

# APPOINTING LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER JUDGES IN THE TRUMP ADMINISTRATION

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President Donald Trump incessantly brags that American citizens selected him to “Make the Judiciary Great Again” and constantly reminds the public that the huge number of federal jurists whom Trump has appointed will be deciding cases decades after his tenure is over. Trump has rapidly submitted many circuit and district court candidates, but not one of his 123 nominees has been openly lesbian, gay, bisexual, transgender or queer (LGBTQ). The White House has also instituted endeavors, specifically regarding transgender people, which seem discriminatory. Indeed, a third of the judicial nominees whom the President has appointed have compiled anti-LGBTQ records. Because Trump pledged to diligently represent all citizens once he secured the presidency, seating diverse jurists assumes crucial relevance. Because of this promise and the significant discrimination that individuals within the LGBTQ community experience, the complete absence of LGBTQ nominees in Trump’s candidates and confirmees warrants systematic analysis.

The first section of this essay reviews why enhanced diversity is critical, ascertaining that expanding minority representation improves judicial decision-making, restricts biases that can undercut justice, and enlarges public confidence in the federal bench. It also recounts how contemporary administrations examine diversity related to LGBTQ candidates when tendering judicial nominees, and detects that all Presidents who followed George H.W. Bush (save George W.) confirmed LGBTQ judges, even though considerably fewer LGBTQ attorneys practiced during the 1990s. The second portion scrutinizes President Trump’s judicial appointments record, and the third surveys its consequences. Because the absolute lack of LGBTQ jurists can have detrimental effects, and considering that Trump possesses multiple years still to rectify this dearth, the concluding section posits suggestions that could help to increase the number of LGBTQ individuals nominated and confirmed for the federal bench.

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## I. A SHORT HISTORY OF FEDERAL COURT DIVERSIFICATION

Modern Presidents and upper chambers employ similar general nomination and confirmation procedures. They also carefully assess the effects of increasing minority court representation, although Democratic and Republican chief executives and senators often evaluate the value of such effects quite differently. For instance, most Democratic Presidents and senators champion diversity's advantages, considered below, while numerous Republican Presidents and senators are more often concerned with intelligence, industriousness, character, independence, and balanced judicial temperament, and with nominating and confirming candidates with strong conservative ideological perspectives.

### A. *The Selection Process*

The White House Counsel has the lead responsibility for appointments. The Department of Justice (DOJ) coordinates integral selection and confirmation obligations, primarily by analyzing choices recommended by home state lawmakers or White House staff and preparing individuals who receive nominations for hearings. The Senate Judiciary Committee fulfills duties throughout the confirmation process, mainly by evaluating nominees and staging panel hearings. Legislators from states with vacancies principally identify, recruit, and recommend strong possibilities and introduce nominees to colleagues.

### B. *Diversity's Benefits*

Enhancing minority representation offers numerous and important benefits. LGBTQ, ethnic minority, and female jurists afford knowledgeable and constructive "outsider" points of view and salient perspectives respecting crucial questions involving alleged discrimination in military, educational, and civilian institutions and workplaces.<sup>1</sup> The individuals provide valuable insight into the innumerable daunting questions that judges regularly confront.<sup>2</sup> They help restrict various sexual orientation, ethnic, and gender prejudices that can operate to subvert justice's delivery.<sup>3</sup> The

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1. Theresa M. Beiner, *The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 610–17 (2003); Linda Greenhouse, Opinion, *Why Judges Matter*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/opinion/trump-judges-abortion-immigration.html> (including LGBTQ people in its consideration of "minorities").

2. See generally Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759 (2005). But see Stephen J. Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011).

