

Why Federal Courts Matter to the LGBT Community

A Guide to Filling Judicial Vacancies with Qualified & Diverse Judges Who Administer Equal Justice for All

Fair Courts Project

Federal courts play a crucial role in the lives of lesbian, gay, bisexual, transgender people and those with HIV. Across the country, federal courts are deciding cases involving access to health care, employment protections, safety in schools, the freedom to marry, parenting rights, and family protections for same-sex couples.

LGBT people and those with HIV are an integral part of the fabric of America and are entitled to equality and liberty under the law. Yet, the federal courts—and the judges whose job it is to interpret the law and safeguard our civil rights—are not well understood by the public and many people fail to appreciate their importance. The nomination and confirmation of judges, who serve lifetime terms on the federal bench, must be a priority. Our federal courts should be staffed with a full complement of well-qualified and diverse judges who understand that the rights and liberties guaranteed by our Constitution apply equally to LGBT people. **If we care about equality, we have to care about the courts.**

A Fair and Balanced Federal Judiciary

The fight for equality has come a long way, but the struggle for full recognition of the civil rights of LGBT people and people with HIV continues. In the coming years, a number of key issues that significantly impact the LGBT community are likely to come before the federal courts. Therefore, ensuring federal judges are fair-minded and approach decisions without bias is of upmost importance to our system of justice and the individuals who our legal system has the highest obligation to protect.

While politicians may come and go from one election to another, federal judges serve for life. For example, President Nixon served 5 ½ years, but his nominee to the Supreme Court, Chief Justice William H. Rehnquist, served for 31 years after Nixon resigned.

The people we elect to represent us at the federal level have significant influence over who makes it on the federal courts and how long it takes them to get there. For this reason, it is important to appreciate that presidential elections makes a big difference when it comes to who serves on the federal bench.

Often when we think about the role of the president in nominating judges, we think of the Supreme Court. However, presidents make between 150 to more than 200 appointments to lower federal courts across the country.

The ability of our elected representatives to influence the composition of our courts doesn't end with the Oval Office. Individual senators play an important advice and consent role, and have to confirm the president's nominees. This means voters have the ability to encourage their senators to address judicial vacancies in a timely way, and to support the nomination and confirmation of well-qualified, diverse candidates on the federal bench who believe that justice for all applies to everyone.

LGBT Rights at the U.S. Supreme Court



It might be hard for some to imagine, but as recently as 10 years ago, lesbian and gay Americans in many states were considered criminals in the eyes of the law—simply for having sex with someone of the same gender. But discriminatory state sodomy statutes extended far beyond criminal law. As a result of these laws, parents were denied custody of their children, workers were turned down from jobs, and prospective tenants were refused housing.

In 2003, after decades of fighting against state sodomy laws, Lambda Legal's historic victory in *Lawrence v. Texas* opened a new path toward LGBT equality. For the first time, the Supreme Court established that lesbian and gay men share the same fundamental right to private intimacy with another adult that heterosexuals have.

In 2013, for the first time in history, the Supreme Court heard two gay rights cases in one term. One case challenges the so-called Defense of Marriage Act (DOMA), which bars the federal government from recognizing the marriages of same-sex

couples. The other challenges California's Prop 8, which revoked same-sex couples' freedom to marry in that state.

For LGBT Americans, the courts have played, and will continue to play, an important role in the struggle for full equality under the law. And while the Supreme Court has been at the forefront of that fight, lower federal courts across the nation are deciding cases that have a significant and long-term impact on the rights of LGBT people and those with HIV.

With the Supreme Court hearing fewer than 100 cases each term, federal district and circuit courts often have the final say on many important issues. So for the LGBT community and our allies, it is not enough to think about the courts during a presidential election cycle. If we want to make sure that federal courts at all levels are staffed with fair and independent judges that believe in justice for ALL, we have to be engaged on the issue of fair courts year-round.

Federal Courts Protect LGBT Rights



School Harassment: *Pratt v. Indian River*

Charlie Pratt endured years of antigay bullying and harassment at school and was forced to withdraw after teachers and school officials refused to take appropriate action. Later, the principal turned down Charlie's sister Ashley's request to form a GSA. In 2009, Lambda Legal sued the school district and several of its employees in federal court, asserting claims for illegal and unconstitutional discrimination, harassment and censorship. Just days after the suit was filed, the school district stated that it would allow Ashley to form a GSA. In 2011, the U.S. District Court for the Northern District of New York refused to dismiss any of the plaintiffs' federal claims, clearing the way for the lawsuit to continue to move forward.

