

AFFJ NOMINEE REPORT

# RALPH ERICKSON



*U.S. Court of Appeals for the Eighth Circuit*

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# INTRODUCTION

On June 7, 2017, President Trump nominated Judge Ralph Erickson of the Federal District Court of North Dakota to fill a vacancy on the Eighth Circuit Court of Appeals.<sup>1</sup> Judge Erickson's nomination comes after the seat was denied to President Obama's nominee, as is the case for numerous judicial positions currently being filled by the Trump Administration. The seat opened on April 22, 2015, when Judge Kermit Edward Bye took senior status; on January 28, 2016, President Obama nominated Jennifer Puhl, an Assistant United States Attorney in the District of North Dakota, to fill the vacancy. Despite the fact that she was supported by both home state senators and was unanimously approved by the Judiciary Committee, Ms. Puhl never received a full Senate vote. Ms. Puhl's nomination was ultimately returned to the President. Had she been confirmed, she would have been the first female federal judge in North Dakota, and only the third woman to ever serve on the Eighth Circuit.

Erickson's record raises concerns. He has issued notable anti-LGBTQ and anti-environment rulings, granting one injunction to halt a Department of Health and Human Services rule that would have protected transgender individuals from discrimination by health providers, and another to halt the Obama Administration's Clean Water Rule.

Erickson has been heavily involved in partisan politics for many years. He ran for the North Dakota State House of Representatives as a

Republican and worked actively in the party for almost two decades. He also made numerous donations to Republican candidates, and his wife continued to give to the GOP while Erickson sat on the state court bench.<sup>2</sup> He faces a high bar in demonstrating that he would be capable of being a fair and neutral arbiter on the bench, rather than a partisan politician unable to separate his politics from his public service.

Finally, as noted, Erickson's nomination was only possible because the Senate never acted on Puhl's nomination, despite the bipartisan support she received. Senators Heitkamp and Hoeven both supported Puhl. Senator Lindsey Graham, commenting at her hearing, said “[y]ou did an excellent job and I look forward to moving you through the process.”<sup>3</sup> In Committee, no senator from either party voted against her. Yet she never received a floor vote. Like Trump nominees Amul Thapar, Kevin Newsom, and Damien Schiff, all already considered by the Judiciary Committee, Erickson is enjoying the fruits of Republican obstruction of Obama's nominees.

# BIOGRAPHY

Erickson was born in Thief River Falls, Minnesota, on April 28, 1959.<sup>4</sup> He is 58 years old and currently resides in Fargo, North Dakota.<sup>5</sup>

<sup>2</sup> *Money Trails to the Federal Bench*, CENTER FOR INVESTIGATIVE REPORTING (Oct. 31, 2006), [http://cironline.org/sites/default/files/legacy/files/MoneyTrails\\_FullReport.pdf](http://cironline.org/sites/default/files/legacy/files/MoneyTrails_FullReport.pdf).

<sup>3</sup> Patrick Springer, Puhl's federal judicial nomination appears stalled in Congress, INFORUM (Nov. 30, 2016), <http://www.inforum.com/news/4169980-puhls-federal-judicial-nomination-appears-stalled-congress>.

<sup>4</sup> Ralph R. Erickson, U.S. District Judge, North Dakota Courts, <https://www.ndcourts.gov/court/bios/erickson.htm>.

<sup>5</sup> *Confirmation Hearings on Federal Appointments: Hearings Before the Comm. on the Judiciary, 108th Cong., 1st Session (2003) [hereinafter Hearing]* (statement of Hon. Ralph Erickson, East Central Judicial District of North Dakota), <https://www.congress.gov/108/chrg/shrg90303/CHRG-108shrg90303.htm>.

<sup>1</sup> Adam Liptak, *White House Announces Slate of 11 Judicial Nominees*, THE NEW YORK TIMES (June 7, 2017), available at <https://mobile.nytimes.com/2017/06/07/us/politics/trump-judicial-nominations.html>.

