

AFJ NOMINEE SNAPSHOT

JAMES

HO

U.S. Court of Appeals for the Fifth Circuit

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INTRODUCTION

On October 16, 2017, President Trump nominated James C. Ho to the U.S. Court of Appeals for the Fifth Circuit.¹ Ho is nominated to fill the seat of Judge Carolyn D. King, who took senior status in 2013.² Like the vast majority of President Trump's nominees, Ho is a member of the right-wing Federalist Society, an outside group to which Trump has indicated he has delegated the judicial nomination process.³

Alliance for Justice has identified the following concerns with Ho's record.

BIOGRAPHY

Ho was born in Taiwan in 1973, and immigrated to the United States in 1974.⁴ He received his undergraduate degree from Stanford University in 1995, and his J.D. from the University of Chicago Law School in 1995. He clerked for Judge Jerry Smith on the Fifth Circuit Court of Appeals, and then for Justice Clarence Thomas on the U.S. Supreme Court. From 2001 to 2003 he worked at the Department of Justice, first in the Civil Rights Division and then in the Office of Legal Counsel. From 2003 to 2005 he was chief counsel to Senator John Cornyn. He served as the solicitor general of Texas from 2008 to 2010. Finally, Ho has spent much of his career at Gibson, Dunn & Crutcher LLP in

Dallas. He was an associate at Gibson from 2006 to 2008, before leaving for public service, and he returned to Gibson as a partner in 2010.

Ho has frequently written and spoken against attempts to repeal birthright citizenship, arguing "[t]hese proposals raise serious constitutional questions. Birthright citizenship is guaranteed by the Fourteenth Amendment. That birthright is protected no less for children of undocumented persons than for descendants of *Mayflower* passengers."⁵ Ho has also argued and authored briefs before the U.S. Courts of Appeal and the U.S. Supreme Court, including in pro bono matters on behalf of crime victims, wrongly convicted individuals, and immigrants facing deportation.⁶

LEGAL AND OTHER VIEWS

I. TORTURE

- » While at the Department of Justice Office of Legal Counsel, Ho authored a memo on the Geneva Conventions.⁷ Ho's work was then cited in the infamous Bybee-Yoo "Torture Memo" that "paved the way

¹ Press Release, Fifteen Nominations Sent to the Senate Today, The White House (Oct. 16, 2017), <https://www.whitehouse.gov/the-press-office/2017/10/16/fifteen-nominations-sent-senate-today>.

² Current Judicial Vacancies, Administrative Office of the U.S. Courts (last checked Nov. 10, 2017), <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies>.

³ Sen. Comm. On the Judiciary, 115th Cong., James Chiun-Yue Ho: Questionnaire for Judicial Nominees, 8 [hereinafter SFJ]; see Lawrence Baum & Neal Devins, *Federalist Court: How the Federalist Society became the de facto selector of Republican Supreme court justices*, SLATE (Jan. 31, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/how_the_federalist_society_became_the_de_facto_selector_of_republican_supreme.html.

⁴ See SJO, *supra* note 3, at 1; James C. Ho, *Two Wrongs Don't Make a Right*, RAFU SHIMPO (Oct. 9, 1996).

⁵ James C. Ho, *Defining 'American': Birthright Citizenship And The Original Understanding Of The 14th Amendment*, THE FEDERALIST (Aug. 25, 2015), <http://thefederalist.com/2015/08/25/defining-american-birthright-citizenship-and-the-original-understanding-of-the-14th-amendment/>.

⁶ See *supra* note 3 at 70–1.

⁷ See U.S. Department of Justice Office of Legal Counsel Memorandum for Alberto R. Gonzales, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A*, 15 n.8 (citing Memo for John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, from James C. Ho, Attorney-Advisor, Office of Legal Counsel, *Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War* (Feb. 1, 2002)), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [hereinafter Torture Memo].

for waterboarding of terrorism suspects and other harsh interrogation tactics[.]”⁸

