

**AMERICAN PLANNING ASSOCIATION ♦ CLEAN WATER ACTION
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 12, 2003

The Honorable Orrin Hatch
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

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

Dear Chairman Hatch and Ranking Member Leahy:

We urge you to consider our very serious concerns about Victor J. Wolski's pending nomination to the United States Court of Federal Claims (CFC). Mr. Wolski, is a 40-year old lawyer who has spent a considerable portion of his legal career bringing challenges to environmental 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" view on government power and "property rights." These statements raise serious questions about whether Mr. Wolski has the appropriate temperament to be a fair and neutral federal judge.

The Importance of the Court of Federal Claims

The CFC is one of the most important environmental courts in the country. 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 notes 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 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 views on government power and property rights. As a CFC judge, Mr. Wolski would have a considerable amount of power to write his principles into law, if he so chooses. But that is not the proper role of a federal judge.

The arguments Mr. Wolski has made in his legal work on behalf of Pacific Legal Foundation indicate that Mr. Wolski’s ideology is extreme and 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, and similar plans preserving unique places such as New York’s Pine Barrens, Florida’s Everglades and New Jersey’s Pinelands would have failed with it.

Mr. Wolski has also described the right to develop property as 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.”). He 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.”).

Mr. Wolski’s argument 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 refers to the more than twelve acres of seasonal ponds at issue as “puddles” and belittles 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.

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 accelerates the path of CFC judges to senior status and has resulted in the CFC’s current 1-to-1 relationship between active and senior judges. By way of comparison, the ratio for active 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.

Thank you for considering these important environmental concerns with Mr. Wolski's record, and for considering the need for new CFC judges before confirming any new judges to this important court.

Sincerely,

Jeffrey Soule, FAICP
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American Planning Association

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CC: Members, Senate Committee on the Judiciary