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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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June 1, 2005

Douglas Kendall
Community Rights Counsel
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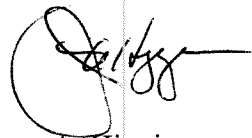
Re: Complaint of Judicial Misconduct No. 04-6-372-17

Dear Mr. Kendall:

Enclosed is a copy of an Order with a Supporting Memorandum signed on May 23, 2005 by United States Circuit Judge James B. Loken, Chief Judge, Eleventh Circuit Court of Appeals, in which your complaint of judicial misconduct filed against Chief United States Circuit Judge Danny J. Boggs was dismissed pursuant to 28 U.S.C. 352(b)(1)(A)(iii), 28 U.S.C. § 352(b)(1)(B), and Rule 4(c)(3) of the Rules Governing Complaints of Judicial Misconduct or Disability of the Judicial Council of the Sixth Circuit.

Pursuant to Rule 6 of the Rules Governing Complaints of Judicial Misconduct or Disability, you have the right to file a petition for review of the chief judge's disposition with the Sixth Circuit Judicial Council. If you wish to file a petition for review, your petition must be received in this office within 30 days of the date of this letter.

Sincerely,



James A. Higgins
Circuit Executive

Enclosure

JAH/jab

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

In re:
Complaint of Judicial Misconduct

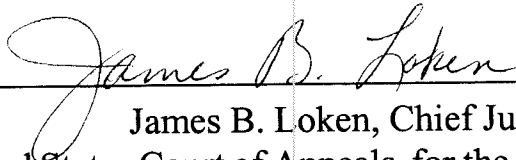
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* No. 04-6-351-17
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O R D E R

A complaint of judicial misconduct having been filed by Douglas Kendall against the Honorable Danny J. Boggs, Chief Judge of the United States Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 351¹, the complaint having been reviewed by me pursuant to 28 U.S.C. §§ 291(a), 295, and 352,

It is ORDERED that, for the reasons contained in the attached memorandum, the complaint shall be dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii), 28 U.S.C. § 352(b)(1)(B), and Rule 4(c)(3) of the Rules Governing Complaints of Judicial Misconduct or Disability.

Date: May 23, 2005



James B. Loken, Chief Judge
United States Court of Appeals for the Eighth Circuit
By Designation

¹The 21st Century Department of Justice Appropriations Authorization Act, Division C, Title I, Subtitle C, §§ 11041-43 (Pub. L. No. 107-273, Nov. 2, 2002) amended the Judicial Conduct and Disability Act, the former 28 U.S.C. § 372(c). Section 372(c) was recodified as sections 351 through 364 of Title 28.

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

In re:

Complaint of Judicial Misconduct

*
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* No. 04-6-351-17
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M E M O R A N D U M

This is a judicial misconduct complaint by the Executive Director of the Community Rights Council (“CRC”) against Danny J. Boggs, Chief Judge of the United States Court of Appeals for the Sixth Circuit,¹ challenging Judge Boggs’s service on the Board of Trustees of the Foundation for Research on Economics and the Environment (“FREE”). FREE is a Montana-based nonprofit organization that hosts multi-day educational seminars for federal judges on environmental and other topics. The seminars are co-sponsored by Montana State University and are held at scenic sites near Bozeman, Montana. FREE provides scholarships to judges covering their expenses in attending the seminars.

The complaint alleges that service on FREE’s board constitutes “conduct prejudicial to the effective and expeditious administration of the business of the courts” within the meaning of 28 U.S.C. § 351. Citing FREE’s purported ideological slant, its sources of funding, and the seminars it conducts on environmental topics, the complaint alleges that Judge Boggs’s service on the board reflects adversely on his impartiality in important environmental cases before the Sixth Circuit, and undermines public confidence in the judiciary by giving critics of environmental laws

¹Rule 4(f)(1) of the Rules Governing Complaints of Judicial Misconduct or Disability provides that the names of the complainant and the judge complained against usually remain confidential. However, the Community Rights Counsel has disclosed the complaint in its publications, and Judge Boggs has waived his confidentiality privilege. See Rule 17.