3. See, e.g., U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, FINAL REPORT: NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS AND ETHNIC FAIRNESS (1997); FED. JUDICIAL CENTER, REPORT

confirmation of diverse jurists will help not only to enhance the quality of the justice which the federal judicial system administers, but also to showcase the highly-qualified, mainstream candidates who are present within the LGBTQ community.<sup>4</sup>

Because many of President Trump's legal efforts have not been inclusive—indeed, numerous observers have even deemed certain of his endeavors discriminatory—nominating and confirming LGBTQ jurists assumes critical significance. Consider, for example, Justice Department actions concerning marriage equality. The United States government favored a baker's plea that the Supreme Court Justices reverse a determination which imposed the requirement that he serve gay partners.<sup>5</sup> When the Texas Supreme Court held that *Obergefell* allowed localities to not pay same-sex couples pertinent spousal benefits, the DOJ eschewed asking that the U.S. Justices decide the case.<sup>6</sup>

Trump has vigorously opposed the recognition of rights for transgender individuals. In 2017, the President attempted to alter Obama Administration policies which supported transgender peoples' military service, a controversial action that district court jurists preliminarily enjoined.<sup>7</sup> Similarly, in 2017 the Department of Justice and the Department of Education (DOE) retracted Obama-era secondary public school guidance prescribing current (and not birth) gender identity as the touchstone for treating students' circumstances, claiming that the stricture lacked sufficient legal justification.<sup>8</sup> Peculiarly crucial was the contention by numerous

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OF THE FED. COURTS STUDY COMM. 169 (1990); 164 CONG. REC. S1258 (daily ed. Feb. 28, 2018) (statement of Sen. Schumer) ("Having a diversity of views and experience on the Federal bench is necessary for the equal administration of justice").

4. These candidates, once confirmed, may better appreciate circumstances which might cause LGBTQ individuals to appear before the federal courts. See Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L. J. 1423, 1442 (2008); Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), <https://www.newyorker.com/magazine/2014/10/27/obama-brief>; see also WILLIAM ESKRIDGE, GAYLAW (1999).

5. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Brief for United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Comm'n*, S. Ct., (2017) (No. 16-111); see also Adam Liptak, *Where to Draw Line On Free Speech? Wedding Cake Case Vexes Lawyers*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/us/politics/gay-wedding-cake-free-speech-first-amendment-supreme-court.html>.

6. Pidgeon v. Turner, 538 S.W.3d 73 (Tex. 2017), cert. denied, 138 S. Ct. 505 (2017). But see Eli Stokols, *Trump Says He's 'Fine' With Legalization of Same-Sex Marriage*, POLITICO (Nov. 13, 2016), <https://www.politico.com/story/2016/11/donald-trump-same-sex-marriage-231310>.

7. *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017); see Helene Cooper, *Transgender People Will Be Allowed to Enlist in the Military as a Court Case Advances*, N.Y. TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/us/politics/transgender-military-pentagon.html>.

8. U.S. DEP'T JUSTICE & U.S. DEP'T EDUC., DEAR COLLEAGUE LETTER (Feb. 22, 2017); see Libby Bulinski, "Transgender Need Not Apply", 102 MINN. L. REV. DENOVO (Nov. 12, 2017), <http://www.minnesotalawreview.org/2017/11/transgender-need-not-apply>; Sari Horwitz & Spencer S.

individuals and groups engaged in monitoring civil rights that the records of many Trump nominees and confirmees “demonstrate hostility” to the LGBTQ community—a contention that is both chilling and revealing.<sup>9</sup>

Observers who criticize efforts to designate additional LGBTQ lawyers for judicial service contend that augmenting representation could dilute merit, as the candidate “pool” is tiny, and that America currently lacks sufficient ideologically conservative nominees.<sup>10</sup> These suppositions are less convincing today than ever—burgeoning LGBTQ prospects are superb, conservative aspirants.<sup>11</sup>

### C. Diversifying Federal Courts

The records of contemporary Democratic and Republican Presidents highlight the difficulties entailed in realizing greater federal bench diversity in terms of sexual orientation, ethnicity, and gender. Before Jimmy Carter’s presidency, the circuit and district courts included few ethnic minorities and women.<sup>12</sup> President Carter adopted sound practices in naming strong persons of color and women to circuit court judgeships<sup>13</sup> and requesting that lawmakers supply plentiful talented minority attorneys when district court slots opened.<sup>14</sup> Although Carter appointed numerous people of color and women to the circuit and trial courts, he failed to recommend a sole LGBTQ nominee.<sup>15</sup>

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Hsu, *Sessions Ends Workplace Protections for Transgender People Under Civil Rights Act*, WASH. POST (Oct. 5, 2017), [https://www.washingtonpost.com/local/public-safety/trump-administration-asks-court-to-toss-out-challenge-to-military-transgender-ban/2017/10/05/3819aec4-a9d5-11e7-92d1-58c702d2d975\\_story.html?noredirect=on&utm\\_term=.94afb444da21](https://www.washingtonpost.com/local/public-safety/trump-administration-asks-court-to-toss-out-challenge-to-military-transgender-ban/2017/10/05/3819aec4-a9d5-11e7-92d1-58c702d2d975_story.html?noredirect=on&utm_term=.94afb444da21).

