

**Nomination of Damien Schiff to the U.S. Court of Federal Claims
Questions for the Record
Submitted June 21, 2017**

QUESTIONS FROM SENATOR FEINSTEIN

1. At your hearing, you were asked by several Senators about a 2007 blog post in which you noted that Justice Kennedy had voted with the majority in every case in the 2006 term that was decided 5-4. Based on this, you wrote: “It would seem that Justice Kennedy is (and please excuse the language) a judicial prostitute, ‘selling’ his vote as it were to four other Justices in exchange for the high that comes from aggrandizement of power and influence.”

In responding to a question from Chairman Grassley about your post, you stated: “[T]he point of that blog post was not to impugn or malign any person, but rather 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, and that I believe to be categorically improper.”

- a. **You authored a blog post describing a sitting Supreme Court Justice as a “judicial prostitute,” then told the Senate Judiciary Committee under oath that the point of your blog post “was not to impugn or malign any person.” To say the least, your explanation strains credulity. With a reminder that your written responses are also considered testimony—just like your oral responses at the hearing were—I want to give you another opportunity to explain your provocative criticism of Justice Kennedy in your 2007 blog post.**

The point of my blog post, "Kennedy the most powerful justice?" was not to attack any person but rather to attack a certain style of judging. That being said, I acknowledge that the language and tone of the blog post were intemperate and uncharitable. I injudiciously appeared to ascribe to him the media caricature of his judging style as a strategic judge. I should not have used such inappropriate language. I reiterate my sincere apology to anyone who may have taken offense.

- b. **How do you define “strategic judging”?**

"Strategic judging" is judging that is not based exclusively on the law and the facts.

- c. **Based on your testimony at the hearing, it seems that your blog post was arguing that during the October 2006 term, Justice Kennedy regularly based his vote in 5-4 cases on “factors other than the law or the facts.” Please detail below the specific cases from that term in which you believe Justice Kennedy based his opinion on “factors other than the law or the facts.”**

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."

In the same post you wrote, "the legal media would better serve the Republic if, instead of perpetuating the myth of the 'Great Sphinx of Sacramento,' it excoriated the Justice for trying to be a statesman and a legislator in the wrong Branch."

d. Which of the 5-4 cases in the 2006 term showed Justice Kennedy to decide cases as "a legislator in the wrong Branch"?

Please see my response to 1.c. I was trying to state that the media should focus less on whether a judge votes in the majority or minority, and more on his or her analysis of the facts and the law. I believe that it is inappropriate for the media to suggest that the role of a judge extends beyond analyzing the facts and the law.

2. In 2009, you wrote a blog post titled "Teaching 'gayness' in public schools," in which you criticized a California school district's proposed anti-bullying initiative for teaching that "homosexual families are the moral equivalent of traditional heterosexual families." In the same post, you wrote that "[u]ntil consensus is reached on the moral implications of homosexuality, any attempt on the part of the public schools to take sides on those implications is wrongheaded."

a. Are same-sex couples and the families of same-sex couples morally inferior to opposite-sex couples and their 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.

b. What are the "moral implications" of homosexuality?

Please see my response to Question 2.a.

c. Is it your belief that schools' efforts to protect LGBT students through anti-bullying initiatives wrong?

No.

d. If you were confirmed and an LGBT litigant came before your court, how could they be confident that you would be an impartial judge?

Please see my response to Question 2.a.

3. In 2009, you wrote a blog post in which you discussed *Roe v. Wade*. Regarding abortion, you wrote: “the lack of regulation is directly attributable to the Supreme Court’s de-democratization of the issue. Until the Supreme Court releases the issue to the democratic branches, dialogue is fruitless.” In the same blog post, you argued that “the Church can legitimately argue to secular [government] that laws allowing abortion are gravely immoral. It is not a question of imposing one’s religious views on anyone (after all, the fact that the Ten Commandments forbid murder and theft does not make civil laws against those acts improper).”

a. How should the Supreme Court “release” the issue of abortion?

The blog post in question simply restated the widely accepted proposition that, to the extent that the Supreme Court holds that a certain activity is protected by the Constitution, to that extent the activity is not subject to regulation by the politically accountable branches, whether state or federal. Similarly, to the extent that the Supreme Court holds that a certain activity is *not* protected by the Constitution, to that extent the activity is subject to regulation by those same politically accountable branches.

b. Does the “release” of the issue of abortion require overturning *Roe v. Wade*?

Please see my response to Question 3.a.

c. Do you believe that abortion is “gravely immoral”?

The Supreme Court has held that access to abortion is protected by the Fourteenth Amendment. See generally *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). Please also see the final paragraph of my response to Question 2.a.

d. Do you believe that laws criminalizing abortion would be a proper response to a “gravely immoral” act?

Please see the final paragraph of my response to Question 2.a.

e. If so, what should the punishment be for a woman who has an abortion?

Please see the final paragraph of my response to Question 2.a.

f. What should the punishment be for a doctor who performs an abortion?

Please see the final paragraph of my response to Question 2.a.

