

**Written Public Testimony – Senate Committee on Appropriations
Subcommittee on Financial Services and General Government**

*Submitted by Gabe Roth, Fix the Court Executive Director
Regarding FY2020 Funding of the Federal Judiciary
May 1, 2019*

Chairman Kennedy, Ranking Member Coons and members of the Subcommittee: thank you for the opportunity to submit written testimony on the judiciary’s FY2020 budget. Fix the Court, a national nonpartisan organization that advocates for greater transparency and accountability in our federal courts, is requesting four appropriations totaling \$3,100,000 that are aimed at expanding public access to the third branch and ensuring the courts have the resources they need to fulfill their mission.

Of the \$3,100,000, \$100,000 would be a direct appropriation to the Supreme Court of the United States, and \$3,000,000 would be an appropriation to the Administrative Office of the United States Courts (AO), which would then be distributed as grants to circuit courts. These requests were also submitted March 12 to the House Appropriations Subcommittee on Financial Services and General Government.

1. FTC is requesting an appropriation of **\$100,000 for conflict-check software** to be utilized by the chambers of the justices of the Supreme Court. Over the last four years, Supreme Court justices have, on more than half a dozen occasions, missed statutory conflicts – i.e., they sat on cases from which they should have recused themselves,¹ either due to confusion over which stocks they owned at the time or which cases they had previously participated in.

These mistakes cause the public to doubt the integrity of the Court, which is unnecessary, since the justices make the proper decision on recusals the vast majority of the time. Conflict-check software would then bring this process much closer to error-free.

With all lower federal judges having been required to use conflict check software since 2007², the highest court should be held to the same standard, which Congress, since it wrote the recusal statute that every federal judge and justice must follow³, has the authority to require.

2. FTC is requesting an appropriation of **\$1,000,000 for a live audio pilot program**. From 2011-2015 the federal judiciary ran a cameras-in-courts pilot program in 14 federal districts that, unfortunately, was not designed to succeed: parties could easily opt out of agreeing to be

¹ “Recent Times in Which a Justice Failed to Recuse Himself or Herself Despite a Conflict of Interests,” <https://fixthecourt.com/2019/04/recent-times-justice-failed-recuse-despite-clear-conflict-interest>. Retrieved April 30, 2019.

² “Every judge is required to develop a list of personal and financial interests that would require recusal, which courts use with automated conflict-checking software to identify court cases in which a judge may have a disqualifying conflict of interest,” <https://www.uscourts.gov/about-federal-courts/judicial-administration/administrative-oversight-and-accountability>. Retrieved April 30, 2019.

³ “Disqualification of justice, judge, or magistrate judge,” 28 U.S. Code § 455, <https://www.law.cornell.edu/uscode/text/28/455>. Retrieved April 30, 2019.

recorded; judges could also opt out of recording their courtrooms; the overall video quality was lacking; and unlike the previous cameras pilot of 1991-1994, no appellate courts were included.

Nevertheless, nearly 75 percent of participating judges and attorneys said they were in favor of video recording, according to a 2016 Federal Judicial Center Report⁴. This demonstrates a willingness from judges and practitioners to try again, and I believe that live audio presents such an opportunity.

First off, audio recording equipment already exists in every appellate courtroom in the country. Second, some appeals courts, including the D.C. Circuit and Ninth Circuit, routinely employ live audio, and other courts, such as the Fourth Circuit, have demonstrated willingness to livestream on a case-by-case basis. Court officials in these locales could assist their associates should any challenges with deployment occur.

A live audio pilot would thus be a fiscally responsible way for the judiciary to determine if this policy is an appropriate way to increase public access to federal courts nationwide.

3. FTC is requesting an appropriation of **\$1,000,000 for the execution of circuit-wide judicial wellness seminars** aimed at assisting judges identify and mitigate the signs of cognitive decline. According to a March 2019 report from the AO, senior judges are handling a quarter of all federal court cases⁵. Though there is no reason to be concerned that any judge in particular is experiencing cognitive deterioration, that potential rises with age, as the Supreme Court itself acknowledged in a 1991 opinion written by Justice Sandra Day O'Connor: "It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age" (*Gregory v. Ashcroft*, 501 U.S. 452).

Today, around half of the U.S. courts of appeals have judicial wellness committees comprising programs, both formal and informal, aimed at tackling this problem head on, from a confidential hotline for staff concerned about judges' health to circuit-wide seminars featuring neurological experts to a buddy system, where judges periodically check in with one another. I am hopeful the remaining circuits create wellness plans in short order to ensure judges at all levels can better understand the warning signs of decline.

In the meantime, I envision that this money would be set aside for grants for daylong or weekend cognitive health seminars that circuits could apply for with the AO.

As long as our nation's judges have life tenure, there will be judges who will need to proactively manage the aging process and their cognitive health. This program would assist in that endeavor.

⁴ "Video Recording Courtroom Proceedings in United States District Courts: Report on a Pilot Project," [https://www.fjc.gov/sites/default/files/2017/Cameras%20in%20Courts%20Project%20Report%20\(2016\).pdf](https://www.fjc.gov/sites/default/files/2017/Cameras%20in%20Courts%20Project%20Report%20(2016).pdf). Retrieved April 30, 2019.

⁵ "The Federal Bench – Annual Report 2018," <https://www.uscourts.gov/statistics-reports/federal-bench-annual-report-2018>. Retrieved April 30, 2019.

4. FTC is requesting an appropriation of **\$1,000,000 for the AO to hire additional directors of workplace relations** in the circuit courts in order to help judges and other judiciary employees understand what is expected of them conduct-wise and where they can go if they have been a victim of harassment or other misconduct.

As you are aware, a package of Workplace Conduct Reforms was approved by the Judicial Conference of the United States on March 12, 2019. These reforms came out of the Judicial Working Group on Workplace Conduct that Chief Justice Roberts established in 2017.

Unfortunately, there has been a mixed response at the circuit level to the implementation of these reforms. Some have fully incorporated the new rules and created their own circuit-wide working groups for a more local approach, while others have outdated rules published on their websites and have not created circuit-based entities or positions to assist their employees⁶.

In order to more directly handle local concerns regarding workplace conduct, and to help implement nationwide workplace policy improvements, I recommend staffing each circuit with a director of workplace relations, and the AO should have the funding it needs to pay them.

Finally, Fix the Court would like to thank Sens. Kennedy and Coons for their leadership on judicial reform efforts, specifically regarding the national discussion on allowing broadcast in federal appeals courts, including the Supreme Court. Sen. Kennedy made a point to ask then-nominee Brett Kavanaugh his thoughts on cameras in the courtroom more than once during his confirmation hearing last year⁷, and Sen. Coons has offered his support for a bill that would permit Supreme Court broadcasts⁸.

Thank you again for the opportunity to submit comment, and I look forward to working with the Subcommittee on strategies for improving openness and transparency in the judicial branch.

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⁶ “Judicial Working Group Update,” <https://tinyurl.com/WorkingGroupUpdateFTC>. Retrieved April 30, 2019.

⁷ “Kavanaugh Doesn’t Say No to Cameras in Supreme Court,” <https://www.wsj.com/livecoverage/brett-kavanaugh-supreme-court-hearings>. Retrieved April 29, 2019.

⁸ “Senate Panel Advances Bill on Cameras in the Supreme Court,” <https://blogs.wsj.com/law/2012/02/09/senate-panel-advances-bill-on-camera-in-the-supreme-court/>. Retrieved April 29, 2019.