

CHAPTER 5 TOWARDS A SOLUTION

“Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges.”

Code of Conduct - Commentary.

“Judges today are just too pressed to enjoy the gift described by Burns—‘to see ourselves as others see us.’ On the other hand, the people do see judges’ every apparent or real ethical infraction, and if they do not, the media will show it to them.” The Hon. Howard T. Markey.¹

I. Introduction

In *Nothing for Free*, Community Rights Counsel documented a remarkable correlation between the 10 most activist rulings striking down environmental protections and private trips taken by the judges writing these opinions. In this report, we have explained in detail the disconcerting intersection between FREE trips and three important and high profile environmental cases. Can anyone really still believe that existing ethical guidance is adequately shielding judges from ethical concerns associated with attendance at private trips? It is time, past time, actually, for policymakers and judges to find a solution to a problem that has already badly stained the reputation of the federal judiciary.

This chapter sets forth important guideposts for reform and responds in advance to potential concerns.

II. Outlines of a Potential Solution

As explained in detail in Chapter 3, judicial trips such as those sponsored by FREE are a problem for judges and the judiciary because of a combination of three factors: the size of the gift to judges involved; the funding from sources that have an interest in federal court litigation; and the ideological slant of the programs. None of these problems standing alone would rule out judicial attendance at FREE seminars. It is only because of the combination of these factors that judges subject themselves to reasonable criticism by participating.

A solution to the problem must be as nuanced as the problem itself. A flat ban on biased seminars, or on all private funding of judicial education, would be an inappropriately blunt instrument. What is needed is a solution that bans only private financing of multi-day trips while preserving a wide range of appropriate continuing legal education (CLE) activities of federal judges.

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The portions of S. 787, The Fair and Independent Judiciary Act of 2003, that address private judicial seminars provide a good example of such a nuanced response. Sponsored by Sen. Patrick Leahy, the Senate Judiciary Committee's ranking member, and Sen. John Kerry, this proposed legislation links a ban on certain expense-paid private education programs with new funding to allow judges to attend the programs of their choosing. It also combines these measures to address judicial trips with a sizeable increase in judicial compensation.²

The trips portion of this bill is worth examining in some detail. The most important section of the bill is § 630(a)(2), which defines private judicial seminar as follows:

- (A) a seminar, symposia, panel discussion, course, or a similar event that provides continuing legal education to judges; and
- (B) does not include—
 - (i) seminars that last 1 day or less and are conducted by, and on the campus of, an institute of higher education;
 - (ii) seminars that last 1 day or less and are conducted by national bar associations or State or local bar associations for the benefit of the bar association membership; or
 - (iii) seminars of any length conducted by, and on the campus of an institute of higher education or by national bar associations or State or local bar associations, where a judge is a presenter and at which judges constitute less than 25 percent of the participants;

This definition, which separates what is banned from what is unregulated by the bill, is narrow and tailored. It excludes speeches, moot courts and any other similar activities where judges are invited to share their wisdom with others, rather than to learn themselves.³ It excludes most CLE programs for judges offered by universities and bar associations. What it includes are the multi-day, privately sponsored vacation-like trips criticized in this and earlier reports.

S. 787 bans gifts associated with trips that meet the bill's definition of private judicial seminars, meaning that private interests cannot pay judges' expenses for such trips. Two options remain for judges, however. First, judges always remain free to pay their own way to such programs and S. 787 would give judges a sizeable pay raise that would ease any financial difficulty this might present. Second, and more importantly, S. 787 establishes a Judicial Education Fund and authorizes an annual appropriation to this fund of \$2 million to pay for judges to attend private judicial seminars. As we calculate it, this annual appropriation is more than twice the amount that groups like FREE and LEC spend annually to host judicial trips, so it should be more than sufficient to pay for any trips requested by judges.⁴

This taxpayer funding would come with a few, reasonable, conditions attached. The first condition is that the judiciary could only approve reimbursement of seminars after concluding that the seminar is conducted in a manner "so as to maintain the public's confidence in an unbiased and fair-

mindful judiciary.” This is essentially just a restatement of the guideposts already set in the canons of judicial ethics, and the bill authorizes the judiciary to establish its own rules for reaching this conclusion.

Second, the bill requires that sponsors seeking taxpayer funding for judicial participation at their seminars submit to the Board of the Federal Judicial Center—the government organization that was established by Congress to provide CLE for judges—information about the content of the seminars and the litigation activity of the sponsor and presenters at the seminar. Once the Center considers the information and approves reimbursement for judicial participation from the Judicial Education Fund, the bill requires that the Board make the submitted information available to the public by posting it on the internet.

III. Responding to Potential Objections

S. 787 represents the type of nuanced solution necessary to preserve and enhance the diversity of educational offerings for federal judges while preserving the public’s trust and confidence in the federal judiciary. The bill bans only gifts for the types of programs that have long proven controversial. The bill provides a Judicial Education Fund to enhance the CLE opportunities available to judges. Finally, the bill provides a sizeable increase in judicial compensation, enhancing judges’ ability to pay their own way to CLE programs.

