

COMMITTEE ON CODES OF CONDUCT  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
UNITED STATES DISTRICT COURT  
482 GERALD R. FORD FEDERAL BUILDING  
110 MICHIGAN STREET, N.W.  
GRAND RAPIDS, MI 49503-2363

JUDGE WILLIAM H. BARBOUR, JR.  
JUDGE KAREN K. BROWN  
JUDGE WILLIAM C. BRYSON  
JUDGE CAMERON MCGOWAN CURRIE  
JUDGE ROBERT H. HENRY  
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JUDGE JAMES MAXWELL MOODY  
JUDGE THOMAS C. MUMMERT, III  
JUDGE RUDOLPH T. RANGA  
JUDGE DAVID B. SENTELLE  
JUDGE MARK L. WOLF

MARILYN J. HOLMES  
COUNSEL  
(202) 502-1100

JUDGE GORDON J. QUIST  
CHAIRMAN

Tel: (516) 456-2253  
Fax (516) 456-2243  
Email: quist@mwd.uscourts.gov

March 30, 2005

Honorable Andre M. Davis  
United States District Court  
United States Courthouse  
101 West Lombard Street  
Baltimore, MD 21201-2605

Re: Docket No. 1798

Dear Judge Davis:

Thank you for your inquiry.

You have requested an opinion from the Committee on Codes of Conduct (the "Committee") about whether you can, consistent with the Code of Conduct for United States Judges (the "Code"), continue to serve on the Board of Trustees of the Foundation for Research on Economics and the Environment ("FREE"). You have served on the FREE Board since the Spring of 2004.<sup>1</sup>

The propriety of a judge's service on the board of an organization depends upon the nature of the organization and its activities and members. For purposes of evaluating your serving on the Board of Trustees of FREE, we rely upon FREE's description of itself from its website. See <http://www.free-eco.org> (last visited March 22, 2005).

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<sup>1</sup>Your letter advises that there is a pending complaint (the "Complaint") against you with the Circuit Council of the United States Court of Appeals for the Fourth Circuit. The Complaint alleges that your service on the FREE Board constitutes a violation of 28 U.S.C. § 351 and Canons 2A, 2B, and 5B(1) of the Code. The Complaint makes various allegations about the activities and goals of FREE and its Board members. It is not within the Committee's purview to consider allegations in complaints filed against a judge or to evaluate or make factual findings regarding those allegations. In addition, this Committee is not authorized to interpret 28 U.S.C. § 351, and this response thus addresses whether you can continue to serve on the Board only under the relevant Canons of the Code.

In light of the information you provided as well as the publicly available information about FREE, your inquiry poses specific, difficult questions. Although we have generally considered the question of service on various boards of trustees, we consider this inquiry sui generis and thus understand your desire to seek the Committee's view.

#### FREE's Purpose and Activities

According to FREE's website, FREE's mission is to "advance[] conservation and environmental values by applying modern science and America's founding ideals to policy debates." FREE describes itself as "intellectual entrepreneurs, explaining how economic incentives, secure property rights, the rule of law, and responsible prosperity can foster a healthy environment." To those ends, FREE conducts seminars and conferences and produces books and articles, focusing on federal judges, law professors, business leaders, and environmental entrepreneurs; in which it "appl[ies] economics and scientific analysis to generate and explore innovative solutions to environmental problems." FREE states that its seminars are "explicitly pro-environment," but "explain why ecological values are not the only important ones" and "stress that trade-offs among competing values are inescapable." Further, the seminars "show why it is ethically and materially irresponsible to pretend such choices can be avoided." [Http://www.free-eco.org](http://www.free-eco.org).

FREE's stated objectives are to: (1) "describe how incentives and voluntary cooperation can be used to protect and enhance environmental values while fostering economic prosperity"; (2) "show how the application of economics and science to public policy provides insights that advance the public interest"; (3) "explain the importance of secure property rights and economic freedom to the efficient and sensitive use of environmental resources"; and (4) "examine the dangers of legislating 'risk-free' laws and make explicit the linkages among science, risk analysis, and economics."

FREE's seminars address a wide range of law and policy topics. For example, current program offerings include the following: Exploring the Ecology, Economics, and Public Policy of Water Resources and Fisheries; Entrepreneurship, Telecommunications, and Social Change; Illicit Drugs, Civil Society, and the Environment; Terrorism, Energy, and Civil Society; and Biotechnology, Risk Analysis, and the Environment: Implications for Federal Judges.

