



August 4, 2017

**OPPOSE THE CONFIRMATION OF DAMIEN M. SCHIFF TO THE
U.S. COURT OF FEDERAL CLAIMS**

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I am writing in strong opposition to the confirmation of Damien M. Schiff to the U.S. Court of Federal Claims. The Leadership Conference urges the Senate to reject this nomination.

It is difficult to imagine a judicial nominee less deserving of confirmation than Damien Schiff, whose prolific blog posts reflect a strong hostility to civil rights, LGBT rights, women's rights, environmental protection, campaign finance reform, and judicial precedent. Mr. Schiff's offensive and intemperate blog posts were written anonymously to hide his identity, but he was required to disclose them to the Senate as part of the nomination process. His extreme and intolerant views would render him incapable of serving as a neutral arbiter, an inability further reinforced by the fact that Mr. Schiff has devoted his entire legal career to advancing ultra-conservative causes in the courts.

Temperament: In a 2007 blog posting entitled "Kennedy as the Most Powerful Justice?," Mr. Schiff wrote 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." He went on to write: "[D]oesn't Justice Kennedy's toying or proclivity to concurrence-writing simply reveal a chameleon mind, without mooring in the rule of law or other principles extrinsic to its own fancy?"

At his Senate Judiciary Committee hearing, Mr. Schiff showed little remorse for his comments. Senator Kennedy, who had heard about but apparently not seen Mr. Schiff's blog post, asked Mr. Schiff if he had, in fact, called Justice Kennedy a "judicial prostitute." Mr. Schiff was evasive in his answer: "That was not my intent. My intent was to compare the style of judging that I believe the particular article that I quoted in that blog post was attributing to Justice Kennedy, to call that style of judging a bad name." Mr. Schiff's response is deceptive and dishonest. Of course it was Mr. Schiff's intent to call Justice Kennedy a "judicial prostitute" – that is the exact term he used in his blog post.

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And as demonstrated by the direct quotes from Mr. Schiff on a variety of topics below, he has frequently adopted what one could only call an incendiary, deeply disrespectful voice that is not in any way suited for the bench.

Equal Opportunity: In a 2011 law review article, Mr. Schiff expressed hostility and extreme views on equal opportunity programs in education. He wrote: “The sad truth is that the United States has a sordid history when it comes to dealing with issues involving race. From *Dred Scott v. Sandford*, to *Plessy v. Ferguson*, to *Korematsu v. United States*, the Supreme Court has all too often been at the forefront of this ugly history. Yet, the Supreme Court has also righted each one of those wrongs. In the *Slaughterhouse Cases*, the Supreme Court recognized that the Fourteenth Amendment overturned *Dred Scott* by making all persons born in the United States citizens (and not chattels). In *Brown v. Board of Education*, the Supreme Court overturned *Plessy* by holding that separate is inherently unequal. And in *Adarand Constructors v. Peña*, the Supreme Court affirmed that strict scrutiny must be rigorously applied so mistakes like *Korematsu* do not happen again. *Grutter v. Bollinger* should also be recognized as one of the Supreme Court’s mistakes.”¹

By comparing the *Grutter* decision, which held that diversity was a compelling interest and that universities could use race as a factor in admissions, with the Supreme Court’s most historically and morally flawed decisions – *Dred Scott*, *Plessy*, and *Korematsu* – Mr. Schiff reveals an extreme bias against, and a lack of understanding of, equal opportunity and opposition to the principles of ensuring equal access for all that lie at the core of these important equal opportunity programs.

LGBT Rights: In 2009, Mr. Schiff wrote a piece entitled “Teaching ‘gayness’ in public schools,” where he anonymously railed against the anti-bullying lesson plan of a California school district. He wrote: “I have not seen the proposed lesson, but from the article, it seems to teach not only that bullying of homosexuals is wrong, *but also* that the homosexual lifestyle is a good [sic], and that homosexual families are the moral equivalent of traditional heterosexual families.”² He went on to state: “Perhaps someone will respond: would you have objected to an anti-racism curriculum being taught in 1950s Arkansas? I guess my answer there would be a qualified yes, that I would have objected, not that I would approve of racism, but that, as a prudential matter, the best way to get people to drop their racist views would *not* be to force the teaching of their children. 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. And so, the remedy? Allow parents to opt out of public schools altogether, and let them keep their taxes.”³

Mr. Schiff has demonstrated a disturbing anti-LGBT bias in other writings as well. In one post, he stated: “I strongly disagree with the *Lawrence* [sic] because I can find no historical or precedential basis, pre-1868, for its limitation on the legislative proscription of sodomy.”⁴ In another posting, he wrote: “The impetus for the gay rights movement is that we cannot deny to consenting adults the full cultural and legal

¹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803475.

² <http://www.afj.org/wp-content/uploads/2017/05/Schiff-SJQ-1487-1488.pdf>.

