



November 13, 2019

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Graham, Ranking Member Feinstein, and Committee Members:

On behalf of our 1.5 million supporters nationwide, People For the American Way opposes the nomination of Lawrence VanDyke to be a United States judge on the Ninth Circuit Court of Appeals. Although nominated to a seat designated for a Nevadan, VanDyke's connections to the state are sparse. He has been found unqualified by the ABA, an evaluation that came as little surprise given what was already in the public record before his nomination. He has worked as a culture warrior fighting to enlist the judicial branch as a partner to advance the ideological agenda of the Republican Party's funders and base.

The American Bar Association's Standing Committee on the Federal Judiciary has carefully evaluated VanDyke's record, based solely on a review of "integrity, professional competence, and judicial temperament."¹ Because the first review found him unqualified, the committee directed a former chair to conduct a supplemental review to ensure fairness. The results were the same, and a substantial majority of the 15-member committee found him unqualified.

The ABA's report was exhaustively researched, based on conversations with those who are most familiar with VanDyke's professional work:

The evaluator's Formal Report is based on 60 interviews with a representative cross section of lawyers (43), judges (16), and one other person who have worked with the nominee in the four states where he has worked and who are in a position to assess his professional qualifications. They include but are not limited to attorneys who worked with him and who opposed him in cases and judges before whom he has appeared at oral argument. The evaluator obtained detailed background materials such as more than 600 pages of publicly produced emails involving and/or written by Mr. VanDyke, news reports where Mr. VanDyke had been interviewed, and articles and opinions written about him.

VanDyke's lack of qualifications are striking. The ABA found:

Mr. VanDyke's accomplishments are offset by the assessments of interviewees that Mr. VanDyke is arrogant, lazy, an ideologue, and lacking in knowledge of the day-to-day practice including procedural rules. There was a theme that the nominee lacks humility, has an "entitlement" temperament, does not have an open mind, and does not always have a commitment to being candid and truthful.

...

Even though Mr. VanDyke is clearly smart, comments were made that in some oral arguments he missed issues fundamental to the analysis of the case. There were reports that his preparation and performance were lacking in some cases in which he did not have a particular personal or political interest.

This conclusion should not have come as a surprise, because it reflects material that was in the public record before the White House selected him. In 2014, when VanDyke was running for a seat on the state supreme court, the press reported on scathing office emails from his colleagues, those who knew his work best. For instance, Mike Black, Chief of the Civil Services Bureau of the Montana Department of Justice, wrote this in an email to Deputy Attorney General Mark Mattioli and Chief of Staff Scott Darkenwald:

For the past year, I have been told the AG wants to run this office like a law firm. But running a law firm means insisting on accountability, rewarding proficiency, and demanding professionalism, Ever since he has arrived, Mr. VanDyke has been arrogant and disrespectful to others, both in and outside of this office. He avoids work. He does not have the skills to perform, nor desire to learn how to perform, the work of a lawyer. Now that he has resigned and refuses to work on cases assigned to him, while remaining on the payroll for the next several months, I am not allowed to disclose he is leaving even when it would be prudent in order to obtain extension of deadlines because we are short-handed. This is not how to run this office like a law firm.ⁱⁱ

Black was hardly alone in his professional assessment of VanDyke: Mattioli replied that “your frustration does not exceed ours.”

Similarly, it comes as little surprise that VanDyke’s colleagues told the ABA that they found him to act in an entitled manner. His career highlights reflect a sense of entitlement to hold positions of responsibility and honor that he is simply not qualified for. He felt entitled to run for the Montana Supreme Court despite not meeting the state’s constitutional requirement of being admitted to the practice of law in the state for at least five years. He felt entitled to work as the solicitor general of Nevada even though he was not eligible to actually practice law in the state. And now, he feels entitled to fill a seat designated for a Nevadan.

President Trump bypassed Nevada Sens. Jacky Rosen and Catherine Cortez Masto to make this nomination.ⁱⁱⁱ In fact, the White House bypassed the entire state, selecting a nominee with so few ties to Nevada that its senators consider him “an outside political operative.”^{iv} Van Dyke is a Washington lawyer who grew up in Montana, who went to college in Montana, and who went to graduate school in Montana. He moved east for law school and afterward, but he eventually returned to Montana for a brief but tumultuous stint as solicitor general in 2013-2014. He quit that job to run for the state supreme court, and when he lost, he accepted an offer to work as solicitor general in Nevada, a state he had never practiced law in. In fact, he did not bother to join the Nevada Bar until late 2017, more than two and a half years after taking the job, and only after concerns were raised about the legality of his holding the position for so long as someone not licensed to practice law in Nevada. He left in 2019 to work in Washington DC for the Trump administration. VanDyke does not live in Nevada, does not work in Nevada, and does not own property in Nevada.

