

July 14, 2017

VIA EMAIL

Dear Senator:

On behalf of the National Women's Law Center (the Center), an organization that has fought to promote women's legal rights and protections for nearly 45 years, I write to urge you to oppose the nomination of Damien Schiff to a 15-year term on the United States Court of Federal Claims. While the Court of Federal Claims has limited jurisdiction, it frequently adjudicates legal issues of importance to women, including (but not limited to) claims of race, disability, sexual orientation, gender identity, and sex discrimination in the context of government contracts and civil service and military employment.

Mr. Schiff is spectacularly unfit for the federal bench. A prolific blogger, Mr. Schiff has made numerous intemperate statements, including referring to Justice Anthony Kennedy as "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."¹ He has also impugned advocates whose views he does not share,² raising serious questions about whether he will treat all litigants coming before him with respect and impartiality.

Mr. Schiff has expressed an extremely troubling view of the role of the judiciary as the driver of policy, urging a "reinvigorated constitutional jurisprudence, emanating from the judiciary" which "could well be the catalyst to real reform [of federalism and separation of powers doctrines], as opposed to that reform coming from other branches."³ Moreover, both in his blogs and as a legal commentator and litigator

¹ Damien M. Schiff, *Kennedy as the Most Powerful justice?*, OMNIA OMNIBUS (June 29, 2007, 8:35 AM), https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia_omnia/2007/06/index.html. At his hearing, Mr. Schiff explained that he was criticizing the media's portrayal of Justice Kennedy with this language. In his responses to questions for the record, he maintained that he in fact did not mean to "ascribe to [Justice Kennedy] the media caricature of his judging style," but apologized for his "intemperate and uncharitable" language. DAMIEN M. SCHIFF, QUESTIONS FOR THE RECORD, SENATE JUDICIARY COMMITTEE 1 (2017), available at <https://www.judiciary.senate.gov/download/schiff-responses-to-questions-for-the-record> [hereinafter Schiff QFRs] (note: the pagination within the source is not consecutive, therefore all page numbers refer to the page number of the PDF document in its entirety, rather than the page numbers listed in the document).

² See, e.g., Damien M. Schiff, *Putting Good Sense on the Endangered Species List*, CASPER STAR TRIB. (Sept. 28, 2009) http://trib.com/news/editorial/forum/putting-good-sense-on-the-endangered-list/article_d158df1c-2736-584d-872e-3ba13bdaf5fd.html (calling the Endangered Species Act "a handy tool for environmentalist extremists to push an agenda that has more to do with stifling productive human activity than fostering ecological balance."). When asked whether these statements might cause his impartiality to reasonably be questioned, Mr. Schiff responded by pledging that, if he were confirmed, he would "decide all matters strictly according to the law and the facts." Schiff QFRs, *supra* note 1, at 32.

³ Damien M. Schiff, *Federalism and the Separation of Powers, Day II*, OMNIA OMNIBUS (May 18, 2008, 6:59 PM), https://web.archive.org/web/20081018211427/http://omniaomnibus.typepad.com:80/omnia_omnia/2008/05/index.html. When asked about this statement in questions for the record,

with the Pacific Legal Foundation, he has taken positions on a number of legal issues of importance to women that are extreme, ideological, and contrary to controlling law and precedent, which raise serious doubts as to whether he can fairly and impartially adjudicate cases involving those and related issues. Specifically:

Persistent Error in Interpreting Title IX. Mr. Schiff asserted that Title IX does not apply to high school sports.⁴ This assertion is contrary to the decisions of numerous courts as well to the decades old Title IX regulations and Department of Education policies that consistently have been upheld by the courts. Notwithstanding, the Pacific Legal Foundation filed a lawsuit asserting that Title IX does not apply to high school sports.⁵ Mr. Schiff's refusal to accept long-established guidance and precedent raises serious concerns about whether he could fairly adjudicate claims related to Title IX, other Spending Clause antidiscrimination legislation, or antidiscrimination laws more generally; and also about whether Mr. Schiff would adhere to settled law, if confirmed to the bench.

