

CHAPTER 3

THE PROBLEM OF PRIVATELY-FUNDED TRIPS

Federal judges attend a fairly wide variety of privately-funded educational programs. These programs range from programs sponsored by groups like the Einstein Institute that seem, by outward appearances, utterly uncontroversial, to the programs run by FREE, which CRC and scores of other experts and commentators find deeply problematic.

This diversity in the type of programs offered to judges has made reaching consensus on a solution to the problem of private judicial seminars challenging because of the fear of throwing quality, uncontroversial programs out with the FREE bathwater. We attempt to solve this difficulty by advocating a narrow and nuanced solution in Chapter 5. For the purposes of the next two chapters our goal is only to demonstrate that there is a problem with the current ethical standards that guide judges on attendance of private seminars. For these purposes it is enough to demonstrate only that the standards regularly permit judges to participate in seminars that raise ethical concerns among reasonable observers. We can focus on the programs that create the most problems: in our opinion, the private judicial trips conducted by FREE.

FREE's trips raise ethical concerns for the judges that attend its programs, free of charge, because of a combination of three factors. First, the gift associated with judicial attendance at FREE's seminars is quite large; it costs FREE thousands of dollars per judge to host its judicial trips. Second, FREE's funding sources consist almost entirely of corporations and foundations that have a litigation agenda in the federal courts. Finally, FREE uses its seminars to advance the pecuniary and ideological interests of its funders. None of these factors alone would necessarily require that judges limit their participation in FREE's seminars. In combination, however, FREE's seminars create an appearance of impropriety among reasonable observers.

This chapter addresses each of these factors in more detail, responding carefully to the arguments that FREE, judges, and other commentators have raised in defense of FREE's programs.

I. FREE's Gift

The problem with FREE's seminars starts with the size of the gift FREE provides to the judges that attend their seminars. FREE flies judges out to Big Sky, Montana, hosts them at lovely ranches and hotels, pays their room and board, assembles course materials, and brings a faculty from around the country to

FREE's funding sources consist almost entirely of corporations and foundations that have a litigation agenda in the federal courts.

While FREE has contested the assertion that their programs are lavish, there is no questioning that they are expensive. FREE's tax filings for 2000 and 2001 indicate that . . . FREE is spending more than \$10,000 per judge per trip.

lecture to the judges. For example, at the Elkhorn Ranch, one of FREE's recurring venues, judges may enjoy "some of the world's finest blue ribbon trout streams," take a horseback ride through "millions of acres of pristine and spectacularly beautiful mountain scenery," or maybe go whitewater rafting.¹ Montana's Gallatin Gateway Inn, another frequent FREE destination, boasts "[r]elaxing after a meeting could be basking in front of the Inn's distinctive fireplace, or soaking in the outdoor hot tub. During the summer months, you could also swim beneath the stars."²

While FREE has contested the assertion that their programs are lavish, there is no questioning that they are expensive. FREE's tax filings for 2000 and 2001 indicate that they spent \$273,057 for judicial seminars in 2000 and \$217,580 for judicial seminars in 2001.³ During those same years, judges report attending 20 and 15 FREE trips, respectively.⁴ These figures suggest that FREE is spending more than \$10,000 per judge per trip.

The size of the gift offered by FREE, and the vacation-like feel of their resort trips, plainly and appropriately focuses more scrutiny upon FREE's trips than other CLE programs offered to judges. When a bar association pays the expenses to allow a local federal judge to attend a bar CLE program, the gift is typically worth hundreds, not thousands of dollars. This difference both in the size of the gift and the vacation settings offered by FREE justifies a closer look into where the money for the gift is coming from and why those sources of funding are so eager to offer such a large gift to federal judges.

II. FREE's Funding

FREE's funding comes from a handful of large corporations such as Texaco, Exxon, GE, Monsanto, Shell, and a collection of some of the country's most notoriously ideological conservative foundations, including Sarah Scaife Foundation (run by Richard Mellon Scaife), Charles Koch Foundation (run by Charles Koch of Koch Industries) and Castlerock Foundation (run by the Coors family of Coors Inc.). Almost all of these foundations also fund other groups that bring environmental litigation in federal court. The problem with FREE's funding, in a nutshell, is that virtually every one of its major funders has a clear stake in the results of environmental litigation in federal courts.

FREE has responded to criticism regarding the funding sources of their seminars by asserting that moneys for its seminars for judges come entirely from what FREE calls "dead man" foundations. FREE's argument is that while it gets corporate support, corporate support is not used for seminars and the money it uses for the seminars is from foundations that received their money from beneficiaries that are now dead. This is what FREE says on its website:

FREE does not accept any corporate support for judges' seminars. It is a violation of judicial standards for judges to accept such support, hence FREE relies on "dead-man" foundations to cover direct expenses (e.g., lodging, meals and travel) for judges participating in our seminars. We consider "dead-man" foundations to be those sharing the following characteristics: (1) a foundation whose principle founder is deceased; (2) a foundation whose operation and oversight is independent of any corporate entity; and (3) a foundation that does not participate in litigation in the federal courts.⁵

There are major problems with FREE's explanation.

A. Corporations Give Money to FREE Because of FREE's Judicial Seminars.

As an initial matter, FREE needs to be better at getting their corporate funders on message with their explanation of their funding practices. Here is how the GE Fund, the corporate foundation for General Electric Co, describes their 1998 grant to FREE:

Foundation for Research on Economics and the Environment.
Seattle, WA. \$10,000. For the Environmental Economics Judicial Program.⁶

GE sure seems to think its money was going toward FREE's "environmental economics judicial program."

