

## Fed Jud Webinar — timestamp notes for email to members

### [Webinar](#)

(LWV US [Website Resources](#) are here)

5:40 — Introduce panelists

Alicia Bannon directs Judiciary Project, [Brennan Center](#) for Justice ([judiciary](#) pages),  
Thomas Berry from the [CATO Institute](#),  
Erinn Martin from [NGV LLC](#) (previously at [National Women's Law Center](#))

8:30 — Marcia Johnson, Chief Counsel for LWV US

10:20 — Alicia Bannon

18:00 — Thomas Berry

23:50 — Erinn Martin

27:40 — Marcia to moderate Q&A from LWV Fed Judiciary Study and then from audience

28:30 — What is the most pressing issue about what is harming judicial legitimacy?

- Politicization of confirmation process
- Unpredictability of vacancies + lengthier tenure of justices (up to 27 years)
- Perception that the Court is behaving in a political manner, not as a court

34:15 — What are the consequences of public opinion being at an all-time low?

- The more rushed, the more biased decisions appear; the media covers decisions too simplistically; Congress is abdicating its responsibilities around constitutionality, evaluating things only on policy — so Congress is leaving the courts to be the last and only check on constitutionality, which then lets executive branch to abdicate responsibility to courts
- It's harder for SCOTUS to stand up to other branches of govt when its approval rating (perceived legitimacy) is low
- It's the lack of enforcement of the rule of law and erosion of norms, that everything will be challenged because everything is political

39:00 — What are the consequences of frequent use of the shadow docket?

- Two kinds of decisions without reasons: 1) denials of *certiorari* (the case shouldn't have been brought to us), 2) case rulings to reverse or uphold circuit court rulings. #2 should be transparent about votes, with faster written opinions on the merits.
- The increase in shadow docket rulings is concerning (several times/term vs 40 times during Trump's first term) and the types of cases (national security vs civil rights) because with no written rationale there's no guidelines for lower courts to follow
- The shadow docket is essentially the emergency docket and emergencies exist, but SCOTUS could move faster to resolve issues, and perhaps some types of cases could be made regularized to be heard without delay (e.g., death penalty appeals). It is not always clear what legal standard the Court is using to make its determination in shadow docket rulings because it's silent on its reasoning: courts need to articulate the legal standard they're applying and how.

45:30 — What ethics mechanisms for enforcement do you recommend?

- SCOTUS don't have anyone above them regarding recusal, so there needs to be enforcement (by other SCOTUS or Circuit Court judges or a rotating panel of Circuit and District Court judges) around conflicts of interest or, as an example from last term, where one justice met *ex parte* with an attorney for a case before the court or failure to disclose financial entanglement with parties appearing before the court; and we need disclosure and transparency (requirement to disclose), especially for gifts for anyone and especially for those appearing before the court (including in amicus briefs).
- A key distinction at play: recusal or forced recusal is so much more consequential in SCOTUS than in the lower courts; appellate courts hear cases in panels of three so recusal means a different judge (of 12) on the panel and only rarely would it change a vote in a very close *en banc* vote (all 12 hearing the case) and most cases are by panel; SCOTUS always has all 9 justices, so recusal will change how many votes there are and SCOTUS decisions are always more consequential, making the decision for the entire country, not one eleventh of the country — so it's a lot of power to put in the hands of other SCOTUS justices or lower-court judges — and there may be constitutional issues ([Pauline Newman](#) case may address some of this); the impeachment should have more sunshine so Congress has more evidence available.
- Some of the concerns about recusal would be resolved by more robust rules around conflict at the front end, and we need a more robust enforcement mechanism, including a complaint process and review with transparent results of any inquiry. SCOTUS noted a need but refused to create such a system. Congress should require them to create such a system.

53:25 — Audience Question about Term Limits: How do you feel about a ten-year renewable term based on unbiased record to avoid need for impeachment? and what we need to enact term limits?

- Much of my work has been with state courts where these renewable process exist and my work leads me to have concerns about judicial independence (judicial decision-making should not be influenced by how the decision will look, e.g., evidence suggests sentencing is more harsh in election years because judges recognize how lighter sentences may look). Similarly studies of when judges are facing a mandatory retirement age, their behavior changes because they are not facing such pressures. From the perspective of judicial independence, having a lengthy single term would better protect independence.
- It would also raise constitutional questions. The Term Act, which requires senior status, which SCOTUS has previously ruled is legal.
- Any system where justices have their terms extended (or not) at the discretion of a political body puts unacceptable incentives in place.

58:16 — So let's say we all agree on term limits, what would be the preferable length and how would you justify whatever number you pick?

- The most common recommendations are 18 years, which has to do by the size of SCOTUS. If you want to have regular appointments, 9 members would mean a vacancy every two years, so it would regularize the process.
- Another benefit: you would no longer have the incentive for young judges. Appointed at 55, you could serve the full term while today you're no longer in the candidate pool
- you'll also be closer to the historic averages of length of tenure of 15-16 years, which went way up only recently

1:00:51 — Why do you say today's SCOTUS has power that would be unrecognizable to Founding Fathers?