9. *Stacking the Courts: The Fight Against Trump’s Extremist Nominees*, LAMBDA LEGAL (2017), <https://www.lambdalegal.org/judicial-nominees>; see Kenneth Jost, *Trump’s Judges Pose Danger to LGBT Rights*, JOST ON JUSTICE (Feb. 11, 2018), <http://www.jostonjustice.com/2018/02/trumps-judges-pose-danger-to-lgbt-rights.html>.

10. For analysis of merit and the pool, see SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 335 (1997); Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 NW. U. L. REV. COLLOQUY 283, 294–96 (2012).

11. See *infra* notes 43–49, 52 and accompanying text.

12. See generally Elliot E. Slotnick, *Lowering the Bench or Raising it Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL’Y REV. 270 (1983); see also GOLDMAN, *supra* note 10, at 233–34; Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9 (2001).

13. LARRY BERKSON & SUSAN CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES, AND CANDIDATES (1980); see GOLDMAN, *supra* note 10, at 238–50.

14. Merit selection panels promoted well qualified, diverse appointments. ALAN NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES (1981); *Federal Judicial Selection: The Problems and Achievements of Carter’s Merit Plan*, 62 JUDICATURE 463, 463–510 (1979).

15. He confirmed 41 women and 52 ethnic minorities, including the first Native American, Frank Howell Seay. Sheldon Goldman, *Reagan’s Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322 (1989).

The Grand Old Party (GOP) Presidents who succeeded Carter undertook negligible efforts to seat LGBTQ picks. President Ronald Reagan, for example, declared that his administration would nominate and confirm exceptionally conservative aspirants, rejected President Carter's diversity approach, conducted extremely limited activity to canvass minorities, and failed to confirm one single LGBTQ jurist.<sup>16</sup> The senior President George Bush vowed to follow Reagan's selection procedures, demonstrated *de minimis* initiative to foster the appointment of minorities,<sup>17</sup> and did not choose a sole LGBTQ person for a seat on the bench.<sup>18</sup> His son's appointments regime was similarly deficient.<sup>19</sup>

In contrast, modern Democratic Presidents have developed rigorous concepts to nominate and confirm many knowledgeable, mainstream minority attorneys. President Bill Clinton assertively encouraged numbers of home state politicians to forward myriad superb, diverse candidates.<sup>20</sup> In 1994, the chief executive recruited, named, and confirmed Deborah Batts, the first lesbian appointed to the federal bench,<sup>21</sup> where she remained the only sitting LGBTQ judge until Barack Obama's Administration.<sup>22</sup>

#### D. The Obama Administration

President Barack Obama—who comprehensively promoted sexual preference, ethnic, gender, and experiential representation<sup>23</sup>—deserves closer investigation, because the efforts that his administration made to increase the diversity of the bench were comparatively recent and very successful.<sup>24</sup> Obama's practices included contacting less traditional sources

16. GOLDMAN, *supra* note 10, at 290–91, 298–302, 327–35.

17. See generally Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282 (1993).

18. He confirmed Northern District of California Judge Vaughan Walker, who was not openly gay at the time of his appointment. Bob Egelko, *Judge Vaughan Walker Tells His Side of Prop. 8 Trial*, S.F. CHRON. (Apr. 20, 2014), <https://www.sfgate.com/lgbt/article/Judge-Vaughn-Walker-tells-his-side-of-Prop-8-5416851.php>.

19. See Jennifer Segal Diascro & Rorie Spill Solberg, *George W. Bush's Legacy on the Federal Bench: Policy in the Face of Diversity*, 92 JUDICATURE 289 (2009); Goldman, *supra* note 17.

20. George, *supra* note 12, at 10–11; Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265, 266–67 (1999); see also Sheldon Goldman et al., *Clinton's Judges - Summing up the Legacy*, 84 JUDICATURE 228 (2001).

