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## CHAPTER 2

### RESULTS AND TRENDS

#### I. Overview

The release of *Nothing for Free*, and follow-up investigative reporting by ABC News' 20/20 and others, generated a very significant amount of negative publicity for the judiciary and the individual judges attending private educational trips.<sup>1</sup> In the report's wake, ethics experts,<sup>2</sup> judges,<sup>3</sup> public interest groups,<sup>4</sup> and more than thirty editorial boards<sup>5</sup> strongly criticized these privately-funded judicial trips. It also prompted efforts in Congress and the American Bar Association to reform judicial ethics rules.

Not surprisingly, this heightened scrutiny affected the behavior both of judges and groups hosting the trips. As demonstrated below, the number of judges taking trips dropped dramatically after the publication of *Nothing for Free* but has since returned to pre-publication levels. Some groups have apparently shut down their operations at least temporarily. New groups have emerged seeking to present balanced, informative seminars organized by committees of federal judges.

While some things have changed, far too much remains the same. FREE's programs, in particular, have undergone only cosmetic changes and, as described in detail in Chapter 3, these programs remain deeply problematic. As importantly, with reform efforts in Congress and at the ABA stalled to date, the ethical guidelines in this area have, if anything, been weakened by a judiciary that, thus far, has been remarkably hostile to new restrictions on judges' ability to accept corporate-funded trips. The positive trends that emerged after the publication of *Nothing for Free* appear to have been a temporary response to heightened scrutiny. Systemic ethical reform remains the only guarantee of a genuine solution to the stain private judicial trips have placed on the reputation of the federal judiciary.

#### II. The *Nothing for Free* Study

*Nothing for Free* provided a comprehensive study of privately-funded judicial trips.<sup>6</sup> It covered such fundamental questions as: How many organizations conduct seminars for federal judges? How many judges attended? What information were these programs presenting to judges? Ultimately, the study sought to find out whether the seminars were having any impact on the rulings of the attending judges and on public trust in the judiciary.

*While some things have changed, far too much remains the same.*

***The fairness and impartiality of the federal judiciary are already being seriously undermined by allowing federal judges to accept free vacations at posh resorts from private interests bent on influencing their future decisions.***

***- Editorial, The New York Times***

To answer these questions, CRC conducted a comprehensive review of judges' financial disclosure forms. By law, under the Ethics Reform Act of 1989<sup>7</sup> every judge must file with the Administrative Office of the U.S. Courts a report detailing gifts and reimbursements received exceeding \$250 that were paid for by private organizations.<sup>8</sup>

CRC reviewed the 1992-1998 financial disclosures for all active and senior federal judges, excluding bankruptcy and magistrate judges. In total, we reviewed more than 6,600 disclosure forms, over 51,000 pages of material. CRC staff then created a database for virtually every gift received by active federal judges between 1992 and 1998. The database was posted on the internet at <http://www.tripsforjudges.org> and contained information on more than 5,800 privately-funded trips taken by 1,030 current and former federal judges.<sup>9</sup>

This initial analysis revealed that right-leaning, anti-regulatory organizations dominate private judicial education. Three groups in particular—FREE, George Mason University's Law and Economic Center (LEC) and the Liberty Fund (dubbed "the Big Three")—sponsored a total of 540 trips among them.<sup>10</sup> These organizations share certain characteristics. All host multi-day trips for judges at attractive resort locations.<sup>11</sup> Each promotes a conservative/libertarian perspective on the law.<sup>12</sup> Attendance at these private judicial seminars continued to increase through the 1990s, with some 10 percent of the roughly 800 active judges in any given year attending a seminar sponsored by one of these three groups.<sup>13</sup>

*Nothing for Free* also identified what we believed to be the ten most significant lower federal court rulings during the 1990's striking down an important environmental protection, and the study documented that the author of every single one of these opinions had attended a Big Three seminar. In six of those cases the judge attended a seminar while presiding over the case.<sup>14</sup> While it is impossible to prove that seminar attendance influenced those judges' rulings, this correlation was quite remarkable and, at a minimum, shows that these seminars threaten public trust in the judicial process. In one notable case, *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*,<sup>15</sup> Judge Stephen Williams of the DC Circuit voted to uphold the Department of the Interior's authority to regulate habitat under the Endangered Species Act and then switched his vote after attending a FREE seminar.<sup>16</sup>

### III. Reaction to *Nothing for Free*

#### A. The Media, the Hill, & the ABA

Reaction to *Nothing for Free* in the media and by non-judicial policymakers was nothing short of extraordinary. The release generated dozens of newspaper stories<sup>17</sup> and prompted editorial boards across the nation to decry corporate lobbying of the judiciary.<sup>18</sup> The *New York Times* wrote that "the fairness and impartiality of the federal judiciary" is "being seriously undermined by allowing federal judges to accept free vacations at posh resorts from private interests bent on influencing their future decisions."<sup>19</sup> The *Washington Post* called the trips "A Blot on Judicial Ethics"<sup>20</sup> and *USA Today* opined in a piece called "Just Say No to Judge Junkets" that "[t]ighter ethics rules or new federal laws are needed to end this practice."<sup>21</sup>

The report also generated serious reform efforts by Congress. Members of Congress spoke out against the trips,<sup>22</sup> held hearings raising the subject,<sup>23</sup> and introduced legislation to ban them altogether.<sup>24</sup> In particular, the week

*Nothing for Free* was released, Senators John Kerry and Russell Feingold introduced the Judicial Reform Act of 2000, S.2990, the first legislative attempt to address the appearance problems caused by privately-funded judicial seminars.<sup>25</sup>

The American Bar Association (ABA) also initiated efforts to promote ethics reform through interpretation of the Association's Model Code of Judicial Conduct. In August 2001, the ABA's Standing Committee on Federal Judicial Improvements hosted a program on private trips at the ABA's Annual Meeting.<sup>26</sup> At this conference, Professor Loretta Argrett, a member of the ABA Standing Committee on Ethics and Professional Responsibility, indicated that the Ethics Committee was working on a draft ethics opinion concerning judges attending expense-paid seminars. Professor Argrett made it clear that, in her opinion, judges attending private judicial seminars can have "a problem under the Code [of Judicial Conduct]."<sup>27</sup>

### B. Reaction in the Judiciary

For this study, Community Rights Counsel updated *Nothing For FREE's* comprehensive review of judges' financial disclosure forms. CRC reviewed the 1999-2001 financial disclosures for all active and senior federal judges, excluding bankruptcy and magistrate judges. In total, we reviewed more than 3,000 disclosure forms, over 20,000 pages of material. During this review, we collected new information about privately-funded educational trips taken by judges, information that is now posted on-line at <http://www.tripsforjudges.org>. This database now contains information on more than 7,300 privately-funded trips taken by 1,094 current and former federal judges.

