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June 8, 2017

The Honorable Charles Grassley
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

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

Dear Chairman Grassley and Ranking Member Feinstein:

Defenders of Wildlife urges you to oppose Damien M. Schiff's nomination to the United States Court of Federal Claims (CFC). Mr. Schiff is a 38-year-old lawyer who has spent much of his legal career bringing challenges to environmental protections, particularly the Endangered Species Act, on behalf of the industry-funded Pacific Legal Foundation. His prolific published writings and public statements, consuming 19 pages of his response to the Judiciary Committee's nominee questionnaire, display a relentlessly consistent hostility to government efforts to address environmental problems – from the Endangered Species Act to the Clean Water Act to climate change measures – and a shameful willingness to impugn the motives of those who support such measures. In every respect, Mr. Schiff's background reveals an intensely committed ideologue who lacks the temperament to be a fair and neutral federal judge.

The U.S. Court of Federal Claims

The CFC hears principally money claims against the United States, most alleging property rights takings under the Fifth Amendment Takings Clause or breach of contract. 28 U.S.C. § 1491(a). Cases seeking tens of millions of dollars are not uncommon, and the court has nationwide jurisdiction. It is the takings cases at the CFC – 16% of the court's current caseload – that most concern Defenders of Wildlife. U.S. CFC, "Statistical Report for the Fiscal Year October 1, 2015 – September 30, 2016." Because the United States is the defendant in virtually every case filed in the CFC, Mr. Schiff's hostility to government could play a role in any case before him.

The CFC was created under Article I of the Constitution, so its judges are not subject to the Article III guarantee of lifetime tenure. Rather, they are appointed to statutory 15-year terms. 28 U.S.C. § 172. In effect, however, a CFC judge enjoys a lifetime appointment, since judges

who have completed their statutory terms, if not renominated by the President for an additional term, are authorized to continue to take cases as senior judges of the court. Thus, Congress should consider that any appointee to the CFC may serve for a lifetime.

The Ideology of Damien Schiff

As detailed below, Mr. Schiff's case work, writings, and public statements evidence his strong anti-government anti-regulatory ideology. His aggressive efforts to advance a singular anti-regulatory agenda raise serious questions as to his impartiality and make him deeply unsuitable for the bench.

A. The Takings Issue

Opponents of government regulation have long looked to the Fifth Amendment's Takings Clause as a potential restraint on government action. The Pacific Legal Foundation (PLF) has been at the center of this effort to expand the takings doctrine and reign in government regulation. Indeed, since its founding in 1973, PLF has been attacking environmental laws and property regulations in the courts (not to mention affirmative action, affordable housing laws, and other public causes). Damien Schiff has spent nearly his entire career with PLF advancing not just property rights claims but many additional challenges to environmental and other governmental regulations.

The Fifth Amendment promises a property owner "just compensation" whenever his or her property is "taken." If the government were forced to pay a property owner whenever a regulation potentially affected the value of his or her property, regulation would, presumably, grind to a halt. Historically a "highly muddled" area of the law, *see* John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1006 (2003), in recent years, the U.S. Supreme Court has articulated a few principles for when a regulation might rise to the level of a compensable taking, *see, e.g. Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005). Although the Court has set a high bar for such claims, takings law remains less than a model of clarity.

In light of this ambiguity, the Takings Clause provides judges and lawyers opportunities to advance an anti-government agenda. Indeed, the ideological leanings of a reflexively anti-regulation judge may dictate finding a taking even for minor, reasonable restraints on property owners. A former EPA takings lawyer has written that "in the CFC the identity of the judge seems to be an unusually good indicator of the likely outcome of the cases." 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 of the four wetlands permit denial cases in which a taking had been found by that time, three involved the same judge).

Decades ago, former Solicitor General Charles Fried (1985-1989) described the approach of the Reagan Administration's Department of Justice as "[a] specific, aggressive, and, it seemed to me, quite radical project, to use the Takings Clause of the Fifth Amendment as a severe brake

upon federal and state regulation of business and property." Charles Fried, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION 183 (1991). Prof. Richard Epstein, a darling of the property rights bar, conceded that his vision of the Takings Clause "invalidates much of the twentieth century legislation," including civil rights legislation, Social Security, minimum wages and "virtually all public transfer and welfare programs." Richard A. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 281, 324 (1985).