“remarkable access to one of the nation’s most important environmental decision makers,” and by “lend[ing] the considerable weight of his judicial office to the positions on environmental law topics adopted by FREE.” However, the complainant “is not alleging actual impropriety by Chief Judge Boggs in any case.” The complaint seeks a declaration that Judge Boggs may not properly serve on the board.

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, as amended by the Judicial Improvements Act of 2002, created “a simple and clear procedure for the resolution of alleged disability or misconduct of a Federal judge.” S. Rep. No. 96-362, at 2 (1979), reprinted in 1980 U.S.C.C.A.N. 4315. The Act provides that “any person” may file a judicial misconduct complaint against a federal judge with the clerk of the court of appeals for the judge’s circuit. 28 U.S.C. § 351(a)-(c). The chief judge of the circuit conducts a limited inquiry into the matter and either dismisses the complaint or convenes a special committee to investigate the allegations and report its findings and recommendations to the circuit judicial council. 28 U.S.C. §§ 352, 353. Sanctions are available to the judicial council “to assure the effective and expeditious administration of the business of the courts within the circuit,” including suspension of the judge’s assignments, private or public censure or reprimand, a request that the judge voluntarily retire, certification of disability or of possible grounds for impeachment, and referral to the Judicial Conference of the United States for further proceedings. 28 U.S.C. § 354.

Some months after the complaint was filed, I was designated to act as the Chief Judge of the Sixth Circuit in this matter, and I consented to this intercircuit designation. See 28 U.S.C. §§ 291, 295.² Judge Boggs has responded to the complaint. I have completed a somewhat expansive initial inquiry that included

²I note that FREE has invited me to attend its seminars, but I have not done so. I have attended a privately sponsored educational seminar as a guest of the Aspen Institute.

review of two lengthy CRC reports attached to the complaint;³ review of FREE’s website, some of its literature, and a recent report by two former United States Attorneys concerning whether FREE seminars offer participants “an opportunity to obtain substantive continuing legal education”; analysis of the relevant Codes of Judicial Conduct and advisory opinions interpreting those Codes; review of court opinions construing and applying the Act; and review of legislative proposals concerning privately sponsored judicial education programs. Having completed this inquiry, I conclude that the complaint should be dismissed.

I.

The Act defines judicial misconduct as “conduct prejudicial to the effective and expeditious administration of the business of the courts” but does not catalog the types of judicial behavior that fail this standard. The legislative history provides some guidance. The Senate Judiciary Committee report noted that misconduct includes “willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, and other conduct . . . that brings the judicial office into disrepute.” S. Rep. No. 96-362, at 9, reprinted in 1980 U.S.C.C.A.N. 4315, 4323. The Committee stated its expectation that “[o]nly in the rare case will it be deemed necessary to invoke . . . the Act.” *Id.* at 3-4, reprinted in 1980 U.S.C.C.A.N. 4315, 4317. The Committee also opined that a chief judge or judicial council applying the Act “may consider, but is not bound by,” the principal source of ethical guidance for judicial conduct on and off the bench, the Code of Conduct for United States Judges. *Id.* at 9, reprinted in 1980 U.S.C.C.A.N. 4315, 4323. The House Judiciary Committee report noted that judicial misconduct includes “impeachable behavior,” other criminal conduct, accepting bribes in exchange for

³CRC, *Nothing for Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public’s Trust* (2000); CRC, *Tainted Justice: How Private Judicial Trips Undermine Public Trust in the Federal Judiciary* (2004).

favorable opinions, or “a large number of judges” who together become “intoxicated in a bar of ill repute.” H.R. Rep. No. 96-1313, at 10, 12 (1980).⁴

Courts and judicial councils examining the Act and its legislative history have concluded that the statute “was directed at serious judicial transgressions.” Hastings v. Judicial Conference of the U.S., 829 F.2d 91, 106 (D.C. Cir. 1987). They have agreed that judicial misconduct under 28 U.S.C. § 351 “is not, and was never meant to be, coextensive with judicial ethics as embodied in the [Code of Conduct].” In re Charge of Judicial Misconduct, 62 F.3d 320, 321 (9th Cir. Jud. Council 1995); accord In re Charge of Judicial Misconduct, 91 F.3d 1416, 1418 (10th Cir. Jud. Council 1996); In re Charge of Judicial Misconduct or Disability, 85 F.3d 701, 703 (D.C. Cir. Jud. Council 1996). In particular, because the Code’s ethical guidelines are cast in general terms, discipline is not likely warranted “where reasonable judges might be uncertain as to whether or not the conduct is proscribed.” In re Charge of Judicial Misconduct, 85 F.3d at 703.

