**May 20, 2016**

# The Trump List: Donald Trump's List of Potential Supreme Court Nominees and What that Means for America

By refusing to even consider the nomination of Chief Judge Merrick Garland—who has received bipartisan praise throughout his long career, and who has more judicial experience than any previous Supreme Court nominee—the Senate Republicans are holding the current vacancy for Donald Trump—a man Republicans have called a "race-baiting, xenophobic, religious bigot," a "con artist," "phony," "know-nothing candidate," and an "utterly amoral," "uninformed," "nut job." One Republican Senator said that Trump has "no understanding of the fact that, in the American system, we have a constitutional system of checks and balances."

So what kind of justice would President Trump appoint? And what would that mean for the nation's most pressing issues? These are important questions not just for the current vacancy, but for an aging Court that could easily have another two or three vacancies in the next president's first term.

Trump provided some long-promised answers this week when he released the names of 11 potential Supreme Court nominees. Trump said that he would "use this list as a guide to nominate our next United States Supreme Court justices" and that the list is "representative of the kind of constitutional principles [he] value[s]"[1]—though he previously said he would "guarantee" a nomination from the list.[2] He later added that the campaign will "add[ ] some additional" names.[3] Though Trump did not explain how he arrived at the names, he previously said he sought advice from two conservative groups—The Heritage Foundation and the Federalist Society.[4]

The list includes six federal court of appeals judges, and five state supreme court justices. The federal judges are Third Circuit Judge Thomas Hardiman, Eighth Circuit Judges Steven Colloton

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[1] Alan Rappeport and Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, NEW YORK TIMES (May 18, 2016) http://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html.

[2] Bob Woodward and Robert Costa, *In a revealing interview, Trump predicts a 'massive recession' but intends to eliminate the national debt in 8 years*, WASHINGTON POST (April 2, 2016) https://www.washingtonpost.com/politics/in-turmoil-or-triumph-donald-trump-stands-alone/2016/04/02/8c0619b6-f8d6-11e5-a3ce-f06b5ba21f33_story.html?postshare=5681459648271443&tid=ss_mail.

[3] Alex Swoyer, *Donald Trump on SCOTUS List: "We'll Be Adding Some Additional Ones,"* BREITBART (May 19, 2016) http://www.breitbart.com/2016-presidential-race/2016/05/19/donald-trump-scotus-list-well-adding-additional-ones/.

[4] Bob Woodward and Robert Costa, *In a revealing interview, Trump predicts a 'massive recession' but intends to eliminate the national debt in 8 years*, WASHINGTON POST (April 2, 2016) https://www.washingtonpost.com/politics/in-turmoil-or-triumph-donald-trump-stands-alone/2016/04/02/8c0619b6-f8d6-11e5-a3ce-f06b5ba21f33_story.html?postshare=5681459648271443&tid=ss_mail.

and Raymond Gruender, Sixth Circuit Judge Raymond Kethledge, Seventh Circuit Judge Diane Sykes, and Eleventh Circuit Judge William Pryor. The state court judges are Allison Eid of Colorado, Joan Larsen of Michigan, Thomas Lee of Utah, David Stras of Minnesota, and Don Willett of Texas.

Collectively, these individuals reflect a radical-right ideology that threatens fundamental rights and legal protections, and that favors the powerful and privileged over everyday Americans, especially those from historically marginalized communities. The list has very little diversity, with only three women, no people of color, and no one who has worked as a public defender or civil rights attorney. Even worse, the judges' records are suffused with open hostility toward reproductive rights, criminal defendants, LGBTQ equality, affordable healthcare, consumer protections, workplace safety, equal voting rights, and even the sort of basic economic regulation embodied in the New Deal. Such are the policies that the Senate Republican leadership, in refusing to even consider the president's Supreme Court nominee, want to impose on all of America.

Each judge is profiled below.

## *Federal Circuit Judges*

### Diane Sykes, Seventh Circuit Court of Appeals

Diane Sykes was appointed to the Seventh Circuit by President George W. Bush in 2004. She previously served for five years as a justice on the Supreme Court of Wisconsin, and clerked for her future colleague Judge Terence T. Evans on the U.S. District Court for the Eastern District of Wisconsin.

