Statement of Gabe Roth, Executive Director, Fix the Court
Presidential Commission on the Supreme Court of the United States
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To the members of the Presidential Commission on the Supreme Court of the United States: thank you for inviting me to testify and to submit a statement on court reform that describes my research and experience on the topic.

My name is Gabe Roth, and I am executive director of Fix the Court, a national, nonprofit organization that advocates for non-ideological "fixes" that would make the federal courts, and primarily the Supreme Court, more open and more accountable to the American people.

My background is in broadcast journalism and political consulting, not the law. For years I worked with public interest groups across the U.S. whose issues reached the Supreme Court and were granted review. Time and again I had to explain to them that, no, you can't watch the proceedings on C-SPAN; you'll have to fly to Washington, get up before dawn and spend six or 26 hours in line for just the chance to watch your case being argued.

In the hopes of convincing the justices to open their arguments and opinion announcements, via live audio or video, to more than the 400 people who can fit inside the courtroom, I brought together 20 media associations and nonprofit groups in 2013 to form the Coalition for Court Transparency[1]. After a year of protests, press releases and events, it became clear that the broadcast issue was not, in fact, at the heart of what made the Court the most powerful, least accountable institution in D.C. It was their life tenure, lack of an ethics code and the black box covering their conflicts of interest, finances and junkets. So in 2014, I started Fix the Court as a public education and advocacy effort aimed at opening up and modernizing the Supreme Court, as well as district and circuit courts.

My goal has always been fairly simple: public officials in a democracy need public scrutiny, and since federal judges and justices are public officials, they should not be exempt from it. That scrutiny, I believe, will build trust in these officials, in their rulings and in the third branch as a whole.

Add to that the upsurge in federal judicial power in the recent years, and the impetus for reform becomes even clearer. Very quickly, since 2000, the Court has picked the president, changed the scope of campaign finance laws, upended voting laws, marriage laws and the role of religion in public life and issued monumental rulings on guns, immigration, affirmative action, extraterritorial detention and health care. The Court made these pronouncements — not our duly elected members of Congress.[2] This is a mountain of unbridled power, and no matter which "side" it may have helped in any one case or in all cases, oversight is wanting.

Where the reform movement stands today

The Supreme Court and the lower courts want to hold on to this power. Not surprisingly, there's been a continued, fervent effort by judges and judiciary officials to avoid oversight for decades. Maybe it was naïve of me to think that, when I started Fix the Court, the courts would act as partners in my modest modernization efforts, not throw up roadblocks at every turn.

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[1] The Coalition for Court Transparency members are listed here. The group has been idle since 2016, but the groups frequently join Fix the Court in its efforts — letters, press releases, etc. — to urge court officials to broadcast and livestream their proceedings.

[2] *See* Richard L. Hasen, "End of the Dialogue? Political Polarization, the Supreme Court, and Congress," 86 S. Calif. L. Rev. at 104 (2013) (link): "The governing model of Congressional-Supreme Court relations is that the branches are in dialogue on statutory interpretation: Congress writes federal statutes, the Court interprets them, and Congress has the power to overrule the Court's interpretations." Yet in recent years, lawmakers have all but stopped writing or rewriting laws that were reinterpreted by the courts. That's meant a marked increase in judicial power.

In spite of this ongoing anti-reform campaign (more on this later), never in the nearly seven years of Fix the Court's existence has the political environment been as ripe for judicial reform as it is right now. That's thanks in large part to the creation of the Commission and to recent attention in Congress. Let's take a look at what's happened on Capitol Hill in just the last seven months:

- A bill that would make access to district and circuit court filings free, and not $0.10 per page, passed the House by unanimous consent in December[3];
- a provision requiring the Supreme Court to adopt a formal code of conduct passed the House for the first time in March[4];
- a provision requiring the Supreme Court to adopt a formal code of conduct reached the Senate floor for the first time in June[5]; and
- also in June, two third-branch broadcast bills passed the Senate Judiciary Committee for the first time in a decade.[6]

That's on top of the fact that every federal appeals court (the 13 circuits and the Supreme Court) has been livestreaming its oral arguments during the last year, most of them for the first time.[7]

There's more reason for optimism, as modernization proposals are broadly popular.[8] Nearly 70 percent of Americans, across party lines, believe that livestreaming in federal appeals courts, including the Supreme Court, should be a requirement. About the same percentage wants to end life tenure at the Supreme Court. Nearly 90 percent want the justices to adopt an ethics code. Liberals and conservatives in the legal field complain equally about overwhelming caseloads and the need for more lower courts judgeships. And three-fourths of Americans say that the Supreme Court should be subjected to as much public scrutiny as the President and members of Congress.[9]

It's true the third branch comes out ahead of the other two on measures of public trust.[10] But again, that shouldn't mean the judiciary as a whole, or the nine judges on First Street, should be exempted from the gauntlet — and the benefits — that public scrutiny offers. Life tenure must not insulate the justices from basic measures of oversight.

Congress is poised to fill in the gaps, using its own recently enacted good-government reforms as a blueprint.

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[3] Jacqueline Thomsen, "Rejecting Opposition From Judiciary, House Passes Bill to Make PACER Free," *National Law Journal*, Dec. 8, 2020 (link). The bill was H.R. 8235, the Open Courts Act (116th Congress).

[4] The version of H.R. 1 that passed the House on March 3, 2021, included §7001, "Code of Conduct for Federal Judges" (link), which would have required Supreme Court justices to have a formal code of conduct. A more in-depth discussion follows.

[5] The version of S. 2093 that reached the Senate floor on June 22, 2021 included §7001, "Code of Conduct for Federal Judges" (link), which would have required Supreme Court justices to have a formal code of conduct. A more in-depth discussion follows.

[6] Josh Gerstein, "Senate committee approves legislation to put Supreme Court hearings on camera," *Politico*, June 24, 2021 (link). The bills are S. 807, the Cameras in the Courtroom Act, and S. 818, the Sunshine in the Courtroom Act (both 117th Congress).

