

Courts, Confirmations, & Consequences:

How Trump Restructured the
Federal Judiciary and Ushered
in a Climate of Unprecedented
Hostility toward LGBTQ+
People and Civil Rights



Lambda Legal

making the case for equality

OVERVIEW

The Trump-Pence Administration has caused unprecedented harm to the promise of a fair and independent federal judiciary. Enabled and abetted by Senate Majority Leader Mitch McConnell and Senate Judiciary Committee Chairman Lindsey Graham, and advised by a powerful but shrouded network of far-right wing organizations, the Trump-Pence Administration has been laser-focused on confirming ideologically-driven judges to lifetime appointments in order to further their ultra-conservative policy objectives through the federal courts. After nearly four years of pushing through a judicial nominations at breakneck speed, the actions of Senate Republicans during the waning hours of this administration – from a rushed confirmation of a Supreme Court justice while a national election was already underway to an unprecedented number of judicial confirmations during the lame duck session – demonstrates the extent to which seizing control of the federal judiciary has been Mitch McConnell’s highest priority and signature achievement. The cumulative effect of these past four years on the federal judiciary will have consequences for years to come.

As an organization that has defended the rights of LGBTQ+ people and people living with HIV in the courts

for more than 40 years, Lambda Legal has fought this harm at every turn. We have repeatedly sounded the alarm about these dangerous nominees and have continually warned about the impact that they will have on the ability of LGBTQ+ people and people living with HIV to receive fair and impartial justice. The Trump-Pence Administration will soon no longer be in the White House, but the lifetime tenure of the over two hundred Trump-appointed judges will have only just begun.

Since Trump’s inauguration in January 2017, Lambda Legal’s team of legal experts mounted an aggressive and painstaking four-year effort to meticulously monitor, track, document, and analyze the extent to which Trump’s influence over the federal judiciary would impact the lives of LGBTQ+ people and people living with HIV. Our team’s findings are the culmination of four years of rigorous, methodical, and in-depth research.^[1]

Lambda Legal’s analysis provides for the first time a clear and complete snapshot of the outsized impact Trump has had in not only restructuring and damaging the federal judiciary, but ultimately ushering in a judicial climate significantly hostile toward LGBTQ+ people and people living with HIV.

KEY FINDINGS OF THE ANALYSIS

- **Nearly 40 percent of the federal judges that Trump has appointed to the courts of appeals have a demonstrated history of hostility towards the LGBTQ+ community** – an overall increase from the 1-in-3 number reported in Lambda Legal’s 2018 and 2019 reports. This trend reflects the commitment of President Trump and the Republican-controlled Senate to appointing and confirming anti-LGBTQ+ judges over the course of his presidency, notwithstanding public outcry over the dangerous records of these nominees.
- **Nearly 85 percent of all of Trump’s circuit court nominees were white and 80 percent were men, while none of his circuit court nominees were Black** – representing an unprecedented whitewashing of the judicial system that has become significantly less diverse. Only two of Trump’s circuit court nominees were Latinx.
- **Almost one-third of the circuit court judgeships are now Trump judges (54 out of 179)** – On nine of the country’s 12 circuit courts, Trump nominees makeup at least 25 percent of the active-duty (i.e., non-senior status) judges in that circuit.
- **85 percent of Trump’s circuit court nominees are or have been affiliated with the Federalist Society** – an activist organization that advocates for a deeply conservative reading of the Constitution, and gives a platform

to many anti-LGBTQ activists who have argued against marriage equality, fought nondiscrimination protections for LGBTQ workers, and sought to strip away parental rights of same-sex parents.

- **The Trump Administration has outpaced the last five administrations in number of judges confirmed** – The Trump Administration has confirmed fifty-four circuit court judges in four years, just one less than the Obama Administration had confirmed in eight years. This is nearly double the number of circuit court judges confirmed during the first term of Presidents Obama (30) and Clinton (30), and over 50 percent higher than the number of appellate court confirmations during the first terms of Presidents Reagan (33) and George W. Bush (35).

