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

In re:
COMPLAINT OF JUDICIAL MISCONDUCT

No. 06-08-90031

MEMORANDUM

This Complaint was filed with the Judicial Council of the Sixth Circuit pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. 96-458, as amended by the Judicial Improvements Act of 2002, Pub. L. 107-203, the Rules for Judicial-Conduct and Judicial-Disability Proceedings, and the Rules Governing Complaints of Judicial Misconduct adopted by the Judicial Council of the Sixth Circuit.

The Complaint alleges that a judge's membership in a country club violates Canon 2A and 2C of the Code of Conduct for United States Judges because the country club practices invidious discrimination of the type described in Canon 2C. The complainant asserts that the club in question did not have its first African-American member until 1994, and that females are not allowed full membership status, but rather are relegated to a non-voting "lady member" status. The complainant acknowledges that the club has no formal policies restricting membership.

Canon 2A of the Code of Conduct for United States Judges provides that "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The Commentary to Canon 2A explains that "an appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired." Canon 2C provides that "a judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." Such affiliation is

discouraged because "[m]embership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired." Canon 2C, Commentary.

Determining whether a particular organization practices invidious discrimination is a complex, sensitive question. *Id.* The composition of an organization's current membership rolls is not dispositive: an absence of diverse membership alone is not sufficient to show a violation "unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination." *Id.*

The Chief Judge conducted a limited investigation pursuant to 28 U.S.C. § 352(a), and entered an order dismissing the Complaint, finding no showing that the country club engaged in invidious discrimination, and that the conduct of the judge complained of did not violate Canon 2C of the Code of Conduct for United States Judges. The complainant petitioned the Judicial Council for review of the dismissal of her Complaint, and provided additional information in support of her allegations. The Judicial Council did not affirm the dismissal. The new Chief Judge thereupon activated the standing Special Committee of the Sixth Circuit Judicial Council, consisting of the Chief Judge and one circuit judge and one district judge from each of the states in the circuit. The two judges from the state of residence of the judge against whom the complaint was brought did not participate. See Rule 11(f), Rules for Judicial-Conduct and Judicial-Disability Proceedings, and Rule 9(a), Rules Governing Complaints of Judicial Misconduct. The Chief Judge designated a district judge to chair the committee, see Rule 12(b), Rules for Judicial-Conduct and Judicial-Disability Proceedings, and Rule 9(b), Rules Governing Complaints of Judicial Misconduct; however, the Chief Judge participated fully in the work of the Committee. The Committee retained the services of outside counsel to investigate and to interview witnesses.

Outside counsel conducted and recorded interviews of the complainant, the individual who had assisted the complainant in preparing the Complaint and supporting materials, the subject judge, several members of the country club, and one Sixth Circuit judge. The Committee requested that counsel prepare both proposed Findings of Fact and a legal analysis; those Findings and Analysis, together with the transcripts of the interviews counsel had conducted, were provided to each member of the Committee. After careful and thorough review of all of the materials provided by outside counsel,

including counsel's Findings and Analysis, the Committee unanimously adopted the Findings and Analysis as the Committee's Findings and Analysis.

The Committee concluded that the evidence does not support the conclusion that the country club engages in invidious discrimination against African Americans or women. The Committee further concluded that the judge complained of has actively worked toward diversifying the membership of the country club, and that "[t]here are any number of reasons why there are no women or African American Resident members of the Country Club and to automatically assume discrimination as the reason for the lack of women and African American Resident members ignores the complexity of the issues recognized by the Commentary to Canon 2C." Finally, the Committee concluded that the judge's membership in the country club violates neither Canon 2A nor 2C. The Committee provided its Findings of Fact, Analysis and Recommendations to the Judicial Council, and recommended that the Judicial Council dismiss the Complaint.

The Judicial Council met on January 20, 2011, to consider the Complaint and the recommendation of the Committee. Eighteen of the nineteen voting members of the Council were present, either in person or by telephone. After a full and vigorous discussion, including the questioning of the Committee's outside counsel who was present by telephone, the Council, by a vote of 12 to 6, found that the Committee's Report, including the materials submitted by the outside counsel, provided an adequate basis upon which to decide the merits of the Complaint. By a vote of 10 to 8 the Council then adopted the Committee's Findings, Analysis and Recommendation concluding that the judge's membership in the country club does not violate either Canon 2A or 2C, and that the Complaint should be dismissed.

