

AFJ NOMINEE REPORT

# DAVID PORTER



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

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# INTRODUCTION

On April 12, 2018, President [Trump nominated](#) David J. Porter to the United States Court of Appeals for the Third Circuit. Porter was nominated to [replace](#) Judge Michael Fischer, who assumed senior status on February 1, 2017. Notably, one of Pennsylvania's U.S. senators, Sen. Bob Casey, has chosen to withhold his blue slip on Porter's nomination. Alliance for Justice strongly opposes Porter's confirmation on grounds related both to the process surrounding his nomination, and to the merits of his record.

A brief history of events surrounding another recent nomination to the Third Circuit is relevant here. In March of 2016, Pennsylvania's other U.S. senator, Sen. Pat Toomey, announced he would not return his blue slip on President Obama's nomination of Rebecca Haywood to the Third Circuit Court of Appeals, [stating](#), "The Administration knows that I have concerns about the nomination of Ms. Haywood to serve on the Third Circuit." He added, "Instead of blowing up a bipartisan working arrangement for judicial nominees that has done so much good for Pennsylvania," the president should "instead work across the aisle with Senator Casey and me to arrive at a consensus nominee as we have for every other vacancy since 2011."

At the time, Judiciary Committee Chairman Chuck Grassley respected Toomey's decision not to support Haywood's nomination; Grassley did

not schedule a hearing, nor did Haywood receive a committee vote. (If she had been confirmed, Haywood, chief of the Appeals Division in the U.S. Attorney's Office in the Western District of Pennsylvania and rated well qualified by the ABA, would have been the first African-American woman on the Third Circuit.)

Now, just two years later, the contrast between Grassley's approach to Haywood's nomination and his approach to Porter's could not be more stark. Casey is attempting to exercise the same right exercised by Toomey in withholding a blue slip on a judicial nominee. Chairman Grassley is refusing to honor Casey's right, and has [found](#) an ostensible new reason for doing so: "the blue slip isn't supposed to allow the unilateral veto of a nominee."

What makes this action even more striking is that Grassley has continued to espouse the value of the blue slip while not respecting it in practice. Publicly, he has [continued to maintain](#) that "[t]he blue slip serves the important purpose of encouraging consultation between the White House and the Senate. The White House has an obligation to engage in good-faith consultation with home-state senators. I won't allow the White House to just steamroll home-state senators."

Such statements stand in contradiction to the reality that Grassley is enabling the White House to run roughshod over Casey's rights with regard to the Porter nomination. Porter's nomination was fast-tracked from the start without consultation with Casey; the White

House decided to nominate Porter to the Third Circuit just four months after he first expressed interest in the position.

Since then, by Porter's own [admission](#), he has had no interactions with Casey.<sup>1</sup> Also, Casey had made clear prior to this nomination that he was willing to work with the White House to find consensus on nominees other than Porter; in fact, Casey returned his blue slip on [Stephanos Bibas](#) even though he opposed Bibas's confirmation, and he has supported Trump's nominees to the district courts in Pennsylvania.

The disrespect shown to Casey throughout the nomination process is deeply troubling and on its own could merit the withholding of a blue slip. But Casey's decision to withhold support is in fact based on his assessment of Porter's record. Porter's career has been marked by fidelity to highly ideological and partisan missions. He is [affiliated](#) with several ultraconservative groups, including the [Federalist Society](#).<sup>2</sup> He has a close relationship and is philosophically aligned with Leonard Leo, the president of the Federalist Society, as he made clear when he thanked Leo for his comments on a book review Porter [wrote](#) on *Ourselves and Our Prosperity: Essays in Constitutional Originalism*.<sup>3</sup> Disturbingly, Porter is a contributor to the Center for Vision & Values, a conservative think tank that has advocated against [LGBTQ rights](#) and argued that the [minimum wage](#) is unconstitutional. With former Senator Rick Santorum, he founded the [Pennsylvania Judicial Network](#), an organization which opposed the

nomination of U.S. Supreme Court Justice Sonia Sotomayor.

