



September 10, 2019

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OPPOSE THE CONFIRMATION OF STEVEN MENASHI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write in strong opposition to the confirmation of Steven Menashi to the U.S. Court of Appeals for the Second Circuit.

Mr. Menashi is a staunch right-wing ideologue who would be incapable of serving as a fair and impartial judge. From his offensive and incendiary college writings to his present-day post in the Trump administration, he has advanced extreme viewpoints on numerous civil and human rights issues, including women's rights, LGBTQ equality, racial justice, and respect for the Muslim religion. Mr. Menashi is opposed by his New York home-state senators, which traditionally would have been a bar to Mr. Menashi's nomination moving forward. But Senate Republicans have repeatedly trampled on this tradition in order to help stack the courts with President Trump's ideological extremists. The Senate must exert its independence and deny Mr. Menashi a lifetime appointment to the federal judiciary.

Supported Civil Rights Rollbacks in Betsy DeVos Education Department: Mr. Menashi served as acting general counsel in the Betsy DeVos Education Department ("ED") from May 2017 to April 2018. During his tenure, he oversaw ED's decisions to roll back guidance and weaken the enforcement of laws critical to protecting sexual assault survivors, students of color, students with disabilities, and LGBTQ people.¹ On his Senate questionnaire, Mr. Menashi wrote that he was "responsible for providing legal advice related to all aspects of the Department's operations, including litigation, rulemaking, regulation, and enforcement."²

In June 2017, ED's Office for Civil Rights ("OCR") issued unclear new instructions on transgender student discrimination and, at the same time, ED decided to delay implementation of and to renegotiate the Borrower Defense to Repayment and Gainful Employment regulations (critical rules protecting students from exploitation in higher education). In September 2017, ED rescinded Title IX guidance regarding sexual violence and educational opportunity. Less than a month later, ED rescinded 72 guidance documents outlining the rights of students with disabilities. In February 2018, it was reported that ED would no longer investigate complaints filed by transgender students who have been banned

¹ <https://civilrights.org/trump-rollbacks/>.

² <https://afj.org/wp-content/uploads/2019/09/Steven-Menashi-Senate-Questionnaire.pdf>.

from using the restrooms that correspond with their gender identity. During the same month, ED proposed to delay implementation of a rule that enforces the Individuals with Disabilities Education Act (“IDEA”). The rule implements the IDEA’s provisions regarding significant disproportionality in the identification, placement, and discipline of students with disabilities with regard to race and ethnicity – the delay has since been struck down by the courts. In March 2018, OCR released a new Case Processing Manual that created greater hurdles for people filing complaints and allowed dismissal of civil rights complaints based on the number of times an individual has filed – a decision that ED has since rescinded.

Mr. Menashi’s pivotal involvement in these deeply troubling civil rights education rollbacks should itself preclude his elevation to a lifetime appointment as a federal judge.

Supported Trump Administration Anti-Immigration Policies: In addition to his role at the Education Department, Mr. Menashi has worked in the Trump White House since September 2018, and he serves on Stephen Miller’s Immigration Strategic Working Group.³ Senators must ask Mr. Menashi what role, if any, he played in developing and advocating for President Trump’s most draconian anti-immigrant measures such as its brutal family-separation policy, the harsh asylum policy, attacks on the Deferred Action for Childhood Arrivals program (“DACA”) and the Deferred Action for Parents of Americans and Lawful Permanent Residents program (“DAPA”), the unlawful use of federal funds to build a wall on the U.S.-Mexico border, and the discriminatory Muslim ban. The Trump administration’s inhumane treatment of immigrants has been widely condemned, and the Senate must find out what role Mr. Menashi has played in furthering those disgraceful policies.

Mr. Menashi’s Disrespect for Women and Reproductive Rights: Mr. Menashi’s recent efforts to undermine Title IX protections for sexual violence survivors mirror his offensive college writings about women and bodily autonomy.

