TRUMP’S JUDICIAL ASSAULT ON LGBT PROTECTIONS

AFTER THREE YEARS OF TRUMP NOMINEES, BIAS AND BIGOTRY REMAIN THE NORM
INTRODUCTION


The Trump Administration, enabled by Senate Majority Leader Mitch McConnell and Senate Judiciary Committee Chairman Lindsey Graham, and advised by a powerful but shrouded network of right wing organizations, has worked tirelessly to confirm ideologically driven judges to lifetime appointments in order to further their ultra-conservative policy objectives through the Federal courts.

As an organization that has defended the rights of LGBT people in the courts for over 40 years, Lambda Legal believes that it has an obligation to the communities that we serve to sound the alarm about the impact that these nominees will have on the ability of LGBT people to receive fair and impartial justice.

THREE KEY TAKEAWAYS FROM OUR ANALYSIS

1. After three years, the overall story remains the same; over 1 in 3 of Trump’s circuit court nominees (36%) have a demonstrated history of anti-LGBT bias. This year they included:

   - **Steven Menashi**, who supported banning LGB people from the military and denigrated the marriage equality ruling in *Obergefell v. Hodges*.
   - **Lawrence Van Dyke** who claimed that marriage equality harms children and society.
   - **Eric Murphy**, who argued the opposing side in *Obergefell v. Hodges*.
   - **Chad Readler**, who had his fingerprints on almost every Trump-Pence initiative seeking to undermine LGBT protections while serving in the U.S. Department of Justice.
Eight of the country’s 12 circuit courts now have 25% or more of Trump nominees.

The Trump Administration has confirmed nearly twice the number of circuit court confirmations after three years as each of the last five administrations.

The only circuit court judges to be confirmed in 30 years with a “Not Qualified” rating from the American Bar Association are Trump nominees Steven Grasz, Jonathan Kobes, and Lawrence VanDyke. In the last 30 years, only 15 nominees who were rated “Not Qualified” by the American Bar Association have been confirmed. Seven of them were Trump nominees.

The assault on the nation’s circuit courts continued unabated in 2019.

Here are six ways in which the Trump-Pence Administration has already dramatically reshaped the federal courts in 2019 and cumulatively in ways that will harm the federal judiciary and the LGBT community for generations to come.

1. After factoring in 2019’s findings, the cumulative number of 1 in 3 of Trump’s circuit court nominees who have a demonstrated history of opposing LGBT equality has remained unchanged.

Lambda Legal opposed seven of the 19 circuit court nominees who were confirmed in 2019. Lambda Legal has cumulatively opposed 19 of the 53 circuit court nominees nominated in the last three years by the Trump Administration due to their anti-LGBT record.

2. Eight of the country’s 12 circuit courts are now composed of over 25% Trump judges. In other words, two-thirds of our circuit courts are made up of a quarter or more of Trump nominees.

While some circuits, such as the First and Tenth, have remained relatively unscathed, other circuits have experienced a dramatic upheaval in their court’s makeup. This massive shift in the U.S. Courts of Appeals, which—as noted below—are the courts of last resort in most cases, threatens to do lasting damage to the civil rights of LGBT people.

2. These nominees were Allison Rushing, Chad Readler, Eric Murphy, Neomi Rao, Kenneth Lee, Steven Mensashi, Lawrence VanDyke.

In 2019, three Circuit Courts “flipped” from a majority of judges who were nominated by Democratic presidents to a majority of judges nominated by Republican presidents.

The makeup of the U.S. Circuit Court of Appeals for the Second Circuit (covering Connecticut, New York and New Hampshire), the U.S. Circuit Court of Appeals for the Third Circuit (covering Delaware, New Jersey and Pennsylvania) and the U.S. Circuit Court of Appeals for the Eleventh Circuit (covering Alabama, Florida and Georgia) all shifted from a majority of nominees nominated by a Democratic president to a majority of judges who were nominated by a Republican president.