[7] Fix the Court, "Audio and Video Broadcast Policies in Federal Appeals Courts," last updated June 2, 2021(link).

[8] According to a 2018 poll, a Supreme Court-specific code of conduct (86%), judicial recusal explanations (82%), 18-year Supreme Court term limits (68%) cameras in the Supreme Court (67%) and live argument audio (67%) each have strong public support — and nearly identical support from Democrats, Republicans and Independents. Support for ending life tenure at the Supreme Court may be as high as 69%, per this Feb. 2021 national poll, or 77%, per this May 2020 survey, depending on how the question is asked. Having done polling on the "fixes" since Coalition for Court Transparency days, the most surprising result was the one from Feb. 2021, where a majority of Democrats, Republicans and Independents who answered the question (i.e., taking our "not sure") said they were fine with a temporary expansion of the Court in order to facilitate the transition from the current system to one with 18-year term limits (link).

[9] *Ibid*. (2018 poll), at 3.

[10] *Ibid*., at 1.

A brief history of reform

Detractors of the Presidential Commission on the Supreme Court, or of the idea of court reform in general, are asking why now? Why in 2021 is the idea of court reform gaining so much ground?

The better, more historically accurate question is what has taken so long? There hasn't been a significant, congressionally mandated reorganization in the structure or function of our federal courts in more than three decades. The type of meaningful changes that occurred roughly every decade or two since the founding, turning the judiciary into what we understand it to be today, stopped cold in the early 1990s.

A concise survey includes: Congress reducing the Supreme Court's mandatory jurisdiction (1988), writing new gift acceptance rules for judges (1989) and increasing, by nearly 100, the number of lower court judgeships (1990). A decade before that yielded the annual financial disclosure requirement (1978) and the rubric for bringing complaints against judges (1980). Five other major judgeships bills, comprising nearly 450 new judges, were enacted between 1961 to 1984. Congress expanded the grounds for judicial disqualification in 1948 and 1974. Judicial councils were established in 1939.

In 1937, Congress enacted a law permitting retired justices to serve on lower courts. The Judiciary Act of 1925 reduced the Supreme Court's caseload and expanded circuit courts' jurisdiction. In 1919 senior status was created. In 1911 circuit riding ended. The Judiciary Act of 1891 established the courts of appeals. After 1875 certain state court claims could be moved to federal court. In 1869 Supreme Court membership was fixed at nine. Several other judiciary reorganization bills were passed in the decades prior to the Civil War.

What about Congress?

Despite the recent congressional inaction on the courts, Congress has enacted exacting reforms regarding its own operations. This may be hard to believe given the popular perception of the branch's dysfunction, but these reforms have made congressional operations, and the men and women who represent us, more transparent and accountable.

The public can watch committee hearings and floor activity in both houses live.[11] Senators and representatives must release, in a timely manner, extensive details about the trips that third parties pay for[12] and get prior approval from an ethics office before embarking on those trips.[13] Those reports are posted online.[14] They must tell the public within 45 days when they buy or sell a stock. Those reports are also posted online.[15] Congressmen and women must post their annual financial disclosures online, as well.[16] Congressional staff is covered by a series of anti-harassment, anti-discrimination and anti-retaliation laws.[17] Committee chairs in some cases have term limits.[18]

These reforms can serve as an outline for the federal judiciary. (*For more specificity, see Appendix A.*)

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[11] "C-SPAN through the years…," May 2020 (link).

[12] Bryan Kappe, "Overview of Travel Rules for Congress," Public Citizen, May 2011 (link).

[13] The Senate form, "Employee Pre-Travel Authorization," is here. The House one, "Traveler Form, is here.

[14] The public can find senators' travel reports here, by typing in a senator's last name and hitting the "search" bar, and they locate representatives' travel reports here, via the "search reports" tab on the left side of the page and entering the member's last name. No such database exists for judges' and justices' paid-for and reimbursed trips.

[15] Senators' periodic transaction reports and financial disclosure reports, like travel reports, can be obtained via search here. Representatives' periodic transaction reports and financial disclosure reports are available here.

[16] *Ibid.*

[17] "Newly Passed Congressional Sexual Harassment Bill Aims to Set a 'Positive Example' for Nation," Crowell & Moring, Jan. 4, 2019 (link).

[18] "Some Even Have Term Limits: Why the Supreme Court Should Join Much of the Rest of the Federal Government and Reject Lifetime Tenure," Fix the Court, July 11, 2017 (link).

The courts don't want any part in fixing themselves

Despite two centuries of the "judiciary acts" summarized on the previous page, the prevailing and ahistorical attitude of the judiciary today — as articulated by its policymaking body, the Judicial Conference of the United States, and its administrative arm, the Administrative Office of the United States Courts — is that the third branch should be left to its own devices. In other words, though the courts could choose to open up themselves, that doesn't seem likely any time soon: the judiciary has not only failed to act as a partner in modernization efforts; it has also actively tried to undermine them.

For example, neither posting justice's financial disclosures online nor adopting a formal code of conduct should be considered overly burdensome. And yet, meet the last two Chief Justices. In 1999 the Judicial Conference, led by Chief Justice William Rehnquist, voted against allowing the now-defunct APBnews.com to obtain and post online every federal judge's annual financial disclosure report,[19] though that decision was eventually overturned due to public pressure. More well known, Chief Justice John G. Roberts, Jr., in his year-end report of 2011, chafed at a congressional proposal to require him and his colleagues to follow the same ethics code that lower court judges follow. "[N]o compilation of ethical rules can guarantee integrity," he wrote at the time.[20]

A decade later, things do not seem to be getting any better. Last year the House was considering passage of the Open Court Act,[21] a bill that would have made public access to electronic court records free. The proposal had gone through many different iterations that fall, and the one that had reached the House floor in December reflected several concerns that judiciary officials had articulated earlier in the year. One such revision gave the director of the Administrative Office the ability to "temporarily delay[ ] the delivery of the system" — i.e., thwart the entire modernization project — over any number of budgetary concerns, real or imagined.