Judicial participation in what *Nothing for Free* labeled the Big Three—FREE, LEC, and the Liberty Fund—increased during 1999 and 2000 and then dropped off significantly in 2001, the year after *Nothing for Free* was published. For example, in 2000, 75 judges each accepted a trip from LEC, while 22 judges attended a trip sponsored by FREE. That's 97 judges who attended trips sponsored by one of these two groups in just one year's time. By contrast, in 2001 a combined total of 62 judges reported accepting 53 trips from LEC and 17 trips from FREE. The drop-off in attendance at Liberty Fund programs was absolute. The Liberty Fund sponsored 25 judges on trips in 1999 and 2000. In 2001, no judges reported attending a Liberty Fund event, although the group has indicated that it intends to continue hosting judicial seminars.<sup>28</sup> The Aspen Institute (the fourth most-frequent provider of judicial trips in our *Nothing for Free* study) did not host any trips for judges during 2001.

In 2001, 10 judges reported attending programs sponsored by a relatively new organization, the Einstein Institute for Science, Health & the Courts.<sup>29</sup> By outward appearances, the Institute appears to be the ideal type of organization to offer CLE programs to judges. Run entirely by judges, the Institute offers programs on emerging scientific issues such as human cloning. As Judge Raymond Randolph remarked at a speech to the Federalist Society, these seminars are relatively uncontroversial because "there's no conservative or liberal DNA. It's just DNA."<sup>30</sup>

Unfortunately, the downward trend in judicial trips appears to have evaporated as the uproar over these trips has subsided. FREE program schedules, which are posted on their website (<http://www.free-eco.org>) and now contain lists of participants, indicate that 44 judges took FREE trips in 2002 and 38 judges took trips in 2003.

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 - Editorial, *The Washington Post*

This recent uptick in attendance at FREE programs is almost certainly attributable to the fact that the Judicial Conference and the Administrative Office remain immovably committed to the flawed ethical guidance that allowed these programs to flourish in the first place.

Shortly after the Kerry/Feingold bill was introduced, the Judicial Conference announced its opposition, calling it “hasty” and “overly broad” and claiming that it would “subject judges to the most restrictive rules of any government officials.”<sup>31</sup> These claims were overblown and, in places, simply inaccurate,<sup>32</sup> but the adamant opposition of the judiciary prevented Kerry/Feingold from generating any legislative momentum.

After ABC News rekindled interest in reform with its 20/20 exposé on judicial trips, Chief Justice William Rehnquist gave a speech to an American Law Institute forum that was plainly designed to prevent any new legislative effort to ban the trips. Rehnquist called the Kerry-Feingold approach “a bad idea” that is “contrary to the public interest in encouraging an informed and educated judiciary, and contrary to the American belief in unfettered access to ideas.”<sup>33</sup> “The effect of the Kerry-Feingold bill,” he warned, “would be to dramatically restrict the information made available to federal judges through seminars by requiring that the content of that information and the identities of its presenters be weighed against a prediction of public confidence in fair-mindedness.”<sup>34</sup>

Chief Justice Rehnquist’s speech was harshly treated on editorial pages across the country.<sup>35</sup> For example, after quoting from the Chief Justice’s speech, the *Washington Post* editorialized: “Please. The right of free speech does not include the right of public officials to be flown about the country at private expense, as any executive branch official can testify.”<sup>36</sup> Again, however, the speech served its intended purpose of staving off legislative reforms.

Recently, the judicial bureaucracy’s resistance to reform has started to border on the absurd. When the Administrative Office of the United States Courts learned that the ABA’s Standing Committee on Ethics and Professional Responsibility was preparing ethical guidance on the trip issue, the Director of the Administrative Office of the U.S. Courts, Leonidas Ralph Mecham, wrote what the *Washington Post* called “a bizarre memo” to Chief Justice Rehnquist and other members of the judicial conference, in which he accused the ABA committee of “secret activities” and asserted that it was “relying almost entirely upon Doug Kendall and the Community Rights Counsel” in drafting its opinion.<sup>37</sup> He wrote: “It is expected that the ABA Ethics Committee opinion will be released with great public relations and media fanfare, probably at the time of its annual meetings in Washington, D.C. from August 9 to 13 [2002].”

As the ABA pointed out in its response to Mr. Mecham, the factual predicate for Mecham’s memorandum was entirely false. In the ABA’s words, Mr. Mecham’s memo “contains misstatements and mischaracterizations and thus has needlessly alarmed many federal judges who have accepted its assertions at face value.”<sup>38</sup> In particular, the ABA called Mr. Mecham’s assertion that the ABA’s Ethics Committee was relying on Community Rights Counsel “an absolute falsehood.”<sup>39</sup>

Baseless as it was, Mr. Mecham’s missive appears to have created enough controversy over the Ethics Committee’s work to have prevented the Committee from releasing its opinion.<sup>40</sup> The August 2002 ABA meeting came and went, and nearly two years later, the ABA seems no closer to issuing any new guidance to

judges.

