

October 22, 2019

The Honorable Lindsey Graham
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Diane Feinstein
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

**RE: OPPOSITION TO CONFIRMATION OF STEVEN MENASHI
TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT**

Dear Chairman Graham and Ranking Member Feinstein:

On behalf of the NAACP, our nation's oldest, largest and most widely-recognized grassroots civil rights organization, I strongly urge you to oppose the confirmation of Steven Menashi to the U.S. Court of Appeals for the Second Circuit. His nomination to a federal appellate court is an insult to the integrity and reputation of the judiciary. The White House should withdraw the Menashi nomination.

For decades, the NAACP has fought to ensure that nominees to the federal courts are diverse, fair, and committed to the progress our nation has made on civil rights. Our efforts are under attack as never before. Enabled by a Republican-led Senate, Donald Trump has dramatically overhauled the courts by appointing dozens of far-right judges who have undermined the racial diversity of the bench. He has nominated over 50 appellate judges, but none is African-American. This is consistent with an appalling lack of diversity in Trump's judicial selections overall. His almost exclusive emphasis on white male nominees with extremist ideologies has had a devastating impact on the legitimacy and fairness of the judiciary.

It is patently offensive that Donald Trump has nominated Steven Menashi to Thurgood Marshall's former seat on the Second Circuit. Adding insult to injury is that, if confirmed, Menashi would preside in the Thurgood Marshall Courthouse in New York City. President Kennedy appointed Thurgood Marshall to this seat in 1961, integrating a federal appellate court for only the second time in history. Justice Marshall, who would become the nation's first African-American justice on the Supreme Court, served on the Second Circuit until 1965 when he became Solicitor General of the United States. The notion that Menashi would occupy this seat demeans its seminal role in judicial history as well as the reputation of the circuit itself. Residents living within the Second Circuit, which includes New York, Connecticut and Vermont, deserve much better than this offensive nomination for their appellate court.

Steven Menashi has played a central role in some of the worst efforts by the Trump administration to gut civil rights protections and deny equal protection under the law. Menashi served as Acting General Counsel to Education Secretary Betsy DeVos during pernicious rollbacks of equal opportunity policies in education. He was Stephen Miller's accomplice on cruel and inhumane immigration policy. Even before his work for Donald Trump at the highest levels, Menashi was a dangerous zealot who unabashedly attacked almost every group of Americans protected by civil rights laws. Instead of the open-mindedness and commitment to civil rights which a judicial nominee should demonstrate, Menashi's record reveals a litany of hateful, offensive statements that demean historically marginalized groups and the very protections that the law affords them against discrimination and exclusion.

In an egregious violation of longstanding Senate practice, the Senate is moving Menashi's nomination over the objections of New York Senators Charles Schumer and Kirsten Gillibrand. For decades, the Senate has refused to process a judicial nomination if a senator from the nominee's home state failed to return a "blue slip," indicating his or her objection. This policy was strictly enforced regardless of the consequences to the nominee and the circuit.

But it is not just Democratic senators who have condemned Menashi's fitness to serve as a judge. At a hearing before this Committee last month, Menashi repeatedly [refused](#) to answer questions by senators from both sides of the aisle about his work in Trump's White House. For example, Menashi was asked whether he worked on the Administration's decisions to end deferred deportation for undocumented immigrants receiving treatment for life-threatening illnesses, but he [declined](#) to answer. Republican Senator John Kennedy from Louisiana later [stated](#): "I'm real doubtful [about supporting him]. My thought is, look, if he'll treat a United States senator the way he treated us, I wonder how he would treat the people."

Since Steven Menashi's hearing, more critical questions about his legal work for Donald Trump have surfaced and have gone unanswered. Menashi's hearing occurred on September 11, 2019. Two weeks later, a whistleblower complaint [disclosed](#) that Trump attempted to pressure Ukraine to investigate political rival Joe Biden. Ten senators on this Committee [wrote](#) to Menashi about his possible role in the Ukraine scandal as a White House lawyer. They sought answers about whether he knew about Trump's call to Ukrainian President Volodymyr Zelensky and participated in [efforts](#) by White House lawyers to cover it up. Yet Menashi [refuses](#) to answer. It is inconceivable that the Judiciary Committee would vote on Menashi's nomination without probing his possible role in covering up what likely involved impeachable conduct by the president.

RACIAL JUSTICE

Steven Menashi has a tremendously offensive record of vile, hateful comments against people of color and the laws and policies that help counter centuries of segregation and discrimination. Given his nomination to fill Thurgood Marshall's former seat on the Second Circuit, it is the height of irony that one of the worst aspects of his record are his attacks on students of color and the promotion of equal educational opportunity.

In college writings, Menashi [argued](#) that a Dartmouth fraternity was not racist when it held a "ghetto party" at which white students wore Afros and carried guns, calling it "harmless and ultimately unimportant." He also defended a "Lu'au" party and a "Miami" party where guests dressed up "like Cubans." He wrote that charges of racism resulted in "a hostile campus environment, where students are unwilling to express themselves, lest they be condemned as bigots. The victims here are not only the students who are demeaned as racists. Liberal education cannot exist where students are unable to freely express their ideas and opinions." On another occasion, Menashi [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."