Nevertheless, the Administrative Office sent several judges talking points[22] to be used to lobby their House members in an effort to kill the bill. Many of these points are highly disputed. For example, that a case management and electronic case filing system would "cost at least $2 billion" was based on a failed California courts online case filings project[23] that was launched 20 years ago, was poorly managed and does not reflect two decades of experience on how to run more cost-effective systems. (The Congressional Budget Office cost estimate for the bill was about $9 million over 10 years.[24]) Another talking point: "civil and bankruptcy cases will have to pay double, triple, or even more in additional fees […] to file their cases in court." Yet the bill itself states[25] that increases to filing fees would only occur in rare instances, could not "impose inappropriate burdens on access to justice by litigants" and would be capped at 15 percent. This lobbying continued as the bill was being debated on the House floor. Though their effort failed, and the bill passed the House, it did not advance any further.

Another example of misguided judicial lobbying: just weeks ago, the Judicial Conference expressed its opposition to a Senate bill[26] that permits judges at any level to authorize live or tape-delayed audio or video recordings of their courtroom's proceedings. "[C]amera coverage can do irreparable harm to a citizen's right to a fair and impartial trial.

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[19] "Panel Rejects Disclosure of Judges' Finances on the Internet," Associated Press, Dec. 15, 1999 (link).

[20] John G. Roberts, Jr., "2011 Year-End Report on the Federal Judiciary" at 11 (link). While on the topic of the Chief, a source told me that Roberts made a personal visit to Capitol Hill soon after the passage of the 2018 ROOM Act, *see* note 46, *infra*, to lobby against the bill, which brought the fear of God into the staff who had written it.

[21] See note 2, *supra*.

[22] *See* "Talking Points on the Open Courts Act of 2020 (H.R. 8235)" (link), which I received from a judiciary source.

[23] Michael Krigsman, "California abandons $2 billion court management system," *ZDNet*, Apr. 2, 2012 (link).

[24] "Statutory Pay-As-You-Go Effects of H.R. 8235, Open Courts Act of 2020," Dec. 8, 2020 (link).

[25] *See* §§ 2(f) and 5(c)(2)(B).

[26] *See* note 5, *supra*. The Conference opposed S. 818 but not S. 807 since it does not opine on bills that are Supreme Court-specific.

The intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process,"[27] wrote Judge Rosalyn Mauskopf, the director of the AO and secretary of the Judicial Conference.[28]

But they don't speak for all judges

Dozens of trial courts across America have unobtrusive, remote-controlled, pool feed cameras that are capable of obscuring juries, or that are turned off when a minor or crime victim is on the witness stand. That judges-turned-congressmen are often the ones introducing broadcast bills speaks volumes. Here's what former Rep. Ted Poe, a frequent cameras-in-courts bill sponsor, told his colleagues[29] at a House Judiciary Committee hearing in 2017:

> I was a trial judge in Texas for 22 years. I tried only felony cases, everything from stealing to killing, and everything in between, and I was one of the first, if not the first, trial judge in Texas to allow cameras in the courtroom. We had a very structured system where it was very discreet. […] The camera did not film the jury. It did not film child witnesses, sexual assault witnesses or any other witness that the lawyers did not agree should be filmed. Those that opposed that system said the world would end if we had cameras in the courtroom, […] but none of that happened. Lawyers don't play to the cameras. They play to the trier of fact, whether it's the court or the jury. […] We have the greatest judicial system in the world for determining guilt or innocence. […] Why would we not want the world to see it, […] whether it's in a trial court or whether it's in the Supreme Court or appellate court or federal district court.

On the appellate side, there are no witnesses or juries, making appeals easier to film than trials. But when Americans think of courtrooms, they think of trials; luckily, any knowledge gap can be closed in real time. Take this 2014 hearing that was being broadcast on C-SPAN, and the brief statement Judge Gerard Lynch of the U.S. Court of Appeals for the Second Circuit made for the viewing public[30]:

> The procedure here is going to involve lawyers making arguments; they are likely to be interrupted and asked a lot of questions by the judges. That's not because we're rude. […] This is, to some degree, our time to ask questions to lawyers to clarify the points that they're making and the implications of those points, to perhaps raise issues that haven't been fully addressed [in the briefs].

Any judge concerned about how a livestreamed hearing may be perceived by the public can choose to begin the proceeding with a similar explanation.

There are dozens of current and former federal judges at all levels who have told me, though typically off the record, that they support basic modernization efforts, from live audio to online disclosures to stronger stock ownership rules, and would welcome congressional action — or, for the ones still serving, would welcome more autonomy on matters of courtroom administration.

Reform efforts through the lens of partisanship

The confounding reticence of judiciary administrators to modernize the third branch in a way that would increase public understanding of it, and public trust in it, moves the ball squarely back into Congress' court. Remember, if

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[27] "Letter to Chairman Durbin," Judge Roz Mauskopf, June 23, 2021 (link).

[28] *See* Tony Mauro, "Let the Cameras Roll: Cameras in the Court and the Myth of Supreme Court Exceptionalism," 1 Reynolds Courts & Media Law Journal 259 (2011) (link). Tony has been the dean of "asking the judiciary why it's resisted modernity" for decades. There are far too many examples of that to recount here but suffice it to say that Fix the Court would not exist without his scholarship.

[29] "Hearing on Judicial Transparency and Ethics," House Judiciary Committee, Subcommittee on Courts, IP and the Internet, Feb. 14, 2017 (link).

[30] "*ACLU v. Clapper* Oral Argument," U.S. Court of Appeals for the Second Circuit, C-SPAN, Sept. 2, 2014 (link).

