

AFJ NOMINEE REPORT

# STEVEN MENASHI

*U.S. Court of Appeals for the Second Circuit*

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# INTRODUCTION

On August 14, 2019, President Trump announced his intent to nominate Steven Menashi to the Second Circuit Court of Appeals for the seat previously held by Thurgood Marshall, and most immediately held by Judge Dennis Jacobs. If confirmed, the Second Circuit will contain six Democratic appointed judges and six Republican appointed judges, with one other pending Trump nominee.

Based on his history of inflammatory rhetoric and the work he has done throughout his legal career, Alliance for Justice believes Menashi, if confirmed, will erode critical rights and legal protections. He will protect the wealthy and the powerful, not the rights of all Americans. Because little in Menashi's ultraconservative career suggests he will be a fair-minded nonbiased jurist, Alliance for Justice strongly opposes his confirmation and calls on every senator to oppose. Every senator who votes for his confirmation will own Menashi's vile quotes and positions contained in this report.

Menashi's long written record opposing and undermining equity for communities of color, women, and LGBTQ Americans is deeply disturbing and does not portend well for a jurist

who is tasked with serving in an impartial manner. For example, as a young adult, Menashi [compared](#) the collection of race data in college admissions to Germany under Adolf Hitler. He [denounced](#) women's marches against sexual assault and bemoaned the fact that schools could discipline students who harassed women. He [opposed](#) "radical abortion rights advocated by campus feminists and codified in *Roe v. Wade*." He argued against diverse communities, [writing](#) that "ethnically heterogeneous societies exhibit less political and civic engagement, less effective government institutions, and fewer public goods." In another instance, Menashi [defended](#) Italian leader Silvio Berlusconi for stating "the obvious" when he wrote of "the superiority of Western civilization over Islam." Menashi [dismissed](#) education about multicultural awareness (which "was never about understanding non-Western cultures" but "about denigrating Western culture to promote self-esteem among 'marginalized' groups"). In college writings, he [defended](#) a fraternity that threw a "ghetto party," characterizing the event as "harmless and unimportant." Menashi, while a student at Dartmouth, also [wrote](#): "Equally ridiculous is the belief that chanting the old Dartmouth football cheer, 'Wah-Hoo-Wah! Scalp 'Em!' proceeds from a racist belief in the inferiority of American Indians."

As a lawyer, Menashi has been on the front lines in undermining rights and legal protections for millions, often times taking positions repudiated by courts. For example, Menashi [opposed](#) need-based financial aid explicitly because it purportedly hurts the wealthy and has been Education Secretary Betsy DeVos's right-hand man at the Department in eroding protections for students of color, sexual assault survivors, and victims of fraudulent for-profit colleges. [In his own words](#), he was "responsible for providing legal advice on ALL aspects of the Department's operations, including litigation, rulemaking, regulation, and enforcement." (emphasis added). As a White House lawyer, he has worked closely with Stephen Miller on advancing Trump's draconian immigration [policy](#).

While Menashi's record of bias would be troubling enough, he also attacks, demeans, and questions the motives of those with which he disagrees. For example, he [accused](#) an LGBTQ advocacy organization of exploiting the brutal murder of Matthew Shepard, a gay student, for political and financial ends. To him, those who opposed war in Iraq – "[pro-Saddam activists](#)" were not well-meaning citizens with policy disagreements but were "[totally unprincipled](#)," "thoroughly contemptible," and were protesting "[on behalf of despotism](#)." He [claimed](#)<sup>1</sup> Randi Weingarten, president of the United

Federation of Teachers, [was](#) "dishonest" and "self-serving" and concerned "less about promoting students' educational attainment than winning salary increases for public school teachers, regardless of their performance." He [argued](#) that those enforcing civil rights laws weren't doing so to use public accommodations, but to "vindicate a principle" about "religious beliefs." He questioned whether lawyers for consumers and employees really "have the public's well-being at heart." He called the president of the People for the American Way "[hysterical](#)" because of his opposition to state funding of religious schools. He called animal rights activists "[a contemptible bunch](#)."

