public access to a primary source of information as soon as possible allows more citizens to participate in our democratic system and illustrates the care with which the Court considers the issues that matter to the people."*
>
> *- Letter from Sens. Cruz and Hirono to Chief Justice Roberts requesting same-day audio in* Trump v. Hawaii*, Mar. 22, 2018*

At SCOTUS, FTC collaborated with the offices of Sens. Ted Cruz and Mazie Hirono to write a letter signed by the senators requesting same-day audio for the travel ban case when it reached the high court. We did the same on the House side, with Reps. Gerry Connolly, Hank Johnson, Zoe Lofgren, Jerry Nadler and Mike Quigley signing on.

It wasn't all successes on the audio front, as FTC (through contacts) asked for same-day audio two other times at SCOTUS this past term and were not met with a positive response. On Sept. 29, Reps. Connolly, Nadler, Quigley and Ted Poe unsuccessfully requested expedited audio in *Gill v. Whitford*, which was argued on Oct. 3, and on Nov. 20, amici from opposite sides of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* asked for early audio in that case and were turned down, as well.

"Although we support different sides of the case," Ilya Shapiro of the Cato Institute and John Paul Schnapper-Casteras, formerly of the NAACP LDF, wrote, "we write jointly to urge the Supreme Court to provide an audio

recording of its oral argument on the Court's website the day it is argued, Dec. 5. […] We believe that elevating cases such as this can foster a greater understanding of and respect for our courts."

That an expedited release was so painless - it took a mere 45 minutes after the conclusion of arguments for an .mp3 file to be uploaded to the court's website – prompted legal experts across the country to ask why it's not standard. Former Supreme Court clerk and frequent practitioner Kannon Shanmugam, Case Western Law Prof. Jonathan Adler, Ohio Supreme Court Justice Pat DeWine and L.A. Times Senior Editorial Writer Mike McGough – to name a few of the ideologically and geographically diverse voices – called on the justices to make same-day audio standard for all arguments, even the more dry ones on the Armed Career Criminal Act or ERISA.

That an expedited release was so easy prompted legal experts across the country to ask why it's not standard issue for the Supreme Court.

The Associated Press went further. "The fast turnaround raises two questions," the outlet wrote. "**Why not just provide live audio of the proceedings? At the very least, why not do same-day release more often?**"

Then on June 29, citing FTC's data on circuit court audio, Sens. Grassley and Leahy sent a letter to Chief Justice Roberts requesting same-day audio for all Supreme Court arguments in the upcoming term.

"By releasing same-day audio recordings of all oral arguments, the Court has a unique opportunity to open up its proceedings beyond the select few who will ever have the chance to be physically present during arguments. Most importantly, the American public will grow in its appreciation of—and confidence in—the rule of law that safeguards our constitutional system," Grassley and Leahy wrote. Six months later, the court still has not responded.

Judicial Wellness Takes Center Stage

In 2016-17, Fix the Court worked with legal experts to craft policies that would result in an end to life tenure at the Supreme Court. Most notably, that included a legislative proposal that would permit presidents to nominate a new justice every two years, with the result being a court whose jurists would only serve for 18 years before retiring or returning to a lower court. (How would this work exactly? It's gamed it out here.)

Over time this push for a court comprising jurists who were more of the times than relics of presidents past led FTC to consider the superannuation of the federal judiciary as a whole. The politicization of vacancies at all levels of the judiciary yielded a slowdown in confirmations from 2015-17 and required senior judges to hear additional cases. Older judges mean a greater likelihood of mental decline, so FTC focused its efforts on trying to convince circuits to implement judicial wellness policies, if not to create standalone committees, that would help judges age gracefully and know when forgetting one's keys on Tuesday won't lead to forgetting the Fourth Amendment on Thursday.

In fact, since our last report came out, FTC pushed and received word from the **First, Fourth, Sixth and Eighth Circuits that they'll likely be joining the Third, Fifth, Seventh, Ninth, Tenth and D.C. Circuit with their own initiatives on judicial wellness in the near future**. This is a development we'll be following closely in the next term, especially since D.C. has a long history of public servants serving past their primes.