In 2013, Sykes wrote the opinion in *Korte v. Sebelius*, which held that both for-profit corporations *and* their individual owners may challenge the Affordable Care Act's contraception mandate, and that the mandate "substantially burdens" the religious practice of closely-held corporations whose owners have religious objections to contraception,[5] a view later endorsed by the Supreme Court in *Hobby Lobby*. At the time, SCOTUSblog described *Korte* as "the broadest ruling so far by a federal appeals court barring enforcement of the birth-control mandate in the new federal health care law."[6]

In 2006, Judge Sykes wrote the divided panel opinion that compelled Southern Illinois University to officially recognize the Christian Legal Society as a student organization.[7] SIU had stripped the group of its "official" status because it prohibited gay students from joining as voting members or serving in leadership positions, in violation of SIU's antidiscrimination policy. Judge Diane Wood dissented, arguing that the majority failed to adequately weigh "the harm to SIU from being forced to accept into its expressive association a group that undermines its message of nondiscrimination

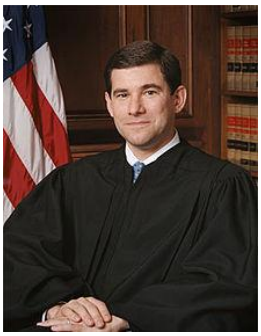
[5] 735 F.3d 654, 655 (7th Cir. 2013).
[6] Lyle Denniston, *Broad bar to birth control mandate*, SCOTUSBLOG (Nov. 9, 2013), *available at* http://www.scotusblog.com/2013/11/broad-bar-to-birth-control-mandate/.
[7] *Christian Legal Society v. Walker*, 454 F.3d 853 (2006).

and diversity."[8] Sykes' reasoning—which essentially held that anti-gay groups have a constitutional right to receive government subsidies, and drew a spurious distinction between discrimination based on sexual *conduct* and not *orientation*—was later rejected by the Supreme Court.[9]

Judge Sykes has also endorsed a broad conception of the Second Amendment: In *Ezell v. City of Chicago*,[10] she wrote the panel opinion that overturned the district court, and enjoined a Chicago ordinance that banned firing ranges within city limits. Sykes described "the right to maintain proficiency in firearm use" in "the controlled environment of a firing range" as "an important corollary to the meaningful exercise of the core [Second Amendment] right to possess firearms for self-defense."[11]

Finally, Judges Sykes reinstated Wisconsin's discriminatory voter ID law[12] after a trial court found that it "results in the denial or abridgment of the right to vote on account of race or color," and that defenders of the law "could not point to a single instance of known voter impersonation occurring in Wisconsin at any time in the recent past."[13]

**William H. Pryor, Jr., Eleventh Circuit Court of Appeals**



Judge Pryor was President George W. Bush's only appointee to the Eleventh Circuit. Prior to taking the bench, Judge Pryor served as Alabama's Attorney General from 1997 to 2004. Citing his public statements on abortion and other social issues, as well as his narrow view of federal powers, Senate Democrats initially blocked Judge Pryor's nomination. President Bush then made him a recess appointment in 2004 before he was confirmed in 2005 by a vote of 53-45.

As Alabama Attorney General, Judge Pryor had characterized *Miranda v. Arizona* and *Roe v. Wade* as "the worst examples of judicial activism." And further on *Roe*, he remarked that "[o]n January 22, 1973, seven members of [the Supreme Court] swept aside the laws of the fifty states and created—out of thin air—a constitutional right to murder an unborn child." Judge Pryor also took anti-environment stances during his tenure as attorney general. In 2001, Judge Pryor filed a an *amicus brief* on behalf of the State of Alabama urging the Supreme Court to review and reverse a case that had upheld, against a Commerce Clause challenge, a regulation protecting an endangered species of wolf.[14] In another case, Judge Pryor filed an *amicus brief* arguing that the Supreme Court should curb the Army Corps of Engineers' authority under the Clean Water Act to regulate "deep rigging" activity harmful to wetlands on states' rights grounds.[15]

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[8] *Id.* at 876 (Wood, J., dissenting).
[9] *Christian Legal Society v. Martinez,* 561 U.S. 661 (2011).
[10] 651 F.3d 684 (7th Cir. 2011).
[11] *Id.* at 708.
[12] *Frank v. Walker*, 766 F.3d 755 (7th Cir. 2014).
[13] *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014).
[14] Brief for Amicus Curiae the State of Alabama in Support of Petition for a Writ of Certiorari, *Gibbs v. Norton*, 531 U.S. 1145 (2001) (No. 00-844).
[15] Brief of the States of Alabama et al. as Amici Curiae in Support of Petitioners, *Borden Ranch Pshp. v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002) (No. 01-1243), 2001 U.S. Briefs 1243.