Equally troubling for a future jurist who is supposed to dispassionately apply facts to law, Menashi has made claims that eerily echo the worst of Trump's xenophobic rhetoric and dismissal of facts when they conflict with his ideology. Most illustrative, Menashi favorably [repeated](#) the Islamophobic myth that General John Pershing executed Muslim prisoners in the Philippines with bullets dipped in pig's fat. David French, [writing](#) in the *National Review*, wrote the following about Donald Trump's retelling of the same story:

In one tweet Trump spread fake history, libeled an American hero, and

signaled a willingness – even eagerness – to commit war crimes. That’s conduct unbecoming the lowliest officer in the military. Coming from the commander-in-chief, it’s a complete disgrace.

The same could certainly be said for a person seeking to sit on the second highest court in the country.

In sum, Menashi is an ultraconservative ideologue who will be neither fair nor unbiased in carrying out his agenda of eroding rights and legal protections on which millions of people in the Second Circuit rely.

## BIOGRAPHY

Steven Menashi is a graduate of Dartmouth College and Stanford Law School. He was editor-in-chief of the *Dartmouth Review* and a writer and editor for the Hoover Institution’s *Policy Review*. He was also a member of the editorial board for *The New York Sun*, a now-defunct conservative newspaper. Menashi also [co-authored](#) with Ross Douthat the conservative blog *The American Scene*, which largely concerned foreign policy, including defending the Iraq war and attacking critics of the invasion. He [condemned](#) war protesters as being “pro-despotism” and attacked libertarian Republicans,

including the CATO Institute, [arguing](#) that “libertarianism, especially in the arena of foreign policy, has been rendered ideologically obsolete in the post-September 11 world.”

After law school Menashi clerked for Judge Douglas Ginsburg and Justice Samuel Alito. He practiced law at Kirkland & Ellis and then was hired as an Assistant Professor of Law at George Mason University. According to reports, Menashi was [hired](#) with money provided by the Koch Brothers through a fund [administered](#) by Leonard Leo. Menashi joined the Federalist Society in 2008 and is a [member](#) of its Founders Club.

From [May 2017](#) to [September 2018](#), Menashi served as Deputy General Counsel for Postsecondary Education and Acting General Counsel at the Department of Education (the “Department”), under Betsy DeVos. He currently works as Special Assistant to President Trump and Associate Counsel to the President. According to reports, he is a [member](#) of the Stephen Miller-led Immigration Strategic Working Group.

# EDUCATION AND STUDENT PROTECTIONS

Menashi has written extensively on education. In bemoaning the “moral drift” of the 1990s, he [highlighted](#) that “[i]ncreasingly educators came to believe that the schools should address the various social pathologies that the larger society seemed unable to remedy. Schools displaced traditional curricula with programs about AIDS, illegitimacy, drunk driving, and other causes.”

He [supports school vouchers](#), including [on the grounds](#) that it “restore[s] taxpayers’ property rights.” As he [wrote](#), [t]here’s an alternative to raising taxes that would still help New York meet its responsibility to provide a sound basic education to its schoolchildren. It is school choice through a system of vouchers.” As a lawyer, he defended Florida’s school voucher program. See 2016 Fl. S. Ct. Briefs LEXIS 232.

And, as discussed below, throughout his career, Menashi has fought against equal access to quality education, once [lamenting](#) that Americans schools “persist” in “promoting egalitarianism.”

## MENASHI ARGUED AGAINST ALL NEED-BASED FINANCIAL AID

Menashi has not only argued against need-based financial aid, but done so under the guise that it harms the wealthy and powerful. In a 1998 *New York Times* op-ed, Menashi [wrote](#), “[e]conomic need . . . determines who gets help. Families with higher incomes as well as more savings and fewer children qualify for less aid. The system thus punishes families with the foresight and prudence to save for their children’s education.”

In the same article he approvingly quoted Martin Feldstein, former chief economic advisor to President Reagan, who wrote that need-based financial aid is “equivalent to a substantial capital levy on the wealth that a family accumulates before and during the time that a family’s child attends college.”

Menashi [wrote](#), “Yes, the Government should help families pay for higher education. But we shouldn’t punish the ants for the sake of the grasshoppers.”

