



**DELIVERED BY FAX AND FEDEX**

**December 9, 2010**

Honorable Edith Brown Clement  
United States Circuit Judge  
United States Court of Appeals  
for the Fifth Circuit  
600 Camp Street, Room 200  
New Orleans, Louisiana 70130-3425

Re: Codes of Conduct Committee opinion finding it improper  
for a federal judge to serve on FREE's Board of Directors

Dear Judge Clement:

I am writing on behalf of Constitutional Accountability Center ("CAC") concerning Your Honor's service on the Board of Directors of the Foundation for Research on Economics and the Environment ("FREE"), which service is currently noted on FREE's web site.<sup>1</sup> Specifically, we are writing to make sure you are aware of the enclosed ethics opinion issued by the Committee on Codes of Conduct of the Judicial Conference of the United States ("Committee") finding that it was a violation of Canons 2 and 5 of the Code of Conduct for then-U.S. District Judge Andre M. Davis (Md.) to serve on FREE's Board for the reasons discussed at length in the opinion. As you know, the Committee is the federal judiciary's most authoritative voice on the meaning of the Code of Conduct. The Committee has now stated, unequivocally, that service on FREE's Board violates the Code of Conduct with which all federal judges must comply. We therefore respectfully request that Your Honor resign immediately from that Board.

Although the Committee's opinion was issued on March 30, 2005, it was not made public until the publication this week of the hearing record in connection with the confirmation of Judge Davis to the United States Court of Appeals for the Fourth Circuit. *Confirmation Hearings on Federal Appointments, S. Comm. on the Judiciary, 111th Cong., 1<sup>st</sup> Sess., at 76 (April 29, 2009)*. In 2004, on behalf of CAC's predecessor organization, Community Rights Counsel, I filed ethics complaints pursuant to 28 U.S.C. § 351 against the four federal judges then serving on FREE's Board -- Judge Davis, Chief Judge Danny Boggs (6<sup>th</sup> Cir.), Judge Douglas Ginsburg (D.C. Cir.), and Judge Jane Roth (3d Cir.) -- asserting that their service on FREE's Board violated the

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<sup>1</sup> See [www.free-eco.org/staff.php](http://www.free-eco.org/staff.php) (last visited December 8, 2010).

Code of Conduct for judges. After consulting with Fourth Circuit Chief Judge William Wilkins about the ethics complaint, Judge Davis solicited an opinion from the Codes of Conduct Committee as to the propriety of his continuing to serve on FREE's Board.

In its March 30, 2005 opinion, the Committee -- comprised of 15 federal judges -- specifically advised Judge Davis that "your continued service on the FREE Board in the future is inconsistent with Canons 2 and 5 of the Code of Conduct." Thereafter, Judge Davis resigned from FREE's Board. While the Committee's opinion was solicited by Judge Davis and was addressed to him, there is nothing in that opinion finding a violation of the Code of Conduct that is grounded in circumstances specific or unique to Judge Davis. To the contrary, it is clear from a plain reading of the opinion that it turns solely on Judge Davis' status as a sitting federal judge and his membership on FREE's Board of Directors -- and thus that its conclusions that the Canons had been violated by that Board membership are equally applicable to any other federal judge serving on FREE's Board.

In particular, according to the Committee, Judge Davis' service on FREE's Board "violate[d] Canon 5B," which prohibits a judge from participating in activities that "reflect adversely upon the judge's impartiality." As the Committee explained, "because FREE espouses particular points of view on controversial public issues frequently before the courts, and [Judge Davis] as a Board member would reasonably be perceived as personally supporting these positions, it is the Committee's view that [Judge Davis'] service as a Board member is inconsistent with Canon 5B of the Code."

In addition, the Committee found that Judge Davis' service on FREE's Board "also [ran] 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.'" In this regard, the Committee explained that Judge Davis' "service on the Board of FREE [lent] prestige to FREE and allow[ed] FREE to exploit the prestige of the office." Among other things, the Committee noted that FREE exploited the participation of sitting federal judges on its Board by listing those judges "on its website, brochures, and letterhead," pointedly observing to Judge Davis that "[y]our picture is displayed prominently on the website, as is your title."

The Committee's opinion issued to Judge Davis was not only unequivocal in its finding of a violation of the Canons, but, as noted above, is clearly applicable to any other judge serving on FREE's Board. This plain reading of the opinion was confirmed by Judge Davis. In written questions to Judge Davis submitted in connection with the Fourth Circuit confirmation process, Senator Russ Feingold asked if there were anything in the Committee's opinion that was specific to Judge Davis' circumstances or whether the opinion would apply equally to other judges sitting on FREE's Board. Judge Davis replied: "I do not interpret the Committee's opinion to depend on the identity of the judge who serves on the FREE Board."

The Committee's opinion that service on FREE's board is in violation of the Code of Conduct is in no way undermined by the decision by Judge James B. Loken not to take action against Judge Danny Boggs in response to CRC's complaint. Judge Loken's ruling was made

under the more stringent standards of § 351, which, according to the authorities cited by Judge Loken, “was directed at serious judicial transgressions” and “is not, and was never meant to be, coextensive with judicial ethics as embodied in the [Code of Conduct].” Moreover, Judge Loken was clearly unaware of the Committee’s opinion issued to Judge Davis. To the contrary, Judge Loken relied heavily upon an earlier letter written to Judge Boggs by the Committee which, as quoted by Judge Loken, gave Judge Boggs the discretion to make the determination about whether service on FREE’s board violated the Code of Conduct. The Committee’s opinion in Judge Davis’ case addresses its earlier letters to judges, noting that the Committee in the past had relied upon individual judges to make this determination but now had enough information about FREE to render judgment. The Committee’s March 2005 opinion plainly supersedes its earlier advice, which was relied upon by Judge Loken. For the first time in the opinion issued to Judge Davis, the Committee examined FREE and determined that service on FREE’s Board violates the Code of Conduct.

It is our understanding that Your Honor joined the Board of FREE relatively recently, and in any event sometime after the Committee issued its March 2005 opinion finding that service on FREE’s Board is in violation of the Code of Conduct. We trust that Your Honor did not know of the Committee’s opinion when you decided to join this Board. However, now that the opinion has been provided to you, we also trust and request that, consistent with Your Honor’s obligation to comply with the Code of Conduct, you will resign immediately from FREE’s Board.

Respectfully,



Douglas T. Kendall  
President

Encl.