



**NOTHING
FOR FREE:**

**How Private Judicial
Seminars Are Undermining
Environmental Protections
and Breaking the Public's Trust**

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Undermining Environmental Protections
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ABOUT COMMUNITY RIGHTS COUNSEL

Community Rights Counsel (CRC) is a public interest law firm based in Washington DC that defends laws that make our communities healthier, more livable, and socially just. CRC has helped local governments around the country successfully defend land use laws that promote public health, combat suburban sprawl, and protect wetlands, forests, critical habitat, historic structures, and open space. CRC has also recently published a Takings Litigation Handbook to guide government attorneys in defending challenges brought under the “takings” clauses of federal and state constitutions. This report is part of CRC’s ongoing efforts to expose and critique judicial lobbying by special interests.

CRC is directed by a board consisting of Henry Underhill, the Executive Director and General Counsel of the International Municipal Lawyers Association, James E. Ryan, a law professor at University of Virginia, Charles Lord, the founder and Executive Director of the Watershed Institute at Boston College, and Doug Kendall, CRC’s founder and Executive Director.

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FOREWORD

By the Honorable Abner J. Mikva

The notion that judges must be honest for the system to work is hardly a profound statement. As early as the Declaration of Independence, our founders complained about judges who were obsequious to King George, rather than the cause of justice. But a pure heart is not all that judges must bring to the judicial equation. For the system to work as it should, the judges must *be perceived* to be honest, to be without bias, to have no tilt in the cause that is being heard.

That perception of integrity is much more difficult to obtain. After spending 15 years as a judge and a lifetime as a lawyer and lawmaker, I can safely say that the number of judges who were guilty of outright *dishonesty—malum in se*—were happily very few. Even taking into account that I started practicing law in Chicago in the bad old days, the number of crooked judges was small. But that is not what people believe—then or now.

The framers and attenders to our judicial system have taken many steps to help foster the notion of the integrity of its judges. Some relate to smoke and mirrors—the high bench, the black robe, the “all rise” custom when the judge enters the room. Some, like life tenure for federal judges, the codes of conduct promulgated for all judges, are intended to create the climate for integrity.

All of those steps become meaningless when private interests are allowed to wine and dine judges at fancy resorts under the pretext of “educating” them about complicated issues. If an actual party to a case took the judge to a resort, all expenses paid, shortly before the case was heard, it would not matter what they talked about. Even if all they discussed were their prostate problems, the judge and the party would be per-

ceived to be acting improperly. The conduct is no less reprehensible when an interest group substitutes for the party to the case, and the format for discussion is seminars on environmental policy, or law and economics, or the "takings clause" of the Constitution.

That's what this report is about. It is about the perception of dishonesty that arises when judges attend seminars and study sessions sponsored by corporations and foundations that have a special interest in the interpretation given to environmental laws. It may be a coincidence that none of these seminars and study sessions take place in Chicago in January, or Atlanta in July. It may be a coincidence that the judges who attend these meetings usually come down on the same side of important policy questions as the funders who finance these meetings. It may even be a coincidence that environmentalists seldom are invited to address the judges in the bucolic surroundings where the seminars are held. But I doubt it. More importantly, any citizen who reads about judges attending such fancy meetings under such questionable sponsorship will doubt it even more.

The federal judiciary has a very effective Federal Judicial Center. It already provides many of the educational services that these special interest groups seek to provide to judges. Since the Center is using taxpayer funds and must answer to Congress, the locales of its programs are not as exotic. (The last ones I attended were in South Bend, Indiana in October, and Washington, D.C. in December.) The purpose of Center sponsored programs is as vanilla as it claims: there is no agenda to influence the judges to perform in any particular way in handling environmental cases. As a result, the programs are not only balanced as to presentation, but they provide no tilt to the judges' subsequent performance.

Unfortunately, the U.S. Judicial Conference, the governing body for all federal judges, has punted on the propriety of judges attending seminars funded by special interest groups. It advises judges to consider the propriety of such seminars on a "case by case" process. That delicacy has not begun to stem the erosion of public confidence in the fairness of the judicial process when it comes to environmental causes. One of the special interest sponsoring groups publishes a "Desk Reference for Federal Judges" which it distributes to all its judge attendees. That must be a real confidence builder for an environmental group that sees it on the desk of a judge sitting on its case. One of the judges on the court on which I sat has attended some 12 trips

sponsored by the three most prominent special interest seminar groups. I remember at least two occasions where co-panelist judges took positions that they had heard advocated at seminars sponsored by groups with more than a passing interest in the litigation under consideration.

When I was in the executive branch, all senior officials operated under a very prophylactic rule. Whenever we were invited to attend or speak at a private gathering, the government paid our way. Whether it was the U.S. Chamber of Commerce or the A.F.L-C.I.O., nobody could even imply that the official was being wined and dined and brainwashed to further some special interest. Experience showed that such a policy was not sufficient in itself to restore people's confidence in the Executive Branch; at least we didn't make the problem worse.

If the Federal Judicial Center can't provide sufficient judicial education to the task, maybe the federal judges could use such a prophylaxis. If the judges want to go traveling, let the government pay for the trip. It may or may not change the places they go or the things they learn, but it will at least change the transactional analysis.

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