

AFJ NOMINEE SNAPSHOT

HOWARD NIELSON

U.S. District Court for the District of Utah

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INTRODUCTION

On September 29, 2017, President Trump [nominated](#) Howard C. Nielson to the United States District Court for the District of Utah. Nielson's nomination continues Trump's trend of offering lifetime appointments to ideological attorneys and judges.

Alarming, Nielson shares with Trump a propensity for attacking judges' integrity based on personal characteristics. During the presidential campaign, Trump attacked federal judge Gonzalo Curiel and said the judge should recuse himself from a case solely because of his Mexican heritage. Howard Nielson, in taking a leading role in the effort to prohibit same-sex marriage in California, argued that a federal judge should be disqualified from hearing the case because he was gay.

President Trump and Nielson also share records of attacking the independence of the Justice Department. President Trump has demanded loyalty from the FBI director, politicized prosecutorial decisions, and tried to purge non-political law enforcement personnel whom he perceives as insufficiently supportive of his administration. Nielson fits right in: As an official in the Justice Department under George W. Bush, Nielson was part of the "Screening Committee" that impermissibly, as the Department's Inspector General concluded, "considered political or ideological affiliations" in making non-political hiring decisions and weeding progressive applicants out of civil service jobs.

President Trump's desire to cater to the wishes of the National Rifle Association (NRA)

is reflected in his nomination of Nielson. The NRA [broke](#) its own spending records in support of Donald Trump's presidential campaign, and [spent](#) one million dollars on an advertising campaign to support Supreme Court nominee Neil Gorsuch. In return, Trump [told](#) the NRA, "You came through for me, I am going to come through for you." In nominating Nielson, Trump has kept his word. Nielson has been one of the NRA's go-to attorneys, fighting to eliminate restrictions on guns in public places and limits on assault weapons.

On yet another front, the use of torture, Nielson appears inclined to reinforce the worst impulses of President Trump. Trump has [questioned](#) the Geneva Conventions and supported waterboarding, saying, "The problem is we have the Geneva Conventions, all sorts of rules and regulations, so the soldiers are afraid to fight[.]" He has said he wants to "bring back a hell of a lot worse than waterboarding." Significantly, Nielson worked in the Office of Legal Counsel (OLC) in the George W. Bush Administration when the notorious "torture memos" were issued. In response to criticism of the memos in The Washington Post, Nielson wrote a letter to the editor defending the memos' author, Stephen Bradbury. In addition, he authored a memorandum that gutted protections for persons in custody under the Geneva Conventions, a memorandum one expert said was based on such "erroneous legal reasoning and conclusions" that it should be "add[ed] . . . to the Legal Scrapheap."

Finally, Nielson has fought efforts to ensure equality in education for people of color; has advocated against regulating

greenhouse gases; has frequently litigated against the Affordable Care Act; and has defended severe burdens on women's exercise of their reproductive rights.

Alliance for Justice opposes his confirmation.

BIOGRAPHY

Nielson has been a partner at Cooper & Kirk, PLLC in Washington, D.C. since 2010, after being of counsel there since 2005. He attended Brigham Young University and attained his J.D. from University of Chicago Law School in 1997. After graduating, Nielson clerked for Judge J. Michael Luttig on the Fourth Circuit and for Justice Anthony Kennedy. After clerking, Nielson joined Jones Day as an associate. In 2001, Nielson joined the Bush Administration's Department of Justice as Special Assistant to the Deputy Attorney General, before becoming Counsel to the Attorney General, and finally, Deputy Assistant Attorney General for the Office of Legal Counsel from 2003 to 2005. Nielson also worked as a legal consultant for Boeing from 2008 to 2014.

LEGAL AND OTHER VIEWS

Nielson fought equality for LGBTQ Americans and argued that a judge should be recused from a case because he is gay.

Nielson represented the defendants in [*Hollingsworth v. Perry*, 133 S. Ct. 2652 \(2013\)](#), defending Proposition 8, which would have banned same-sex marriage in California.

