

AFJ NOMINEE REPORT

PETER PHIPPS



U.S. Court of Appeals for the Third Circuit

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INTRODUCTION

On May 3, 2019, President Trump announced his intent to [nominate](#) Peter Phipps to the Third Circuit Court of Appeals for the seat previously held by [Judge Thomas Vanaskie](#). Just last year, Phipps was [nominated](#) and confirmed to be a United States District Court Judge in the Western District of Pennsylvania, filling the seat of retired Judge Terrence F. McVerry. Since that time, AFJ has reviewed Phipps's short [record](#) as a District Court judge and found Phipps has authored only eight opinions.¹

This is Trump's fourth nominee to the Third Circuit since taking office, and all four of those nominees have been white men.² In contrast, President Obama nominated [Rebecca Ross Haywood](#) to the Third Circuit in March 2016 and Haywood would have been the first African American woman to serve on the Third Circuit. However, her nomination was blocked because Senator Pat Toomey [never returned](#) his blue slip. In response, the Senate Judiciary Committee – respecting the blue slip tradition at that time – did not consider Haywood's nomination.

As was the case with the nominations of [Paul Matey](#) and [David Porter](#) to the Third Circuit, there was no meaningful

consultation with at least one home-state senator on Phipps's nomination.

In a press statement, Senator Bob Casey [stated](#) that he did not believe Phipps's "six months on that bench is sufficient experience or preparation." Moreover, Senator Casey emphasized how, "[l]ike justices of the Supreme Court, circuit court judges are often asked to decide questions of law that can have an enormous impact on Americans' lives, and I have significant concerns about Judge Phipps' judicial and constitutional philosophy." As a result, Senator Casey will not return his blue slip for Phipps's nomination.

In addition, during his initial confirmation hearing for the district court, Phipps joined many of Trump's nominees in his refusal to answer whether he believed *Brown v. Board of Education* was correctly decided.³

Due to the lack of meaningful consultation with home-state senators and Phipps's short tenure as a district court judge, Alliance for Justice opposes Phipps's nomination.

BIOGRAPHY

Phipps is currently serving as a district court judge in the Western District of Pennsylvania. President Trump [nominated](#) Phipps for the seat on February 15, 2018 and he was

confirmed on October 11, 2018; thus, he has served as a judge for less than one year.

Prior to his confirmation as a district court judge, Phipps held a variety of roles at the Department of Justice (DOJ) including as senior trial counsel from 2011-2018, senior counsel from 2009-2011, and trial attorney from 2003-2009.⁴

Phipps was a law clerk to Judge R. Guy Cole, Jr. of the Sixth Circuit Court of Appeals before working at the DOJ. Prior to his clerkship, Phipps worked as an associate at Jones Day from 1998-2001.⁵

He received his J.D. from Stanford Law School in 1998. He also received his B.S. in Physics and B.A. in History from the University of Dayton in 1995. Phipps is 46 years old.⁶

The following sections highlight notable cases that Phipps worked on as an attorney for the DOJ. The Senate should note the various issues they raise and question Phipps on his role in these cases.

REPRODUCTIVE RIGHTS

In October 2018, Phipps was the lead attorney for the DOJ in [ACLU v. Azar](#), 2018 U.S. Dist. LEXIS 175470. Phipps defended a Health and Human Services policy to provide grants to religious institutions that care for unaccompanied immigrant children and victims of human trafficking, even though these organizations had “religious objection[s] to providing access to abortion or contraception.”

LGBTQ RIGHTS

Phipps defended the discharge of a nurse from the United States Air Force under the “Don’t Ask, Don’t Tell” policy in [Witt v. Department of the Air Force](#), 444 F. Supp. 2d 1138 (W.D. Wa. 2006).

The ACLU represented the plaintiff, Major Margaret Witt. Maj. Witt was a [decorated](#) flight and operation nurse, and had served in the Air Force for almost twenty years. The ACLU noted how Witt “was discharged from the U.S. Air Force on the grounds that she engaged in homosexual conduct” and that doing so [violated](#) Maj. Witt’s Fifth and First Amendment rights.

Phipps's examination of Witt during trial focused on her moral standards. For instance, he [asked](#) her – regarding her relationship with a married civilian woman – if she believed adultery was “not consistent with a high standard of conduct.” Phipps [insisted](#) during his opening statement that [the nurse's] conduct necessitated her firing.”

Further, Phipps argued her “discharge therefore eliminated a risk to unit cohesion and morale.” [Following](#) President Obama's repeal of “Don't Ask, Don't Tell,” Witt's case was settled in 2011 and she was able to retire from the Air Force with full benefits.

HOUSING DISCRIMINATION

Phipps represented the U. S. Department of Housing and Urban Development (HUD) in the landmark case [Thompson v. United States HUD](#), 348 F. Supp. 2d 398 (D Md. 2005), in which the court held HUD violated the Fair Housing Act through its practice of what the Legal Defense Fund [described](#) as “unfairly concentrating African-American public housing residents in the most impoverished, segregated areas of Baltimore City.”

In 2005, the United States District Court of Maryland [found](#) that “HUD failed to consider regionally-oriented desegregation and integration policies, despite the fact that Baltimore City is contiguous to, and linked by public transportation and roads to, Baltimore and Anne Arundel Counties and in close proximity to the other counties in the Baltimore Region.” Moreover, the court found that by “effectively wearing blinders,” HUD “at best, abused their discretion and failed to meet their obligations under the Fair Housing Act to promote fair housing affirmatively.”

The court found that the plaintiffs were entitled to seek remedial measures for the harms caused by HUD's policies. The decision expressed frustration with HUD's unwillingness to confront past practices, as the court explained it was “no longer appropriate for HUD, as an institution with national jurisdiction, essentially to limit its consideration of desegregative programs for the Baltimore Region to methods of rearranging Baltimore's public housing residents within the Baltimore City limits.”

CONCLUSION

As of this writing, a home-state senator opposes Phipps's nomination to the Third Circuit. Consistent with Senate practice for nearly a century, the Judiciary Committee should not proceed with a hearing. Moreover, Phipps's brief tenure as a district court judge and his record raise serious concerns. Alliance for Justice opposes the nomination of Peter Phipps to the Third Circuit.

ENDNOTES

1. Sen. Comm. on the Judiciary, 116th Cong., Peter Joseph Phipps Questionnaire for Judicial Nominees, at 8, available at <https://afj.org/wp-content/uploads/2019/05/Peter-Phipps-Senate-Questionnaire.pdf>.
2. The other three white men nominated to the Third Circuit by President Trump are [Paul Matey](#), [David Porter](#), and [Stephanos Bibas](#).
3. Sen. Comm. on the Judiciary, Nomination Hearing, April 25, 2018, at 02:14:02, available at <https://www.judiciary.senate.gov/meetings/04/25/2018/nominations>.
4. Sen. Comm. on the Judiciary, 116th Cong., Peter Joseph Phipps Questionnaire for Judicial Nominees, at 1-3, available at <https://afj.org/wp-content/uploads/2019/05/Peter-Phipps-Senate-Questionnaire.pdf>.
5. *Id.* at 1.
6. *Id.*