

# Coalition for a Fair and Independent Judiciary

February 28, 2005

The Honorable Arlen Specter  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

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

Dear Chairman Specter and Ranking Member Leahy,

We, the undersigned civil rights, disability rights, senior citizens, women's rights, human rights, Native American, planning and environmental organizations, are writing to express our strong opposition to the confirmation of William G. Myers III to a lifetime seat on the United States Court of Appeals for the Ninth Circuit. Mr. Myers has neither obtained the qualifications necessary to serve on the Ninth Circuit nor demonstrated the ability to be fair and impartial as an appellate judge. He has devoted his career to advancing the interests of grazing and mining industries at the expense of the environment and the rights of Native Americans and tribal governments. His pursuit of that agenda continued unabated during his tenure on the public payroll as Solicitor of the Department of the Interior. His writings, public statements and legal work also reveal radical views on property rights, individual rights, and federal government authority—views that broadly threaten basic safeguards that are of critical concern to the millions of members represented by our organizations.

Mr. Myers lacks the qualifications necessary to serve on the Ninth Circuit. More than one-third of the panel of the American Bar Association's Standing Committee on the Federal Judiciary rejected Mr. Myers as "unqualified" for the bench, while not one considered him "well-qualified" for the position. Mr. Myers does not have significant litigation experience at either the trial or appellate level, and has not generated any important legal scholarship. In more than two years as Solicitor of the Interior Department, he produced just two formal legal opinions and one "correction" of his second opinion. By contrast, his predecessor produced 28 formal opinions during an eight-year tenure.

Even more troubling than what his record lacks is what it contains. As the Interior Department's chief lawyer, Mr. Myers regularly favored the interests of the mining and grazing industries over the rights of American Indian tribal governments, Native Americans, and the environment. One of his two formal solicitor opinions reversed a detailed opinion by his predecessor in order to pave the way for Secretary Gale Norton to reverse the decision of former Secretary Bruce Babbitt and allow reconsideration of Glamis Gold's proposed cyanide heap-

leach gold mine in the Imperial Valley of California on lands sacred to the Quechan Indian Nation and other Colorado River Tribes. A recent federal court decision rejected the result that Mr. Myers' reached and harshly criticized his reasoning.<sup>1</sup> Mr. Myers' opinion relied on twisting the meaning of the statutory word "or" to mean its opposite: "and." Mr. Myers' actions and legal advice in the Glamis matter reveal an activist preference for natural resource extraction that disrespects tribal values and raises serious questions about his ability to fairly and impartially decide cases affecting the public lands.

Although Glamis' representatives were granted meetings to urge their points of view on top Interior Department officials – an Inspector General report details numerous contacts with representatives of the mining industry on the subject – Mr. Myers' legal opinion and Secretary Norton's subsequent decision to approve the Glamis mine were issued without any input from the Quechan Indian Nation, which by law is entitled to government-to-government consultation.<sup>2</sup> This is especially disturbing in light of the Interior Department's responsibility as the lead agency in the federal government's trust and treaty relationship with the American Indian tribes.

The National Congress of American Indians (NCAI), which was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments, unanimously approved a resolution opposing Mr. Myers' nomination. This is the first time NCAI has opposed one of President Bush's judicial nominees. NCAI explained that Mr. Myers' actions as Interior Solicitor "show a deep lack of respect and understanding of the unique political relationship between the federal government and tribal governments" and "could result in the extinguishment of the Quechan people's tribal heritage." See NCAI Resolution ABQ-03-061 (2003), available at <http://www.ncai.org/data/docs/resolution/annual2003/03-061.pdf>.

Mr. Myers' second formal opinion – and his subsequent correction to it – prevents even the voluntary retirement of federal grazing permits relinquished by ranchers in co-operation with groups like the Grand Canyon Trust, which has invested more than \$1.5 million in its effort to retire grazing permits and reduce grazing impacts on publicly owned lands. These voluntary transactions enjoy wide, bipartisan support, but are opposed by the grazing industry. Mr. Myers went to great lengths to support the grazing lobby and undermine the efforts of environmentalists to use the free market to achieve conservation goals. Indeed, Mr. Myers has been so one-sided in his support of his former grazing clients that his actions have been the subject of two additional ethics investigations by the Interior Department's Inspector General.

