

IN THE TENTH CIRCUIT COURT OF APPEALS

[REDACTED])
Complainant,)
)
v.)
) **Case No. 10-18-90056**
JUDGE BRETT KAVANAUGH,)
Defendant,)
) **PETITION FOR REVIEW**

PETITION FOR REVIEW

I HEREBY PETITION FOR REVIEW of the order of the committee of judges formed Chief Circuit Judge Tymokovich, which dismissed my complaint against then-Judge Brett Kavanaugh on December 18, 2019. I appeal the entire order.

The Order dismissed my complaint on a technicality. The defendant was filed against a sitting circuit judge of the U.S. Court of Appeals for the District of Columbia. As a sitting circuit judge, the federal Code of Judicial Ethics, which governs all circuit judges, district judges, magistrate judges, and bankruptcy judges, applied to the defendant during his U.S. Senate Confirmation hearings for his nomination to the Supreme Court. The federal ethics rules are mandatory, and they apply whether a federal judge is making rulings from the bench or appearing before the public. During the Senate hearings, however, the defendant ignored those ethics rules. In violation of the Code's canons, he made partisan comments, made untrue statements, disrespected female Senators of the opposing political party, and engaged in demeanor unbecoming of the judicial office he then held.

My ethics complaint was timely filed and addressed only the defendant's conduct while he was still a circuit judge. The Order

acknowledged that the defendant's violations of the ethics rules were "serious." Nonetheless, the Order dismissed the complaint on the ground that the defendant's Supreme Court confirmation was an "intervening event." I appeal.

BASIC FACTS UNDERLYING THE COMPLAINT

The Senate confirmation hearings on the defendant's nomination were broadcast to the nation in the autumn of 2018, and like much of the nation, I watched them online. Deeply disturbed by the defendant's statements and demeanor, I sought out information on the legal obligations of a sitting judge in his position. In turn, I came across and reviewed the 2018 edition of the Code of Judicial Conduct that governs the District of Columbia courts. It was clear the defendant had violated several of these rules. Accordingly, as a concerned American, I filed the appropriate ethics complaint and sent it to the Clerk of the D.C. Circuit Court of Appeals while defendant was still a D.C. Circuit Court of Appeals Judge.

HISTORY OF ITS CONSIDERATION

My complaint first landed on the desk of Chief D.C. Circuit Court of Appeals Judge Merrick Garland, who then passed the complaints to Judge Karen LeCraft Henderson. Upon reviewing it, Judge Henderson concluded my complaint, along with 82 others, was non-frivolous. My complaint, along with those 82 others, was substantive enough to warrant investigation, and she referred them to Supreme Court Chief Justice John Roberts. Chief Justice Roberts then transferred the case to the Tenth Circuit, where the Honorable Justice Timothy Tymkovich serves as the Chief Circuit Judge. Under the federal procedures for judicial ethics cases, Judge Tymkovich elected to convene a council of judges to hear the matter. Without allowing for written or oral argument by me or any of the other 82 others complainants, however, the committee, sua sponte, dismissed my case, along with the other 82, despite stating that the misconduct alleged in our complaints was "serious."

THE COUNCIL'S DECISION

Attached herein is a copy of Judge Tymkovich's ruling in this matter.

GROUNDINGS ON WHICH THE PETITIONER SEEKS REVIEW

While I am not a lawyer I am a rational and moral being. As such, I concluded from a serious study of this matter that Justice Kavanaugh appears to have both perjured himself under oath and violated the judicial guidelines he had sworn to uphold while serving as a federal judge. In dismissing this case, the court made errors of law in concluding that the judicial ethics code does not apply to the defendant. Listed below are some of the grounds upon I believe the court has mistakenly dismissed this case:

- The defendant was sworn in as a U.S. Circuit Judge on June 1, 2006, and as such, became obligated to abide by the Code of Judicial Conduct that governs the behavior of U.S. Circuit Judges in his district.
- In September, 2018, while still a U.S. Circuit Judge, and therefore obligated to abide by the Code of Judicial Conduct that governs the behavior of U.S. Circuit Judges in his district, the defendant gave sworn testimony before the Senate Judiciary Committee.
- As set forth in detail in my original complaint, the defendant's conduct under oath during his Senate testimony on September 27, 2018 violated the following canons of conduct to which he was beholden at the time: Rule 1.1, Rule 2.3 (B), Rule 2.4 (A), Rule 2.4 (C), Rule 3.1, Rule 4. (A)(2), Rule 4. (A)(6), Rule 4. (A)(7), and Rule 4.1 (A)(11).
- The "scope" of the Code of Judicial Conduct states that the rules stated therein are "binding and enforceable" on all judges in the District of Columbia; Code of Judicial Conduct, page 2 (2018) (Scope).
- In an Op-Ed piece published the Wall Street Journal on October 4th, 2018, Justice Kavanaugh expressed remorse for some of the statements he made during his testimony before the Senate on 9/27/18. Kavanaugh wrote, "I said a few things I should not have said." Thus, the defendant himself has recognized that while he was a judge, he engaged in conduct unbecoming that post.
- I wrote and submitted my complaint, via U.S. Postal Service Express Mail, while the defendant was still a Circuit Court Judge. (Judge Kavanaugh did not take the oath of office as a Supreme Court Justice on October 6, 2018.) Although the Court's letter confirming it had received my complaint was not dated (attached herein), I sent my letter by Express Mail with enough time to get to the Court *before* the defendant became a Supreme Court Justice.

- The Order's official statement regarding its' dismissal of my complaint starts with the phrase, "Complaints of judicial misconduct have been filed against Supreme Court Justice Brett M. Kavanaugh...." This is, in and of itself, a thoroughly erroneous statement, as I very obviously did *not* file my complaint against a Supreme Court Justice. I filed my complaint against a Court of Appeals judge, who then became a Justice.

- The Order fails to account for the disconcerting fact that the defendant engaged in the conduct set forth in my complaint *in order to become* a Justice. That the defendant's conduct happened to prove successful in elevating him to a Justice-ship should not absolve him. Indeed, the Order is illogical.

Under the Order's reasoning, a federal judge who unsuccessfully makes partisan statements or lies in order to further a Supreme Court bid may be sanctioned for that conduct. For instance, if Judge Robert Bork or Judge Merrick Garland (who were unsuccessful in their Senate confirmation hearings) had made the exact same comments as Judge Kavanaugh did, then under the Order's logic, those Judges Bork and Garland could have been subject to sanctions. Yet, a sitting judges who lies successfully enough, thereby puts himself beyond the reach of the judicial ethics code. In both scenarios, the judges were sitting judges. The Code should apply equally in both scenarios.

- Furthermore, how exactly is it that Judicial Council loses jurisdiction if the defendant is no longer a circuit judge? Consider a lawyer who violates numerous ethics rules, and then voluntarily resigns. The lawyer may not simply thumb his nose at the bar. The Bar has the power to reprimand the lawyer anyway. So should the Judicial Council. This does not offend the federal hierarchy. While the defendant has now been elevated to a higher slot in the federal hierarchy, the Judicial Council was asked to review the defendant's ethical conduct that took place only while he was a peer.

- The Judicial Council should not lose jurisdiction to hear complaints about the judge's conduct when the judge was a judge anymore than a court loses jurisdiction to try a case involving injuries a defendant inflicted upon other, simply because the defendant fled to South America *after* the conduct was committed.

- And what if the defendant had, rather than lied and made partisan comments, offered favors to certain Senators, or blatantly offered votes in future cases in order to gain his judgeship? Should the

elevation erase the conduct? This Order sets a dangerous precedent. Should it stand, then future Supreme Court nominees (who are almost always sitting judges) will have little reason not to bargain for the nomination by promising how they will vote in future cases or openly playing to the partisan crowd, because they will be insulated from censure if they succeed, no matter how unseemly conduct.

- Fortunately, the Judicial Council's authority is not so feeble. The Order misread the language of the Act. The relevant rule allows for a complaint to be dismissed if "*intervening events render some or all of the allegations moot or make remedial action impossible.*" I fail to see how the defendant's elevation to the Supreme Court rendered moot the questionable behavior that helped him win that seat. Nor do is remedial action impossible now that the defendant is a Supreme Court Justice. The Judicial Council still has the power to censure, the power to order apologies, and the like.

- In order to avoid ruling against Justice Kavanaugh, the Judicial Council also had to overcome the relevant Commentary on the Act, which states that as long as the subject of a complaint performs judicial duties, a complaint alleging judicial conduct *must be addressed.*