- In a 2000 editorial entitled “Heteropatriarchal Gynophobes!” in the right-wing *Dartmouth Review*, for which he served as editor-in-chief, Mr. Menashi criticized Take Back the Night marches as discriminatory against men. He wrote: “‘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) – not to mention the ‘Frats Rape’ accusation that’s chalked on the sidewalks from time to time.... Offhand remarks or jokes can create a ‘hostile environment’ or ‘stigmatize’ women – and can be punished through official disciplinary action. 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. So men at Dartmouth and similar schools live, as Sommers has written, ‘in a state of permanent culpability.’”⁴
- In a 2001 editorial entitled “Tolerance at Dartmouth,” Mr. Menashi defended two fraternity members who repeatedly yelled “Wah Hoo Wah! Scalp those bitches!” at women who walked by

³ <https://www.thedailybeast.com/trump-aide-may-davis-a-stephen-miller-ally-who-floated-sending-migrants-to-sanctuary-cities-gets-promotion>.

⁴ <https://afj.org/wp-content/uploads/2019/09/Heteropatriarchal-Gynophobes.pdf>.

their fraternity house.⁵ The incident resulted in widespread criticism of the fraternity and led to the offending students being banned from fraternity events. But Mr. Menashi wrote: “Of course, the screaming students on the porch of Psi U were acting silly, and obscene language is never pleasant, but one needs to keep in mind their actual offense: they spoke words.”⁶ He complained that “what has been in evidence on campus is a regime of intimidation in which students are chastised for unpopular speech and expression.”⁷

- In a 2001 op-ed, “The College on the Pill,” Mr. Menashi criticized Dartmouth for, in his opinion, misleading women students about the effects of Plan B emergency contraception, commonly referred to as the morning-after pill. He stated that an anti-abortion organization views Plan B as abortion and that “Health Services is misleading those students who believe that life begins at conception – pushing them toward a choice they might abhor if they had complete information.... Women’s health programs are notoriously ideological, and often see moral or religious conviction against abortion as hopelessly parochial – not to mention patriarchal and oppressive.”⁸
- In another 2001 editorial, “The Yuck Factor,” Mr. Menashi railed against college campuses for being too liberal on abortion rights. 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* and subsequent decisions – abortion on demand, for any reason, at any stage of pregnancy.”⁹
- In a 2002 op-ed, “The Empty Decade,” Mr. Menashi criticized the 1990s decade for its “singular moral drift” and wrote that “Clinton-era politics was about private comforts – family and medical leave, a patients’ Bill of Rights, targeted tax cuts for school tuition – rather than broad national interests.”¹⁰ It is troubling that Mr. Menashi believes the Family and Medical Leave Act – historic legislation that has allowed millions of Americans to take up to 12 weeks of unpaid leave for the birth of a child or to care for a sick family member – is merely a “private comfort” and not a national interest.
- Mr. Menashi wrote a 2000 op-ed, “Vagina Friendly,” that demeaned a sex awareness program organized by the Dartmouth Women’s Resource Center. The program included a performance of the off-Broadway play “The Vagina Monologues,” about which Mr. Menashi wrote: “The point of *The Vagina Monologues* is simple, and very silly: by saying the word ‘vagina’ enough times, women will find empowerment.”¹¹

⁵ <https://afj.org/wp-content/uploads/2019/09/Tolerance-at-Dartmouth.pdf>.

⁶ *Id.*

⁷ *Id.*

⁸ <http://civilrightsdocs.info/pdf/judicial-nominations/documents/Menashi-The-College-On-The-Pill.pdf>.

⁹ <https://afj.org/wp-content/uploads/2019/09/The-Yuck-Factor.pdf>.

¹⁰ <https://afj.org/wp-content/uploads/2019/09/The-Empty-Decade.pdf>.

¹¹ <http://civilrightsdocs.info/pdf/judicial-nominations/documents/Menashi-Vagina-Friendly.pdf>.

More recently, in the 2016 case *Zubik v. Burwell*, Mr. Menashi filed an amicus brief arguing that the mere act of providing notification of a religious objection to providing contraception to employees was too burdensome for religious employers and a violation of their rights under the Religious Freedom Restoration Act.¹² The Supreme Court was unwilling to go that far and remanded the case.