Erickson graduated from Jamestown College (now the University of Jamestown) in 1980 and the University of North Dakota School of Law in 1984. Following law school, Erickson joined the law firm Ohnstad Twichell, P.C. in West Fargo, North Dakota as an associate.<sup>6</sup> He worked as a solo practitioner from 1991-1994.

Erickson was an active member of his state Republican Party between 1976 and 1994.<sup>7</sup> He was a member of the 13th District Executive Committee from 1986 to 1994, and between 1992 and 1994, Erickson was District 13 Chair and a member of both the Executive Committee of the Unified Republican Committee of Cass County and the North Dakota Republican Committee.<sup>8</sup>

After applying for a state magistrate judgeship, Erickson said, “If somebody said you were going to be a judge I would have thought I was not suited for it temperamentally...”<sup>9</sup> He was later elected to serve as a judge for the East Central Judicial District.<sup>10</sup>

On September 12, 2002, President George W. Bush nominated Erickson to replace Judge Rodney Webb on the Federal Court of the District of North Dakota. The Senate did not act on his nomination during that session of Congress, and on January 7, 2003, the President renominated Erickson. He was confirmed on March 12, 2003.

Commendably, Erickson has spoken about how overcoming alcoholism has shaped his

life and career.<sup>11</sup> In describing his alcohol addiction and his subsequent recovery, he states: “It has made me a better man, a better husband, a better father, and frankly a better judge.”<sup>12</sup> “I have an insight into personal failures that I would not have if I had not had this particular problem, and as a judge it allows me to refrain from judging other people.”<sup>13</sup> Throughout his career, he has spoken at Alcoholics Anonymous meetings and conferences, as well as been involved in community organizations that support persons struggling with sobriety.<sup>14</sup>

# LEGAL VIEWS AND RECORD

## I. CIVIL RIGHTS

In December 2016, Erickson was brought the case *Catholic Benefits Association, Diocese of Fargo and Catholic Charities of North Dakota v. Sylvia M. Burwell, et al.*, No. 16-432, (D. N.D.).

Applying Section 1557 of the Affordable Care Act, the nondiscrimination provision, the Department of Health and Human Services issued a rule banning discrimination against patients on the basis of a person’s gender identity or “termination of pregnancy.” The rule explicitly carved out room for organizations to opt out pursuant to genuine religious beliefs under the Religious Freedom Restoration Act.

<sup>11</sup> *The Case of a Lifetime*, [https://law.und.edu/\\_files/docs/alumni/pdf/nd-law/07nd-law02.pdf](https://law.und.edu/_files/docs/alumni/pdf/nd-law/07nd-law02.pdf).

<sup>7</sup> Sen. Comm. on the Judiciary, 115th Cong., Ralph Robert Erickson: Questionnaire for Judicial Nominees, available at [https://www.judiciary.senate.gov/imo/media/doc/SJQ\\_Erickson.pdf](https://www.judiciary.senate.gov/imo/media/doc/SJQ_Erickson.pdf).

<sup>8</sup> *Id.*; *Money Trails to the Federal Bench*, *supra* note 2.

<sup>9</sup> *The Case of a Lifetime*, 1 NORTH DAKOTA LAW 4, 8 (2007), available at [https://law.und.edu/\\_files/docs/alumni/pdf/nd-law/07nd-law02.pdf](https://law.und.edu/_files/docs/alumni/pdf/nd-law/07nd-law02.pdf).

<sup>10</sup> Ralph Erickson, Official Abstract of the Votes Cast at the General Election, 1994, <https://vip.sos.nd.gov/pdfs/Abstracts%20by%20Year/1990s%20Election%20Results/1994/General%20Election%2011-08-1994.pdf>.

<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> Sen. Comm., *supra* note 7, at 14.

Erickson enjoined the rule. And, in an extremely rare action, he sealed his order. Shortly after Erickson's sealed order, Judge Reed O'Connor of the Northern District of Texas issued a nationwide injunction against the rule. That decision, unlike Erickson's, was publicly released.

