

February 1, 2022

In a Record-Breaking Year for Judicial Nominations, the Biden Administration Fell Short on LGBTQ+ Representation

As a civil rights organization that litigates and advocates for policies that come before judges for interpretation, Lambda Legal has a vested interest in ensuring that our judiciary can be trusted to administer justice fairly and impartially. We also know that the credibility of our judicial system hinges not only on the decisions it renders but also on whether the institution as a whole reflects the diversity of the nation it serves.

For four years, Lambda Legal documented how former President Donald Trump undermined the integrity of our judiciary. Working closely with then-Senate Majority Leader Mitch McConnell, Trump advanced numerous judges with documented anti-LGBTQ+ histories. More than one-third of Trump's 57 federal appellate nominees had records that were so alarming, Lambda Legal opposed their nominations and, in spite of our objections, 54 of them were confirmed.¹ And, perhaps unsurprisingly, only two openly LGBTQ+ judges out of a total 231 (0.8%) were confirmed during the entirety of the Trump term.² Other aspects of diversity also suffered, resulting in a federal judiciary that was 74% white and 67% male. In fact, the Trump administration holds the dubious distinction of having confirmed the lowest percentage of non-white judges since George H.W. Bush.³

*For this reason, **one of our top 10** asks of the incoming Biden administration was that it prioritize reversing the damage done to the federal judiciary by the previous administration and restore the integrity and credibility of our courts. We recently published a **report** on how well President Joe Biden did in his first year to address the full range of asks, including restoring the legitimacy of the federal judiciary. However, because of our unique role as a guardian of the judiciary as a place where LGBTQ+ people and people living with HIV can be assured of access to fair and impartial justice, Lambda Legal authored this additional separate, more extensive report on the state of the federal courts at the end of the first year of the Biden administration.*

Why the Federal Judiciary Matters for LGBTQ+ People

Approximately 5.6% of the general population identifies as LGBTQ+, a number that continues to increase as people become more willing to affirmatively respond to polling and as younger generations increasingly reject the stigma of identifying as such.⁴ Yet the composition of the federal judiciary completely fails to reflect this reality and therefore woefully under-represents the communities it serves. There are only 14 active federal judges who openly identify as gay or lesbian,⁵ which is a mere



1.6% of the 870 Article III judgeships in the federal judiciary. In fact, even when including the nomination of the late Hon. Deborah Batts (S.D.N.Y.), the pending nominations of Charlotte Sweeney (D. Colo.), William Pocan (E.D. Wisc.), and Nina Morrison (E.D.N.Y.), and the failed nominations of Edward C. DuMont (Fed. Cir.) and William L. Thomas (S.D. Fla.), only 20 openly gay or lesbian people have ever been nominated to the federal judiciary since the ratification of the Constitution. More disappointingly, there has never been an openly transgender, nonbinary, or bisexual nominee in the history of the federal judiciary.⁶

It is essential for the judiciary to reflect the communities that 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 view the court's decisions with legitimacy, because they will see themselves represented in the institution. This is particularly important for LGBTQ+ people, as there is overwhelming evidence of bias by the courts towards these communities. According to Lambda Legal's "Protected and Served?" report, a national study of the experiences LGBTQ+ individuals and people living with HIV have with police, courts, jails and prisons, and school security, 43% of survey respondents who interacted with the court system had negative experiences. Respondents also reported hearing a judge, attorney, or other court employee make negative comments about a person's sexual orientation, gender identity, or gender expression (19%), feeling their own sexual orientation or gender identity was raised by an attorney or judge when it was not relevant (16%), or having their HIV status raised when it was irrelevant (15%).⁷ Aside from the obvious procedural and emotional implications of this courtroom misconduct, it represents a failure of the judiciary to uphold its promise of equal justice under the law.

