AFJ NOMINEE REPORT

STEPHEN SCHWARTZ

U.S. Court of Federal Claims

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INTRODUCTION

On June 7, 2017, President Trump nominated Stephen S. Schwartz to serve as a judge on the United States Court of Federal Claims, the same court to which Damien Schiff has been nominated.[1] Schwartz's brief legal career has been as an advocate for ultraconservative causes, opposing critical legal protections for women, transgender youth, immigrants, and people of color. Alliance for Justice opposes Schwartz's nomination to the CFC.

Schwartz's legal career has been short. He is only thirty-four years old. But that brief career can be defined as extremely ideological. In this context it is worth noting the past comments of Republicans who opposed the nomination of Debo Adegbile to head the Justice Department's Civil Rights Division, which is not even a judicial position. Regarding Adegbile, Senator Chuck Grassley opined that "the President's nominee can't be so committed to political causes, and so devoted to political ideology, that it clouds his or her judgment."[2] At the same time, Senator Mitch McConnell insisted that Mr. Adegbile should not be confirmed because of his work as a lawyer, which he characterized as "marked by ideologically-driven positions."[3] These remarks were based largely on a single case in which the NAACP Legal Defense Fund filed briefs seeking to protect the constitutional rights of a death-row inmate.

By contrast, Schwartz's "ideologically-driven positions" are numerous and include defending discriminatory voter laws, severe restrictions on a women's access to abortion, and discriminatory policies against transgender students. By Senator McConnell's and Senator Grassley's own standards, Schwartz is simply unfit for the federal bench.

CONTEXT OF SCHWARTZ'S NOMINATION

Before discussing Schwartz's short, ideologically-driven career, it is critical to put his nomination in context.

Schwartz is nominated for a position that became vacant on October 22, 2013, when Lynn Jeanne Bush assumed senior status.[4] On April 10, 2014, President Obama nominated Thomas L. Halkowski to fill the vacancy.[5] Mr. Halkowski had served as a trial attorney for eight years in the Environmental and Natural Resources Division of the Justice Department, and for 14 years had served as a Principal at Fish & Richardson P.C., one of the preeminent IP law firms in the nation, where he primarily

1 *See Damien M. Schiff*, ALLIANCE FOR JUSTICE (2017), https://www.afj.org/our-work/nominees/damien-m-schiff.

2 Press Release, Senator Chuck Grassley, Grassley statement on the Nomination of Debo Adegbile to be Assistant U.S. Attorney (Mar 5. 2014), https://www.grassley.senate.gov/news/news-releases/grassley-statement-nomination-debo-adegbile-be-assistant-us-attorney.

3 Senator McConnell's statement on Debo Adegbile notes his 2011 representation of Mumia Abu-Jamal, who was sentenced to death when a jury found him guilty of shooting police officer Daniel Faulkner in 1981. See Press Release, Senator Mitch McConnell, McConnell to Oppose Justice Nominee Over Advocacy on Behalf of Philadelphia Cop-Killer (Mar. 5, 2014), https://www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=AEDCCD4C-73B9-4D8C-A511-243AF-D40C898. Adegbile appeared on the brief in opposition to writ of certiorari before the Supreme Court. Brief in Opposition. Wetzel v. Abu-Jamal, 132 S. Ct. 400 (2011), (No. 11-49), 2011 WL 4048834.

4 *See Current Judicial Vacancies*, UNITED STATES COURTS, http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies, (last visited July 19, 2017).

5 Press Release, The White House, President Obama Nominates Three to Serve on the U.S. Court of Federal Claims (Apr. 10, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/04/10/president-obama-nominates-three-serve-us-court-federal-claims.

handled patent litigation.[6]

On June 19, 2014, Mr. Halkowski's nomination was reported out of the Judiciary Committee by voice vote.[7] However, Halkowski did not receive a full vote in the Senate before the Senate adjourned. President Obama renominated him on January 7, 2015, and on February 26, 2015, his nomination was reported out of committee by voice vote yet again.[8] And, yet again, he did not receive a full Senate vote.

Indeed, Senator Tom Cotton had blocked Halkowski's nomination along with other Obama-nominated judges to the CFC. He said that "in light of the dramatic drop in caseloads at the [CFC]," the court "doesn't need new judges. We should keep in mind that the number of active judges authorized for the Court of Federal Claims by statue [sic], 16, isn't a minimum number, it's a maximum."[9]

Just as Damien Schiff was only able to be nominated because Jeri Kaylene Somers was refused a full Senate vote, it is only because Thomas Halkowski was refused a full Senate vote – despite being unanimously approved twice by the Senate Judiciary Committee – that President Trump was able to nominate Schwartz.