In 2014, Senator Grassley, with respect to Obama judicial nominee David Barron, said "The Senate simply cannot evaluate whether this nominee is fit for lifetime appointment to one of the nation's most important courts without complete access to his writings."<sup>15</sup> He added, "[o]ur obligation, as senators, is to ensure that our constituents have full access to information," and "[w]ithout full disclosure to the full Senate...this nomination cannot proceed."<sup>16</sup> At issue was a memo Barron had written while at the Justice Department, the content of which had not been made public; that content subsequently was disclosed.

The Senate and the American people deserve to be able to review Erickson's decision in *Catholic Benefits Association* to properly judge his commitment to civil rights for all Americans, including LGBTQ persons and people exercising their reproductive rights.

## II. ENVIRONMENTAL LAW

Erickson blocked the Obama Administration's Clean Water Rule, which expanded protection for two million miles of streams and 20 million acres of wetlands.<sup>17</sup> The rule would have helped ensure access to clean water for Americans

<sup>15</sup> Press Release, Senator Chuck Grassley, Transparency Needed from White House on Barron Nomination (May 8, 2014), <https://www.grassley.senate.gov/news/news-releases/transparency-needed-white-house-barron-nomination>.

<sup>16</sup> *Id.*

<sup>17</sup> Steven Mufson, *Trump Administration to Propose Repealing Rule Giving EPA Broad Authority Over Water Pollution*, THE WASHINGTON POST (June 27, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/06/27/trump-administration-to-propose-repealing-rule-giving-epa-broad-authority-over-water-pollution/>.

around the country.

Anti-environment state attorneys general, led by current EPA Director Scott Pruitt, brought suit to block the rule. Erickson granted an injunction. He concluded that "[t]he Rule allows EPA regulation of waters that do not bear any effect on the 'chemical, physical, and biological integrity'" of any navigable-in-fact water as required under the *Clean Water Act*. *North Dakota v. U.S. E.P.A.*, 127 F. Supp. 3d 1047, 1055 (D.N.D. 2015). He also claimed that the rule was "inexplicable, arbitrary and devoid of a reasoned process" even though the EPA had met with and carefully scrutinized the views of the agriculture, oil, home-building, and fishing industries along with environmental activists and consumer protection groups. *Id.* The agency also carefully explained the science behind the rule in a 423-page support document and read over one million public comments about the rule.<sup>18</sup>

Moreover, Erickson claimed states would "lose their sovereignty over intrastate waters" were the rule to go into effect. *Id.* at 1059.

## III. ESTABLISHMENT CLAUSE AND RELIGION

Erickson routinely speaks at faith-based legal conferences and professes that he is guided by God in his legal decision-making.<sup>19</sup> At a faith and law conference, Erickson quoted Pope John XXIII as the

<sup>18</sup> U.S. ENVT'L PROT. AGENCY & U.S. DEP'T OF THE ARMY, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES (May, 27 2015), available at [http://www.epa.gov/sites/production/files/2015-05/documents/technical\\_support\\_document\\_for\\_the\\_clean\\_water\\_rule\\_1.pdf](http://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf).

<sup>19</sup> Concordia College Offutt School of Business, "Faith & Law" – Mike Williams, Mark Friese & Judge Ralph Erickson (Lorentzen Center), YOUTUBE, at 50:15, Feb. 19, 2014, <https://www.youtube.com/watch?v=ltCylI6fQ4M>.

basis for how he approaches judging:

[Pope] John the XXIII used to say... at the close of his prayers, ‘you know Lord I’m going to bed now; it’s your church anyway.’ And ya know that’s kind of the approach I take to judging; it’s His court anyway.<sup>20</sup>

(Emphasis added).

Since Erickson’s most prominent case to date concerned a challenge to LGBTQ and reproductive rights brought by Catholic organizations, and since the substance of Erickson’s order on the case has never been made public, such a comment may be relevant as the Committee examines Erickson’s willingness to separate the law from his personal beliefs.

