

The New Frontier of LGBT Equality: The California State and Federal Judiciary

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By California LGBT Judicial Coalition*

A diverse judicial branch is one comprised of judges from each diverse category of persons, including lesbian, gay, bisexual and transgender persons. As the judicial branch of California has recognized, “in order to serve the state of California effectively, the judicial branch should reflect the diversity of the state. The judicial branch must continue efforts to enhance public trust and confidence by *working with other branches of government toward a judicial branch that mirrors the state's diversity.*”¹ Although the Judicial Council has recognized that, in order to ensure access and fairness, the courts must reflect the increasing diversity of the state’s population, California’s judiciary still does not reflect that diversity, and representation of LGBT people on the bench is no exception.

Diversity on the bench is imperative for the equitable administration of justice. “Although judges must remain impartial in deciding all cases that come before them, having a broad range of diverse judges helps protect the public’s trust of the judicial system,” explains Barbara J. Cox, a nationally recognized authority on sexual orientation and the law and Vice Dean and Clara Foltz Professor of Law at California Western School of Law. “It is important for California’s judicial branch to reflect the LGBT diversity of its population.”

This article reports the status of LGBT presence in the California state and federal judiciary, explores why a diverse judiciary requires more LGBT judges, analyzes causes of the lack of diversity, and identifies remedies to improve diversity.

I. LGBT Presence is Necessary for a Diverse California Judiciary

From Sacramento to San Diego, the legal community in California as a whole, regardless of sexual orientation, acknowledges the importance of LGBT representation in California’s judiciary.

“It’s time for California to make a sustained commitment to increase LGBT representation throughout the judiciary. The legitimacy of the justice system depends on inclusion,” asserts Herbst Foundation Professor and Dean’s Circle Scholar at University of San Francisco School of Law Julie A. Nice.

Both San Diego County Bar Association President Richard Huver and Executive Director Ellen Miller-Sharp also highlight the importance of LGBT representation in the judiciary. “Our court system ensures justice for all, and therefore we should have a bench that represents all,” notes Huver, “Diversity in the judiciary, inclusive of individuals who represent all minorities & the LGBT community, is important to California’s court system.” And, in Ellen Miller-Sharp’s words, “Until we ensure that our bench adequately represents the diversity of our population,

¹ Judicial Council of California, *Justice in Focus, The Strategic Plan for California Judicial Branch 2006-2012*, Goal I, <http://www.courts.ca.gov/4629.htm> (Adopted Dec. 1, 2006).

including individuals who identify as LGBT, our justice system does not give an equal voice to all of our citizens."

"The greater Los Angeles area is the second largest metropolitan region in the country, and is home to a remarkably diverse population that is dynamic and growing. LGLA, an affiliate of the Los Angeles County Bar Association, works in partnership with other minority bar affiliates to create a diverse pipeline of qualified judicial candidates who reflect this dynamic community. A diverse judiciary works to instill confidence in the populace – the individuals who are affected every day by its decisions – that the courts resolve disputes with fairness, impartiality, and integrity." T. Peter Pierce, Secretary of the Lesbian and Gay Lawyers Association of Los Angeles.

Last, Yolanda Jackson, Executive Director and General Counsel of the Bar Association of San Francisco, acknowledges the value of LGBT presence in the judiciary, "Analyzing the depth of LGBT members of the bench is important work in our combined efforts on behalf of the citizens of California."

II. Lack of Reliable Demographic Data On LGBT Status

What is the current status of LGBTs in the judiciary at the state and federal levels in California? The answer to this question is not as easily obtained as one may think.

There are numerous challenges to obtaining precise demographic data on LGBT members of both the judiciary and community. Unwillingness to volunteer LGBT status is a common problem, illustrating that the social stigma of LGBT status continues to exist in California:

"Measuring sexual orientation and gender identity can be challenging since these concepts involve complex social and cultural patterns. As a group still subject to social stigma, many of those who identify as lesbian, gay, bisexual, or transgender may not be forthcoming about this identity when asked about it in a survey."²

Accurate and reliable statistics are crucial to ensure LGBT status is included in our discussions about diversity on the bench. The lack of precise demographic data on the LGBT population makes it difficult to analyze how disproportionate the LGBT bench is compared to the LGBT population in a specific geographic area.

