

AFJ NOMINEE REPORT

ROBERT J. LUCK

U.S. Court of Appeals for the Eleventh Circuit

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INTRODUCTION

On September 12, 2019, President Trump announced his intent to nominate Robert J. Luck to the U.S. Court of Appeals for the Eleventh Circuit. The Senate Judiciary Committee must carefully review Luck's record before confirming him to a lifetime seat on the U.S. Court of Appeals for the Eleventh Circuit.

BIOGRAPHY

Luck received his B.A. and law degree from the University of Florida. He served as a law clerk, and later as a staff attorney, to Judge Edward Carnes of the Eleventh Circuit. Luck spent five years as an Assistant U.S. Attorney in the Southern District of Florida. In 2013, then-Governor Rick Scott appointed Luck to be a state trial judge, and in 2017 elevated him to the state court of appeals. In January 2019, the same month he took office, Governor Ron DeSantis appointed Luck, along with Barbara Lagoa and Carlos Muniz, to the Supreme Court of Florida.

Luck is a member of the Federalist Society, and his appointment to the Florida Supreme Court was "[screened](#)" by the group's executive vice president Leonard Leo who flew down to Orlando and [interviewed](#) Luck for the position. Less than three weeks after Luck became a state Supreme Court justice, he was feted

at the Florida chapter of the Federalist Society's annual event at Disney World's exclusive Yacht and Beach Club Resort.

JUDICIAL RECORD

Several of Luck's decisions raise concerns that, as a federal judge, he will side with the wealthy and powerful at the expense of everyday Americans. For example, one of Luck's first decisions on the state Supreme Court made it harder for homeowners to defend themselves against banks that were improperly trying to foreclose on their homes.

On January 4, 2019, before Luck and Lagoa joined the court, the Florida Supreme Court [held](#), in *Glass v. Nationstar Mortgage, LLC*, that homeowners are entitled to attorney's fees under a mortgage contract if a bank improperly files a foreclosure action against them. Florida was a state hit hard by the financial and housing crisis. In 2008, more than 40,000 foreclosures were [filed](#) in Lee County Florida alone. Between 2012 and 2017, 16,654 reverse mortgage holders in Florida [went](#) into foreclosure at nearly double the rate of California, the second-hardest hit state. And, as the *Glass* case itself demonstrates, [many](#) foreclosure filings are improper. This decision was significant because it made it possible for

indigent people facing foreclosure to obtain an attorney to defend them in court.

The [ruling](#), however, “sent tremors through the mortgage industry” as it meant homeowners could now mount proper defenses and be able to recover legal fees from banks that improperly sued them. Thus, days after Luck, Lagoa and one other Desantis-appointed judge were sworn in, mortgage giant Nationstar requested a rehearing; and in April, the Florida Supreme Court, joined by Luck and Lagoa, withdrew their *Glass* decision [giving](#) the mortgage industry with a huge win.

As one attorney wrote, in an [amicus brief](#), if Nationwide did indeed prevail:

[B]anks will have free reign. They can file suit no matter who they are, whether or not they have possession of the original note, because there are no consequences. There will be no recourse or liability if their ability to enforce the note and mortgage is disproven. Borrowers will have to pay for representation against lawsuits that should not have been brought in the first place, with no ability to be made whole for having to defend such wrongful litigation. Banks’ unfettered ability to sue without any consequence will propel countless new, unfounded filings and further congest the court system.

Other decisions also raise questions regarding Luck’s commitment to equal justice. For example, in *MetroPCS Communications, Inc. v. Porter*, while on the Court of Appeals, Luck [reversed](#) a lower court’s decision to deny a cellphone provider’s request to enforce an arbitration clause. In the case, Jorge Porter brought a class action lawsuit against the company for violating Florida’s Deceptive and Unfair Trade Practices Act by charging customers sales tax on the full price of mobile phones purchased using a rebate. The trial court found that the plaintiff did not have notice of the arbitration clause that was buried in the terms and conditions of his purchase. On appeal, Luck found that, because the plaintiff had notice that there were terms and conditions attached to his purchase, he had notice of the arbitration clause.

In *R.J. Reynolds Tobacco Co. v. Davis*, Luck also [reversed](#) a lower court’s decision to grant a new trial in a wrongful death tobacco case. After the jury returned a verdict that R.J. Reynold’s cigarettes were not the legal cause of the plaintiff’s lung cancer and subsequent death, the trial court found that a defense expert, in response to question from defense counsel, had improperly told the jury about a favorable verdict in another case. Luck joined an opinion that reinstated the verdict for the tobacco company, finding that there was “no reasonable probability

that the objectionable question was so prejudicial” that a new trial was warranted.

In *Martin v. Sowers*, Luck would have [affirmed](#) a judgment in favor of a doctor who failed to alert his patient that he observed a “suspicious mass” during her mammogram and that there was “a better than 70% probability” that it was cancer. As a result, the woman did not learn that she had breast cancer until almost two years later, when the cancer had spread to her bones. On appeal, the woman argued that the jury had confused the issues it was deciding because the trial judge had denied her motion for summary judgment on the issue of the statute of limitations. The two other judges who reviewed the case on appeal agreed with the woman, finding that the trial judge erred and that the court’s failure to grant her motion “allowed the [defendant] to inadvertently cloud the issues before the jury.” In dissent, Luck wrote, “I cannot say that the statute-of-limitations-defense errors deprived [plaintiff] of due process and a fair trial...”

Luck has also [criticized](#) the longstanding doctrine of tribal immunity. The federal government recognizes the sovereignty of tribal nations, and immunity from lawsuits is crucial to the right of indigenous tribes to govern themselves. In a case brought by two lawyers who

accused the Miccosukee Tribe of Indians of “filing false lawsuits, suborning perjury, and obstructing justice,” Luck wrote, “There are reasons to doubt the wisdom of perpetuating the doctrine’ of tribal immunity.” He expressed sympathy for the plaintiffs and noted that tribal immunity “can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.” He concluded his opinion by asserting that the plaintiffs deserved a “proper redress for their injuries,” but that “[g]ranting immunity to Indian tribes is a policy choice made by our elected representatives.”

Despite his criticism of tribal sovereignty, Luck did not express similar concern when he [upheld](#) the state legislature’s extension of sovereign immunity to employees of a private university hospital and upheld the dismissal of lawsuits brought by Fernando Vallecillo and Latoya Bean. Vallecillo was born with a benign tumor on the right side of his face. He went for an ear-nose-and-throat consultation, and the doctor recommended an “embolization procedure.” The surgeon performed the procedure “despite evidence that Vallecillo was not amen[.]able to it.” “As a result of the surgery,” Vallecillo was blinded in his right eye. In a separate case, Bean’s baby died in childbirth after a doctor gave her medication to induce labor that was not FDA-approved for that use and that

contained a warning that it could lead to premature birth and birth defects. After the drug was administered, the baby's heartbeat was "non-reassuring," and Bean had indications of "placental abruption and/or fetal compromise." Yet, "the doctors waited hours before performing a C-section." Noah Bean "required aggressive resuscitation." He suffered respiratory failure, and a hemorrhage and died on the evening of his birth.

In contrast to his opinion in the tribal immunity case, Luck did not show any remorse in issuing a decision that denied the plaintiffs' legal recourse for the injuries they suffered at the hands of negligent doctors. He concluded that the legislature's amendment "did not violate the sovereign immunity, equal protection, due process, access to courts, jury trial, and private debt provisions of the Florida Constitution."

CONCLUSION

The Senate Judiciary Committee should carefully consider Luck's record before putting him in a lifetime seat on the U.S. Court of Appeals for the Eleventh Circuit.