His views on church-state matters are also illustrative. In *Twombly v. City of Fargo*, he held that a Ten Commandments monument,<sup>21</sup> donated by a private organization but maintained by the City and placed on city-owned land in close proximity to the Fargo City Hall, did not violate the Establishment Clause. 388 F.Supp.2d 983, 984 (D.N.D. 2005).

After *Twombly*, the group Red River Freethinkers proposed that the City either: (1) accept a secular monument donated by the Freethinkers as a “sister” monument to the Ten Commandments, (2) donate the Ten Commandments monument to a private recipient, or (3) consider relocating the Ten Commandments monument away from the City Hall civic area. *Id.* at 944. The City ultimately chose to refuse the secular monument, accepted a citizen petition that codified an

<sup>20</sup> *Id.*

<sup>21</sup> See William Harris, *Ten Commandments*, CENTER FOR HERITAGE RENEWAL, <http://heritagere-newal.org/stone/10commandments.htm> (last visited July 13, 2017).

ordinance prohibiting the removal of any monument over 40 years old (which would only apply to the Ten Commandments monument), and adopted a policy of rejecting any further donated monuments. *Id.* Freethinkers brought suit, asserting that the City violated the Establishment Clause by refusing its monument and adopting the ordinance against removing the Ten Commandments. *Id.* at 945.

Erickson wrote that plaintiffs failed to assert jurisdiction for reasons of *res judicata*, since the constitutionality of the monument had already been litigated in *Twombly*, and for lack of standing. *Id.* at 946. However, the Eighth Circuit disagreed and reversed. On remand, Erickson again ruled in favor of the City of Fargo, granting their motion for summary judgment. His decision was upheld on appeal. Judge Bye dissented. *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015 (8th Cir. 2012).

Erickson is also a member of a private group that may embrace views that are questionable. He is a current member of the American Chesterton Society of Fargo,<sup>22</sup> which “works to promote interest in G.K. Chesterton (1874-1936), one of the 20th century’s greatest writers.”<sup>23</sup> Chesterton continues to be a highly controversial figure because of his comments, caricatures, and authorship of anti-Semitic material. Chesterton once commented that he could “tolerate Jews in England, but only if they are compelled to wear [‘Arab’] clothing, to show that they are an alien nation” and consistently referred to the “Jewish problem.”<sup>24</sup> He

<sup>22</sup> Sen. Comm., *supra* note 7, at 7.

<sup>23</sup> Discover and Rediscover G.K. Chesterton, THE AMERICAN CHERSTERTON SOCIETY, <https://www.chesterton.org/about-us/> (last visited July 14, 2017).

<sup>24</sup> Adam Gopnik, The troubling genius of G.K. Chesterton, THE NEW YORKER, July 7, 2008, <http://www.newyorker.com/magazine/2008/07/07/the-back-of-the-world>.

also claimed that “Hitlerism is almost entirely of Jewish origin,” and “the new Nordic Man has all the worst faults of the worst Jews: jealousy, greed, the mania of conspiracy, and above all, the belief in a Chosen Race.”<sup>25</sup> The American Chesterton Society has claimed Chesterton was not anti-Semitic, and actually devoted a double issue of its periodical Gilbert Magazine to defending Chesterton against charges of anti-Semitism; the name of that issue was “Chesterton & the Jews.”<sup>26</sup> Given the controversial nature of Chesterton, Erickson should clarify the reasons for his membership in the organization.

## IV. NATIVE AMERICAN ISSUES

While a student at the University of North Dakota School of Law, Erickson authored “Aboriginal Land Title in the United States and Canada,” about the historical treatment of tribal land claims in North America.<sup>27</sup>

Erickson also served as the chairman on the United States Sentencing Commission Tribal Issues Advisory Group from 2015 through 2016. While on the Commission, Erickson recommended eliminating sentencing disparities created by the Federal Guidelines for crimes that warranted higher penalties in the Federal System than they would under the corresponding state system.

As a judge, Erickson has decided several notable cases implicating the rights of tribal people. In *Spirit Lake Tribe v. Benson County, N.D.*, Erickson granted a tribe’s request for a preliminary injunction to stop Benson County from closing six out of eight polling places on

<sup>25</sup> Simon Mayers, *Chesterton’s Jews: Stereotypes and Caricatures in the Literature and Journalism of G.K. Chesterton*, 101 (2nd ed. 2016).