Because the judiciary has acted so aggressively in the past in rejecting any attempt at reform in this area, we now anticipate and respond to possible procedural and substantive objections to this proposal.

A. Objection 1: Congressional Action is Unwarranted

The judiciary has long argued against a legislative solution to the problem of privately sponsored trips, arguing that Congress should not meddle in internal issues of judicial ethics. We are sympathetic to this argument and would prefer that reform on this topic originate in the judiciary. The reality, however, is that Congress often legislates in the area of judicial ethics,⁵ and, despite a case for reform that has long been overwhelming, the judiciary has repeatedly failed to act.

The judiciary’s own inaction compels congressional action. As importantly, the judiciary cannot, without the involvement of Congress, provide the additional appropriations necessary to solve the trips problem while expanding CLE opportunities available to judges. To craft the type of nuanced solution best fit for solving the trips problem, Congress must be a part of the solution.

B. Objection 2: The Federal Judicial Center Should Not Be in the Business of Approving Judges’ Educational Choices

Chief Justice Rehnquist and other critics of past reform efforts have argued that the Federal Judicial Center is not well equipped to review and approve private seminars attended by federal judges. S. 787 addresses this concern in several ways. First, it significantly narrows the category of activities covered by the legislation,⁶ addressing only those multi-day CLE programs for judges that most resemble the programs already conducted for judges by the Center. The Center’s role in approving reimbursement for these programs would be very similar to the role the Center already plays in approving its own programs.⁷

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As importantly, S. 787 leaves it up to the judiciary to decide how best to administer the program. The bill would permit the Federal Judicial Center to approve any seminar request regardless of location, topic or content, provided adequate funds are available and a determination is made that the trip would not undercut public confidence in the judge or the judiciary. The judiciary itself is required to promulgate guidelines for seminar approval, and it is likely that the judiciary will choose to adopt a fairly permissive standard.

We also note that while S. 787 authorizes the Board of the Federal Judicial Center to administer the Judicial Education Fund, the bill does not prevent the Center from delegating responsibility to individual district and circuit courts. A former president of the Federal Bar Council has recommended that each district and circuit court create a committee to evaluate the propriety of judicial participation in private seminars.⁸ S. 787 would allow the judiciary to implement a slight variation on this idea. While the bill requires the Board of the FJC to collect and post information and provide general approval of seminars, the FJC could easily delegate to task of approving specific funding for specific judges to the district and circuit courts. Indeed, this is probably the best way to ensure that a particular trip does not create an ethical concern.

C. Objection 3: S. 787 Permits Attendance at Ideological Seminars

Substantively, the Leahy-Kerry bill could be attacked as too permissive, because taxpayer money may be used to pay judges to attend biased private seminars, even perhaps seminars conducted by FREE. Is Community Rights Counsel really advocating a solution that might lead to taxpayer funding for FREE seminars? Actually, the answer is a qualified yes. The reason, again, is that our problem with FREE trips stems from a combination of factors that prominently includes FREE's funding from corporations and foundations that have an interest in federal court litigation. Stripped of the stain and bias that stems from its funding by corporations and ideological foundations, FREE's trips would become far less problematic as a matter of judicial ethics.

As importantly, taxpayer funding would dramatically alter the market for privately-provided CLE programs for judges. No longer will judges enter the CLE marketplace looking for handouts; they would enter as paying customers. Program providers would be forced to compete for judicial dollars by offering the most interesting and best-run programs for the money. The availability of federal dollars may spur other organizations that presently cannot afford to pay judges expenses to host programs of their own, expanding the range of interests and ideas in the market of CLE programs. If organizations like FREE survive in such a competitive environment, then there is far less basis for objection.

D. Objection 4: S. 787 Is Too Restrictive

On the other hand, critics might challenge S. 787 as too restrictive, because it eliminates certain seminar gifts and imposes certain conditions on taxpayer funding. But both S. 787's seminar ban and its funding conditions are reasonable and narrow, and by addressing longstanding judicial pay issues, the bill would, on balance, significantly improve the quality of life of federal judges.⁹ Moreover, as the Canons eloquently state, a judge must "accept restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."¹⁰ S. 787's elimination of seminar gifts and requirement of modest consultation prior to participation in a seminar should insulate individual judges

from questionable decisions and the harsh glare of the media's spotlight. It's a tradeoff we would think that many judges would make without hesitation.

IV. Conclusion

In two separate reports, Community Rights Counsel has now demonstrated overwhelmingly the corrosive effects private judicial seminars are having on the public's trust and confidence in the federal judiciary. No reasonable person could read the case studies in Chapter 4 and conclude that existing ethics guidance is working in preventing the appearance of impropriety in association with private judicial seminars.