## MENASHI WEAKENED PROTECTIONS FOR WOMEN ON COLLEGE CAMPUSES

As a young adult, in an article titled *Heteropatriarchal Gynophobes!* Menashi [criticized](#) “Take Back the Night” marches,

which seek to end violence against women, writing “Take Back the Night’ marches charge the majority of male students with complicity in rape and sexual violence (every man’s a potential rapist, they say, it’s part of the patriarchal culture).”

Menashi also [minimized](#) sexual harassment of women. In the same article he bemoaned that “[o]ffhand remarks or jokes can create a ‘hostile environment’ or ‘stigmatize’ women – and can be punished through official disciplinary action.” He continued, “[a]fter all, women may be the majority, they may be the beneficiaries of special academic programs and institutional support, but they remain, by definition, an oppressed minority.” In another article, he [criticized](#) as “neo-McCarthyism” discipline based on “verbal” “abusive or harassing behavior.” “The concept of ‘verbal behavior’” he wrote, is “nonsensical.”

Given these views, it is no surprise that, Menashi has been at the forefront of rolling back protections for survivors of sexual harassment and assault on college campuses in his professional career.

As Acting General Counsel of the Department of Education he was intimately involved in the 2017 Title IX Question and Answer guidance

document that [rescinded](#) Title IX guidance on schools’ responsibilities for protecting students from sexual harassment and violence; and he worked on the Department’s proposed rule on campus sexual assault. As organizations such as End Rape on Campus and Know Your IX [explain](#), “survivors will lose access to their education and schools will continue to sweep sexual violence under the rug. The new rule will stop survivors from coming forward and make schools more dangerous for all students.”

## **MENASHI IS COMMITTED TO DISMANTLING EQUAL OPPORTUNITY**

Menashi compared universities’ use of race as one consideration among many in the admissions process to Germany under Adolf Hitler. He [wrote](#): “Sixty years after the promulgation of the Nuremberg laws, universities persist in cataloguing students according to race on college applications and official documents.”

He has further [said](#) that “[d]efenders of racial preferences in college and graduate school admissions resort to the most convoluted arguments.”

It is not just affirmative action that he [opposes](#); he has fought other measures to ensure equal education. While he was acting general counsel at the Department

of Education, the Department [narrowed](#) the [scope](#) of civil rights enforcement. Under Menashi, the Department made [clear](#) that it will limit the use of a systematic approach to see if prohibited behavior “was indicative of a broader problem affecting other students or school community members.” As Senate Health, Education, Labor and Pensions (HELP) Committee Ranking Member Patty Murray and other Democratic Senators [highlighted](#), the decision will “scale[] back civil rights enforcement.”

Furthermore, in February 2018, also when Menashi was Acting General Counsel, the Education Department delayed implementation of an Obama-era rule that would help expose the disproportionate placement of students of color in special education settings. The Obama Administration implemented the rule based on significant evidence that students of color have historically been marginalized through questionable special education placement, classification, and/or disciplinary outcomes compared to their white counterparts.

After DeVos and Menashi proposed delaying implementation of the rule, on March 9, 2018, a federal judge found that the Department violated the law and required the rule go into effect. *Council of Parent Attys & Advocates, Inc. v. Devos*, 2019 U.S. Dist. LEXIS 36318 (D.D.C. March 7, 2019). The court found that Menashi’s Department acted arbitrary and capricious; “failed to provide a reasoned

explanation for delaying the 2016 Regulations;” and “fail[ed] to account for the costs to children, their parents, and society.”

As a side note, it is worth contrasting Menashi’s lack of consideration for the costs to children of color evidenced in *Counsel of Parent Attys* to his disproportionate consideration of the costs of clean air protections on industry (discussed below). In an article, he [praised](#) Brett Kavanaugh’s dissent – in a case where Kavanaugh would have invalidated protections regarding hazardous emissions – for observing that considering the cost of a regulation “is so clearly ‘just common sense and sound government practice.’” Apparently, for Menashi, this only applies to costs to industry, not African American children.

Finally, as discussed below (LGBTQ Rights), Menashi was acting general counsel when the Department [undermined](#) Title IX protections for transgender students.

## **MENASHI SIDED WITH FOR-PROFIT SCHOOLS OVER DEFRAUDED STUDENTS**

Menashi also fought to delay an Obama-era rule which would have made it easier for students to receive debt relief when they are victims of illegal or deceptive tactics by colleges.