Anti-LGBTQ Animus: Mr. Menashi’s writings reveal he opposes LGBTQ equality and supports religion-based discrimination against LGBTQ individuals.

- In a 2001 op-ed, “Matters of Life and Death,” Mr. Menashi criticized the extensive media coverage of the hate-based murder of a gay man, Matthew Shepard, and the relative lack of coverage of another murder case in which the killers themselves were gay. To Mr. Menashi, this represented a double standard, which he chalked up to “politics.”¹³ He wrote that the *New York Times* and *Washington Post* had given very little attention to the other case, and he stated: “Compare that to the media coverage of the murder of Matthew Shepard, which occurred a year earlier: ‘It made the cover of Time magazine with the headline “The War Over Gays,”’ observes Brent Bozell of the Media Research Center, ‘with reporters predictably using the occasion to blame religious conservatives and call for hate-crime laws and other gay-left agenda items.’”¹⁴
- In the same 2001 op-ed, Mr. Menashi alleged that the Human Rights Campaign – a leading national organization that promotes LGBTQ equality – has “incessantly exploited the slaying of Matthew Shepard for both financial and political benefit...”¹⁵ Such commentary is obviously inaccurate and profoundly insensitive.
- In a 2000 op-ed entitled “Double Dorm Standards,” Mr. Menashi criticized universities that established dormitories for LGBTQ students. He wrote: “The military says its ‘Don’t ask, don’t tell’ policy promotes the unit cohesion needed in combat by reducing sexual tension and respecting personal privacy. The colleges say these claims only mask irrational prejudice. University administrators insist troops in mortal combat should be able to handle the tension of living in mixed quarters. But it turns out that college kids living in dorms and frat houses, threatened by such dangers as beer kegs and basketball games, are quite a different matter.... The hypocrisy in all this has not gone entirely unnoticed.”¹⁶
- In a 2015 op-ed, “How Great Is the Threat to Religious Freedom, Really?,” Mr. Menashi attacked LGBTQ couples who sought legal action against vendors who would deny them wedding services on the basis of their sexual orientation. Mr. Menashi wrote: “Who, after all, would want to hire a wedding photographer unable to appreciate the ceremony, especially where alternatives are readily available? No one, really. For the plaintiffs and state regulators in these cases, the apparent motive is not to insure access to photography services or wedding cakes – which could

¹² <https://www.scotusblog.com/wp-content/uploads/2016/01/Former-Justice-Department-Officials-LSP-Amicus.pdf>.

¹³ <https://afj.org/wp-content/uploads/2019/09/Matters-of-Life-and-Death.pdf>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ <http://civilrightsdocs.info/pdf/judicial-nominations/documents/Menashi-Double-Dorm-Standards.pdf>.

be and were purchased elsewhere – but to vindicate a principle about the status of the photographer’s or the baker’s religious beliefs.”¹⁷

Insensitivity to Racial Justice: Mr. Menashi has made several narrow-minded and offensive comments about multiculturalism and racial justice.

- In his 2001 op-ed, “Matters of Life and Death,” Mr. Menashi made an outrageous comparison between Nazi Germany laws and affirmative action policies. 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.”¹⁸ This analogy reflects both ignorance of history and tremendous hostility to diversity and efforts to remedy past discrimination.
- In a 1999 op-ed entitled “The Diversity Test,” Mr. Menashi disparaged race-conscious admissions programs as “preferential admissions policies for minority applicants” and complained that “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.”¹⁹
- In a 1999 op-ed, “Hula No More: Lu’au Called Racist,” Mr. Menashi criticized what he viewed as an overreaction to three campus fraternity theme parties: a “lu’au” party, a “ghetto” party, and a “Miami” party where attendees were encouraged to dress up “like Cubans.”²⁰ Such parties were condemned by campus affinity groups but defended by Mr. Menashi, who asserted: “Many students perceive an oppressive environment on campus, where non-minority students must avoid any mention of ethnic or cultural issues, lest they be condemned as racists.”²¹ He added that “students and student organizations apologize almost reflexively for speech and expressive conduct deemed offensive to minority groups – regardless of the merit of the charges.”²² Mr. Menashi’s comments demonstrate disrespect and sheer arrogance.
- In a 1998 op-ed, “A Cultural Revolution for Dartmouth?,” Mr. Menashi disparaged efforts by universities to promote cultural awareness on campus. He criticized a program at Brown University for students of color that took place a few days before classes started. Mr. Menashi wrote that after the program ended: “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.”²³

