NOTHING FOR FREE:

How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public's Trust

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Community Rights Counsel

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ABOUT COMMUNITY RIGHTS COUNSEL

Community Rights Counsel (CRC) is a public interest law firm based in Washington DC that defends laws that make our communities healthier, more livable, and socially just. CRC has helped local governments around the country successfully defend land use laws that promote public health, combat suburban sprawl, and protect wetlands, forests, critical habitat, historic structures, and open space. CRC has also recently published a Takings Litigation Handbook to guide government attorneys in defending challenges brought under the "takings" clauses of federal and state constitutions. This report is part of CRC's ongoing efforts to expose and critique judicial lobbying by special interests.

CRC is directed by a board consisting of Henry Underhill, the Executive Director and General Counsel of the International Municipal Lawyers Association, James E. Ryan, a law professor at University of Virginia, Charles Lord, the founder and Executive Director of the Watershed Institute at Boston College, and Doug Kendall, CRC's founder and Executive Director.

This report is available for downloading at CRC's website (www.communityrights.org). For an additional paper copy of this report, please send $15 to: Community Rights Counsel, 1726 M Street, NW, Suite 703, Washington, DC 20036.

FOREWORD

By the Honorable Abner J. Mikva

The notion that judges must be honest for the system to work is hardly a profound statement. As early as the Declaration of Independence, our founders complained about judges who were obsequious to King George, rather than the cause of justice. But a pure heart is not all that judges must bring to the judicial equation. For the system to work as it should, the judges must *be perceived* to be honest, to be without bias, to have no tilt in the cause that is being heard.

That perception of integrity is much more difficult to obtain. After spending 15 years as a judge and a lifetime as a lawyer and lawmaker, I can safely say that the number of judges who were guilty of outright *dishonesty—malum in se*—were happily very few. Even taking into account that I started practicing law in Chicago in the bad old days, the number of crooked judges was small. But that is not what people believe—then or now.

The framers and attenders to our judicial system have taken many steps to help foster the notion of the integrity of its judges. Some relate to smoke and mirrors—the high bench, the black robe, the "all rise" custom when the judge enters the room. Some, like life tenure for federal judges, the codes of conduct promulgated for all judges, are intended to create the climate for integrity.

All of those steps become meaningless when private interests are allowed to wine and dine judges at fancy resorts under the pretext of "educating" them about complicated issues. If an actual party to a case took the judge to a resort, all expenses paid, shortly before the case was heard, it would not matter what they talked about. Even if all they discussed were their prostate problems, the judge and the party would be per-

ceived to be acting improperly. The conduct is no less reprehensible when an interest group substitutes for the party to the case, and the format for discussion is seminars on environmental policy, or law and economics, or the "takings clause" of the Constitution.

That's what this report is about. It is about the perception of dishonesty that arises when judges attend seminars and study sessions sponsored by corporations and foundations that have a special interest in the interpretation given to environmental laws. It may be a coincidence that none of these seminars and study sessions take place in Chicago in January, or Atlanta in July. It may be a coincidence that the judges who attend these meetings usually come down on the same side of important policy questions as the funders who finance these meetings. It may even be a coincidence that environmentalists seldom are invited to address the judges in the bucolic surroundings where the seminars are held. But I doubt it. More importantly, any citizen who reads about judges attending such fancy meetings under such questionable sponsorship will doubt it even more.

The federal judiciary has a very effective Federal Judicial Center. It already provides many of the educational services that these special interest groups seek to provide to judges. Since the Center is using taxpayer funds and must answer to Congress, the locales of its programs are not as exotic. (The last ones I attended were in South Bend, Indiana in October, and Washington, D.C. in December.) The purpose of Center sponsored programs is as vanilla as it claims: there is no agenda to influence the judges to perform in any particular way in handling environmental cases. As a result, the programs are not only balanced as to presentation, but they provide no tilt to the judges' subsequent performance.

Unfortunately, the U.S. Judicial Conference, the governing body for all federal judges, has punted on the propriety of judges attending seminars funded by special interest groups. It advises judges to consider the propriety of such seminars on a "case by case" process. That delicacy has not begun to stem the erosion of public confidence in the fairness of the judicial process when it comes to environmental causes. One of the special interest sponsoring groups publishes a "Desk Reference for Federal Judges" which it distributes to all its judge attendees. That must be a real confidence builder for an environmental group that sees it on the desk of a judge sitting on its case. One of the judges on the court on which I sat has attended some 12 trips

sponsored by the three most prominent special interest seminar groups. I remember at least two occasions where co-panelist judges took positions that they had heard advocated at seminars sponsored by groups with more than a passing interest in the litigation under consideration.

When I was in the executive branch, all senior officials operated under a very prophylactic rule. Whenever we were invited to attend or speak at a private gathering, the government paid our way. Whether it was the U.S. Chamber of Commerce or the A.F.L-C.I.O., nobody could even imply that the official was being wined and dined and brainwashed to further some special interest. Experience showed that such a policy was not sufficient in itself to restore people's confidence in the Executive Branch; at least we didn't make the problem worse.

If the Federal Judicial Center can't provide sufficient judicial education to the task, maybe the federal judges could use such a prophylaxis. If the judges want to go traveling, let the government pay for the trip. It may or may not change the places they go or the things they learn, but it will at least change the transactional analysis.

Honorable Abner J. Mikva
Former Chief Judge, U.S. Court of Appeals for the D.C. Circuit
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CHAPTER 1
INTRODUCTION

Every year more and more federal judges fly to resort locations to attend privately funded seminars. All of a judge's expenses are paid for, including tuition, transportation, food, lodging, and various leisure activities. These trips, which cost thousands of dollars per judge, are privately bankrolled by corporations and foundations. Meanwhile, the same funders are simultaneously financing federal court litigation touching upon the same topics covered at the seminars. These sponsors are not supporting the seminars out of benevolence; rather they do so in the hope of influencing judicial thinking to their benefit. They are paying to have judges attend seminars that stress economic and policy arguments, which, if adopted by the judges, would advance their ideological and pecuniary interests.

These seminars amount to a veiled effort to lobby the judiciary under the guise of judicial education.

These seminars amount to a veiled effort to lobby the judiciary under the guise of judicial education. There are many reasons why lobbying of the judiciary is more strictly limited than lobbying of other government officials, but the principal reason stems from the special role the judicial branch plays within our government. The power and legitimacy of the federal court system rests to a great degree upon the public's perception of its fairness and impartiality. The courts have no enforcement powers of their own. Thus, for a judicial decision to have effect, it must be respected and enforced by others. This is why the judiciary, and the individual judges who make up the judiciary, accept that they must avoid not only impropriety but even an appearance of impropriety in order to maintain the respect their decisions require.

This research report addresses the fundamental question raised by this situation: Should private corporations and special interests be permitted to fund, and thus shape, the continuing

legal education of our nation's judges? To date, the judiciary has permitted private reimbursement of expenses for judicial education. But the facts uncovered in this report demonstrate that this position is inconsistent with the judiciary's own principles and ethical guidelines concerning maintaining public confidence and avoiding the appearance of impropriety.

Countless critical newspaper articles, editorials, and Congressional comments have decried the intolerable appearance problems created by these private seminars, which the press and public often view as junkets.

This report presents four arguments for banning private reimbursement of the expenses judges incur in obtaining continuing legal education. First, the public is plainly uneasy with the current situation. Since the emergence of privately funded judicial education, countless critical newspaper articles, editorials, and Congressional comments have decried the intolerable appearance problems created by these private seminars, which the press and public often view as junkets. Moreover, the educational elements of these trips are redundant. The Federal Judicial Center, created by Congress and funded by taxpayers, provides unbiased education running the gamut of legal issues. As the Center's chair testified recently, the biggest complaint the Center gets is that its seminars "work the judges too hard." The Federal Judicial Center appears capable of providing all the continuing legal education judges might need.

Second, privately funded judicial education, at least in its current form, is highly biased and offers a consistently truncated view of important issues. Community Rights Counsel (CRC) reviewed every federal judge's financial disclosure form filed for each of the last seven years. This research confirmed that the marketplace of privately funded judicial education is overwhelmingly dominated by pro-market, anti-regulatory seminars offering a single and unchallenged line of reasoning in areas of law with many competing views. Indeed, the three organizations hosting the most trips—the Law and Economics Center (LEC), the Foundation for Research on Economics and the Environment (FREE) and Liberty Fund (collectively the "Big Three")—share a remarkably similar, and in some respects extreme, conservative/libertarian ideology.

Third, there is significant evidence suggesting that these biased, pro-market seminars are working as their sponsors intend, breeding a new conservative judicial activism. This report canvasses the last decade of environmental decisions and traces the emergence of a growing anti-environmental judicial activism developing in lockstep with the ideological goals promoted by the Big Three. Four key legal issues are focused on, and remarkably, in each area, the author of every leading activist decision

has attended at least one Big Three seminar. Most of the judges attended numerous trips, sometimes while a pertinent case was before the court, and sometimes ruling in favor of a litigant backed by the same special interests that sponsored the judge's trip. In one case, a judge ruled one way in a very high-profile case, attended a seminar and, upon his return, switched his vote to agree with his newly acquired "education."

Of course, it is impossible to prove that any particular trip impacted any particular judge's ruling in any particular case. But this remarkable correlation between ideological seminars and ideological activism provides the strongest possible support for the conclusion that the judiciary should ban privately funded judicial education. After all, as Representative Zoe Lofgren (D-CA) put so plainly: "there is nothing more damaging to citizens' faith in the country and in the due process of law than the belief, even if inaccurate, that those who are trusted to judge have been influenced by financial connections."

The final argument for banning private reimbursement of seminar expenses is that it is a simple alternative to the current, unworkable, case-by-case approach used by the judiciary to evaluate the propriety of accepting reimbursement of seminar expenses. This report documents three critical flaws with the current standard. First, the standard leaves important ambiguities unaddressed, resulting in considerable confusion among judges about when it is and is not proper to attend a particular seminar. Second, it requires the collection and consideration of a tremendous amount of information and neither judges nor the judiciary seem willing to collect or consider this information. Finally, under the current standard, private judicial education takes place largely in secret, with the seminar sponsors, the judiciary, and individual judges each withholding critical information needed to effectively evaluate private judicial seminars.

* * *

This report proceeds in five chapters. Chapter Two employs the results of CRC's investigative research and the largest-ever review of judges' financial disclosure reports to authoritatively answer questions about which organizations host seminars for judges, what viewpoints are emphasized, and how many judges attend. Chapter Three illustrates the bias that pervades private judicial education by highlighting the one-sided seminars conducted by FREE. Chapter Four documents that the judges writing the decade's most activist, anti-environmental opinions

This report canvasses the last decade of environmental decisions and traces the emergence of a growing anti-environmental judicial activism developing in lockstep with the ideological goals promoted by the Big Three.

have all attended Big Three seminars, frequently while the case in question was pending. Chapter Five explains why the current case-by-case approach to evaluating the propriety of privately funded trips has failed to prevent these appearance problems. Chapter Six concludes the report by discussing a solution through which Congress and the judiciary could ban private reimbursement for educational seminars while ensuring that judges continue to receive any necessary continuing legal education.

[T]here is nothing more damaging to citizens' faith in the country and in the due process of law than the belief, even if inaccurate, that those who are trusted to judge have been influenced by financial connections.

— Representative Zoe Lofgren (D-CA)

CHAPTER 2
OVERVIEW AND TRENDS

We have offered annually a program on environmental law, for example, in conjunction with Lewis & Clark University. The primary complaint we've had about that is that we work the judges too hard.

—Judge Rya Zobel, Director of the Federal Judicial Center[1]

THE EVOLUTION OF JUDICIAL EDUCATION

Not so long ago, the notion of judges attending school to brush up on some weak areas of law was practically laughable. At the very least, it seemed unwise to hint that judges needed further education to make fully informed decisions.[2] However times have changed, and unlike the "good old days," judges must now routinely decide cases that turn on inordinately complicated scientific and technological questions. Keeping up with today's rapid pace of change is not easy for anyone, and for some judges the task is compounded by the fact that they have been out of school for many decades. Yet, to decide many cases fairly, it is imperative for judges to keep current with legal, scientific and technological trends. What was good science or cutting edge technology only five years ago is often completely outdated today and occasionally considered wrong.

Congress established the Federal Judicial Center in 1967 to meet a widely acknowledged need for an office within the judicial branch designed to educate and train judges.

Emergence of the Federal Judicial Center

In response to these pressures, and the prodding of Chief Justice Earl Warren in particular,[3] Congress established the Federal Judicial Center (FJC) in 1967.[4] In creating the FJC, Congress sought to meet a widely acknowledged need for an office

within the judicial branch designed to educate and train judges and court personnel. The FJC's "primary commitment"[5] is to "stimulate, create, develop and conduct programs of continuing education and training for personnel of the judicial branch . . . ."[6]

[W]e present education that judges need, and when there are legitimate differences of opinion about an issue, we ensure that our participants hear them all.

— Judge Rya Zobel

By statute, management of the FJC rests in a governing Board that is chaired by the Chief Justice of the United States and comprised of the Director of the Administrative Office of the U.S. Courts and seven federal judges elected by the Judicial Conference.[7] A Director, selected by the Board, is in direct charge of the activities of the FJC. Thus, the FJC operates entirely within the Judicial Branch, and is specifically organized in a way that avoids the introduction of biases from the swings of partisan politics.[8] Judge Rya Zobel, the former Director of the FJC, explained to the House Judiciary Subcommittee on Courts and Intellectual Property, that:

> 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.[9]

In 1998, the FJC provided 843 educational programs for more than 38,000 federal judge and court staff participants"[10] with 69 seminars and workshops directed specifically for federal judges.[11] Programs run by the FJC cover many diverse subjects including evidentiary problems, employment law, intellectual property law, and environmental and natural resources law.[12] The FJC is constantly covering new topics to stay current with legal trends.[13]

Beginnings of Privately Funded Judicial Seminars

Despite the existence of the FJC, private organizations and legal institutions have created judicial conferences and semi-

nars of their own. Unlike courses offered through the FJC, these privately funded seminars are organized and designed without any direct control from the judiciary. As a result, such courses are rarely designed with an eye toward a balanced viewpoint. Rather, privately funded seminars often seek "educational" goals that reflect the aims of the sponsoring organization—which in turn must meet the desires of its backers in order to receive continued funding.[14] In addition, many of the privately funded programs attract judges by offering seminars in resort locations complete with luxury accomodations—all free of charge to the judge. Not surprisingly, the emergence of these seminars raised ethical concerns both in and out of the legal community.

Privately funded programs attract judges by offering seminars in resort locations complete with luxury accommodations — all free of charge to the judge.

The Law and Economics Center (LEC) was the first such organization to raise serious public concerns. Henry Manne founded LEC in 1974, while he served as a professor at the University of Miami School of Law. After a brief stop at Emory University, Manne became dean of George Mason University's Law School in 1986 and brought LEC to Virginia with him.[15] Manne, a passionate adherent of the right-leaning "Chicago school" of law and economics, transformed George Mason's Law School into a bastion of law and economics thinking. As part of Manne's vision, LEC is dedicated to teaching the economic analysis of law to judges, all with a distinct anti-regulatory, free market spin. Beginning in 1976, LEC began offering seminars for federal judges at Florida resorts.[16] A few early LEC seminars were co-sponsored with the FJC. However, for the last several decades, LEC has offered its trips completely independently, with no guidance from or oversight by the judiciary.[17]

The Public Is Outraged, The Judiciary Is Nonplussed

The Law and Economic Center, and the propriety of privately financed judicial seminars in general, came under intense criticism following a series of newspaper articles which revealed that major corporations were quietly bankrolling LEC's anti-regulatory seminars.[18] The sponsoring corporations were frequently before the federal courts and the subject matter of the seminars touched upon their legal concerns. Judicial scholars, members of Congress, members of the bar, and the public expressed concern, and in some cases outrage, at the situation.[19] In response, the Institute for Public Representation, a public interest law program affiliated with Georgetown University Law Center, submitted a petition to the Judicial Conference requesting the issuance

Editorial Outrage Over Judges' Junkets

"**Jurists Squired and Sullied:** [I]f some group offers a federal judge free travel and accommodations to an exotic location for a legal seminar, shouldn't the average judge suspect that the group is trying to put the touch on him regarding some legal issue? It seems, though, that . . . many seasoned jurists . . . are being led to these seminars like sheep to a legal fleecing." RALEIGH NEWS & OBSERVER, July 23, 1998, at 12A.

"**Let Judges Spurn Bogus Seminars and Pay for Their Own Vacations:** At the least, for judges to attend these seminars creates an unacceptable public impression of questionable conduct. At the most, doing so creates an egregious ethical conflict of interest, bordering on wholly improper out-of-court communication with special-interest lobbyists or representatives of people who have filed lawsuits." FT. LAUDERDALE SUN-SENTINEL, April 18, 1998, at 18A.

"**The Bunkhouse Bench***:* At a minimum, the public, hearing that an interest group has put part of the federal judiciary in its saddle, will be moved to a greater mistrust of the legal system." THE LOUISVILLE COURIER-JOURNAL, June 19, 1998.

The Law and Economic Center came under intense criticism following a series of newspaper articles which revealed that major corporations were quietly bankrolling the LEC's anti-regulatory seminars.

of guidelines regarding privately funded judicial education programs, and LEC in particular.[20]

The Institute for Public Representation's petition was referred to the Judicial Conference's Advisory Committee on Codes of Conduct, which declined to investigate the concerns raised. Rather, the Committee cited its recently issued Advisory Opinion 67, "Attendance at Educational Seminars."[21] This Advisory Opinion instructs judges to evaluate the propriety of attending a privately funded seminar on a case-by-case basis after considering information about the seminar, its sponsors and the sponsors' ties to litigation. The flaws in Advisory Opinion 67's case-by-case approach are discussed in detail in Chapter 5. The overall impact of Advisory Opinion 67 has been to give a green light to privately funded seminars for judges. Not surprisingly, other ideologically driven groups have emerged to capitalize on the potential to share their viewpoint on particular subjects with federal judges.

"**Special-Interest Trips Are Blatant Conflicts:** Federal judges are well paid. They enjoy good benefits and lifetime job security. It's not too much to ask that they refrain from taking trips where special interests cozy up to them." BATON ROUGE ADVOCATE, April 14, 1998, at 6B.

"**Memo to Judges: Nothing Really 'Free':**[J]urists have to avoid the appearance of impropriety as much as impropriety itself. That's hard to do while wetting a line or riding the ponies at the expense of the special interests out in Montana." PORTLAND PRESS HERALD, April 28, 1998, at 8A.

"**And When Judges Take Freebies:** The first question a federal judge should ask when he or she receives an invitation to an expense-paid trip to a legal seminar at some resort is: Why me? If it is obvious the goal is to brainwash, he or she should decline. If judges believe the seminar to be a balanced presentation, they should pay their own way." DES MOINES REGISTER, June 18, 1998, at 10A.

"**Judges Should Avoid Trips Tied To Likely Litigators***:* The conflict is clear, and the judges' participation is mind-boggling." SAN ANTONIO EXPRESS-NEWS, April 19, 1998.

[J]urists have to avoid the appearance of impropriety as much as impropriety itself. That's hard to do while wetting a line or riding the ponies at the expense of the special interests out in Montana.

—PORTLAND PRESS HERALD

Recent Developments

In April 1998, Community Rights Counsel released a report that revealed that a relatively new group, the Foundation for Research on Economics and the Environment (FREE), was hosting seminars for federal judges at first class Montana guest ranches.[22] Unlike predecessors such as LEC, FREE is not affiliated with any university. Moreover, FREE's focus is considerably more narrow than LEC's. It promotes "free market environmentalism," a doctrine that advocates reliance on the free market and private property rights to protect the environment. FREE receives funding from corporations and conservative foundations to educate judges about the virtues of a free-market and the elimination of environmental regulations—issues that directly impact the interests of these same sponsors. Meanwhile, FREE's sponsors are simultaneously bankrolling litigation in federal courts to limit environmental regulation, often before the same judges.[23]

Following a nationwide burst of newspaper stories and editorials,[24] members of Congress asked the Judicial Conference to reconsider its guidance concerning privately funded semi-

nars. Representative Zoe Lofgren (D-California), before an oversight hearing of the House Judiciary Committee's Courts and Intellectual Property Subcommittee, commented that it was "totally, totally inappropriate" for judges to be accepting such free trips. In her words, attendance at the seminars "very clearly raises at least the appearance of impropriety."[25] Representative Barney Frank (D-Massachusetts) added that he was concerned with "a problem of ex parte impact" and requested that "a provision in the canons" be included to ensure judges seek out a "balanced view" on critical issues.[26]

To answer these questions, CRC conducted the most comprehensive review of judges' financial disclosure forms ever undertaken.

William Terrell Hodges, Chairman of the Judicial Conference, agreed to ask the Judicial Conference's Committee on Codes of Conduct to examine whether additional guidance on the subject of the educational seminars was necessary. However, the Codes of Conduct Committee once again refused to alter the case-by-case approach enshrined in Advisory Opinion 67.[27]

THE PRESENT STUDY

Purpose of This Study

The judiciary's failure to take any action to curtail attendance at FREE's seminars convinced Community Rights Counsel (CRC) to conduct this study. Although much ado had already been made of private judicial seminars, they proceed unabated. Fundamental questions also remained. How many organizations conduct seminars for federal judges? How many judges attend? What precisely was being presented to judges at these seminars? Are the seminars having any impact on the rulings of the attending judges?

Methodology

To try to answer these questions, CRC conducted, to our knowledge, the most comprehensive review of judges' financial disclosure forms ever undertaken. Each year, every federal judge is required to file a financial disclosure report. Among other things, a judge must report as a gift any expenses exceeding $250 that were paid for by a private organization; this includes the tuition, free travel, food and lodging associated with educational seminars.[28] The Administrative Office of the U.S. Courts holds these records for the public for six years. In July 1998, CRC requested the right to review the 1992-1997 financial disclosures for all Article III judges, excluding bankruptcy and mag-

istrate judges, and all judges on the Court of Federal Claims. In response, the Administrative Office produced over 6,600 financial disclosure forms, over 51,000 pages of material.[29]

Community Rights Counsel's staff reviewed each of the financial disclosures and created a database record for virtually every gift received by every active federal judge between 1992 and 1997.[30] Shortly after the completion of CRC's initial review, the 1998 financial disclosures became available. CRC staff reviewed these additional disclosures and recorded information concerning travel gifts to attend private seminars. At the end of the review process, CRC recorded information on over 5,800 privately funded trips taken by 1,030 federal judges.

SUMMARY OF ORGANIZATIONS HOSTING SEMINARS

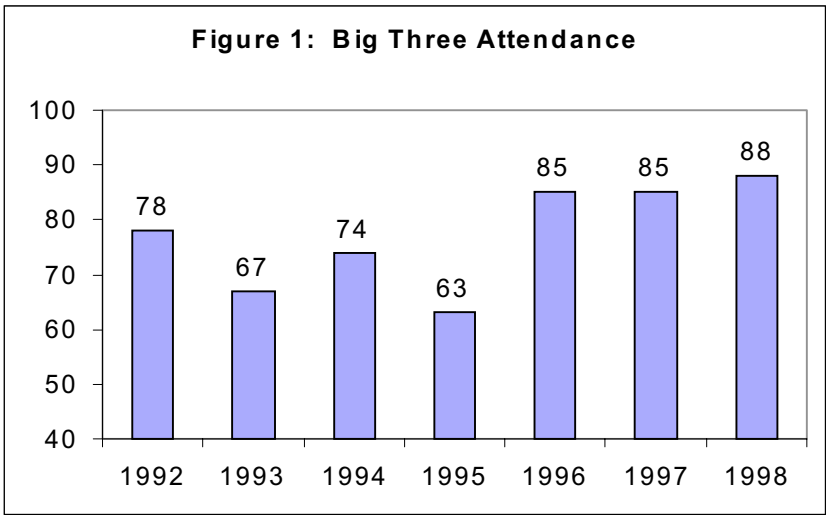
The "Big Three"

One of the objectives of CRC's study was to test the frequently-aired accusation that the bulk of privately funded educational seminars are conducted by right-of-center organizations. Our review of judges' disclosure forms confirms that right-leaning, anti-regulatory organizations dominate private judicial education. Indeed, the three organizations hosting the most seminars, LEC, FREE and the Liberty Fund (collectively the "Big Three"), with 246, 194 and 100 trips reported by judges, respectively, share remarkably similar conservative/libertarian leanings.[31]

Our review of judges' disclosure forms confirms that pro-market, anti-regulatory organizations dominate private judicial education.

Looking at this trio, reported attendance at private seminars appears to be increasing fairly steadily. The last three years

Figure 1: Big Three Attendance



of the study period had the highest reported attendance—an average of 86 trips per year compared to 70 during the first four years. This represents a 23% increase over the study period (see Figure 1). Moreover, bearing in mind that one of these groups, FREE, only began offering seminars in 1992, it seems likely that if data were available for prior years, an even more marked increase would be apparent. With about 800 active judges at any given time,[32] this means that about 10% of the federal judiciary takes a Big Three trip each year.

The LEC pays for the course, deluxe accommodations, transportation, food, drink and some recreational activities. One judge attending a 1997 LEC seminar reported that the value of the seminar was $7,367.

One important cavaet must be placed on these numbers. As discussed in Chapter 5, CRC research indicates that approximately 1 of 9 judges taking a seminar violates federal disclosure laws by failing to report the trip on his or her financial disclosure form. Thus, the actual number of trips appears to be significantly higher than the number of reported trips.

The Law and Economics Center

The Law and Economics Center continues to host a large number of seminars for federal judges at resort locations. Past seminar locations include: Amelia Island Plantation, Amelia Island, Florida;[33] Sea Pines Plantation, Hilton Head, South Carolina;[34] The Ritz-Carlton, Naples, Florida;[35] Radisson Suite Beach Resort, Marco Island, Florida;[36] and, the Omni/Tucson Golf Resort and Spa, Tucson, Arizona,[37] to name only a few. LEC pays for the course, deluxe accommodations, transportation, food, drink and some recreational activities. One judge attending a 1997 LEC seminar reported that the value of the seminar was $7,367.[38]

The Law and Economics Center has been very successful in attracting judges to its programs. Indeed, in 1997, LEC gloated that "[m]ore than one-third of the sitting federal judiciary" had attended a LEC economic institute.[39] CRC research revealed that 141 judges reported attending 246 LEC programs during the 1992-1998 period. Apparently, admittance to the programs is so sought after that there are frequently far more applicants than spaces available. According to LEC, the *Science and Public Health Institute*, held in the fall of 1998, had 70 applicants for only 18 or so spots.[40]

Programs at LEC cover a number of topics, all with a distinctly free-market, anti-regulatory bent. The foundational *Eco-*

nomics Institute, which is a prerequisite to most of the other programs offered, is described as "an intensive course of study in price theory taught from a property rights perspective with an emphasis on the economic effects of alternative legal regulations."[41] LEC's *Risk, Injury and Liability Institute* is described as demonstrating "the superiority of a legal system that assigns liability to those best able to avoid injury over a system that seeks only to spread risks by assigning liability to the 'deepest pockets.'"[42] Other program offerings include *Antitrust Economics*, *Science and Public Health*, and an *Advanced Economics Institute*. Within the programs, judges are instructed in such matters as "Misconceptions about Environmental Pollution and Cancer" and "Real Science vs. Junk Science."[43]

By all accounts, LEC programs are effective and convincing. A LEC newsletter proudly proclaims that many judges report that the program "totally altered their frame of reference for cases involving economic issues."[44] In an infamous example, U.S. District Judge Spencer Williams attended a LEC seminar while presiding over a predatory pricing case. While he was attending the LEC seminar at the Key Biscayne Hotel in Miami, the jury returned a verdict for the plaintiff in the amount of $5 million which, under the law, he was bound to triple to $15 million. Instead, he returned from the seminar and overturned the jury's verdict. He later wrote a letter to LEC that read in part: "As a result of my better understanding of the concept of marginal costs, I have recently set aside a $15 million anti-trust verdict."[45]

A LEC newsletter proudly proclaims that many judges report that the program "totally altered their frame of reference for cases involving economic issues."