HIV Discrimination: *Roe v City of Atlanta*

The Atlanta Police Department disqualified an HIV-positive man from a position as an officer after learning of his HIV status. Lambda Legal filed suit against the city of Atlanta, alleging violation of the Americans with Disabilities Act and the

federal Rehabilitation Act. After the district court threw out the case, the 11th Circuit Court of Appeals reversed, ruling that the lower court did not give sufficient consideration to the City of Atlanta's admissions regarding the employability of HIV-positive individuals as police officers, and remanded the case for further proceedings. As a result of the ruling, the Atlanta Police Department settled, awarding the plaintiff \$250,000.



Workplace Discrimination: *Glenn v. Brumby*

Vandy Beth Glenn was fired from her job at the Georgia General Assembly when she informed her boss of her gender transition. In 2008, Lambda Legal filed a federal lawsuit in U.S. district court on behalf of Glenn, asserting that her firing violated the Constitution's equal protection guarantee. In 2011, the 11th Circuit Court of Appeals upheld the district court's ruling that the Georgia General Assembly discriminated against Glenn. This important ruling sends a clear message to employers that discrimination against transgender employees will not be tolerated.

Marriage Equality: *Sevcik v. Sandoval*

In April 2012, Lambda Legal filed a federal lawsuit in the U.S. District Court for Nevada on behalf of eight same-sex couples challenging the state's constitutional ban on equal marriage for same-sex couples as a violation of the Equal Protection Clause of the U.S. Constitution. Nevada is one of eight states to give comprehensive legal recognition to same-sex couples without the honored distinction of marriage. The lead plaintiffs, Beverly Sevcik, 73, and Mary Baranovich, 76, of Carson City, have been together for nearly 41 years and committed their lives to each other in October 1971. Together, they raised three children, and they are now proud grandmothers of four grandchildren. In November, the District Court ruled against the plaintiffs, upholding Nevada's marriage equality ban. The decision relies on a 1972 one-sentence summary dismissal by the Supreme Court in a case challenging Minnesota's denial of marriage rights to a same-sex couple. The case has been appealed to the Ninth Circuit Court of Appeals.

Understanding the Federal Courts

The Framers of the U.S. Constitution set up a three-branch, co-equal system of government. Each branch—the executive (the president and the federal agencies), legislative (Congress), and judicial (courts) — has separate duties, and all have some form of control over each of the other branches. These overlapping responsibilities form a system of “checks and balances” that prevent any one branch from having too much power.

The federal courts are an essential part of our democracy and provide a vital balance in our government, particularly when it comes to protecting individual rights. The Framers were very concerned that the democratic process could be used to make government work for the majority and the politically powerful at the expense of minority rights. For this reason, the Constitution gives federal judges life tenure and forbids Congress from reducing judicial salaries so that judges would be accountable to the law, without fear of political pressure or retaliation. This independence from the electoral process helps to ensure that courts provide fair and impartial justice for all.

In the federal court system, most cases begin in the **U.S. District Courts**, which consist of 94 trial level courts across the country with at least one in every state. Decisions issued by the district courts can then be appealed to the **Court of Appeals**, also known as the “circuit courts.” There are 13 circuit courts in total, each responsible for reviewing decisions issued from district courts in particular states. A decision at the lower level may ultimately be reviewed by the **U.S Supreme Court**, if the Court agrees to hear the case.

The Selection of Federal Judges

Under the Constitution, federal judges are appointed by the president with the advice and consent of the Senate. While this seems straightforward, the nomination and confirmation process is often fraught with politics, deal-making and delay.

When there is an open seat on a federal court at the district or the appellate level, the White House consults with the senators who represent the state in which the vacancy occurs. Home-state senators play an important role in the process, by screening or recommending candidates and providing initial support that will be essential to confirmation.

After a candidate is identified, he or she is carefully vetted by the White House, and if successful, officially nominated by the president. The nomination then moves to the Senate Judiciary Committee, where home-state senators are again asked to consent to a nominee before a hearing is scheduled. At the hearing, members of the Senate Judiciary Committee have an opportunity to question a nominee and eventually, hold a vote on the merits.

If the nominee receives a majority vote by the Judiciary Committee, the nomination can be forwarded to the Senate for a full floor vote to be scheduled by the Senate Majority Leader. A simple majority vote is all that is required for a nominee to be confirmed. However, if any Senator blocks the prompt schedule of a vote, an effective filibuster is initiated and a 60-vote margin will be required to end debate and proceed to an up or down vote.

During this lengthy nomination and confirmation process there are a number of opportunities for delay and political obstruction. For example, when home-state senators fail to recommend candidates or refuse to allow a nominee to go forward, the process can grind to a halt, causing the vacancy to persist. In addition, members of the Senate Judiciary Committee can delay the prompt scheduling of a hearing and any member of the Senate can filibuster a nominee on the floor.

Because individual Senators play such an important advice and consent role, individuals and groups have the ability to weigh in by urging support for a particular nominee or to encourage swift action when considering the nominations as a whole. Without political pressure from constituents, particularly at the state level, there is little consequence for delaying votes on even the most noncontroversial nominees.

