

April 12, 2023

WHILE HISTORIC, IN YEAR TWO, THE BIDEN ADMINISTRATION STILL FELL SHORT ON LGBTQ+ REPRESENTATION IN FEDERAL JUDICIAL NOMINATIONS

*As a civil rights organization fighting for the lived equality of all LGBTQ+ people and everyone living with HIV, Lambda Legal has a vested interest in the integrity of the judicial system in the United States. Therefore, we have been tracking federal judicial nominations for many years, increasing our focus as the Trump administration radically reshaped the federal bench. Nearly 40% of all federal appellate judges confirmed during his presidency demonstrated a history of [hostility toward LGBTQ+ people](#). Due to Trump's enormous impact on the federal bench, one of [Lambda Legal's first asks of the Biden administration](#) was that it focus on reversing the damage done to our federal judiciary. For the past two years, President Biden has prioritized nominating a diverse set of well-qualified, fair, and impartial judges to the federal courts. While there have been momentous, record-breaking improvements to the diversity of the federal bench during the Biden administration, LGBTQ+ people and people living with HIV are still significantly underrepresented. With the increase in people who openly identify as LGBTQ+ in the United States and the few new confirmations of openly LGBTQ+ judges, the gap in LGBTQ+ representation on the federal bench actually **increased** from what we [reported last year](#).*

We are asking the Biden administration, again, to prioritize the nominations of LGBTQ+ judges and judges living with HIV, particularly LGBTQ+ judges of color who are currently less than one percent of all Article III judges;¹ judges living with HIV; and transgender, nonbinary, and bisexual judges. Currently, there are no openly bisexual, transgender, or nonbinary judges on the federal courts. We are also asking that President Biden focus on filling vacancies in states where there is currently no LGBTQ+ representation at all, particularly in the U.S. South.



FEDERAL COURTS: WHY JUDICIAL DIVERSITY IS IMPORTANT FOR LGBTQ+ PEOPLE AND PEOPLE LIVING WITH HIV

Federal judges serve lifetime appointments on the bench. The federal courts decide cases on a myriad of issues that impact LGBTQ+ people and people living with HIV, such as health care, employment, protections for families and youth, and criminal matters. Cases that implicate these and other issues will certainly be heard in many federal courts over the next few years. Politicians will come and go, but federal judges may remain on the bench for decades after the President who nominated them has left office. They will leave a lasting impact in the interpretation of our legal rights. We need well-qualified, fair-minded judges who are unbiased, come from diverse backgrounds—professionally and demographically—and understand that constitutional protections apply equally to LGBTQ+ people and people living with HIV.

Judicial diversity leads to enriched decision-making, increased public confidence in the courts, and “structural impartiality,” which Sherrilyn Ifill, law professor and former president and director-counsel of the NAACP Legal Defense and Educational Fund, has explained “exists when the judiciary as a whole is comprised of judges from diverse backgrounds and viewpoints.” Diversity “fosters impartiality by diminishing the possibility that one perspective dominates adjudication.”² With 870 judgeships on Article III courts, including more than 100 current and future vacancies on the federal bench, the Biden administration has an opportunity to make significant steps toward the federal judiciary being more representative of the United States to ensure it will protect the rights of all.

BUILDING THE BENCH: JUDICIAL DIVERSITY IN YEAR TWO OF THE BIDEN ADMINISTRATION

During the second year of the Biden administration, the President nominated 71 Article III judges,³ bringing the total number of Article III judges nominated during the first two years of the Biden Administration to 152. Halfway through President Biden’s first term, the Senate confirmed 97 of those judges, which is 12 more than the number of confirmations during the first two years of the Trump Administration.⁴ Since January 2023, 21 more nominees have been confirmed by the Senate, bringing the number to 118 confirmed judges.⁵

The most notable nomination in 2022 came when President Biden fulfilled his campaign promise to nominate the first Black woman to the U.S. Supreme Court in our country’s history. Justice Ketanji Brown Jackson was sworn in on June 30, 2022, and has already brought a new and previously missing voice and perspective to the Supreme Court. Justice Jackson is also the first former public defender to become a Supreme Court Justice.

