Roberts at 10:

Leader of the Supreme Court, Leader of the Federal Courts

By Brianne Gorod

I. Overview

All of the previous snapshots in our yearlong look at John Roberts's first decade as Chief Justice have focused on substantive areas of the law and how the Chief Justice's views and votes have shaped those areas. But the Chief Justice's ability to shape the law and the courts is not limited to the votes he casts or the opinions that he writes. Rather, as we discussed in the opening snapshot, the "first among equals" appellation often applied to the Chief Justice "understates the potential significance of the Chief Justice's role—both as a leader of the Court and leader of the federal judiciary." Indeed, although the power inherent in these responsibilities is significant, these responsibilities are often overlooked in discussions of the Court and the Chief Justice. In this snapshot, we look at those aspects of the Chief Justice's role—and how John Roberts has fulfilled those significant responsibilities in his first decade as Chief Justice of the United States.

We first look at the Chief Justice as a leader of the Court, and we focus in particular on three aspects of that leadership. First, when he was nominated to be Chief Justice, Roberts made clear that bringing greater consensus to the Court's decisions would be a priority. In his first decade on the Court, however, there's been little progress in this regard. To be sure, there have been a slightly higher percentage of unanimous decisions under John Roberts than there were under his predecessor, William Rehnquist (continuing a trend that predated Roberts's accession to the high court), but the increase has only been modest. And the percentage of 5-4 decisions under Roberts has been greater than under either of his predecessors, underscoring that this Court, at least through Roberts's first decade as Chief Justice, is hardly one marked by consensus.

Second, we turn to one of the most important and longstanding debates about administration of the Supreme Court, that is, the existence of transparency (or lack thereof) at the Court. Most often, this debate focuses on the Justices' refusal to allow cameras in the courtroom. During his confirmation hearing, Roberts suggested he was at least open to the idea of bringing greater transparency to the Court, claiming that he had no "set view" on cameras and would want to "listen" to his colleagues. But, in Roberts's first decade on the Court, it has become clear that there are unlikely to be cameras in the courtroom any time in the near future, although there have been modest improvements in other areas. For example, the Court now releases audio of oral arguments more quickly than it used to, and the Court has announced that it will soon make all filings with the Court available on its webpage. These

improvements are important steps toward greater transparency, but much more remains to be done.

Third, we look at one of the most significant trends at the Court over the last several decades, that is, the decline in the Court's workload—its "shrinking docket," as one law review article puts it.[1] Although Roberts observed at his confirmation hearing that the Court could probably be reviewing more cases, the "shrinking docket" has only shrunk further during Roberts's first decade on the high court.

After examining the Chief Justice as leader of the Supreme Court, we look at the Chief Justice as a leader of the federal judiciary. One of the most important of the Chief Justice's responsibilities is the appointment of members of specialized courts, such as the Foreign Intelligence Surveillance Court, and committees of the Judicial Conference. When it comes to these appointments, Chief Justice Roberts has, at least in some contexts, named to these positions significantly more judges appointed by Republican presidents than Democratic presidents, thus potentially undermining his professed goal of ensuring that the judiciary is viewed as nonpartisan. It is worth noting, however, that there may have been some modest improvement on this score in recent years, and we looked only at a limited universe of Roberts's Judicial Conference appointments.

We also look at the Chief Justice's annual reports on the judiciary. Here, Chief Justice Roberts deserves some credit. Unlike his predecessors who sometimes used these reports to advance their own ideological agenda for the courts, Roberts has largely used them to advance the interests of the federal judiciary as a whole, most often drawing attention to the need for raises for federal judges and sufficient appropriations for the federal judiciary to fulfill its responsibilities, and also highlighting the need for judicial vacancies to be filled.

Overall, then, Chief Justice Roberts's record as the head of the Supreme Court and the federal courts has been mixed. He has certainly not achieved all that he set out to achieve, but he has achieved some. And while he has not been quite as impartial a leader of the federal courts as one might have hoped based on his stated views about the role of the courts, he has not been (in at least one key respect) as bad as his immediate predecessors.

II. Confirmation Hearing and Media Interviews Early in his Tenure

Although much of John Roberts's confirmation hearing focused on substantive areas of law, there was also significant attention paid to how Roberts viewed the role of Chief Justice. He noted, for example, that "the chief justice has a particular obligation to try to achieve consensus consistent with everyone's individual oath to uphold the Constitution," and he

[1] Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012).

explained that achieving that consensus "would certainly be a priority" if he were confirmed.[2] While recognizing that this desire for legitimacy-building consensus "should be a matter of concern for all of the Justices," Roberts thought the Chief Justice "with responsibility for assigning opinions . . . has greater scope for authority to exercise in that area, and perhaps over time can develop greater persuasive authority to make the point."[3] He also explained that the other Justices might be more receptive to such a push for consensus "coming from the Chief"; they might be more willing to accept that "we are not benefited by having six different opinions in a case, that we do need to take a step and think whether or not we really do feel strongly about a point on which a Justice is writing a separate concurrence which only he or she is joining, or whether the majority opinion could be revised in a way that wouldn't affect anyone's commitment to the judicial oath to decide the cases as they see fit, but would allow more Justices to join the majority so the Court speaks as a Court."[4]

Roberts elaborated on these views in interviews conducted early in his tenure as Chief Justice. In one, he observed that his power to assign the writing of the Court's opinion when he is in the majority is not his "'greatest power; it's [his] only power,' . . . . 'Say someone is committed to broad consensus, and somebody else is just dead set on "My way or the highway. And I've got five votes, and that's all I need." Well, you assign that [case] to the [consensus-minded] person, and it gives you a much better chance, out of the box, of getting some kind of consensus.'"[5] Roberts also explained why he viewed this effort to achieve consensus as so important: "'[i]f the Court in Marshall's era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have.'"[6] He expressed concern that "'what the Court's been doing over the past thirty years has been eroding, to some extent, the capital that Marshall built up,'" and cautioned that if the Court doesn't "'refocus on functioning as an institution'" it will "'lose its credibility and legitimacy as an institution.'"[7] In a different interview, he also explained that "[t]he more justices that can agree on a particular decision, the more likely it is to be decided on a narrow basis, and I think that's a good thing when you're talking about the development of the law, that you proceed as cautiously as possible."[8]

