
CHAPTER 1

EXECUTIVE SUMMARY

This report, detailing how corporations and special interests lobby the federal judiciary through gifts of expense-paid trips to private seminars, should be utterly unnecessary. Over the past twenty years, the issue has been subject to extensive discussion and criticism. Numerous studies already detail the serious conflicts of interest and perceptions of impropriety that can arise when judges attend private trips. Members of Congress have spoken out against the trips and introduced legislation to ban them altogether. Ethics experts, judges, public interest groups, and more than thirty editorial boards have strongly criticized these programs.

Despite this outcry by policy makers and opinion leaders, the judicial bureaucracy has remained steadfastly unwilling to alter the flawed ethical guidance provided by what is known as Advisory Opinion 67. This inexplicable resistance to reform makes necessary this new report.

This report builds upon Community Rights Counsel's July 2000 study entitled *Nothing for Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public's Trust*.¹ *Nothing for Free* provided the first comprehensive look at the private educational trips offered to and accepted by federal judges. It detailed how the "marketplace of privately funded judicial education is overwhelmingly dominated by pro-market, anti-regulatory seminars offering a single and unchallenged line of reasoning in areas of law with many competing views."² *Nothing for Free* also chronicled a remarkable and disturbing correlation between seminar attendance and rulings that were hostile to environmental, health, and safety protections.³ Finally, it explained in detail why existing ethical guidelines were inadequate to stem the conflicts of interest and appearance problems that result from these trips.⁴

This report provides the most devastating evidence yet uncovered of the profound impact that private judicial trips are having on public confidence in the judiciary. Like its predecessor, this report focuses heavily upon the trips to Yellowstone-country resorts and dude ranches provided to federal judges by a Montana-based outfit called the Foundation for Research on Economics and the Environment (FREE). The centerpiece of the report is Chapter 4, where case studies explore in depth the serious ethical problems presented by judicial attendance at FREE seminars in the context of three of the most important environmental cases decided in the last decade. In particular:

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- American Trucking Ass'ns, Inc. (ATA) v. EPA:** In the annals of environmental case law, few rulings are as sweeping, disturbing, and indefensible as the DC Circuit's ruling in *ATA*, which struck down a central component of the Clean Air Act as an inappropriately sweeping "delegation" of authority from Congress to EPA. Termed "bizarre and extreme" by the EPA Administrator, the ruling was reversed unanimously by the Supreme Court in a pointed opinion written by Justice Scalia, but only after considerable damage was done to rules designed to prevent 15,000 premature deaths and 1 million cases of respiratory distress in children. While *ATA* was pending, Ed Warren, the lawyer who argued *ATA* for the industry petitioners, was added to FREE's Board of Directors, where he sat with Judge Douglas Ginsburg, one of the authors of the *ATA* opinion. Judge Stephen Williams, Ginsburg's *ATA* co-author, participated with Judge Ginsburg in a FREE seminar while *ATA* was pending. Judge David Sentelle, the third of four votes preventing reconsideration of *ATA* by the full DC Circuit, attended a FREE seminar featuring a presentation by Mr. Warren in August 1998 while *ATA* was pending. FREE gets funding from many of the corporations that were bankrolling the *ATA* case, and FREE illegally failed to disclose Mr. Warren's board membership on their public tax filings. Mr. Warren resigned from FREE's board around the time of the *ATA* ruling.
- United States v. Koch Industries:** *Koch* was one of the most significant environmental enforcement cases of the past decade. Prosecuted jointly by the federal government and the State of Texas, the government sought hundreds of millions of dollars in fines against Koch Industries for more than 300 oil spills from Koch's pipelines and oil facilities in six states. While *Koch* was pending in her courtroom, the presiding judge, Vanessa Gilmore, attended a FREE trip to Montana worth thousands of dollars. A primary source of funding for the seminar was a foundation controlled by Charles Koch, CEO of Koch Industries and a witness in the *Koch* case. Accepting this very valuable gift allowed her to spend five days at a Montana retreat emphasizing that existing environmental statutes (such as the Clean Water Act, under which Koch was being prosecuted) are inefficient and "voluntary controls" are the preferred alternative. In a decision that was questioned by environmentalists, Judge Gilmore accepted a consent decree that required payment of a fraction of the fines originally sought by the government.
- Aguinda v. Texaco:** In *Aguinda*, thousands of Ecuadorean Indians living in a remote corner of the Amazon ravaged by the oil extraction and waste disposal practices of Texaco, sued in New York, home of Texaco's world headquarters, seeking \$1 billion in compensatory damages for diseases and cancers linked to environmental contamination. District Judge Jed Rakoff raised a series of procedural roadblocks to this lawsuit and ultimately dismissed the case on procedural grounds. Just before the Second Circuit reversed this ruling and remanded the case to him, Judge Rakoff attended a FREE seminar at which one of his teachers was Alfred DeCrane, Texaco's former CEO, an important potential witness in the case. Mr. DeCrane gave a lecture entitled "The Environment: Some Thoughts from the Corner Office." Texaco contributed \$50,000 to FREE the year of this trip. After denying a motion to recuse himself from the case, Judge Rakoff