After the district court, in [*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 \(N.D. Cal. 2010\)](#), ruled that Proposition 8 was unconstitutional, Nielson filed a [motion](#) to vacate the judgment. Nielson's motion argued that the judge, Chief Judge Vaughn Walker, a Reagan appointee, "had a duty to disclose not only the facts concerning his [same-sex] relationship, but also his marriage intentions."

Nielson's motion reflected the rhetoric of certain right-wing groups. The American Family Association [said](#) that it was "extremely problematic that Judge Walker is a practicing homosexual himself. He should have recused himself from this case, because his judgment is clearly compromised by his own sexual proclivity." Conservative activist Tony Perkins specifically [said](#) that Judge Walker's decision was compromised by the fact he is "openly homosexual."

Nielson argued, in attempting to vacate the judgment, that only if Judge Walker had "unequivocally disavowed any interest in marrying his partner could the parties and the public be confident that he did not have a direct personal interest in the outcome[.]"

Kamala Harris, then California Attorney General, filed a brief opposing the motion. She wrote, "[j]ust as every single one of the attempts to disqualify judges on

the basis of their race, gender, or religious affiliation has been rejected by other courts, this Court should similarly reject Defendant-Intervenors' effort to disqualify Judge Walker based on his sexual orientation." Now-NAACP Legal Defense Fund President Sherrilyn Ifill [wrote](#) that "the suggestion that Judge Walker's sexual orientation is evidence of bias is the kind of argument that was firmly discredited in a series of cases challenging the impartiality of black judges to decide civil rights cases....Black judges pushed back firmly against attempts to question their impartiality and framed what has become the universally accepted understanding among the bench and bar: that judicial bias cannot be assumed based on racial, gender or other status of the judge." She added, "[t]hose who seek to discredit Judge Walker's decision based on the allegation that the judge was biased are barking up the wrong tree. They are also raising the ugly specter of judicial bias based on status." Journalist Dahlia Lithwick [pointed out](#) that while the "legal argument is degrading and futile doesn't mean nobody will make it. For as long as there have been bigots in America, litigants have tried to argue that women are too womanly to decide gender cases and that Jews are too Jewish to hear cases involving the first attacks on the World Trade Center...these litigants also have tried to dress up their claims as something other than pure bigotry. They never prevail."

Nielson's motion to disqualify the judge was denied. See [Perry v. Schwarzenegger, 790 F. Supp. 2d 1119 \(N.D. Cal. 2011\)](#). As George H.W. Bush appointee Judge James Ware wrote, "[t]he sole fact that a federal judge shares the same circumstances or personal characteristics with other members of the general public, and that the judge could be affected by the outcome of a proceeding in the same way that other

members of the general public would be affected, is not a basis for either recusal or disqualification. ... It is not reasonable to presume that a judge is incapable of making an impartial decision about the constitutionality of a law, solely because, as a citizen, the judge could be affected by the proceedings."

During his defense of Proposition 8, Nielson also suggested that same-sex attraction is a choice, not an innate characteristic. As one journalist [summarized](#), "Nielson appear[ed] to be trying to undercut [an expert's] assertion that homosexuality is an inherent characteristic of gays and lesbians, not a social choice.... [by] making the point that there has been some debate about how sexual orientation is defined by the scientific world." Nielson's questioning [suggested](#) that since some studies found "[t]here is currently no scientific or popular consensus on the exact constellation of experiences that definitively qualify an individual as lesbian, gay, or bisexual rather than confused, curious, or maladjusted[.]" sexual orientation might be a choice, rather than a definable characteristic.

Of course, the overwhelming consensus is that sexual orientation "is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice." [Baskin v. Bogan, 766 F.3d 648, 657–58 \(7th Cir. 2014\)](#) (J. Posner) (summarizing scientific studies on homosexuality).

In rejecting Nielson's argument, the district court pointed out that "[s]exual orientation is fundamental to a person's identity and is a distinguishing characteristic that

defines gays and lesbians as a discrete group.... Individuals do not generally choose their sexual orientation. No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.” *Perry* 704 F. Supp. 2d at 964–66.