<sup>26</sup> *Id.*

<sup>27</sup> Ralph Erickson, *Aboriginal Land Rights in the United States and Canada*, 60 N.D. L. REV. 107 (1984).

the reservation, which would have made it difficult for tribal members to vote. No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010).

In *United States v. Cavanaugh*, Erickson ruled that use of “uncounseled [misdemeanor] tribal court convictions to prove an essential element of [a] federal crime” violated a defendant’s due process rights and Sixth Amendment right to counsel. 680 F.Supp.2d 1062, 1065 (D.N.D. 2009), rev’d and remanded, 643 F.3d 592 (8th Cir. 2010). The Eighth Circuit reversed Erickson, and on remand he allowed the government to use the prior convictions as proof of an essential element.

Finally, in *Spirit Lake Sioux Tribe of Indians v. The Nat’l Collegiate Athletic Ass’n*, Erickson ruled that the National Collegiate Athletic Association (NCAA) had the right to require colleges who participate in the NCAA to discontinue the use of Native American symbols and caricatures in school mascots. No. 2:11-cv-95, 2012 WL 12886993 (D.N.D. May 1 2012).

Erickson has also spoken at several conferences on tribal issues. His speeches covered topics ranging from the importance of restructuring the tribal court system to juvenile justice and the importance of returning to traditional tribal values.<sup>28</sup>

In one speech, Erickson advised tribal leaders and liaisons to shame distressed

<sup>28</sup> Ralph Erickson, Speech to the 3rd Annual Tribal Consultation Conference There Ain’t No One in Washington Coming to Solve the Problem so Let’s Quit Burning the Woodwork to Heat the House: Envisioning a Traditionally Rooted Due Process Based Solution for Indian Country (Aug. 1, 2013), [hereinafter Erickson, Speech to the 3rd Annual Tribal Consultation Conference]. See also, Ralph Erickson, Waiting for a Bus that Never Comes: Finding Our Way to Community-Based Solutions to Save Our Children (Feb. 21, 2014) [hereinafter Erickson, Waiting for a Bus].

tribal members into living a better lifestyle. He counseled that “their [sic] ought to be shame in living a life of complete dysfunction” and “[n]o child should grow up in [a] place that looks and smells like a garbage heap—and the people who live like that should be ashamed of it.”<sup>29</sup> Moreover, he advised the tribal leaders that instead of attempting to take legal recourse against the federal government for failing to honor its promises, tribes should “shame Washington into doing what they’ve promised.”<sup>30</sup>

Furthermore, Erickson continually references alcoholism in his speeches to tribal leaders. He calls on tribal leaders to “make the place they live safe and clean and sober” and has told them that they “need more of [their] sons and daughters clean, healthy, sober, educated, and employed.”<sup>31</sup> He suggested to one group that their “communities have a set of problems” including alcoholism and that tribal judges, through sentencing, could make communities “alcohol free.”<sup>32</sup>

## V. CRIMINAL JUSTICE

On the bench, Erickson has cited *United States v. Rodriguez* as his most important trial. In that case, a jury sentenced Alfonso Rodriguez to death after he was convicted of kidnapping Dru Sjodin and transporting her across state lines, resulting in her death. He said “the pain and suffering of all the people involved was so obvious, the lawyers, prosecutors, defense lawyers, witnesses, families; it was just a bad deal.”<sup>33</sup>

A jury ultimately convicted Rodriguez and

sentenced him to death. Erickson took the opportunity to make a statement from the bench. He stated: “I would gladly lay down my own life to have had this whole ordeal avoided, to have Dru Sjodin back with her family, to have never heard of you, Mr. Rodriguez. The life of one federal judge more or less pales in comparison to the pain that this crime has inflicted on so many people.”<sup>34</sup>

In *Ellis v. Devig*, No. CIV 3:08-CV-19, 2009 WL 18866446 (D.N.D. June 26, 2009), Erickson denied summary judgment based on qualified immunity to officers who tased and used pepper spray during an arrest. The officers had arrested Frank Ellis after his wife called the police during a domestic dispute. By the time officers obtained an arrest warrant, the wife had been out of the house for several hours. Erickson wrote that a genuine issue of fact existed regarding whether the plaintiff resisted arrest and whether the plaintiff took actions that would make a reasonable officer believe he was in a “standoff” with the plaintiff, such that an increase in force was actually warranted.