ANALYSIS + RESEARCH OVERVIEW

The following is an analysis of the significant impact that the Trump-Pence Administration has had on the federal judiciary over the past four years. By successfully advancing an unprecedented number of nominees, a high percentage of whom were confirmed despite records evincing significant anti-LGBTQ hostility, the Trump administration used every tool in its arsenal to produce a federal judiciary significantly more hostile to the rights of LGBTQ+ people and people living with HIV, notwithstanding greater social acceptance of our community and support for our full legal equality than at any time in our nation's history.

The administration's emphasis on stacking the nation's circuit courts with nominees hostile to civil rights, and LGBTQ rights in particular, continued unabated over the past four years.

1. Lambda Legal opposed 22 of the 57 circuit court nominees nominated in the last four years due to their anti-LGBTQ+ record; in other words, almost 40% of circuit court nominees have a demonstrated history of anti-LGBTQ+ bias.^[2] Lambda Legal opposed three circuit court nominees who were confirmed in 2020.^[3] Among this notorious group were Andrew Brasher who worked with the Alliance Defending Freedom to author an amicus brief in *Obergefell v. Hodges* arguing that LGBTQ+ parents weren't as ideally suited as "biological parents" to raise children, Justin Walker who wrote extensively against the Affordable Care Act and whose main qualification to become a judge seemed to be his lifelong relationship with Majority Leader McConnell, and Cory Wilson who supported a law allowing businesses to refuse service to LGBTQ+ and unmarried people if they had a "sincerely held religious belief" when he worked in the Mississippi legislature.

2. The Trump Administration's nomination of judges who are overwhelmingly white and male not only halted but reversed modest gains made in recent years to ensure that the federal judiciary more accurately reflects the demographics of our nation.

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 nearly 85% of Trump's circuit court nominees are white and 80% of Trump's circuit court nominees are men. 0% of Trump's circuit court nominees are Black and only two of Trump's circuit court nominees are Latinx.^[4] The Trump Administration has even resegregated the Seventh Circuit.^[5] The Trump Administration has confirmed five consecutive white nominees to the Seventh Circuit since the retirement of the circuit's only jurist of color, Judge Ann Claire Williams, leaving almost eight million people of color with no representation on a court that will often serve as the court of last resort.^[6] It is essential for the judiciary to reflect the community it serves. Not because it guarantees a particular outcome in a particular case but because it helps to ensure that all who walk through the courthouse doors will be treated with dignity and will receive equal justice under the law. It is indefensible that this court and our judiciary has become less diverse while our country has become more diverse.

3. The Trump Administration outpaced previous administrations in terms of number of circuit court nominees confirmed. The Trump Administration has confirmed 54 circuit court nominees in the past four years. By comparison, President Obama had only 55 circuit judges confirmed during his entire eight years in office. The Senate had only confirmed 30 of President Obama’s appellate judicial nominees by the end of his fourth year in office. Similarly, at the same point in their Administrations, President George W. Bush had confirmed 35 nominees, President Clinton had confirmed 30 nominees, President George H.W. Bush had confirmed 42 nominees, and President Reagan had confirmed 33 nominees to the U.S. Court of Appeals.^[7]

4. Trump judges now comprise 25% or more of the sitting justices on fully 75 percent of the country’s 12 circuit courts. While some circuits, such as the First, Fourth, and Tenth have remained relatively unaffected by Trump’s campaign to remake the judiciary, other circuits have experienced a dramatic upheaval in their court’s makeup. The Eleventh Circuit (covering Alabama, Florida and Georgia) for example has seen a significant transformation with a 50 percent change in that circuit’s composition.

5. In the last four years, 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. Court of Appeals for the Second Circuit (covering Connecticut, New York and New Hampshire), the U.S. Court of Appeals for the Third Circuit (covering Delaware, New Jersey and Pennsylvania) and the U.S. 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 flipping of three circuits in four years is demonstrative of the aggressive prioritization of the Senate to confirm judicial nominees at the expense of other legislative priorities.

