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 <u>under oath</u> 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 Sphynx 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-democraticization 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.

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 Special 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.

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.

Senator Dick Durbin
Written Questions for John Bush, Kevin Newsom, and Damien Schiff
June 21, 2017

For questions with subparts, please answer each part separately.

1. **In your view, what constitutes the appropriate judicial temperament?**

Appropriate judicial temperament constitutes the ability to decide cases without being influenced by one's personal views or opinions regarding the law, the facts, the parties, or their counsel. Put another way, it constitutes the ability to decide cases exclusively based on (i) the law, as established by the Constitution, statute, regulation, and judicial precedent, and (ii) the facts, as determined by the submissions of the parties and the rules of evidence and procedure.

2. **Do you believe that you possess the appropriate judicial temperament?**

Yes. I solemnly pledge to all members of the Judiciary Committee that, if I am confirmed and appointed as a Judge of the Court of Federal Claims, I will set aside any personal views or opinions that I may have about any matter that may come before me, and decide such matter based solely on the law and the facts, as discussed in my answer to Question 1.

3. **Do you regret any statements you have posted on your blog? If so please list each statement that you regret posting.**

I regret the blog post, "Kennedy as the most powerful justice?", the language and tone of which were intemperate and uncharitable.

I also regret the blog post "Teaching gayness" 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.

As a more general matter, I regret the tongue-in-cheek tone of many of the blog posts and the extent to which my thoughts on various topics could be viewed as being uncharitable towards individuals.

4. In a 2007 post on your blog, you said the following about Supreme Court Justice Anthony Kennedy: “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, and the blandishments of the fawning media and legal academy.”

   You say in your questionnaire that you contacted an official in the White House Counsel’s office on February 6 this year to express your interest in serving on the Court of Federal Claims.

   a. **Who was the official you contacted?**

b. When did you inform a person at the White House Counsel's office about your 2007 blog post in which you made your comments about Justice Kennedy?

I informed the White House Counsel's office about the blog post on May 26, shortly after the first media reports on the post were published. Prior to those articles I had forgotten about the post, which I had written nearly a decade ago on a blog that has been defunct for nearly as long. Although I reviewed my blog posts prior to their submission to the Judiciary Committee, I did not notice that post and it was not brought to my attention.

c. What was the response of the person at the White House Counsel's office after you informed that person of your comments about Justice Kennedy?

The official noted that I should be prepared to answer questions about the post during the committee hearing.

5. You have been a member of the Federalist Society since 2007. **Why did you join the Federalist Society?**

I joined the Federalist Society because I shared its commitment to (i) fostering vigorous but nevertheless civil debate on a variety of significant legal and policy issues, as well as (ii) Hamilton's view in *The Federalist* No. 78 that the judiciary exercises neither force nor will but only judgment.

6. **Do you agree with the views espoused by the Federalist Society?**

To the extent that such views are consistent with those set forth in my answer to Question 5, yes.

7. **Do you believe that the views espoused by the Federalist Society views are compatible with your own views?**

To the extent that such views are consistent with those set forth in my answer to Question 5, yes.

8.

a. Do you believe it was appropriate for the President to announce the involvement of the Federalist Society in the selection of his candidates for the Supreme Court?

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.

b. Do you believe that the President's announcement sent a message that lawyers and judges should not assert views that are at odds with the Federalist Society if they aspire to serve on the Supreme Court?

Please see my response to Question 8.a.

c. Are you concerned that the announced involvement of the Federalist Society and Heritage Foundation in selecting Supreme Court candidates undermines confidence in the independence and integrity of the federal judiciary?

Please see my response to Question 8.a.

9. The Federalist Society website lists the organization's statement of purpose. That statement begins with the following: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." **Do you agree or disagree with this statement? Please explain your answer.**

Please see my response to Question 8.a.

10. **Please list all years in which you attended the Federalist Society's annual national convention.**

I have not attended the Federalist Society's annual national convention.

11. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

a. Do you want outside groups or special interests to make undisclosed donations to front organizations in support of your nomination?

Please see my response to Question 8.a.

b. Would you discourage donors from making such undisclosed donations?

Please see my response to Question 8.a.

c. If any such donations are made, will you call for the donors to make their donations public so that you can have full information when you make subsequent decisions about recusal in cases that these donors may have an interest in?

I am not aware of any donations made to support my nomination. If confirmed and appointed as a Judge for the Court of Federal Claims, I would resolve any potential recusal issue 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.

12. In a 2008 blog post you said "I urged that a reinvigorated constitutional jurisprudence, emanating from the judiciary, could well be the catalyst to real reform" and that "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." **What precedents were you calling for the Supreme Court to overturn in this statement?**

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 my response to Question 8.a.

13. You have said that environmentalists "push an agenda that has more to do with stifling productive human activity than fostering ecological balance." You also wrote an article in February entitled "Environmental Law – A Good Place to Start for Trump to Make America Great Again," in which you said that the Clean Water Act and Clean Air Act "are enforced not for the public's benefit but to stop productive activity that activists or bureaucrats dislike."

    a. Do you agree with President Trump's 2014 statement that "Global warming is an expensive hoax"?

    Please see my response to Question 8.a.

    b. Do you believe that human activity is changing our climate, and do you believe that there is a public interest in addressing climate change?

    Please see my response to Question 8.a.

14. In a 2011 law review article, you said the United States "has a sordid history when it comes to dealing with issues involving race." You then mentioned the *Dred Scott, Plessy v. Ferguson*, and *Korematsu* cases before saying "*Grutter v. Bollinger* should also be recognized as one of the Supreme Court's mistakes." The *Grutter* decision held that diversity was a compelling interest and that universities could consider race as a factor in admissions. **Do you understand why it is troubling that your writings appear to equate Grutter with cases such as Dred Scott, Plessy and Korematsu?**

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.