The Trump Administration is rapidly outpacing previous administrations in terms of number of Circuit Court nominees confirmed. The Trump Administration has confirmed 50 circuit court nominees in the past three years. By comparison, President Obama had only 55 circuit judges confirmed during his entire eight years in office. The Senate had only confirmed 25 of President Obama’s appellate judicial nominees by the end of his third year in office. Similarly, at the same point in their Administrations, President George W. Bush had confirmed 30 nominees, President Clinton had confirmed 28 nominees, President George H.W. Bush had confirmed 31 nominees, and President Reagan had confirmed 23 nominees to the U.S. Court of Appeals.
OVER 85 PERCENT OF TRUMP’S CIRCUIT COURT NOMINEES ARE MEMBERS OF THE FEDERALIST SOCIETY. While each nominee’s history of anti-LGBT advocacy is distinct, there are a number of commonalities that emerge from their records.

For example, nominees are being funneled in from conservative organizations that compare same-sex couples to polygamists. In fact, the Federalist Society has been vocal about their desire to “pack the courts” with conservative judges to undo what they call the “Judicial Legacy of Barack Obama.”

Among these is Steven Menashi, who denigrated the decision in Obergefell v. Hodges and supported banning LGB people from the military, and Lawrence VanDyke, a nominee confirmed to the Ninth Circuit who was rated as “Not Qualified” by the American Bar Association in part because of his animus towards LGBT people, and who promoted the discredited myth that same-sex marriages will “hurt families and consequentially children and society.”

With LGBT rights the subject of frequent litigation in federal court, the documented animus of these nominees (now confirmed judges) towards the LGBT community should cause grave concern to anyone who believes that our federal courts should be a place where all people are guaranteed a fair and impartial adjudication of their claims.

You can read about Lambda Legal’s opposition to these nominees as well as the other nominees that we have opposed here.


5. See If Marriage Is A Federal Constitutional Right… (And Other Impertinent Questions), THE FEDERALIST SOCIETY (September 3, 2015) available at https://fedsoc.org/commentary/blog-posts/if-marriage-is-a-federal-constitutional-right (“Does the right to marry also include transgender individuals like Chelsea Manning and Caitlyn Jenner?… suppose that Caitlyn Jenner wanted to remarry, for example, all of his [sic] former wives simultaneously [or would they now be husbands? May a state prohibit—or conversely, lawfully permit—it?”)


THE TRUMP ADMINISTRATION HAS FAILED TO MAKE OUR CIRCUIT COURTS MORE DIVERSE. For our court system to be fully respected and seen as legitimate in the minds of all of the people whose rights it has the power to uphold, the people making decisions within the judiciary must reflect the incredible diversity of the United States. Yet almost 85% of Trump’s circuit court nominees are white and almost 80% of Trump’s circuit court nominees are men. 0% of Trump’s circuit court nominees are African-American and only 1 of Trump’s circuit court nominees is Latinx. ⁹

AS THE AVERAGE AGE OF CONFIRMED CIRCUIT COURT NOMINEES IS 49, THE IMPACT OF THESE JUDGES WILL BE FELT FOR DECADES.

The importance of circuit courts of appeals

There are approximately 170 actively serving circuit court judges. The Trump-Pence Administration has confirmed 50 of those judges. In other words, almost one-third of these courts are now Trump nominees.

Circuit court judges exert tremendous influence in shaping our nation’s laws and have a profound impact on the everyday lives of Americans. The Supreme Court takes up only around one hundred cases a year, but the circuit courts take up tens of thousands of appeals—effectively making them the courts of last resort for the vast majority of litigants. For example, during the term ending in 2019, the Supreme Court heard only 76 cases, ¹⁰ whereas the U.S. Courts of Appeals had 49,363 filings. ¹¹

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For better or for worse, cases decided by a circuit court have serious consequences for all the states in that circuit. For example, in a case Lambda Legal brought on behalf of a transgender woman in Georgia, the Eleventh Circuit ruled in 2011 that firing someone for being transgender is a form of sex discrimination prohibited by federal law. While that case originated in Georgia, the Court of Appeals decision has been binding precedent for almost a decade in Georgia, Alabama and Florida, extending important protections to workers in states lacking explicit protections against discrimination on the basis of gender identity.