Hostility to Race-Conscious Admissions Policies in Higher Education. Mr. Schiff co-authored a law review article in anticipation of the Supreme Court's first review of the *Fisher v. University of Texas* case, 133 S. Ct. 2411 (2013). The article contended that *Grutter v. Bollinger*, 539 U.S. 306 (2003), "should . . . be recognized as one of the Supreme Court's mistakes," along with *Dred Scott*, *Plessy v. Ferguson*, and *Korematsu*

Mr. Schiff asserted both that he would follow "all precedents from the Supreme Court from all periods in history," and that his personal views would not be relevant if confirmed as a judge. Schiff QFRs, *supra* note 1, at 4. However, this assertion fails to address the question of whether he still would encourage the judiciary to undertake a reinvigorated constitutional jurisprudence that could produce "real" reform.

⁴ Specifically, Mr. Schiff's legal claims were based on the factually untrue assertion that application of Title IX to high school athletics represented a "quota" system that discriminated against boys. He made these claims despite clear precedent to the contrary. For example, in 2007, the Pacific Legal Foundation had submitted a petition to the Department of Education to rescind the regulation and policy interpretations that have long applied Title IX to high school sports. The Department of Education rejected their petition, noting that the Pacific Legal Foundation had presented the same arguments in 2003—namely, that the Title IX athletics policies create an affirmative action or quota system—and that the Department had rejected them then too. Letter from Margaret Spellings, Sec'y of Educ., United States Dep't of Educ., to Steven Geoffrey Gieseler, Pacific Legal Foundation (Mar. 27, 2008), *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/title-ix-2008-0327.pdf>.

⁵ In speaking about his lawsuit, which was summarily dismissed on standing grounds, he stated:

Most people thought that Title IX only applied to collegiate athletics until recently the National Women's Law Center, a left leaning group, has been threatening all sorts of high schools through the country because they contend that they are out of compliance with Title IX Our argument is applying Title IX to high school athletes not only violates Title IX itself, the statute, but in fact violates the Constitution because under the Constitution the government can only discriminate or differentiate on the basis of sex only if the government has a strong justification for it.

D.A. Tuma, *Libertarian Counterpoint #1044*, 8/4/11, YOUTUBE at 17:20 (Aug. 13, 2011), <https://www.youtube.com/watch?v=cQbBuAYlov4>.

v. United States.⁶ In particular, the article argued: “By deferring to the law school’s diversity interest, *Grutter* sanctioned a lesser standard of review than strict scrutiny, thereby allowing universities to employ pernicious racial classifications that treat individuals as a by-product of their race.”⁷ The article asserted that the Supreme Court should, in its review of the University of Texas’s race-conscious admissions policy in *Fisher I*, overturn *Grutter*.⁸

The positions taken in this article further raise concerns about Mr. Schiff’s ability to review policies intended to further equal opportunity and diversity, including for federal contractors and for civil service and military employees.

Criticism of Cases Protecting LGBT Rights and Use of Hostile Anti-LGBT Rhetoric. On multiple posts on his blog, Mr. Schiff has expressed hostility to established precedent protecting LGBT rights and employed language that is hostile to LGBT individuals.

In one blog post, he stated: “I strongly disagree with the *Lawrence* [*v. Texas* decision] because I can find no historical or precedential basis, pre-1868, for its limitation on the legislative proscription of sodomy.”⁹ This statement raises questions about whether he could fairly and impartially follow the relevant precedents, and Mr. Schiff’s hearing statements that he will follow Supreme Court precedent do not provide much comfort given the extreme nature of the material in his blog.¹⁰

In another blog post, he criticized a school district’s efforts to address bullying of LGBT students. In a post entitled “Teaching ‘gayness’ in public schools,” Mr. Schiff criticized the curriculum for asserting “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 This language can reasonably be interpreted to mean that Mr. Schiff objected to the

⁶ Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn Its Flawed Decision in Grutter*, 15 TEX. REV. L. & P. 437, 486 (2011), available at <https://drive.google.com/file/d/0BxwJ7kYwYA7FLXV4N0hRMWdfbWM/view>. When asked about the article’s grouping of these cases, Schiff responded, “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.” Schiff QFRs, *supra* note 1, at 6.