— LAW AND ECONOMICS CENTER NEWS

The Foundation for Research on Economics and the Environment (FREE)

The Foundation for Research on Economics and the Environment began offering its series of seminars for federal judges in 1992 and immediately established itself as a major player on the private seminar circuit. From 1992 to 1998, 137 federal judges reported 194 trips to FREE seminars, and since 1995, FREE has been accommodating roughly as many, or more, attendees as the long established programs offered by the Law and Economic Center. FREE boasts that nearly one-third of the federal judiciary has either attended or asked to enroll in a future FREE seminar and that, in 1996, nearly 150 federal judges applied for only 54 seminar openings.[46]

Part of FREE's popularity is surely attributable to their attractive seminar package. FREE provides judges with free travel,

food and accommodations at one of a few private ranches near Bozeman, Montana, complete with plenty of "time for cycling, fishing, golfing, hiking and horseback riding."[47] For example, at the Elkhorn Ranch, one of FREE's recurring venues, judges may enjoy "some of the world's finest blue ribbon trout streams," take a horseback ride through "millions of acres of pristine and spectacularly beautiful mountain scenery," or maybe go whitewater rafting.[48] Montana's Gallatin Gateway Inn, another frequent FREE destination, boasts "[r]elaxing after a meeting could be basking in front of the Inn's distinctive fireplace, or soaking in the outdoor hot tub. During the summer months, you could also swim beneath the stars."[49] FREE's seminar packages are sufficiently attractive that many of the judges bring their spouses.[50]

While Republican-appointed judges disproportionately attend all of the Big Three programs, this trend is extreme in the case of Liberty Fund. CRC research revealed that Republican-appointed judges took a remarkable 97% of the reported Liberty Fund trips.

In return for these perquisites, judges attend lectures that, in FREE's words, "emphasiz[e] property rights, market processes and responsible liberty."[51] In the past, lecture topics have included: "Takings: Property, Environment and the Constitution;""Liberty and the Environment: A Case for Principled Judicial Activism;" and "The Environment -- A CEO's Perspective."[52] The entire program presented to judges at one of FREE's seminars is discussed in detail in Chapter 3.

Liberty Fund

The final member of the Big Three is the Liberty Fund. The late Indianapolis industrialist Pierre F. Goodrich founded Liberty Fund in 1960 to pursue his personal vision of "the ideal of a society of free and responsible individuals."[53] Mr. Goodrich was a strong believer in the libertarian philosophy and, in particular, was concerned that "institutional arrangements that concentrate political and economic power" would "invariably erode liberty and moral values."[54] According to its literature, Liberty Fund seeks to encourage the fragmentation and decentralization of power and "is intellectually and uncompromisingly committed to liberty."[55]

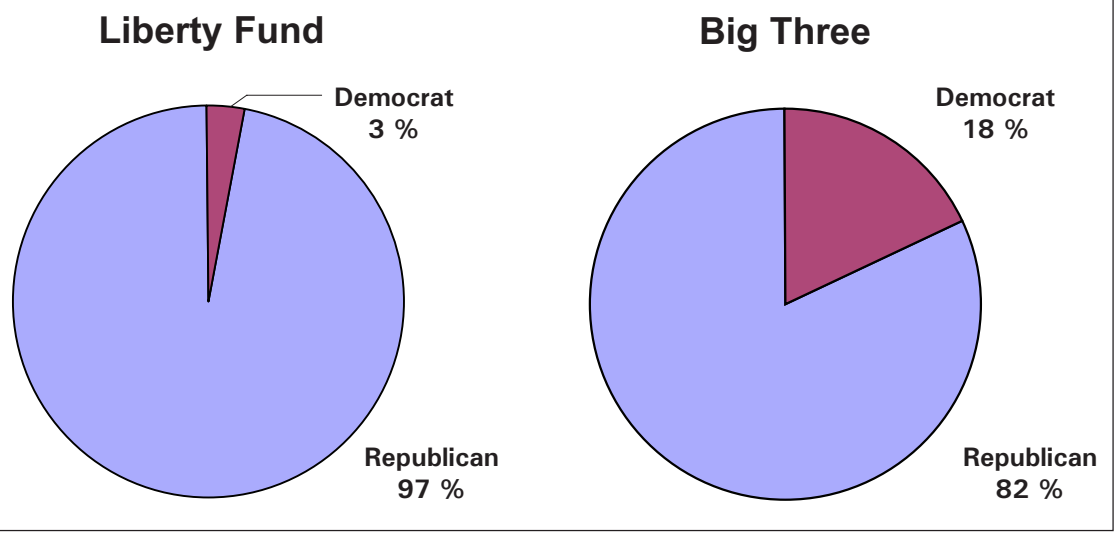
As of 1996, Liberty Fund had over $202 million in assets.[56] Liberty Fund makes grants directly to conservative/libertarian organizations such as the Cato Institute, the Center for Study of Federalism, and the Political Economy Research Center.[57] In 1997, the Fund reported spending $1.6 million (over 20% of its total expenses for the year) bankrolling meetings and seminars, including Liberty Fund's colloquia for federal judges.[58]

Between 1992 and 1998, 53 federal judges reported 100 Liberty Fund sponsored travel gifts.[59] Judges have reported attending conferences around the nation on such topics as, "Liberty and the Separation of Powers," "Freedom and Federalism," "Law, Liberty and Responsible Individuals," and "Liberty and the Meaning of Rights."[60] Liberty Fund not only hosts its own seminars for judges, it also funds those of philosophically-aligned groups. In fact, Liberty Fund has co-sponsored seminars with both FREE and LEC.[61]

Perhaps the most salient fact about Liberty Fund-sponsored seminars is the ideological make-up of the attending judges. While Republican-appointed judges disproportionately attend all of the Big Three programs, this trend is extreme in the case of Liberty Fund. CRC research revealed that Republican-appointed judges took a remarkable 97% of the reported Liberty Fund trips, compared with 82% for the Big Three as a whole.[62] (See Figure 2). Over the same period, Republican appointees made up approximately 60% of the active federal judiciary.[63]

Peter Huber explains that fossil fuels, superhighways, urban sprawl, pesticides and a cornucopia of modern environmental problems are actually good for the environment.

Figure 2: Who Appointed Seminar Attendees?



Funding Sources and Litigation Ties

Uncovering a complete picture of the funding sources for groups like FREE and LEC is virtually impossible. While both FREE and LEC receive a good portion of their total budget directly from corporations, it is impossible to discover the identity of these funders and the size of their gifts. The organizations do not typically disclose this information.[64] The IRS does not disclose corporate donations that non-profits report on their 990 forms.[65] Finally, as discussed in Chapter 5, the judiciary makes no effort to collect information for judges or the public on the sponsors of privately funded seminars.

Litigants funded by FREE and LEC sponsors often get the advantage of appearing before a judge schooled at FREE or LEC.

Information about FREE and LEC funding from private and corporate foundations is available from federal tax returns (Form 990-PF) and is compiled annually in the Foundation Grants Index. These indices show that both FREE and LEC get funding from a number of prominent conservative foundations, most notably the Sarah Scaife and Carthage Foundations (both controlled by right-wing financier Richard Mellon Scaife) and the John M. Olin Foundation. Both FREE and LEC also get a portion of their funding from the foundations of large companies: FREE from Shell Oil Company Foundation, Burlington Resources Foundation, General Electric Fund, Temple-Inland Foundation (a timber company) and Koch Oil (Lambe Foundation); LEC from, among others, Ford Motor Company Fund, the Abbott Laboratories Fund, and the Proctor and Gamble Fund.

FREE and LEC's funders also bankroll federal court litigation. For example, the Olin, Scaife and Carthage foundations are among the largest supporters of non-profits such as the Pacific Legal Foundation, Washington Legal Foundation and the New England Legal Foundation (groups that challenge environmental regulations in federal court). Similarly, the companies that fund FREE and LEC through their corporate foundations appear in court and bankroll associations to litigate on their behalf. As a result, litigants funded by FREE and LEC sponsors often get the advantage of appearing before a judge schooled at FREE or LEC. This disturbing situation is discussed in Chapter 4.

ANY RESPONSE FROM THE LEFT?

As noted above, one objective of this study was to answer the frequently posed question: Are any left-of-center orga-

nizations hosting expense-paid educational seminars for federal judges? The answer is that no left-of-center organization hosts trips that rival the Big Three in the number of judges attending, the luxury and length of seminars or in the ideological slant of the programs. The conservative/libertarian viewpoints of the Big Three overwhelmingly dominate the private sector seminar marketplace.

The organization that probably comes closest to being a left-of-center rival to the Big Three is the Aspen Institute. The

The Big Three Honor Role

From 1992-1998, 237 federal judges reported attending 539 Big Three seminars. The majority of attendees (51%) reported going to a Big Three seminar only once during the study period. A few judges, however, attended seminar after seminar, year after year. One begins to wonder just how much education these judges need in law and economics and libertarian thought.

The judges attending the most seminars—all appointed by Presidents Reagan or Bush—are:

Total Trips

12	**Douglas H. Ginsburg**	D.C. Circuit Court of Appeals
11	**Loren A. Smith**	U.S. Court of Federal Claims
11	**Gregory W. Carman**	U.S. Court of International Trade
10	**D. Brooks Smith**	District Court of Western Penn.
10	**Suzanne B. Conlon**	District Court of Northern Illinois
9	**Kenneth L. Ryskamp**	District Court of Southern Florida
8	**Danny J. Boggs**	Sixth Circuit Court of Appeals
8	**Rodolfo Lozano**	District Court of Northern Indiana
7	**Eugene E. Siler**	Sixth Circuit Court of Appeals
7	**Pauline Newman**	Federal Court of Appeals

Aspen Institute is a "global forum that convenes leaders from diverse disciplines to address critical issues that confront societies, organizations, and individuals."[66] The Aspen Institute maintains conference facilities in Wye River, Maryland (on the Eastern Shore of the Chesapeake Bay), and Aspen, Colorado.

CRC's research identified 75 judges who reported attending 88 Aspen Institute programs. The majority appeared to be attending a two- or three-day seminar on international human rights law. Unlike the Big Three, research into the Aspen Institute revealed no overwhelming biases. For one thing, the Board of Trustees does not consist solely of individuals leaning toward the left or the right. The board is comprised of individuals as varied as David H. Koch, executive vice president of Koch Industries; John J. Phelan, Jr., retired chairman and CEO of the New York Stock Exchange; and Ann W. Richards, former Governor of Texas.[67]

Whatever the Aspen Institute may or may not be, it is most definitely not a counterbalance to the ideas promoted by the LEC, FREE and the Liberty Fund.

A sense of balance is also present in the foundations that contribute to the Aspen Institute—with donations from groups ranging from the conservative Charles Koch Foundation to the generally progressive Pew Charitable Trusts. Also, looking at the makeup of the judges attending Aspen Institute seminars, another difference surfaces. While 82% of the trips reported to Big Three programs were taken by Republican-appointed judges, the breakdown of Aspen Institute attendees was much more evenly split, with 57% of Aspen Institute trips reported by Democratic appointees.

Regardless of whether or not the Aspen Institute is correctly labeled a left-of-center organization, the Aspen Institute seminars do not address the key argument jointly espoused by the Big Three—that a free-market and less government regulation will result in environmental improvement and a better society. Thus, whatever the Aspen Institute may or may not be, it is most definitely not a counterbalance to the ideas promoted by LEC, FREE and Liberty Fund.

CONCLUSION

Despite the existence of the Federal Judicial Center and the controversy surrounding private judicial seminars, private trips have flourished over the last decade. Indeed, in 1998, more than ten percent of the nation's federal judges jetted off to a luxury resort to attend a private seminar. The education judges

receive at these trips is one-sided, with the pro-market, anti-regulatory seminars of the Big Three dominating the market of private judicial education.

ENDNOTES

[1] *Oversight Hearing on the United States Judicial Conference, Administrative Office, and Federal Judicial Center, Before the Courts and Intellectual Property Subcommittee of the House Judiciary Committee*, 105th Cong., 2nd Sess. (June 11, 1998) (hearing transcripts available through Federal News Service).

2 Tom C. Clark, the first Director of the Federal Judicial Center, stated this belief clearly: "When I first entered practice many years ago, the judges were so jealous of their prerogatives that a lawyer might as well have turned in his shingle if he suggested that judges needed to go to some sort of school." Tom C. Clark, *The Federal Judicial Center*, 1974 Ariz. St. L.J. 537, 538 (1974).

[3] *See id*. at 537.

[4] Federal Judicial Center Act, 28 U.S.C. §§ 620-29 (1999). Background information concerning the Federal Judicial Center may be found on their web page, <http://www.fjc.gov.html> (visited May 2, 2000).

[5] FEDERAL JUDICIAL CENTER, 1998 ANNUAL REPORT 2 (1999). Judge Rya Zobel, the former Director of the Federal Judicial Center, has indicated that the Center "commit[s] about three-fourths of [its] resources to education and training . . . ." Rya W. Zobel, *Prepared Statement of Rya W. Zobel, Before the House Judiciary Subcommittee on Courts and Intellectual Property* (June 11, 1998) (available on the internet, <http://www.house.gov/judiciary/42021.htm> (visited May 2, 2000)).

[6] Federal Judicial Center Act, 28 U.S.C. at § 620(b)(3).

[7] 28 U.S.C. at § 621.

[8] In 1988 Congress created the Federal Judicial Center Foundation, a private non-profit, to receive gifts to support the FJC. Such gifts may come from private foundations, such as a 1992 gift of $400,000 from the Carnegie Corporation to support the development of a manual on scientific and technical evidence. FEDERAL JUDICIAL CENTER, 1992 ANNUAL REPORT 7 (1993). However, the Foundation may not accept gifts earmarked for projects that have not previously been approved by the FJC's Board, and the FJC has sole control over the design and conduct of research or education programs supported by donations. 1998 ANNUAL REPORT, *supra* note 5, at 10.

[9] ZOBEL, *supra* note 5.

[10] 1998 ANNUAL REPORT, *supra* note 5, at 2 (sidebar).

[11] *Id.* at 5 (2,178 participants total).

[12] *Id.* at 1, 4.

[13] *Id*. at 4.

[14] For example, Henry Manne, founder of the Law and Economics Center, said that his center is committed to "serve the interests of its contributors effectively." *Institute's Analysis of Privately Funded Judicial Seminars*, LEGAL TIMES, Sept. 15, 1980, at 21 (reprinting the Institute for Public Representation's petition) (quoting the FOURTH ANNUAL REPORT OF THE LAW AND ECONOMIC CENTER, at 3). Moreover, Manne states that the Law and

Economic Center avoids "the monotonous political liberalism that has biased academic economics" in favor of "considerations of individual choice, private property, freedom of contract, and the market allocation of resources." *Id*. (quoting FIFTH ANNUAL REPORT OF THE LAW AND ECONOMIC CENTER, at 2).

[15] George Mason University School of Law, *Law and Economics* (undated) (on file with CRC). *See also*, ALLIANCE FOR JUSTICE, JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN 71 (1993).

[16] ALLIANCE FOR JUSTICE, *supra* note 15, at 70-75. *See also* Law and Economics Center, *The Economics Institute for Federal Judges* (May 1997) (brochure describing Fall 1997, Economics Institute at Amelia Island, Florida) (on file with CRC).

[17] Jack B. Weinstein, *Essay: Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May Judges Learn?,* 36 ARIZ. L. REV. 539, 548 (1994) (citing a telephone conversation with Henry Manne).

[18] Fred Barbash, *Big Corporations Bankroll Seminars for U.S. Judges*, WASH. POST, Jan. 20, 1980, at A1. The corporations mentioned in the article include: IBM, ITT, AT&T, Standard Oil of Ohio, Ford Motor Company, and U.S. Steel. *Id*. at A1. *See also*, Walter Guzzardi, Jr., *Judges Discover the Word of Economics*, FORTUNE MAGAZINE, May 21, 1979, at 58.

[19] Barbash, *supra* note 18, at A1; *Institute's Analysis of Privately Funded Judicial Seminars, supra* note 14, at 19.

[20] The petition was submitted on Aug. 29, 1980.

[21] Advisory Op. No. 67, Advisory Committee on Codes of Conduct, *Attendance at Educational Seminars*, (Aug. 25, 1980).

[22] COMMUNITY RIGHTS COUNSEL, THE TAKINGS PROJECT: USING FEDERAL COURTS TO ATTACK COMMUNITY AND ENVIRONMENTAL PROTECTIONS 35-39 (1998) (modified version published as Douglas T. Kendall & Charles P. Lord, *The Takings Project, A Critical Analysis and Assessment of the Progress So Far,* 25 B.C. ENV. AFF. 509 (1998)).

[23] *See infra* Chapter 4.

[24] Ruth Marcus, *Issue Groups Fund Seminars for Judges*, WASH. POST, April 9, 1998, at A1; David Josar, *State Judges Defend Resort Trips,* DETROIT NEWS, June 15, 1998, at 1A; Beverly Bartlett, *Kentucky Judges' Trips Spur Questions: Expenses Paid for Montana Seminars at Resorts, Ranches,* LOUISVILLE COURIER-JOURNAL, June 17, 1998, at B1; Frank Santiago, *Judge Ropes Free Trip,* DES MOINES REGISTER, June 13, 1998, at 1A; Jeff Barker, *Judges on Junkets: Conservatives Fund Seminars,* ARIZ. REPUBLIC, May 10, 1998, at A1; Dustin Solberg, *Judges get FREE lessons on Property Rights,* HIGH COUNTRY NEWS, July 6, 1998. See also text block on pages 8-9.

[25] *Oversight Hearing on the United States Judicial Conference, Administrative Office, and Federal Judicial Center, Before the Courts and Intellectual Property Subcommittee of the House Judiciary Committee*, 105th Cong., 2nd Sess. (June 11, 1998) (transcript available through Federal News Service).

[26] *Id.*

[27] *Agenda F-6 , Report of the Judicial Conference Committee on Codes of Conduct*, 8-12 (Sept. 1998). This failure again drew fire on Capitol Hill. Representative David Skaggs (D-CO) opined as follows in a speech given on the House floor:

> I think everyone here would agree that it would be unfair for a judge to accept an expenses-paid vacation from one party in a lawsuit. . . .
>
> But suppose a corporation, instead of paying directly, gives money to a foundation to pay for the vacation indirectly? Does that make it all right? Of course not. . . .
>
> [Yet,] [u]nder the interpretation provided by the Judicial Conference, judges may accept gifts in the form of free travel and vacation seminars so long as they are not directly sponsored by an entity likely to appear as a party to a case. The judge need not investigate further. This allows persons or corporations interested in federal litigation effectively to launder their gifts to judges by passing them through a non-profit foundation. . . .
>
> This is difficult to reconcile with the obligation to avoid the appearance of impropriety.

Cong. Rec. H10802 (daily ed. Oct. 13, 1998) (statement of Rep. Skaggs); s*ee also*, *Friendly Fire*, LEGAL TIMES, Oct 19, 1998, at 2.

[28] *See infra* Chapter 5.

[29] CRC was not provided with disclosures for judges who had resigned, retired or were deceased at the time of the request.

[30] The primary focus of the review was to track information concerning privately funded judicial seminars. When it was clear that a travel gift was related to participation in law school moot court competitions, such information was not recorded, as this information is beyond the scope of this study.

[31] The Liberty Fund co-sponsored a number of trips with LEC and FREE. These trips have been counted as LEC and FREE trips. Including such trips, the Liberty Fund sponsored 128 reported trips.

[32] There are 843 authorized slots for life-tenured, active federal judges. The number of active judges varies widely depending on speed of the judicial nomination/confirmation process.

[33] In November 1997, LEC offered *The Economics Institute for Federal Judges* at Amelia Island Plantation, Amelia Island, Florida. Law and Economics Center, *The Economics Institute for Federal Judges* (brochure and application) (on file with CRC).

[34] In 1992, LEC offered four seminar programs at Sea Pines Plantation, Hilton Head, South Carolina. In 1993, three seminar programs were offered at The Cottages, Hilton Head, South Carolina. LAW AND ECONOMICS CENTER, 1992 ANNUAL REPORT, inside cover (1993). The LEC offered three more seminar programs at Hilton Head, South Carolina in 1994. LAW AND ECONOMICS CENTER, 1993-4 ANNUAL REPORT, inside cover.

[35] In May – June 1991, LEC offered an *Advanced Course for Federal Judges on Science and Public Health* at the Ritz-Carlton, Naples, Florida. LAW AND ECONOMICS CENTER, 1991 ANNUAL REPORT, inside cover (1992).

[36] In January 1991, LEC offered an *Advanced Course for Federal Judges on Quantitative Methods* and an *Advanced Course for Federal Judges on the Economics of Risk, Injury and Liability*, at the Radisson Suite Beach Resort, Marco Island, Florida. LAW AND ECONOMICS CENTER, 1991 ANNUAL REPORT, inside cover (1992).

[37] In 1998, LEC offered three seminar programs at the Omni/Tucson Golf Resort and Spa, Tucson, Arizona. Law and Economics Center, *Advanced Economics Institute for Federal Judges* April 25 – May 1, 1998 (brochure and application) (on file with CRC); Law and Economics Center, *Science and Public Health Institute for Federal Judges* May 2 – 8, 1998 (brochure and application) (on file with CRC); Law and Economics Center, *Basic Economics Institute for Federal Judges* Oct. 17-27, 1998 (brochure and application) (on file with CRC).

[38] Financial Disclosure Report for 1997 for Judge Diane Weinstein.

[39] Law and Economics Center, *The Economics Institute for Federal Judges* Nov. 8 – 21, 1997 (brochure on file with CRC).

[40] *Law and Economic Center's 1998 Institutes for Federal Judges Attract Record Number of Responses,* LAW & ECONOMICS CENTER NEWS, Fall 1998, at 1.

[41] *LEC 1996 Institutes*, THE LEC QUARTERLY, Fall 1996, at 1.

[42] *Id*. at 1

[43] Law and Economics Center, *Science and Public Health Institute for Federal Judges* May 2 – 8, 1998 (brochure on file with CRC).

[44] Law and Economics Center*,* LAW & ECONOMICS CENTER NEWS, Fall 1998, at 1, 2.

[45] *Institute's Analysis of Privately Funded Judicial Seminars, supra* note 14, at 19 (quoting LAW AND ECONOMICS CENTER, CONTRIBUTORS REPORT, THIRD ECONOMICS INSTITUTE FOR FEDERAL JUDGES, APRIL 16-30, 1978, front page). The LEC only identified Judge Williams as a judge from "the Northern District of California." Later publications reveal Judge William's identity. *See* ALLIANCE FOR JUSTICE, *supra* note 15, at 72.

[46] Marcus, *supra* note 24, at A12.

[47] Letter from John A. Baden, Chairman, Foundation for Research on Economics and the Environment, to a federal judge (Jan. 7, 1996) (copy on file with CRC). *See also* FREE's website at <http://www.free-eco.org> (visited May 2, 2000).

[48] Elkhorn Ranch Brochure, Gallatin Gateway, Mont. (brochure on file with CRC).

[49] Gallatin Gateway Inn Brochure, Gallatin Gateway, Mont. (brochure on file with CRC); *see also* <http://www.gallatingatewayinn.com>.

[50] Six of the 17 judges FREE lists as attending its June 15-20, 1996 seminar reportedly brought their spouses. FREE, Agenda for 1996 Colloquium for Federal Judges, June 15-20, 1996 at 4 (on file with CRC).

[51] John A. Baden, *Effective Environmentalism Uses a New Shade of Green*, THE SEATTLE TIMES, June 26, 1996 (John Baden is the chairman and founder of FREE).

[52] FREE program schedules (on file with CRC).

[53] Liberty Fund Brochure, Liberty Fund, Inc., Indianapolis, Ind., at 1.

[54] *Id.* at 2.

[55] *Id.* at 2-3.

[56] Emily Hebert, *Gift Pulls Liberty out of Shadows*, 18 INDIANAPOLIS BUS. J. 15 (1997)

[57] Liberty Fund Inc., *A Statement Attached to and Made Part of U.S. Private Foundation Income Tax Return for the Year Ended April 30, 1997* (on file with CRC).

[58] Hebert, *supra* note 56.

[59] This figure does not include 28 trips that Liberty Fund co-sponsored with either FREE or LEC.

[60] These are the names of Liberty Fund Seminars reported by judges on their Financial Disclosure Reports.

[61] *See id*.

[62] When including the 28 trips co-sponsored by Liberty Fund and either LEC or FREE, 92% of reported trips were taken by Republican-appointed judges. With respect to LEC and FREE independently, 80% and 76% of reported trips were taken by Republican-appointed judges, respectively.

[63] The percentage of Republican-appointed judges has gradually decreased during the period covered by this report—60% represents an approximate average. In mid-1993, approximately 65% of active judges were Republican appointees (*Clinton Gets His Turn,* BOSTON GLOBE, Aug. 8, 1993, at 69) while Republican appointees accounted for only approximately 54% by the end of 1997 (ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT: ANNUAL REPORT 1998, 5-7). *See also* the Federal Judicial Center's online database < http://air.fjc.gov/history> (visited May 2, 2000).

[64] FREE refuses to disclose the identity of its corporate funders. Marcus, *supra* note 24, at 12. LEC goes a step further, channeling donations to the George Mason Foundation, which then distributes the money to LEC. This essentially sets up a firewall for investigating LEC's corporate funding. LEC annual reports from 1992-1994 (on file with CRC) do list individual and corporate contributers. These list confirm that LEC receives direct funding from dozens of the nation's largest corporations including Philip Morris, Shell, Du Pont, Hercules, Weyerhaeuser, Exxon and GM.

[65] 26 C.F.R. § 301.6104(b)-1(b)(1) (2000).