In addition, Porter has vocally [opposed](#) the legality of the Affordable Care Act. In a 2012 [article](#) for the Center for Vision & Values, Porter reviewed landmark Supreme Court decisions that upheld the National Labor Relations Act, the Fair Labor Standards Act and federal civil rights laws, and said that if the Supreme Court were to uphold the ACA under the Commerce Clause, it would "further stretch" and "break the Framers' structural design[.]" In the same article, Porter praised the Supreme Court's ruling in *United States v. Morrison*, which struck down part of the Violence Against Women Act.

As Pennsylvanians are well aware, Porter's many affiliations and statements are clear signifiers of a philosophy that is hostile to the civil and human rights progress of recent decades. His record has generated intense home-state opposition to his candidacy for a federal judgeship, both now and when the possibility has arisen in the past. This opposition is [well-documented](#) and should be taken very seriously by senators charged with evaluating this nominee.

Finally, we note that [Grassley's shabby treatment of Casey](#) with regard to the Porter nomination follows egregiously disrespectful treatment of Senators Tammy Baldwin, Ron Wyden and Jeff Merkley when they withheld blue slips on judicial nominees, and heightens our concern that the judicial nominations process is being irreparably damaged by the actions of the Chairman.

# BIOGRAPHY

David Porter is a [partner](#) at Buchanan Ingersoll & Rooney in Pittsburgh, Pennsylvania. He [received](#) his B.A. from Grove City College and his law degree from George Mason University School of Law.<sup>4</sup> After law school he clerked for Judge D. Brooks Smith, then a judge on the U.S. District Court for the Western District of Pennsylvania. Porter's practice at Buchanan Ingersoll focuses on business litigation in the areas of trade secrets, higher education, First Amendment and media law, copyright and trademark matters, shareholder and partnership disputes, banking, and civil rights.

After the White House announced Porter's nomination, Americans for Prosperity-Pennsylvania, a conservative think tank funded and run by the Koch brothers, [applauded](#) the nomination. AFP-PA's support was so strong that it soon announced that it would fund and run an advertising campaign in support of Porter.

# NOMINATION PROCESS

David Porter's name was first floated for a federal district court judgeship in 2014, when Sen. Toomey advocated for Porter as part of negotiations with the Obama Administration and Sen. Casey regarding judges in the state. Thousands of Pennsylvanians, however, made clear that Porter's career fighting civil rights,

environmental protections, access to health care, and other critical legal protections demonstrated that he would not be a fair-minded judge. After a [petition](#) with signatures of nearly 40,000 people opposing Porter's nomination was delivered to Senators Toomey and Casey, his name was pulled from consideration.

At the same time that Porter was being considered for a district court vacancy, there was a vacancy on the Third Circuit Court of Appeals. In August 2013, over two and a half years before she was ultimately nominated, [Rebecca Ross Haywood](#) submitted an application to Pennsylvania's nominating commission. Twice over the next two years, Haywood met with Toomey, and Toomey ultimately announced he would not return the blue slip on Haywood's nomination.

Chairman Grassley, respecting the blue slip tradition, [did not consider](#) Haywood's nomination.

Because Chairman Grassley respected Toomey's blue slip, the vacancy on the Third Circuit for which Haywood had been nominated remained vacant throughout Obama's term, leaving an opening for the Trump White House to nominate Porter last May. According to Porter's [Senate Judiciary Questionnaire](#), Porter first met with Toomey in November and December 2016 to discuss a federal judgeship. Only a few months later, in March 2017, the White House notified Porter of its intent to nominate him to the Third Circuit. Porter was eventually nominated in April 2018. Critically, Porter never met with Casey in connection with Porter's nomination to the Third Circuit.

At that time, according to The Philadelphia Inquirer, Casey “warned the White House he’s prepared to withhold Porter’s blue slip if Trump nominates [Porter].” Casey then worked with the White House in good faith, and [returned](#) his blue slip on Stephanos Bibas, another Third Circuit nominee, even though Casey had concerns about Bibas’s record and voted against Bibas’s confirmation.

In spite of this good-faith effort by Casey to work with the White House on judicial nominations, when there was a second vacancy on the Third Circuit, the White House chose to nominate Porter over Casey’s previously stated opposition.

