



June 9, 2017

The Honorable Charles Grassley
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C., 20510

The Honorable Dianne Feinstein
Ranking Member
U.S Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C., 20510

Dear Chairman Grassley and Ranking Member Feinstein,

We write to express our opposition to the confirmation of Damien Schiff and John K. Bush to seats on the federal bench. As an organization that litigates cases to protect equality for lesbian, gay, bisexual, and transgender(LGBT) people, we do not take lightly a decision to oppose judicial nominees. The records of these two individuals, however, compel us to take this position. We urge the committee to reject these and any other nominees whose writings and views are antithetical to the foundational principles of our Constitution and the very premise of democratic equality.

The National Center for Lesbian Rights (NCLR) is a 40-year-old civil rights organization, founded in San Francisco in the late 1970s to advocate for lesbians who were losing custody of their children simply due to their sexual orientation. Since then we have continued our legal and policy work to advance LGBT equality in family recognition – including bringing one of the marriage equality cases that reached the United States Supreme Court in 2015 – as well as in employment and educational opportunities, fair treatment of LGBT youth in schools, LGBT inclusion in sports, and many other areas.

Our work advancing LGBT equality through the courts makes us keenly aware of the importance of a fair and balanced judiciary committed to upholding the principles of equal protection and due process of law. The cases that we and our sister organizations have brought have created opportunities for LGBT people to live openly, marry who we love, raise children, serve in the military, and hold jobs. These advances were achieved because we asserted our claim to the same constitutional rights and protections enjoyed by others, and were afforded a fair shot to make our arguments in court and have them judged on their legal merits. We've won some and lost some, as is to be expected. What we always count on is that the judges deciding our cases will do so based on the facts and the law in front of them, setting aside, to the extent humanly possible, their personal beliefs and biases.

It is difficult to imagine, however, that any lesbian, gay, bisexual or transgender plaintiff would be accorded the respect and fair treatment they deserve if they came before nominees Bush or Schiff. Both of these individuals have extensive records of public writings and publicly expressed views of LGBT people that render them unfit to serve in a role that requires impartial judgment. We set forth some examples below.

John K. Bush

Perhaps operating under a belief that doing so would shield him from accountability, Bush has authored over 400 posts under the pseudonym “G. Morris” on the blog “Elephants in the Bluegrass.” In one such post, he mocked the State Department for modifying passport application forms to account for two parents of the same sex (while also employing barely-veiled misogynistic language to refer to then Secretary of State Clinton). He wrote:

Henceforth, the application will ask for ‘Mother or Parent 1’ and ‘Father or Parent 2.’ I supposed that’s better than ‘Thing Two’ or ‘Thing Two,’ but Hillary’s hybrid hardly eliminates my confusion. . . . It’s just like the government to decide it needs to decide something like which parent is number one or number two. When that happens, both parents are subservient to the nanny state – more precisely, a nanny Secretary of State.¹

In another blog post, Bush denigrated then-president Obama for “looking like a girly-man” in a photograph.²

Not all of Mr. Bush’s distasteful rhetoric regarding LGBT people has been reserved for his anonymous blogs. Perhaps most troubling, in a speech, he chose to recite a quote from another author containing this: “I come here every year, and let me tell you one thing I’ve learned – this is no town to be giving people the impression you’re some kind of faggot.”³ It is difficult to even type this painful slur that is too often aimed at members of our community, sometimes with accompanying violence, and stunning that an individual who employed it without hesitation is before this body seeking confirmation to the federal bench.

Finally, in a paper published for the Federalist Society, Bush and his co-author criticized the Kentucky Supreme Court for striking down that state’s sodomy law even before the Supreme Court did so for Texas and thus, nationwide. They wrote: “Kentucky was the first state whose highest court immunized consensual sodomy from criminal prosecution under the state constitution in the wake of a contrary holding of the U.S. Supreme Court under the federal Constitution.”⁴ The Senate should not elevate someone to a seat on a federal appellate court who believes that we should return to the days when same-sex intimacy was criminalized.

¹ G. Morris, A Parent 2’s Outrage, ELEPHANTS IN THE BLUEGRASS (Jan. 9, 2011, 8:01 PM), <https://elephantsinthebluegrass.blogspot.com/2011/01/parent-2s-outrage.html>.

² When Did Obama Jump the Shark?, ICHABOD, THE GLORY HAS DEPARTED (Sept. 13, 2008), <http://ichabodthegloryhasdeparted.blogspot.com/2008/09/when-didobama-jump-shark.html>.

³ John K. Bush, A Certain Starting Place, Address at The Forum Club of Louisville (Sept. 8, 2005), notes available at Sen. Comm. on the Judiciary, 115th Cong., John Kenneth Bush: Questionnaire for Judicial Nominees—Public Appendix 12(d), *available at* <http://www.afj.org/wp-content/uploads/2017/06/A-Certain-Starting-Place.pdf>.

