

January 28, 2019

Office of the Circuit Executive
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

IN RE: COMPLAINTS UNDER THE JUDICIAL CONDUCT AND DISABILITY ACT	 	Nos. 10 18-90038 through 10-18 90067, Nos. 10 18-90069 through 10-18 900107, and Nos. 10-18 900109 through 10 18 90122
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PETITION FOR REVIEW

To the honorable Judges of the Judicial Council of the Tenth Circuit:



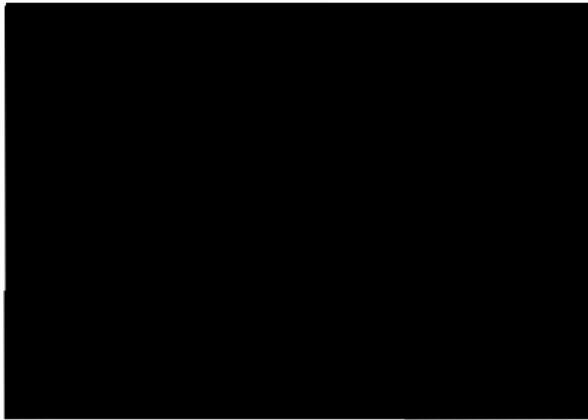
("Petitioners"), who were complainants in case Nos. 10 18 90039 and 10 18 90046, hereby petition the Judicial Council of the Tenth Circuit for review of the order of Chief Circuit Judge Tymkovich ("the Chief Judge"), entered on or about December 18, 2018, dismissing the above listed 83 complaints of serious judicial misconduct made against Justice Brett Kavanaugh ("Kavanaugh").

SUMMARY

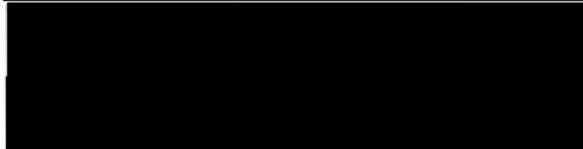
Petitioners assert that dismissal of the judicial misconduct proceedings against Justice Brett Kavanaugh is not appropriate for three primary reasons. First, when it is

broadly construed the Act applies to the judicial misconduct engaged in by Kavanaugh as a circuit court judge and the Judicial Council has jurisdiction as a result. Established rules of statutory construction require that the Judicial Conduct and Disability Act, 28 U.S.C. § 351, et. cet. (“the Act”), be broadly construed to bring about the purpose of the act – to ensure that the public has a remedy for judicial misconduct committed by circuit court judges. Second, the Chief Judge dismissed the 83 complaints based on his erroneous conclusion that the Act did not apply to Kavanaugh because he is no longer a “covered judge” due to his promotion to the Supreme Court. Kavanaugh is a judge subject to disciplinary action under the Act because he committed judicial misconduct while he was active as a circuit judge, he has not resigned as a circuit judge, he continues to hold that position under our Constitution and laws, and he remains eligible to serve as a circuit judge. Third, the Chief Judge dismissed the 83 complaints based on his erroneous conclusion Kavanaugh’s confirmation as a Supreme Court Justice was an “intervening event” that made action on the complaints “no longer necessary” and deprived the Judicial Council of jurisdiction. Under Rule 11 (e), only intervening events that render some or all of the allegations moot or make remedial action impossible provide grounds for dismissal. Kavanaugh’s continued activity as a judge means that the allegations are not moot and remedial actions such as censure or reprimand remain possible.

As further grounds for this petition, the Petitioners incorporate by reference the attached memorandum as if fully set forth herein.



Signatures of Petitioners Individually:



JUDICIAL COUNCIL OF THE
TENTH CIRCUIT

IN RE: COMPLAINTS UNDER THE
JUDICIAL CONDUCT AND DISABILITY
ACT

| Nos. 10 18-90038 through 10-18 90067,
| Nos. 10 18-90069 through 10 18-900107,
| and Nos. 10-18 900109 through
| 10 18 90122

PETITION FOR REVIEW SUBMITTED BY COMPLAINANTS

[REDACTED]
[REDACTED]

[REDACTED]

("Petitioners"), who were complainants in case Nos. 10-18-90039 and 10-18-90046, hereby petition the Judicial Council of the Tenth Circuit for review of the order of Chief Circuit Judge Tymkovich ("the Chief Judge"), entered on or about December 18, 2018, dismissing the above listed 83 complaints of serious judicial misconduct made against Justice Brett Kavanaugh ("Kavanaugh"). The Petitioners request review of the attached order because it is contrary to the Constitution and laws of the United States, including but not limited to, Article III, § 2 of the Constitution of the United States and the Judicial Conduct and Disability Act, 28 U.S.C. § 351, et. cet. ("the Act").

