



# Lucy H. Koh

## Nominee for the United States Court of Appeals for the Ninth Circuit

*On September 20, 2021, President Biden nominated Judge Lucy Haeran Koh, who currently sits on the U.S. District Court for the Northern District of California, to the United States Court of Appeals for the Ninth Circuit. Before her decade-long service on the District Court, Judge Koh had a distinguished career in public service and in private practice as a trailblazer in the technology and intellectual property field. If confirmed, Judge Koh would be the first Korean-American woman to serve as a federal appellate judge and the third AAPI woman to serve on any U.S. Circuit Court.*

### **Background**

Judge Koh was born in Washington, DC in 1968 to parents who had recently immigrated from South and North Korea. Judge Koh's mother was a teacher, and her father owned a series of small businesses. Judge Koh was raised in Mississippi and Oklahoma, where the family moved for her father's work. Being [bused](#) to predominantly Black schools in the post-*Brown v. Board of Education* South was one of the experiences that motivated Judge Koh to pursue a career in public service. Judge Koh graduated from Harvard University in 1990 with a B.A., *magna cum laude*, and received her J.D. from Harvard Law School in 1993. While at Harvard Law, Judge Koh represented low-income individuals in the school's legal clinics and interned at the NAACP Legal Defense and Educational Fund, the ACLU Immigrants' Rights Project, and the Natural Resources Defense Council.

### **Legal Experience**

Judge Koh began her legal career in public service. Directly after law school, she served as a Women's Law and Public Policy Fellow for the U.S. Senate Judiciary Committee. After the fellowship, she worked at the U.S. Department of Justice and assisted in the development, implementation, and enforcement of federal law. She first served as Special Counsel for Legislative Affairs and next as a Special Assistant to the Deputy Attorney General.

Judge Koh moved to Los Angeles and served as an Assistant U.S. Attorney in the Criminal Division of the Central District of California. There, Judge Koh largely prosecuted fraud cases and earned the FBI Director Louis J. Freeh Award for her successful prosecution of a \$54 million securities fraud case. In addition, Judge Koh prosecuted intellectual property crimes including identity theft, hacking, and counterfeiting.

Judge Koh then relocated to Northern California and developed expertise in technology and intellectual property law, first as a Senior Associate at Wilson Sonsini Goodrich & Rosati and later as a partner at McDermott Will & Emery.

At McDermott Will & Emery, she specialized in complex intellectual property litigation and represented both individuals and technology companies. As part of McDermott's representation of Seagate Technology, Koh was on the team that set a new standard for willful patent infringement for the first time in 24 years.

In 2008, Governor Arnold Schwarzenegger appointed Judge Koh to the California Superior Court, where she served for two years. In 2010, President Obama nominated Judge Koh to the United States District Court for the Northern District of California, and the Senate confirmed her 90-0.

On February 25, 2016, President Obama nominated Judge Koh to the Ninth Circuit seat vacated by Judge Harry Pregerson, who took senior status on December 11, 2015. On September 15, 2016, the Senate Judiciary Committee reported her nomination to the full Senate by a bipartisan [vote](#) of 13-7 (with the support of Republican senators Chuck Grassley, Orrin Hatch, Lindsey Graham and Jeff Flake). The full Senate never considered her nomination, and her nomination was returned to the White House with the expiration of the 114<sup>th</sup> Congress. Over the objections of both of California's home state senators, the Senate later confirmed President Trump's nominee, Daniel Collins, to fill Pregerson's seat.

### **Judicial Decisions**

Judge Koh has served as a United States District Judge for the Northern District of California since June 9, 2010. As a U.S. District Judge, she has issued approximately 3,250 opinions on a wide range of civil and criminal federal issues and has a reversal rate of just 1.3%.

### **PRIVACY AND TECHNOLOGY**

Judge Koh has issued several notable decisions in the area of privacy and technology law. Her predecessor on the bench, George H. W. Bush appointee Ronald M. Whyte, [commented](#) that "she seems to grasp tough technological issues as well as, if not better, than anybody . . . . She doesn't shy away from them." In [In re Yahoo Inc. Customer Data Sec. Breach Litig.](#), Judge Koh presided over litigation brought by millions of Yahoo users whose names, passwords, and data were lifted by hackers in 2014. Judge Koh ultimately approved a \$117 million settlement after rejecting a previous smaller settlement offer in which Yahoo attempted to minimize the extent of its data breaches. In [In re Anthem Inc. Data Breach Litig.](#), consumers sued Anthem for a data breach in which the insurance company had exposed the Social Security numbers, birthdays, income, and other private health information of 80 million people. Judge Koh ultimately approved a settlement of \$115 million which included credit services and funds for class members and changes to strengthen Anthem's security practices.