In September 2018, a federal judge ruled that the delay was unlawful, and he highlighted “unacknowledged and



unexplained inconsistency” in arguments the Department made, the “hallmark of arbitrary and capricious decision-making.” *Bauer v. DeVos*, 325 F. Supp. 3d 74 (D.D.C. 2018). The court emphasized that the Department “offer[ed] no explanation for why it was necessary to stay twenty-two sections of the final rule” and the court made clear that much of the Department’s defense was done in a “perfunctory manner;” “mere boilerplate” and “unsupported by any analysis.”

Devos and Menashi also improperly delayed implementation of the State Authorization for Distance Education Rule, which requires disclosure of troubles with state regulation or accreditation to inform students whether a program meets state requirements for certification or licensure in a particular field. This rule acts as a key consumer protection to vulnerable Americans seeking education, who, according to the National Consumer Law Center, are often low-income people, non-native English speakers, veterans, or first-generation college students. Such students “are too often targeted by unscrupulous and [predatory](#) out-of-state schools that encourage individuals to take out federal student loans to enroll in distance education programs without regard to whether the programs are worthwhile investments or will qualify students for licensure in their states.” As HELP Committee Ranking Member Patty

Murray [wrote](#), the Department’s decision will have “significant, negative implications for students, who will lack effective consumer protections and information.” Yet again, a federal judge found the delay illegal. *Nat’l Educ. Ass’n v. Devos*, 379 F. Supp. 3d 1001 (N.D. Cal. 2019).

DeVos and Menashi [have](#) also “thrown roadblocks in front of state law enforcement officials and federal regulators who are pursuing legal action” against student loan companies “as they seek to fend off allegations of cheating and misleading borrowers.” Among other actions, in March 2018, the Education Department issued guidance arguing that state regulations of federal student loans “impedes uniquely federal interests.” And, yet again, courts found Menashi’s actions illegal. See *Nelson v. Great Lakes Educ. Loan Servs.*, 928 F.3d 639 (7<sup>th</sup> Cir. 2019); *Student Loan Servicing Alliance v. District of Columbia*, 351 F. Supp. 3d 26 (D.D.C. 2018). In particularly scathing language, the Seventh Circuit, in an opinion joined by Reagan- and Trump-appointed judges, found Menashi’s notice of interpretation on preemption “not persuasive because it is not particularly thorough.” *Nelson*, 928 F.3d at 651, n.2 (internal quotation omitted).

# LGBTQ RIGHTS

Throughout his career, Menashi has demonstrated hostility toward LGBTQ rights and equality. Menashi [supported](#) the [ban](#) on lesbian, gay and bisexual people serving in the military; he [opposed](#) court decisions which recognized marriage equality; and he [defended](#) discrimination against LGBTQ Americans in public accommodations such as restaurants and movie theaters. During his leadership at the Department of Education, the Department [weakened](#) Title IX protections for transgender students.

Illustrative of his bias, while the rest of the country was outraged at the killing of Matthew Shepard, targeted and brutally beaten because of his sexual orientation, Menashi claimed that the Human Rights Campaign (which he [called](#) a “race-gender warrior group”) was “incessantly exploiting the slaying of Matthew Shepard for both financial and political benefit.” He [wrote](#) that HRC “values lives instrumentally, according to political calculations.”

That was not the only time that Menashi attacked the motives of those fighting for LGBTQ equality. For [example](#), with respect to those trying to enforce their rights under laws prohibiting discrimination in public accommodation,

he wrote that the “apparent motive is not to insure access to photography or wedding cakes” but “to penalize [the business owner’s] attempt to live in accordance with their religious beliefs.”

In addition to policy positions, Menashi has gone as far as to [imply](#) that LGBTQ identities are “outside and above nature” and those who support equality are attempting to “peer[] down on the rest of creation with a godlike power to manipulate it for our own purposes.”

Furthermore, in the context of equality he refers to LGBTQ rights as a “deviation from political decency.” He [cited](#) approvingly a comment by Mark Steyn that “the European tendency . . . is to see deviation from basic guarantees of political decency ‘as just another alternative lifestyle – lesbian, vegetarianism, totalitarianism, whatever.’ This may save some public figures the burden of judging others, but it constitutes a flight from reality.”