Because many issues never reach the Supreme Court, who sits on the courts of appeals will have a significant and lasting impact on the development of the law. Most circuit courts have only between 10 and 20 judges who serve as the court of last resort in thousands of Federal cases. For example, the U.S. Court of Appeals for the Eleventh Circuit handled almost six thousand appeals in 2018, but has only 12 judges, five of whom have been put on that court by President Trump.

And with over one-third of Trump’s judicial nominees to the circuit courts having records of working to undermine LGBT rights and protections, there is reason to fear what this will mean for the legal progress that has been made in recent years by the LGBT community. Indeed, we are already witnessing the results in parts of the country where there are the fewest protections for LGBT people. For example, Judge

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13. This issue is now pending before the Supreme Court in *R.G. & G.R. Funeral Homes Inc., v. EEOC*, Docket No. 18-107.
14. Kevin Newsom, Elizabeth Branch, Britt Grant, Robert Luck, and Barbara Lagoa have been confirmed. Andrew Brasher’s nomination is pending.
James Ho, a Trump-nominated judge with a lifetime appointment to the U.S. Court of Appeals for the Fifth Circuit (covering Louisiana, Mississippi, and Texas) recently wrote an opinion denying health care to a transgender woman. Adding insult to injury, Judge Ho used improper pronouns throughout the decision, even after the district court had used the correct pronouns.\textsuperscript{15}

**DISTRICT COURTS**

**2019 HAS ALSO SEEN A LARGE NUMBER OF DISTRICT COURT CONFIRMATIONS:** There has also been a dramatic increase in the number of confirmations to district courts (district courts hear trials while circuit courts hear appeals.)

At the end of 2017, six district court nominees had been confirmed; by the end of 2018, that number had risen to 47, for a total of 53 confirmed judges. That number increased again this year to 80 confirmations in 2019, for a total of 133 confirmed district court judges in the last three years.

And there are 32 more district court nominees currently awaiting consideration by the Senate Judiciary Committee. While much attention is given to the Supreme Court and the courts of appeals, the importance of the district courts cannot be overlooked. District courts continue to play a critical role in curbing the excesses of the Trump Administration, as demonstrated by the recent district court decisions striking down the so-called “Denial of Care Rule” from the U.S. Department of Health and Human Services. With district court positions being increasingly filled by dangerous ideologues, we may see fewer rulings like these, which have prevented (or at least delayed) some of the Trump Administration’s most harmful policies from taking effect.

**PROCEDURAL SAFEGUARDS**

**THE PROCEDURAL SAFEGUARDS THAT HAVE HISTORICALLY ENSURED THAT THE SENATE FULFILLS ITS DUTY TO PROVIDE MEANINGFUL OVERSIGHT HAVE CONTINUED TO BE RECKLESSLY ABANDONED IN 2019.**

This year, Senate Republicans did away with a Senate rule that allowed for 30 hours of debate on a district court judicial nominee—giving Senators just two hours to debate a lifetime appointment.\textsuperscript{16} The truncation of the time to consider the records of the

\textsuperscript{15} Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019).

Trump Administration’s nominees will further diminish the integrity of the advice and consent process, particularly considering how frequently the Trump Administration’s judicial nominees have failed to disclose important aspects of their records, including controversial and often inflammatory personal writings.\(^{17}\)

**OTHER EXAMPLES OF THE DISMANTLING OF PROCEDURAL SAFEGUARDS OVER THE LAST THREE YEARS INCLUDE:**

1. **ABA RATINGS** The American Bar Association (ABA) has been issuing ratings on all nominated Article III judges since 1956. The ABA’s nonpartisan committee on the federal judiciary issues a nominee one of three possible ratings: Well Qualified, Qualified, or Not Qualified. In the last 30 years, only 15 nominees that were rated “Not Qualified” have been confirmed. Seven of these judges—almost half—have been Trump nominees.

   Also notable, the only circuit court judges to be confirmed in the last 30 years with a “Not Qualified” rating have been Trump nominees Steven Grasz, Jonathan Kobes, and Lawrence VanDyke.\(^{18}\) The ABA Ratings, which are based on input from lawyers and judges familiar with the nominee, have been a long respected part of the confirmation process, but are now regularly disregarded in the push to stack the courts.