³ *Id.*

⁴ https://web.archive.org/web/20080610122430/http://omniaomnibus.typepad.com:80/omnia_omnia/2008/05/index.html.

recognition of the propriety of their sexual fulfillment.”⁵ In that same piece, he said that a state court ruling that permitted same-sex couple adoption “underscores my fear that soon the advocacy of traditional sexual morality will be deemed to fall outside the sphere of legitimate secular political debate.”⁶

Women’s Rights: In a 2008 blog posting, Mr. Schiff equated abortion with slavery, arguing that anti-abortion laws can be justified on non-religious grounds, specifically, on natural law. He wrote that “infanticide and slavery can be shown to violate natural law; that is to say, those offenses can be known as such by the rightly formed human conscience, unaided by any divine assistance. I think the same goes for abortion.”⁷ He went on to assert: “I am not saying that people in favor of legalized abortion are morally decrepit (although I would consider their view on this matter to be gravely in error).”⁸

In a 2007 posting, Mr. Schiff criticized an article written by a pro-choice advocate because, among other reasons “it presupposes that the unborn person is not a person entitled to any of the protections of the Constitution, including the Due Process (DPC) and Equal Protection Clauses (EPC) of the 14th Amendment. To avoid that issue is to ignore the 800 lb elephant.”⁹ He further rejected the author’s argument because it was “non-originalist.”¹⁰

Mr. Schiff serves on the board of directors of the Sacramento Life Center, an anti-choice counseling group that refuses to inform its patients about abortion and contraception options.¹¹ The group was recently found to be out of compliance with a state law requiring that such centers put up signs informing patients about California’s free and low-cost public programs for family planning, prenatal care, and abortion services.¹²

In the 2011 case *American Sports Council v. Department of Education*, Mr. Schiff challenged the application to high schools of Title IX – the key federal civil rights law prohibiting sex discrimination against students and employees in education programs and activities receiving federal financial assistance. In an interview about the case, Mr. Schiff stated: “Congress had absolutely no evidence before when it enacted Title IX that there was sexual discrimination going on in high schools. So therefore, they have no constitutional basis to impose those restrictions on high school athletics.”¹³ Mr. Schiff’s case was dismissed for lack of standing.

Money in Politics: On behalf of the Pacific Legal Foundation, Mr. Schiff authored an amicus brief in *Citizens United v. Federal Election Commission* that called for corporations to have the same First Amendment rights as human beings. He wrote that the “distinction between natural and corporate persons” was unjustified and that “[t]he core political speech protections of the First Amendment should

⁵ <http://www.afj.org/wp-content/uploads/2017/05/Schiff-SJQ-Attachments-Final-1503.pdf>.

⁶ *Id.*

⁷ <http://www.afj.org/wp-content/uploads/2017/05/Schiff-SJQ-1515-1517.pdf>.

⁸ *Id.*

⁹ https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia_omnibus/2007/06/index.html.

¹⁰ *Id.*

¹¹ <https://saclife.org/our-services>.

¹² <http://www.sacbee.com/news/local/health-and-medicine/healthy-choices/article66246282.html>.

¹³ <https://www.youtube.com/watch?v=cQbBuAYIov4>.

be open to all equally.”¹⁴ He also asked the Supreme Court to reverse longstanding precedents that had upheld sensible campaign finance restrictions. In a blog posting about the *Citizens United* case, Mr. Schiff wrote: “PLF’s brief also makes the larger point that corporations provide significant societal goods, and that their speech (which really is nothing more than the combined speech of the natural persons who form the corporation) should be encouraged, not censored.”¹⁵

Environmental Rights: Mr. Schiff has expressed contempt for federal environmental laws that protect clean air, clean water, and wildlife. In a February 2017 article entitled “Environmental Law – A Good Place to Start for Trump to Make America Great Again,” he wrote that “the sad reality is that, as a result of environmentalist litigation and agency misrepresentation, these statutes [the Clean Water Act, Clean Air Act, and Endangered Species Act] often are enforced not for the public’s benefit but to stop productive activity that activists or bureaucrats dislike. Such misuse needlessly increases costly regulatory burdens, creating a crippling drag on the economy.”¹⁶ He also proposed an extreme suggestion for Fifth Amendment takings claims, writing: “To 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.”¹⁷

In 2011, Mr. Schiff was interviewed by Lou Dobbs about a case in which he was representing an Idaho family who had sued the Environmental Protection Agency for denying them a permit to build a home because it qualified as a wetland under the Clean Water Act. Mr. Schiff stated: “This 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.”¹⁸

In 2013, Mr. Schiff lambasted the Endangered Species Act in a *Wall Street Journal* op-ed, in which he wrote that “the law has endangered the economic health of many communities – while creating a cottage industry of litigation that does more to enrich environmental activist groups than benefit the environment. How did things get so turned around? Blame the bureaucrats of the Endangered Species Act. They have administered the law poorly and flouted provisions designed to promote good science and good sense.”¹⁹ In an article published in April 2017, on Earth Day, Mr. Schiff continued his campaign against the Endangered Species Act, writing: “Unfortunately, the good intentions of that statute – much like those of Earth Day itself – have been perverted to make it, in too many cases, a threat to individual liberty and property rights.”²⁰

¹⁴ <http://plf.typepad.com/files/plf-ac-brf-in-sprt-of-aplnt.pdf>.