### C. The Ignorance Defense

More disturbing even than the judicial bureaucracy's adamant opposition to reform is what appears to be a concerted effort by that bureaucracy to undermine what little ethical guidance already exists in Advisory Opinion 67, the judiciary's most specific guidance to judges on the propriety of accepting seminar gifts. In recent years, judges have repeatedly argued that they may attend trips without making any inquiry into whether the funders are involved in litigation that is likely to appear before their court. This view simply lacks any foundation and serves as yet another example of how existing rules are inadequate.<sup>41</sup>

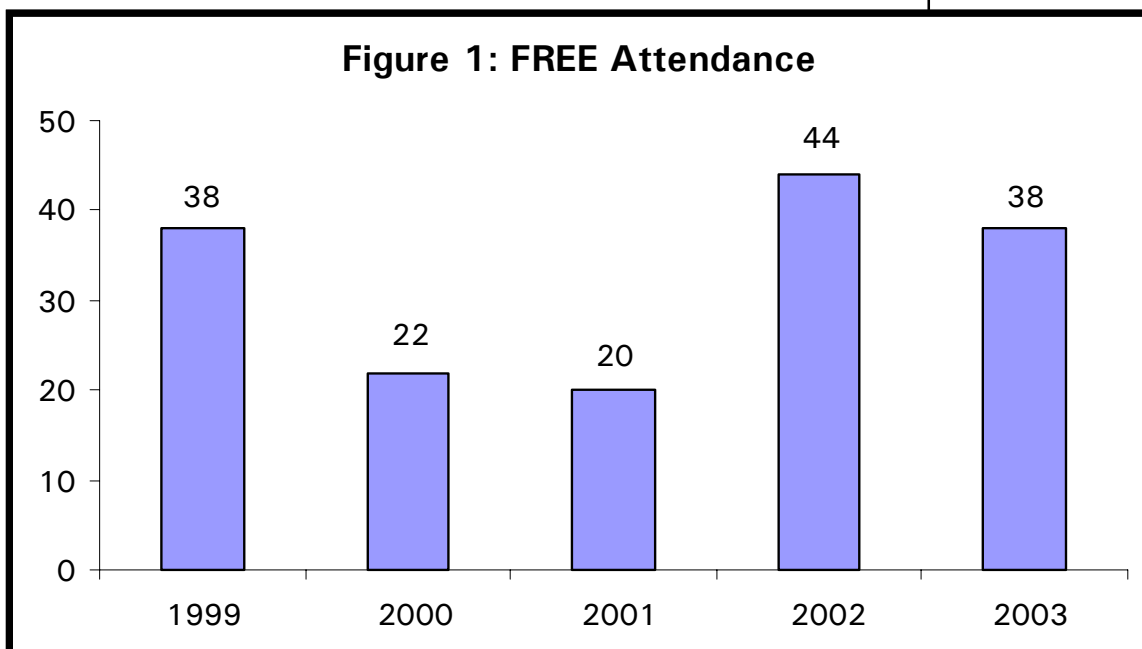
#### 1. Some Judges Choose Ignorance Over Investigation

Advisory Opinion 67 imposes three requirements on judges: 1) to investigate whether the source of funds is likely to be involved in litigation; 2) to consider the extent to which seminar topics touch on matters related to litigation; and 3) to disclose the value of the gifts and benefits received.<sup>42</sup> Underlying this entire analysis is Canon 2 of the Code of Conduct for United States Judges, which compels a judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."<sup>43</sup>

Despite this clear guidance, a considerable number of judges apparently believe that remaining ignorant of seminar funding somehow shields them from questions of impropriety. Call it the "blissful ignorance" defense.

ABC News interviewed several federal judges in attendance at an LEC seminar for their 20/20 program in April 2001.<sup>44</sup> None of them had any idea where LEC received its funding—nor did they seem concerned. One judge told reporters, "I have no idea where [LEC] gets its money."<sup>45</sup> When asked by 20/20 whether he knew that LEC gets its money from corporations, another judge re-

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- former DC Circuit Chief Judge Abner Mikva***

sponded “[LEC] didn’t tell us that.” When asked whether he had an obligation to find out, this judge responded: “Not necessarily, I mean because what’s the difference.”<sup>46</sup> One judge is quoted as saying, “If I don’t know who’s paying for it, then I’m not going to be affected by it.”<sup>47</sup> As another judge told the *Wall Street Journal*, “I can’t be influenced by something I don’t know.”<sup>48</sup>

This ignorance defense came up in the context of the recent confirmation of a federal appellate judge. In answering a congressional question regarding his attendance at an LEC seminar, nominee and then District Judge D. Brooks Smith wrote that “because George Mason’s sponsorship of LEC was apparent from the face of the materials I received regarding the seminars, I concluded that no further inquiry into sources of funding was required.”<sup>49</sup> Under Advisory Opinion 67, according to noted legal ethicists like Stephen Gillers, further inquiry was required.<sup>50</sup> As Gillers recently told the United States Senate: “The authorities agree that before attending an expense-paid judicial seminar, a judge should learn who is picking up the tab for the judge’s travel and housing.”<sup>51</sup>

That there is still so much confusion on this basic point is devastating evidence that existing ethics rules are inadequate to the challenge of ensuring a fair and impartial judiciary. As Abner Mikva, the former chief judge of the DC Circuit has noted, this notion that funder anonymity “sanitizes” the issue “turns the problem on its head.”<sup>52</sup> In his words: “Should the public be more concerned about an open and notorious attempt to influence the judge’s thinking (briefs are supposed to accomplish that purpose) or an insidious effort by anonymous benefactors?”<sup>53</sup>

## **2. The Financial Disclosure Office Prevents Judges from Investigating and Disclosing Relevant Information**

As noted above, on the issue of disclosure, Advisory Opinion 67, which was issued by the Judicial Conference’s Committee on Codes of Conduct, could not be clearer. It states that “[p]ayment of tuition and expenses involved in attendance at non-government sponsored seminars constitutes a gift” and requires that judges “must report the reimbursement of expenses and the value of the gift on their financial disclosure forms.”<sup>54</sup> The AO thus imposes an ethical obligation on judges to report the value of gifts received in conjunction with seminar attendance.<sup>55</sup>

Despite this unambiguous requirement, we are not aware of any judge in recent years who actually reports the value of the “tuition and expenses involved in attendance” at a FREE seminar. How can this be? Well, it turns out that the Judiciary’s Financial Disclosure Office has interpreted the Ethics Reform Act, the law governing financial disclosure by judges, to allow judges to report all expenses that accompany a private judicial seminar as a “reimbursement” rather than a gift (even though tuition, board and lodging at FREE seminars are neither paid by the judge nor reimbursed by FREE). The Disclosure Office has also interpreted the Ethics Reform Act not to require disclosure of the value of reimbursements, even though the law is silent on this point. Indeed, the Disclosure Office has gone so far as to scold judges who attempt to quantify the size of the largess that accompanies attendance at a FREE seminar.<sup>56</sup>

The result is that it is impossible for judges to simultaneously comply with the ethical guidance established by Advisory Opinion 67 and file disclosure reports consistent with the guidance offered by the Disclosure Office. The Committee on Codes of Conduct gets this issue right: tuition and expenses at FREE

seminars *are* gifts to judges and judges should be forced to disclose the value of these gifts. But even if the Judicial Conference disagrees with this conclusion, the current state of affairs—with conflicting instructions and complete non-compliance with a clear ethical mandate—is plainly intolerable.