Even more importantly, it is clear that one of the benefits that corporations get by funding FREE is that, in exchange for corporate funding, FREE provides these corporations access to judges at their judicial programs. Time and again, corporate litigants have given money to FREE and in return been provided a forum for their leaders to address federal judges on issues of significant pecuniary importance to the company:

Texaco, Inc. - Texaco gave FREE \$50,000 in 1997 and 1998 and another \$25,000 in 1999.⁷ Former Texaco chairman and CEO Alfred DeCrane was a featured speaker at the September 1998 and July 1999 seminars on "Environmental Economics and Policy Analysis." DeCrane's speeches were entitled respectively "The Environment: Some Thoughts from the Corner Office"⁸ and "The Environment: A CEO's Perspective."⁹

Proctor & Gamble - From 1997 to 1999, Procter & Gamble gave FREE \$25,000 a year.¹⁰ The company's senior vice-president and general counsel, James Johnson, spoke to judges at the August 1998 seminar on "Science in the Courts: A View from an R&D Based Company."¹¹ In August 1997, Johnson lectured on "Judicial Gatekeeping: Sound Science in the Court Room."¹²

Temple-Inland - Temple-Inland, a forest products company, gave FREE \$30,000 in 1997 and \$20,000 in both 1998 and 1999.¹³ Their vice president, Dr. C. Michael Harbordt, spoke twice, in July 2002¹⁴ and July 2000.¹⁵

Caterpillar, Inc. - Caterpillar, Inc. funded FREE in 2001;¹⁶ their corporate litigation attorney, Douglas S. Grandstaff, spoke at FREE's July 2002 seminar on "The Environmental and Economic Impact of Regulation by Litigation"¹⁷ and attended the August 2001 event—with ample access to judges—as a "guest."¹⁸

Georgia-Pacific - Georgia-Pacific has contributed to FREE.¹⁹ James Kelley, their senior vice president and general counsel lectured the judges in July 2000 on "The Complexities of Complying with Environmental Laws."²⁰

General Motors - Contributor General Motors²¹ had their senior vice-

The problem with FREE's funding, in a nutshell, is that virtually every one of its funders has a clear stake in the results of environmental litigation in federal courts.

It is absolutely clear that one of the benefits that corporations get by funding FREE is that, in exchange for corporate funding, FREE provides these corporations access to judges at their judicial programs.

president and general counsel, Thomas Gottschalk, address an August 2000 seminar on “The Impact of Environmental Regulation & Uncertainty on Business Decision Making in the Auto Industry.”²²

FREE gets corporate support because of its seminars for federal judges and, in exchange for this corporate support, FREE lets these corporations send representatives to their trips where they get to spend five or more days riding horseback through Yellowstone country with federal judges and even the opportunity to “teach” federal judges on their views of environmental topics.²³ Accounting tricks do not remove the problem that corporate funding poses for judges attending FREE’s programs.²⁴

B. FREE’s “Dead Men” Foundations Are Tied to Live Corporations That Have Real Litigation Agendas.

Even if FREE got no funding directly from corporations, its funding sources would still be very problematic because of the litigation interests of FREE’s foundation funders.

Consider, for example, the Claude R. Lambe Foundation, which has been listed as a funder of six FREE judicial seminars since 1997.²⁵ Claude Lambe is indeed a dead man. While he lived, however, he was a founding partner²⁶ of Koch Industries, an oil, gas, and agribusiness conglomerate that is the second largest privately-held company in America.²⁷ At his death, Mr. Lambe created a foundation that is now controlled by Charles G. Koch, the chairman and chief executive officer of Koch Industries.

The Board of Trustees for the Lambe Foundation consists of the following: Charles Koch; his wife Elizabeth B. Koch; Wayne Gable, Koch Industries’ managing director of federal affairs and lead Washington lobbyist;²⁸ Richard Fink, who sits on Koch Industries’ Board of Directors;²⁹ and Vonda Holliman, Koch Industries’ foundation accounting officer.³⁰ The Lambe Foundation also pays Koch Industries an annual fee for its management of the Foundation.³¹

The Koch foundations themselves recognize the fallacy of the “dead man” label as applied to the Lambe Foundation. A 1999 Koch foundations report, prepared for an internal ethics investigation of the foundations’ FREE funding,³² states the following:

On questioning, a staff member of FREE indicated that “dead-men foundations” are, roughly speaking, those foundations that are not controlled by the settlor. Thus, under this view, the CRL [Claude R. Lambe] Foundation is a “dead-man” foundation notwithstanding the fact that it is controlled by Charles Koch. Charles Koch’s control of Koch Industries, however, calls into question at least the relevance of this term, as defined by FREE, if not the accuracy of the disclosure.³³

In other words, FREE’s explanation of its funding sources, an explanation that FREE continuously uses to attract judges to its programs³⁴ and to defend itself in the media,³⁵ has been seriously undermined even by FREE’s own funders.

Koch Industries is a notorious environmental polluter. In the last decade, Koch has regularly been a defendant in civil and criminal environmental cases in federal court that threatened the company with hundreds of millions of dollars in

civil fines and serious criminal penalties. The Lambe Foundation functions as an arm of Koch Industries. For FREE to claim that funding from the Lambe Foundation causes no problem because Claude Lambe is dead misses the point entirely. The point is that the Lambe Foundation has the litigation interests of Koch Industries in mind and advances these interests by funding FREE. As illustrated in case studies 2 and 3 in Chapter 4, this presents problems for judges that attend FREE seminars and preside over cases involving Koch.