¹⁷ <https://mosaicmagazine.com/response/politics-current-affairs/2015/08/how-great-is-the-threat-to-religious-freedom-really/>.

¹⁸ <https://afj.org/wp-content/uploads/2019/09/Matters-of-Life-and-Death.pdf>.

¹⁹ <http://civilrightsdocs.info/pdf/judicial-nominations/documents/Menashi-The-Diversity-Test.pdf>.

²⁰ <http://civilrightsdocs.info/pdf/judicial-nominations/documents/Menashi-Hula-No-More.pdf>.

²¹ *Id.*

²² *Id.*

²³ <http://civilrightsdocs.info/pdf/judicial-nominations/documents/Menashi-Cultural-Revolution-Dartmouth.pdf>.

- In a 1998 op-ed, “Neo-McCarthyism in the Academy,” Mr. Menashi attacked university efforts to protect vulnerable communities on campus from hateful and bigoted treatment. He wrote: “Today, the neo-McCarthyite academy chastises defenders of free speech by incessantly telling them that they are fighting to safeguard the campus for ‘racism,’ ‘classism,’ ‘homophobia,’ and ‘sexism’.... What’s more, members of ‘disadvantaged’ groups – certain minorities, women, and gays – are informed at orientation that there is a bigot under every bed, seeking constantly to violate their ‘right’ not to be offended.”²⁴
- In a 2002 op-ed, “The Empty Decade,” amidst reports that the FBI was in need of more Arabic and Pashto translators post-September 11, Mr. Menashi asserted: “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.”²⁵

Hostility to Muslims: Mr. Menashi has made deeply offensive comments about Muslims. In a 2002 *Washington Times* book review, he defended comments made by Italian Prime Minister Silvio Berlusconi that Western civilization was superior to Islam. Mr. Menashi wrote: “Appearing in Germany shortly after the September 11 terrorist attacks, the Italian prime minister said: ‘We must be aware of the superiority of our civilization, a system that has guaranteed well-being, respect for human rights, and – in contrast with Islamic countries – respect for religious and political rights.’ Mr. Berlusconi did nothing other than state the obvious.”²⁶

In another 2002 book review, Mr. Menashi praised an apocryphal incident involving war crimes allegedly committed against Muslims by U.S. General John Pershing following the Spanish-American War over a century ago. Mr. Menashi wrote: “His forces captured some of the militants, executed them with bullets dipped in pig fat, and wrapped their bodies in pigskin before burial – a devastating contamination according to Muslim law.... Pershing’s approach is probably no longer in the army’s counterterrorism repertoire, but the result was that guerilla violence ended – and failed to resurface even after Pershing left the Philippines to command U.S. troops in World War I. The American response to Islamic extremism has not always been so harsh – or as effective.”²⁷ Mr. Menashi’s view that General Pershing’s alleged conduct was “effective” makes clear that he has little regard for the rights or humanity of Muslims.

In light of Mr. Menashi’s strident and intolerant views on such a broad range of civil and human rights issues, he would simply not be able to serve as an impartial arbiter in many cases that would come before him if confirmed as a judge.

²⁴ <http://civilrightsdocs.info/pdf/judicial-nominations/documents/Menashi-NeoMcCarthyism.pdf>.

²⁵ <https://afj.org/wp-content/uploads/2019/09/The-Empty-Decade.pdf>.