With respect to marriage equality, he [wrote](#): “Feminists and gender theorists argue that institutions like marriage and the family – and indeed gender itself – are ‘social constructs’ that can be uprooted and rearranged through education and social engineering.”

Further, commenting on essays by Hilton Kramer and Roger Kimball called

“The Survival of Culture,” Menashi [wrote](#), “These pages are full of warnings about the tendency to ignore reality. Mr. Kimball mentions the incipient normalization of ‘gender reassignment surgery.’” With comments like this, one must question Menashi’s ability to apply, without bias, laws designed to ensure equality for transgender people and queer women.

## WOMEN’S RIGHTS

As noted above in the Education section, Menashi [criticized](#) “Take Back the Night” marches and discipline for sexual harassment on college campuses. And, he [worked](#) with Betsy Devos to undermine Title IX.

He has diminished the rights of women outside the college arena too.

For example, in an article titled, *The Empty Decade*, he [criticizes](#) the “moral drift in 1990s America.” In doing so, he singles out “family and medical leave” as “Clinton-era politics” that “were about private comforts...rather than broad national interests.”

What does it say about Menashi that he considers a law that enables workers to

care for themselves and their loved ones without jeopardizing their jobs as not in the “broad national interest?” In fact, since 1993, the Family and Medical Leave Act, although limited in its coverage, has been used [more than 200 million times](#) by women and men who were able to take time away from their jobs to address serious health conditions, welcome a new child, or care for a seriously ill loved one – without fear of losing their jobs or health insurance coverage.

In addition, Menashi has attacked people’s access to reproductive health care. He authored an [amicus brief](#), pro bono, on behalf of former Justice Department officials in [Zubik v. Burwell](#), 136 S. Ct. 1557 (2016), supporting religious nonprofits’ challenges to the Affordable Care Act’s contraceptive mandate. And while President Trump promised to appoint judges who will [“automatically”](#) overturn *Roe v. Wade*, Menashi satisfies that litmus test. For example, in 2001, he [wrote](#), “perhaps most striking for those confined to academe is the public consensus – in evidence now for a number of years – on abortion, a consensus that opposes the radical abortion rights advocated by campus feminists and codified in *Roe v. Wade*.” In 2005 he [criticized](#) the Democratic Party’s “extreme position on abortion,” suggesting he disagrees with the [position](#), contained in the Party’s 2004

platform, that “we stand proudly for a woman’s right to choose, consistent with Roe v. Wade” and that “we strongly support family planning and adoption incentives. Abortion should be safe, legal, and rare.”

# HUMAN RIGHTS

In a 2002 [article](#), Menashi favorably repeated the Islamophobic myth that General John Pershing executed Muslim prisoners in the Philippines with bullets dipped in pig’s fat. Menashi wrote that “Pershing’s approach is probably no longer in the army’s counterterrorism repertoire, but the result was that guerilla violence ended.” He added, “The American response to Islamic extremism has not always been so harsh – or as effective.”

Menashi reciting this story is telling; it demonstrates his willingness to put ideology ahead of facts. The reality is, as historian Brian McAllister Linn [stated](#), “this story is a fabrication and has long been discredited.” Linn [added](#), “there is absolutely no evidence this occurred...It’s a made-up story.” David French, [writing](#) in the *National Review*, called Trump retelling the same story “a complete disgrace.”

In addition to praising Pershing’s purported actions in killing Muslims with bullets dipped in pig’s fat, Menashi, in the same [article](#), praised Augusto Pinochet: “Yet, amidst his general endorsement of despotism, [Author Robert Kaplan] for some reason condemns Chilean dictator Augusto Pinochet. It’s unclear why he does so.” In reality, as Amnesty International [noted](#), under Pinochet “[t]ens of thousands of people were detained, tortured, killed or disappeared. The total number of people officially recognized as disappeared in Chile or killed between 1973 and 1990 stands at over 3,000 and survivors of political imprisonment and/or torture at around 40,000.”

Yet, Menashi added, “Pinochet even had noble aims: He saved Chile from communism and eventually surrendered his authority to a democratic government. But Kaplan somehow concludes that Pinochet employed ‘excessive’ violence.”

