

Hearing before the Senate Committee on the Judiciary
“Nominations”
Questions for the Record Submitted by Senator Al Franken

Questions for Damien Michael Schiff:

Question 1. During your hearing, I asked you about a May 17, 2009 blog post you wrote entitled “Teaching ‘gayness’ in public schools.” Your post focused on a California school district’s proposal to add an anti-bullying initiative to its curriculum. You wrote that the initiative, “seems to teach not only that bullying of homosexuals qua homosexuals is wrong, *but also* that the homosexual lifestyle is good, and that homosexual families are the moral equivalent of heterosexual families.”

- **I asked you to explain the title of your post, and how, in your view, the school’s proposed initiative would “teach gayness.” You did not answer the question. Now that you have had an opportunity to reflect on my question, please explain what, in your view, “gayness” entails and how the school district’s plan taught “gayness.”**

By teaching "gayness," I meant the concept of a school going beyond teaching that bullying, for any reason, is bad, and instead extending its curriculum into teaching about the morality of physical intimacy by persons of the same sex.

- **Please explain your use of the phrase “homosexuals qua homosexuals.” Your use of that phrase seems to suggest that you believe that the bullying of LGBT children on the basis of their LGBT status is not necessarily wrong, but that the bullying of LGBT children for some other reason, unrelated to their LGBT status, could be a legitimate cause for concern.**

By "homosexuals qua homosexuals," I meant to draw a distinction between a curriculum that simply teaches that the bullying of an LGBT child on account of the child’s LGBT status is wrong—an uncontroversial position—and a curriculum *that also* teaches that homosexuality is morally indistinguishable from heterosexuality. It was not my intention in any way to express approval of the bullying of LGBT children for any reason.

- **In your view, what is the “homosexual lifestyle?” How was the “homosexual lifestyle” relevant to the school’s proposed curriculum, and how did the curriculum teach that it is “good?”**

By "homosexual lifestyle" I meant the desire to engage in, and the engaging in, physically intimate activity with a person of the same sex. Please also see my first response to Question 1 above.

- **How did the school’s proposed curriculum teach “that homosexual families are the moral equivalent of heterosexual families?” Do you believe that LGBT families are not the moral equivalent of straight families? If so, on what basis do you determine moral equivalency?**

To the extent that the question addresses the blog post, please see my responses above. 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.

Question 2. During our exchange, you said that you did not recall whether you had reviewed the school's curriculum before writing that post. In fact, you did not. In the post, you state, "I have not seen the proposed lesson."

- **Why did you decide to write a post critical of a curriculum that you had not personally read or reviewed?**

I do not recall precisely why I chose to write the post, but I suspect that I had concluded that the *San Francisco Chronicle* article linked in the post (<https://web.archive.org/web/20090521120415/http://www.sfgate.com:80/cgi-bin/article.cgi?f=/c/a/2009/05/15/BA9C17LD8G.DTL>) provided an accurate summary of the relevant portions of the curriculum.

- **During your hearing, you said that your post "was not meant to take a position but merely meant to explore [the issue] as a matter of prudence." Do you agree that it would have been prudent to familiarize yourself with the subject of your writing before opining on it?**

In retrospect, I agree that it was imprudent not to have reviewed the curriculum personally before opining on it.

Question 3. The Senate questionnaire asks you to "describe your experience in the entire judicial selection process, from beginning to end." In response, you stated that you contacted the White House Counsel's Office to express an interest in serving on the Court of Federal Claims. You also stated that you later spoke by phone with the same official from the White House Counsel's Office, and that you later interviewed with several officials from the White House Counsel's Office, and that you have subsequently been in contact with the Department of Justice's Office of Legal Policy regarding your nomination.

- **During the judicial selection process, did you disclose and/or discuss your blog posts during the above listed interactions? If not, why? If so, did anyone express concern about the content of your writings? If so, what was the nature of their concern?**

In preparing my responses to the Judiciary Committee questionnaire, I notified officials in the Department of Justice that I had maintained a personal blog, but that I had closed it some years ago and did not retain copies of the posts. Department officials were able to locate the blog posts using an Internet archive site. I reviewed those posts before submitting them to the Committee, but I did not catch any of the blog posts that since have attracted notice, and none of those was brought to my attention.

In preparing my questionnaire responses, I recall mentioning to a Justice Department official that, in reviewing some of my old blog posts (again, not the ones that garnered attention), I was somewhat embarrassed by their occasionally flip and tongue-in-cheek tone.

I did not become aware, however, of any of the controversial posts until May 26, shortly after the first media reports were published. Prior to those articles, I had forgotten about the controversial posts, which I had written nearly a decade ago on a blog that has been defunct for nearly as long. After the media stories came out, I was advised by White House Counsel and Justice Department officials that I should be prepared to respond to questions about those posts at the hearing.