STATEMENT OF FACTS

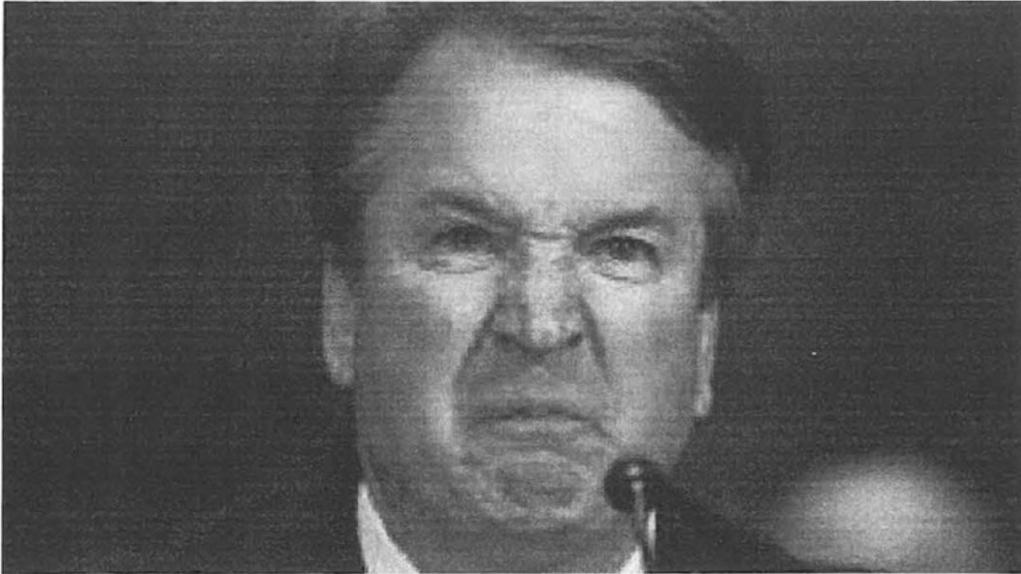
Included within the 83 complaints that were dismissed by the Chief Judge are very serious allegations against Kavanaugh concerning judicial misconduct that is prejudicial to the administration of justice and violates the Act.

The Petitioners alleged in Case No. 10 18 90039 that "Kavanaugh received stolen information taken from Democratic members of the Senate Judiciary Committee while he

worked in the White House and he perjured himself while testifying about the matter in Congress in 2004, 2006 and 2018.” Canon 1 of the Code of Conduct for United States Judges provides: “. . . A judge should maintain and enforce high standards of conduct and should personally observe those standards[.]” Canon 2 of the Code of Conduct for United States Judges provides: “A Judge Should Avoid Impropriety And The Appearance of Impropriety In All Activities.” The perjury committed by Kavanaugh that is described and substantiated in the Petitioners’ complaint is egregious judicial misconduct that violates Canon 1, Canon 2 and the Act.

In Case No. 10 18 90046 the petitioners alleged that in 2018 Kavanaugh engaged in “a public campaign of lies to cover-up and conceal sexual misconduct and crimes he committed in the past. He committed crimes by making false statements to the Senate Judiciary Committee and by committing perjury in his testimony to the Committee. Kavanaugh lied about and falsely denied engaging in sexual misconduct in an interview with Fox News that was a part of his public campaign to cover up and conceal his sexual misconduct.” The perjury, cover up and public campaign of lies committed by Kavanaugh that is described and substantiated in the Petitioners’ complaint is egregious judicial misconduct that violates Canon 1, Canon 2 and the Act.

Several of the dismissed complaints concern Kavanaugh’s nationally and internationally televised testimony made to the Senate Judiciary Committee on September 27, 2018. In a rage filled diatribe, Kavanaugh yelled, cried and attacked people and groups he associated with Democrats. Kavanaugh’s disgraceful and partisan spectacle degraded the judiciary.



Circuit Judge Brett Kavanaugh Testifying In the U.S. Senate on September 27, 2018

In his testimony on September 27, 2018, Kavanaugh declared:

This whole two week effort has been a calculated and orchestrated political hit, fueled with apparent pent up anger about President Trump and the 2016 election, fear that has been unfairly stoked about my judicial record; revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups.