Other important firsts from 2022 include the confirmations of Dana Douglas, the first woman of color to ever serve on the U.S. Court of Appeals for the Fifth Circuit, and John Z. Lee, the first Asian American judge to ever serve on the U.S. Circuit Court of Appeals for the Seventh Circuit. The Biden administration has now nominated and confirmed 12 Black women to the federal appellate courts, which is more Black women appellate judges than have been nominated by all other presidents combined.⁶ Of the 19 judges nominated to circuit courts of appeal in the second year of the Biden Administration, nearly two-thirds are people of color, and more than two-thirds are women. Of the



118 Biden Article III judges that have been confirmed by the Senate, 31.36% are white, 30.51% are Black, 16.95% are Latinx, 10.17% are Asian-American, 7.63% are multiracial, and 1.69% are Native American. Additionally, 71.19% of all confirmed judges are women.⁸

In terms of professional diversity, the Biden administration has prioritized appointments of judges who are not former prosecutors and corporate attorneys as they are over-represented on the federal bench. During the first two years of the Biden Administration, 47 judges (40% of Biden's judicial confirmations) are former public defenders and/or civil rights attorneys.⁹

In 2022, President Biden appointed one judge who identifies as a person with a disability, Jamal Whitehead, recently confirmed to the bench on the United States District Court for the Western District of Washington. People with disabilities are dramatically under-represented on the federal bench. The number of federal judges with disabilities is not routinely collected or reported, but it appears that only ten or eleven judges with disabilities are serving on the federal bench.¹⁰ This is only approximately 1.2% of Article III judgeships. Twenty-six percent of the U.S. population has a disability.¹¹ This includes approximately 3 to 5 million LGBTQ+ people.¹² The Biden Administration must prioritize nominating people living with disabilities, including those living with HIV.

LGBTQ+ Nominations and Confirmations

In 2022, the U.S. Senate confirmed three openly lesbian judges to the federal courts. District Court judge Alison Nathan was elevated to the U.S. Court of Appeals for the Second Circuit, where she joined fellow Biden nominee, Beth Robinson, as the second openly lesbian judge on the Court. Nina Morrison was confirmed to the District Court for the Eastern District of New York, joining Obama appointee Pamela Chen as the second openly lesbian judge on that court. Lastly, Charlotte Sweeney was confirmed to the District Court for the District of Colorado, becoming the first openly LGBTQ+ federal judge in Colorado and the first openly lesbian federal judge west of the Mississippi.

President Biden also nominated five lesbian and gay judges to the federal bench in 2022: Daniel Calabretta, Ana Reyes, Jamar Walker, P. Casey Pitts, and Gina Méndez-Miró. Because these nominees were not confirmed before the end of the 117th Congress, all five were renominated during the 118th Congress in January 2023. Three of those nominees, Ana Reyes (District of D.C.), Jamar Walker (Eastern District of Virginia), and Gina Méndez-Miró (District of Puerto Rico) are people of color. At the time of publication, four of these nominees have been confirmed by the Senate. P. Casey Pitts is still awaiting confirmation and should be moved expeditiously through the Senate confirmation process.



LGBTQ+ CONFIRMATION HIGHLIGHT:

GINA MÉNDEZ-MIRÓ

Gina Méndez-Miró was confirmed to the District Court for the District of Puerto Rico. She previously served as a judge on the Puerto Rico Court of Appeals. She is the first openly LGBTQ+ person to serve on the federal bench in Puerto Rico.

President Biden nominated a total of ten openly gay or lesbian people to the federal courts in his first two years in office. While the Senate confirmed eight of those nominees to their judgeships and one is awaiting confirmation, one nominee, William Pocan, never received a hearing in the Senate Judiciary Committee. Even after previously recommending Judge Pocan to serve as a District Judge, Senator Ron Johnson withheld his blue slip, a move that prevented Judge Pocan from being confirmed by the Senate.¹³ As of the date of this publication, it appears he will not be renominated by President Biden.¹⁴ There have been no new nominations of LGBTQ+ people since September 2022. The Biden administration has yet to nominate an openly bisexual, transgender, non-binary, or intersex person to the federal judiciary, nor has any administration in the country’s history.