6. More than 85 percent of Trump’s circuit court nominees are members of the Federalist Society.^[8] The Federalist Society has functioned as a recruitment operation or “farm team” devoted to providing reliably ultra-conservative partisan judges for the Trump Administration to nominate. Almost all of their members hold views that are consistently opposed to LGBTQ+ protections, and some have been vocal about their desire to “pack the courts” with conservative judges to undo what they call the “Judicial Legacy of Barack Obama.”^[9] Among the most prominent champions of the anti-LGBTQ positions promoted by the Federalist Society, Justice Samuel Alito recently delivered the keynote address to the organization’s national convening in which he claimed that marriage equality threatened constitutional protections for the freedom of speech, insisting that those who express the belief that marriage is between a man and a woman are automatically labeled a ‘bigot’ and therefore people have been exiled to only “whisper their views in their homes.”^[10]

7. The last four years have also led to a large number of district court confirmations. At the end of 2017, six district court nominees had been confirmed; by the end of 2018, 53 nominees had been confirmed; by the end of 2019, 133 nominees had been confirmed, and by December 29 2020, a total of 174 nominees will have been confirmed.^[11] 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 an important role in curbing the excesses of the Trump administration, as demonstrated by recent district court rulings blocking actions by the Department of Health and Human Services to rollback LGBTQ nondiscrimination protections in the Affordable Care Act^[12] and orders requiring the administration to reinstitute the DACA program.^[13] 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 harmful policies from taking effect.

Why the circuit courts of appeals are important

There are approximately 177 actively serving circuit court judges. The Trump-Pence Administration has confirmed 54 of them, i.e., 30 percent of the total. 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 2020, the Supreme Court heard only 61 cases,^[14] whereas the U.S. Courts of Appeals had 50,258 filings.^[15]

Most circuit courts have only between 10 and 20 judges who serve on these courts of last resort in thousands of

Federal cases. For example, the U.S. Court of Appeals for the Eleventh Circuit (Alabama, Florida and Georgia) handled almost five thousand appeals in 2019, but has only 12 judges (6 of whom are Trump-nominated judges).^[16] In addition, circuit courts typically hear cases on panels of three, so a litigant in the Eleventh Circuit has an extremely high probability of having at least one Trump-nominated judge assigned to their case. For better or for worse, cases decided by a circuit court have serious consequences for all the states in that circuit, as evidenced by cases challenging denials of health care coverage for transgender people, cases challenging a state's refusal to recognize same-sex parentage, and cases challenging discrimination targeting people living with HIV.

Discriminating from the Bench

How Trump's Judges Have Ruled on Issues Impacting the LGBTQ+ Community

With nearly 40 percent of Trump's judicial nominees to the circuit courts having records of working to undermine LGBTQ+ rights and protections, their decisions will have a profound impact the LGBTQ+ community. Indeed, we are already witnessing the results in parts of the country where there are the fewest protections for LGBTQ+ people.

***Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019):** Judge 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) 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.

***Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019):** Judge David Stras, a Trump-nominated judge with a lifetime appointment to the U.S. Court of Appeals for the Eighth Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) wrote an opinion allowing a wedding videographer to challenge a law prohibiting sexual orientation discrimination where the business claimed that, even though it purported to be open to the public, the owners viewed the wedding videos that they were planning to create as their own speech (not the couple's), and therefore felt that the nondiscrimination law

compelled them to express their approval of same-sex marriage.

***United States v. Varner*, 948 F.3d 250 (5th Cir. 2020):** Judge Kyle Duncan, a Trump-nominated judge with a lifetime appointment to the U.S. Court of Appeals for the Fifth Circuit (covering Louisiana, Mississippi, and Texas) wrote an opinion rejecting the claims of a transgender litigant, and in doing so, repeatedly and deliberately misgendered her. Furthermore, Judge Duncan wrote a lengthy and dicta-filled opinion setting forth his fringe view that respecting a transgender litigant's identity through the use of appropriate pronouns would somehow call into question a judge's impartiality.