Roberts also addressed some other areas relevant to Court administration during his confirmation hearing. For example, when asked whether he opposed cameras in the

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[2] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 303 (2005), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/content-detail.html [hereinafter *Confirmation Hearing*].
[3] *Id.* at 371.
[4] *Id.*
[5] Jeffrey Rosen, *Roberts's Rules*, ATLANTIC, Jan./Feb. 2007, http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/.
[6] *Id.*
[7] *Id.*
[8] Jan Crawford Greenburg, *Interview with Chief Justice Roberts*, ABCNEWS (Nov. 28, 2006), http://abcnews.go.com/Nightline/story?id=2661589&page=1&singlePage=true.

courtroom, he said, "I don't have a set view on that. I do think it's something that I would have to—I would want to listen to the views of, if I were confirmed, to my colleagues—"[9]

He was also asked about the Court's workload: "Well, in 1983, of course, they were hearing about 150 cases a year. They hear about half that now. Again, I don't want to prejudge questions or even be presumptuous to look down the road, but it seems to me that there's the capability there to hear more cases today, not fewer. And I'm sure there are reasons for the reduction in the caseload that I'm not familiar with that I might become more familiar with, but they handled twice as many cases 20 years ago than they do today. And I think the capability to address more issues is there in the Court."[10]

In short, during his confirmation hearing, Roberts gave some hints as to how he intended to handle the role of Chief Justice, and he made clear that one of his priorities would be trying to bring greater consensus to the Court to ensure the Court's continued institutional legitimacy.

III. Managerial Responsibilities During Roberts's First Decade on the Court

A. Leader of the Court: Unanimity and Consensus

As John Roberts finished his ninth Term as Chief Justice in June 2014, one of the dominant themes in coverage of the Court was the high degree of consensus, and even unanimity, among the Court's Justices that year.[11] Although many Court watchers attributed that high degree of consensus to the particular cases the Court heard that Term, and some questioned whether there even was a high degree of consensus that year,[12] others credited Roberts for achieving the agreement that he had set as a goal when he was confirmed.[13]

In fact, that Term was anomalous. To determine the number of cases that have been decided unanimously during each Term of Roberts's tenure, we looked to the broadest definition of unanimity identified by SCOTUSblog in its end of year Stat Pack for the most recent Term. This definition includes all cases "[w]here all Justices simply voted for the same

[9] *Confirmation Hearing*, *supra* note 2, at 324.
[10] *Id*. at 309.
[11] *See, e.g.*, Neal K. Katyal, *The Supreme Court's Powerful New Consensus*, N.Y. TIMES, June 26, 2014, http://www.nytimes.com/2014/06/27/opinion/the-supreme-courts-powerful-new-consensus.html?_r=0; Richard Wolf, *At the Supreme Court, an Uptick in Unanimity*, USA TODAY, June 22, 2014, http://www.usatoday.com/story/news/politics/2014/06/22/supreme-court-unanimous-decisions-roberts/10900049/.
[12] *See, e.g.*, Dahlia Lithwick, *The Justices Don't Like Massachusetts' Buffer Zones. But They're Fine with the One Around the Supreme Court*, SLATE (June 26, 2014, 4:08 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/scotus_end_of_term_massachusetts_abortion_clinic_buffer_zone_law_goes_down.html (noting that the term "faux-nanimous" better captured some of the Court's big decisions than "unanimous" given the Justices' strong differences of view on the proper rationale for the Court's result); *cf.* Brianne J. Gorod, *A Year of Contradictions*, 17 GREEN BAG 2d 405, 405-09 (2014).
[13] Wolf, *supra* note 11 (quoting former Judge Michael McConnell).

judgment," even if they authored conflicting opinions.[14] Under this broad definition, SCOTUSblog calculated that 66% of cases were decided unanimously in the October 2013 Term.[15] The Term before that (October Term 2012) saw 49% of cases decided unanimously,[16] the second highest percentage of unanimous decisions since the Term that began in October 2008.[17] The most recent Term (2014-2015), by contrast, saw only 41% of cases decided unanimously even under this broad definition.[18] Using the Supreme Court Database and SCOTUSblog data, we calculated that the Roberts Court has decided 45% of its cases unanimously, which does seem to reflect a slight, but noticeable, increase in unanimous rulings over previous Courts.[19] By our calculation, roughly 42% of argued cases were decided unanimously during the Rehnquist Court and roughly 39% during the Burger Court.[20]

Two significant caveats are in order, however. First, as noted, this measure of unanimity is exceptionally broad, as it would include cases in which there is significant disagreement among the Justices. For example, it would include the Court's 2014 decision in *NLRB v. Canning*, holding that President Obama's recess appointments to the NLRB were unconstitutional, even though the Court split 5-4 on fundamental questions about the scope of the President's recess appointment power.[21] When one defines unanimity much more narrowly as cases in which "every Justice joined the majority opinion in full and without reservation," the numbers can change dramatically. For example, for October Term 2013, 66% of cases were decided unanimously under the broad measure discussed above, but only 38% of cases were decided unanimously under this narrower measure.[22] We were not able to assess how this figure compares to a comparable measurement of decisions by the Rehnquist and

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[14] Kedar Bhatia, *Final Stat Pack for October Term 2014*, SCOTUSBLOG 20 (June 30, 2015, 11:23 AM), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_Stat_Pack_OT14.pdf [hereinafter *SCOTUSblog Stat Pack*]; Kedar Bhatia, *A Few Notes on Unanimity*, SCOTUSBLOG (July 10, 2014, 10:40 AM), http://www.scotusblog.com/2014/07/a-few-notes-on-unanimity/ [hereinafter *A Few Notes*].