It is time for the judiciary to find a solution to this problem. We think the solution outlined in S. 787 is both a fair and moderate one. It respects judicial independence, meets the need for continuing judicial education, and insulates individual judges from charges of impropriety. The bill points the way toward restoring public confidence in the impartiality and integrity of the federal judiciary.

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ENDNOTES

¹ Howard T. Markey, *A Need for Continuing Education in Judicial Ethics*, 28 VAL. U. L. REV. 647, 651 (1994) (quoting Robert Burns, *To a Louse*, in POEMS AND SONGS OF ROBERT BURNS 137 (James Barke ed., 1960) (1786)).

² The problem of lagging federal judicial salaries has been extensively documented and remains a major concern of Chief Justice Rehnquist. See, e.g., 2002 Year-end Report on the Federal Judiciary; Statement of William H. Rehnquist, Chief Justice of the United States, before the National Commission on Public Service, July 15, 2002, available at http://www.supremecourtus.gov/publicinfo/speeches/sp_07-15-02.html (visited June 1, 2003). The National Commission on the Public Service documented retention and recruitment problems for both the federal judiciary and senior executives due to inadequate compensation. The Commission noted “an historic pattern of lengthy periods of stagnation and relative decline of purchasing power” of judicial salaries and found a decline of 35 percent from 1969-1988. LEADERSHIP FOR AMERICA: REBUILDING THE PUBLIC SERVICE 274 (National Commission on Public Service 1990). The American Bar Association and the Federal Bar Association have also detailed the judicial pay problem in their 2001 report, *Federal Judicial Pay Erosion—A Report on the Need for Reform*.

S. 787 substantially increases salaries for federal judges and restores the skipped cost of living adjustments that should have occurred in 1995, 1996, 1997, 1999, and 2002, so that judges’ salaries would keep pace with inflation. Under the bill, district judges would receive \$164,700, and appellate court judges would get \$174,600. Supreme Court justices would receive at least \$202,100. Moreover, the bill repeals the statutory provision that requires specific congressional authorization of increases in judicial salaries, thereby decoupling judicial and congressional pay. Lastly, it reconvenes the Salary Review Commission to periodically examine whether judges are adequately compensated.

Other proposals for increasing judicial compensation have been introduced this Congress. For example, in May 2003, Senator’s Hatch and Leahy co-sponsored legislation that would increase judges pay by approximately 16.5 percent (fill in bill number and details). This bill could obviously be amended to include the private seminar language from S.787. See Editorial, *Federal Judges Deserve a Pay Raise*, N.Y. TIMES, May 9, 2003 (endorsing pay raise and calling for an end to judicial junkets: “As part of the package, judges should be required to forgo privately financed junkets that cast an ethical cloud on the courts, as Senator Leahy has previously proposed.”).

³ While S. 787 does not expressly exclude such activities from its definition of private judicial seminars, such activities, for which judges routinely receive reimbursement, plainly do not fall within the definition of a “seminar . . . or similar event that provides continuing legal education to judges.” Moreover, the bill gives the Judicial Conference promulgate guidance on interpreting the bill, authority the judiciary can easily use to expressly exclude such activities.

⁴ CRC’s research indicates that approximately 80 judges attend the type of seminars that would be banned by S. 787. Assuming the total costs of these programs is \$10,000 per judge, the total amount of money required to fund the existing private judicial education programs is less than \$1 million. S. 787 would double this amount and thus would provide expanded educational opportunities for judges.

⁵ See, e.g., Ethics Reform Act of 1989, Public Law 101-194 (Nov. 30, 1989); 28 U.S.C. § 455 (governing recusal of federal judges).

⁶ Critics of S. 2990, introduced in 2000 shortly after the release of NOTHING FOR FREE, argued that the bill threatened to eliminate a host of unobjectionable programs sponsored by law schools and bar associations. S. 787 is narrowly tailored to specifically exclude most of these programs from any regulation.

⁷ As Judge Rya Zobel, the former Director of the Federal Judicial Center, told the

House Judiciary Subcommittee on Courts and Intellectual Property:

In all our judicial education—whether by seminars, by manuals and monographs, or through video broadcasts—we assure that judges receive balanced and practical explanations of the governing law and its implications, and of the economic and scientific factors that increasingly affect litigation. *** With the guidance of our Board and our judicial education advisory committees, we present education that judges need, and when there are legitimate differences of opinion about an issue, we ensure that our participants hear them all.

Rya W. Zobel, Prepared Statement of Rya W. Zobel, Before the House Judiciary Subcommittee on Courts and Intellectual Property (June 11, 1998), available at <http://www.house.gov/judiciary/42021.htm>.

⁸ See Steven M. Edwards, *Seminars for Judges*, FEDERAL BAR NEWS (Fall 2002). Edwards expressed concerns that public funding would not be sufficient and that banning private funding entirely would limit the quality and diversity of educational choices for judges.

⁹ See, e.g., Judicial Education Reform Act of 2000, S. 2990, 106th Cong. (2000).

¹⁰ Canon 2 of the Code of Conduct for United States Judges.