In addition, most of the foundations that FREE identifies as funding their programs for judges simultaneously fund libertarian law firms like Pacific Legal Foundation and Washington Legal Foundation to bring federal court litigation challenging environmental laws.³⁶ In this way, these sponsoring foundations can attempt to influence both the judges and the cases that will come before them.

For example, the largest funder of FREE's seminars in recent years has been the M.J. Murdock Charitable Trust, which gave FREE \$275,000 in 2000.³⁷ That same year, Murdock gave \$300,000 to Pacific Legal Foundation and \$263,500 to the Washington Legal Foundation.³⁸ Another significant seminar funder is the John M. Olin Foundation which gave FREE \$50,000 in 2000.³⁹ The same year Olin contributed \$600,000 to WLF⁴⁰ and \$120,000 to PLF.⁴¹ Olin also contributed \$225,000 to the Institute for Justice for litigation programs and to establish a litigation clinic at the University of Chicago Law School.⁴² The Institute for Justice is a libertarian law firm that frequently litigates on property rights and takings issues.⁴³ The Charlotte and Walker Kohler Foundation, which gave FREE \$30,000 a year from 1998-2001, gave the litigation group Defenders of Property Rights \$50,000 during the same period.⁴⁴

We are not the only ones to link FREE's "educational programming" to the litigation activities of WLF, PLF, and others. These are the words of FREE trustee James Huffman:

[T]he Political Economy Research Center (PERC) laid the foundation for what has become known as free market environmentalism. *Through a long term strategy of educational programming*, PERC and its offshoot, the Foundation for Research on Economics and the Environment (FREE), have spread their message to journalists, congressional staffers, federal judges, government bureaucrats, environmental activists, and the general public.

* * *

Meanwhile, larger and more influential conservative think tanks have taken on the command and control orthodoxy in Washington, D.C. and across the country. * * * At the same time, a handful of conservative, public interest law firms, notably the Pacific Legal Foundation and the Washington Legal Foundation, have consistently challenged regulatory excesses and defended the economic liberties essential to a free market economy.⁴⁵

Thus, in the words of a FREE trustee, FREE is engaged in "educational programming" of federal judges that supports the legal challenges to "command and control" environmental protections brought by PLF and WLF. The fact that the same foundations support FREE's seminars and WLF's litigation suggests

***FREE's
explanation of
its funding
sources, an
explanation that
FREE
continuously
uses to attract
judges to its
programs and to
defend itself in
the media, has
been seriously
undermined even
by FREE's own
funders.***

***In the words of a
FREE trustee,
FREE is engaged
in “educational
programming” of
federal judges
that is designed
to support the
legal challenges
to “command
and control”
environmental
protections
brought by PLF
and WLF.***

A specific case example helps illustrate the problem with FREE’s foundation funders. For the last decade, in courts around the country, the Washington Legal Foundation (WLF) has been waging a litigation war against Interest on Lawyers Trust Account (IOLTA) programs. IOLTA programs, in place in every state in the country, generate more than \$160 million annually for legal services for the poor. They do so by pooling funds held by lawyers for clients that would otherwise be too small and held for too short of a time to generate net interest. IOLTA programs pool these funds in interest bearing accounts and use the interest generated to fund legal services for the indigent.

WLF argues that IOLTA programs “take” property rights in the interest generated in violation of the Fifth Amendment’s takings clause. WLF has described its litigation campaign against IOLTA as an attempt to “deal a death blow to the single most important source of income for radical legal groups all across the country,” “groups dedicated to the homeless, to minorities, to gay and lesbian causes.”⁴⁶ After the Fifth⁴⁷ and Ninth circuits⁴⁸ split on

very strongly that these foundations too understand the synergy between the complementary efforts: they fund FREE to advance the litigation interests of other foundation grantees.

III. FREE’s Bias

The final problem with FREE’s seminars is that FREE uses its judicial seminars to advance the pecuniary and ideological interests of the corporations and foundations that provide FREE’s funding. As FREE’s Chairman John Baden has written, FREE’s seminars offer “a coherent new vision” with a “unifying theme” of “rejection of top-down, command and control environmentalism.”⁵² As noted above, FREE trustee James Huffman has described FREE’s trips as “educational programming” of judges designed to complement the efforts of groups like the Heritage Foundation and Pacific Legal Foundation.⁵³

FREE has defended its use of free trips to influence the views of federal judges as the American way. Responding to criticism of FREE’s judicial seminars, Huffman told the *San Diego Union-Tribune*: “If people feel strongly about ideas and they want to influence someone in government they can - that’s the way the system works.”⁵⁴ But is this how the system should work? Should we permit corporations and other interested parties to use lavish trips worth thousands of dollars to lobby federal judges?

A. FREE on Climate Change

To see precisely how FREE’s seminars advance the pecuniary and ideological interest of FREE’s funders, it is helpful to examine in more detail the agenda and substance of the message that is delivered at FREE seminars. We did this once already in *Nothing for Free*, where we examined FREE’s *Federal Judge’s Desk Reference to Environmental Economics* and the agenda for one of FREE’s basic courses in environmental economics and supported, in detail, our conclu-

WLF's challenges to the Texas and Washington state programs, the Supreme Court granted review and upheld IOLTA.⁴⁹

In August 2001, Judge W. Eugene Davis of the Fifth Circuit Court of Appeals attended FREE's basic course in Environmental Economics and Policy Analysis.⁵⁰ In May of 2002, Judge Davis voted to deny rehearing of a panel of the Fifth Circuit that adopted WLF's takings theories and invalidated IOLTA programs in states throughout the Fifth Circuit. The vote on rehearing was 7 to 7, meaning that, in essence, Judge Davis cast the deciding vote.⁵¹