- » The specific passage that cites Ho’s memo argued that the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) “distinguishes between torture and other acts of cruel, inhuman, or degrading treatment or punishment.”⁹ Ho’s memo was cited as evidence that Common Article 3 of the Geneva Conventions “contains somewhat similar language” that distinguishes torture from other types of “cruel treatment” toward prisoners.¹⁰
- » Ho’s memo has not been made public, and is not listed on his Senate Judiciary Committee questionnaire. Due to the memo’s controversial use by Yoo and Bybee defending the practice of waterboarding, Ho’s nomination should not proceed until his work on this critical issue can be properly evaluated.
- » Ho co-authored a law review article with John Yoo titled “The New York University-University of Virginia Conference on Exploring the Limits of International Law: The Status of Terrorists.” Ho and Yoo argued that the status of al Qaeda detainees do not reach the status of lawful combatants, and are therefore not afforded protections under the Geneva Convention and other protections under international law for prisoners of war.¹¹

II. MONEY IN POLITICS

- » In a law school article for the Federalist Forum, a Federalist Society publication at the University of Chicago, Ho opposed the McCain-Feingold campaign finance reform bill.¹² In fact, Ho wrote that he opposed the concept of campaign finance reform altogether, claiming:

Proponents of campaign finance reform assert a seemingly unassailable claim. Contributions corrupt the political system. To arrest this corruption, we must expand the laws that regulate campaign finance. The inevitable result of such expansion, however, is the end of free speech. For truly radical but effective reform, we must reverse course and abolish all restrictions on campaign finance.¹³

- » Ho argued that government corruption should not be blamed on money in politics, but on government regulation:

But perhaps the most important lesson is that the campaign finance reform debate obscures the true cause of corruption. Politicians can coerce campaign contributions from ever-willing donors for one simple reason: the state intrudes upon so many areas of personal and commercial life that success is impossible without permission from the sovereign.¹⁴

⁸ Carrie Johnson & Julie Tate, *Authors of waterboarding memos won't be disciplined*, WASH. POST (Feb. 20, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/19/AR2010021904157.html>.

⁹ See Torture Memo, *supra* note 7.

¹⁰ *Id.*

¹¹ John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207 (2003).

¹² Ho, *Free Speech. First and Foremost*, FEDERALIST FORUM (Nov. 1997).

¹³ *Id.*

¹⁴ *Id.*

- » In the private sector, Ho acted as lead counsel for plaintiffs opposing campaign finance laws, including First Liberty Institute President Kelly Shackelford, in [*Free Mkt Found., et al v. Reisman*, 540 F.Supp. 2d 751 \(W.D. Tex. 2008\)](#). The laws in question were anti-bribery restrictions on the election of the Speaker of the Texas House of Representatives that had been passed in the 1970s. *Id.* at 753. The district court issued a preliminary injunction that enjoined enforcement of the statutes. Later, the court found the statutes to be unconstitutional. [*See Free Mkt. Found. v. Reisman*, 573 F. Supp. 2d 952, 957 \(W.D. Tex. 2008\)](#).

III. FIRST LIBERTY INSTITUTE

- » Ho is President Trump’s third federal judicial nominee to be associated with the First Liberty Institute, an organization that has taken strong stances against legal protections for the LGBTQ community as well as women’s reproductive rights. Just this year, Ho co-wrote an article with First Liberty Institute’s President, Kelly Shackelford, claiming, “government officials and courts are now telling us we can’t pray—at work, or at home.”¹⁵
- » Jeff Mateer, a nominee to the U.S. District Court for the Eastern District of Texas and former general counsel of the First Liberty Institute, has made inflammatory public statements claiming that transgender children are a part of “Satan’s plan” and comparing Obama-era regulations to “Nazi Germany.”¹⁶ After Mateer was appointed to serve as the assistant attorney general of Texas, Ho wrote that the appointment was “worthy of praise,” that “[i]t was an honor to share the podium with [Mateer],” and “[h]is appointment should be celebrated—not criticized.”¹⁷

IV. MARRIAGE EQUALITY

- » As solicitor general, Ho vigorously defended Texas’s Defense of Marriage Act and the federal Defense of Marriage Act (DOMA) with fellow judicial nominee Jeff Mateer. Ho and Mateer both litigated [*In the Matter of the Marriage of J.B. & H.B.*, 326 S.W.3d 654 \(Tex. App. – Dallas 2010\)](#), where a same-sex couple that had been married in Massachusetts sought to obtain a divorce in Texas.
- » The divorce action motivated “the State [to] intervene[]” in the action “as a party respondent to oppose the Petition for Divorce and defend the constitutionality of Texas and federal law.” *Id.* at 659. Mateer, representing the First Liberty Institute, served as Ho’s co-counsel.¹⁸ While the district court struck down the Texas law, the Dallas Court of Appeals reversed. *Id.* at 681. Of course, state laws banning same-sex marriage were later recognized as unconstitutional by the U.S. Supreme Court’s decision in *Obergefell v. Hodges*.