Kavanaugh also threatened revenge on his political enemies, declaring:

This is a circus. The consequences will extend long past my nomination. The consequences will be with us for decades. This grotesque character assassination will dissuade confident and good people of all political persuasions from serving our country, and as we all know, in the political system of the early 2000s, what goes around comes around.

Kavanaugh's partisan tirade violated Canon 2A of the Code of Conduct for United States Judges. Canon 2A provides in relevant part:

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. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct.

The website of the Administrative Office of the U.S. Courts advises the public that a judge engages in judicial misconduct by treating "others in a demonstrably egregious and hostile manner" or by "making inappropriately partisan statements." Kavanaugh's partisan tirade violated Canon 2A because reasonable minds would conclude from them that Kavanaugh's "impartiality, temperament, [and] fitness to serve as a judge is impaired."

Kavanaugh's evasive, dissembling & disrespectful testimony in response to questioning by Senator Klobuchar and other Democratic Senators on the Judiciary Committee violated the Canons of the Code of Conduct for United States Judges. In response to questions about his drinking history that were relevant to the sexual misconduct allegations of witness Christine Blasey Ford, and were raised by Kavanaugh in his own written testimony, Kavanaugh challenged Senator Klobuchar, repeatedly demanding to know if she had experienced blackouts. Kavanaugh implicitly admitted that he went to far with this disgraceful testimony since he reportedly apologized to Senator Klobuchar afterward. Kavanaugh's testimony in response to questioning by Democratic Senators violated Cannons 1, 2, 2A and 3.

This matter was referred to the Judicial Council of the United States Court of Appeals for the Tenth Circuit by Chief Justice Roberts. In his letter to the Chief Judge, Justice Roberts stated: "I have selected the Judicial Council of the United States Court of Appeals for the Tenth

Circuit to accept the transfer and to exercise the powers of a judicial council with respect to the identified complaints and any pending or new complaints relating to the same subject matter."

The Petitioners request that the Chief Judge be disqualified from participation in review of this Petition under Rule 25 (c).

ANALYSIS

I. CHIEF CIRCUIT JUDGE TYMKOVICH ERRED IN CONCLUDING THAT THE JUDICIAL COUNCIL LACKED JURISDICTION OVER 83 COMPLAINTS OF JUDICIAL MISCONDUCT FILED AGAINST KAVANAUGH.

A. When it is broadly construed the Act applies to the judicial misconduct engaged in by Kavanaugh as a circuit court judge and the Judicial Council has jurisdiction as a result.

The Chief Judge narrowly and erroneously construed the Act to protect another judge rather than broadly construing the statute to protect the people of the United States. The Act grants "any person" the right to file judicial misconduct complaint against a circuit court judge. 28 U.S. Code § 351 (2); 28 U.S. Code § 351 (d)(1). It's purpose is to provide a remedy for judicial misconduct. In re Complaint of Judicial Misconduct, 570 F.3d 1144, 1148 (9th Cir. 2009). It has long been a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." Sutton v. United Air Lines, Inc., 527 U.S. 471, 504 (1999) quoting Tcherepnin v. Knight, 389 U. S. 332, 336 (1967). Under the rule of broad construction, the Act should apply to any active judge who committed misconduct while serving as a circuit judge unless it appears with unmistakable clarity that the judge is excluded from the Act. Nothing in the Act or in the Rules for Judicial-Conduct and Judicial-Disability that

implement the Act show with unmistakable clarity that Kavanaugh is not subject to the Act. Kavanaugh is subject to the Act under well established rules of statutory construction notwithstanding his promotion to the Supreme Court.

B. Kavanaugh is a judge subject to the jurisdiction of the Judicial Council under the Act.

The Chief Judge erroneously concluded that the Act did not apply to the 83 complaints against Kavanaugh because Kavanaugh is no longer a “covered judge.” 28 U.S. Code § 351 (d) (1) explains which judges are covered by the act: “the term ‘judge’ means a circuit judge, district judge, bankruptcy judge, or magistrate judge.” Kavanaugh was a covered judge both when he committed the violations complained of by the Petitioners and when they filed their complaints against him. The petitioners were permitted to file a complaint against Kavanaugh by 28 U.S. Code § 351(a) which provides:

Filing of Complaint by Any Person.—

Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability, 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.