VanDyke’s defenders note that he spent “most of his adult life in the West.”^v But Montana is not Nevada, and noting that they are both western states does not make VanDyke a Nevadan. U.S. senators understand that their states are not fungible. To the contrary, each state is unique and has a legal community that is separate and apart from those of other states. That is why Congress requires that there be at least one judge from each state within a circuit,^{vi} and why senators have traditionally associated circuit judgeships with particular states.

Bypassing many qualified Nevadans, the White House appears to have selected VanDyke for his work for conservative political causes—the kind of political and ideological record that Republicans have made clear is what they look for in a circuit court nominee. Sen. Ted Cruz made this explicit in 2019 while questioning Sul Ozerden for the Fifth Circuit. Specifically, the litmus test asks whether a nominee is a conservative; has been affiliated with the conservative movement; has volunteered his time to advance conservative causes; has been active in conservative legal circles; and (for those already on the bench) has written judicial decisions that have advanced conservative principles.^{vii}

For those seeking to fill the bench with narrow-minded elitists who can be counted upon to bend the law in favor of corporate and wealthy interests and against target communities, VanDyke’s record matches up with their checklist perfectly. He currently works for the Justice Department’s Environment and Natural Resources Division under the Trump administration, whose environmental policies are anything but beneficial to the environment or to the nation’s health. That has given him the opportunity to defend the Keystone XL pipeline, advocate to repeal rules protecting federal and tribal land from the impact of fracking, and empower drilling permits without due consideration of the harm they would cause. Not coincidentally, this is the same agenda he had followed as a state official joining a lawsuit against the Obama-era EPA’s Clean Water Rule, filing an amicus brief seeking to invalidate the Clean Power Plan, and opposing efforts to protect sage-grouse habitats.^{viii}

He has also indicated a narrow conception of the rights of working people that advantages corporate interests. When Neil Gorsuch was nominated to the Supreme Court, VanDyke praised his infamous 10th Circuit ruling in *TransAm Trucking v. Administrative Review Board* (sometimes referred to as “the frozen trucker case”).^{ix} In a dissent, then-Judge Gorsuch would have upheld the right of a company to fire an employee for not obeying instructions to remain parked in an unheated truck in sub-zero weather, possibly for hours, even though he had already been waiting for hours, felt numbness in his extremities and torso, and had difficulty breathing. Gorsuch wrote that a law giving truckers the right not to put their own lives at risk did not apply. This was one of the most callous (and legally unsound) dissents during his time on the Tenth Circuit, and it is telling that VanDyke chose this case as a reason to *support* Gorsuch’s nomination to the Supreme Court.

VanDyke has also used his legal training to advance policies targeting LGBTQ+ people for mistreatment. The very first chance he had to use his legal education, he chose to use it to harm LGBTQ+ people. In 2003, the summer after his first year of law school, he worked at the zealously anti-LGBTQ+ Alliance Defending Freedom (then called the Alliance Defense Fund). In 2004, he wrote an article stating that there is “ample reason for concern that same-sex

marriage will hurt families, and consequentially children and society.” As evidence, he cited a non-sequitur: studies showing that children raised by two opposite-sex parents fare better than children raised in unstable or single-parent families. In the same article, he suggested that same-sex couples in the United States should not have the legal right to marry in part because other countries—which are not governed by the U.S. Constitution—have allegedly violated the free speech rights of marriage equality opponents.^x As Montana solicitor general, he supported signing on to amicus briefs stigmatizing same-sex couples’ relationships and denying them the legal rights of marriage. He has also participated in several ADF panel discussions, including as recently as August of this year.^{xi}

VanDyke has also used his position in government to diminish abortion rights through the courts. As Montana solicitor general, he submitted an amicus brief urging the Supreme Court to uphold an Arizona law banning abortion after 20 weeks, which was clearly unconstitutional under precedent saying states cannot prohibit abortion pre-viability. He made the ludicrous claim that the law had neither the purpose nor the effect of imposing an undue burden on the right to abortion. Instead, he claimed, it simply “channel[s]” that right. VanDyke argued that the Court’s abortion jurisprudence had never considered the scientifically dubious assertion that a fetus feels pain weeks before viability, thereby creating a heretofore unconsidered state interest to justify abortion restrictions. In other words, he asked the Court to reconsider its entire line of cases recognizing a constitutional right to abortion.^{xii}