In an effort to increase diversity in the judiciary, the Governor and the Commission on Judicial Nominees Evaluation (JNE) release a yearly demographic report summarizing the self-reported data collected on the gender, race, and ethnicity of California justices, judges and

² Gary J. Gates, Frank Newport, "Special Report: 3.4% of U.S. Adults Identify as LGBT," <http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx> (Oct. 18, 2012).

applicants through a voluntary questionnaire. Only recently, in 2011, California added LGBT status to the information gathered, with the LGBT statistics first released in the 2012 Demographic Report.³

Because the demographic data is collected through a voluntary questionnaire, the Governor releases the number of judges who did not provide responses to the questions regarding race, nationality and LGBT status. A closer look at the percentages, outlined in the below table, reveals the severity of the lack of accurate data on LGBT members of the judiciary. For example, in 2014, over 35% of the judges chose not to respond to the question regarding LGBT status whereas only 2.8% of the judges chose not to respond to the race/nationality questions.

CALIFORNIA JUDGES WITH NO INFORMATION PROVIDED ⁴		
	No Information Provided on LGBT Status	No Information Provided on Race/ Nationality
2011	672 (40%)	49 (2.9%)
2012	647 (39.1%)	49 (3.0%)
2013	625 (37.2%)	48 (2.9%)
2014	582 (35.2%)	46 (2.8%)

Further, each of California’s five LGBT bar associations work closely with the LGBT legal communities across the state and have vetted and recommended candidates for judicial appointments. As a result, the collective knowledge of the LGBT bar associations reveals some of the counties are undercounted in the Demographic Reports, for whatever reason.

III. LGBT Presence in the California State Judiciary

Historically, openly LGBT lawyers have not been appointed to judgeships at the same rate as non-LGBT lawyers. Appointment is the only way to become a justice on a California Court of Appeal or on the California Supreme Court. And while Superior Court judges may be elected, the Governor initially appointed almost 88% of the trial judges according to the most recent statistics.⁵

³ Judicial Council of California, *2015 Demographic Data Report*, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2014).

⁴ Judicial Council of California, *2015 Demographic Data Report*, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2014); Judicial Council of California, *2014 Demographic Data Report*, <http://www.courts.ca.gov/documents/2014-Demographic-Report.pdf> (as of December 31, 2013); Judicial Council of California, *2013 Demographic Data Report*, <http://www.courts.ca.gov/documents/2013-Demographic-Report.pdf> (as of December 31, 2012).

⁵ California Commission on Judicial Performance, *Summary of Discipline Statistics 1990-2009*, http://cjp.ca.gov/res/docs/Miscellaneous/Statistical_study_1990-1999.pdf, A-10, Table A-5.5.

“The California judiciary should be leading on the measure of LGBT inclusion. But we're trailing. Unfortunately, the lack of representation creates the perception of a lack of opportunity. Because LGBT lawyers seldom see a judicial appointment from their community, they remain reluctant to pursue these positions. We need strong leadership to make clear that California is committed to LGBT inclusion at every level of the judiciary.” Herbst Foundation Professor of Law, and Dean’s Circle Scholar Julie A. Nice.

Fortunately, the Governor’s office is beginning to address the low LGBT representation in the judiciary. Governor Brown should also be recognized and applauded for his commitment to appointing diverse judges to the California judiciary. He appointed the first gay and the first lesbian justices to the California Court of Appeal. In fact, Governor Brown appointed the first openly gay judge in the United States back in 1979.⁶

A. Historic Demographics

An examination of the California Judicial Demographic Reports for 2012-2015 reveal some fairly stark conclusions:

- There was no change in the total number of LGBT judges in California from 2013 to 2014.
- Currently, 45 of California’s 58 counties do not have any LGBT judges.
- Seven California counties with over 20 judges do not have any LGBT judges.
- There has never been an openly LGBT Justice of the California Supreme Court.
- The first openly LGBT Justice of California’s Courts of Appeal was appointed in 2012.
- The first openly LGBT judge on the Orange County Superior Court was appointed in 2014.
- There are no openly bisexual judges or justices in California.
- There is only a single transgender judge on California’s Superior Courts (and that judge was elected).
- Only 1 out of 23 LGBT judicial applicants was appointed in 2013.

