



## ***What you need to know about the nomination of Kevin Newsom to the Eleventh Circuit Court of Appeals***

Kevin Newsom is President Trump's nominee to fill an Alabama vacancy on the Eleventh Circuit Court of Appeals. Newsom replaces President Obama's nominee to this seat, Judge Abdul Kallon, who would have been the first African American from Alabama on the Eleventh Circuit. The Republican-controlled Senate refused to give Judge Kallon a hearing while his nomination languished for over 300 days.

Newsom is currently a partner at Bradley Arant Boult Cummings LLP in Birmingham, and previously served as Solicitor General for the State of Alabama. Newsom's record raises concerns in a number of civil rights areas, including capital punishment, which remains [a core area of LDF's work](#). Newsom has opposed limitations on capital punishment (including the Supreme Court's holding that juvenile offenders cannot be sentenced to death), worked to restrict death row prisoners' access to judicial remedies, and defended—both in court and the press—Alabama's particularly harsh and unjust death penalty system. In other areas, he has advocated for narrowing statutory civil rights protections, and questioned the Supreme Court's jurisprudence recognizing fundamental rights, including by comparing *Roe v. Wade* to the Supreme Court's 1857 *Dred Scott* decision that affirmed slavery.

### **Judicial Diversity**

- Since 1891, only white males have represented Alabama on the federal court of appeals. President Obama tried to change that by nominating Judge Kallon, who in 2009 was unanimously confirmed to the Northern District of Alabama with the support of Senator Richard Shelby and then-Senator Jeff Sessions. Judge Kallon would have added much-needed diversity to the entire court. The population within the Eleventh Circuit—which hears federal appeals from Alabama, Florida, and Georgia—is 25 percent African American, yet the court has only one Black judge among its 11 current members.
- Trump's replacement of Judge Kallon with Newsom is part of a disturbing trend: So far, Trump has replaced eight judicial nominees of color left pending at the end of last Congress, and in each case he has done so with a white nominee. Overall, of Trump's 25 Article III judicial nominees, 24 are white and not one is African American.

### **Capital Punishment**

- In 2006, as Alabama's Solicitor General, Newsom defended Alabama's failure to provide counsel to death row prisoners seeking post-conviction relief.<sup>1</sup> Alabama relied solely on nonprofit organizations and *pro bono* counsel—usually large commercial law

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<sup>1</sup> See *Barbour v. Haley*, 471 F.3d 1222 (11th Cir. 2006).

firms—to provide volunteer assistance. As the Supreme Court later observed, the result was that “some prisoners sentenced to death receive no postconviction representation at all.”<sup>2</sup> In addition, the American Bar Association’s “Alabama Death Penalty Assessment Report” found that, “as of April 2006, approximately fifteen of Alabama’s death row inmates in the final rounds of state appeals had no lawyer to represent them,” and “more than a dozen death-sentenced inmates currently seeking post-conviction relief do not have any counsel, let alone counsel trained in death penalty post-conviction representation, to help them properly prepare their petition to avoid summary disposition.”<sup>3</sup> Yet in defending the policy, Newsom criticized the prisoners for portraying a “gloom-and-doom tale” about the state of postconviction relief in Alabama,<sup>4</sup> and [in the press he said](#) that the representation Alabama’s death-sentenced prisoners receive “is second to none” and “the idea that inmates are en masse unrepresented, and wandering through the system alone, is just not true.”

- Newsom argued to the Supreme Court on two separate occasions that death-sentenced prisoners cannot challenge methods of execution via § 1983, the federal statute that allows people to sue state actors for civil rights violations. Newsom’s position meant that death row prisoners with such claims would have no access to federal court. The Supreme Court unanimously rejected his argument in both cases.<sup>5</sup> After these decisions, Newsom [told the Washington Post](#) that “it’s discouraging” and warned that “the floodgates are, to a certain extent, open.”
- After the Supreme Court held in *Roper v. Simmons* that it is unconstitutional to execute juvenile defenders,<sup>6</sup> Newsom said he regretted the ruling because juries are fully capable of considering age when they impose a penalty.<sup>7</sup> He said: “I just don’t think the science has demonstrated . . . that there is no 16- or 17-year-old . . . that can possibly fully . . . understand . . . the wrongfulness of his actions, and the consequences of those actions sufficiently to warrant at least eligibility for society’s ultimate punishment.”<sup>8</sup>

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<sup>2</sup> *Maples v. Thomas*, 565 U.S. 266 (2012).

<sup>3</sup> American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* (June 2006), <https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf>.

<sup>4</sup> Brief of Defendants-Appellees, *Barbour v. Haley*, No 06-10920-CC, 2006 WL 4541663 (11th Cir. May 24, 2006).

<sup>5</sup> See *Nelson v. Campbell*, 541 U.S. 637 (2004) (arguing on behalf of Alabama); *Hill v. McDonough*, 547 U.S. 573 (2006) (writing as amicus on behalf of Alabama and 24 other states).

<sup>6</sup> 543 U.S. 551 (2005).

<sup>7</sup> Nina Totenberg, *US Supreme Court rules death penalty for juveniles is unconstitutional*, NPR ALL THINGS CONSIDERED (March 1, 2005).

<sup>8</sup> *A time to kill? Supreme court tackles death penalty for teens*, CURRENT EVENTS, vol. 104, issue 11 (Nov. 19, 2004).

## Title IX

- Both as amicus in the Supreme Court and [in an article he wrote for the Federalist Society](#), Newsom argued that Title IX does not protect those who face retaliation for reporting gender discrimination. With a majority opinion written by Justice O'Connor, the Supreme Court rejected this position in the 2005 decision *Jackson v. Birmingham Bd. of Education*.<sup>9</sup>

## Fundamental Rights & Substantive Due Process

- In a 2000 law review article, Newsom criticized the legal rationale of *Roe v. Wade*, equating the decision's merits with some of the Supreme Court's most notorious and long-discredited decisions, including *Dred Scott*, which affirmed slavery in 1857, and *Lochner v. New York*, which recognized economic and property rights that rendered worker safety regulations unconstitutional. Newsom wrote: "courts invoking substantive due process—the idea of grounding protection for a substantive right in what is, by all accounts, a purely procedural provision—would do well to remember that all roads lead first to *Roe*, then on to *Lochner*, and ultimately *Dred Scott*."<sup>10</sup> Newsom's demonization of *Roe* and attempt to delegitimize modern substantive due process doctrine poses a risk to many important constitutional rights, including marriage equality.

The personal views Newsom has expressed—consistent with the positions he has taken in litigation—raise serious concerns about his ability to fairly adjudicate civil rights claims and perform the judiciary's role of ensuring equal justice and giving full meaning and effect to our civil rights laws. Chief among LDF's concerns is Newsom's advocacy in support of capital punishment, even against juvenile offenders. It is well established that [race plays a pernicious role in the administration of the death penalty](#), and Alabama's and other states' use of capital punishment [will continue to be an issue](#) before the Eleventh Circuit.

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<sup>9</sup> 544 U.S. 167 (2005).

<sup>10</sup> Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 742 (2000).