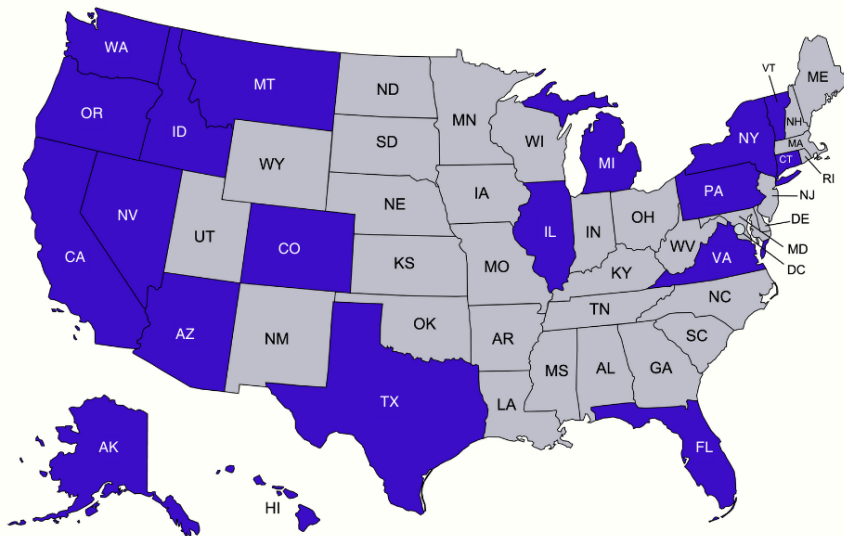
REPRESENTATION ON THE BENCH: LGBTQ+ FEDERAL JUDGES

The most recent polling shows that 7.1% of the U.S. population is LGBTQ+.¹⁵ This is up 1.5 % from the data available the previous year. In the past year, the Senate has confirmed seven openly LGBTQ+ judges to the federal bench, with one having already been a federal lower court judge (Alison Nathan). This brings the current total number of openly LGBTQ+ active Article III judges to 20 as of March 2023,¹⁶ which is 2.2% of the 870 Article III judgeships. While there has been a 0.6% increase in LGBTQ+ judges on the federal bench since last year (up from 1.6%), the gap between the percentage of LGBTQ+ federal judges and the LGBTQ+ population of the U.S has grown from 4% to 4.9% since

Lambda Legal’s 2022 report.¹⁷ The federal judiciary, as it stands today, does not reflect the diverse country it serves, and more queer judges are needed for it to do so.

In terms of geographic representation, the confirmations of Judge Sweeney in Colorado, Judge Walker in Virginia, Judge Reyes in Washington, D.C., and Judge Méndez-Miró in Puerto Rico added LGBTQ+ representation to the federal bench in jurisdictions that formerly had none. However, there are still 31 states in the U.S.¹⁸ that remain without any LGBTQ+ judges on either the district or circuit

31 STATES WITH NO OPENLY LGBTQ+ DISTRICT OR CIRCUIT COURT JUDGE



■ STATES WITH NO OPENLY LGBTQ+ DISTRICT OR CIRCUIT COURT JUDGE

■ JURISDICTIONS WITH AT LEAST ONE OPENLY GAY OR LESBIAN DISTRICT OR CIRCUIT COURT JUDGE

■ GUAM
NORTHERN MARIANA ISLANDS
PUERTO RICO
U.S. VIRGIN ISLANDS
WASHINGTON, D.C.



courts. Most of the mid-west and the south still have never seen a single LGBTQ+ nominee. And the entire country has never seen an openly bisexual, transgender, non-binary, or intersex judicial nominee.

OPPORTUNITIES FOR CHANGE: CURRENT AND FUTURE FEDERAL JUDICIAL VACANCIES

As of March 28, 2023, there are 40 current and 24 future vacancies without pending nominees at the district and circuit courts.¹⁹ There are 31 of these vacancies within 17 states and 5 circuit courts of appeal without any LGBTQ+ representation on the bench: the Third, Fourth, Fifth, Seventh, and Tenth Circuits, as well as in district courts in Alabama, South Carolina, Louisiana, Tennessee, Indiana, Wisconsin, Arkansas, Missouri, Nebraska, South Dakota, Oklahoma, Utah, Wyoming, New Jersey, North Carolina, Kentucky, and Minnesota.

