

AMERICAN RIVERS ♦ COAST ALLIANCE
COMMUNITY RIGHTS COUNSEL ♦ DEFENDERS OF WILDLIFE
EARTHJUSTICE ♦ ENDANGERED SPECIES COALITION
FRIENDS OF THE EARTH ♦ MINERAL POLICY CENTER
NATIONAL ENVIRONMENTAL TRUST
NATURAL RESOURCES DEFENSE COUNCIL
OCEANA ♦ SIERRA CLUB
SOUTHERN UTAH WILDERNESS ALLIANCE

March 28, 2003

Re: Opposition to Nomination of Victor J. Wolski to the U.S. Court of Federal Claims

Dear Senator:

On behalf of our organizations and their members, we strongly urge you to exercise independent judgment pursuant to the Senate's constitutional advise and consent responsibility and decline to confirm the nomination of Victor J. Wolski to the United States Court of Federal Claims (CFC). Mr. Wolski is a 40-year old lawyer who has spent the largest portion of his legal career bringing challenges to environmental and other protections on behalf of the industry-funded Pacific Legal Foundation. Mr. Wolski is a self-described ideologue on the very property rights issues that he would decide as a CFC judge. He told the *National Journal* in 1999 that "every single job I've taken since college has been ideologically oriented, trying to further my principles," which he describes as a "libertarian" belief in "property rights" and "limited government." In light of these statements, his record, and his testimony, it is clear that Mr. Wolski has not demonstrated the appropriate temperament and credibility to be a fair and neutral federal judge on this important court.

The Importance of the Court of Federal Claims

The CFC is one of the most important courts in the country for environmental and other federal safeguards. The court was created in 1982 and given exclusive jurisdiction over most "takings" claims against environmental and other protections. Recent rulings by the CFC illustrate the court's ability to sidestep binding Supreme Court precedent and to make taxpayers pay corporations millions of dollars simply for following basic health, safety and environmental protections. For example, in August 2002, in two separate rulings, the CFC awarded over \$10 million to a corporate chicken farmer for complying with protections against salmonella poisoning, and \$40 million to a coal company simply for having to bear the burden of seeking a "compatibility" ruling before mining coal in the Daniel Boone National Forest. Another initial ruling by the CFC found a physical taking of water that was left in a stream to protect endangered species.

Sadly, ideology already appears to play too large a role in the rulings of the CFC. David Coursen, a former senior counsel for the Environmental Protection Agency, 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.” Coursen noted that “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.” David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 *Envtl. L.* 821, 829-830 (1999).

The Disturbing Ideology of Victor J. Wolski

Against this background, the undersigned groups find Mr. Wolski’s nomination enormously disturbing. Mr. Wolski has devoted his entire career to furthering his libertarian belief in “property rights” and “limited government.” As a CFC judge, Mr. Wolski would have considerable authority to write his principles into law, if he so chooses. But that is not the proper role of a federal judge.

Mr. Wolski spent the largest portion (1992 to 1997) of his relatively brief legal career to the Pacific Legal Foundation, an extreme group that brings sweeping challenges to fundamental protections for the environment, workers, and victims of discrimination. See www.pacificlegal.org. While Mr. Wolski worked at Pacific Legal Foundation (PLF), a Jan. 30, 1995, article in *The Nation* quoted PLF Legal Director Jim Burling as stating that the organization’s goal was to “get rid of the regulatory state established by F.D.R.’s New Deal.” The arguments Mr. Wolski made in his legal work on behalf of the Pacific Legal Foundation indicate that his extreme ideology threatens health, safety and environmental protections across the board. For example, in *Suitum v. Tahoe Regional Planning Agency*, Mr. Wolski argued that a much-heralded regional plan established to save Lake Tahoe from pollution worked a categorical “taking” of property even though affected landowners were permitted to sell their development rights, often for far more than their lot’s purchase price. See *Petition for Writ of Certiorari, Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725 (1987) (No. 96-243). Had the Supreme Court accepted Mr. Wolski’s argument, the plan to save Lake Tahoe would have failed, as would similar plans to preserve unique places such as New York’s Pine Barrens, Florida’s Everglades and New Jersey’s Pinelands.

Mr. Wolski has argued that a “special” form of “due process” is required whenever the government denies any form of zoning permit or variance. See *Brief Amicus Curiae of Pacific Legal Foundation at 13, Rivkin v. Dover, cert. denied*, 519 U.S. 911 (1996) (No. 95-1980) (“a special process is ‘due’ when property rights are at stake.”). Apparently this reflects his argument that city permit application restrictions on “the right to develop or use real property” affect a “fundamental” constitutional right. See *Petition for Writ of Certiorari at 9, Clark v. Hermosa, cert. denied*, 520 U.S. 1167 (1997) (No. 96-1278) (“When a city imposes restrictions on the right to develop or use real property, usually in the context of a permit application process, the city is affecting a fundamental right.”). Mr. Wolski’s arguments would turn the federal courts into zoning boards of appeals, something even conservative judges and justices have been loath to do. See *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828 (4th Cir. 1995) (Niemeyer, J.) (“Resolving the routine land-use disputes that inevitably and constantly arise among

developers, local residents, and municipal officials is simply not the business of the federal courts.”); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) (Easterbrook, J.) (“Federal Courts are not boards of zoning appeals.”).