For the official statistics on the number of LGBT judges appointed from 2012-2014 we can look to the judicial appointment data released annually by Governor Brown’s office for 2012-2014⁷ coupled with the demographic reports during the same time period.⁸

⁶ Eric Lesh, “Making Judicial History in California and the Importance of LGBT Judges,” <http://www.lambdalegal.org/blog/making-judicial-history-in-california-and-the-importance-of-lgbt-judges> (Dec. 21, 2012).

⁷ Press Release, *Governor Brown Releases 2014 Judicial Appointment Data*, <http://gov.ca.gov/news.php?id=18873>, (Feb. 27, 2015); Press Release, *Governor Brown Releases 2013 Judicial Appointment Data*, <http://gov.ca.gov/news.php?id=18428> (Feb. 28, 2014); Press Release, *Governor Brown Releases 2012 Judicial Appointment Data*, <http://gov.ca.gov/news.php?id=17939>, (Feb. 28, 2013).

LGBT JUDICIAL APPLICANTS VERSUS APPOINTMENTS					
	LGBT Applicants	LGBT Appointed	Total Appointed	Total Judges	Total LGBT Judges
2012	21	4	90	1656	39
2013	23	1	71	1681	41
2014	10	5	76	1655	41

As highlighted above, in 2014, Governor Brown appointed five self-identified LGBT judges and justices to California’s judiciary, equaling the total number of LGBT appointees made in the two preceding years combined.⁹ But at best, the Governor’s recent LGBT appointments have kept pace with open LGBTs who have left the judiciary. Based on the Judicial Council’s data, there has been *no change* in the total number of openly LGBT judges from 2013 to 2014. LGBTs are just trading water: even with recent appointments and election victories, the percentage of openly LGBT sitting California judges and justices still remains at a disappointing 2.4%.

Recently, Governor Brown appointed the first openly LGBT judge in Orange County. Casey R. Johnson, the current Vice President of the Orange County Lavender Bar Association, applauds this historic appointment:

“Governor Brown's appointment of Orange County's first openly LGBT judge in 2014 marked an historic step towards establishing a local judiciary that more accurately reflects Orange County's increasingly diverse population. Until this appointment, Orange County was the largest county in California by population without an openly LGBT judicial officer. As the Orange County Lavender Bar Association celebrates its 5th Anniversary, Orange County's commitment to diversity has never been stronger, and it is our sincere hope that this marks the first of many future such appointments.”¹⁰

⁸ Judicial Council of California, *2015 Demographic Data Report*, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2014); Judicial Council of California, *2014 Demographic Data Report*, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2013); Judicial Council of California, *2013 Demographic Data Report*, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2012).

⁹ Press Release, *Governor Brown Releases 2014 Judicial Appointment Data*, <http://gov.ca.gov/news.php?id=18873>, (Feb. 27, 2015).

¹⁰ Gary J. Gates, Frank Newport, “Special Report: 3.4% of U.S. Adults Identify as LGBT,” <http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx> (Oct. 18, 2012).

B. Current Demographics

The judiciary in California does not reflect its LGBT population. “The statistics for 2014 show slight growth, but it appears that the LGBT community is still not sufficiently represented in our judiciary consistent with the demographics of our state.” California Superior Court Judge Tara M. Flanagan (Alameda County).

Most recently, on March 4, 2015, the Judicial Council of California released its annual Demographic Data Report, the fourth such report that includes self-reported information on the LGBT status of California’s judiciary. The 2015 Demographic Report confirms California’s 1,655 state court judges and justices do not proportionally represent the state’s LGBT population.

CALIFORNIA’S OPENLY LGBT JUDGES FROM 2011-2014¹¹				
	2011 Demographics	2012 Demographics	2013 Demographics	2014 Demographics
Supreme Court (7 Justices)	0	0	0	0
Courts of Appeals (98 Justices in 2014)	0	1 (1%)	2 (2.1%)	2 (2%)
Superior Court (1,551 Judges in 2014)	37 (2.3%)	38 (2.4%)	39 (2.4%)	39 (2.5%)

At the local level, 45 of California’s 58 counties do not have *any* self-identified LGBT judges. In other words, the LGBT community is not represented in the judiciary in 78% of the counties in California. And, seven of these counties have over 20 judges.