The fact that the foundations that fund FREE also fund WLF raises the following question: Wouldn't the foundations supporting WLF's campaign against IOLTA be delighted to find out that their funding of FREE permitted a judge on the Fifth Circuit to spend five days at a Montana seminar sponsored by an organization that advances absolutist views on property rights?

sion that FREE's seminars promote a school of thought called "free market environmentalism" and "offer no balance whatsoever in terms of presenting views contrary to the seminars' principle themes."⁵⁵

We update that research in this report with an examination of a July 2002 FREE trip entitled "Understanding the Ecology, Economics and the Ethics of Climate Change."⁵⁶ This seminar provides a useful vehicle for analysis because FREE has posted on its website both the agenda for this seminar and an opinion piece, written by FREE's John Downen, that describes, in FREE's words, the programming missions of this particular seminar.⁵⁷ Both the seminar schedule and Downen's article are attached in Appendix A to this report.

The July 2002 panel was co-directed by FREE's Chairman John Baden, FREE's Program Director Pete Geddes, and George Priest, the John M. Olin Professor of Law and Economics at Yale Law School. Other instructors were: Prof. Todd Zywicki of George Mason Law School, Howard Klee of the World Business Council for Sustainable Development,⁵⁸ Michael Harbordt, vice-president of environmental affairs for the Temple-Inland Forest Products Corporation, Douglas Grandstaff, corporate litigation attorney for Caterpillar, Inc.,⁵⁹ University of Colorado law professor Lakshman Guruswamy, Michael Schlesinger of University of Illinois, Neal Wilkins, formerly of Port Blakely Tree Farms, and Robert Mendelsohn, Professor of Forest Policy at the Yale School of Forestry and Environmental Sciences.⁶⁰

According to FREE, Professors Schlesinger and Mendelsohn started FREE's climate seminar by "emphasiz[ing] the deep uncertainty around global warming" and noting that "natural temperature variation has contributed as much to warming over the last 25 years as humans have."⁶¹ FREE used this uncertainty to advocate that the U.S. and other countries around the world "adapt" to climate change instead of cutting emissions. Adaptation, FREE argues, means more economic growth because "richer countries have greater resources to deal with environ-

*FREE eschews
supply-side
limits on the
amount of
carbon produced
because these
limits "restrict[]
freedom."*

FREE rounded out its seminar with a broadside attack against environmentalists and environmental organizations.

mental problems.”⁶² Here are FREE’s words:

Given the uncertainty around warming, and the fact that some models predict that temperature increases of up to 4.5 degrees Fahrenheit would have beneficial effects, increasing our adaptability to change may be more important than cutting emissions. The best way to do this, particularly for the developing world, is through economic growth.⁶³

Beyond adaptation and more economic growth, FREE argues in favor of creating markets for carbon emission. FREE eschews supply-side limits on the amount of carbon produced because these limits “restrict[] freedom.”⁶⁴ Instead, FREE argues that such a market should be created entirely on the demand side with the World Bank and environmentalists paying “for environmental services” provided by owners of forests and grasslands. In FREE’s words: “Environmentalists truly concerned about global warming could put their money where their mouths are and buy and hoard carbon credits. This reduces emissions without restricting freedom.”⁶⁵

FREE’s solution to climate change, in other words, is to have taxpayers and environmental groups pay timber companies for the carbon sequestration services provided by their operations. Mandatory reduction in carbon emissions are rejected because they hinder growth and restrict freedom.

FREE rounded out its seminar with a broadside attack against environmentalists and environmental organizations. This attack was delivered primarily by George Mason’s Todd Zywicki, who delivered two lectures on environmental “rent-seeking” explaining how environmentalists prefer regulation, because “the regulatory approach allows them to exert an influence disproportionate to their numbers,”⁶⁶ and Douglas Grandstaff of Caterpillar Inc., who lectured on “the environmental and economic impacts of regulation by litigation.”⁶⁷ Summarizing this portion of the seminar, FREE asks:

Are Greenpeace, the Sierra Club, and their ilk more interested in social engineering and scaremongering than in truly helping the environment? Law and litigation are their preferred tactics. Do they understand that growth-stifling regulations harm the world’s poor? Their positions suggest that these Greens hold humanity in low regard.⁶⁸

FREE’s article summarizing its July climate seminar concludes by advocating that we apply the “ecological principle of resiliency” to the “difficult and contentious” question of climate change. This resiliency principle holds that “wealth improves the ability to cope.” Climate policies that “inhibit creation of wealth in the Third World,” FREE concludes, “may soothe the psyches of affluent Greens but they fail the ethical test.”⁶⁹

In another recently published article, FREE’s Pete Geddes, a co-director of the July seminar, takes this broadside a step further, analogizing what he calls the “romantic environmentalism” of politicians such as Al Gore to the authoritarian political movements run by “Castro, Franco, Hitler, Pol Pot, and Stalin.” He concludes that “we must recognize the danger of romantic environmentalism for what it may become - tyranny cloaked in a Green shroud.”⁷⁰ Similarly, in December 2003, FREE’s John Baden compared environmentalists who oppose genetic engineering of food to “Stalin and Mao” because they are willing to “sacri-

fice millions of the worst off in pursuit of their utopia."⁷¹

IV. Conclusion

Despite the explanation of FREE's bias in *Nothing for Free* and the very candid admissions by FREE and its trustees about the purpose and nature of FREE's judicial programs, judges and other commentators still frequently treat FREE's bias as either an open question⁷² or an irrelevant one.⁷³ It is neither. The description of FREE's climate change trip that FREE itself has posted on its website should close this debate once and for all. The positions FREE advanced at its July 2002 climate change seminar are indistinguishable from the positions advanced by industry groups on the topic and diametrically opposed to the positions taken by environmentalists.⁷⁴ The agenda for the most recent FREE program, a September 2003 program for federal judges on toxic torts, appears equally one-sided.⁷⁵ Environmentalists, who have an intense interest in having laws that prevent climate change passed and enforced, and toxic tort cases heard fairly, have every reason to be outraged at the "educational programming" offered at FREE's seminars. More generally, environmentalists have a right to be offended by the fact that educational programs for federal judges are organized and conducted by people like Baden, Geddes, and Downen, who compare environmental activists to Stalin, Hitler, and Pol Pot.