With more Americans working into their twilight years, the public should be confident that the circuits and the Supreme Court are equipped to handle the problems associated with aging. Since no one wants a diminished judge or justice to be the deciding vote on a case of national importance, federal courts can do more to ensure its hundreds of life-appointed jurists remain cognitively unimpaired.

With Americans more likely nowadays to continue working into their twilight years, the public should be confident that circuits and the Supreme Court are equipped to handle the various problems associated with aging.

Term Limits Make a Comeback

The Kavanaugh confirmation has reinvigorated the national debate over life tenure at the Supreme Court. And that's a debate we'd like to have.

For years, Fix the Court has said that unaccountable officials serving for decades on end and ruling on our country's most important issues is likely not what our Founders intended when copying and pasting English phrasing on judicial tenure from 1701 into Article III of the Constitution.

The vast majority of the country – 78 percent according to our Oct. 2018 poll, with nearly identical numbers among party identification – **agrees that life tenure is problematic, and even some justices are questioning it.**

"Could you do [tenure] with sufficiently long terms – 18 years seems to be the going proposal – maybe," Justice Kagan said at Georgetown Law in October. "I'm not saying that there's nothing to proposals like that. I think that what those proposals are trying to do is to take some of the high stakes out of the confirmation process, and certainly to the extent that that worked, and that people could feel as though no single confirmation was going to be a life or death issue, that that would be a good thing. So I think it's a balance among good goals."

More and more members of Congress are talking terms, and time and again, it's Fix the Court's proposal that's being cited as the gold standard among SCOTUS reformers; listing all of those references here would take up the bulk of the year-end report, so we'll have to refer you to this helpful URL.

There is much more to come on the topic of terms in 2019.

Stock Selloffs: Continuing Yet Not Complete

It was another banner year for stock selloffs at SCOTUS, as we learned on June 14 that the three Supreme Court justices who own individual securities shed up to $360,000 from their portfolios in 2017. Chief Justice Roberts sold up to $50,000 in Hill-Rom Holdings, up to $15,000 in Hillenbrand and up to $15,000 in Nokia; Justice Breyer sold up to $100,000 in Cisco, up to $50,000 in Air Products & Chemical and up to $15,000 in Versum Materials; and Justice Alito sold up to $100,000 in C.R. Bard and up to $15,000 in Schlumberger while making the only high court securities purchase of 2017, up to $15,000 in Becton Dickinson.

All told, Roberts, Breyer and Alito owned shares in 44 companies at the end of 2017, compared to 49 companies at the end of 2016, 60 companies at the end of 2015 and 76 companies at the end of the 2014.

The issue here, of course, is that **each year dozens of publicly traded companies petition the Supreme Court, and in roughly 50 instances annually, a justice will own shares in a petitioner, meaning he must recuse from the case and hope an even-numbered court can find a resolution**. Luckily, only three justices own individual stocks, and they've slowly begun selling them off. But if savings accounts and retirement funds are good enough for two-thirds of the justices, then these types of investments, which almost never yield recusals, should be fine for all nine.

There was a wrinkle in this theory during the past term: on Apr. 3, the court released an order for a petition from which every justice, save Kennedy and Thomas, was conflicted out. As soon as the news broke, FTC and its team of researchers sprang into action, discerning in short order that the parties in this case, regarding the Tribune Co.'s 2008 bankruptcy, were the types of large mutual funds that nearly every adult, and seven of the justices, has in his or her retirement account: funds managed by TIAA-CREF, Blackrock, Vanguard, Deutsche Bank, JPMorgan, Fidelity and USAA, to name a few.

Stepping Aside (or Not): Missed Recusals, Un-Recusals and Non-Recusals

Beyond the April order, there were some other shenanigans at the court on the recusal front. On Mar. 28, the Supreme Court Press Office noted that Justice Alito was no longer recused in *WesternGeco LLC v. Ion Geophysical Corp.*, which means he sold his stake in WesternGeco's parent company, Schlumberger Ltd., at some point. (We later learned that point was Dec. 12, 2017, so no idea why this took four-and-a-half months to note the unrecusal.)