[66] Aspen Institute, *About the Aspen Institute,* <http://www.aspeninst.org/about/default.asp> (visited 5/3/00).

[67] Aspen Institute, *Board of Trustees,* <http://www.aspeninst.org/about/about_board.asp> (visited 5/3/00).

CHAPTER 3
FREE'S AGENDA

The last thing that would make sense for judges who are used to hearing two sides is to only present one. That would be grossly counterproductive, I think.

—John Baden, Founder and Chairman, Foundation for Research in Economics and the Environment, Washington Post, April 9, 1998.[1]

*The lectures [at FREE's seminars for judges] were diverse, but a coherent new vision emerged from their training * * *. The unifying theme was a rejection of top-down, command and control environmentalism.*

—John Baden, Seattle Times, June 26, 1996.[2]

It almost seems unnecessary to carefully parse the schedule and program material of privately funded educational seminars conducted by FREE, LEC and others to demonstrate that these groups are using judicial education to advance a political agenda. After all, it would be surprising indeed to discover that conservative philanthropists like Richard Mellon Scaife and resource extraction companies such as Amoco, Koch Oil, and Burlington Resources Inc., are spending hundreds of thousands of dollars each year to provide the same unbiased education judges are already receiving at seminars run by the Federal Judicial Center. And LEC, FREE and others are not shy about advertising their perspective and approach. For example, FREE touts its seminars as "promoting private property rights, market incentives

and voluntary arrangements"[3] and highlights its rejection of "command-and-control" regulatory approaches.[4] Anyone with a passing knowledge of environmental politics recognizes that these are positions most frequently espoused by corporate executives, politicians and activists who seek to limit or repeal federal environmental protections.[5]

Mr. Baden was right in saying that FREE's programs offer a "coherent new vision" with the "unifying theme" of "a rejection of top-down, command and control environmentalism."

But in responding to criticism about FREE's seminars, FREE's founder and chairman John Baden has asserted that FREE's seminars provide judges with a "very wide range" of viewpoints.[6] This assertion has been echoed by other FREE speakers[7] and even a judge who has attended a FREE seminar.[8] FREE also adamantly asserts that its programs are not hostile to the environment at all, but instead represent a "new shade of green."[9] According to Mr. Baden, FREE's positions are "supported by informed and concerned environmentalists."[10]

This surprising defense makes necessary a detour into the agenda of FREE's judicial seminars. Thus, this report explains below precisely what Scaife, Olin, Koch & Shell are getting from their "FREE" dollars. Using FREE's book entitled *Federal Judge's Desk Reference to Environmental Economics* (FREE's Desk Reference) as a guide, the report outlines the three primary messages FREE seminars give to judges:

- Existing federal environmental laws are wildly inefficient and should be repealed in favor of the free market, which will produce an "optimal" amount of pollution.

- It makes little or no difference whether corporations are given the "right" to develop and pollute or, instead, neighbors and the government have the "right" to stop the pollution.

- Judges can aggressively reinterpret the Constitution in order to repeal or frustrate existing environmental laws and allocate property rights to landowners and corporations.

Following an agenda for a recent FREE seminar,[11] this report then walks through the program FREE presented to judges. It gives biographical information about each of the seminar speakers and uses the speaker's published work to help illustrate the speaker's perspective on the subject matter covered. This report demonstrates through this review that Mr. Baden was right

in saying that FREE's programs offer a "coherent new vision" with the "unifying theme" of "a rejection of top-down, command and control environmentalism."[12] In fact, the discussion which follows demonstates that FREE offers no balance whatsoever in terms of presenting views contrary to the seminar's principal themes.

ENVIRONMENTALISTS AND FREE MARKETEERS

A thorough discussion of the differences between the tenets of those who support strong federal environmental protections ("Environmentalists") and those opposing federal protections in favor of a "free-market" approach ("Free Marketeers") is beyond the scope of this report.[13] However, the summary below highlights the enormous gulf between the worldviews of the two groups and the reasons why neither side of the debate should have an *ex parte* opportunity to school hundreds of federal judges.

Environmentalists see the 1960's America, populated with burning rivers, Love Canals and silent springtimes, as evidence of the spectacular failure of the free market and the common law to protect the environment.

The chasm between Environmentalists and Free Marketeers can be gleaned from their respective answers to the following three questions: (1) Is government regulation necessary to achieve environmental protection? (2) What "rights" come with property ownership and how are property rights to be allocated? (3) What is the role of the judiciary in reviewing environmental laws?

Is Government Necessary?

The Environmentalists' View: Market Failure and the Need for Government Intervention

Environmentalists view our nation's federal environmental laws as among this century's hallmark legislative achievements. They see the 1960's America, populated with burning rivers, Love Canals and silent springtimes, as evidence of the spectacular failure of the free market and the common law to protect the environment. Environmentalists thus support each of the major federal environmental statutes – including the Clean Air Act, Superfund, the Endangered Species Act, and the Clean Water Act — as essential components of a system necessary to preserve our nation's health, quality of life, and natural environment. Environmentalists also believe that, in general, these federal laws have been both effective and efficient in achieving their goals.[14]

Environmentalists contend that environmental laws are necessary because of what economists' term "market failure."[15] They argue that the market fails to protect the environment for several related reasons. First, corporations frequently do not pay all the costs associated with their industrial and commercial activities.[16] In economic jargon this is called the problem of external costs or externalities.[17] The classic illustration is air pollution. An industry employs a smokestack to send air pollution high into the atmosphere. This pollution may wreak health and environmental havoc miles (sometimes hundreds of miles) away from the industry. Absent government correction, these costs – in health care, loss of life, and detriment to the natural environment – will remain "external" to the industry; the industry will not pay them. If the corporation does not pay these costs, it will produce more than the optimal amount of the product that causes the pollution, as the true costs of manufacturing the product are not taken into account.[18]

Environmentalists ask: What price tag do you put on clean air and water? What is the cost of a human life lost to environment-related health problems? What would we pay to prevent the extinction of a species?

Environmentalists assert that external costs are ubiquitous in our crowded society. They point to large-scale farm operations with the accompanying noises, smells, and pesticide runoff. The brickyard in a residential area. The subdivision built in a wetland. All of these uses of land impose considerable costs upon neighboring properties. In each case, unless forced to consider these costs, they will not be reflected in the landowner's bottom line.[19]

Markets also fail to adequately value environmental protection.[20] Many environmental attributes, such as clean air, the water-filtration of a wetland, open space and viewsheds, are what economists call "collective goods."[21] Collective goods are shared by the public generally and cannot effectively be fenced.[22] Because a developer cannot fence in the environmental attributes of his property and cannot extract from his neighbors the value attributable to these amenities, private landowners, motivated by individual gain, will under-produce collective goods.[23]

Finally, Environmentalists highlight the difficulty in accurately pricing environmental attributes.[24] Environmentalists ask: What price tag do you put on clean air and water? What is the cost of a human life lost to environment-related health problems? What would we pay to prevent the extinction of a species? What is the value of a pristine wilderness area? Environmentalists assert that because environmental protection is impossible to accurately price, markets, which lead to efficient outcomes only when individuals are armed with complete and

accurate pricing information, are wildly *inefficient* when it comes to allocating and protecting environmental resources.[25]

The failure of the market due to external costs, collective goods and incalculable values and benefits informs the Environmentalists' conviction that, left to its own devices, the market will dramatically under-produce environmental protection. The problems of externalities, collective goods and intangible costs each result in too little environmental protection.

Environmentalists thus insist that the democratic political process must be used to determine the correct amount of environmental protection. While many Environmentalists support employing market mechanisms, such as the emissions trading program employed under the Clean Air Act, to achieve a stated environmental goal in a more cost efficient manner, Environmentalists fundamentally reject the suggestion that the market can determine the appropriate *amount* of environmental protection.

Free Marketeers label federal environmental laws "experiments in sylvan socialism" and decry their unnecessary costs and "tragic consequences."

The Free Marketeers' View: Markets Are Good, Government is Bad

Free Marketeers weave together other doctrines from economics and political science to attack federal environmental laws.[26] They extol the benefits of the market and disparage government regulation, concluding that the market can be relied upon to protect the environment. They label federal environmental laws "experiments in sylvan socialism" and decry their unnecessary costs and "tragic consequences."[27] Environmentalists, in supporting these laws, are either hopelessly naïve[28] or "crisis entrepreneurs" who "use shoddy science and biased media coverage" to fabricate environmental dangers and "seduce members and donations."[29]

Free Marketeers' attack on environmental law begins with the economics of Frederick Hayek and Hayek's exuberant promotion of the genius of the free market. Free Marketeers argue that markets increase efficiency, prosperity and well-being because of the vast sums of information available to the individual participants.[30] The innumerable individuals participating in a market each possess unique information that is employed in making rational decisions.[31] While each actor pursues his or her self-interested outcome, the result is the maximization of the total pie and an increase in the well-being of all. Government

bureaucrats, on the other hand, have only a small fraction of the total information available to participants in the larger market, and this limited information leads them to make irrational and inefficient decisions on the optimal amount of production of things like pollution.[32]

Public choice theory paints a highly negative picture of a political process corrupted by self serving behavior by individuals and political capture by interest groups.

Free Marketeers combine their praise of the market with the work of James Buchanen, Mancur Olson and other proponents of what is known in academia as "public choice" theory.[33] Public choice theory is an application of economic theory to political science. It posits that individuals and groups enter the political process not out of any idealistic notion of improving public welfare, but rather to further their own economic well being.[34] Public choice theory is, at its essence, an attack on the premise that government intervention can improve the human condition.[35] It paints a highly negative picture of a political process corrupted by self-serving behavior by individuals and political capture by interest groups. Free Marketeers do not dispute the existence of market failure. Instead, using public choice theory and examples of inefficient government regulation, they argue that government failure is, in almost every case, the greater problem.[36]

Who Gets What Property Rights?

The Environmentalists' View: Ensuring the Polluters Pay

Environmentalists believe that a company that pollutes should be forced to stop polluting or pay for the damage caused by its activities. This "polluter pays" principle informs Environmentalists' understanding of property rights. Environmentalists find offensive the notion that a landowner has a property right to pollute, to kill endangered species or drain wetlands. Professor Oliver Houck puts it this way:

> The idea that anyone, through the payment of money and the completion of other rituals, may dispose of the millions of living things that occupy his titled property, heedless of the role these things play in the life of everything around it, is an anachronism supportable only in a world ignorant of its dependence on all life, and in which its inhabitants could not imagine the major, even catastrophic impacts of human actions. The bell for this anachronism is tolling.[37]

Environmentalists also believe that common law liability rules such as nuisance law are incapable of enforcing the polluter pays principle.[38] Environmentalists point out that under the common law, which predated federal environmental protections, pollution victims labored under significant procedural and substantive burdens.[39] In Professor Michael Blumm's words:

> Nuisance showed itself to be a spectacular failure in confronting the environmental problems of the Nineteenth and Twentieth Centuries. An argument premised on the belief that the Twenty-First Century will be different ought to explain with some precision how the pertinent causation, burden of proof, and remedy problems can be overcome.[40]

In sum, Environmentalists believe that markets fail ubiquitously in protecting the environment and that government intervention is necessary to ensure an adequate amount of environmental protection. Under the "polluter pays" principle, Environmentalists assert that property rights cannot mean that a landowner has a right to pollute or that the government has to pay a landowner not to pollute and not to use property in a way that harms neighboring property.

The idea that anyone, through the payment of money and the completion of other rituals, may dispose of the millions of living things that occupy his titled property . . . is an anachronism supportable only in a world ignorant of its dependence on all life.

— Oliver Houck

Free Marketeers' View: Stop Breathing My Dirty Air

Free Marketeers dispute the fundamental premise of environmental law that pollution is bad and should be minimized or, if possible, eliminated.[41] Pollution is not a moral issue, according to the Free Marketeers, it is an economic issue.[42] And the question is not whether there should be pollution, the question is what is an "optimal" amount of pollution.[43] From the Free Marketeers' perspective, it does not matter whether a polluter is given a right to pollute or a neighbor is given the right to stop the pollution.[44] All that matters is that property rights are allocated and transaction costs are low enough to permit trades in the market. [45]

Free Marketeers rest this position on a series of arguments. First, they point to what is known as the "coming to the nuisance" problem.[46] The coming to the nuisance problem is best illustrated by example: a farmer sets up shop in a rural area and, for years, goes merrily about his business, sending noises and odors over his neighbor's farmland. Then, lo and behold, the neighbor develops a subdivision and the new residents start

to complain about those same smells and noises. It is undeniably a vexing policy questions: Should what was formerly deemed an uncontroversial and productive use be deemed a nuisance simply because neighbors settle within smelling distance?

Free Marketeers see all environmental problems as coming to the nuisance problems. In their view, the neighbor who lives next to a polluting industry is as much to blame for the costs of the pollution as the neighboring smokestack.[47] FREE's Desk Reference for Federal Judges provides an example:

> The first step is to realize that an external cost is not simply a cost produced by the polluter and borne by the victim. In almost all cases, the cost is a result of decisions by both parties. I would not be coughing if your steel mill were not pouring out sulfur dioxide. But your steel mill would do no damage if I (and other people) did not happen to live downwind from it. It is the joint decision – yours to pollute and mine to live where you are polluting – that produces the cost.[48]

Pollution is not a moral issue, according to the Free Marketeers, it is an economic issue. And the question is not whether there should be pollution, the question is what is an "optimal" amount of pollution.

After explaining the equal moral culpability of polluter and the downstream landowner, Free Marketeers explain why pollution makes economic sense.[49] Here Free Marketeers rely on the economic doctrine of marginalism: the proposition that there is an optimal amount of every activity (including pollution) and the objective is to determine where the marginal benefit of more pollution exceeds the marginal costs of pollution control.[50] As FREE's Desk Reference explains, "the choice facing a rational society is not between clean air and dirty air, or between clean water and polluted water, but rather between various levels of dirt and pollution. The aim must be to find a level of pollution abatement where the costs of further abatement begin to exceed the benefits."[51]

With pollution rendered morally ambiguous and the goal of society to achieve an optimal amount of pollution, Free Marketeers' turn to the question of how to allocate property rights to achieve an optimal amount of pollution.[52] Here Free Marketeers rely on what is known as the Coase Theorem for their answer, which is: It does not really matter.[53] The Coase Theorem posits that, absent transaction costs, private bargaining through the market will produce efficient results no matter how property rights are initially allocated.[54] It matters little in a Coasian world whether a corporation is allocated the right to

pollute or a neighbor is given a right to enjoin the pollution; the result, in theory, will be the same.[55] In the former case, the corporation will purchase the right to pollute from its neighbors. In the latter case, the neighbors will purchase pollution protection from the polluter. Either way, the Theorem posits that, after bargaining, the market will result in an optimal amount of pollution.[56] What matters is not who gets property rights, but rather that property rights be private, clearly defined and easily transferable.[57]

Having debunked the moral dimensions of pollution and established the economic and political superiority of the market vis-à-vis government regulation, Free Marketeers elaborate on their theory of protecting the environment. Free Marketeers believe that governments should intervene in private choices as little as possible.[58] Government's role instead should be limited to reducing transaction costs and protecting property and contracts.[59] Free Marketeers thus argue for a return to common law property regimes[60] and support expansive interpretations of constitutional provisions such as the Takings Clause because they see this as a way of ensuring that property rights are assigned and secure.[61]

Environmentalists argue that judicial activism is inappropriate in favor of developers and corporations that have little trouble getting their views heard in the political process.

What is the Role of the Judiciary?

The Environmentalists' View: Political Process Theory and Environmental Protection

In assessing the appropriate role of judges in evaluating environmental laws, Environmentalists often look to what is known as political process theory.[62] Political process theory posits that courts should defer to the substantive decisions made by properly functioning legislative or administrative bodies. Courts should step in only when necessary to correct flaws in the political process. The classic examples of process failure are where groups are denied access to the political process and where prejudice causes the majority to ignore the interests of discrete and insular minorities.

Environmentalists argue that there is a role for judges in ensuring both that regulatory agencies are not "captured" by the regulated community[63] and that the political process takes into account the interest of future generations to inherit a habitable planet.[64] Even more forcefully, Environmentalists argue that there is no justification for judges to be activist in favor of devel-

opers and corporations that have little trouble getting their views heard in the political process.[65]

Free Marketeers' View: Looking for a Few Activist Judges

Free Marketeers have a problem. Public support for federal health, safety and environment laws has proven to be both broad and deep, and attempts by both the Reagan Administration and the 104th Congress to curtail these statutes produced little progress and have proven to be political damaging for their proponents. Free Marketeers' pessimistic view of the political process and optimistic view of the market has simply not resonated with the populace.

Free Marketeers therefore have turned increasingly to the law and federal judges who, conveniently, sit before them at FREE seminars. Their solution is what FREE's Desk Reference

Environmentalists and Free Marketeers – Less in Common Than Meets the Eye

Free Marketeers frequently point to two of their positions to illustrate why, despite their funding sources and political benefactors, their views are indeed simply a "new shade of green." In particular, Free Marketeers highlight: (1) their opposition to corporate welfare on public lands,[71] and (2) the success of market-based measures in achieving environmental goals.[72] Both positions have to be put in their proper context.

Environmentalists and Free Marketeers agree that corporate welfare in the form of below-cost timber sales, mining rights, and grazing permits has led to utterly unnecessary environmental degradation. However, the two groups differ dramatically in their proposed solutions. Environmentalists see the failure of "multiple use" management of public lands as an argument for a switch in the management of most public lands to preservation or wilderness uses.[73] Free Marketeers, on the other hand, support elimination of corporate welfare as part of a call for wholesale privatization of vast amounts of public land.[74] Free Marketeers' advocate auctioning much of this country's public land to the highest bidder.[75] Environmental groups (whom Free Marketeers argue are quite wealthy) would bid against

calls the "constitutional order of classical liberalism"[66] in which our Constitution is reinterpreted for, among other things "the protection of private property."[67] Or in the words of FREE trustee and lecturer James Huffman, judges should employ "unabashed activism" in re-interpreting the Takings Clause, the Commerce Clause and other constitutional provisions in order to create a "libertarian Constitution."[68] Free Marketeers argue that judges can strike down much of environmental law as beyond Congress's regulatory authority[69] and frustrate other laws by forcing the government to pay compensation for any diminution in property value.[70]

Free Marketeers' teaching thus reduces to three central themes: government regulation is the problem, market allocation is the solution, and judges can return this country to market allocation through activism in interpreting constitutional provisions.

oil, timber and mining companies for the use of the land.[76] Free Marketeers' policy on corporate welfare, in other words, is similar to that of James Watt and the Sagebrush Rebels.[77] Environmentalists contend that because of externalities, free riders and inadequate pricing information, privatizing public lands would result in far less land in this country available for wilderness, open space and habitat for endangered species.[78]

Environmentalists and Free Marketeers also agree that market incentives can sometimes lead to environmental protection at a lower cost. That is why environmental organizations such as Environmental Defense and Natural Resources Defense Council have supported market mechanisms such as the emissions trading program established under the 1990 amendments to the Clean Air Act to achieve a reduction in sulfur dioxide emissions. What Environmentalists do not abide is the Free Marketeers' far more radical notion of allowing the market to determine the *amount* of environmental protection. There is a fundamental difference between using market mechanisms to achieve a set level of environmental protection (which many Environmentalists support) and allowing the market to decide the amount of pollution control (which is the goal of most Free Marketeers).[79]

Again, the essential point of this side-by-side comparison of the views of Environmentalists and Free Marketeers is not to prove that one side is right and the other is wrong. The point is simply to demonstrate that Free Marketeers take one position on a controversial and divisive issue upon which there are two very different schools of thought.

A WEEK IN THE LIFE OF A "FREE" JUDGE

All but one of the daytime programs at the September 1996 FREE seminar were directed by a core faculty that consisted of James Huffman, Lynn Scarlett, Michael Greve, John Baden and Randal O'Toole.

Having outlined the policy and philosophical differences between Environmentalists and Free Marketeers, this section explains how FREE seminars track and advance the political agenda of the Free Marketeers. The section takes as its guide a schedule for the most recent judges' seminar available from FREE, a "Colloquium for Federal Judges" on "Environmental Economics and Policy Analysis" held at the Elkhorn Ranch in Big Sky Montana from September 17 to September 22, 1996.

FREE's seminars for judges follow a common pattern. FREE typically schedules two or three 90-minute work sessions that take up most of the morning, and in some cases, stretch into the early afternoon. Judges have most of their afternoon off for "cycling, fishing, golfing, hiking and horseback riding." In the evening, following a cocktail hour, judges are served dinner and listen to an "evening address."

Core Faculty

All but one of the daytime programs at the September 1996 FREE seminar were directed by a core faculty that consisted of James Huffman, Lynn Scarlett, Michael Greve, John Baden and Randal O'Toole. These five lecturers led 13 of the 17 substantive programs offered at the seminar.

James Huffman

Lecture Topics

- Law, Property, and the Environment
- Private Interests, Public Interests and the Public Lands
- Judges, Judging, and the Environment

The bias of FREE's seminars is perhaps best captured by the almost constant presence at the seminars of FREE trustee

James Huffman.[80] Huffman, the Dean of Lewis and Clark Law School in Oregon, is typically the only legal academic attending FREE's judicial seminars.[81] As a result, his role is critical. To paraphrase an old saying about the weather: while most FREE speakers simply complain about federal environmental laws, Huffman tells judges what they can do about it.

Huffman's interpretation of Constitutional provisions such as the Takings Clause[82] and his call for "unabashed activism" in striking down federal environmental laws place him far outside the mainstream of even conservative legal scholarship.[83] Huffman hails as "bold acts" decisions by lower court judges that blatantly disregard binding Supreme Court precedent.[84] He also argues that the *Lochner*-era[85] Supreme Court, which brought about a constitutional crisis in the 1930's by repeatedly striking down provisions of the New Deal, "got it right."[86] He argues that "[l]iberty is too important to be sacrificed to an abstract commitment to judicial restraint." Huffman asks "why this persistent concern about democracy?" He posits that "one of the problems with our judiciary is that our judges have too much experience in the real world."[87]

Huffman asks "why this persistent concern about democracy?" and posits that "one of the problems with our judiciary is that our judges have too much experience in the real world."

Huffman advocates that judges abandon real world concerns and employ a "little of the vision thing."[88] He asserts that "[t]he most significant accomplishment of the Reagan-Bush Administrations has been the staffing of the federal courts with intelligent judges," but worries "that the Reagan revolution will come to nothing as these judges sit on their hands in the name of a simplistic theory of judicial restraint."[89] Huffman is, in short, a political ideologue bent on using the federal judiciary to advance an attack on federal environmental law.

Huffman's polemic views and cheerleading for judicial activism make his frequent role as the only legal academic at FREE's judicial seminars enormously disconcerting. Exacerbating this problem considerably is Huffman's role as a property rights litigator. Huffman serves on the board of the property rights litigation shop that litigated *Dolan v. Tigard*[90] before the Supreme Court[91] and submits briefs in takings cases on behalf of corporate interests such as the Northwest Mining Association,[92] sometimes to the judges who attend FREE's seminars.

For example, in December 1994, Huffman wrote an *amicus* brief on behalf of an association of agricultural companies in *Fallini v. United States*,[93] arguing that the Wild and Free Roaming Horses and Burros Act "took" the rancher's water by permit-

ting wild horses and burros to drink water on public land.[94] On June 8, 1995, the Federal Circuit Court of Appeals issued an opinion ruling against Huffman.[95] Two days later, one of the three judges hearing Huffman's case flew to Montana for a 6-day FREE seminar. There, the judge was treated to lectures by Professor Huffman entitled "Property, Environment and the Constitution" and "Liberty and the Environment: A Case for Principled Judicial Activism."[96] This type of contact between judges as students and litigants as lecturers seems inappropriate.

Greve lauds conservative judges for "deliberately and explicitly reject[ing] the ecological paradigm as a matter of principle." He cajoles judges with the reminder that "curtailment of [environmental] rights would require a disciplined judiciary, with a clear sense of purpose."

Michael Greve

Lecture Topics

- The Demise of Environmental Values in American Law: An Overview
- Standing to Sue: From Values to Harms
- Private Interest in Environmental Politics

Michael Greve, the Executive Director of the Washington DC-based Center for Individual Rights, came to the 1996 FREE seminar as part of a tour promoting his recently released book, *The Demise of Environmentalism in American Law.*[97] Like Professor Huffman, Greve promotes judicial activism in striking down federal environmental laws.[98] Greve makes no attempt to hide his hostility to environmentalism[99] and makes no pretense of seeking more environmental protection. His argument is simple: judges should reject the fundamental tenet of environmental law that "everything is connected to everything else."[100] While acknowledging that the notion of connectivity has "a certain undeniable plausibility," Greve argues that judges must nevertheless reject it because its implications are "absurd."[101]

Greve's book argues that courts in the 1970s and early 1980s adopted an "ecological presumption" in reaching decisions and that Reagan/Bush appointees engineered the demise of this presumption.[102] In his words, "over the past decade * * * courts have come to reject the ecological paradigm * * * and they have reasserted harm-based, common-law-like doctrines as an organizing principle of American Law."[103] Greve praises the judiciary in particular for: (1) "expand[ing] property owners' Fifth Amendment protection against environmental land-use regulations,"[104] (2) "sharply curtail[ing] environmentalists' and other public interest plaintiffs' standing to challenge agency action,"[105]

and (3) "replac[ing] the hard look of the environmental era," where courts would ensure that regulatory agencies were complying with Congressional intent to protect the environment, with a doctrine of "substantive review," pursuant to which judges second-guess regulatory decisions protecting the environment.[106]

Greve credits the shift in each area of law to "the same underlying shift in judicial perspective" and a rejection of the notion that "environmental values are entitled to special judicial solicitude." Greve lauds conservative judges for "deliberately and explicitly reject[ing] the ecological *paradigm as a matter of principle.*"[107] He cajoles judges with the reminder that "curtailment of [environmental] rights would require a disciplined judiciary, with a clear sense of purpose."[108]

Lynn Scarlett

Lecture Topics

- Painting the New Shade of Green (evening address)
- Economic, Institutional, and Moral Issues of Environmental Enforcement
- Economics, Property Rights, and Environmental Nuisance: Status versus Negotiations

Lynn Scarlett is Vice President for Research at the California-based Reason Foundation. The Reason Foundation, a libertarian think tank, "support[s] the rule of law, private property and limited government . . . seek[s] to promote the use of economic reasoning . . . [and] to reverse the public perception that government intervention is the appropriate or efficient solution to most social problems."[109]

In an op-ed describing a FREE seminar, John Baden hailed Lynn Scarlett's lecture "Painting the New Shade of Green," as "set[ting] the tone for the conference."[110] Scarlett's new shade of green emphasizes "the importance of incentives and the imperatives of dispersed information," as well as "market coordination and decentralized decisionmaking."[111] Scarlett details horror stories about companies like Adolph Coors being penalized after a self-audit revealed previously undiscovered air pollution and concludes that "complex and confusing regulations contain the ingredients for error and confrontation."[112]

"Pollution," Scarlett explains, "is as old as human activity, but only recently have we been rich enough to worry about it." Environmentalists, she argues, must reconcile themselves with the fact that species and other environmental values are "some goods among many."