On the court, Judge Pryor has written several opinions adverse to racial justice. In *Common Cause/Georgia v. Billups*,[16] for example, he wrote the panel opinion upholding Georgia's voter ID law—a state law that required all registered voters in Georgia to present a government-issued photo identification to vote in person. Although the record showed that nearly half of those the law prevented from voting were African American, the court found that the law placed an "insignificant burden" on voters.[17]

And in the several appeals made during the *Ash v. Tyson Foods* litigation, Judge Pryor issued rulings both limiting the ability of discrimination victims to seek relief, and protecting large corporations from paying punitive damages. In *Ash*, an African American employee of Tyson Foods won a $1.75 million jury verdict after he was denied a promotion because of his race. An Eleventh Circuit panel (of which Judge Pryor was not a part) then vacated the verdict for insufficient evidence, despite testimony that a white supervisor referred to the plaintiff as "boy." The court reasoned that "boy" was evidence of discriminatory intent only "when modified by racial classification like 'black' or 'white.'"[18] The Supreme Court rejected this reasoning and remanded,[19] and the employee again won a million dollar jury award. But Judge Pryor and Judge Edward Carnes issued a *per curiam* decision rejecting that verdict as well, and holding that the supervisor's use of the word "boy" was simply "conversational" and among "ambiguous stray remarks" unrelated to the employment decision.[20]

Finally, Pryor has shown little regard for the separation of church and state, once writing an opinion holding that sectarian prayers used to open county commission meetings do not violate the Establishment Clause.[21]

**Steven Colloton, Eighth Circuit Court of Appeals**

Steve Colloton's political stripes are far from subtle. He began his career clerking for Judge Laurence Silberman of the D.C. Circuit and Justice William Rehnquist. He served in the Office of Legal Counsel under the George H. W. Bush administration and as an associate independent counsel assisting Kenneth Starr's Whitewater investigation. He also served as a prosecutor as an assistant U.S. attorney and a U.S. attorney before his nomination to the Eighth Circuit by President George W. Bush.[22] In the debate before his confirmation vote, Senator Patrick Leahy expressed his hope that Judge Colloton would "act[] as a fair and impartial judge, despite his active role in conservative political causes and groups" such as the conservative Federalist Society.[23]

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[16] 554 F.3d 1340 (11th Cir. 2009).
[17] *Id.* at 1354.
[18] 129 F. App'x 529, 536 (2005).
[19] 546 U.S. 454 (2006).
[20] 392 F. App'x 817, 829 (11th Cir. 2010).
[21] *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008).
[22] Steven F. Colloton, Biographical Directory of Federal Judges, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=3024.
[23] CONG. REC., 108th Congress, S11095 (Sept. 4, 2003) http://thomas.loc.gov/cgi-bin/query/z?r108:S04SE3-0011:..

Unfortunately, Judge Colloton's record reveals little evidence that he has lived up to Senator Leahy's optimism. From the death penalty, to workers' rights, to healthcare, Judge Colloton has consistently advanced a conservative agenda from his seat on the Eighth Circuit. For example, Judge Colloton authored an opinion for a 7-3 majority of an *en banc* panel of the Eighth Circuit which prohibited inmates from learning the physician, pharmacist, and laboratory involved in carrying out Missouri's execution protocol.[24] Judge Colloton wrote that the plaintiffs never had a valid Eighth Amendment claim since they had not proposed a "more humane alternative method of execution."[25] The dissent said that Judge Colloton's opinion "places an absurd burden on death row inmates" by announcing a new pleading standard in which inmates must present an alternative method for their own executions.[26]

Judge Colloton has also been hostile to claims from employees short-changed by their employer. Judge Colloton authored two decisions that, taken together, reversed $24 million awarded to workers at two Tyson Foods processing facilities to compensate them for unrecorded time spent putting on and taking off work equipment in violation of the Fair Labor Standards Act (FLSA).[27] Judge Colloton dismissed both of the FLSA class action claims on technical grounds, holding that the plaintiffs did not properly file certain paperwork. Each of the cases is virtually identical to the recent Supreme Court case, *Tyson v. Bouaphakeo*, in which the Supreme Court upheld a $2.9 million class action award for employees who alleged the exact same violation of the FLSA under Tyson's same compensation policies.[28]

Judge Colloton also signed onto the only circuit court decision to rule that the Affordable Care Act's birth control accommodation for religious non-profit organizations—such as religious colleges and hospitals—creates a substantial burden for the organizations' religious practices.[29] The accommodation simply requires the objecting organization to sign a form indicating that they do not want to provide birth control to the employees and students to whom they provide health insurance. The government then works with the insurance company to provide birth control to the affected women. Seven circuit courts held that the accommodation does not substantially burden religious practice before the Supreme Court vacated the circuit decisions in *Zubik v. Burwell*.

Finally, Judge Colloton joined Judge Gruender's *en banc* opinion reinstating a South Dakota law that requires women seeking an abortion to sign a statement that included "the abortion will terminate the life of a whole, separate, unique, living human being" and that "the pregnant woman has an existing relationship with that unborn human being."[30]

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[24] *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014).
[25] *Id.* at 896.
[26] *Id.* at 900 (Bye, J., dissenting).
[27] *Gomez v. Tyson Foods, Inc.*, 799 F.3d 1192 (8th Cir. 2015); *Acosta v. Tyson Foods, Inc.*, 800 F.3d 468 (8th Cir. 2015).
[28] *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).
[29] *Dordt Coll. v. Burwell*, 801 F.3d 946 (8th Cir. 2015); *Sharpe Holdings, Inc. v. United States HHS*, 801 F.3d 927 (8th Cir. 2015).
[30] *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008).

