
CHAPTER 4 CASE STUDIES

Professor Stephen Gillers aptly described the status of debate over the topic of private judicial trips in a May 2002 letter to the Senate Judiciary Committee:

The gap between judges' reaction to criticism of these events and the perspectives of the critics does not seem to be shrinking. Many judges are annoyed to think that anyone would think that they would compromise their objectivity because of an invitation (or many invitations) to a privately funded judicial seminar. Critics, on the other hand, argue that only certain groups of litigants have the wherewithal to support these seminars and that it diminishes the appearance of justice when judges attend them at luxury resorts to hear programs designed by those who can afford to sponsor them.¹

Ultimately, the propriety of judicial participation in private seminars offered by FREE and others is not supposed to be judged by either judges or the critics of these trips. The arbiter of the propriety of these seminars, according to the Code of Conduct for United States Judges, is the "reasonable minds" test.² If reasonable minds, knowing the relevant facts, would form "a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired," then judges should not participate. As Judge Howard Markey has put it:

For it is not the judges' perception that counts, nor the judges' confidence in their own ethical rectitude, nor even the judges' own sense of logic. In building and maintaining the image of the judiciary, it is the reasonable perception of the people that counts—and that is all that counts.³

The judgment of the people has already been rendered in a very meaningful way. In addition to the criticism from ethics experts, policy makers, and former judges, thirty newspapers with widely differing editorial perspectives have editorialized in opposition to FREE trips.⁴ To our knowledge, not a single editorial board has endorsed FREE's seminars.⁵

The following case studies should end any lingering debate. We do not believe that it is possible for a reasonable person to look at the facts collected in these case studies and conclude that the existing ethical guidance for judges is

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We do not believe that it is possible for a reasonable person to look at the facts collected in these case studies and conclude that the existing ethical guidance for judges is adequately shielding judges from the appearance of impropriety.

adequately shielding judges from the appearance of impropriety in attendance of FREE seminars. While each of these case studies is disturbing, the third case study—discussing the links between FREE and the DC Circuit’s opinion in *ATA v. EPA*—stands out because of the strength of the evidence that indicates FREE has used its seminars to advance the position of its corporate sponsors in a pending, and important, environmental case.

CASE STUDY I: FREE, Texaco, and the Destruction of the Ecuadorean Rain Forest

Imagine you are the litigant in the following scenario. You are a native Ecuadorean living in a remote corner of the Amazon ravaged by some twenty years of oil extraction by a United States company—Texaco—that employed outmoded drilling and waste disposal practices that it had abandoned decades before in its operations in the United States. Your people suffer from various diseases and cancers linked to environmental contamination.

Convinced that the American court system, with its reputation for fairness and justice, is the best hope for relief for your people, you file a lawsuit in federal court in New York, where Texaco is headquartered. The judge in your case raises a series of procedural roadblocks and then dismisses your claim on procedural grounds. The judge then attends a vacation seminar paid for in part by Texaco at which he is “instructed” by the company’s former CEO, a key potential witness in the case. When the Second Circuit reverses the judge’s dismissal and sends the case back to district court for reconsideration, you move for recusal. The judge rejects your motion. On appeal, your recusal motion is again denied,⁶ this time in an opinion written by the Chief Judge of the Second Circuit, who had harshly criticized a congressional effort to ban judicial acceptance of private seminars gifts just weeks earlier. Two weeks later, the district court judge yet again dismisses your case on procedural grounds. In all this time, not once has a court even entertained the merits of your complaint.

Not surprisingly, at the end of this frustrating five-year odyssey, plaintiffs and their counsel are left feeling “absolutely outraged” by the judges’ conduct and unjustly disadvantaged by the American justice system.

A. Background

Texaco’s impact on the 2,000-square-mile stretch of Ecuadorean rainforest known as the Oriente could be compared to that of the Exxon *Valdez* oil spill or Union Carbide’s Bhopal disaster but for one important detail. What happened to the Ecuadorean Indians and their homeland was no accident. The American oil giant came to the region nearly 30 years ago to drill for crude oil.⁷ Texaco took advantage of the country’s lax environmental standards and employed outmoded drilling and waste disposal practices.⁸

Before the company pulled out in 1992, it logged more than 2 million acres of rainforest and built in its place a massive system of roads, pumps, pipelines and waste pits to extract crude oil from thousands of feet under the ground.⁹ These inadequate waste systems still dump as much as 4.3 million gallons of contaminated waste water into Amazon tributaries.¹⁰ Broken and deteriorating oil pipes have spilled at least 16 million gallons of oil into the rainforest—one and one-half times the 10.8 million gallons spilled in the *Valdez* accident.¹¹

Texaco transformed a once-pristine wilderness, one of the most species-

rich environments on Earth, into a toxic waste dump.¹² The Indians and settlers who still reside in the region face higher rates of cancer, a rise in miscarriages, and unexplained skin, digestive, and respiratory ailments as a result of river contamination and toxic fumes.¹³ One study found streams near the Texaco oil facilities contaminated with arsenic, lead, mercury, and other chemicals at a level between 10 and 1,000 times the Environmental Protection Agency's recommended safe levels.¹⁴ According to the report, "medical examinations of residents showed health ailments associated with exposure to these highly toxic chemicals."¹⁵ Another study concluded, "The level of petroleum in the rivers, on which local residents depend for daily usage is 200 to 300 times higher than the limits set for human consumption."¹⁷ In addition, some 1.5 million cubic meters of gases produced in the process of separating crude oil are burned in the Amazon region each day with no controls on emissions.¹⁸

In response, Massachusetts environmental lawyer Cristobal Bonifaz filed a lawsuit against Texaco in the United States on behalf of 30,000 native Ecuadorians seeking up to \$1 billion in compensation and remediation. The case was filed in federal court in New York, where Texaco is headquartered, and assigned to U.S. District Judge Jed Rakoff. Judge Rakoff promptly dismissed the action, accepting Texaco's argument that the case should be tried in Ecuador, where a more pliable judicial system would give Texaco a considerable advantage.¹⁹ The Ecuadorians sought reconsideration after the government of Ecuador moved to intervene on their behalf, but Judge Rakoff denied reconsideration on the grounds that New York was an "inconvenient" forum for the case.²⁰ When the Second Circuit reinstated the claims in 1998, it sent the case back to Judge Rakoff's court.²¹ Almost two years then went by without a decision.

B. The Seminar

During this two-year waiting period, Mr. Bonifaz made an unsettling discovery. Utilizing CRC's *Trips for Judges* website, Bonifaz learned that Judge Rakoff attended a FREE seminar at a Montana dude ranch²² entitled "Real and Alleged Environmental Crises"²³ the summer before the case was remanded to him. Bonifaz also discovered that Texaco contributed \$50,000 to FREE in 1998²⁴ and Judge Rakoff's seminar included a lecture by Alfred C. DeCrane, Texaco's former chairman and CEO, entitled: "The Environment: Some Thoughts from the Corner Office."²⁵ As the head of Texaco during the time of the destruction in the Oriente, Mr. DeCrane was a key potential witness in the *Aguinda* case.²⁶

"I nearly fell out of my chair when I learned that Texaco had a part in funding that seminar," said Mr. Bonifaz in an interview. "I was absolutely outraged, because the guy who gave the lecture, Alfred DeCrane, was the chairman of Texaco during the time the events of the case were going on. Can you imagine [Texaco's response] if one of my indigenous people had been at a resort hotel for six days with the judge in the case?"²⁷

In September 2000, the *Aguinda* plaintiffs cited these facts and asked Judge Rakoff to recuse himself. They argued that the topics of the seminar were "directly related to the issues bound to arise in the course of [their] litigation."²⁸ They contended that Judge Rakoff's attendance at the seminar "created an appearance of partiality" that disqualified him from hearing the case on remand.²⁹

C. Recusal Denied

One of the more remarkable aspects of federal court rules is the fact

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In his ruling, Judge Rakoff argued that his acceptance of the travel gift was within existing rules, a hair-splitting explanation that does not remove qualms about his judgment or impartiality.
- Editorial, The New York Times

that recusal motions are heard by the very same judge the petitioners are seeking to remove.³⁰ When the judge in question decides against recusal, his ruling is then reviewed by an appellate court for “abuse of discretion.”³¹ The appeals court can only overturn the presiding judge’s failure to recuse if the petitioners “clearly and indisputably”³² demonstrate that the judge abused his or her discretion. In filing the recusal motion, the *Aguinda* petitioners faced a decidedly uphill struggle.

Judge Rakoff denied recusal in a short order that hinges on the judge’s assertions that he was unaware FREE received any funding from Texaco (notwithstanding his duty under Advisory Opinion 67 to inquire into the source of funding for his seminar trip)³³ and that the merits of the *Aguinda* case were not discussed at the seminar.³⁴ The ruling drew a remarkable response from the *New York Times*, which editorialized against Rakoff’s decision: “Judge Rakoff argued that his acceptance of the travel gift was within existing rules, a hair-splitting explanation that does not remove qualms about his judgment or impartiality.”

Judge Rakoff’s decision was affirmed on appeal.³⁵ Citing the “extraordinary showing” required to overturn a judge’s decision not to recuse, the Second Circuit ruled that “the district judge did not abuse his discretion in denying the motion for disqualification.”³⁶ The Circuit Court found that “no reasonable observer” would believe that “Texaco’s provision of a minor portion of FREE’s general funding” - Texaco’s grant of \$50,000 provided approximately 6 percent of FREE’s funding for 1998 - “would influence a seminar-attending judge’s decision in litigation involving Texaco.”³⁷ While noting that “the recusal calculus will differ” “where a presentation * * * involves parties, witnesses, or counsel in particular actions,” the Court never discussed the implications of Mr. DeCrane’s participation at Judge Rakoff’s seminar.

To hold that Judge Rakoff’s FREE trip did not cause an appearance of impropriety, the court had to finagle around the discordant fact that the *New York Times* had declared in an editorial that the trip had created just such an appearance. With the “appearance” issue judged by a “reasonable person” standard,

FREE, Texaco, and One Federal Court

Multi-national resource extraction companies like Texaco are involved in hundreds of lawsuits all over the country. Thus, it would be surprising indeed if the *Aguinda* case is the only time where Texaco has had the opportunity to appear before a judge that has attended a FREE trip.

As this review of the Texaco cases before FREE-attending judges in just one district court in one part of Louisiana indicates, these occurrences are all too common. Take, for example, District Court Judge Stanwood Duval (E.D. La.) who attended a FREE conference in July 1999⁴⁴ at which Mr. DeCrane lectured on “The Environment: A CEO’s Perspective.”⁴⁵ Judge Duval had two cases involving Texaco before him at the time he attended the seminar. A case called *In re South Coast Boat Rentals* was filed in Duval’s court in November 1998.⁴⁶ Duval ruled on summary judgment motions in the case on August 12, 1999, one month after attending the FREE seminar with Mr. DeCrane.⁴⁷

this required the court to find that the editors of one of the nation's largest and most distinguished papers were not sufficiently reasonable. To do so indirectly, rather than directly, the Court singled out Community Rights Counsel for its "ample access to the media."³⁸ "A recusal-causing appearance," the court ruled, "must be based on the facts of the presentation and not on the amount of publicity partisans on the particular issues can muster."³⁹

We are flattered by the court's remarkable assessment of our public relations' operation (CRC is a four-employee public interest law firm with three lawyers and no press secretary), but media coverage is driven, at least in part, by the facts of the particular story. Our "access to the media" surely pales in comparison to Texaco's, a multi-billion dollar, multi-national corporation. While a single editorial does not require a judge to recuse, judges need to take more seriously the overwhelming editorial opposition to FREE's seminars in deciding whether to attend FREE's seminars and in deciding whether recusal is necessary after attendance. To reiterate the words of Judge Markey, "it is not the judges' perception that counts, nor the judges' confidence in their own ethical rectitude, nor even the judges' own sense of logic. In building and maintaining the image of the judiciary, it is the reasonable perception of the people that counts." By stating that the appearance of impropriety "in the present case * * * is based solely on publicity generated by critics rather than underlying facts," the Court insults the intelligence and professionalism of the *Times* and newspapers around the country that have editorialized against FREE trips and falls into the trap warned of by Judge Markey.⁴⁰

After the Second Circuit ruled on the recusal motion, Rakoff dismissed the case again.⁴¹ Another appeal to the Second Circuit failed in August 2002,⁴² leaving Bonifaz and his indigenous clients no choice but to file suit in Ecuador or give up their fight for justice. The American court system failed the Ecuadorean Indians, in no small part because judicial support for industry-paid seminars tainted, or appeared to taint, the proceedings. "I'm still outraged about [the seminar], and I definitely think it had a tremendous impact on my case," Bonifaz said. I will forever feel that it disadvantaged us in the litigation."⁴³

Likewise, Texaco was also a claimant in *In re Gladiator Marine, Inc.* which was on Judge Duval's docket at the time he attended the FREE trip and listened to Mr. DeCrane's "perspective" on the environment.⁴⁸

Duval's colleagues, judges Ivan Lemelle and A.J. McNamara, had similar FREE/Texaco issues. Judge Lemelle attended the July 1999 FREE seminar at which Mr. DeCrane lectured.⁴⁹ Before him at the time was the case of *LeBouef v. Texaco*.⁵⁰ Judge Lemelle dismissed the claim against Texaco in January 2000. Likewise, Judge McNamara attended FREE seminars in June 1998 and September 1999.⁵¹ During this time, Texaco was before his court in four cases.⁵² For example, days before he attended the June 1998 FREE seminar Judge McNamara ruled for Texaco in an important case brought by native Americans challenging Texaco's right to build a gas processing plant on an ancient Indian burial ground.⁵³ A motion for reconsideration was filed by the tribe on the day Judge McNamara left for FREE. Judge McNamara denied this motion a month and a half later.

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The Nomination of D. Brooks Smith

The contentious battle over the confirmation of Federal District Judge D. Brooks Smith to the Court of Appeals for the Third Circuit illustrates yet again the ethical concerns that private seminars can pose for federal judges.

Between 1992 and 2000, only four federal judges in America took more trips than Judge Smith.⁵⁴ During this period, Judge Smith took nine trips sponsored by the Law and Economics Center (LEC) and three trips sponsored by the FREE; trips that were held at resorts in places like Hilton Head, South Carolina and Sanibel Island, Florida⁵⁵ and were valued at more than \$37,000.⁵⁶

It was one particular trip, however, and one particular ruling, that united many senators and ethics experts against Judge Smith’s confirmation. In June 1993, Judge Smith spent a week at a resort in Hilton Head, South Carolina attending an LEC seminar on “Risk, Injury, and Liability.”⁵⁷ One of LEC’s funders that year was Medtronic,⁵⁸ who was also appearing before Judge Smith in a products liability case called *Gerber v. Medtronic*, challenging a defective Medtronic pacemaker.⁵⁹ In *Gerber*, Medtronic argued that tort claims against it were preempted by federal medical device standards. The LEC risk seminar, which “examine[d] the role of private insurance, as an alternative to civil liability”⁶⁰ and advocated against assigning losses to “the ‘deepest pockets,’”⁶¹ prominently featured Kip Viscusi,⁶² who in 1993 also produced a study with drug company officials

CASE STUDY II: *U.S. v. Koch Industries* and The Koch Brothers’ Web of Influence

If you ran Koch Industries, an oil, gas, and coal conglomerate that is America’s second largest privately-held corporation,⁶⁹ and were facing criminal charges and hundreds of millions of dollars in civil fines for violations of federal environmental law,⁷⁰ what would you do about it? One option would be to fix the corporation’s environmental problems and comply with the law, but what if that doesn’t comport with your ideology or generate the profits you seek? The other answer is to try to change the rules and change the players to free your company of the burden of complying with these rules. As discussed above, FREE trustee James Huffman says that is the great thing about this country: if you want to influence those in power, you can.⁷¹

A company with assets totaling as much as \$40 billion can buy a lot of influence.⁷² So can corporate officers like Charles and David Koch, who are both fabulously rich individually, and in control of four foundations—the Fred and Mary Koch,⁷³ Charles G. Koch,⁷⁴ David H. Koch,⁷⁵ and Claude R. Lambe⁷⁶ foundations—with combined assets of more than \$80 million.⁷⁷ Indeed, the Kochs’ philanthropic empire targets every stage of the political process—from elections to policy enactment to enforcement—and spans the media, legislatures, and the judiciary.

advocating for preemption of the type of claims.⁶³ In May 1994, Judge Smith granted summary judgment to Medtronic, finding that state law tort claims were “preempted” by federal law.⁶⁴ The Supreme Court ruled two years later in a case called *Lohr v. Medtronic*⁶⁵ that federal law did not in fact preempt the type of state tort claims at issue in *Gerber*.