Nielson also [disputed](#) the effects of discrimination on LGBTQ individuals, such as increased rates of depression and attempted suicide. In cross-examining an expert during the Proposition 8 trial, Nielson [highlighted](#) studies that “homosexuals d[o] not have abnormally elevated psychiatric symptomatology compared with heterosexuals[,]” and argued that the research finding that “gay and lesbian population[s] do have higher rates of some [mental] disorders” was inconsistent and flawed. That LGBTQ Americans suffer acutely due to discrimination, and that this suffering leads to increased mental distress, is settled. The American Psychological Association [explained](#) that “one result of the isolation and lack of support experienced by some lesbian, gay, and bisexual youth is higher rates of emotional distress, suicide attempts, and risky sexual behavior and substance abuse.” The National Alliance on Mental Illness [found](#) that “LGBTQ individuals are almost 3 times more likely than others to experience a mental health concern such as major depression or generalized anxiety disorder.”

Nielson continued his opposition to same-sex marriage years later, when he authored an [amicus brief](#) opposing marriage equality in [Obergefell v. Hodges, 135 S. Ct. 2584 \(2015\)](#), arguing that marriage must be inherently a relationship between a man and a woman because “in particular, through the institution of marriage, societies seek to increase the

likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.”

Nielson was on a committee that politicized the Justice Department.

In 2002, Nielson served as Counselor to the Attorney General. In that capacity, he was part of a four-person “Screening Committee” to approve or deselect candidate applications to be submitted to hiring attorneys for the Honors Program and Summer Law Intern Program. His participation on the committee is discussed in the inspector general’s 2008 report: “[An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and the Summer Law Intern Program.](#)” In the report, the inspector general noted that “Nielson said he believed that he may have participated in [the screening process], but said he could not recall with certainty.”

The inspector general specifically [found](#) that “the Department’s Honors Program is the exclusive means by which the Department hires recent law school graduates. These are career positions, and, therefore, Department policy and Federal civil service law prohibit discrimination on the basis of political affiliations. However, the evidence in our investigation showed that a Screening Committee established by the Department in 2002 deselected for interviews those candidates with Democratic Party and liberal affiliations apparent on their applications at a significantly higher rate than applicants with Republican Party, conservative, or neutral

affiliations. This pattern continued even when we compared a subset of academically highly qualified candidates.”

The inspector general [added](#), “the problem was not necessarily with the law. The problem was with the application of the law by the people in the Department of Justice, which is very troubling that the Department of Justice would not adhere to the law.”

In response to questions from Senators Charles Schumer and Sheldon Whitehouse regarding consequences for the Department of Justice officials involved in the politicization scandals at the department, including firing of U.S. Attorneys, improper politicization of hiring of immigration judges, and politicization of the honors program, the inspector general [said](#): “people did leave the Department so they cannot be disciplined by the Department, but we have recommended that they never get a job with the Department again, hopefully never with the Federal Government again, that they consider this report if they ever do apply. They have been exposed. Their conduct has been exposed in a transparent way for all to see.” He emphasized, “[t]he ones who are no longer with the Department should never get a job with the Department or, in my view, any other Federal agency based upon the conduct listed[.]”

Nielson led the effort against common-sense gun reform.

Nielson has repeatedly represented the NRA in failed attempts to overturn firearm regulations. These suits include [NRA v. McCraw, 134 S. Ct. 1365 \(2014\)](#), where Nielson argued that bans on 18-20 year olds publicly carrying firearms are unconstitutional; [NRA v. BATFE, 134 S. Ct. 1364 \(2014\)](#), where Nielson argued that the

Supreme Court should overturn a statute banning handgun purchases to people under the age of 21; and [Friedman v. City of Highland Park, 136 S. Ct. 447 \(2015\)](#), where Nielson represented the Illinois State Rifle Association in fighting Chicago’s ordinance banning semiautomatic rifles and large capacity magazines. In each one of these cases, the laws were upheld by the circuit courts and the Supreme Court denied certiorari.