Congress can write the recusal statutes,[31] dictate the number of federal courts,[32] set where and when they meet,[33] and more, then it can require the Supreme Court to note in its weekly orders list, "Justice Breyer took no part in the consideration or decision of this petition due to a 28 U.S.C. 455(b)(4) or (b)(5) conflict"[34] when he recuses because his brother, a federal judge, heard the case in U.S. district court or because it involves one companies whose securities he owns or his wife's former employer.[35]

The judiciary hasn't been the only barrier to change; so, too, is the partisanship with which the court reform movement has often been enveloped. Partisan concerns prompted the Federalist-controlled Congress to pass the Judiciary Act of 1801 to reduce the size of the Supreme Court, and it was the motivation behind 20th century efforts to push Justices Earl Warren, Abe Fortas, William Douglas and Clarence Thomas off the bench.

More recent attempts to improve judicial accountability have also been tied to partisanship, but many of the policies proposed by those partisans, if applied more broadly, might be considered neutral attempts at oversight. Three examples stand out. First, in the late 1990s and early 2000s, the liberal Community Rights Counsel sought to increase reporting requirements for judicial junkets, though it focused more on trips taken by judges appointed by Republican presidents over those taken by judges appointed by Democratic presidents. Yet these efforts[36] to bring more sunlight to judicial travel do not in and of themselves have a partisan valence.[37] [38]

Second, in June 2010, a conservative group, Judicial Watch, raised the question[39] as to whether Justice Elena Kagan should be conflicted out of the Supreme Court's Affordable Care Act cases due to her participation in crafting the legal strategy for upholding the law during her stint as U.S. solicitor general. They used a Freedom of Information Act request, followed by a lawsuit, to try to prove her bias. Though a Court without Kagan would be more likely to yield conservative outcomes in the ACA cinematic universe, the process Judicial Watch undertook to seek out potential bias was not itself "conservative."[40]

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[31] 28 U.S.C. §§ 144 and 455.

[32] 28 U.S.C. §§ 41 and 132.

[33] 28 U.S.C. §§ 48.

[34] *Cf.*, the 21st Century Courts Act (H.R. 6017; 116th Congress), § 3: "In the case of any matter in which a justice, judge, or magistrate judge of the United States disqualifies himself or herself under this section, the clerk of the court shall publish timely notice of the disqualification on the website of the court, with a brief explanation of each reason for the disqualification," and the Federal Judiciary Ethics Reform Act of 2006 (S.2202; 109th Congress), § 4: "Each justice, judge, and magistrate of the United States shall maintain a list of all financial interests that would require disqualification under subsection (b)(4)."

[35] This example underscores how simple some of the "fixes" would be to implement.

[36] CRC's efforts, led by Doug Kendall, provoked a 2006 change in Judicial Conference policy, whereby funders of these seminars must now disclose to the AO not only the name of organization that's paying for a seminar but also what topics a judge is to address on it. Unfortunately, these reports have never been publicly released, and what the AO does publish online, available here, sheds scant light into what's actually going on at the events or which interest groups might be behind them.

[37] Fix the Court owes much to Doug for his leadership in pushing for greater judicial transparency, his creative strategies behind those efforts and for his support of the organization from the outset.

[38] It's worth mentioning two recent examples of bipartisan attempts at oversight here. First, on Feb. 4, 2021, Sens. Sheldon Whitehouse (D-R.I.) and Lindsey Graham (R-S.C.) wrote a letter (link) to Chief Justice Roberts and Supreme Court Clerk Scott Harris asking if the Court has "any [plans] to adopt a code of ethics or to bring its gift, travel and hospitality restrictions in line with those of the Executive Branch and Congress." (Sadly, there's been no response.) Second, on June 4, 2021, Whitehouse and John Kennedy (R-La.) senator sent a letter to the Justice Department — which oversees the U.S. Marshals Service, which oversees security for the justices' out-of-Washington travel — seeking more information on the justices' often well-appointed, often free trips (link).

[39] *See* "Judicial Watch Sues Justice Department for Documents Detailing Justice Kagan's Participation in Obamacare Discussions as Solicitor General," referring to the group's June 9, 2010, FOIA request (link).

[40] It was fitting that when Fix the Court found out via 2020 public records requests that two justices failed to report reimbursed travel, it was one Republican appointee, Justice Thomas, and one Democratic appointee, Justice Sotomayor.

Third, in Jan. 2011, Common Cause, a liberal interest group, asked the U.S. Department of Justice to investigate[41] whether Justices Scalia and Thomas should have recused themselves in *Citizens United v. FEC*, decided in 2010, due to their attendance at retreats held by Charles Koch, whose organizations stood to gain from that case's holding, whereby certain limits on political spending by outside groups were held to be unconstitutional. That same month, Common Cause also learned Justice Thomas failed to include his wife's employment on a dozen of his annual financial disclosure reports. Shortly thereafter, 100 law professors, organized by the liberal Alliance for Justice, sent a letter asking Congress "to extend to Supreme Court justices the ethics code that applies to other federal judges,"[42] and by March, the Supreme Court Transparency and Disclosure Act was introduced in the House.[43] An ethics code is not "liberal," of course — and neither is concern over justices receiving free trips from individuals who might stand to gain from the cases before them.

What's possible when Congress takes the lead

Buoyed by these partisan-not-partisan efforts, and encouraged by a new non-ideological group seeking to bring transparency and accountability to the third branch, lawmakers began to unite around the idea that ethics, travel and disclosure reform should not simply be used as a tool to expose the "other" side's misdeeds but a more consistent application of best practices in government oversight. In the 114th Congress (2015-2016), House Judiciary Committee Chairman Bob Goodlatte (R-Va.), Courts, IP and the Internet Subcommittee Chairman Darrell Issa (R-Calif.) and Ranking Member Jerry Nadler (D-N.Y.) — all veterans of countless government oversight efforts — began that work in earnest, along with Committee member Hank Johnson (D-Ga.), who prior to becoming a congressman spent 12 years as a county judge. Nadler (Committee chairman), Johnson (Subcommittee chairman) and Issa (Subcommittee ranking member) remain in leadership roles today in the 117th Congress.