Similarly, in *Partlow v. Stadler*, No. 3:12-CV-80, 2014 WL 12059001 (D.N.D. Jan. 22, 2014), rev’d, 774 F.3d 497 (8th Cir. 2014), Erickson denied summary judgment for officers in a § 1983 suit. He held that a material issue of fact existed when police officers shot Michael Partlow. The officers had been called to the scene because Partlow was armed and contemplating suicide.

The Eighth Circuit reversed, however, holding that even if the officers were

<sup>29</sup> *Id.* at 18-9.

<sup>30</sup> *Id.* at 14.

<sup>31</sup> *Id.* at 21.

<sup>32</sup> *Id.* at 21.

<sup>33</sup> *The Case of a Lifetime*, *supra* note 9, at 6.

<sup>34</sup> *Id.*

mistaken as to whether Partlow aimed the gun at them, that mistake was objectively reasonable given undisputed facts. Therefore, the officers were entitled to immunity.

With regard to his views on criminal defendants, Erickson is described in a troubling way in a book about Norwegian-Americans, *The Promise Fulfilled* by Odd Lovoll. The book describes remarks of former North Dakota state legislator Jens Tennefos. Tennefos said, “[m]y father feared and loved the Lord and taught me respect for life and compassion for others,” and claimed “[o]ur Norwegian heritage is much more compassionate than the Hispanic.”<sup>35</sup> The author then discusses Erickson:

Few past or present public servants would, to be sure, express these biased beliefs as openly as here. District Court Judge Ralph Erickson, a fourth generation Norwegian-American, nevertheless made the observation that Scandinavians who appeared in front of his bench did not commit violent crimes; such felonies were more commonly associated with other ethnicities in the community.<sup>36</sup>

While Erickson is not directly quoted here, the Committee must examine this statement and whether Erickson does in fact believe as Lovoll has written.

## VI. MISCELLANEOUS

### **Marriage Equality**

Following the Supreme Court’s decision in *Obergefell v. Hodges*, Erickson acted as a federal judge complying with his oath of office

<sup>35</sup> Odd. S. Lovoll, *The Promise Fulfilled* 115-6 (2007).

<sup>36</sup> *Id.*

was required to do, and struck down North Dakota’s state ban against same sex marriages in *Jorgensen v. Montplaisir*, 3:14-cv-00058 (D.N.D. Oct. 29, 2015).

### **Right to Health Care**

In a presentation, Judge Erickson emphasized that he believes there is no right to health care. He said, “Many Americans believe that they have a ‘Right to Medical Care.’ This right is not enumerated in the Constitution—nor can it be divined from the language of the Constitution.”<sup>37</sup>

### **Fair Housing and Disability**

In *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028, plaintiffs sued a property management company, for banning non-specifically trained assistance animals that worked primarily for those with mental health issues. Erickson granted summary judgment for the defendants on the plaintiffs’ disparate treatment claim, but allowed the disparate impact claim to go forward.

# CONCLUSION

Judge Ralph Erickson must explain his record of concerning rulings and clarify his troubling comments. If he is unable to do so persuasively, then senators of both parties must question his fitness for a seat on the Eighth Circuit Court of Appeals.

<sup>37</sup> Ralph Erickson, *Freedom of Conscience: Religious Liberty*, Address to North Dakota Catholic Medical Association (2013) (transcript available at Sen. Comm. on the Judiciary, 115th Cong., Ralph Erickson: Questionnaire for Judicial Nominees—Public Appendix 12(d), at 579).