CALIFORNIA COUNTIES WITH OVER 20 JUDGES AND NO LGBT JUDGES¹²					
	Total Judges	Lesbian	Gay	Bisexual	Transgender
Fresno Superior	41	0	0	0	0
Kern Superior	32	0	0	0	0
Sacramento Superior	59	0	0	0	0
San Joaquin Superior	28	0	0	0	0
Santa Barbara Superior	21	0	0	0	0
Stanislaus Superior	21	0	0	0	0
Ventura Superior	27	0	0	0	0

¹¹ Judicial Council of California, *2015 Demographic Data Report*, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2014).

¹² Judicial Council of California, *2015 Demographic Data Report*, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2014).

Further, of the 13 counties in California that do have openly LGBT judges (Alameda, Contra Costa, El Dorado, Imperial, Los Angeles, Marin, Mendocino, Orange, Riverside, San Bernardino, San Diego, San Francisco, San Mateo, Santa Clara), almost half of those counties are in the Bay Area. And the First District Court of Appeal, based in the Bay Area, is the *only* Court of Appeal with any openly LGBT justices.

SAN FRANCISCO REGION, OPENLY LGBT JUDGES¹³					
	Total Judges/Justices	Lesbian	Gay	Bisexual	Transgender
1st District Court of Appeal	20	1	1	0	0
6th District Court of Appeal	7	0	0	0	0
Alameda Superior	71	2	1	0	1
Contra Costa Superior	37	1	1	0	0
Del Norte Superior	2	0	0	0	0
Lake Superior	4	0	0	0	0
Marin Superior	11	1	0	0	0
Monterey Superior	17	0	0	0	0
Napa Superior	6	0	0	0	0
San Benito Superior	2	0	0	0	0
San Francisco Superior	47	4	2	0	0
San Mateo Superior	25	1	1	0	0
Santa Clara Superior	75	2	0	0	0
Santa Cruz Superior	11	0	0	0	0
Solano Superior	20	0	0	0	0
Sonoma Superior	19	0	0	0	0
TOTAL	374	12	6	0	1

Orange County

Orange County's population of over 3.1 million people (the third largest county by population in the state) is served by 113 judges - only one of whom identifies as LGBT. In other words, less than one percent.

ORANGE REGION, OPENLY LGBT JUDGES¹⁴					
	Total Judges/Justices	Lesbian	Gay	Bisexual	Transgender
4th District Court of Appeal	25	0	0	0	0
Orange County Superior	113	0	1	0	0
Riverside Superior	56	2	1	0	0
TOTAL	194	2	2	0	0

¹³ Judicial Council of California, 2015 Demographic Data Report, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2014).

¹⁴ Judicial Council of California, 2015 Demographic Data Report, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2014).

Los Angeles Region

Over a quarter of California's population resides in Los Angeles County.¹⁵ Not surprisingly, Los Angeles County is also home to 438 trial court judges, over 25% of the trial court judges statewide. But only nine of those judges self-identified as LGBT in the Report, approximately 2% of the total number of judges.

LOS ANGELES' REGION, OPENLY LGBT JUDGES¹⁶					
	Total Judges/Justices	Lesbian	Gay	Bisexual	Transgender
2nd District Court of Appeal	26	0	1 ¹⁷	0	0
Los Angeles Superior	438	4	5	0	0
Kern Superior	32	0	0	0	0
San Luis Obispo Superior	11	0	0	0	0
San Bernardino Superior	65	2	1	0	0
Santa Barbara Superior	21	0	0	0	0
Ventura Superior	27	0	0	0	0
TOTAL	620	6	6	0	0

San Diego Region

According to the 2015 Demographic Report, only three judges out of 126 in San Diego County identified as lesbian or gay in response to the judicial questionnaire, but it is commonly known that there are at least five openly LGBT judges on the San Diego Superior Court bench.

