



The Evolution of Judicial Independence in America – Part 2

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live, constitutional conversations and debates hosted by the Center in-person and online. I'm Tanaya Tauber, the Senior Director of Town Hall programs. This episode is the second in a three part series exploring the evolution of judicial independence in America and its critical role in our democracy from the founding to present day. Part two explores the 20th century and the major milestones that shape the judiciary, including the crucial role of Chief Justice Taft in key Supreme Court rulings.

[00:00:38] Tanaya Tauber: The conversation features scholars Neil Devins and Allison Orr Larsen of William and Mary Law School and Marin Levy of Duke University School of Law. Jeffrey Rosen, president and CEO of the National Constitution Center, moderates. The series is presented in partnership with the Federal Judicial Center and was hosted live at the National Constitution Center on May 15th, 2023. Here's Jeff to get the conversation started.

[00:01:08] Jeffrey Rosen: Welcome. Friends, we're gonna jump to the 20th century. You've just heard this marvelous discussion of judicial independence at the founding. And I'd love to begin with some broad reflections from you about how we got to the 20th and 21st century. We began at a time when the party system was just up and running, and so little was agreed—as we just heard from our panelists—about judicial review, to a world where judicial appointments are so entrenched in partisan politics and polarization pervades all the branches of government. Maybe why don't we begin with you, Marin Levy, and what are your reflections about how we got here?

[00:01:50] Marin Levy: Sure. Well, first I just wanna say thank you. It's such a privilege to get to be here with this group today. So it's a great question, right? How do we get to this point today? And how do we think about judicial independence the way that we do now, in the kind of robust sense? I think there are

a few different stories that are worth telling, and I'm gonna focus just briefly on two of them. So the first thing I think to appreciate that we might overlook kind of from the modern day is just how much the courts grew up over this time. I mean, truly, we saw the expansion of the courts from 1789 to today. So I'll just say a word about that. But then also this key part about how the courts came to govern themselves and really administer themselves. I think that's happening in the background of all these other big moments that we think about, like with the court packing plans. I'll just say a quick word on those two.

[00:02:36] Marin Levy: So something I always like to go back and think about is in 1789, you know, we have fewer than 20 Article III judgeships. This is, the federal judiciary as we think of it, was such a small institution at the time. Fast-forward to 1900, it's only a little more than 100 judges. And of course, by the time you hit the end of that century, we're up to 850 Article III judges. So there's the major expansion of the federal courts. Again, this really becomes a robust institution during this time, and with that, right, it has real administrative needs. And this is the other key part of the story that I think is worth emphasizing.

[00:03:11] Marin Levy: So if we go back again to the beginning of the federal courts, the administrative piece of it was actually housed in the executive branch. So it was actually the Department of the Treasury that was tasked with dealing with the kind of financials of the courts. This then gets passed over to the Department of the Interior for a bit of time, and then by the time we get to 1870, this is when we get the Department of Justice. And again, this will feel surprising to modern ears. It's the Department of Justice that's the principle administrative agency for the federal courts, right, for decades and decades to come. So what this means is that it's actually DOJ that's tasked with preparing the budget for the federal courts. They're the ones that are keeping the statistics for the courts, like what is the workload and all that sort of thing that's housed within the executive.

[00:03:59] Marin Levy: And what this ends up doing by the time we hit the 20th century, is it creates these sites of tension between the branches. So just a couple quick kind of fun points on that. So, 1934, right, we have the Great Depression, and we actually then have the Attorney General turning to the courts and saying, "I'm ordering a 25% cut in your budget." Which is a shocking thing to think about today, right, if the Attorney General of the United States told the judges in this room, "I'm cutting your expenditures by 25%." So again, we have this really interesting contest between the branches, and at the same time we have Congress coming in and saying, "We're actually gonna cut the pay of senior judges by 15%,"

this is all part of the kind of cost saving measures. Now, that's something that the Supreme Court then ends up pushing back on and rejecting in a case called Booth in 1934.