Finally, in *Cargill, Inc. v. United States*, Mr. Wolski argued that it was “far beyond” Congress’s power under the Commerce Clause to protect ponds that served as habitat for 55 different species of migratory birds. Brief Amicus Curiae of Pacific Legal Foundation at 5, *Cargill, Inc. v. United States*, cert. denied, 516 U.S. 955 (1995) (No 95-73). Mr. Wolski praised the Supreme Court’s 5-4 ruling in *United States v. Lopez*, for beginning to “rein in the abuses of the commerce power justification for acts of Congress.” *Id.* at 6. Mr. Wolski’s intemperate brief repeatedly referred to the more than twelve acres of seasonal ponds at issue as “puddles,” and belittled the possibility that there might be a national interest in protecting migratory birds. *See, e.g., id.* at 6-7 (“[j]urisdiction over puddles * * * was justified by the Ninth Circuit on the basis that birds might frolic in these puddles”); *id.* at 7 (“Will one fewer puddle for the birds to bathe in have some impact on the market for these birds?”). If Mr. Wolski’s views on the Commerce Clause were ever adopted by the Supreme Court, innumerable federal protections would be rendered unconstitutional.

Mr. Wolski’s Testimony Raised Additional Problems With His Nomination

Mr. Wolski’s testimony at his March 12, 2003, Judiciary Committee hearing raised additional grounds for rejecting his nomination. When Mr. Wolski was asked about his *Cargill* brief, he testified that it was merely “a brief on behalf of clients,” that was “no reflection of his personal views.” This testimony, however, ignores the fact that the brief he wrote and signed in *Cargill* was an amicus brief and the “client” was his employer, the Pacific Legal Foundation. Mr. Wolski chose to work for the Pacific Legal Foundation from 1992 to 1997, and he told *National Journal* in 1999 that he did so to further his libertarian principles, which he specified included his belief in property rights and limited government. In these circumstances, it is simply not credible for Mr. Wolski to claim that the views expressed in *Cargill* are no reflection of his personal views.

Similarly untenable are Mr. Wolski’s responses to questions about his statements indicating his commitment to furthering his ideological principles. The full text of the relevant portions of a profile of Mr. Wolski by *National Journal* on June 19, 1999, reveals him to be a self-described ideologue on the very property rights issues that he would decide as a CFC judge:

“Every single job I’ve taken since college has been ideologically oriented, trying to further my principles,” said Wolski, who grew up in New Brunswick, N.J., and received his undergraduate degree from the University of Pennsylvania. “I’m essentially a libertarian. I believe in limited government, individual liberty, and property rights.”

Mr. Wolski did not seriously dispute the accuracy of the quotes in this article, but asserted, nonetheless, that all he meant was that he was committed to taking jobs in the

non-profit and the public sector. This is simply not a plausible interpretation of the words quoted by *National Journal*.

Equally unworthy of credit is his assertion in testimony that he “certainly meant no disrespect” when he referred to members of Congress as "bums" in a letter to the editor published in the *San Francisco Chronicle* in 1992. The following language from Mr. Wolski's published letter is irreconcilable with this testimony:

Admittedly, it is ironic that in this of all years - when people are thoroughly disgusted with a rogue Congress that raises taxes, raises spending, raises its pay and is so used to the unconstrained use of other people's money that its members don't bother to balance their own checkbooks - we might see the presidential election decided in the House. However, there are two silver linings: Many of the current bums will be gone, and the importance of the individual states in our system of government will be underscored. It is this latter point that proponents of stronger federal government like [current Hardball host Chris] Matthews, who view the states themselves as anachronisms, really fear.

Are Any New CFC Judges Needed?

Before filling any of the vacant judicial seats on the CFC, the Senate has a responsibility to consider the shocking results of an empirical analysis of the court's workload and jurisdiction recently published by George Washington Law Professor Steven Schooner. (Professor Schooner's study—*The Future: Scrutinizing The Empirical Case For the Court of Federal Claims*—will be published in an upcoming edition of the *George Washington Law Review*; it is available now online at <http://papers.ssrn.com>).

Professor Schooner, a director of GW's Government Contracts Law program, demonstrates that “a federal district court judgeship bears more than eight cases for each case allocated to a CFC judgeship.” Schooner also notes that even this remarkable statistic exaggerates the CFC's workload, because it does not take into account the court's “inefficient” life tenure system that has accelerated the path of CFC judges to senior status and has resulted in the CFC's current 1-to-1 ratio of active judges to senior judges. By way of comparison, the ratio of active judges to senior judges in the federal district courts is 2.3 to 1. Factoring the CFC's “abundance of senior judge resources” into the equation, an active CFC judge has approximately one-tenth the caseload of the average federal district judge.

Each year, federal judges cost taxpayers an average of more than \$1 million per judge. If confirmed, Mr. Wolski, who is 40 years old, would likely spend many decades as a member of the CFC, costing taxpayers tens of millions of dollars. Before adding new judges to the CFC--particularly young new judges like Mr. Wolski--Congress has a responsibility to assess Professor Schooner's indictment of the CFC's life tenure system and his compelling evidence indicating that no additional judges are needed on the CFC. We strongly believe that such an assessment must be done before any new judges are confirmed to the Court of Federal Claims.

Conclusion

We strongly urge you to exercise independent judgment pursuant to the Senate's constitutional advise and consent responsibility and to decline to confirm Mr. Wolski to this critical position in light of the major environmental, credibility, demeanor and other concerns raised by his statements, record and testimony.

Sincerely,

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