For a person who does not consider thousands killed and around 40,000 imprisoned or tortured “excessive violence,” it is perhaps no surprise that Menashi also [minimized](#) human rights concerns regarding the detention facility at Guantanamo Bay: “The detainees at Guantanamo are reportedly well fed and clothed, have access to medical care and

shower facilities, and Muslim detainees even have the opportunity to pray six times daily with military chaplains and copies of the Koran.”

# ACCESS TO JUSTICE

Menashi has often expressed strong negative opinions regarding attorneys on one side of the cases he will be hearing: those who represent workers and consumers. Those attorneys will likely be at a distinct disadvantage when they face a biased jurist like Menashi.

Menashi [wrote](#) that “trial lawyers have been feeding on the public for long enough” and “it would be a blessed relief for the American taxpayer if the trial lawyers started cannibalizing each other and left the rest of us alone.” He added, “if anyone in America . . . actually thinks that trial lawyers have the public’s well-being at heart, let them come to watch internecine warfare among trial lawyers in New York.”

He even [attacked](#) lawyers who advocate for the elderly: “there[s] a whole discipline of ‘elder law’ devoted to these tricks,” referring to efforts to ensure people who are eligible for Medicaid can

receive the benefits to which they are entitled.

Menashi has also [supported](#) efforts to cap recovery for those injured as a result of medical malpractice (which he [argued](#) was a better policy than “expanding the Medicaid program and paying for it with new taxes on the rich”). This would mean in a country where preventable errors cause over [400,000](#) patient deaths annually, the civil justice system could not give families of patients who have died or have been injured by medical negligence an avenue to seek full accountability. As Dean Clancy, former senior budget official in the George W. Bush administration [wrote](#) about such caps, such “half-baked ideas . . . don’t save money, don’t increase physician supply, and don’t reduce health care costs” and “may actually increase costs.”

Given Menashi’s belief that those who are injured, through no fault of their own, due to the negligence of others should not have the ability to hold corporations fully accountable, it is no surprise that he chose to devote his career as a litigator to defending pharmaceutical companies against lawsuits when drug companies failed to provide adequate warnings to doctors and consumers.

For example, Menashi argued against justice for Bo Anderson, a teenage boy who was prescribed medication for a

skin condition known as psoriasis, which causes patches of irritated skin on his scalp. At the time, the drug was approved for treatment of adults, but not for children; and after taking the drug Anderson developed leukemia. Even though the company admitted it failed to warn of the known risk of pediatric leukemia, Menashi argued against Anderson's right to hold the drug company accountable. *Anderson v. Abbott Labs.*, 2012 U.S. Dist. LEXIS 141585 (N.D. Tex. Sep. 30, 2012); 2013 U.S. 5th Cir. Briefs LEXIS 581 (Menashi brief to Fifth Circuit).

In another case, Menashi also argued against justice for Samantha Reckis, a seven-year-old girl who had developed a life-threatening rash when her parents gave her over-the-counter children's Motrin for her fever and sinus congestion. Her parents believed the drug to be safe based on the label and doctor's instructions. Yet, side effects of the drug caused her to be hospitalized for six months. She had to be placed in a medically induced coma. Samantha suffered a stroke followed by an aneurysm, a cranial hemorrhage that causes seizures, and underwent brain surgery. While she lived, Samantha will have life lasting effects such as blindness, diminished lung function, and cognitive limitations. *Reckis v. Johnson & Johnson*, 471 Mass. 272 (2015); 2015 U.S. S. Ct. Briefs

LEXIS 3571 (Menashi's cert petition); Cert. denied, 136 S. Ct. 896 (2016).

Menashi also argued against liability in a case where 39-year-old father of five was prescribed a generic narcotic pain reliever just months before the FDA pulled the drug from the market for a high risk of heart arrhythmias. As a result, he became a spastic quadriplegic and then died of cardiac arrest. The plaintiff argued that Teva and Target should not have marketed or sold the drug in the first place once they knew the product was unsafe. An Illinois state court found that the case could go forward and was not preempted by federal law. *Guvnoz v. Target Corp.*, 30 N.E.3d 404; 2016 U.S. S. Ct. Briefs LEXIS 874 (Menashi cert. petition)

## PUBLIC HEALTH AND SAFETY

Menashi wants to tie the hands of the agencies that Congress has recognized as having the knowledge and experience to enforce critical laws, safeguard essential protections, and ensure the health and safety of the public. He has criticized legal principles that are essential to enabling the federal

government to regulate corporations and protect consumers, the environment, workers, and more.