Here, the comparison between President Trump and President Obama's nominations to the Federal Court of Claims could not be starker. Jeri Kaylene Somers had served in the Air Force, retiring with the rank of lieutenant colonel; had spent two decades as a judge advocate general and then as a military judge in the Air Force and District of Columbia's Air National Guard; and had served as a judge with the U.S. Civilian Board of Contract Appeals.[10] Halkowski was one of the preeminent patent attorneys in the country and had served his country for nearly a decade in the Justice Department.

Schiff, 38 years old, and Schwartz, 34 years old, in contrast, have spent their very brief careers attacking civil rights, women's rights, LGBTQ rights, and environmental laws, to name just a few. Whereas Halkowski and Somers were non-ideological nominees enjoying universal support, both Schiff and Schwartz epitomize what Grassley and McConnell bemoaned just a few years ago – attorneys "marked by ideologically-driven positions."[11]

BIOGRAPHY

Schwartz graduated from Yale in 2005, and he received his J.D. from the University of Chicago Law School in 2008.[12] He clerked for Judge Jerry E. Smith on the United States Court of Appeals for the Fifth Circuit[13] and then worked as an associate at Kirkland & Ellis LLP.[14] While at Kirkland, two prominent cases he was involved in were one in which he represented raisin farmers who sued the Department of Agriculture in *Horne v. Department of Agriculture*, 576 U.S. _ (2015), and another in which

6 *Id.*
7 Senate Judiciary Committee, Results of Executive Business Meeting (Jun. 19, 2014), https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%20-%2006-19-14.pdf.
8 *See* Press Release, The White House, Presidential Nominations Sent to the Senate (Jan. 7, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/01/07/presidential-nominations-sent-senate; Senate Judiciary Committee, Results of Executive Business Meeting (Feb. 26, 2015), https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%202-26-15%20Update.pdf.
9 Jordain Carney, *Cotton blocks push to confirm Federal Claims judges*, The Hill (Sept. 13, 2016), http://thehill.com/blogs/ballot-box/247934-cotton-blocks-senate-from-approving-federal-claims-judges.
10 *Schiff, supra* note 1, at 3.
11 McConnell, *supra* note 3.
12 Sen. Comm. on the Judiciary, 115th Cong., Stephen Sidney Schwartz: Questionnaire for Judicial Nominees 1.
13 *Id.*
14 *Id.*

he represented a New York State prisoner in solitary confinement alleging violations of his due process rights. *See Proctor v. LeClaire*, 715 F. 3d 402 (2d Cir. 3013). Schwartz left Kirkland after spending six years there to work as counsel at the Cause of Action Institute ("CoA Institute").

The CoA Institute is an ultraconservative group funded by the Koch Brothers.[15] While Schwartz was counsel at CoA Institute, the organization filed multiple controversial suits against the government, including one against John Kerry and David Ferriero for failing to preserve former Secretary Clinton's e-mails[16] and one against 11 federal agencies and the Office of the White House Counsel for alleged delays in responding to Freedom of Information Act requests.[17] While at CoA, Schwartz served as pro-bono counsel in a suit filed by New England fishermen challenging regulations promulgated by the National Marine Fisheries Service requiring certain commercial vessels to carry at-sea monitors to ensure compliance with fishing quotas and in a suit filed by a business owner alleged to have violated the Fair Labor Standards Act. *See Goethel v. Pritzker*, No. 15-CV-497-JL, 2016 WL 4076831, (D.N.H. July 29, 2016); *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023 (D.C. Cir. 2016).

In 2016, Schwartz became an associate at Schaerr Duncan LLP, and was promoted to partner in 2017.[18] During his time at Schaerr Duncan, Schwartz has continued to litigate cases opposing fundamental protections.

15 Evan Halper, *Koch-backed group with ties to liberal causes? Critics call it a charade*, N.Y. Times (Feb. 7, 2015), http://www.latimes.com/nation/la-na-cause-action-20150207-story.html.
16 Press Release, Cause of Action Institute, Cause of Action Lawsuit Challenges Legality of Hillary Clinton's Email Practices (July 8, 2015), https://causeofaction.org/cause-of-action-law-suit-challenges-legality-of-hillary-clintons-email-practices/.
17 *See* Press Release, Cause of Action Institute, Cause of Action Institute Sues to Stop White House Obstruction of the Freedom of Information Act (May 9, 2016), https://causeofaction.org/cause-of-action-institute-sues-to-stop-white-house-obstruction-of-the-freedom-of-information-act/. The U.S. District Court for the District of Columbia granted the Government's motion to dismiss on the grounds of failure to state a claim and lack of subject matter jurisdiction. *See* Cause of Action Inst. v. Eggleston, 224 F. Supp. 3d 63 (D.D.C. 2016).
18 Sen. Comm on the Judiciary, *supra* note 12.