It is therefore no surprise that Casey immediately made clear he could not support Porter, issuing the following [statement](#):

As a lawyer, David Porter has advocated legal theories that stack the deck against workers, deny Pennsylvanians access to health care and undermine the equal protection of our laws for all Americans. I have worked in a bipartisan way with Senator Pat Toomey to recommend and move forward candidates for the federal judiciary in Pennsylvania, even when I have had concerns about the candidates’ judicial philosophies. It is unfortunate that this Administration has decided to nominate, over my objections, an individual who is far outside the mainstream to a lifetime appointment to one of the most important courts in the nation: the Third Circuit Court of Appeals.

# LEGAL AND POLITICAL VIEWS

Porter’s record raises serious concerns regarding whether he will be a fair-minded jurist able to approach cases without bias toward any predetermined outcome. In a [2000 op-ed](#), Porter gave a clear indication of his own agenda when he applauded the nomination of John Ashcroft as Attorney General and wrote that Ashcroft is “pro-life, pro-death penalty, anti-gun control, prefers judges who exercise restraint and strictly construe the Constitution, and disfavors quota-based affirmative action plans.”

## I. AFFORDABLE CARE ACT

Porter is a vocal opponent of the Affordable Care Act. He has written several columns arguing the law is unconstitutional, including an op-ed in the Pittsburgh Post-Gazette in 2012 calling for the Supreme Court to strike down the individual mandate provision of the ACA. In that piece, Porter [argued](#) that the provision was unconstitutional and said that the individual mandate “compels individuals to buy insurance in an attempt to suppress the ruinous effects of the ACA’s other provisions.”

He has framed his legal objection to the ACA in terms of his originalist ideology, [saying](#) that “under the original understanding of [the Commerce Clause, the Necessary and Proper Clause and the Taxing Clause] and the more expansive interpretation given to them by the Supreme Court in recent decades, the mandate is an unprecedented assertion of federal control that violates the framers’ constitutional design.”

[In another piece](#), Porter engaged in a brief review of the Supreme Court’s Commerce Clause jurisprudence, concluding that compelling people to join the health insurance marketplace would be a “metaphysical abstraction” of the Commerce Clause that “threatens not merely to further stretch, but finally break the Framers’ structural design that for 225 years has preserved individual liberty and served as a check on unlimited federal power.”

After the Supreme Court upheld the individual mandate, Porter wrote an [op-ed](#) criticizing the decision and calling for the 2012 presidential election to be a referendum on the Supreme Court and the ACA.

## II. POLITICAL AND PARTISAN ACTIVITIES

Porter has extensive connections to ultraconservative groups that have worked to undermine critical constitutional rights and legal protections.

He [leads the Lawyers Chapter](#) of the Pittsburgh Federalist Society, an ultraconservative group to which President Trump has delegated several aspects of the judicial nominations process. In 2013, while Porter was the Pittsburgh chapter’s president, [the group invited Roger Clegg](#), President of the Center for Equal Opportunity (CEO), to give a presentation on voting rights. [The CEO is a right-wing think tank](#) that is anti-immigrant and anti-affirmative action.

In 2009, Porter was a [founding member of the Pennsylvania Judicial Network](#), a partner group of the Judicial Crisis Network that opposed the nomination of Sonia Sotomayor to the U.S. Supreme Court. Other founding members included former Senator Rick Santorum; Charlene Bashore, Legislative Director of the Pennsylvania Pro-Life Federation; Thomas J. Shaheen of the [Pennsylvania Family Council](#), which has advocated vigorously against women’s reproductive rights and against equality for LGBTQ persons; and Colin A. Hanna, President of [Let Freedom Ring](#), which states is was “[formed to counter the attacks](#) of anti-conservative groups on patriotic candidates as well as attacks on the important issues of our day—those that affect the core of our society: the family, marriage, the economy, energy, abortion, health care and foreign policy.”

Porter [praised](#) Senator Rick Santorum's 2005 book, *It Takes a Family*, writing that "[Santorum] argues, 'the currency of social capital is trust' and that 'is first created and then nurtured by healthy families,' a prosperous society 'depends on healthy mom-and-dad families.'"<sup>5</sup>

Porter called the book a "thoughtful articulation of conservative vision and public policy."

