LWVUS FEDERAL JUDICIARY STUDY

BACKGROUND ON THE STUDY

At the national League of Women Voters (LWVUS) 2024 Convention, delegates voted to proceed with a study on the federal judiciary. The study is unusual in two respects:

1) It includes a broad range of issues, covering an entire branch of government.
2) It is on a fast-track timeline with the goal of announcing a position at the LWVUS 2025 Council in June 2025.

The LWVUS has prepared ten short policy papers discussing various aspects of the federal judiciary. Those policy papers and recordings of a kickoff webinar and an online town hall are posted here on the LWVUS website. We have referenced certain relevant portions of these materials in the discussion below but encourage our members to review all the materials for a fuller understanding of the issues.

The LWVMC will address this study and the proposed consensus questions at our April Discussion Groups. In preparation for those discussions, we convened a small group of LWVMC members, including attorneys with experience working with and in the federal judiciary, to review the materials and synthesize the issues for our membership. We highlight below some particular concerns about the scope of the study as well as the statements the LWVUS has presented for consensus.

As noted above, the study addresses the entire judicial branch rather than specific areas of policy. Some have argued that because the League has positions regarding the legislative and executive branches, it should similarly have positions addressing the judicial branch. On the other hand, the existing League positions were developed over decades, involving many studies focused on specific questions and policies. Does the need for policies outweigh the advantages of the traditional League approach of intensive study of specific issues?

The proposed consensus statements are very general. This can be positive in that it avoids narrowly addressing the "hot issue" of the moment and could provide more lasting guidance. On the other hand, some of the statements are so vague as to be meaningless in guiding advocacy on recommended remedies that Congress might propose. Members should discuss first whether there is sufficient information to justify the proposed position. Then we should discuss whether endorsing a general statement will be meaningful in guiding advocacy or whether it might serve as a blank check for any legislation that League leadership may support.

Another general concern is that the League's reputation and credibility are based primarily on its work addressing issues around voting rights and elections. The League has positions on other issues, such as environmental protection and women's rights, but we should consider carefully whether we will have the same credibility in addressing issues that relate to the structure and procedures of the courts.

Finally, the study is conducted in the context of controversies around the Supreme Court. These controversies arose from apparent ethical lapses by some Justices as well as from unpopular decisions regarding the 2000 election, gay marriage, abortion, gun ownership and voting rights. Media coverage of the Supreme Court has focused on sharp ideological divisions with general agreement that a bloc of conservatives form a majority. The Court's reputation has also been affected by the refusal of the Senate to vote on then President Barrack Obama's nomination to the Court of Merrick Garland,

ostensibly because an election was "only" nine months away, but then subsequently confirming Justice Amy Coney Barrett only a few weeks before the 2020 election. All of these factors have contributed to the public impression that the court is not a neutral arbiter of the law but is simply another political branch. This is occurring at a time when the courts are facing political pressure to adjudicate challenges to certain actions of President Donald Trump while some members of Congress threaten to impeach any judge who rules against him. Will the League's adoption of these principles contribute to further politicization of the Court or to restoring its role as a protector of the Constitution and laws of the United States?

Given the very broad scope of the proposed statements, members may first want to decide whether to attempt to reach consensus on all of them or to select a few on which there is general agreement and recommend that the others be dropped or studied further. After reviewing the available materials, the LWVMC study committee has grave concerns about the repercussions of a wholesale adoption of the proposed positions below. While we do not find the first four positions to be particularly problematic, the remaining eight positions raise issues that we believe counsel against adopting them.

BACKGROUND ON THE FEDERAL JUDICIARY

The federal judiciary is established in Article III of the Constitution. It plays a distinct role in our system of government. The legislative branch is intended to reflect the will of the people, changing membership and policies to reflect changing attitudes. The short, two-year term of representatives is an example of that intent to build in responsiveness. Congress exercises legislative power, writing new laws and policies to reflect the public mood. The President, while required to execute the laws adopted by Congress, is similarly subject to election for a four-year term to enable the public to influence administration of the laws. In contrast, the role of the courts is to interpret the laws, including the Constitution, whether or not their decisions are politically popular. The framers of the Constitution had strong memories of British kings replacing judges who ruled against royal governors in the colonies. To insulate judges from political pressures, the Constitution provides that:

1) Judges are not elected but rather are nominated by the President and confirmed by the Senate.[1]
2) Judges have life tenure.
3) Judges' salaries may not be reduced.

In simplest terms, there are three levels of federal courts:

1) District courts hear both criminal and civil cases while bankruptcy courts within each district handle petitions for bankruptcy.[2]
2) Twelve circuit courts of appeals hear appeals from the district courts, overturning decisions when procedures have not been followed or if the result is inconsistent with the law.
3) The Supreme Court hears appeals of decisions made by the courts of appeals.