Scarlett's May 1996 publication, *Evolutionary Ecology: A New Environmental Vision*, sheds additional light on her views about her chosen topics.[113] Regarding "moral" issues in environmental enforcement, Scarlett apparently believes that there are very few.[114] She takes Environmentalists to task for viewing environmental protection in moral, not economic terms.[115] "Pollution," Scarlett explains, "is as old as human activity, but only recently have we been rich enough to worry about it."[116] Environmentalists, she argues, must reconcile themselves with the fact that species and other environmental values are "some goods among many" and the Environmentalists' "absolutism" must be rejected.[117]

According to Scarlett, the correct "institution" for addressing environmental problems is almost never the federal government. Federal environmental regulation should be replaced by state, local or, most preferably, voluntary controls.

According to Scarlett, the correct "institution" for addressing environmental problems is almost never the federal government. Federal environmental regulation should be replaced by state, local or, most preferably, voluntary controls.[118] For example, Scarlett critiques the industry-backed plan of the National Environmental Policy Institute to "phase in devolution of most environmental decisions to states."[119] In Scarlett's words, this plan did "not go far enough, since, ultimately, what is needed is further decentralizing to local communities and, where feasible, privatization of most environmental decisions."[120]

Scarlett's views on property rights and common law liability rules are also in line with other Free Marketeers. Scarlett asserts that "'privatizing' resource and land-use decisions through various property rights arrangements" is the essential first component of environmental reform.[121] She thus enthusiastically backs the "takings" legislation passed in 1995 by the House of Representatives that would have required government compensation for almost every regulation that reduces property value.[122] Scarlett also advocates reliance on common law concepts of liability, nuisance and trespass to address most environmental problems.[123]

Randal O'Toole

Lecture Topics

- Why We Should Run Public Lands Like Businesses
- Urban Planning: Cure or Disease?

Randal O'Toole is the Director of the Oak Grove, Oregon-based Thoreau Institute.[124] While the titles of O'Toole's lectures give a good sense of his arguments, his writing supplements the picture. His article, *Run Them Like Businesses,* complains of the inefficiencies of the current "soviet management" of our public lands.[125] He argues that Congress should cease all funding for our national parks, recreational areas, forests and other public lands and manage these lands entirely off fees charged to users.[126] Under his proposal, every inch of public land, from national parks, such as Yellowstone and Yosemite, to wilderness areas to battlefields and historic landmarks, would be open for resource development.[127] Those public lands that cannot return a profit would be auctioned off to the highest eligible bidder.[128]

O'Toole's view on urban planning is equally polemic and simple to explain: he's against it.[129] O'Toole objects to all "coercive tools such as zoning" on the grounds that such tools do "not allow for a reasonable transition to other land uses when changes in tastes and property values might call for such a change."[130] He also complains about government agencies such as Portland, Oregon's Metro on the grounds that they "can use zoning to force their New Urban vision on people and neighborhoods rather than let people choose what they want their neighborhood to be like."[131] As a result, if O'Toole's advice were followed, "neighborhood associations would completely replace zoning."[132]

Under O'Toole's proposal, every inch of public land, from national parks, such as Yellowstone and Yosemite, to battlefields and historic landmarks, would be open for resource development. Those public lands that cannot return a profit would be auctioned off to the highest eligible bidder.

John Baden

Lecture Topics

- Progressive Myths and the Lords of Yesterday (opening discussion)
- General Discussion (closing session)

John Baden, FREE's founder and chairman gave the introductory and closing remarks at the September workshop. Baden's views, as expressed in *Federal Judges Desk Reference to Environmental Economics*, are explained in detail above and need not be repeated here. The following excerpts from an editorial authored by Baden and printed shortly after the September 1996 FREE seminar give a sense of Baden's message to judges about Progressive Myths and the Lords of Yesteryear:

> The Progressive Era reformers, in contrast to America's Founding Fathers, believed that elite government planners could achieve efficiency, justice, and conservation. Failing to first separate hopes

Of Species and Slavery

Free Marketeers' insistence that there is a market solution to every problem leads them to make some startling statements.[133]

For example, on the Thoreau Institute's website, Randal O'Toole argues that the way to save our endangered species is to make them privately-owned, like our dogs and house cats:

> It is time to consider the possibility of private ownership of wildlife. * * * In some cases, people would be allowed to own individual animals. Just as dog breeders compete in sheep herding and other exercises, black-footed ferret owners might compete on their ability to raise ferrets that can survive in the wild. In other cases, ownership might extend to entire populations or even a whole species.[134]

and expectations, they launched America's counter-revolution by reversing the Founding Fathers' presumption about the role of government.

* * *

Progressives demonstrated great naiveté. They believed benevolent bureaucrats would exercise intelligence and foster the public good, not their own or that of constituents.

America's Founders, on the other hand, believed institutions must be arranged to check political ambition. They designed a system of checks and balances with one ambition countering another. They knew that otherwise government would become an engine of plunder. And political plunder is the natural consequence of unchecked power. The Founders built this understanding into our Constitution.[136]

O'Toole even argues that the Civil War could have been avoided if northerners had more respect for the property rights of southern slaveholders:

> Slavery is a good example of how this works. In Britain, the government solved the problem with incentives. It simply bought the slaves from their owners and freed them. This was called *emancipation*. * * * But the Northern abolitionists wanted to end slavery through coercion; they considered slavery too immoral to be solved through emancipation. * * * The result, of course, was a Civil War that killed or maimed more than a million people and left the South polarized against civil rights for more than a century. In contrast, the black slaves emancipated by the British government in the early 1900s easily integrated into English society. So the lesson is: If you want to protect a resource through coercion, the likely result will be violence and generations of resentment against that resource. Incentives will work far better and at far lower political and social cost.[135]

Reducing Mr. Baden's somewhat overblown language into plain English, Baden's message to judges is that federal environmental laws are both inefficient and unconstitutional.

Evening Addresses and Other Programs

Four additional presenters led single sessions at the September 1996 FREE seminar. Three of these four presenters gave dinner addresses to judges after a cocktail hour. The fourth led a single session on the first full day of the seminar. These single session presenters ranged from the former CEO of Texaco to a program officer at the Ford Foundation, and these speakers seem designed to add additional perspectives on environmental issues. As summarized below, however, the message of each of these presentations appears generally consistent with FREE's overall philosophy.

DeCrane complains about "[t]hose who sing this siren song of environmental absolutism. . . ." He calls "the threat of environmental Armageddon" "a dreadful wrong being visited on the American people."

Alfred DeCrane

Lecture Topic

° The Environment—A CEO's Perspective (evening address)

Alfred DeCrane is a retired Chairman of the Board and Chief Executive Officer of Texaco, Inc., and a member of the Board of Directors of the Birmingham Steel Corporation. A longtime critic of environmental statutes, Mr. DeCrane received an award from the Atlantic Legal Foundation, honoring him as "a person who best exemplifies the principles of the free market system."[137]

Not surprisingly, DeCrane's views compliment FREE's program perfectly. DeCrane complains about "[t]hose who sing this siren song of environmental absolutism [and] would demand that we abandon environmental growth, forego a prosperous society and disdain petroleum products. . . ."[138] He calls "the threat of environmental Armageddon" "a dreadful wrong being visited on the American people."[139] DeCrane argues that "[t]here 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."[140]

Of course, as a corporate executive Mr. DeCrane has an incentive to persuade judges to cut back on environmental safe-

guards. Texaco, for example, is regularly in federal court defending against environmental lawsuits. In one high-profile case during Mr. DeCrane's tenure as CEO, Texaco was sued by Natural Resources Defense Council, held liable for 365 violations of their federal clean water permit, fined over $1 million, and, after the expert Texaco nominated testified against the company, forced to perform extensive monitoring of the health and safety impacts of its ongoing discharges.[141]

Michael Harboldt

Lecture Topic

° An Overview of Temple-Inland's Environmental Program (evening address)

Mr. Harboldt is Vice President of Temple-Inland Forest Products Corporation in Diboll, Texas, a leading forest products company with about 2.2 million acres of timberland throughout the southeast. In addition to timber products, the company is involved in financial services and has real estate, mortgage and insurance subsidiaries.[142] Like Texaco, Temple-Inland is a frequent litigant before both federal and state courts, with lawsuits ranging from mineral rights[143] to asbestos exposure.[144] Also like Texaco, Temple-Inland is a funder of FREE, suggesting that one way FREE induces and rewards its corporate funders is by giving them the opportunity to plead their company's case before federal judges at FREE seminars.[145]

Mr. Harboldt almost certainly emphasized Temple-Inland's voluntary efforts to preserve species on its timberland, efforts Mr. Baden hails in his writings. Mr. Harboldt's presentation thus dovetails nicely with FREE's promotion of deregulation in order to allow businesses the opportunity to voluntarily address environmental issues.[146]

Like Texaco, Temple-Inland is a funder of FREE, suggesting that one way FREE induces and rewards its corporate funders is by giving them the opportunity to plead their company's case before federal judges at FREE seminars.

Donald Snow

Lecture Topic

° Before the Leisure Class Arrived: Hard Luck and Good Times in the Vanishing West (evening address)

FREE's assertion that its seminars present a "very wide range" of viewpoints is true only insofar as FREE seminars feature both ideologues like Greve, Huffman and DeCrane and moderates such as Olson. The seminars offer no balance whatsoever in terms of presenting views contrary to the seminar's principle themes.

Don Snow is Editor and Publisher of *Northern Lights* and Executive Director of Northern Lights Research and Educational Institute, Missoula, Montana, and Arts and Literary Director of the Gallatin Institute (which, like FREE, was founded and is directed by John Baden). Mr. Snow has mainstream environmental credentials, having worked for the Wyoming Outdoors Council, the Montana Environmental Information Center, and *High Country News,* a progressive paper covering western environmental issues.

Mr. Snow's writings, however, suggest that his address on "The Vanishing West" was quite consistent with FREE's overall agenda. In his introduction to *The Next West: Public Lands, Community, and Economy in the American West* (a book Snow co-edited with Baden, which consists primarily of essays written by Free Marketeers), Snow mocks the possibility of a "'New West' of cappuccino cowboys, internet worship, and some ambient, simpering sense of 'the public's willingness to embrace environmental issues.'"[147] Snow instead embraces, "a Next West based on the renewal of environmental politics, experiments in local and supra-local control of public lands, and the use of markets at least partly to replace the political allocation of natural resources."[148]

Jeffrey Olson

Lecture Topic

° Environmental Protection: The Role of Community-Based Solutions to Environmental Problems

Jeffrey Olson is the Acting Director of Ford Foundation's program on Community and Resource Development. The program Mr. Olson manages at Ford stresses the role of land acquisition and community-based institutions in solving environmen-

tal problems. Before joining the Ford Foundation, Mr. Olson worked both for timber companies and the Wilderness Society.

In his remarks to the judges at the 1996 seminar, Mr. Olson stressed community and market-based solutions to environmental problems.[149] While he called on judges to enforce "existing statutes and regulations," he commented that "command and control and regulatory approaches to conservation are inherently inefficient and flawed."[150] He also declared the "environmental movement is in crisis," and hailed "the changing face of environmentalism" necessary because the "environmental problems facing this country and the planet are far more complex than a command and control regulatory and legislative approach can hope to resolve." [151]

CONCLUSION

It is easy to see why corporations and conservative foundations so eagerly fund FREE. FREE's seminars for judges explain how and why judges should strike down federal environmental laws. FREE's assertion that its seminars present a "very wide range" of viewpoints is true only insofar as FREE seminars feature both ideologues like Greve, Huffman and DeCrane and moderates such as Olson and Snow. The seminars offer no balance whatsoever in terms of presenting views contrary to the seminar's principle themes. No one at the seminar (1) gave a robust defense of existing federal environmental laws, (2) explained fully why the market fails to protect the environment, or (3) critiqued the legal and constitutional analysis of Huffman and Greve. In the words of Doug Honnold, another moderate who, like Jeff Olson, was occasionally invited to lecture at the FREE seminars:

> One of the most important groups of decisionmakers is being systematically exposed to a particular philosophical standpoint and with the express purpose of modifying results.[152]

One of the most important groups of decisionmakers is being systematically exposed to a particular philosophical standpoint and with the express purpose of modifying results.

— Doug Honnold

ENDNOTES

[1] Ruth Marcus, *Issue Groups Fund Seminars for Judges: Classes at Resorts Cover Property Rights*, THE WASHINGTON POST, April 9, 1998, at A1, A12 (quoting John A. Baden).

[2] John A. Baden, *Effective New Environmentalism Uses a New Shade of Green*, THE SEATTLE TIMES, June 26, 1996 (hereinafter "*A New Shade of Green*").

[3] John A. Baden, *Foreword*, in FEDERAL JUDGE'S DESK REFERENCE TO ENVIRONMENTAL ECONOMICS 1, 1 (John A Baden, ed., 1998). ("JUDGE'S DESK REFERENCE")

[4] *A New Shade of Green*, *supra* note 2 ("FREE speakers emphasize[] property rights, market processes, and responsible liberty as key components of an effective environmentalism.")

[5] For example, "free market environmentalism" has been adopted as the official ideology of the Coalition of Republican Environmental Activists (CREA), a coalition comprised of Republican legislators including Helen Chenowith Hage (R-ID) and Richard Pombo (R-CA) who are known for their antipathy for federal environmental law. H. Josef Herbert, *Does Free Market Environmentalism Exist*, LAS VEGAS REV. J., July 17, 1998, at B15. Republicans who have a history of supporting environmental protections, such as Rep. Sherwood Bohlert (R-NY), refused to join the coalition, *see id.*, and the Republicans for Environmental Protection labels CREA a "greenscam organization." *An Outlandish Proposal*, THE GREEN ELEPHANT, Winter 2000, at 5.

[6] Marcus, *supra* note 1, at A12 (quoting John A. Baden).

[7] Peter Shinkle, *Trimble, There's Nothing Wrong With Attending Seminar*, BATON ROUGE ADVOCATE, April 10, 1998, at A1 (quoting FREE Speaker James Huffman: "I think it's balanced in the sense of a wide range of views about environmental problems.").

[8] *Id.* (Judge Trimble argued that the seminars were balanced because there "were a number of tree-huggers.").

[9] *A New Shade of Green*, *supra* note 2; John A. Baden, *Rigorous Environmental Training*, WASH. POST, April 21, 1998 ("[W]e are strongly pro-environment and offer new environmental arguments to the judges.").

[10] John A. Baden, *Rigorous Environmental Training*, WASH. POST, April 21, 1998.

[11] Community Rights Counsel received copies of the schedules for five FREE seminars conducted between 1992 to 1996 from Tulane law professor Oliver Houck, who obtained them from FREE. This report analyzes below the most recent seminar schedule CRC was able to obtain, the schedule for the September 1996 seminar (attached as Appendix A).

[12] *A New Shade of Green*, *supra* note 2.

[13] For a more extensive debate of these issues, *see* Michael Blumm, *Fallacies of the Free Market,* 15 HARV. J.L. & PUB. POL'Y 371 (1992) ("*Fallacies*") (defending the Environmentalists' position); James L. Huffman, *Protecting the Environment from Orthodox Environmentalism*, 15 HARV.J.L. & PUB. POL'Y 349 (1992) (defending the Free Marketeers' position).

[14] *See, e.g.*, *Progress Toward Clean Air: Hearings before the Subcomm. on Clean Air, Wetlands, Private Property and Nuclear Safety of the Senate Comm. On Environment & Public Works*, 106th Cong., 1st Sess. (Oct. 14, 1999) (Testimony of Robert Perciasepe, Assistant Administrator, EPA Office of Air and Radiation) (discussing EPA estimates that the Clean Air Act has yielded $22.2 trillion in health, welfare and environmental benefits at a compliance cost of approximately $525 billion (a 40 to 1 cost/benefit ratio)).

[15] *See* N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186, 197-201 (1996).

[16] *See* RICHARD B. STEWART & JAMES E. KRIER, ENVIRONMENTAL LAW & POLICY, 107-114 (2nd ed. 1978); *Fallacies, supra* note 13, at 375.

[17] *See Fallacies*, *supra* note 13, at 375.

[18] *See id.*

[19] *See id.* at 375-76.

[20] *See generally,* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1967); James E. Krier, *Environmental Watchdogs: Some Lessons from a "Study Council,"* 23 STAN L. REV. 623, 662-63 (1971).

[21] *See* JOHN V. KROTILLA & ANTHONY C. FISHER, THE ECONOMICS OF NATURAL ENVIRONMENTS 23-25 (1975).

[22] *See Fallacies, supra* note 13, at 376.

[23] *See id.*

[24] CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE, 45 (1990); *Fallacies*, *supra* note *13*, at 376.

[25] *See Fallacies*, *supra* note 13, at 376.

[26] A good summary of the Free Marketeers' view is found in Richard Stroup & John Baden, *Property Rights and Natural Resource Management*, in JUDGE'S DESK REFERENCE, *supra* note 3, at 35. Professor Blumm calls free market environmentalism an "odd conglomeration of Coasian bargains, Sagebrush values, and Public Choice political theory." *Fallacies*, *supra* note 13, at 388.

[27] John A. Baden, *Understanding the Failings of the Socialist Economic Model*, in JUDGE'S DESK REFERENCE, *supra* note 3, at 32, 34.

[28] *Section I: Economic Coordination: Introduction*, in JUDGE'S DESK REFERENCE, *supra* note 3, at 6, 7 (belittling Environmentalists that have "an unconstrained vision" and believe "that if we care enough and plan well enough, we can achieve specific outcomes.").

[29] John A. Baden, *Risk Analysis Can Further Environmental Goals*, in JUDGE'S DESK REFERENCE, *supra* note 3, at 315, 316.

[30] Frederick A. Hayek, *The Use of Knowledge in Society*, in JUDGE'S DESK REFERENCE, *supra* note 3, at 8, 11, 17; *see also* Thomas Stowell, *Visions of Knowledge and Reason,* in JUDGE'S DESK REFERENCE, *supra* note 3, at 22, 23.

[31] *See* Hayek, *supra* note 30, at 11, 17.

[32] *See* Hayek, *supra* note 30, at 8, 11; *see also* John A. Baden, *Understanding the Failings of the Socialist Economic Model*, in JUDGE'S DESK REFERENCE, *supra* note 3, at 32, 34.

[33] See generally, MANCUR OLSON, *supra* note 20; JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962). For a critical assessment of Public Choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW & PUBLIC CHOICE (1991).

[34] *See* Daniel A. Farber & Philip P. Frickey, *The New Public Law: In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 879-80 (1991).

[35] In an essay in FREE's JUDGE'S DESK REFERENCE, James Buchanan, a Nobel Prize-winning public choice theorist, decries that "all existing constitutions are failures" because they are informed by "the 'fatal conceit' (using Frederick Hayek's term) that political direction can facilitate rather than retard economic progress" and the "romantic image of the benevolent state." James M. Buchanan, *Notes on the Liberal Constitution*, in JUDGE'S DESK REFERENCE, *supra* note 3, at 215, 215. Many top scholars have concluded that public choice theory, developed in the 1960s, was proven wrong almost immediately by the emergence of federal environmental law in the 1970s. See Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. ORG. 59, 60 (1992) ("[T]he Olson paradigm appears to have a straightforward implication for environmental legislation: there should not be any * * *."); Richard Revesz, *The Law and Economics of Federalism: The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 543, 561 (1997) ("It is difficult to explain, in public choice terms, why there would be any environmental regulation at all."); Peter H. Schuck, *Against (And For) Madison: An Essay in Praise of Factions,* 15 YALE L. & POL'Y REV. 553, 566 (1997) (calling the emergence of federal environmental law a "major predictive error of the new public choice theorists").

[36] *See, e.g.,* Stroup & Baden, *supra* note 26, at 60 ("privately held, exchangeable property rights tend to encourage preservation, relative to a simple democratically controlled collective management system.").

[37] Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings,"?* 80 Iowa L. Rev. 297, 331-332 (1995).

[38] See *Fallacies, supra* note 13, at 377 (citing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 74-78, 102 (1977) and other sources to support the proposition that "[n]uisance showed itself to be a spectacular failure in confronting the environmental problems of the Nineteenth and Twentieth Centuries.")

[39] One commentator lists the following five obstacles to legal actions the common law system:

> "(1) significant standing requirements; (2) tough evidentiary burdens on the plaintiff to prove that the alleged polluter's conduct was unreasonable; (3) "overly solicitous" defenses available to the alleged polluter; (4) the burden on the plaintiff to prove that the defendant's pollution caused the

> plaintiff's injury; and (5) the real possibility that even if the plaintiff proved injury and causation, a court would refuse to enjoin the polluting activity because of a balancing of the equities."

Andrew Mcfee Thompson, note, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency,* 45 EMORY L.J. 1329 (1996).

[40] *Fallacies, supra* note 13, at 377 (citations omitted).

[41] Larry E. Ruff*, The Economic Common Sense of Pollution*, in JUDGE'S DESK REFERENCE, *supra* note 3, at 140, 140-43, 145; *Section 4; Introduction: Externalities,* in JUDGE'S DESK REFERENCE, *supra* note 3, at 139, 139.

[42] *See id.* at 142-43, 145.

[43] *See id.* at 142-43, 151.

[44] David Freidman, *How to Think About Pollution, or Why Ronald Coase Deserved the Nobel Prize*, in JUDGE'S DESK REFERENCE, *supra* note 3, at 73, 79-85. *See also,* Ruff, *supra* note 41, at 153-56.

[45] Stroup & Baden, *supra* note 26, at 35, 41.

[46] Friedman, *supra* note 44, at 76-78.

[47] *See id.*

[48] *See id.* at 76 (emphasis added).

[49] *See id.* at 79-81.

[50] *See id.; see also* Ruff, *supra* note 41, at 142-43.

[51] *See* Friedman, *supra* note 44, at 142-43.

[52] *See id.* at 79-81.

[53] *See id.*; *see also* Ronald H. Coase, *The Problem of Social Cost*, in JUDGE'S DESK REFERENCE, *supra* note 3, at 86.

[54] *See id.*

[55] *See id.*

[56] *See id.*

[57] *See id.; see also* Stroup & Baden, *supra* note 26, at 41.

[58] *See* Stroup & Baden, *supra* note 26, at 42-44.

[59] *See id.* at 46 ("All instances where markets fail to achieve ideal efficiency can be classified under the rubric 'transaction costs.'").

[60] *See* Roger Meimers & Bruce Yandle, *Clean Water Legislation: Reauthorize or Repeal?*, in TAKING THE ENVIRONMENT SERIOUSLY 73, 90-91 (Roger E. Meiners & Bruce Yandle eds., 1993); Roger Meimers & Bruce Yandle, *Constitutional Choice for the Control of Water Pollution,* 3 CONST. POL. ECON. 359, 357 (1992) ("A market approach requires federal statutes to be phased out, and therefore replaced with common law liability rules.").

[61] James L. Huffman, *The Heritage Foundation Lectures & Educational Programs*: *A Case for Principled Judicial Activism*, <http://www.heritage.org/library/categories/crimelaw/lect456.html> (visited Mar. 22, 2000).

[62] *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COL. L. REV. 782 (1995); Douglas T. Kendall, *The Limits to Growth and the Limits to the Takings Clause*, 11 VA. ENVTL. L. J. 547, 558-62 (1992). Political process theory originated in United States v. Caroline Prods. Co., 304 U.S. 144, 152 n.4 (1938), and has been most thoroughly developed in JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[63] For a discussion of the risk that regulatory agencies will become "captured" by the corporations they are regulating, see SUNSTEIN, *supra* note 24, at 84-99.

[64] Bruce Ledewitz, *Constitutional Law and Civil Rights Symposium, Part II: Establishing A Federal Constitutional Right to a Healthy Environment in Us and in Our Posterity*, 68 MISS. L.J. 565 (1998).

[65] *See* Treanor, *supra* note 62, at 872; Saul Levmore, *Just Compensation and Just Politics,* 22 CONN. L. REV. 285, 312 (1990).

[66] Buchanan, *supra* note 35, at 215.

[67] *Id*. at 219.

[68] Professor Huffman, in a lecture frequently delivered to FREE seminars, salutes as heroes the most aggressive practitioners of anti-environmental judicial activism. For example, Huffman lauds two takings opinions (Florida Rock Indus., Inc. v. United States, 23 Cl. Ct. 653 (1991), and Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990)) by Chief Judge Loren Smith while conceding that Smith's rulings are "in direct conflict, most would say, with Supreme Court takings jurisprudence." By ignoring Supreme Court guidance, Huffman argues, Smith is "serv[ing] the interests of our libertarian Constitution." Similarly, Huffman lauds Judge Daniel Manion for ruling that Congress lacked the constitutional power under the Commerce Clause to regulate isolated wetlands. Again, while recognizing that Manion's ruling was inconsistent with 'what every lawyer learns in law school" and acknowledging that Judge Manion's co-panelists quickly undid Manion's handiwork, Huffman hails Manion for his "bold act." Huffman, *supra* note 61.

[69] *Id*.

[70] *Id.; see also* James L. Huffman, *A Coherent Takings Theory At Last: Comments on Richard Epstein's Private Property and the Power of Eminent Domain*, 17 ENVTL. L. 153, 177 (1986) (book review) (praising Richard Epstein for advocating an interpretation of the Takings Clause that "invalidates much of the twentieth-century legislation" and for calling for a "level of judicial intervention far greater than * * * we ever have had."); John A. Baden, *A Green Campaign Speech For A Better Environment,* SEATTLE TIMES, Nov. 13, 1996, at B5 ("The Constitution requires due compensation when government takes or restricts private owners' property.").

[71] *See* John A. Baden, *The Failure of American Sylvan Socialism*, THE SEATTLE TIMES, Feb. 5, 1997.

[72] Lynn Scarlett, *Evolutionary Ecology: A New Environmental Vision,* 28 REASON 20 (May 1996).

[73] *See* Michael Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405 (1994).

[74] *See* Baden, *supra* note 71 ("It's time to end our experiment with sylvan socialism where politics decides timber production. We should carefully transfer the roaded and logged areas of the national forests to private owners and charge the Forest Service with research and monitoring. Certainly, that's a proposal worth considering on the centennial of America's counter-revolution.").

[75] *See* TERRY ANDERSON & DONALD LEAL, FREE MARKET ENVIRONMENTALISM, 92 (1991).

[76] *Id.* at 93-96 (Anderson & Leal note that the thirteen largest environmental groups have total revenue in excess of $400 million).

[77] *Fallacies*, *supra* note 13, at 383 ("Such an auction would have created fragmented land management on a myriad of dominant-use parcels, increased spillover costs from incompatible parcels, inestimable difficulties in managing transboundary resources, and would leave ultimate decisionmaking authority in the hands of members of the various boards of directors of oil, timber, and mining companies and environmental groups alike. This was, of course, the chief intellectual contribution of the Sagebrush Rebellion that helped usher Secretary Watt to office. The authors of *Free Market Environmentalism* mean to keep the old Sagebrush Rebels agitated.") (citations omitted).

