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Senate Critics Question Need To Fill Court of Federal Claims

By Jennifer Dlouhy

As the Senate Republican leaders are making a bid to break through Democratic holds on four nominees to the Court of Federal Claims, a specialty court whose mere existence has been challenged by some in the Senate.

On July 8, the Senate is set to vote to invoke cloture, or shut off debate, on the contentious nomination of Victor J. Wolski to the panel. If cloture is invoked and Wolski is later confirmed, as expected, the Senate then would consider three other claims court nominees.

Charles E. Schumer, D-N.Y., has used a hold to block Senate action on Wolski, who has drawn fire from activists who say he would tear down important environmental safeguards.

But the holdup of Wolski and the other federal claims court nominees is not just about the individuals and their stances on environmental and other issues. It is also about the court to which they have been appointed.

Critics, including Schumer, say the panel already is underworked and overstuffed. Where the typical federal district court judge has an average of 355 cases at any given time, the average caseload for a federal claims court judge is 24, Schumer said.

If the four federal claims court nominees are confirmed, Schumer noted, the workload will drop to 19 cases per judge.

"They'll barely have to come to the office at all," Schumer said.

The fight over nominees to this relatively obscure court mirrors the larger struggle over who should fill vacancies on other federal courts. Democrats and Republicans have fought over the credentials of federal claims court nominees just as they have bickered over whether nominees are qualified for lifetime seats on other federal courts.

Democrats also have complained that the administration is not consulting with them on nominees to the claims court - a panel known as a favorite destination for former Senate and administration aides.

Unique Terms

The 21-year-old Court of Federal Claims has a broad jurisdiction, handling lawsuits against the government seeking damages of more than \$100,000. Cases can range from tax refund and property takings lawsuits to claims for compensation from asbestos and vaccination injuries. (Court jurisdiction, p. 1687)

But the panel also has drawn flak for its relatively light workload - and its unique rules for judges who serve on the panel. Unlike judges on courts established by Article III of the Constitution, who serve lifetime terms, the appointments of federal claims judges expire after 15 years.

Judges can be reappointed for a second term. But federal claims judges who are not reappointed also can stay on as "senior judges" - a status that allows them to remain without any reduction in salary or workload.

In effect, "they are lifetime appointments," said Glenn Sugameli, senior legislative counsel for Earthjustice, previously the Sierra Club Legal Defense Fund.

For instance, when the 15-year term of Federal Claims Court Judge Marian Horn expired in 2001, she switched from active to senior status. President Bush reappointed Horn for a second term on the court, but while Horn's nomination was pending, she was a senior judge.

In March, the Senate confirmed Horn, giving her a second term on the panel.

Horn dropped her classification as a senior judge and returned to one of the court's 16 seats for active judges.

The court now has 11 active judges and 10 senior judges. In addition, six special masters handle claims brought under the Vaccine Injury Compensation Program.

"On a typical U.S. District Court, they have one or two senior judges," said Steven L. Schooner, a law professor at George Washington University. "This court is basically in one-to-one status. If you get appointed at the age of 45, once you turn 60, you still have this lifetime part-time judgeship."

If the four claims court nominees pending before the Senate are confirmed, the panel will have its full complement of 15 active judges.

Schumer and others have questioned whether it makes sense to confirm more people to active judgeships on the court when the panel's workload is already relatively low.

"Before I vote to spend a couple of extra million dollars [on judges] that could be spent on, for example, adding desperately needed [drug enforcement officers] . . . I want to be sure these vacancies need to be filled," Schumer said.

The debate over whether the Senate should fill vacancies on the claims court is similar to a struggle over the U.S. Court of Appeals for the D.C. Circuit during the last two years of President Bill Clinton's administration. Then, Judiciary Republicans, including Charles E. Grassley of Iowa, argued passionately that the D.C. Circuit was already overstaffed and that pending Clinton nominees to the court were not needed.

Senate Democrats and Republicans have struggled over the makeup of the Court of Federal Claims before. Late in 2002, when Democrats controlled the Senate, the chamber confirmed Larry Block, a former aide to Judiciary Committee Chairman Orrin G. Hatch, R-Utah, to a seat on the court. Republicans say Democrats unfairly held up Block's nomination for months.

Judiciary Democrats accuse Republicans of stalling some of Clinton's nominees to the court in a bid to ensure that then-Chief Judge Loren A. Smith would stay in the panel's top position.

Democrats also contend that the administration has not consulted with them about nominees to the court. In particular, some Democrats remain irked that Bush refused to agree to their request to renominate Sarah Wilson, who just completed her 15-year-term on the federal claims court.

"The process for nominating judges to the Court of Federal Claims has traditionally included accommodation and compromise," said Patrick J. Leahy, D-Vt. "This administration appears to be acting unilaterally in disregard for tradition and bipartisanship in the selection of nominees to this court."

Environmental Concerns

Wolski's nomination is at the center of this struggle over the makeup and legitimacy of the court.

But Wolski also faces criticism from environmental groups who say the lawyer has spent most of his life fighting environmental protections, specializing in bringing property rights challenges to environmental and land-use restrictions.

Critics have flagged his work at the conservative Pacific Legal Foundation and point to a statement he made in 1999: "Every single job I've taken since college has been ideologically oriented, trying to further my principles. I am essentially a libertarian. I believe in limited government, individual liberty and property rights."

Because of the Court of Federal Claims' jurisdiction over many takings issues, environmentalists say he is unfit for a seat on that court. "He is a self-professed, extreme ideologue on the very issues he would be deciding as a Court of Federal Claims judge," Earthjustice's Sugameli said. "This is a court for which he is uniquely unqualified."

Wolski defended his record during a confirmation hearing in March, saying he did not view a federal claims court judgeship as an opportunity to further his political or policy views.

"I don't consider myself an ideologue," said Wolski, an aide to former Sen. Connie Mack, R-Fla. (1989-2001). "I'm not somebody who rigidly sticks to one position. I'm not somebody who is inflexible."

The Senate Judiciary Committee endorsed Wolski's nomination along mostly party lines March 27. The vote was 11-5, with Dianne Feinstein of California the sole Democrat joining Republicans in supporting the nomination. Three of the panel's nine Democrats voted "present" because of their complaint about a lack of consultation with the administration about the court.