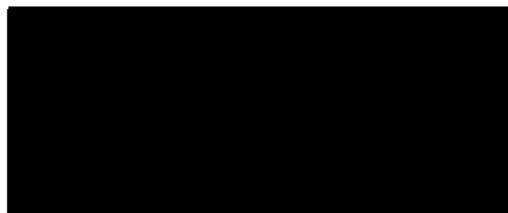


Ms. Elisabeth Shumaker  
Clerk of the Tenth Circuit  
The Byron White U.S. Courthouse  
1823 Stout Street  
Denver, Colorado 80257



*In re: Complaint Under the Judicial Conduct and Disability Act, No. 10-18-90050*

Dear Ms. Shumaker,

I hereby petition the Judicial Council for review of the Order dated December 18, 2018 (the “Order”), by which the Council dismissed a judicial-misconduct complaint (No. 10-18-90050) (the “Complaint”) against The Honorable Brett Kavanaugh that was filed while he was a circuit judge, merely because he was later sworn in as an Associate Justice of the Supreme Court. For ease of reference, I will number the paragraphs that follow.

1. The Order is erroneous because it violates the time-of-filing rule by which federal subject-matter jurisdiction is almost always determined. Moreover, no subsequent event has made consideration of the Complaint any less “necessary”—the statutory test—than on the day the Complaint was filed.
2. The Order is otherwise inappropriate, in that it is unlawful, inequitable, wrong on policy grounds, and even in tension with the transfer of the Complaint to this Council.

**Facts**

3. I filed the Complaint with the United States Court for the District of Columbia Circuit on October 1, 2018. On October 4, 2018, the Office of the Circuit Executive for that Circuit assigned the Complaint number DC-18-90069. (*See* date stamps on Complaint.)
4. On October 5, 2018, the Deputy Circuit Executive for the District of Columbia Circuit forwarded the Complaint to the Chief Justice of the United States.
5. Only on the next day, October 6, 2018, was Justice Kavanaugh confirmed by the Senate and sworn in as an Associate Justice of the United States. In other words, the Complaint was pending against Justice Kavanaugh, while he was a circuit judge, for five days.
6. On October 10, 2018, the The Honorable John Roberts, Chief Justice of the United States, assigned the Complaint to the this Council. The Chief Justice’s letter of transfer—dated October 10, 2018, several days *after* Justice Kavanaugh was elevated to the Supreme Court—did not describe any jurisdictional flaw in the Complaint.
7. On December 18, 2018, this Council issued the Order dismissing the Complaint, along with 82 other judicial-misconduct complaints against Justice Kavanaugh.

8. In the Order, this Council initially stated that the Complaint “must be dismissed” because “Justice Kavanaugh *is* no longer a judge covered by the Act.” (Order at 2 (italics added).) According to the Order, this Council “[l]ack[s] statutory authority to do anything more” and “lacks jurisdiction” to make findings on the merit of the Complaint.
9. Elsewhere, however, the Order’s reasoning is less jurisdictional. For the Order also states that the Complaint is “no longer *appropriate* for consideration.” (Order at 9 (italics added).) The Order reasons that the Act “*effectively precludes*” action against “an individual who is no longer a circuit, district, bankruptcy or magistrate judge.” (Order at 6–7 (italics added).)
10. Two days later, on December 20, 2019, I wrote Chief Justice Roberts, copying all eight Associate Justices, a letter that read in part as follows:

Unlike the circuit courts, this Court does not seem to have posted on its website any judicial-misconduct rules or other guidance for a potential complainant who wishes to lodge a complaint.

Could the Court please therefore inform me (1) how I may file a judicial-misconduct complaint in this Court and (2) what procedural rules would govern such a complaint?

11. A copy of that letter is enclosed with this petition.
12. As of yesterday—January 27, 2019—I had not received any response to that December 20 letter, whether from the Chief Justice, from any Associate Justice, or from any member of the Supreme Court’s staff.