- John Jay described SCOTUS as a terrible job — the federal govt was smaller and the rights revolution hadn't happened. You had to ride circuit, it wasn't prestigious, and it had little effect on Americans. Today it is far more powerful.
- The ineffectiveness of Congress has made SCOTUS more powerful. If Congress didn't like a SCOTUS decision, Congress would act. (Voting Rights Act was gutted and Congress didn't respond.) Today, the number of executive orders is ballooning because Congress is not checking the SCOTUS rulings.
- The history of SCOTUS often surprises, e.g., the Bill of Rights didn't apply to the states until the Civil War and SCOTUS didn't acknowledge that until the early 20th century. A lot of what we consider bedrock constitutional law is less than 100 years old. Bread and butter civil rights cases didn't come up when SCOTUS was only dealing with federal laws and it was less likely to be the law citizens were interacting with.

1:05:17 — What role can nonpartisan organizations like LWV play in education advocacy around federal judiciary nominations

- Nonprofits play a significant role in providing analyses and framing of court decisions: even if people don't know to check websites, the media does and that affects coverage. At the grassroots level, local chapters can connect implications of federal decisions to respective states.

1:05:17 — What role can they play around nominations:

- For nominations, we can submit advocacy letters to the Senate (501(c)3s can spend 20% on lobbying) and blogs on nominations. Typically 501(c)4's do more direct lobbying
- Education on why courts matter to local communities really matters; it's a critical role for LWV
- Cato voluntarily does no advocacy, but we do push back on sound bites that can make decisions sound terrible (rather than rational): on refugees, asylum. Reasonable people can disagree and these weren't political decisions.

1:09:30 — What about "judge shopping" and is there a way to stop this practice?

- There has been a trend toward judge shopping and it's concerning around public perception, particularly because we have some very small divisions where the shopping is one judge (e.g., TX single-judge divisions) who is willing to do nationwide injunctions. Brennan Ctr has filed a letter to address this: encouraging judicial conference to make a rule change: that if you are seeking a national injunction (or other national ruling), there should be a randomized process of assignment across your whole district. The judicial took up a policy but results have been inconsistent. It needs a rule change.
- It has become a larger issue related to nationwide injunctions (which was never the case when they rode circuit).
- We could have a whole panel on nationwide injunctions; for the sake of percolation and to stop gamesmanship we should end nationwide injunctions.

1:13:35 — Is there a problem with the blue slip process, where Senators can influence federal judiciary nominations or confirmations?

- It's not a Senate rule; it's up to the chair how it is used. Currently none are required for Circuit Court judges, now only for District Court judges, but Grassley may be different
- It has become easier to confirm judges (because of end of filibuster) so judges can be confirmed with more partisan views; fewer moderate jurists are being put forth

1:17:15 — How can recusals be enforced?

- A difficult question, but it would help if more specific rules for recusals were required and more explicit reason-giving for stepping aside or not; we need to have independent ways to have others assess the issues (we don't assess our own biases well)

1:19:35 — Could you give a lay definition of shadow docket?

- The normal way SCOTUS decides includes a months-long process of receiving briefs, followed by oral arguments, and then it writes opinions, usually at least 15 or so pages long (sometimes 30-40 pages long). In the shadow docket, SCOTUS takes action that have real effect and change the status quo in many cases but aren't through that normal process. Usually they are rushed, sometimes having only one brief filed, sometimes simultaneously by both sides, and almost always without any oral argument and often without any written opinion.

1:21:00 — In terms of realistic next steps, what can be done about politicizing the judiciary and enforceable codes of conduct?

- Term limits may be the most realistic, I see Gen Z and broader public support there. The right says the left is punishing Thomas for not disclosing gifts which they say is an honest mistake, although they don't account for Alito's flag-flying. Term limits has the advantage that it will affect judges across the board, not by party so it would be easier to build support for it were Congress to campaign on it.
- Disclosure is a good place to start by making explicit rules so Court could self-police.

- Term limits and some kinds of ethics reform have broad bipartisan support even though specific debates have become more polarized. Laying the groundwork across grassroots discussions is important to move the country to change.

1:24:22 — So is there no recourse to allow a SCOTUS Justice to continue serving even with diagnosed dementia?

- Consider William O. Douglas who hung on in the late 70s a few years longer than he possibly should have — and the other justices reached an informal decision to push off any opinions where he was the deciding vote until the next term. This suggests there isn't much recourse. The Pauline Newman case is on-going to determine if it's constitutional to force a lower court judge to step down on claims of mental disability but, as we've said, that's not enforceable at SCOTUS level.

1:25:30 — What would be your takeaways for the participants in this webinar as they enter into the study process? What should they have as top of mind?

- I think keeping the framing by the founding fathers in mind: that the judiciary is an impartial branch of government, free from bias (which is affecting public trust), so reforms need to be created to be nonpartisan.
- The first principle is judicial independence; reform has to take a long view so it can be permanent. Avoid trying to counteract a trend that varies based on who has power, who has a majority.
- Focus on basic values, why we care about the court, and how to deal with the court's accretion of power in a way that still respects judicial independence. That's why I find term limits so compelling because it addresses concerns about individual justices having power for life without targeting any individual. Also public education and civic education are important in this moment — especially on the roles of the courts and what reform options are being considered,

1:31:00 — End