Complete non-disclosure of trips by judges—a major problem documented by *Nothing for Free*<sup>57</sup>—also appears to still be a problem for some judges. One of the 13 judges that FREE reports on their website as having attended a August 2001 trip, F.A. Little, Jr. (W.D. La.), did not report the trip on his financial disclosure form.

#### IV. Conclusion

The recent increase in FREE judicial trips in the last two years provides conclusive evidence that only actual ethics reform will prevent corporate litigants and other interested parties from using private seminars to advance their litigation interests. Individual judges respond to the interpretation of ethical mandates provided by the judicial bureaucracy, and so far that bureaucracy has sent the message that FREE's trips pose no serious ethical problems for judges. The evidence in the next two chapters provides an overwhelming case for why this conclusion is wrong and why reform is necessary now, more than ever.

**ENDNOTES**

<sup>1</sup> Public attention was first drawn to the issue of private judicial seminars in the late 1970s. David Beckwith, *Judges Study Free Market Economics*, LEGAL TIMES OF WASH., Feb. 5, 1979, at 1; Walter Guzzardi, Jr., *Judges Discover the World of Economics*, FORTUNE, May 21, 1979, at 58; James Russell, *Law and the Economy: Mysteries of Money Disrobed for Judges*, MIAMI HERALD, Apr. 30, 1978, at F1.

Although initial stories focused primarily on the trend itself, the coverage grew increasingly critical. See, e.g., Jack Anderson, *State Dept. Obstructing Cambodia Aid*, WASH. POST, Oct. 29, 1979, at D27 (“More than 100 federal judges have gone to sunny Florida for a crash course in conservative economics, courtesy of some of the biggest corporate fat cats that will ever appear before them as defendants.”); Fred Barbash, *Big Corporations Bankroll Seminars for U.S. Judges*, WASH. POST, Jan. 20, 1980, at A1. The corporations mentioned in the Barbash article include: IBM, ITT, AT&T, Standard Oil of Ohio, Ford Motor Company, and U.S. Steel. *Id.* Ruth Marcus, *Issue Groups Fund Seminars for Judges*, WASH. POST, April 9, 1998, at A1. See also ALLIANCE FOR JUSTICE, JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN (1993); COMMUNITY RIGHTS COUNSEL, THE TAKINGS PROJECT: USING FEDERAL COURTS TO ATTACK COMMUNITY AND ENVIRONMENTAL PROTECTIONS 35-39 (1998) (modified version published as Douglas T. Kendall & Charles P. Lord, *The Takings Project, A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENV. AFF. 509 (1998)).

<sup>2</sup> Erwin Chemerinsky, Professor of Law, University of Southern California, *quoted in* Joan Osterwalder, *Leading With the Right: The Jury Is Out on Whether Junkets for Judges Are Out of Order*, L.A. DAILY J., Dec. 2, 2002 (“I think it’s very dangerous when it’s paid for by people who are going to be litigants with an interest before their courts.”); Stephen Gillers, Vice Dean and Professor of Law, New York University, *quoted in* Ruth Marcus, *Issue Groups Fund Seminars for Judges*, WASH. POST, April 9, 1998, at A1 (“The luxury of these trips is often apparent and the sponsors have a particular viewpoint that the want to see the judiciary advance and the content of the seminars promotes that viewpoint. I have always felt uncomfortable about the phenomenon.”); Bruce A. Green, *May Judges Attend Privately Funded Education Program? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L. J. 941 (2002) (“The problem is the appearance that private corporations with a conservative ideology have taken over judicial education in an area that has considerable impact on a class of cases involving corporate interests, and that this education is having a large impact on decision making by the judiciary as a whole, if not by judges individually.”); Peter A. Joy, *A Professionalism Creed for Judges: Leading By Example*, 52 S.C. L. REV. 667, 689 n.120 (2001) (“I hope that judges, bar associations, and other commentators will explore some of the other judicial professionalism issues such as \* \* \* the need to ban state and federal judges from attending all-expense paid educational seminars funded by ‘private interests bent on influencing their future decisions.’”).

<sup>3</sup> Abner J. Mikva, *From the Bench: Judges, Junkets and Seminars*, LITIGATION 3 (Summer 2002); Abner Mikva, *The Wooing of Our Judges*, N.Y. TIMES, Aug. 28, 2000 at A21. Cf. Jack B. Weinstein, *Limits on Judges’ Learning, Speaking and Acting—Part 1—Tentative First Thoughts: How May Judges Learn?* 36 ARIZ. L. REV. 539 (1994); Jack B. Weinstein, *Limits on Judges’ Learning, Speaking and Acting: Part II—Speaking and Part II—Acting*, 20 U. DAYTON L. REV. 1 (1994); Julie Kay, *Have Gavel, Will Travel*, PALM BEACH DAILY BUS. REV., Aug. 4, 2000 (quoting Judge Donald Middlebrook (S.D. Fla): “I think I’ll stick to seminars run by the judicial center. If I want to take a trip, I’ll go with my family.”).