21. He established contemporary records, confirming 106 women and 91 ethnic minorities. See sources cited *supra* note 20.

22. Of 1400 federal jurists, Judge Batts was the sole lesbian and Judge Seay the only Native American. See *supra* notes 15, 21.

23. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239 (2013). I rely substantially below on Sheldon Goldman et al., *Obama's Judiciary at Midterm: The Confirmation Drama Continues*, 94 JUDICATURE 262 (2011). See also Jeffrey Toobin, *Bench Press*, NEW YORKER (Sept. 21, 2009), <https://www.newyorker.com/magazine/2009/09/21/bench-press>.

24. GREGORY CRAIG, LETTER FROM GREGORY CRAIG, WHITE HOUSE COUNSEL, TO PRESIDENT BARACK OBAMA (Nov. 13, 2009); see Tobias, *supra* note 10.

(such as LGBTQ, minority, and women's political, interest, and bar committees) and nominating and confirming astute LGBTQ choices and many strong people of color. Under President Obama's direction, the White House solicited assistance from numerous well-connected politicians, including LGBTQ, minority and female elected officials, while also cajoling and urging home state officers to institute thorough efforts which ensured the consistent tendering of numerous impressive, mainstream, and diverse prospects.

At the same time, legislators examined and suggested numerous qualified minority candidates.<sup>25</sup> Pertinent to initiatives respecting LGBTQ aspirants were endeavors of New York Democratic Senators Chuck Schumer and Kirsten Gillibrand, who mustered Paul Oetken and Alison Nathan for the Southern District of New York, and also recruited Pamela Ki Mai Chen in the Eastern District. Notably, at that time, Oetken was the initial gay trial jurist, and Nathan and Chen were the only lesbian active judges.<sup>26</sup> Moreover, Texas Republican Senators John Cornyn and Ted Cruz sought out and powerfully favored Robert Pitman,<sup>27</sup> while California Democratic Senators Dianne Feinstein and Barbara Boxer carefully searched for, perused, and supported Michael Fitzgerald.<sup>28</sup>

In short, President Obama initiated numerous effective measures that resulted in the nomination and confirmation of many strong, minority, LGBTQ individuals, while nearly all Democratic (and some Republican) senators helped facilitate these nominations and confirmations. Obama established practically all records for tapping distinguished persons of color. Most relevant to the issues addressed in this piece was his tenfold expansion of sitting LGBTQ jurists.<sup>29</sup>

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25. Carl Tobias, *Filling the Federal Appellate Court Vacancies*, 17 U. PA. J. CONST. L. ONLINE 1, 1–2 (2015).

26. 157 CONG. REC. S4634 (daily ed. July 18, 2011) (confirming Paul Oetken); 157 CONG. REC. S6493 (daily ed. Oct. 13, 2011) (confirming Alison Nathan); 159 CONG. REC. S1082 (daily ed. Mar. 4, 2013) (confirming Pamela Ki Mai Chen); Carl Tobias, *Considering Lesbian, Gay, Transgender, and Bisexual Nominees for the Federal Courts*, 90 WASH. U. L. REV. 577, 579 (2012); Devlin Barrett, *Over 12 Years, Schumer Tips Court Balance*, WALL STREET J. (Oct. 7, 2011), <https://www.wsj.com/articles/SB10001424052970204612504576611263146437944>; Mark Joseph Stern, *Obama's Most Enduring Gay Rights Achievement*, SLATE (June 17, 2014), [http://www.slate.com/blogs/outward/2014/06/17/openly\\_gay\\_federal\\_judges\\_are\\_obama\\_s\\_most\\_enduring\\_gay\\_rights\\_achievement.html](http://www.slate.com/blogs/outward/2014/06/17/openly_gay_federal_judges_are_obama_s_most_enduring_gay_rights_achievement.html).

27. 160 CONG. REC. S6907 (daily ed. Dec. 16, 2014) (confirming Robert Pitman); see Carl Tobias, *Filling the Texas Federal Court Vacancies*, 95 TEX. L. REV. SEE ALSO 170, 177 (2017) (recommending and powerfully supporting Latino/as).