### **Legal Argument**

13. If the Order is considered as a ruling on subject-matter jurisdiction, then the Order is erroneous because it violates the time-of-filing rule. If the Order is considered as a ruling on whether consideration of the Complaint is appropriate, the Order is wrong for a host of further reasons.

#### **I. The Order Is Erroneous Because It Violates the Time-of-Filing Rule.**

14. “It has long been the case that ‘the jurisdiction of the court depends upon the state of things at the time of the action brought.’” *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) (Scalia, J.) (quoting *Mollan v. Torrance*, 9 Wheat. 537, 539 (1824)).
15. Moreover, the jurisdiction of the federal courts, once vested, “cannot be ousted by subsequent events.” *Mollan*, 9 Wheat. at 539 (Marshal, C.J.).
16. This time-of-filing rule is “hornbook law . . . taught to first-year law students in any basic course on federal civil procedure.” *Grupo Dataflux*, 541 U.S. at 570–71.

**A. When the Complaint was filed, Justice Kavanaugh was a judge subject to the Act.**

17. Here, as shown above, the Complaint was filed on October 1, 2018.
18. On October 1, 2018, of course, Justice Kavanaugh was a circuit judge, and therefore was a judge subject to the Act. *See* 28 U.S.C. § 351(d)(1).
19. At the time of filing, therefore, the Complaint arose under the Act, and the federal courts were vested with subject-matter jurisdiction to adjudicate the Complaint.
20. Under the time-of-filing rule (which the Order did not mention), the issue is whether the courts' jurisdiction was ousted (a concept that the Order also did not mention) by the fact that Justice Kavanaugh was elevated to the Supreme Court *after* the Complaint was filed.

**B. The elevation of Justice Kavanaugh to the Supreme Court did not render adjudication of the Complaint any less “necessary.”**

21. The Order rests chiefly on the notion that the elevation of Justice Kavanaugh to the Supreme Court was an “intervening event” that somehow rendered adjudication of the Complaint “no longer necessary” under the Act.
22. That is obviously not the case.
23. The elevation of Justice Kavanaugh was an “intervening” event, certainly—and a “subsequent event,” to use Chief Justice Marshal’s words. But that subsequent event did not render adjudication of the Complaint any less “necessary”—the statutory test.
24. If anything, the elevation of Justice Kavanaugh to the highest Court in the land makes adjudication of a jurisdictionally proper complaint against him all the more urgent.
25. That elevation sharply distinguishes this Complaint from other complaints that were dismissed because the subject judges resigned. (*See* Order at 7 (citing decisions).) Those decisions are best read as decisions about mootness, not decisions about jurisdiction.
26. Indeed, none of the decisions cited by the Order supports the specific result of the Order, because none of them considered this exact circumstance: the elevation of a federal judge to the Supreme Court, while the judge was subject to a proper judicial-misconduct complaint.
27. The Order cites an order dismissing a complaint against Associate Justice Clarence Thomas. (Order at 7.) But Justice Thomas was elevated to the Supreme Court in 1991. Therefore a dismissal “for lack of jurisdiction” as to him *in 2000* is best understood as a holding merely that the Act did not create subject-matter jurisdiction over any complaint filed against him while he was an Associate Justice. *See Petition of John Doe*, 207 F.3d 1102 (8th Cir. 2000).
28. The result in *Doe*, in order words, was *required* by, and was entirely *consistent* with, the time-of-filing rule.

**C. The Order cited Rule 11(e), but did not address in any way either mootness or the possibility of remedial action.**

29. The Order's avoidance of the real jurisdictional issue is nowhere more clear than in the Order's treatment of Rule 11(e).
30. That Rule states that a chief judge may conclude a complaint proceeding "upon determining that intervening events render some or all of the allegations moot or make remedial action impossible." Rule 11(e).
31. It is under that Rule that the Order dismissed the Complaint. (*See* Order at 6.)
32. Strikingly, though, the Order entirely omits any discussion of either mootness or remedial action. The words "moot" and "remedial" are nowhere to be found. (*See* Order *passim*.)