LEGAL AND OTHER VIEWS

I. CIVIL RIGHTS

Schwartz's personal and professional backgrounds demonstrate that he consistently advocates against the advancement of civil rights, and has fought against a woman's right to choose whether to have an abortion.

Racial Justice

In 2016, Schwartz argued on behalf of North Carolina in a failed attempt to get the Supreme Court to review the Fourth Circuit's ruling striking down a restrictive voter law as violating the Equal Protection Clause of the Fourteenth Amendment because it was enacted with racially discriminatory intent. *See North Carolina. v. N.C. St. Conf. of the NAACP*, 581 U.S. ____ (2017); *N.C. St. Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2017). The law required voters to have photo identification, reduced the days of early voting, and eliminated same-day registration, out-of-precinct voting, and preregistration. In its ruling, the Fourth Circuit observed that the law "target[s] African Americans with almost surgical precision." *Id.* at 211. Yet Schwartz's petition repeatedly stated that the Fourth Circuit erred because there was no evidence that the law was passed with discriminatory intent or had a discriminatory impact.[19]

19 Petition for Writ of Certiorari and Volume I of the Appendix at 1, North Carolina. v. N.C. St. Conf. of the NAACP, 581 U.S. ____ (2017)(No. 16-833), 2016 WL 7634839.

Schwartz's short publication history includes a Letter to the Editor of the *Washington Post* disparaging hip-hop music. In the letter titled *Hip-hop fails at wordplay*, Schwartz states: "Assuming that an artistic defense of hip-hop *is possible*, Gilbert Newman Perkins's Sept. 20 op-ed, 'Hip-hop hypocrisy,' wasn't it."[20] Perkins's op-ed was a direct response to comments made by TV hosts Bill O'Reilly and Don Lemon who, according to Perkins, both "asserted that hip-hop music and children raised out of wedlock are root causes of all ills in the black community."[21] Perkins's central argument focused on the literary importance of hip-hop contributions and praised hip-hop artists for mastering the English language.[22] Schwartz argued directly against Perkins's opinion that hip-hop has a positive impact on black communities. Schwartz stated that "rap artists use the same basic literary devices that also appear in middle school fan fiction" and used Lil Wayne lyrics to demonstrate that hip-hop artists have not "mastered the English language, with all its nuances and transmutations."[23]

Transgender Rights

Schwartz's extreme legal views undermining transgender rights are prominent in his 2017 representation of the Gloucester County (Virginia) School Board, where as co-counsel he drafted a merits brief arguing that Gavin Grimm, a transgender high school boy, should not be allowed to use the men's restroom. *See Gloucester County School Board v. G.G.*, 137 S. Ct. 1239 (2017).

The Department of Education had sent a letter to Grimm affirming that when a school decides to provide sex-segregated restrooms under Title IX, "a school generally must treat transgender students consistent with their gender identity."[24] Yet Schwartz argued that Title IX does not protect transgender students and that the school was under no legal obligation to respect Grimm's choice to use the men's restroom. Schwartz claimed that Title IX is a "straightforward prohibition intended to erase discrimination against women in classrooms, facilities, and athletics" and implied Title IX protects nothing beyond that interpretation.[25] The Fourth Circuit concluded that the Department's interpretation of Title IX was afforded deference.[26]

In arguing against the Fourth Circuit Court's interpretation of Title IX, Schwartz stated that the Court's proposed solution to undertake case-by-case evaluations of a student's gender presentation "poses a threat to female-only athletic teams, one of Title IX's signal achievements."[27] Schwartz attempted to justify this position by explaining that "[s]ex separation in athletics only works, however, if 'sex' means physiological sex; if it means 'gender identity' nothing prevents athletes who were born male from opting onto female teams, obtaining competitive advantages and displacing girls and women."[28]

