



January 24, 2019

Mr. David Tighe
Circuit Executive
United States Courts for the Tenth Circuit
Office of the Circuit Executive
1823 Stout Street
Denver, Colorado 80257

Re: **Judicial Complaint Nos. DC-18-90064; 10-18-90045**

Dear Mr. Tighe,

I have received and reviewed the letter from your office dated December 18, 2018, and signed by Ms. Fathallah as Deputy Circuit Executive, along with the documents referenced.

Introduction:

I hereby petition the Council for review of: (a) the Order of the Judicial Council of the 10th Circuit Court of Appeals (the "Council") dated December 18, 2018 (the "Order"), dismissing my judicial misconduct complaint (the "Complaint") against The Hon. Brett Kavanaugh; and (b) the process, procedure and decision-making underlying the Order; and (c) clarification of the Order's purported avenue of appeal and/or petition for review; and (d) a continuation of the proceedings after such clarification is provided, such that all 83 complainants, or at least those seeking appeal/review, are not prejudiced in the pursuit of their rights by erroneous procedures not of their own making.

This letter expresses the intention to request and receive guidance from the Council, or other appropriate person or entity, on how any of the 83 Complainants ought to obtain and exercise their right of appeal, more specifically pursue their right to Petition for Review, given that the procedural issues reflected in the Order, and presented to Complainants and the public, appear to prevent the exercise of the right to Petition for Review pursuant to the Act, Rules and Order.

Reference is made to the Rules for Judicial-Conduct and Judicial-Disability Proceedings (each a "Rule" and collectively the "Rules") promulgated under the Judicial Conduct and Disability Act of 1980 (the "Act"). The Act provides me with a right to present a complaint of judicial misconduct, a right to have that complaint considered and decided in accordance with the Rules, and a right to have the decision reviewable in accordance with the Rules. The latter two rights have been denied to me, and likely to all 83 complainants, by the procedures used in this matter

It appears that the Council's Order dismissing my Complaint, presumably along with all of the other 82 Complaints,¹ used one or more procedures not provided in the Rules or the Act.

By so doing, the Council violated its responsibilities under law and denied the due process guaranteed to me, and all of the other 82 Complainants, under the Act. As my recourse at this moment might be to any of the addressees of this letter, I write this to you all and ask that you correct this situation and provide me with a clear path forward to pursue my Complaint.

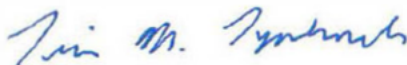
Relevant Facts:

My complaint was sent to the D.C. Circuit Court of Appeals on September 20, 2018, and accepted by the Court Executive, in the manner required under Rule 6. It appears that the D.C. Circuit Judicial Council ultimately requested that Chief Justice Roberts transfer my Complaint (along with many others) to the judicial council of another circuit, and on October 10, 2018, the Chief Justice transferred these complaints to the Council.

Over two months later, the Council issued the Order dismissing my complaint. The Order is very specific in the required procedure a Complainant must use to pursue the right of a Petition for Review of this Order:

and Disability. See Rule 11(g)(2). As with any misconduct complaint, under 28 U.S.C. § 352(c) and Rule 11(g)(3), any complainant has a right to seek review of this Order by filing a petition for review by the Judicial Council as provided in Rule 18(a) and (b). Should any complainant petition for review, the Judicial Council must consider the petition in accordance with Rule 19. Any such petition must be filed with the Office of the Circuit Executive within 42 days after the date of this Order. See Rule 18(b); 10th Cir. Misconduct Rule 8.1.

So ORDERED, December 18, 2018. and
Entered on behalf of the Judicial Council
Of the Tenth Circuit*