Two of the country’s most distinguished experts in judicial ethics criticized Judge Smith for taking these trips and for his defense of these trips before the Senate. Stephen Gillers, Vice Dean of New York Law University Law School, concluded in a letter to the Senate Judiciary Committee that Judge Smith was “wrong” in his argument that he could attend the LEC seminar without inquiring into LEC’s corporate funders. “There would be room for much mischief,” Gillers wrote, “if a judge invited to an expense-paid seminar could rely on the non-profit nature of an apparently neutral sponsor to immunize the judge’s attendance.”⁶⁶ On the merits, Professor Monroe Freedman, the Lichtenstein Distinguished Professor of Law at Hofstra University Law School, concluded that Judge Smith violated three and perhaps four separate canons of judicial ethics in attending the LEC seminar while the *Gerber* case was pending.⁶⁷

Five senators voting against Judge Smith’s confirmation mentioned Judge Smith’s attendance at private seminars as an important reason justifying this vote.⁶⁸

These efforts start the old-fashioned way with generous campaign contributions⁷⁸ and legislative and executive branch lobbying.⁷⁹ They extend to the formation of the Cato Institute and Citizens for a Sound Economy (CSE), public relations and research institutes with multi-million dollar annual budgets that promote Koch’s anti-regulatory goals in Washington and in statehouses throughout the country.⁸⁰ Koch foundations have contributed more than \$9 million to CSE since its founding in 1984.⁸¹ Likewise, in just a four year period (1986-89), the Cato Institute received \$6.5 million from the Koch family foundations.⁸² Koch also provides critical funding for other groups that oppose environmental protections⁸³ and that challenge these protections in court.⁸⁴

What makes Koch unique is the extent to which it has extended its lobbying to the federal and state judges that are decision-makers in cases involving Koch Industries. As described in Chapter 3, the Charles Koch and the Claude Lambe foundations provided FREE with a total of \$495,000 between 1998 and 2001.⁸⁵ Koch foundations also provided millions to help start the Law and Organizational Economics Program at the University of Kansas (LOEC), which began offering FREE-like seminars to state judges in 1995. Between 1995 and 1999, LOEC hosted seminars in Colorado, Utah, and Florida resorts at which more than 550 judges from around the country were lectured on free-market principles.⁸⁶ Finally, Koch has funded state organizations that issue judicial scorecards that

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rate state judges on whether their decisions were sufficiently business-friendly⁸⁷ and has contributed to the campaigns of judges that pass this litmus test.⁸⁸

A. U.S. v. Koch Industries

Koch's efforts to lobby and shape the federal and state judiciary are disturbing even in the abstract. Only in the context of a real dispute, however, do the details of the problem emerge. The case of *United States v. Koch Industries*,⁸⁹ in particular, illustrates the inappropriate access Koch receives as a result of its contributions to groups such as FREE.

U.S. v. Koch was one of the most significant civil environmental enforcement cases of the past decade.⁹⁰ Prosecuted jointly by the federal government and the State of Texas, the government sought hundreds of millions of dollars in fines against Koch for more than 300 oil spills from Koch's pipelines and oil facilities in six states.⁹¹ In total, the suit alleged that Koch repeatedly violated the Clean Water Act and allowed some 3 million gallons of crude oil to leak from its pipelines into rivers, lakes, and streams mostly in Oklahoma, Texas, and Kansas. In one instance almost 100,000 gallons of oil was spilled in Texas, causing a 12-mile oil slick on Nueces Bay and Corpus Christi Bay.⁹²

Not surprisingly, Koch-funded groups came to the assistance of the company. For example, in March 1998, Citizens for a Sound Economy helped form a new organization called "Texans for Responsible Legal Fees" that relentlessly attacked then-Texas Attorney General Dan Morales for his practice—employed in *U.S. v. Koch*—of deputizing private law firms to prosecute law breakers on behalf of the state and receive compensation based on the fines recovered in the case.⁹³ In the words of Sam Goodhope, a former assistant Texas Attorney General who worked on the *Koch* case, this practice made the case against Koch possible: "[i]t is a big environmental case, involving millions of dollars. It couldn't go forward without outside counsel because of the resources and technical aspects."⁹⁴ Koch Industries' Political Action Committee also contributed \$5,000 and co-hosted a fundraiser for the campaign of John Cornyn, a strong opponent of deputizing private firms, who was elected in November 1998 to replace Morales. One of Mr. Cornyn's first actions as attorney general was to demand a reworking of the fee contract between the state and outside counsel in the *U.S. v. Koch* case. Michael Gallagher, one of the leading outside counsel for the state, resigned in protest of Cornyn's action.⁹⁵

But FREE attracted the biggest player in the *Koch* case: U.S. District Judge Vanessa Gilmore, the judge presiding over *U.S. v. Koch*, who reports attending a FREE "Environmental Economics and Policy Seminar" between July 16th and 20th, 1998, while the case was actively being litigated in her courtroom.⁹⁶ The Claude Lambe Foundation, which contributed \$120,000 to FREE in 1998, is listed by FREE as one of the two sources of funding for this seminar.⁹⁷ It bears recalling that though Claude Lambe himself is deceased—and therefore the gift technically meets FREE's criteria of accepting seminar funding only from "dead man" foundations—the foundation's chairman is Charles Koch, and every member of its board of directors is connected to Koch Industries. The Charles G. Koch Foundation also contributed \$75,000 to FREE that year.⁹⁸ Combined, the Koch foundations provided nearly 25 percent of FREE's total budget for 1998. Charles Koch was deposed in *U.S. v. Koch* in late 1999 for his role in the pollution at issue in the case.⁹⁹

It is hard to overstate how bad this looks for Judge Gilmore. *U.S. v. Koch* was one of the largest and most significant cases on her docket in July 1998—it was one of the most significant environmental cases pending in the country. Yet Judge Gilmore took a trip to a Montana resort worth many thousands of dollars where a primary source of funding was a foundation controlled by Koch Industries. Accepting this very valuable gift allowed her to spend five days at a Montana retreat learning why environmental statutes (such as the Clean Water Act, under which Koch was being prosecuted) were inefficient and should be replaced with “voluntary controls.” Judge Gilmore ultimately accepted a consent decree that required payment of a fraction of the fines original sought by the government.

Like many cases, the resolution of *U.S. v. Koch* was controversial, with environmentalists questioning the ultimate settlement.¹⁰⁰ How will these environmentalists feel when they learn that the presiding judge was at a Koch-sponsored trip while the case was pending for “educational programming” against federal environmental laws? Probably, they, like Mr. Bonifaz, will feel outraged and disadvantaged. Likely, their faith in the fairness and impartiality of the federal judiciary will be undercut. Undoubtedly, they will think this is just another way that Koch Industries buys access and influence.

We are not the only ones to have discerned a very serious problem with the appearance of impropriety that can accompany Koch funding of FREE seminars. In *Zuniga v. Koch Midstream Services, Co.*, U.S. District Judge Royal Ferguson recused himself from a case involving Koch after learning that the Koch foundations were funding a FREE seminar that he was committed to taking.¹⁰¹ After reading an article in the *Wall Street Journal* entitled, “How Koch Industries Tries to Influence the Judicial System,”¹⁰² Judge Ferguson began to wonder about the FREE seminar he was scheduled to attend during the pendency of the case. The article chronicled how Koch Industries and its related philanthropic foundations have “sought to influence thinking in the judicial system” most notably through LOEC and FREE.¹⁰³

Ferguson took it upon himself to inquire about the relationship between FREE, the Koch foundations, and Koch Industries. In an order dated, August 12, 1999, Ferguson wrote:

The Court was informed that one umbrella organization administered the sponsoring foundation as well as the Koch family foundation. Based on this fact alone, the Court is of the view that if Defendant herein has any relationship to Koch Industries, Inc. or Koch family foundation, directly or indirectly, then the Court should ... recuse itself from the case out of an abundance of caution and fairness.”¹⁰⁴

Accordingly, Ferguson ordered the Defendant, Koch Midstream, to brief its relationships with Koch Industries and the Koch family foundations.¹⁰⁵ Upon confirming that Koch Midstream was indeed related to Koch Industries,¹⁰⁶ Judge Ferguson issued an order recusing himself from the case. In so doing, he wrote:

Although neither side has yet raised a question concerning the Court’s ability to hear the case, 28 U.S.C. §455(a) directs that a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” Bearing this in mind, the Court believes that the most prudent course would be

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to recuse itself, out of an abundance of caution and fairness.¹⁰⁷

Judge Ferguson’s decision to recuse himself from a non-environmental case involving a Koch subsidiary—because “his impartiality could reasonably be questioned”—sets an important precedent, which fully honors the letter and spirit of the Code of Conduct.

CASE STUDY III: The Disturbing Story Behind *American Trucking Ass’ns, Inc. v. Environmental Protection Agency*

The *Aguinda* and *Koch Industries* cases were enormously important cases to the industries involved and the victims of their environmental misconduct. The outcome of *American Trucking Ass’ns, Inc. (ATA) v. Environmental Protection Agency (EPA)*¹⁰⁸ was important to the entire country. At issue was one of the most significant environmental achievements of the past decade, new air quality standards designed to reduce airborne soot and smog. EPA Administrator Carol Browner described the regulations as “the most significant step we’ve taken in a generation to protect the American people—and especially our children from the health hazards of air pollution.”¹⁰⁹ The regulations were designed to protect the more than 125 million Americans, including some 35 million children, who increasingly suffer from asthma or other respiratory ailments.¹¹⁰ The EPA estimated that the new air quality standards could have prevented 15,000 premature deaths, 350,000 cases of aggravated asthma, and nearly a million cases of decreased lung function in children.¹¹¹

In 1999, in *ATA*, a split panel of the U.S. Court of Appeals for the District of Columbia Circuit (“DC Circuit”) struck down these clean air protections. This ruling, premised on the notion that the Clean Air Act provided no “intelligible principle” for setting air pollution standards and thus represented an “unconstitutional delegation” of legislative authority from Congress to EPA, was both sweeping and shocking. EPA Administrator Carol Browner called the decision “extreme, illogical, and bizarre.”¹¹² Professor Cass Sunstein of the University of Chicago Law School, a leading constitutional law expert, described the ruling as a “remarkable departure from precedent” that “if taken seriously, brings much of the activity of the federal government into question.”¹¹³ Judge David Tatel said in dissent that the majority—Judges Douglas Ginsburg and Stephen Williams—ignored “the last half century of Supreme Court nondelegation jurisprudence.”¹¹⁴

Two years later, the Supreme Court unanimously reversed in a very pointed decision written by Justice Scalia.¹¹⁵ The section of the Clean Air Act at issue, Justice Scalia ruled, was “well within the outer limits of our non-delegation precedents.”¹¹⁶ The DC Circuit’s remand of the soot and smog standards to EPA to cure the delegation problem by finding an intelligible principle was “internally contradictory.”¹¹⁷ In the words of Seth Waxman, former Solicitor General of the United States who argued *Whitman v. ATA* to the Supreme Court, “I can’t imagine a more thoroughgoing rebuke of the DC Circuit’s little escapade.”¹¹⁸ The importance of the clean air protections at issue, the extreme and sweeping nature of the DC Circuit’s ruling, and the pointed, unanimous reversal by the Supreme Court, all indicate that the DC Circuit’s ruling in *ATA* was both extraordinary and disturbing.

It is only when the FREE connections to this ruling are considered, however, that the extent of the problems with the ruling emerge. As described below, while *ATA* was pending before the DC Circuit, FREE provided all-expense paid trips to Montana to three of the circuit’s judges. Chief Judge Douglas Ginsburg,

At issue was the most significant environmental achievement of the past decade, new air quality standards designed to reduce airborne soot and smog.

who sits on FREE's Board of Directors, attended a FREE board meeting in July 1998 and then joined his ATA co-panelist, Judge Stephen Williams, on the faculty of a FREE program immediately thereafter. Judge David Sentelle, who joined Chief Judge Ginsburg and Judge Williams in voting against rehearing of ATA, attended an August 1998 FREE seminar for judges. During approximately this same time period, Edward Warren—the lawyer who briefed and argued ATA for the industry petitioners—was added to FREE's board. After he filed his reply brief in ATA, and before oral argument, FREE twice brought Mr. Warren—who appears to have had no prior contact with FREE—to Montana to participate on the faculty of FREE's programs for judges, including the August 1998 program attended by Judge Sentelle. Mr. Warren's lecture topic appears to have closely paralleled the arguments he made to the court in ATA. Mr. Warren then resigned from the board around the time the panel decided ATA out of an apparent concern that his presence on FREE's board might look bad in light of his litigation activities before the circuit. FREE then failed to disclose Mr. Warren's service on its board in apparent violation of federal tax laws, thus making it difficult for these facts ever to come to light.

The picture that unfolds in the details below is remarkably troubling and certain to undermine the public's confidence in judges as fair and neutral arbiters of cases that come before them. More than any other single case, ATA illustrates why FREE's judicial programs must be banned in their current form.

A. EPA's Proposed Standards Prompt Industry Campaign in Opposition

EPA proposed new standards for soot and smog (the technical terms are National Ambient Air Quality Standards (NAAQS) for low level ozone (smog) and particulate matter (soot)) in November 1996 after reviewing thousands of peer-reviewed studies demonstrating that EPA's existing standards were not stemming a growing epidemic of asthma in children and respiratory problems in older Americans.¹¹⁹ EPA recognized that implementation of these standards would involve significant costs, an estimated \$6.5-to-\$8.5 billion, but believed that they would result in \$120 billion worth of health benefits.¹²⁰

This evidence was not good enough for industry groups, which immediately launched what the *Washington Post* called an "extraordinary, multimillion-dollar campaign" to prevent implementation of the regulations.¹²¹ In 1996, they formed the Air Quality Standards Coalition (AQSC) specifically to fight the EPA rules. The 500 member group, which included companies like Koch Industries, Texaco, Teneco, Phillip Morris, Chevron, and Monsanto, was coordinated by the National Association of Manufacturers and led by C. Boyden Gray.¹²² A non-profit group also directed by Mr. Gray, Citizens for a Sound Economy (CSE), simultaneously organized a multi-million dollar "educational" campaign against the rules.¹²³ Members of the AQSC contributed heavily to CSE's "charitable" efforts. For example, the American Petroleum Institute matched donations for the CSE project up to \$600,000.¹²⁴ Other CSE donors included coalition members Amoco, Chevron, Dow Corning, and Union Carbide. CSE's budget soared from \$4 million in 1991 to \$17.6 million in 1996 when the campaign against the air standards began.¹²⁵

When this lobbying effort failed to convince EPA to abandon these new standards, the industry coalition immediately turned to the courts, bringing suit in the DC Circuit on the very day the new regulations were finalized. The industry challengers to these regulations—associations representing most segments

When this lobbying effort failed to convince EPA to abandon these new standards, the industry coalition immediately turned to the courts, bringing suit in the DC Circuit on the very day the new regulations were finalized.

of corporate America—including the American Petroleum Institute, the National Association of Manufacturers, the U.S. Chamber of Commerce and the National Association of Home Builders. Seeking to emphasize the potential costs of the regulations on small businesses, the industry coalition chose the American Trucking Association as the “lead” petitioner.