28. 158 CONG. REC. S1714 (daily ed. Mar. 15, 2012) (confirming Michael Fitzgerald); see Carl Tobias, *Combating the Ninth Circuit Judicial Vacancy Crisis*, 73 WASH. & LEE L. REV. ONLINE 687, 702–23 (2017) (proposing many Asian Americans).

29. President Obama confirmed 136 female, 98 ethnic minority, and 10 LGBTQ jurists, and nominated many other female, ethnic minority and LGBTQ candidates whom Republicans obstructed from 2009 to 2014, and refused to consider in 2015 and 2016.

## II. THE TRUMP ADMINISTRATION

President Trump has yet to nominate a single LGBTQ individual for the federal judiciary, even though all but one President since George H.W. Bush's Administration have considered and confirmed LGBTQ candidates, and despite the considerably smaller number of LGBTQ attorneys who were practicing previously.<sup>30</sup> During his presidential campaign, Trump vowed to recruit, nominate and seat a multitude of ideological conservatives; indeed, he has kept this promise by robustly marshaling and confirming Justice Neil Gorsuch and many other conservative circuit and district court nominees, apparently prioritizing these nominees over more diverse possibilities.

The White House Counsel, Donald McGahn, along with the President, has stressed filling appellate court openings. McGahn and Trump mainly use the list of twenty-one potential Supreme Court nominees compiled by the Federalist Society and the Heritage Foundation.<sup>31</sup> Most circuit nominees are extremely conservative and highly qualified. Trump emphasizes the appellate courts, which are the courts in which ninety-nine percent of appeals are concluded. For this reason, the circuit courts have greater opportunity to develop significant policies and precedents than district courts.<sup>32</sup> When filling empty trial court positions, President Trump—somewhat like his predecessors—usually defers to the recommendations of home state officials and premises nominations substantially on case management abilities.<sup>33</sup> The White House has made no effort to implement rigorous actions that would promptly denominate and confirm accomplished LGBTQ candidates.

So far, Trump has appointed thirty-eight circuit and district court members, four of whom are persons of color,<sup>34</sup> and tapped 123 lower court

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30. Trump has confirmed the fewest minority judges since Ronald Reagan was President. I rely substantially here on Tobias, *supra* note 28, at 702–11; Charlie Savage, *Trump is Rapidly Reshaping the Judiciary. Here's How*, N.Y. TIMES, (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html>.

31. Melissa Quinn, *Inside the Mind of Leonard Leo, Trump's Supreme Court Right-Hand Man*, WASH. EXAMINER (Jan. 28, 2018), <https://www.washingtonexaminer.com/inside-the-mind-of-leonard-leo-trumps-supreme-court-right-hand-man>; Charlie Savage, *Poor Vetting Sinks Trump's Nominees for Federal Judge*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/politics/matthew-petersen-judge-nominee-withdraws-trump.html>; see *President Donald J. Trump Announces Five Additions to Supreme Court List*, WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, (Nov. 17, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-announces-five-additions-suprem-e-court-list>.

32. Goldman, *supra* note 17, at 293; Tobias, *supra* note 23, at 2240–41; Savage, *supra* note 30.

33. Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 19 (2017). *But see* Seung Min Kim, *Trump's Judge Picks: "Not Qualified," Prolific Bloggers*, POLITICO (Oct. 17, 2017), <https://www.politico.com/story/2017/10/17/trump-judges-nominees-court-picks-243834>.

34. 163 CONG. REC. S8033 (daily ed. Dec. 14, 2017) (confirming James Ho); *id.* at S3179 (daily ed. May 25, 2017) (confirming Amul Thapar); 164 CONG. REC. S2661 (daily ed. May 15, 2018)

prospects, eleven of whom are persons of color.<sup>35</sup> In terms of quantity, his candidate numbers surpass those of other modern Presidents at analogous junctures.<sup>36</sup>

Decoding exactly why Trump has a miserable LGBTQ record cannot be felicitously discerned, as the chief executive furnishes extremely limited information on the nomination and confirmation processes.<sup>37</sup> However, there are substantially more practicing, estimable LGBTQ lawyers now than there have ever been. Many of these lawyers would make impressive choices and provide excellent court service, a conclusion evidenced in part by the records of the ten LGBTQ jurists confirmed during Obama's presidency.<sup>38</sup>

The primary reason for Trump's dismal record is his administration's demonstrated disinterest in recruiting, examining, interviewing and proposing superb LGBTQ possibilities. In sharp contrast to previous Democratic Presidents, Trump has apparently employed no initiatives that

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(confirming John Nalbandian);164 CONG. REC. S1333 (daily ed. Mar. 5, 2018) (confirming Karen Gren Scholer).

