

**Amazon Watch • Animal Welfare Institute • Center for Biological Diversity
Center for Food Safety • Earthjustice • Endangered Species Coalition • Friends of Animals
International Marine Mammal Project of Earth Island Institute • Sierra Club
Turtle Island Restoration Network • Western Watersheds Project • WildEarth Guardians**

June 13, 2017

The Honorable Chuck Grassley
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Diane Feinstein
Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Opposition to the Nomination of Damien Schiff to the U.S. Court of Federal Claims

Dear Chairman Grassley, Ranking Member Feinstein,

On behalf of our organizations and their millions of members, we strongly urge you to reject the nomination of Damien Schiff to the United States Court of Federal Claims (CFC). Mr. Schiff has devoted most of his career to advancing an extreme judicial ideology that opposes virtually all forms of environmental safeguards at the federal, state and local levels that are designed to protect the public good. A large part of his career focuses on challenging and redefining the legal precedents regarding what forms of government actions represent “takings” that must be compensated by the federal government under the Constitution. Under Mr. Schiff’s view, nearly all environmental safeguards would qualify as takings, which would make it virtually impossible to protect our nation’s water and air from pollution and would allow most endangered species to slide to extinction. Given his extreme ideology and single-minded pursuit of rolling back environmental regulations, Mr. Schiff does not possess the temperament needed to act as a fair and neutral arbiter on the Court of Federal Claims, but would instead approach issues before him with a heavy thumb on the scale in favor of private interests.

Mr. Schiff has spent nearly his entire legal career at the Pacific Legal Foundation (PLF), a reactionary libertarian organization that seeks to undermine and eliminate fundamental environmental safeguards, weaken worker protections, and otherwise oppose social progress. For example, the PLF has brought multiple lawsuits challenging the constitutionality of the Endangered Species Act. Despite separate rulings in five different Circuit Courts of Appeal affirming the constitutionality of the Act, PLF continues to try to force a Circuit split in an attempt to dismantle the Act at the Supreme Court.¹ Mr. Schiff and the Pacific Legal Foundation

¹ *People for the Ethical Treatment of People v. U.S. Fish and Wildlife Service*, No. 2:13-CV-00278-DB, (10th Cir. Mar. 29, 2017); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *GDF Realty Invs., Ltd. v. Norton*,

have also fought a long — and unfortunately somewhat more successful — effort to limit the ability of the Environmental Protection Agency and U.S. Army Corps of Engineers to protect wetlands under the Clean Water Act, and are champions of Scott Pruitt’s efforts to further roll back environmental regulations.² It is not only federal environmental regulations that Mr. Schiff and the PLF oppose — they have also consistently fought the efforts of state level agencies like the California Coastal Commission and Lake Tahoe Regional Planning Agency to take reasonable steps to balance economic growth and environmental protections.

We respect and defend the PLF’s and Mr. Schiff’s rights to advance their personal beliefs using the legal process. What is notable about Mr. Schiff however, and what makes him unqualified to be a federal judge, are his tactics in public to personally demonize his opponents, to repeatedly call their motives into question, and to attack them in ideologically absolutist terms.

Mr. Schiff has, without factual support, repeatedly asserted that environmental organizations do not care about the environment, but instead are focused on enriching themselves, stifling economic growth, or both. During the depths of the drought in California, Mr. Schiff stated that “radical environmental regulations” were a “major contributor” and that all restrictions on water use to protect endangered species should be ended, all while belittling the efforts of environmental organizations over the previous multiple decades to restore the California Bay Delta ecosystem.³