[15] *SCOTUSblog Stat Pack*, *supra* note 14, at 5.

[16] *Id.*

[17] *A Few Notes*, *supra* note 14.

[18] *SCOTUSblog Stat Pack*, *supra* note 14, at 5.

[19] We calculated this figure by using the Supreme Court Database to count all cases by citation in which there were zero minority votes from the 2005 Term to the 2013 Term, added the number of unanimous cases for the 2014 Term as reported by the *SCOTUSblog Stat Pack*, and then divided that combined total by the number of cases from 2005-2013 as reported by the Supreme Court Database plus the total cases from the 2014 Term as reported by the *SCOTUSblog Stat Pack*. Harold J. Spaeth et al., *2014 Supreme Court Database* (Version 2014 Release 01), http://supremecourtdatabase.org/analysis.php (last visited Aug. 11, 2015); *SCOTUSblog Stat Pack*, *supra* note 14, at 5.

[20] We calculated these figures using data in the Supreme Court Database, and we counted as unanimous all cases in which the Database indicated that there were zero minority votes. Spaeth et al., *supra* note 19.

[21] 134 S. Ct. 2550 (2014).

[22] *A Few Notes*, *supra* note 14. Unanimity may also be defined as a case in which "all Justices joined some part of the same majority opinion, but one or more Justices (1) wrote separately to state their individual positions or (2) did not join the majority opinion in full." *SCOTUSblog Stat Pack*, *supra* note 14, at 20. Under that definition, 52% of cases were decided unanimously in October Term 2013. *A Few Notes*, *supra* note 14. To see how unanimity percentages differ between these three measures for October Terms 2008 through 2013, see *A Few Notes*, *supra* note 14.

Burger Courts, but the point is simply to underscore the significant percentage of cases in which there remains considerable disagreement on the Roberts Court.

Second, unanimity is only one measure of consensus on the Supreme Court. A separate measure is the number of 5-4 decisions. According to some, "unanimous decisions are a less reliable metric of Court consensus than 5-to-4 decisions, which tend to capture the most significant cases, if not also the most partisan."[23] While there's been considerable fluctuation in the number of 5-4 decisions during Roberts's tenure as Chief Justice, "Roberts has presided over three of the four Court terms [since 1801] where 5-to-4 majorities decided at least 30 percent of the rulings."[24] And the percentage of 5-4 splits is higher under Roberts than it was under his immediate predecessors: 22% of cases have been decided by 5-4 votes under Roberts as compared to 12%, 17%, and 20.5% under Warren, Burger, and Rehnquist, respectively.[25] According to SCOTUSblog, 67% of the 5-4 decisions by the Roberts Court have been "[i]deological,"[26] and 61% of those ideological 5-4 decisions have been "[c]onservative" wins.[27]

In sum, despite some claims to the contrary at the end of June 2014, the Court has clearly not become less divided in Roberts's first decade as Chief Justice. To be fair to Roberts, there may be only so much a Chief Justice can do to achieve consensus on a Court that is as divided as this one, but to the extent Roberts thought he might be able to exercise leadership to forge greater consensus on the Court, he has not succeeded thus far.

B. Leader of the Court: Transparency

The Supreme Court's transparency (or lack thereof) is a longstanding issue, and one of the most discussed topics related to Court transparency is whether cameras should be permitted in the courtroom. Although at his confirmation hearing Roberts suggested some openness to the idea, there has been no move to put cameras in the courtroom during his tenure as Chief Justice to date, and it seems unlikely that there will be cameras in the Supreme Court anytime soon. Indeed, in 2011, in response to a question on the topic, Roberts claimed that cameras were not necessary because the Court is "'the most transparent branch of

[23] David Paul Kuhn, *John Roberts' Supreme Court Is as Polarized as Ever*, THE NEW REPUBLIC (July 1, 2014), http://www.newrepublic.com/article/118500/supreme-court-polarization-why-its-bad-ever; *see* Lee Epstein et al., *Are Even Unanimous Decisions in the United States Supreme Court Ideological?*, 106 NW. U. L. REV. 699, 712 (2012) (observing that "decisions are unanimous when the ideological stakes are not large enough to lead a Justice who disagrees with the majority to dissent").

[24] Kuhn, *supra* note 23.

[25] *Id.*; *see also SCOTUSblog Stat Pack*, *supra* note 14, at 22-23.

[26] SCOTUSblog identifies "[i]deological" 5-4 splits as those in which the Court breaks down along traditional ideological lines (i.e., Roberts, Scalia, Thomas, and Alito on one side and Ginsburg, Breyer, Sotomayor, and Kagan on the other). *SCOTUSblog Stat Pack*, *supra* note 14, at 22.