Furthermore, research has demonstrated that diversity on the bench impacts how civil rights cases are ultimately decided.⁸ So, it is critical that the Biden administration nominate and confirm openly LGBTQ+ nominees—and especially LGBTQ+ people of color and transgender, nonbinary, and bisexual nominees—to ensure those diverse voices are heard by their colleagues and that they are able to participate in the development of the law. LGBTQ+ people, particularly those who are out in their communities, have historically experienced—and continue to experience—personal and systemic discrimination at alarming rates that inflicts serious negative long-term consequences. This is especially true for LGBTQ+ people of color, LGBTQ+



people with disabilities, LGBTQ+ immigrants, and others who experience intersectional discrimination. Confirming more openly LGBTQ+ judges could help redress the harms inflicted by historical and ongoing discrimination and demonstrate to young LGBTQ+ people that they too can grow up to have a place in the top echelons of the legal profession. Therefore, it is more crucial than ever that the Biden administration, with collaboration from senators who have judicial vacancies in their state, take action in 2022 to make the federal judiciary more representative of the diversity of our great nation.

How Trump and McConnell Reshaped the Federal Judiciary

The harmful impact on the federal judiciary by former President Trump and then-Senate Majority Leader Mitch McConnell cannot be overstated. In just one term, Trump nominated, and McConnell's Senate confirmed, three Supreme Court justices, 54 circuit court judges, and 174 district court judges for a total of 231 lifetime appointments to the federal judiciary. Compared to other administrations, Trump and McConnell confirmed the most Supreme Court justices by any president since Ronald Reagan, only one fewer circuit court judge than Barack Obama in half the time, and the most district court judges by a one-term president since Jimmy Carter.⁹

Perhaps the most devastating impact of the Trump administration was its effect on the circuit courts. While the Supreme Court often garners the most public attention, it only decides around 100 cases each year. On the other hand, circuit courts decide tens of thousands of cases each year, often serving as the court of last resort in a wide array of civil rights issues. In Trump and McConnell's haste to pack the circuit courts, McConnell abandoned procedural safeguards meant to help the Senate fulfill its constitutional duty to provide meaningful consideration of, and advice on, judicial nominees.

At the end of the Trump administration's nominations surge, the active judges on Article III courts were nearly 74% white, 67% men, 99% straight, and 100% cisgender

One such safeguard, the so-called "blue slips" process, guarantees that the Senate only considers for confirmation judicial nominees that have the support of both their home state senators. McConnell jettisoned this long-standing Senate norm and in doing so, was able to confirm 54 circuit court judges and "flip" three circuit courts from a majority of judges who were nominated by Democratic presidents to a majority of judges nominated by Republican presidents.¹⁰ Trump and McConnell managing to flip three circuits in four years demonstrates the aggressive prioritization of the Senate to confirm judicial nominees at the expense of other legislative priorities.¹¹

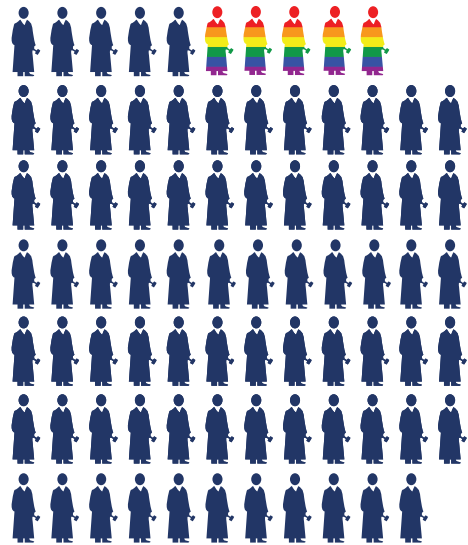
Exacerbating the equity concerns regarding the large numbers of circuit court confirmations is the fact that nearly 40% of the federal judges that Trump appointed to the circuit courts had a demonstrated history of hostility towards the LGBTQ+ community.¹² Indeed, we are already witnessing the repercussions in parts of the country with the fewest protections for LGBTQ+ people. For example, in *Gibson v. Collier*, Trump-appointed Fifth Circuit Judge James Ho wrote an opinion denying health care to a transgender woman and, intentionally misgendered her throughout the decision.¹³ And in *Otto v. City of Boca Raton, Fla.*, two Trump-nominated judges in the Eleventh Circuit joined forces to issue a split decision striking down local laws protecting LGBTQ+ minors from being subject to conversion therapy.¹⁴