SAN DIEGO REGION, OPENLY LGBT JUDGES¹⁸					
	Total Judges/Justices	Lesbian	Gay	Bisexual	Transgender
4th District Court of Appeal	25	0	0	0	0
Imperial Superior	10	0	1	0	0
San Diego Superior	126	1	4 ¹⁹	0	0
TOTAL	161	1	5	0	0

¹⁵ U.S. Census Bureau: *State and County QuickFacts* – Los Angeles County, California, <http://quickfacts.census.gov/qfd/states/06/06037.html>.

¹⁶ Judicial Council of California, *2015 Demographic Data Report*, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2014).

¹⁷ This number is updated to reflect the appointment of Justice Luis Lavin to the Los Angeles Court of Appeal. Press Release, *Governor Brown Appoints Luis A. Lavin to the Second District Court of Appeal*, <http://gov.ca.gov/news.php?id=19016>, (June 26, 2015).

¹⁸ Judicial Council of California, *2015 Demographic Data Report*, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2014).

¹⁹ This number is updated to reflect the actual number of openly gay judges on the San Diego Superior Court bench.

Sacramento Region

For the greater Sacramento region only there are only two LGBT judges on the Superior Court bench.

SACRAMENTO REGION, OPENLY LGBT JUDGES²⁰					
	Total Judges/Justices	Lesbian	Gay	Bisexual	Transgender
3rd District Court of Appeal	25	0	0	0	0
5th District Court of Appeal	10	0	0	0	0
Alpine Superior	2	0	0	0	0
Amador Superior	2	0	0	0	0
Butte Superior	10	0	0	0	0
Calaveras Superior	2	0	0	0	0
Colusa Superior	2	0	0	0	0
El Dorado Superior	7	1	0	0	0
Fresno Superior	41	0	0	0	0
Glenn Superior	2	0	0	0	0
Humboldt Superior	7	0	0	0	0
Lassen Superior	2	0	0	0	0
Madera Superior	8	0	0	0	0
Mariposa Superior	1	0	0	0	0
Merced Superior	9	0	0	0	0
Modoc Superior	2	0	0	0	0
Mono Superior	2	0	0	0	0
Nevada Superior	6	0	0	0	0
Placer Superior	10	0	0	0	0
Plumas Superior	2	0	0	0	0
Sacramento Superior	59	1	0	0	0
San Joaquin Superior	28	0	0	0	0
Shasta Superior	10	0	0	0	0
Sierra Superior	2	0	0	0	0
Siskiyou Superior	4	0	0	0	0
Stanislaus Superior	21	0	0	0	0
Sutter Superior	4	0	0	0	0
Tehama Superior	4	0	0	0	0
Trinity Superior	2	0	0	0	0
Tulare Superior	18	0	0	0	0
Tuolumne Superior	4	0	0	0	0
Yolo Superior	10	0	0	0	0
Yuba Superior	5	0	0	0	0
TOTAL	404	2	0	0	0

²⁰ Judicial Council of California, 2015 Demographic Data Report, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2014).

The lack of LGBT representation in the California judiciary becomes more drastic at the appellate level. There are two openly LGBT justices, both sitting on the First District Court of Appeal.

CALIFORNIA APPELLATE LEVEL LGBT JUDGES²¹					
	Total Justices	Lesbian	Gay	Bisexual	Transgender
1st District Court of Appeal	20	1	1	0	0
2nd District Court of Appeal	26	0	0	0	0
3rd District Court of Appeal	10	0	0	0	0
4th District Court of Appeal	25	0	0	0	0
5th District Court of Appeal	10	0	0	0	0
6th District Court of Appeal	7	0	0	0	0
TOTAL	98	1	1	0	0

Many states have openly LGBT justices on their Supreme Courts. For example, Oregon has two openly LGBT justices (1 gay and 1 lesbian); Colorado, Connecticut, Hawaii, Massachusetts, Vermont, and Washington each have a single LGBT justice on their Supreme Courts. Puerto Rico also has an openly gay justice on its Supreme Court. So, why is California lagging behind?

IV. LGBT Presence in the California Federal Judiciary

Out of 874 authorized Article III judgeships in the country, there are 11 openly LGBTs. District Judge Deborah Batts of the Southern District of New York, who is on senior status as of April 2013, was the first openly LGBT Article III judge in the country, nominated by President Clinton and confirmed by the Senate in 1994.²² President Obama has nominated and successfully confirmed 11 openly LGBT Article III judges.