²⁶ <https://afj.org/wp-content/uploads/2019/09/Defining-culture-but-not-as-anthropologists-would.pdf>.

²⁷ <https://www.hoover.org/research/teaching-evil>.

Ideological Affiliations: Mr. Menashi has been a member of the Federalist Society since 2008 and was an inaugural member of its Founders Club.²⁸ A recent news article explained: “Because membership in the Federalist Society has long been seen as a demonstration of ideological bona fides and a subscription to a package of ideas, prospective federal judges can use the group’s events to signal their fealty to the movement’s legal policy goals. Indeed, there is evidence that judges who are Federalist Society members are significantly more conservative on the bench than unaffiliated nominees.”²⁹ This out-of-the-mainstream organization represents a sliver of America’s legal profession – just four percent – yet more than 80 percent of President Trump’s circuit court nominees and nearly 50 percent of his district court nominees are Federalist Society members.

Lack of Home-State Senator Support: Due to his extreme record, Mr. Menashi is opposed by Senators Schumer and Gillibrand, his home-state senators. It is also worth noting the nominee’s lack of experience – Mr. Menashi has not had a single trial during his legal career. Nominating someone over the objection of their home-state senators departs from a century-old Senate tradition and subverts the Constitution’s advice and consent process. It is particularly alarming when one of the objecting senators is the leader of his Senate caucus. As former Senator Hatch observed in 2014: “Weakening or eliminating the blue slip process would sweep aside the last remaining check on the president’s judicial appointment power. Anyone serious about the Senate’s ‘advice and consent’ role knows how disastrous such a move would be.”³⁰ This institutional check has never been more important than today, with a president who undermines the legitimacy of judges and their rulings, and who prioritizes personal loyalty over fidelity to the law.

When Republicans controlled the Senate during the Obama administration, they did not give a hearing or vote to a single nominee who lacked support from both home-state senators. During the Trump presidency, however, Senate Republicans have employed a double standard and given a hearing to *15 circuit court nominees* who were so extreme that they could not earn the support of one or both home-state senators: David Stras, Michael Brennan, Ryan Bounds, David Porter, Eric Murphy, Chad Readler, Eric Miller, Paul Matey, Michael Park, Joseph Bianco, Kenneth Lee, Daniel Collins, Daniel Bress, Peter Phipps, and now Mr. Menashi. Senate Republicans have destroyed the blue slip tradition for circuit court nominees, and future presidents and Senates are unlikely to revive it.

Disturbing Lack of Diversity: President Trump’s lack of commitment to diversity on the federal judiciary is deeply disturbing. Mr. Menashi, like the vast majority of the president’s judicial nominees, is white and male. The 15 Trump circuit court nominees listed above who have been advanced through the Senate Judiciary Committee over home-state senators’ objections are all men, and 13 of the 15 are white. President Trump has appointed the least diverse group of nominees in decades.³¹ Of his 50 appellate nominations, none are African American. None are Latino. Only 10 are women. His district court

²⁸ <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/qiGbnU0fkfcfdAiHpZ9fdP00uNXYtDUSQzCSuEvj.pdf>.

²⁹ <https://www.politico.com/magazine/story/2019/08/31/federalist-society-advocacy-group-227991>.

³⁰ <https://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role>.

³¹ <https://www.usatoday.com/story/news/politics/2018/02/13/trumps-87-picks-federal-judges-92-white-just-one-black-and-one-hispanic-nominee/333088002/>.



nominees are similarly nondiverse. Our nation's great diversity should be reflected in its government institutions, especially the federal judiciary, which serves as the ultimate guardian of our rights and liberties. At a time when the legal profession has more women and attorneys of color than ever before, President Trump's record on judicial diversity is truly appalling.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Steven Menashi to the U.S. Court of Appeals for the Second Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel, at (202) 466-3311.

Sincerely,

A handwritten signature in black ink, appearing to read "Vanita Gupta". The signature is fluid and cursive, with a large initial "V" and a long, sweeping tail.

Vanita Gupta
President & CEO