2. **BLUE SLIPS** The “blue slip” process is a century-old procedure that provides home state senators the ability to return a blue sheet of paper indicating whether they approve or oppose the nomination. In the last three years, 17 circuit court judges have had hearings over the objection of their home state Senators—all of them except Ryan Bounds were confirmed.\(^{19}\)

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17. See, e.g., Bryn Stole, *Wendy Vitter didn’t disclose several speeches, political ad in questionnaire, senator charges*, *The New Orleans Advocate* (Mar. 6, 2018), available at [http://www.theadvocate.com/new_orleans/news/politics/article_d7ab04d2-217c-11e8-a8b7-07a926bd1755.html](http://www.theadvocate.com/new_orleans/news/politics/article_d7ab04d2-217c-11e8-a8b7-07a926bd1755.html); 164 Cong. Rec. S74,253 (daily ed. May 8, 2018) (statement of Sen. Merkley), available at [https://www.congress.gov/crec/2018/05/08/CREC-2018-05-08-senate.pdf](https://www.congress.gov/crec/2018/05/08/CREC-2018-05-08-senate.pdf) (stating, “Mr. Bounds’ writings themselves are objectionable not only for the views they express, but for the intemperate and demeaning tone that he uses to express his opinion. Equally, if not more disturbing, Mr. Bounds failed to disclose these writings when specifically asked by the committee about his views on equity and diversity. Although he felt free to volunteer details about his life going back to childhood, he misled the committee in response to this important inquiry. For this reason, five of the seven committee members no longer recommend Mr. Bounds.”).

18. *ABA ratings During the Trump Administration*, Ballotpedia available at [https://ballotpedia.org/ABA_ratings_during_the_Trump_administration#Footnotes](https://ballotpedia.org/ABA_ratings_during_the_Trump_administration#Footnotes)

19. Chairman Grassley and Chairman Graham have now held hearings for nominees without support from both home state senators for David Stras, Michael Brennan, Ryan Bounds, David Porter, Eric Miller, Eric Murphy, Chad Readler, Paul Matey, Joseph Bianco, Michael Park, Kenneth Lee, Daniel Collins, Daniel Bress, Peter Phipps, Steven Menashi, Patrick Bumatay, and Lawrence VanDyke.
3 NOMINEE PACKING Another egregious departure from committee procedure is the large number of nominees that have been bunched into a single hearing. On several occasions, more than four district court nominees have appeared in one hearing, and multiple circuit court nominees have been slated on the same panel. As a result, there has been little opportunity for senators to properly question each nominee—hampering their ability to properly provide meaningful advice and consent.

4 RECESS HEARINGS In 2018, Chairman Grassley and Senate Republicans held nomination hearings while Congress was in recess, ensuring that many Senators would not be able to attend the hearings. In the past, recess hearings had never occurred without the consent of the minority party. This practice effectively turned the Senate Judiciary Committee into a complete rubber stamp for the Trump Administration without even the pretense of providing meaningful advice and consent.

NOTE: There are a troublingly high number of Senators who have voted 100% of the time to confirm nominees Lambda Legal has opposed. It is deeply disturbing that these Senators have consistently voted to confirm nominees that have demonstrated at every turn they will not be able to administer fair and impartial justice to LGBT litigants.

CONCLUSION

The federal judiciary must remain an impartial institution that administers equal justice for all. The United States Senate—Democrats and Republicans alike—owe it to the American people to be more than just a rubber stamp for every nominee that the Trump Administration puts forward for consideration. Advice and consent is not just a suggestion, but rather a constitutional obligation, particularly during this tenuous time in our nation’s history. Otherwise, the damage done to our constitutional democracy will be felt for many decades to come, and may be devastating to those who care about LGBT equality.

