

**Nomination of Damien Michael Schiff to be
Judge of the United States Court of Federal Claims
Questions for the Record
Submitted June 21, 2017**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

The Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), sets forth the relevant approach:

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” *Poe v. Ullman*, 367 U.S. 497, 542, 81 S. Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*, *supra*, at 572, 123 S. Ct. 2472. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Id. at 2598. If I were to be confirmed and appointed as a Judge of the Court of Federal Claims, I would follow the above-quoted approach, as well as any other approach required by precedent of the Supreme Court and Federal Circuit.

- a. Would you consider whether the right is expressly enumerated in the Constitution?

Yes. See *Obergerfell*, 135 S. Ct. at 2597 ("The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights.").

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Please see my responses to the preceding questions.

- c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the decisions of other courts of appeals?

A Judge of the Court of Federal Claims would be bound to follow all Federal Circuit precedent, in addition to Supreme Court precedent. Although a judge is not bound to follow out-of-circuit precedent, I believe it to be generally accepted practice for a judge to consult all relevant precedents, even those that are not binding. Please see also my responses to the preceding questions.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

Please see my responses to the preceding questions.

- e. Would you consider whether the right is central to “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Please see my responses to the preceding questions.

- f. What other factors would you consider?

Please see my responses to the preceding questions.

- 2. You were a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.

- a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

Respectfully, my personal views 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. That being said, substantial scholarship supports the conclusion that *Brown* is consistent with originalism. See, e.g., Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*,

19 Harv. J.L. & Pub. Pol'y 457 (1996); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited June 21, 2017).

Respectfully, my personal views on the critiques of originalism 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.

3. Does your approach to judicial interpretation lead you to conclude that the Fourteenth Amendment’s promise of “equal protection” guarantees equality across race and gender, or does it only require racial equality?

The Supreme Court has held that the equal protection clause requires heightened scrutiny of laws that discriminate on the basis of sex. *E.g.*, *United States v. Virginia*, 518 U.S. 515, 530 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”). If I am confirmed and appointed as a Judge of the Court of Federal Claims, I would apply this case law and all other case law of the Supreme Court and the Federal Circuit pertaining to equal protection and sex discrimination.

- a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

To the extent that the question seeks my personal view on the relationship between originalism and the Supreme Court’s equal protection case law, please see my response to Question 2.b. Also, please see my response to the preceding question.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I have not had occasion to study the requirements on states pre-*Virginia*. But I solemnly pledge to this Committee that I will faithfully apply *Virginia* and all other case law of the Supreme Court and the Federal Circuit pertaining to equal protection and sex discrimination.

- c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

The Supreme Court's decisions in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *United States v. Windsor*, 133 S. Ct. 2675 (2013), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), make clear that homosexual persons enjoy substantial protection under the due process and equal protection clauses. To the extent that I might be required to address this question as a Judge of the Court of Federal Claims, I would do so in strict accordance with all relevant precedents of the Supreme Court and the Federal Circuit.

- d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

The Supreme Court has not addressed the question. It appears that the lower courts are divided on the level of scrutiny to be applied to classifications based on transgender status. See *White v. City of New York*, 206 F. Supp. 3d 920, 932 (S.D.N.Y. 2016) (discussing cases). To the extent that I might be required to address this question as a Judge of the Court of Federal Claims, I would do so in strict accordance with all relevant precedents of the Supreme Court and the Federal Circuit.

4. With regard to the right to privacy encompassed in substantive due process:

- a. Do you agree that the right to privacy protects a woman's right to use contraceptives?

The Supreme Court has held that the Constitution provides that right. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). To the extent that I might be required to address this question as a Judge of the Court of Federal Claims, I would do so in strict accordance with these and all other precedents of the Supreme Court and the Federal Circuit.

- b. Do you agree that the right to privacy protects a woman's right to obtain an abortion?

The Supreme Court has held that the Constitution provides that right. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). To the extent that I might be required to address this question as a Judge of the Court of Federal Claims, I would do so in strict accordance with these and all other precedents of the Supreme Court and the Federal Circuit.

- c. Do you agree that the right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court has held that the Constitution provides that right. *Lawrence v. Texas*, 539 U.S. 558 (2003). To the extent that I might be required to address this question as a Judge of the Court of Federal Claims, I would do so in strict accordance with *Lawrence* and all other precedents of the Supreme Court and the Federal Circuit.

- d. If you do not agree with any of the above, please explain whether these rights are protected or not, and which constitutional rights or provisions encompass them.

Please see my responses to Question 4.a., 4.b., and 4.c.

5. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “Higher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

I understand the question to be made with respect to the determination of whether the Constitution recognizes a particular right as fundamental. To the extent that I might be required to address this question as a Judge of the Court of Federal Claims, I would do so in strict accordance with the *Lawrence* framework as set forth in my response to Question 1, as well as in accordance with all other precedent of the Supreme Court and the Federal Circuit.

- b. What is the role of sociology, scientific evidence, and data in judicial analysis?

I would look to Supreme Court and Federal Circuit precedents to determine the relevance of these factors in a particular case.

6. In a blog post, you referred to Justice Anthony Kennedy as a “judicial prostitute” for “‘selling’ his vote as it were to four other Justices in exchange for the high that comes from aggrandizement of power and influence, and the blandishments of the fawning media and legal academy.” During the Senate Judiciary Committee hearing, you testified that your language was “intemperate” and “uncharitable.” You further testified that the point of the post was to “attack a certain style of judging that is frequently applauded in the media. And I might call that sort of ‘strategic judging’ and I find it very objectionable that the media would applaud that because in my mind, strategic judging implies that a judge is making his or her decision based upon factors other than the law or the facts.”

- a. Which Supreme Court precedents do you believe were the result of Justice Kennedy “‘selling’ his vote”?

I do not recall whether I had any particular decision in mind when I wrote the blog post. Based on the text of the blog post, I believe that the post's critique was not directed at any decision in particular, but rather at the *SCOTUSBlog*'s observation that "Justice Kennedy's just-completed October Term 2006 will certainly go down as one of the most 'successful' in

the Court's modern history" in part because during that Term he was "a perfect 24-for-24 in 5-4 (or 5-3) cases."

- b. Explain in detail the basis for your view that Justice Kennedy has engaged in "strategic judging" or judging on any basis other than the law and the facts?

I define strategic judging as judging that is not based exclusively on the law and the facts. In my view, the media commonly attribute that view of judging to Justice Kennedy. In my blog post "Kennedy the most powerful justice?", I injudiciously appeared to ascribe to him the media's caricature of his judging style as a strategic judge. I do not believe that Justice Kennedy engages in strategic judging. To the extent that any of my writings may suggest otherwise, I disavow such an interpretation.

- c. What evidence can you point to that would assure a party relying on a precedential opinion authored by Justice Kennedy that you will be a fair and neutral arbiter?

I solemnly pledge to the Committee that, if I am confirmed and appointed as a Judge of the Court of Federal Claims, I will faithfully apply all Supreme Court precedent, including all such precedent authored by Justice Kennedy. Please see also my response to Question 6.b.

7. You wrote a 2009 blog post titled "Teaching 'Gayness' in Public Schools." In the post, you criticized California public schools for teaching "not only that bullying of homosexuals *qua* homosexuals is wrong, *but also* that the homosexual lifestyle is a good, and that homosexual families are the moral equivalent of traditional heterosexual families."

- a. What evidence did you consider before writing this post?

Based on the text of the blog post (I do not retain any direct recollection), I reviewed a *San Francisco Chronicle* article (<https://web.archive.org/web/20090521120415/http://www.sfgate.com:80/cgi-bin/article.cgi?f=/c/a/2009/05/15/BA9C17LD8G.DTL>) which summarized the curriculum and discussed the controversy over its proposed implementation.

- b. What was the basis for your conclusion that California public schools taught "that homosexual families are the moral equivalent of traditional heterosexual families"?

The summary of the curriculum provided in the *San Francisco Chronicle* article made it appear that an important component of the curriculum was its acceptance of the proposition that homosexual relationships are not meaningfully different from heterosexual relationships.

- c. Do you regret writing this post?

Yes. I regret writing the post because it has given the absolutely and categorically false impression that I was or am opposed to anti-bullying curricula for LGBT children, or that I favor legal disabilities for LGBT persons.

d. Are there any other blog posts you have written that you now regret?

As previously discussed, I regret having written the post "Kennedy the most powerful Justice?" because in it I allowed my anger over an idea to spill over, unjustifiably, into anger towards a person.

8. During the entire judicial selection process, from beginning to end, did any White House staff or Justice Department staff raise any concerns about your posts? If so, please identify the individuals who raised concerns, the posts discussed, and the nature of the concerns raised.

At some point after March 13, 2017, I notified Department of Justice officials that I had maintained a personal blog but that I did not recall its contents nor did I retain them. The officials, however, were able to locate those contents through a search of an Internet archive site. I then reviewed the posts, but I did not catch any of the posts that since have garnered attention, until the first media reports on them on May 26, 2017. Prior to that time, no White House Counsel or Department of Justice official brought those specific posts to my attention.

Following the initial May 26 media reports on the above-discussed blog posts, I was informed by White House Counsel and Department of Justice officials that I should be prepared to answer questions about them at the hearing.