FREE's website also describes the history of the organization. FREE was founded in 1985 by its current chairman, John Baden, and has its roots in the Center for Political Economy and Natural Resources (the "Center"), established by Baden at Montana State University in 1978. The Center did much of the pioneering work on "New Resource Economics," and critiqued prevailing natural resource management systems. FREE's website states that while the Center's work was widely accepted and highly successful, it met with some anger:

Some commodity groups were outraged that "their" University would harbor these outspoken critics of crony capitalism. And a generation ago, many Greens had more than a tinge of pink. They were livid that a bunch of libertarian economists had trespassed into their domain and claimed the intellectual, ethical, and ecological environmental high ground.

Federal bureaucracies, such as the Forest Service, were irate that they, the apostles of “scientific management” (and supporters of university research), were attacked with solid data on government malfeasance and causal models explaining it: incentive structures that lead agency budget maximization to trump the public interest.

[Http://www.free-eco.org](http://www.free-eco.org). The website explains that “FREE has consistently fought corporate subsidies . . . fostering exploitation and strongly advocates such efforts as wolf reintroduction to the federal lands of the West. The intellectually naive confuse FREE’s classical liberal, pro-market process orientation with that advocated by supporters of a subsidized, pro-business position that exploits the environment (e.g., below-cost timber sales on the national forests).” *Id.*

Based on its self-description, FREE (through its Board) is primarily devoted to specific issues of social and governmental policy regarding the environment, including environmental issues currently being addressed by not only the executive and legislative branches of government but also by the federal judiciary. FREE’s goal is to advance certain environmental values and points of view regarding those issues.

With this factual background, we discuss the applicable Canons.

#### Canon 5

Two Canons of the Code address a judge’s involvement in extrajudicial activities: Canon 4 addresses participation in law-related activities, and Canon 5 addresses participation in non-law-related, civic and charitable activities. Because FREE’s purpose is to advance particular approaches to environmental policy (albeit through the law), FREE is not an organization devoted to the improvement of the law for purposes of Canon 4 of the Code. *See* Advisory Opinion No. 93 (stating that to qualify as a Canon 4 activity, the activity must be “directed toward the objective of improving the law, *qua* law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective”). Thus, your service on the FREE Board is subject to review under Canon 5 rather than Canon 4.

Canon 5 of the Code provides that a judge may be a member and may serve as an officer, director, or trustee of a civic or charitable organization subject to certain limitations. Specifically, Canon 5B provides:

A judge may participate in civic and charitable activities that do not reflect adversely upon the judge’s impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

- (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the judicial office for that purpose, but the judge may be listed as an officer, director, or trustee of such an organization. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

(Emphasis added.) To the Committee's knowledge, FREE is not likely to be engaged in proceedings that would ordinarily come before you or regularly engaged in adversary proceedings in any court. If FREE is likely to be engaged in proceedings before you or regularly engaged in adversary proceedings in any court, then your participation on FREE's Board is improper. The Committee also understands that you are not involved in fund-raising, in the type of membership-solicitation described in Canon 5B(2), or in financial or legal advising to FREE. However, if you are engaged in any of these activities, your participation is improper.

Even assuming that Canon 5B(1)-(3) is inapplicable, our inquiry does not end. We must still decide whether your service on the FREE Board reflects adversely upon your impartiality. See Canon 5B. The Committee previously has advised that "[i]f the judge believes that his or her personal, direct advocacy to the public of the policy positions advanced by the organization might reasonably be seen as impairing the judge's capacity to decide impartially any issue that may come before the judge, and the affiliation may reasonably be seen as indirect advocacy of those policy positions, the judge should not be a member of the organization." Advisory Opinion No. 82.

Because you are serving on the Board of FREE, there is no practical way for you to disassociate yourself from the policies advanced by FREE, and your affiliation would reasonably be seen as personal advocacy of FREE's policy positions. See Compendium § 4.5(c-1) ("A judge should not chair an American Bar Association section responsible for developing positions on controversial political and social matters that are frequently the subject of federal court litigation, where the judge could not properly advocate such policies individually and cannot as a practical matter be disassociated from the section's policies."). In addition, we note that on FREE's website your name is listed as a Board member, and, as outlined above, the website emphasizes the policy positions of FREE. Thus, the website further increases the link between your leadership affiliation with FREE and its policies. Accordingly, the Committee concludes that your leadership affiliation with FREE would be seen as personal support for the policy positions of FREE.

The next question is whether your personal, direct advocacy of FREE's policy positions could reasonably be seen as impairing your capacity to decide impartially any issue that may come before you. The Committee has advised that a judge should not serve as a director of the Lawyers Alliance for Nuclear Arms Control. See Compendium § 5.3-2(a). The Committee also has advised that whether a judge should serve on the national board of an ethnic group depends upon the extent to which the group principally espouses particular points of view on public issues and whether the judge would reasonably be perceived as personally and publicly supporting these positions. See Compendium § 5.3-2(b). The same considerations govern a judge's service on a health-system

ethics committee. *See id.* Further, in advising a judge against signing a petition regarding a contentious social or political issue, the Committee expressed the view that a judge should avoid public expressions of personal opinion regarding such controversial issues. *See* Compendium § 5.3-2(j).