Adopted by the Judicial Conference in 1973, the judicial Code of Conduct is reproduced in Volume II, Chapter 1, of the Administrative Office of U.S. Courts’ Guide to Judiciary Policies and Procedures. The Judicial Conference Committee on Codes of Conduct provides guidance in construing specific Canons by issuing advisory opinions responding to inquiries from judges. Judges are also advised to consult the Compendium of Selected Opinions (the “Compendium”), a summary of Committee opinions on ethical matters that provides general guidance and demonstrates how the Canons have been applied in various situations. See II Guide to Judiciary Policies and Procedures, ch. 5.

⁴Some examples of misconduct are recounted in Richard L. Marcus, Who Should Discipline Federal Judges, and How?, 149 F.R.D. 375 (1993).

Two Canons speak directly to the issues raised by the complaint against Judge Boggs for serving on FREE's board of trustees. Canon 5B provides that a judge may "participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality." More specifically, a judge may serve as a director of an "educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members," unless the organization is likely to be involved in proceedings before the judge or will regularly be involved in legal proceedings in any court. Canon 4 specifically encourages activities concerning the law, the legal system, and the administration of justice, such as teaching, speaking, writing, or serving on the boards of organizations or law schools, so long as the activity does not cast reasonable doubt on the judge's capacity to decide impartially any issue that may come before him. Canon 4, A, C, and Commentary.

The Compendium contains a number of pertinent rulings construing Canon 5B. Sections 5.3-2, 5.3-3, and 5.3-6 list the types of organizations on whose boards a judge may serve, including the governing board of a private college, the non-governing board of regents of a public university, the board of trustees of a university foundation, and the board of trustees of a foundation to fund a religious school for children. Section 5.3-6(d) advises that "[a] judge may serve on the board of directors of an education and research foundation, if satisfied that the organization does not advocate positions on issues likely to come before the court, that the judge would not be so identified with the views of the organization as to undermine the public perception of the judge's impartiality, and that frequent recusals would not be required." Similarly, § 5.3-2(d) advises that "[i]t is permissible for a judge to serve on the council of academic advisors of the American Enterprise Institute, unless the judge concludes that such service would reasonably be viewed as endorsing the views of that organization on issues which are likely to come before the court." Applying Canon 4, § 4.6-2(h) explains that "[a] judge may serve on the board of an organization dedicated to the improvement of the law and the administration of

justice, and if the Board takes a position on occasion with respect to which the judge would prefer not to be identified, the judge could abstain.”

A number of advisory opinions have addressed membership in outside organizations. Advisory Opinion No. 15 permits membership on the board of directors of a nonprofit organization “whose object is to promote an interest in and to enlighten its membership on important governmental, economic and social issues” provided it “does not engage in partisan political activity, and does not take positions on governmental, economic and social issues which would embarrass the judge in the exercise of judicial duties.” Advisory Op. No. 15, *Judge Serving as Director of Nonprofit Club* (1998). Advisory Opinion No. 40 addresses the issue of membership in organizations directly engaged in advocacy:

Canon 5B(1) affirms the propriety of judicial . . . service as officer, director, trustee, or non-legal advisor in such organizations. Certain reservations and limitations, however, are appended. The first is that such activities may not reflect adversely upon the judge’s impartiality or interfere with the performance of the judge’s judicial duties. The second limitation is that “[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.”

The application of these unambiguous principles must be in accord with the good judgment of each individual.

Advisory Op. No. 40, *Membership in Such Organizations as the Anti-Defamation League of B’nai B’rith, the Sierra Club and the National Association for the Advancement of Colored People* (1998). Advisory Opinion No. 82 provides 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 Op. No. 82, Joining Organizations (1998).