¹⁵ Kelly Shackelford & James C. Ho, *US courts: Can’t pray at work, can’t pray at home*, THE HILL (Sept. 1, 2017), <http://thehill.com/blogs/pundits-blog/civil-rights/348858-opinion-us-courts-cant-pray-at-work-cant-pray-at-home>.

¹⁶ Press Release, AFJ Mateer Comments “Disgusting”, Alliance for Justice (Sept. 21, 2017), <https://www.afj.org/press-room/press-releases/afj-mateer-comments-disgusting>.

¹⁷ Ho, *Mateer appointment worthy of praise*, MYSANANTONIO.COM (Apr. 13, 2016), <http://www.mysanantonio.com/opinion/commentary/article/Mateer-appointment-worthy-of-praise-7246618.php>.

¹⁸ See SJJ, *supra* note 3, at 67–8.

V. DEATH PENALTY

- » Ho has also fought to maintain the death penalty in Texas, including defending Texas's lethal injection protocol. [*Raby v. Johnson*, 600 F.3d 552 \(5th Cir. 2010\)](#).
- » Ho was lead counsel for the State of Texas in the stay of execution proceedings in [*Medellin v. Texas*, 554 U.S. 759 \(2008\)](#). The Supreme Court had previously affirmed the dismissal of Jose Medellin's habeas case, [*Medellin v. Texas*, 552 U.S. 491 \(2008\)](#), where in a 6-3 decision the court found that an international treaty, in this case the Vienna Convention, did not bind domestic law unless Congress had enacted a statute implementing it, or it was "self-executing." The Court also held that decisions of the International Court of Justice were not binding and could not be enforced by the President absent an act of Congress. Ho represented Texas in the subsequent proceedings before the Supreme Court, which in a 5-4 per curiam decision denied a stay of execution "on the theory that either Congress or the Legislature of the State of Texas might determine that the actions of the International Court of Justice should be given controlling weight..." *Medellin*, 554 U.S. at 759. Justice Stephen Breyer, in dissent, wrote that "to permit this execution to proceed forthwith places the United States irremediably in violation of international law and breaks our treaty promises." *Id.* at 764 (Breyer, J., dissenting).

VI. MEDICAL MALPRACTICE

- » Ho has supported Texas's extremely strict cap on medical malpractice suits.¹⁹ Texas has one of the "most aggressive" caps on medical malpractice awards in the country, limiting all non-economic damages to just \$250,000.²⁰ The law was estimated in one study to "reduce non-economic damages by 73 percent in cases that go to trial[.]" while not "driv[ing] down medical costs."²¹ After a 4-year legal battle over whether such a \$250,000 cap on the amount that plaintiffs could be awarded for pain and suffering, emotional distress, and loss of quality of life was constitutional, a Texas district court upheld the law. At the time, Ho commented: "This ruling is a welcome and timely reminder that, under our Constitution, the states have an important role to play in improving access to health care."²²

CONCLUSION

Given James Ho's involvement in controversial legal territory including torture and money in politics, as well as his praise for nominee Jeff Mateer, Alliance for Justice requests that the Senate Judiciary Committee carefully scrutinize Ho's record

¹⁹ Mark Curriden, *U.S. judge upholds Texas cap on medical malpractice awards*, DALLAS MORNING NEWS (Mar. 27 2012), <https://www.dallasnews.com/business/health-care/2012/03/27/u.s.-judge-upholds-texas-cap-on-medical-malpractice-awards>.

²⁰ Sarah Kliff, *Gov. Rick Perry's Texas medical malpractice law: What it does, doesn't and might do*, WASH. POST (Aug. 16, 2011), https://www.washingtonpost.com/blogs/ez-ra-klein/post/gov-rick-perrys-texas-medical-malpractice-law-what-it-does-doesnt-and-might-do/2011/08/02/gIQA1afZJJ_blog.html?utm_term=.f84a05591445.

²¹ *Id.* (summarizing David A. Hyman, et. al., *Estimating the Effect of Damages Caps in Medical Malpractice Cases: Evidence from Texas*, 1 J. OF LEGAL ANALYSIS 355 (Winter, 2009)).

²² Curriden, *supra* note 19.

before giving him a lifetime appointment on the Fifth Circuit Court of Appeals.