The Committee has advised that it saw no impropriety in a judge serving on the Board of the Urban League. *See* Compendium § 5.3-6(c). However, that advice was expressly subject to the caveat that if a judge believes that his or her personal, direct advocacy to the public of the policy positions advanced by an organization might reasonably be seen as impairing the judge's capacity to decide impartially any issue that may come before the judge, and the affiliation may reasonably be seen as indirect advocacy of those policy positions, the judge should not be a member of the organization.

It is the Committee's view that your service on the FREE Board of Trustees violates Canon 5B. It is clear from FREE's website that FREE espouses particular points of view on a broad array of public policy issues, both through its seminars and conferences and through its publications. Indeed, FREE takes an active stance on environmental issues that are frequently before the courts. While FREE is not a party to those cases, your impartiality reasonably could be questioned in environmental cases because you personally advocate FREE's values and positions on environmental issues through your service on FREE's Board of Trustees.

Thus, because FREE espouses particular points of view on controversial public issues frequently before the courts, and you as a Board member would reasonably be perceived as personally supporting these positions, it is the Committee's view that your service as a Board member is inconsistent with Canon 5B of the Code.

#### Canon 2

Because your service on FREE's Board could create in reasonable and informed minds a perception that your impartiality may be impaired as to certain issues likely to arise in federal court, your service also runs afoul of Canon 2A of the Code, which requires a judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Further, Canon 2B provides that "[a] judge should not lend the prestige of the judicial office to advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the judge." The commentary to Canon 2B states that "[a] judge should be sensitive to possible abuse of the prestige of office."

It is the Committee's view that your service on the Board of FREE lends prestige to FREE and allows FREE to exploit the prestige of the office. *See* Compendium § 2.12(I) ("It is inappropriate for a law clerk to serve on the governing board of an advocacy organization that actively lobbies state officials on issues that are subject to debate in the political arena. Such service would be likely to lend the prestige of the law clerk's office to the organization and the positions it espouses."). FREE's website and brochures state that its seminars focus on federal judges and law professors. The presence of federal judges on the Board of FREE advances FREE's interests in advocating its environmental policy positions, in soliciting funds, and in appealing to its target groups. To that end, FREE lists each of its Board members on its website, brochures, and letterhead.

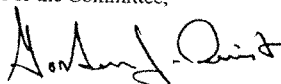
Your picture is displayed prominently on the website, as is your title: The Honorable Andre M. Davis, District Judge, United States District Court, District of Maryland, Baltimore, Maryland. Because your service on the Board lends the prestige of your office to advance the interests of FREE, it is inconsistent with Canon 2B as well.

We note that your inquiry is a very difficult one. It was debated at length by the Committee. We understand that the advice we give you today would not be obvious from reviewing the Canons and our previous advisory opinions. In the past, the Committee often has assumed that the inquiring judge is in the best position to evaluate the activities of a board on which he or she serves and has deferred to the inquiring judge's determination about the propriety of service. However, in light of the wealth of information about FREE that is now available to us and to the public, we believe that we are in a position to provide you with advice, as you requested. Thus, while we never before have advised judges about this issue and acknowledge that you reasonably could have arrived at a different conclusion after diligently reviewing the most relevant Code of Conduct materials available to you, we advise you now that your continued service on the FREE Board in the future is inconsistent with Canons 2 and 5 of the Code of Conduct.

We also note that this response does not address the propriety of a judge attending a seminar conducted by FREE. That inquiry would be governed by a different set of factors, articulated in recently-revised Advisory Opinion No. 67. While you as a Board member would reasonably be perceived as personally supporting the positions advocated by FREE, the same is not necessarily true of a judge whose only affiliation with FREE is attendance at a FREE seminar or conference. *See* Advisory Opinion No. 67 ("That a lecture or seminar may emphasize a particular viewpoint or school of thought does not necessarily preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to consider and analyze them."); *see also* Compendium § 5.4-6(g), (h) (to be published) (concluding that a judge may, under the factors set forth in Advisory Opinion No. 67, attend a seminar at George Mason University and a Medina seminar conducted at Princeton University). Thus, this response does not answer the separate issue of the propriety of a judge attending FREE seminars, which has not been posed to the Committee.

We hope this response has been helpful. If you have any further question, please call or write.

For the Committee,



Gordon J. Quist  
Chairman