[78] *See Fallacies, supra* note 13, at 382.

[79] For example, Free Marketeers decry the Clean Air Act, despite its use of market mechanisms, because "the political process determines the initial or optimal pollution levels." ANDERSON & LEAL, *supra* note 75, at 158; MICHAEL GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 131 (1996) (terming the 1990 Clean Air Act Amendments "a convoluted, 600-page enactment that carries environmental presumptions to the extremes" and "the most convoluted environmental statute on record"); *A New Shade of Green, supra* note 2, (discussing FREE seminar speech of Lynn Scarlett critiquing the Clean Air Act); *see also* James E. Krier, *The Tragedy of the Commons, Part Two,* 15 HARV. J. L. & PUB. POL'Y 325, 327 (1992) (Free Marketeers "hope to rely on the market more or less entirely and sidestep the government just about altogether."); Thompson, *supra* note 39, at 1336 ("Free Marketeers are opposed to any political or collective determination of environmental policies.").

[80] Dean Huffman was on the faculty at 4 of the 5 FREE seminars for which CRC was able to obtain schedules. He led a total of 12 sessions at those four seminars. These 5 seminar schedules are on file with CRC.

[81] *Id*.

[82] Huffman is one of the few legal academic supporters of University of Chicago law professor Richard Epstein, who calls for "a level of judicial intervention . . . far greater than we ever have had" in re-interpretating the Takings Clause to require compensation for regulations "no matter how small the alteration and no matter how general its application." RICHARD A. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) at 30. Huffman declares that "Epstein is on the right track in

urging judicial activism . . ." *A Coherent Takings Theory at Last*, *supra* note 70 at 177.

[83] For example, conservative legal scholars such as Robert Bork and Reagan-era Solicitor General Charles Fried have savaged the Epstein/Huffman interpretation of the Takings Clause. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 230 (1990) ("My difficulty is not that Epstein's constitution would repeal much of the New Deal and the modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the takings clause."); Charles Fried*, Protecting Property – Law and Politics*, 13 HARV. J.L. & PUB. POL'Y 44, 48-49 (1990) ("Locke himself . . . was insufficiently Lockean. . . ."; "Professor Epstein is moved to complete not only the text of the Constitution by reference to the Lockean spirit, but Locke's text itself.").

[84] *A Case for Principled Judicial Activism, supra* note 61.

[85] The *Lochner*-era is named for its most famous case, Lochner v. New York, 198 U.S. 45 (1905), in which the Supreme Court struck down a law establishing a 60-hour work week for bakery employees. During this period, which lasted roughly forty years from 1897 through 1937, the Supreme Court interpreted the Contract and Commerce Clauses of the Constitution to invalidate labor laws and other progressive social reform initiatives of that era. This era reached its zenith in the mid-1930's, when the Court repeatedly struck down important provisions of President Roosevelt's New Deal, and ended in 1937 when Justice Roberts switched his vote and became the fifth justice necessary to uphold New Deal regulations. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937).

[86] *A Case for Principled Judicial Activism, supra* note 61. Even Chief Judge Wilkinson, a conservative judge on the Fourth Circuit, has recently deemed the *Lochner*-era activism an unmitigated disaster which "solidified the image of an obstructionist Supreme Court, determined to impede legislative efforts to reverse the era's economic dysfunction and to ease the human suffering that it had wrought." Brzonkala v. Virginia Polytechnical Institute, 169 F.3d 820, 892 (4th Cir. 1999) (Wilkinson, C.J., concurring).

[87] *See id.*

[88] *See id.*

[89] *See id.*

[90] 512 U.S. 374 (1994).

[91] Huffman serves as a board member of the Oregonian's in Action Legal Center, a non-profit property rights group, with a mission to "protect Constitutional rights of landowners . . . through litigation," that litigated *Dolan v. Tigard* before the Supreme Court. ECON. AMERICA, INC., THE RIGHT GUIDE, A GUIDE TO CONSERVATIVE AND RIGHT-OF CENTER ORGANIZATIONS (Derk Arend Wilcox 1997) at 251-52.

[92] *See* Brief of Amicus Curiae, Northwest Mining Association, Kincross Copper Corporation v. Oregon*,* 160 Or. App. 513 (1999) (arguing that Oregon's refusal to issue a Clean Water Act permit was a "taking" of Kincross Copper's unpatented mining claims on public land.).

[93] 56 F.3d at 1378 (Fed. Cir. 1995).

[94] *See* Brief of Amicus Curiae, Water for Life, Inc., Fallini v. United States, 56 F.3d 1378 (Fed Cir. 1995).

[95] *See Fallini*, 56 F.3d 1378.

[96] FREE Schedule for Seminar Entitled "Environmental Economics and Policy Analysis," Diamond J Ranch, Ennis, Montana, June 10-15, 1995 (on file with CRC).

[97] GREVE, *supra* note 79.

[98] *See id.* at 168-72.

[99] Greve calls environmentalism "an extravagant pretense" and "a spent force" that is operating "like a religion that has lost its core." *Id.* at 115, 133. See also *id.* at 116 ("Complexity" has been statism's perennial battle cry. Environmentalism sounds it yet again, albeit in a particularly shrill tone.").

[100] *Id.* at 5.

[101] *Id.* at 111.

[102] *Id.* at 124.

[103] *Id*. at 2.

[104] *Id.* at 18.

[105] *Id.* at 18-19.

[106] *Id.* at 64-84.

[107] *Id*. at 3.

[108] *Id.*

[109] Reason Foundation Mission Statement (visited Mar. 23, 2000) <http://www.reason.org/mission2.html>.

[110] *A New Shade of Green*, *supra* note 2.

[111] *Id.*

[112] *Id.*

[113] Lynn Scarlett, *Evolutionary Ecology: A New Environmental Vision,* 28 REASON at 20 (May 1996).

[114] *Id.*.

[115] *See id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id*. ("The 1995 House proposals regarding takings compensation are essential to realigning the incentive equation.")

[123] To be fair, Scarlett does recognize that federal legislative solutions may sometimes be necessary to address environmental problems. However, her admission is begrudging and the conditions that she requires are almost insurmountable. *Id*. ("[W]here problems are indivisible, risks posed by the problems are extremely high, and causes of those risks are well-understood, public rules offer a plausible solution."). Earlier, Scarlett notes that even Free Marketeers like Bruce Yandle and Roger Meiners concede that "it is hard to imagine how the common law could address urban auto emissions, ozone layer problems, and global warming," but she hastens to add Yandle and Meiners' rather large caveat that any regulation of these problems should wait until "the science of those problems becomes more settled." *Id.*

[124] O'Toole's Thoreau Institute should not be confused with an identically titled Institute run by the Massachusetts-based Thoreau Society. One can envision Thoreau being quite unhappy with O'Toole's use of his name to support his call for privatization of our public lands. Thoreau believed that "[i]n wildness is the preservation of the world," Henry David Thoreau, *Walking*, in THE PORTABLE THOREAU 592, 609 (Carl Bode ed., 1977) and argued that "[e]ach town should have a park, or rather a primitive forest, of 500 or a thousand acres, where a stick should never be cut for fuel, a common possession forever, for instruction and recreation." Claude Crowley, *Of Nature, Heavenly and Fine,* FT. WORTH STAR-TELEGRAM, Feb. 6, 2000, at 6 (reviewing HENRY DAVID THOREAU, WILD FRUIT, (Norton, 2000) and quoting from essay entitled *Huckleberries*). To get from Thoreau's writing support for a plan that would open every acre of this Nation's public land to resource development – including the 66 million acres subject to protection under the Wilderness Act — seems, to put it kindly, a stretch.

[125] Randal O'Toole, *Run Them Like Businesses; Natural Resource Agencies in an Era of Federal Limits* <http://www.teleport.com/~rot/business.html> (visited Mar. 23, 2000).

[126] *See id.*

[127] *See id.*

[128] *See id.* O'Toole would initially limit eligible bidders to "nearby forests, parks, districts, state agencies, or non-profit organizations" who would, according to O'Toole, pay the federal government for these sites and hold them "in trust for the people of the United States." *Id.* O'Toole never addresses what would happen to the countless monuments and historic sites where upkeep costs exceed revenues and for which there is thus no eligible bidder. Presumably — given that O'Toole makes no allowance for the possibility of appropriations to maintain these sites — these sites would then be sold to the public.

[129] *See* Randal O'Toole, The Myth of the Vanishing Automobile, <http://www.teleport.com/~rot/Metrotofc.html> (visited May 8, 2000) (address is case-sensitive).

[130] *Id.* at *http://www.teleport.com/~rot/2000.html#RTFToC2*.

[131] *Id.*

[132] *Id.*

[133] Professor Blumm collects several other examples of this phenomena in *Fallacies, supra* note 13, at 380, such as: (1) "Protection of grizzly bear habitat should be a function of how much people are willing to pay to camp nearby," and (2) Hazardous waste cleanup at "'orphan sites' should be the responsibility of only those who choose to purchase title of these sites from the government."

[134] Randal O'Toole, *Private Ownership to Save Species,* ARIZONA DAILY STAR, Jan. 5, 1998.

[135] *Frequently Asked Questions About Free Market Environmentalism* <http://www.teleport.com/~rot/faqs.html> (visited May 8, 2000).

[136] Baden, *supra* note 71.

[137] Atlantic Legal Foundation, Inc., <http://www.atlanticlegal.org/5.html> (visited Mar. 23, 2000). The Atlantic Legal Foundation (ALF) is a "public interest legal foundation that advocates the principles of free enterprise, the rights of individuals and limited government." ALF litigates in federal court "to challenge burdensome governmental regulations" and to fight for "private property rights . . . and curbing unwarranted governmental intrusion in economic, environmental and energy matters." *Id.* at ALF's home page <http://www.atlanticlegal.org>.

[138] Jeff Share, *Texaco Chief Rejects Fears of Environmental Armageddon*, OIL DAILY, Jan. 26, 1994, at 2.

[139] *Id.*

[140] *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*, THE CHRISTIAN SCIENCE MONITOR, Aug. 25, 1994, at 18 (arguing that Clean Air Act requirements should be met by reducing NOx emissions from cars (as opposed to developing cleaner fuel)).

[141] *See* NRDC v. Texaco, 2 F.3d 493 (3rd Cir. 1993); NRDC v. Texaco, 20 F. Supp. 700 (D. Del. 1998).

[142] Inland Paperboard & Packaging, Inc., *Doing the Right Thing for the Environment*, *Inland's Values in Action*, <http://www.iccnet.com/internet/com/com_env.html> (visited Mar. 23, 2000) .

[143] *See generally* Temple Inland Forest Products v. United States, 988 F.2d 1418 (E.D. Tex. 1993).

[144] *See generally* Temple Inland v. Carter, 42 Tex. Sup. J. 592 (1999).

[145] Temple Inland Foundation gave FREE $20,000 in 1995. In 1997, the year after Mr. DeCrane's speech, Texaco Foundation gave FREE $50,000 to fund a series of FREE seminars for members of the media. 1997 and 1999 Foundation Grant Indecis.

[146] For a critique of the argument that species are best protected by voluntary actions taken by private actors, see Jeffrey J. Rachlinski, *Protecting Endangered Species Without Regulating Private Landowners: The Case of Endangered Plants,* 8 CORNELL J. LAW & PUB. POL'Y 1, *35 ("the data support the conclusion that the ESA does what it says—it prevents the further destruction of the habitat of endangered and threatened species.. . . The likely consequences of eliminating the FWS's regulations restricting private landowners would be to drive more species into extinction.")

[147] DONALD SNOW, THE NEXT WEST: PUBLIC LANDS, COMMUNITY, AND ECONOMY IN THE AMERICAN WEST 8 (Donald Snow & John A. Baden eds., 1998).

[148] *Id.*

[149] Remarks of Jeffrey T. Olson, FREE seminar for Federal Judges (copy provided by author and on file with CRC).

[150] *Id.*

[151] *Id.*

[152] Marcus, *supra* note 1, at A12.

CHAPTER 4
JUDICIAL SEMINARS AND JUDICIAL ACTIVISM

My fear is that the Reagan Revolution will come to nothing as [Reagan/Bush] judges sit on their hands in the name of a simplistic theory of judicial restraint.

— FREE Board Member James Huffman[1]

[J]udicial activism on the part of conservative judges is a much more serious problem, as some Reagan and Bush appointees have proved far too willing to invalidate decisions made by Congress and the executive branch.

— University of Chicago Law Professor Cass Sunstein[2]

A strand of judicial activism has emerged that is distinctly pro-market, clearly hostile to federal environmental regulations and decidedly in keeping with the curriculum of FREE seminars.

INTRODUCTION

There is considerable evidence that the education judges receive at Big Three seminars is influencing judicial opinions. In lockstep with the start of FREE seminars and the dominance of law and economics in privately funded judicial education, a strand of judicial activism has emerged that is distinctly pro-market, clearly hostile to federal environmental regulations and decidedly in keeping with the curriculum of FREE seminars. Federal judges are expanding Constitutional provisions beyond their text and original meaning, ignoring or skirting Supreme Court precedent and overruling laws passed by Congress.

This anti-environmental activism is new. It emerged only around 1992, when FREE set up shop and once Presidents Reagan and Bush had appointed a majority of the nation's federal judges.

It is mostly a product of lower federal court judges. These lower courts are transforming Supreme Court half steps and non-binding suggestions from Justices Thomas and Scalia into expansive rulings that strike down environmental statutes. This activism is a product of Big Three judges. In case after case, the judges writing the opinions that strike down environmental statutes have attended FREE, Liberty Fund and LEC seminars.

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This Chapter tracks the emergence of anti-environmental activism in four areas: (1) the second-guessing of regulatory decision making by executive agencies; (2) the expansion of the Constitution's Takings Clause beyond its text and original meaning; (3) the limitation of Congress' Commerce Clause authority to solve environmental problems; and (4) the restriction of congressionally-granted standing for environmental organizations. For each area of the law, this Chapter outlines the doctrinal shifts, highlights the most activist opinions and then discusses the seminars attended by the judges writing these opinions. In each area, the authors of the leading activist decisions have attended at least one Big Three seminar. In many cases, the judge attended a seminar while the case was pending before his or her court. In some cases, the judge ruled in favor of a litigant that was funded by the same special interests that helped fund his or her seminar.

This remarkable correlation between seminar attendance and judicial activism suggests that these seminars are contributing to the emergence of this new, activist jurisprudence. It also provides the strongest possible support for the conclusion that the judiciary should ban privately funded judicial education. After all, as Representative Zoe Lofgren (D-California) puts it: "there is nothing more damaging to citizens' faith in the country and in the due process of law than the belief, even if inaccurate, that those who are trusted to judge have been influenced by financial connections." [3]

SECOND-GUESSING REGULATORY DECISION MAKING

Summary of Anti-Environmental Activism

The U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit) is empowered to hear most cases challenging a regulatory decision made by the Environmental Protection Agency (EPA), the Department of Interior or any other executive branch agency. This unique jurisdiction makes the court the sec-

ond (to the Supreme Court) most prestigious and powerful court in the nation. The court is a breeding ground for Supreme Court appointees[4] and a battle ground for judicial appointments.

A switch in the ideological center of the DC Circuit from progressive in the 1970s and early 1980s to conservative in the 1990s has had a profound impact on the ability of executive branch agencies to enact regulations that advance environmental goals.[5]

In the 1970s, the DC Circuit developed the "hard look" doctrine to prevent capture of regulatory agencies by the industries they regulate and to ensure that the environmental objectives expressed in the laws passed by Congress trumped concerns of political expediency.[6] The hard look doctrine gave way in the 1980s to the Chevron doctrine (named after the Supreme Court's opinion in *Chevron U.S.A., v. NRDC*[7]), pursuant to which courts defer to any "permissible construction of the statute" reached by an executive branch agency.[8] In the 1990s, the DC Circuit has swung to the other end of the pendulum, laying down a gauntlet of new hurdles for executive agencies seeking to implement environmental protections.

EPA estimates that the standards would have prevented annually 15,000 premature deaths, 350,000 cases of aggravated asthma and nearly a million cases of significantly decreased lung function in children.

American Trucking Ass'n v. Environmental Protection Agency

The most dramatic example is the DC Circuit's May 1999 opinion in *American Trucking Ass'n v. Environmental Protection Agency,*[9] striking down EPA's proposed health standards for smog and soot (or to use the technical terms, the National Ambient Air Quality Standards (NAAQS) for low level ozone (smog) and particulate matter (soot)). Carol Browner hailed these 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." EPA estimates that the standards would have prevented annually 15,000 premature deaths, 350,000 cases of aggravated asthma and nearly a million cases of significantly decreased lung function in children. [10]

Striking down these regulations, Judges Douglas Ginsburg and Stephen Williams issued a *per curiam* opinion[11] in which they dusted off what is known as the "non-delegation doctrine" to rule that a central provision of the Clean Air Act, as interpreted by EPA, represents an unacceptable transfer of power by Congress to the EPA.[12] The Court thus vacated the standards enacted pursuant to that provision and remanded them to EPA

with the instructions that EPA find within the Clean Air Act "a determinate criteria for drawing lines."[13]

Judge Tatel's dissent pointed out the most glaring problem with this ruling: it "ignores the last half-century of Supreme Court non-delegation jurisprudence."[14] As chronicled by Judge Tatel, the Supreme Court has repeatedly approved transfers of authority that are far less restricted than the delegation under the Clean Air Act.[15] The DC Circuit had also reviewed and upheld the precise section of the Clean Air Act in 10 prior opinions without once suggesting that Congress had transferred inordinate authority to EPA.[16] The ruling is thus, in EPA administrator Carol Browner's words: "bizarre and extreme."[17] The ruling also calls into question many of this nation's health, safety and welfare statutes: as the preeminent constitutional scholar Cass Sunstein put it, the ruling represents "a remarkable departure from precedent" that "if taken seriously, brings much of the activity of the federal government into question."[18]

Judge Tatel's dissent pointed out the most glaring problem with this ruling: it "ignores the last half-century of Supreme Court non-delegation jurisprudence."

Sweet Home v. Babbitt

A second prominent example is the DC Circuit's ruling (reversed by the Supreme Court the next year) in *Sweet Home v. Babbitt,*[19] striking down Department of Interior (DOI) regulations prohibiting severe habitat modifications that would kill an endangered or threatened species. The Endangered Species Act is a comprehensive law directed toward halting the extinction of species. It expresses a national commitment to the measures necessary to protect this country's endangered and threatened species. As the Supreme Court ruled in *Tennessee Valley Authority v. Hill*, Congress's intent was "to halt and reverse the trend toward species extinction, whatever the cost."[20]

It is thus hard to fathom why it was unreasonable for DOI to conclude that when Congress prohibited actions that "harm" endangered species, it intended to prohibit habitat modifications that further a species' extinction. Indeed, both the Ninth Circuit and the DC Circuit, in its first decision in *Sweet Home,* upheld the regulations.[21] After granting a rare rehearing to the timber companies, however, Judge Williams changed his mind and wrote an opinion for himself and Judge Sentelle striking down the regulations.[22] Relying almost entirely on an obscure doctrine of statutory interpretation called *noscitur a sociis* ("a word is known for the company it keeps"),[23] Judge Williams defined harm not by its ordinary meaning (which would include habitat modifications),

but by reference to the words next to it, which all suggested animus directed toward the species.[24] The ruling, if upheld, would have taken from DOI one of its most powerful tools for protecting species.

The Supreme Court reversed a year later.[25] The Court dismissed Judge Williams' flawed statutory construction in a single paragraph that chronicles three clear errors in Williams' logic.[26] The Court upheld the regulation as reasonable under a straightforward *Chevron* analysis.[27]

The FREE/Big Three Connection

ATA v. EPA and *Sweet Home* both provide striking illustrations of the appearance problems that can result from FREE seminars.

KEEPING SCORE

FREE and Big Three Trips By DC Circuit Judges Waging A War Against Environmental Regulations

Judge	Case	FREE Trips	Big Three Trips
Williams	*ATA v. EPA & Sweet Home*	**3**	**6**
Ginsburg	*ATA v. EPA*	**8**	**12**

Consider *Sweet Home.* As discussed above, Judge Williams initially upheld the Department of Interior's authority to regulate habitat in *Sweet Home*, and then switched his vote and struck down DOI's authority.[28] The timing of this switch is remarkable. The initial panel opinion was released on July 23, 1993.[29] Less than two weeks later, Judge Williams reports being reimbursed for a trip to Island Park, Idaho to attend a week-long FREE seminar.[30] Upon returning, Judge Williams granted rehearing, switched his vote, and wrote an opinion striking down DOI's regulations.[31]

As troubling, but harder to pin down, is the potential link between FREE's corporate funders and the timber companies that brought the *Sweet Home* case. FREE admits to receiving nearly a third of its budget from donations from corporations.[32] FREE also receives grants from the corporate foundations of resource extraction companies like Amoco Oil, Koch Oil, Shell Oil, Burlington Resources and timber companies such as Temple-

Inland Co.[33] Thus it seems likely that some of these same companies are FREE's corporate donors. However, there is no way to test this assertion. As discussed in Chapter 2, it is impossible to get comprehensive information about corporate donors to groups like FREE. Thus, one can speculate that when Judge Williams flew to FREE after initially upholding the Endangered Species Act in *Sweet Home*, his trip was at least partially bankrolled by the same timber interests that appeared before him.[34] Until there is access to full information about FREE's corporate funders, however, there is no way to be sure.

Upon returning, Judge Williams granted rehearing, switched his vote, and wrote an opinion striking down the Department of Interior's regulations.

The story of *ATA v. EPA* is similar. In July 1998, after Judges Williams and Ginsburg had been assigned to the *ATA v. EPA*[35] case and after both judges had ruled on preliminary motions,[36] the judges flew to Montana to spend a week at a FREE seminar for law professors.[37] This represented Judge Williams's third trip to a FREE Seminar since 1992. For Judge Ginsburg, who sits on FREE's Board of Directors, 1998 was the seventh consecutive year in which he spent at least one week of his summer at a FREE seminar.[38] They returned and issued a "bizarre and extreme" ruling striking down what was to be the most important environmental achievement of the Clinton presidency.

EXPANDING THE TAKINGS CLAUSE

Summary of Anti-Environmental Activism

The Fifth Amendment's Takings Clause commands that "private property" shall not "be taken for public use, without just compensation."[39] Although the Constitution does not define the term "taken," it most naturally refers to a physical expropriation of property. In other words, the text of the Takings Clause does not readily apply to mere restrictions on the *use* of property.[40] As one law professor puts it, if you tell a child not to play with a ball in the house, you have regulated the use of the ball, but you have not taken the ball away.[41]

Despite the Takings Clause's narrow plain meaning, the Clause has emerged over the last decade as a potential impediment to environmental regulation. While the Supreme Court has facilitated this activism by finding for landowners in several recent, high-profile cases, [42] the most dramatic developments have occurred in the Court of Federal Claims and the Federal Circuit Court of Appeals. These two obscure Washington, DC-based

tribunals were created during the Reagan Administration and given the power to hear every takings claim against the United States Government seeking over $10,000 in money damages.[43] Led by Judge Jay Plager on the Federal Circuit, and Chief Judge Loren Smith on the Court of Federal Claims, these two courts are developing a unique takings jurisprudence that threatens many federal environmental statutes.

Partial Regulatory Takings

The most significant case is Judge Plager's 1994 opinion in *Florida Rock Inc. v. United States*.[44] Florida Rock Inc. is a large commercial limestone mining operation that sought to extract limestone from over 1,500 acres of wetlands in the Everglades region of Southern Florida.[45] The Corps of Engineers denied Florida Rock a dredge and fill permit citing (1) concerns about the pollution that inevitably accompanies limestone mining and (2) the destruction of the wetland, which filters and recharges the underlying Biscayne Aquifer and serves as critical habitat for the unique flora and fauna that inhabit the Everglades ecosystem.[46] Even with the restriction on mining, Florida Rock received purchase offers for the property that would have allowed them to recover more than twice their original purchase price.[47]

Despite Florida Rock's ability to double its original investment, the Federal Circuit Court of Appeals ruled that a taking could have occurred.[48] Ignoring a century of Supreme Court cases interpreting the Takings Clause, Judge Plager held the government may have to pay compensation for "partial regulatory takings": reductions in property value caused by regulations.[49] On remand, Judge Smith of the Court of Federal Claims found that a partial taking had indeed occurred.[50] When compound interest, attorneys' fees and costs are added in, the federal government could end up paying Florida Rock tens of millions of dollars to prevent limestone mining on a small patch of the Florida Everglades.[51]

One law professor has called the Federal Circuit's opinion in *Florida Rock* "an extremely destabilizing decision, exposing all wetlands regulation, indeed all environmental and land use regulation, to compensation claims."[52] After *Florida Rock*, in the Federal Circuit, every time a regulation decreases the value of property, the government can be sued for monetary damages. If compensation is required for any significant re-

Ignoring a century of Supreme Court cases interpreting the Constitution's Takings Clause, Judge Plager held the government may have to pay compensation for "partial regulatory takings": reductions in property value caused by regulations.

duction in value, this monetary burden could seriously hamper attempts to regulate against environmental harms.[53] This appears to be precisely what Judge Plager intended. As Chief Judge Nies noted in dissent, "the objective of the [partial takings] theory is to preclude government regulation precisely because regulation will entail too great a cost."[54]

Florida Rock *is "an extremely destabilizing decision, exposing all wetlands regulation, indeed all environmental and land use regulation, to compensation claims."*

— Professor Michael Blumm

Property, Property, Everywhere

In addition to extending the Takings Clause to so-called "partial regulatory takings," the Federal Circuit and Court of Federal Claims are dramatically expanding the property interests given protection under the Takings Clause.