In July 2016, the Subcommittee held a hearing on "The Judicial Branch and the Efficient Administration of Justice." Before then-AO Director James Duff, Rep. Issa began the hearing by saying: "The judicial branch is the least well-known branch. […] It has also historically lacked transparency. It is time, however, for the judicial branch to come out of the shadows. Americans expect an open and transparent government. Americans expect disclosures of conflicts of interest along with financial disclosures."[44] Chairman Goodlatte added: "The American people expect transparency with respect to judicial actions. Transparency bolsters Americans' trust [that] fair and independent judges are above ethical reproach." This was hand-to-hand combat.

Seven months later, in Feb. 2017, another hearing took place, and more frustration poured out from Committee members on the lack of partnership in the judiciary[45]:

> Rep. Nadler: "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."

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[41] Eric Lichtblau, "Advocacy Group Says Justices May Have Conflict in Campaign Finance Cases," N.Y. Times, Jan. 19, 2011 (link).

[42] Tony Mauro, "Law Profs Urge Ethics Rules for Supreme Court Justices," *Blog of the Legal Times*, Feb. 24, 2011 (link).

[43] A version of this bill has been introduced in five successive Congresses (the 112th, 113th, 114th, 115th and 116th) but, in large part due to partisan genesis, has never gained a single Republic co-sponsor.

[44] Issa was not done, later in the hearing adding, "Everyone up here [in Congress] fills out an incredibly detailed form for financial disclosure, and it doesn't happen the same way in the judicial branch. […] Why should we not mandate, if we cannot voluntarily get from the court, a similar level of transparency for the question of possible conflicts of interest? […] I do not know who paid for trips by various justices and judges on a regular basis because it's not disclosed with the kind of transparency that we have, and my understanding is there is much less limitation on who can pay for [such a trip]" (link).

[45] *See* "House Panel Blasts Lack of Transparency in Federal Judiciary," Fix the Court, Feb. 14, 2017 (link), and note 29, *supra.*

> Rep. Issa: "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."

By the following year, Republicans and Democrats on the Committee had coalesced around a proposal called the Judiciary Reforms, Organization and Operational Modernization (ROOM) Act, H.R. 6755. That bill[46] would have created an ethics code for the Supreme Court, required recusal explanations from the justices when they stepped aside from a case or petition and would have livestreamed argument audio in SCOTUS and argument video in circuit courts. It passed through the House Judiciary Committee by voice vote on Sept. 13, 2018.

Though the bill failed to advance, Democrats the following year, with some encouragement from Fix the Court, took the very language on Supreme Court ethics in that bill and included it in their "For the People Act" (known as "H.R. 1") in the House and Senate. That language was again included in the 2021 versions of the bill.

Seeing the writing on the wall, Justice Elena Kagan told a House Appropriations Subcommittee a few weeks after H.R. 1 was first introduced, "The Chief Justice is studying the question of whether to have a code of judicial conduct that is applicable only to the United States Supreme Court. That's something we have not discussed as a conference yet, and has pros and cons I'm sure, but it's something that's being thought very seriously about."

There has been no word as to whether this "study" is ongoing, and both attempts I have made this year[47] to get clarity from the Court have gone unanswered.

But let's return to the crux of the matter, which is best laid out in the five-times-introduced (see note 43) Supreme Court Ethics Act:

> Congress has the authority to regulate the administration of the Supreme Court of the United States. For example, Congress sets the number of Justices who sit on the Supreme Court and how many constitute a quorum, the term of the court, meaning the dates the court will be in session, and the salaries of the Justices. Additionally, the Ethics in Government Act of 1978 (5 U.S.C. App.) requires most high-level Federal officials in all 3 branches, including the President, Vice President, cabinet members, Justices of the Supreme Court, and Members of Congress, to file annual financial disclosure statements.

In 2020, Nadler, Johnson and Rep. Mike Quigley (D-Ill.) introduced a bill that would have required live audio streaming for circuit and Supreme Court arguments, recusal explanations for all judges and justices, a Supreme Court code of conduct, online financial disclosures and free PACER. But the bill was introduced days before COVID became an international pandemic and soon lost momentum.

I expect a subsequent version that will incorporate these reforms and several more, including proposals being discussed by several other Commission witnesses, to be introduced in the fall.

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[46] The bill was introduced on Sept. 10, 2018, by three Republicans and was not bipartisan at introduction because it also included the creation of 52 new district judgeships, and Republicans and Democrats on the Committee disagreed on how to pay for those judgeships. So although I was told by phone that day by Democratic Committee staff that "we are on board with the transparency proposals," plus the judgeships, the GOP's judgeships pay-for precluded their co-sponsorship. In any event, the bill advanced on Sept. 13, but hard as I tried, then-Majority Leader Kevin McCarthy declined to put it on the House floor.

[47] E-mails on file with author.

Term limits for the (future) Supreme Court

I am on record supporting an end to life tenure for future justices via statute, and here is how that would work: Congress would pass a law whereby future justices would maintain the office of federal judge for life, per Art. III, §1, but after 18 years, they would move into senior status and either rotate to a lower court, retire or stand by to fill in at the high court should there be an unexpected vacancy. The math works out that a new justice would be added every two years; nine times two is an 18-year term.[48]

Eighteen is not a magic number, but I would argue there's value in ensuring that the justices serve *for a time*, not (seemingly) *for all time*. Up until about 1970, Supreme Court tenures average around 16 years. The justices who have retired or died in office since then have averaged 27 years of high court service.

Without intervention — and with the confluence of increasing life expectancies, later professional retirements and outsized power for the Court likely to continue — the average length of tenure could easily increase by another full decade before the end of the century. Justice Douglas' 36 years would become the norm. On the other hand, reducing tenures to something more reasonable, like 18 years, could double the number of individuals who'd serve on the Court over time, which would, very likely and quite critically, increase several measures of judicial diversity. And it would demonstrate that although the job is exceptional, there are more than just a handful of individuals who can fill the role at any given time.