B. Ed Warren, More Good than Harm, and the ATA Ruling

The industry challengers chose as their lead counsel Ed Warren, a partner at the Washington DC-office of the prestigious Chicago-based law firm Kirkland & Ellis. Mr. Warren is a talented and very successful lawyer who has devoted much of his legal career to representing industry groups in environmental challenges and to changing the rules of judicial review of agency action in a way that would favor industry interests.

1. Warren’s More Good than Harm Principle

In a law review article entitled *More Good than Harm: A First Principle for Environmental Agencies and Reviewing Courts*,¹²⁶ Mr. Warren developed a theory on the role of courts in environmental cases that is simultaneously simple and remarkably extreme.

Mr. Warren’s goal is to transform the federal courts (and in particular the DC Circuit, which has exclusive authority to review many EPA actions), into a super, omnipresent OMB.¹²⁷ Mr. Warren argues that courts reviewing environmental statutes should strike down any agency action where a court believes that the costs of the regulation exceed the demonstrable benefits. In his words: “[t]he central issue in every case would be whether an agency’s proposed regulation does more good than harm overall and at the margin, considering reasonable alternatives and potential risk-risk tradeoffs.”¹²⁸ In Mr. Warren’s view, the goal of reviewing courts is to “seek solutions that maximize societal wealth.”¹²⁹

While Mr. Warren tries to describe his position as a modest, practical reform for judges comparable to the maxims of Hippocrates for doctors,¹³⁰ the details of his argument belie such a description. The key is Mr. Warren’s insistence that benefits must exceed costs “at the margin.”¹³¹ It is not enough in Mr. Warren’s view that, overall, an agency action would achieve benefits that exceed the costs. Mr. Warren would have courts review agency decisions at the margins, and strike them down whenever the court decides that, at some step along the way, the agency has acted in a manner in which the marginal costs exceed the marginal benefits. Thus, with the soot and smog rules, the fact that the rules achieve \$120 billion in benefits for at most \$8.5 billion in costs would not satisfy Mr. Warren. If industry could come forward with evidence showing that the costs of addressing the 4th highest annual level of smog, rather than the 5th highest level, exceeded the benefits of this more demanding standard, then the rules would be struck down.¹³²

Mr. Warren would establish this marginal utility review as a “background norm” that is applied by courts unless Congress states with exceptional clarity that such a review is not to be conducted.¹³³ Thus, Mr. Warren’s article advocated overturning the DC Circuit’s ruling that Congress, in passing the Clean Air Act, intended EPA to set standards sufficient to protect public health, regardless of cost. In his opinion, “Congress has seldom, if ever, expressly negated the presumptive desirability of doing more good than harm.”¹³⁴

In a law review article entitled More Good than Harm: A First Principle for Environmental Agencies and Reviewing Courts, Mr. Warren developed a theory on the role of courts in environmental cases that is simultaneously simple and remarkably extreme.

Mr. Warren offers his marginal utility review as a way to “cabin the sweeping and constitutionally suspect delegations found in many environmental statutes.”¹³⁵ He specifically identifies Section 109 of the Clean Air Act as an example of a provision where Congress has created an overly sweeping delegation of legislative authority.¹³⁶ He advocates applying his marginal utility review as a way to “immunize such provisions from nondelegation challenges.”¹³⁷

Mr. Warren’s argument encompasses three very dramatic departures from settled law. First is the assertion that Section 109 of the Clean Air Act represents a constitutionally suspect delegation of legislative authority. As mentioned above, the Supreme Court rejected this argument unanimously in *Whitman v. ATA* as inconsistent with decades of non-delegation precedent. Second, Warren’s assertion that it is “impossible to discern the true intent of Congress”¹³⁸ as to whether costs should be considered in setting standards under the Clean Air Act was rejected unanimously by the D.C. Circuit in *Lead Industries Association, Inc. v. EPA* and by the Supreme Court in *Whitman v. ATA*. Both courts found that Congress had unambiguously decided that standards under the Act were to be determined according to scientists and the demands of public health, not the compliance costs to industry.¹³⁹

Third, Mr. Warren calls for a stunning level of unwarranted judicial activism by courts in reviewing and striking down environmental protections on behalf of polluting industries.¹⁴⁰ There is no basis in current law for a court to perform the searching marginal utility review that Mr. Warren proposes. While Mr. Warren argues that judges could use their power under the Administrative Procedure Act (APA) to perform “more good than harm” review, this argument does not pass the straight face test. The APA requires that judges apply a very deferential “arbitrary and capricious” standard in reviewing the substance of EPA regulations. As defined by the Supreme Court, an agency action is only arbitrary and capricious if the decision is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹⁴¹ The APA does not permit a court to strike down agency actions as arbitrary and capricious any time an industry group can “identify less burdensome alternatives, demonstrate that the marginal costs exceed marginal benefits, or show that substitute risks would substantially change the agency’s balance of costs and benefits.”¹⁴² In advocating his proposed marginal utility review, Mr. Warren is calling on judges to engage in judicial activism in its most raw and unprincipled form.¹⁴³

2. More Good Than Harm in the DC Circuit

Mr. Warren’s *More Good Than Harm* article provided a rough draft for the brief he would file on behalf of the U.S. Chamber of Commerce, the American Trucking Association and dozens of other industry petitioners in March 1998 in *ATA*. Warren’s brief, like his article, argued: (1) that Courts must review all environmental regulations to ensure that EPA has selected “the least burdensome regulatory option” (Brief at 8); (2) that the DC Circuit’s *Lead Industries* ruling should be overruled to allow EPA to consider costs in setting clean air health standards (Brief at 16); and (3) that, as interpreted by EPA, Section 109 of the Clean Air Act represents an unconstitutional delegation of legislative power (Brief at 20-21).

Specifically, Mr. Warren argues that by passing the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 1996 to amend the 1980 Regulatory Flexibility Act (RFA), Congress essentially authorized reviewing courts to engage in his proposed marginal utility review. According to Warren, SBREFA—a proce-

Mr. Warren calls for a stunning level of unwarranted judicial activism by courts in reviewing and striking down environmental protections on behalf of polluting industries.

Citing Mr. Warren’s brief the court, by a 2-1 vote adopted the most sweeping of Warren’s arguments, the argument that Section 109 of the CAA, as interpreted by EPA, constituted an unconstitutional delegation of legislative power.

dural law designed only to ensure that regulatory agencies “consider” significant regulatory impacts and describe the “steps * * * taken to minimize the significant economic impacts on small entities”—also has a substantive component that demands that EPA “select the least burdensome regulatory option for small entities.” Brief at 8 (emphasis added). Thus, for example, Mr. Warren argues that compliance with SBREFA would have required EPA to “measure compliance with a [ozone] standard based on the fifth, rather than the fourth, highest annual concentration.” Brief at 19.

According to Mr. Warren, SBREFA also implicitly amended the Clean Air Act—and overruled the DC Circuit’s binding *Lead Industries* precedent—and requires now that EPA consider compliance costs when setting health-based clean air standards. Because Congress was “well aware of the CAA” when it passed SBREFA, Mr. Warren argued, and because Congress “gave no indication that the CAA or other environmental statutes should be exempted from SBREFA,” compliance costs must now be considered under CAA and every other statute subject to SBREFA. Brief at 17.

Finally, Mr. Warren argued that by excluding explicit consideration of costs in setting clean air standards under Section 109 of the Act, the EPA failed to “confine its NAAQS standard-setting discretion within constitutional bounds” and lacked an “intelligible principle to govern the exercise of its discretion.” Brief at 20. As a result, Warren argued, EPA’s standard setting under the CAA should be struck down as an unconstitutional delegation of legislative authority. *Id.*

3. The DC Circuit’s ATA Ruling

The DC Circuit rejected the first two arguments made by Mr. Warren as barred by binding DC Circuit precedent. Specifically, the Court found that SBREFA had no application to the revised standards for soot and smog because it is “incontestable” that the regulations would have only an indirect impact on small businesses.¹⁴⁴ The Court ruled that under long-standing DC Circuit precedent,¹⁴⁵ SBREFA did not apply to such indirect regulatory impacts. The panel also ruled that *Lead Industries* and its progeny prohibited EPA from considering costs in setting NAAQS under the Clean Air Act.

Citing Mr. Warren’s brief, however, the court, by a 2-1 vote, adopted the most sweeping of Warren’s arguments, the argument that Section 109 of the CAA, as interpreted by EPA, constituted an unconstitutional delegation of legislative power. EPA, the court found, “articulated no ‘intelligible principle’ to channel its application” of the statutory mandate, and it “failed to state intelligibly how much is too much.”¹⁴⁶

The DC Circuit denied rehearing on a 4-5 vote with Chief Judge Ginsburg and Judges Williams and Sentelle providing critical votes against rehearing.¹⁴⁷

C. The FREE Connection

At a panel discussion held shortly after his victory in *ATA*, Ed Warren declared that “this time last year, there were three people in Washington who believed in the nondelegation doctrine,”¹⁴⁸ referring to himself, his co-counsel Gary Marchant, and C. Boyden Gray, who wrote the only other industry-side brief that discussed the non-delegation doctrine. This statement emphasizes the extraordinary nature of the DC Circuit’s ruling. Even more remarkable, however, are the circumstances under which two panel judges (Judges Ginsburg and Will-

iams) adopted this theory, and then four (the number of judges needed to deny rehearing by the full DC Circuit) rejected a motion for rehearing en banc. Part of the story, of course, are the briefs Mr. Warren, Mr. Marchant, and Mr. Gray filed in the spring and fall of 1998 and the argument Warren made to the DC Circuit in December 1998. But that's not all there is to the story, and that is where the story gets interesting.

According to a document prepared by the foundations controlled by Koch Industries, and obtained by Community Rights Counsel,¹⁴⁹ in 1998, Ed Warren found himself sitting with Judge Douglas Ginsburg on FREE's very small Board of Directors. As explained in Chapter 3, the "Koch Report" was prepared for an internal ethics investigation of the foundations' funding of private judicial trips. Here's how this document describes the issue:

One issue of potential significance to FREE's board surrounds the recent decision by the District of Columbia Circuit in *American Trucking Assoc. v. EPA*, 1999 W.L. 300618 (D.C. Cir. May 14, 1999) (citations omitted). In this opinion, issued *per curiam* - but, in light of a dissent, clearly joined by Stephen Williams and Douglas Ginsburg - the Court purported to strike down certain provisions of the Clean Air Act as violative of the non-delegation doctrine. Note that Judge Ginsburg is on FREE's board and Judge Williams has attended a FREE seminar and Edward Warren - at the time a FREE board member - was the attorney * * * who, along with several other attorneys for other parties, briefed and argued the case. According to a FREE staff member, Mr. Warren has recently resigned from FREE's board.¹⁵⁰

A review of FREE's program schedules and judicial disclosure forms also reveals that shortly after he filed his reply brief in *ATA*, and before oral argument, Mr. Warren found time to travel twice to Montana to FREE seminars where he lectured to dozens of federal judges, including DC Circuit Judge David Sentelle (one of the four votes against rehearing of *ATA*) on "Applying More Harm than Good Principles in Environmental Decision Making."¹⁵¹ FREE has confirmed, as the Koch Report indicates, that Mr. Warren served on its board from approximately early 1998 to mid-1999, approximately the same time in which the *ATA* case was briefed, argued, and decided.¹⁵²

This factual history raises a host of ethical concerns for FREE, Mr. Warren, and the judges deciding the case in the industry group's favor. That FREE's own funders would describe this circumstance as an "issue of potential significance" in their internal ethics review is revealing. Each of these issues is explored in more detail below.

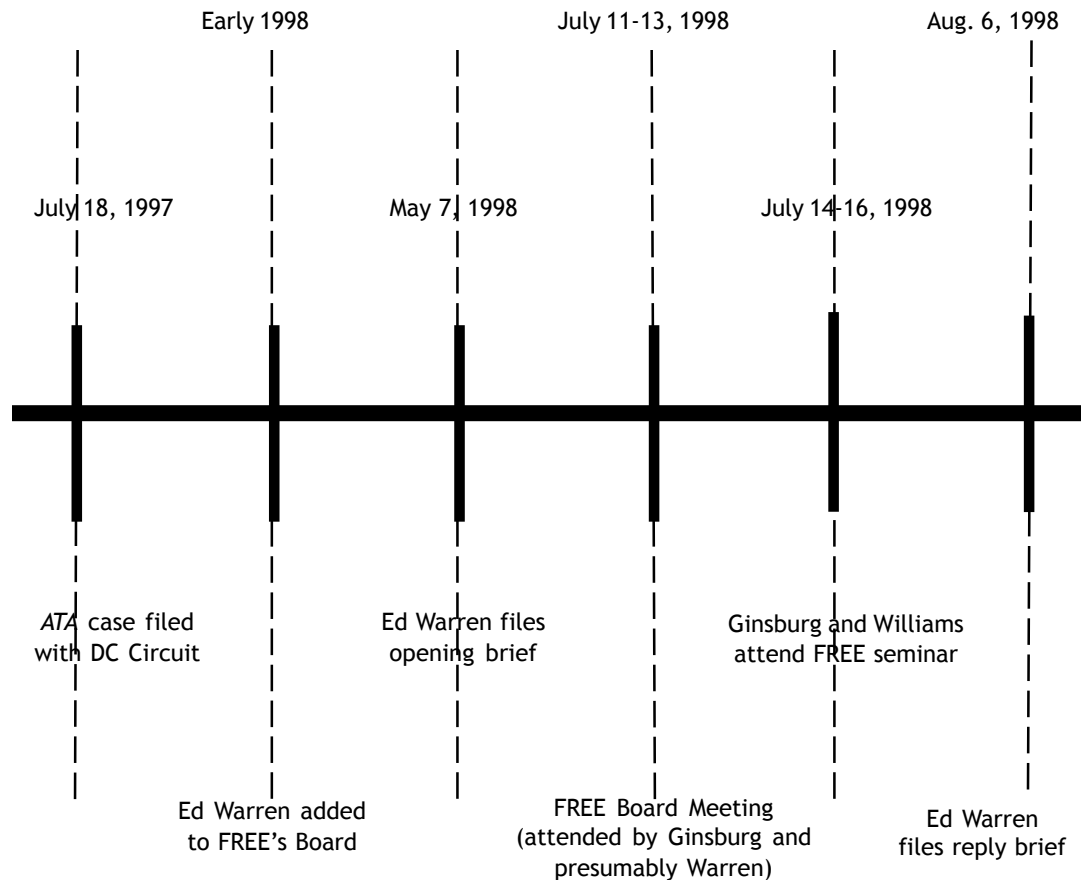
1. FREE's Board

FREE's problems with respect to Mr. Warren's membership on its Board of Directors while *ATA* was pending start with the fact that FREE never disclosed the fact of Mr. Warren's membership on its board on its federal tax returns, in apparent violation of federal tax law.¹⁵³ An inadvertent omission of such information would surely not subject a non-profit to investigation and potential prosecution by the IRS, but there is reason to question whether this omission was inadvertent. As the Koch Report recognizes, the fact that Mr. Warren served with Judge Ginsburg on FREE's board while the *ATA* case was pending was an ethical issue of "potential significance" to FREE, Judge Ginsburg, and Mr. Warren. If