In other writings, Steven Menashi [attacked](#) multiculturalism: "It is now evident that multiculturalism was never about understanding non-Western cultures; it was about denigrating Western culture in order to promote self-esteem among 'marginalized' groups." He [ridiculed](#) programs designed to assist students of color with entry into Ivy League life, calling them "Third World Training Programs." He wrote: "Next, the insidious part: the entire freshman class is divided into small groups and assigned a 'facilitator' to discuss race, class and the rest. Naturally, those who participated in the Third World Training program are the most outspoken: they have just completed four days of instruction in PC orthodoxy.... Brown fancies itself party to some objective truth and feels compelled, in order to 'liberate' its students, to fully indoctrinate them in leftist multiculturalism." He [condemned](#) university programs to protect students from bigotry: "What's more, members of 'disadvantaged' groups—certain minorities, women, and gays—are informed at orientation that there's a bigot under every bed, seeking constantly to violate their 'right' to not be offended."

Menashi has repeatedly condemned affirmative action in higher education, which the Supreme Court has long endorsed to promote racial equality. Shockingly, he compared affirmative action policies to laws under Nazi Germany. 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." In the same article, he [stated](#): "When students are taught to see all of history through the lens of racial conflict, it's not surprising that they will adopt this view in their actual lives. Thus, campuses boil with racial tension, accusations of prejudice, and overt competition between 'identity' groups, demanding parochial academic programs, resource centers, and so on for the benefit of their own kind and from a limited pool of funds."

Steven Menashi has also blatantly mischaracterized the legal arguments supporting affirmative action. In an [op-ed](#) for the New York Sun, he wrote, "Defenders of racial preferences in college and graduate school admission resort to the most convoluted arguments." He suggested that proponents of affirmative action argue that "universities need to admit a host of unqualified students in order to help the few qualified students feel more at home." He concluded with this: "The next time apologists for racial preferences contend that minority students are too scared to apply to selective universities without special standards, opponents of such preferences can point to the young people of Texas and California who remain determined to excel – this time, on the merits." Elsewhere, he has [written](#): "What's needed is a renewed emphasis on educational achievement. But American schools persist in deriding accomplishment and promoting egalitarianism and self-esteem." In another op-ed, he [wrote](#): "For the past few decades universities have created an exception to the merit principle in college admissions in order to create ethnically diverse student bodies."

In yet another article opposing affirmative action, Menashi [blasted](#) the protections of Title VII of the Civil Rights Act of 1964, the seminal law prohibiting employment discrimination. He wrote: "Whatever the original concept of civil rights entailed, Title VII has evolved, through an elaborate distortion of the law, into a tool for imposing equality of results rather than equal opportunity. The system of racial preferences that grew from Title VII are justified as either compensation for 'historic prejudice' and its legacy or as a necessary step in achieving the goal of 'diversity,' a cherished objective of the academic world."

As general counsel, Menashi advised Betsy DeVos during a period of severe rollbacks to civil rights within the Department of Education. His tenure overlapped with [deliberations](#) on rescinding a critical guidance addressing the obligations of school districts to reduce discipline practices that disproportionately impact students of color. Uncontroverted [evidence](#) demonstrates racial disparities in the use of discipline in schools, setting into motion the "school to prison pipeline." For example, black students accounted for 15% of the student body in school year 2015-16 but 31% of the arrests. The Obama administration took several steps to reduce these growing disparities, including issuing guidance to curb harsh discipline and warning school districts that they could be violating civil rights laws if significant racial disparities existed. Shortly after Menashi left the Department of Education for the White House, the Department [rescinded](#) this

guidance. This was widely [viewed](#) as the first salvo of the Trump administration’s broad-based [attack](#) on “disparate impact,” a longstanding civil rights doctrine to address discriminatory policies that are neutral on their face but adversely impact protected groups. Menashi’s role in ending this policy reveals an alarming disdain for longstanding civil rights tools to prevent discrimination.

Under Menashi’s watch, the Education Department dramatically limited the scope of civil rights enforcement. Specifically, it [restricted](#) the scope of investigations into civil rights complaints filed with the Department’s Office of Civil Rights. Contrary to [longstanding policy](#) which allowed the identification of patterns of discrimination or harassment, the Department limited the investigation of systemic or class-wide issues to only those situations “where the individual complaint allegations themselves raise systemic or class-wide issues or the investigative team determines a systemic approach is warranted through conversations with the complainant.” This rule forecloses the ability of investigators to broaden an investigation based on evidence uncovered from any source other than the complainant, who is often not in a position to know how others are treated. The Department also [announced](#) it would allow investigators to close cases more quickly at the expense of the quality of the investigation, shield regional offices from oversight from headquarters which promotes consistency and uniformity, and would no longer require investigators to obtain three years of complaint data from target school districts to assess compliance. The restrictions were widely condemned, and the Senate Health Education, Labor and Pensions (HELP) Committee which conducts oversight of the Education Department [blasted](#) the approach, warning it would “scale[] back civil rights enforcement.”

