

AFJ NOMINEE REPORT

JOSEPH BIANCO



U.S. Court of Appeals for the Second Circuit

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INTRODUCTION

On November 13, 2018 President Trump [nominated](#) Joseph F. Bianco to the Second Circuit Court of Appeals for the seat held by [Judge Reena Raggi](#), who took senior status in August 2018. The Senate did not act on Bianco's nomination before the end of the Congress, and on January 3, 2019, his nomination was returned to the President. On January 23, 2019, President Trump [renominated](#) Bianco.

It's important to note that Bianco's nomination is being advanced over the objections of both of his home-state senators, Chuck Schumer and Kirsten Gillibrand. Consistent with Senate practice for nearly a century, the Judiciary Committee should not proceed with a hearing without positive blue slips from both senators. The Congressional Research Service has [found](#) no known instance in which a nominee has ever been confirmed over the objections of both home-state senators. As Senator Orrin Hatch [said](#) in 2014, "[w]eakening 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."

BIOGRAPHY

Bianco has [served](#) as a United States District Court judge for the Eastern District of New York since 2006.¹ Most notably, he presided over several cases involving the MS-13 gang.² See, e.g., [United States v. Prado](#), 2011 U.S. Dist. LEXIS 86631 (E.D.N.Y.) (involving numerous counts of attempted murder, racketeering, and witness tampering); [United States v. Ayala](#), 64 F. Supp. 3d 446 (E.D.N.Y. 2014) (involving high-profile, violent MS-13 crimes in Long Island).

Prior to his confirmation to the bench, he spent portions of his career working in government, as both senior counsel/deputy assistant attorney general for the Department of Justice Criminal Division from 2004 to 2006, and as an assistant United States attorney for the Southern District of New York from 1994 to 2003.³ Bianco also worked in private practice as counsel at Debevoise & Plimpton LLP from 2003 to 2004, and as an associate at Simpson Thacher & Bartlett LLP from 1991 to 1992 and 1993 to 1994.⁴

Bianco clerked for Judge Peter K. Leisure on the District Court for the Southern District of New York from 1992 to 1993. He received his J.D. from Columbia University School of Law in

1991 and his B.A. from Georgetown University in 1988.⁵

Bianco has been a member of the Federalist Society since 2004.⁶

DISTRICT COURT JUDGE

During his 12-year career as a district court judge, Bianco has ruled and commented on a number of prominent issues. For example:

I. EMPLOYMENT DISCRIMINATION AND LABOR

According to one study, as a judge, Bianco grants motions to dismiss in employment law cases over 84 percent of the time.⁷ For a notable case where he ruled for the employee, however, see [Leibowitz v. Cornell Univ.](#), 584 F.3d 487 (2d Cir. 2009) (sitting by designation vacating grant of summary judgment for university defendant in age and gender discrimination suit).

In 2010 Bianco held that claims of employment discrimination based on sexual orientation do not constitute sex-based discrimination under Title VII of the Civil Rights Act of 1964. See [Zarda v. Altitude Express](#), 855 F.3d 76 (2d Cir. 2017). In *Zarda*, Bianco ruled that a plaintiff who was fired after he

revealed to a client that he was gay had no relief under Title VII. At the time, Bianco's district court ruling was a proper application of Second Circuit precedent. In 2018, the Second Circuit sat *en banc* in an appeal of [Zarda](#) and overruled the previous precedent Bianco had relied upon, thus holding that sexual orientation discrimination was actionable under Title VII.

II. NATIONAL SECURITY, CIVIL LIBERTIES, AND PRESIDENTIAL POWER

In a 2005 panel [discussion](#) titled "Prosecuting Terrorism: The National Challenge," Bianco defended the USA Patriot Act.⁸

In another [symposium](#), he also raised concerns regarding trying terror suspects in Article III courts. In his 2007 notes, Bianco wrote, "[h]ow difficult or complicated is it to try terrorism cases in civilian courts? Is it any different than prosecuting a complicated organized crime case?" He then replied: "Answer – Yes. Absolutely no comparison. For those who say that all cases can be brought in civilian courts, that is simply incorrect."⁹ Bianco cited various difficulties involved with trying a terrorism case in civil courts. These difficulties included the nonexistent access to classified evidence and the fact that alternative evidence tends to

not be reliable, therefore it is “not admissible under the evidentiary and legal rules in a civilian court.”¹⁰

The Senate should probe his views on how to balance national security needs with the need to protect civil liberties and critical constitutional rights. The Senate should also probe his views on presidential powers, and the role of courts to check such power, especially in areas of national security.