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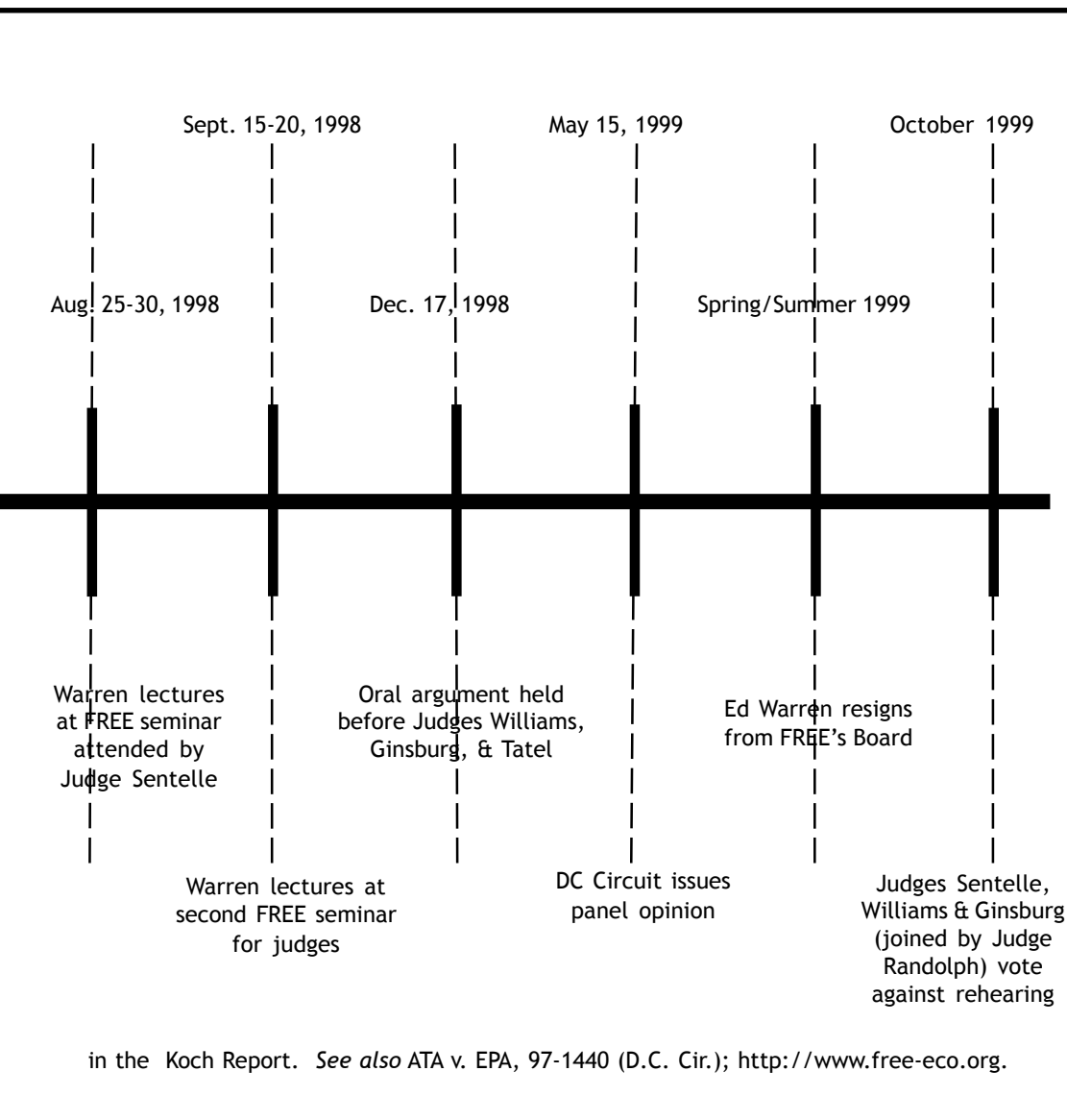
ATA v. EPA Timeline*



* Source: Warren's service on FREE's board is estimated based on information contained

FREE withheld this information purposefully to avoid embarrassment or ethical charges, FREE should be prosecuted for violating federal tax laws.

FREE's decision to add Mr. Warren to its board, which already included Judge Ginsburg,¹⁵⁴ and its decision to provide Mr. Warren with the opportunity to lecture to federal judges (including Judge Sentelle) at two seminars while the ATA case was pending, also raises a host of other important questions for FREE. How precisely did it happen that Mr. Warren was added to FREE's board? Was Mr. Warren's involvement in the ATA case discussed when the board, including Judge Ginsburg, voted Mr. Warren on to the board? How did FREE select Mr. Warren to participate in its August and September 1998 seminars? How did it recruit Judge Sentelle, who had never before attended a FREE seminar, to attend the August 1998 seminar? What judge nominated Judge Sentelle to participate in the seminar?¹⁵⁵ As explained in Chapter 3, FREE seminars are intimate affairs, typically attracting no more than 10-15 judges per event, with ample opportunity for socializing. Mr. Warren and Judge Sentelle thus could not have been unaware of each other's presence. Did anyone attempt to recruit other DC Circuit judges to



attend?

There does not appear to be completely innocent answers to these questions. It strains credibility to suggest that FREE had no knowledge of *ATA*—the most important environmental case then pending in the country—when it selected Warren for its board and program schedules. Certainly Mr. Warren knew about the case and the access advantages that serving on FREE's board with Judge Ginsburg and having the opportunity to lecture to judges like Judge Sentelle could provide for his clients. Did Mr. Warren fail entirely to mention this to John Baden, FREE's Board Chair and other FREE board members as he was being considered for FREE's board and programs? Did he also fail to mention that his lecture at FREE's 1998 seminars would address issues raised in his *ATA* brief? If so, then how was it that Mr. Warren, who does not appear to have had any prior involvement with FREE, became a repeated FREE lecturer and board member while *ATA* was pending. Simply coincidence?

At some point, certainly by the time Mr. Warren stood up in front of him

How was it that Mr. Warren, who does not appear to have had any prior involvement with FREE, became a repeated FREE lecturer and board member while ATA was pending. Simply coincidence?

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at oral argument and made the non-delegation argument, and probably well before,¹⁵⁶ Judge Ginsburg must also have recognized that Mr. Warren—a fellow FREE board member—was counsel for one side of a very important environmental case pending in his court. Did Judge Ginsburg ever raise a concern about this potential appearance of impropriety to Mr. Warren or other FREE board members? Mr. Warren's resignation from FREE's board around the time of the ATA decision, and FREE's failure to disclose his membership on its board, also undercut innocent explanations.

The totality of these circumstances provide extremely disturbing evidence that FREE used its trips and its board structure to advance the litigation interests of its corporate funders in a critical environmental case then pending before one of its board members. This is precisely the scenario judicial ethics rules seek to prevent. According to the Committee on Codes of Conduct, before attending a private judicial seminar a judge "should be satisfied that there is no appearance of attempting to influence decision of specific cases."¹⁵⁷ Plainly, federal judges cannot attend FREE's trips—and federal judges cannot serve on FREE's board—if FREE is using its trips to advance the litigation interests of its corporate funders in particular cases.

2. Koch Industries and other FREE Funders

In the Koch Report, the foundations affiliated with Koch Industries flag the "potential significance" of Mr. Warren's membership on FREE's board to an ethical analysis of their funding of FREE's seminars. As discussed in Chapter 3, Koch also recognizes that it is a sham for FREE to describe the Charles Lambe Foundation as a "dead man" foundation, when the Lambe Foundation is controlled by Charles Koch, CEO of Koch Industries. None of this begins to capture, however, the omnipresent role that Koch interests played in the ATA case or the ethical concerns this creates for the Koch Foundations.

Koch Foundations provided \$195,000 to FREE in 1998, a contribution of approximately 24 percent of FREE's entire revenues that year. The Lambe Foundation is listed as one of the two foundations that funded the seminars at which Ed Warren lectured to judges including David Sentelle on "Applying More Harm than Good Decision Making in Environmental Cases."¹⁵⁸ The Charles Koch Foundation is one of three listed funders for the judges seminar attended by Chief Judge Ginsburg and Judge Williams.¹⁵⁹

At the same time, Koch Industries and the Koch foundations were both bankrolling briefs in the ATA case. In particular, Koch Industries was a significant financial contributor¹⁶⁰ to American Petroleum Institute, which, in turn, was one of the lead industry petitioners in ATA.¹⁶¹ Koch foundations and David Koch also control the Citizens for a Sound Economy Foundation,¹⁶² which paid for the only amicus brief in ATA that focused solely on the non-delegation doctrine, a brief prepared by C. Boyden Gray, Chairman of Citizens for a Sound Economy (CSE).¹⁶³

To summarize, there were two briefs filed in ATA that raised the non-delegation doctrine. Koch funded one of these briefs through David Koch's CSE Foundation. Koch money also helped FREE: (1) place Ed Warren, the author of the second non-delegation brief, on the same board with Judge Ginsburg; (2) pay for trips worth well over a thousand dollars for three of the four DC Circuit judges—Judges Ginsburg, Williams, and Sentelle—who voted against rehearing the decision striking down the soot and smog standards; and (3) choose Mr. Warren to

teach Judge Sentelle on why he should apply his “more good than harm” review in environmental cases. Meanwhile, Koch Industries, which faced millions in potential compliance costs if the soot and smog regulations were upheld, was challenging these regulations in *ATA* through its association with the American Petroleum Institute.

As FREE’s James Huffman has said, “If people feel strongly about ideas and they want to influence someone in government they can—that’s the way the system works.”¹⁶⁴ The question we raise again is whether this is the way judges, and we as a nation, want the judicial system to work.

3. Judge Douglas Ginsburg

As Chief Judge of the DC Circuit, Judge Ginsburg is one of the most powerful judicial officers in the United States. The DC Circuit is widely viewed as the second most important court in the country, surpassed in power only by the Supreme Court. With exclusive authority to review challenges to many environmental protections, it is certainly one of the country’s most important environmental courts.

Judge Ginsburg’s membership on FREE’s board has always raised thorny questions of judicial ethics.¹⁶⁵ Judge Ginsburg’s disclosure reports indicate that he has been reimbursed by FREE for a remarkable total of 15 trips spanning 120 days between 1992 and 2001. The first year that Judge Ginsburg listed his membership on FREE’s board on his disclosure form, Judge Frank McGill, then chair of the Judicial Conference’s Office of Financial Disclosure, wrote to Judge Ginsburg inquiring about the nature of FREE and the “functions” Ginsburg performed in as a FREE board member.¹⁶⁶ Judge Ginsburg’s response, which states that FREE hosts seminars for federal judges and “encourage[s] responsible private sector actions, where feasible, in lieu of government intervention to deal with environmental problems,” did nothing to quell these questions, at least from the perspective of a litigant that is defending an environmental protection before Judge Ginsburg.¹⁶⁷ What is a judge whose court has exclusive jurisdiction over legal challenges to many fundamental environmental protections doing serving in a fiduciary capacity on the board of an organization that advocates against government intervention to solve environmental problems? As importantly, given FREE’s corporate funders, what is a judge that regularly hears environmental challenges brought by corporations doing accepting travel and accommodations each summer to Montana resorts, paid for in part by the same corporations,¹⁶⁸ to discuss FREE’s work, which advances the litigation positions of those corporations?

The fact that Mr. Warren was added to FREE’s board and given a platform by FREE to lecture to judges including Judge Sentelle, all while *ATA* was pending, raises these ethical questions to an entirely new level. In particular, Judge Ginsburg’s position with Mr. Warren as a fiduciary board member of FREE, while *ATA* was pending, supports the perception that he was acting as an advocate for Mr. Warren’s side of the *ATA* case, not a fair and neutral arbiter of the law. This would violate Canon 2A of the Code of Conduct for United States Judges which requires a judge to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”¹⁶⁹

To understand this assertion completely, you have to remember that Judge Ginsburg has a long and distinguished pedigree as a political advocate for deregulation efforts. Before he was appointed by President Reagan to the DC Cir-

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Judge Ginsburg appears to have badly transgressed ethical boundaries by remaining on FREE's board with Mr. Warren while FREE was providing Mr. Warren an ex parte opportunity to lecture to dozens of federal judges, including Judge Sentelle.

cuit, Judge Ginsburg served in high-ranking political positions for President Reagan, first as the head of the anti-trust enforcement division of the Department of Justice,¹⁷⁰ where he dramatically scaled back antitrust enforcement,¹⁷¹ and then as Director of the Office of Information and Regulatory Affairs for the Office of Management and Budget, where he came under fire for adopting a formula that valued human lives at as little as \$22,000.¹⁷²

Even as a judge, Judge Ginsburg continued to be an outspoken critic of what he believes to be over-zealous government regulation. For example, Judge Ginsburg wrote a forward to a book called *Environmental Gore* edited by FREE's John Baden, which Ginsburg describes as "an answering brief [to Al Gore's *Earth in the Balance*] from the other side."¹⁷³ In 1996, Judge Ginsburg prepared a book review for the Cato Institute's journal *Regulation*. This review praises a book by David Schoenbrod entitled *Power Without Responsibility: How Congress Abuses the People Through Delegation*¹⁷⁴ and wistfully discusses the resurrection of the nondelegation doctrine and the rest of what Judge Ginsburg labels "the Constitution in exile":

So for 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their own lifetimes.¹⁷⁵

As an ethical matter, Judge Ginsburg cannot be criticized for bringing anti-regulatory sentiments with him to the bench, for writings as a judge that yearn for a restoration of the "Constitution-in-exile," or even for bending precedent in a ruling that, for a year or so, accomplished the partial restoration of this "Constitution of liberty." But Judge Ginsburg appears to have transgressed ethical boundaries by remaining on FREE's board with Mr. Warren and acting as a FREE fiduciary while FREE was providing Mr. Warren an opportunity to lecture to dozens of federal judges, including Judge Sentelle.

Here again there are many important unanswered questions.¹⁷⁶ But even assuming the most innocent answer to these questions, Judge Ginsburg's conduct was problematic. No later than at oral argument, Judge Ginsburg realized that he was sitting on the Board of Directors of FREE and acting as a co-fiduciary for FREE with the lead counsel for the industry petitioners in the then-pending ATA case. By this point, FREE's seminars were already very controversial, with an April 1998 front-page exposé in the *Washington Post* detailing FREE's corporate funding and anti-environmental ideology, more than a dozen anti-FREE editorials, and a Congressional inquiry into the matter pending.

Judge Ginsburg had to know that, if discovered, his role on FREE's board with Mr. Warren would raise serious questions about his neutrality in ATA. Yet Judge Ginsburg does not appear to have ever raised these issues with the parties in ATA to give them the opportunity to seek his recusal. Rather, Judge Ginsburg stayed silent and ruled in Mr. Warren's favor. Meanwhile, Mr. Warren quietly resigned from FREE's board. FREE then failed to disclose Mr. Warren's membership on its board on its tax forms, making it very difficult for these facts ever to come to light.

CRC has filed a petition (see Appendix B) pursuant to 28 U.S.C. §351 that explains in detail the ethical concerns stemming from Chief Judge Ginsburg's service on FREE's Board of Directors and seeks his resignation from the board.

4. Judge David Sentelle

The first question that arises out of Judge Sentelle's appearance at FREE's August 1998 seminar featuring Mr. Warren is how Judge Sentelle decided then to make his first appearance at a FREE seminar. After never before attending a FREE event, why would Judge Sentelle decide to go to a FREE seminar so shortly after the *Washington Post* exposé and while a Congressional inquiry into FREE's programs was pending? In April 1998, when Judge Sentelle's colleague, Judge Raymond Randolph, was asked by the *Washington Post* about the appearance of impropriety posed by FREE's corporate funding, he responded, "It is not a problem I thought about until you called." A similar explanation is not available to Judge Sentelle, who decided to attend in spite of the controversy over the seminars.