Finally, the majority concludes that although reasonable minds could — and indeed do — differ on the question of whether this Club engages in invidious discrimination, the specific issue before the Council is whether the judge complained of has committed judicial misconduct. 28 U.S.C. § 351(a) defines such misconduct as "conduct prejudicial to the effective and expeditious administration of the business of the courts." Rule 3(h)(2) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings explains that such misconduct includes "conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread

lowering of public confidence in the courts among reasonable people." It is this standard that we must apply in reviewing this complaint.

> Although the Code of Conduct for United States Judges may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules. Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules.

Id., Commentary.

The Special Investigating Committee hired a lawyer to investigate the allegations about the Club, and it is clear that she committed significant time and energy to the inquiry and performed her task in a thorough and professional manner. The record clearly supports her finding that the judge complained of engaged in long and sincere efforts to integrate the club in question. In the majority's view, those efforts preclude a finding that he has engaged in misconduct as defined in the statute and the rule.

Accordingly, this Complaint is dismissed.

/s/

Alice M. Batchelder
Chief Judge

Date: April 8, 2011

OLIVER, District Judge, dissenting. In my view, the opinions of Judges Clay and Cole have compellingly demonstrated that the Belle Meade Country Club engaged in invidious discrimination. While there is much evidence in the record to support Judge Cole's conclusion that the Judge "personally holds none of the perceived prejudices of the institution of which he remains a member," the record strongly suggests that he should have resigned his membership when it became clear long ago that his efforts to change the Club's discriminatory practices against women and minorities were having no effect. I must, therefore, respectfully dissent from the Judicial Council's dismissal of the Complaint of Judicial Misconduct in this case.

KAREN NELSON MOORE, Circuit Judge, in which Chief District Judge Susan J. Dlott concurs, dissenting from the Judicial Council's Memorandum and Order in Complaint No. 06-08-90031. Judge Clay's dissent presents persuasive proof of invidious discrimination in membership policies of the country club (the "Club"). The Club relegates women to a separate, lesser class of membership lacking the rights of full resident members. The Club has held in apparently permanent pending status the applications of all African American applicants (save one non-resident member), thereby effectively denying membership to African Americans. In light of the discriminatory admission practices of the Club regarding women and African Americans, the conclusions of the Special Committee and the bare majority of the Judicial Council are flawed. I would conclude that Canon 2 of the Code of Conduct for United States Judges requires resignation from the Club in light of its refusal to rectify its membership practices. Therefore, I respectfully dissent from the Judicial Council's dismissal of the Complaint of Judicial Misconduct.

CLAY, Circuit Judge, dissenting from the Judicial Council's Memorandum and Order in Complaint No. 06-08-90031. The Memorandum and Order of the Sixth Circuit Judicial Council in Complaint No. 06-08-90031, against the Honorable *_____, which are signed by the Chief Judge and adopt the findings of the Report of the Special Investigating Committee of the Sixth Circuit Judicial Council, are more notable for what they do not say, and for the lack of evidentiary support for the conclusions they reach, than for what they do say.

It is worth noting at the outset that the Memorandum in this matter, which seeks to rely on Rule 3(h)(2) of the Rules of Judicial-Conduct and Judicial-Disability Proceedings, highlights language from the Commentary to Rule 3 which states that "the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules." Not only is the aforesaid language presented in a misleading manner in the Memorandum because it is ripped completely out of context from an extremely lengthy Commentary, but the Memorandum seems to imply that the Judicial Council has unfettered discretion to ignore the plain meaning of the Code of Conduct for United States Judges. Needless to say, such a strained interpretation of the disciplinary rules applicable to federal judges cannot be countenanced by a fair reading of the Commentary. Although the Judicial Council must retain sufficient flexibility to exercise the judgment necessary to apply the disciplinary rules in varying and complex factual situations, we must nevertheless be guided by the requirements of the rules and the high standards of conduct demanded of federal judicial officers.

In declining to find invidious discrimination on the part of the Judge's Club, in the face of abundant evidence of invidious discrimination, the Memorandum and Order completely fail to explain why it is acceptable for the Belle Meade Country Club to maintain a separate membership category for women members that does not confer equal voting rights on women or permit them to participate in the governance and management of the Club. The majority of the Judicial Council would have us accept the Club's self-serving representation that the separate and subordinate membership status for women does not indicate gender bias, notwithstanding the tacit or express admissions by some Club members that women have never been considered for "Resident" membership and have never been voting Resident members.