In addition to the sheer number of federal judges confirmed during the Trump presidency, the demographic make-up of his appointees further entrenched the white, cisgender maleness of the courts. Nearly 85% of all of Trump's circuit court nominees were white and 80% were men, and none of his circuit court nominees were Black. Only two of Trump's circuit court nominees were Latinx¹⁵ and just two were openly LGBTQ+. It was a significant whitewashing of the judicial system that already failed to adequately represent the diversity of the United States. At the end of the Trump administration's nominations surge, the active judges on Article III courts were nearly 74% white, 67% men,¹⁶ 99% straight, and 100% cisgender.

Building the Bench During Year One of the Biden Administration

During its first year, the Biden administration made a laudable effort to diversify and rebalance the federal judiciary in the wake of Trump's wave of confirmations. The administration nominated, and the Senate confirmed, more judges in its first year than any other administration since Ronald Reagan.¹⁷ The Biden administration named 81 nominees for district and circuit courts. Of these nominees, 52 are women (73% of all nominees) and 31 of them are women of color. The Biden administration also nominated 46 people of color (64.8%). Disappointingly, the number of openly LGBTQ+ nominees pales in comparison with a paltry 5 (6%), one of whom, Judge Alison Nathan, is already a federal judge.¹⁸

5 OPENLY LGBTQ+ NOMINEES



Consistent with the Biden administration's impressive pace of nominations, Senate Majority Leader Chuck Schumer secured the confirmation of a record-tying 40 judges.¹⁹ Of these 40 judges confirmed during the administration's first year, 32 are women; 27 are people of color; 21 are women of color; 27 add professional diversity, including 15 former public defenders; and one is the first openly lesbian circuit court judge in the country.²⁰ The confirmations thus far have resulted in lowering the overall number of white judges from 74% to 72% and lowering the number of male-identified judges from 67% to 65%.²¹ This is a small but notable step in the right direction for gender and racial equity, and the Biden administration must maintain, if not increase, its pace.



Judge Beth Robinson

LGBTQ+ CONFIRMATION HIGHLIGHT: BETH ROBINSON

Beth Robinson was confirmed to the U.S. Court of Appeals for the Second Circuit. Robinson was previously an associate judge on the Vermont Supreme Court and is the first openly lesbian woman to serve on a U.S. Court of Appeals.

There are not, nor have there ever been, any openly bisexual, transgender, or nonbinary federal judges.

Moreover, there are not, nor have there ever been, any openly bisexual, transgender, or nonbinary federal judges. Transgender and nonbinary people experience high rates of harassment, discrimination, and violence in their daily lives and are often the target of political degradation and vilification. Confirming a qualified transgender or nonbinary judicial nominee would insert an important voice into the federal judiciary that is currently silent and would help ensure that they are able to participate in the development of the law.

Bisexual people are often erased or ignored, and statistics demonstrate that bisexual people experience significantly high rates of discrimination and disproportionately negative health care outcomes.²⁵ Confirming a qualified bisexual judicial nominee would ensure that bisexual people are represented on the federal judiciary.

Our legal profession is filled with outstanding LGBTQ+ people that have been overlooked for these important positions of public trust for too long

Current Vacancies

As of January 20, 2022, there are 52 current and 28 future vacancies without pending nominations on the district and circuit courts.²⁶ Of those there are 26 current and 10 future vacancies in states with at least one Democratic senator who, with a Democratic majority in the Senate and a Democratic president, have the unique opportunity to appoint and confirm qualified LGBTQ+ nominees.