Substantively, the most serious ethical question arising from Judge Sentelle's participation in the August 1998 seminar concerns whether Mr. Warren discussed the *ATA* case or legal issues related to the case during his presentation to Judge Sentelle at the seminar. If so, this would seem to be a violation of the canon of judicial ethics instructing that a "judge shall not initiate, permit, or consider *ex parte* communications * * * concerning a pending or impending proceeding." Even assuming *ATA* was never mentioned by name, the fact that Mr. Warren lectured to Judge Sentelle¹⁷⁷ on the same general topics that were covered in his *ATA* briefs while the case was pending arguably constitutes prohibited *ex parte* communication.¹⁷⁸

At the very least, Judge Sentelle's FREE trip demonstrates the appearance problems FREE trips can create for federal judges. Judge Sentelle took a trip worth thousands of dollars funded in significant part by a foundation controlled by Koch Industries, a very interested party, while *ATA* was pending in the DC Circuit. One of the instructors at this seminar was Ed Warren, the lead counsel for the industry challengers in *ATA*. Mr. Warren's lecture topic closely paralleled the legal arguments Mr. Warren made in his *ATA* briefs. A year later, Judge Sentelle cast a critical vote against rehearing of the industry victory in *ATA*, requiring the Supreme Court to intervene and helping delay implementation of the soot and smog standards. Under any standard, Judge Sentelle's attendance at this trip is easily questioned.¹⁷⁹ Having done so, he should have alerted the parties to the facts of his participation to allow the supporters of the regulations to consider seeking his considered recusal.¹⁸⁰

It is no answer to say that Judge Sentelle, and Judges Ginsburg and Williams, for that matter, are conservatives who reached a conservative outcome in this case. The DC Circuit's non-delegation ruling in *ATA* was not conservative; it was radical and bizarre. Judge Laurence Silberman, a conservative Reagan appointee, wrote a scathing opinion in favor of rehearing *en banc* and the Supreme Court unanimously reversed in a very pointed opinion written by Justice Scalia.

Industry could not count on any DC Circuit judge's vote in striking down the clean air protections at issue in *ATA*. While no one will ever know what influences any judge's particular decision, it is entirely reasonable to suspect

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that a week in Montana listening to Ed Warren and others deride command and control environmental statutes such as the Clean Air Act may have had some influence on Judge Sentelle's decision to vote against rehearing in *ATA*. This possibility is why FREE exists. It has to be why Ed Warren spent so much time in Montana in the summer of 1998.

The simple fact is that three of the four judges voting in industry's favor took an industry-funded FREE trip while the *ATA* case was pending. None of the judges supporting rehearing has ever reported attending a FREE trip. The facts of this case create an undeniable appearance of impropriety in the eyes of a reasonable observer. That is the ethical standard judges must observe.

5. Ed Warren

More than any other participant in this story, we can assume that Ed Warren knew all the relevant facts. He knew by 1997 that he was serving as lead counsel for the industry challengers in *ATA*. He knew that it could advance his client's interests if he were to serve on FREE's board with Judge Ginsburg and lecture to Judge Sentelle while *ATA* was pending. As a member of FREE's board, he knew where FREE's money was coming from and the links between these funders and the *ATA* industry challengers. He knows why he decided to resign from FREE's board once victory in *ATA* was achieved.¹⁸¹ He may have participated in any discussions concerning whether FREE would list him as a board member on its tax filings.

Lawyers, no less than judges, are subject to standards of professional conduct. To the extent Judges Ginsburg, Sentelle, and Williams broke the canons of judicial ethics by participating in FREE seminars and on FREE's board with Mr. Warren, Mr. Warren is equally at fault.¹⁸²

IV. Conclusion

It is difficult to fully capture the magnitude of the appearance problem created by what took place at FREE while the *ATA* case was pending. Just months after a front-page *Washington Post* exposé and while a Congressional inquiry was pending, FREE added Mr. Warren to FREE's board and brings him to lecture to judges at two FREE seminars. Both panel judges voting to strike down the soot and smog regulations and three of the four judges denying rehearing en banc attended a FREE seminar while the case was pending. FREE failed to disclose Mr. Warren's membership as required for its federal tax forms, and Mr. Warren resigned from its board around the time of the *ATA* victory. The *ATA* ruling dramatically furthered the ideological interests of FREE and the pecuniary interests of FREE's corporate funders. And remember, as described in detail above, the *ATA* ruling was bizarre, extreme, and reversed unanimously in a pointed decision by Justice Scalia.

Appellate court rulings have consequences, even if ultimately corrected by the Supreme Court. If the DC Circuit had adopted the reasoning of Judge Tatel, the implementation rules for the ozone standard probably would have been fully in place by the time President Clinton left office.¹⁸³ Instead, by the time the Supreme Court reversed the DC Circuit, the Bush administration was in power and, not surprisingly, the Bush administration has proposed an implementation plan for ozone that environmentalists argue actually weakens the existing protections against this often deadly pollutant.¹⁸⁴ This possibility appears to have been what Mr. Warren had in mind when he told reporters on the day the DC

Circuit issued its opinion that “there is no doubt the 2000 election does impact where this thing ultimately comes out.”¹⁸⁵ It is very disturbing to even have to contemplate whether corporate judicial lobbying had an impact on a court decision with the public health stakes at issue in the *ATA* case. Standing alone, the appearance of impropriety that stems from FREE’s actions in the *ATA* case should lead the judiciary to bar judicial participation on FREE’s board and severely limit judicial participation in FREE’s trips.

ENDNOTES

¹ Letter from Vice Dean Stephen Gillers to Senator Russ Feingold, May 17, 2002, available at <http://www.communityrights.org/PDFs/Gillers.pdf>.

² Canon 2A of the Code of Conduct for United States Judges states: “A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” As the Commentary to Canon 2A makes clear, “The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.”

³ The Hon. Howard T. Markey, *A Need for Continuing Education in Judicial Ethics*, 28 VAL. U. L. REV. 647, 652-53 (1994).

⁴ See *supra* Chapter 2 note 5.

⁵ See *infra* text accompanying notes 38-40 for an interesting discussion of the Second Circuit’s treatment of editorial commentary under the reasonable minds test.

⁶ *Aguinda v. Texaco*, 241 F.3d 194 (2d. Cir. 2001).

⁷ David Talbot, *Rain Forest Pays the Price of Oil; Suit Claims Texaco Polluted Ecuador*, BOSTON HERALD, Aug. 29, 1999, at 1.

⁸ Rather than pump waste water back into the ground, as is common practice elsewhere, Texaco allowed the chemically-laden water to spill into rivers and creeks and into the Amazon basin. See *id.*

⁹ David Holmstrom, *Texaco Has Left Ecuador, But Its Impact Remains: Environmentalists, Indians Cite Damage from Oil Company’s Methods*, CHRISTIAN SCI. MONITOR, March 25, 1994, at 8.

¹⁰ Talbot, *supra* note 7.

¹¹ *Id.*

¹² *Id.* Ecuador is roughly the size of Colorado, but contains 10 percent of the world’s known plants, about 20,000 to 25,000 species. All of North America contains only 15,000 species. Eric Niiler, *Drilling in the Rain Forest: After Years of Pollution, Amazon Still Under Attack*, PATRIOT LEDGER, Oct. 21, 1995, at 1.

¹³ Talbot, *supra* note 7.

¹⁴ Niiler, *supra* note 12.

¹⁵ Holmstrom, *supra* note 9.

¹⁶ Talbot, *supra* note 7.

¹⁷ Kintto Lucas, *Health-Ecuador: High Cancer Rates Found Near Oil Wells*, INTER PRESS SERVICE, available at 2002 WL 4912879.

¹⁸ *Id.*

¹⁹ The plaintiffs’ lawyers hoped to try the case in U.S. courts because, according to news reports, “the Ecuadorean government’s dependence on oil revenues would make it unlikely for courts to deliver justice. Oil exports account for about 40% of Ecuador’s revenue.” *U.S. Lawyers File Suit Against ChevronTexaco in Ecuador*, DOW JONES

BUS. NEWS, May 9, 2003. What's more, until 1999, Ecuador had no equivalent to America's Superfund law, which requires polluters to pay for environmental clean ups even if they no longer own or operate the property. *Id.* See also *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. Nov. 12, 1996).

²⁰ *Aguinda v. Texaco, Inc.*, 175 F.R.D. 50 (S.D.N.Y. Aug. 12, 1997).

²¹ *Jota v. Texaco, Inc.*, 157 F.3d 153, 157 (2d Cir. 1998).

²² Judge Jed Rakoff, Financial Disclosure Report for Calendar Year 1998; see also <http://www.tripsforjudges.org>. According to its website, Elkhorn Ranch is "just one mile from the northwest corner of Yellowstone National Park, surrounded by the Gallatin National Forest and the Lee Metcalf Wilderness - millions of acres of spectacularly beautiful mountain scenery." <http://www.elkhornranchmt.com> (visited May 31, 2003).

²³ FREE Seminar Agenda, Real and Alleged Environmental Crises, available at http://www.free-eco.org/agenda_seminar_judges_sept15_1998.html (visited May 31, 2003). According to IRS forms filed by FREE and obtained by the *Aguinda* petitioners in the course of litigation, Texaco gave FREE \$50,000 in 1997 and 1998, and another \$25,000 in 1999. FREE IRS Forms 990 (available at <http://www.communityrights.org/TaintedJustice/FREE979899.pdf>). As a result, Mr. DeCrane was allowed to attend and teach judges at two FREE seminars—in September 1998, when Judge Rakoff attended, and again in July 1999.

²⁴ See FREE IRS Form 990 (1998) (available at <http://www.communityrights.org/TaintedJustice/FREE1998.pdf>); see also *Aguinda v. Texaco*, 241 F.3d 194, 198 (2d Cir. 2001).

²⁵ See *Aguinda*, 241 F.3d at 199; http://www.free-eco.org/agenda_seminar_judges_sept15_1998.html (visited May 31, 2003).

²⁶ Mr. DeCrane is a long standing critic of environmental policy. Mr. DeCrane has railed against "those who sing this siren song of environmental absolutism [and] would demand that we abandon environmental growth, forego a prosperous society and disdain petroleum products," see Jeff Share, *Texaco Chief Rejects Fears of Environmental Armageddon*, OIL DAILY, Jan. 26, 1994, at 2, and argued that "there is evidence all around that excessive command and control environmental regulations, written with good intentions but with inadequate facts and science, have just not worked." *Texaco CEO Calls for More Rational Approach to Regulations*, UNITED PRESS INT'L, Jan. 25, 1994. See also Alfred C. DeCrane, Jr., *EPA Should Use Business, Not Sanctions to Clean Air*, CHRISTIAN SCI. MONITOR, Aug. 25, 1994, at 18.

²⁷ Telephone conversation with Cristobal Bonifaz, March 19, 2003.

²⁸ *Aguinda*, 241 F.3d at 199. The petitioners highlighted six of the eleven sessions, the titles of which were: Scientific Arguments and Their Contexts; An Introduction to Proof, Cause and Their Use (and Misuse) in Public Policy; Applying More Good than Harm: Principles in Environmental Decision Making; It Ain't Necessarily So: Two Case Studies of (Alleged) Heath Risks and the Power of the Press; The Environment: Some Thoughts from the Corner Office; The Coming Battleground: Estrogenic Chemicals, Campaigns of Alarm, and Precautionary Pitfalls; and Risk Ledger—A Balancing Act.

²⁹ *Id.*

³⁰ The presiding judge, it is argued, "is in the best position to appreciate the implications of those matters alleged in the recusal motion." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988). This may be so, but it seems more than a little unfair to force a party, who takes the extraordinary step of alleging that a presiding judge is so biased that he or she has to be removed, to argue this recusal motion in front of the very judge that the party believes is biased against them.

³¹ *Aguinda*, 241 F.3d at 200.

³² *Id.*

³³ Judge Rakoff wrote: “As plaintiffs’ counsel correctly surmise, the fact that FREE has apparently received some minor portion of its funding from Texaco was unknown to the undersigned prior to receipt of the plaintiffs’ instant motion papers.” *Aguinda v. Texaco*, 139 F. Supp. 2d 438, 439 (S.D.N.Y. 2000). Of course, under Advisory Opinion 67, judges have an obligation to consider their host’s “source of funding” before attending a private seminar. As ethicist Stephen Gillers, Vice Dean of New York University Law School, has concluded “[t]here would be much room for mischief if a judge invited to an expense-paid seminar could rely on the non-profit nature of an apparently neutral sponsor to immunize the judge’s attendance.” Letter from Professor Stephen Gillers to Senator Russ Feingold, May 17, 2002, available at <http://www.communityrights.org/PDFs/Gillers.pdf> (visited May 31, 2003). Judge Rakoff’s invocation of this ignorance defense indicates yet again that judges are not taking sufficiently serious the obligations incumbent upon them under A.O. 67.

³⁴ *Aguinda*, 139 F. Supp. 2d at 439.

³⁵ Again, the cards were not in the *Aguinda* petitioners’ favor. After notice of an oral argument date and a panel composition was first given to the parties, Mr. Bonifaz learned that the date and panel were changed and now included Chief Judge Winter, who weeks before hearing the appeal, in his position as Chair of the Executive Committee of the Judicial Conference, had harshly criticized a the Kerry-Feingold bill to ban FREE junkets. Telephone conversation with Cristobal Bonifaz, March 19, 2003. The bill, in Judge Winter’s words, was “a very draconian ban,” and “an interference in the marketplace of ideas” that would turn the Federal Judicial Center “into a censor.” Editorial, *Congress Dumbs Down Judges*, WALL ST. J., Oct. 24, 2000 (quoting Judge Winter); Editorial, *Congress Must Overrule Judges’ Unethical Junkets*, ATLANTA J. & CONST., Sept. 22, 2000 (same).

³⁶ *Aguinda*, 241 F.3d at 202.

³⁷ *Id.*

³⁸ *Id.* at 206.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

⁴² *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

⁴³ Telephone conversation with Cristobal Bonifaz, March 19, 2003.

⁴⁴ Financial Disclosure Form for Calendar Year 1999 filed by Stanwood Duval; see also <http://www.tripsforjudges.org>.

⁴⁵ FREE Seminar Agenda, Environmental Economics and Policy Analysis, available at http://www.free-eco.org/agenda_seminar_judges_july6_1999.html (visited May 31, 2003).

⁴⁶ *In re S. Coast Boat Rentals, Inc.*, No. 2:98cv3452 (E.D. La. filed Nov. 29, 1998).

⁴⁷ See *In re S. Coast Boat Rentals, Inc.*, No. CIV.A. 98-3452, 1999 WL 615180 (E.D. La. Aug. 12, 1999). The *South Coast Boat Rentals* case involved personal injury claims against Texaco by an employee of a ship carrying Texaco oil. In August 1999, Judge Duval denied a summary judgment claim against Texaco with prejudice (meaning it

could not be brought again at a later time) and a summary judgment motions filed by Texaco without prejudice (allowing a later refile of this motion). The effect of these rulings was to let the case against Texaco continue towards trial.

⁴⁸ *In re Gladiator Marine, Inc.*, No. 2:98cv2037 (E.D. La. filed July 10, 1998).

⁴⁹ Financial Disclosure Form for Calendar Year 1999 filed by Ivan Lemelle; *see also* <http://www.tripsforjudges.org>.

⁵⁰ *LeBouef v. Texaco*, No. 2:99cv684 (E.D. La. filed March 1, 1999).

⁵¹ Financial Disclosure Forms for Calendar Years 1998 and 1999 filed by A.J. McNamara; *see also* <http://www.tripsforjudges.org>.

⁵² *United Houma Nation v. Texaco*, No.2:97cv4006 (E.D. La. filed Dec. 31, 1997); *In re NGO*, No. 2:97cv779 (E.D. La. filed Mar. 14, 1997); *Alliance v. Texaco Exploration*, No 2:98cv756 (E.D. La. filed Mar. 9, 1998); *Texaco Trading & Transp. v. Laine Constr. Co.*, No. 2:98cv1473 (E.D. La. filed May 15, 1998).

