



Empowerment Programs

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November 16, 2020

The Honorable Lindsey Graham
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

**RE: OPPOSITION TO NOMINATION OF THOMAS KIRSCH
TO U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

Dear Chairman Graham and Ranking Member Feinstein:

On behalf of the NAACP, our nation's oldest, largest, and most widely-recognized grassroots civil rights organization, I strongly urge you to oppose the nomination of Thomas Kirsch, a white male, to the U.S. Court of Appeals for the Seventh Circuit. His appointment will perpetuate the segregation of the only all-white appellate bench in the country. His nomination should not move forward in the Senate, especially when we are on the cusp of a new presidency and a new Senate. We urge Chairman Graham to cancel his hearing. If he insists on moving forward, we urge each and every Senator on the Judiciary Committee to refuse to participate in the hearing in protest of the continued segregation of this important appellate court.

I. THE SEVENTH CIRCUIT IS AN ALL-WHITE COURT

Donald Trump has nominated Thomas Kirsch to the U.S. Court of Appeals for the Seventh Circuit. Shockingly, in 2020, the Seventh Circuit is once again an all-white court. The court has eleven seats, and all ten judges currently sitting on the court are white. The Seventh Circuit is the only all-white appellate court in the country.

The Seventh Circuit covers Illinois, Wisconsin, and Indiana. Its jurisdiction includes cities such as Chicago, Milwaukee, and Indianapolis. Thirty percent of the 25 million residents within the Seventh Circuit are people of color. It is unfathomable that this vital circuit court which hears appeals of federal cases affecting the rights and liberties of its residents has no racial or ethnic diversity whatsoever. The absence of diversity undermines the integrity and legitimacy of the federal judiciary. Judges from different racial, ethnic, and other backgrounds enrich judicial decision-making and promote trust and confidence by communities impacted by their rulings.

Efforts to diversify the federal appellate courts were begun over seventy years ago. The first federal appellate court was racially integrated in 1949, when President Harry Truman appointed William Henry Hastie to the Third Circuit. In 1961, President Kennedy appointed Thurgood Marshall to the Second Circuit. In the ensuing decades, presidents from both parties appointed Black judges, Latino judges, and Asian-

American judges to our appellate courts. Tragically, no Native American judge has ever served on the appellate bench.

More than twenty years ago, President Clinton appointed the first and only judge of color to serve on the Seventh Circuit, Judge Ann Claire Williams. Judge Williams is a Black woman, who was first appointed to the U.S. District Court for the Northern District of Illinois by President Reagan in 1985. President Clinton appointed Judge Williams to an Illinois vacancy on the Seventh Circuit in 1999.

The very next year, President Clinton integrated the last all-white appellate court in the country. Faced with insurmountable Republican obstruction of multiple nominations of African Americans to the Fourth Circuit, President Clinton took the extraordinary step of recess appointing Roger Gregory to this court. When President George W. Bush entered office in 2001, he appointed Judge Gregory to a lifetime position on the Fourth Circuit.

Since then, every appellate court in the country has reflected some degree of racial or ethnic diversity until the Trump administration. Donald Trump has appointed the least representative federal judges in modern history. Nearly 90% of his nominees have been white. The lack of diverse appointments to appellate courts—which usually have the final word on cases given the small docket of the Supreme Court—is especially destructive. Trump has appointed zero African Americans, zero Native Americans, and only one Latino appellate judge.

Trump’s failure to make diverse appointments is causing devastating damage to the federal courts. Nowhere is that more evident than with the Seventh Circuit, which Donald Trump has resegregated. Today, we once again have an all-white appellate bench, thanks to Donald Trump. The Seventh Circuit lost its only judge of color at the beginning of Trump’s term. In 2017, Judge Ann Claire Williams retired from the bench. Since that time, Trump has had five vacancies to fill on this circuit. Instead of nominating a person of color to restore diversity to the court, Trump appointed four white individuals: Amy Coney Barrett, Michael Brennan, Amy Joan St. Eve, and Michael Scudder. Now, at the end of his presidency, Trump has nominated a fifth white individual, Thomas Kirsch. It is past time for the segregation of this appellate court to end.

II. THIS JUDICIAL SEAT WAS STOLEN FROM A BLACK WOMAN

Donald Trump’s failure to ensure diversity on the Seventh Circuit is even more appalling considering Republican action to prevent a Black woman from sitting in the very seat to which Thomas Kirsch is nominated. This is the same judicial seat to which President Obama nominated Myra Selby, a Black woman, in 2016. But Republican Senators blocked Myra Selby’s confirmation so the position would be open for Donald Trump to fill. After Trump was elected, he appointed Amy Coney Barrett to the seat. Now that Amy Coney Barrett has been elevated to the Supreme Court, the seat is again open. Once again, Trump seeks to fill it with a white judge.

On January 12, 2016, President Obama nominated Myra Selby to an Indiana seat on the Seventh Circuit, which was vacated by Judge John Daniel Tinder. As described in a law review [article](#) devoted to her confirmation, Myra Selby was an extraordinarily accomplished member of the bar and the judiciary. At the time of her nomination, she had been a lawyer for 36 years. She was the first African American to become a partner in a large law firm in Indianapolis. She served as Director of Health Care Policy for the State of Indiana. In 1995, she became the first African American and the first woman to serve on the Indiana Supreme Court. Upon her retirement as Associate Justice of the Indiana Supreme Court in 1999, she returned to private practice. The Indiana Supreme Court appointed her to chair its newly formed Commission on Race and Gender Fairness to promote racial and gender fairness in the legal system.