The discrimination is actually quite blatant when one considers that the Club maintains a separate, lesser membership category for women members who are referred to by the Club as "Lady Members;" and Mr. Ed Nelson, the Club's former Board president, was quoted in the press as saying that women cannot be Resident members, and subsequently refused to answer any questions about his statements in that regard. Judge *_____ has even sought to excuse the separate and subordinate membership category for women by suggesting that it is beneficial for women that the lesser membership category permits them to get away with paying a lesser membership fee.

Perhaps the most authoritative and illuminating testimony in this matter was provided by Mr. William Ridley Wills, III, a long-term member of the Belle Meade Country Club who is also the author of a book detailing the history of the Club entitled *The First Hundred Years*, copyright 2001. Mr. Wills testified that it is his understanding that a woman would not be permitted to be a Resident member of the Club. (Dep. of William Ridley Wills, III, June 30, 2010, p. 9.) Mr. Wills also candidly admitted that the Club discriminates in its membership practices. (Dep. of William Ridley Wills, III, June 30, 2010, p. 17.) The Special Investigating Committee completely fails to address Mr. Wills' testimony.

The majority of the Judicial Council, by adopting the findings of its Special Investigating Committee, attempts to establish that there is no invidious race-based discrimination by accepting at face value the Club's contention that though the Club has never had a full Resident member who is African American, it has also never rejected the application of an African American.[1] That contention is actually ludicrous since the record demonstrates that the Club has avoided turning down the applications of qualified African American applicants, who have been properly sponsored for membership, by permitting their applications to remain pending for six years or longer without acting on them. The Special Investigating Committee was all too eager to accept the representations of apologists for the Club who contend that it is not unusual for applications for memberships to remain pending for such an extended period of time, regardless of race, without being acted upon. There is simply no indication that this

[1]Not only is the one African American member of the Club, Mr. Richard Sinkfield, a Non-Resident member without voting rights, but the Club was well aware when it admitted Mr. Sinkfield that he would seldom visit the Club because he lives 250 miles away in Atlanta, Georgia.

contention, which seems suspect on its face, was ever properly or adequately investigated by the Judicial Council's Special Investigating Committee.

Judge *_____ completely misapprehends the issue raised by his membership in the Club, as does the Judicial Council and its Special Investigating Committee. The issue is not whether Judge *_____ claims he has attempted to get the Club to accept African Americans as members. The issue is whether it is proper for Judge *_____ as a federal judge to continue to maintain his membership in a club that discriminates against African Americans and women in violation of the Code of Conduct for United States Judges.

Furthermore, the facts of this matter call into question the sincerity of Judge *_____'s claim that he is making a reasonable or good faith effort to end discrimination at the Club. He claims that he has been attempting to persuade the Club to diversify its membership for 15 years—apparently to no avail; and the African American he is currently sponsoring for membership, Mr. Daryl Freeman, has had his membership application pending for five or six years without it being acted upon. But the Commentary to Canon 2C of the Code of Conduct for United States Judges states that if the organization fails to discontinue its discriminatory practices as promptly as possible, and in all events within two years of the judge first learning of the practices, the judge should resign immediately from the organization. In finding in favor of Judge *_____, both the Special Investigating Committee and the majority of the Judicial Council simply ignore this requirement; the Committee and the Judicial Council do not even attempt to put forward a plausible explanation for failing to require Judge *_____ to comply with this requirement—other than the unsupportable and conclusory assertion that there is an absence of proof that the Club engages in invidious discrimination.

The decision-making engaged in by the Judicial Council's majority with respect to this matter has been deeply troubling. Although this matter involves credible allegations of a federal judge having maintained membership for decades in a country club that practices invidious racial and gender discrimination (Judge *_____ has been a member since 1978), the Judicial Council's Special Investigating Committee has bent over backwards in its investigation to resolve virtually every factual dispute, with little factual basis for doing so, in favor of Judge *_____ and the offending country club. The majority of the Judicial Council and the Judicial Council's

Special Investigating Committee have rejected the allegations of invidious discrimination based upon their contention that the claimant cannot prove discrimination; however, given the demonstrated record of historical discrimination by the Belle Meade Country Club, the lack of diverse membership in a club that exists in a very diverse community, the Club's failure and/or refusal to end its past discriminatory practices, and the obvious fact that women cannot vote and participate fully in the Club's management and governance, the burden should shift to the Judge to explain why it is equitable that women cannot vote as full Resident members and why the Club's past exclusionary practices cannot be ended. At the very least, Judge *_____ should have been compelled to explain why he continues to embarrass the federal judiciary by creating and perpetuating the *appearance* of impropriety.