In all of California, there is only one openly LGBT Article III judge, the Honorable Michael Fitzgerald of the Central District of California, nominated by President Obama and confirmed by the United States Senate in 2012.

California has three openly LGBT federal magistrate judges, the Honorable Donna Ryu, Northern District of California, the Honorable Allison Claire, Eastern District of California, and the Honorable Ruben Brooks, Southern District of California.

Under President Obama, in 2011, Judge James Oetken was the first openly gay man nominated and confirmed Article III judge to serve on the federal bench. In 2013 Judge Pamela Chen became the first openly gay Asian American Article III judge nationwide. Also in 2013 Judge Nitza Quinones became the first openly gay Hispanic Article III judge nationwide. In

²¹ Judicial Council of California, *2015 Demographic Data Report*, <http://www.courts.ca.gov/13418.htm> (as of December 31, 2014).

²² Judge Vaugh Walker from the Northern District of California, who presided over *Hollingsworth v. Perry* (CA's Prop 8) case, nominated by Ronald Reagan and confirmed under George H.W. Bush, did not come out until 2011, after his retirement.

2014 Judge Darrin Gayles became the first openly gay African American Article III judge nationwide.

In the Central District of California, since Obama’s presidency, there have been eight Obama nominated and confirmed Article III judges, and only one is openly LGBT. There have been nine magistrate judges appointed by the judges in the CDCA since 2009. None of those appointed magistrate judges are openly LGBT.

In the Southern District of California, there have been four Obama nominated and confirmed Article III judges, and none are openly LGBT. Since 2009, there have been six magistrate judges appointed by the judges in the SDCA, and none are openly LGBT. There is one openly LGBT magistrate judge- Magistrate Judge Ruben Brooks, appointed in 1993.

In the Eastern District of California, there have been two Obama nominated and confirmed Article III judges, and neither is openly LGBT. Since 2009, of the eight magistrate judges appointed by the judges in the EDCA one is openly LGBT Magistrate Judge - Allison Claire, appointed in 2012.

In the Northern District of California, there have been six Obama nominated and confirmed Article III judges, and none are openly LGBT. Since 2009, of the seven magistrate judges appointed by the NDCA judges, one is openly LGBT - Magistrate Judge Donna Ryu, appointed in 2010.

Since 2009, there have been seven Obama nominated and confirmed Article III Ninth Circuit judges. However, there are no openly LGBTs on the entire Ninth Circuit, which covers the greater West Coast (Alaska, Washington, Oregon, California, Idaho, Montana, Nevada, Arizona, Hawaii, and Guam). In fact, there is only one openly LGBT federal appellate judge in the entire country, The Hon. Todd Hughes of the Federal Circuit, nominated by President Obama and confirmed by the US Senate in 2013.

CALIFORNIA’S FEDERAL JUDGES²³					
	Total Judges	Lesbian	Gay	Bisexual	Transgender
United States Court of Appeals for the 9th Circuit (AL, WA, OR, CA, ID, MN, NV, AZ, HI. Guam)	29	0	0	0	0
California District Court Judges * (active judges, not including senior judges)	62	0	1	0	0
California Magistrate Judges	65	2	1	0	0

²³ Data for both tables in this section were retrieved from http://www.fjc.gov/history/home.nsf/page/courts_district_ca.html; <https://www.whitehouse.gov/share/judicial-nominations>; and from each court’s websites, www.cand.uscourts.gov; www.caed.uscourts.gov; cacd.uscourts.gov; and casd.uscourts.gov.

JUDGES NOMINATED AND CONFIRMED DURING THE OBAMA PRESIDENCY (2009 - Present)				
Ninth Circuit and US District Courts of California	Obama Nominated and Confirmed Article III Judges	LGBT Article III Judges	Magistrate Judges* <small>(*selected by the district court judges)</small>	LGBT Magistrate Judges
United States Court of Appeals for the 9th Circuit	7	0	NA	NA
EDCA	2	0	8	1
NDCA	6	0	7	1
CDCA	8	1	10	0
SDCA	4	0	6	0
TOTAL	27	1	31	2

The responsibility for making appointments of Article III judges is shared by the President and the Senate. Pursuant to the Constitution’s Appointments Clause, the President nominates persons to fill federal judgeships, with the appointment of each nominee also requiring Senate confirmation. California’s two Senators each take turn reviewing and recommending the candidates to the White House. Politics is inherent in this process.