QUEERING THE BENCH: WHAT THE FEDERAL GOVERNMENT MUST DO FOR JUDICIAL DIVERSITY

We applaud the Biden administration for continuing to nominate qualified LGBTQ+ people to the federal bench, and particularly for rising to our 2022 recommendation of nominating more LGBTQ+ people of color to the federal judiciary. However, much more work remains to be done if we are to approach an adequate level of representation on the federal bench of LGBTQ+ people and of people living with HIV.

We need an increase in the number of openly LGBTQ+ people being nominated to the bench in the next two years. In particular, the first openly bisexual, transgender, non-binary, or intersex nominees are long overdue. Due to historic exclusion from the bench and intertwining systems of oppression that keep higher education out of reach for many LGBTQ+ folk, there is a considerable amount of work needed to close the gap in LGBTQ+ representation. We know the Biden administration is capable of this given the incredible achievements of the last two years to diversify the federal bench.

President Biden should continue to focus on diversity within the LGBTQ+ judges he nominates. LGBTQ+ judges of color are woefully lacking across the country. We have never seen a bisexual, transgender, non-binary, or intersex federal judicial nominee, a disabled LGBTQ+ nominee, or a federal judge openly living with HIV. Everyone in our country must be able to see themselves on the bench and their perspectives accounted for in legal opinions in order for the judiciary to be legitimate in the public's eyes. Over the next two years, we need to see these firsts happen for LGBTQ+ people and people living with HIV.

We need the Biden administration to focus its attention on locations that currently have no LGBTQ+ representation on the courts, with particular focus on the U.S. South, where over half of all Black LGBTQ+ adults in the U.S. reside.²⁰ We should not have different systems of justice in our federal judiciary depending on where we live in the country. It is imperative that we fix the courts for everyone, regardless of the location or political party in control of their state.



Home state senators must put forward to the Biden Administration LGBTQ+ nominees and nominees living with HIV for the federal bench as expeditiously as possible. LGBTQ+ people and people living with HIV have historically experienced, and continue to experience, personal and systemic discrimination at alarming rates. This has inflicted serious negative long-term consequences—especially for LGBTQ+ people of color, LGBTQ+ people with disabilities, LGBTQ+ immigrants, and others who experience intersectional discrimination. Due to the persistence of this stark reality,

the importance of nominating openly LGBTQ+ candidates who can understand the array of LGBTQ+ lived experiences cannot be overstated.

It is worth noting that addressing other historic barriers to federal judicial service need not come at the expense of LGBTQ+ inclusion. The LGBTQ+ community is incredibly demographically diverse.

We need President Biden and our Senators to Queer the Bench!

¹ Only eight active Article III judges are LGBTQ+ people of color. Hon. Patrick Bumatay (Ninth Circuit), Hon. Darrin Gayles (S.D. Fla.), Hon. Staci Yandle (S.D. Ill.), Hon. Nitza Quiñones Alejandro (E.D. Pa.), Hon. Pamela Chen (ED NY), Hon. Gina Méndez-Miró (D. P.R.), Hon. Ana Reyes (D.D.C.), Hon. Jamar Walker (ED VA).

² See Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C.L. REV. 95 (1997) Boston College Law Review, <https://bclawreview.bc.edu/articles/1262>.

³ Lambda Legal is counting judicial nominees for each full year of a President's term. This report includes announced nominations from January 20th, 2022 – January 19th, 2023, to reach 71 nominees for the second year of the Biden administration.

⁴ Carl Hulse, *Democrats Outpace Trump in Seating Federal Judges*, With 97 Confirmed, N.Y. Times (Dec. 29, 2022), available at <https://www.nytimes.com/2022/12/29/us/politics/democrats-federal-judges.html>.

⁵ As of March 28, 2023. *Judicial Nominations Tracker*, Alliance for Justice, (last visited Mar. 28, 2023), available at, <https://www.afj.org/our-work/judicial-nominations/nominees/>.

⁶ Judges Hon. Ketanji Brown Jackson (D.C. Cir.), Hon. Candace Jackson-Akiwumi (7th Cir.), Hon. Tiffany Cunningham (Fed. Cir.), Hon. Eunice Lee (2nd Cir.), Hon. Holly Thomas (9th Cir.), Hon. Stephanie Davis (6th Cir.), Hon. J. Michelle Childs (D.C. Cir.), Hon. Arianna Freeman (3rd Cir.), Hon. Doris Pryor (7th Cir.), Hon. Tamika Montgomery-Reeves (3rd Cir.), Hon. Dana Douglas (5th Cir.), and Hon. DeAndrea Benjamin (4th Cir.). See Carrie Johnson, *President Biden has made choosing diverse federal judges a priority*, N.P.R. (Jan. 2, 2023), available at <https://www.npr.org/2023/01/02/1146045412/biden-diverse-federal-judges-women-black-appeals-courts>.