Mr. Schiff’s characterization of the role of government, of public servants, and of the laws themselves is equally hostile. While reasonable people can disagree about the role of government in society, Mr. Schiff takes apparent glee in simply lumping all those who disagree into a single camp of malicious actors conspiring in a scheme to eliminate liberty in the United States. Local zoning laws are characterized as “extortion” because in his view government officials believe that the “government maintains all rights and can simply divvy them up to individuals in exchange for various indulgences.”⁴ State level regulations to protect air quality for disproportionately impacted communities are labeled as “draconian” measures designed to “destroy” California’s trucking industry.⁵ He views the EPA’s efforts to protect the environment as apparently ineffective, since “simply because our water and air quality have improved in the last 40 years, and that EPA has been around for the same length of time, is no reason to conclude that EPA is the *cause* of such improvement.”⁶ To him, science is simply useless: “We do not have the expertise to confirm or deny climate change.”⁷

326 F.3d 622, 625 (5th Cir. 2003); *Gibbs v. Babbitt*, 214 F. 3d 483(4th Cir. 2000); *Nat’l Ass’n of Home Builders of the United States v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

² See, e.g. Damien Schiff, Environmental Law — A Good Place To Start For Trump To Make America Great Again, Investors Business Daily Commentary, Feb 9, 2017, <http://www.investors.com/politics/commentary/environmental-law-a-good-target-for-trumps-efforts-to-make-america-great-again/> (last accessed May 30, 2017).

³ The Greens Are All Wet, by Brandon Middleton and Damien Schiff, Feb. 5, 2010, <http://www.sandiegouniontribune.com/sdut-greens-are-all-wet-2010feb05-story.html> (last accessed June 6, 2017).

⁴ Building-Permit Extortion by Damien Schiff, May 16, 2009, <http://blog.pacificlegal.org/building-permit-extortion/>

⁵ California Air Resources Board and Bad Science by Damien Schiff, Aug. 6, 2009, <http://blog.pacificlegal.org/california-air-resources-board-and-bad-science/> (last accessed June 6, 2017).

⁶ Defending the indefensible by Damien Schiff, January 19, 2012, <http://blog.pacificlegal.org/defending-the-indefensible/> (last accessed June 12, 2017).

⁷ The Danger of Climate Change Regulation by Damien Schiff, June 17, 2009, <http://blog.pacificlegal.org/the-danger-of-climate-change-regulation/> (last accessed June 6, 2017).

At the end of the day, Mr. Schiff believes that most, if not all, environmental safeguards represent nothing more than “layers of redundant, unjustified, draconian, or counterproductive environmental mandates and restrictions that harm the economy often without actually helping the environment.”⁸ Moreover, environmental protections are simply used “to stop productive activity that activists or bureaucrats dislike.”⁹ As a result of his beliefs, Mr. Schiff naturally concludes that the best course of action is to implement “Pay to Play” restrictions on all environmental laws where any restriction imposed to protect the public good must be fully compensated.¹⁰ In other words, all government regulation represents the taking of federal property and must be compensated. If this radical view were adopted by the courts, the ability of society to protect the environment and the common good would virtually disappear.

If Mr. Schiff is confirmed, it is likely he will bring an extreme ideology to the Court of Federal Claims. Further politicization of this important court is of significant concern, since decisions as to whether something is a taking appear to fall along predictable ideological lines, with a few judges being responsible for most decisions where environmental takings claims are accepted.¹¹

We strongly urge you to exercise independent judgment pursuant to the Senate’s constitutional advise and consent responsibility and to decline to confirm Mr. Schiff to this position in light of the major concerns raised by his statements and legal record.

Sincerely,

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⁸ Damien Schiff, Environmental Law — A Good Place To Start For Trump To Make America Great Again, Investors Business Daily Commentary, Feb 9, 2017, <http://www.investors.com/politics/commentary/environmental-law-a-good-target-for-trumps-efforts-to-make-america-great-again/> (last accessed May 30, 2017).

⁹ *Id.*

¹⁰ *Id.*

¹¹ David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 *Envtl. L.* 821, 829-830 (1999) (Noting that in fourteen wetlands decisions, from a wide range of judges, reject takings claims. “Only four decisions find takings, and three of these decisions are from a single judge (former Chief Judge, now Senior Judge, Loren Smith), who, in turn, has never decided an environmental takings case in favor of the government.”).