[00:04:45] Marin Levy: So this is all to say, though, that we see these tensions between the branches, and it becomes clear, I think, for the federal judiciary that for it to assert real independence from the other branches, it needs to be taking the administration, right, of the courts in-house. So we actually see a little glimmer of this in the 1937 court packing plan of all places. So I think this is an overlooked provision of FDR's plan, that they were gonna create an office called a Proctor who was going to be in charge of collecting statistics about the courts. Pulling that administrative piece from the executive over to the judicial branch. So of course that doesn't work out, but within a couple years.

[00:05:21] Marin Levy: Instead, what we get is a working group created by the Chief Justice of the United States, Charles Evans Hughes, who brings together several of what we would call today chief judges from around the country working with representatives at DOJ and the ABA, and they come up with a proposal to create what then became the administrative office of the US Courts, which came online in 1939. So I think a really big part of the story that we can talk about is how today we see the judges kind of pushing back and saying, "We get to mind our own shop." But there really is this important story about that shop kind of coming into formation during this time, and that allows the judiciary to stand apart, right, doesn't have to then go through the executive to really be kind of an equal branch in all of this.

[00:06:04] Jeffrey Rosen: Such important reminders about the internal administrative reforms essential to the story, and how memorable to think of the Office of Proctor, which was thankfully resisted. That's just great. Neil Devins, how did we get here?

[00:06:17] Neil Devins: Well, when we look at where we are today, the Reagan presidency is so critical in the story. Before Ronald Reagan was elected, presidents did not think about ideology when appointing judges and justices. Dwight Eisenhower, of course, appointed Brennan and Warren for political gain, to reward Warren for his help in California. Truman gave judgeships to personal friends, often conservatives. Before Reagan, there was no ideological divide between Democrats and Republicans. Democrats occupied every niche on the spectrum. There were southern Democrats, Republicans occupied every niche on the

ideological spectrum. There were Rockefeller Republicans. George Wallace, when he ran for president, said, "I'm running for President, 'cause there's not a dime's worth of difference between the Republicans and the Democrats."

[00:07:08] Neil Devins: Reagan is elected in 1980, and he runs in an effort to make ideology relevant. He makes ideology relevant in judicial selections, working with Attorney General Meese, there's a focus on identifying conservatives. At the time that Reagan is president, there isn't a established conservative legal network like there is today. And we can talk about that later, I hope. But at that time there's an effort to find conservatives. There's an effort to get young people in part through the Federalist Society, into the Justice Department to be credentialed, to become judges later in time. But in understanding where we are today, the key moment is Reagan and the shift to ideology and judicial appointments and the shift to separating Democrats from Republicans along ideological lines.

[00:08:01] Jeffrey Rosen: Thanks so much. Maybe a thought on that provocative point. Do you agree that ideology became relevant in the 20th century, only in the '80s? And what about the progressive era when Wilson chose Brandeis and FDR, of course, chose his justices? And how would you say we got here?

[00:08:19] Allison Orr Larsen: Well, there's a lot in there. I definitely agree with Neil that like the '80s marked a change in terms of the politics of judicial appointments. And I think that's part of the story of judicial independence, because at least in the eye of the public, you're only independent from politics if you act like it. And that goes into sort of what I was gonna say about the importance of norms of judicial independence. So a lot of the story of how we got to where we are today, it's not, there's no change in Article III. There was no change—not a dramatic change—in the statutes that touched on the judiciary. It's about norms of what is out of bounds and what is not out of bounds in terms of political repercussions to judicial decisions.

[00:09:03] Allison Orr Larsen: And that's important because I think it shows the fragility of judicial independence, because if it's really about bipartisan norms of how we leave the judges alone, then if those norms erode, I mean, I don't have to paint the ugly story for you, but that's a real danger to judicial independence. And if you'll allow me a brief anecdote, which I borrowed from my friend Tara Grove who's gonna be here tomorrow. When Newt Gingrich ran for president in 2011, part of his platform included a proposal to abolish the Ninth Circuit because they were out of step with mainstream America. And that proposal was met with

bipartisan criticism. "What, you can't do that, like that would be totally crazy and a real invasion of judicial independence."