FREE's bias is relevant because it indicates that corporations and foundations fund FREE to advance their litigation interests, which correlate with the bias in FREE's programming. As importantly, it gives reasonable observers the impression that the judiciary can be lobbied and the basis for questioning judicial independence. This is true even if no judge has ever actually been influenced by the bias inherent in FREE seminars.

We are not arguing that judges should avoid particular ideas or messengers because they are "biased." Indeed, as described in Chapter 5, we do not believe that bias alone should prevent a judge from attending any particular seminar. But that doesn't make irrelevant the bias that accompanies a very valuable gift to judges from corporations and other interested parties. FREE's seminars are biased, and coupled with the corporate largess that makes FREE's seminars possible and the presence of corporate officers at their trips, FREE's seminars create a very serious appearance problem for the federal judiciary. We make this final point even more clearly in the case studies in the following chapter.

***FREE's
programming . . .
gives reasonable
observers the
impression that
the judiciary can
be lobbied and
the basis for
questioning
judicial
independence.***

ENDNOTES

- ¹ Elkhorn Ranch Brochure, Gallatin Gateway, Mont. (brochure on file with CRC); see also <http://www.elkhornranchmt.com> (visited May 29, 2003).
- ² Gallatin Gateway Inn Brochure, Gallatin Gateway, Mont. (brochure on file with CRC); see also <http://www.gallatingatewayinn.com> (visited May 29, 2003).
- ³ FREE, IRS Forms 990 (2000-2001), available at www.guidestar.com (visited May 29, 2003).
- ⁴ Numbers are derived from CRC's review of federal judicial disclosure forms for the same years.
- ⁵ FREE, About Our Funding, available at <http://www.free-eco.org> (visited May 29, 2003).
- ⁶ RESOURCES FOR GLOBAL SUSTAINABILITY, INC., ENVIRONMENTAL GRANTMAKING FOUNDATIONS 265 (2001). The GE Fund also lists a \$10,000 grant to George Mason University for their Law and Economics Center.
- ⁷ FREE IRS Forms 990 (1997-99) (available at <http://www.communityrights.org/TaintedJustice/FREE979899.pdf>).
- ⁸ FREE Seminar Agenda, Real and Alleged Environmental Crimes, available at http://www.free-eco.org/agenda_seminar_judges_sept15_1998.html (visited May 29, 2003).
- ⁹ FREE Seminar Agenda, Environmental Economics and Policy Analysis, available at http://www.free-eco.org/agenda_seminar_judges_july6_1999.html (visited May 29, 2003).
- ¹⁰ FREE IRS Form 990 (1997-99) (available at <http://www.communityrights.org/TaintedJustice/FREE979899.pdf>).
- ¹¹ FREE Seminar Agenda, Bringing Sound Science & Economics to Risk Analysis, available at http://www.free-eco.org/agenda_seminar_judges_august25_1998.html (visited May 29, 2003).
- ¹² FREE Seminar Agenda, Environmental Economics and Policy Analysis, available at http://www.free-eco.org/agenda_seminar_judges_aug20_1997.html (visited May 29, 2003).
- ¹³ FREE IRS Forms 990 (1997-99) (available at <http://www.communityrights.org/TaintedJustice/FREE979899.pdf>).
- ¹⁴ FREE Seminar Agenda, Understanding the Ecology, Economics and Ethics of Climate Change, available at http://www.free-eco.org/agenda_seminar_judges_july9_2002.html (visited May 29, 2003).
- ¹⁵ FREE Seminar Agenda, Environmental Economics and Policy Analysis, available at http://www.free-eco.org/agenda_seminar_judges_july25_2000.html (visited May 29, 2003).
- ¹⁶ FREE, 2001 Corporate Funders, available at <http://www.free-eco.org> (visited May 29, 2003).
- ¹⁷ FREE Seminar Agenda, Understanding the Ecology, Economics and Ethics of Climate Change, available at http://www.free-eco.org/agenda_seminar_judges_july9_2002.html (visited May 29, 2003).
- ¹⁸ FREE Seminar Agenda, Environmental Economics and Policy Analysis, available at http://www.free-eco.org/agenda_seminar_judges_aug21_2001.html (visited May 29, 2003).

2003).

¹⁹ FREE, 2001 Corporate Funders, *available at* <http://www.free-eco.org> (visited May 29, 2003).

²⁰ FREE Seminar Agenda, Environmental Economics and Policy Analysis, *available at* http://www.free-eco.org/agenda_seminar_judges_july25_2000.html (visited May 29, 2003).

²¹ FREE, 2001 Corporate Funders, *available at* <http://www.free-eco.org> (visited May 29, 2003).

²² FREE Seminar Agenda, Beyond the Vicious Circle: Science in the Agencies and Courts, *available at* http://www.free-eco.org/agenda_seminar_judges_august8_2000.html (visited May 29, 2003).