**Thomas Hardiman, Third Circuit Court of Appeals**

Judge Thomas Hardiman's conservative values are evident both in his political affiliations and his judicial opinions. Hardiman gave $12,850 in federal contributions and $9,000 in state contributions to Republicans including George W. Bush, Arlen Specter, and Rick Santorum.[31] He made several contributions to Senator Specter and President Bush as he moved through the selection process to be nominated to the U.S. District Court for the Western District of Pennsylvania, to which he was confirmed in 2003 before being elevated to the Third Circuit in 2007. Judge Hardiman is a longtime member of the Federalist Society and has spoken at four Federalist Society panels since joining the Third Circuit.[32]

Judge Hardiman's decisions reflect these affiliations in an array of issues. Judge Hardiman authored two opinions upholding the right of correctional officers to conduct strip searches. In *Florence v. Board of Freeholders*, Judge Hardiman held that arrestees—even those accused of minor offenses like civil contempt—could be strip searched as part of a jail's intake process.[33] The decision was narrowly affirmed by the Supreme Court in a 5-4 vote.[34] In *Blaisure v. Susquehanna County*, Judge Hardiman ruled that strip searches are also permitted when inmates leave jail, even if they are leaving to go to court and will be searched again when entering the courthouse.[35]

Judge Hardiman also takes a "law and order" approach to schools; he dissented from a Third Circuit *en banc* opinion which held that a school could not ban "I ♥ boobies! (KEEP A BREAST)" bracelets.[36] Though the nine-judge majority held that the bracelets could not be banned since they were not lewd and commented on a social issue (breast cancer awareness), Judge Hardiman wrote, "Many twelve- and thirteen-year-old children are susceptible to juvenile sexualization of messages that would be innocuous to a reasonable adult," and also expressed concern about "the specter of an 'I ♥ Balls' slogan to support testicular cancer awareness."[37]

Another of Judge Hardiman's dissents is even more troubling. In *Drake v. Filko*, the Third Circuit held that it was constitutional, under the Second Amendment, for New Jersey to require people to show they had a "justifiable need" for a gun before they could be issued a license to carry a handgun for self-defense in public.[38] The court reasoned that the "justifiable need" requirement was a longstanding regulation, making it presumptively lawful and outside the guarantee of the Second Amendment. Though the Supreme Court did not declare an individual right to gun ownership until 2008, Judge Hardiman chastised the majority for determining that New Jersey's "justifiable need" requirement—which dates back at least to 1966 and arguably to 1924—was sufficiently

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[31] *Money Trails to the Federal Bench*, Center for Investigative Reporting (Oct. 31, 2006) http://cironline.org/sites/default/files/legacy/files/MoneyTrails_FullReport.pdf.
[32] Thomas M. Hardiman, The Federalist Society (accessed March 29, 2016) http://www.fed-soc.org/experts/detail/thomas-m-hardiman.
[33] *Florence v. Bd. of Chosen Freeholders of Burlington*, 621 F.3d 296 (3d Cir. 2010).
[34] *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012).
[35] *Blaisure v. Susquehanna Cty.*, 621 F. App'x 145 (3d Cir. 2015).
[36] *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013).
[37] *Id.* at 336-337. (Hardiman, J., dissenting).
[38] *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

longstanding. He opined that "unless history and tradition speak clearly, we should hesitate to recognize new exceptions."[39] This originalist appeal suggests Judge Hardiman takes an exceptionally broad view of the Second Amendment.

**Raymond Kethledge, Sixth Circuit Court of Appeals**

Raymond M. Kethledge was appointed to the Sixth Circuit by President George W. Bush in 2008. He graduated from the University of Michigan Law School in 1993 and clerked for Sixth Circuit Judge Ralph B. Guy, Jr. and Justice Anthony Kennedy on the Supreme Court.