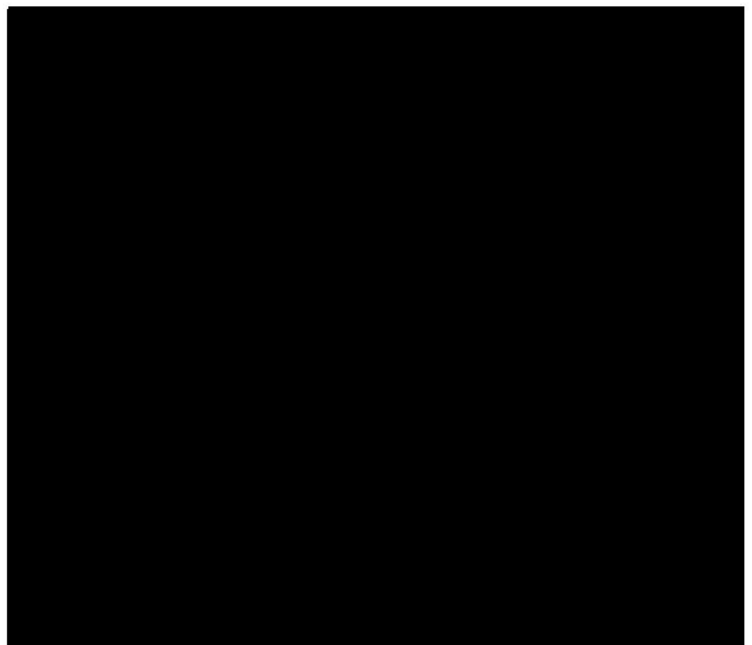
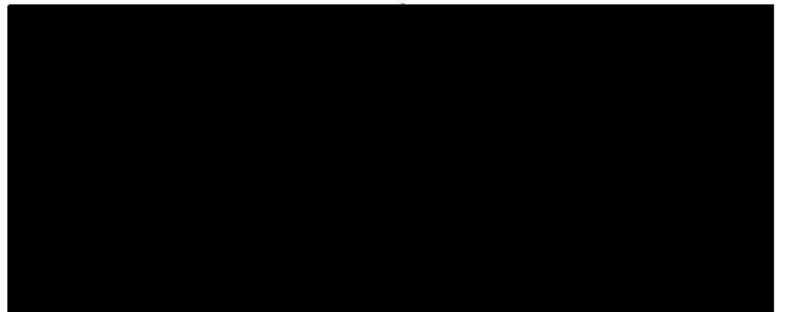
Even though the defendant can be observed performing judicial duties on a daily basis as a Justice on the Supreme Court, the Judicial Council concluded that Kavanaugh is "no longer performing judicial duties." In doing so, the Order confined ongoing "judicial duties" to those acts a person makes of the Court of Appeals but not those of the Supreme Court. The point is that while a person sits on a bench, the Judicial Council is bound to address complaints, because our justice system requires the confidence of its citizens. It requires that those involved in making decisions be acting within the bounds of justice and fair play in order for it to function. The Order's crabbed reading of "judicial duties," to exclude ongoing service on the Supreme Court in order to dodge making a decision that would sully the reputation of a justice, defies common sense, equity, and justice.

CONCLUSION

I respectfully request that my petition for review be granted so that I may argue that the Order should be reversed and that the defendant be held accountable for violating the ethics provisions that governed his conduct as a sitting federal judge when he appeared before the

Senate. The laws of the United States should apply to all citizens equally, regardless whether they are subsequently passed on to higher posts. A Special Committee should be formed to investigate the allegations set forth in my complaint, allegations of misconduct by a sitting judge that undermined the public's trust in the federal judiciary. The present Order, which further undermines the public's perception of the federal judiciary by avoiding addressing serious ethics violations, should be reviewed and reversed.

January 14, 2019

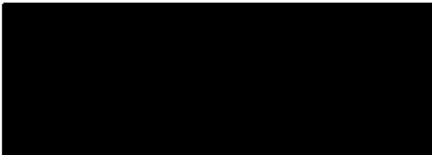


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Office of the Circuit Executive
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David Tighe
Circuit Executive

Leslee Fathallah
Deputy Circuit Executive

December 18, 2018



Re: [REDACTED] v. former Circuit Judge Brett M. Kavanaugh
Judicial Complaint No. 10-18-90056

Dear [REDACTED]

The Judicial Council of the Tenth Circuit has issued an Order dismissing the above-referenced complaint. The Order is publicly available here:
<https://www.ca10.uscourts.gov/ce/misconduct/kavanaugh-complaints>
Please let our office know if you would like a paper copy of the Order mailed to you.

To seek review of the Order, you must file a petition for review within 42 days after the date of the dismissal Order. See Rule 18(b) of the Judicial-Conduct and Judicial-Disability Proceedings. Should you wish to file a petition, please submit it to this office.

Sincerely,

A handwritten signature in cursive script that reads "Leslee F".

Leslee Fathallah
Deputy Circuit Executive

cc: Chief Circuit Judge Timothy M. Tymkovich
Justice Brett M. Kavanaugh