It is clear that the Petitioners made a valid complaint in conformity with the Act. Rule 8 (c) provides: “Complaint Against Noncovered Person. If the circuit clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint under these Rules.” The Petitioners’s complaints were accepted by the circuit court because they were filed while Kavanaugh was a circuit judge and did not violate the prohibition in Rule

8 (c) on filing against a non-covered person. Kavanaugh is subject to the Act because he committed misconduct while he was an active circuit court judge, the Petitioners' complaints and those of others were filed while he was a circuit judge, the complaints concerned the misconduct he committed while he was a circuit court judge and he remains an active judge.

Kavanaugh's continuing status as a circuit judge is further grounds for the Judicial Council's jurisdiction in this matter. If Kavanaugh remains a circuit judge in addition to being a Supreme Court Justice, then the Act explicitly grants Judicial Council has jurisdiction over the Petitioners' complaints as well as some of the other 81 complaints. The Chief Judge erroneously assumed that Kavanaugh lost his status as a circuit judge because he was elevated to the Supreme Court. Confirmation to the Supreme Court did not deprive Kavanaugh of his status as a circuit judge so much as it gave him a new qualification to sit on an additional court. The Constitution provides: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour." Article III, § 2. Since Kavanaugh has never resigned his position as Judge or been removed from office under the Constitution for bad behavior, he remains a circuit judge even though he was elevated to the Supreme Court. This understanding of the Constitution is consistent with Acts of Congress and longstanding practice in which acting and retired Supreme Court Justices have served on circuit courts and other inferior courts by designation. 28 U.S. Code §§ 292 and 294. Even when a judge retires from service as a Supreme Court Justice and is replaced, the judge can still serve as a circuit court judge so long as their status as a circuit court judge has not been terminated by resignation or impeachment. 28 U.S. Code § 294 provides:

Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.

If being elevated to the Supreme Court terminated a judge's status as a circuit court judge, it would be unlawful for the Chief Justice to designate and assign retired justices to serve as a circuit justices since their status as circuit judges would be revoked. Kavanaugh's elevation to the Supreme Court is analogous to an attorney who, after being admitted to practice in a circuit court, is later admitted to practice before the Supreme Court. Being admitted to the Supreme Court does not deprive an attorney of his or her previously granted right to practice in a circuit court. Having never relinquished his office by resignation, Kavanaugh remains a circuit judge. A judge who is promoted, like a judge who retires, does not relinquish his or her office. Booth v. United States, 291 U.S. 339, 348-351 (1934) (a judge who retires does not relinquish his or her office). Kavanaugh is subject to the Judicial Council under the Act because his promotion to Supreme Court Justice does not negate his confirmation as a circuit court judge.

Kavanaugh's continuing authority to sit as a circuit judge, as demonstrated by the actions of retired Supreme Court Justices, subjects him to the jurisdiction of the Judicial Council under the Act. Justices Souter and O'Connor are recent examples of Supreme Court Justices who returned to service as circuit court judges. Saltzman, Jonathan, O'Connor to Hear Cases as Visiting Judge to Hub Court: Ex Justice to Serve US Appeals Court, The Boston Globe (April 29, 2008). Justice Souter has served as a circuit judge on dozens of reported cases since stepping down from the Supreme Court, including the recent case of Draper v. Healey, 827 F.3d 1

(2016). The distinction between a circuit judges and a circuit judge who has been promoted to the Supreme Court is not a reason to deny the Judicial Council jurisdiction in Kavanaugh's case.

Kavanaugh remains subject to the Act for valid complaints filed against him while was a circuit judge regardless of his promotion to the Supreme Court because there is no provision in the Act excusing him from responsibility for the judicial misconduct described in the complaints against him and there is no good reason to excuse him from responsibility since he continues to perform judicial duties. Criminal offenders are not normally excused from responsibility analogous circumstances. For example, an officer of a bank would not normally escape responsibility from laws prohibiting theft by bank tellers merely because the officer received a promotion to being an officer of the bank after committing the offense. Giving Kavanaugh a free pass on his misconduct simply because he was given a promotion defies logic and common sense. The Chief Judge's conclusion that Kavanaugh's elevation to the Supreme Court made moot the Petitioners' complaints about his unethical conduct as a circuit judge defies the logic that is traditionally applied in other legal settings. Being elevated to the Supreme Court does not make Kavanaugh above the law.

- C. Kavanaugh's promotion to the Supreme Court was not an intervening event that deprived the Judicial Council of Jurisdiction.