The PLF routinely files briefs in significant federal and state takings cases, always against the government, in an effort to expand the takings doctrine's potential chilling effect on government action. For example, in *Harmon v. Kimmel*, No. 11-496 (cert. denied) April 23, 2012), PLF and the Cato Institute filed a brief in support of certiorari arguing for the return of *Lochner*-era substantive due process review in lieu of a takings challenge to a New York City rent control ordinance. *See Lochner v. New York*, 198 U.S. 45 (1905). Previously, in *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005), PLF's amicus brief supported turning the Takings Clause into a second Due Process Clause, one that allows a compensation remedy. Cases under the explicit Due Process Clause allow only invalidation of the government action. Most recently, in *Murr v. State of Wisconsin*, No. 15-214 (cert. granted Jan. 15, 2016), PLF's party brief took aim at the long-standing "parcel as a whole" doctrine, arguing instead that when assessing the impact of a government regulation on land, one must generally evaluate each legally distinct parcel separately. Thus, if development of one lot on a 100-lot tract is blocked by wetlands protection regulation, government likely would have to compensate the owner for a taking of that lot -- notwithstanding the landowner's ability to develop the other 99 lots profitably. The temptation to draw lot lines strategically around environmentally sensitive land is clear. (*Murr* was argued before the Supreme Court on March 20, 2017 and currently awaits decision.)

Mr. Schiff has spent nearly his entire legal career with the Pacific Legal Foundation and clearly shares the organization's anti-government ideology. As an example of his mindset, Mr. Schiff once grossly exaggerated that "the constitutional guarantees protecting private property rights have been dismantled" and that "the landowner may no longer exercise dominion over his property without petitioning for permission from the authorities." Damien M. Schiff, Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol'y 97, 122 (2012).

The danger that a Judge Schiff would apply an expansive vision of takings liability goes well beyond environmental and land use laws. Actual court decisions involving the Civil Rights Act, Americans with Disabilities Act, contaminated poultry regulations, and many other non-environmental laws protecting the public generally rebuff takings attacks -- but could easily, under a broader reading of the Takings Clause, have gone the other way. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1963) (public accommodations provision in Civil Rights Act); *Pinnock v. Int'l House of Pancakes Franchisee*, 844 F. Supp. 574 (S.D. Cal. 1993) (Americans with Disabilities Act); and *Rose Acre Farms, Inc. v. United States*, 559 F.2d 1260 (Fed. Cir. 2009) (regulations protecting against salmonella-contaminated poultry).

If confirmed, Mr. Schiff would be the second PLF attorney on the CFC bench (the other is Victor J. Wolski, for whom Mr. Schiff clerked, appointed in 2003). Defenders strongly

believes that two CFC judges schooled in the hard-right PLF philosophy, out of the 11 active-duty judges that will be on the court, are too much.

B. Endangered Species Act

Mr. Schiff has brought dozens of lawsuits challenging Endangered Species Act (ESA) restrictions, and attacked the Act in a mountain of published writings. To be sure, the CFC lacks jurisdiction over attacks on the *validity* of government restrictions, and must limit itself to whether the United States, as by a taking, owes the plaintiff *money*. But this is small comfort. Given the above-mentioned looseness – read, manipulability – of takings law principles, Mr. Schiff's dim view of the ESA could easily lead him to find takings based on even the most reasonable of ESA measures. Just a few successful takings actions against the ESA would inevitably have a chilling effect on the Act's implementation. (To date, there has been only one such successful action. *The Endangered Species Act and Claims of Property Rights "Takings"*, CRS Report RL 31796.)

Quite recently, Mr. Schiff attacked the ESA as "in too many cases, a threat to individual liberty and property rights." Damien Schiff, *We Can Pursue Earth Day's Goals Without Endangering Freedom*, American Thinker, Apr. 22, 2017. He belittles concern over the current alarming extinction rate: "Although some species have no doubt gone extinct because of man, untold numbers of species perished from the earth before man .... At least five mass extinctions occurred on earth before the appearance of man." *Earth Day and Overpopulation*, PLF Liberty Blog, April 22, 2010. He mischaracterized a letter by 1,300 scientists urging the Senate not to politicize endangered species decisions as saying the people can't be trusted to govern themselves. *Government by scientists?* PLF Liberty Blog, Mar. 31, 2011. And he has suggested amending the ESA "to provide landowners compensation for the cost of ESA land-use controls." Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, 37 SPG Environs Envtl. L. & Pol'y 105 (2014).

But attacking the ESA has not been enough for Mr. Schiff; his hostility carries him further to attack the motives of its supporters. "Whatever its original purpose," he wrote in an op-ed, "the ESA has become a handy tool for environmental extremists to push an agenda that has more to do with stifling productive human activity than fostering ecological balance." Damien Schiff, *Putting Good Sense on the Endangered List*, Casper Star-Tribune, Sept. 28, 2009. Caring about biological creation is, in his view, "frequently ... the fruit of an anti-human animus that sees man as a cancer on the natural world." *Earth Day and Overpopulation*, PLF Liberty Blog, April 22, 2010.