In articles called *Our Illiberal Administrative Law* and *Presidential Power in Historical Perspective: Reflections on Calabresi and Yoo's the Unitary Executive*, Menashi, and co-author Douglas Ginsburg, [bemoan](#) that "our administrative law is marked not by fringe judicial zealotry but by judicial passivity in enforcing mainstream liberal norms." He [criticizes](#) "deferential judicial posture" towards agencies, as well as that "[body of administrative law](#)" that "no longer provides [a] mandated check upon the agencies." He [decries](#) "extreme deference." He [calls](#) for "more probing judicial review of the merits – including the scientific merits – of agency decisions."

In his articles, Menashi called for reinvigorating the nondelegation doctrine – last used successfully in 1935 by a famously reactionary Supreme Court majority bent on invalidating the New Deal. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Currently, executive agencies are permitted to exercise rulemaking authority pursuant to a valid delegation from Congress. As long as the delegation provides a "sufficiently intelligible principle, there is nothing inherently unconstitutional about it." *Whitman v.*

*Am. Trucking Ass'ns*, 531 U.S. 457, 490 (2001) (Stevens, J., concurring).

Criticizing the law since 1935, Menashi [argues](#) "the evisceration of the nondelegation doctrine has left a void in the constitutional structure." He [added](#), "[t]he nondelegation doctrine is too essential a principle of American constitutionalism to disappear entirely . . . What is needed, in short, is a Court that recognizes that the nondelegation principle...is no less a part of the judiciary's charge to uphold the Constitution."

In other words, Menashi disagrees with a nearly 85-year-old principle of law, arguing that agencies should not be able to exercise authority, even if Congress properly delegates it. Even conservative justice Antonin Scalia made clear this position's radical nature. As he explained, reviving that doctrine would deprive Congress of the authority essential to empower agencies to effectively implement and enforce critical statutes that protect the American people in countless areas from ensuring financial stability to controlling health hazards. As Scalia noted, "we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law" because "a certain degree of discretion, and thus of lawmaking, inheres in most executive and judicial action." *Mistretta v. United*

*States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting).

Menashi would flout these principles and disable Congress from making government work for the American people.

In addition to accepting the non-delegation doctrine, Justice Scalia also accepted the legal principle that gives agencies the authority to determine how they will carry out their mandates when the congressional act governing their actions might be open to different interpretations – referred to as “Chevron deference.” As Justice Scalia [noted](#), “in the long run Chevron will endure and be given its full scope” because “it more accurately reflects the reality of government, and thus more adequately serves its needs.”

Menashi disagrees on this point and has expressed hostility towards the decades-old doctrine that is a cornerstone of administrative law.

Menashi has also specifically argued that agencies that historically have been independent should have less power to issue public protections and enforce safety standards. He opined that such agencies should no longer be independent, [emphasizing](#) that “Congress has intruded upon the executive branch through the last half-

century. Since the expansion of the federal bureaucracy during the New Deal, agencies nominally within the executive branch receive mandates directly from Congress, bypassing the president.”

Agencies such as the Consumer Financial Protection Board, the Securities and Exchange Commission (SEC), the National Labor Relations Board (which Menashi singles out for criticism, [noting](#) that “sometimes the claim to expertise is entirely fraudulent; the most well-documented case is that of the [NLRB]”), and the Consumer Product Safety Commission play critical roles in upholding the rights of consumers, workers, and investors; Menashi would be hostile to the protection of these rights.

Finally, in a law review article titled *The Classical Liberal Constitution: Rational Basis With Economic Bite*, Menashi and co-author Douglas Ginsburg [praise](#) Richard Epstein’s view that courts should conduct “more muscular review of economic legislation,” in addition to the heightened scrutiny applied to government actions with respect to race. This would enable ultraconservative federal judges like himself to second-guess government regulations, like those protecting consumers and workers.