Otto v. City of Boca Raton, Fla. No. 19-10604, 2020 WL 6813994 (11th Cir. 2020): Two Trump-nominated judges in the Eleventh Circuit joined forces to issue a split (2-1) decision striking down local laws protecting LGBTQ minors from being subjected to so-called "conversion therapy," a discredited and unethical practice masquerading as mental health care.

Important procedural safeguards – tools that have historically ensured that the Senate fulfills its duty to provide meaningful oversight – have been eroded or removed entirely over the last four years, and continued to be recklessly abandoned in 2020.

1. Confirmation process for Justice Amy Coney Barrett. Justice Barrett was nominated eight days after Justice Ginsburg’s passing, with her hearing scheduled for two weeks later. To expedite her vote out of Committee, on the morning of the fourth day of her hearing, and before the scheduled afternoon panel where the Committee would complete their questioning and conclude her hearing, her nomination was held over at a mark-up, which allowed her to be voted out of Committee and be reported to the Senate floor the following week. Despite not having a single member of the minority party present, in a clear violation of quorum rules, Chairman Graham held a vote, and Justice Barrett’s nomination was reported to the Senate floor. Majority Leader McConnell then reconvened the Senate for a rare Sunday session for her cloture vote on October 25th. In our country’s entire

history, the Senate has only held a Sunday session 62 times, and never before to vote on a judicial nominee.^[17] Justice Barrett is the first Supreme Court Justice to be confirmed without one vote from the minority party in over 150 years.^[18]

2. Senate Judiciary Committee hearings during the “lame duck” session. Senate Republicans shoved aside longstanding precedent of not moving forward with post-election hearings for judicial nominees of a losing president.^[19] At the time this report went to press, the Senate was on track to have confirmed 13 judges to lifetime appointments during the lame duck session, including Thomas Kirsch, first nominated on November 16 and confirmed exactly a month later to fill the seat on the Seventh Circuit vacated by Justice Barrett.

Other examples of the dismantling of procedural safeguards over the last four years.

1. Post-cloture debate time. In 2019, 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.^[20] The truncation of the time to consider the records of the Trump Administration’s nominees diminished the integrity of the advice and consent process, particularly considering how frequently Trump’s judicial nominees failed to disclose important aspects of their records, like their controversial and often inflammatory personal writings.^[21]

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 four years, 18 circuit court judges had hearings over the objection of their home state Senators—all of them except Ryan Bounds were confirmed.^[22]

3. 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 one of three possible ratings: Well Qualified, Qualified, or Not Qualified. In the last 30 years, only 16 nominees that were rated “Not Qualified” have been confirmed. Eight of these judges — half — have been Trump nominees.^[23] Also notable, the only circuit court judges to ever be confirmed with a “Not Qualified” rating have been Trump nominees Steven Grasz, Jonathan Kobes, and Lawrence VanDyke.^[24] The ABA Ratings which are based on input from lawyers and judges familiar with the nominee have been a long respected part of the judiciary process, but were regularly disregarded in the push to stack the courts.

4. Recess Hearings. In 2018, then-Senate Judiciary 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.^[25] This practice has had the effect of turning the Senate Judiciary Committee into a complete rubber stamp for the Trump Administration without even the pretense of

providing meaningful advice and consent, bolstering the view that Senators are merely acting as rubber stamps.

5. 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,^[26] and multiple circuit court nominees have been slated on the same panel.^[27] As a result, there has been little opportunity for senators to properly question each nominee—again hampering their ability to properly provide meaningful advice and consent.

Trump's Rubber Stamp in the Senate

Finally, it is important to note that there was a troublingly high number of Senators, 59 in total, who voted 100% of the time to confirm nominees Lambda Legal has opposed.^[28] It is deeply disturbing that these Senators appear to have put party loyalty ahead of their obligation to engage in meaningful advice and consent, and their duty to protect the integrity of the federal judiciary. Instead, they voted consistently to confirm nominees whose records give the public no reason to believe that they can be trusted to administer fair and impartial justice to LGBTQ+ litigants and people living with HIV.