Judge Boggs’s response to the complaint explains that he sought guidance from the Committee on Codes of Conduct before agreeing to serve on FREE’s board and includes a copy of the letter response he received from the Committee. In that letter, the Committee advised:

That you serve as a trustee is of import only insofar as the general public may reasonably view your affiliation (the details of which are unknown to the public) as an endorsement of the views and activities of the Foundation.

* * * * *

If you believe a judge’s personal, direct advocacy to the public of the policy positions advanced or opposed by the Foundation might reasonably be seen as impairing that judge’s capacity to decide impartially any issue that may come before him, you should consider the appropriateness of what may reasonably be seen as indirect advocacy through affiliation. If you determine that those policy positions are likely to come before your court in a context creating a reasonable basis for questioning your impartiality and the possibility of recurring recusals, you should consider whether your affiliation impairs your ability to perform your judicial duties generally.

As you know, the committee’s function is solely advisory. The final decision is the responsibility of the individual judicial officer.

II.

Ignoring Canon 4, which encourages judges to participate in organizations that engage in or promote legal education, the complaint alleges that Judge Boggs’s

service on FREE's board violates Canon 5B because it reflects adversely on his impartiality. The complaint does not reference any action taken or position advocated by Judge Boggs personally. Rather, the complaint is based upon CRC's long-publicized criticisms of FREE and its judicial education seminars:

1. FREE and Its Seminars Are Biased. The complaint alleges that FREE seminars provide its supporters an opportunity to lecture judges on a one-sided view of environmental issues that come before the federal courts. In support, the complaint quotes FREE's founder as saying that its judicial education seminars advance "a coherent new vision" with a "unifying theme" that rejects "top-down, command and control environmentalism." The complaint quotes a FREE trustee and lecturer as saying that the seminars are "educational programming" designed to complement the efforts of other organizations that challenge environmental laws in federal court. The complaint alleges that FREE's advocacy of these positions can be attributed to Judge Boggs as a member of the board, thereby calling into question his impartiality on environmental issues.

Judge Boggs responds that "FREE does not litigate, on its own behalf or as amicus, nor does it take official positions on any public matter." As the advisory opinions applying Canon 5B confirm, two critical factors for a judge to consider in deciding whether to serve on the board of a private educational organization are whether the organization litigates, so that it is likely to be a party in the judge's court, requiring recusals, and whether the organization takes official positions, so that the judge's "affiliation may reasonably be seen as indirect advocacy of those policy positions." Advisory Op. No. 82. Nothing in the lengthy CRC reports attached to the complaint casts doubt on Judge Boggs's statement that FREE does not litigate and does not take official positions.

Nor do the materials I have reviewed support the complaint's assertion that FREE seminars are nothing more than a one-sided diatribe against federal

environmental laws (I doubt many federal judges would waste their time attending that type of program, even in scenic Montana). The complaint does not deny that FREE is a non-profit organization engaged in providing genuine continuing legal and judicial education. The seminars have addressed a broad array of policy issues, such as “Modernization, Agricultural Technology, Trade, and Population Migration” and “Illicit Drugs, Civil Society, and the Environment.” FREE’s lecturers are predominantly university professors but include members of the business, legal, and environmental communities. The board has included federal judges, university professors, a law school dean, and a vice president of the Heritage Foundation.

FREE’s 2003 annual report states that “[w]hile our seminars are explicitly pro-environment, they explain why ecological values are not the only important ones. We stress that trade-offs among competing values are inescapable.” FREE, 2003 Annual Report 2 (2004). For persuasive evidence that the federal judges attending FREE seminars consider them valuable judicial education, one need look no further than a July 31, 2000 letter from my esteemed colleague, the late Eighth Circuit Judge Richard S. Arnold, to the Chairman of FREE:

[FREE’s seminar] was of the highest intellectual quality of any seminar I have attended since going on the bench almost 22 years ago. The subject matter was diverting and challenging. It may never help me decide a specific case, but it will broaden the minds of all those that heard it, and that’s more important.