By: 
Honorable Timothy M. Tymkovich
Chief Circuit Judge

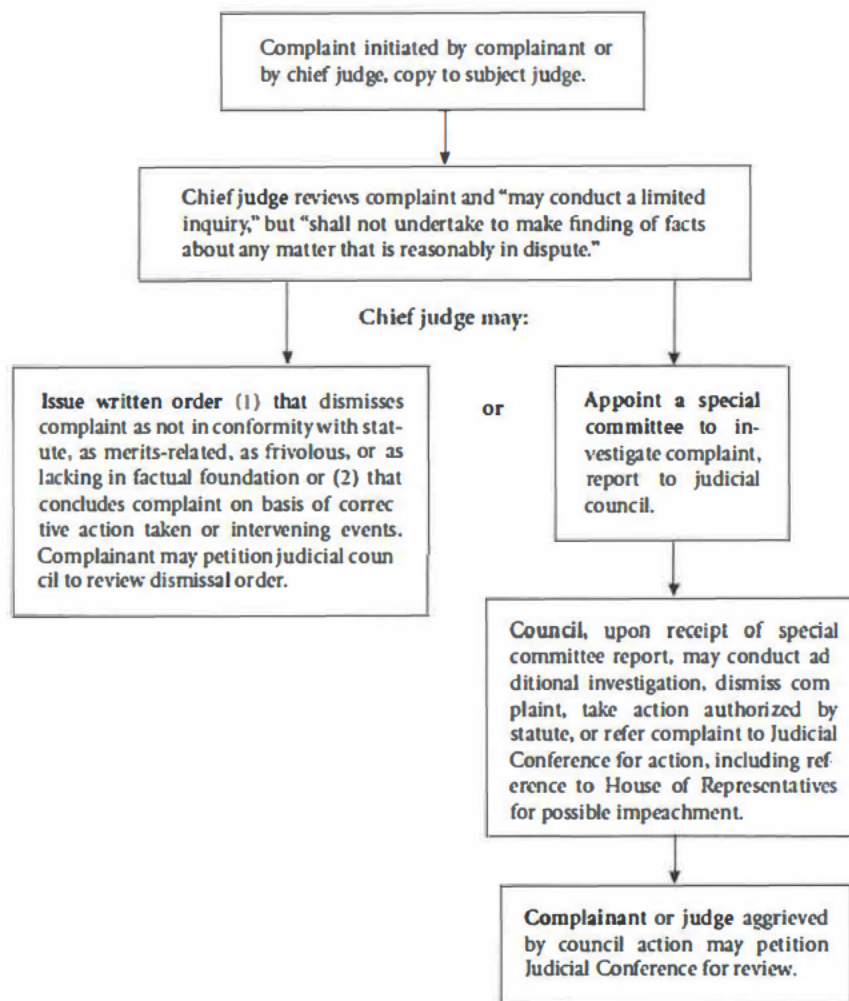
Order, p. 10.

¹ <https://www.ca10.uscourts.gov/ce/misconduct/kavanaugh-complaints>



It is useful at this point to review the chart set forth in the Breyer Report cited as authoritative in the Order illustrating the procedure the Rules require for the resolution of judicial misconduct complaints:

Figure 1. Flowchart of Major Steps in Complaint Processing



The required procedure for a judicial misconduct complaint against a judge sitting on a United States Court of Appeal is review by the Chief Judge of that court (or her appointee in the event of a recusal by the Chief Judge)(here, the "Chief Judge"). The options available to the Chief Judge, pursuant to the Act and/or Rules, are only these:

- (1) Dismiss the complaint on grounds set forth in Rule 11(c) [not done here];
- (2) Conclude the complaint on the ground that voluntary corrective action has been taken as described in Rule 11(d) [not done here];



(3) Conclude the complaint because of “intervening events” described in Rule 11(e) [not done here]; or

(4) Appoint a special committee as described in Rule 11(f), to investigate the complaint and report to the judicial council (see generally Rule 11(a)) [not done here].

If a complaint against an appellate judge is dismissed under Rules 11(c)-(e), the complainant has a right to appeal (petition for review) that dismissal under Rule 18. That appeal is to the Council.

There are three ways in which the Council, as an appellate body, may act under the Rules:

(A) If the Chief Judge disposes of a Rule 5 “identified” complaint under Rules 11(c), (d) or (e), the Chief Judge must transmit the complaint for review by the relevant judicial council (Rule 11(g)(3)).

(B) If the Chief Judge disposes of a Rule 6 complaint under Rules 11(c), (d) or (e), the complainant and the Chief Judge have the right to petition the relevant judicial council for review, as provided in Rule 18 (Rule 11(g)(3)).

(C) If the Chief Judge appoints a special committee to investigate a complaint, then upon completion of the special committee’s report, the relevant judicial council can act to dismiss the complaint or take remedial action (Rule 20).