20 Stephen S. Schwartz, Letter to the Editor, *Hip-hop fails at wordplay*, WASHINGTON POST (Sept. 27, 2013), (emphasis added), https://www.washingtonpost.com/opinions/hip-hop-fails-at-wordplay/2013/09/27/a515069c-2557-11e3-9372-92606241ae9c_story.html?utm_term=.1996e24f7dd5.
21 Gilbert Newman Perkins, Opinion, *America's hip-hop double-standard*, WASHINGTON POST (Sept. 19, 2013), https://www.washingtonpost.com/opinions/americas-hip-hop-double-standard/2013/09/19/e1ce0192-1c92-11e3-82ef-a059e54c49d0_story.html?utm_term=.4503a5767ff2; *see also* Bill O'Reilly, T*he Color of Hope*, BILL O'REILLY (July 25, 2013), https://www.billoreilly.com/column/The-Color-of-Hope?pid=41101. The link Perkins uses to cite to Don Lemon's Black Culture segment on CNN "No Talking Points" has been removed from YouTube. However, the video is available on CNN's website. *See No Talking Points: Don Lemon's five things to think about*, CNN (Jul. 7, 2013), http://www.cnn.com/videos/bestoftv/2013/07/27/nr-lemon-no-talking-points.cnn.
22 Perkins, *supra* note 21.
23 Schwartz, *supra* note 20.

24 *See G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 732 (4th Cir. 2016).
25 Brief of Petitioner at 1, Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (No. 16-273), 2017 WL 65477.
26 Gloucester Cty. Sch. Bd., 822 F.3d 709 (2016).
27 Brief of Petitioner, *supra* note 25, at 22.
28 *Id.* at 41.

On March 6, 2017, the Supreme Court vacated the judgment and remanded the case back to the Fourth Circuit for further consideration in light of new guidance issued by the Departments of Education and Justice on February 22, 2017. *Gloucester Cty. Sch. Bd*., 137 S. Ct. 1239. The Departments' Dear Colleague Letter highlighted the new administration's conservative perspective on Title IX's relationship to transgender students. Schwartz filed a supplemental brief in the Fourth Circuit reiterating the same arguments he made to the Supreme Court as well as suggesting the case would be moot because of Grimm's upcoming graduation.[29] The case is scheduled to be argued in the Fourth Circuit on September 12, 2017.

II. REPRODUCTIVE RIGHTS

In May of this year, Schwartz joined the litigation team challenging a law that restricted women's access to abortion care by requiring physicians performing abortions to have admitting privileges at a local hospital. *See June Medical Services v. Caldwell*, No. 3:14-CV-00525-JWD (M.D. LA), *appeal docketed*, No.17-30397 (5th Cir. May 15, 2017).[30] The Supreme Court already has struck down similar legislation in Texas that had an admitting privileges requirement. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

Schwartz is also defending the State of Louisiana against constitutional challenges to seven other bills that severely restrict access to abortion care.[31] *See June Medical Services v. Gee*, No. 3:16-cv-00444 (M.D. La.). The bills, passed by the Louisiana Legislature in 2016, include provisions that would triple Louisiana's 24-hour mandatory delay for women seeking an abortion, prohibit the most common method of second trimester abortions, and ban medication abortion commonly taken during the first trimester at home.[32]

The Center for Reproductive Rights, the organization that filed the lawsuit on behalf of multiple abortion providers in both cases, stated that the 2016 Louisiana legislation was an "unprecedented wave of new restrictions" that "adds to the many obstacles that Louisiana women already face when they have made the decision to end a pregnancy."[33]

Moreover, in 2014, Schwartz filed an amicus brief on behalf of four publishing companies, including the Christian Booksellers Association, in *Burwell v. Hobby Lobby*.[34] 134 S. Ct. 2751 (2014). The publishing companies, like Hobby Lobby, were for-profit corporations seeking to invalidate the requirement in the Affordable Care Act that employers provide insurance coverage for contraception. Schwartz's brief skims over the key issue of contraceptive coverage and focuses generally on protecting the corporations' rights.[35] The Court, in a 5-4 decision, ultimately concluded that the Affordable Care Act's contraceptive requirement violates the Religious Freedom Restoration Act. *Id.* at 2768, 2785.

29 Supplemental Brief of Gloucester Cty. Sch. Bd. at 18, G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 732 (4th Cir. 2016)(No. 15-2056), 2017 WL 2211304.
30 Appearance Form, June Med. Servs. v. Gee, No. 17-30397 (5th Cir. May 24, 2017).
31 Sen. Comm. on the Judiciary, *supra* note 12 at 16; *see also* Complaint at 2, June Med. Servs. v. Gee, No. 3:16-cv-00444 (M.D. La.).