(quoted in In re Aguinda, 241 F.3d 194, 203 n.7 (2nd. Cir. 2000)). Similarly, two former United States Attorneys recently reviewed FREE’s program of educational seminars and found that it “has presented a varied, balanced, intellectually challenging and rigorous series of education opportunities for participants, focusing primarily on the interface between economic and environmental issues.” In refusing to order a district judge to recuse in an environmental case because he had attended a FREE seminar, the Second Circuit surveyed the conflicting views as to FREE’s

alleged policy bias and found no consensus, observing that an inquiry into whether a particular seminar was biased “depends so heavily on each individual’s view as to whether his or her position on the issue is prominently featured that a search for a consensus as to what is a balanced presentation of a particular issue is almost chimerical.” Aguinda, 241 F.3d at 204.

Canon 4 encourages judges to contribute to the improvement of the law by serving on the board of an organization engaged in legal or judicial education, so long as the judge is satisfied that “the organization does not advocate positions on issues likely to come before the court, that the judge would not be so identified with the views of the organization as to undermine the public perception of the judge’s impartiality, and that frequent recusals would not be required.” Compendium § 5.3-6(d). Judge Boggs’s response explains:

My reason for serving on the board was primarily to serve as a liaison with judges who would wish to, or would have, attended such educational offerings as FREE might undertake, to insure that both the quality and intellectual diversity of the offerings was satisfactory and useful to the judges in attendance. That I have done, and, with very rare exceptions, the feedback I have received from attendees has been very positive with respect to the diversity of ideas that are presented and discussed, and the quality and diversity of the presenters.

It is apparent that Judge Boggs has paid due regard to the relevant ethical standards in undertaking and continuing his service on FREE’s board. Judges could not assist in promoting rigorous academic and policy debate if the Canons are construed as prohibiting service to an educational organization whenever any lecturer advocates a controversial policy position, or whenever CRC or another interest group decides to label a seminar program biased or unbalanced.

Nor does Judge Boggs's service on FREE's board become judicial misconduct because CRC construes it as a signal that he endorses market-based mechanisms to achieve environmental objectives. The Code of Conduct does not prohibit judges from having opinions. Judges inevitably come to the bench with views about the virtues of competing economic and political policies. But "the presumption is that a judge will put personal beliefs aside and rule according to the laws as enacted, as required by his or her oath." Aguinda, 241 F.3d at 204. Of course, a judge's affiliation with an educational organization may raise recusal issues in specific cases. But those issues are properly addressed on a case-by-case basis under the more definite standards of 28 U.S.C. § 455, not in a judicial misconduct complaint.⁵ For these reasons, the complaint provides no factual basis to conclude that serving on FREE's board violates 28 U.S.C. § 351 because of FREE's alleged policy bias.

2. FREE Is Funded by Corporations Whose Interests Are Served by the Seminars. Tacitly conceding that FREE does not engage in litigation, the complaint alleges that FREE is funded by corporations that "are frequently involved in environmental disputes in federal court" and by "corporate-controlled foundations" that "finance other organizations . . . that bring environmental litigation in federal court." Based upon the allegation that the seminars present only a "unifying theme" opposing environmental regulation (which I conclude lacks factual foundation), the complaint alleges that Judge Boggs is violating Canon 5B because "[s]erving on the board of an organization that takes money from corporations to promote those

⁵Rule 1(e) of the Rules Governing Complaints of Judicial Misconduct or Disability provides, "The complaint procedures may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case."

corporations' point of view plainly reflects adversely on Judge Boggs's impartiality in environmental cases."⁶

The ethical proposition underlying these allegations is far too broad. A rule prohibiting judges from serving on the board of an educational organization that receives donations from corporations who engage in litigation and whose "point of view" is in any way supported by the organization's educational programs would effectively prohibit judges from serving on the boards of any broadly funded educational organization, a result clearly at odds with Canon 4. Canon 5B provides that a judge may serve as a trustee of an educational organization that is "not conducted for the economic or political advantage of its members," as opposed to its funders. Responding to numerous judicial inquiries about privately sponsored educational programs, the Committee on Codes of Conduct recently identified as one factor for a judge to weigh in deciding whether to attend such a program:

whether there are numerous contributors to seminar funding, none of which contributes a substantial portion of the cost; when no single entity contributes more than a small proportion of the seminar's cost, there is little reason for concern about the identity of individual contributors as the resulting benefits are too minor and attenuated to create ethical concerns.