The inadequacy of the Special Investigating Committee's investigation is highlighted by the Committee's dealings and interaction with Mr. Robert E. Boston, the Resident member of the country club who is a past member of the Club's Board of Directors and the immediate past-secretary of the Board of Directors. At the behest of Mr. Boston, the Committee permitted Mr. Boston to present selective information favorable to the Club's position while denying that the Club is guilty of discrimination—without requiring Mr. Boston to also reveal information at odds with the Club's position. For example, the Club and Judge *_____ permitted Mr. Boston, as their legal representative, to provide an interview to the Committee or its counsel (*see* footnote 1 to the Special Investigating Committee Report) while denying access to the Club's membership records and other potential witnesses.

Moreover, it is troubling that the Committee appears to have permitted Mr. Boston at various times during the investigation to represent Judge *_____, and Mr. Ed Nelson, a former president of the Club, in addition to representing the Belle Meade Country Club as well as himself in this matter. It is a matter of confusion in the Committee's Report that Mr. Boston was permitted to represent both Judge *_____ and the Country Club—while at other times, Mr. Boston seems to speak for and to represent Mr. Nelson. The Committee's willingness to permit Mr. Boston to represent all of these overlapping and potentially conflicting parties in this matter is but one indication of the way in which the Committee mismanaged the entire investigation.

If one reads the Special Investigating Committee's report with any care, it quickly becomes apparent that it is often impossible to determine when, in the course of the investigation, Mr. Boston was speaking for himself, when he was speaking for the Club, when he was speaking for Judge *_____, or when he was speaking for Mr. Nelson. It is also unclear from Mr. Boston's deposition in this matter when Mr. Boston was speaking as a witness, and alternatively, when he was speaking as an attorney and counselor for Judge *_____ or others.

Although Mr. Boston purports to speak at times for all of the individuals and entities who presumably possess much, if not all of the information, that would be needed to resolve this matter, the Committee at several critical junctures suggests that it has ascertained all of the information that could be obtained regarding the gender, race, religion, and national origin of applicants for membership in the Club and the processing of the Club's membership applications, including the length of time such applications have remained pending, the existence of any disparate treatment of applicants based on gender, race, religion and national origin, and the reasons for the lack of timely action on applications of minority group members. The Committee insists at various points in its report that it has obtained all of the information that it can feasibly obtain while at the same time confessing to the inadequacy of that information. The Special Investigating Committee's amateurish inability to penetrate the protective shell placed around the Club's membership information is of some import when one realizes that throughout the Committee's report, there is the reoccurring refrain that certain information simply could not be obtained from the Club and those associated with it.

Notwithstanding Mr. Boston's obvious interest in the outcome of this matter and his many evasions and actual or potential conflicts of interest, the Special Investigating Committee incredibly refers in its report to Mr. Boston's testimony on behalf of the Club as "credible." Although Mr. Boston was a Resident member of the Club, a former member of the Club's Board of Directors, and a member of the Club's membership committee with a wealth of information about the membership practices of the Club, he refused to provide much of that information during his interview with the Committee. Since Mr. Boston was acting as a witness as well as an attorney in this matter (representing the Club as well as other parties), the Committee could have, and should have, used Mr. Boston's reluctance to answer certain highly relevant questions as a basis for an adverse inference against the Club on the issue of whether the Club engaged in invidious discrimination on the basis of race and gender. Rather than drawing the

appropriate adverse inference, the Committee argues that its investigation could not have been further advanced except perhaps by obtaining the Club's membership records, but then represents that the investigation would not have been further advanced by utilizing the subpoena power of the Council and/or its Special Investigating Committee to obtain the membership records.