[27] *Id.* SCOTUSblog defines a "[c]onservative [w]in" as "whenever the majority consists of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and O'Connor or Alito." *Id.* Interestingly, last Term, only 38% of ideological 5-4 decisions were conservative wins, but that was the only Term of the Roberts Court in which the percentage of ideological 5-4 decisions that were conservative wins dropped below 50%.

government.'"[28] According to Roberts, "'Everything we do that has an impact is done in public. We don't do the deliberations. You see the work in public in the Court. Our opinions are out there. You see the materials we look at in the briefs. What is not public are internal conferences.'"[29] Roberts also commented that the use of cameras in Congress has "'ruined'" Senate debates: "'Anyone who sees them, there is always one person standing at the podium and no one else there, people tell me it didn't use to be that way.'"[30]

There have, however, been some improvements during Roberts's tenure with respect to making oral arguments more accessible. First, in 2006, "the Supreme Court began making transcripts of oral arguments available on a same-day basis—a vast improvement over the ten-day to two-week delay in obtaining them commercially (except at significant cost)."[31] One veteran Court watcher observed that "[t]his innovation[] largely result[ed] from the efforts of Chief Justice Roberts," and it "broke decades of tradition."[32] Second, between 2000 and 2010, the Court "released same-day audio recordings 21 times," but "[i]n other cases, recordings were not released until the end of the term."[33] In September 2010, the Court began releasing audio of the week's arguments on Fridays.[34] That system was supposed to take "the court out of the business of making judgments about which arguments are newsworthy," although the Court has continued to release same-day audio occasionally in significant cases.[35] Notably, the Court has made no move toward live audio of oral arguments, even though it currently makes live audio available *within the Court* in an overflow room for members of the Supreme Court bar.

Moreover, Roberts has initiated some steps toward greater transparency in other areas. Most significantly, in his 2014 Year-End Report on the Federal Judiciary, Roberts announced that the Court "is currently developing its own electronic filing system, which may be

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[28] Josh Blackman, *Chief Justice Roberts: "We are the most transparent branch of government."*, CONCURRING OPINIONS (July 1, 2011), http://concurringopinions.com/archives/2011/07/chief-justice-roberts-we-are-the-most-transparent-branch-of-government.html.

[29] *Id.*

[30] *Id.* These comments echoed ones that Roberts made in 2006 expressing concern about the impact cameras would have on the quality of Supreme Court proceedings: "'There's a concern [among Justices] about the impact of television on the functioning of the institution. We're going to be very careful before we do anything that might have an adverse impact.'" Robert Kessler, *Why Aren't Cameras Allowed at the Supreme Court Again?*, WIRE (Mar. 28, 2013, 8:39 AM), http://www.thewire.com/national/2013/03/case-allowing-cameras-supreme-court-proceedings/63633/.

[31] Lyle Denniston, *Horse-and-Buggy Dockets in the Internet Age, and the Travails of a Courthouse Reporter*, 9 J. APP. PRAC. & PROCESS 299, 307 (2007) (footnote omitted).

[32] *Id.* at 307 n.14.

[33] Adam Liptak, *Supreme Court To Release Same-Day Recordings of Health Care Arguments*, N.Y. TIMES, Mar. 16, 2012, http://thecaucus.blogs.nytimes.com/2012/03/16/court-to-provide-same-day-audio-of-health-care-arguments/.

[34] *Id.*

[35] *Id.*; *see* Lyle Denniston, *Court To Release Same-Day Audio for Same-Sex Marriage Cases*, SCOTUSblog (Mar. 5, 2015, 11:46 AM), http://www.scotusblog.com/2015/03/court-to-release-same-day-audio-for-same-sex-marriage-cases/.

operational as soon as 2016."[36] The report promises that "[o]nce the system is implemented, all filings at the Court—petitions and responses to petitions, merits briefs, and all other types of motions and applications—will be available to the legal community and the public without cost on the Court's website."[37] This move, once fully implemented, will markedly increase public access to the briefs and other legal documents filed with the Court. It is also consistent with what one Court commentator recently called "[a]n instance of increased transparency at the Supreme Court," that is, its decision to make publicly available the filings in Supreme Court disciplinary cases.[38]

In sum, there has been some improvement in transparency during Roberts's tenure as Chief Justice, but nonetheless much remains to be done.[39]

C. Leader of the Court: Workload

Shortly after the conclusion of the Term that ended in 1972, a Term in which the Court heard 173 cases, Justice William O. Douglas commented that "the Court is overstaffed and underworked. . . . We were much, much busier 25 or 30 years ago than we are today."[40] During the Court's most recent Term, the Court heard just 75 cases (counting each discrete docket number as its own case), and issued just 66 opinions in argued cases.[41] The Court's "shrinking docket" has long been a preoccupation of Court watchers,[42] and at his confirmation hearing, Roberts suggested that there might be room for the Court to consider more cases. Despite that assertion, the Court has not been hearing more cases, it has been hearing fewer.

The numbers speak for themselves. The Warren Court heard a median of 132 cases per Term and an average of 134,[43] and that figure increased during the Burger Court to a median

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[36] John G. Roberts, Jr., *2014 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 7 (Dec. 31, 2014), http://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf [hereinafter *2014 Year-End Report*].

[37] *Id.*

[38] William Baude, *An Instance of Increased Transparency at the Supreme Court*, VOLOKH CONSPIRACY (Feb. 23, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/23/an-instance-of-increased-transparency-at-the-supreme-court/.

[39] William Baude, *The Supreme Court's Secret Decisions*, N.Y. TIMES, Feb. 3, 2015, http://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html?_r=0. It is worth also noting one change that occurred under Roberts's tenure that does not substantively affect Court transparency, but is nonetheless significant symbolically for what it suggests about the public's relationship with the Court. In 2010, the Court closed its majestic front entrance, prompting Justice Breyer (joined by Justice Ginsburg) to bemoan the change and express hope that at some point in the future it would be possible to "restore the Supreme Court's main entrance as a symbol of dignified openness and meaningful access to equal justice under law." Statement Concerning the Supreme Court's Front Entrance (mem. of Breyer, J.) (2010), http://www.scotusblog.com/wp-content/uploads/2010/05/Justice_Breyer_Statement-1.pdf.