On Nov. 10, 2017, Justice Kagan realized she had a conflict in *Jennings v. Rodriguez* more than a month after it was reargued – and many months after it first appeared on the Supreme Court's docket, again demonstrating that the institution needs a far more comprehensive conflict-check system.

FTC wants to hear from the justices as to why they believe the frequency of missed recusals has ballooned recently. If the court itself is not working to fix that, Congress should find a manageable solution.

On Mar. 24, 2018, the court announced that Justice Kennedy recused himself from an Apr. 18 case due to his involvement in an earlier stage of the lawsuit in 1985 while sitting on the Ninth Circuit, which has to be a record. FTC commended SCOTUS for notifying counsel of the error as soon as it was discovered and, in what we think is a first, for uploading the recusal notice to the online docket.

But that digital notice belies the larger issue of missed recusals, un-recusals and non-recusals.

The following week FTC wrote to Sens. Ben Sasse and Richard Blumenthal, the chairman and ranking member of the Senate Judiciary's Courts Subcommittee, respectively, to study whether congressional intervention is warranted. FTC recommends that the justices be required to use conflict-check software, as lower court judges are, or, at the very least, that the Federal Judicial Center or GAO study why missed recusals now seem so common. FTC also wants to hear from the justices as to why they believe these errors have mushroomed recently. If the court itself is not working to fix that, Congress should find a manageable solution.

In orders released on June 18, 2018, the Supreme Court noted that the justices denied *cert.* in 17-1287, *Marcus Roberts et al. v. AT&T Mobility*, on whether the telecom falsely advertised its mobile phone service plans. But four days earlier, Time Warner, whose shares the Chief Justice owns, had become a subsidiary of AT&T, meaning that by law Roberts should have stepped aside from the *cert.* determination. **The discouraging trend continues**.

It's also noteworthy that in his Senate Judicial Committee materials released last July, Judge Kavanaugh failed to note the reasoning behind two-thirds of his 156 recusals. This fact was confounding because most of the "forgotten" ones are easy to discern. Upon a closer look, FTC determined that they involved issues like presidential pardons, the Plame affair, the Abramoff case, the 2006 firing of U.S. attorneys and the infamous three to five million lost White House e-mails, meaning Kavanaugh was likely involved in each of these events to some extent.

Finally, on non-recusals: last term began with Justice Gorsuch feeling some heat for his Sept. 28, 2017, appearance at Trump International Hotel in D.C., speaking to a conservative group, The Fund for American Studies, whose backers were well-known for supporting several anti-union lawsuits in federal court. The day before, **FTC sent SCOTUS a petition of nearly 1,500 Americans from all 50 states and D.C. asking Chief Justice Roberts to dissuade his colleagues from participating in these types of events** and to delineate clearer ethics rules for the justices' public appearances.

While FTC's position was that Gorsuch should have avoided speaking at a Trump property in order to avoid the appearance of impropriety, I was more bothered by the fact that not once during the previous term did a justice appointed by a Democratic president speak at an event hosted by a conservative group and not once did a justice appointed by a Republican president address a gathering of a liberal group. So I wrote an op-ed about it.

"With all the partisanship in Washington, not to mention on our TVs and in our social media feeds," I wrote, "wouldn't it be nice if the one supposedly apolitical branch branched out and addressed the unexpected? […] **The impact of seeing the country's leading jurists appear before contrarian audiences would go far beyond whatever words they'd share**. It could compel leaders in other positions, both public and private, to seek out opportunities to engage with those with whom they may not always see eye to eye. […] Even if, as we're often told, the Supreme Court is the one institution in Washington that works most of the time, that's quite a low bar. The court can and should play a larger role in raising the political discourse of a divided nation." Amen.

I then took things one step further by sending letters to Justices Ginsburg and Gorsuch requesting they publicly explain their reasoning for participating in certain OT17 cases despite perceived biases.