[00:09:53] Allison Orr Larsen: His answer was, "You know, if you read Article III, Congress has a lot of power to, you know, ordain and establish the lower courts. That includes," he said, "Getting rid of courts that are no longer necessary." The reason that we think that's out of bounds has everything to do with bipartisan norms and assumptions. So that means it's incumbent upon us, I think, in order to protect judicial independence to bolster those norms. So that's, I think, an important part of the story.

[00:10:22] Jeffrey Rosen: Fascinating. Well, if we pull back from the 20th century to today, at the dawn of the 20th century, we had Gilded age judges striking down progressive economic legislation, and democratic presidents from Wilson to FDR pledged to change the court. So judges upheld that legislation and that succeeded, of course, and came to a head in the new deal. And for a while, judges upheld the legislation, and then, as Neil Devins said, president Reagan came and pledged to appoint strict constructionist judges, who would reinstate limits on federal power that had been dormant since the New Deal. And that leads to the current situation.

[00:11:00] Jeffrey Rosen: Marin Levy, what do you think about that as a, just description of what happened? And tell us about the role of the administrative reforms that you mentioned as part of this story, because it was in the '20s that Chief Justice Taft built the judicial conference and created the administrative apparatus that made a strong and powerful judiciary possible. And I know you've been studying further administrative changes that have strengthened that independence.

[00:11:24] Marin Levy: Yes, absolutely. So here's a, I think a story that helps to bookend the century, that has us focus a bit on the lower courts, but I think is really useful here. So we have the judicial conference, we have the AO, and this becomes crucial at a time, as we mentioned, where the courts are really expanding, and the caseload, of course, is really rising significantly in the federal courts. And so one place where I think we see a really interesting contest here, and the assertion of the norm of judicial independence, comes into play with unpublished decisions.

[00:11:55] Marin Levy: So as the caseload is rising, this is in the '50s, '60s, and '70s, one of the first moves we see from the federal courts is the judicial conference

stepping in in 1964 and saying for the first time to the judges, "You don't actually need to publish formally every single decision that's gonna come out of your court," right, so this is really speaking to the courts of appeals. So if you have a decision that's really not meant to be precedential, just applying precedent that's well established, it doesn't need to be in the federal reporter. This is a huge shift for the courts.

[00:12:25] Marin Levy: And then what comes out of that is the decision by each of the different circuits as to how to respond to that, right, so when it's appropriate to publish a decision and when is it fine to forego that. And then how you treat the decisions that aren't published, right, so those aren't precedential and they're not meant to be cited as such, but can you even cite them at all to the courts? And there was a split on this, as many in the room will remember. So what this then ended up with was by the time we get to the early 2000s, we have Congress stepping in and saying, "We're hearing some concerns about these unpublished decisions, and in particular in some circuits that you can't even cite back to these opinions. So what does it mean to have these courts if you can't cite back to a prior opinion?"

[00:13:05] Marin Levy: What's fascinating about this moment in time is that when the hearings are going on, you have members of the judiciary coming back and saying, "This is really our territory, and it's not appropriate for Congress to be stepping in and telling us what to do with our decisions." So you have then Judge Alito from the third circuit. You have the chief judge of the Ninth Circuit, Alex Kozinski, right, testifying. And this is really what their point is. You know, again, this is the management of the courts that we're talking about. "This is for us to decide, and we want to avoid a real confrontation between the branches." This is something that Kozinski says directly back to Congress. Um, and then what happens of course, is Congress backs off a bit, and we have the judiciary itself coming up with a solution to this.

[00:13:47] Marin Levy: We get a change in FRAP, the Federal Rules of Appellate Procedure, at 32, right, this is starting in 2007, that these are all decisions that can be cited to, but they're not meant to be persuasive authority. But so now we pull back again thinking about this in the larger lens. This is one of these moments where, because we have these different kind of sites now for administration within the judiciary, you can speak kind of in a unified way and actually push back against the other branches and say, "This is our shop and we're minding it and we don't wanna have a contest." And then you see Congress really acquiescing and backing off to that. So for all the politics that are happening in the background, for

all the shifts that are happening with the Supreme Court, you actually get this really interesting kind of unified assertion in the lower courts about, right, "This is our territory." Um, and again, Congress really stepping back from that.