As Chief Justice Roberts stated with respect to similar arguments made by scholars in the past: “There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner v. New York*. We should not seek to reclaim that ground for judicial supremacy.” *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007). (internal citation omitted).

# ENVIRONMENT

Menashi, who [opposed](#) the Kyoto Accord, has made clear his belief that courts need to constrain the ability of the U.S. Environmental Protection Agency (EPA) and other agencies to protect climate, clean air and clean water.

His own views are expressed in *Our Illiberal Administrative Law* where he criticizes courts for deferring to agencies, including the EPA. He [praises](#) then-Judge Kavanaugh’s dissent in *White Stallion Energy Center v. EPA*, 348 F.3d 1222 (D.C. Circ. 2014) where Kavanaugh sided with industry over pollution control. He dissented in part from a ruling that upheld regulation of mercury

and other hazardous pollution from power plants as “appropriate and necessary” under the Clean Air Act. In Kavanaugh’s dissent, which Menashi lauds, he criticized the EPA for failing to consider costs to industry. The Supreme Court eventually reversed the D.C. Circuit in a 5-4 decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

In another article, *Presidential Power in Historical Perspective*, Menashi explicitly mentioned the Clean Air Act as an example of why rejuvenating the non-delegation doctrine is important; to enable judges to prevent the EPA from carrying out its delegated authority to protect our nation’s clean air.

Finally, it bears noting that Menashi, in 2005, [criticized](#) New York Senator Charles Schumer for asking then-Judge John Roberts: “what is the proper role of the federal government in enacting laws to protect the environment?” Menashi [called](#) the question “cornball...as if a Supreme Court justice ought to have a role in making environmental policy.”

Menashi’s attack on Senator Schumer was disingenuous at best as his own articles on administrative law demonstrate why such a question is so important. His articles are replete with examples of courts being asked to evaluate the ability of the federal government to protect clean air and

water. In one article, he [describes](#) at length *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973) – where “it was the court of appeals – not the people’s representatives, not even the bureaucrats at the EPA – who balanced the environmental costs of pollution against the economic costs to the auto industry.” And, in describing *Massachusetts v. EPA*, he [wrote](#), “the Supreme Court ordered the EPA to regulate carbon dioxide emissions.”

## CONSUMERS

In 2005, Menashi [cheered](#) the resignation of George Bush-appointed chair of the SEC William Donaldson. “Under Mr. Donaldson’s direction,” he [wrote](#), “the SEC set records by imposing more than \$6 billion in fines and other payouts on securities law defendants.”

He wrote that Donaldson’s resignation gave the Administration “an opportunity to change the SEC’s direction away from over-regulation.” Illustrative of what he considered over-regulation was a requirement that mutual fund boards be chaired by independent outsiders and that stock orders must be filled by the best price available.

Menashi also [bemoaned](#) a D.C. Circuit decision upholding the FCC’s net-neutrality rules, citing it as an example

for why Chevron deference to agencies is inappropriate.

## MONEY IN POLITICS

Menashi [opposes](#) any contribution limits. He [wrote](#), “When the Congress decided to restrict such freedom by limiting political contributions, it led politicians to resort to actual criminality.”

He also [defended](#) the Swift Boat Veterans for Truth, criticizing “Senator Schumer and his cohorts in the Anti-First Amendment Caucus” who advocated for legislation which “would force independent 527 groups to register as political committees.”

## CONCLUSION

Throughout his career, from writings as a young adult, to his work as a litigator shielding pharmaceutical companies, to his work at the Department of Education, Menashi has made clear his commitment to eroding critical rights and legal protections and protecting the wealthy and the powerful. Menashi will not be a fair-minded nonbiased jurist, and Alliance for Justice strongly opposes his confirmation.

## ENDNOTES

- 1 Although his name is not on editorials written for the New York Sun, Menashi himself [submitted](#) them to the Committee. He wrote, “from 2004 to 2005, I served as an editorial writer for the New York Sun. Among my responsibilities was the writing of the initial draft of unsigned staff editorials that generally appeared on a daily basis.” He added, “I have provided ... a list of those editorials, based on my recollection, for which I may have prepared the initial draft or participated substantially in editing.”