



July 15, 2019

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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, and he has demonstrated insensitivity to LGBTQ equality. 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 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

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>.

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 14 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, Daniel Bress, and Mr. Phipps. Senate Republicans have destroyed the blue slip tradition for circuit court nominees, and future presidents and Senates are unlikely to revive it.

Insensitivity to LGBTQ Equality: Mr. Phipps has demonstrated a lack of respect for the dignity of LGBTQ individuals. Senator Booker has asked the following question of 17 Trump judicial nominees: “Would you honor the request of a plaintiff, defendant, or witness in your courtroom who is transgender to be referred to in accordance with that person’s gender identity?” Twelve of the 17 nominees have answered this question in the affirmative, most simply answering just “Yes.” Mr. Phipps was one of the five outliers. He gave the following response:

Appellate courts generally review the record from district courts and the briefs of the parties without the occasion to address parties or witnesses directly by name in open court. If there is a need to use a pronoun to refer to a plaintiff, defendant, or witness in a written opinion, I would review the record and the parties’ briefing to assess the appropriate pronoun.³

This answer is disappointing and shows a lack of basic respect for transgender individuals. The fact that the vast majority of Trump nominees gave different answers shows that Mr. Phipps has extreme views on the issue of LGBTQ equality. Moreover, Mr. Phipps listed on his Senate questionnaire that one of his most significant cases as an attorney was his defense of the discredited and repealed “Don’t Ask, Don’t Tell” law in *Witt v. U.S. Air Force*.⁴ Listing this case on his Senate paperwork signals that Mr. Phipps is proud to have defended the exclusion of openly gay individuals from the U.S. military.

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 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 47 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

³ <https://www.judiciary.senate.gov/imo/media/doc/Phipps%20Responses%20to%20QFRs1.pdf>.

⁴ <https://www.judiciary.senate.gov/imo/media/doc/Peter%20Phipps%20SJQ%20-%20PUBLIC.pdf>.

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/>.

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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