again dismissed it and this time was upheld on appeal, meaning that the merits of the Ecuadoreans' claims will never be heard by a court in the United States. All this has left the attorney for the Ecuadoreans understandably disenchanted with the U.S. system of justice: "I'm still outraged about [the seminar], and I definitely think it had a tremendous impact on my case. I will forever feel that it disadvantaged us in the litigation."

It is impossible to deny the appearance of impropriety these seminar programs can cause. Left unaddressed, these programs seriously threaten public confidence in the American judicial system.

The remaining chapters of the report fill in the rest of the story. Chapter 2 summarizes the developments since the release of *Nothing for Free*. It chronicles: reform efforts in Congress and by the American Bar Association (ABA); the judicial bureaucracy's attempt to scuttle these reform efforts; and judges' continued acceptance of FREE trips. While attendance at FREE programs plummeted in 2000 and 2001 in response to a wave of negative publicity about FREE's judicial trips, the number of judges accepting these trips has returned to record levels. Roughly 5 percent of the active federal judiciary now attends a FREE trip each year. Chapter 2 also details how, despite crystal clear ethics guidance that requires judges to report the value of gifts associated with FREE trips, the judiciary's Federal Disclosure Office actually instructs judges not to disclose this important information.

Chapter 3 explains that FREE's trips raise serious ethical problems for the judges who take them for a combination of three factors. The first factor is the size of FREE's gift to judges: according to FREE's tax forms, it costs FREE upwards of \$10,000 per trip per judge. The second factor is the sources of FREE's funding, which comes almost entirely from corporations and foundations that have a litigation agenda in the federal courts. Compounding this problem, FREE regularly allows representatives of its corporate funders to lecture to federal judges at its seminars. The final problem is that FREE uses its seminars to advance the pecuniary and ideological interests of its funders. A sense of FREE's perspective can be gleaned from the fact that FREE's Director John Baden and Program Director Pete Geddes have both written articles recently likening environmentalists to murderous dictators like Stalin, Hitler, and Pol Pot. Describing a message delivered to federal judges at a FREE junket, FREE's John Downen complains that environmentalists seeking emission reductions to prevent global warming "hold humanity in low regard."

Chapter 5 turns to solutions. We advocate a ban on private reimbursement of the expenses judges incur in obtaining continuing legal education, coupled with taxpayer funding of needed private programs. We also advocate coupling this reform with a judicial pay raise to make up for improperly withheld cost of living adjustments for judges and to increase the ability of judges to pay their own way to any program they may choose to attend. A bill containing most of these principles was introduced into the Senate in April 2003 by Senators Patrick Leahy and John Kerry, and is still pending. The Leahy/Kerry bill would be an effective and relatively painless solution to a practice that is staining the reputation of federal judges and undermining the public's faith in the judicial branch. Unfortunately, to date, even this modest and sensible legislative solution has been opposed by the judicial bureaucracy.

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ENDNOTES

¹ COMMUNITY RIGHTS COUNSEL, NOTHING FOR FREE: HOW PRIVATE JUDICIAL SEMINARS ARE UNDERMINING ENVIRONMENTAL PROTECTIONS AND BREAKING THE PUBLIC'S TRUST (2000) [hereinafter NOTHING FOR FREE] (also published as Douglas T. Kendall & Eric Sorkin, *Nothing for Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public's Trust*, 25 HARV. ENVTL. L. REV. 405 (2001)). A searchable database of private seminars and the judges who attended them is available on-line at <http://www.tripsforjudges.org>.

² NOTHING FOR FREE, *supra* note 1 at 2.

³ *Id.* at 61-88.

⁴ *Id.* at 89-102.