In presiding over [In re Google Inc. Gmail Litigation](#), Judge Koh addressed Google's collecting, scanning, and aggregating of information from user emails. The information, collected without consent, was used for advertising

purposes. Due to her rulings, Google ultimately increased the transparency of its terms of service and eliminated email scanning for education, business, and government accounts. In another Google data collection suit currently before Judge Koh, [Calhoun et al. v. Google LLC](#), class members alleged that Google violated its promise not to track data on Google Chrome when users are not in sync mode. In March 2021, Judge Koh rejected most of the claims in Google’s motion to dismiss, holding that users had not consented to the sweeping data collection that took place.

In [Prager University v. Google](#), Prager University, a conservative non-profit that creates YouTube videos about social and political issues, claimed that YouTube violated their First Amendment rights. Prager University argued that its rights were violated when some of its videos were unfairly tagged by the “restricted mode,” a setting users can enable to filter content. Judge Koh held that because YouTube is a private company and First Amendment claims require state action, the claim could not proceed. Her decision was upheld by a Ninth Circuit panel that included two George W. Bush appointees.

## **INTELLECTUAL PROPERTY**

Judge Koh presided over a seven-year long case in which Apple sued Samsung for patent and trademark infringement. The initial jury [order](#) went up to the Supreme Court, where the Court created a new standard for calculating damages in patent cases, and remanded to Judge Koh for a retrial. A jury ultimately found that Samsung was liable and ordered the company to pay Apple \$539 million dollars. [Throughout](#) the suit, Judge Koh “earned praise for her deft handling of that case and, more generally, for her fluency with technology—a rare quality among judges.”

Judge Koh also presided over a suit between Voip-Pal, a telecom company, and many of the nation’s largest tech companies including Apple, Twitter, AT&T, and Verizon. Voip-Pal claimed that the companies had infringed on its patents with their use of phone calls and text messaging. Judge Koh ultimately dismissed the four suits because Voip-Pal’s ideas were [too abstract](#) to meet the standard for computer patents established by the U.S. Supreme Court in 2014.

In [FTC v. Qualcomm](#), the Federal Trade Commission (FTC) claimed that Qualcomm, a modem chip maker, used anticompetitive tactics by refusing to license their patents to other chipmakers and charging excessive fees for their licenses. In 2019, Judge Koh ruled that Qualcomm violated U.S. antitrust law and ordered the company to re-negotiate all of its licensing deals. In 2020, the U.S. Court of Appeals for the Ninth Circuit reversed the decision. After deciding not to appeal to the U.S. Supreme Court, acting Chairwoman of the FTC Rebecca Kelly Slaughter [noted](#) that “the district court’s conclusion that Qualcomm violated the antitrust laws was entirely correct.”

## **CIVIL RIGHTS**

Judge Koh has gained extensive experience applying employment and labor law in the quickly-changing Northern California economy. In [In re High-Tech Employee Antitrust Litigation](#), tech workers sued Apple, Google, and others for conspiring to keep their salaries low. The conspiracy, discovered during a Department of Justice investigation of Silicon Valley employment practices, depressed workers' pay by 10% to 15%. Koh denied the companies' motion to dismiss and rejected an initial settlement offer as too low and giving too great a share to attorneys rather than employees. In *U.S. Equal Employment Opportunity Commission v. Air Systems Inc.*, Judge Koh presided over a suit in which an Apple subcontractor failed to address racial discrimination and threats of racial violence against Black electrical workers. At the construction site, the workers were harassed with a noose, threats of lynching, and racial slurs. In a consent decree, Judge Koh [ordered](#) a \$1.25 million payment to the workers and mandated that the subcontractor implement new policies and procedures to address racial discrimination.