Justice Selby would have been the first African American and the first woman to represent Indiana on the Seventh Circuit. Importantly, as the second judge of color appointed to the Seventh Circuit, she would have added much needed racial diversity to the court. This would have been especially important when Judge Williams, the only judge of color on the court, chose to retire. But the Republican-led Senate blocked Justice Selby's confirmation and her nomination expired at the end of the Obama administration. Their obstruction kept the seat open for Donald Trump to fill.

Justice Selby was one of many Obama nominees of color blocked by the Republican Senate. In the last two years of the Obama presidency, the Senate confirmed only two appellate court nominations. Multiple nominees were blocked, including Judge Abdul Kallon, who would have been the first Black judge to represent Alabama on the Eleventh Circuit, and Rebecca Haywood, who would have been the first Black woman to serve on the Third Circuit. While most of the nation's attention was focused on Senate Majority Leader Mitch McConnell's outrageous refusal to move President Obama's nomination of Merrick Garland to the Supreme Court, Republican obstruction prevented President Obama's lower court nominees from being confirmed and, as a result, deprived federal appellate courts around the country from desperately needed diversity.

Once in office, Donald Trump quickly took advantage of the Republican obstruction that blocked Justice Selby by immediately appointing Amy Coney Barrett to the seat. After she was confirmed, then-Judge Barrett wasted no time in ignoring bedrock civil rights precedents and ruling against victims of discrimination. As described in the NAACP's [letter of opposition](#) to Amy Coney Barrett's nomination to the Supreme Court, Judge Barrett [voted](#) to leave in place a decision which found that there is no "adverse effect" under the law when an employer maintains racially segregated workplaces, [authored](#) a decision holding that the n-word was not necessarily grounds to sustain a racially hostile work environment claim, and joined a [ruling](#) to severely restrict a decades-old civil rights enforcement tool, excluding an entire category of workers protected by federal civil rights laws. That Judge Barrett took these actions on a circuit court lacking any racial or ethnic diversity whatsoever is all the more shocking.

Donald Trump simply cannot be allowed to install another white judge in the judicial seat that should be occupied by Justice Selby. Trump announced his intent to nominate Thomas Kirsch to the seat on October 21, before it was even vacated by Amy Coney Barrett. The Senate had not even voted to confirm Judge Barrett to the Supreme Court at the time. Subsequent to Trump's nomination of Thomas Kirsch, the American people voted to reject Donald Trump. President-Elect Joe Biden must be allowed to fill this critical seat and to desegregate this court.

III. THE SENATE MUST REFUSE TO CONFIRM ANY MORE TRUMP JUDGES

Donald Trump has caused incredible damage to the federal judiciary by devaluing diversity and appointing judges at all levels with long records of hostility to civil rights. He had made three Supreme Court appointments, 53 appellate court appointments, and 164 district court appointments. Enough is enough. The Senate should refuse to move any more Trump nominees who will irreparably harm our courts for decades to come.

We are 65 days away from installing a new president and a new Senate. Donald Trump and most Republican Senators have refused to acknowledge that President-Elect Joe Biden won this election. Their attempts to sow public distrust in the process and call into question the integrity of the election pose a dangerous threat to our democracy during this lame duck period. Moreover, the Black community is still suffering incalculable harm from the coronavirus. Instead of forcing another white nominee onto an already segregated court, the Senate should provide relief from the deadly pandemic raging across the country and disproportionately affecting the lives and livelihoods of African Americans.

At this critical juncture, Donald Trump and the U.S. Senate should not be engaged in installing judges in lifetime positions on the federal courts. This is especially true for appellate courts. Presidents and Senates from both parties have refrained from acting on appellate court nominations this late in a presidency. The last appellate court judge confirmed by the Senate after the election of a new president was then-Judge Stephen Breyer, who was nominated and confirmed to the First Circuit in the waning days of President Jimmy Carter's administration forty years ago. The Breyer appointment was certainly an outlier in judicial appointments history, as the nominee served as chief counsel to the Senate Judiciary Committee at the time and was confirmed overwhelmingly. Breaking this longstanding precedent to confirm Trump's 54th appellate judge overall and fifth appellate judge to the Seventh Circuit, in order to preserve an all-white bench, is inconceivable, even in the Trump era.

IV. CONCLUSION

In the year 2020, no federal appellate court in the United States should be racially segregated. More than 70 years ago, our nation took the first step to ensure that our federal judiciary reflected the diversity of the American people, and we never looked back. A total of 76 judges of color have been appointed to our appellate courts, by presidents of both political parties. We certainly have not achieved full representation of this country's incredibly rich and diverse populations on our federal courts. But we cannot allow our judiciary to backslide now to a situation in which there is no diversity on a court which presides over 7.5 million people of color and is charged with dispensing justice in appeals relating to their civil rights and liberties. The Senate's move to confirm Thomas Kirsch in the face of four recent appointments to perpetuate the segregation of the Seventh Circuit must be rejected. No Senator, either Democrat or Republican, should play a role in this travesty of justice that will permanently stain the federal judiciary in its significance and impact on the American people across the nation.

Thank you for considering the NAACP's strong opposition to the nomination of Thomas Kirsch. Should you have any questions or comments, please contact Hilary Shelton, Director of the Washington Bureau and Senior Vice President for Policy and Advocacy at (202) 463-2940.

Sincerely yours,



Derrick Johnson
President and CEO

cc: Members of the Senate Judiciary Committee