Porter is also a [contributor to The Center for Vision & Values](#), a think tank at Grove City College—where Porter is a [trustee](#). Grove City College [does not allow](#) its students to accept federal financial aid in order to avoid complying with Title IX. The Princeton Review [ranked](#) Grove City College as one of the least LGBTQ-friendly colleges in the country.

Illustrative of the Center for Vision & Values' mission is a piece on its website [supporting Neil Gorsuch's nomination](#) to the Supreme Court, based on the perception that Gorsuch favored "natural law." In the piece, the author writes that "[i]f you're endeavoring to fundamentally transform human nature, especially on issues like marriage, family, sexuality, and gender, then the natural law is your chief foe" and "[n]ature tells you what to do; you don't tell nature what to do. Just as your biology and your 74 trillion chromosomes tell you your gender; you don't tell yourself your gender." The Center has [also published pieces](#) critical of marriage equality and contraceptives and has regularly hosted

anti-LGBTQ activists at its annual conference.

The Center also [endorsed](#) Mark Levin's book, *Rediscovering Americanism and the Tyranny of Progressivism*, and noted that "all sorts of governments make laws that are unjust, especially laws that ignore or violate the natural law, from the legal right to own a slave to the legal right to kill unborn children, from the denial of the inherent humanity and dignity of a black person (the Dred Scott case) to the denial of the inherent humanity and dignity of an unborn person (Roe v. Wade and Casey v. Planned Parenthood). These laws of the state contravene the laws of nature. That, in essence, first and foremost, is why they are unjust laws."

Porter is a [member](#) of the Republican National Lawyers Association. He once represented former Senator Rick Santorum in [a dispute](#) about Santorum's ability to claim residency in Pennsylvania and [in a lawsuit](#) challenging the proposed deactivation of a Pennsylvania National Guard unit. In 2013, [Porter represented the Republican caucuses](#) of Pennsylvania's General Assembly in a lawsuit defending the constitutionality of a 2009 anti-environment bill that vastly expanded the amount of state forest land eligible for gas extraction.

# CONCLUSION

David Porter's nomination represents a highly politicized attempt to place a hard-line partisan ideologue on the federal bench over the objections of residents from his home state and one of his home-state senators. Porter's record shows a longtime dedication to and affiliation with far-right-wing causes, and his nomination to a federal judgeship has been met with an unusually high level of opposition by Pennsylvanians. He is strenuously opposed by one of his home-state senators, who has chosen to withhold a blue slip on the nomination. Nonetheless, Porter's nomination is being forcibly advanced by the same Judiciary Committee chairman who very recently acquiesced to Sen. Toomey's objections to an Obama nominee for a seat in the same circuit. If this effort succeeds, Porter will bring to the Third Circuit a record of clear hostility to accessible health care, reproductive rights, LGBTQ rights, and racial equality. Alliance for Justice strongly opposes his confirmation.

## ENDNOTES

- 1 Sen. Comm. on the Judiciary, 115th Cong., David James Porter Questionnaire for Judicial Nominees, 28-29, available at: <https://www.afj.org/wp-content/uploads/2018/05/David-Porter-Questionnaire-PUBLIC-OCR.pdf>.
- 2 Sen. Comm. on the Judiciary, 115th Cong., David James Porter Questionnaire for Judicial Nominees, 4-5, available at: <https://www.afj.org/wp-content/uploads/2018/05/David-Porter-Questionnaire-PUBLIC-OCR.pdf>.
- 3 David J. Porter, Book Review: *Ourselves and Our Posterity: Essays in Constitutional Originalism*, 2 GROVE CITY C. J. OF L. & PUB. POL'Y 63 (Spring 2011), available at: <https://www.afj.org/wp-content/uploads/2018/05/Review-Ourselves-and-Our-Posterity.pdf>.
- 4 Sen. Comm. on the Judiciary, 115th Cong., David James Porter Questionnaire for Judicial Nominees, 1, available at: <https://www.afj.org/wp-content/uploads/2018/05/David-Porter-Questionnaire-PUBLIC-OCR.pdf>.
- 5 David J. Porter, Book Review: *It Takes a Family*, MERE COMMENTS: THE TOUCHSTONE BLOG (Sept. 7, 2007), <http://touchstonemag.com/merecomments/2007/09/page/5/>.