**II. The Order Is Highly Inappropriate.**

33. The Order fares no better if it is considered as a decision about whether adjudicating the Complaint would be appropriate.

**A. The Order unlawfully allows jurisdiction that Congress has conferred by statute to be defeated by a one-chamber nomination process.**

34. Under the approach taken by the Order, a judicial-misconduct complaint against a circuit judge, district judge, or magistrate judge may be rendered "unnecessary" not by any development that really moots the controversy, but by the mere nomination and elevation of that judge to the Supreme Court.
35. In countenancing this result, the Order has effectively allowed the President and a majority of the Senate to strip the federal courts of jurisdiction of a genuine-controversy misconduct complaint that arose under the laws of the United States.
36. This result violates the rule that a statute, even a jurisdiction-granting statute, may be displaced only by another duly enacted statute—one passed by both Houses of Congress.

**B. The Order is grossly inequitable.**

37. Furthermore, the Order is grossly inequitable because it is at sharp odds with the law of diversity jurisdiction generally.
38. Under long-established precedents, an ordinary civil litigant cannot destroy removal jurisdiction based on diversity by taking a new job and moving to a new state. *See, e.g., Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 391 (1998). With the Order, however, it now appears that high-ranking judges may destroy federal subject-matter jurisdiction when they take an important new job and move to Washington.
39. This contrast is grossly inequitable. The Order effectively opens, in favor only of judges who are confirmed to the Supreme Court, a jurisdictional loophole that the federal judiciary has properly closed as to the rest of the American people.

40. This inequity is especially incongruous now, when American citizens are famously not merely being prosecuted, but are also being disbarred, for lying to Congress.
41. If we assume the allegations of the Complaint to be true, then under the approach taken by the Order, even attorneys fresh out of law school may face professional-misconduct or attorney-disciplinary proceedings for lying to Congress, yet a Justice of the Supreme Court may evade judicial-misconduct proceedings arising out of the same allegations.
42. In this way the Order would appear to apply (or to not apply) the law on the basis of power. That is the very opposite of equity and indeed of equal justice.

**C. The Order disregards policy concerns that underlie the Act.**

43. One of the policy concerns that supports the Act is a very practical understanding. Congress understood that it may be difficult for any court to fairly investigate and decide (and to appear to fairly investigate and decide) any judicial-misconduct complaint against a judge who sits on that court. This is why the Act includes a transfer procedure in the first place.
44. Indeed, the comments on the Act recognize that the transfer procedure is especially appropriate in serious cases.
45. As the Council has already recognized, the Complaint and the 82 other complaints dismissed by the Order are serious.
46. From that premise, it should have followed that the United States Supreme Court, like any other court, may have difficulty investigating a serious complaint against one of its own, and may need the assistance of a judicial council or conference.

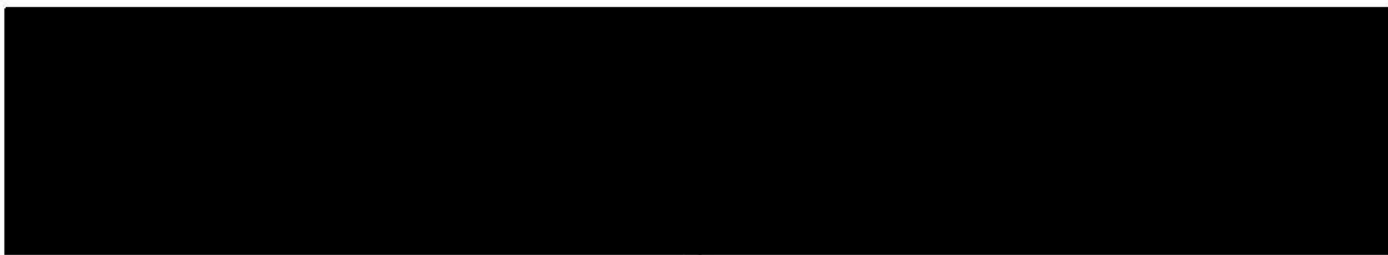
**D. The Order is in tension with the Chief Justice's transfer of the Complaint.**