Interestingly, in downplaying the value of the information it could obtain via subpoena power, the Committee states that it could only secure by subpoena Mr. Nelson's testimony and the membership records of the Country Club, both of which it thought would be of little value—because even if Mr. Nelson testified that women could not be admitted as Resident members of the Club, Mr. Boston would be expected to testify to the contrary; and even if they could obtain the membership records, the Committee expected that they "would likely have limited utility." In other words, the Committee was of the view that it was not necessary to obtain the appropriate discovery because of its unsupported conjecture that the discovery might not prove helpful.

A further impediment to the investigation which may have compromised the credibility of the Special Investigating Committee's investigation and findings was the composition of the Committee itself. The lack of diversity with respect to the membership of the Committee investigating this matter has resulted in an investigation and a committee report which in the eyes of some will be perceived to lack objectivity and legitimacy. Except for the Chief Judge herself, there were no minorities or women among the judicial members of the Special Investigating Committee appointed by the Chief Judge to investigate the complaint regarding Judge *_____'s membership in a club that allegedly discriminates against African Americans and women. (Upon information and belief, the Chief Judge did not actively participate as a member of the Committee, but instead delegated the stewardship of the Committee to its appointed Chairman.) The lack of diversity in the composition of the membership of the Special Investigating Committee resulted in an unrepresentative membership on the Committee, thereby opening the Judicial Council to charges of an appearance of impropriety in the handling of this matter at the very least.

It is not an exaggeration to say that the Special Investigating Committee failed miserably in carrying out its responsibility. In resolving virtually all issues against the complainant, it refocused its inquiry on the question of whether it believed that Judge *_____ had engaged in efforts to desegregate the Club when it should have

properly focused its attention on the question of whether Judge *_____ created an appearance of impropriety in violation of Canon 2C by refusing to resign from a discriminatory club within two years of the Judge having first learned of the discriminatory practices.

Moreover, there is at least an appearance of impropriety with respect to the issue before the Judicial Council when one considers that the matter was resolved on a Judicial Council vote of 8 to 10 in favor of Judge *_____. The closeness of the vote alone is more than enough to indicate that a reasonable person might conclude, as eight federal judges did, that the Judge's membership in the Belle Meade Country Club poses at least an appearance of impropriety in violation of Canon 2C.

The significance of this matter involves the ability and willingness of the Judicial Council to fully and fairly administer the law and carry out its responsibilities. [redacted] the complainant in this matter, framed the issue very well during her deposition testimony in this matter when she stated:

> "You know, again, I just would like to point out that, you know, having that kind of a backwards view such as Judge *_____ has makes it really difficult to have confidence in the judiciary system going into his court as a female or as a black when he carries a membership in a club that is clearly discriminatory in its practices, and to feel that you're being treated fairly or equally when you're before him, either as a individual citizen in his courtroom or as an attorney for that matter.
>
> I just don't see how anyone can look at this evidence and – who is open-minded, and especially if they are female or they are black, and not be, to a certain degree, offended by the club's practices in that someone who is supposed to show that they have a higher standard that they have to live by because they are a judge and they are there to oversee and enforce the laws. I just don't see how someone can do that and think that that's okay."

(Dep. of [redacted] March 12, 2010, pp. 33-34.)

It is deeply distressing, in this day and age, that a Judicial Council of federal judges is willing to render a finding of no discrimination or the appearance thereof in the face of a record rife with evidence of discrimination. It is also deeply distressing for

some of us on the Judicial Council to be placed in the position of having to resort to dissents which call attention to our colleagues' apparent unwillingness to enforce the most fundamental strictures against federal judges' countenancing discrimination or the appearance of discrimination by their own behavior.

Based upon abundant evidence that Judge *_____ has violated the standards of conduct for United States Judges, specifically Canon 2C, the appropriate disposition of this matter would have consisted of the Judicial Council for the Sixth Circuit terminating the services of *_____ as a United States Bankruptcy Judge. At the very least, some appropriate discipline should have been imposed upon Judge *_____. I therefore respectfully dissent from the Judicial Council's Memorandum and Order dismissing the Complaint of Judicial Misconduct in this matter.