In fact, VanDyke’s actions in his 2014 run for the Montana Supreme Court strongly signaled that, if elected, he would have used the bench to impose his own policy preferences over the law. As a candidate for elected office, he received a questionnaire from the NRA, and he expressed strong views against gun violence prevention measures. He told Judiciary Committee members in his responses to written questions for the record:

As noted in my email transmitting the completed questionnaire [to the NRA], the questionnaire was “obviously geared towards legislative candidates,” so I “answered it as if I was a legislative candidate. My role as a [state] Supreme Court justice would be different, obviously. Legislators make the law. Justices apply the law; they shouldn’t be legislating from the bench. And if elected to the Montana Supreme Court, I am 100% committed to being a justice who correctly *applies* the law.”^{xiii}

If VanDyke truly believed that his personal views were irrelevant, then he would not have returned the questionnaire “as if I was a legislative candidate.” The way he approached the NRA questionnaire revealed how he would use his position as an appellate court judge. He clearly signaled his agreement with the organization’s agenda, then added boilerplate lines about the proper role of a judge—language that would have been unnecessary but for his decision to make his personal policy positions relevant to the campaign.

We urge all senators to oppose VanDyke’s nomination to a lifetime seat on the Ninth Circuit.

Sincerely,



Marge Baker
Executive Vice President for Policy and Program

ⁱ Letter from Chair William Hubbard of the ABA Standing Committee on the Federal Judiciary to Judiciary Committee Chair Lindsey Graham and Ranking Member Dianne Feinstein, Oct. 29, 2019, https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/10-29-2019-vandyke-rating.pdf (“ABA letter”).

ⁱⁱ John Adams Records Request, Sept. 2014, p. 667, posted at <https://s3.amazonaws.com/s3.documentcloud.org/documents/1284252/foi-request-re-montana-solicitor-sept-2014.pdf> (“FOIA Records”).

ⁱⁱⁱ “Rosen, Cortez Masto Statement on White House Announcement of Ninth Circuit Nomination,” Sept. 20, 2019, <https://www.rosen.senate.gov/rosen-cortez-masto-statement-white-house-announcement-ninth-circuit-nomination>.

^{iv} “Rosen Speaks on Senate Floor In Opposition to Ninth Circuit Court Nominee,” Oct. 31, 2019, <https://www.rosen.senate.gov/node/483>.

^v “Who Is Lawrence VanDyke,” Carrie Severino, National Review, Sept. 20, 2019, <https://www.nationalreview.com/bench-memos/who-is-lawrence-vandyke>.

^{vi} 28 U.S.C. 44(c).

^{vii} Confirmation hearing for Halil Suleyman Ozerden to be a United States Circuit Judge for the Fifth Circuit, Senate Judiciary Committee, July 17, 2019, <https://www.judiciary.senate.gov/meetings/07/17/2019/nominations>, starting at 0:58:47.

^{viii} League of Conservation Voters, “Oppose the Judicial Nomination of Lawrence VanDyke to the United States Court of Appeals for the Ninth Circuit,” Oct. 24, 2019, <http://www.lcv.org/article/re-oppose-judicial-nomination-lawrence-vandyke-united-states-court-appeals-ninth-circuit>.

^{ix} “What Gorsuch understands about unelected judges,” Adam Laxalt and Lawrence VanDyke, Fox News, Feb. 8, 2017, <https://www.foxnews.com/opinion/what-gorsuch-understands-about-unelected-judges>.

^x “One student’s response to ‘A Response to Glendon,’” Lawrence VanDyke, The Harvard Law Record, March 11, 2004, <https://web.archive.org/web/20160322082152/http://hlrecord.org/2004/03/one-students-response-to-a-response-to-glendon>.

^{xi} Senate Judiciary Committee Questionnaire, <https://www.judiciary.senate.gov/download/lawrence-vandyke-sjq-public>.

^{xii} Brief amici curiae of States of Ohio and Montana and 14 other States, *Isaacson v. Horne*, Supreme Court docket 13-402, <http://www.ohioattorneygeneral.gov/OhioAttorneyGeneral/files/e5/e5fa00ee-6a4b-45aa-b1db-0fc2549d08c9.pdf>.

^{xiii} VanDyke Questions for the Record, <https://www.judiciary.senate.gov/download/vandyke-responses-to-questions-for-the-record>, p. 2.