An important example is Judge Plager's opinion for a plurality of judges in *Preseault v. United States.*[55] The Preseaults claimed to own "reversionary interests" in a portion of a railroad corridor that was scheduled for conversion into a recreational trail under the federal Rails-to-Trails Act.[56] Beginning in 1920, federal regulation prohibited abandonment of rail lines (the condition necessary for a corridor to "revert" to its original owners) without federal approval.[57] By 1979, when the Preseaults purchased their parcel, federal regulations sanctioned the temporary use of rail corridors as recreational trails.[58]

Judge Plager nonetheless ruled that a taking of the Preseault's "reversionary interest" had occurred.[59] Despite the clear indication by the Supreme Court in *Lucas v. South Carolina Coastal Council* that federal restrictions in place at the time of purchase limit a property owner's title, [60] Judge Plager ruled that these federal statutes were irrelevant and that the Preseaults owned the precise state law property rights held by the landowners who purchased the property in 1899.[61]

Judge Smith is expanding considerably upon Judge Plager's *Preseault* analysis in the ongoing case of *Hage v. United States.*[62] Smith seems intent on ruling that a rancher has a right to receive compensation from the government if told that he cannot graze cattle on public land. Mr. Hage, a western rancher and cause celebre in the so-called Wise Use Movement,[63] claims that he suffered a taking when elk in the Toiyabe National Forest ate forage in the Forest that properly belonged to Hage's cows.[64] Just one of the innumerable problems with Hage's claim on this point was an "unbroken line of Supreme Court precedent"[65] holding that grazing cattle on public land is a privilege, not a right.[66]

Nonetheless, in two preliminary rulings in the *Hage* case, Judge Smith has suggested strongly that he will rule for Hage in his "taking by elk grazing" claim.[67] Smith's reasoning is that it was possible that the western settlers, who started Hage's ranch in 1865, may have held valid water rights on federal land that pre-existed the establishment of the National Forest.[68] Additionally, Smith reasoned, those water rights may have included the right to graze around watering holes (even though, as explained above, Hage could have no grazing rights, per se, on federal lands).[69] If so, and if Hage can show that the elk ate grass Hage's cows' otherwise would have eaten, then, Smith has stated, Hage will prevail in a takings claim for the grass eaten by the elk.[70]

In most courts and in most eras, Hage's claim almost certainly would have been dismissed as frivolous. In Judge Smith's court, these claims are taken seriously and may well result in what one commentator called "a revolutionary new takings theory that would eviscerate public ownership of hundreds of millions of acres of land in the western United States."[71]

The FREE/Big Three Connection

Judges Plager and Smith are both regular attendees at Big Three seminars, with 16 seminars between them from 1992 to 1998. Both judges attended seminars while the cases discussed above were pending before them. In both *Florida Rock* and *Preseault*, Judge Plager ruled in favor of a group appearing before him that was bankrolled by the funders of his FREE seminars.

KEEPING SCORE

FREE and Big Three Trips By Judges Expanding the Takings Clause

Judge	Case	FREE Trips	Big Three Trips
Plager	*Florida Rock & Preseault*	**4**	**5**
Smith	*Florida Rock & Hage*	**3**	**11**

For example, in September 1993, while Florida Rock was before him, Judge Plager and his wife attended a FREE seminar entitled "Harmonizing Liberty, Ecology, and Prosperity" at the Elkhorn Guest Ranch in Gallatin Gateway, Montana. Pacific Le-

gal Foundation appeared before Judge Plager in *Florida Rock* as an *amicus curiae* (friend of the court) on the side of the mining company. During the 1993-1994 period, Pacific Legal Foundation and FREE shared sizable foundation funding from the M.J. Murdock Foundation[72] and the foundations controlled by Richard Mellon Scaife.[73] Thus, Judge Plager and his wife received a gift worth several thousand dollars from a group funded by foundations that were simultaneously bankrolling a group to appear before him.

In between Judge Smith's two rulings in the* Hage *case, he attended a total of five Big Three trips. These trips included a FREE seminar and a Liberty Fund colloquium on "The History of Property."

The appearance problem in the *Preseault* case is equally bad.[74] Again, Judge Plager attended a FREE seminar while *Preseault* was pending before him. Specifically, Judge Plager attended a FREE seminar in August 1996 and he released his *Preseault* opinion in November 1996. Again, Judge Plager's trip was funded in part by foundations that also helped bankroll the New England Legal Foundation, which represented Mr. & Mrs. Preseault.[75]

Judge Smith's seemingly insatiable need for the latest in libertarian thought creates questions about the link between the seminars he attended and his rulings. For example, in between Judge Smith's two rulings in the *Hage* case, he attended a total of five Big Three trips. These trips included a FREE seminar and a Liberty Fund colloquium on "The History of Property" (a subject probably of interest to Judge Smith considering that in *Hage,* he seems intent on ruling that property rights established by western settlers survived 140 years of federal management of the nation's public lands). In the five years between the Federal Circuit remand of *Florida Rock* and Judge Smith's decision that a taking had occurred, Judge Smith attended two FREE seminars and a total of seven Big Three trips.

LIMITING THE COMMERCE CLAUSE

Summary of Anti-Environmental Activism

Congress has rooted most environmental statutes in its authority under the Commerce Clause (granting Congress the right to "regulate commerce * * * among the several states").[76] The economic theory that supports the Environmentalists' argument for federal environmental laws[77] similarly supports regulating environmental harms under the Commerce Clause. Pollution and environmental degradation are external costs of many land uses and manufacturing processes. These external costs are fre-

quently borne by residents outside of the state in which the pollution or degradation originates. Even wholly intra-state pollution can have significant impacts on interstate commerce, *e.g.* where the despoliation of a lake or river reduces tourism dollars spent by out-of-state vacationers. Thus, there is ample justification for Congress to regulate a wide variety of environmental harms in order to protect the free flow of commerce among the states.

For the first two decades of the modern environmental era, Commerce Clause jurisprudence was so settled that few questioned whether the Commerce power was broad enough to authorize federal environmental law.[78] Over the last decade, however, a handful of federal judges have written opinions suggesting that Congress may be far more limited in its authority under the Commerce Clause to fix environmental problems.

Judge Manion demanded that EPA demonstrate that filling this specific wetland would have a more direct impact on "human commercial activity."

Hoffman Homes v. United States

The first example of activism in this area came in a 1992 opinion in *Hoffman Homes v. United States,*[79] authored by Judge Manion of the Seventh Circuit Court of Appeals. Judge Manion, in an opinion that was almost immediately vacated by his colleagues, ruled that Congress could not, under the Commerce Clause, regulate wetlands without first showing that the wetlands were connected to an interstate waterway.[80]

The Environmental Protection Agency assumes jurisdiction over certain isolated wetlands because they serve as habitat for migratory birds.[81] In its subsequent opinion upholding EPA's regulation of wetlands under this "migratory bird" rule, the Seventh Circuit noted that "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds." The court found Commerce Clause authorization for regulation of wetlands serving as habitat because "the cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds."[82] This was not enough for Judge Manion, who demanded that EPA demonstrate that filling this specific wetland would have a more direct impact on "human commercial activity."[83]

Judge Manion's refusal to consider the cumulative impacts of destruction of wetland habitat on interstate commerce was inconsistent with established Supreme Court precedent.[84]

If adopted by the Supreme Court, his reading of the Commerce Clause could lead to the destruction of vital wetlands and waterfowl habitat across the country.

Olin Corporation v. United States

The number of Commerce Clause rulings have multiplied since the Supreme Court's 5-4 decision in *United States v. Lopez*,[85] striking down the Gun-Free School Zones Act of 1990 as beyond the Congress's Commerce Clause authority. While *Lopez* stands as the first post-New Deal Supreme Court case invalidating a federal law on the grounds that it exceeded Congress' Commerce power, the opinion itself is quite narrow. Even read broadly, the *Lopez* decision establishes limits only on Congress's ability to regulate an activity (such as the criminal act of carrying a handgun near a school) that "has nothing to do with 'commerce' or any sort of economic enterprise."[86] Since most environmental statutes regulate commercial activities and the externalities associated with those activities, *Lopez* would seem to have little relevance to most federal environmental laws.

Since most environmental statutes regulate commercial activities and the externalities associated with those activities, Lopez would seem to have little relevance to most federal environmental laws.

Nonetheless, certain federal judges have viewed the crack in the door opened by *Lopez* as a signal that it is open season for questioning the Commerce Clause authority for federal environmental statutes. The first, and to date, the most remarkable ruling was District Judge Brevard Hand's decision in *Olin Corp v. United States,*[87] striking down EPA's attempt to force a chemical manufacturer to clean up a hazardous waste site under the Comprehensive Environmental Response, Compensation and Liability Act (Superfund) .

Olin Corporation operated a chemical manufacturing plant in McIntosh, Alabama for over 30 years, producing mercury and chlorine-based chemicals that contaminated soil and groundwater around the plant.[88] Judge Hand ruled that because the site was no longer active, the clean up of the site was essentially a local real estate matter, not "economic activity."[89] Because "the law regulating real property has traditionally been a local matter," Judge Hand declared that Congress could not regulate such activities under the Commerce Clause.[90] While Judge Hand's opinion was rejected by other courts[91] and quickly reversed by the Eleventh Circuit Court of Appeals,[92] *Olin* sets a marker as to the breadth of the threat conservative judicial activism poses to federal environmental laws. After all, if hazardous waste disposal and cleanup of hazardous waste sites are not economic

activities that are properly regulated within the scope of the Commerce Clause, then many environmental statutes are subject to successful challenges under the Clause.[93]

United States v. Wilson

The Fourth Circuit's opinion in *United States v. Wilson*[94] stands out because of the size of the commercial activity that was presumed to be outside the purview of the Commerce Clause. James Wilson is among the nation's largest and wealthiest developers.[95] Calvert County, Maryland authorized Wilson's companies to build a planned community of 80,000 residents.[96] In February 1996, Mr. Wilson was convicted of four felony counts of knowingly discharging fill material and excavated dirt into wetlands without a permit.[97] Evidence introduced at trial demonstrated that Mr. Wilson had ignored his own consultants' warnings to obtain a Clean Water Act permit from the Army Corps of Engineers before beginning development and had continued to fill other wetlands even after the Corps issued a cease and desist order to halt construction on a neighboring parcel.[98] Mr. Wilson was sentenced to 21 months in prison and fined $1 million.[99]

***United States v. Wilson* stands out because of the size of the commercial activity that was presumed to be outside the purview of the Commerce Clause.**

The Fourth Circuit Court of Appeals overturned Mr. Wilson's conviction.[100] The flaw, according to Judge Niemeyer, was that regulations issued by the Army Corps of Engineers required a wetland permit whenever dredging and filling of a wetland "could affect" interstate commerce.[101] Judge Niemeyer struck down this regulation and thus the trial court jury instructions, reasoning that the regulation "is unauthorized by the Clean Water Act as limited by the Commerce Clause and therefore is invalid."[102] In Judge Niemeyer's analysis, the economic nature of the activity regulated (dredging and filling wetlands to develop an entire city) seems to be irrelevant.[103] Congress can only regulate a wetland where it can show "a direct or indirect surface connection" between the wetland and interstate waters.[104]

Again, Judge Niemeyer's view of the Commerce Clause seems flatly inconsistent with Supreme Court rulings, including *Lopez.* As long as an activity (such as the dredging and filling of a wetland to facilitate development) is correctly labeled commercial, *Lopez* and other Supreme Court cases demand only that the government show that type of activity, if permitted by landowners across the country, would have a substantial impact on

interstate commerce.[105] Existing Supreme Court precedent does not saddle the Corps with the burden of documenting ties with interstate commerce each time it seeks to prohibit destruction of a wetland. Judge Niemeyer's approach would impose a burdensome new hurdle for the Corps to overcome and would inevitably mean that far fewer wetlands are protected under the Clean Water Act.

The FREE/Big Three Connection

KEEPING SCORE

FREE and Big Three Trips By Judges Finding Commerce Clause Limits on Congress' Ability to Protect the Environment

Judge	Case	FREE Trips	Big Three Trips
Hand	*Olin Corp. v. EPA*	**0**	**5**
Manion	*Hoffman Homes*	**1**	**3**
Niemeyer	*U.S. v. Wilson*	**1**	**2**

As in other areas of anti-environmental activism, the judges interpreting the Commerce Clause to impose limits on federal environmental protection have all attended at least one Big Three seminar over the past 7 years. Again, in some cases, the timing of these trips raises questions about the impact of these seminars on activist decisions. For example, less than a month before Judge Hand issued his ruling suggesting that the federal government lacked the power to force the clean up of hazardous waste sites, Judge Hand attended a Liberty Fund seminar entitled "Freedom and Federalism." Federalism concerns then formed the foundation of Judge Hand's *Olin* decision, in which he spent ten pages explaining why "federal courts play an important part in maintaining federalism."[106] Similarly, Judge Manion attended a Liberty Fund seminar the same year he issued *Hoffman Homes.* Judge Niemeyer attended a FREE seminar in 1992 and a Liberty Fund Colloquia on constitutional law hosted by the Center for Judicial Studies in 1993.

ELIMINATING ENVIRONMENTAL STANDING

Overview of Anti-Environmental Activism:

An innovation of modern environmental statutes is the power Congress granted to citizens to ensure that environment

laws are carried out by regulatory agencies and obeyed by polluters. Concerned that agencies would be "captured" by regulated industries, Congress authorized suits against the government to force compliance with Congressional mandates. Concerned that enforcement budgets would be slashed, Congress enacted "citizen suit" provisions deputizing citizens to act as "private attorneys general" to force polluters to comply with federal mandates.[107]

Over the past decade, the federal judiciary has increasingly closed its doors to environmental plaintiffs. Overruling Congressional authorization, courts have ruled that environmental plaintiffs are not sufficiently injured by environmental harms to have "standing" in court.[108] Unlike other areas of anti-environmental activism, the changes in the law of standing have been led by the Supreme Court. Over vehement dissents, the Court, through Justice Scalia, has declared that Congress is limited in its ability to create legal rights that are enforceable in court.[109] Thus, even if Congress believes that environment groups and citizens are sufficiently harmed by environmental pollution to have a case, judges can disagree. Justice Scalia has also declared that it should be easier for an "object" of regulation (i.e. a corporate polluter) to establish standing to sue than a beneficiary (i.e. an environmentalist trying to stop pollution).[110]

Over the past decade, the federal judiciary has increasingly closed its doors to environmental plaintiffs.

Certain lower federal courts have been particularly aggressive in following Justice Scalia's lead in expanding standing barriers to exclude environmental plaintiffs.

Public Interest Research Group v. Magnesium Elektron

Perhaps the best example is Judge Roth's decision for the Third Circuit in *Public Interest Research Group (PIRG) v. Magnesium Elektron*.[111] The Clean Water Act authorizes "any citizen" to bring a civil enforcement action against any person "who is alleged to be in violation" of any water pollution limit.[112] A citizen is defined as "a person or persons having an interest which is or may be adversely affected."[113] Consistent with Congress' intent, most courts have found standing where the plaintiffs can prove a violation of a pollution limit under the Clean Water Act, and show that they live adjacent to the polluter and suffer potential impacts on their health, recreational or aesthetic interests.[114]

The plaintiffs in *Magnesium Elektron* easily met the traditional test for standing. They demonstrated (1) that Magnesium Elektron Inc. (MEI) violated its Clean Water Act permit 150 times, (2) that PIRG members used the polluted resource for fishing and recreational purposes, and (3) that the pollution had interfered with these interests because their members knew of the pollution and were concerned with contaminated fish and water.[115] On the basis of these allegations, the District Court fined MEI $2.625 million and awarded plaintiffs $524,899 in attorneys fees and expenses.[116]

To demonstrate standing under Judge Roth's ruling, an environmental plaintiff must hire an expert, test the water body, demonstrate specific detrimental environmental impacts and tie the impacts to the polluter's discharge.

The Third Circuit reversed this ruling, denying PIRG standing because it had not demonstrated that MEI's pollution had resulted in serious harm to the environment.[117] The Court relied exclusively on an affidavit by an expert for MEI, suggesting that the pollution had not seriously harmed the waterbody.[118] The trial court termed the affidavit "conclusory" and considered it only with respect to the penalty charged to MEI.[119] PIRG never rebutted this affidavit because doing so would be costly and was unnecessary under the Clean Water Act, which substituted strict effluent limitations for detailed and expensive efforts to trace pollution impacts to specific polluters.

Judge Roth deemed Congress's intent to give PIRG standing irrelevant. In her words:

> Congress can confer only so much power on citizens wishing to sue polluters who have violated their NPDES permit. Accordingly, we read the phrase 'may be adversely affected' as inherently limited by the injury prong of the constitutional test for standing. Thus, even if PIRG's members can show that they 'may be adversely affected' by MEI's pollution into the Wichecheoke Creek, they must also demonstrate that their threat of injury is imminent.[120]

Thus, to demonstrate standing under Judge Roth's ruling, an environmental plaintiff must do far more than simply prove a violation by a company and show that they live in the vicinity. The group must hire an expert, test the water body, demonstrate specific detrimental environmental impacts and tie the impacts to the polluter's discharge. In January 2000, the Supreme Court in *Friends of the Earth, Inc. v. Laidlaw*,[121] rejected Judge Roth's analysis, ruling (over a heated dissent by Justice Scalia) that "the relevant showing for purposes of Article III stand-

ing, however, is not injury to the environment, but injury to the plaintiff."

Florida Audubon Society v. Bentsen

Another striking example is *Florida Audubon Society v. Bentsen*. In *Bentsen,* a deeply divided DC Circuit ruled by a vote of 7 to 4 to deny standing to environmental plaintiffs who petitioned the Department of Treasury to consider, under the National Environmental Policy Act (NEPA), the potential environmental impacts of a large tax credit proposed for the gasoline additive ETBE.[122] The petitioners offered detailed affidavits, expert testimony and numerous reports demonstrating that they could suffer two types of injuries from the proposed tax credit: injuries to their use of wildlife habitat and injuries to their drinking water supplies.[123]

The DC Circuit nevertheless denied standing.[124] According to Judge Sentelle, it is not enough for a plaintiff to show that he is "injured as is everyone else," or even that he is "more likely to sustain injury" than others.[125] To ask for an assessment of the impacts of a regulatory action, an environmental petitioner must demonstrate both "the demonstrably increased risk of serious environmental harm" and a link between that risk and their "particular interests."[126]

Responding to the dissent's charge that the court's opinion will make it "effectively impossible for anyone to bring a NEPA claim in the context of a rulemaking with diffuse impact,"[127] Judge Sentelle answered: so be it. The flaw, according to Judge Sentelle, lay in "the nature of plaintiff's claim" which alleged "diverse environmental impacts." Such claims are "too general for court action."[128]

KEEPING SCORE

FREE and Big Three Trips By Judges Curtailing Environmental Standing

Judge	Case	FREE Trips	Big Three Trips
Roth	*Magnesium Elektron*	**2**	**3**
Sentelle	*Florida Audubon*	**1**	**1**

The FREE/Big Three Connection

Magnesium Elektron provides yet another compelling example of the appearance problems that can result from FREE seminars. Judge Roth attended two FREE seminars between 1992 and 1997, one in 1994, two years before the case landed in her court and one that began on August 20, 1997, two weeks after she issued her opinion in *Magnesium Elektron.* MEI was assisted before the Third Circuit by an *amicus* brief filed by Washington Legal Foundation (WLF), which joined MEI in arguing the environmental group did not have standing to bring the case. Washington Legal Foundation, like FREE, gets a considerable portion of its funding from foundations such as Olin,[129] Sarah Scaife[130] and Carthage.[131] Thus, two weeks after ruling in WLF's favor in a landmark environmental standing case, Judge Roth received an expense paid trip to Montana bankrolled in part by WLF's biggest funders.

Looking at what are objectively the most activist rulings issued by federal district and appellate courts over the last decade, all of the opinions have been written by judges attending at least one Big Three seminar.

Judge Sentelle did not attend a FREE seminar until August 1998, two years after his opinion in *Florida Audubon.* However, three of the judges joining him in denying Florida Audubon standing had attended at least 8 FREE seminars before the court's ruling,[132] making it difficult to eliminate the possibility that the seminars influenced the *Florida Audubon* ruling.

CORRELATION, CAUSATION, AND THE APPEARANCE OF IMPROPRIETY

This chapter demonstrates a remarkable correlation between the judges that have attended Big Three seminars and the most activist, anti-environmental opinions issued by lower federal courts over the past decade. In four distinct areas of environmental law, judges who have attended Big Three seminars have written the leading activist rulings. This chapter has not discussed every activist ruling by a FREE judge, and it is not suggesting that anti-environmental activism is exclusively a product of Big Three judges. But looking at what are objectively the most activist rulings issued by federal district and appellate courts over the last decade, all of the opinions have been written by judges attending at least one Big Three seminar.

This correlation seems significant because less than 1 in 3 judges attended Big Three seminars during the course of our study. It is also interesting to note that during the same period some of the federal bench's best known conservatives – includ-

ing, for example, Judges Kozinski, Wilkinson, Posner, Easterbrook and Silberman – have not attended these seminars and, correspondingly, have not issued any strikingly activist opinions in the area of environmental law. This discounts an alternative explanation of the cases as simply the product of ideologues that came to the bench driven to strike down environmental laws. While the decisions discussed above were all written by conservative judges, this only suggests that the seminars offer something that is more helpful to a conservative judge and more dangerous to the independence of our judicial system: the tools to reach the results that conservatives favor as a matter of politics or ideology. That is to say, the evidence compiled in this report suggests that the most powerful result of FREE/Big Three seminars may be that conservative judges are receiving instructions in how to transform their political commitments into concrete judicial action.

The timing of many of these trips is also very suggestive. As discussed above, in many cases, judges have attended a Big Three seminar while a case was pending in their court. The best example is clearly *Sweet Home v. Babbitt,* where Judge Williams voted to uphold the Department of Interior's authority to regulate habitat under the ESA, attended a FREE seminar, and then switched his vote. The timing of Judge Hand's Liberty Fund seminar on "Freedom and Federalism" – the month before he issued his opinion in *Olin* – is also striking.

Finally, there is also the issue of the frequent presence of groups funded by seminar sponsors appearing before judges who have attended seminars. To illustrate why this connection is so troublesome, imagine one wealthy foundation, interested in shaping the law in a conservative, anti-regulatory fashion. That foundation decides on a strategy, which has two parts. First, fund groups that are going to litigate. Second, fund seminars that will try to persuade judges. The problem with this, of course, is that the seminars are like gifts from the foundation, and the groups litigating before the judges are like representatives of the foundation. So the real problem, if "only" an appearances one, is that the same foundation is both giving a gift to judges and, through its representatives, litigating before the same judges.

Has this Chapter proven that Big Three seminars are fueling anti-environmental activism? Are judges, in the words of Judge Williams, "be[ing] bought for a mess of pottage" (or more accurately, a week at a luxury resort)?[133] It is impossible to say. As stated in the introduction, it is impossible to prove that any

It is enough to support a ban on private seminars if a reasonable person could conclude that privately funded seminars create an appearance of impropriety for the federal judiciary. The evidence laid out in this Chapter more than meets this standard.

particular seminar influences any particular judge's ruling in any particular case. But the task here is not to prove causation to a scientific certainty. Judicial ethics laws and canons prohibit the appearance of impropriety as much as impropriety itself. It is enough to support a ban on private seminars if a reasonable person could conclude that privately funded seminars create an appearance of impropriety for the federal judiciary. The evidence laid out in this Chapter more than meets this standard.

ENDNOTES

[1] James L. Huffman, *The Heritage Foundation Lectures & Educational Programs*: *A Case for Principled Judicial Activism*, <http://www.heritage.org/library/categories/crimelaw/lect456.html> (visited Mar. 22, 2000).

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

[3] *Oversight Hearing on the United States Judicial Conference, Administrative Office, and Federal Judicial Center, Before the Courts and Intellectual Property Subcommittee of the House Judiciary Committee*, 105th Cong., 2nd Sess. (June 11, 1998) (available through Federal News Service).

[4] Justices Antonin Scalia, Clarence Thomas and Ruth Bader Ginsburg all were elevated to the Supreme Court from the DC Circuit.

[5] *See* Richard Revezs, *Environmental Regulation, Ideology and the DC Circuit*, 83 VA. L. REV. 1717, 1776 (1997). Professor Revezs conducted an empirical study of the environmental decisions of the DC Circuit over the last decade to confirm that ideology influenced results in environmental cases. In his words, his "study provides empirical support for the theory that D.C. Circuit judges employ a strategically ideological approach to judging." *Id.* at 1766. Professor Revezs suggests that his study provides "an argument against vesting in the D.C. Circuit exclusive venue over the review of important sets of environmental regulations." *Id.* at 1771.

[6] *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C.Cir.1970); *see also* Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

[7] 467 U.S. 837 (1984).

[8] *Id.* at 843

[9] 175 F.3d 1027, 1033 (D.C. Cir. 1999).

[10] *See* Environmental Protection Agency, *Fact Sheet, EPA's National Ambient Air Quality Standards: The Standard Review/Reevaluation Process,* July 16, 1997; *see also* Margaret Kris, *Why the EPA's Wheezing a Bit*, NATIONAL JOURNAL, June 24, 1999, at 2166.

[11] *Per curiam* means literally "for the court." Typically, *per curiam* opinions are short and unanimous, though neither description fits the *ATA v. EPA* case.

[12] *See id.* at 1034-39.

[13] *Id.* at 1034 (Tatel, J., dissenting).

[14] *Id.* at 1057 (Tatel, J., dissenting); *see also* 193 F. 3d 4, 14 (1999)(Silberman J. dissenting from denial of rehearing) (terming the panel's non-delegation ruling "rather ingenious, but * * * fundamentally unsound").

[15] *See id.*

[16] *Id.*

[17] Kris, *supra* note 10, at 2166.

[18] Sunstein, *supra* note 2.

[19] 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995).

[20] 437 U.S. 153, 184 (1978)

[21] *See* Palila v. Hawaii Dep't of Land and Natural Resources, 852 F.2d 1106, 1108 (9th Cir. 1988); Sweet Home v. Babbitt,1 Fed. 3d 1 (1993).

[22] *See Sweet Home,* 1 F.3d 1 (D.C. Cir. 1993).

[23] *See* Sweet Home v. Babbitt, 515 U.S. 687, 694 (1995) (citing Neal v. Clark, 95 U.S. 704, 708-709 (1878)).

[24] *Sweet Home,* 17 F.3d at 1465-66.

[25] *See Sweet Home,* 515 U.S. 687.

[26] *See id.* at 701-02.

[27] *Id*. at 703

[28] 1 F.3d 1; 17 F.3d 1463.

[29] 1 F.3d 1.

[30] 1993 Financial Disclosure Form for Judge Stephen Williams.

[31] 17 F.3d 1463.

[32] FREE ANNUAL REPORT for 1997.

[33] 1992 – 1998 Foundation Grant Indices.

[34] The plaintiffs in *Sweet Home* were a collection of timber companies and timber employees. The litigation was bankrolled by the American Forest Resource Association (an organization ultimately subsumed by the American Forest Products Association).

[35] 175 F.3d 1027 (D.C. Cir. 1999).

[36] According to the docket sheet for the case, ATA v. EPA was scheduled for oral argument on 5/19/98 and assigned then to Judges Williams, Ginsburg and Tatel. On 6/25/98, Judges Ginsburg and Williams joined an order changing the briefing schedule in the case in order to accommodate the participation of Senator Orrin Hatch (R-UT).

[37] 1998 Financial Disclosure forms filed by Judges Stephen Williams and Douglas Ginsburg.

[38] 1992-1998 Financial Disclosure Forms for Douglas Ginsburg.

[39] U.S. CONST. amend. V.

[40] *See* FRED BOSSELMAN, ET AL., THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL 51 (1973) ("The word 'take' ordinarily refers to the act of obtaining possession or control of property, and although there are many other usages of the word none of them seems descriptive of governmental regulation of the use of land.").