<sup>4</sup> Alliance for Justice, see ALLIANCE FOR JUSTICE, JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN (1993); Association of Trial Lawyers of America, see Joan Osterwalder, *Leading With the Right: The Jury Is Out on Whether Junkets for Judges Are Out of Order*, L.A. DAILY J., Dec. 2, 2002 (quoting spokesman Carlton Carl as saying, “It just so happens that some of the more biased presentations tend to [be] in resort settings, where it’s not just presentations ... but lobbying of judges in social situations. We

think the judiciary should be independent.”); **Common Cause**, see Letter from Scott Harshbarger, President, Common Cause to Chief Justice William H. Rehnquist, June 18, 2001 (on file with CRC) (“Just as private interests use campaign contributions to buy access to important congressional decision makers and influence legislative outcomes, an appearance is created here that private resources are being used to purchase favored access to federal judges in order to influence judicial outcomes.”); Letter from Scott Harshbarger, President, Common Cause to Chief Justice William H. Rehnquist, Sept. 7, 2000 (on file with CRC) (“We believe the Conference and the Administrative Office should consider an outright ban on federal judges’ attendance at privately financed seminars. We believe that attendance by judges at these seminars and conferences is generally inappropriate.”); **Center for Public Integrity**, see Charles Lewis, *Judiciary Should Let Sunshine In to Reduce Public Skepticism*, June 8, 2001, available at <http://www.public-i.org> (visited May 29, 2003) (“I am all for legal education for government lawyers and judges, but shouldn’t the government pay for that? In general, federal government officials now take *thousands* of privately funded trips all over the world each year, all sponsored by groups hoping to get something from the public-policy, decision-making process—all in the ostensible, bogus name of saving the taxpayer money.”); **Environmental Working Group**, see Press Release, Corporate-Backed Junkets for Federal Judges Linked to Recent Wave of Anti-Environmental Rulings, available at <http://www.tripsforjudges.org/press.html> (visited May 29, 2003) (quoting spokesman Mike Casey: “Judges don’t need free vacations bankrolled by some of America’s biggest polluters and lobbying forces, especially given that taxpayers already fund continuing education for judges to the tune of \$20 million a year.”); **Public Citizen**, see Joan Osterwalder, *Leading With the Right: The Jury Is Out on Whether Junkets for Judges Are Out of Order*, L.A. DAILY J., Dec. 2, 2002, available at <http://www.communityrights.org/Newsroom/crcInTheNews/DJE12-2-02.asp> (visited May 29, 2003), (quoting staff lawyer Brian Wolfman, “It’s quite bizarre to essentially have litigants in the system to pick up the tab. I think it’s a bad idea.”).

<sup>5</sup> See, e.g., Editorial, *A Threat to Judicial Ethics*, NY TIMES, Sept. 15, 2000, at A30; *Just Say No to Judge Junkets*, USA TODAY, May 1, 2001, at 14A; Editorial, *Judicial Junketeering*, BOSTON GLOBE, Sept. 24, 2000, at F6; Editorial, *Congress Must Overrule Judges’ Unethical Junkets*, ATLANTA CONST., Sept. 22, 2000, at A22; Editorial, *A Blot on Judicial Ethics*, WASH. POST, July 28, 2000, A24; Editorial, *The Judicial Jet Set*, STAR-LEDGER, May 21, 2001; Editorial, *The Junketeers: Judges, Port Commissioners Flying Too High*, SAN DIEGO UNION-TRIB., Aug. 12, 2000, at B12; Editorial, *Poor Judgment: Our Position—Judges Should Steer Clear of Trips Paid for By Special Interests*, ORLANDO SENTINEL, May 16, 2001, at A10; Editorial, *Injudicious Junkets*, PITTSBURGH POST-GAZETTE, July 31, 2000, at A15; Editorial, *The Pay and Perks of Federal Judges*, TAMPA TRIB., Oct. 3, 2000, at 6; Editorial, *Free Lunch for Judges: Some Jet Off to Vacation Resorts—At the Expense of Advocacy Groups*, DES MOINES REG., July 13, 2000; Editorial, *Junkets for Judges*, BANGOR DAILY NEWS, April 23, 2001; Editorial, *Judges Shouldn’t Accept Junkets*, MISSOULIAN, July 31, 2000. These editorials and many others are available at <http://www.communityrights.org/TaintedJustice/editorials.pdf>.

<sup>6</sup> As noted in Chapter I, numerous studies have addressed the issue, including: Institute for Public Representation, *Petition for the Adoption of Guidelines for Judicial Participation Privately Sponsored Educational Programs for Federal Judges and Other Relief*, Before the United States Judicial Conference, Aug. 29, 1980, reprinted in LEGAL TIMES OF WASH., Sept. 15, 1980; ALLIANCE FOR JUSTICE, *JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN* (1993); COMMUNITY RIGHTS COUNSEL, *THE TAKINGS PROJECT: USING FEDERAL COURTS TO ATTACK COMMUNITY AND ENVIRONMENTAL PROTECTIONS* 35-39 (1998) (modified version published as Douglas T. Kendall & Charles P. Lord, *The Takings Project, A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENV. AFF. 509 (1998)); COMMUNITY RIGHTS COUNSEL, *NOTHING FOR FREE: HOW PRIVATE JUDICIAL SEMINARS ARE UNDERMINING ENVIRONMENTAL PROTECTIONS AND BREAKING THE PUBLIC’S TRUST* (2000) (also published as Douglas T. Kendall, *Nothing for Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public’s Trust*, 25 HARV. ENVTL. L. R. 405 (2001)).

<sup>7</sup> The Ethics Reform Act of 1989, Pub. L. 101-194 (1989), provides that judges shall not “accept anything of value from a person ... whose interests may be substantially

affected by the performance or nonperformance of the individual's official duties" unless the gift is permitted under "reasonable exceptions" established by the Judicial Conference.

<sup>8</sup> Federal law requires that judges disclose information about privately-funded seminars on their annual public disclosure forms. Specifically, judges must report: "The identity of the source and a brief description (including a travel itinerary, dates, and nature of expenses provided) of reimbursements received from any source aggregating more than ... \$250." 5 U.S.C. Appendix 4, § 102 (a)(2)(B). See also Commentary to the Regulations of the Judicial Conference of the United States under Title III of the Ethics Reform Act of 1989 Concerning Gifts, *reprinted in* Financial Disclosure Office, *Filing Instructions for Judicial Officers and Employees* 80 (Jan. 2, 1997).

<sup>9</sup> We note that it is not CRC's intention to criticize judges for taking all or even most of the privately-funded trips listed in our Trips for Judges database. We believe it is commendable for judges to find time in their busy schedules to give speeches and impart wisdom to students, lawyers, etc. We have included in our database comprehensive information about reported trips primarily because we feared that otherwise we would be criticized for selectively posting only those trips we found problematic. In addition, it is sometimes hard based on the available information to ascertain whether the privately-funded trip was problematic or not. Rather than making this determination for users of the site, we have erred, if at all, in being over-inclusive.