A complainant can then, and only then, appeal a decision of a judicial council to the Committee on Judicial Conduct and Disability (depending on whether the complaint was considered by a special committee and whether the decision of the judicial council was unanimous). See Rule 21.

For reasons not discussed, much less explained, the Council elected to ignore the procedure set forth in the Rules. Instead of having my Complaint first considered by the Chief Judge under Rule 11, the Council took it upon itself to consider my Complaint and issue the Order.

By substituting itself for in the role of Chief Judge, coupled with the specific mandate for seeking an appeal in the last paragraph of the Order, *supra.*, the Council rendered uncertain, if not procedurally impossible, my right (or any of the other 82 Complainants’ rights) to seek an appeal to the Council under Rule 18 because Rule 18 by its terms **applies only to orders issued by the Chief Judge** under Rule 11(c), (d) or (e)).² By so doing, the Council’s Order requires the complainant to seek its appeal before the same Council that made the underlying decision.

My right to appeal my Complaint to the Committee on Judicial Misconduct and Disability is similarly uncertain, as it applies only to certain Council orders entered under Rules 19 and 20. The Order gives no indication it travelled on these Rules; indeed, the Order states differently.

² It should be noted that the Order states that pursuant to Rule 11(g)(3) I have a right to seek review of the Order under Rule 18. Unfortunately, I have no clear right to seek an appeal that is not provided for in the Rules, any more than the Council has the power to grant me such a right—or for that matter, to resolve judicial misconduct complaints outside of the procedures set forth in the Rules.



The sole explanation offered up by the Council for its failure to consider my Complaint in accordance with the Rules is asserted in a passing, conclusory fashion on page two of the Order:

Following the transfer by the Chief Justice, the Tenth Circuit Judicial Council has retained the matter and assumed the initial role ordinarily assigned to the chief circuit judge under 28 U.S.C. § 352(a)–(b) and Rule 11. *See* Rule 26 cmt. (the transferee judicial council “shall determine the proper stage at which to begin consideration of the complaint”); *In re Complaint of Judicial Misconduct*, No. 17-90018 (2nd Cir. 2017) (resolving through initial analysis by full judicial council complaint transferred to it by Chief Justice under Rule 26). This Order remains subject to any appeal rights available

Order, p. 2

As authority for this fundamental change in procedure, the Council cites not to Rule 26, but a “comment” to the Rule. The portion of the comment quoted by the Council is interpreted to mean that, where a judicial council receives a complaint from a Chief Justice under Rule 26, the council “shall determine the proper stage at which to begin consideration of the complaint.” But the Council ignores the fact that this quoted text, snipped from the comment to the Rule 26, is necessarily controlled by the text of the Rule itself.

First, Rule 26 provides that upon receiving a complaint a council “may then exercise **the powers of a judicial council under these Rules.**” (emphasis added). Rule 26 expressly limits what a judicial council can do. To be sure, Rule 26 nowhere grants, or implies a grant, to any judicial council the power to resolve complaints in lieu of the Chief Judge.

Moreover, and wholly discomfiting, is the fact that the Council, in this effort to justify its departure from the Rules, elected to truncate the very text it quoted, and on which it relies entirely for the power it usurps from the Chief Judge. The text of the comment reads in full:

“Upon receipt of a transferred proceeding, the transferee judicial council shall determine the proper stage at which to begin consideration of the complaint for example, **reference to the transferee chief judge, appointment of a special committee**, etc.” (emphasis added).

There is nothing in this text to suggest that its authors intended that, included in the definition of “the proper stage” was to place the Council in the role of primary decisionmaker, the role specifically assigned by the Act and Rules *only to* a Chief Judge or a Special Committee. On the contrary, as a full quote of the text would have demonstrated had it been fully quoted.

The comment expressly states that reference to a Chief Judge is one of the “proper stages” available. The comment expressly states that appointment of a special committee is another “proper stage” available to the Council. What the text of the comment does *not* do is allow the

Council to empower itself to substitute into the role of a Chief Judge, or the special committee. There may be several reasons, but most assuredly one of those reasons is because the Act, and the Rules, call for the Council to handle appeals or “petitions for review” of a decision by a Chief Judge or Special Committee. By usurping the role of either of these decisionmakers, the Council has violated the legal boundaries of the process and procedure set forth in the Act and the Rules, with serious consequences for all.