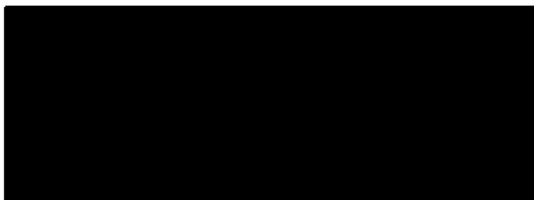
47. Perhaps the oddest aspect of the Order is that it was issued after the Chief Justice acted under the Act to transfer the Complaint here.
48. Justice Kavanaugh was confirmed and sworn in on October 6. The Chief Justice transferred the Complaint on October 10, several days *after* the subsequent event at issue.
49. Therefore the Chief Justice's letter of transfer must be read at the very least as an explicit determination by the Chief Justice that the Act applies to the Complaint. Despite the elevation of Justice Kavanaugh, the Chief Justice had the statutory power—that is, the jurisdiction—to transfer the Complaint to this Council.
50. Yet with the Order, this Council has refused to accept the assignment from the Chief Justice, and has based that refusal on supposedly jurisdictional grounds. The Order effectively accuses the Chief Justice of acting lawlessly by transferring the Complaint here.
51. Rather than give any impression along those lines, the better course would be for this Council to construe the Chief Justice's letter of transfer (and also perhaps the entire Supreme Court's non-response to my December 20 letter) as a jurisdictional suggestion.

**Conclusion**

- 52. The federal courts had subject-matter jurisdiction of the Complaint on the day it was filed. Since that day, no subsequent event has rendered adjudication of the Complaint any less “necessary.”
- 53. Adjudication of the Complaint would be appropriate for reasons of equity and sound policy. Adjudicating the Complaint would also, I believe, assist the Supreme Court.
- 54. For all these reasons, this Council should reverse the Order, apply the Act, and consider the Complaint.

Respectfully submitted,





The Honorable John G. Roberts, Jr., Chief Justice  
Supreme Court of the United States  
1 First Street NE  
Washington, DC 20543

Dear Chief Justice Roberts,

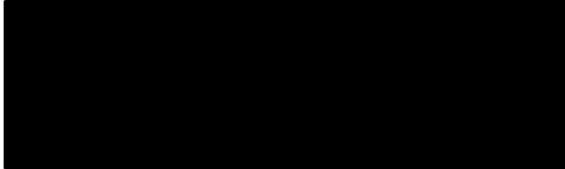
I am the Complainant in *In re: Complaint Under the Judicial Conduct and Disability Act* (No. 10-18-90050), which the Judicial Council of the Tenth Circuit has dismissed on the ground that the subject judge, The Honorable Brett M. Kavanaugh, has been elevated to this Court.

Unlike the circuit courts, this Court does not seem to have posted on its website any judicial-misconduct rules or other guidance for a potential complainant who wishes to lodge a complaint.

Could the Court please therefore inform me (1) how I may file a judicial-misconduct complaint in this Court and (2) what procedural rules would govern such a complaint?

I thank the Court for its consideration of this request.

Respectfully submitted,



- cc: The Honorable Clarence Thomas, Associate Justice
- The Honorable Ruth Bader Ginsburg, Associate Justice
- The Honorable Stephen G. Breyer, Associate Justice
- The Honorable Samuel A. Alito, Jr., Associate Justice
- The Honorable Sonia Sotomayor, Associate Justice
- The Honorable Elena Kagan, Associate Justice
- The Honorable Neil M. Gorsuch, Associate Justice
- The Honorable Brett M. Kavanaugh, Associate Justice