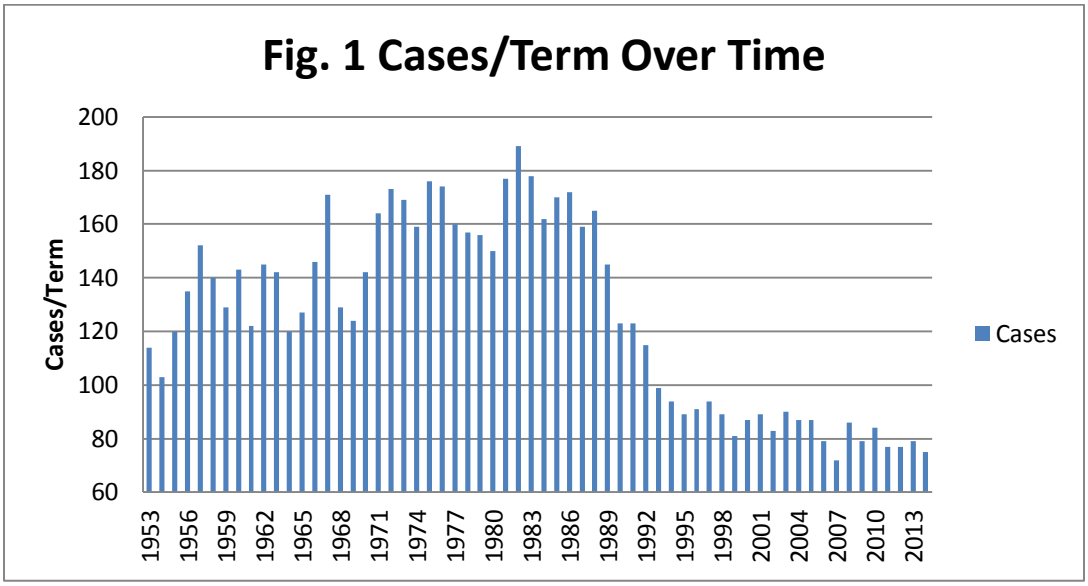
[40] ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 119 (2006).

[41] *SCOTUSblog Stat Pack*, *supra* note 14, at 15.

[42] Owens & Simon, *supra* note 1, at 1219.

[43] We calculated the figures in this Section using the Supreme Court Database, Spaeth et al., *supra* note 19, and we counted as a discrete case each individual docket number that was the subject of oral argument and resulted in a judgment of the Court. Because multiple docket numbers might be consolidated to produce one opinion, this

(and average) of 164 cases per Term. Since then, the number of cases heard per Term has steadily declined. The Rehnquist Court heard a median of just 94 cases/Term and an average of 109, and the Roberts Court in its first decade has heard a median of just 79 cases/Term and an average of only 80. Figure 1 below graphically represents this trend.

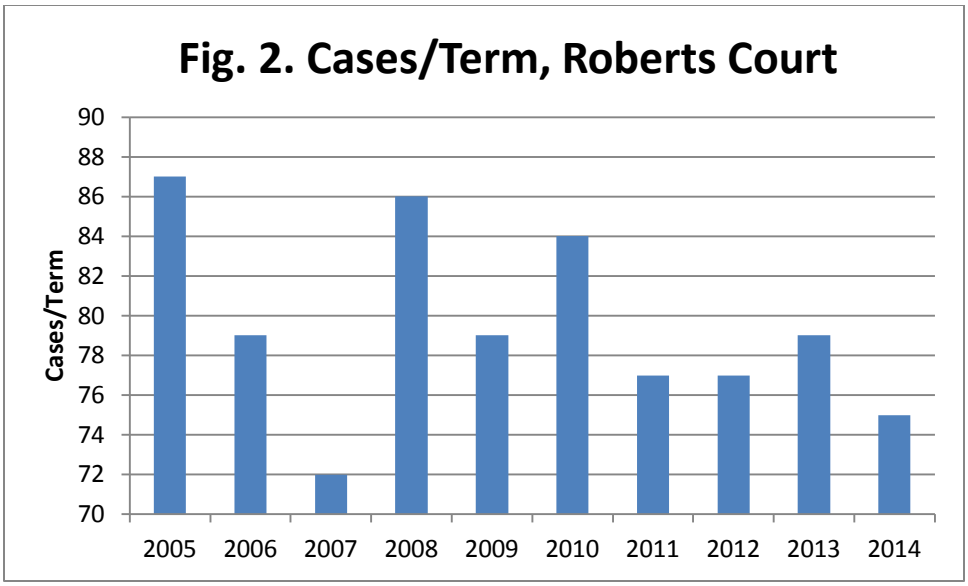


While there is not a straight-line trend during the first decade of the Roberts Court, the Court has clearly not reversed its downward trend, as shown in Figure 2 below, despite Roberts's suggestion that it might be able to do so at his confirmation hearing.[44] Last Term, the Court heard fewer cases than it's heard in any Term since 1940, but one, and that Term (October Term 2007) was also during Roberts's tenure as Chief Justice.[45]

methodology will result in higher figures than one that only considers the total number of opinions issued following oral argument. Because the Supreme Court Database does not yet have data for the October 2014 Term, we manually calculated the figure for that Term using the same criteria used for all other Terms.

[44] While the number of petitions for review filed with the Court has not been constant over the first decade of the Roberts Court, in no Term were there fewer than 7,000 petitions filed. For information about the number of petitions filed at the Court each year, see the appendices to the Chief Justice's end of year reports. *See Chief Justice's Year-End Reports on the Federal Judiciary*, SUP. CT. U.S., http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx (last visited Aug. 13, 2015).

[45] *See* Owens & Simon, *supra* note 1, at 1271.



In short, during the first decade of the Roberts Court, the Court has not been hearing more cases per year, it has been hearing fewer. There is, of course, only so much the Chief Justice can do in this regard—he has only one vote to cast in favor of review, just like his colleagues—but to the extent John Roberts hoped he might be able to encourage his colleagues to hear more cases, he thus far has not succeeded.