General policies for the courts below the Supreme Court are adopted by the Judicial Conference of the United States, which is composed of judges from each of the courts of appeals circuits.

[1] There are exceptions: Bankruptcy judges serve 14-year terms and are appointed by the courts of appeals; magistrate judges serve seven-year terms and are appointed by the district courts. There are also "Article I Courts" such as the court of claims, and tax court and administrative agencies have administrative law judges, but these are not part of the federal judiciary and are not addressed in this study.

[2] The nation is divided into 94 districts, corresponding to states or portions of states.

All three branches of government have systems of accountability, but these reflect the varying roles of the branches. The remedy for Congress or the President making a bad decision is an election in which the voters choose new officials. The remedy for a judge making a bad decision is an appeal to a higher court that can reverse the decision for failing to follow the applicable law. A circuit court of appeals also may direct that a case be assigned to a different judge.

The systems of accountability for individual judges include protections for judicial independence. The House of Representatives may impeach judges and the Senate can remove them from office, but this requires a two-thirds vote in the Senate and has happened only a few times. Other judges of a particular court also may relieve one of their judges from judicial duties for misconduct. That disciplinary procedure has safeguards against abuse for political or ideological purposes.

LWVUS CONSENSUS QUESTIONS

For each of the 12 proposed position statements below we will be asked to report one of the following:

- Strong consensus for
- Moderate consensus for
- Strong consensus against
- Moderate consensus against
- No consensus

The proposed statements are:

1. Transparency is essential to an effective federal judiciary.
2. Accountability is essential to an effective federal judiciary.
3. Independence is essential to an effective federal judiciary.
4. Ethics is essential to an effective federal judiciary.
5. There should be binding universal standards of conduct for judges and Justices at all levels of the federal courts.
6. Court hearings, documents filed in the court and rulings for all federal cases should be open and available to the public.
7. There should be an effective enforcement mechanism for the federal judiciary code of ethics at all levels.
8. An enforcement mechanism should include a process to require a judge or Justice to recuse when a reasonable litigant would believe that the judge or Justice has a bias against any party or an issue raised in the case.
9. A judge or Justice's decision and rationale to recuse or not recuse should be publicly disclosed in writing.
10. Federal judges and Justices should be subject to rigorous financial disclosure requirements, enforcement and penalties for all financial benefits, including but not limited to income, gifts, paid speaking engagements and book deals.
11. Stability of law, or *stare decisis*, is a value that contributes to a strong democracy.
12. Public perception of the Supreme Court's legitimacy contributes to a strong democracy.

The following is an explanation of each of the proposed statements and guidance on how to approach the discussion of them.

1. Transparency is essential to an effective federal judiciary.

   Transparency is a general principle that already underlies many of the rules and standards that apply to the federal judiciary. The policy paper on Judicial Ethics and Enforcement points out that Supreme Court Justices' decisions to recuse or not to recuse lack transparency in that they

often are not explained. In addition, the policy papers on Supreme Court Legitimacy and the Shadow Docket discuss the lack of transparency in certain Supreme Court rulings that lack any explanation or basis for granting or denying emergency relief.

Members should discuss how the principle of transparency can be balanced against legitimate needs for privacy such as withholding the identity of vulnerable witnesses and jurors or preventing disclosure of trade secrets in business litigation.

2. Accountability is essential to an effective federal judiciary.

Accountability is discussed in the policy papers addressing Financial Disclosure, Judicial Ethics and Enforcement, Recusal, Shadow Docket and Stare Decisis and Binding Precedent. Here again, the problems identified seem to be exclusively at the Supreme Court level and not throughout the entire federal judiciary. To whom will the judges be accountable? The President? Congress? The voters? Other judges? Any process that would involve accountability to the President or Congress would risk conflict with the doctrine of separation of powers, which generally prevents each branch from interfering with the work of the other two branches.

Members should discuss how to balance accountability with protections against Congress or the President misusing it under the guise of enforcing an ethical standard to punish judges for politically unpopular decisions.

3. Independence is essential to an effective federal judiciary.

Judicial independence is discussed in the policy paper on Structural Reforms for the US Supreme Court. The reasons supporting judicial independence are well-known. An example from Maryland illustrates both the need for independence and the risks of interference from the other branches. The redistricting of the Maryland legislature after the 2000 census was challenged for violating the requirements of the Maryland constitution in a way that favored the majority party. The Maryland Court of Appeals (now called the Supreme Court of Maryland) found that the legislative map did not comply with the constitution and ordered new lines drawn. In the following legislative session the Maryland General Assembly approved salary increases for all court judges except the Court of Appeals.