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.

Senator Mazie K. Hirono

Questions for the Record following the hearing on May 14, 2017 entitled:

"Nominations"

Damien M. Schiff

1) In 2009, you wrote that dialogue on reproductive rights issues is useless until the Supreme Court "releases the issue to the democratic branches." Should we understand that to mean that you think states and the federal government should be free to place limits on the fundamental right to choose that the Court recognized in *Roe* and re-affirmed in *Casey*?

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

To the extent that the question asks whether, as a Judge of the Court of Federal Claims, I would faithfully apply all precedent of the Supreme Court, my response is that I would do so, regardless of any personal views I may have on any such precedent. To the extent that the question asks for 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.

2) In 2011, you co-wrote a piece for the Federalist Society journal and the University of Texas where you called for an end to affirmative action in college admissions, and compared Court approval of affirmative action to its upholding of Japanese internment in *Korematsu*. Do you believe there is no difference between government action intended to correct the historical harms of discrimination and government-sanctioned actions to round up and inter citizens based on race?

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.

3) In 2009, you joined an *amicus* brief in support of Citizens United in their infamous case before the Supreme Court. The brief stated that the only constitutional rationale for limiting corporate spending on elections was to prevent actual quid pro quo corruption—essentially, bribery. Does that mean you disagree with the Supreme Court's holding in *McConnell v. FEC* that there is a government interest in preventing both actual corruption *and the appearance of corruption*?

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

4) Throughout your legal career, you have represented and advocated for clients who oppose environmental regulations that protect clean air, clean water, and endangered species. Although you have represented these clients pro bono, your organization, the Pacific Legal Foundation, receives funding from right-wing millionaires and corporate polluters. As a member of the Court of Federal Claims, you would be required to decide of claims against the federal government by individuals and corporations.

    a. Can you guarantee that you would judge these cases fairly, without regard to your career-long opposition to environmental laws or your personal views?

    Yes. As stated in my response to Question 1, I solemnly pledge that, should I be confirmed and appointed as a Judge of the Court of Federal Claims, I would decide every matter to come before me strictly on (i) the law, as established by the Constitution, statute, regulation, and judicial precedent, and (ii) the facts, as determined by the submissions of the parties and the rules of evidence and procedure.

    b. How would you handle a case involving a party that has a financial connection to the Pacific Legal Foundation?

    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.

5) During your hearing, you apologized for using the term "judicial prostitute" to describe Justice Anthony Kennedy's style of judging in a blog post, calling the term intemperate and unartful, and saying that you did not intend to call him that. However, you stated that you stood by the point made in that blog post, that the media should not applaud "strategic judging."

    a. Judges, particularly those that hear arguments as a panel, are often required to write opinions that can command the support of their colleagues. Do you think that writing such an opinion would be "strategic judging," and that it should be avoided?

    By "strategic judging," I mean judging that is not based exclusively on the law and the facts. It is certainly plausible to imagine a statement of law or fact that could be phrased in more than one way, without changing the underlying meaning. A judge choosing to rephrase such a statement in a non-substantive way in order to convince a colleague to join an opinion would not, in my view, be guilty of strategic judging.

    b. Could you give examples of cases where you think Justice Kennedy engaged in "strategic judging," rather than offering his forthright opinion? What evidence do you have to support this claim?

I do not recall whether I had any particular decision in mind. 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."

c. In what ways did you "not intend" to call Justice Kennedy a "judicial prostitute" when you chose to use those words in your blog post? What steps did you take to change the language of your blog or correct the record so that it would reflect your apparent intent?

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.

d. In light of the deeply troubling nature of your blog post, how can you reassure us that you have the appropriate temperament to be a federal judge, one that all litigants could trust would fairly apply the law?

Appropriate judicial temperament constitutes the ability to decide cases without being influenced by one's personal views or opinions regarding the law, the facts, the parties, or their counsel. Put another way, it constitutes the ability to decide cases exclusively based on (i) the law, as established by the Constitution, statute, regulation, and judicial precedent, and (ii) the facts, as determined by the submissions of the parties and the rules of evidence and procedure.

I solemnly pledge to all members of the Committee that, if I am confirmed and appointed as a Judge of the Court of Federal Claims, I will set aside any personal views or opinions that I may have about any matter that may come before me, and decide such matter based solely on the law and the facts.

6) You were asked in the hearing about a blog post you wrote entitled "Teaching Gayness," in which you criticized a California school district for its LGBTQ 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." During the hearing, you characterized the point of your blog post as an exploration of when it was appropriate for schools to weigh in on a contested issue.

a. Is it your opinion that whether or not it is appropriate to bully LGBTQ youth constitutes a contested issue? What makes it a contested issued?

No. The blog post in question was not intended in any way to express approval of the bullying of LGBTQ children for any reason.

b. In addition to your blog post, you have stated in the past that you "strongly disagree with the [sic] *Lawrence*," that the legalization of gay marriage in California was incorrect, and that the "empirical foundations" of anti-LGBT animus are not without merit. It is clear that you have been an opponent of LGBTQ rights. Do you stand by your testimony that your blog post was not meant to reflect your own views criticizing the "moral implications of homosexuality" as you described it?

Correct. The purpose of the anti-bullying curriculum blog post was not to take sides on the morality of homosexuality but instead to make the broader point that it may be counterproductive for public schools to weigh in on any contested moral issue.

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 is 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.