4. In a 2008 blog post entitled “Federalism and the Separation of Powers, Day II,” you wrote: “I urged that a reinvigorated constitutional jurisprudence, emanating from the judiciary, could well be the catalyst to real reform, as opposed to that reform coming from other branches. That fact is due in no small part to the collective action obstacle: the President is hampered by the modern administrative state; Congress, as a collective body of 535 persons, cannot act effectively; but the Supreme Court, with just five votes, can overturn precedents upon which many of the unconstitutional excrescences of the New Deal and Great Society eras depend.”

a. What specifically do you believe are “the unconstitutional excrescences of the New Deal and Great Society eras”?

I do not recall the particular decisions I had in mind when I wrote that blog post. Should I be confirmed and appointed as a Judge of the Court of Federal Claims, I solemnly pledge to apply all precedents of the Supreme Court from all periods of history, including from the New Deal and Great Society eras. To the extent that the question seeks my personal views on any such precedents, please see the final paragraph of my response to Question 2.a.

b. What specific Supreme Court precedents do you believe should be overturned?

Please see my response to the preceding question, as well as the final paragraph of my response to Question 2.a.

5. In 2009, you filed an amicus brief in support of Citizens United in the case *Citizens United v. Federal Election Commission*. In that brief, you said that “corporate speech adds value to our democratic society and should not be treated as a malignancy that the body politic rejects.” And you urged the Supreme Court to “affirm the enduring importance of corporate speech in our society.”

a. Why did the Pacific Legal Foundation choose to file a brief in *Citizens United*?

Pacific Legal Foundation's decision on whether to become involved in a case is made ultimately by the Foundation's Board of Trustees. Although some Foundation attorneys typically are present during the Board's consideration of cases, I do not recall whether I was present for the Board's consideration of *Citizens United*. That being said, I am aware that one of the Foundation's objectives is to promote the principle that corporate speech should not receive less legal protection simply because it is "corporate."

b. Should there be any limits on political contributions made by corporations?

Please see the final paragraph of my response to Question 2.a.

c. Should corporations be prohibited from contributing funds directly to candidates running for federal office?

Please see the final paragraph of my response to Question 2.a.

6. In December 2011, Lou Dobbs interviewed you about your role in *Sackett v. EPA*. In the interview, you comment about the agency's use of compliance orders, saying that the EPA's use of this type of enforcement mechanism "is a problem with the agency across the board treating American citizens as if [they] were not American citizens, as if they were just slaves, and it's atrocious." **Please explain how the EPA's use of compliance orders for environmental enforcement "treat[s] American citizens... as if they were just slaves."**

My comment was not intended to draw a strong parallel between EPA's treatment of landowners and the horrific experiences of enslaved African Americans. Rather, my comment was simply meant to highlight the injustice of EPA's position that landowners who received a compliance order from the agency should not be allowed immediate judicial review of that order. In *Sackett v. EPA*, 132 S. Ct. 1367 (2012), the Supreme Court unanimously rejected EPA's position.

7. In 2008, you wrote an opinion piece in which you stated that "the cries to save the polar bear through the Endangered Species Act may be as much the attempt of environmental activists to impose their view of man's relationship to the earth on the American people through the courts as it is the fruit of a sincere desire to save a remarkably persistent Arctic mammal."

a. What did you mean by environmental activists' "view of man's relationship to the earth"?

I meant by that phrase to refer to how human beings ought to interact with the natural world.

b. Do you acknowledge that climate change is a scientifically-proven phenomenon, and that overwhelming scientific evidence supports the fact that the current warming trend is the result of human activity?

Please see the final paragraph of my response to Question 2.a.

c. What sources of information have informed your views on the issue of climate change and global warming?

Please see the final paragraph of my response to Question 2.a.

d. How will you ensure that your personal views on climate change will not impact your role as a judge on the Court of Federal Claims?

Please see the final paragraph of my response to Question 2.a.

8. In 2011, you co-authored a law review piece in the Texas Review of Law and Policy in which you argued the Supreme Court should use *Fisher v. University of Texas* to overturn *Grutter v. Bollinger* and, in doing so, invalidate admissions programs in higher education that take any account of race, even as one of many factors. In urging the Court to do so, you equated *Grutter* to *Dred Scott*, *Plessy v. Ferguson*, and *Korematsu*.

a. Explain how *Grutter v. Bollinger* is similar to *Dred Scott*.

The referenced law review article draws a parallel between *Grutter*, on the one hand, and *Dred Scott*, *Plessy*, and *Korematsu*, on the other hand, only in this sense: that all of these cases dealt with race and the Constitution, and that all of these cases are wrongly decided.

b. Explain how *Grutter v. Bollinger* is similar to *Plessy v. Ferguson*.

Please see my response to Question 8.a.

c. Explain how *Grutter v. Bollinger* is similar to *Korematsu*.

Please see my response to Question 8.a.

9. You have stated that a “threat to property anywhere is a threat to liberty everywhere.”

a. Is the Clean Air Act a “threat to property anywhere”?

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Supreme Court laid down the "general rule . . . that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," which supports the related principle that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 415-16.

