

**Nomination of Damien M. Schiff
To be Judge on the Court of Federal Claims
Questions for the Record
Submitted June 21, 2017**

QUESTIONS FROM SENATOR WHITEHOUSE

1. You have spent the past 12 years challenging and condemning our federal environmental laws, and you have expressed contempt for laws that protect clean air, clean water, and wildlife. For example, you have stated that our environmental laws “[a]re enforced not for the public’s benefit but to stop productive activity that activists or bureaucrats dislike.” You have said that in enforcing Congress’s environmental laws, the EPA treats Americans “[a]s if they were just slaves.”
 - a. Given that record, do you think your “impartiality might reasonably be questioned,” as that term is used in Canon 3(C)(1) of the Code of Conduct for United States Judges, in cases involving the EPA as a party? Involving interpretation of federal environmental laws? If not, why not?

Our adversarial system depends on two distinct but nevertheless related components: zealous advocacy and absolutely neutral decision-making. Given that all judges are former lawyers, our system could not operate if judges were disqualified from judging simply because, prior to their ascending the bench, they ably discharged their ethical obligation to be zealous advocates for their clients. The history of the federal judiciary demonstrates that judges who pursued public interest careers, and who thereby took prominent positions on significant questions of public policy prior to their becoming judges, nevertheless were able to set aside their former roles as advocates once they became judges.

I provide the Committee my solemn pledge that, should I be confirmed and appointed as a Judge of the Court of Federal Claims, I would decide all matters strictly according to the law and the facts. 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.

- b. You have argued that “[t]he 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.” In your view, what is the environmental activists’ “[v]iew of man’s relationship to the earth”? Do you believe that view is wrong?

The quoted op-ed does not argue that a single view animates all environmentalist thinking, which runs the gamut of philosophical expression, from Deep Ecology to a strongly market-based, "green" libertarian approach. With respect to the listing of the polar bear under the Endangered Species Act, the op-ed took the position that the listing was as much about using the courts to establish a policy response to global climate change as it was about directly protecting the polar bear from harm.

c. Do you believe that climate change is real, and that humans are contributing to it?

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.

d. You have written that the Endangered Species Act is a “tool for environmental extremists to push an agenda that has more to do with stifling productive human activity than fostering ecological balance.” Given that record, do you think your “impartiality might reasonably be questioned,” as that term is used in Canon 3(C)(1) of the Code of Conduct for United States Judges, in cases interpreting that statute? If not, why not?

Please see my response to Question 1.a.

e. You have suggested that the EPA’s successes in reducing pollution over the last four decades “would have been achieved anyway through the private sector.” On what evidence do you base that conclusion?

I do not recall the context in which the quoted assertion was made. That being said, I believe there is a body of scholarship suggesting that effective alternatives to federal environmental regulation have existed and continue to exist.

To the extent that the question seeks my personal views on the effectiveness or propriety of federal environmental regulation, please see my response to Question 1.c.

f. You have argued that the Constitution’s Due Process Clause provides an independent cause of action in federal court “against irrational and arbitrary land use regulations.” What legal precedent that supports that cause of action?

In *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), the Supreme Court held unanimously that a land-use regulation that does not further a legitimate governmental interest violates due process. *See id.* at 540. *See also id.* at 548-49 (Kennedy, J., concurring).

g. Given your consistent oppositions to environmental laws, will you commit to recusing yourself from any cases that concern them? Specifically, will you recuse yourself from cases concerning the Clean Water Act and the Endangered Species Act?

Please see my response to Question 1.a.

2. You have consistently advocated for extreme, pro-property views of the Takings Clause of the 5th Amendment. For example, you wrote that “[t]o make this key right effective, federal agencies should be required to provide compensation when their environmental regulations substantially reduce the value of one’s property.” This view has not been accepted by the Supreme Court in the context of regulatory takings. Takings cases comprise 16% of the Court of Federal Claims’ caseload, so your views on this topic will be directly relevant to your work on the bench.
 - a. Given the views you have stated in the past about what the law should be, how can you assure this Committee that you have the capacity to rule on cases based on what the law actually is?

Please see my response to Question 1.a.

- b. What is your understanding of the current law governing when a regulation rises to the level of a taking?

The Supreme Court's 2005 decision in *Lingle*, 544 U.S. at 537-40, provides a comprehensive overview of the relevant takings tests. Since *Lingle*, the Supreme Court has provided additional guidance in *Arkansas Game & Fish Commission v. United States*, 133 S. Ct. 511 (2012), *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), and *Murr v. Wisconsin*, No. 15-214 (U.S. June 23, 2017).

- c. Through the Pacific Legal Foundation, you have filed numerous briefs before the Court of Federal Claims in takings cases. Please list every case in which you filed a brief before the Court of Federal Claims in a takings case in which your brief sided with the government.

I am not aware of any case in which Pacific Legal Foundation has supported a government entity in opposing a takings claim.

3. Last year, you wrote a blog post criticizing the Attorney General for the U.S. Virgin Islands, which had served a subpoena on a think tank called the Competitive Enterprise Institute (CEI). You were concerned that compelling the think tank to turn over documents that might reveal the identity of certain CEI donors was a violation of the think tank’s First Amendment freedoms. You wrote that “[t]he threat of global climate change is no reason to erase the First Amendment freedoms that protect climate change deniers as much as climate change advocates.”
 - a. In your view, is money the same as speech?