Candace Carroll, who currently chairs Senator Barbara Boxer's Judicial Appointments Committee for the Southern District of California, aptly sums up the process and the importance of creating a pipeline:

"It is important to be sure that all U.S. Senators understand the importance of LGBT diversity on the federal bench (because the whole Senate has to confirm judicial nominees), but it must also be remembered that there are many fewer district court judges than there are state court judges, and that an effort is made to appoint to federal seats the best of the best. That means the LGBT community has to make sure that there are many highly-qualified LGBT candidates available and applying from private practice, from the U. S. Attorneys' offices, from the magistrates' bench, from the state court bench, and so on."

While many in the LGBT community decry the lack of LGBTs on the federal judiciary, they acknowledge the LGBT community’s first and foremost responsibility is to take an active role in this process.

“Local LGBT bars must be mindful that they hold the first responsibility of creating a pipeline of candidates and equally important, making sure that the decision makers along the process are aware of the community’s interest in having LGBTs on the Federal Bench.” Steve Muni, 2015 Board of Directors Co-chair and Chair of Judiciary Committee of Sac LEGAL, Sacramento’s LGBT Bar Association.

Federal courts issue decisions that affect nearly every aspect of life for LGBT people, and those courts often have the final say in many of the most important issues of day. The federal courts provide the gateway for achieving broader civil rights victories by issuing findings of fact that frame the cases and legal issues going forward.

The lack of LGBT judges diminishes public confidence in the ability of the bench to act fairly on matters important to the LGBT community and may diminish the ability of the bench as a whole to act as impartial decision makers pursuing justice. The federal judiciary, including U.S. Magistrate Judges and U.S. District Court judges, should reflect the population that it serves, including the LGBT community. The public does not perceive the federal bench as impartial decision makers pursuing justice when the judiciary does not reflect the community. Likewise, a diverse federal judiciary acts more effectively as impartial arbiter pursuing justice because of the greater diversity of knowledge within the judiciary.

V. Looking Forward

There are many reasons for the underrepresentation of LGBT people in California's stated and federal judiciary. We in the LGBT legal community must harness our collective energy and explore solutions.

First, and foremost, the stigma of LGBT status must be dispelled in order to expand the pool of LGBT judicial applicants and gather reliable statistics. Dean Cox recognizes the effect of this stigma:

“Unless judges are willing to be open about their sexual orientation, then their representation on the bench does not help show LGBT diversity in the judicial profession. It is understandable, however, that some judges fear that they will be discriminated against if they are open about their sexual orientation since they have to win elections to maintain their seats. ... I would encourage all LGBT judges to be open and out, but I know it is difficult when discrimination still exists.”

The limited representation of open LGBT judges on the bench affects both LGBTs' and the public's perception of LGBTs in society. Dean Cox explains, “Having judges who are openly LGBT helps show the public that LGBT people are found throughout society.” In addition, Dean Cox recognizes that “Seeing ourselves as members of the judiciary is as important as seeing ourselves as lawyers, senior partners, leaders of organizations, professors, and other positions.”

Second, we must recognize the role the support and mentorship from our LGBT leaders, attorneys, and judges plays in increasing LGBT representation in the judiciary and in exploring ways to publicize that support. Direct mentorship is not always the most far-reaching method to increase diversity, especially in the historically closeted LGBT population. Sometimes, mere exposure to successful, openly LGBT judges is sufficient to inspire the path to judgeship.

Judge Flanagan’s journey to the bench is a prime example of this concept. Her personal experience highlights the importance of openly LGBT judiciary members as role models. “To create diverse future leaders, lawyers and judges, we must have diverse role models. The moment I met Judges Stephen Lachs (the first openly gay judge in the United States) is the moment I knew it was possible to be gay or lesbian, be out, and to be a judge.”

Creating a California LGBT judges association would also foster a more diverse judicial pipeline. Among other things, such an association could serve to illustrate a cohesive LGBT presence and inspire the LGBT community to seek appointment.