⁵³ *Suit Dismissed to Block Texaco Plant on Indian Burial Ground*, BATON ROUGE ADVOCATE, June 9, 1998, at 4B.

⁵⁴ *See* Douglas T. Kendall & Eric Sorkin, *Nothing for Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public's Trust*, 25 HARV. ENVTL. L. REV. 405 (2001). A list of Smith's trips is available on-line at www.tripsforjudges.org.

⁵⁵ *See* www.tripsforjudges.org.

⁵⁶ Some judges regularly report the value of seminar gifts. The figure of \$37,000 is derived primarily from a review of disclosure forms of judges that attended the same seminars as Judge Smith and reported the value of these trips.

⁵⁷ Advanced Course on Risk, Injury, and Liability for Federal Judges; The Cottages, Hilton Head, South Carolina. One judge attending this trip with Judge Smith valued this trip at \$2,754. *See* Financial Disclosure Form for Calendar Year 1993, filed by Judge Rodolfo Lozano (on file with CRC).

⁵⁸ Law and Economics Center, Annual Report 1993/94 (on file with CRC). LEC does not specify the size of Medtronic's contribution. A review of an index of Judge Smith's unpublished rulings indicates that Judge Smith has presided over at least 25 cases that involve companies that have contributed to LEC. These companies include: Bethlehem Steel Corp., Aetna, Sears, Roebuck and Co., Medtronic, and General Motors. *See id.*

⁵⁹ *Gerber v. Medtronic, Inc.*, No. 93-CV-102 (W.D. Pa. filed April 22, 1993).

⁶⁰ The LEC Quarterly, Fall 1996, at 1 (on file with CRC).

⁶¹ *Id.*

⁶² Mr. Viscusi lectured for two entire days of the six day seminar, which ran from June 12-18, 1993. George Mason University School of Law, Law and Economics Center Annual Report 1993-94 at 32 (on file with CRC).

⁶³ Kip Viscusi, et al, *Deterring Inefficient Pharmaceutical Litigation: An Economic Rationale for the FDA Regulatory Compliance Defense*, 24 SETON HALL L. REV. 1437, 1478 (1994) (arguing that "courts should be prohibited from co-regulating pharmaceuticals through the award of tort damages."). Though published in 1994, this paper was written and first delivered at a pharmaceutical industry symposium in November 1993. *Id.* at 1480 n.d1. The article notes that Mr. Viscusi's three co-authors all either work

for pharmaceutical companies or represent drug companies in product liability cases.
Id.

⁶⁴ *Gerber v. Medtronic, Inc.*, No. 93-CV-102, Order Granting Motion for Summary Judgment, (May 16, 1994). Judge Smith returned to Hilton Head for a seminar on “Quantitative Methods” two months before issuing his ruling in *Gerber*. See Basic Course for Judges on Quantitative Methods; Harbor Town Yacht Club, Hilton Head, South Carolina, Mar. 12-18, 1994. The value of this trip was reported by one judge as \$4,238.27. See Financial Disclosure Form for Calendar Year 1994, filed by Rodolfo Lozano.

⁶⁵ 518 U.S. 470 (1996).

⁶⁶ Letter from Professor Stephen Gillers to Senator Russ Feingold, May 17, 2002, available at <http://www.communityrights.org/PDFs/Gillers.pdf> (visited May 31, 2003).

⁶⁷ See Letter from Professor Monroe Freedman to Senator Russ Feingold, May 21, 2002, available at <http://www.communityrights.org/CombatsJudicialActivism/JEP/Smith/Freedmanclubsjunkets.asp> (“[T]he appearance of impropriety with regard to the judicial seminars is the appearance that a party is buying special access to the judge, both by financing an expert to express *ex parte* opinions to the judge, and by making a gift to the judge to induce the judge to pay special attention to the expert’s *ex parte* opinion. Thus, Judge Smith’s conduct violates Canons 2, 2B, and 6, and appears to violate Canon 3A(4), as explained below.”)

⁶⁸ See 148 CONG. REC. S7557 (daily ed. July 30, 2002) (statement of Sen. Leahy); 148 CONG. REC. S7563 (daily ed. July 30, 2002) (statement of Sen. Kennedy); 148 CONG. REC. S7653 (daily ed. July 31, 2002) (statement of Sen. Cantwell); 148 CONG. REC. S7654 (daily ed. July 31, 2002) (statement of Sen. Durbin); 148 CONG. REC. S7655 (daily ed. July 31, 2002) (statement of Sen. Feingold).

⁶⁹ Scott Kilman, Christina Binkley, & William Bulkeley, *An Empire on the Brink*, WALL ST. J., Dec. 12, 2002, at B1, available at 2002 WL-WSJ 103128496.

⁷⁰ In addition to the *U.S. v. Koch Industries* case, discussed below, in 2000 the United States indicted Koch Industries and four employees on 97 counts of violating federal clean air and hazardous waste laws. Prosecutors accused the company of illegally releasing benzene fumes—a suspected carcinogen—into the atmosphere and lying about it to Texas state regulators. The company paid a \$20 million dollar fine to settle these claims. *Koch Unit Admits Guilt, Will Pay Fine to End Benzene Case*, WALL ST. J., April 10, 2001, at B4; Dan Eggen, *Oil Company Agrees to Pay \$20 Million in Fines; Koch Allegedly Hid Releases of Benzene*, WASH. POST, April 10, 2001, at A3; James Pinkerton, *Koch Slapped With Big Penalty/Guilty of Hiding Pollution Violation*, HOUSTON CHRON., April 10, 2001, at A1; Ralph K.M. Haurwitz & Jeff Nesmith, *Polluters Punished ‘Through the Back Door’; 1994 Rupture of Neglected Pipe Fouled Bays in Corpus Christi*, AUSTIN AMERICAN-STATESMAN, July 23, 2001, at A7. That same year, a Koch subsidiary paid \$8 million in fines for environmental violations at its Rosemount, Minnesota, refinery and agreed to spend \$80 million to cut emissions at refineries in Minnesota and Texas. Chris Ison, *Koch Group Will Reduce Pollutants at 3 Plants Under a Settlement, Koch Will Spend Up to \$80 Million for Emission-Control Equipment*, STAR-TRIB., Dec. 27, 2000, at 3B; *Koch Agrees to Pay Fines, Install Pollution Controls*, TULSA WORLD, Dec. 23, 2000, at 8. In 1998, Koch Industries paid commercial fisherman \$10.5 million in compensation for an oil pipeline spill near Corpus Christi, Texas. Ralph K.M. Haurwitz, *Lawsuit Criticizes Pipelines’ Upkeep, Class Action Seeks to Force Testing, Repair of Oil, Gas Lines*, AUSTIN AMERICAN-STATESMAN, Aug. 6, 2001, at A1. In 1996, a Koch pipeline explosion near Dallas killed two teenagers; a jury awarded the father of one deceased girl \$296 million. *Koch Faces Lawsuit Over Pipelines*, J. REC. (Okla. City), Aug. 8, 2001.

⁷¹ See Chapter III, notes 45-54 and accompanying text, for a fuller discussion of James Huffman and his views on FREE.

⁷² See Forbes Largest Private Companies 2002, available at <http://www.forbes.com/2002/11/07/privateland.html> (visited May 29, 2003).

⁷³ Fred Koch (now deceased) was the founder of Koch Industries and in 1958 was a charter member of the John Birch Society. Curtis Moore, *Rethinking the Think Tanks: How Industry-Funded "Experts" Twist the Environmental Debate*, SIERRA July/August 2002, available at <http://www.sierraclub.org/sierra/200207/thinktank.asp> (visited May 31, 2003).

⁷⁴ Charles Koch has served as Koch Industries' chairman and chief executive officer since 1967. See About Koch, available at <http://www.kochind.com/about/history.asp> (visited May 31, 2003).

⁷⁵ David Koch is the company's executive vice president. See *id.* Koch was the Libertarian Party's nominee for president in 1980 and remains a strong supporter of libertarian ideas. "My overall concept," Koch has said, "is to minimize the role of government and to maximize the role of private economy and to maximize personal freedoms." PEOPLE FOR THE AMERICAN WAY, BUYING A MOVEMENT: RIGHT WING FOUNDATIONS AND AMERICAN POLITICS (1996) (quoting Koch), available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=2052> (visited May 31, 2003) [hereinafter BUYING A MOVEMENT].

⁷⁶ Claude Lambe, now deceased, was a business partner of Fred Koch. His foundation shares a board of directors with the Charles Koch Foundation.

⁷⁷ The Foundation Center, Foundation Directory Online (2002).

⁷⁸ See, e.g., Robert Parry, *D(oil)e: What Wouldn't Bob Do for Koch Oil?*, THE NATION, Aug. 26, 1996, reprinted at <http://www.mediatransparency.org/reprints/bobdolekoch.htm>. For a discussion of Koch contributions to President Bush in 2000 and their potential effect on pending litigation, see Dan Eggen, *Oil Company Agrees to Pay \$20 Million in Fines; Koch Allegedly Hid Releases of Benzene*, WASH. POST, April 10, 2001, at A3.

⁷⁹ See Parry, *supra* note 78. One former Koch lobbyist, Elizabeth Stolpe, is now assistant director for toxics and environmental protection at the White House Council on Environmental Quality. See Bureau of National Affairs, *Administration Proposal, Jeffords Measure Remain Far Apart, Speakers Tell Conference*, (June 25, 2002) available at <http://www.bna.com/awma2002/story09.htm> (visited June 1, 2003); Clean Air Villain of the Month (Jan. 10, 2002), available at <http://www.cleanairtrust.org/villain.0102.html> (visited June 1, 2003).

⁸⁰ Charles Koch co-founded the libertarian Cato Institute in 1977, while David Koch helped create Citizens for a Sound Economy (CSE) in 1986. See <http://www.mediawhoresonline.com/koch.htm> (visited June 1, 2003), and IRS Forms 990PF for the Koch family foundations.

The Cato Institute consistently takes anti-regulatory positions and is a vocal critic of the science behind environmental health concerns. See Moore, *supra* note 73. Its "Natural Resources Studies" program is designed to "broadly challenge the 'market failure' critique of capitalism as it pertains to energy policy and environmental protection." <http://www.cato.org/electricity/scholars.html> (visited June 1, 2003). Cato is a consistent voice against government regulation and a vocal opponent of global warming theories. For more information, see http://www.mediatransparency.org/search_results/info_on_any_recipient.php?51 (visited June 1, 2003) or <http://www.cato.org> (visited June 1, 2003).

CSE uses its Koch and industry-financed \$17 million budget to produce and

promote policy papers, op-eds and news stories advocating limited government and questioning environmental health threats like acid rain and global warming. CSE's publications include such vignettes as these: "environmental conservation requires a commonsense approach that limits the scope of government," acid rain is a "so-called threat [that] is largely nonexistent," and global warming is "a verdict in search of evidence." Moore, *supra* note 73.

⁸¹ David Callahan, *Gifts to Right Wing Think Tanks Have Become a Form of Political Donation*, THE NATION (April 26, 1999) (indicating the CSE has received \$9.3 million from Koch family foundations since CSE's founding). IRS 990PF forms for two of the Koch family foundations—the Claude Lambe Charitable Foundation and the David H. Koch Charitable Foundation, reveal that the two foundations contributed in excess of \$3,000,000 to CSE between 1998 and 2001. IRS Forms 990PF: David H. Koch Charitable Foundation (1998-2001), Claude R. Lambe Foundation (1998, 2000), available at <http://www.guidestar.com> (visited June 1, 2003).

⁸² W. John Moore, *Wichita Pipeline*, NAT'L J., May 16, 1992, at 1169.

⁸³ For example, Koch foundations gave some \$240,000 to the American Legislative Exchange Council, \$275,000 to the Competitive Enterprise Institute and \$550,000 to the Reason Foundation between 1998 and 2001. IRS Forms 990PF: Charles G. Koch Foundation (1998-2001); David H. Koch Foundation (1998-2001); Claude R. Lambe Foundation (1998, 2000), available at <http://www.guidestar.com> (visited June 1, 2003).

⁸⁴ Koch support for the property rights-oriented law firm Institute for Justice topped \$750,000 from 1998-2001. IRS Form 990PFs, David H. Koch Foundation (1998-2001). In 1992 alone, Koch foundations contributed \$700,000 to the Institute for Justice, nearly 70 percent of the group's budget. BUYING A MOVEMENT, *supra* note 75. Pacific Legal Foundation and Defenders of Property Rights have also received Koch family grants. IRS Form 990PF, Claude R. Lambe Foundation (1998), available at <http://www.guidestar.com> (visited June 1, 2003).

⁸⁵ IRS Forms 990 for 1997-99—Foundation for Research on Economics and the Environment (on file with CRC). The Lambe Foundation gave FREE \$150,000 in 1999 and 2000 and \$120,000 in 1998. IRS Forms 990PF, Claude R. Lambe Foundation (1997-2000); FREE, IRS Forms 990 (1997-99) (on file with CRC). The Charles G. Koch Charitable Foundation gave FREE an additional \$75,000 in 1998. IRS Forms 990PF, Charles G. Koch Charitable Foundation (1997-2000); FREE, IRS Forms 990 (1997-99) (available at <http://www.communityrights.org/TaintedJustice.org/FREE979899.pdf>).

⁸⁶ Koch foundations were instrumental in creating the Law and Organizational Economics Program at the University of Kansas, which provided free-market training for state judges from 1995-1999. In its heyday, LOEC hosted seminars in Colorado, Utah, and Florida resorts at which more than 550 judges from around the country were lectured on free-market principles. See Ziva Branstetter, *Economics for Judges Questioned: Critics Fear It's a Bid to Influence*, TULSA WORLD, Sept. 5, 1999; John Fialka, *How Koch Industries Tries to Influence Judicial System*, WALL ST. J., Aug. 9, 1999, at A20; see also Shannon Davis, *Frontline: Justice for Sale—Independent and Business Support for the Pennsylvania Judiciary*, available at <http://www.muckraker.org/investigations/jspasupport.html> (visited June 1, 2003).

⁸⁷ Koch provided seed money to a former employee to start an Oklahoma-based group called Citizens for Judicial Review, which outlined a plan in 1996 to prepare state-by-state evaluations of state judges decisions and distribute the results to "pro-business opinion leaders." Fialka, *supra* note 86; GEORGETOWN ENVIRONMENTAL POLICY PROJECT, CHANGING THE RULES BY CHANGING THE PLAYERS: THE ENVIRONMENTAL ISSUE IN STATE JUDICIAL ELECTIONS 5 (2000) (hereinafter GELPI). The initial plan called for evaluating judges in eight states—Alabama, Arkansas, Kansas, Louisiana, Mississippi, Oklahoma, Tennessee and Texas—with an eye toward creating a national program on judicial evaluations. In Oklahoma, another Koch-funded group, Oklahomans for Judicial Excellence, prepared scorecards evaluating judges on their economic performance. State judges were told that they

could increase their rating if they attended an LOEC seminar, also sponsored by Koch. See Henry M. Butler, *Judicial Decisions Can Affect the Economy*, DAILY OKLAHOMAN (Oct. 29, 1998); see also GELPI, *supra*, at 9.

88 For example, in Texas, Koch family businesses have contributed more than \$13,500 to Texas Supreme Court justices since 1994. Michael Scherer, *Courting Big Money*, MOTHER JONES, Dec. 6, 2000; see also, Texans for Public Justice, *Classic Koch*, Jan. 30, 2000, available at <http://www.tpj.org/payola/docket1.html> (visited June 1, 2003) (detailing Koch contributions to and favorable rulings by the Texas Supreme Court). Corporate political contributions to judges is a growing trend. More than 39 states hold elections for judges for some or all courts from local district to state supreme courts. See Scherer, *supra*.