It is my understanding that, since *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court has held that expenditures of money may be entitled to some measure of First Amendment protection. See *id.* at 19 (per curiam). As to my personal views, please see my response to Question 1.c.

b. Do you believe that there is a public interest in combating climate change?

The Supreme Court has stated that "[t]he harms associated with climate change are serious and well recognized," and that "[t]he risk of catastrophic harm, though remote, is nevertheless real." *Massachusetts v. EPA*, 549 U.S. 497, 521, 526 (2007). As to my personal views, please see my response to Question 1.c.

4. In a 2007 piece entitled *Kennedy as the Most Powerful Justice?*, you referred to Supreme Court 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."

a. Do you believe such a statement comports with Canon 2(A) of the Code of Conduct for United States Judges, which states: "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"?

To the extent that the blog post credits the common media caricature of Justice Kennedy's style of judging, the post thereby suggests that Justice Kennedy practices "strategic judging," i.e., not deciding cases exclusively based on the law and the facts. Strategic judging is inconsistent with the integrity and impartiality of the judiciary.

b. Do you apologize for using such language?

I should not have used such inappropriate language. I do sincerely apologize to anyone who may have taken offense.

c. In your nominations hearing, you stated that this post was meant as a critique of the media, not of Justice Kennedy. How does that square with your assertion that Kennedy is a "judicial prostitute"?

In that post, I injudiciously appeared to ascribe to Justice Kennedy the media caricature of his judging style as a strategic judge. My intent was to attack the media's caricature, but I reiterate that the language and tone of the blog post were intemperate and uncharitable.

d. Do you believe that Justice Kennedy was, as you wrote, "selling his vote . . . in exchange for the high that comes from aggrandizement of power and influence, and the blandishments of the fawning media and legal academy" when he joined majorities of the Supreme Court in four landmark decisions recognizing the full humanity and citizenship of LGBT Americans: *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)?

I do not believe that Justice Kennedy practices "strategic judging," and thus any critique attendant upon such judging would not apply to Justice Kennedy. To the extent that my writings suggest otherwise, I disavow such an interpretation of them. To the extent that I as a judge might be asked to address or to apply any of the cited judicial precedents, I give my solemn pledge to the Committee that I will do so without regard to any personal opinion I may have of them. To the extent that the question seeks my personal view on the cited judicial precedents, please see my response to Question 1.c.

5. As a legal matter, not your own personal views, do you understand sexual orientation to be an immutable trait?

I have not studied whether and to what extent federal courts hold sexual orientation to be an immutable trait. To the extent that I might be asked to address that issue 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.

6. In a 2007 piece, you wrote that you "strongly disagree" with *Lawrence v. Texas*, the Supreme Court's 2003 landmark decision striking down Texas's sodomy law as an unconstitutional deprivation of liberty. Is it your view that a government should be able to ban consensual intercourse between same sex adults, but should not be able to ban pollution to protect our environment? If so, please explain.

The basis for the strong disagreement noted in the referenced blog post was my view, at that time, that *Lawrence* would be difficult to reconcile with an originalist understanding of the Constitution. See *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting). To the extent that the question seeks my personal views, please see my response to Question 1.c.

7. In a 2008 piece, you criticized the California Supreme Court's application of heightened judicial scrutiny to laws targeting gay people, stating that doing so would have far-ranging and, in your view, negative effects in the years to come.

- a. It's been some time. Were you right? Please provide some examples of how heightened scrutiny for sexual orientation-based classifications has had far-ranging and negative effects?

My comment that the court's adoption of heightened scrutiny on the basis of sexual orientation would have far-ranging effects was focused on how the issue would continue to be divisive and polarizing. To the extent that the question seeks my personal views, please see my response to Question 1.c.

8. At your hearing, Senator Franken asked you about your 2009 blog posting entitled "Teaching 'gayness' in public schools," in which you criticized a California school district for its LGBT anti-bullying lesson plan. You wrote: "Until 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. What did you mean to signify by using the word “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.

- b. In your view, how are schools teaching “gayness”?

Please see my response to Question 8.a.

9. You stated in your Senate questionnaire that on February 17, 2017, you interviewed with White House officials about your interest in being nominated to the Court of Federal Claims. You further stated that on March 8, 2017, you were contacted by White House officials to inform you that you had been selected as a preliminary candidate for a vacancy on the Court of Federal Claims, and that on March 13, 2017 you were contacted by the Justice Department about the nomination. Your nomination was made on May 8, 2017.

- a. On what date did you reveal and submit your anonymous blog postings to the White House or Justice Department?

I do not believe that my personal blog was ever anonymous; rather, it is my understanding that I always prominently displayed my identity and my contact information. See *Omnia Omnibus* — About, <https://web.archive.org/web/20080610122150/http://omniaomnibus.typepad.com:80/about.html>.

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 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.

- b. Why did you choose to publish your blog postings anonymously rather than under your own name? What about the posts led you to make that decision?

Please see my response to Question 9.a.