CONCLUSION

President Trump and the Republican-controlled Senate made no secret of the fact that their goal was to pack the federal judiciary and, in doing so, use the courts to achieve what they could not accomplish either through legislative action or from electoral gains. And as the analysis above demonstrates, their campaign has been a success, with nearly every available judicial slot having been filled before the clock ran out on the Trump administration. This dramatic shift in the makeup of the federal judiciary will undoubtedly be one of the most noteworthy accomplishments of the Trump era, and the effects of this overhaul will be felt for a generation or more, with the rights of LGBTQ+ people and other historically vulnerable communities hanging in the balance.

While we are troubled by what has happened to the federal judiciary over the last four years, we hope that there is a silver lining: specifically, we believe that people who care about civil rights understand more deeply and concretely the importance of our federal courts, and that the state and the fate of our courts will be a higher priority issue for progressives in the years to come. Our democracy depends on a federal judiciary that not only operates as — but is also perceived as — a fair and impartial institution. As one of our three co-equal branches of government, our federal courts must be a place where the constitutional guarantee of equal justice under law for all people can be redeemed. With the end of the Trump administration, we will finally stop the bleeding, but much work will need to be done to heal and restore this critically important institution.

Nominees Lambda Legal Opposed in the Last Four Years

Supreme Court Nominees

Neil Gorsuch: Confirmed to the U.S. Supreme Court. Criticized the use of the courts to achieve recognition of civil rights, saying that doing so was pushing a “social agenda,” specifically listing same-sex marriage, and saying these types of litigation were “bad for the country.”

Brett Kavanaugh: Confirmed to the U.S. Supreme Court. Expressed extreme hostility to the Affordable Care Act in his judicial writings and undermined nondiscrimination laws in favor of allowing religious adherents an unfettered license to discriminate.

Amy Coney Barrett: Confirmed to the U.S. Supreme Court. Said that transgender people were not protected by Title IX’s prohibition against sex discrimination, saying that Congress would “never have dreamed of that result.”^[29]

Circuit Court Nominees

John K. Bush: Confirmed to the U.S. Court of Appeals for the Sixth Circuit. Compared abortion to slavery, saying that it relied on the reasoning of “activist judges,” and used homophobic slurs and sexist remarks in his writings and public statements.

Joan Larsen: Confirmed to the U.S. Court of Appeals for the Sixth Circuit. Authored articles disparaging the holding of *Lawrence v. Texas* and criticizing the Obama Administration for refusing to defend the so-called Defense of Marriage Act.

Gregory Katsas: Confirmed to the U.S. Court of Appeals for the D.C. Circuit. Provided legal advice to the Trump Administration for their implementation of the transgender military ban and the rollback of protections for transgender students in public schools.

L. Steven Gras: Confirmed to the U.S. Court of Appeals for the Eighth Circuit. Argued against marriage equality and against LGBTQ+ families having the right to adopt. Also served as Board Director for an organization that supported the dangerous practice of conversion therapy.

Don Willett: Confirmed to the U.S. Court of Appeals for the Fifth Circuit. Frequently sided against LGBTQ+ rights while serving on the Texas Supreme Court, including joining an opinion denying benefits to the spouses of same-sex couples, saying that “*Obergefell* is not the end.”

David Stras: Confirmed to the U.S. Court of Appeals for the 8th Circuit. Called constitutional protections for LGBTQ+ people “mere social policy.”

Kyle Duncan: Confirmed to the U.S. Court of Appeals for the Fifth Circuit. Said that marriage equality “imperils civic peace.”

David Porter: Confirmed to the U.S. Court of Appeals for the Third Circuit. Was a contributor to an anti-LGBTQ+ think tank, which supported conversion therapy and denigrated marriage equality.

Ryan Bounds: Nominated to the U.S. Court of Appeals for the Ninth Circuit. Authored many articles disparaging LGBTQ+ people and people of color.