Contrary to the overwhelming weight of precedent before the Supreme Court considered the question in [District of Columbia v. Heller, 554 U.S. 570 \(2008\)](#), Nielson authored a 2004 [memorandum](#) for OLC concluding that the Second Amendment secured an individual right to bear arms. At the time he wrote his memorandum, the Supreme Court decision that was most directly on point was [United States v. Miller, 307 U.S. 174 \(1939\)](#), where the Court had held that the Second Amendment “must be interpreted and applied” in view of its “obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces[.]” *Id.* at 178. Moreover, as Justice Stevens noted in dissent in *Heller*, since *Miller*, “hundreds of judges ha[d] relied on the view of the Amendment we endorsed there; we ourselves affirmed it in 1980.” *Heller*, 554 U.S. at 638 (Stevens, J., dissenting) (citing *Lewis v. United States*, 445 U.S. 55, 65-66 n.8 (1980)). Indeed, at the time of Nielson’s memorandum, the First, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits had all held that “the Amendment protects only a right of the various state governments to preserve and arm their militias.” [Parker](#)

[v. District of Columbia, 478 F.3d 370, 379 \(D.C. Cir. 2007\)](#) (reviewing court decisions). Only the Fifth Circuit had held to the contrary. Ignoring precedent, Nielson determined that the “original meaning of the [Constitution] provides extensive reasons” to hold that the individual right existed.

The Giffords Law Center to Prevent Gun Violence and Democracy Forward have [sued](#) the Trump Administration in order to compel compliance with the Freedom of Information Act and release “records that would reveal the extent to which the Washington gun lobby is exercising influence and control over the Trump Administration’s selection of nominees for lifetime appointments to federal judgeships.” Nielson, along with many other Trump nominees, is specifically named in the complaint.

Nielson’s involvement with issues of torture and executive power must be fully disclosed.

Nielson served as Deputy Assistant Attorney General (AAG) in the Office of Legal Counsel from 2003 to 2005. During that time, Nielson’s boss, Stephen Bradbury, authored the “torture memos,” which provided the legal justifications for 13 types of enhanced interrogation techniques employed by the CIA, including waterboarding. As Senator John McCain [said](#), “[p]ut simply, Mr. Bradbury’s memos were permission slips for torture.”

It is imperative that Nielson disclose his full involvement in the “torture memos,” since the evidence suggests he may have been intimately involved with their issuance.

At OLC, Nielson, like Bradbury, was involved in issues regarding the United States’ treatment

of persons in custody. He authored a memorandum [titled](#) “Whether Persons Captured and Detained in Afghanistan are ‘Protected Persons’ under the Fourth Geneva Convention.” In that memorandum, Nielson “[argues](#) that the Fourth Geneva Convention, which protects civilians in the hands of a state of which they are not nationals, applies only to individuals on *U.S. territory*[.]”

Beth Van Schaack, former Deputy to the Ambassador-at-Large for War Crimes Issues at the State Department, [noted](#) that this “interpretation . . . would significantly truncate, if not virtually gut, the protections of that treaty.” Indeed, “the impact of [Nielson’s] interpretation would be that the United States . . . would be bound by [the Fourth Geneva Convention] only with respect to actions taken *on the territory* of the United States.... As a result, if the United States were to detain Afghan or Iraqi civilians, those individuals would not benefit from [the Convention’s] dictates about humane treatment, non-discrimination, etc. unless they were brought back to the United States.”

Van Schaack [noted](#) that Nielson’s “erroneous legal reasoning and conclusions” were so flawed that the memo should be “add[ed] . . . to the Legal Scrapheap.” She wrote, “[t]he 2005 Nielson Memorandum should be withdrawn because its conclusions are inconsistent with the text, the original intent of the treaty, and the prevailing legal interpretation of the [Geneva Conventions].”

In addition to authoring an opinion limiting the protections of the Geneva

Conventions, Nielson wrote a [letter](#) to the editor of The Washington Post in 2007 defending Bradbury. Nielson and other former deputies wrote, “one or more of us have worked with him *on virtually every issue* that has gone through the office, and *each of us is intimately familiar* with how the office has treated the legal issues that have come before it.” (emphasis added).