89 United States v. Koch Industries, Inc., No. 4:95cv1118 (S.D. Tex. filed April 17, 1995).

90 The \$35 million penalty ultimately agreed to was the “largest ever under the federal Clean Water Act.” Pete Slover, *Firm in Oil Spill to Pay a Record Fine*, DALLAS MORNING NEWS, Jan. 14, 2000, at A1.

91 *Id.* (“[I]n the past government lawyers had indicated they might seek as much as \$200 million in penalties from Koch in the case.”).

92 See EPA Press Release, *Koch Industries, Inc. Oil Spills Settlement*, Jan. 13, 2000, available at <http://www.epa.gov/compliance/resources/cases/civil/cwa/kochcwa.htm> (visited June 1, 2003).

93 Clay Robison, *More Voices Question Tobacco Lawsuit Fees*, HOUSTON CHRON., Mar. 13, 1998, at A25 (reporting that CSE joined two other groups in creating Texans for Responsible Legal Fees to side “with Gov. George W. Bush and several legislators in the fee dispute with Morales.”). While focusing on the contingency fees sought by private lawyers representing Texas in a case against the tobacco industry, the position taken by CSE and the other coalition members was that “lawyers’ fees should be set by the Legislature” not the Attorney General. *Id.* This would have made it difficult for Morales to obtain the assistance of private firms in cases like *U.S. v. Koch*.

94 George Kuempel, *AG Cornyn Renegotiating Lawyers’ Pay*, DALLAS MORNING NEWS, Mar. 13, 1999, at A1.

95 *Id.*

96 See Trips for Judges database, available at <http://www.tripsforjudges.org>.

97 FREE Seminar Agenda, Environmental Economics and Policy Analysis, available at http://www.free-eco.org/agenda_seminar_judges_june16_1998.html (visited June 1, 2003).

98 IRS Forms 990PF, Claude R. Lambe Foundation (1998); IRS Forms 990PF, Charles G. Koch Charitable Foundation (1998), available at <http://www.guidestar.com>; FREE, IRS Forms 990 (1998) (on file with CRC).

99 See Docket Entry 141, Order on Deposition Schedule, July 15, 1999 (listing Charles Koch of Wichita, Kansas to be deposed on Aug. 9, 1999), available at <http://pacer.tx.uscourts.gov>.

100 Pete Slover, *Firm in Oil Spill Suit to Pay a Record Fine*, DALLAS MORNING NEWS, Jan. 14, 2000, at A1 (“[E]nvironmentalists questioned whether that amount was large enough, considering how much Koch may have saved by cutting environmental corners.”). The role of judges in shaping consent decrees is critically important as by far the vast majority of civil cases are settled long before they reach trial or verdict. Peter H. Shuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53

U. CHI. L. REV. 337, 337 (1986). Indeed, in Professor Schuck's example, the judge in the Agent Orange case played an active role in leading—some might argue coercing—the parties to settlement. A judge's attitude toward the case may manifest itself in pre-trial rulings and statements in ways that can dramatically affect the trial strategy. Schuck's words could not be more apt: "We cannot assume that a settlement is legitimate simply because the parties' lawyers voluntarily subscribe to it." *Id.* (citing Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984)). For additional discussion of the ways judges can influence the settlement process through pre-trial rulings and prejudices, see also Marc Galanter & Mia Cahill, 'Most Cases Settle': *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Thomas D. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363 (1983-84); Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981).

¹⁰¹ *Zuniga v. Koch Midstream Services, Co.*, No. MO:98-CA-169-F (W.D. Tex. filed Nov. 20, 1998).

¹⁰² John Fialka, *How Koch Industries Tries to Influence Judicial System*, WALL ST. J., Aug. 9, 1999, at A20.

¹⁰³ See *id.*

¹⁰⁴ *Zuniga v. Koch Midstream Services Co.*, No. MO-98-CA-169-F (W.D. Tex. Aug. 12, 1999) (order requesting briefing of Defendant's relationship to Koch Industries and Koch foundations).

¹⁰⁵ *Id.*

¹⁰⁶ *Zuniga v. Koch Midstream Services Co.*, No. MO-98-CA-169-F (W.D. Tex. Aug. 27, 1999) (Defendant Koch Midstream Services Co.'s response to the court's August 12, 1999, order).

¹⁰⁷ *Zuniga v. Koch Midstream Services Co.*, No. MO-98-CA-169-F (W.D. Tex. Sept. 24, 1999) (order recusing the court) (available at <http://www.communityrights.org/TaintedJustice/Zuniga.pdf>).

¹⁰⁸ *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *revised, rehearing denied* 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom* *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

¹⁰⁹ Environmental Protection Agency, Fact Sheet, EPA's National Ambient Air Quality Standards: The Standard Review/Reevaluation Process, July 16, 1997 (on file with CRC); see also Margaret Kris, *Why the EPA's Wheezing a Bit*, NAT'L J., June 23, 1999, at 2166.

¹¹⁰ According to one account, the EPA developed its standards after research showed a two-thirds drop in the number of children hospitalized for asthma in the Provo, Utah, area during the thirteen months in 1986-87 that the area's Geneva Steel plant was shut down. Hanna Rosin, *Shades of Gray*, THE NEW REPUBLIC, April 14, 1997, available at <http://www.tnr.com>.

¹¹¹ Environmental Protection Agency, Fact Sheet, EPA's National Ambient Air Quality Standards: The Standard Review/Reevaluation Process, July 16, 1997 (on file with CRC); see also Kris, *supra* note 109, at 2166.

¹¹² Steve France, *EPA, Lawyers, Scholars Take Measure of "Nondelegation" Theory in Ozone Ruling*, 67 U.S. L. WKLY. 2739, June 15 1999.

¹¹³ Cass R. Sunstein, *The Court's Perilous Right Turn*, N.Y. TIMES, June 2, 1999, at A2.

¹¹⁴ 175 F.3d at 1057 (Tatel, J. dissenting). The U.S. Supreme Court has not used the nondelegation doctrine to invalidate any statute since the New Deal. See RONALD A.

CASS & COLIN S. DIVER, *ADMINISTRATIVE LAW* 18-33 (1987). The only two successful invocations of the doctrine occurred within several months of one another in 1935, see, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

¹¹⁵ *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

¹¹⁶ 531 U.S. at 474.

¹¹⁷ *Id.* at 473.

¹¹⁸ Linda Greenhouse, *Clean Air Act Rules Upheld by High Court*, *SAN DIEGO UNION TRIB.*, Feb. 28, 2001, at A1.

¹¹⁹ EPA's Updated Clean Air Standards, A Common Sense Primer, September 1997, available at <http://www.epa.gov/oar/primer/> (visited June 1, 2003); EPA Fact Sheet, EPA's Revised Particulate Matter Standards, available at http://www.epa.gov/ttn/oarpg/t1/fact_sheets/pmfact.pdf (visited June 1, 2003).

¹²⁰ John J. Fialka, *Group Gears Up to Block EPA Proposals on National Air-Quality Standards*, *WALL ST. J.*, Nov. 29, 1996, at B3.

¹²¹ Joby Warrick, *A Dust-up Over Air Pollution Standards*, *WASH. POST*, June 17, 1997, at A1.

¹²² Rosin, *supra* note 110. Mr. Gray is currently and was then the Chairman of CSE's Board of Directors. See <http://www.cse.org/know/board.php> (visited June 1, 2003).

¹²³ Rosin, *supra* note 110.

¹²⁴ *Id.* Koch Industries appears to have dropped its membership in API, but it was a member in the 1990s, according to the API's website. See *Tackling the Year 2000 Problem, What Our Companies Are Doing*, formerly available at <http://www.api.org/ecit/y2k/company.html> (copy on file with CRC).

¹²⁵ *Id.*

¹²⁶ Edward W. Warren & Gary E. Marchant, *More Good than Harm: A First Principle for Environmental Agencies and Reviewing Courts*, 20 *ECOLOGY L.Q.* 379 (1993).

¹²⁷ The Office of Management and Budget (OMB) is the executive branch agency that has historically been charged with comparing the costs to the benefits of proposed government regulation.

¹²⁸ Warren & Marchant, 20 *ECOLOGY L.Q.* at 433.

¹²⁹ *Id.* at 382.

¹³⁰ The popular doctor's maxim "first, do no harm" is actually derived not from the Hippocratic Oath, but from the philosopher's other writings, the *Epidemics*, Bk. I, Sect. XI. Warren quotes Hippocrates as follows: "The physician must be able to tell the antecedents, know the present, and foretell the future—must mediate these things, and have two special objects in view with regard to diseases, mainly to do good or to do no harm." Warren & Marchant, 20 *ECOLOGY L.Q.* at 433. If Warren were advocating only that courts seek to do no harm, there would be little cause to object—and the EPA's soot and smog standards, which by the agency's own estimates would achieve \$120 billion in benefits for \$6.5 billion to \$8.5 billion in cost would easily pass muster. As described above, however, Warren's position is not one of ensuring greater benefits, but rather marginal utility. In his view courts should decide on their own initiative the point at which, on the margin, a benefit exceeds the cost irrespective of the overall gain to society. Such a view would empower courts

to engage in ad hoc economic analysis and usurp the role of the policy-making branches of government.

¹³¹ See also Warren & Marchant, 20 *ECOLOGY L.Q.* at 434-435 (“Parties wishing to persuade an agency to alter its proposal must themselves identify less burdensome alternatives, demonstrate that the marginal costs exceed marginal benefits, or show that substitute risks would substantially change that agency’s balance of costs and benefits. When a party comes forward with such proof, the burden shifts to the agency to respond.”).

¹³² This is precisely the argument Mr. Warren made to the Court in *ATA*. See Brief of Small Business Petitioners and Intervenor at 7, *ATA v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (“The magnitude of these small business impacts is a direct function of the regulatory option chosen by EPA. For example, an ozone standard based on the *fifth* rather than the *fourth* highest concentration would nearly cut in half the number of industries for which small business costs exceeded the cost-to-sales impact thresholds used by EPA.”).

¹³³ Warren & Marchant, 20 *ECOLOGY L.Q.* at 429-432.

¹³⁴ *Id.* at 431.

¹³⁵ *Id.* at 382

¹³⁶ *Id.* at 410 n.196 and accompanying text.

¹³⁷ *Id.* at 410.

¹³⁸ *Id.* at 431.

¹³⁹ Congress decided specifically that it wanted Clean Air Act health standards decided by scientists not economists. As Justice Scalia details in *Whitman*, Congress commissioned a study in 1967 on the costs of carrying out the act, including the economic effects of the standards on industries and communities, and decided specifically that standards should be set on the basis of public health, not economic impact. He writes: “Congress not only anticipated that compliance costs could injure the public health, but provided for that precise exigency.” *Whitman*, 531 U.S. at 466. Indeed, if meeting the science-based standards turned out to be overwhelmingly costly or technologically infeasible, many other sections of the act “explicitly permitted or required economic costs to be taken into account in implementing the air quality standards.” *Id.* at 467. Likewise, in *Lead Industries*, the D.C. Circuit recognized Congress’ desire to set public health standards irrespective of cost. *Lead Industries Ass’n*, 647 F.2d 1130, 1148 (D.C. Cir. 1980) (holding that “economic considerations [may] play no part in the promulgation of ambient air quality standards under Section 109.”). As the court held: “While states may consider economic and technological feasibility in selecting the mix of control devices, they may do so only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards.” *Id.* at 1149 n.37.

¹⁴⁰ Mr. Warren’s more good than harm review is a one way ratchet designed only to help industries weaken environmental protections. One could imagine a variation on Mr. Warren’s proposal that would allow environmental organizations also to challenge EPA actions where they can demonstrate that more stringent environmental protections would increase net societal welfare. But this is clearly not what Mr. Warren had in mind. He asks only whether the regulation does more good than harm, not whether more protective standards could produce even more net good. And from Warren’s perspective, more protective standards are not an option: He opines that EPA should always seek “the alternative that achieves its regulatory objective at the lowest cost.” Warren & Marchant, 20 *ECOLOGY L.Q.* at 426.

¹⁴¹ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)

(“[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”); *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 282 (D.C. Cir. 1981) (“This ‘arbitrary and capricious’ standard of review is a highly deferential one, which presumes the agency’s action to be valid. This standard is viewed as a narrow one, which forbids a court from substituting its judgment for that of the agency. The standard mandates judicial affirmance if a rational basis for the agency’s decision is presented, even though we might otherwise disagree.” (citations omitted)).

¹⁴² Warren & Marchant, 20 *ECOLOGY L.Q.* at 434-35.

¹⁴³ Constitutional scholars have sometimes defended judicial protection of “discrete and insular minorities” against claims of judicial activism by arguing that it is appropriate, and indeed enhances the democratic operation of government, for federal courts to protect those who are shut out from the normal political process because of systemic prejudice or a denial of access to power. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1982). According to these theorists, judicial intervention, in other words, might be appropriate to correct a legislative process that does not pay sufficient attention to the needs and concerns of “discrete and insular” minorities. With regard to the industries represented by the Air Quality Standards Coalition, it is simply impossible to justify federal court intervention on the ground that such groups have limited access to or are routinely shortchanged by the political process.

¹⁴⁴ Rather, states would be responsible for developing revised state implementation plans (SIPs) to achieve the new NAAQS for soot and smog. While EPA acknowledged that those revised SIPs might impact certain small business entities, it argued that such impacts were too indirect to assess under SBREFA.

¹⁴⁵ See *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 342-43 (D.C. Cir. 1985) (“Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.”).

¹⁴⁶ *ATA*, 175 F.3d at 1033-34 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

¹⁴⁷ At the time rehearing en banc was requested in *ATA v. EPA*, there were ten active DC Circuit judges. Six votes—a majority of the active judges—are required for rehearing. Judge Henderson recused herself from consideration of the *ATA* case, and rehearing was denied on a 4-5 vote, with five judges voting for rehearing. See 195 F.3d 4 (D.C. Cir. 1999).

¹⁴⁸ Steve France, *EPA, Lawyers, Scholars Take Measure of “Nondelegation” Theory in Ozone Ruling*, 67 U.S. L. WKLY. 2739, June 15 1999.

¹⁴⁹ 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 produce 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 the “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*, Oct. 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).

¹⁵⁰ Koch Report at 14, n.33. See also Financial Disclosure Form for Calendar Year 1998 filed by Stephen Williams, available at (<http://www.communityrights.org/TaintedJustice/Williams.pdf>).

¹⁵¹ Warren gave his lectures—entitled “Applying More Good than Harm Principles in Environmental Decision Making”—on August 27 and September 17, 1998. FREE Seminar Agenda, Bringing Sound Science & Economics to Risk Analysis, available at http://www.free-eco.org/agenda_seminar_judges_august25_1998.html (visited June 1, 2003); FREE Seminar Agenda, Real and Alleged Environmental Crises, available at http://www.free-eco.org/agenda_seminar_judges_sept15_1998.html (visited June 1, 2003). Judge Sentelle reports attending the August 1998 seminar on his financial disclosure form for that year. Financial Disclosure Form for Calendar Year 1998, prepared by Judge David Sentelle (available at <http://www.communityrights.org/TaintedJustice/Sentelle.pdf>).

¹⁵² Telephone Conversation between Doug Kendall, executive director of Community Rights Counsel and John Baden, chairman of FREE, February 24, 2004.

¹⁵³ Federal law requires all non-profit organizations to file annual returns (Form 990) that require a listing of all who served the organization as a director or officer “at any time” during the year. See IRS, Instructions for Form 990 and 990 EZ (2002), available at <http://www.irs.gov/pub/irs-pdf/i990-ez.pdf> (visited June 1, 2003). An officer of the organization must certify as follows: “Under penalties of perjury, I declare that I have examined this form, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete, and that I am authorized to prepare this form.” IRS Form 990, available at <http://www.irs.gov/pub/irs-pdf/f990.pdf> (visited June 1, 2003).