32 Complaint, *supra* note 31, at 3-4; *see also* June Med. Servs. v. Gee, CENTER FOR REPRODUCTIVE RIGHTS (Jul. 22, 2016) (last updated Jun. 13, 2017), [hereinafter Reproductive Rights] https://www.reproductiverights.org/case/june-medical-services-v-gee.
33 Reproductive Rights, *supra* note 32.
34 Brief for the Christian Booksellers Association et al. as *Amicus Curiae* supporting Hobby Lobby and Conestoga, Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014)(Nos. 13-354,13-356), 2014 WL 343200, *available at* https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_cba-etal.authcheckdam.pdf.
35 *Id.* at 7.

III. IMMIGRATION

Schwartz filed a certiorari-stage amicus brief on behalf of Florida Governor Jeb Bush in support of Arizona's decision to defend its law denying driver's licenses to Deferred Action Childhood Arrivals (DACA) recipients. *See* [*Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014), *petition for cert. filed*, No. 16-1180 (U.S. Mar. 29, 2017)]. The amicus brief argued that DACA was implemented through an executive order, and therefore should not be allowed to preempt state law.[36]

The Ninth Circuit enjoined Arizona's law. Schwartz stated that the Ninth Circuit's decision "implies that presidential pronouncements can preempt States even though they are not law," and "state laws can only be preempted by federal acts that carry the force of law."[37] The petition for certiorari is still pending before the Supreme Court.

IV. ENVIRONMENT

While at Kirkland and Ellis, Schwartz repeatedly litigated cases challenging environmental protections. Most notably, he worked extensively on the *BP Macondo Well Litigation*.[38] This litigation arose from the devastating Deepwater Horizon explosion that caused approximately 3.19 million barrels of oil to spill into the Gulf of Mexico.[39] Schwartz worked in various strategic roles representing BP, the corporation that owned the Macondo Well, through 2015. Most notably, he argued BP had no civil liability under the Clean Water Act (CWA). On June 4, 2014, the Fifth Circuit affirmed the lower court decision and held that the co-owners were liable for civil penalties under the CWA. *In re Deepwater Horizon*, 753 F.3d 570, 576 (5th Cir.), adhered to, 722 F.3d 350 (5th Cir. 2014).

In 2015, the Department of Justice announced that a global resolution of civil claims against BP, including those under the Clean Water Act, resulted in a $20.8 billion settlement, which was "the largest settlement with a single entity in the department's history."[40]

In addition to representing BP, Schwartz worked as co-counsel for the Rocky Mountain Farmers Union challenging Low Carbon Fuel Standard (LCFS) regulations for motor fuel used in California. In the petition for a writ of certiorari, Schwartz claimed that the Ninth Circuit ignored Supreme Court precedent when it determined that the California law does not have discriminatory purpose or intent against out-of-state ethanol and crude oil and that the "State of California, in the name of combatting global warming, has violated the basic norms of interstate federalism."[41] The brief goes even further to state the only direct benefit California can gain from the LCFS is economic because the LCFS will never "measurably" reduce greenhouse gas emissions.[42] The Supreme Court denied the petition in 2014.

36 Brief of Governor Bush as *Amicus Curiae* Supporting Petitioners at 2, in *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014), petition for cert. filed, No. 16-1180 (U.S. Mar. 29, 2017), available at http://www.scotusblog.com/wp-content/uploads/2017/05/16-1180-cert-amicus-Jeb-bush.pdf.
37 *Id.* at 11.
38 Sen. Comm. on the Judiciary, *supra* note 12, at 18-19.
39 The Ocean Portal Team, *Gulf Oil Spill*, Smithsonian Museum of Natural History, http://ocean.si.edu/gulf-oil-spill.
40 Press Release, United States Department of Justice, U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill (Oct. 5, 2012), https://www.justice.gov/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater.
41 Petition for a Writ of Certiorari at 1, Corey v. Rocky Mountain Farmers Union, 134 S. Ct. 2884 (2014) (No. 13-1148), 2014 WL 1154199.
42 *Id.* at 7; *see also Corey v. Rocky Mountain Farmers Union*, 134 S. Ct. 2884 (2014).

CONCLUSION

Stephen Schwartz's legal practice has focused on attacking critical legal protections for women, immigrants, transgender youth, and people of color. In just the last two years, Schwartz managed to represent Jeb Bush against DACA recipients, Gloucester County against transgender students, North Carolina against people of color, and Louisiana against women. His decision to build a career around relentless advocacy for ideologically-driven efforts to erode basic Constitutional rights makes him unfit to be a federal judge.

Alliance for Justice opposes the nomination of Stephen S. Schwartz to the Court of Federal Claims.