Advisory Op. No. 67 (2004).

⁶FREE's website states that it "has consistently fought corporate subsidies fostering exploitation and strongly advocates such efforts as wolf reintroduction to the federal lands The intellectually naïve 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.)" FREE History at <http://www.free-eco.org/history.php> (visited May 19, 2005). The debate supports Judge Boggs's view that he is participating in an organization that fosters legitimate judicial education.

Applying that standard here, Judge Boggs's response attached a portion of FREE's 2004 Annual Report in which the Finance Director reported that 87% of FREE's funding came from foundations, 11% from corporations, and the rest from individuals. In addition, the Annual Report stated that FREE relies entirely on "dead person foundations"⁷ to cover the expenses of judges participating in its seminars, and further stated that FREE "maintains a diversity of funding sources to assure that no single source has or is perceived as having undue influence on our activities." Noting that he has served as Chair of the Appellate Judges Conference of the American Bar Association, Judge Boggs further responds:

the vast majority of FREE's funds come from foundations, and all money devoted to judicial seminars comes from "dead man" foundations as stated. Thus, there is no real question of a judge receiving funds from corporations that might have cases before that court, any more than in the case of the many corporations that contribute to Harvard [University] or the American Bar Association while litigating in the courts of judges who sit on those boards. In particular, I note that the only reference in the complaint to any Sixth Circuit matter is a citation to a case . . . in which an amicus brief was filed by an organization that had received funding, not from FREE (which funds no outside organization), but from a foundation that had also funded FREE, a classic example of . . . "guilt by association"

The complaint does not challenge this data and thus lacks any factual support for the claims that FREE is overly dependent on any source of funding, that parties to environmental litigation are funding FREE's judicial seminars, or that FREE is the captive of any donor. The allegation that Judge Boggs is guilty of judicial

⁷Defined by FREE as a foundation whose principal founder is deceased, whose operation and oversight are independent of any corporate entity, and which does not participate in litigation in the federal courts.

misconduct because of FREE's funding is conclusively refuted by the objective evidence I have reviewed.⁸

3. Public Criticism of FREE Establishes That Judge Boggs Is Violating Canons 2A and 2B. Canon 2A provides that a judge should at all times promote public confidence in the integrity and impartiality of the judiciary. The complaint alleges that Judge Boggs is violating Canon 2A because:

FREE's programs have been criticized by members of Congress, ethics experts, a former chief judge of the D.C. Circuit, and more than 30 major newspaper editorial pages spanning the political spectrum. There does not appear to be a single editorial page in the country that has supported FREE's judicial trips.⁹

Canon 2B provides that a judge should not convey or allow others to convey the impression that they are in a special position to influence the judge. The complaint alleges that Judge Boggs is violating Canon 2B because service on FREE's board gives "vitriolic critics of environmental laws . . . remarkable access to one of the nation's most important environmental decision makers."

These allegations are without merit. The fact that many have criticized privately sponsored judicial education does not make it unethical for a judge to support the concept and to participate in organizations that sponsor bona fide

⁸The Second Circuit in *Aguinda* rejected a similar contention that the district court must recuse because a party to the lawsuit had recently donated 3% to 6% of the reportable contributions to FREE. "[N]o reasonable observer would believe that such funding would influence a seminar-attending judge's decision in litigation involving Texaco." 241 F.3d at 202.

⁹This last assertion is no longer true, if it ever was. See "FREE No More," *The Wall St. J.*, May 17, 2005, at A12.

educational programs, so long as neither Congress nor the Judicial Conference has prohibited the practice. As the commentary to Canon 2A explains, “The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.” Reasonable people, unlike the complainant, do not presume a lack of integrity and impartiality from a judge’s association with legitimate judicial education, however controversial. Similarly, the complaint concerning Canon 2B is far too broad. A rule prohibiting judges from serving on a board which includes other members who have strongly held personal opinions on legal issues would likely disqualify judges from serving on the board of any educational organization, contrary to Canon 4.