D. Leader of the Federal Courts: Committee and Court Appointments

As noted earlier, at his confirmation hearing and early in his tenure as Chief Justice, John Roberts made clear that one of his priorities as Chief Justice would be to try to ensure that the federal courts are not perceived as partisan. One of his powers as Chief Justice that can influence that perception is his responsibility to appoint members of special courts and of committees of the Judicial Conference. As Yale Law professor Judith Resnik has written, this is an "important" power,[46] and that is true for many reasons. Among other things, the specialized courts can exercise a significant amount of responsibility; the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review, for example, interpret the meaning of surveillance laws in classified proceedings where only the government is present.[47] And the Judicial Conference is responsible for making policy for the entire federal judiciary on a range of issues, and those policies can in turn affect how cases are litigated.[48]

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[46] Judith Resnik & Lane Dilg, Symposium, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1615-16 (2006).

[47] Some have argued that "a pro-government tilt in FISC proceedings is almost inevitable" regardless of the "political leanings of the court's judges," Elizabeth Goitein, *Appointing Democratic Judges to the FISA Court Won't Solve Its Structural Flaws*, JUST SECURITY (Apr. 16, 2015, 9:18 AM), https://www.justsecurity.org/22085/fisa-court-judges-problematic-judicial-review/, but it is nonetheless instructive to consider who the Chief Justice has appointed to these positions.

[48] Resnik & Dilg, *supra* note 46, at 1619 (noting that "[a]s Judicial Conference committees craft rules that create or narrow opportunities for access to courts . . . or for information disclosure . . . , the range of opportunities for

We first look at Roberts's appointments to specialized courts. In 2013, the *New York Times* reported that "[t]en of the [FISC] court's 11 judges—all assigned by Chief Justice Roberts—were appointed to the bench by Republican presidents," and "[s]ince the chief justice began making assignments in 2005, 86 percent of his choices have been Republican appointees."[49] Just as significantly, the *New York Times* looked at "a list of every judge who has served on the court since it was established in 1978" and found that Chief Justice Burger's and Chief Justice Rehnquist's "assignments to the surveillance court were more" diverse on this metric.[50]

Since then, however, Roberts has named a number of Democratic-appointees to these courts, suggesting that he may be trying to address the concerns raised by the 2013 story. In 2014, for example, he appointed one new judge to the FISC and one to the Foreign Intelligence Surveillance Court of Review; both were appointed to the bench by Democratic presidents.[51] In April 2015, Roberts made two more appointments to the FISC, and again both were judges put on the bench by a Democratic president.[52] Even with those more recent appointees, an April 2015 study found that "[t]he proportion of Republican appointees has been increasing—from 60 percent of Burger's designees to 71 percent of Roberts'."[53]

In fairness to Roberts, however, political party of the appointing president is only one measure of ideology, and a rough one at that. One biographical attribute that might be relevant to the ideologies of those judges serving on these courts is whether they have served as prosecutors because former prosecutors might bring a pro-government perspective to the bench. On this measure, Roberts's appointments have been more balanced than those of his predecessors: "[t]he proportion of judges with prosecutorial experience has declined from 73 percent of Burger's designees to 59 percent of Roberts'."[54]

We then looked at Roberts's appointments to the Judicial Conference committees. As noted, the Judicial Conference makes policy for the federal courts across a wide range of issues;

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plaintiffs and defendants change," and "[t]he appointment power gives the Chief Justice the ability to select particular people who shape these decisions"); *id.* ("Because committee work can be interesting and enables those involved to step back from individual cases to consider structural issues, the Chief Justice has the ability to endow some jurists with significant social (or juridical) capital—and to marginalize others."); Judith Resnik, Symposium, *Drafting, Lobbying, and Litigating VAWA: National, Local, and Transnational Interventions on Behalf of Women's Equality*, 11 GEO. J. GENDER & L. 557, 560 (2010) ("the Judicial Conference took the official position that, while 'supporting the objectives' of VAWA, it was opposed to enactment of the civil rights remedy of VAWA").

[49] Charlie Savage, *Roberts's Picks Reshaping Secret Surveillance Court*, N.Y. TIMES, July 25, 2013, http://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html?pagewanted=all&_r=0.

[50] *Id.*; *see id.* (concluding that "66 percent of their selections were Republican appointees").

[51] Michael McGough, *Is Chief Justice John Roberts 'Unpacking' the FISA Courts?*, L.A. TIMES, Feb. 7, 2014, http://www.latimes.com/opinion/opinion-la/la-ol-roberts-fisa-court-democrats-20140207-story.html.

[52] Goitein, *supra* note 47.

[53] Russell Wheeler, *Changing Composition of the Foreign Intelligence Surveillance Court: New Designees*, BROOKINGS FIXGOV (Apr. 16, 2015, 5:00 PM), http://www.brookings.edu/blogs/fixgov/posts/2015/04/16-fisc-judges-wheeler (emphasis omitted).

[54] *Id.* (emphasis omitted).

it is composed of roughly twenty-five standing committees and an assorted number of *ad hoc* committees.[55] Examining all of Roberts's appointees to all twenty-five committees was beyond the scope of this snapshot, but we looked at the party of the appointing President for all of the current committee chairs, as well as the full membership of three of the committees.[56] We choose those three committees at random, with the caveat that we wanted to choose at least one committee focused on civil law and one focused on criminal law. This examination gives a window, albeit only a limited one, into Roberts's appointments to the Judicial Conference committees.

