



June 4, 2019

OPPOSE THE CONFIRMATION OF PETER PHIPPS TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write in opposition to the confirmation of Peter Phipps to the U.S. Court of Appeals for the Third Circuit.

Mr. Phipps's nomination is a continuation of President Trump's shameful effort to pack the federal courts with conservative, white, male ideologues. Mr. Phipps is opposed by Senator Casey, one of his home-state senators. When he was a district court nominee just last year, Mr. Phipps refused to say whether he believes the Supreme Court's unanimous ruling in the landmark case *Brown v. Board of Education* was correctly decided. The Senate must vote against Mr. Phipps's elevation to the Third Circuit.

Lack of Home-State Senator Support: Senator Casey has publicly stated: "I have significant concerns about Judge Phipps' judicial and constitutional philosophy."¹ Although Mr. Phipps does not have the same obvious ideological record as many other Trump nominees, Senator Casey's concerns are based on his observation and belief that the Trump White House uses ideological criteria in selecting federal appeals court judges. Senator Casey also expressed concerns about Mr. Phipps's minimal judicial experience; he has served as a district court judge for only seven months. We share those concerns.

Nominating someone over the objection of a home-state senator departs from past Senate tradition and subverts the Constitution's advice and consent process. As former Senator Hatch astutely observed in 2014: "Weakening or eliminating the blue slip process would sweep aside the last remaining check on the president's judicial appointment power. Anyone serious about the Senate's 'advice and consent' role knows how disastrous such a move would be."² This institutional check has arguably never been more important than today, with a president who routinely undermines the legitimacy of judges and their rulings, and who prioritizes personal loyalty over fealty to the law.

Opposition from Senator Casey traditionally would have been a bar to Mr. Phipps even receiving a Senate hearing. During the last two years of the Obama presidency, the

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¹ <https://www.courthousenews.com/trump-nominates-six-for-federal-court-seats/>.

² <https://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role>.

Republican chair of the Senate Judiciary Committee, Senator Grassley, did not grant a hearing or vote to a single judicial nominee unless they had support from both home-state senators. During the Trump presidency, however, the Republican committee chairs (Senators Grassley and Graham) have employed a double standard and hypocritically given a hearing to 13 circuit court nominees who lacked the support of a home-state senator: David Stras, Michael Brennan, Ryan Bounds, David Porter, Eric Murphy, Chad Readler, Eric Miller, Paul Matey, Michael Park, Joseph Bianco, Kenneth Lee, Daniel Collins, and Daniel Bress. Mr. Phipps will be the 14th such nominee. Senate Republicans have destroyed the blue slip tradition for circuit court nominees, and future presidents and Senates are unlikely to revive it.

Unwilling to Say *Brown v. Board of Education* Was Correctly Decided: Last year, when Mr. Phipps went through the confirmation process to be a U.S. District Judge for the Western District of Pennsylvania, he refused to acknowledge that *Brown v. Board of Education* was correctly decided. This landmark Supreme Court decision – handed down 65 years ago last month – ended legalized apartheid in America’s school system and set the stage for racial integration in all facets of American life. Yet Mr. Phipps, like many of President Trump’s nominees, refused to state that it was correctly decided. In response to a question from Senator Blumenthal, Mr. Phipps testified:

“I think that *Brown versus Board of Education* corrected an abominable wrong in our nation's history, that of segregation. The false doctrine of separate but equal was established in *Plessy v. Ferguson*. As far as commenting on any specific Supreme Court decision even one as entrenched and as important as *Brown*, I resist that for two reasons, one, to preserve my impartiality with respect to not just that opinion but every single Supreme Court opinion that's ever been decided. And second, I rely in part on the precedent of this august committee and this body that has not and has understood that nominees for judicial office should not be giving their seal of approval or disapproval to any individual Supreme Court decision or any part of the reasoning of those even one as foundational and as important to our nation's history, as *Brown versus Board of Education*.”³

Mr. Phipps’s rationale for refusing to directly answer this question is flawed. It would not jeopardize his impartiality to state that *Brown* was correctly decided, and many past nominees have done so. As recently as last fall, then-D.C. Circuit Judge Brett Kavanaugh testified: “I think *Brown versus Board of Education*, as I’ve said many times before, is the single greatest moment in Supreme Court history.... And it’s correct. It’s correct. It’s correct because it corrected a historic mistake in *Plessy versus Ferguson*.”⁴ At the Senate Judiciary Committee’s most recent hearing, on May 22, 2019, five of the six judicial nominees were willing to state that *Brown* was correctly decided. Nominees like Mr. Phipps who cannot bring themselves to affirm such a vital case as *Brown v. Board of Education* do not deserve a lifetime appointment as a federal judge. There must be a moral floor for lifetime appointments to our federal judiciary.

Disturbing Lack of Diversity: President Trump’s lack of commitment to diversity on the federal judiciary is deeply disturbing. Mr. Phipps, like the vast majority of the president’s judicial nominees, is

³ <https://www.judiciary.senate.gov/meetings/04/25/2018/nominations>.

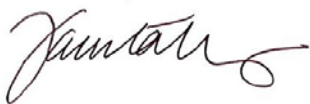
⁴ <https://www.c-span.org/event/?449706/senators-press-supreme-court-nominee-record-spar-documents>.



white and male. There have been four vacancies on the Third Circuit over the past two years, and President Trump has nominated conservative white males to fill them all. President Obama's nominee to a vacancy on the Third Circuit, Rebecca Haywood, would have been the first African-American woman to serve on that court, but she was blocked by Senator Toomey and Senate Republicans. The 14 Trump circuit court nominees listed above who have been advanced through the Senate Judiciary Committee over home-state senators' objections are all men, and 12 are white. President Trump has appointed the least diverse group of nominees in decades.⁵ Of his 46 appellate nominations, none are African-American. None are Latino. Only nine are women. His district court nominees are also predominately white and male. Our nation's great diversity should be reflected in its government institutions, especially the federal judiciary, which serves as the guardian of our rights and liberties. At a time when the legal profession has more women and attorneys of color than ever before, President Trump's record on judicial diversity is truly appalling. And Mr. Phipps's confirmation would make that even worse.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Peter Phipps to the U.S. Court of Appeals for the Third Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel, at (202) 466-3311.

Sincerely,



Vanita Gupta
President & CEO

⁵ <https://www.usatoday.com/story/news/politics/2018/02/13/trumps-87-picks-federal-judges-92-white-just-one-black-and-one-hispanic-nominee/333088002/>.