4. A Specific Case. Finally, the complaint alleges that, in 1998, FREE manipulated its board membership and seminar programs in an attempt to influence the outcome of a case then pending in the D.C. Circuit. It is not alleged that Judge Boggs played any part in, or was even aware of, the events described. Judge Boggs’s response states that he has no knowledge of these events and therefore cannot comment on them. As this portion of the complaint alleges no impropriety by Judge Boggs, it provides no basis for concluding that he is guilty of judicial misconduct.

I also note that I was the judge designated to inquire into CRC’s virtually identical complaint against Chief Judge Douglas H. Ginsburg of the D.C. Circuit. In that capacity, I reviewed Judge Ginsburg’s extensive response to these allegations. The response persuaded me that there is no factual foundation to support an inference of wrongdoing by anyone, and certainly no evidence of judicial misconduct by any judge of the D.C. Circuit. Rather, these allegations typify the character assassination that is all too common in our Nation’s Capital, much of it intended to further the accuser’s legislative agenda. By use of this tactic, it is the complainant who is

undermining public confidence in the integrity and impartiality of the judiciary, not the judges complained of.

Conclusion.

CRC's motivation for filing this complaint is candidly revealed in the allegation that "[t]he service of preeminent jurists like Chief Judge Boggs on FREE's Board of Directors [sic] enables FREE to continue to attract judges to its programs despite this controversy" over privately sponsored judicial education programs. For some time, CRC has supported bills in Congress to prevent judges from attending private seminars that are not approved by a government agency. It is not uncommon for those with strong views to seek to suppress the dissemination of contrary views by legislative or regulatory prohibition or control. Though I subscribe to the view expressed by Justice Holmes and Justice Brandeis in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), that "the ultimate good desired is better reached by free trade in ideas," the current legislative debate is one on which jurists differ.¹⁰ Likewise, individual judges may differ on the appropriateness of serving on FREE's board of trustees, or of attending a particular FREE seminar. But this is a decision for each judge to make, applying the standards of the Canons and their interpretive advisory opinions to that judge's particular docket of cases and profile in the community.

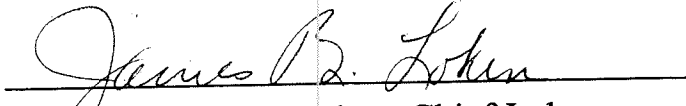
Judge Boggs has done precisely that. The statute which I am called upon to apply is "directed at serious judicial transgressions." Hastings, 829 F.2d at 106. Nothing in the text of the Act, its legislative history, or the cases construing it suggests that, absent a specific allegation of impropriety, or a clear violation of the

¹⁰Compare Abner J. Mikva, Foreword to CRC, Nothing For Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public's Trust (2000) with A. Raymond Randolph, Private Judicial Seminars: A Reply to Abner Mikva, 29 Litig. 3 (Fall 2002).

Code of Conduct, Judge Boggs's service on the board of a bona fide educational organization that conducts no litigation and takes no official positions on legal or public policy issues constitutes "conduct prejudicial to the effective and expeditious administration of the business of the courts" within the meaning of 28 U.S.C. § 351.

Judges engage in myriad civic and intellectual activities. They author books and articles, speak to groups, and serve on the boards of non-profit organizations. These extrajudicial activities are broadly accepted, even encouraged by the judicial Code of Conduct. Hopefully, they yield worthwhile contributions to the public domain. Most certainly, the judges benefit from such public engagements. Judges must remain impartial, but impartiality should not mean isolation from civic life. I express no view as to whether Congress or the Judicial Conference should continue to permit federal judges to attend privately funded judicial education seminars. But so long as such activity is permitted, I conclude that the complaint alleging that Judge Boggs is guilty of judicial misconduct simply because he is serving on FREE's board of trustees should be dismissed because (i) I find the complaint to be "lacking sufficient evidence to raise an inference that misconduct has occurred," 28 U.S.C. § 352(b)(1)(A)(iii), and (ii) my limited inquiry demonstrates that "the allegations [of misconduct] lack any factual foundation or are conclusively refuted by objective evidence," 28 U.S.C. § 352(b)(1)(B).

Date: May 23, 2005


James B. Loken, Chief Judge
United States Court of Appeals for the Eighth Circuit
By Designation