On the Sixth Circuit, Kethledge recently authored an anti-union opinion in a case brought by public school employees. In 2012, Michigan enacted an anti-union statute that singled out public school employee union members by prohibiting school districts from collecting union dues through payroll deductions.[40] The law was inspired by the onslaught of anti-union legislation signed into law by Governor Scott Walker of Wisconsin around the same time.[41] While written in a neutral fashion, public school employees argued that the law was passed in retaliation to their union-organized efforts to oppose anti-union legislation passed by the Michigan legislature, and thus the law violated their rights under the First Amendment and the Equal Protection Clause.[42] The district court agreed with the union employees and enjoined the state from enforcing the law.[43] The Sixth Circuit, however, reversed in a relatively short opinion written by Kethledge that turned a blind-eye to the blatantly anti-union purpose of the legislation.[44] As Judge Jane Stranch wrote in dissent:

> The majority spills little ink in its dismissal of the school unions' free-speech challenge. In doing so, it mischaracterizes the First Amendment interests at stake, glosses over key distinctions the Supreme Court requires us to observe, and averts its gaze from Act 53's blatant viewpoint discrimination. Most concerning to me, however, is the majority's refusal to engage in an analysis of viewpoint discrimination in light of Michigan's explicit statement that the law's purpose is to put a "check on union power."[45]

Kethledge's Sixth Circuit rulings have also included striking down on First Amendment grounds an Ohio law that barred Medicaid providers from making campaign contributions to elected prosecutors,[46] and affirming a district court's summary judgment ruling in an ADA case over a

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[39] *Id.* at 452 (Hardiman, J., dissenting).
[40] *See* Lisa Buchmeier, *State vs. Union War Flares Up in Michigan*, COURTHOUSE NEWS SERVICE, Apr. 6, 2012, *available at* http://www.courthousenews.com/2012/04/06/45386.htm.
[41] *Id.*
[42] *Id.*
[43] *See* Lorraine Bailey, *Republican Judges Back Michigan Anti-Union Law*, COURTHOUSE NEWS SERVICE, May 16, 2013, *available at* http://www.courthousenews.com/2013/05/16/57709.htm.
[44] *Bailey v. Callaghan*, 715 F.3d 956 (6th Cir. 2013).
[45] *Id.* at 961 (Stranch, J., dissenting).
[46] *Lavin v. Husted*, 689 F.3d 543 (6th Cir. 2012).

dissent by Judge Ronald Gilman, who argued that conflicting medical opinions about the extent of the plaintiff's disability merited a jury trial, not summary judgment.[47]

**Raymond Gruender, Eighth Circuit Court of Appeals**

Raymond Gruender was appointed to the Eighth Circuit by President George W. Bush in 2004. Prior to joining the Eighth Circuit, Gruender worked in private practice, was a state campaign director for Bob Dole's presidential campaign, and served as U.S. Attorney for the Eastern District of Missouri.

Judge Gruender's record shows hostility to women's right to access reproductive care. He wrote an opinion holding that employers can deny contraception coverage (except for non-contraceptive purposes, like hormone regulation) without violating the Pregnancy Discrimination Act (PDA).[48] The trial court and the Equal Employment Opportunity Commission had both agreed that such a policy amounts to unlawful sex discrimination, but Judge Gruender reversed, writing nonsensically that "the PDA does not require coverage of contraception because contraception is not 'related to' pregnancy . . . and is gender-neutral."[49]

Judge Gruender also authored two opinions stating that a state may pass a law that requires a woman to sign a consent agreement and a doctor to provide non-medical information prior to an abortion without violating a women's right to abortion or a doctors' rights to free speech.[50] The South Dakota law requires women seeking an abortion to sign a statement that included "the abortion will terminate the life of a whole, separate, unique, living human being" and that "the pregnant woman has an existing relationship with that unborn human being." The same law requires doctors to warn women that an abortion could increase their risk of suicide and to provide the name of a nearby pregnancy help center. Judge Gruender dissented from a panel decision upholding a preliminary injunction preventing the law from going into effect,[51] then authored the opinion that vacated the injunction when it came before the Eighth Circuit *en banc*.[52] As the dissent from the second opinion wrote, the provisions of the law "go far beyond the informed consent laws which have been upheld by the Supreme Court."[53]

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[47] *Michael v. City of Troy Police Dep't*, 808 F.3d 304 (6th Cir. 2015).
[48] *Standridge v. Union Pac. R.R. Co. (In re Union Pac. R.R. Empl. Practices Litig.)*, 479 F.3d 936 (8th Cir. 2007).
[49] *Id.* at 942.
[50] *Planned Parenthood Minn. v. Rounds*, 467 F.3d 716 (8th Cir. 2006) (Gruender, J., dissenting); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008).
[51] 467 F.3d 716 (8th Cir. 2006) (Gruender, J., dissenting).
[52] 530 F.3d 724 (8th Cir. 2008).
[53] 530 F.3d 724, 739 (Murphy, J., dissenting).

## *State Supreme Court Justices*

### Thomas Lee of Utah

Thomas Lee, the son of Reagan's Solicitor General Rex Lee and the brother of Senator Mike Lee (R-UT), was appointed to the Utah Supreme Court in 2010. He was sworn in by Justice Clarence Thomas, for whom he had clerked.[54] Prior to joining the Utah Supreme Court, Lee worked in private practice specializing in intellectual property, taught law at Brigham Young University, and worked in the Civil Division of the Department of Justice under President George W. Bush.