⁷ Thompson & Schiff, *supra* note 6, at 486.

⁸ *Id.* at 487.

⁹ Damien M. Schiff, *Federalism and Separation of Powers Part I*, OMNIA OMNIBUS (May 15, 2008, 9:03 PM), https://web.archive.org/web/20080610122430/http://omniaomnibus.typepad.com:80/omnia_omnibus/2008/05/index.html.

¹⁰ Schiff QFRs, *supra* note 1, at 17.

¹¹ Damien M. Schiff, *Teaching “Gayness” in Public Schools*, OMNIA OMNIBUS (May 17, 2009, 2:32 PM), https://web.archive.org/web/20090530124852/http://omniaomnibus.typepad.com:80/omnia_omnibus/2009/05/index.html. He did state in his answers to questions for the record that he regretted the blog post “because it has given the . . . false impression that I was or am opposed to anti-bullying curricula for LGBT children, or that I favor legal disabilities for LGBT persons.” Schiff QFRs, *supra* note 1, at 21.

positive characterization of LGBT individuals and viewed families with LGBT members as morally inferior. Further troubling is his statement at his hearing that he wrote this blog without actually reading the policy that he criticized.

Similarly, Mr. Schiff criticized a Florida state court decision invalidating the state's ban on adoption by same-sex couples, for its holding that "that the state could not articulate any rational basis for treating same-sex couples differently from heterosexual couples, notwithstanding the state's proffering of expert testimony indicating that adoptees of same-sex relationships exhibit higher incidences of drug and alcohol abuse, and other anti-social behavior."¹² Taken together, these and other statements made by Mr. Schiff would give LGBT individuals coming before him as a judge, if he were confirmed, reason to doubt that they would receive fair and impartial treatment.¹³

Urged Limiting Deference to Agency Interpretations of Laws. Mr. Schiff authored an op-ed that described one case as offering the court in question the chance to "dial back judicial deference to agency regulations."¹⁴ In answers to questions for the record, he explained that the point of the op-ed "was to suggest that agencies do not have special expertise over and above judges at interpreting the meaning of legal text."¹⁵

Federal agencies have the legal responsibility to interpret, implement, and enforce core labor and employment rights, as well as civil rights protections in the context of education, health care, and elsewhere. Through their day-to-day work fulfilling these responsibilities, agencies build deep expertise in these issues. Often agency regulations define, for all practical purposes, the contours of the protections established by statute. A critical legal principle that respects the authority and expertise of federal agencies is "*Chevron* deference," whereby the judicial branch defers to agencies' reasonable interpretations of federal law when the statute is susceptible to different interpretations. It stems from Supreme Court precedent, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Mr. Schiff asserted in his answers to questions for the record that he would follow precedent, including the Supreme Court's decision in *Chevron*.¹⁶ Notwithstanding, the statements in this op-ed raise concerns that, if cases involving the interpretation

¹² Damien M. Schiff, *Traditional Sexual Mores and the Permissible in Secular Discourse*, OMNIA OMNIBUS (Nov. 26, 2008, 8:21 PM), https://web.archive.org/web/20090427193309/http://omniaomnibus.typepad.com:80/omnia_omnia/2008/11/index.html.

¹³ See, e.g., Schiff QFRs, *supra* note 1, at 12 ("I do not believe that any of my writings can be fairly construed to argue that LGBT persons not ought to receive the full protection of the laws, or ought not to be treated fairly, respectfully, and absolutely equally with any other litigant.").