Most important, by our count, just under two-thirds of the current committee chairs are judges appointed to the bench by Republican presidents. Within the three committees whose full membership we examined, the composition varies. On the Committee on Criminal Law, which influences sentencing and corrections law, nine of the twelve federal judges on the committee were appointed to the bench by Republicans.[57] On the Committee on Judicial Resources, which is responsible for all issues related to human resource administration (e.g., identifying districts in which additional Article III judgeships should be created), ten of the thirteen members who are federal judges were appointed by Republicans as of 2013.[58] And, finally, on the Advisory Committee on Civil Rules, which makes recommendations for changes to the Federal Rules of Civil Procedure, three of the members were appointed by Democratic presidents, while six were appointed by Republican executives (one is a state supreme court judge appointed by a Republican governor); eight (including two "liaison members") are not federal or state appointed judges.[59] It is, of course, impossible to extrapolate from the membership of three committees to the rest of the Judicial Conference, but as to these three

[55] *Administrative Offices and Agencies: Committees of the Judicial Conference of the United States*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/admin_01_01_02.html (last visited Aug. 6, 2015); *Governance & the Judicial Conference*, U.S. CTS., http://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last visited Aug. 6, 2015). We include in that count the five advisory committees under the Committee on Rules of Practice and Procedure.

[56] Because "[a]s a general rule, committee appointments are for a term of three years, subject to one reappointment," we assume those currently serving were appointed by Roberts. *About the Judicial Conference*, U.S. CTS., http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference (last visited Aug. 10, 2015).

[57] Committee membership as of July 13, 2015, as reflected in the letterhead of a recent Committee memo. Memorandum from Honorable Irene M. Keeley, Chair of Comm. on Criminal Law of the Judicial Conference of the United States, to Judges of the United States District Courts (July 13, 2015), http://pdfserver.amlaw.com/nlj/Clemency%20Project%20memo.pdf. One member, Franklin L. Noel, is a magistrate judge and accordingly is not counted.

[58] Committee membership as of October 2, 2013, as reflected in letter from Committee Chair Timothy Tymkovich to Senator Patrick Leahy. Letter from Timothy Tymkovich, Chair of Comm. on Judicial Res. of the Judicial Conference of the United States, to Senator Patrick J. Leahy, Chair of the Comm. on the Judiciary (Oct. 2, 2013), http://www.judiciary.senate.gov/imo/media/doc/091013QFRs-Tymkovich.pdf. Two members, Linda Anderson and Dale Somers, are magistrate and bankruptcy judges respectively and accordingly are not counted.

[59] Committee membership as reflected in the Advisory Committee on Civil Rules Agenda Book for April 9-10 of this year. *Advisory Committee on Rules of Civil Procedure - April 2015*, U.S. CTS. 9-11 (Apr. 2015), http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2015.

committees, it is fair to say that Roberts's appointments have not been balanced when measured by the partisan affiliation of the appointing president.

All in all, Roberts's appointments to the special courts and the Judicial Conference committees seem to be in some tension with his promise that he would try to keep partisanship out of the judiciary. That said, there has been some improvement recently, providing hope that continued public focus on Chief Justice Roberts's appointments will produce appointments going forward that are more balanced than they have been in the past.

E. Leader of the Federal Courts: End of Year Reports

One of the Chief Justice's lesser known responsibilities is to release an annual report on the state of the federal courts. Nodding to how little attention these reports generally receive, Roberts one year wrote that he "once asked [his] predecessor . . . why he released this annual report on the state of the federal courts on New Year's Day" and was told that "it was difficult to get people to focus on the needs of the judiciary and January 1 was historically a slow news day—a day on which the concerns of the courts just might get noticed."[60] While these annual reports may receive relatively little attention, that does not mean that they are not significant, or that they do not reveal something about the Chief Justices who write them. Judith Resnik and Lane Dilg, for example, have observed that Chief Justice Burger used these year-end reports to argue for tools to "cut back on federal court jurisdiction."[61] William Rehnquist, too, they note, "used that medium to insist that too many issues were before the federal courts."[62]

In his first decade of annual reports, Roberts has, to his credit, distinguished himself from his predecessors by largely focusing on issues of general interest and importance to the judiciary, rather than pushing an ideological agenda. In his first such report, for example, Roberts focused on appropriations and judicial independence, noting that "[i]n recent years, the budget for the federal judiciary and the ever-lengthening appropriations process have taken a toll on the operations of the courts."[63] Among other things, he noted that "[a] more direct threat to judicial independence is the failure to raise judges' pay."[64] Roberts exhorted Congress to raise judicial pay, stating, "I understand that it is difficult for Congress to raise the salaries of federal judges, especially in a tight budget climate. I also understand that it is the responsibility of Congress to do difficult things when necessary to preserve our constitutional system."[65]

This is a theme to which Roberts has returned again and again in his year-end reports. For example, in his 2006 report, Roberts again focused on judicial pay. Indeed, he addressed

[60] John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 1 (Jan. 1, 2007), http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf [hereinafter *2006 Year-End Report*].
[61] Resnik & Dilg, *supra* note 46, at 1603.
[62] *Id.* at 1609.
[63] John G. Roberts, Jr., *2005 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 2 (Jan. 1, 2006), http://www.supremecourt.gov/publicinfo/year-end/2005year-endreport.pdf.
[64] *Id.* at 3.
[65] *Id.* at 5.

only that one issue, "in an effort to increase even more the chances that people will take notice."[66] This is important, Roberts explained, because "the issue has been ignored far too long and has now reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary."[67] And in his 2007 report, Roberts noted that he was "committed to continuing three of [his] predecessor's important but unfinished initiatives to maintain the quality of our courts," one of which was to "continue Chief Justice Rehnquist's twenty-year pursuit of equitable salaries for federal judges."[68] (The two others were to "carry on the efforts to improve communications with the Executive and Legislative Branches of government" and to "ensure that federal judges maintain the highest standards of integrity."[69])

In Roberts's 2008 report, his pleas for increased judicial compensation became even more impassioned: "I suspect many are tired of hearing it, and I know I am tired of saying it, but I must make this plea again—Congress must provide judicial compensation that keeps pace with inflation."[70] Later in the report, Roberts wrote, "Given the Judiciary's small cost, and its absolutely critical role in protecting the Constitution and rights we enjoy, I must renew the Judiciary's modest petition: Simply provide cost-of-living increases that have been unfairly denied! We have done our part—it is long past time for Congress to do its."[71] The rest of that year's report focused on "what the dedicated men and women in the Judiciary are doing to control the costs of administering justice,"[72] and how small the judicial appropriation is.[73]