COLE, Circuit Judge, dissenting. I concur with Judge Clay's observation that there was a "lack of diversity in the composition of the membership of the Special Investigating Committee." Slip Op. at 14. As to the merits of the complaint against the judge, I also agree with Judge Clay's assessment of the Belle Meade Country Club ("Belle Meade"): namely, that there exists in the record "abundant evidence of [Belle Meade's] invidious discrimination." *Id.* at 9. On this basis, I would reject the findings of the Report of the Special Investigating Committee of the Sixth Circuit Judicial Council dismissing the complaint against the judge here. My vote to do so, however, is a critique more of the membership that the judge maintains than the man he is. The judge has been a Resident Member of Belle Meade since 1978, but he states that he has been trying to diversify its membership for at least fifteen years. And I believe him. In fact, he is one of the sponsors for Darrell Freeman, an African American whose application for Resident Membership is still pending. This sort of act is typical of the judge. In the many years that he has been a colleague of mine, I have never known him to be anything but a fair and thoughtful jurist. I am convinced that he personally holds none of the perceived prejudices of the institution of which he remains a member.

Belle Meade, however, is a different story. Located in Nashville, Tennessee, Belle Meade was founded in 1901 and, by all accounts, does not have a diverse membership. In the 110 years since its founding, Belle Meade has never accepted an African-American or female Resident Member. Only Resident Members can vote or occupy positions on Belle Meade's Board of Directors, so it seems that mostly white men continue to determine the direction of Belle Meade's future. Belle Meade has, meanwhile, only ever accepted a single African American for any type of membership: Atlanta lawyer Richard Sinkfield received Non-Resident Membership in 1994. And because it appears that Mr. Sinkfield rarely visits Nashville, the non-diverse composition of the Belle Meade's membership remains largely unchanged.

This absence of diversity is not for lack of competent applicants. Although Belle Meade's proponents offer numerous justifications for why no African-American applicants for Resident Membership succeeded in the Sisyphean task, the fact remains that two compelling applicants—David Ewing and Darrell Freeman—have been waiting now at least six years for a decision on their applications. And the amount of time may be even longer. (*See* Wills Dep. 10 (stating in June 2010 that he "did recommend David [Ewing] for membership . . . seven or eight years ago").) This is so notwithstanding the fact that their Belle Meade supporters are "some of the most persuasive and well thought

of people in Nashville," according to Belle Meade's lawyer and former Secretary. (Boston Dep. 69.) One of Mr. Ewing's sponsors, Mr. William Ridley Wills, III, who is a member and literally wrote the book on Belle Meade, believes Mr. Ewing's application has been rejected through "languishing." (Wills Dep. 10.) Mr. Wills is extremely frustrated by the Board's failure to act on Mr. Ewing's application: "Q: Do you think Mr. Ewing has given up on his application? A: Probably. Probably. I have. I threw away his file. I thought he would get in." (*Id.* at 31.) Mr. Freeman's application has suffered the same fate. Moreover, aside from these two individuals, during his deposition Mr. Wills named three more successful African-American Tennesseans that he believes merit Resident Membership. (*Id.* at 25-26.) There is no record, however, that any of the three have been sponsored for membership. The fact remains that there is not a single African-American Resident Member at Belle Meade.

Even Belle Meade's own members acknowledge that the club discriminates. Speaking generally, Mr. Wills stated that Belle Meade "discriminates in its membership practices." (*Id.* at 17.) Also, according to the *Nashville Scene*, Belle Meade's former president, Ed Nelson, candidly admitted that women could not become Resident Members. Matt Pulle, *A White Man's Dance*, Nashville Scene, Mar. 13, 2008, http://www.nashvillescene.com/gyrobase/a-white-manandrsquos-dance/Content?oid=1196204. Mr. Wills agreed with this assessment, to the best of his knowledge. (Wills Dep. 8-9.) Likewise, my colleague, Judge Gilbert S. Merritt, a former Resident Member and current Honorary Member, observed that "[i]t's true women do not have a vote, and it's based on tradition," during an interview with the *Nashville Scene* in 2008. Matt Pulle, *A White Man's Dance*, *supra*; *see also* Wills Dep. 26 (also pointing to "tradition" as the reason for this practice). Judge Merritt now believes that there is "perhaps slight but still some ambiguity" about the question. (Merritt Dep. 36.)

While there is no way I can ascertain what is in the hearts and minds of Belle Meade's members, and recognizing that the club has no formal policies restricting membership, the record before this Court paints a picture of Belle Meade as an old boy's club that considers and admits Caucasian male applicants on a different basis than African-American and female applicants. Yet the Code of Conduct for United States Judges prohibits federal judges, such as the judge here, from "hold[ing] membership in any organization that practices invidious discrimination on the basis of race [or] sex." Canon 2C, Code of Conduct for U.S. Judges, *available at* http://jnet.ao.dcn (Guide to

Judiciary Policy, Volume 2, Part A, Chapter 2). If a judge wants to remain a member of such an organization, he may do so if he "make[s] immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices." Commentary to Canon 2C, Code of Conduct for U.S. Judges. But, if these efforts are unsuccessful, the judge must resign from the organization "in all events within *two years* of the judge's first learning of the [discriminatory] practices." *Id.* (emphasis added). This two-year resignation requirement has been in place since at least 1992.