⁴ JOHN K. BUSH & PAUL E. SALAMANCA, “EIGHT WAYS TO SUNDAY”: WHICH DIRECTION, KENTUCKY SUPREME COURT? 5 (The Federalist Society for Law & Public Policy Studies 2006), <https://www.bgdlegal.com/clientuploads/Publications/Publications/John%20Bush%20-%20Eight%20Ways%20to%20Sunday.pdf>.

Damien Schiff

It appears that re-criminalizing sodomy would also pass muster with Damien Schiff, nominated to fill a vacant seat on the Court of Federal Claims. Mr. Schiff has written on several occasions⁵ of his opposition to privacy protections for same-sex intimacy. He stated: “I contend that the due process clause, assuming that it has a substantive component, likely does not forbid the criminalization of sodomy.”⁶

Perhaps more troubling than his view on the Constitution’s liberty guarantee and his outspoken opposition to marriage equality⁷ is Mr. Schiff’s equivocation as to whether animus against LGBT people is a bad thing. He wrote in a blog post:

[R]acism became a pariah position because (1) its enforcement, both legally and culturally, effected loathesome [sic] evils (and evils recognized as such by all sides), and (2) its supposed empirical foundations were without merit. Similarly, when it comes to gay issues, many folks on the gay rights side would contend that both (1) and (2) are present, which thus justifies the villification [sic] of anti-gay-rights folks. I would disagree.⁸

In criticizing a Florida decision striking down that state’s ban on same-sex couples adopting children, Schiff wrote: “I think that this decision simply underscores my fear that soon the advocacy of traditional sexual morality will be deemed to fall outside the sphere of legitimate secular political debate, much like racism has (and quite rightfully so).”⁹ His view that the jury is still out on “the moral implications of homosexuality” led him to oppose a school district’s attempt to address bullying of LGBT students, equating it to “taking sides” in a debate with two legitimate and competing viewpoints.¹⁰ In a blog post entitled “Teaching ‘gayness’ in public schools,” Schiff criticized the district 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.”¹¹

⁵ Damien M. Schiff, *The original meaning of Due Process*, OMNIA OMNIBUS (Aug. 1, 2007, 10:36 PM), https://web.archive.org/web/20080610122355/http://omniaomnibus.typepad.com:80/omnia_omnibus/2007/08/index.html; Damien M. Schiff, *Federalism and Separation of Powers Part I*, OMNIA OMNIBUS (May 15, 2008), https://web.archive.org/web/20080610122430/http://omniaomnibus.typepad.com:80/omnia_omnibus/2008/05/index.html.

⁶ Schiff, *The original meaning*, supra note 5.

⁷ Damien M. Schiff & Timothy Sandefur, *The Modern California Supreme Court: Progressivism and Practical Constraints*, THE FEDERALIST SOCIETY at 10 (Oct. 6, 2008), <http://www.fed-soc.org/publications/detail/the-modern-california-supreme-court-progressivism-and-practical-constraints>.

⁸ Damien M. Schiff, *Traditional Sexual Mores and the Permissible in Secular Discourse*, OMNIA OMNIBUS (Nov. 26, 2008, 8:21 PM), <http://www.afj.org/wp-content/uploads/2017/05/Schiff-SJQ-Attachments-Final-1503.pdf>.

⁹ *Id.*

¹⁰ Damien M. Schiff, *Teaching “gayness” in public schools*, OMNIA OMNIBUS (May 17, 2009, 2:32 PM), <http://www.afj.org/wp-content/uploads/2017/05/Schiff-SJQ-1487-1488.pdf>.

¹¹ *Id.*

Finally, we believe that Mr. Schiff's appalling denigration of a sitting Supreme Court justice is alone sufficient to disqualify him from serving on the federal bench. We refer to a 2007 online post in which he called Justice Kennedy, "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."¹² A person who would characterize a justice this way should not be given the honor of joining that justice as a colleague on the federal judiciary.

We believe that the unvarnished animus towards LGBT people exhibited by Mr. Bush and Mr. Schiff render them unfit to serve as federal judges. It is incumbent upon this committee, and indeed all members of the United States Senate, to exercise their constitutional duty to carefully review the records of these nominees and vote against their confirmation.

A handwritten signature in blue ink that reads "Julianna S. Gonen". The signature is written in a cursive style with a long, sweeping underline.

Julianna S. Gonen
Policy Director

¹² Damien M. Schiff, Kennedy as the most powerful justice?, OMNIA OMNIBUS (Jun. 29, 2007, 8:35 AM), https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia_omniaomnibus/2007/06/index.html.