²³ This stands in marked contrast to the express policy of George Mason's LEC, which prohibits corporate involvement in its trips. A sample letter used by LEC to invite judges to the program states in pertinent part:

We can sponsor your participation at an institute because of the generous contributions of private foundations, individuals, and corporations. We accept donations from anyone with a genuine interest in economic and scientific education. However, to protect the integrity and credibility of the program, we only accept general contributions and never donations for a specific purpose. *Of course, no corporate donor is ever allowed to interact with any program participants in any way whatsoever.*

Model LEC Invitation Letter (dated February 8, 1999) *reprinted in* Appendix B: Report on Koch Foundations' Funding of Judicial Education at 6-7 (1999) *in* Bruce A. Green, Ethics of Judicial Education: An Analysis of Private Charitable Gifts for Judicial Learning, Oct. 15, 1999 (prepared for the Fred and Mary R. Koch Charitable Foundation), *see infra* note 94. To be clear, we are not suggesting that LEC's policies and programs are better than FREE's. Indeed, LEC's policies are more problematic than FREE's in that LEC refuses to disclose the identity of its corporate funders even to judges attending its programs. Our point is only that even LEC recognizes that it is a serious problem to allow corporate funders to fraternize with judges at its seminars.

²⁴ Our view, expressed in the text that precedes and follows this note, is that FREE's attempt to use accounting tricks to insulate its seminars from criticism fails entirely to do so. We also note that, even on its face, FREE's policy does not appear to insulate judges attending their seminars from the charge that they are receiving a large gift funded by corporate litigants. FREE's description of its funding, quoted in text above, qualifies its assertion that corporate money does not go towards its judicial seminars by noting that foundations fund "direct" expenses such as "travel, room and board." This presumably allows FREE to use corporate money for "indirect" expenses such as the costs FREE incurs in putting on the programs. Under the Ethics Reform Act of 1989, these "indirect" tuition expenses are treated identically to "direct" costs for travel, room, and lodging. As a result, if corporate money is used for these indirect expenses, these corporations are giving a gift to federal judges.

²⁵ *See, e.g.,* Claude R. Lambe Foundation, IRS Forms 990 (1997-2000), *available at* <http://www.guidestar.org>. The Lambe Foundation is listed as a sponsor of seminars on August 20-24, 1997, *see* http://www.free-eco.org/agenda_seminar_judges_aug20_1997.html (visited May 29, 2003); October 8-12, 1997, *see* http://www.free-eco.org/agenda_seminar_judges_oct8_1997.html (visited May 29, 2003); June 16-21, 1998, *see* http://www.free-eco.org/agenda_seminar_judges_june16_1998.html (visited May 29, 2003); August 25-30, 1998, *see* http://www.free-eco.org/agenda_seminar_judges_august25_1998.html (visited May 29, 2003); and September 15-20, 1998, *see* http://www.free-eco.org/agenda_seminar_judges_sept15_1998.html (visited May 29, 2003). FREE's posted agen-

das do not list seminar sponsors for seminars in 1999-2001. The Lambe Foundation is listed as a sponsor for an Aug. 6-11, 2002 seminar, with a caveat noting that Lambe funded law professors' expenses while the John M. Olin Foundation paid for the judges' attendance. See http://www.free-eco.org/agenda_seminar_judges_aug6_2002.html (visited May 29, 2003).

26 Claude Lambe's status as a business partner of Fred Koch was confirmed in a phone call to the Koch Foundations' Washington office. See also <http://www.kochind.com/about/history.asp> (visited May 29, 2003).

27 Forbes Largest Private Companies 2002, available at <http://www.forbes.com/2002/11/07/privateland.html> (visited May 29, 2003).

28 Biography of Wayne Gable, available at <http://www.cse.org/know/board/wgable.html> (visited May 29, 2003).

29 Biography of Richard Fink, available at <http://bov.gmu.edu/fink.html> (visited May 29, 2003).

30 Holliman's position was confirmed via telephone conversation with Koch Industries' public affairs office on Dec. 4, 2002.

31 According to recent IRS filings, the four foundations each pay Koch Industries compensation for management services. See Claude R. Lambe Foundation, IRS Form 990 (2000), and Charles G. Koch Foundation, IRS Form 990 (2000), available at <http://www.guidestar.org> (visited May 29, 2003). Filings from the Fred and Mary Koch Foundation and the David H. Koch Foundation indicate that this money pays specifically for services provided by their treasurer, Koch employee Vonda Holliman. See David H. Koch Charitable Foundation, IRS Form 990 (2001), and Fred C. and Mary R. Koch Foundation, IRS Form 990 (2001), available at <http://www.guidestar.org> (visited May 29, 2003).

32 Responding to intense scrutiny of privately-funded judicial trips by policy makers and the media, the Koch foundations commissioned Professor Bruce Green, a legal ethics expert from Fordham University Law School, to do an analysis of the ethical implications of the seminars. To facilitate Professor Green's analysis, the Koch foundations provided Professor Green with a report "intended to serve as the factual basis upon which [Green] is to base his legal conclusions." This report [hereinafter "Koch Report"] was "drafted and provided by the foundations, in cooperation with the judicial education programs at issue." Professor Green's analysis was included in a package of materials prepared for an ABA panel discussion on the trips entitled "Continuing Education for Federal Judges: Purpose, Problems and Public Perception - The Controversy Examined," held at the ABA's annual meeting in Chicago on August 5, 2001. See Bruce A. Green, Ethics of Judicial Education: An Analysis of Private Charitable Gifts for Judicial Learning, October 15, 1999 [hereinafter "Green Analysis"]. The Green Analysis attached the Koch Report as Appendix B. Professor Green later published an expanded version of this analysis, without the Koch Report. See 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). The entire Koch Report is available at <http://www.communityrights.org/TaintedJustice/KochReport.pdf>.