In his relatively short tenure on the Utah Supreme Court, Justice Lee has already issued opinions that raise questions about his views on reproductive justice, employee rights, criminal justice, and the environment. In *Carranza v. United States*, Lee wrote a concurring opinion stating that a fetus is a "child" under Utah's wrongful death statute.[55]

With respect to employee rights, Lee has ruled that under Utah state law, employers are responsible only for the workplace safety of their own employees, not those of subcontractors.[56] He cited "fairness to employers" as outweighing the workplace safety concerns at the core of Utah's workplace safety laws.[57]

On criminal justice, Justice Lee authored a concurrence arguing that Utah's prohibition on unreasonable searches—a state analog to the Fourth Amendment—does not include the exclusion of illegally obtained evidence as a remedy for the law's violation, unlike the Fourth Amendment.[58] The "exclusionary rule" rejected by Lee's concurrence is critical to ensuring that police do not conduct illegal searches and that illegally obtained evidence cannot be used in court. Lee also dissented from a decision of the Utah Supreme Court which held that the Utah Indigent Defense Act requires the government to provide necessary defense resources—such as expert witnesses or private investigators, as appropriate—to indigent criminal defendants, even if those defendants have found enough resources to hire their own attorney.[59] Lee's dissent argued that indigent clients should be forced to choose between totally public or totally private financing of their defense. He argued that allowing indigent clients to supplement private counsel with funding for necessary experts allowed them to "hav[e] it both ways."[60]

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[54] Aaron Falk, *Clarence Thomas swears in Thomas R. Lee to Utah Supreme Court* , DESERET NEWS (July 2010) http://www.deseretnews.com/article/700049382/Clarence-Thomas-swears-in-Thomas-R-Lee-to-Utah-Supreme-Court.html?pg=all.
[55] 267 P.3d 912 (Utah 2011) (Lee, J., concurring).
[56] *Hughes Gen. Contrs., Inc. v. Utah Labor Comm'n*, 322 P.3d 712 (Utah 2014).
[57] *Id.* at 718.
[58] *State v. Walker*, 267 P.3d 210, 216 (Utah 2011) (Lee, J., concurring).
[59] *State v. Parduhn*, 283 P.3d 488 (Utah 2011).
[60] *Id.* at 500 (Lee, J., dissenting).

Finally, Lee sparked concerns among environmentalists and health professionals during a line of questioning in a case about air pollution from a refinery.[61] The Sierra Club and Utah Physicians for a Healthy Environment challenged a permit that would allow the refinery to expand and add significantly more pollution to an area already suffering from pollution. Justice Lee questioned whether the doctors' group had standing to bring a challenge: "I would think . . . that the cognizable economic interests of the physicians, you know, would cut the other way—more patients, more patients with more problems. I mean, not that we want that," Lee stated in oral argument.[62] The executive director of the group said he did not know doctors that think of air pollution as a way to pad their wallets. "I think it was quite inappropriate, to be quite blunt about it," he said.

**Don Willett of Texas**

Don Willett, age 49, has served as a justice of the Texas Supreme Court for the past 11 years. He was appointed to the post by then-Governor Rick Perry, then elected to successive six-year terms in 2006 and 2012 in Texas's partisan judicial elections. Willett's campaign commercials tout him as Texas's "most conservative Justice"[63] Before joining the Texas Supreme Court, Willett worked for governor and then President George W. Bush, was a Deputy Assistant Attorney General in the Department of Justice Office of Legal Policy, and was Deputy Texas Attorney General for Legal Counsel.[64]

As his own campaign commercials brag, Willett is a radical conservative. In 2015, he wrote a concurring opinion that suggests he believes it is appropriate for courts to second-guess legislatures and strike down basic health and safety regulations in the name of economic liberty. The Texas Supreme Court struck down a training requirement for cosmetic eyebrow "threaders" as a violation of the Texas constitution.[65] Rather than carefully examining whether the regulation conforms to the state constitution, Judge Willett's concurrence argues that courts must vigorously preserve economic liberty and Texas's "spirit of daring and rugged independence."[66] He suggested that safety regulations like those at issue are driven by "naked economic protectionism, strangling hopes and dreams with bureaucratic red tape."[67] Willett's opinion—with its sweeping references to Madison, Hamilton, Adam Smith, Frederick Douglass, and even Davy Crockett—shows utter disregard for judicial restraint and suggests he would be willing to strike down numerous health, safety, and consumer-protection regulations for their supposed violation of economic liberty.