The first of these reports documents the continuous intimate contact between Mr. Myers and the industries he once represented and shows extremely poor judgment by Mr. Myers. The second investigation documents how a senior political appointee under Myers' direct supervision "failed to act impartially and gave preferential treatment" to a politically-connected Wyoming rancher during the negotiations of a stunningly one-sided and apparently illegal settlement agreement. Mr. Myers has testified that he "specifically authorized" the negotiation of this

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<sup>1</sup> Mineral Policy Center v. Norton, 2003 WL 22708450 (D.D.C. Nov. 18, 2003), available at <http://www.dcd.uscourts.gov/01-73.pdf>.

<sup>2</sup> The Department's role, and Mr. Myers' involvement, in the validity determination, finding Glamis Gold's mining claimed to be valid, was the subject of an Inspector General investigation in October 2002 through March 2003.

settlement, and the first IG report documents that Mr. Myers was updated on the progress of these negotiations. This second report paints a highly disturbing picture about the functioning of the Office of the Solicitor during Myers' tenure and raises serious questions about his actions as a supervisor in the matter.

Especially for organizations concerned about environmental protection and the important natural resources within the Ninth Circuit, Mr. Myers' intemperate criticism of environmental safeguards and environmentalists provides further reason to question his capacity to serve as an impartial judge in environmental cases. Mr. Myers has compared the federal government's management of the public lands to King George's "tyrannical" rule over the American colonies and claimed that public land safeguards are fueling "a modern-day revolution" in the American West.<sup>3</sup> He has denounced the California Desert Protection Act as "an example of legislative hubris"<sup>4</sup> and claimed that many environmental laws have the "unintended consequence of actually harming the environment."<sup>5</sup> He has called environmental critics of his Department's policies the "environmental conflict industry" and he has stressed the "importance of . . . rejecting [their] scheming."<sup>6</sup>

Beyond the environmental arena, Mr. Myers has advocated an extreme legal philosophy that would also seriously threaten civil rights and other protections. This is illustrated by a Supreme Court "friend-of-court" brief Myers filed in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt* on behalf of the National Cattlemen's Association. His status as both client and counsel in the case precludes an assertion that he does not espouse the views expressed in the brief and was merely representing his client. In *Sweet Home*, Mr. Myers argued that "the Constitutional right of a rancher to put his property to beneficial use is as fundamental as his right to freedom of speech or freedom from unreasonable search and seizure."<sup>7</sup> The Supreme Court has held that a very limited number of "fundamental" rights, including freedom of speech, are entitled to the highest level of protection ("strict scrutiny"). Such rights can be limited only if there is a compelling governmental interest, using means that are "narrowly tailored" to address the government's interest.

Mr. Myers' argument for elevating ranchers' property rights would place these rights above the vast majority of other rights, including many aspects of the right to privacy. Indeed Mr. Myers has praised what he called the Supreme Court's "retreat" from the protection of privacy.<sup>8</sup> His approach apparently would apply strict scrutiny to federal and local laws and regulations that limit the use of property. This revolutionary theory would return the federal

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<sup>3</sup> William G. Myers III, *Western Ranchers Fed Up with Feds*, FORUM FOR APPLIED RES. & PUB. POL., Winter 1996 at 22.

<sup>4</sup> William G. Myers III, *Environmental Command and Control: The Snake in the Public Lands Grass*, in FARMERS, RANCHERS & ENVIRONMENTAL LAW 209 (1995).

<sup>5</sup> *Id.* at 208.

<sup>6</sup> William Myers, *Agency Lawyer Has Obligation to Speak on Behalf of a Client*, IDAHO STATESMAN, Nov. 26, 2002, available at <http://www.idahostatesman.com/Search/story.asp?id=26580>.

<sup>7</sup> Brief of the National Cattlemen's Association and the CATL Fund, *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995).