We also caution the users of the database that data on gifts for 1998-2001 is much less comprehensive than is data for 1992-1997. By the time the 1998 disclosures became available, the focus of our study had narrowed exclusively to privately funded seminars, and thus we only recorded information for seminar gifts. Finally, we note that we are only human. CRC staff reviewed and recorded a massive amount of information in a relatively short period of time. We were careful, but no amount of care can guarantee 100% accuracy in a project like this. We are sure that there are instances in which we made mistakes in recording information into the database. We thus urge users of the database to double check our work by obtaining judges financial disclosure forms (visit [www.uscourts.gov/forms/reqinstr.htm](http://www.uscourts.gov/forms/reqinstr.htm) for instructions) or by contacting the judge in question.

<sup>10</sup> NOTHING FOR FREE, *supra* note 6 at 11.

<sup>11</sup> Part of the popularity of these programs is surely attributable to their attractive seminar package. FREE, for example, provides judges with free travel, food, and accommodations at one of a few private ranches near Bozeman, Montana, complete with plenty of "time for cycling, fishing, golfing, hiking and horseback riding." Elkhorn Ranch Brochure, Gallatin Gateway, Mont. (brochure on file with CRC). Past seminar locations for Law and Economics Center events include: Amelia Island Plantation, Amelia Island, Florida; Sea Pines Plantation, Hilton Head, South Carolina; The Ritz-Carlton, Naples Florida; Raddison Suite Beach Resort, Marco Island, Florida; and the Omni/Tuscon Golf Resort and Spa, Tucson, Arizona. NOTHING FOR FREE, *supra* note 6 at 12.

<sup>12</sup> These organizations and their programs are discussed in detail in NOTHING FOR FREE, *supra* note 6 at 11-18.

<sup>13</sup> There are 862 authorized slots for life-tenured, active federal judges. See U.S. Dept. of Justice, Office of Legal Policy, Judicial Nominations, available at <http://www.usdoj.gov/olp/judicialnominations.htm> (visited May 29, 2003). The actual number of active judges varies widely depending on the speed of the judicial nomination/confirmation process.

<sup>14</sup> See NOTHING FOR FREE, *supra* note 6 at Chapter 4.

<sup>15</sup> 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995).

<sup>16</sup> See NOTHING FOR FREE, *supra* note 6 at 64-65.

<sup>17</sup> Media coverage of NOTHING FOR FREE was extensive. See, e.g., Jim Drinkard, *Advocacy Groups Pay for Judges' Seminars*, USA TODAY, July 25, 2000, at 6A; Glen Elsasser, *Activists Shine Light on Junkets for Judges*, CHICAGO TRIB., July 25, 2000, at 4; George Lardner, Jr., *Report Links Environmental Rulings, Judges' Free Trips*, WASH. POST, July 25, 2000; Rob O'Dell, *Group Suggests Judges Swayed By Corporate-Backed Seminars; Environmental Cases Cited As Troubling*, ATLANTA CONST., July 25, 2000, at A3; Lynn Sweet, *Group Urges Ban on Junkets for Judges*, CHICAGO SUN-TIMES, July 25, 2000, at 16.

<sup>18</sup> See, e.g., Editorial, *A Threat to Judicial Ethics*, N.Y. TIMES, Sept. 15, 2000, at A30; Editorial, *Just Say No to Judge Junkets*, USA TODAY, May 1, 2001, at 14A; Editorial, *Judicial Junketeering*, BOSTON GLOBE, Sept. 24, 2000, at F6; Editorial, *Congress Must Overrule Judges' Unethical Junkets*, ATLANTA CONST., Sept. 22, 2000, at A22; Editorial, *A Blot on Judicial Ethics*, WASH. POST, July 28, 2000, A24; Editorial, *The Judicial Jet Set*, STAR-LEDGER, May 21, 2001; Editorial, *The Junketeers: Judges, Port Commissioners Flying Too High*, SAN DIEGO UNION-TRIB., Aug. 12, 2000, at B12; Editorial, *Poor Judgment: Our Position—Judges Should Steer Clear of Trips Paid for By Special Interests*, ORLANDO SENTINEL, May 16, 2001, at A10; Editorial, *Injudicious Junkets*, PITTSBURGH POST-GAZETTE, July 31, 2000, at A15; Editorial, *The Pay and Perks of Federal Judges*, TAMPA TRIB., Oct. 3, 2000, at 6; Editorial, *Free Lunch for Judges: Some Jet Off to Vacation Resorts—At the Expense of Advocacy Groups*, DES MOINES REG., July 13, 2000; Editorial, *Junkets for Judges*, BANGOR DAILY NEWS, April 23, 2001; Editorial, *Judges Shouldn't Accept Junkets*, MISSOULIAN, July 31, 2000.

<sup>19</sup> Editorial, *A Threat to Judicial Ethics*, N.Y. TIMES, Sept. 15, 2000, at A30.

<sup>20</sup> Editorial, *A Blot on Judicial Ethics*, WASH. POST, July 28, 2000, A24 (“When ... judges take educational vacations on the dime of private groups, they do so at the expense of the judiciary’s reputation for impartiality, even if not the impartiality itself.”).

<sup>21</sup> Editorial, *Just Say No to Judge Junkets*, USA TODAY, May 1, 2001, at 14A.

<sup>22</sup> **Sen. Russell Feingold** (D-Wisc.): “The appearance created by these seminars is not consistent with the image of an impartial judiciary. One sided seminars given in wealthy resorts funded by wealthy corporate interests to ‘educate’ our judges in a particular view of the law cannot help but undermine public confidence in the decisions that judges who attend the seminars ultimately make.” Julie Kay, *Have Gavel, Will Travel*, DAILY BUS. REV., Aug. 4, 2000, at A10; **Sen. John Kerry**, (D-Mass.): “At a minimum, it creates a perception of improper influence that erodes the trust the American people must have in our judicial system.” Jim Drinkard, *Advocacy Groups Pay for Judges' Seminars*, USA TODAY, July 25, 2000, at 6A; see also Remarks of Senator John Kerry to the American Bar Association Regarding Private Judicial Seminars, August 2001 (copy on file with CRC) (“[C]orporations and foundations that have a legal agenda in the courts are paying for the continuing legal education received by our federal judges. At a minimum, the fact that any judicial education is being paid for by entities that have an interest in or are parties to federal litigation creates a perception of improper influence.”); Joint Statement of Sens. John Kerry and Russell Feingold on Judicial Junkets, April 6, 2001, available at [http://abcnews.go.com/sections/2020/2020/2020\\_010406\\_judges\\_statement.html](http://abcnews.go.com/sections/2020/2020/2020_010406_judges_statement.html) (visited May 29, 2003) (“There is a major perception problem when corporations with cases pending before the courts underwrite junkets for judges. Trust and confidence in our judicial system will surely suffer when these images are burned into the public consciousness.”).

