Third Circuit Nominee Judge D. Brooks Smith and Corporate-Funded Trips

U.S. District Judge D. Brooks Smith, nominated by President Bush to the Court of Appeals for the Third Circuit, has attended more corporate-sponsored seminars than almost any other federal judge in America. Between 1992 and 2000, Judge Smith spent nearly three months at luxury resorts and dude ranches on trips funded by corporations and special interests with a stake in federal court litigation. These controversial trips, valued at well over $30,000, permitted Judge Smith to play golf and take horseback rides through Yellowstone Park with corporate CEO's, right-wing ideologues, and free-market legal theorists. They also allowed these special interests an ex-parte opportunity to "educate" Judge Smith on the positions and interests that they believe the judicial system should promote.

Judge Smith's opinions indicate that the corporate money for these trips is well spent. In a series of rulings on a wide variety of legal topics, Judge Smith has ignored precedent and bent statutory and constitutional language in protecting corporations and denying recovery to the victims of corporate bad behavior. Until now, the Third Circuit has been available to reverse Judge Smith's rulings – an oversight function it has regularly exercised. If Judge Smith is confirmed by the Senate, any opinions that he writes for the court will be the law of the circuit, subject only to the discretionary and rare review of the U.S. Supreme Court.

I. The Trips

As part of a comprehensive study of judicial lobbying by corporate special interests, Community Rights Counsel has reviewed every financial disclosure form filed by a federal judge between 1992 and 2000. During that nine-year period, Judge Smith took a total of twelve trips

conducted by the Foundation for Research on Economics and the Environment (FREE) and George Mason's Law and Economics Center (LEC). He went on at least one trip every year, and attended two trips in three of the nine years.[1]

The trips were all held at favorable locales such as: Amelia Island Plantation, Amelia Island, Florida (www.aipfl.com); Westward Look Resort, Tucson, Arizona (www.westwardlook.com); and Gallatin Gateway Inn, Gallatin Gateway, Montana (www.gallatingatewayinn.com). FREE and LEC receive funding from large corporations, such as General Electric, Texaco and Monsanto, which regularly appear in federal court. The rest of the money for the trips comes from right-wing foundations such as the Sarah Scaife Foundation (Richard Mellon Scaife) and the Claude Lambe Foundation (run by Charles Koch, Koch Industries), which simultaneously bankroll federal court litigation by groups such as Pacific Legal Foundation and Washington Legal Foundation.

FREE and LEC openly admit that they host trips to influence judicial decision-making. FREE, for example, promotes “free market environmentalism,” a “new shade of green” that emphasizes “property rights, market processes and responsible liberty” and rejects “command and control” environmentalism. LEC teaches economics from "a property rights perspective," emphasizing the "economic effects of alternative legal regulations." As the Dean of the George Mason Law School told ABC News' 20/20, which did an exposé on these trips in April 2001, LEC is "out to influence minds . . . If court cases are changed, then that is something we are proud of as well."

[1] It is interesting to note that in both August 1997 and 1998, Judge Smith attended a FREE seminar entitled "Bringing Sound Science and Economics to Risk Analysis." The two identically titled seminars featured many of the same lecturers on many of the same topics.

II. The Results

Even in the abstract, it is problematic that Judge Smith has spent so much of his time over the past decade at trips sponsored by corporate special interests. But these junkets did not happen in the abstract. They happened while Judge Smith was presiding over, and often dismissing, cases against corporations by victims of corporate misbehavior.