¹⁵⁴ Judge Ginsburg reports attending a FREE board meeting on July 8 to July 17, 1998. Financial Disclosure Form for Calendar Year 1998, prepared by Judge Douglas Ginsburg (available at <http://www.communityrights.org/TaintedJustice/Ginsburg.pdf>). Because FREE failed to disclose Mr. Warren’s membership on its Board on its tax forms, we do not know precisely when Mr. Warren joined FREE’s board and when he resigned. While the Koch Report is less than completely clear on this issue, it indicates that Mr. Warren was a member of FREE’s board “at the time” he “briefed and argued” ATA and that Mr. Warren resigned from FREE’s board after the decision in ATA in May 1999, but before the Green Analysis was finished in October 1999.

¹⁵⁵ The Koch Report contains a very interesting summary of FREE’s marketing efforts to federal judges. According to the Report, FREE is “keen to attract those [judges] with the most decision making authority in the realm of environmental law, namely, judges on the Court of Claims, the Federal Circuit and the District of Columbia Circuit,” but it “makes no special efforts to bring them to its programs.” FREE does, however, “send a personal invitation to those judges ‘nominated’ by prior attendees” and FREE and “in order to be accepted into the program a judge must at some point obtain a nomination from a prior attendee.” Koch Report at 15 (available at <http://www.communityrights.org/TaintedJustice/KochReport.pdf>).

¹⁵⁶ In January 1998, Judge Ginsburg joined a per curium case scheduling order for the DC Circuit that required Ginsburg to review and act upon briefs filed by Mr. Warren. *ATA v. EPA*, No. 97-1440 (D.C. Cir. Jan 21, 1998) (per curiam order). Judge Ginsburg was assigned to hear ATA on the merits in an order dated May 19, 1998.

¹⁵⁷ Compendium § 5.4-6 (available at <http://www.communityrights.org/TaintedJustice/Compendium.pdf>).

¹⁵⁸ FREE Seminar Agenda, Bringing Sound Science & Economics to Risk Analysis, *available at* http://www.free-eco.org/agenda_seminar_judges_august25_1998.html (visited June 1, 2003); FREE Seminar Agenda, Real and Alleged Environmental Crises, *available at* http://www.free-eco.org/agenda_seminar_judges_sept15_1998.html (visited June 1, 2003).

¹⁵⁹ FREE Seminar Agenda, Environmental Economics and Policy Analysis, *available at* http://www.free-eco.org/agenda_seminar_law_july14_1998.html (visited June 1, 2003).

¹⁶⁰ Dues in the API are based on the size of the company, meaning that Koch, which is among the nation's largest private companies and a significant petroleum producer, would have contributed a significant amount in dues to API. For a description of API membership dues and requirements, see <http://api-ec.api.org/aboutapi/index.cfm?bitmask=2B827D9F-92A0-11D5-BC6B00B0D0E15BFC> (visited June 1, 2003) ("API dues are volumetrically based, so it depends on the size of the company and its involvement in the API segments. Oil and natural gas company dues are based on a volumetric formula. Pipeline dues are based on throughput as reported to the FERC. Dues for service and supply members are based on sales to the U.S. petroleum industry, beginning at \$1,000.").

¹⁶¹ See *API v. EPA*, No. 97-1555 (D.C. Cir. filed Sept. 12, 1997). Texaco Inc., another of FREE's 1998 funders, was also a member of API in 1998. John A. Lamping, a Vice President of Amoco Corporation, a third API member, served with Judge Ginsburg and Mr. Warren on FREE's Board in 1998.

¹⁶² CSE was founded by David Koch in 1986 and he still serves as the Chairman of the Board of the CSE Foundation. Koch Industries, Koch foundations, and Koch family members contributed a total of \$2,041,500 to CSE in 1998, nearly 13 percent of CSE's \$16.2 million budget for that year. See Public Citizen, *Corporate Shill Enterprise: A Public Citizen Report on Citizens for a Sound Economy, a Corporate Lobbying Front Group*, Oct. 6, 2000, *available at* <http://www.citizen.org/congress/civjus/tort/industry/articles.cfm?ID=798> (visited June 1, 2003). According to a CSE release and news reports: "CSE Chairman Boyden Gray prepared the amicus brief that developed the delegation of legislative power argument relied on by the Court in making its landmark decision. Boyden Gray's brief was funded in part by CSE's education affiliate CSE Foundation." Patrick Burns, *Landmark Court Decision Brings Sound Science to the Environment*, May 18, 1999, *available at* http://www.cse.org/informed/issues_template.php/447.htm (visited June 1, 2003). See also John B. Judis, *Deregulation Run Riot*, *THE AMERICAN PROSPECT* (Sept.-Oct. 1999), *available at* <http://www.prospect.org/print/V10/46/judis-j.html> (visited June 1, 2003); Briefs of Amicus Curiae *Orrin Hatch & Tom Bliley, ATA v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

¹⁶³ For an interesting discussion of the ethical issues raised by CSE's funding of a brief on behalf of members of Congress, see Curtis Moore, *Lawsuit Against Clean Air Act By Members of Congress Raises Conflict-of-Interest Questions*, *available at* http://www.public-i.org/commentary_01_082900.htm (visited June 1, 2003). Many of the corporations that fund CSE and their litigation efforts also fund FREE. For example in 1998, Texaco gave \$7,000 to CSE and \$50,000 to FREE. Other corporations that have contributed significant sums to both groups include: Dow Chemical, Exxon, Ford Motor Company, General Electric, General Motors, Georgia Pacific, Koch Industries, and Shell Oil. See *Corporate Shill Enterprise: A Public Citizen Report on Citizens for a Sound Economy, a Corporate Lobbying Front Group*, *available at* <http://www.citizen.org/congress/civjus/tort/industry/articles.cfm?ID=798> (visited June 1, 2003). See also FREE IRS Forms 990 (1997-99) (on file with CRC) and <http://www.free-eco.org> (visited June 1, 2003).

¹⁶⁴ 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.

¹⁶⁵ Several Canons of Judicial Ethics, and numerous Advisory Opinions issued by the

Judicial Conferences Code of Conduct Committee address the question of whether it is appropriate for a judge to serve as a member or director of private organizations such as FREE. See, e.g., Canons 2C & 5B; Advisory Opinions 15, 40, & 82. The general rule that emerges from this guidance is that a judge should not join an organization if the organization's positions "would embarrass the judge in the exercise of judicial duties" (Advisory Opinion 15) or where the organization's policy positions "might reasonably be seen as impairing the judge's capacity to decide impartially any issue that may come before the judge." (Advisory Opinion 82). The ethics petition, which is attached as Appendix B, addresses these issues in greater detail.

¹⁶⁶ See Letter from Judge Douglas H. Ginsburg to Judge Frank McGill, Feb. 23, 1994 (on file with CRC) ("I reply to your letter of February 15 requesting additional information * * * about the nature of The Foundation for Research on Economics and the Environment and the extent of the functions that I perform in connection with it.").

¹⁶⁷ *Id.*

¹⁶⁸ Judge Ginsburg has spent nearly a week or more at FREE board meetings or seminars every year between 1992 and 2000. Financial Disclosure Forms filed by Douglas Ginsburg (1992-2000). FREE has repeatedly stated that its corporate donations are not used to fund its judicial seminars. By implication, FREE can be presumed to use its corporate funding to fund general administrative functions such as transporting its board members to board meetings.

¹⁶⁹ Canon 2 of the Code of Conduct for United States Judges. See also Appendix B.

¹⁷⁰ See Douglas Ginsburg, Curriculum Vitae, available at <http://www.law.uchicago.edu/faculty/ginsburg/cv.html> (visited June 1, 2003).

¹⁷¹ Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust - Retrospective and Prospective: Where Are We Coming From? Where Are We Going?* 62 N.Y.U. L. REV. 936, 947-48 (1987); Nancy Lewis, *U.S. Lawyer Said to Lead Field for Appeals Bench*, WASH. POST, July 22, 1986 ("Ginsburg, who has headed the antitrust division for a year, is one of the administration's leading proponents of industry deregulation and is its point man for a far-reaching package of proposed antitrust amendments that centers on a more lenient stand on merger enforcement."); *Merge While the Merging's Good*, FORTUNE, Nov. 23, 1987, at 12 ("Government antitrust enforcement is at an ebb. 'Undoing' the law appears to be the cutting edge. When asked his priorities at the 1986 Annual Spring Meeting of the American Bar Association Antitrust Section, then Assistant Attorney General Douglas Ginsburg replied, '[L]egislative reform, legislative reform, and legislative reform.'").

¹⁷² See, e.g., John M. Broder, *Collapse of the Ginsburg Nomination: At the End, Ginsburg Stood Alone—and Still a Puzzle*, L.A. TIMES, Nov. 8, 1987, at 19; Dennis Bell, *Ginsburg Assailed on Health Role*, NEWSDAY, Nov. 5, 1987, at 7.

¹⁷³ Douglas Ginsburg, *Forward*, in ENVIRONMENTAL GORE: A CONSTRUCTIVE RESPONSE TO EARTH IN THE BALANCE iv (John A. Baden ed., 1994).

¹⁷⁴ DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

¹⁷⁵ Douglas Ginsburg, Book Review, *Delegation Running Riot*, 18 REGULATION (1996) available at <https://www.cato.org/pubs/regulation/regv18n1/reg18n1-readings.html> (visited June 1, 2003). Ginsburg's essay was a review of a book by NYU law professor and occasional FREE lecturer David Schoenbrod, who researched the nondelegation doctrine for the Cato Institute. See SCHOENBROD, *supra* note 174. Ginsburg and Schoenbrod's work formed the basis for congressional testimony outlining the reasoning behind the nondelegation doctrine delivered by Jerry Taylor, the Cato Institute's director of natural resources. Testimony of Jerry Taylor, Director of Natural Resource Studies, The Cato Institute, Before the Subcommittee on Commercial and Administrative Law

of the House Judiciary Committee, on the Role of Congress in Monitoring Administrative Rulemaking, Sept. 12, 1996 (discussing the nondelegation doctrine, quoting Judge Ginsburg's book review and stating that "[t]his testimony draws heavily from material prepared by David Schoenbrod and Gene Healy for a forthcoming *Cato Institute Policy Analysis*).

176 These questions include: (1) what role, if any, did Judge Ginsburg have in Mr. Warren's ascension to membership on FREE's Board and in the selection by FREE of Mr. Warren to lecture at FREE's 1998 judicial seminars?; (2) did Judge Ginsburg nominate Judge Sentelle for participation at FREE's August 1998 seminar or encourage Judge Sentelle to attend?; and (3) did Judge Ginsburg ever discuss the *ATA* case and Mr. Warren's board membership with Mr. Warren or any other FREE Board member?

177 According to the Koch Report, before attending FREE's seminar, Judge Sentelle, like all other judges, had to commit to FREE to "attending all lectures, activities, lunches and dinners." Koch Report at 16.

178 The *ATA* case was pending in the DC Circuit at the time of the August seminar, and Judge Sentelle had issued an important procedural ruling in the case as late as March 1998. *ATA v. EPA*, No. 97-1440 (D.C. Cir. March 11, 1998) (per curiam order denying motion of Pacific Legal Foundation and California Chamber of Commerce to file non-party motion to allow amicus out of time, before Judges Williams and Sentelle). Given his involvement in the case and the near certainty of a petition for rehearing en banc regardless of the outcome, *ATA* seems plainly to have been "pending or impending" before Judge Sentelle in August 1998 even though it was by that point assigned to Judges Ginsburg, Williams, and Tatel for oral argument.

179 In the *Aguinda* decision, Judge Winter ruled that judges may attend seminars so long as:

- (i) a presentation does not relate to legal issues material to the disposition of a claim or defense in an action before a judge who attended the presentation, (ii) the funding by a party of a seminar's sponsor is too remote or minor to appear to a reasonable person to have an influence on the judge, and (iii) the nature of a party's funding of a sponsoring organization does not create an appearance of either control or impropriety.

In re Aguinda, 241 F.3d 194, 204 (2d Cir. 2001). Sentelle's attendance at this FREE seminar appears to violate each of these criteria. Unlike in *Aguinda*, there is little doubt here that legal issues related to the *ATA* case were discussed at FREE's seminar. As Winter acknowledged: "Judges should be wary of attending presentations involving litigation that is before them or likely to come before them without at the very least assuring themselves that parties or counsel to the litigation are not funding or controlling the presentation. Where parties or counsel to them fund or control such a presentation, the appearance created bears too great a resemblance to an *ex parte* contact." *Id.* at 206.

180 A judge is obligated to "disclose on the record any information that a judge believes the parties or their lawyers might consider relevant to the issue of disqualification, even if the judge believes there is no real basis for disqualification." See ABA Model Code of Judicial Conduct, Canon 3(E)(1) cmt. (2000); see also *American Textile Mfrs. Inst. v. The Limited*, 190 F.3d 729, 742 (5th Cir. 1999) ("judges have an ethical duty to 'disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification.'" (quoting *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995))). This obligation is designed to protect judges from investigations into their personal and financial interests. *American Textile Mfrs. Inst. v. The Limited*, 190 F.3d at 742 ("litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters * * * litigants and counsel should be able to rely upon judges to comply with their own Canons of Ethics.").

181 FREE's Founder and Chairman John Baden confirmed in a telephone conversation

that Mr. Warren left FREE's Board out of a concern that there might be an issue with his litigation activities before the DC Circuit. Telephone Conversation between Doug Kendall, executive director of Community Rights Counsel, and John Baden, chairman of FREE, February 24, 2004.

182 For example, the D.C. Rules of Professional Conduct require that “a lawyer shall not: (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; (b) communicate *ex parte* with such a person except as permitted by law: ...” Rule 3.5. The Comment to the rule further states that an advocate “should be familiar” with the ABA Model Code of Judicial Conduct. “A lawyer is required to avoid contributing to a violation of such provisions.” Comment to Rule 3.5 [1].

183 Judge Tatel dissented from the panel's non-delegation ruling, 175 F.3d at 1057 (Tatel, J. dissenting), and urged rehearing of the panel's ruling striking down EPA's proposed implementation plan for the new ozone standard, stating that “I would have granted rehearing and held that the Agency's position represents a reasonable interpretation of an ambiguous statute.” 195 F.3d at 11-13 (Tatel, J, concurring in part and dissenting in part). While industry would likely have sought Supreme Court review of a DC Circuit ruling along the lines advocated by Judge Tatel, there is little reason to believe the Supreme Court would have granted review of industry's petition. Ultimately, the Supreme Court unanimously agreed with Judge Tatel's analysis of the non-delegation question. See *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472-474 (2001). While agreeing with much of Judge Tatel's analysis of the implementation question (and rejecting much of the panel's analysis), the Court ended up vacating the implementation rules, giving the Bush administration the opportunity to propose new rules on a relatively blank slate. *Id.* at 482-484.

184 See Earthjustice, EPA Smog Proposal Falls Short of Protecting the Public, available at <http://www.earthjustice.org/news/display.html?ID=656> (visited Mar. 16, 2004).

185 Robert L. Jackson & James Gerstenzang, *Air Quality Standards Rejected by Appeals Court Environment: EPA Construed Clean Air Act Too Loosely in Setting Rules for Smog and Soot, Judges Say. Ruling Is Seen as Setback for Clinton Administration*, L.A. TIMES, May 15, 1999, at A1. See also Joyce Howard Price, *Appeals Court Tosses out EPA's Air Quality Rule: Major Setback for Clinton, Gore*, WASH. TIMES, May 15, 1999, at A1 (“Both Mr. Warren and Mr. Gray predict the fate of the clean air regulations will not be decided in this administration. ‘These rules, in all likelihood, will be determined by the next administration,’ Mr. Gray said in an interview.”).