The majority statement, perhaps seeing the cracks in its analysis, offers one final bolster: The clear two-year requirement in the Code, the statement urges, is simply aspirational and not the relevant test. To anchor this view, the majority statement points us to the commentary to our Rules for Judicial-Conduct and Judicial-Disability Proceedings. *See* Commentary to Rule 3, Rules for Judicial-Conduct and Judicial-Disability Proceedings, U.S. Court of Appeals for the Sixth Circuit (2008) ("Although the Code of Conduct for United States Judges may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules.").

But this assertion is not made in a vacuum, for through it, the commentary tries to flesh out the dictates of 28 U.S.C. § 351(a). Section 351(a) explains that "[a]ny person alleging that a judge has engaged in *conduct prejudicial to the effective and expeditious administration of the business of the courts* . . . may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct." *Id.* (emphasis added). The commentary proposes that, "[u]ltimately, the responsibility for determining what constitutes misconduct *under the statute* is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules." Commentary to Rule 3, Rules for Judicial-Conduct and Judicial-Disability Proceedings, U.S. Court of Appeals for the Sixth Circuit (2008) (emphasis added).

However, 28 U.S.C. § 351(a) and the commentary to Rule 3 seek to vindicate an entirely separate mandate on federal judges than that of the Code of Conduct for United States Judges. The Code's existence and power stems from 28 U.S.C. § 331. That statute created the Judicial Conference of the United States, which is composed of representatives from all the federal circuits and districts. *Id.* And the Judicial Conference "is authorized to exercise the authority provided in chapter 16 of this title as

the Conference, or through a standing committee." *Id.* Chapter 16 of Title 28 of the U.S. Code deals with "Complaints Against Judges and Judicial Discipline" and includes 28 U.S.C. § 351. The Judicial Conference exercised its § 331 authority by adopting the Code of Conduct for United States Judges, which binds all "United States circuit judges, district judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges." Introduction and Compliance with the Code of Conduct, Code of Conduct for U.S. Judges, *available at* http://jnet.ao.dcn (Guide to Judiciary Policy, Volume 2, Part A, Chapter 2). The dictates of the Code are thus requirements, which federal judges must follow, and nothing in federal statute or the Code suggests otherwise. While our rules may seek to clarify these mandates, they may not supersede them. Meanwhile, to the extent the commentary to Rule 3 could be read to suggest that the Code is not binding generally, it would conflict with § 331 and have to yield. Therefore, whether or not the judge's conduct here violated the separate federal requirement that he not engage in "conduct prejudicial to the effective and expeditious administration of the business of the courts," 28 U.S.C. § 351(a); Rule 3(h)(2), Rules for Judicial-Conduct and Judicial-Disability Proceedings, U.S. Court of Appeals for the Sixth Circuit (2008), that fact does not affect the separate inquiry of whether the judge violated the federal judiciary's Code of Conduct.

Our assessment of Belle Meade commands us to answer this question in the affirmative. The judge here apparently believed that he would succeed in combating Belle Meade's admissions practices, whether through his sponsorship of Mr. Freeman's application or otherwise. It is uncontested that the judge has actively sought out African-American members of the Nashville community in an effort to persuade them to seek membership in the club. However, it should have been clear to him at some point—and certainly now—that there is no likelihood that Belle Meade will admit either Mr. Freeman or Mr. Ewing, or any other African-American applicant, to its membership. I cannot say when the judge should have realized that his efforts would be unsuccessful, but it is reasonable to say that such knowledge would be inferred for at least the past several years. The judge's decision to continue as a member of Belle Meade after realizing the nature of its membership practices—in violation of the commentary to Canon 2C—compels me to vote to reject the findings of the Special Investigating Committee's Report. We federal judges must sometimes make sacrifices for the honor of the office we hold, and the judge's membership in Belle Meade should have been one of them. I respectfully dissent.