Of the places with zero LGBTQ+ representation in their federal district or circuit courts highlighted in the map above, there are current or future vacancies without a pending nominee in the Fourth and Tenth Circuits, as well as in district courts in Alabama, Arkansas, Delaware, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, New Mexico, Ohio, Oklahoma, Puerto Rico, South Carolina, South Dakota, Utah, Virginia, and Wyoming.²⁷ Particular emphasis should be placed on naming openly LGBTQ+ “firsts” in these states.

Recommendations for 2022

In 2021, the Biden administration made meaningful strides in diversifying the federal judiciary with a historic number of nominations of diverse candidates that cut away at the homogenous slate put in place by the Trump administration. White cisgender men, corporate law firm attorneys, and former prosecutors continue to be overrepresented, so it is important that the Biden administration keep up the effort to diversify the courts. In order to make up for the dearth of LGBTQ+ representation in the federal judiciary, there must be a more concerted effort to name and confirm LGBTQ+ nominees, especially in the five circuits—D.C., First, Fourth, Eighth, and Tenth—where there is not one openly LGBTQ+ judge in either the circuit court or district courts. At the very least, this administration should prioritize closing the gap between the 5.6% of the United States population who identify as LGBTQ+ and the paltry 1.6% of active federal judges who openly identify as LGBTQ+. This lack of representation is not due to a lack of qualified legal minds. Our legal profession is filled with outstanding LGBTQ+ people that have been overlooked for these important positions of public trust for too long.



And when looking to fill these vacancies with qualified LGBTQ+ nominees, the administration and home state senators should strongly encourage all qualified LGBTQ+ people to apply and interrogate selection processes that repeatedly fail to advance such candidates. In particular, strong LGBTQ+ candidates of color should be identified, encouraged

to apply, and supported through the daunting nomination process. We are deeply troubled by the particularly hostile and disrespectful treatment directed at judicial nominees who are Black or brown²⁸ and those who openly identify as LGBTQ+.²⁹ This mistreatment may lead strong candidates, particularly those who live at the intersection of being LGBTQ+ and a person of color, to hesitate before putting their name forward for consideration. To be clear, we celebrate each openly gay or lesbian nominee put forward by the Biden administration, but the lack of racial diversity in the five nominees advanced to date fails to reflect the diversity of the LGBTQ+ community. Therefore, the administration must recognize its particular obligation to advance LGBTQ+ people of color to the judiciary and commit to unapologetically supporting them through the confirmation process.

Lambda Legal urges the Biden administration to prioritize the nomination and confirmation of people living with disabilities to the federal bench, which includes people living with HIV

Moreover, this administration has the opportunity and an obligation to confirm the first openly transgender, bisexual, or nonbinary judge to a federal bench. At a time when transgender and gender nonconforming youth are under constant attack by their state legislatures, this representation is more important than ever. A recent Trevor Project poll illuminated that 85% of trans or nonbinary youth say these attacks have negatively impacted their mental health.³⁰ Imagine the impact it would have on these same young people to see someone like them elevated to the upper ranks of the legal profession.

Lambda Legal urges the Biden administration to prioritize the nomination and confirmation of people living with disabilities to the federal bench, which includes people living with HIV. It is incredibly important that this administration prioritize disabled visibility in the federal judiciary to dispel the misconception that people living with disabilities are not capable of fulfilling the demands and responsibilities of judicial service. A core tenet of our mission is to fight the stigma surrounding people living with HIV because we believe that someone's status does not, and should not, inhibit them from full participation in society—nor should it exclude them from being appointed to the federal bench. To date, the Biden administration has not nominated a single person who self-identifies to be living with a disability, even though people living with disabilities make up at least one-fifth of the U.S. population.³¹

Finally, we note other important gaps that still need to be filled in terms of demographic and professional representation on our federal judiciary, notwithstanding the progress that has been made on that front over the past year. For example, the Latinx community remains dramatically underrepre-

sented on the federal bench relative to its proportion of our population; even though Latinx people comprise 18.7% of the population, only around 7% of federal judges are Latinx, of whom only 2% are Latinas.³² We also recommend continuing to diversify the professional backgrounds of nominees to include reproductive rights, immigration, labor, and environmental justice specialists, as all of these issues intersect with the rights of LGBTQ+ people and everyone living with HIV.