The quoted language I meant consistent with the above-quoted principles, *i.e.*, a violation of the constitutionally protected right to private property is a threat to liberty. To the extent that the question seeks my personal views on the Clean Air Act, please see the final paragraph of my response to Question 2.a.

b. Is the Clean Water Act a “threat to property anywhere”?

Please see my response to Question 9.a.

c. Is the Endangered Species Act a “threat to property anywhere”?

Please see my response to Question 9.a.

d. Is the Comprehensive Environmental Response, Compensation, and Liability Act a “threat to property anywhere”?

Please see my response to Question 9.a.

e. Is the National Environmental Policy Act a “threat to property anywhere”?

Please see my response to Question 9.a.

10. In a November 2006 speech, you stated that “property rights and environmental regulation can only be reconciled to the extent that we recognize that where property rights are burdened so as to produce a public benefit, to be enjoyed by the public at large, justice and natural law require that the public pay for the cost of that good which is disproportionately born [sic] by the individual property owner.”

a. How would you determine whether an individual property owner was disproportionately bearing the cost of a public good?

To the extent that the question asks how I as a Judge of the Court of Federal Claims would determine whether a plaintiff is entitled to just compensation under the Fifth Amendment to the Constitution, I would do so by applying the Supreme Court's and the Federal Circuit's precedents interpreting the Takings Clause. To the extent that the question seeks my personal views on takings law, please see the final paragraph of my response to Question 2.a.

b. How would you determine how much the public should pay to those individual property owners who disproportionately bear the cost of a public good?

Please see my response to Question 10.a.

11. President Trump’s budget blueprint calls for additional funding for Justice Department attorneys who can “pursue Federal efforts to obtain land and holdings necessary to secure the Southwest border.” The Justice Department has specifically requested \$1.8 million for 20 positions, including 12 attorneys, within the Land Acquisition Section of the Environment and Natural Resources Division (ENRD). As the Justice Department’s budget request states, “[t]his increase will allow ENRD to dedicate an additional 20 positions to meet litigation, acquisition, and appraisal demands during the construction along the border between Mexico and the United States.”

a. As noted earlier, you have stated “threat to property anywhere is a threat to liberty everywhere.” Is the government’s attempt to acquire land for the purpose of building a border wall therefore a “threat to liberty everywhere”?

As explained in my response to Question 9.a, my statement meant to convey my view that a violation of the constitutionally protected right to private property is a threat to

liberty. To the extent that the question seeks my personal views, please see the final paragraph of my response to Question 2.a.

b. Is acquiring land for the purpose of building a border wall a valid use of the eminent domain power?

To the extent that the question asks how I as a Judge of the Court of Federal Claims would determine whether a particular land acquisition is a valid use of the eminent domain power, I would do so by applying the Supreme Court's and the Federal Circuit's precedents interpreting the Public Use and Takings Clauses. To the extent that the question seeks my personal views on the law interpreting and applying those clauses, please see the final paragraph of my response to Question 2.a.

c. Does the validity of that use depend in any way on whether the border wall will be effective?

Please see my response to Question 11.b.

d. The Pacific Legal Foundation regularly represents clients in takings cases. What is the average cost to the Pacific Legal Foundation of litigating a takings case?

I am not aware of the average cost to the Foundation to litigate a takings case or any other type of case.

e. Does \$1.8 million seem like a sufficient amount to cover the cost of government attorneys who will be tasked with litigating all the takings cases that are likely to arise in the context of building a border wall?

I have not studied this issue, and, respectfully, cannot answer hypothetical questions.

12. Many statutes regulating the environment are highly technical, and the agencies tasked with promulgating rules under those statutes and enforcing those statutes have developed an expertise shared by few others.

a. Do you agree that federal agencies have specialized expertise on environmental rules and regulations?

I agree that such expertise is greater than what one would expect to find in the average citizen.

b. What is your understanding of *Chevron* deference?

The Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), established the principle that courts must defer to an

agency's authoritative and reasonable interpretation of ambiguous language found within a statute that it administers.

c. If confirmed, would you follow the Supreme Court's *Chevron* precedent?

Should I be confirmed and appointed as a Judge of the Court of Federal Claims, I solemnly pledge to apply all precedents of the Supreme Court, including *Chevron*. To the extent that the question seeks my personal views on *Chevron*, please see the final paragraph of my response to Question 2.a.

13. If confirmed, what are the circumstances in which you would decline to follow precedent?

None.

14. Please detail all the circumstances under which you will recuse yourself from cases litigated by the Pacific Legal Foundation, if confirmed.

If confirmed and appointed as a Judge for the Court of Federal Claims, I would resolve any potential conflict of interest by adhering to the Code of Conduct for United States Judges, 28 U.S.C. § 455, and all applicable policies and procedures of the United States Courts generally and of the Court of Federal Claims in particular. I also would engage in prompt and immediate review of the parties, their affiliates, and the issues presented by any matter assigned to me so that I could make a prompt, informed decision regarding the need for recusal.

15. Please describe with particularity the process by which these questions were answered.

I received the questions on the evening of Wednesday, June 21, 2017. I reviewed the questions, conducted research, and drafted answers. I then shared the answers with the Office of Legal Policy in the Department of Justice. After speaking with them, I made revisions and then authorized the submission of my responses.