Gorsuch's potential conflict was just noted and Ginsburg's conflict came from her perceived animus against a high court litigant, namely the president. In 2016, Ginsburg made several negative comments about then-candidate Donald Trump. Then in 2017 she voted at least six times – on June 26, July 19, Sept. 12, Oct. 10 and twice on Dec. 4 – on the so-called travel ban cases, stemming from executive orders Trump issued to prevent citizens of certain nations from entering the U.S. Statements Trump made as a candidate – and to which Ginsburg was likely responding – were at issue in these cases.

As other tangentially conflicted justices (Rehnquist and Scalia, famously on a few occasions) have done in the past, I believe that Ginsburg and Gorsuch should have explained to the American people how they can remain unbiased in cases in which they have perceived prejudice. Unsurprisingly, these letters went unanswered.

H.R. Wonderful

Here's some silver lining on ethics: a Fix the Court-backed measure that would direct Supreme Court justices to create a professional code of conduct akin to existing rules for their lower court counterparts will be included in H.R. 1, the House Democrats' ethics-focused first bill of the new Congress.

As referenced above, Supreme Court justices, like judges of U.S. District Courts and U.S. Courts of Appeals, are required to follow the federal recusal statute, 28 U.S.C. 455, which is based on the common law maxim that no one should be a judge in his own case and proscribes participation in cases featuring family members and personal investments.

Beyond that, lower court judges are required to follow the Code of Conduct for U.S. Judges, which sanctions against political activity and proactively states that judges "should uphold the integrity and independence of the judiciary" and "should avoid impropriety and the appearance of impropriety in all activities."

Even as detractors have noted that a conduct code would not be fully enforceable at Supreme Court, given there's no recourse or reprimand for non-compliance save the high bar of impeachment, the thinking that our nation's top judges should follow tougher ethics rules remains meritorious, with 86 percent of Americans in favor of implementing a SCOTUS ethics code, according to our latest polling.

It's malpractice for Supreme Court justices to be exempt from the federal judiciary's code of conduct, and they know it. This omission is something both Republicans and Democrats alike have recognized in this past Congress as injudicious, and FTC is pleased that lawmakers are already talking about introducing a measure in the new session to improve high court ethics rules.

Fix the Court Goes to Court – to Defend the Justices

On the day before he died, Antonin Scalia – deplaning at Houston Hobby, gun in tow and in poorer health than was widely known – was met by deputy U.S. marshals for assistance in transferring to a chartered plane headed for the posh Cibolo Creek Ranch in a remote part of West Texas. As a Supreme Court justice, he was within his rights to

request that the agents remain with him during his entire trip but instead opted for protection only during his layover.

Scalia's ultimate interaction with marshals came as deputies in field offices across Texas and as far away as Washington scrambled to notify one another and other authorities of his passing. SCPD wasn't told of Scalia's death until two hours after his body was found the morning of Feb. 13, 2016. USMS deputies did not arrive at the ranch until mid-afternoon.

FTC and its allies on Capitol Hill share a concern that the justices may not have adequate security coverage at a time when threats against public figures are on the rise and when, for several of them, frequent health monitoring is paramount.

Documents procured in March 2018 from a nearly two-year-old Fix the Court FOIA request to USMS offered new insight into how federal agents respond to a momentous event in an isolated part of the country and for the first time revealed the formal policies for when justices are granted protection outside of the nation's capital.

This request stems from the concern, shared by FTC and allies on Capitol Hill and elsewhere, that **the justices may not have adequate coverage at a time when threats against public figures are on the rise and when, for several of them, frequent health monitoring is paramount**. There is no indication in these documents that the deputies who met Scalia in Houston or those who responded to his death had any knowledge of his weakening health, and though there were no active threats against Scalia at the time of his death, several lines of redacted text appear in USMS reports under the threat assessment fields for trips taken by Justice Ruth Bader Ginsburg and Sonia Sotomayor in July 2015.