Allison Jones Rushing: Confirmed to the 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.

Chad Readler: Confirmed to the 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: Confirmed to the U.S. Court of Appeals for the Sixth Circuit. Served as counsel in *Obergefell v. Hodges*, personally arguing against marriage equality at the 6th Circuit Court of Appeals 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: Confirmed to the U.S. Court of Appeals for the D.C. Circuit. Wrote that LGBTQ+ equality is a “radical” effort to alter society.

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

Steven Menashi: Confirmed to the U.S. Court of Appeals for the Second Circuit. Supported the ban on open military service by lesbians, gay men and bisexual people. Denigrated the decision in *Obergefell v. Hodges*, warning against the dangers of “nine unelected lawyers in Washington” making policy in favor of marriage equality.

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

Andrew Brasher: Confirmed to the U.S. Court of Appeals for the Eleventh Circuit. Authored an amicus brief against marriage equality, saying that “biological parents” are best suited to raise children.

Justin Walker: Confirmed to the U.S. Court of Appeals for the D.C. Circuit. Called the Supreme Court’s decision to uphold the Affordable Care Act “indefensible.”

Cory Wilson: Confirmed to the U.S. Court of Appeals for the Fifth Circuit. Supported a law allowing businesses to refuse services to LGBTQ+ people and unmarried couples if they had a “sincerely held religious belief” which considered them immoral.

Stephanos Bibas: Confirmed to the U.S. Court of Appeals for the Third Circuit. Criticized those who “pursue equality judicially,” claiming that it “undervalues America’s deep commitments to federalism, localism, and democratic self-government.”

Allison Eid: Confirmed to the U.S. Court of Appeals for the Tenth Circuit. Dissented from an opinion that disallowed the use of school vouchers at religious schools that discriminated against students and teachers who are LGBTQ or living with HIV.

District Court Nominees

Jeff Mateer: Nominated to the U.S. District Court for the Eastern District of Texas. Gave a public speech in which he says that transgender children were part of “Satan’s plan” and said that marriage equality would be “the destruction of marriage.”

Mark Norris: Confirmed to the U.S. District Court for the Western District of Tennessee. Supported preemption laws which would disallow passing of local nondiscrimination ordinances protecting LGBTQ+ people and worked to fight the Obama Administration’s Title IX guidance which protected the rights of transgender students.

Gordon Giampietro: Nominated to the U.S. District Court for the Eastern District of Wisconsin. Called marriage equality an “assault on nature” and said that same-sex relationships are “troubled.”

Matthew Kacsmaryk: Confirmed to the 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: Confirmed to the 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.

Stephen Clark: Confirmed to the United States 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.”

Brantley Starr: Confirmed to the U.S. District Court for the Northern District of Texas. Supported legislation that would harm LGBTQ+ families.

Lee Rudofsky: Confirmed to the Eastern District of Arkansas. Argued against the rights of a same sex married couple to automatically have both spouses listed on their child’s birth certificate.

Court of Federal Claims Nominees

Steven Schwartz: Confirmed to the U.S. Court of Federal Claims. Worked on litigation supporting legislation (HB2) seeking to deny transgender people from using public restrooms.

Damien Schiff: Confirmed to the U.S. Court of Federal Claims. Authored articles saying that he “strongly disagrees” with *Lawrence v. Texas*, and criticizing California public schools for teaching that bullying LGBTQ+ classmates was wrong.

###

^[1] Methodology: Lambda Legal determines a nominee has a demonstrated anti-LGBTQ+ bias warranting opposition through a comprehensive review of the nominee’s record, including prior judicial rulings, academic and personal writings, personal statements, and legal advocacy targeting LGBTQ+ people or other marginalized communities.

^[2] Of the 57 court of appeals nominees, 54 were ultimately confirmed, two nominations were withdrawn, and one nomination remains pending at the time of this report’s publication.