Conclusion

While the Biden administration deserves praise for its efforts toward improving racial, gender, and professional diversity in the federal judiciary, the bench is still far from representative of the lived experiences of LGBTQ+ communities—particularly transgender, nonbinary, and bisexual communities who have never seen themselves represented in the federal judiciary. Addressing other historic barriers to federal judicial service does not and need not come at the expense of LGBTQ+ inclusion. The LGBTQ+ community is incredibly diverse. There are LGBTQ+ people of color, LGBTQ+ people living with disabilities, LGBTQ+ people of different ages, and LGBTQ+ people with various immigration histories, backgrounds, and professions. All of these experiences will only enhance the quality of judicial adjudication and improve the credibility of the institution as a whole.

In his first slate of nominees in 2022, aimed at continuing the President's promise of diversifying the federal judiciary, we were disappointed to see that, yet again, none of the nominees is openly LGBTQ+.³³ Particularly in this moment, as our national attention is focused on the pipeline of judicial talent available to fill Justice Breyer's seat on the Supreme Court, the administration can and simply must do better in terms of addressing the gross underrepresentation of LGBTQ+ people on the federal bench.

As a legal organization, Lambda Legal wants everyone, but particularly LGBTQ+ litigants, to have faith in our courts. One critical way to advance this goal would be by nominating more openly LGBTQ+ judges. If openly LGBTQ+ judges continue to be overlooked for judicial nominations, the Biden administration will have failed its aspirations for truly diversifying the bench and lost an invaluable opportunity to make this critical institution stronger, both in the eyes of the LGBTQ+ community and for the nation as a whole. ■