Proposals to end life tenure for the justices are as old as the republic,[49] and the 18-year plan has been around for several decades.[50] Two recent periods have accelerated its popularity and its broad acceptance. First, soon after the end of the record 11-year period (1994 to 2005) during which there were no high court appointments, several law professors, led by Roger Cramton and Paul Carrington, led a national symposium among law faculty titled "Reforming the Court."[51] Their introduction in part reads: "This symposium deals with an important issue concerning the 'ascendant branch' of the federal government – the Supreme Court of the United States — that has received remarkably little attention: the lengthening tenure in office of Supreme Court justices." The lead article: the famous-in-certain-circles missive, "Term Limits for the Supreme Court: Life Tenure Reconsidered" by scholars Steve Calabresi and Jim Lindgren, which argues in favor of 18-year term limits.[52]

Second was what happened between June 2015 and Feb. 2016. On the front end, many leading Republicans — including several candidates for president[53] — came out in favor of proposals to end life tenure at the Supreme Court, both as a reaction to the Court that month upholding Obamacare and making same-sex marriage the law of the land and to capture the support of the GOP's historically pro-term limits base on the campaign trail.

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[48] For those concerned that having a Supreme Court confirmation hearing every two years would be too much for the country to handle, consider this: when Fix the Court in 2019 conducted eight focus groups on Supreme Court reform (two each in Des Moines, Philadelphia, New York and Washington, D.C.), few participants had any specific recollection of the Justice Gorsuch confirmation hearings, which at that point had occurred less than two years prior. (Research on file with author.)

[49] *See* Michael Mazza, "A New Look at an Old Debate: Life Tenure and the Article III Judge," 39 Gonz. L. Rev. 131 (2003–04) (link).

[50] *See* Philip D. Oliver, "Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court," 47 Ohio St. L.J. 799 (1986) (link).

[51] Roger C. Cramton and Paul D. Carrington, eds., *Reforming the Court: Term Limits for Supreme Court Justices*, Carolina Academic Press (2006) (link).

[52] Steven G. Calabresi and James Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," 29 Harv. J.L. & Pub. Pol'y (2006) (link).

[53] Ted Cruz, "Constitutional Remedies to a Lawless Supreme Court," *National Review*, June 26, 2015 (link), and Kathy A. Bolten, "Some candidates call for high court term limits," *Des Moines Register*, July 2, 2015 (link).

Then on the back end, once Justice Scalia died — which was followed by a nearly year-long blockade of President Obama's attempt to fill the vacancy, and later, the often rancorous confirmation hearings of 2017, 2018 and 2020 — countless articles, editorials and public events[54] about life tenure sprung up, moving the issue from law reviews to public discourse, with the upshot best summarized by a *Washington Post* editorial written days after another highly politicized judicial death:

> Is there a better way? The untimely death of Justice Ruth Bader Ginsburg could easily further poison the relationship between the parties, sap the legitimacy of the judiciary and encourage half the country to feel as though it has been cheated. But what if it spurred those leaders who cling to a modicum of principle to seek something better? […] The key would be to lower the stakes of any one Supreme Court pick, so the parties are not tempted to resort to all-out war every time a justice retires or dies. The best way to do that is to impose term limits — of, say, 18 years — on Supreme Court justices.[55]

Detractors most commonly cite the "good behavior" clause as rightly understood from English common law as an appointment for life. But this proposal does not violate the "good behavior" clause, as future justices could keep their office for life, moving into "senior status" after 18 years.

As senior justices, they would keep their titles and compensation, but they would not hear Supreme Court cases unless there was an unexpected vacancy due to death or resignation. And as justices have been able to do for eight decades, they could opt to serve on a lower court for as long as they wanted. One retired justice, David Souter, is doing so at this moment. Ten others preceded him in retiring from the high court and then returning to service on a lower court or courts.[56]

Recall that "senior status" in the judiciary is a statutory creation[57] and has been almost universally accepted as a constitutionally valid interpretation of Article III. Expanding senior status to apply to the Supreme Court would seem to be a natural extension. As Yale Law Prof. Judith Resnik has written:

> Just as over this past century reinterpretation [of Article III] has permitted much of the 'judicial Power of the United States' […] to be delegated to non-life-tenured jurists in courts [e.g., magistrates] and in agencies, Article III could similarly be reinterpreted to require guaranteed terms yet also to permit a mandatory, statutorily-fixed retirement age [or term limit]. Congress could enact such a statute with prospective application, such that current judges would not lose their seats, thereby avoiding any arguments that it would diminish the salary or otherwise impair the independence of sitting jurists.[58]

And in the words of Justice Breyer:

> I think it would be fine to have long terms, say 18 years or something like that, for a Supreme Court justice. It would make life easier. I wouldn't have to worry about when I'm going to retire or not. That would be easier for

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[54] "In the Wake of Justice Scalia's Death, Calls for SCOTUS Term Limits Grow Louder. Much Louder," Fix the Court, Feb. 25, 2016 (link).

[55] "Judicial term limits are the best way to avoid all-out war over the Supreme Court," *Washington Post*, Sept. 21, 2020 (link).

[56] See E. Jon A. Gryskiewicz, "The Semi-Retirement of Senior Supreme Court Justices: Examining their Service on the Courts of Appeals," Seton Hall eRepository (2015) (link). It's also worth pointing out here that after Justice John Paul Stevens retired in 2010, he worked with Sen. Patrick Leahy (D-Vt.) on a legislative proposal, S. 3871 (111th Congress; link) that would have allowed a retired justice to return to the Supreme Court in the event of a recusal. There was nothing stopping a modified version of this law from being enacted (a) after Justice Scalia's death, so Justice O'Connor, Souter or Stevens could have filled in for the 14 months between Scalia's death and Justice Gorsuch's appointment, or (b) at this very moment, seeing as how nearly every sitting justice is of advanced age, has health problems that often lead to sudden death or both.

[57] 28 U.S. Code § 294.