III. FOURTH AMENDMENT

As a district court judge, Bianco has ruled on numerous Fourth Amendment issues. Two are notable:

In [United States v. Bailey](#), 468 F. Supp. 2d 373 (E.D.N.Y. 2006), Bianco ruled that a stop and subsequent detention of Chunon Bailey, which occurred after police followed Bailey for one mile after leaving the home they had a warrant to search, was permissible. While the Second Circuit affirmed his decision,¹¹ the Supreme Court reversed, holding that the police could only follow the defendant in the immediate vicinity of the premises to be searched.¹²

In [Vassallo v. Lando](#), 591 F. Supp. 2d 172 (E.D.N.Y. 2008), Bianco ruled against Patricia Vassallo, who brought a suit against her son’s school district and school officials, alleging that officials unlawfully searched her son’s

belongings and outer garments. The son was searched after suspicion that he started a fire at the school. During the search, officials found marijuana seeds. Bianco held the search was not unlawful, justifying it due to the son’s proximity to the fire at the time and the fact that he pulled his hood up to cover part of his face after encountering a teacher.¹³

IV. TRIBAL RIGHTS

In [New York v. Shinnecock Indian Nation](#), 523 F. Supp. 2d 185 (E.D.N.Y. 2007), [vacated and remanded](#), 686 F.3d 133 (2d Cir. 2012) (holding that district court lacked jurisdiction), Bianco ruled against the Shinnecock Indian Nation’s construction of a casino on a parcel of non-reservation property, holding that the tribe’s original claim to the land expired during colonial times.

CONCLUSION

As of this writing, both home-state senators oppose Bianco’s nomination. Consistent with Senate practice for nearly a century, the Judiciary Committee should not proceed with a hearing.

ENDNOTES

- 1 Senate Report of the Senate Judiciary Committee Minority Members Review of Republican Efforts to Stack Federal Courts, 115th Cong., 25 (May 10, 2018), available at https://www.feinstein.senate.gov/public/_cache/files/b/7/b783e2d9-38be-4798-a7fb-e89ff11fd47c/A233636E649CB9CD98B0555FB3D18C88.judiciary-dems-final-judges-report-5.10.18-.pdf.
- 2 Sen. Comm. on the Judiciary, 115th Cong., Joseph Frank Bianco Questionnaire for Judicial Nominees, 2, available at <https://www.judiciary.senate.gov/imo/media/doc/Bianco%20SJO.pdf>.
- 3 *Id.* at 23-26.
- 4 *Id.* at 2-3.
- 5 *Id.* at 3.
- 6 *Id.* at 1, 3.
- 7 *Id.* at 6.
- 8 Carmen Castro-Pagan, *Know Your Judge: Joseph F. Bianco*, Big Law Business, Apr. 18, 2018 <https://biglawbusiness.com/know-your-judge-joseph-f-bianco/>.
- 9 Notes, Joseph Bianco, Panelist, “*Trying Terrorists: Courts, Tribunals, or Commissions?*” St. John’s University School of Law, 3 (Feb. 29, 2007).
- 10 Notes, Joseph Bianco, Panelist, “*Prosecuting Terrorism: The National Challenge*,” Center on Law and Security, New York University Law School, 1 (Apr. 14, 2005).
- 11 *Id.*
- 12 *United States v. Bailey*, 652 F.3d 197 (2d Cir. 2013).
- 13 *United States v. Bailey*, 568 U.S. 186 (2013).
- 14 *Vassallo v. Lando*, 591 F. Supp. 2d 172, 178-179 (E.D.N.Y. 2008).