⁷ *Diversity of the Federal Bench: Current statistics on the gender and racial diversity of the Article III courts*, American Constitution Society, (last visited Mar. 23, 2023), available at, <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/>.

⁸ *Id.*

⁹ *Judicial Diversity Matters for Equal Justice*, The Leadership Conference on Civil and Human Rights, (last updated Mar. 16, 2023), available at, <https://civilrightsdocs.info/pdf/Judicial-Diversity-Matters-for-Equal-Justice.pdf>.

¹⁰ Ann Motl, *Why Disability Diversity is Important in the Judiciary*, Business Law Today (Nov. 11, 2022), available at, https://www.americanbar.org/groups/business_law/publications/blt/2022/11/disability-diversity/.

¹¹ *Id.*

¹² *LGBT People with Disabilities*, Movement Advancement Project, (July 2019), available at, <https://www.lgbtmap.org/file/LGBT-People-With-Disabilities.pdf>.

¹³ *Durbin Responds to Senator Johnson Withholding Blue Slip for Eastern District of Wisconsin Nominee*, (Feb. 16, 2022), available at, <https://www.judiciary.senate.gov/press/dem/releases/durbin-responds-to-senator-johnson-withholding-blue-slip-for-eastern-district-of-wisconsin-nominee>.

¹⁴ Nate Raymond, *Biden not renominating two stalled judicial picks*, White House says, Reuters (Jan. 24, 2023), available at <https://www.reuters.com/legal/government/biden-not-renominating-two-stalled-judicial-picks-white-house-says-2023-01-24/>.

¹⁵ Jeffrey M. Jones, *LGBT Identification in U.S. Ticks Up to 7.1%*, Gallup (Feb. 17, 2022), available at <https://news.gallup.com/poll/389792/lgbt-identification-ticks-up.aspx>.

¹⁶ Hon. Alison Nathan (Second Circuit), Hon. Beth Robinson (Second Circuit), Hon. Patrick Bumatay (Ninth Circuit), Hon. Todd Hughes (Federal Circuit), Hon. Nina Morrison (ED NY), Hon. Charlotte Sweeney (D. Colorado), Hon. Mary Rowland (ND IL), Hon. Robert Pitman (WD TX), Hon. Darrin Gayles (SD FL), Hon. Staci Yandle (SD IL), Hon. Judith Ellen Levy (ED MI), Hon. Nitza Quiñones Alejandro (ED PA), Hon. Michael McShane (D. Oregon), Hon. Pamela Chen (ED NY), Hon. Michael Fitzgerald (CD CA), Hon. J. Paul Oetken (SD NY), Hon. Gina Méndez-Miró (D. P.R.), Hon. Ana Reyes (D.D.C.), Hon. Daniel Calabretta (ED CA), Hon. Jamar Walker (ED VA).

¹⁷ In 2022, Lambda Legal reported 1.6% of the Article III judgeships were held by openly LGBTQ+ judges and 5.6% of the U.S. population was LGBTQ+. *In a Record-Breaking Year for Judicial Nominations, the Biden Administration Fell Short on LGBTQ+ Representation*, Lambda Legal (Feb. 1, 2022), available at https://www.lambdalegal.org/publications/report_biden-administration-fell-short-on-lgbtq-representation.

¹⁸ Alabama, Arkansas, Delaware, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming.

¹⁹ *Current Judicial Vacancies*, United States Courts, (last visited Mar. 28, 2023), available at, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies>; *Future Judicial Vacancies*, United States Courts, (last visited Mar. 28, 2023), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/future-judicial-vacancies>.

²⁰ Soon Kyu Choi, et al., *Black LGBTQ Adults in the U.S.: LGBT Well-Being at the Intersection of Race*, The Williams Institute (Jan. 2021), available at, <https://williamsinstitute.law.ucla.edu/publications/black-lgbt-adults-in-the-us/>.



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