In an article he co-authored with disgraced former Interior Department official Julie MacDonald, he bemoans "a cottage industry of [ESA] litigation that does more to enrich environmental activists groups than benefit the government." Damien Schiff & Julie MacDonald, *The Endangered Species Act Turn 40 --- Hold the Applause,* Wall Street J., Dec. 27, 2013. Ms. MacDonald was the former Assistant Secretary for Fish, Wildlife & Parks in the George W. Bush administration. She resigned her position after an Inspector General investigation found

that she had improperly manipulated scientific evidence in a number of high profile endangered species cases, causing the agency to have to redo listing decisions and other determinations. In a scathing report, the Inspector General found that she "injected herself personally and profoundly in a number of Endangered Species Act decisions" in violation of federal rules. DOI, Office of the Inspector General, Report of Investigation, Julie MacDonald, Assistant Secretary for Fish, Wildlife & Parks (2007), *available at* http://www.biologicaldiversity.org/swcbd/PROGRAMS/esa/pdfs/doi-ig-report_jm.pdf. Mr. Schiff's choice of Ms. MacDonald as a partner in criticizing the ESA speaks volumes, given that MacDonald was personally responsible for a number of decisions that specifically undermined implementation of the act.

Mr. Schiff's opposition to the ESA has also led him to argue in multiple cases that key provisions of the ESA are unconstitutional under the Commerce Clause. *San Luis & Delta–Mendota Water Authority v. Salazar*, 638 F.3d 1163 (9th Cir.2011), *cert. denied* 565 U.S. 1009 (2011); *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 1341 (D. Utah 2014), *rev'd and remanded sub nom. People for Ethical Treatment of Prop. Owners v. United States Fish & Wildlife Serv. (PETPO),* 852 F.3d 990 (10th Cir. 2017). Six circuit courts have rejected this incredibly narrow view of federal authority to protect wildlife; in five cases the Supreme Court denied petitions for certiorari (the most recent case, *PETPO*, has been petitioned for en banc review in the 10th Circuit). These views on the limitations of the Commerce Clause are troubling, not just because they would eliminate federal protection for isolated species in a single state – a majority of the 1,600 species listed under the ESA – but because they would call into question a raft of environmental, health, safety and welfare laws that are based on Commerce Clause jurisprudence.

C. Environment Generally

Mr. Schiff's views on takings law and the ESA are but islands in a vast ocean of uncritical animus toward environmental regulation generally. Federal environmental statutes, he writes, "often are enforced not for the public's benefit but to stop productive activity that activists or bureaucrats dislike." Investor's Business Daily (IBD) Commentary, Feb. 9, 2017. He charges that "good ideas become coopted by radical interest groups and compliant bureaucrats." American Thinker, Apr. 22, 2017. Mr. Schiff sees federal environmental regulations as comprising "layers of redundant, unjustified, draconian, or counterproductive environmental mandates and restrictions that harm the economy often without actually helping the environment." IBD Commentary, Feb. 9, 2017.

Mr. Schiff seems to reserve particular animosity for the EPA. Verging on the histrionic, he has accused the agency of "across the board treating American citizens as if there [sic] were not American citizens, as if they were just slaves." Transcript, *Lou Dobbs Tonight*, Nov. 24, 2011, *available at* http://www.afj.org/wp-content/uploads/2017/05/Schiff-LouDobbs.pdf. And contrary to any school of academic thought known to Defenders, Mr. Schiff raises a query whether EPA's successes in reducing pollution over the last four decades "would have been

achieved anyway through the private sector." *EPA Turns 40, But I'm Not Sending a Birthday Card*, PLF Liberty Blog, Dec. 2, 2010.

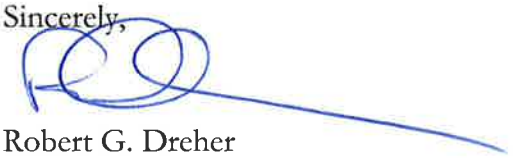
Finally, Mr. Schiff seems not to take climate change seriously. He refers derogatorily to the "gospel" of holding atmospheric CO_2 concentrations to 350 ppm. He then trivializes the most serious environmental threat of our time by reducing it to a personal epiphany at the San Diego Zoo: "Based on the rather happy disposition of the three polar bears I observed at the Zoo, I anticipate that they will do quite well even if their languid San Diego afternoons soon become a touch warmer than usual." Damien Schiff, *Climate Change and the San Diego Zoo*, PLF Liberty Blog, May 6, 2010.

Conclusion

The career of Damien Schiff to date presents a depressingly consistent picture – environmental regulations and environmental agencies are to be dimly viewed, with the Takings Clause of the Fifth Amendment expansively construed to require compensation for landowners whenever a regulation impacts an economic use of property, even if that use might be harmful to the environment or public health. His prodigious output of writings and speeches embodying these views suggest strongly that representing the hard-right, libertarian philosophy of his 12-year employer, the Pacific Legal Foundation, is not just a job for him. Rather, these appear to be views to which he is personally and uncompromisingly committed. Given this commitment, Mr. Schiff appears ill-suited to meeting the demands on a federal judge for fair, nonpartisan, neutral decision-making.

Accordingly, Defenders of Wildlife respectfully requests that you oppose the nomination of Damien M. Schiff to the U.S. Court of Federal Claims.

Sincerely,



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