Even if Nielson did not work on the “torture memos,” it is disturbing that he has defended them. When The Washington Post [editorialized](#) against the “torture memos,” it noted that the “Office of Legal Counsel issued two classified memos in 2005 to justify techniques that the [CIA] had used when interrogating terrorism suspects abroad – and to undercut a law passed by Congress that outlawed ‘cruel, inhuman, and degrading treatment.’” In his [letter](#) to the editor, Nielson claimed the Post’s criticism was “deeply unfair” and “was remarkably ill-informed.”

As Sen. McCain [said](#) in opposing Bradbury’s nomination to serve as General Counsel of the Department of Transportation, “[i]n voting against Mr. Bradbury’s nomination, as I also voted last week for similar reasons against Mr. Steven Engel’s nomination to head the Department of Justice’s Office of Legal Counsel, I am making it clear that I will not support any nominees who justified the use of torture by Americans. The laws of war were carefully created to be precise and technical in nature – but also to leave room for interpretation, even at the risk of abuse, by the Executive Branch. This makes the duty of government lawyers all the more significant. They must serve as guardians of our ideals and our obligations under international law. They are safeguards and checks on the conscience of our government, and I cannot in good faith vote

to confirm lawyers who have fallen short of this awesome responsibility.”

Nielson supported a ban on affirmative action in higher education.

Nielson advocated for Michigan’s ballot proposal to end affirmative action policies at state universities in [Schuette v. Coalition to Defend Affirmative Action, 134 S.Ct. 1623 \(2014\)](#). Nielson represented a white law-school applicant who intervened in the suit to defend the constitutionality of the ballot proposal before the Sixth Circuit and the U.S. Supreme Court. The Sixth Circuit held that the proposal violated the Equal Protection Clause by burdening racial minorities’ ability to obtain protection through the political process. However, the Supreme Court overturned the holding in a plurality opinion.

Nielson has fought efforts to protect the environment.

Nielson represented Republicans in Congress in opposing EPA regulations in [Util. Air Regulatory Group v. EPA, 134 S. Ct. 2427 \(2014\)](#). Nielson’s [amicus brief](#) argued the EPA lacked the authority to regulate greenhouse gases emitted by large, industrial polluters, despite the Clean Air Act’s language bestowing regulatory authority on the EPA over “any air pollutant.” Had Nielson prevailed, carbon pollution from large-scale industries like power plants and oil refineries, which account for 83 percent of such emissions, would have gone unchecked. See *id.* at 2438–39. The Supreme Court found in a 7-2 decision that the EPA had the authority to regulate greenhouse gases emitted by

those large polluters.

Nielson opposed reproductive rights for women.

Nielson co-authored an [amicus brief](#) in [Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 \(2016\)](#), arguing that the Supreme Court should uphold restrictive abortion regulations in Texas. These regulations required that all outpatient abortion providers meet [untenable standards](#) that would have shut down many women's health facilities, making it incredibly difficult for women in Texas to safely access abortion providers. The Supreme Court disagreed with Nielson, finding that the Texas regulations were unduly burdensome and violated the Constitution.

Nielson fought access to healthcare for all Americans.

Nielson was a prominent opponent of the Affordable Care Act, co-authoring amicus briefs representing conservative members of Congress in [Halbig v. Sebelius, 27 F.Supp.3d 1 \(DC Cir. 2014\)](#) and [King v. Burwell, 135 S.Ct. 2480 \(2015\)](#).

CONCLUSION

Nielson has put his allegiance to far right ideology ahead of any allegiance to the rule of law. His nomination by President Trump continues this administration's disturbing trend of acquiescing to the gun lobby, as well as blatant hostility towards the rights of women, LGBTQ people and people of color. Nielson's record is especially marred by his efforts at the Department of Justice, both in his role on the

partisan "Screening Committee" and in his work on the status of detainees. Alliance for Justice opposes his confirmation.