[58] Judith Resnik, "Judicial Selection and Democratic Theory: Demand, Supply and Life Tenure" 26 Cardozo L. Rev. 641 (2005) (link).

me. And moreover, it must be long. And the reason that it must be long is because you don't want somebody looking for his next job after — while he's a member of the court. (*For a compendium of what sitting and recently sitting justices have said about an end to life tenure, see Appendix B.*)

Proposals to end life tenure on the Supreme Court via constitutional amendment, on the other hand, should be dismissed as unserious, not because a term limits amendment wouldn't be kosher — of course it would be — but because we can't wait around for the country to move to a place in which an amendment is possible. The acrimony and resentment that occurs every time a justice leaves the Court is completely unnecessary and will only get worse unless we do something about it. Don't presume that "worse" is not possible.

A term limits statute would make high court appointments part of regular Senate business. It would move the appointment process away from a gross misapplication of the Founders' attempt to bolster judicial independence toward something our founding generation would more recognize — and a policy our current generation would approve.[59]

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In my view, "fixing the court" is not adding four justices or six justices or 29 justices. It's ensuring that members of the third branch are held to the same high standards of ethics and transparency as those in the other two.

It's real-time access to court hearings. Stronger ethics and disclosure rules. Oversight of travel and stock transactions. Increased understanding of potential conflicts of interest. Increased awareness that in a modern democracy, there should be limits to one's power and tenure.

I want to thank you again for inviting me to present this statement and to offer testimony.

[59] At least three-fourths of us, per the May 2020 poll in note 6.

Appendix A: Where things stand across a range of judiciary policies and my recommendations

Media and public access

Since 1954, the audio of Supreme Court oral arguments has been recorded, with a tape or audio file generally made available to the public around the start of the subsequent term. Beginning in 2010, the Court would release audio files at the end of an argument week, meaning on Friday afternoons. Twenty-seven times between 2000 and 2020 the Court released audio shortly after the conclusion of an argument, i.e., "same-day." Due to the pandemic, the audio of arguments conducted between May 2020 to May 2021 were livestreamed online via pool feed. (There were no oral opinion announcements during this time.) It's unclear if the live audio policy will continue in the next term, which begins Oct. 4.

All 13 circuit courts livestreamed their arguments at press times, yet it's unclear if any of them — save the Ninth and D.C. Circuits, which livestreamed before COVID — will continue post-pandemic.

SupremeCourt.gov hosts all filings in all cases, which anyone with Internet access can view and download for free. A paywall (PACER) restricts public access to case filings in lower federal courts, and to read a docket sheet or a filing on one's computer, tablet or phone, that costs $0.10 per page.

Recommendation: live argument audio should be required in all circuit courts and the Supreme Court, and district court judges should have discretion on whether or not to permit audio or video coverage, live or tape delayed, and PACER should be free.

Term limits

Life tenure in the judiciary is mostly unchanged since it was codified in a 1701 English law.[60] That said, life expectancies have increased and medicine has improved in the last 300 years, so judges are far more likely today to live and work into their 80s and even 90s than they were in centuries past. Two recent developments Fix the Court has worked are as follows: first, the first-ever bill to end life tenure in the Supreme Court for future Supreme Court judges was introduced on Sept. 29, 2020.[61] A new version will be introduced later this year.[62] Second, nearly every circuit court has a judicial wellness committee or initiative, which helps assist aging judges understand the signs of cognitive decline. These initiatives may include a "wellness hotlines" to get judges' and judicial employees' questions on cognition and aging answered by experts, a buddy system among judges for periodic cognition check-ins and seminars from neurologists on the topic of aging.[63]

Recommendation: a prospective, 18-year Supreme Court term limit should be (re)introduced via statute.

Judicial conduct

Unlike lower court judges, which must follow the Code of Conduct for U.S. Judges. the Supreme Court has no formal ethics code. Many of the anti-harassment, anti-discrimination and anti-retaliation protections codified in federal law (e.g., Title VII of the Civil Rights Act of 1964 and amendments) do not apply to judicial branch staff.

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[60] *See* note 48, *supra*, at 135.

[61] *See* Supreme Court Term Limits and Regular Appointments Act of 2020 (116th Congress), link.

[62] @RepRoKhanna: "I will be re-introducing my legislation with @RepDonBeyer to implement term limits on Supreme Court Justices. We can't have a national crisis every time there's a vacancy" (link), Jan. 27, 2021.

[63] "Judicial Wellness, Workplace Conduct and Broadcast Policies in Federal Appeals Courts," Fix the Court, Nov. 22, 2019 (link). For a discussion on why judicial wellness policies and committees are critical for in industry with an aging population, see David J. Garrow, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment," 67 Univ. of Chicago L. Rev. 995 (2000) (link), and "History of the Wellness Committee," Ninth Circuit Judicial Wellness Committee (2006) (link). On Nov. 18, 2015, I asked the AO to create a national judicial wellness committee (link), but the AO declined (see then-Director Jim Duff's Jan. 21, 2016 response, link). So I went circuit by circuit and lobbied each to create one if they hadn't yet. By now, the vast majority have.

Recommendation: the Supreme Court should write a Supreme Court Code of Conduct, and all judicial staff, from clerks to judicial assistants to federal defenders, should have the same protections in federal law as anyone else, plus the internal resources they need so they know where to go if and when misconduct occurs.

Stocks and recusals

Three of the nine justices — Roberts, Breyer and Alito — own shares in individual companies, while the rest do not. The justices are no longer compelled, and haven't been for at least a century,[64] to describe or explain the reasons for their 200-plus *cert*.-stage recusals, or their two to six merits-stage recusals, per term. The justices continue to make between two to four recusal errors per term, i.e., "missed recusals," which Fix the Court tracks.[65] Lower court judges don't even know when they've recused since case assignments are made via software, and if there's a conflict — each judge has a "conflicts sheet" that's fed into the digital system —the software will simply skip over the judge without his or her knowing.

Recommendation: judges and justices should be required to file periodic transaction reports within a few weeks of buying or selling a security, and each court, including the Supreme Court, should write a note on its website whenever a judge or justice recuses — even those identified by software — with a brief explanation as to the cause of the conflict, so long as personal privacy is not implicated.