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[61] Judy Fahys, *Environmentalists Rattled by Justice's Remark In Refinery Case*, KUER 90.1 (Dec. 2, 2015) http://kuer.org/post/environmentalists-rattled-justices-remark-refinery-case.
[62] *Id.*
[63] *Justice Don Willett Commercial: Conservative*, YOUTUBE (May 7, 2012) https://www.youtube.com/watch?v=WJQFioXc4Mg.
[64] *About: Extensive Legal Experience*, Justice Don Willett, http://www.donwillett.com/about (last visited May 19, 2016).
[65] *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015).
[66] *Id.* at 121 (Willett, J., concurring).
[67] *Id.* at 122.

**Allison Eid of Colorado**

Allison Eid, age 51, is an associate justice on the Colorado Supreme Court. She was appointed to the court by Republican Governor Bill Owens in 2006. Justice Eid earned her undergraduate degree from Stanford University and her law degree from the University of Chicago. In between college and law school she worked as a special assistant and speech writer in the Department of Education during the Reagan administration. She clerked after law school for Judge Jerry E. Smith on the United States Court of Appeals for the Fifth Circuit and Justice Clarence Thomas on the Supreme Court.

Justice Eid practiced commercial and appellate litigation at Arnold & Porter after her clerkships and went on to become a law professor at the University of Colorado Law School where she taught constitutional law, torts, and legislation. In 2002, President George W. Bush appointed her to serve on the Permanent Committee for the Oliver Wendell Holmes Devise, established by Congress in 1955 to prepare the history of the U.S. Supreme Court. In 2005, Justice Eid was appointed Solicitor General for Colorado prior to assuming her current seat on the state's high court. Justice Eid prevailed in her retention election in 2008 and her current term on the Colorado Supreme Court expires in 2019.

In 2012, Justice Eid authored an opinion holding that the University of Colorado could not ban concealed weapons on campus.[68] The plaintiffs in the case were students challenging the university's policy—first adopted by the board of regents of the university in 1994—banning the possession of firearms on the campuses of the university. The students argued that the ban violated Colorado's Concealed Carry Act (CCA), enacted in 2003, and their right to bear arms under the Colorado Constitution.

The court resolved the students' challenge on statutory grounds and declined to rule on the merits of the constitutional claim.[69] The CCA, the court explained, broadly guaranteed individuals the right to carry concealed weapons throughout the state, subject to only certain exceptions, such as areas where firearms are prohibited by federal law, like federal buildings, or on private property. The court interpreted those exceptions narrowly. One of the exceptions allows public schools to ban concealed weapons, but only lists K-12 public schools. The court ruled that since public universities was not one of the areas specifically listed in the public schools exception or any other exception, the University of Colorado could not ban concealed weapons on its campuses.[70]

Also in 2012, Justice Eid dissented from the court's decision to uphold a redistricting map for the state's congressional districts.[71] The redrawn map made several districts more competitive. However, Justice Eid objected on the grounds that even though no new districts were added or subtracted, the new map moved over a million people into a different congressional district than they had previously occupied.[72]

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[68] *Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus, LLC*, 271 P.3d 496 (Colo. 2012).
[69] *Id.* at 499.
[70] *Id.* at 500.
[71] *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012).
[72] *Id.* at 983–84 (Eid, J., dissenting).

Justice Eid also dissented in a criminal case that is now pending before the U.S. Supreme Court.[73] At issue in the case is whether investigating allegations of a juror's racial bias outweigh the privacy interests in keeping jury deliberations secret. After the jury in the case convicted the defendant, the defendant learned that some of the jurors expressed racial slurs stereotypes about him and another witness while the jury was deliberating. While the defendant was able to obtain affidavits from two juror members about the statements made during deliberations, the trial court refused to consider the affidavits under a state rule of evidence that barred inquiries into jury deliberations. The Colorado Supreme Court upheld the decision, finding that applying the evidentiary bar in this case did not violate the defendant's Sixth Amendment right to an impartial jury.[74] Justice Eid joined Justice Monica Marquez's dissent that disagreed with the court's majority and argued that the policy reasons for keeping jury deliberations secret did not "trump a defendant's opportunity to vindicate his fundamental constitutional right to an impartial jury untainted by the influence of racial bias"[75]

**Joan Larsen of Michigan**

Joan Larsen, age 47, is an associate justice on the Michigan Supreme Court. She was appointed to the court by Republican Governor Rick Snyder in 2015. Justice Larsen clerked for Judge David Sentelle on the D.C. Circuit and Justice Antonin Scalia on the Supreme Court. She penned a tribute to Justice Scalia upon his death that appeared in the *New York Times*.[76] After her clerkships, Justice Larsen practiced law at Sidley & Austin where she worked on constitutional, criminal, and civil litigation. Justice Larsen will be up for election this fall to fill out the remainder of her predecessor's term on the court.