Other members of Congress have also spoken out against the trips: **Rep. Zoe Lofgren** (D-Calif.): “There is nothing more damaging to citizens’ faith in the country and in the due process of law than the belief, even if inaccurate, that those who are trusted to judge have been influenced by financial connections.” Oversight Hearing on the United States Judicial Conference, Administrative Office, and Federal Judicial Center Before the Courts and Intellectual Property Subcommittee of the House Judiciary Committee, 105<sup>th</sup> Cong. 2 Sess. (June 11, 1998) (transcript available through Federal News Service). **Rep. Barney Frank** (D-Mass.) expressed concern about “a problem of ex parte impact” and requested a “provision in the canons” be included to ensure

judges seek out a “balanced view” on critical issues. *See id.* Rep. David Skaggs (D-Colo.) took to the House floor after the Judicial Conference refused to amend or issue new guidance on Advisory Opinion 67 in 1998: “I think everybody here would agree that it would be unfair for a judge to accept an expense paid vacation from one party in a lawsuit.... But suppose a corporation, instead of paying directly, gives money to a foundation to pay for the vacation indirectly? Does that make it all right? Of course not ...” 144 CONG. REC. H10802 (daily ed. Oct. 13, 1998) (statement of Rep. Skaggs); *see also Friendly Fire*, LEGAL TIMES, Oct. 1, 1998, at 2.

<sup>23</sup> *Review of Judicial Misconduct Statutes: Hearings Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. (Nov. 29, 2001).

<sup>24</sup> The Judicial Education Reform Act of 2000, S. 2990, 106th Cong. (2000) (Kerry-Feingold Bill).

<sup>25</sup> *Id.*

<sup>26</sup> ABA Standing Committee on Federal Judicial Improvements and Judicial Division, *Continuing Education for Federal Judges: Purpose, Problems and Public Perception—The Controversy Examined*, Aug. 5, 2001 (transcript on file with CRC).

<sup>27</sup> *Id.*

<sup>28</sup> *See* Joan Osterwalder, *Leading with the Right: The Jury Is Out On Whether Junkets for Judges Are Out of Order*, L.A. DAILY J., Dec. 2, 2002, available at <http://www.communityrights.org/Newsroom/crcInTheNews/DJE12-2-02.asp> (visited May 29, 2003).

<sup>29</sup> The Einstein Institute describes itself as a “voluntary educational and research organization affiliated with the Judicial Branch of Government” and organized “to make science accessible to the instruments of justice.” For more information, see <http://www.einshac.org> (visited May 29, 2003).

<sup>30</sup> A. Raymond Randolph, *Judicial Seminars: Political Correctness or Appeal to Ethics?*, 2 ENGAGE 146, 148 (2001). Not all new entries into the field of judicial trips appear to be so benign. For example, the Georgia Chamber of Commerce is hosting appellate judges and their guest at a conference at the Cloister on Sea Island, “a secluded beachside resort where rooms start at about \$300 per night.” According to news reports, “[t]he May 21-23 event includes two morning sessions and a free afternoon at the resort, where guests can take advantage of a spa, tennis courts, horseback riding, a shooting school, kayaking and nature walks.” The forum includes sessions on business ethics, tourism and tort reform. Jonathan Ringel, *Ga. Chamber Trip Spawns Question of Ethics*, FULTON COUNTY DAILY REP., May 9, 2003.

<sup>31</sup> News Release, Administrative Office of the U.S. Courts, *Judicial Conference Opposes Sweeping Restrictions on Educational Programs*, Sept. 19, 2000.

<sup>32</sup> For example, the Judicial Conference claimed that the bill would “subject judges to the most restrictive rules of any government officials.” In fact, the prohibition on seminar gifts was patterned after and no more restrictive than the gift ban that already applies to executive branch officials, U.S. Attorneys, and Justice Department lawyers. *See* 5 C.F.R. § 2625.201-205.

The Judicial Conference also asserted that S. 2990 mandated an inappropriate censorship role for the Federal Judicial Center. In fact, the Center has long strived to present balanced programs. As former director Rya Zobel testified: “In all of our judicial education ... we assure that judges receive balanced and practical explanations of the governing law and its implications, and of the economic and scientific factors that increasingly affect litigation.” Testimony of the Hon. Rya W. Zobel, director of the Federal Judicial Center, before the Subcomm. on Courts and Intellec-

tual Property of the House Comm. on the Judiciary, 106th Cong. (June 11, 1998), available at 1998 WL 309955. S. 2990 simply asked the Federal Judicial Center to play the same role in assuring that education seminars funded by the taxpayers are legitimate.

The most alarmist claim, raised by the Judicial Conference, was that S. 2990 somehow infringed on First Amendment rights. In reality, all S. 2990 did was prevent judges from accepting travel and education gifts offered because of their position as federal judges. Indeed, it even contained a broad exception allowing large gifts to judges if the judge participated in the seminar “as a speaker, panel participant or otherwise presents information.” Despite the judges’ rhetoric to the contrary, the bill did not prohibit any judge from attending any event of any sort; judges are always free to attend forums as long as they pay their own way.

<sup>33</sup> Remarks of Chief Justice William H. Rehnquist at the American Law Institute Annual Meeting, May 14, 2001 (“The notion that judges should not attend private seminars unless they have been vetted and approved by a government board is a bad idea. It is contrary to the public interest in encouraging an informed and educated Judiciary, and contrary to the American belief in unfettered access to ideas.”).