Judge Smith, in turn, relies on the arguments and principles advanced at these seminars in dismissing claims brought against the corporations that appear before him. For example:

> ***Metzgar v. Playskool*:**[2] Smith dismissed claims brought by the parents of a 15-month old child that died choking on a Playskool block. Smith ruled that statistics showing that eleven children a year (out of a large population) died by choking on small toys ruled out a conclusion that Playskool's toy was defective. He dismissed the Metzgars' failure to warm claims on the ground that the choking risk was obvious, despite the fact that the company -- to avoid liability on the product defect claim -- was arguing that there was no choking risk at all.[3] A panel of the Third Circuit, consisting entirely of judges appointed to the bench by President Reagan, reversed Smith on all counts and sent the case back to Smith for trial.
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> ***U.S. v. Action Mining*:**[4] Clandestinely, during nights and weekends, Action Mining buried 1,000 feet of pipe to illegally carry mining waste from a massive coal mine to Coal Run, a tributary of the Casselman River. In place for nearly four years, this pipe carried millions of gallons of toxic waste into the creek before, during, and after the discovery that mine waste had kill 60,000 stocked trout and every other form of aquatic life in 42 miles of the Casselman River. According to published reports, Action Mining's calculations indicated that the illegal pipe saved the company about $5 million in treatment costs. Nevertheless, Judge Smith accepted a plea bargain from the company that limited damages to a maximum of $500,000 and then sentenced the company to pay only $50,000, one-tenth the maximum and just one-percent of the profit apparently realized by Action.[5]

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[2] No. 92-CV-31 (W.D. Pa. 1993), *rev'd*, 30 F.3d 459 (3d Cir. 1994).
[3] No. 92-CV-31 (W.D. Pa.) (Opinion dated Sept. 9, 1993).
[4] No. 99-CR-7-ALL (W.D. Pa).
[5] No. 99-CR-7-ALL (W.D. Pa.) (Judgment dated Dec. 20, 1999).

> ***Wicker v. Conrail*:**[6] Employees, ordered by Conrail to bury toxic chemicals on the grounds outside the rail repair yard in which they worked, brought claims seeking recovery for health problems caused by exposure to these chemicals. Judge Smith dismissed the suits brought by all workers who had signed a general release in settling prior, unrelated, injury claims against the railroad, even though federal law designed to protect railroad workers (known as the Federal Employee Liability Act or FELA) voids such general releases.[7] Judge Smith justified this departure from Congress's plain statutory text by reference to "economic analysis."[8] The Third Circuit, again in a panel controlled by Reagan appointees, unanimously reversed Judge Smith. Looking to the plain statutory language and binding Supreme Court precedent, the circuit court ruled that "claims relating to unknown risks * * * may not be waived under § 5 of FELA."[9]

III. Conclusion

Junkets for judges have been forcefully condemned by Senators including John Kerry (D-MA) and Russ Feingold (D-WI), who have introduced legislation to ban these trips, former judges including Abner Mikva, and the editorial boards of more than 30 major papers including The New York Times, The Washington Post, USA Today, and the San Diego Union-Tribune. As the Post concluded: "when * * * judges take educational vacations on the dime of private groups, they do so at the expense of the judiciary's reputation for impartiality, even if not the impartiality itself."

Judge Smith has regularly attended these controversial trips, even well after public concerns were raised about their propriety. His rulings suggest that Judge Smith applies the pro-corporate ideology advanced at these seminars in cases before his court. These issues should be

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[6] No. 93-CV-41 (W.D. Pa.) (Memorandum and Order dated Dec. 31, 1996).
[7] *See* 45 U.S.C. § 55 (voiding "any contract * * * the purpose or intent of which shall be to enable [an employer] to exempt itself" from liability under FELA.)
[8] *See* Wicker v. Conrail Corp., 142 F.3d 690, 695, n.2 (3d Cir. 1998) (quoting Smith's unpublished slip op at 20.) ("Broadly worded releases negotiated with departing or retired employees, as a matter of economic analysis, do not permit a FELA employer to exempt itself from future liability * * * [because] the liable employer under such a release pays the full discounted value of the known and unknown injuries of the settling parties. ")
[9] *Id*. at 701

carefully considered by the Senate in reviewing President Bush's nomination of Judge Smith for a seat on the Third Circuit Court of Appeals.