¹⁴ Damien M. Schiff & Ethan Blevins, *Alaska's Land and Water Go to Court*, DAILY J. (Jan. 8, 2016).

¹⁵ Schiff QFRs, *supra* note 1, at 13.

¹⁶ *Id.* at 9. He also stated in his written answers that his personal views would not be relevant to his role as a judge, if confirmed, see, e.g., *id.* at 12, 28, and that he would decide all cases "strictly according to the law and the facts." See, e.g., *id.* at 2, 22.

of federal law by federal agencies were to come before Mr. Schiff if he is confirmed as a judge, he would be predisposed to afford less weight to those authoritative interpretations to which judges are required to defer.

Hostility to Abortion Rights. On his blog, Mr. Schiff has written several posts in which he expressed opposition to abortion rights. In one post that focused on his view that abortion prohibitions can be justified on secular grounds, he compared abortion to infanticide and slavery:

I don't think anyone would consider a political movement to ban infanticide or slavery to be an improper importation of religion into even the most secular of states, because 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 that the same goes for abortion.¹⁷

In the conclusion to this post, he stated: "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)."¹⁸

In another blog post, Mr. Schiff criticized an article by Professor Reva Siegel that discussed sex equality arguments for reproductive rights.¹⁹ In doing so, he stated that "intellectual underpinning" is "painfully absent" from the Supreme Court's abortion jurisprudence and criticized Professor Siegel for "presuppos[ing] that the unborn person is not a person entitled to any protections of the Constitution."²⁰

These statements reinforce concerns about whether his strong views about legal issues and his disdain for individuals who disagree with those views would interfere with the judicial decision making process. To the extent that cases implicating abortion rights or reproductive health care might come before Mr. Schiff if he is confirmed, these statements also indicate that he would be unable to rule impartially.

¹⁷ Damien M. Schiff, *Abortion and "Secular Government"*, OMNIA OMNIBUS (July 22, 2008, 10:15 PM), https://web.archive.org/web/20081018211439/http://omniaomnibus.typepad.com:80/omnia_omniaomnibus/2008/07/index.html.

¹⁸ *Id.* In his answers to questions for the record, Mr. Schiff declined to state whether or not he thought abortion was immoral, instead citing *Roe v. Wade* and *Planned Parenthood of S.E. Pennsylvania v. Casey* for the proposition that "The Supreme Court has held that access to abortion is protected by the Fourteenth Amendment" and asserting that his personal views would not be relevant if confirmed as a judge. Schiff QFRs, *supra* note 1, at 3. When asked whether he believes that abortion violates natural law, he stated that his personal views would not be relevant to his role as a judge, if confirmed, because he would "decide all matters strictly according to the law and the facts." *Id.* at 11.

¹⁹ Damien M. Schiff, *Abortion and Equality*, OMNIA OMNIBUS (June 21, 2007, 7:56 AM), https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia_omniaomnibus/2007/06/index.html.

²⁰ *Id.* He also maintained that the argument that "forbidding women to abort their unborn children" deprives them of liberty under the Due Process Clause was "without originalist merit." *Id.*

In sum, Damien Schiff's record demonstrates troubling legal views on a number of issues important to women, as well as a lack of judicial temperament. His blanket assurances during his hearing that he would follow precedent, decide cases impartially, and treat all litigants fairly should be given little weight in comparison to the literally hundreds of intemperate statements and troubling legal views in his record. For all of the reasons described above, the Center has concluded that Damien Schiff should not be confirmed to the Court of Federal Claims. We urge you to reject his nomination. Please feel free to contact me, or Amy Matsui, Senior Counsel and Director of Government Relations at the Center, at (202) 588-5180, should you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Fatima Goss Graves". The signature is written in a cursive, flowing style.

Fatima Goss Graves
President and CEO
National Women's Law Center