And in 2012, after observing that "[n]o one seriously doubts that the country's fiscal ledger has gone awry," Roberts again returned to the Judiciary's efforts to cut costs.[74] He also noted again the need for more judges, "encourag[ing] the President and Congress to be especially attentive to the needs of the Judicial Branch and provide the resources necessary for its operations. Those vital resource needs include the appointment of an adequate number of judges to keep current on pending cases."[75] In 2013, Roberts once again focused on "the need

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[66] *2006 Year-End Report*, *supra* note 60, at 1.
[67] *Id.*; *id.* at 8 ("As we enter the new year, the federal judiciary remains strong, but it needs the support of the coordinate branches if it is to maintain the strength and independence it must have to fulfill its constitutional role. That is the challenge for the coming year.").
[68] John G. Roberts, Jr., *2007 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 4, 6 (Jan. 1, 2008), http://www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf; *see id.* at 8 ("I simply ask once again for a moment's reflection on how America would look in the absence of a skilled and independent Judiciary.").
[69] *Id.* at 4, 5.
[70] John G. Roberts, Jr., *2008 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 7 (Dec. 31, 2008), http://www.supremecourt.gov/publicinfo/year-end/2008year-endreport.pdf.
[71] *Id.* at 8-9.
[72] *Id.* at 3; *see id.* (noting that the Judiciary "has found new ways to achieve significant savings in three general areas: rent, personnel, and information technology").
[73] *Id.* ("Two-tenths of 1%! That is all we ask for one of the three branches of government—the one charged 'to guard the Constitution and the rights of individuals.'" (quoting THE FEDERALIST NO. 78 (Alexander Hamilton))).
[74] John G. Roberts, Jr., *2012 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 3 (Dec. 31, 2012), http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf.
[75] *Id.* at 9.

to provide adequate funding for the Judiciary,"[76] explaining in detail the Judicial Conference's requested appropriation and why those funds were necessary.

Most of the other topics in Roberts's year-end reports to date have been similarly uncontroversial, at least from an ideological or partisan perspective. In 2009, the Chief Justice kept it brief, issuing a report whose body text was but one page and "limited to what is essential: The courts are operating soundly, and the nation's dedicated federal judges are conscientiously discharging their duties."[77] In 2010, Roberts wrote about the Judicial Conference's approval of the *Strategic Plan for the Federal Judiciary*, and he noted two "immediate obstacles to achieving [the Judiciary's] goals": "an economic downturn that has imposed budgetary constraints throughout the government, and the persistent problem of judicial vacancies in critically overworked districts."[78] With respect to the second obstacle, he seemed to cast blame on both parties, noting that "a persistent problem has developed in the process of filling judicial vacancies. Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes. This has created acute difficulties for some judicial districts."[79] He urged the "political branches to find a long-term solution to this recurring problem."[80]

In his 2011 report, Roberts focused on ethics issues affecting the Supreme Court, and used the report to explain how and why the Court's approach to ethical issues differs from that of the lower courts. Among other things, Roberts noted that one major difference in the recusal process for Supreme Court justices, as compared to other judges, is that "[t]here is no higher court to review a Justice's decision not to recuse in a particular case," and Justices must take into account that their recusal will result in the Court "sitt[ing] without its full membership."[81]

Finally, Roberts used his 2014 report to announce that "[t]he Supreme Court is currently developing its own electronic filing system, which may be operational as soon as 2016."[82] As discussed above, this system will make "all filings at the Court . . . available to the legal community and the public without cost on the Court's website."[83] At the same time that Roberts announced this innovation, he also tried to deflect criticism of the Court's failure to adopt other technologies and made clear that the public shouldn't count on other technological

[76] John G. Roberts, Jr., *2013 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 1 (Dec. 31, 2013), http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf.
[77] John G. Roberts, Jr*., 2009 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 1 (Dec. 31, 2009), http://www.supremecourt.gov/publicinfo/year-end/2009year-endreport.pdf.
[78] John G. Roberts, Jr., *2010 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 4, 5 (Dec. 31, 2010), http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf.
[79] *Id.* at 7-8.
[80] *Id.* at 8.
[81] John G. Roberts, Jr., *2011 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 8, 9 (Dec. 31, 2011), http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.
[82] *2014 Year-End Report*, *supra* note 36, at 7.
[83] *Id.*

changes to come to the Court anytime soon. "Like other centuries-old institutions," he wrote, "courts may have practices that seem archaic and inefficient—and some are. But others rest on traditions that embody intangible wisdom."[84]

In sum, while one might not agree with everything the Chief Justice has written in his annual year-end reports, there should be little disagreement that Roberts has used these reports to address topics of general importance to the judiciary and those who care about our nation's courts, rather than to advance more controversial and ideological ends.

IV. Conclusion

The Chief Justice is often called the "first among equals," and the "first" appellation carries with it real powers and responsibilities. As leader of the Supreme Court and leader of the federal courts, John Roberts's record has been mixed. While there have been improvements in some areas (such as Court transparency), those improvements have been modest, and there are other areas (such as Court workload) in which there has been no improvement at all. While there are contexts (such as year-end reports) in which Roberts has worked to advance the interests of the courts as a whole without regard to ideology or partisanship, there are others (such as appointments) in which it is difficult to reach the same conclusion. Thus, when it comes to Chief Justice Roberts's exercise of his managerial and administrative responsibilities, the story of his first decade on the Court has been a complicated one, which should make it interesting to see how this story continues to unfold in his second decade.

[84] *Id.* at 11.