35. Thapar, Ho, Nalbandian, Scholer, Jill Otake, and Diane Gujarati comprise Asian Americans; Terry Moorer and Rodney Smith constitute African Americans; Fernando Rodriguez, Raúl M. Arias-Marxuach and Rodolfo Ruiz comprise Latinos. *President Donald J. Trump Announces Seventh Wave of Judicial Nominees*, WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (Sept. 7, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-seventh-wave-judicial-candidates>; *President Donald J. Trump Announces Ninth Wave of Judicial Nominees*, WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (Dec. 20, 2017); *President Donald J. Trump Announces Tenth Wave of Judicial Nominees*, WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (Jan. 23, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-tenth-wave-judicial-nominees/>; *President Donald J. Trump Announces Thirteenth Wave of Judicial Nominees*, WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (Apr. 26, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-thirteenth-wave-judicial-nominees-seventh-wave-united-states-marshall-nominees/>; *President Donald J. Trump Announces Fourteenth Wave of Judicial Nominees, Thirteenth Wave of Attorney Nominees, and Eighth Wave of United States Marshal Nominees*, WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (May 10, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-fourteenth-wave-judicial-nominees-thirteenth-wave-united-states-attorney-nominees-eighth-wave-united-states-marshall-nominees/>; see Richard Wolf, *Trump's 87 Picks to be Federal Judges are 92% White with Just One Black and One Hispanic Nominee*, USA TODAY (Feb. 13, 2018), <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/>; see also sources cited *supra* note 34.

36. The last three Presidents nominated considerably fewer. See *Archive of Judicial Vacancies*, United States Courts, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> (last visited May 28, 2018) (consider, especially, the vacancies in 1993–94, 2001–02, and 2009–10).

37. The privacy needs of Presidents, senators, nominees, candidates and other individuals and entities that participate in the selection process may justify affording comparatively limited information. Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089, 1103 (2017). But see *Doing What He Said He Would: President Trump's Transparent, Principled and Consistent Process for Choosing a Supreme Court Nominee*, WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (Jan. 31, 2017), <https://www.whitehouse.gov/briefings-statements/said-president-trumps-transparent-principled-consistent-process-choosing-supreme-court-nominee>.

38. See *supra* notes 29, 35; *infra* note 44. The nation currently has many U.S. Magistrate and Bankruptcy Judges and state court judges who are LGBTQ individuals.

would seek out and confirm competent LGBTQ lawyers. For example, his White House has assigned insufficient LGBTQ people to the judicial selection team. Trump has neither attempted to (1) press or cajole home state politicians to search for, evaluate, interview and tender capable LGBTQ prospects, or (2) solicit recommendations of putative nominees from sources—including, *inter alia*, numerous LGBTQ, minority, and women’s interest, political, and bar entities—that know of strong candidates. The current administration has consistently prioritized the nomination and confirmation of ideological conservatives over aspirants with comparatively diverse backgrounds and ideologies.<sup>39</sup> Finally, the paucity of LGBTQ nominees might simply reflect the deleterious treatment that the President has seemingly accorded the LGBTQ community.<sup>40</sup>

### III. IMPLICATIONS

President Trump’s neglect of LGBTQ submissions when recruiting and confirming jurists has numerous adverse impacts. The federal courts are a locus of justice, where LGBTQ persons may encounter difficulty when navigating the criminal and civil systems. LGBTQ individuals concomitantly experience only minimal representation in the judiciary. This negligible attention to improving LGBTQ judicial diversity constitutes a real lost opportunity for expanding the justice which parties deserve and courts supply. Increased representation enhances opinions with incisive perspectives, ends or constricts biases which undermine justice, and improves confidence that jurists will address litigants fairly.<sup>41</sup> Enlarging the number of LGBTQ judges is clearly essential in light of President Trump’s activities, previously recounted, which could exclude, or even seem to discriminate against, LGBTQ people.<sup>42</sup>