[41] *See* WILLIAM MICHAEL TREANOR, THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE 3-4 (1998).

[42] *See generally,* City of Monterey v. Del Monte Dunes, 119 S.Ct. 1624 (1999); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), Nollan v. California Coastal

Cmm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

[43] For a more detailed discussion of the creation of these two courts, the Reagan and Bush administrations' careful shaping of the courts' ideological composition and the anti-environmental activism of the judges on these courts, *see* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far,* 25 B.C ENVT'L AFF. L.J. 509 (1998).

[44] 18 F.3d 1560 (Fed. Cir. 1994).

[45] *See id.* at 1562.

[46] *See id.* 1563.

[47] *See id.*

[48] *See id.* at 1565.

[49] *See id.* at 1568.

[50] *See id.* at 1564.

[51] Judge Smith found a "partial regulatory taking" of the 98 acres and awarded plaintiff $754,444 plus interest from 1980, attorneys' fees and costs. Florida Rock Indus. v. United States, 45 Fed. Cl. 21, 23, 43-44 (1999). Judge Smith also strongly suggested that he would find a taking of the other 1,462 acres of land. *See id.* at 44. Assuming the same $7,700 per acre decrease in value is applied to these other acres, the total compensation award would increase to approximately 12 million, plus interest, attorneys fees and costs. In cases where there is a long delay between a permit denial and a finding of a taking, interest charges can be many times the actual award. For example, in Whitney Benefits v. United States, 30 Fed. Cl. 411, 416 (1994), Judge Smith awarded $60 million in compensation for the right to strip mine coal, and over $250 million in interest.

[52] Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 180 (1995).

[53] *See Florida Rock,* 18 F.3d at 1575 (Nies, C.J., dissenting) ("it requires little imagination to envision the vast sums required for the lost value/use claims if the government must pay for mere impairment of rights.").

[54] *Florida Rock*, 18 F.3d 1560 (Nies, C.J., dissenting); *see also* Jay Plager, *Takings Law and Appellate Decision Making,* 25 ENVT'L 161, 162-63 (1995) (acknowledging that the partial takings issue had not been "fully briefed and argued," and explaining that sometimes he has "a problem of trying to fit the issue you want to write about to the case that is before you.")

[55] 100 F.3d 1525 (Fed. Cir. 1996).

[56] *See id.* at 1536.

[57] *See id.* at 1537.

[58] *See id.* at 1538.

[59] *See Preseault,* 100 F.3d at 1552; *Preseault*, 66 F.3d at 1190.

[60] 505 U.S. 1003, 1028-29 (1992) (listing a federal navigational servitude as a "background principle of law" that limits title and prevents a successful takings claim).

[61] *See Preseault*, 100 F.3d at 1539.

[62] 35 Fed. Cl. 147 (1996).

[63] Hage first stated his takings claim in a widely publicized 1989 book entitled *Storm Over the Rangelands*. Hage cemented his standing in the Wise Use Pantheon in 1999 with his marriage to the self-proclaimed "poster child of the Militia," Representative Helen Chenowith (R-ID).

[64] *See Hage,* 35 Fed. Cl. at 156.

[65] *Id.* at 174 (quoting Gardner v. Stager*,* 892 F. Supp. 1301, 1304 (D. Nev. 1995)

[66] *Id.*

[67] *See* Hage v. United States, 42 Fed. Cl. 249, 251 (1998).

[68] *See id.* at 251.

[69] *See id.* at 251.

[70] *See Hage,* 35 Fed. Cl. at 175 n.13.

[71] John D. Echeverria, *Don't Make Poor Choice, Judge Smith,* National Law Journal A21, February 1, 1999.

[72] *See* M.J. Murdock Charitable Trust, 1993 Annual Report ($78,000 grant to FREE in 1993); M.J. Murdock Charitable Trust, 1994 Annual Report ($200,000 to PLF in 1994); *see also* 1994 Foundation Grant Index at 330 (reporting a $200,000 grant from Murdock to PLF in 1992).

[73] *See* Carthage Foundation 1993, 1995 & 1996 Annual Reports (reporting grants to FREE of $100,000 in each year); 1994 Foundation Grant Index at 327 (reporting $75,000 Carthage grant to PLF in 1991); Sarah Scaife Foundation, 1994 Annual Report at 16 (reporting $200,000 grant to PLF); 1992 – 1996 Foundation Grant Indices (reporting Sarah Scaife grants of $175,000 to PLF in 1991, 1992 and 1993); *see also* Sarah Scaife Foundation, 1995 Annual Report at 8 (hailing PLF for "[i]ts successes in litigating property rights cases" and approving a $200,000 general support grant to PLF to allow PLF to "assist petitioners in court cases concerned with issues of major public policy.").

[74] As mentioned in the conclusion to this chapter, a hypothetical helps to illustrate why this connection is troublesome. Imagine one wealthy foundation, interested in shaping the law in a conservative, anti-regulatory fashion. That foundation decides on a strategy, which has two parts. First, fund groups that are going to litigate. Second, fund seminars that will try to persuade judges. The problem with this, of course, is that the seminars are like gifts from the foundation, and the groups litigating before the judges are like representatives of the foundation. So the real problem, if "only" an appearances one, is that the same foundation is both giving a gift to judges and, through its representatives, litigating before the same judges.

[75] *See* 1999 Foundation Grant Index at 1700 (reporting $25,000 grant in 1996 to FREE "for seminars for federal judges on environmental econom-

ics"); John M. Olin Foundation, 1995 ANNUAL REPORT ($25,000 grant to FREE for "seminars for federal judges on environmental concerns"); John M. Olin Foundation, 1994 ANNUAL REPORT ($35,200 to NELF for "research and litigation on a case involving the "takings" clause of the Constitution,"); The Carthage Foundation, 1996 ANNUAL REPORT ($100,000 grant to FREE); Sarah Scaife Foundation, 1996 ANNUAL REPORT at 13 ($50,000 to NELF).

[76] *See* U.S. CONST. art. I, § 8; *see also* ELIZABETH GLASS GELTMAN, MODERN ENVIRONMENTAL LAW, 2-3 (1997).

[77] *See* Ch. 3 above.

[78] *See generally* Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981) (unanimously upholding federal regulation of environmental impacts of surface mining); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 811-817 (describing the Supreme Court's interpretation of the Commerce Clause from 1937-1995).

[79] 961 F.2d 1310 (7th Cir. 1992).

[80] *See id.* at 1319.

[81] *See id.* at 1320.

[82] Hoffman Homes v. United States, 999 F.2d 256, 261 (7th Cir. 1993).

[83] *See Hoffman Homes,* 961 F.2d at 1322.

[84] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 128-29 (1942); *see also* Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 282 (1981) ("we agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one state.")

[85] 514 U.S. 549 (1995).

[86] *Id.* at 560-61.

[87] 927 F. Supp. 1502 (S.D. Ala. 1996).

[88] *See id.* at 1504.

[89] *Id*. at 1532-1533.

[90] *Id.* at 1533.

[91] See Nova Chemicals, Inc. v. GAF Corp., 945 F.Supp. 1098 (E.D.Tenn 1996); U.S. v. NL Indus., 936 F.Supp. 545 (S.D. Ill. 1996).

[92] United States v. Olin Corporation, 107 F.3d 1506 (11th Cir. 1997).

[93] *See* Nova Chemicals, Inc. v. GAF Corp., 945 F.Supp. 1098, 1106 (E.D. Tenn. 1996) ("The release of hazardous wastes and the remediation of hazardous waste sites are clearly economic activities.").

[94] 133 F.3d 251 (4th Cir. 1997).

[95] Wilson's companies, Interstate General Co., and St. Charles Associates, have assets exceeding $100 million. *Id*. at 254.

[96] *Id.* at 254.

[97] *Id.* at 253.

[98] *Id.* at 255.

[99] *Id.* at 254.

[100] *Id.* at 254.

[101] *Id.* at 253.

[102] *Id*. at 254.

[103] *Id.* at 271.

[104] *Id*. at 258 (This portion of the opinion is only for Judge Niemeyer).

[105] *See* Maryland v. Wirtz, 392 U.S. 183, 197 n. 27 (1968)("where a general regulatory statute bears a substantial relation to commerce, the *de minimus* character of individual instances arising under that statute is of now consequence."); *see also* Lopez, 514 U.S. at 559-61 (reaffirming *Wirtz* and distinguishing the Gun-Free School Zones Act as a "criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise."); Gibbs v. United States, 2000 WL 726073 (4th Cir. 2000).

[106] 27 F. Supp. at 1523.

[107] *See generally* Oliver Houck, Environmental Law and the General Welfare, 16 PACE ENVT'L L. REV. 1, 3 (terming citizen suit provisions one of two primary engines of practically everything that has succeeded in the environmental law field since 1965).

[108] Like other anti-environmental judicial activism, this hostility to environmental plaintiffs is enormously controversial. Prominent historians have unanimously agreed that nothing in the Constitution or in the practice of courts throughout history suggests that there are limits to the authority of Congress to create judicially enforceable rights. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969). Other critics observe that the doctrine of standing is also remarkably malleable and, as a result, decisions on standing too frequently reflect a judge's view on the merits of the claims before them. For example, Professor Richard Pierce recently did a study of every standing case decided in the last several years by the Supreme Court and federal courts of appeals. *See* Richard J. Pierce, Jr., *Is Standing Law or Politics?* 77 N.C.L. REV. 1741 (1999). He put his conclusion starkly: "Judges provide access to the courts to individuals who seek to further the political and ideological agendas of judges." *Id.* at 1742-43.

[109] *See* Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003 (1998); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). As noted below, in *Friends of the Earth v. Laidlaw Envtl. Services, Inc.,* 120 S. Ct. 693 (2000), the Supreme Court, over a dissent by Justices Scalia and Thomas, ruled that an environmental group had standing to sue in a Clean Water Act case and called into question many of the further reaching assertions made by Justice Scalia in *Lujan* and *Steel Co.*

[110] *See Lujan*, 112 S. Ct. at 2137 (when "an injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed."); Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 186-187 (explaining why Congress and the Warren Court rejected the distinction between objects and beneficiaries).

[111] 123 F.3d 111 (3rd Cir. 1997).

[112] 33 U.S.C. § 1365 (a).

[113] *See* 33 U.S.C. § 1365 (g).

[114] *See generally* Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

[115] *See* Public Interest Research Group v. Magnesium Elektron, Inc., 89-3193, 1995 U.S. Dist. LEXIS 20748, at *2 (N.J. March 9, 1995), *rev'd and vacated*, 123 F.3d 111 (3rd Cir. 1997).

[116] *See id.* at *47; Public Interest Research Group v. Magnesium Elektron, Inc., 89-3193, 42 ENV'T REP. CAS. (BNA) 1731 (D.N.J. Dec. 28, 1995), *rev'd and vacated*, 123 F.3d 111 (3rd Cir. 1997).

[117] *See Magnesium Elektron*, 123 F.3d at 121-22. To even address the standing issue, the Court first had to ignore its own prior ruling that there was standing, a ruling that was what lawyers call "law of the case" – meaning that its early standing ruling could not be re-litigated. The Court recognized that "revisitation of issues resolved earlier in the litigation is a serious matter and should not be taken lightly." *Id.* at 118. It nonetheless proceeded, concluding that expanding standing law and dismissing PIRG's case "trump the prudential goals of preserving judicial economy and finality." *Id.*

[118] *See id.* at 115.

[119] Public Interest Research Group v. Magnesium Elektron, Inc., 89-3193, 1992 U.S. Dist. LEXIS 654, at *31 (N.J. Jan. 23, 1992).

[120] *Magnesium Elektron,* 123 F.3d at 122.

[121] 120 S. Ct. 693, 704 (2000).

[122] 94 F.3d 658, 661 (D.C. Cir. 1996) (en banc).

[123] *Id.* at 677-679 (Rogers J., dissenting). This evidence was clearly sufficient to establish standing under DC Circuit precedent. For example, in *City of Los Angeles v. NHTSA,* 912 F.2d 478, 492 (D.C. Cir. 1990), the Court ruled that a plaintiff could demand an Environmental Impact Statement (EIS) under that National Environmental Policy Act (NEPA) as long as the plaintiff could demonstrate that, without the EIS, the agency might overlook a "reasonable risk of environmental harm" and that the petitioner has "a sufficient geographical nexus" to the potential harm. This precedent also seemed insulated from recent changes in Supreme Court standing law because the Court had expressly distinguished environmental plaintiffs that "are seeking to enforce a procedural requirement." *Defenders of Wildlife v. Lujan*, 504 U.S. 555, 572 (1992). Plaintiffs enforcing a procedural right can establish standing, the Court declared, "without meeting all the normal standards for redressability and immediacy." *Id.* at 572 n.7.

[124] *See Florida Audubon Society,* 94 F.3d at 661.

[125] *Id.* at 667 n.4.

[126] *Id.* at 665.

[127] *Id*. at 673 (Rogers, J., dissenting)

[128] *Id*. at 667 n.4.

[129] 2000 Foundation Grant Index at 429, 1879 (Reporting that in 1997, the Olin Foundation granted FREE $74,328 for its seminars for judges and granted WLF $200,000 for its litigation activities).

[130] 2000 Foundation Grant Index at 887 (reporting that in 1997, the Sarah Scaife Foundation granted $75,000 to FREE); 1999 Foundation Grant Index at 377 (reporting that in 1996, the Sarah Scaife Foundation granted $125,000 to Washington Legal Foundation).

[131] Carthage Foundation 1998 ANNUAL REPORT ($75,000 to FREE); Carthage Foundation 1996 ANNUAL REPORT ($100,000 to FREE; $200,000 to WLF); Carthage Foundation 1995 ANNUAL REPORT ($100,000 to FREE; $450,000 to WLF); Carthage Foundation 1993 ANNUAL REPORT ($100,000 to FREE; $800,000 to WLF).

[132] Financial Disclosure Forms for Judge Ginsburg 1992-96 (6 FREE seminars); Financial Disclosure Forms for Judge Williams (2 FREE seminars). FREE reports that Judge Buckley attended at least one seminar between 1992 and 1996. Judge Buckley did not disclose this seminar on his financial disclosure form. None of the four judges voting to grant Florida Audubon standing attended a FREE seminar prior to the August 1996 ruling. One judge, Judge Rogers, reports attending a FREE seminar in June 1997. Financial Disclosure Form for Judge Rogers 1997.

[133] Andrew Leonard, *Tipping the Scales of Justice,* SALONMAGAZINE.COM, March 17, 1999 (Quoting DC Circuit Court of Appeals Judge Stephen Williams).

CHAPTER 5
THE CURRENT SYSTEM IS BROKEN

Specific information about the sponsor of the seminar, the source of funding, their involvement in litigation, the content of the seminar, and the judge's relationship to such litigation all bear on the question whether a judge's participation is proper or improper under the Code of Conduct.

— Judicial Conference's Committee on Codes of Conduct[1]

I went up there not knowing anything about the organizations that sponsored this thing.

— Judge James Trimble[2]

It seems plain enough that privately funded educational seminars create a problem for the federal judiciary. Judges are attending highly biased programs offered in desirable settings designed to advance the political agendas of the groups paying for their attendance. The emergence of these trips coincides with a pro-market shift in judicial thinking on key legal issues, exacerbating this unseemly situation. Equally disturbing is the regularity with which groups bankrolled by seminar sponsors appear before the judges attending the trips.

This Chapter explains why the existing guidance for judges has failed to prevent these appearance problems. After giving an overview of the existing ethical rules governing attendance at private seminars, three critical flaws are identified. First, the current rules are vague and ambiguous. Second, they require the collection and consideration of a tremendous amount of information and neither judges nor the judiciary seem willing to

collect or consider this information. Finally, under the current rules, private judicial education takes place largely in secret, with the seminar sponsors, the judiciary and individual judges each withholding information necessary to effectively evaluate private judicial seminars.

OVERVIEW OF CURRENT STANDARDS

Under the current rules, private judicial education takes place largely in secret, with the seminar sponsors, the judiciary and individual judges each withholding information necessary to effectively evaluate private judicial seminars.

Guidance for judges on attending private judicial seminars is scattered among a confusing jumble of federal statutes, ethical canons, judiciary regulations and advisory opinions.

Federal Law

The Ethics Reform Act of 1989[3] provides that judges shall not "accept anything of value from a person . . . whose interests may be substantially affected by the performance or nonperformance of the individual's official duties" unless the gift is permitted under "reasonable exceptions" established by the Judicial Conference.[4] Reimbursement of travel expenses and payment of seminars expenses are gifts within the meaning of the Act.[5] Advisory Opinion 67, discussed below, establishes a "reasonable exception" from the ban on seminar gifts in certain circumstances.[6]

Federal law also requires that judges disclose information about privately funded seminars on their annual public disclosure forms. Specifically, judges must report: "The identity of the source and a brief description (including a travel itinerary, dates, and nature of expenses provided) of reimbursements received from any source aggregating more than . . . $250."[7]

Ethical Canons

The Judicial Canons demand that judges must "avoid impropriety and the appearance of impropriety in all of the judge's activities" and shall "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[8] Commentary to the Canons explains that: "A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."[9] The Commentary further clarifies:

> The test for appearance of impropriety is whether the conduct would create in reasonable minds, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.[10]

Advisory Opinion 67

The most direct guidance available to judges on private seminars is contained in Advisory Opinion 67, issued first in August 1980 and reissued most recently in January 1997.[11] Advisory Opinion 67 addresses "whether judges may with propriety attend seminars and similar educational activities organized by non-governmental entities and may have the expenses of their attendance paid by such entities." It establishes a case-by-case test that a judge must apply in evaluating the propriety of attending a private seminar.

The Advisory Opinion has four parts. First, it clarifies that "payment of tuition and expenses involved in attendance at non-government sponsored seminars constitutes a gift" and that judges may accept such gifts only where "certain tests are met."

Second, it states the principal test that judges must meet in order to attend a seminar:

> It would be improper to participate in such a seminar if the *sponsor*, or *source of funding*, is *involved* in litigation, or likely to be so involved, and the *topics* covered in the seminar are likely to be in some manner related to the subject matter of such litigation.

(emphasis added).

Third, Advisory Opinion 67 places several affirmative obligations upon judges. Specifically, it requires:

> If there is a reasonable question concerning the propriety of participation, the judge should take such measures as may be necessary to satisfy himself or herself that there is no impropriety.

Additionally, when a judge "obtain[s] further information from the sponsors" he or she "should make clear an intent to

A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

— Commentary to Ethical Canon # 3

make the information public if any question should arise concerning the propriety of the judge's attendance." Finally, it requires that judges "must report the reimbursement of expenses and the value of the gift on their financial disclosure reports."

Fourth, Advisory Opinion 67 makes clear that bias alone does not necessarily preclude a judge from attending an educational seminar:

> That a lecture or seminar may emphasize a particular viewpoint or school of thought does not in itself preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to weigh them.

Most judges avoid private seminars altogether, suggesting that many judges have concluded it is never appropriate to receive private reimbursement for an educational seminar.

FLAWS WITH THE CURRENT STANDARDS

Vagueness

The first problem with Advisory Opinion 67 is that it gives a vague and complex answer to the simple question of whether or not a judge should accept a seminar gift. The Codes Committee has never defined critical terms in Advisory Opinion 67 such as "source of funding" and "involved in litigation." Thus, important ambiguities remain. Does the required inquiry into the "source of funding" for the seminars reach to the corporations and foundations funding an organization like FREE? If so, is the Olin Foundation "involved" in litigation when it funds the New England Legal Foundation to litigate a takings case? Similarly, is a corporation "involved" in litigation when an industry association (such as the American Forest Products Association or the American Petroleum Institute) litigates on the corporation's behalf?

A straightforward answer to each of these questions is yes, in which case many of the seminar trips discussed in Chapter 4 would be inappropriate even under Advisory Opinion 67. Unfortunately, however, the Codes Committee has never addressed these important questions. The predictable result is confusion. Most judges avoid private seminars altogether, suggesting that many judges have concluded it is never appropriate to accept a seminar gift. Other judges routinely attend seminars, even when attending a seminar pretty clearly creates at least an appearance of impropriety.

The Information Deficit

An even more serious problem is the amount of information needed for the case-by-case approach of Advisory Opinion 67 to work and the failure of judges and the judiciary to obtain and consider this information. In its recent report on private educational seminars, the Judicial Conference's Codes Committee recognized the amount of information necessary to correctly apply Advisory Opinion 67:

> The Codes Committee cannot determine in the abstract whether judges may properly attend any particular private seminar. Specific information about the sponsor of the seminar, the source of funding, their involvement in litigation, the content of the seminar, and the judge's relationship to such litigation all bear on the question whether a judge's participation is proper or improper under the Code of Conduct. Judges on one court may be able to attend a private seminar that judges on another court would be advised to forego, though they could attend offerings by other entities.[12]

The Committee clearly envisions that every judge will obtain and consider a sizable amount of information before attending an educational seminar. However, there is no evidence to suggest that such investigations routinely take place. Indeed, the existing evidence is to the contrary. District Court Judge James Trimble, for example, when asked about a FREE seminar, commented: "I went up there not knowing anything about the organizations that sponsored this thing."[13] Similarly, Judge Jay Plager commented:

> When I get invited to attend a conference . . . I assure myself that the sponsor is not a litigant or potential litigant before this court and I assure myself that the sponsor is a charitable institution. *Beyond that I do not ask and do not want to know the details . . .*[14]

Advisory Opinion 67 does not permit such willful ignorance about the funding of FREE and the litigation activities of FREE's sources of funding. Indeed, it appears to demand the opposite.

The Committee clearly envisions that every judge will obtain and consider a sizable amount of information before attending an educational seminar. However, there is no evidence to suggest that such investigations routinely take place.

Equally problematic is the Judiciary's failure to help judges meet the standards of Advisory Opinion 67. The burdens the Opinion places on judges are almost completely redundant. There is no reason why every judge considering a FREE seminar should have to make an independent investigation into FREE, FREE's funding sources, the litigation activities of FREE and its funding sources, and the content of FREE's seminars. There is every reason why the Codes of Conduct Committee or some other office within the Administrative Office of the U.S. Courts should gather this information from FREE and provide it to judges on request. Unfortunately, there is no evidence that the judiciary is helping judges in this manner. Indeed, in responding to allegations of impropriety stemming from FREE's seminars, the Committee on Codes of Conduct stated bluntly, "the committee does not undertake investigations."[15] If not the Committee, then whom?

In responding to allegations of impropriety stemming from FREE's seminars, the Committee on Codes of Conduct stated bluntly, "the committee does not undertake investigations." If not the Committee, then whom?

The Veil of Secrecy

One would hope that a certain amount of transparency would surround the process of educating our federal judges. Ideally, the public should have easy access to information about the groups educating judges, and judges should be open about which seminars they attend and who pays for them. As District Judge Jack Weinstein has commented in discussing this issue, "as much disclosure as is practicable is desirable."[16]

The reality, and the final problem with the current standards, is that the public cannot easily obtain even the most basic information about privately funded judicial education. As discussed below, every actor in the process — organizations like FREE, the judiciary and individual judges – bears responsibility for this lack of transparency. The result is that the public, which is ultimately the judge of the propriety of such seminars, is left almost entirely in the dark.

What FREE Does Not Tell the Public

It is surprising that an organization like FREE, run by ideologues and funded by special interests, can educate over 100 federal judges at luxury Montana resorts without the slightest bit of public scrutiny. But the reality is that FREE conducted seminars for six years and educated approximately 150 judges before a single major news organization profiled its operation.

FREE and other organizations conducting judicial seminars clearly cultivate this anonymity. In contrast to the Federal Judicial Center, which freely provides information on its judicial seminars, FREE tries to keep virtually every aspect of its operation secret. FREE has denied a journalist's request to attend its judicial seminars.[17] FREE refuses to release lists of judges who have attended its seminars, explaining to one reporter that "some judges don't want that known."[18] FREE also declines to identify the sources of the considerable funding the organization receives directly from corporations.[19]

In contrast to the Federal Judicial Center, which freely provides information on its judicial seminars, FREE tries to keep virtually every aspect of its operation secret.

What the Judges Don't Tell to the Public—Nondisclosure and Under-Disclosure on Financial Disclosure Forms

With alarming frequency, judges also fail to disclose or under-disclose information about the private seminars they attend. In contrast to the vague guidance offered by Advisory Opinion 67 concerning attending seminars, the laws and guidelines concerning what a judge must disclose to the public could hardly be clearer. Federal law demands judges disclose:

> The identity of the source , a brief description, and the value of all gifts aggregating more than . . . $250.
>
> and
>
> The identity of the source and a brief description (including a travel itinerary, dates, and nature of expenses provided) of reimbursements received from any source aggregating more than . . . $250.[20]

These requirements are further fleshed out in Advisory Opinion Number 67, which states that:

> Payment of tuition and expenses involved in attendance at non-government seminars constitutes a gift. . . . Judges who accept invitations to participate in such seminars . . . must report the reimbursement of expenses and the value of the gift on their financial disclosure reports.[21]

Many judges have not adhered to these clear-cut requirements — even after being chastised for failing to do so in the

press and receiving individual reminders of their obligations from the Administrative Office.

In August 1998, the Kansas City Star ran a story highlighting two judges who had attended FREE seminars and failed to disclose the seminars on their financial disclosure forms.[22] In response, the Judicial Conference Committee on Financial Disclosure sent a memorandum to every federal judge specifically reminding them of their duty to disclose such trips, and requesting that any judges who had failed to do so amend their disclosures to include such information.[23] The Committee was clear and succinct:

> Judges who have accepted such trips and not reported them on their financial disclosure forms in past years should immediately file amended reports.

Judges who have accepted such trips and not reported them on their financial disclosure forms in past years should immediately file amended reports.

— Judicial Conference Committee on Financial Disclosure

This memorandum triggered responses from 8 judges who disclosed an additional 13 previously undisclosed Big Three trips. Comparing attendee lists prepared by FREE for 1992 to 1996 and attendee lists for LEC for 1992 and 1993 with the judge's financial disclosure forms filed from 1992-1998, Community Rights Counsel was able to determine that 22 other judges apparently failed to report FREE or LEC seminars, even after the September 1998 memorandum from the Judicial Conference.[24] Looking at these same periods, this means that approximately 11% of judges failed to report privately funded trips.[25] Put another way, nearly one out of every nine federal judges apparently failed to report a privately funded trip, even after a personal reminder of federal law from the Disclosure Committee. On one particular FREE seminar, which took place in June 1996, 5 of the 17 judges (or nearly 30%) listed by FREE as having attended the seminar did not report attending the trip on their financial disclosure report.[26]

It is hard to imagine how judges could have been better informed about their disclosure obligations. Federal law is clear, there was a rush of publicity, and each judge was sent an individual memo reminding them of their obligation to disclose free travel, food and lodging related to attending private seminars. Yet, this system is obviously not working when so many judges are failing to report basic information.