In short, the very comment cited and (partially) quoted by the Council as the sole authority to substitute itself into the role of Chief Judge or special committee (or both) is actually authority *standing for exactly the opposite proposition*. This conclusion is inescapable.

The only precedent cited by the Council for its handling of my Complaint is *In re Complaint of Judicial Misconduct*, No. 17-90118 (2nd Cir. 2017) (here, “*Kozinsky*”).³ But the order in *Kozinsky* is wholly inapt. It does not support the conclusory proposition asserted in the Order.

Rather, the *Kozinsky* order relies on the power granted to judicial councils under Rule 20(b)(1)(B) to act **following appointment of a special committee**. As no special committee was appointed to investigate my complaint, the Council’s reliance on *Kozinsky* is facially incorrect.⁴ *Kozinsky* was a Rule 5(a) matter, “identified” **by the Chief Judge of the Ninth Circuit**, so there was no complainant in that case with due process rights that would be violated by a judicial council’s conclusion that it could deviate so materially from the Rules.

My Complaint, and the other 82 complaints, is unlike *Kozinsky* in a third important respect. *Kozinsky* addressed this question: can a judicial council address the judicial misconduct of a judge who has **retired or resigned**? This Rule 11 “intervening event” relied upon in *Kozinsky* has a case-dispositive factual distinction from the Kavanaugh matter – the act of retirement/resignation allows judicial notice of the fact that Judge Kozinsky would never serve another day on the federal bench for the remainder of his life. These are most assuredly not the facts alleged in the 83 complaints presented in the Kavanaugh matter.

My Complaint, and likely all 82 others, creates an important issue of first impression:

³ The *Kozinsky* case order itself cites a number of cases for support: (1) *In re Charge of Judicial Misconduct*, No. 12-90069 (2nd Cir 2012) (“Martin Case”), (2) *In re: Complaint of Judicial Misconduct*, No. 16-01 (Comm. On Jud. Conduct and Disability of U.S. Jud. Conf. Jan 26, 2017) (“Smith-Hudspeth Case”), (3) *In re Charge of Judicial Misconduct*, 91 F.3d 90 (9th Cir. 1996) (“Unknown Judge Case 1”), and (4) *In re Complaint of Judicial Misconduct*, 10 F.3d 99 (3rd Cir. 1994) (“Unknown Judge Case 2”). The Martin Case was a Rule 5(a) identified complaint transferred under Rule 26, where the transferee judicial council ruled that the complaint should be handled by a special committee. The Smith-Hudspeth Case was a complaint involving alleged sexual misconduct by Judge Walter S. Smith, Jr., which was investigated by a special committee and approved by a judicial council. In Unknown Judge Case 1, a special committee was also appointed. Unknown Judge Case 2 was decided by the chief circuit judge.

⁴ The order in *Kozinsky* did not explain how the procedure followed by the judicial council in that case fit into that provided by Rule 20(b)(1)(B). We must note that there does not appear to have been any appointment of a special committee in the *Kozinsky* case.

Should the Act cover misconduct *committed by an individual while serving as a Circuit Judge*, who is elevated to Supreme Court Justice *after* the misconduct has occurred?

The answer to this question is of interest not just to me and the other 82 complainants, but also the American people, and also the three branches of federal government – not the least of which is the Judiciary. After all, each of the five (5) Canons in the Code of Conduct for United States Judges pivots on one big idea, above all others: “public confidence in the integrity and independence of the Judiciary.” It is notable that the Order accepts and restates the fact that “the allegations contained in the [83 Kavanaugh] complaints are serious... .” Order, p. 9. The Canons apply to all judges, including justices, because public confidence in the integrity and independence of every judge or justice is essential for the Judiciary to function in a democracy.

The Path Forward (?):

The question created by the fundamental procedural errors presented in this matter remain wholly unresolved: What recourse is left to me, or any of the other 82 complainants, to challenge either, or both, the unorthodox procedure used by the Council to dismiss my Complaint, as well as the substantive grounds for the dismissal?