<sup>8</sup> William G. Myers III, *Advice and Consent on Trial: The Case of Robert H. Bork*, 66 DENVER U. L. REV. 1, 24-25 (1988); see also, William G. Myers III, *The Role of Special Interest Groups in the Supreme Court Nomination of Robert Bork*, 17 HASTINGS CONST. L.Q. 399 (1989-1990).

courts to their discredited pre-New Deal role in which they stood as the guardians of property to the exclusion of almost all government reform and thus could lead to the invalidation as unconstitutional of a vast range of labor, health, environmental, disability, civil rights, zoning, and other basic laws that Americans have come to take for granted.

Challenges under the Takings Clause ordinarily focus on the impact of a regulation as applied to a particular claimant, but Mr. Myers argued in *Sweet Home* that key Endangered Species Act safeguards that apply to private property are facially unconstitutional. In other words, Mr. Myers believes that government lacks the authority to enact these safeguards under any circumstances. Mr. Myers thus proposed a radical extension of the Takings Clause that no court has ever countenanced. If accepted, Mr. Myers views could well require taxpayers to pay corporations simply for having to comply with health, labor, civil rights, and environmental protections.

The constitutional argument advocated by Mr. Myers in his “friend-of-court” brief to the Supreme Court in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* is equally extreme. Mr. Myers argued that Congress does not have the power under the Constitution’s Commerce Clause to prevent a waste disposal facility from destroying waters and wetlands that serve as habitat for migratory birds. His brief suggests that “federal regulation of land use” is beyond congressional power because that area is “traditionally regulated by state and local governments.”<sup>9</sup> The Commerce Clause is the authority upon which many of our most essential health, safety, environmental, and anti-discrimination laws are based. If protection of waters from pollution caused by a commercial waste disposal operation that threatens the interstate flight of migratory birds does not fall within the scope of the Commerce Clause, then a wide array of protections could also be subject to attack. That is why a large coalition of civil and human rights organizations filed a brief in *SWANCC* arguing that such a narrow interpretation of the Commerce Clause would “cast serious doubt on the previously well-accepted foundations of some of the central civil rights laws of our time.”<sup>10</sup> Indeed, although the Court did not specifically rule on the constitutional issue in *SWANCC*, four justices dismissed the argument that Congress did not have power to regulate the wetlands as having “no merit.”<sup>11</sup> This aspect of Mr. Myers’ philosophy is extremely troubling, as is his claim that Robert Bork’s judicial philosophy was “well within the parameters of acceptable constitutional theory, worthy of representation on the Supreme Court,” despite the Senate’s bipartisan rejection of Judge Bork’s legal philosophy as out of the mainstream.<sup>12</sup>

Mr. Myers’ record as Interior Solicitor of favoring the interests of the grazing and mining industries over the rights of Native Americans and the environment, coupled with his long history as an extreme advocate for the those industries, cast serious doubts on his willingness or ability to put aside his personal views in performing his official duties. His disturbing legal philosophy threatens a broad range of civil rights, labor, health, disability, and environmental

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<sup>9</sup> Brief of the American Farm Bureau Federation, the National Cattlemen’s Beef Association, and the North Dakota Farm Bureau, *SWANCC*, 531 U.S. 159 (2001), available at 2000 WL 1059641.

<sup>10</sup> Brief of the Anti-Defamation League, et al, *SWANCC*, 531 U.S. 159 (2001), available at 2000 WL 1369409.

<sup>11</sup> 531 U.S. at 197 (Stevens, J. with Souter, Ginsburg, and Breyer., J.J. *dissenting*).

<sup>12</sup> William G. Myers, III, *Advice and Consent on Trial: The Case of Robert H. Bork*, 66 DENVER L. REV. 1 (1988) at 25.

protections. His poor ABA rating reflects his weak qualifications for a lifetime seat on the Ninth Circuit. In all respects, Mr. Myers appears to be a singularly poor choice for this critical court. We strongly urge you to reject this nomination.

Sincerely,

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**Stonewall Democratic Club**

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