A California LGBT judges association could also serve as a valuable resource for mentoring LGBT judicial candidates. Dean Cox and the Honorable Tara Flanagan both recognize the importance of LGBT judges as mentors. “It’s important for judicial officers to serve as mentors to attorneys who are interested in pursuing these positions.” Dean Cox stated. “Their willingness to support others by mentoring, availability, and involvement is very important.”

Beyond judicial officers, the LGBT community as a whole can make a difference by advocating for qualified LGBT judicial candidates during the judicial vetting process. “Many in the LGBT community feel that we simply need to do more. More political pressure, more lobbying, more identifying and mentoring our LGBT lawyers to become candidates for judges, and being more vocal about these issues. It is not acceptable that the community does not have an openly LGBT Article III judge in the Northern District of California. I think many people in our community have a false impression that the federal bench is diversified with LGBT judges. It is not. When federal judge openings in our district come up, there has not been adequate pressure from our community to consider LGBT candidates. How can we expect the decision makers in the vetting and appointment process to listen if we as a community are not being loud and clear?” Denise Bergin, BALIF (San Francisco Bay Area’s LGBT Association) Board Member and co-chair of Judiciary Committee.

And, of course, the best method for remedying the issue is through the appointment process, which begins with qualified LGBT applicants in the pipeline. “This vital pipeline feeds into the judiciary, creating a bench that reflects the community it serves,” acknowledges Yolanda Jackson, Executive Director and General Counsel of the Bar Association of San Francisco. “With more qualified LGBT applicants, the judiciary, the governor, and the LGBT community can work together to ensure that California’s LGBT population is adequately reflected in its judiciary.”

Across the state, California’s LGBT bar associations are embracing the importance of their role. “The LGBT legal community acknowledges that our own challenge is to develop a larger pool of qualified lesbian, gay, bisexual and transgender judicial candidates,” recognizes Kimberly Ahrens, Co-President of Tom Homann LGBT Law Association, San Diego’s LGBT bar association. “As leaders of the various LGBT bar associations in California, we are exploring methods to achieve this goal. We believe the Governor recognizes the significance of a diverse bench and we look forward to working with the Governor’s office in this regard.”

Fortunately, opportunities currently exist throughout California for judicial appointments. There are currently seven vacancies in California's Courts of Appeal and 63 vacancies in Superior Courts throughout the state.²⁴ There are also two openings for Article III judges in U.S. District Courts in California.²⁵ The judiciary, the Governor, and the LGBT legal community all have opportunities to encourage openly LGBT lawyers to seek appointments and to seek elective judicial office.

“California has the largest judicial system in the Nation. For the People to perceive that the justice system is just, the judicial branch must be accessible to them and reflect who they are. When the judiciary does not reflect the People, it loses credibility because it does not appear to be a place where justice can be found,” Mattheus Stephens, Board Member of the Victory Fund acknowledges. “This makes it critical to appoint and elect more openly LGBT judicial officers. The credibility of the Nation's largest judiciary depends on it.”

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About California LGBT Bar Coalition. California LGBT Bar Coalition, a group comprised of representatives of each of California's LGBT bar associations, monitors, analyzes and promotes LGBT representation on the bench. The members of the coalition that contributed to this article include:

Kimberly Ahrens: **THLA**, Tom Homman LGBT Law Association (San Diego's LGBT bar), <http://www.thla.org>;

Andrew Chang & Andrew Vu: **BALIF**, Bay Area Lawyers for Individual Freedom, (San Francisco Bay Area's LGBT bar association), <http://www.balif.org>;

Casey Johnson: **OCLBA**, Orange County Lavender Bar Association, <http://www.oclba.org>;

Steve Muni: **SacLEGAL** (Sacramento's LGBT bar association), <http://www.saclegal.org>; and

Peter Pierce & Mark Lemke: **LGLA**, Lesbian and Gay Lawyers Association of Los Angeles (LA Area's LGBT bar association), <http://www.lgla.net>.

²⁴ Judicial Council of California, *Judicial Vacancy Report*, <http://www.courts.ca.gov/documents/jvr-0515.pdf> (May 31, 2015).

²⁵ United States Courts, *Current Judicial Vacancies*, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (May 22, 2015).