The Importance of a Diverse Judiciary

Today, it is more important than ever that our courts reflect the growing diversity of our country, but we have a long way to go. There are nearly 900 federal judges in the U.S., and most are white men. A legal system that represents a diverse range of perspectives and experiences will improve the quality of justice and build public confidence in the courts.

During President Obama’s first term, 44% of his federal judicial nominees were women and 40% were people of color. In addition, President Obama has nominated an unprecedented nine openly gay candidates to the federal bench, including the first gay African-American judge, William L. Thomas, and lesbian Latina judge, Nitza Quiñones Alejandro. If confirmed by the Senate, they will join openly gay and lesbian judges Pamela Chen, Michael McShane, Michael Fitzgerald, J. Paul Oetken, Alison Nathan and Deborah Batts on the federal district courts.

In 2013, President Obama nominated Todd Hughes to the Court of Appeals for the Federal Circuit. If confirmed, Hughes would become the first openly gay appeals court judge. However, while Hughes’ confirmation would make judicial history, this is not the first time the President has nominated an openly gay attorney to a federal court of appeals. In 2010, Edward C. DuMont was nominated to the Federal Circuit, but was forced to withdraw his name from consideration after his nomination languished for 18 months with no action from the Senate.

The delay of the DuMont nomination highlights the relentless obstruction in the Senate, which has given rise to a judicial vacancy crisis that forces many Americans to wait months or even years to get a chance to stand up for their rights in court.

But even with these important advances, we still have a long way to go.

LGBT in the Federal Judiciary

- **3.4%** of the **population** identifies as LGBT
- **1.8%** of **attorneys** identify as LGBT
- **4-5%** of **law students** identify as LGBT

And yet, only...

- **0.5%** of federal **district court judges** identify as LGBT
- **0.0%** of federal **appeals court judges** identify as LGBT
- **0.0%** of **Supreme Court justices** identify as LGBT

The Federal Judicial Vacancy Crisis

Our democracy is under attack. This country depends upon the shared balance of power between three co-equal branches of government. An attack on the judiciary is an attack on all three. The unprecedented obstruction of judicial confirmations threatens the very foundation of our government. Court-bashing by political candidates continues to draw national attention, the Senate relentlessly blocks the confirmation of qualified nominees, and a judicial vacancy crisis plagues our federal court system.

There are 874 federal judgeships, and for the past few years, the vacancy rate has remained at around 75-90 seats. This means approximately 1 in 10 positions on the federal bench remain empty. The nonpartisan Administrative Office of the U.S. Courts has designated approximately 33 open seats (40% of vacancies) as “judicial emergencies,” based on the length of time the position has been vacant and the backlog of cases.

This vacancy crisis has resulted in crowded dockets making it difficult for Americans who live in a district without enough judges to have their cases heard in a timely manner. Further, federal judges must give priority to criminal cases and as a consequence, important cases involving civil rights, discrimination and immigration are often delayed for years.

In the past four years:

- **The number of vacancies has gone up.** Since President Obama took office, the number of judicial vacancies has gone up 51% compared to declining by 34% under President George W. Bush.
- **The delays are longer.** President Obama’s judicial nominees wait an average of 116 days for a vote in the Senate, compared to 34 days for President George W. Bush’s nominees;
- **The confirmation rate is lower.** During his first term, President Obama had 160 judicial nominees confirmed, compared to 205 under President George W. Bush.

Our Access to Justice is at Stake

As a legal organization committed to using impact litigation to achieve full recognition of the civil rights of LGBT people and those living with HIV, Lambda Legal relies on a fair and impartial judiciary that is adequately staffed with qualified jurists from the trial courts to the Supreme Court. When too few judges are available to hear a growing number of cases, justice is inevitably delayed and denied to many Americans.

Federal district courts provide a gateway for achieving broader civil rights protections for vulnerable communities. By ignoring the vacancy crisis at the trial level, gateways are clogged, denying justice to many Americans. As time goes by, memories fade, people get sick or die, or witnesses become otherwise unavailable, and the financial and emotional burdens exacerbate the sting of injustice.

The federal appellate courts are also vitally important to our justice system, as they often provide the final word in the most important cases of our time. This delay of justice, stemming from the backlog of cases, directly harms plaintiffs and denies the civil rights of individuals whose interests remain in legal limbo.

Without the timely confirmation of federal judges, the more than 250 million Americans currently living in a district with a courtroom vacancy are effectively denied access to justice. The vacancy crisis must be addressed if we hope to preserve the fair and impartial judiciary that is a hallmark of the American system of government.

Take Action!

We can all let our U.S. Senators and other elected officials know that we care about preserving a fair and impartial judiciary and a confirmation process that works. Learn more about how each of us can demand action on the federal judicial vacancy crisis by visiting www.lambdalegal.org/issues/fair-courts-project