[00:14:36] Jeffrey Rosen: Fascinating. Neil Devins, what was distinctive about president Reagan's effort to appoint strict constructionist judges in the '80s? Of course, as you've noted, presidents have taken partisan valences into account throughout the 19th and 20th century, so there's always been politics in the nominations process. But what changed?

[00:14:53] Neil Devins: Well, I think Attorney General Meese made a concerted effort to develop a network of young lawyers who would be able to carry water, which is what we're seeing today. People such as Neil Gorsuch, Sam Alito, John Roberts, you know, all worked in the administration. There was an effort essentially to be future focused. And one other thing that Meese did that was, I think very smart politically, was that he wanted people to be organized around ideas.

[00:15:27] Neil Devins: So he used the Justice Department as a venue to have seminars on originalism, where people like Justice Scalia would speak to, and people would essentially develop norms of decision making that they would be committed to, so that when they later were eligible to become judges, they would be well-schooled in these norms, well-schooled in what the project was and committed to the project. Their social networks were networks of conservative lawyers as well. And that reinforced the norms within the group. So Reagan was particularly good, or Attorney General Meese was particularly good, in being future oriented and in laying the seeds for what we're seeing today with the rise of conservative legal network and the rise of the Federalist Society, and obviously the rise of textualism, originalism and the like.

[00:16:20] Jeffrey Rosen: As we heard on the first panel, the debate between strict constructionists and living constitutionalists dates back to Jefferson and Hamilton and played itself out on the Marshall Court between Marshall and Taney. So to what degree did norms of there being a political valence to methodologies of judicial interpretation change in the 20th century?

[00:16:44] Allison Orr Larsen: Well, I think one important norm is that judges will not decide cases based on the partisan affiliation of the President who appointed them. I think that's an important norm of judicial independence that is

potentially vulnerable to change. I think another important norm is that presidents and political actors are gonna comply with federal court orders, even if they don't like 'em. And that hasn't always been the case, and is also, I think, vulnerable to change. And then the third one's, the one I mentioned originally, which is that Congress isn't going to abolish courts because they don't like the way that the judges are making the decisions on that court.

[00:17:22] Allison Orr Larsen: And if you sort of take them one at a time, maybe in reverse order from the way I had it before, I think the change to the first one, the one that led to the bipartisan criticism of the Gingrich suggestion to get rid of the ninth Circuit. I think you can see that changing through, even as late as the 1920s you still had that conversation happening in Congress. You didn't see that conversation, that norm changing, until like the '60s and '70s. And that goes hand in hand with the second norm about political actors complying with federal court orders.

[00:17:57] Allison Orr Larsen: So if you think back to Nixon and Watergate, so he says, "I don't..." you know, he says to his political colleagues, "I'm not, I might not comply with a Supreme Court order to, that tells me to turn over the tapes." And the response was, "Oh, you have to do that. Right? That's a, that's a norm of judicial independence." Contrast that to the massive resistance to Brown in the '60s and the late '50s and '60s, which always startles my students. And I think it's a good reminder to when you show that to a modern audience and they're like, "What do you mean? Like Supreme Court or no Supreme Court, we're not gonna integrate these schools."

[00:18:36] Allison Orr Larsen: I think following the Civil Rights movement, you have this creation of a bipartisan, a distance from that, uh, that eventually leads you to what happened in US versus Nixon, and then, you know, ultimately Bush versus Gore. I also think, you know, the 9/11 cases, after, you know, Boumediene [v. Bush], Hamdan [v. Rumsfeld], Hamdi [v. Rumsfeld], you have George W. Bush saying, "Look, I don't like these decisions from the Supreme Court, but I'm gonna comply with them." That's, again, that's a norm, a bipartisan norm of judicial independence. There's nothing in the Constitution that necessarily requires that.