Financial disclosures

Until 2016, the press and public could only get paper copies of the justices' annual financial disclosure report. From 2017 on, the Judicial Conference's Committee on Financial Disclosure has distributed them via thumb drive, and in the last year, the formatting changed from .TIFF (hard to search) to .PDF (easier). Lower court judges' disclosures may also be obtained via request and thumb drive, but the Committee is typically a few years behind in releasing district and circuit judges' forms, and none of the 2019s and 2020s — save a few Supreme Court shortlisters — have yet to been released, in large part since the Committee is understaffed and handles judicial nominees' disclosures, as well.

Recommendation: judges and justices' disclosures should be posted online, and the Committee should double its staff in order to facilitate more timely releases of annual disclosures.

Public appearances

The Supreme Court does not advise the press or public before a justice speaks at a law school, civic event or other colloquium, and neither does any lower court.

Recommendation: The Supreme Court and lower courts should redouble their efforts to capture judicial public events, as well as their funders, and all federal jurists should file the same exacting post-travel reports —comprising dollar amounts for reimbursed transportation, food and lodging — that officials in the other two branches file.

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[64] The Court used to explain some of the justices' recusals on some occasions. *See* "FTC Calls on SCOTUS to Resume Century-Old Practice of Recusal Explanations," Fix the Court, Apr. 27, 2017 (link), noting periodic explanations in late 19th and early 20th century orders lists, e.g., "Mr. Justice White, not having been present at the argument, took no part in this decision" (1904) or "Mr. Justice Brewer, not having been a member of the court when this case was argued, took no part in the decision" (1889).

[65] "Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests," Fix the Court, June 13, 2021 (link). As I was writing this (June 28), there was likely another missed recusal. That post will be updated, with the link staying the same, once the error is confirmed.

Appendix B: What Supreme Court justices have said about life tenure

Then-White House Associate Counsel John Roberts: "There is much to be said for changing life tenure to a term of years, without possibility of reappointment. The Framers adopted life tenure at a time when people simply did not live as long as they do now. A judge insulated from the normal currents of life for 25 or 30 years was a rarity then but is becoming commonplace today. Setting a term of, say, 15 years would ensure that federal judges would not lose all touch with reality through decades of ivory tower existence. It would also provide a more regular and greater degree of turnover among the judges. Both developments would, in my view, be healthy ones."[66]

Justice Sandra Day O'Connor: "Because it is an unfortunate fact of life that physical and mental capacity sometimes diminish with age, the people may wish to replace some older judges in order to satisfy the legitimate, indeed compelling, public interest in maintaining a judiciary fully capable of performing judges' demanding tasks."[67]

Then-Judge Samuel Alito: "If I had been a delegate to the Constitutional Convention in Philadelphia in 1787 […], I guess I would narrow the range of possibilities down to—the range of options that I would consider down to either life tenure or a long term of years so that the judiciary would be insulated from being swayed by popular opinion during a particular period as to the constitutional questions that come before them."[68]

Justice Antonin Scalia: "You always wonder whether you're losing your grip and whether your current opinions are not as good as your old ones."[69]

Justice Ruth Bader Ginsburg: "As long as I can do the job full steam [I'll stay]. I think I'll recognize when the time comes that I can't any longer."[70]

Justice Stephen Breyer: "If there were a long term – 18, 20 years, something like that – I'd say that was fine. In fact, it'd make my life a lot simpler, to tell you the truth."[71]

Justice Clarence Thomas: "It's one of the hard parts of being on the Court, watching what happens to your colleagues as time goes by. I've always said that the hard part was watching your colleagues get older and pass away."[72]

Justice Elena Kagan: "Could you do [tenure] with sufficiently long terms—18 years seems to be the going proposal—maybe. 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."[73]

Justice Breyer: "I think it would be fine to have long terms, say 18 years or something like that, for a Supreme Court justice. It would make life easier. I wouldn't have to worry about when I'm going to retire or not. That would be

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[66] "Memorandum for Fred F. Fielding from John G. Roberts; Subject: DOJ Proposed Report on S.J. Res. 39, a Bill which Proposes a Constitutional Amendment to Establish a Ten-Year Term of Office for Federal Judges," John G. Roberts, Jr., Oct. 3, 1983 (link).

[67] *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (link).

[68] "Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States," Jan. 12, 2006 (link, at 604-605).

[69] Jennifer Senior, "In Conversation: Antonin Scalia," *New York*, Oct. 4, 2013 (link).

[70] "Remembering Ruth Bader Ginsburg In Her Own Words," originally published in *ELLE* in 2014; republished Sept. 21, 2020 (link).

[71] "A Conversation with the Honorable Stephen Breyer, U.S. Supreme Court," AALS Annual Meeting, Mar. 28, 2016 (link).

[72] Bill Kristol, "Clarence Thomas," Conversations with Bill Kristol, Sept. 30, 2016 (link).

[73] "Supreme Court Justice Kagan on Pro Bono and Public Service in Conversation with American Bar Association President Bob Carlson at Georgetown University Law Center," C-SPAN, Oct. 24, 2018 (link).

easier for me. And moreover, it must be long. And the reason that it must be long is because you don't want somebody looking for his next job after — while he's a member of the court."[74]

Justice Breyer: "It would be just as good to have very long terms. Yeah, that's fine, as long as the term is long. What I was thinking of when I'm asked the question is that you don't want someone in this job, that I have now, thinking of what his or her next job will be, and that is why it has to be a long term."[75]

[74] "Interview with Bill Press at Hill Center," C-SPAN, Apr. 22, 2019 (link).

[75] "Interview with Judy Woodruff," PBS Newshour, Sept. 25, 2020. Woodruff had asked Breyer: "You said in April of last year that you wouldn't mind seeing term limits imposed on Supreme Court justices as long as they were long, and you mentioned 18 years. Do you still hold that view?" (link).