20. For example, as recently as December 4, 2019, there was a panel with five district court nominees. This is the eighth occurrence of a hearing with five or more judicial nominees.
21. For example, there was a Senate Judiciary Hearing on October 30, 2019 with two circuit court nominees. This is the thirteenth occurrence of a hearing with more than one circuit court nominee.
23. Lamar Alexander (R-TN), John Barasso (R-WY), Marsha Blackburn (TN), Roy Blunt (R-MO), John Boozman (R-AR), Mike Braun (R-IN), Richard Burr (R-NC), Shelley Moore Capito (R-WV), Bill Cassidy (R-LA), John Cornyn (R-TX), Tom Cotton (R-AK), Kevin Cramer (R-ND), Mike Crapo (R-ID), Ted Cruz (R-TX), Steve Daines (R-MT), Mike Enzi (R-WY), Joni Ernst (R-IA), Deb Fischer (R-NE), Cory Gardner (R-CO), Lindsey Graham (R-SC), Chuck Grassley (R-IA), Josh Hawley (R-MO), John Hoeven (R-ND), Cindy Hyde-Smith (R-MS), Jim Inhofe (R-OK), Johnny Isakson (R-GA), Ron Johnson (R-WI), James Lankford (R-OK), Mike Lee (R-UT), Mitch McConnell (R-KY), Martha McSally (R-AZ), Jerry Moran (R-KS), Rand Paul (R-KY), David Perdue (R-GA), Rob Portman (R-OH), James Risch (R-ID), Pat Roberts (R-KS), Mitt Romney (R-UT), Mike Rounds (R-SD), Marco Rubio (R-FL), Ben Sasse (R-NE), Tim Scott (R-SC), Rick Scott (R-FL), Richard Shelby (R-AL), Dan Sullivan (R-AK), John Thune (R-SD), Thom Tillis (R-NC), Pat Toomey (R-PA), Roger Wicker (R-MS), Todd Young (R-IN).
**NOMINEES LAMBDA LEGAL OPPOSED IN 2019**

- **Lawrence VanDyke**  
  U.S. Court of Appeals for the Ninth Circuit  
  Asserted that same-sex marriage hurts families, children and society.

- **Steven Menashi**  
  U.S. Court of Appeals for the Second Circuit  
  Denigrated the decision in *Obergefell v. Hodges*, warning against the dangers of “nine unelected lawyers in Washington” making policy in favor of marriage equality.

- **Chad Readler**  
  U.S. Court of Appeals for the Sixth Circuit  
  Led DOJ team in defending Trump’s transgender military service ban. Authorized brief arguing that Title VII’s ban on sex discrimination did not cover sexual orientation discrimination.

- **Eric Murphy**  
  U.S. Court of Appeals for the Sixth Circuit  
  Served as counsel in *Obergefell v. Hodges*, personally arguing against marriage equality as lead counsel, and as counsel of record for the State of Ohio in the Supreme Court. He argued that same-sex marriage was “disrupting to our democracy”.

- **Neomi Rao**  
  U.S. Court of Appeals for the D.C. Circuit  
  Wrote that LGBT equality is a “radical” effort to alter society.

- **Kenneth Lee**  
  U.S. Court of Appeals for the Ninth Circuit  
  Supported the ban on open military service by lesbians, gay men and bisexual people.

- **Allison Jones Rushing**  
  U.S. Court of Appeals for the Fourth Circuit  
  Criticized the majority in *U.S. v. Windsor* for holding that the Defense of Marriage Act’s moral disapproval of same-sex marriage was constitutionally impermissible.
Matthew Kacsmaryk  
U.S. District Court for the Northern District of Texas  
Argued that the State’s interest in defending against sexual orientation-based discrimination was not enough of a reason to justify burdens on a wedding cake baker’s “constitutionally protected religious freedom.” Authored an article that denigrates as “problematic” the very idea of gender identity.

Howard Nielson  
U.S. District Court for Utah  
Maligned district court judge in Proposition 8 case claiming that he could not be impartial due to his sexual orientation and, specifically, his same-sex relationship.

Brantley Starr  
U.S. District Court for the Northern District of Texas  
Supported legislation that would harm LGBT families.

Stephen Clark  
U.S. Eastern District Court for the District of Missouri  
Argued that the holding in Obergefell v. Hodges would be a slippery slope and that one of the “next evolutions of same-sex marriage is polygamy.”

NOMINATION PENDING  
Stephen Schwartz  
Nominated to the Court of Federal Claims.  
Worked on litigation supporting legislation (HB2) seeking to deny transgender people from using public restrooms.

For more information, visit https://www.lambdalegal.org/2019-judicial-nominees