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Endnotes

- ¹ *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, (Jan. 2021), available at https://www.lambdalegal.org/sites/default/files/judicial_report_2020.pdf.
- ² Hon. Mary Margaret Rowland (N.D. III), Hon. Patrick Bumatay (Ninth Circuit).
- ³ John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, Pew Research Center, (Jan. 13, 2021), available at <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>.
- ⁴ Jeffrey M. Jones, *LGBTQ Identification Rises to 5.6 percent in Latest U.S. Estimate*, Gallup (Feb. 24, 2021), available at <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx>.
- ⁵ Hon. Todd Hughes (Federal Circuit), Hon. Patrick Bumatay (Ninth Circuit), Hon. Beth Robinson (Second Circuit), Hon. Michael Fitzgerald (C.D. Cal.), Hon. Robert Pitman (W.D. Tex.), Hon. Darrin Gayles (S.D. Fla.), Hon. Staci Yandle (S.D. Ill.), Hon. Judith Levy (E.D. Mich.), Hon. Pamela Chen (E.D.N.Y.), Hon. Alison Nathan (S.D.N.Y.), Hon. J. Paul Oetken (S.D.N.Y.), Hon. Michael McShane (D. Or.), Hon. Nitza Quiñones Alejandro (E.D. Pa.), Hon. Mary Rowland (N.D. Ill.).
- ⁶ This statistic does not include current or former members of the federal judiciary who made public their LGBTQ+ status after confirmation to the bench.
- ⁷ *Protected and Served?*, Lambda Legal, (2012), available at https://www.lambdalegal.org/sites/default/files/publications/downloads/ps_executive-summary.pdf.
- ⁸ See Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 *The Yale Law Journal* 1759 (2005), available at https://openyls.law.yale.edu/bitstream/handle/20.500.13051/9589/57_114YaleLJ1759_May2005_.pdf?sequence=2&isAllowed=y.
- ⁹ *Supra* note 3.
- ¹⁰ 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.
- ¹¹ *Trump's Judicial Assault on LGBT Protections*, Lambda Legal, (Dec. 19, 2019), available at <https://www.lambdalegal.org/Trump-Judicial-Nominees-Report-2019>.
- ¹² *Supra* note 1.
- ¹³ *Gibson v. Collier*, 920 F.3d 212, 217 (5th Cir. 2019).
- ¹⁴ *Otto v. City of Boca Raton, Fla.*, 981 F. 3d 854 (11th Cir. 2020).
- ¹⁵ *Supra* note 12.
- ¹⁶ *Judicial Nominations Update*, American Constitution Society (Dec. 2021), available at <https://www.acslaw.org/wp-content/uploads/2021/12/Judicial-Nominations-Report-December-2021.pdf>.
- ¹⁷ *Year One of the Biden Administration: A LGBTQ+ Progress Report*, Lambda Legal, (Jan. 20, 2022), available at https://www.lambdalegal.org/publications/us_20210120_year-one-of-the-biden-administration.
- ¹⁸ *A Fairer Court: How President Biden and Congress Raised the Bar in 2021*, Alliance for Justice, (Dec. 22, 2021), available at <https://www.afj.org/wp-content/uploads/2021/12/A-Fairer-Court-How-President-Biden-and-Congress-Raised-the-Bar-in-2021.pdf>.
- ¹⁹ *Judicial Confirmations for January 2022*, United States Courts, (Last updated Jan. 1, 2022), available at <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2022/01/confirmations>.
- ²⁰ *Supra* note 17.
- ²¹ *Supra* note 16.
- ²² *Supra* note 18.
- ²³ *LGBT Data & Demographics*, UCLA School of Law Williams Institute, <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=6&compare=percentage#comparison>.
- ²⁴ See Ethan H. Mereish et al., *Bisexual-Specific Minority Stressors, Psychological Distress, and Suicidality in Bisexual Individuals: the Mediating Role of Loneliness*, 18 *Preventive Science* 716 (2017), available at <https://link.springer.com/article/10.1007%2Fs11121-017-0804-2>.
- ²⁵ *Current Judicial Vacancies*, United States Courts, (last visited Jan.10, 2022), available at <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies>; *Future Judicial Vacancies*, United States Courts, (last visited Jan. 10, 2022), available at <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/future-judicial-vacancies>
- ²⁶ *Supra* note 26.
- ²⁷ Rachel Wegner, *Sen. Marsha Blackburn criticized for saying judicial nominee has 'rap sheet' over court appearance and speeding ticket*, *Tennessean*, (Updated Jan. 14, 2022, 12:21PM), available at <https://www.tennessean.com/story/news/politics/2022/01/13/marsha-blackburn-tennessee-senator-andre-mathis-lawyer-judicial-nominee-speeding-tickets-rap-sheet/9198081002/>.
- ²⁸ Gabby Birenbaum, *Rand Paul tried to derail Rachel Levine's historic confirmation hearing with transphobic misinformation*, *Vox* (Feb 25, 2021, 12:59 PM), available at <https://www.vox.com/2021/2/25/22301138/rand-paul-transphobic-confirmation-hearing-dr-rachel-levine>.
- ²⁹ Trevor News, *New Poll Illustrates the Impacts of Social & Political Issues on LGBTQ Youth*, *The Trevor Project*, (Jan. 10, 2022), available at <https://www.thetrevorproject.org/blog/new-poll-illustrates-the-impacts-of-social-political-issues-on-lgbtq-youth/>.
- ³⁰ *Letter from Consortium for Citizens with Disabilities to Senators*, (Dec. 3, 2021), available at <http://www.c-c-d.org/fichiers/Letter-to-Senators-re-judges-with-disabilities-120321.pdf>.
- ³¹ *Supra* note 18.
- ³² *President Biden Names Thirteenth Round of Judicial Nominees*, *The White House*, (Jan. 19, 2022), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/19/president-biden-names-thirteenth-round-of-judicial-nominees/>.