The public should be confident that Supreme Court justices are well-protected, both inside their building and when they venture out into the world. That the justices can decline protection when they travel to the most far-flung places in the country does not seem appropriate given the expansive reach and resources of the U.S. Marshals Service and the fact that so many justices choose to remain on the bench well into old age. I don't want to wait for another tragedy to occur to ensure that more comprehensive protection is in place.

To that end, FTC submitted another FOIA request to USMS this spring requesting further policies and lists of trips on which deputies accompanied the justices. The agency quoted FTC an exorbitant fee for the information, and we are currently appealing the fee determination; given that FTC does independent research and disseminates it online much like a news organization, the organization should qualify as media for the purposes of open records requests.

More Lawsuits for Transparency

The day after President Trump nominated Judge Kavanaugh to the Supreme Court, Fix the Court (represented by American Oversight) filed complaints in federal court to uncover records documenting Kavanaugh's previous government service, namely his work on the Starr commission in the 1990s and his time in the White House under President George W. Bush.

As noted above, FTC filed FOIA requests for these documents in May 2017, so it was far more than 20 business days after that when Kavanaugh was nominated.

With heightened interest in Kavanaugh's eventful time in government, FTC wanted to press the National Archives and the Justice Department to resolve these complaints quickly and release the documents. After filing motions for preliminary injunction in both cases, in which we argued that the public interest would be irreparably harmed if the Senate voted on Kavanaugh before the release of his files, both agencies agreed to rolling production schedules where we'd get documents every week or two through the summer and early fall.

Fix the Court filed another FOIA in May 2017 – this one at the Bush Library, which readers know by now has, in concert with Bush's representatives, refused to release any files from Kavanaugh's time as staff secretary. **That's ironic because there are already several hundreds of pages of staff secretary materials that have been released through other FOIAs** – including from FTC's FOIA of Neil Gorsuch's e-mails (he and Kavanaugh conversed in 2006) and from our FOIA of Kavanaugh's e-mails to DOJ, a large cache of which were sent in 2005 and concerned the administration's warrantless wiretapping plan.

Unfortunately, the fight over the nominee's staff secretary files became a partisan battle that quickly spun out of control. That, plus the general difficulty of obtaining any documents that government officials or their designees believe are covered by the strictures of the Presidential Record Act, dimmed the motivation for suing over this FOIA. As of this writing, Senate Democrats are still trying to find creative ways to obtain these files, which, according to the Bush Library's original response to FTC's FOIA request for them "may be completed in approximately 20 years."

Conclusion: The State of SCOTUS Is Up to Congress

In September, the House Judiciary Committee approved a bill, called the Judiciary ROOM Act, that would vastly improve transparency in the third branch. Within one year of the bill's passage, same-day audio release for Supreme Court oral arguments would be required; live audio at the high court would be required within two years and live video for all circuit court arguments also within two years. The bill would compel the Judicial Conference to create a code of conduct that the justices would also be bound to and the SCOTUS clerk to post online the reasoning behind each of the justice's recusals when they occur.

The bill would also require Article III judges to stand for periodic exams. Though the results would largely remain confidential, if a doctor identified a condition "that may impact the ability of the judge or justice to carry out [his or her] duties […], the physician shall submit such finding to the appropriate chief judge or justice."

A month prior, Sen. Elizabeth Warren introduced a bill banning individual stock ownership by federal judges and justices, directing the Supreme Court to establish a formal and binding code of ethics, requiring the Judicial Conference to publicly post judges' speeches and annual disclosure reports and requiring the Judicial Conference to publicly post judicial "conflict sheets."

These two end-of-Congress bills, though they didn't go far, show that there's appetite for SCOTUS oversight from members of Congress in both parties that will undoubtedly continue into 2019.

The challenge, of course, is to find language that's agreeable to both caucuses while not resigning to introducing the same bills (the "Cameras in the Courts Act" or "Sunshine in the Courts Act" or "Supreme Court Ethics Act") that go nowhere past introduction every two years.

But something has changed on both sides of the aisle, and there's a realization that voters expect members not to abdicate their responsibility to oversee the administration of the judiciary.

In other words, it'll be an exciting 2019.