[00:19:15] Allison Orr Larsen: And then the last one is one that I think is really important for us in this room to reflect on. It's the importance of judges and the bipartisan norms of judges in, you know, supporting and reinforcing the norm of judicial independence. So Neil and I have done work where we looked at en banc

decisions, and we went back and collected them for time periods over 60 years. And the reason we were interested is because when a court of appeal sits en banc all collectively, that's really an opportunity to see judges line up in partisan teams, all those appointed by Democrats versus all those appointed by Republicans. And so we were worried, and we were suspicious that we were gonna see an uptick in what we called partisan reversals over time.

[00:20:01] Allison Orr Larsen: But what we found, this is the heartening part of the story, we found like a good news and a bad news. But what we found was actually there was a strong resistance, for 60 years, to that use of the en banc decision. And I think that what we were touching on was a norm, a bipartisan norm of judicial independence. And then the sad news of the story, [laughs], is we also saw that maybe starting to change from 2018 to 2020, where there was a significant uptick in those partisan reversals. So that reason for that story, is more of a, I guess, an important reflection point about how these, if they're just norms that protect judicial independence, how fragile they are and how maybe precious they are, need to be reinforced.

[00:20:51] Jeffrey Rosen: Very helpful to put those three norms of judicial independence on the table. One is immunity from Congress changing the size of the courts for partisan reasons. The second is obeying with orders that you disagree with if you're the president. And the third is bipartisan norms of judges themselves. Marin Levy, what light can history shed on those questions? And did the professionalization of the judiciary in the 20th century increase the strength of each of those norms or not?

[00:21:22] Marin Levy: Yeah, so it's a great question. I think when, so just reflecting back a bit on what Allie was talking about with the, the fragility of these norms, I think it's worth noting, I guess a couple points, one, and this is just now to, I think to reflect back something a lot of people have been thinking about for the last several years. So if you were to have conversations with legal academics and judges a few years ago, and were thinking about the strength of different norms, the one that was always upheld the most as I think the most robust was "We're not gonna see any attempts, and again, to pack the courts. We're gonna be respectful of the courts as they are. And certainly we wouldn't do that in response to any kind of decision that the courts were reaching. So whatever else might be happening, whatever other norms might be broken across the executive, we're not gonna see that sort of attempt from the political branches vis-a-vis the courts."

[00:22:14] Marin Levy: And it's been quite astonishing in recent years to see that be walked back a little bit. And I think it's hard to even at this moment, to fully say what's gone on with that norm. I think one thing we can all kind of think about is obviously the Biden Commission was created to study the Supreme Court in part, to think about court expansion, court packing, and ultimately, you know, walked away from that. And I think a lot of folks think about the creation of that commission as a way of, in fact, not having to come out strongly in favor of court expansion or something like that. But I do think one thing that we're seeing, maybe going back to the idea of unifying the judiciary on this, is some resistance to all of that, right, trying to actually kind of re-substantiate some of those norms. Um, but I think just to echo what Allie said, we're in a time where it feels a lot more fragile than I think any of us would've expected even a few years ago.

[00:23:06] Jeffrey Rosen: Neil Devins, compared now with the '30s in court packing, it's the obvious comparison, threats of court packing that failed, claims that judges were deciding on partisan grounds or valences and, uh, I suppose not threats to ignore judicial decisions, but talk of that sort of thing in the air. Is now different or have we been here before?

[00:23:32] Neil Devins: Well, I think to build on what Marin just said, I think we're at a very precarious time now. The partisan division wasn't one earlier, we didn't have Republicans and Democrats lined up ideologically as we do today. So as a result the stakes seem higher, because there's a greater predictive value that if you nominate a Democrat, that judge will behave differently than if you nominate a Republican. And the world we live in is one where the affluent and well-educated tend to be the most partisan as well. That's the community that selects the judges, the community from which the judges come from.

[00:24:15] Neil Devins: I think it's a challenge for a judge today to rise above these partisan labels just because their priors are oriented in some fashion around their party, or else they probably wouldn't be nominated to be a judge in the first place, which also means, the willingness of the other side to take action against them is greater. And I think the risk of court packing as a result are much greater today than they have ever been. I think if there's a democratic super majority in Congress, and the Supreme Court continues to decide cases the way it has in the past term, I think there's a real risk for court packing to actually happen.