Under-disclosure is as large a problem as nondisclosure. As discussed above, federal law requires that judges give a description of any reimbursed expense including "a travel itinerary,

dates, and nature of expenses provided." Advisory Opinion 67 reinforces this requirement, stating that a judge "must report the reimbursement of expenses and the value of the gift on their financial disclosure reports."

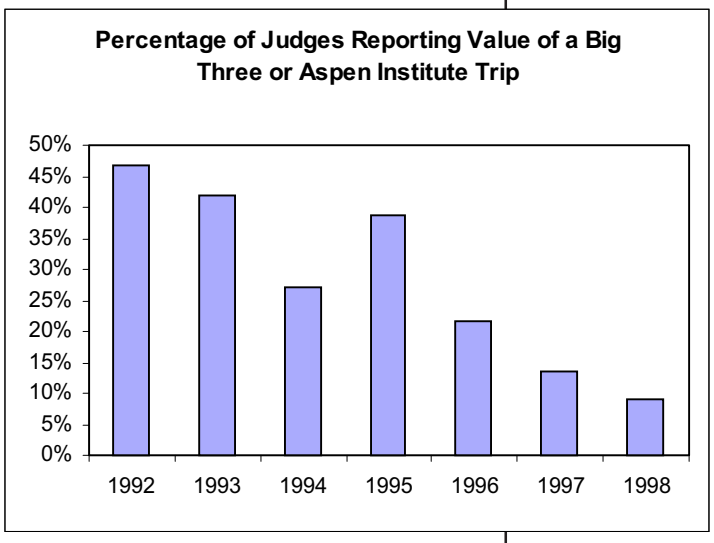
Again, despite these clear mandates, judges' financial disclosure reports routinely fail to report all the information required. A significant number of judges failed to disclose where and when a seminar trip took place, listing only the organization (e.g. FREE) and the type of activity (e.g. seminar). More frequently, judges provide only the most basic information about the sponsor, the type of activity and the dates (e.g. Foundation for Research on Economics and the Environment, seminar, July 16-21, Island Park, Id., travel-related expenses). Very few judges provide details on types of expenses that are reimbursed and only a very small percentage of judges attempted to estimate the value of the tuition, room and board and other seminar-related gifts.

Nearly one out of every nine federal judges apparently failed to report a privately funded trip, even after a personal reminder of federal law from the Disclosure Committee.

What the Judiciary Withholds from the Public

Finally, the judiciary itself bears much of the blame for the secrecy that surrounds private judicial seminars.

As discussed above, judges are routinely disclosing less information about seminar travel than required by federal law and Advisory Opinion 67. The Financial Disclosure Office appears to actually be discouraging judges from disclosing the value of seminar trips. Indeed, beginning around 1996, the Financial Disclosure Office appears to have begun instructing judges *not* to provide information on the value of reimbursed trips. For example, in September 1996, one judge wrote to the Financial Disclosure Office thanking the Office "for pointing out that the actual dollar amount of expense reimbursements is not required."[27] That same year, another judge filed an amended disclosure form where the primary change was the removal of information on the value of expense reimbursements.[28] A third judge, Judge John Wisdom



of the Fifth Circuit, chastised the Office for objecting to financial details on his disclosure, calling it "ridiculous to object to the fact that I have given more information than needed."[29] In reviewing judges' financial disclosure forms, CRC researchers noticed that, after 1996, there was a precipitous drop in the number of judges attempting to estimate the value of the seminar gifts they received. (See graph on previous page).

Beginning around 1996, the Financial Disclosure Office appears to have begun instructing judges not to provide information on the value of reimbursed trips.

The Financial Disclosure Committee and the Financial Disclosure Office have also made it very difficult for the public to review judges' public disclosure forms. Before a disclosure report is released, a judge is told the name and address of the person or organization that requested access to their financial disclosure reports.[30] Because many attorneys and litigants would rather not risk upsetting a judge, this obstacle, unique to the judicial branch,[31] creates a powerful deterrent to many potential reviewers. It also takes at least a week, and frequently over a month, for the Financial Disclosure Office to process a request and the requester must pay 20 cents per page for copies of the disclosures.[32]

The Judiciary's resistance to making public disclosures easily available to the public is perhaps best illustrated by the Committee on Financial Disclosure's recent decision to deny a request for disclosures filed by an online publisher called APBnews.com. In the wake of a CRC study which uncovered 18 cases in which appellate judges had ruled in a case despite owning stock in a litigant,[33] APBnews.com requested a copy of the 1998 disclosure forms for each federal judge with the intent of posting them on the Internet (something already done for members of Congress). APBnews.com paid for the copies, but while waiting for the reports, the Financial Disclosure Committee issued an indefinite moratorium on the public release of any disclosures, to anybody. Eventually the Financial Disclosure Committee lifted the moratorium, but still barred APBnews.com from obtaining copies of the disclosure forms.[34]

This decision appears to be in direct contradiction to federal disclosure law, which specifically permits use of the forms by "news and communications media for dissemination to the general public."[35] As such, it drew bi-partisan ire on Capitol Hill, with Senator Charles E. Grassley (R-Iowa) terming it "an offense to the openness that helps define our system of government"[36] and Senator Patrick Leahy (D-Vermont) stating: "The Judicial Conference should reconsider the scope of its decision, or Congress will have to do so."[37] Editorial boards were even less kind,

with major news organizations terming the decision "laughable,"[38] "infuriating,"[39] "tortured"[40] and "embarrassing."[41] Eventually, after APBnews.com filed suit and Chief Justice Rehnquist intervened, drafting a biting six-page memo critiquing the decision,[42] the Judicial Conference overruled the Committee's decision.[43] Nonetheless, the Financial Disclosure Office has yet to fill APBnews.com's request and has indicated that it may not produce all the disclosure reports until September 2000.[44]

ENDNOTES

[1] *Agenda F-6 , Report of the Judicial Conference Committee on Codes of Conduct*, 11 (Sept. 1998).

[2] Peter Shinkle, *Trimble: Nothing Wrong With Attending Seminar,* BATON ROUGE ADVOCATE, April 10, 1998, at 1A, 4A.

[3] Pub. L. 101-194 (1989).

[4] 5 U.S.C. § 7353 (a)(2).

[5] *See* Commentary to the Regulations of the Judicial Conference of the United States under Title III of the Ethics Reform Act of 1989 Concerning Gifts, (*reprinted in* Financial Disclosure Office*, Filing Instructions for Judicial Officers and Employees* 80 (Jan. 2, 1997)).

[6] Judicial Conference Advisory Committee on Codes of Conduct, Advisory Op. 67, (Aug. 25, 1980) (*Attendance at Educational Seminars*).

[7] 5 U.S.C. Appendix 4, § 102 (a)(2)(B).

[8] CODE OF JUDICIAL CONDUCT Canon 2 (1990) (amended 2000).

[9] CODE OF JUDICIAL CONDUCT Canon 2 cmt. (1990) (amended 2000).

[10] *Id.*

[11] Advisory Op. 67, *supra* note 6. The Committee on Codes of Conduct of the Judicial Conference is authorized to render advisory opinions that set forth reasonable exceptions to the gift ban codified in Title III of the Ethics Reform Act (5 U.S.C. §§ 7351 and 7353). A federal judge may also request a private advisory opinion from the Committee on the propriety of accepting a specific gift.

[12] *Agenda F-6, supra* note 1.

[13] Shinkle, *supra* note 2.

[14] Ruth Marcus, *Issue Groups Fund Seminars for Judges*, WASH. POST, April 9, 1998, at A1 (emphasis added).

[15] *Agenda F-6, supra* note 1, at 9-10.

[16] Jack B. Weinstein, *Essay: Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May Judges Learn?,* 36 ARIZ. L. REV. 539, 556 (1994).

[17] Ed Marston, *The Publisher Replies,* HIGH COUNTRY NEWS, August 3, 1998, at 7 ("HCN tried to cover the seminars two years ago, when freelance writer Ray Ring asked FREE for permission to attend and report on one of the events. However, John Baden would not allow it.").

[18] Marcus, *supra* note 14, at A12.

[19] *Id.*

[20] 5 U.S.C. Appendix 4, § 102 (a)(2)(A) & (B).

[21] Advisory Op. No. 67, *supra* note 6.

[22] Joe Stephens, *Two Judges Took Free Trips but Left Them off Their Reports*, KANSAS CITY STAR, August 16, 1998, at A5.

[23] Memorandum Regarding Reporting of Educational Trips and Seminars Reimbursed or Paid for by Non-profit Entities from Frank Magill, Chair, Committee on Financial Disclosure, to All United States Judges (September 22, 1998) (attached as Appendix B).

[24] It is conceivable that some of these judges could have paid the entire costs of the seminar, their travel, board and lodging, and thus not accepted a reportable gift in attending the seminar. It is also possible that judges could have disclosed these trips after the end of 1998. 1999 Disclosure forms were not yet available at the time research for this report was completed.

[25] This figure breaks down as follows: FREE lists 109 judges that attended its seminars from 1992-1996, 13 of these 109 (12%) did not report the trips. LEC lists 112 judges that attended its seminars during 1992 & 1993, 11 of these 112 (10.%) did not report the trip. Two judges failed to report both FREE and LEC trips.

[26] On the same trip, 6 of the 17 judges brought their spouses. Not one of the judges reports his or her spouse receiving a gift, as would be required if FREE paid for over $250.00 in food, travel, lodging or recreational activities enjoyed by the judge's spouse.

[27] Letter from Judge Bruce M. Selya to Judge Frank Magill, Chair, Financial Disclosure Office (September 3, 1996) (attached as Appendix C). The judiciary has justified its decision to instruct judges not to disclose the value of the seminar reimbursements by noting that 5 U.S.C. App. 4 § 102 treats reimbursement of travel expenses (expenses paid by judges and reimbursed by seminar hosts) differently than seminar gifts (tuition, room & board paid directly by seminar hosts), and federal law does not explicitly require that judges disclose the value of these travel reimbursements. Several responses are in order. First, there is nothing in federal law that says that judges should not disclose the value of travel reimbursements and it is is hard to conceive of a legitimate reason why the Financial Disclosure Office is instructing judges that wants to disclose the value of travel reimbursements not to. Far more importantly, by instructing judges not to disclose travel reimbursements and not simultaneously instructing judges to report the value of seminar gifts, the Disclosure Office has dramatically worsened an already abysmal rate of compliance by judges with the requirement that judges estimate the value of seminar gifts. The number of judges complying with the requirement to estimate the value of seminar gifts plummeted from a high of 47% in 1992 to a low of 9% in 1998. The biggest drop came after 1996 when the judiciary began instructing judges not to disclose the value of travel reimbursements. The Disclosure Office is clearly not helping matters by instructing judges not to disclose the value of travel reimbursements without simultaneously instructing judges of their obligation under federal law to report the value of seminar gifts.

[28] 1996 Financial Disclosure Form filed by Judge John M. Walker Jr.

[29] Letter from Judge John Minor Wisdom to Frank Magill, Chair, Financial Disclosure Committee (July 31, 1996) (attached as Appendix D).

[30] The first of many obstacles to accessing the financial disclosure reports is to fill out and sign a special form—AO Form 10A, Request for Examination of Report Filed by Judicial Officer or Judicial Employee. Among other basic information, the requester is required to provide her name,

occupation and address on the form. If the request is being made on the behalf of another individual or an organization, that individual or organization must be listed on the form as well.

[31] Neither the legislative nor the executive branch has interpreted the Ethics Reform Act to permit advance notification of the government official in question. Both other branches permit forms to be reviewed and copied the same day they are requested.

[32]These procedures actually represent an improvement. In response to a series of stories on the disclosure process run by the Kansas City Star, the Judiciary lowered copying charges from 50 cents a page to 20 cents a page and discontinued the practice of requiring a notarized signature for out-of-town requests for disclosures. Addendum to the Report of the Judicial Conference Committee on Financial Disclosure, September 1998, at 2; *see also* Joe Stephens, *Federal Judges Agree to Ethics Reforms at Conference*, KANSAS CITY STAR, Sept. 17, 1998, at A8.

[33] Community Rights Counsel, *CRC Investigative Report: Appellate Judges' Financial Conflicts*, Sept. 1999 (available at CRC's website, <http://www.communityrights.org>); *see also* Joe Stephens, *Judges Ruled on Firms in Their Portfolios*, WASH. POST, Sept. 13, 1999 at A1.

[34] Joe Stephens, *Judicial Conference Blocks Internet Posting*, WASH. POST, Dec. 15, 1999, at A2; Joe Stephens, *Judge Blocks Release of Financial Records,* WASH. POST, Dec. 8, 1999, at A31; Editorial, *Judges Aim to Rise Above Laws Requiring Public Disclosure*, USA TODAY, Dec. 27, 1999, at A14.

[35] 5 U.S.C. App. 4 § 105(c)(1)(B)

[36] Stephens, *Judicial Conference Blocks Internet Posting*, *supra* note 35.

[37] Comment of Senator Patrick Leahy (D-VT), Dec. 16, 1999.

[38] Editorial, *Judges and Disclosure*, WASH. POST, Dec. 17, 1999, at A40.

[39] *Id.*

[40] Editorial, *Judges Aim To Rise Above Laws Requiring Public Disclosure*, USA TODAY, Dec. 27, 1999, at A14.

[41] Editorial, *Judges' Finances: Embarrassing Stance on Records*, MINNEAPOLIS STAR TRIBUNE, Dec. 23, 1999.

[42] Chief Justice William H. Rehnquist, Memorandum to Members of the Judicial Conference, 2/15/00 (available at <http://www.apbnews.com/cjsystem/justicenews/2000/03/14/judges0314_rehnquistmemo.html>).

[43] Joan Biskupic & Joe Stephens, *Judges to Release Financial Data*, WASH. POST, Mar. 15, 2000, at A2.

[44] Bob Port, *APBnews.com Presses Case for Judges Records,* APBNEWS.COM, April 12, 2000.

CHAPTER 6
CONCLUSION

In the last analysis, it is the public we serve, and we do care what the public thinks of us.

— Justice Sandra Day O'Connor[1]

Chief Justice Rehnquist opined recently that "the search for greater public trust and confidence in the judiciary must be pursued consistently with the idea of judicial independence."[2] He struck precisely the right balance. Judges should act in ways that inspire public trust and confidence, but they should not shy from unpopular decisions in order to court the public's favor. Conversely, the other branches of government and the public may demand that judges meet the highest standards of integrity, but should refrain from calling, as some have recently, for the impeachment of judges that issue unpopular rulings.

The Chief Justice's standard demands a ban on privately funded judicial seminars.

Applied here, the Chief Justice's standard demands a ban on privately funded judicial seminars. The activist rulings of judges such as Stephen Williams, Loren Smith, and Jay Plager in striking down environmental laws are quite controversial and, in certain circles, extremely unpopular. These opinions alone, however, should not lead to calls for impeachment or attacks on the judiciary by the other branches of government. By combining these opinions with the acceptance of seminars funded by the beneficiaries of this activism, however, the judges and the judiciary fail to uphold their end of the bargain. These trips give the public valid reasons to question whether financial ties have influenced judicial opinions. A judiciary seeking the public's trust and wanting to preserve judicial independence must avoid this perception at any cost.

OUTLINES OF A POTENTIAL SOLUTION

Several years ago, Judge Jack Weinstein made the following recommendations concerning reforming the way judges obtain continuing legal education:

- Judges should be encouraged to gain as much general knowledge as possible, preferably from sources not tainted by venal or extreme ideological views;

- Funding for educational programs is critical. It should come from sources that will not benefit from the programs. Where possible, funding through impartial buffering is desirable. Judges' expenses should be paid by neutral government bodies or educational institutions; and

- An independent source for the evaluation of the background of organizations running programs judges expect to attend is desirable.[3]

Judge Weinstein's recommendations provide the outline of a potential solution to the problems posed by privately funded seminars.

Judge Weinstein's recommendations provide the outline of a potential solution to the problems posed by privately funded seminars:

- The judiciary should ban judges from accepting reimbursement for judicial education from private sources;

- Congress should increase appropriations to the Federal Judicial Center, and the Center should pay the expenses judges incur in attending Center-sanctioned education seminars; and

- The Federal Judicial Center should only sanction seminars where the seminar sponsor provides the Center with information about the sponsor and the seminar. The Center should make this information available to judges and the public by posting this information on the internet. The Center should not sanction seminars that are conducted in a manner so as to undermine the public's confidence in an unbiased and fairminded judiciary.

This solution would be similar to the approach taken by the Executive Branch.[4] Under the Executive Branch's implementation of the Ethics Reform Act, government employees (such as United States Attorneys and Department of Justice litigators) are prohibited from accepting reimbursement of the costs of private seminars.[5] To attend such seminars, Executive Branch officials must have the trip approved and paid for by their employer.

The details of any solution are far less important than the need for some meaningful reform. While judicial education on a wide range of topics and viewpoints is undeniably important, it cannot come at the expense of the public's confidence in the impartiality and integrity of the federal judiciary. Nothing is free, and the price judges and the judiciary currently are paying for privately funded seminars is intolerably high.

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ENDNOTES

1 Quoted in James Podgers, *Confidence Game: Bench, Bar Leaders Ponder Strategies to Raise Public Trust in Courts,* ABA JOURNAL 86, July 1999.

2 *Id.*

3 Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting – Part 1 – Tentative First Thoughts: How May Judges Learn?*, 36 ARIZ. L. REV. 539, 565 (1994).

4 5 C.F.R. § 2635.201-05.

5 *Id.*

APPENDICES

FREE's 1996 Colloquium for Federal Judges

Cosponsored by the Lewis and Clark Law School

Elkhorn Ranch
Big Sky, Montana 59716

Environmental Economics and Policy Analysis

Supported by M. J. Murdock Charitable Trust
Vancouver, Washington

John M. Olin Foundation
New York, New York

Alex C. Walker Educational and Charitable Foundation
Decatur, Georgia

Agenda

Tuesday, September 17

2:00 - 4:00 pm	Registration and refreshments
4:30 - 5:30 pm	**Session I: Progressive Myths and the Lords of Yesterday** **John Baden, Ph.D.**, Chairman, Foundation for Research on Economics and the Environment
6:00 pm	Cocktails
6:30 pm	Dinner
	Evening Address: Painting the New Shade of Green **Lynn Scarlett**, Vice President for Research, Reason Foundation, Los Angeles, California

Wednesday, September 18

7:00 - 8:00 am	Breakfast
8:00 - 9:30 am	**Session II: Why We Should Run Public Lands Like Businesses** **Randal O'Toole**, Director, The Thoreau Institute, Oak Grove, Oregon
9:30 - 10:00 am	Break
10:00 - 11:30 am	**Session III: Environmental Protection: The Role of Community-Based Solutions to Environmental Problems** **Jeff Olson**, Program Officer, The Ford Foundation, New York, New York
11:30 - 12:30 pm	Lunch
12:30 - 2:00 pm	**Session IV: Economic, Institutional, and Moral Issues of Environmental Enforcement** **Lynn Scarlett**, Vice President for Research, Reason Foundation, Los Angeles, California
2:00 - 6:00 pm	Free time
6:00 pm	Cocktails
6:30 pm	Dinner
	Evening Address: The Demise of Environmental Values in American Law: An Overview **Michael Greve, Ph.D.**, Author of *The Demise of Environmentalism in American Law;* Executive Director, Center for Individual Rights, Washington, D.C.

Thursday, September 19

7:00 - 8:00 am	Breakfast
8:00 - 9:30 am	**Session VI: Law, Property, and the Environment** **Jim Huffman**, Dean, Northwestern School of Law, Portland, Oregon
9:30 - 10:00 am	Break
10:00 - 11:30 am	**Session VII: Standing to Sue: From Values to Harms** **Michael Greve, Ph.D.**, Author of *The Demise of Environmentalism in American Law;* Executive Director, Center for Individual Rights, Washington, D.C.
11:30 - 12:30 pm	Lunch (Sack lunches are available with advance notice.)

12:30 - 6:00 pm	Free time
6:00 pm	Cocktails
6:30 pm	Dinner

Evening Address: Before the Leisure Class Arrived: Hard Luck and Good Times in the Vanishing West
Don Snow, Editor and Publisher of *Northern Lights*; Executive Director, Northern Lights Research and Educational Institute, Missoula, Montana

Friday, September 20

7:00 - 8:00 am	Breakfast
8:00 - 9:30 am	**Session VIII: Economics, Property Rights, and Environmental Nuisance: Status versus Negotiations** **Lynn Scarlett**, Vice President for Research, Reason Foundation, Los Angeles, California
9:30 - 10:00 am	Break
10:00 - 11:30 pm	**Session IX: Private Interests, Public Interests, and the Public Lands** **Jim Huffman**, Dean, Northwestern School of Law, Portland, Oregon
11:30 - 12:30 pm	Lunch (Sack lunches are available with advance notice.)
12:30 -6:00 pm	Free time
6:00 pm	Cocktails
6:30 pm	Dinner

Evening Address: The Environment—A CEO's Perspective
Alfred DeCrane, Jr., Retired Chairman of the Board and Chief Executive Officer of Texaco Inc., Greenwich, Connecticut

Saturday, September 21

7:00 - 8:00 am	Breakfast
8:00 - 9:30 am	**Session X: Private Interests in Environmental Politics** **Michael Greve, Ph.D.**, Author of *The Demise of Environmentalism in American Law;* Executive Director, Center for Individual Rights, Washington, D.C.
9:30 - 10:00 am	Break
10:00 - 11:30 am	**Session XII: Urban Planning: Cure or Disease?** **Randal O'Toole**, Director, Thoreau Institute, Oak Grove, Oregon

10:00 - 11:30 am	**Session XII: Urban Planning: Cure or Disease?** **Randal O'Toole**, Director, Thoreau Institute, Oak Grove, Oregon
11:30 - 12:30 pm	Lunch
12: 30 - 2:00 pm	**Session XIII: Judges, Judging, and the Environment** **Jim Huffman,** Dean, Northwestern School of Law, Portland, Oregon
2:00 - 6:00 pm	Free time
6:00 pm	Cocktails
6:30 pm	Dinner
	Evening Address: An Overview of Temple-Inland's Environmental Program **Michael Harbordt**, Vice President, Temple-Inland Forest Products Corporation, Diboll, Texas

Sunday, September 22

7:00 - 8:00 am	Breakfast
8:30 - 10:00 am	**Session XIV: General Discussion** **John Baden, Ph.D.**, Chairman, Foundation for Research on Economics and the Environment
10:30 am	Shuttles to the airport will be leaving

JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE ON FINANCIAL DISCLOSURE

One Columbus Circle, N.E.
Washington, D.C. 20544
Telephone: (202) 273-4626
Facsimile: (202) 273-1884

September 22, 1998

MEMORANDUM TO ALL UNITED STATES JUDGES

SUBJECT: Reporting of Educational Trips and Seminars Reimbursed or Paid for by Non-profit Entities

Section 102 of the Ethics in Government Act of 1978, as amended (5 U.S.C. app. 4 § 102), requires judges to report all "reimbursements" for any and all travel and lodging, except for specific cases outlined in the instructions. As noted by Advisory Opinion No. 67 of the Committee on Codes of Conduct, this requirement encompasses reimbursements for trips, lodging, and meals received from or paid for by a non-governmental source in connection with educational programs offered by non-profit entities. Of course, judges who have accepted such trips and not reported them on their financial disclosure forms in past years should immediately file amended reports.

The staff of the Committee on Financial Disclosure at (202) 273-4626 is always available to answer any questions.

Frank Magill

Frank Magill
Chair

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
311 FEDERAL COURTHOUSE
ONE EXCHANGE TERRACE
PROVIDENCE, RHODE ISLAND 02903-1755

BRUCE M. SELYA
CIRCUIT JUDGE

September 3, 1996

Judge Frank Magill, Chair
Judicial Conference of the United States
Committee on Financial Disclosure
One Columbus Circle, N.E.
Washington, DC 20544

Re: 1995 Financial Disclosure Report

Dear Judge Magill:

Thank you for your correspondence dated July 25, 1996 which references several items on my 1995 Financial Disclosure Report. Please find below my response to each of the committee's inquires:

1. Attachment for Part IV — Thank you for pointing out that the actual dollar amount of expense reimbursements is not required. We will note for future reference.

2. Part VII, Page 3, Line 52 — RI DEPOSITORS and RIDEPCO are one and the same; please refer to my listing of bond holdings (item 8). The bond listed on Line 52 of the 1994 report is now included with all my RI DEPOSITORS bonds on the schedule of bond holdings. The bond listed on line 52 of the 1995 report represents a 1995 purchase.

3. Part VII, Page 2, Line 19 — Caduceus Management Service was acquired on November 21, 1974. My investment in this entity totals $103,881.

4. Part VII, Page 2, Lines 22, 23, 29, and 30 — The IRA accounts listed on these lines are simply interest bearing bank IRA accounts. They are not brokerage accounts or mutual funds, accordingly, I believe no further disclosure is required.

5. Part VII, Page 2, Line 36 — My CitiCorp select investment account represents funds I have invested in a money market account. No individual stocks or bonds are held in this account.

6. Part VII, Page 2, Line 24 — Thank you for the update relative to the value codes. The correct code for this asset is "P1".

7. Part VII, Page 3, Line 48 — This item represents a bond that matured in 1995 which was previously included on my schedule of bond holdings (item 1).

8. I have owned a few shares of this company since before I assumed judicial office. Originally, it had not been listed on my Financial Disclosure Report because its value was less than the stipulated minimum. When circumstances changed, the item was inadvertently omitted from my last few reports.

9 Part VIII — Thanks for the clarification. We will delete street addresses in future reports.

Judge Magill, upon your review, please do not hesitate to call with any questions you may have.

Cordially,

Bruce M. Selya
United States Circuit Judge

BMS/ct

THE JOHN MINOR WISDOM
UNITED STATES COURT OF APPEALS BUILDING
FIFTH CIRCUIT

JOHN MINOR WISDOM
CIRCUIT JUDGE
NEW ORLEANS, LOUISIANA

July 31, 1996

Mr. Frank Magill, Chair
Judicial Conference of the United States
Committee on Financial Disclosure
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. Magill:

In response to your letter of July 26, 1996, paragraph No. 1: the dates of the trip for the Washington & Lee Commencement trip were May 19-22, 1995.

Paragraph No. 2: With due deference, were it not reducing your labors I would consider it ridiculous to object to the fact that I have given you more information than needed in naming the Hibernia National Bank as the mortgagor. I have been doing this since I made the first financial disclosure report.

My same comment refers to your criticism in paragraph No. 3 that "For security reasons, the Committee asks that you do not provide more financial detail than is required by the Instructions".

Your criticism is well taken in paragraph No. 4. I simply overlooked reporting those stocks in my 1994 report, two of which are hardly worth mentioning.

With reference to paragraph No. 5, I did not list LA St PRF 93 because it was sold by my broker. The amount I lost was so small that I paid no attention to it, and it was not listed in the Merrill Lynch report for 1995.

Sincerely yours,

John Wisdom