

Senator Richard Blumenthal

June 21, 2017

Questions for the Record for Damien Michael Schiff

1. In a January 7, 2016 appearance on *The Trevor Carey Show*, you said some environmentalists employ an “anti-human ideology that, unfortunately, to some extent the courts have gone along with.” In another interview on *Libertarian Counterpoint #0941* you referred to California environmental regulations as “draconian, anti-development, [and] anti-human.”

- What cases were you referring to in particular?

With respect to the first quote, I do not recall any specific case, although I suspect that I had in mind cases like the United States Supreme Court's ruling in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). That decision construed the Endangered Species Act to mean that "Congress intended endangered species to be afforded the highest of priorities," *id.* at 174, and "to halt and reverse the trend toward species extinction, whatever the cost," *id.* at 184, conclusions which dissenting Justice Powell believed failed to comport "with some modicum of common sense and the public weal," and thereby threatened "the operation of even the most important projects, serving vital needs of society and national defense." *Id.* at 195-96 (Powell, J., dissenting).

Similarly with respect to the second quote, I do not recall any specific case, although I suspect that I had in mind the California Coastal Commission's former policy of demanding a public access easement as the price for a coastal development permit, a practice which Justice Antonin Scalia's majority opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), labels “an out-and-out plan of extortion,” *id.* at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (1981)).

- What makes an environmental regulation “anti-human” and how does that differ from being “anti-development”?

I believe that my writings reflect the position that an environmental regulation is "anti-human" when it subordinates the interests of the human community to other considerations. NIMBYism would be an example of a land-use policy that is not categorically anti-human but nevertheless is anti-development.

To the extent that the question seeks my personal views on any public or private matter, including any judicial precedent, I should like to respond, respectfully, that those would not be relevant to my role as a judge. If confirmed, I would decide all matters strictly according to the law and the facts.

2. You have been a sharp critic of the Endangered Species Act, Clean Air Act, and Clean Water Act and spent a large portion of your legal career challenging applications of these laws.

- Do you believe these environmental protection laws are important?

The general tenor of my writing on this subject has been that environmental protection is good, but it cannot justify violation of our constitutional liberties in those places where they conflict. To the extent that the question seeks my personal views on the importance of environmental protection laws, please see the final paragraph of my response to Question 1.

- How would you approach environmental law cases differently than your peers if you were confirmed to the U.S. Court of Federal Claims?

My approach would be precisely like that of my peers: to apply the law as laid down by the Constitution, statute, and regulation, as they are interpreted by Supreme Court and Federal Circuit precedent.

- How would you work to keep your personal views separate from your role as a judge?

I am firmly committed to the rule of law, which I believe to be one of the essential components to a just society. Essential to the rule of law is a judiciary that applies but does not make the law. Were I to be confirmed and appointed as a Judge of the Court of Federal Claims, I would faithfully and unswervingly serve the rule of law by deciding all cases strictly according to the law and facts as laid down by the Constitution, statute, and regulation, as they are interpreted by Supreme Court and Federal Circuit precedent.

- During a December 23, 2011 appearance on Fox Business with Lou Dobbs, you indicated that you believed some Americans experience dealing with the EPA as akin to being treated as “slaves.” Can you explain that comparison?

Please see my response to Question 6 from Senator Feinstein.

3. In various blog posts, interviews, and articles you reference the concept of natural law.

- Do you believe state police powers are limited by natural law?

I am aware of no Supreme Court decision that has authorized the use of natural law to limit the scope of the states' police powers. Accordingly, I am not aware of any Supreme Court precedent that would justify the invalidation of the exercise of such powers on that ground. Were I to be confirmed and appointed as a Judge of the Court of Federal Claims, I would strictly adhere to all Supreme Court precedent. To the extent that the question seeks my personal views on natural law, please see the final paragraph of my response to Question 1.

- Do you believe abortion violates natural law?

Please see the final paragraph of my response to Question 1.

- How would the concept of natural law factor into your judicial decisions?

Please see the first paragraph of my response to Question 3.

- Are you aware of Supreme Court Justice Oliver Wendell Holmes's assessment that judges who believe in "natural law" principles, "seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere"?

I am aware of Justice Holmes' critique of judging by natural law.

- How would you reply to this critique?

To the extent that Justice Holmes was criticizing the view that natural law is relevant to the decision-making of federal judges, please see the first paragraph of my response to Question 3. To the extent that the question seeks my personal view of Justice Holmes' critique, please see the last paragraph of my response to Question 1.

4. In a 2009 post on the same blog, you criticized a California school district's anti-bully curriculum because the United States had not yet reached a "consensus" that "the homosexual lifestyle is a good, and that homosexual families are the moral equivalent of traditional heterosexual families."

- Do you believe homosexual families are the moral equivalent of traditional families?

The Supreme Court has held that same-sex couples have the same access to legal marriage as do opposite-sex couples. *Obergefell v. Hodges*, 576 U.S. __ (2015).

To the extent that the question seeks my personal views, I should like to respond, respectfully, that those would not be relevant to my role as a judge. If confirmed, I would decide all matters strictly according to the law and the facts.

- Do you believe the United States has reached a consensus on the issue today?

Please see my response to the preceding question.

- In light of these comments, how can LGBT parties who might appear in before you in the U.S. Court of Federal Claims feel confident that you will hear their case impartially?

I do not believe that any of my writings can fairly be construed to argue that LGBT persons ought not to receive the full protection of the laws, or ought not to be treated fairly, respectfully, and absolutely equally with any other litigant. Also, please see the last paragraph of my response to Question 1.

5. Several of your previous comments seem to question environmentalists' motives. For example, in a 2009 article entitled "Putting good sense on the endangered list," you wrote that some environmentalists "push an agenda that has more to do with stifling productive human activity than fostering ecological balance." In light of these comments, how can

environmentalists who might appear before you in the U.S. Court of Federal Claims feel confident that you will hear their case impartially?

I do not believe that any of my writings can fairly be construed to argue that persons within the environmental community ought not to receive the full protection of the laws, or ought not to be treated fairly, respectfully, and absolutely equally with any other litigant. On the difference between advocacy and judging, please see my response to Senator Whitehouse's Question 1.a. To the extent this question seeks my personal views, please see the last paragraph of my response to Question 1.

6. In January 2016, you co-authored an op-ed piece entitled "Alaska's land and water go to court," that argued courts should "dial back judicial deference to agency regulations."
 - Why do you believe that courts are better situated than agencies to decide what is necessary to protect American citizens?

The point of the op-ed's suggestion that courts should revisit principles of agency deference was not to suggest that courts are better suited than agencies to protect American citizens. Rather, it was to suggest that agencies do not have any special expertise over and above judges at interpreting the meaning of legal text.

- How will these beliefs about agency deference impact your decisions as a judge?

Not at all. On the difference between advocacy and judging, please see my response to Senator Whitehouse's Question 1.a. To the extent this question seeks my personal views, please see also the last paragraph of my response to Question 1.