[00:25:04] Jeffrey Rosen: Allison, what about the founding as a precedent for today? So arguably, after the election of 1800, all three of your norms were being, uh-

[00:25:14] Allison Orr Larsen: Yeah.

[00:25:14] Jeffrey Rosen: ... violated. The outgoing Federalists actually change the size of the court to deny Jefferson the opportunity to make appointments. Jefferson absolutely is threatening not to obey Marbury if he's ordered to, and there's clear partisan valence. So weren't things even worse then?

[00:25:29] Allison Orr Larsen: Yeah. So I actually think that's a really important point because it shows when you think like, where does judicial independence come from? It comes from an evolution... like the way we think of judicial independence today, it comes from an evolution of norms since that time. So it's not baked into the Constitution fully, it's something that grew over time and can change, is vulnerable to change. I mean, I'll add on the court packing point. Part of this is colored by hindsight, but when we talk about the 1930s, the 1930s court packing plan, we also discuss the resistance and the public mind to it, that it was actually ultimately proved to be not what the people wanted. We don't want to pack our courts, we want an independent judiciary.

[00:26:15] Allison Orr Larsen: A difference between that and today is that you don't have people talking to each other necessarily. So one camp thinks court packing is essential, and another camp thinks court packing is outside the boundaries. So this, you know, what I've been talking about, these norms of judicial independence, sort of implicit in my comment, is that they're bipartisan norms of judicial independence, and if you don't have the, the parties talking to each other, then you can't have the development and reinforcement of bipartisan norms. Um, and so that makes me nervous, [laughs], and it makes me agree with Neil that we're closer to the, we're closer to the edge, to the cliff than I think we were in the 1930s.

[00:27:00] Jeffrey Rosen: Marin Levy are things better on the lower federal courts, the inferior courts, the appellate courts? And to what degree do we see less polarization there than at the Supreme Court?

[00:27:13] Marin Levy: Sure. Well, and it's funny to answer that question, looking out into this particular audience.

[00:27:18] Jeffrey Rosen: Of course.

[00:27:18] Audience: [laughs].

[00:27:18] Jeffrey Rosen: That's why I asked. Careful how you respond.

[00:27:20] Marin Levy: And we would certainly never say inferior or-

[00:27:24] Audience: [laughs].

[00:27:24] Jeffrey Rosen: Just quoting the constitution [laughs].

[00:27:28] Marin Levy: So this is a terrific question. I mean, I think the answer is, right, is there less polarization there? I think the answer is yes, and for a number of reasons. I mean, I think, and the judges in this audience can answer this far better than I can. If we look at the court of appeals, and the vast majority of cases are decided unanimously, right? Three zero. I'm seeing some nodding, that's encouraging. So you know, part of that of course is just what the issues are that a lot of the issues that come before the courts, I mean, they don't, these judges don't have discretion over their dockets the way that the Supreme Court justices do.

[00:28:04] Marin Levy: So as a result, you have a lot of run-of-the-mill cases, and they're pretty clearly decided. And so you get a lot of 3-0 decisions. And that I think is really critical for those courts, right, that you have judges lining up, and it's not about were you appointed by an R or a D. It's, this is what the law is, and we're all in agreement on that front. So I think that's part of the story, just what is the caseload, right, and so are you bringing together different groups of judges, again, regardless of who appointed them?

[00:28:32] Marin Levy: I think the other part of the story is, and this goes back to what Neil was talking about, you know, there's been a huge focus, obviously on the Supreme Court for quite some time. I think it's only more recently that there has been a focus on the lower federal courts, and thinking about what those appointments look like, and also sort of will those folks then be sort of in a position that they could be elevated to the Supreme Court. And as a result, I mean, one way to think about this is when we look back to the Supreme Court, kind of the court that I think of us as growing up in, like there were swing justices, there was a clear middle on that court.