Prior to her appointment to the Michigan Supreme Court, Justice Larsen was a law professor at the University of Michigan Law School since 1998 and was also special counsel to the dean. She also served as Deputy Assistant Attorney General in the U.S. Department of Justice Office of Legal Counsel from 2002 to 2003. According to the ACLU, Justice Larsen co-authored a memo on Guantanamo detainees' right to habeas corpus while she was at OLC, but the contents of the memo remain secret.[77]

Justice Larsen has authored only one published decision so far in the short time that she has been on the bench. Earlier this year, Justice Larsen wrote a unanimous opinion that reinstated a conspiracy charge against an aide of former Republican Congressman Thaddeus McCotter.[78] The aide was accused of falsely signing nominating petitions containing signatures that were collected in order to place Congressman McCotter on the ballot for re-election in 2012. The trial court had thrown out

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[73] *Pena-Rodriguez v. Colorado*, 350 P.3d 287 (Colo. 2015), *cert. granted*, No. 15-606, 136 S. Ct. 1513 (2016).
[74] *Id.* at 293.
[75] *Id.* at 297 (Marquez, J., dissenting).
[76] Joan L. Larsen, Op-Ed, *What I Learned From Justice Scalia*, N.Y. TIMES (Feb. 16, 2016), http://www.nytimes.com/2016/02/16/opinion/what-i-learned-from-justice-scalia.html?ref=opinion&_r=3.
[77] *Statement on Appointment of Bush Administration Attorney to Michigan Supreme Court*, AM. CIVIL LIBERTIES UNION OF MICH. (Oct. 1, 2015), http://www.aclumich.org/article/statement-appointment-bush-administration-attorney-michigan-supreme-court.
[78] *People v. Seewald*, No. 150146, 2016 Mich. LEXIS 689 (Mich. Apr. 25, 2016).

the conspiracy count—"conspiring to commit a legal act in an illegal manner"—on the grounds that the aide had conspired to commit an *illegal*, not legal, act and thus his conduct was not covered by the conspiracy count as indicted. The Michigan Supreme Court reversed, holding that the aide's conduct—falsely signing otherwise valid nominating petitions—was the illegal *means* in the charged conspiracy and did not turn the generally legal act of submitting nominating petitions to the Secretary of State into an illegal act for purposes of the conspiracy.[79] Thus, the court ordered the trial court to reinstate the conspiracy count against the aide. Congressman McCotter resigned as a result of the scandal but claimed no knowledge of his aide's wrongdoing and was never charged with any crime.[80]

**David Stras of Minnesota**

David Stras, age 41, is an associate justice on the Minnesota Supreme Court. He was appointed to the court by Republican Governor Tim Pawlenty in 2010. Following his initial appointment, Justice Stras was elected to a six-year term in 2012. Justice Stras clerked for Judge Melvin Brunetti on the Ninth Circuit, Judge J. Michael Luttig on the Fourth Circuit, and Justice Clarence Thomas on the Supreme Court.

Justice Stras was a year-long associate at Sidley Austin in Washington, D.C., and joined the faculty of the University of Minnesota Law School in 2004 where he taught courses on constitutional law, criminal law, law and politics, and federal courts. He was also the co-director of the Institute for Law and Politics at the University of Minnesota. Justice Stras has researched and written about the state and federal judiciary and the politics of courts, among other topics. In a piece that appeared in the *Texas Law Review*, Justice Stras lamented the "growing politicization of the judicial appointments process" and argued that "the [Supreme] Court's own ventures into contentious areas of social policy—such as school integration, abortion, and homosexual rights—have raised the stakes of confirmation battles even higher."[81]

In a dissent, Justice Stras sided with an insurance company over a claim arising out of a tragic school bus accident that resulted in multiple deaths and injuries. The plaintiff in the case was one of the students who suffered multiple injuries after an uninsured motorist ran a stop sign and crashed into the school bus he was riding in.[82] The student suffered $140,000 in damages, but received only $35,000 because the bus company's $1 million insurance policy was split among all the victims. The student sought additional benefits from his own family's insurance company, but the insurance company denied the claim.

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[79] *Id.* at *13–16.
[80] Brad Devereaux, *Conspiracy Charge Reinstated Against Ex-Congressional Aide, Michigan Supreme Court Rules*, MLIVE (Apr. 26, 2016), http://www.mlive.com/news/index.ssf/2016/04/conspiracy_charge_stands_again.html.
[81] David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1034 (2008) (reviewing BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006), and JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007)).
[82] *Sleiter v. Am. Family Mut. Ins. Co.*, 868 N.W.2d 21 (Minn. 2015).

The Minnesota Supreme Court found in favor of the injured student, ruling that additional coverage applied because the amount of damages exceeded the amount that the student received. In dissent, Justice Stras argued that the relevant baseline was the total amount of coverage offered by the school bus company's insurance policy ($1 million), not the actual amount the student received.[83]

[83] *Id.* at 28 (Stras, J., dissenting).