The Chief Judge erroneously concluded that the Act did not apply to the 83 complaints against Kavanaugh because Kavanaugh's nomination and confirmation as a Supreme Court Justice was an "intervening event" that made action on the complaint "no longer necessary" under Section 352(b)(2) of the Act. The Rules for Judicial Conduct and Judicial-Disability Proceedings specify the types of intervening events that make action on the complaint "no

longer necessary.” Rule 11 (e) provides:

Intervening Events. The chief judge may conclude a complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible. [emphasis supplied].

The allegations are not moot because Kavanaugh continues to engage in judicial activities and there are a variety of remedial action allowed under Rule 20(b)(1)(D) that are possible. The District Council could “censur[e] or reprimand[]” Kavanaugh and it could request Kavanaugh “to retire voluntarily.” Rule 20(b)(1)(D). The Judicial Council can investigate the matter and determine whether impeachment may be warranted as a result of Kavanaugh’s misconduct during the time that he was a circuit judge. If the Judicial Council makes such a determination, Rule 23 provides that “it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.” The fact that Kavanaugh’s elevation to the Supreme Court is built upon a foundation of crimes and severe judicial misconduct makes addressing these 83 complaints of misconduct that he committed while he was a circuit judge essential to uphold the language and purposes of the Act. By the Chief Judge’s faulty reasoning, Kavanaugh would be subject to the jurisdiction of Judicial Council for his crimes and misconduct had he failed to be elevated to the Supreme Court, but because he succeeded in cheating his way onto the Supreme Court, there is nothing that the Judicial Council can do. Far from being moot, the integrity of the judiciary will be destroyed so long as Kavanaugh’s criminal misconduct and notorious partisan statements are ignored by the Judicial Council.

The Chief Judge’s conclusion that Kavanaugh’s elevation to the Supreme Court was intervening event that warrants dismissal of the complaints was erroneous because it is

contradicted by the commentary to Rule 11(e). The commentary to Rule 11 explains in detail the meaning of the Act's "intervening events" provision:

Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to "conclude the proceeding," if "action on the complaint is no longer necessary because of intervening events," such as a resignation from judicial office. Ordinarily, however, stepping down from an administrative post such as chief judge, judicial-council member, or court-committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as the subject of a complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed. Id. [emphasis supplied].

Proceedings against judges, who have relinquished their judicial office by resigning, are concluded under the Act because their prior actions no longer have any further effect on the judiciary and the resolution of such complaints is therefore a moot matter. Since he has not resigned continues to "perform[] judicial duties," his misconduct remains a concern for the judiciary and for the public. Any circuit judge who engages "in conduct prejudicial to the effective and expeditious administration of the business of the courts" while serving as a circuit judge is subject to the Act so long as he or she continues to perform judicial duties. Kavanaugh is therefore subject to the Act and to the jurisdiction of the Judicial Council.¹

D. The Chief Judge's decision, rather than relying on the text of the statute, erroneously reads language into the Act that was omitted by Congress.

The Chief judge's decision is not properly based in the text of the Act but is oriented toward excusing Kavanaugh from responsibility for violations of the Act by reading language into the Act that is not there. The judiciary is not a legislature and it is not the proper function

¹ Kavanaugh can escape from responsibility for the complaints in this matter as provided in the commentary to Rule 11(e) if he "resign[s] from judicial office."

of a judge to supplement statutes so as to achieve an outcome that is desired by that judge. See Iselin v. United States, 270 U.S. 245, 250-251 (1926) (holding that the courts will not read language into a statute where it would result in "an enlargement of [the statute] by the court, so that what was omitted ... may be included within its scope"). Judge Kavanaugh testified in agreement with this doctrine in his testimony last September before the judiciary committee. Kavanaugh testified that the law "is what is written in the text of the statute. Justice Kagan said it well in a talk two years ago, maybe three, at Harvard Law School. She said, we're all textualists now." The text of the Act does not provide that a circuit judge escapes from liability for violating the Act by obtaining a promotion to the Supreme Court. The Chief Judge erred by reading this language into the Act when it is nowhere to be found in the text.

CONCLUSION

The Petitioners' complaints, and in many of the complaints against Kavanaugh that were filed by others, allege that Kavanaugh committed perjury and other egregious misconduct. This misconduct aided him in obtaining confirmation to the Supreme Court. It is unlikely that Congress intended perpetrators who are elevated to the Supreme Court through the use of crime, fraud and deception to then be able to use their ill-gotten position as shield from responsibility for their misconduct. Although the Chief Judge uses lofty language, he is engaging in judicial activism in order to defend Brett Kavanaugh. The Judicial Council should not give Kavanaugh a free pass.