Members should discuss the more difficult question of what policies would protect judicial independence and how to resolve conflicts between the principle of independence and the principles of ethics and accountability.

4. Ethics is essential to an effective federal judiciary.

This is discussed in several of the policy papers, including Financial Disclosure, Judicial Ethics and Enforcement and Supreme Court Legitimacy. There has been considerable publicity about perceived shortcomings in the conduct of some of the Justices on the Supreme Court.

Members should discuss whether the draft statement adds clarity to the current debate about whether the perceived violations are serious enough to affect the legitimacy of the Court's decisions. Members should also discuss how—and by whom—a system of ethics is to be enforced without compromising judicial independence.

5. There should be binding universal standards of conduct for judges and Justices at all levels of the federal courts.

Standards of conduct and their enforcement are discussed in several policy papers: Financial Disclosure, Judicial Ethics and Enforcement and Recusal. The Judicial Conference of the United States adopted the code of conduct applicable to judges of all courts except the Supreme Court and a Committee on Codes of Conduct is responsible for its implementation. The Supreme Court recently adopted its own code of conduct.

It is not clear whether in posing this question the LWVUS study group was focused only on the Supreme Court or if they perceive a deficiency in the procedures for enforcing standards applicable to other judges.

Members should discuss both the general principle and whether the use of the term "binding" could create an opportunity for abuse. If "binding" is intended to mean that a violation could be grounds for removal from office, one could imagine the House of Representatives giving a free pass to certain Supreme Court Justices while impeaching other Justices for the most picayune of causes.

6. Court hearings, documents filed in the court and rulings for all federal cases should be open and available to the public.

This proposed position was not discussed in any of the LWVUS policy papers. The Sixth Amendment to the Constitution guarantees "the right to a speedy and public trial." There are, however, many categories of cases and types of information that need to remain confidential and many legitimate reasons to protect the privacy and safety of parties and witnesses. Through hundreds of cases over the past two centuries, the courts have developed carefully designed rules and standards to ensure these protections. Matters relating to juveniles, grand jury proceedings, attorney-client privilege, work product, search warrants, wiretaps and surveillance are only a few of the matters which are usually addressed under seal, for a period of time or forever, absent a showing of good cause. From the use of the term "all" it is unclear whether the statement is intended to expand, narrow or repeal the rules that allow some matters to be withheld from the public. Leaders of the LWVUS study cited as a key example the Supreme Court's "shadow docket," but the proposed statement is not limited to that issue.

Members should discuss whether there is sufficient information to adopt this statement or if it might be approved with further comments to clarify its application.

7. There should be an effective enforcement mechanism for the federal judiciary code of ethics at all levels.

Ethics code enforcement is discussed in the policy papers on Financial Disclosure, Recusal and Judicial Ethics and Enforcement. As noted above, there are enforcement mechanisms in place for judges of the district courts and courts of appeals. The primary problems identified in the policy papers seem to be at the Supreme Court level. The great risk for enforcement in any proposal is that it will be abused for political purposes. As noted above, the Constitution provides that judges may be impeached and removed from office. There is a risk that the reference to "an effective enforcement mechanism" could be interpreted to permit removal through a less demanding process.

Members should discuss whether an enforcement mechanism can be developed that would not jeopardize the independence of the judiciary.

8. An enforcement mechanism should include a process to require a judge or Justice to recuse when a reasonable litigant would believe that the judge or Justice has a bias against any party or an issue raised in the case.

The need for an enforcement mechanism regarding recusals is discussed in the policy papers on Judicial Ethics and Enforcement and Recusal. We anticipate there will be general agreement that judges should not be involved in cases that could affect their own interests. The statement presented for consensus poses more difficult questions: when is the actual or perceived bias so serious that recusal should be considered necessary and how is recusal to be enforced?

The Supreme Court addressed the complex questions of recusal in *Caperton v. A. T. Massey*, 556 U.S. 868 (2009), a 5-4 decision that a judge cannot hear a case upon a showing of "probability of bias." The case concerned a state Supreme Court judge who refused to recuse from an appeal concerning a significant donor to the judge's election campaign. Essentially, recusal was enforced by the U.S. Supreme Court voiding the decision of the state court. Chief Justice John Roberts wrote the primary dissent which posed "40 questions" concerning the standard of "probability of bias." The four dissenters remain on the Court; none of those in the majority are still on the bench. Unfortunately, this leading case on the question of recusal was not mentioned in any of the LWVUS policy papers. However, it highlights how complex the issue of bias and recusal can become.