[00:29:07] Marin Levy: And I think we still have some of that across the courts of appeals in a way that's so important, right, I mean, that there's more of a middle. I worry that we're losing that the way that appointments have been going over the last few administrations. And this then, of course, dovetails with work I think that Neil and Allie have done. So this is all to say, I think, right, things look a lot better if we're looking at the courts of appeals and the district courts. But I do worry with the current climate and the kind of pressure on appointments that if this continues down this road, that we may see a little bit of a kind of coming apart and that we're gonna lose that middle that I actually think is really crucial for the federal judiciary.

[00:29:44] Jeffrey Rosen: Neil Devins, you talked about the New Deal as a time of great polarization. Of course, in the progressive era, we also saw arguments for overturning judicial decisions by popular vote and arguments for court packing. And in the Civil War when Congress changed the size of the court for partisan reasons, and there were certainly threats of failure to comply. So what about the thesis that there have been a couple of moments of constitutional change in our history, the founding, the Civil War, the New Deal, and then our current originalist era, beginning in the Reagan era, and this is what happens during the periods of transition?

[00:30:18] Neil Devins: Well, I think that's a very benign way of expressing it, because it does seem to be, as Marin was just talking about, that there are teams in the sense emerging today. And the shift is not one that will endure if the other team gets the majority on the court. There is not the middle that there once was where you can build a consensus, you know, through the middle. If you just have opposite views and you consider the other view not to be legitimate and appropriate, you just hope that your side gets power and then you will change the doctrine when your side gets power.

[00:31:01] Neil Devins: And I think that may be the world we're living in or fast approaching. And I think with respect even to the courts of appeals, the efforts of state attorneys general to target certain lower courts, certain district courts, certain courts of appeals, if they're Republican attorney generals challenging Democrats, and if they're Democratic attorney generals, challenging Republican administrations, you know, you're building this sort of team mentality even in terms of how the lower courts of appeals are being viewed.

[00:31:31] Neil Devins: And it's just a question of who has the numbers, and that's the way the Senate is approaching it. That's the way the White House is approaching it. You know, we obviously have the history of Merrick Garland and what happened just in recent months with Dianne Feinstein being out of the judiciary committee. I like writing with Allie because she makes things brighter than I would write on my own [laughs]. But I, on my own, I am somewhat pessimistic.

[00:32:02] Allison Orr Larsen: Well, and let, if I can just add to that. So one way to crystallize exactly what Neil's talking about. So if you think of, remember a couple years ago when then President Trump talked about "Obama Judge," and the Chief Justice came out in a pretty remarkable statement for the Chief Justice to say, "There are no Obama judges, there are no Trump judges, there's only judges, and that independent judiciary is what we should all be very grateful for." That I think is a very strong norm of judicial independence that is in danger today.

[00:32:32] Allison Orr Larsen: So if you wanna think about like, what if we do become like, "Well, there are Obama judges and Trump judges, and I don't have to negotiate with you because you are on the other team." I mean that's a real shift from where we were even five, 10 years ago. Um-

[00:32:49] Neil Devins: Right. And it requires the judges in some measure to take ownership of the judiciary and say that, "You know, we may need to decide cases that don't match perfectly with what we think the right answer is, but to do so in order to make the court stronger and to resist certain criticisms that might be otherwise directed at the courts."

[00:33:09] Allison Orr Larsen: "So that we don't look like partisan warriors."

[00:33:11] Neil Devins: Right.

[00:33:13] Jeffrey Rosen: Well, I think it's time to sum up in this provocative and important discussion. And maybe I'll ask each of you just to share your thoughts with our really distinguished judicial audience, about what lights history can teach them about how to maintain these norms of judicial independence in a polarized age. Marin Levy, maybe I'll just invite you to sort of offer concluding remarks as you think best.

[00:33:40] Marin Levy: Goodness. This does feel like a hot seat all of a sudden, right? Now I know what it's like to be cold called as a student. I think we're all in this room because we recognize this is a very timely topic, right, on a number of fronts. And I would imagine that many of us here come from the position of thinking that it's crucial that the judiciary remain independent from the other branches, and that we shore up these norms where we can. Part of what I think is so difficult here, just being perfectly candid, is the way in which the judiciary doesn't have full control over these types of things.