^[3] [Andrew Brasher \(11th Cir.\)](#), [Justin Walker \(D.C. Cir.\)](#), [Cory Wilson \(5th Cir.\)](#)

^[4] Federal Judicial Center, *Biographical Directory of Article III Federal Judges, 1789-Present* <https://www.fjc.gov/history/judges/search/advanced-search> (last visited November 12, 2020).

^[5] On January 12, 2016, President Obama nominated Myra Selby to the court. Her nomination was blocked by Majority Leader McConnell and then-Chairman of the Judiciary Committee, Chuck Grassley, who refused to even schedule a hearing on her nomination. This vacancy was then filled immediately by the Trump Administration, who confirmed Amy Coney Barrett to the seat in 2017.

^[6] Amy Coney Barrett, Michael Brennan, Michael Scudder, Amy St. Eve, and Thomas Kirsch.

^[7] Federal Judicial Center, *Biographical Directory of Article III Federal Judges, 1789-Present* <https://www.fjc.gov/history/judges/search/advanced-search> (last visited November 24, 2020).

^[8] [Amul Thapar](#), [John Bush](#), [Kevin Newsom](#), [Amy Barrett](#), [Joan Larsen](#), [Allison Eid](#), [Stephanos Bibas](#), [Gregory Katsas](#), [L. Stephen Grasz](#), [Don Willett](#), [James Ho](#), [David Stras](#), [Elizabeth Branch](#), [Kyle Duncan](#), [Kurt Engelhardt](#), [Michael Brennan](#), [John Nalbandian](#), [Mark Bennett](#), [Andrew Oldham](#), [Ryan Bounds \(nomination withdrawn\)](#), [Britt Grant](#), [Julius Richardson](#), [David Porter](#), [Ryan Nelson](#), [Richard Sullivan](#), [Jonathan Kobes](#), [Eric Miller](#), [Allison Rushing](#), [Chad Readler](#), [Eric Murphy](#), [Paul Matey](#), [Neomi Rao](#), [Joseph Bianco](#), [Michael Park](#), [Kenneth Lee](#), [Daniel Collins](#), [Daniel Bress](#), [Danielle Hunsaker](#), [Steven Mensashi](#), [Robert Luck](#), [Barbara Lagoa](#), [Halil Ozerden \(nomination withdrawn\)](#), [Patrick Bumatay](#), [Lawrence VanDyke](#), [Andrew Brasher](#), [Cory Wilson](#), [Justin Walker](#).

^[9] Steven G. Calabresi & Shams Hirji, *Proposed Judgeship Bill*, Northwestern Pritzker School of Law (November 7, 2017) *available at* <https://thinkprogress.org/wp-content/uploads/2017/11/calabresi-court-packing-memo.pdf>

^[10] Samuel Alito, *Keynote Address to the National Convention*, Federalist Society (November 12, 2020) *available at* <https://www.youtube.com/watch?v=tYLZL4GZVbA&feature=youtu.be> (last accessed December 13, 2020)

^[11] Federal Judicial Center, *Biographical Directory of Article III Federal Judges, 1789-Present* <https://www.fjc.gov/history/judges/search/advanced-search> (last visited November 24, 2020).

^[12] *Walker v. Azar*, No. 20CV2834FBSMG, 2020 WL 4749859 (E.D.N.Y. Aug. 17, 2020) (issued a preliminary injunction blocking parts of a final rule by OCR which sought to limit discrimination protections for LGBT people under section 1557 of the Affordable Care Act).

^[13] *Batalla Vidal v. Wolf*, No. 16CV4756NGGVMS, 2020 WL 7121849 (E.D.N.Y. Dec. 4, 2020) (stating that Acting Secretary Wolf did not have the requisite authority to limit the DACA program as he had attempted to by memo and ordering DHS to post a “public notice” that they were now accepting first-time DACA requests).

^[14] Justia Supreme Court Center, *2019-2020 Term*, Oyez, *available at*: <https://www.oyez.org/cases/2019>.

^[15] United States Courts, *Federal Judicial Caseload Statistics 2020*, available at

<https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020>

^[16] Kevin Newsom, Elizabeth Branch, Britt Grant, Robert Luck, Barbara Lagoa, and Andrew Brasher have been confirmed.