In another notable civil rights ruling, Judge Koh denied qualified immunity to police officers who put attendees of a political rally in danger. In [City of San Jose v. Hernandez](#), attendees of a political rally for Donald Trump were attacked by anti-Trump protestors as they attempted to leave the rally. The attendees alleged that police officers increased the danger to them by leading them into the crowd of violent protestors and that the officers were deliberately indifferent to that danger. Judge Koh held that the police officers should be denied qualified immunity.

## **DEMOCRACY**

As a District Court Judge, Judge Koh made key decisions that ensured a fair and thorough 2020 U.S. Census count. In [National Urban League v. Ross](#), the National Urban League sued to challenge the Trump administration's plans to stop collecting Census data. Due to the COVID-19 pandemic, in April 2020 the Census Bureau extended the timeline to complete the Census count, but in August, the Trump administration reversed course and tried to end the count early. Judge Koh issued a preliminary injunction requiring that the federal government stick to the April 2020 plan made in response to the COVID-19 pandemic and continue the count until October 31, 2020. Two Ninth Circuit panels denied the government's request to stay the injunction, [noting](#) that the new plan "condensed the total time to conduct the census to 49.5 weeks, 4.5 weeks less than the pre-COVID schedule . . . and 22 weeks less than the extended COVID-19 schedule adopted to account for past and future pandemic related delays." On October 13, 2020, the U.S. Supreme Court stayed the preliminary injunction, allowing the Census Bureau to stop counting at that time.

In [City of San Jose v. Trump](#), the City of San Jose challenged the Trump administration's efforts to exclude undocumented people from the Census count used to apportion U.S. House of Representatives seats. Judge Koh, sitting by designation on the Ninth Circuit, joined a *per curiam* decision

on October 20, 2020, holding that such a count would be in conflict with the Constitution, which calls for a census count of all “persons,” and was an overreach of presidential power. The decision was appealed to the U.S. Supreme Court. On December 28, 2020, the Court vacated the decision and remanded to the U.S. District Court for the Northern District of California with instructions to dismiss for lack of jurisdiction.

## **ENVIRONMENT**

Judge Koh’s rulings have enforced federal environmental statutes, as in [Oceana v. Ross](#) where she held that the National Marine Fisheries Service had illegally overfished anchovy, a critical food source for ocean animals including whales, dolphins, and sea lions. Judge Koh also ruled twice against the Obama administration. In [Los Padres Forest Watch v. Forest Service](#), she ruled that the Administration did not include a proper assessment on federally protected eagle populations, and in [Shearwater v. Ashe](#) she held that a project to remove trees and vegetation to reduce fire risk failed to include public and expert input.

## **PUBLIC HEALTH**

In one recent case, Judge Koh [denied](#) a request for a preliminary injunction seeking to halt public health measures put in place by the state of California to address the COVID-19 pandemic, specifically restrictions on large at-home gatherings. Her decision was upheld by a Ninth Circuit panel of two Trump appointees and one George W. Bush appointee, with one judge partially dissenting. However, while Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan would have denied a petition for injunctive relief to the U.S. Supreme Court, a majority of the Court disagreed with Judge Koh and held that California’s order discriminated against religious worship, despite the fact that it applied equally to religious and secular home gatherings. In a dissent, Kagan [slammed](#) the Court for “[commanding] California “to ignore its experts’ scientific findings,” impairing “the State’s efforts to address a public health emergency,” and continuing to “disregard law and facts alike.”

## ***Professional Activities and Accolades***

Judge Koh was inducted as a member of the prestigious American Law Institute and currently serves as an advisor to the Data Economy Project. She was also invited by former Harvard Law Dean, Martha Minow, to serve on the law school’s Visiting Committee, and served on that Committee for eight years. She has received many accolades for her work on the bench, including the Trailblazer Award from the National Asian Pacific American Bar Association and the Mark T. Banner Award from the American Bar Association, Intellectual Property Law Section.

Throughout her career, Judge Koh has served her community as a volunteer. She has taken a leadership role in local bar associations and has sat on the

Board of Directors of the Asian Pacific American Bar Association of Silicon Valley and the Korean American Bar Association of Northern California. Judge Koh has done extensive pro bono work, including volunteering in Washington, D.C. and Southern California at citizenship drives, providing assistance in Los Angeles' Koreatown at free legal clinics, and serving as a volunteer judge for homeless veterans. In addition, Judge Koh volunteers at organizations benefitting the hungry and homeless, mentors local college and high school students, and judges mock trial, moot court, and speech competitions.