[00:34:20] Marin Levy: I think about it in the following way. I imagine telling my colleagues at the law school, you know, suppose somebody just said, "Here are the people who are going to be joining your faculty whether you like it or not, right, and they are now going to be your colleagues for the rest of your life." Or, I've always been struck by the way judges talk about their courts as like a family, but as one put it, "It's like where it's made up of all the in-laws."

[00:34:40] Audience: [laughs].

[00:34:40] Marin Levy: But you don't have any control over who's joining your court, and these are the folks you now have to work with. And I, you know, we can talk about it as, as we've mentioned, right, the way the confirmation process has changed and really I think become quite problematic. So I guess where I'm coming out of this from is I really feel for the judiciary right now. I feel like judges are in a tough spot. And I do worry about the public's perception of the courts at this moment and seeing judges as partisan in a way that I don't think that they are, particularly if we're talking about the lower courts.

[00:35:12] Marin Levy: So this is all by way of saying, I think, you know, we've seen these inflection points over history and we've come out of it. And I hope that when we look back in 10 years, we'll be able to say we came out of it again. And it was thanks to the actions of the judges, including folks in this room. But I do recognize this is a precarious point. And, you know, this is not something that unfortunately everyone here has full control over.

[00:35:36] Jeffrey Rosen: Great thoughts. Thank you for those. Neil?

[00:35:37] Neil Devins: I'm just gonna echo that I think that the judges are very much committed to making law-based decision making. But there are different perspectives on what the right answer is that tend to be divided now along partisan

lines, which is obviously creating a complication for judges who are doing essentially the same thing that judges have always done. But now it's easy to put a partisan label on it. So I just want to echo what I said before, that the judges may need to work together to overcome that, 'cause the political actors are not gonna help them overcome that.

[00:36:17] Neil Devins: And let me close out by referencing another article that Allie and I wrote on the personalities of the different federal courts of appeals. And we found that by the courts investing in their own local cultures and local customs were able to strengthen communal bounds and collegiality between the judges, and that type of communal behavior and investing in the circuits, and recognizing that the duty is primarily to the job of being a federal court judge and not to reaching necessarily one or another outcome, might be the most salutatory thing that the judges can do. And I hope that's something that resonates with, some or all of you, in the audience.

[00:37:00] Allison Orr Larsen: And I'll take the baton, right, as you said-

[00:37:02] Neil Devins: Yes.

[00:37:02] Allison Orr Larsen: ... and bring a little sunshine. So in researching that article, we learned some stories from the lower federal courts, and particularly the DC Circuit and what Judge Edwards did to bring his court back from real partisan, divisive culture. And it was things like lunches out [laughs], making sure that the panels are truly randomly shuffled and that you sit equally with somebody, you're not in the same company over and over again.

[00:37:37] Allison Orr Larsen: Having more rules that make sure your work gets done on time so that there's not pent-up frustration about someone keeping your decision from going out. And making, I mean, making sure that you see members of the other team as human beings, who are all part of a different team, which is the judiciary. And that team allegiance is more important than perhaps the allegiance that got you the job to begin with. So there are examples of success stories of these norms being reinforced, and these norms being, I guess, you know, given to the next generation, we're not powerless, but it is a formidable job. [laughs].

[00:38:20] Jeffrey Rosen: For giving us a ray of optimism-

[00:38:22] Audience: [laughs].

[00:38:22] Jeffrey Rosen: ... please join me in thanking our panelists.

[00:38:26] Tanaya Tauber: This episode was produced by John Guerra, Lana Ulrich, Bill Pollock and me Tanaya Tauber. It was engineered by the National Constitution Center's AV team. Research was provided by Lana Ulrich. Check out part three from the series featuring two federal judges discussing their experiences upholding judicial independence in the face of contemporary challenges. Visit us online for the full line up of exciting programs and register to join us virtually at constitutioncenter.org. As always, we'll publish those programs on the podcast, so stay tuned here as well. Or watch the videos. They're available in our media library at constitutioncenter.org/medialibrary. Please rate, review, and subscribe to Live at the National Constitution Center on Apple Podcast, or follow us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.