33 Koch Report at 13.

34 *Id.* (FREE's "announcement letter [to judges] states that all seminar expenses are covered by 'funds from 'dead-men' foundations.'" Quoting Letter from John Baden, Ph.D., to Hon. Robert J. Dawson, Nov. 4, 1998.)

35 See, e.g., Marisa Taylor, *Judges' Failure to Disclose Junkets Sparks New Outcry Seminar Attendance Is Legal, But Sponsor Influence Questioned*, *SAN DIEGO UNION-TRIB.*, Aug. 7, 2000, at A1; Joe Stephens, *Judges' Free Trips Go Unreported; U.S. Jurists Say*

They Forgot to Comply With Ethics Law, WASH. POST, June 30, 2000.

³⁶ PLF was founded in 1973 to combat “increased government intrusion in our lives, regulatory infringements on private property and individual rights and assaults on free enterprise.” Pacific Legal Foundation, About Us, available at <http://www.pacificlegal.org/PLFProfile.asp> (visited June 12, 2003); see also <http://www.wlf.org> (visited June 12, 2003).

³⁷ M.J. Murdock Charitable Trust, Recent Grants Awarded, available at http://www.murdock-trust.org/grants_awarded/index.html (visited May 29, 2003).

³⁸ *Id.*

³⁹ John M. Olin Foundation, Schedule of Grants [hereinafter Olin Grants], available at <http://www.jmof.org>.

⁴⁰ Olin Grants, available at <http://www.jmof.org/grants/2001w.htm> (visited May 29, 2003).

⁴¹ Olin Grants, available at <http://www.jmof.org/grants/2001p.htm> (visited May 29, 2003).

⁴² Olin Grants, available at <http://www.jmof.org/grants/2001i.htm> (visited May 29, 2003).

⁴³ Institute for Justice, Legal Cases, available at <http://www.ij.org/cases/index.html> (visited May 29, 2003).

⁴⁴ Charlotte and Walter Kohler Charitable Trust, IRS Form 990PF (1998-2001), available at <http://www.guidestar.org> (visited May 29, 2003). FREE’s other major seminar sponsor is the Alex C. Walker Educational & Charitable Foundation, which contributed \$30,000 in 2000 and 2001, \$25,000 in 1999 and \$20,000 in 1998. Alex C. Walker Educational & Charitable Foundation, IRS Forms 990PF (2000), available at <http://www.guidestar.org> (visited May 29, 2003).

⁴⁵ James L. Huffman, *The Past and Future of Environmental Law*, 30 ENVTL. L. 23, 29 (2000) (emphasis added).

⁴⁶ Tony Mauro, *Escrow Fight: Is It Principle or Politics?*, LEGAL TIMES, Dec. 2, 2002, at 1.

⁴⁷ *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 270 F.3d 180 (5th Cir. 2001).

⁴⁸ *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835 (9th Cir. 2001).

⁴⁹ *Brown v. Legal Found. of Washington*, 123 S. Ct. 1306 (2003).

⁵⁰ Source: Financial Disclosure Forms for W. Eugene Davis (2001). See also http://www.free-eco.org/agenda_seminar_judges_aug21_2001.html (visited June 12, 2003).

⁵¹ Judge Leon Higgenbottom recused himself from the vote, and under Fifth Circuit rules, a tie vote is insufficient for rehearing.

⁵² John A. Baden, *Effective Environmentalism Uses a New Shade of Green*, THE SEATTLE TIMES, June 26, 1996.

⁵³ Huffman, *supra* note 45 at 29.

⁵⁴ Marisa Taylor, *Judges’ Failure to Disclose Junkets Sparks New Outcry: Seminar Attendance Is Legal, but Sponsor Influence Questioned*, SAN DIEGO UNION-TRIB., August 7, 2000.

⁵⁵ COMMUNITY RIGHTS COUNSEL, NOTHING FOR FREE: HOW PRIVATE JUDICIAL SEMINARS ARE UNDERMINING ENVIRONMENTAL PROTECTIONS AND BREAKING THE PUBLIC'S TRUST (2000) at 29-60 [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)). *Nothing for Free* painstakingly detailed the disturbing vision of environmental law and policy laid out in FREE's *Federal Judge's Desk Reference to Environmental Economics*. In a forward to the report, Abner Mikva, former Chief Judge of the U.S. Court of Appeals for the DC Circuit, noted what "a confidence builder" it must be for "an environmental group that sees [the *Desk Reference*] on the desk of a judge sitting on its case." NOTHING FOR FREE, at iv. There is an important addendum to this discussion. According to the Koch Foundation report, FREE not only provides judges with a copy of this *Desk Reference*, they require judges to sign a written affirmation attesting to the fact that they will "read this book prior to attending the seminar." See Koch Report at 16 (quoting letter from John Baden to Judge Peter Hill Beer, July 13, 1999). Judges must also commit to "attending all lectures, activities, lunches and dinners" during the course of the seminar. FREE's gift to judges, in other words, gives FREE a remarkable ability to control the lives and minds of judges during their stay at FREE's retreats.

⁵⁶ The seminar was held at the Gallatin Gateway Inn, Gallatin, MT, from July 9-14, 2002. FREE Seminar Agenda, Understanding the Ecology, Economics and the Ethics of Climate Change, available at www.free-eco.org/agenda_seminar_judges_july9_2002.html (visited May 30, 2003).

⁵⁷ John C. Downen, *Resiliency is the Key to Climate Change*, BOZEMAN DAILY CHRON., Nov. 13, 2002, available at <http://www.free-eco.org/pub/021113jd.htm> (visited May 30, 2003).