Members should consider whether there is sufficient information available to support adoption of this position. If members believe they have sufficient information, we should also consider whether the terms are clear enough to provide meaningful guidance to respond to legislative proposals. Finally, the discussion should address what methods of enforcement would be adequate to achieve these purposes without jeopardizing the independence of the judiciary.

9. A judge or Justice's decision and rationale to recuse or not recuse should be publicly disclosed in writing.

The policy paper on Judicial Ethics and Enforcement states that proposed reforms are focused on making the recusal process more transparent and accountable, such as requiring Supreme Court Justices to state reasons for recusal or failure to recuse but no justification is given for why the reasons should be in writing. Could there be unintended consequences of requiring written recusal explanations? A judge may be recusing herself from a case for a reason that, if publicly disclosed, would be highly prejudicial to one of the parties. Consider for example, "I am recusing because I was defrauded by this company when I purchased a vacation home" or "I have discovered that my daughter's husband is having an affair with the litigant's attorney."

Members should discuss whether sufficient information has been provided to support this position.

10. Federal judges and Justices should be subject to rigorous financial disclosure requirements, enforcement and penalties for all financial benefits, including but not limited to income, gifts, paid speaking engagements and book deals.

Financial disclosure requirements already exist for the federal judiciary, including the Supreme Court. These requirements are laid out in the policy paper on Financial Disclosure. However,

enforcement mechanisms appear to be lacking at the Supreme Court level. We also note that the sentence is poorly constructed. Surely they do not mean to apply "penalties for all financial benefits," but rather meant to say "rigorous requirements for disclosure of all financial benefits, including but not limited to income, gifts, paid speaking engagements and book deals, with such requirements including appropriate enforcement procedures and penalties."

Members should discuss whether the information provided in the LWVUS materials sufficiently supports the proposed statement. The statement does not specify a mechanism for enforcement or the range of penalties, so members should also consider whether some methods of enforcement might be inconsistent with the separation of powers or otherwise infringe on the independence of the courts.

11. Stability of law (*stare decisis*) is a value that contributes to a strong democracy.
The principle of *stare decisis* is explained in the policy paper on Stare Decisis and Binding Precedent. It is hard to disagree with the general statement that stability of law is a value that contributes to a strong democracy. The principal reason for including this appears to be the Supreme Court's failure to follow precedent in the decision on *Dobbs v. Jackson Women's Health Organization*. In the ordinary course of appeals, *stare decisis* is enforced on lower courts, so it appears that this position relates only to the Supreme Court.

    Members may want to discuss whether stating a general principle in response to a single ruling is wise. In the *Brown v. Board of Education* decision outlawing segregation of public schools, the Supreme Court reversed long-standing precedent allowing "separate but equal" treatment. The League was one of many organizations that cheered the overturning of that bad decision. Similarly, the Supreme Court reversed its decision in *Bowers v. Hardwick* in the later *Lawrence v. Texas* decision concerning the right to privacy relating to homosexual conduct between consenting adults.

    As with the issue of enforcement of a code of ethics or policy governing recusal, members should discuss whether enforcement of this principle could be abused in a way that would violate the separation of powers that is essential to judicial independence. Also, given that the principle of *stare decisis* is a core principle of our judicial system, members should consider whether an LWVUS position such as this is necessary or meaningful.

12. Public perception of the Supreme Court's legitimacy contributes to a strong democracy.
The decline in public perception of the Supreme Court's legitimacy is discussed in the policy papers on Supreme Court Legitimacy and Structural Reforms for the US Supreme Court. It is also touched upon briefly in the paper on the Shadow Docket. One of the greatest difficulties with this statement is deciding how to measure "public perception" of the Supreme Court. In the era of "massive resistance" to desegregation orders, the Southern senators pointed to strong regional disapproval of the federal courts. As noted earlier, the judicial branch is intentionally different from the legislative and executive branches which are intended to be responsive to public opinion.

    Members should consider a situation in which the courts are faithfully enforcing the law in opposition to a popular President and/or members of Congress and whether public opinion is a reliable measure of the courts' effectiveness in that instance.

CONCLUSION

The LWVMC study committee that reviewed the LWVUS materials has grave concerns about the speed with which this study was developed as well as the sweeping nature of its recommended statements. We urge members who engage in discussion of these proposed statements to carefully consider all of the implications of approving them.

The LWVUS study group presented a series of statements and asked members to register agreement or disagreement with each, but there also is an option to submit comments about each of the statements. A possible response to the consensus questions that would register our concerns is to report to the LWVUS that the consensus of our members is against some or all of the questions presented. We could then provide explanations for our responses on the form that the LWVUS has posted online.

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