Reasons for ignoring or confining diversity are not convincing today. For instance, the ten excellent LGBTQ jurists whom Obama sent, and the talented conservative minorities whom Trump has proffered, repudiate arguments that forwarding skilled LGBTQ nominees will erode merit because the pool is small or lacks individuals with the desired conservative ideology.<sup>43</sup> These astute prospects indicate that Trump does now have

39. See *supra* notes 30–32 and accompanying text.

40. See *supra* notes 5–9 and accompanying text.

41. See *supra* notes 1–4 and accompanying text.

42. See *supra* notes 5–9, 40 and accompanying text.

43. See *supra* notes 23–29, 34–35. Trump confirmed many other strong, conservative women, such as Seventh Circuit Judge Amy Coney Barrett, Sixth Circuit Judge Joan Larsen, Tenth Circuit Judge Allison Eid, and Seventh Circuit Judge Amy St. Eve. 163 CONG. REC. S6908 (daily ed. Oct. 31, 2017) (confirming Amy Barrett); 163 CONG. REC. S6944 (daily ed. Nov. 1, 2017) (confirming Joan Larsen); 163 CONG. REC. S6982 (daily ed. Nov. 2, 2017) (confirming Allison Eid); 164 CONG. REC. S2688 (daily ed. May 14 2018) (confirming Amy St. Eve); see also sources cited *supra* note 35.

numerous competent aspirants who can simultaneously expand merit and conservative views.<sup>44</sup> The administration need only capitalize on this potential.

In sum, despite the many advantages inherent in enhanced minority representation—especially implicating LGBTQ persons—Trump has devoted strikingly few resources to increasing diversity vis-à-vis LGBTQ selections. Nevertheless, a significant amount of time remains in his presidency for Trump to effectuate devices that would expand LGBTQ nominees and confirnees.

#### IV. RECOMMENDATIONS FOR INCREASING FEDERAL BENCH DIVERSITY

President Trump, the chamber, the public, and LGBTQ individuals should adopt particular constructs which enhance LGBTQ judicial representation. Because the Obama Administration's concerted actions to confirm LGBTQ designees were the most recent, and immensely successful, endeavors, Trump's White House should begin to canvass and implement these or similar procedures and practices.

One salient, dependable remedy would be to elevate some of the highly qualified conservative or moderate LGBTQ district judges appointed during the Obama Administration. This venerable notion warrants substantial consideration, because the court members have compiled accessible, thorough records and directly relevant expertise, and the chamber has already comprehensively investigated and dutifully confirmed the nominees.<sup>45</sup> Consider, for example, Paul Oetken or Michael Fitzgerald, either of whom could serve as the first gay federal regional circuit jurist. Alison Nathan or Pamela Ki Mai Chen might become the first lesbian federal appellate judge.<sup>46</sup> A related concept would be to nominate some of the twenty exceptional, conservative, and centrist, Obama district court picks, such as Inga Bernstein, who received committee approval without dissent, but then lacked floor votes.<sup>47</sup> That mechanism would be expeditious, as re-nominees need merely win committee and chamber

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44. See *supra* notes 29, 35. But see *supra* notes 34, 43 (party-line vote confirming Judge Thapar and rather close votes confirming Judges Barrett and Eid).

45. See generally Elisha Carol Savchak et al., *Taking It to the Next Level: The Elevation of District Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478 (2006); Tobias, *supra* note 23, at 2248.

46. There are five additional similarly situated district judge candidates whom Trump could elevate. See sources cited *supra* notes 1, 26, 28, 38.

