POST-APPOINTMENT PREFERENCE SHAPING AND ITS INFLUENCE ON JUDICIAL ANALYSIS OF ECONOMIC REGULATION ISSUES

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1. Introduction

1994 marks the 20th anniversary of a formative event in the modern development of law and economics. In 1974, Henry Manne established the Law and Economics Center (LEC) at the University of Miami and laid an important foundation for the ascent of economic analysis as a tool for evaluating and structuring legal rules. The LEC was designed to change the way law schools and economics departments did business, but its intended audience reached beyond the walls of the academy.

Since 1976, the LEC has offered a variety of courses in economics for federal judges in the United States. Resident at the George Mason University School of Law since 1986, the LEC has provided economics courses to over 400 federal judges, including members of the courts of appeals, district courts, bankruptcy courts, and the Court of International Trade. The LEC's basic offerings have included short courses in microeconomics, quantitative methods, antitrust economics, corporate governance, risk, and science and health. Judges who have taken one or more of these courses currently include two members of the United States Supreme Court (Ruth Ginsburg and Clarence Thomas).

From the time of its first courses for federal judges, the LEC's program of instruction for the judiciary has aroused periodic controversy. Critics of the LEC's...
judicial instruction programs have argued that the Center seeks to imbue attendees with the policy biases of large corporations and pro-business foundations that provide most of the LEC's operating funds (Alliance for Justice 1993; Mueller 1987; Mueller 1990; Mueller et al. 1988). In a representative statement of this view, Nan Aron, the Executive Director of the Alliance for Justice, has observed that the "funding campaign for legal change" undertaken by sponsors of the LEC and similar programs "has created a legal system where justice is bought and sold just like any other commodity." Aron added that sponsorship of activities such as courses in economics for judges "is not, as its proponents claim, simply about making the law more efficient and fair. Rather, it is designed to make protecting corporate profits and private wealth the cornerstones of our legal system." 3

This line of criticism commonly assumes that exposure to LEC programs in fact influences attendees to adopt pro-business positions in deciding subsequent cases. If LEC programs significantly influenced judicial preferences concerning economic regulation, such programs would have important implications for judicial decisionmaking. In varying degrees, all legal rules—whether "judge-made" through common law adjudication, or created by statute or administrative regulation—give judges discretion to affect litigation outcomes through their interpretation and application of the rules' key operative terms. Any post-appointment instructional program that materially affected the way in which judges exercised the omnipresent element of discretion would be important. Indeed, the fact of discretion makes the selection of federal judges a closely-watched (and sometimes contentious) process.

The assumption that LEC programs help generate pro-business litigation outcomes rests heavily on anonymous quotations from selected letters that the LEC receives from past judicial participants and excerpts in its promotional literature (Mueller et al. 1988, 5-7). Such comments give little insight into how LEC programs actually affect post-attendance decisionmaking. 4 Relying on a few letters


4 One much-quoted testimonial from a judge who attended an LEC program states that “[a]s a result of my better understanding of the concept of marginal cost, I have recently set aside a $15 million anti-trust verdict.” See Mueller et al. (1989, 5). Few quotations in the LEC's promotional literature suggest so direct a causal relationship between the courses and outcomes in later cases. Most correspondents give flattering assessments of LEC courses but do not indicate how such programs influenced future decisionmaking. One LEC brochure quotes a “U.S. District Judge” as saying “I am a great fan of your programs. I have urged all of our new judges to apply. Indeed, these courses have been most helpful to me in a number of cases that I have tried.” Another “U.S. District Judge” writes that “I know that all of the judges who attended benefitted tremendously... All too often, federal judges tend to be ‘jacks-of-all-trades’ and ‘masters-of-none.’ The opportunity to spend two intense weeks studying law and economics under the outstanding faculty you assembled was marvelous.” See Office of Public Affairs and Development, Law and Economics Center, George Mason