^[17] <https://www.senate.gov/legislative/SundaySessionsoftheSenate.html>

^[18] <https://www.nytimes.com/live/2020/10/26/us/trump-biden-election>

^[19] The Supreme Court Historical Society, *The Current Court: Justice Stephen G. Breyer*,

<https://supremecourthistory.org/history-of-the-court/the-current-court/justice-stephen-breyer/> (last visited November 24, 2020)

^[20] Cong. Senate, *A Resolution Improving Procedures for the consideration of nominations in the Senate*, 116th Cong. 1st sess. S. Res. 50 (2019).

^[21] 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-a8b7-07a426bd1755.html; 164 Cong. Rec. S74,2537 (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> (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.”).

^[22] Chairman Grassley and Chairman Graham have now held hearings for nominees without support from both home state senators for Joseph Bianco, Michael Park, Steven Menashi (U.S. Circuit Court of Appeals for the Second Circuit), David Porter, Paul Matey, Peter Phipps (U.S. Circuit Court of Appeals for the Third Circuit), Chad Readler, Eric Murphy (U.S. Circuit Court of Appeals for the Sixth Circuit), Michael Brennan (U.S. Circuit Court of Appeals for the Seventh Circuit) David Stras (U.S. Circuit Court of Appeals for the Eighth Circuit), Eric Miller, Kenneth Lee, Ryan Nelson, Daniel Collins, Patrick Bumatay, Daniel Bress, Lawrence VanDyke (U.S. Circuit Court of Appeals for the Ninth Circuit), Andrew Brasher (U.S. Circuit Court of Appeals for the Eleventh Circuit).

^[23] Charles Goodwin (W.D. of Oklahoma), Holly Lou Teeter (D. of Kansas), Jonathan Kobes (Court of Appeals for the Eighth Circuit), Justin Walker (W.D. of Kentucky), L. Steven Grasz (Court of Appeals for the Eighth Circuit), Lawrence VanDyke (Court of Appeals for the Ninth Circuit), Sarah Pitlyk (E.D. of Missouri), and Kathryn Mizelle (M.D. of Florida).

^[24] *ABA ratings During the Trump Administration*, Ballotpedia available at

https://ballotpedia.org/ABA_ratings_during_the_Trump_administration#Footnotes

^[25] See Letter from Ranking Member Feinstein to Senator Grassley (Oct. 15, 2018), available at

https://www.feinstein.senate.gov/public/_cache/files/0/4/0403a9bc-a914-484f-a82d-c4cc2e3fe86e/051C1FA0FF33D91CF3412B4DE0752785.2018.10.15-sjc-dems-to-grassley-re-nominations-hearings-during-recess.pdf.

^[26] 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.

^[27] For example, there was a Senate Judiciary Hearing on October 30, 2019 with two circuit court nominees. This is thirteenth occurrence of a hearing with more than one circuit court nominee.

^[28] Lamar Alexander (R-AL), 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), Thad Cochran (R-MS), Bob Corker (R-TN), 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), Jeff Flake (R-AZ), Cory Gardner (R-CO), Lindsey Graham (R-SC), Chuck Grassley (R-IA), Orrin Hatch (R-UT), Josh Hawley (R-MO), Dean Heller (R-NV), John Hoeven (R-ND), Cindy Hyde-Smith (R-MS), Jim Inhofe (R-OK), Johnny Isakson (R-GA), Ron Johnson (R-WI), John Kyl (R-AZ), James Lankford (R-OK), Mike Lee (R-UT), Kelly Loeffler (R-GA), John McCain (R-AZ), 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), Luther Strange (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).

^[29] Lambda Legal also opposed Amy Coney Barrett when she was nominated to the U.S. Court of Appeals for the Seventh Circuit. Our letter can be found at:

https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/27_lgbt_groups_oppose_confirmation_of_joan_larsen_and_amy_coney_barrett_.pdf