The Order itself declares that the Council’s decision “remains subject to any appeal rights available to complainants pursuant to the Rules.” But those “appeal rights...pursuant to the Rules” depend entirely on the complaints having first been addressed, properly and fairly, *in accordance with those Rules*.

The Rule 18 path to appeal a decision to dismiss a complaint is straight to the relevant judicial council. But this course of action is limited to review of an order issued by a Chief Judge, under Rule 11. As no order was issued by the Chief Judge in this matter, my appeal rights under Rule 18, as Ordered by the Council, have been cut off.

The Rule 21 path to appeal a decision by a judicial council is to the Committee on Judicial Conduct and Disability. But a Rule 21 appeal is limited to only certain judicial council decisions under Rules 19 and 20 and, in some cases, may depend on whether the decision of the judicial council was unanimous. As the Council did not purport to act under *any* provision of Rule 19 and 20, nor did it reveal its vote to be unanimous, the Order by the Council once again cuts off my right to appeal.

Alternatively, one might try to understand that the Council acted not under Rules 11, 19 or 20, but instead under Rule 26. But this is facially improper because, again, Rule 26 limits the Council to only those “powers of a judicial council under these Rules.” Thus, the only way to understand the Council’s Order under Rule 26 is that the Council effectively rejected the offer of transfer of my Complaint, and the other 82 complaints, in the first instance.⁵

⁵ At least one prominent critic of the Council’s Order has concluded that the Council’s Order “punts” the resolution of my Complaint back to the Chief Justice.



If this is truly the best way to understand the Order, if this was in fact the decision and intention of the 10th Circuit Judicial Council, then I and likely 82 other complainants would simply ask of the Council – please so state, in writing, such that we have clarity on how to proceed before the Chief Justice.

If this was not the decision and intention of the Council, please elucidate that intention, please direct complainants toward a pathway for appeal or petition for review *by a body other than the Council itself, which is now unequivocally estopped from a legitimate review of its own decision.*

No fair understanding of due process would require an appellant to take an appeal of any decision back to the same person or body that issued it. The simple reason why we provide avenues of appeal is to uncover and correct errors that inevitably occur in the processes established to achieve justice. Common sense tells us that the body *least* well equipped to discover and correct such errors is the body that made the error in the first place. This same common sense tells us that the Council's decision to act both as trial court and court of appeals in these 83 total complaints is fundamental error.

Conclusion:

Given: (i) the Council's determination to adjudicate my Complaint outside of the rules; (ii) the responsibility shared by other parties not sitting on the Council in following relevant authorities, as well as principles of textual interpretation; and (iii) the acts or omissions by the Council that blocked any clear and certain path forward for the "right to appeal" required by the Act, Rules and the Order, this letter serves as my:

- (1) Initial Petition for Review and/or Appeal of the dismissal of my Complaint, in particular for the purposes of protecting any deadline that might otherwise cut-off any such rights; and
 - a. Reservation of right to supplement this initial petition due to the procedural issues presented above; and
- (2) Formal request to the Council, or other appropriate authority, for clarification of all rights, for all complainants, to appeal and/or petition for review the Council's Order of December 18, 2018, specifically to include clarification on the individual(s) or body to whom said appeal should be directed, and the setting of a new schedule for the delivery of briefing in support of such petition and/or appeal;
- (3) Formal request that the Council direct the Circuit Executive to transmit this letter to the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States to likewise be forwarded "to any relevant Congressional committees for their information," in order to "ensur[e] that governing bodies with clear



jurisdiction are aware of the complaints...,” as this laudable procedure was applied to the Order by the Council itself:

The importance of ensuring that governing bodies with clear jurisdiction are aware of the complaints should also be acknowledged. See Nat’l Comm’n on Judicial Discipline and Removal, *Report of the Nat’l Comm’n on Judicial Discipline & Removal*, 152 F.R.D. 265, 342–43 (1994). Accordingly, we request that the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States forward a copy of this Order to any relevant Congressional committees for their information.

The Circuit Executive is directed to transmit this Order to the complainants and copies to Justice Kavanaugh and the Judicial Conference Committee on Judicial Conduct

Order, p. 10

Thank you in advance for your careful consideration of this matter.