47. The Republican Senate majority denied these well qualified nominees floor debates and confirmation votes. Tobias, *supra* note 33, at 11, 18; Carl Tobias, *Confirm Inga Bernstein for the District of Massachusetts*, THE HILL (Jan. 13, 2017), <http://thehill.com/blogs/congress-blog/judicial/314071-confirm-inga-bernstein-for-the-district-of-massachusetts>.

ballots to achieve confirmation.<sup>48</sup> Trump has duly implemented this apparatus with eleven Obama district court nominees, five of whom the Senate has confirmed, including, for example, Karen Gren Scholer.<sup>49</sup>

President Trump should accord the improvement of LGBTQ representation exceptionally high priority and convey to specific individuals and entities connected with selection and members of the public the significance of approving LGBTQ jurists. Trump's Counsel, who assumes chief responsibility for appointments, needs to carefully orchestrate the activity by clearly and proactively communicating how the supplementation of judicial diversity requires a prominence akin to conservatism. This importuning should aptly focus on White House Counsel employees, Department of Justice staff, Judiciary panel members, and legislators in states with unfilled posts.<sup>50</sup>

The President's Counsel should prescribe expansive techniques that deftly serve to augment LGBTQ jurists. For instance, White House Counsel's Office and the other persons and groups that cooperate on appointments themselves need LGBTQ members, while all involved in the selection process must commit sufficient resources to easily discharge the task of increasing representation. Participants in the nomination process must seek out, pinpoint, evaluate, and suggest talented LGBTQ possibilities by contacting individuals, special interest groups (including, particularly, the Federalist Society), bar committees, and senators with knowledge about preeminent designees.<sup>51</sup> The Counsel should prevail upon all lawmakers whose states confront vacancies to pursue, evaluate, interview and send talented, conservative, and mainstream LGBTQ prospects. His office must closely scrutinize, interview, and recommend these prospects, urging Trump to seriously contemplate naming them.<sup>52</sup> The President may set an example with the picks' concomitant nomination.

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48. Tobias, *supra* note 33, at 18–19.

49. He can name more in the twenty district court nominees, who secured hearings and committee approval, or the thirty district nominees, who secured panel review but no hearing, yet Bernstein was the only nominee who seemed to be openly LGBTQ.

50. For their selection roles, see *supra* note 2.

51. See *supra* note 31. Lambda Legal and Log Cabin Republicans may be examples of other valuable sources for strong designees.

52. Insufficiently rigorous vetting of candidates, or preparation of nominees for committee hearings by the White House and the Department of Justice, apparently prompted three Trump nominees to withdraw. Philip Rucker et al., *'He's Not Weak, Is He?': Inside Trump's Quest to Alter the Judiciary*, WASH. POST (Dec. 20, 2017), <https://www.msn.com/en-us/news/politics/'he's-not-weak-is-he'-inside-trump's-quest-to-alter-the-judiciary/ar-BBH2PV3?li=BBnbcA1&srcref=rss&parent-title=arriving-in-japan-trump-projects-confidence-says-he'll-probably-meet-putin-during-asia-trip&parent-ns=ar&parent-content-id=AAus5Zk>.

LGBTQ individuals who envision appointment should design careers which rigorously prepare them for positions on federal courts.<sup>53</sup> The records and experiences of numerous federal court members, including Judges Fitzgerald and Nathan, comprise strong models. Lawyers ought to diligently explore and carefully strive to emulate their productive career avenues. In general, they should seek out positions in both federal and state legislative, executive, and judicial branch capacities; particularly, they should develop experience in public defender, legal services, and federal court practice.

Should President Trump marshal accomplished LGBTQ candidates, the White House, the DOJ, and both parties' lawmakers must collaborate in order to quickly institute thorough, rigorous, and equitable confirmation processes. For instance, Trump and his advisors might request that senators powerfully support nominees, the Justice Department ought to vigorously prepare them for the confirmation procedures, and the Judiciary Committee must swiftly arrange comprehensive, fair hearings and cogent discussions and votes. When nominees capture panel approval, they merit speedily-orchestrated and robust chamber debates and ballots.

#### CONCLUSION

President Trump has failed to name a single LGBTQ aspirant to the federal bench, although numerous respected, qualified, and ideologically conservative LGBTQ prospects exist. Because the appointment of LGBTQ persons would improve the justice that federal courts deliver, and which litigants warrant, it is extremely important that the chief executive adopt changes to effectively recruit, select, and confirm excellent, mainstream conservative LGBTQ jurists.

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53. A survey of 957 law firms/offices found that the United States has 2,664 openly LGBTQ counsel, but many more may not be accounted for due to not wanting to disclose their LGBTQ status. *LGBTQ Representation Among Lawyers in 2017*, NALP (Jan. 2018), <https://www.nalp.org/0118research>.