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Suspect Seminars

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By Timothy J. Dowling
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Would football fans be upset if NFL referees attended seminars on the rules of football at Hilton Head Island or other posh resorts, with the travel expenses paid for by the New England Patriots?

Everyone (except Patriots fans) would view the arrangement as a threat to the integrity of the game. Even if the seminars were unbiased, the appearance of impropriety would be overwhelming.

Why, then, do we allow federal judges to attend legal seminars at tony resorts, with the travel expenses paid for by nonprofit groups funded by large corporations or private foundations that also fund litigation campaigns?

Several nonprofit groups routinely offer federal judges travel gifts worth thousands of dollars to attend conferences at Amelia Island Plantation in Florida, the Elkhorn Ranch in Montana, and other vacation hot spots. The seminars are not open to the legal community generally, but instead are offered to federal judges because of their official position as judges.

Although the judges find the seminars stimulating, they also enjoy the resort-style accommodations. When asked by ABC News whether a judicial seminar at the Omni Tucson Resort was a "junket," one judge responded in Clintonian terms: "It depends on what you mean by 'junket.'" Another judge candidly described the conference as his well-deserved "vacation." As one seminar host put it, these plush resorts are "a very useful place to have a conversation."

The U.S. Congress is now poised to end this cozy arrangement. As it considers legislation to boost judicial salaries, a move long overdue, the Senate Judiciary Committee is examining a bipartisan proposal by Senators Jon Kyl, R-Ariz., and Russ Feingold, D-Wis., that would prohibit judges from accepting travel gifts from these private groups, with reasonable exceptions for bar associations and the like. Just as Congress relinquished certain perks when it approved previous pay raises for itself, Kyl and Feingold propose that judges do the same.

The proposal is rooted in a proper notion of public service. When Chief Justice John G. Roberts Jr. filled out his application for federal employment prior to joining the Justice Department in 1989, he confronted the question: "Why are you seeking this position?" Roberts responded: "To serve my country."

This should be the response of every applicant for federal service, including federal judges. Public servants should aim to serve our country, period. The taxpayers who pay judges' salaries should not have to wonder whether they are using their official position for private gain by accepting privately funded vacations.

Indeed, this is the ethical norm that already governs federal attorneys. The rules for the executive branch prohibit employees from personally accepting travel gifts and other things of value offered because of one's official position. They allow for continuing legal education provided by outside groups, but there are safeguards that apply to everyone, from career staff attorneys to high-ranking political appointees, to eliminate the appearance of impropriety. The conflicts raised by many private seminars would prompt supervisors at the Justice Department and other agencies to steer their attorneys to other conferences

offered by government groups and bar associations. Because public funds are used to pay for the travel, these supervisors must ensure the seminar is not a junket under any definition.

Unfortunately, federal judges are held to a different standard.

Both conservatives and liberals play the judicial seminar game. The Aspen Institute and trial lawyer groups hold seminars perceived by some as leaning left. Other organizations, such as the Foundation for Research on Economics & the Environment (FREE) and the Law and Economics Center, promote a pro-business philosophy. One former Law and Economics Center funder, Philip Morris, listed the center as one of its "key allies," along with pro-business litigation outfits. A FREE trustee similarly described its seminars as fitting hand-in-glove with libertarian litigation campaigns.

The propriety of these seminars should not be viewed as a left-right political debate, but an ethics issue that should concern everyone.

When viewed in the context of specific cases, the appearance issues can be jaw-dropping. One federal judge, who was presiding over a billion-dollar suit for environmental damages against Texaco, attended a private seminar that included a lecture on environmental law by Texaco's former chairman, Alfred DeCrane, a key potential witness in the case. When the plaintiffs' attorney learned that Texaco funded the host and that a potential Texaco witness had lectured the presiding judge, he was outraged and filed a recusal motion, which the same judge denied.

An industry attorney in a landmark Clean Air Act case, *American Trucking Associations v. EPA,* 175 F.3d 1027 (D.C. Cir. 1999), gave a lecture at a Montana dude ranch on key issues in the case just weeks before he presented oral argument. His audience at the ranch included a judge assigned to the case, and he sat on the seminar host's board with another judge on the panel. Both judges voted in favor of industry, a ruling later reversed by a unanimous Supreme Court. Regardless whether the ex parte lecture influenced anyone's vote, the whole arrangement undermines the integrity of the legal process.

Seminar lecturers also have included people who serve as expert witnesses in tobacco litigation. It must be a joy for them to convey their thoughts on, say, "Economics and Tort Law" to federal judges in congenial settings without having opposing counsel in the room. Perhaps that's why Philip Morris viewed the Law and Economics Center as a key strategic ally.

The arguments against the Kyl-Feingold proposal are often rooted in deception. In a recent Wall Street Journal op-ed, John Fund falsely asserted that the proposal would "flatly ban federal judges from attending anything other than a government-sponsored program." But judges would remain free to attend any seminar or access any other ideas, on their own dime. The proposal addresses the issue of gifts, for the same reason we would frown upon attaching travel vouchers to an amicus brief.

On the legal blog The Volokh Conspiracy, David Bernstein repeated Fund's canard without bothering to check the text of the Kyl-Feingold proposal. He subsequently was forced to correct himself, but he then attacked the proposal as unprincipled because it would allow expense reimbursement for seminars hosted by bar associations, government organizations and similar groups. These exceptions, however, come from the financial disclosure rules promulgated by the Judicial Conference in 2006. If Bernstein finds the exceptions one-sided, he should direct his comments to the conference. But it is entirely reasonable for Kyl and Feingold to use the judiciary's own ethics rules as a point of departure for their proposal.

In his 2007 year-end report, the chief justice pledged that the federal judiciary will "relentlessly ensure that federal judges maintain the highest standards of integrity." A good place to start would be a ban on inappropriate seminars. Then judges would be held to the same standards as federal attorneys, not to mention NFL referees.

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Timothy J. Dowling is chief counsel of Community Rights Counsel, a nonprofit law firm in Washington, D.C., that defends against challenges to environmental safeguards and other community protections.