¹⁵ <http://blog.pacificlegal.org/fighting-for-political-speech-in-the-supreme-court/>.

¹⁶ <http://www.investors.com/politics/commentary/environmental-law-a-good-target-for-trumps-efforts-to-make-america-great-again/>.

¹⁷ Id.

¹⁸ <http://www.afj.org/wp-content/uploads/2017/05/Schiff-LouDobbs.pdf>.

¹⁹ <https://www.wsj.com/articles/schiff-and-macdonald-the-endangered-species-act-turns-408212hold-the-applause-1388186442>.

²⁰ http://www.americanthinker.com/articles/2017/04/we_can_pursue_earth_days_goals_without_endangering_the_environment_for_freedom.html.

Property Rights: Mr. Schiff has brought a number of takings cases during his tenure at the Pacific Legal Foundation. For example, he sued San Jose, California for passing an affordable housing ordinance in 2010 that required at least 15 percent of new residential development projects to be sold at affordable prices. Mr. Schiff, on behalf of a building industry association, claimed this law was an unconstitutional taking. The California Supreme Court rejected Mr. Schiff's argument and unanimously upheld the ordinance.²¹

In a 2011 appearance on a show called "Libertarian Counterpart," there was a discussion of how to safeguard Social Security. The moderator of the show asserted that the federal government owns 40 percent of the country and that "they don't have to sell it all at once but there's enough value in that land over the next 30-40 years to basically buy out Social Security." Mr. Schiff responded to this comment by saying "good point" and "you could sell Yosemite."²² Another panelist then quipped "you could turn it over to Walt Disney," and Mr. Schiff responded: "Yeah, why not, they'd do a damn better job."²³

Judicial Activism: Mr. Schiff views courts as a vehicle to advance an agenda rather than to apply the law. In a 2008 blog posting, Mr. Schiff discussed comments he had made at a conference on the separation of powers. He wrote: "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. A limited 'substantial effects' test, a recharged nondelegation doctrine, and a return to economic due process would yield significant benefits, and quickly."²⁴ Mr. Schiff's radical vision of the law would take us back to the *Lochner* era when the Supreme Court struck down minimum wage and labor laws in order to protect corporate interests above all others. Mr. Schiff's activist agenda and disrespect for precedent are evident from these comments.

Questions for the Record: In his written responses to questions submitted after his hearing, it was revealed that the White House likely did not know about Mr. Schiff's offensive and surreptitious blog posts when he was nominated on May 8. In responding to written questions from Senator Whitehouse and Senator Franken, Mr. Schiff revealed that he did not remember writing his offensive blog posts until there were press articles about them beginning on May 26. He wrote: "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." Had the Trump White House known about Mr. Schiff's blog posts prior to nomination, they presumably either would not have nominated him, or they would have raised them with Mr. Schiff and asked him to explain them. The fact that Mr. Schiff did not recall the "judicial prostitute" and other notorious comments until there were press reports about them on May 26 is a strong indication that the White House did not know about them when they nominated him on May 8. This lack of proper vetting has plagued the Trump White House from the outset, and it has resulted in the withdrawal of several nominations.

²¹ *California Building Industry Association v. City of San Jose*, 351 P.3d 974 (Cal. 2015).

²² <https://www.youtube.com/watch?v=hyNm8SDBbSc>.

²³ *Id.*

²⁴ https://web.archive.org/web/20080610122430/http://omniaomnibus.typepad.com:80/omnia_omnia/2008/05/index.html.

In addition, Mr. Schiff's evasive answers to written questions take committee stonewalling to new heights. Mr. Schiff refused to answer the vast majority of questions posed to him by committee members. While it is common for judicial nominees to deflect certain questions that call for personal opinions not previously stated, Mr. Schiff refused to answer questions about personal opinions that he had previously expressed. For example, in his "teaching gayness" blog post, he 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." In response to a written question from Senator Feinstein which asked "What are the 'moral implications' of homosexuality," Mr. Schiff answered: "Please see my response to Question 2.a.," which, in turn, stated: "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." In light of the fact that Mr. Schiff is the one who used the term "moral implications of homosexuality" in the first place, he should be expected to answer questions about what he meant by his usage of that term.

This deceptive and evasive approach that Schiff utilized throughout his written answers – referring to previous responses which lacked any substance, on literally dozens of occasions – is a departure from the way in which past judicial nominees have answered questions about their statements and writings. Mr. Schiff's extreme evasiveness and refusal to answer legitimate questions about his past writings demonstrates disrespect for the Senate's advice-and-consent role in the confirmation process.

Court of Federal Claims Caseload: Finally, President Obama made five nominations to the Court of Federal Claims in April and May of 2014. None were confirmed, due to the baseless claims of Senator Cotton that the court's caseload did not justify any additional judges. Now that President Trump is making nominations to this court, we will be interested to see whether Senator Cotton will continue to take the same position and object to holding votes on all Court of Federal Claims nominees.

For the foregoing reasons, The Leadership Conference urges you to reject the nomination of Damien Schiff to the Court of Federal Claims. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel and Legal Director, at (202) 466-3311.

Sincerely,



Vanita Gupta
President & CEO