⁵⁸ FREE Seminar Agenda, *supra* note 56.

⁵⁹ Both Temple-Inland and the Caterpillar Corporation have contributed to FREE in recent years. Caterpillar supported FREE in 2001. FREE, 2001 Corporate Funders, available at <http://www.free-eco.org> (visited May 30, 2003). Temple-Inland gave FREE \$30,000 in 1997 and \$20,000 in both 1998 and 1999. See FREE IRS Form 990 (1997-99) (available at <http://www.communityrights.org/TaintedJustice/FREE979899.pdf>).

⁶⁰ FREE Seminar Agenda, *supra* note 56.

⁶¹ Downen, *supra* note 57.

⁶² *Id.*

⁶³ *Id.* While FREE's article does not attribute these views on adaptation, they seem most appropriately attributable to the views of Professor Mendelsohn, who has argued in other settings global warming will be good for the U.S. economy. See Michael Powell, *Warming Trend Seen for Northeast Environment: Report Commissioned by Congress Predicts the Region's Temperatures Will Rise at Least 6 to 9 Degrees in this Century*, L.A. TIMES, Jan. 13, 2002, at A22 ("Even in the extreme scenarios, the northern United States benefits from global warming," said Mendelsohn, editor of the forthcoming 'Global Warming and the American Economy.' 'To have New England lead the battle against global warming would be deeply ironic, because it will be beneficial to our climate and economy.'). The Electric Power Research Institute has provided some of the funding that has allowed Mendelsohn to reach such conclusions. See Joel Lang, *Get Used to It! You Call This Winter?* HARTFORD COURANT, March 3, 2002, at 5. Mendelsohn's rather cavalier views on the impact of climate change are captured by the following quote:

"These changes will happen over a long period of time," Mendelsohn said. "How we will feel about them we don't know exactly. You may be attached to your maple trees, but we had chestnut forests a hundred years ago. Do you lament the loss of chestnuts? Or that

you're sitting in Elm City and the Elm City doesn't have elms any more? I think these slow changes people adapt to. It's not clear they miss what was there."

Id. at 5.

⁶⁴ As *Nothing for Free* notes, many environmentalists support using market mechanisms to achieve a specific regulatory goal such as the return of carbon emissions to 1990 levels (the goal of the Kyoto Protocol). *NOTHING FOR FREE*, *supra* note 55 at 37. What no mainstream environmental group supports is the far more radical notion advanced by free market environmentalists that the market should be allowed to determine the amount of environmental protection. This market determination of the amount of carbon pollution is precisely what FREE was promoting at this July 2002 seminar.

⁶⁵ Downen, *supra* note 57.

⁶⁶ *Id.* In his published writings, Zwyicki claims that environmental groups "maintain almost a complete stranglehold on the flow of information to politicians and regulators." Furthermore, he calls the belief that environmental groups act in the public interest "naïve" and claims "environmental activists represent the interests themselves and their members, and it is purely serendipitous if their private interests overlap with the public." Todd J. Zwyicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 *TULANE L. REV.* 845, 879 (1999).

⁶⁷ FREE Seminar Agenda, *supra* note 56.

⁶⁸ Downen, *supra* note 57.

⁶⁹ *Id.*

⁷⁰ Pete Geddes, *Romantic Environmentalism: A Fatal Conceit*, *BOZEMAN DAILY CHRON.*, Nov. 20, 2002, available at <http://www.free-eco.org/articleDisplay.php?id=14> (visited Mar. 10, 2004).

⁷¹ John Baden, *Dying For Ideology*, *BOZEMAN DAILY CHRON.*, Dec. 31, 2003, available at <http://www.free-eco.org/articleDisplay.php?id=377> (visited Mar. 10, 2004).

⁷² See, for example, the case of *In re Aguinda*, in which Judge Winter declined to rule on the bias question, but assumed it for the purposes of ruling on plaintiffs' recusal motion. Deciding questions of balance, the court said, "depends so heavily on each individual's view as to whether his or her position on the issue is prominently featured that a search for consensus as to what is a balanced presentation of a particular issue is almost chimerical." 241 F.3d 194, 205 (2d Cir. 2001).

⁷³ This "irrelevance" argument goes down one of several avenues. Judge Weinstein has argued that judges should not be deterred from attending conferences that espouse a certain viewpoint" because "[m]ature and experienced judges' thoughts can seldom be rechanneled by an instructor's bias." Jack B. Weinstein, *Limits on Judges Learning, Speaking, and Acting - Part 1 - Tentative First Thoughts: How Many Judges Learn?* 36 *ARIZ. L. REV.* 539, 552 (1994). Judge Raymond Randolph of the DC Circuit has argued that the answer to the bias of groups like FREE is for groups like Community Rights Counsel to "compete in the marketplace of ideas" by hosting biased seminars of their own. A. Raymond Randolph, *Judicial Seminars: Political Correctness or Appeal to Ethics?*, 2 *ENGAGE* 146, 148 (2001). As evidenced in our proposed solution outlined in Chapter 5, we are very much in favor of the marketplace of ideas; what we object to, primarily, is the way corporate money is skewing this marketplace in a way that advances the litigation interest of these corporations.

⁷⁴ Contrast the position of the Natural Resources Defense Council, at <http://www.nrdc.org/globalWarming/default.asp> (visited May 30, 2003), with that of the industry-supported Global Climate Coalition, at <http://www.globalclimate.org> (visited

May 30, 2003).

⁷⁵ Available at http://www.free-eco.org/agendas/agendas_judges_sept9_2003.php.