Steven Menashi also advised Betsy DeVos when she proposed suspending implementation of a rule adopted by the Obama administration that addressed the disproportionate placement of students of color in special education settings. As one special education expert [stated](#): “The delay in implementation will, at best, promote the status quo in special education—which has been characterized by decades of racialized outcomes in the placement, classification, and/or discipline of students with disabilities—or will exacerbate these inequities.” Fortunately, a federal judge [blocked](#) the suspension and allowed the rule to take effect. The court [found](#) that the Department—where Menashi served as general counsel—had acted arbitrarily and capriciously in violation of the law, noting that it “failed to provide a reasoned explanation” and “failed to account for the costs to children, their parents, and society.”

GENDER JUSTICE

Menashi’s background includes demeaning women and trampling on their rights to equal opportunity, safety from sexual violence, and reproductive healthcare. He served as counsel to the Education Department when it [rescinded](#), because of “federal overreach,” Title IX guidance regarding sexual violence that set forth the responsibilities of colleges and universities to address complaints of sexual harassment, assault, and rape that are often ignored. This is particularly disturbing in light of his early record on gender issues. As a college student, Menashi [wrote](#) that “[t]he prevailing view among educators is that girls are disadvantaged, and systematically victimized, in American schools... After 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.” He [attacked](#) Take Back The Night marches as discriminatory against men: “[They] 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)” and [defended](#) fraternity members who threatened women walking by with chants of “Wah Hoo Wah! Scalp those bitches!” He [stated](#) that the Family and Medical Leave Act was about “private comforts” rather than “broad national interests.” He authored a [brief](#) challenging the contraception mandate under the Affordable Care Act as too burdensome for religious employers.

LGBTQ RIGHTS

Steven Menashi has made outrageous statements about and taken adverse action against many other groups protected by civil rights laws. He has demonstrated incredible hostility toward the LGBTQ community, continuing a pattern recently [reported](#) by Lambda Legal that one in every three of Trump’s judicial nominees have anti-LGBTQ records. When Matthew Shephard was brutally murdered because of his sexual orientation, Menashi lashed out at the Human Rights Campaign which led the fight for federal protections against hate crimes. He [called](#) the organization a “class-race-gender warrior group” and [accused](#) it of “incessantly exploiting the slaying of Matthew Shephard for both financial and political benefit.” Menashi [supported](#) the ban against LGBTQ persons serving in the military, [opposed](#) judicial decisions supporting marriage equality, and [defended](#) discrimination against LGBTQ persons in public accommodations.

Menashi served as general counsel when the Education Department [withdrew](#) guidance on protections for transgender students under Title IX despite the fact that a third of transgender students report harassment or bullying and a shocking half of transgender children seriously contemplate suicide. Under Menashi’s purview, the Department also issued a memorandum permitting investigators within the Office of Civil Rights to dismiss complaints filed by transgender students alleging discrimination. As members of the Senate HELP Committee noted in a [letter](#) expressing outrage over the changes, the memorandum suggests the Department “will allow investigators to determine whether and how they will protect transgender students, including the right to use the facilities corresponding with their gender identity.”

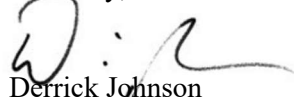
IMMIGRANT RIGHTS

Steven Menashi has a deplorable record on immigrant rights, leading 28 immigrant rights organizations to [oppose](#) his nomination. Alongside Stephen Miller, Menashi has worked on the most inhumane and cruel policies implemented by the Trump administration. This includes [requiring](#) asylum seekers to stay in Mexico while their applications move through the immigration process, [denying](#) asylum to migrants who pass through another country before reaching the U.S. border, and the “public charge” [rule](#) which would withhold green cards from immigrants likely to use public benefits. Menashi has made ghastly comments about the Muslim community, including [defending](#) a foreign leader who said that Western civilization was superior to Islam and [opining](#) that the “American response to Islamic extremism has not always been so hard—or as effective” as executing Muslims “with bullets dipped in pig fat.”

The American people have the right to expect common decency and fairness in their federal judges, even in the Trump era. Steven Menashi’s long record of hateful invective against many of the communities who would appear before him is anathema to the qualities a federal judge should possess. Litigants appearing in his courtroom could never have the confidence that he would administer justice in an impartial manner. That is a fatal flaw in his nomination, and it must be withdrawn.

Thank you for considering the NAACP’s strong opposition to this nomination. Should you have any questions or comments, please contact Hilary Shelton, Director of the Washington Bureau and Senior Vice President for Policy and Advocacy at his office at (202) 463-2940.

Sincerely,



Derrick Johnson
President and CEO