<sup>34</sup> *Id.*

<sup>35</sup> See Editorial, *Mr. Rehnquist on Junkets*, WASH. POST, May 20, 2001, at B6; Opinion, *Poor Judgment Our Position: Judges Should Steer Clear of Trips Paid for by Special Interests*, ORLANDO SENTINEL, May 16, 2001, at 10 (“Incredibly, Chief Justice William H. Rehnquist defended the pervasive practice of federal judges taking junkets.”). See also Anne Gearan, *Top Judges Deserve Their Freebies, Rehnquist Says*, CHICAGO SUN-TIMES, May 15, 2001, at 3; Jonathan Ringel, *Rehnquist Speaks Out*, LEGAL TIMES, May 21, 2001; Edward Walsh, *Rehnquist Assails Curbs on Seminars for Judges: Business-Paid Events Called ‘Valuable,’* WASH. POST, May 15, 2001, at A15.

<sup>36</sup> Editorial, *Mr. Rehnquist on Junkets*, WASH. POST, May 20, 2001, at B6.

<sup>37</sup> Memorandum from Leonidas Ralph Mecham, Administrative Office of the U.S. Courts, to the Chief Justice and Members of the Judicial Conference of the United States, June 6, 2002 (on file with CRC) (“The secret activities of the ABA Ethics Committee are expected to result in the issuance of an Ethics Committee opinion directed at federal judges which is not subject to any review by any other ABA organization.”).

<sup>38</sup> Letter from Marvin Karp, Chair of ABA Standing Committee on Ethics and Professional Responsibility to Leonidas Ralph Mecham, June 18, 2002 (on file with CRC).

<sup>39</sup> The then-president of the ABA, Robert Hirshon put it even more colorfully, “I don’t even know who this Kendall is.” Tony Mauro, *Tensions Flare Between Judges and ABA*, LEGAL TIMES, June 24, 2002. See also Letter from Douglas Kendall to Leonidis Ralph Mecham, July 9, 2002 (on file with CRC).

<sup>40</sup> James V. Grimaldi, *Congress Steps Up to Force Lawyers to Look Closer at Corporate Clients*, WASH. POST, July 29, 2002, at E01, available at 2002 WL 24824371; Audrey Hudson, *American Bar Association Accused in Plot Against Nominee*, WASH. TIMES, July 1, 2002; Tony Mauro, *Tensions Flare Between Judges and ABA*, LEGAL TIMES, June 24, 2002.

<sup>41</sup> Numerous commentators have noted the affirmative obligations that AO 67 imposes on judges. See, e.g., Letter from Stephen Gillers, Vice Dean and Professor of Law, New York University to the Hon. Russell D. Feingold, May 17, 2002 available at <http://www.communityrights.org/PDFs/Gillers.pdf> (“The authorities agree that before attending an expense-paid judicial seminar, a judge should learn who is picking up the tab for the travel and housing.”); Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L. J. 941 (2002); Abner J. Mikva, *From the Bench: Judges, Junkets and Seminars*, LITIGATION 3 (Summer 2000) (“That opinion specifi-

cally charges the judge, before attending such a seminar, to make inquiry as to the source of funding for the seminar and to find out if such sources are involved or likely to be involved in litigation.”).

42 Advisory Opinion 67 states in pertinent part:

It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics covered in the seminar are likely to be in some manner related to the subject matter of such litigation. If there is a reasonable question concerning the propriety of participation, the judge should take such measures as may be necessary to satisfy himself or herself that there is no impropriety. To the extent that this involves obtaining further information from the sponsors of the seminar, the judge should make clear an intent to make the information public if any question should arise concerning the propriety of the judge’s attendance.

Judges who accept invitations to participate in such seminars, having been satisfied that no impropriety or appearance thereof is present, must report the reimbursement of expenses and the value of the gift on their financial disclosure reports.

43 Canon 2 of the Code of Conduct for United States Judges.

44 ABC’s 20/20, *Junkets for Judges*, April 6, 2001.

45 *Id.*

46 *Id.*

47 *Id.*

48 Editorial, *Congress Dumbs Down Judges*, WALL STREET J., Oct. 24, 2000. See also Abner J. Mikva, *From the Bench: Judges, Junkets and Seminars*, LITIGATION 3 (Summer 2000).

49 Letter from D. Brooks Smith to Senator Patrick Leahy Responding to Written Question Submitted by Sen. Russ Feingold, dated April 4, 2002 (on file with CRC).

50 Letter from Stephen Gillers, Vice Dean and Professor of Law, New York University to Sen. Russell D. Feingold regarding the nomination of D. Brooks Smith for the Third Circuit Court of Appeals, May 17, 2002, at 4 (on file with CRC).

51 *Id.*

52 Abner J. Mikva, *From the Bench: Judges, Junkets and Seminars*, LITIGATION 6 (Summer 2000).

53 *Id.*

54 Advisory Op. No. 67, available at <http://www.uscourts.gov/guide/vol2/67.html>.

55 Compendium § 5.4-6 (2001), available at <http://www.communityrights.org/TaintedJustice/Compendium.pdf>. The Compendium of Selected Opinions is the Code of Conduct Committee’s summary of its formal and informal interpretations of the ethics rules. Federal law likewise requires that judges disclose “the identity of the source, a brief description, and the value of all gifts aggregating more than ... \$250” as well as “[t]he identity of the source and a brief description (including a travel itinerary, dates, and nature of expenses provided) of reimbursements received from any source aggregating more than ... \$250.” 5 U.S.C. Appendix 4, § 102 (a)(92)(A) & (B).

<sup>56</sup> For example, in September 1996, one judge wrote to the Financial Disclosure Office thanking the Office “for pointing out that the actual dollar amount of expense reimbursements is not required.” Letter from Judge Bruce M. Selya to Judge Frank Magill, Chair, Financial Disclosure Office (September 3, 1996). That same year, another judge filed an amended disclosure form where the primary change was the removal of information on the value of expense reimbursements. 1996 Financial Disclosure Form filed by Judge John M. Walker Jr. A third judge, John Minor Wisdom of the Fifth Circuit, chastised the Office for objecting to financial details on his disclosure, calling it “ridiculous to object to the fact that I have given more information than needed.” Letter from John Minor Wisdom to Frank Magill, Chair, Financial Disclosure Committee (July 31, 1996). These letters are reproduced in the appendix to NOTHING FOR FREE.

<sup>57</sup> NOTHING FOR FREE, *supra* note 6, at 95-99; see also Joe Stephens, *Judges' Free Trips Go Unreported; U.S. Jurists Say They Forgot To Comply With Ethics Law*, WASH. POST, June 30, 2000 at A1.

