

January 24, 2019

Office of the Circuit Executive
United States Courts for the Tenth Circuit
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Re: Misconduct Petition

I hereby petition the judicial council for review of its Order (the "Order") dated December 18, 2018, dismissing my judicial misconduct complaint [REDACTED] *v. former Circuit Judge Brett M. Kavanaugh*, No. 10-18-90073 (the "Complaint").

When used in this letter, (1) "Council" means the Judicial Council of the 10th Circuit Court of Appeals, (2) "Act" means the Judicial Conduct and Disability Act of 1980, (3) "Breyer Report" means the Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice, dated September 2006, (4) "Illustrative Rules" means the 1986 Illustrative Rules Governing Complaints of Judicial Misconduct and Disability, and (5) "Rules" means the Rules for Judicial-Conduct and Judicial-Disability Proceedings promulgated under the Act, and "Rule" refers to one of the Rules. I will note here that the Rules are based on recommendations in the Breyer Report (see Rule 1 Commentary) and that the Order cited the Breyer Report as a significant authority in the determination of judicial misconduct complaints. For this reason, I have relied on the Breyer Report as a guide in this Petition.

My Petition should be granted by the Council because (1) the Council failed to follow the procedures set forth in the Act and the Rules in considering my Complaint, and (2) the Council's dismissal of my Complaint is itself in violation of the Rules and the Act.

Background

My Complaint was sent to the D.C. Circuit Court of Appeals on October 2, 2018, in the manner required under Rule 6. Following the procedure permitted under Rule 26, the D.C. Circuit Judicial Council requested that Chief Justice Roberts transfer my complaint (along with others) to the judicial council of another circuit, and on October 10, 2018, the Chief Justice transferred these complaints to the Council. By the time the Order was issued, the 10th Circuit had received and consolidated 83 judicial misconduct complaints (collectively, the "Complaints") against then-Justice Kavanaugh.

It took the Council more than two months after its receipt of my Complaint, and more than three months after the filing of the first of the Complaints, to issue its Order.¹ In issuing the Order, the Council bypassed the usual procedure of beginning consideration of my Complaint with a review by the chief judge under Rule 11. Instead, the Council followed the unprecedented procedure of assuming "the initial role ordinarily assigned to the chief circuit judge under 28 U.S.C. §352(a)-(b) and Rule 11."

¹ Section 352(a) of the Act tells chief judges to review complaints "expeditiously." The Illustrative Rules state "it should be a rare case in which more than a month is permitted to elapse from the filing of the complaint to the chief judge's action on it. The Breyer Report Appendix E stated that it would be "a rare case in which more than sixty days is permitted to elapse from the filing of the complaint to the chief judge's action on it."

The Complaints set forth significant and troubling allegations concerning the conduct of then-Judge Kavanaugh while he was serving as a federal circuit court judge, and before he was sworn in as a Justice of the Supreme Court. The Order acknowledged that these allegations are “serious,” but the Council did not consider whether the allegations in any of the Complaints amount to misconduct under the Act and the Rules. (As the Order never reached the substance of any of these allegations, this substance will not be repeated or argued in this Petition.) Instead, the Council dismissed the Complaints based on its determination that it was powerless to address these allegations. The Council’s dismissal was based on two principal and overlapping arguments:

- The Act and the Rules apply to “the actions or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. §363.” (Rule 4). From this, the Council argued that “Neither the Act nor the Rules apply to justices of the United States Supreme Court.”
- The Act and the Rules provide that a misconduct proceeding can be concluded because of “intervening events.” (Rule 11(e)). The Council argued that the elevation of Brett Kavanaugh to the Supreme Court was such an intervening event, because the Act does not apply to Supreme Court justices.

As I will argue below, both of these arguments are fatally flawed. But first, I need address the preliminary question: did the Council have the power to dismiss my Complaint by (as it put it) assuming “the initial role ordinarily assigned to the chief circuit judge” under Rule 11.

The Council Lacked The Power To Decide My Complaint

The Breyer Report (p. 1) succinctly notes a “special problem” in any system for discovering and assessing discipline for judicial misconduct. If the system relies on people other than judges to run the system, the judiciary faces a critical loss of independence. But if the system is operated solely by judges, the system runs the risk of “institutional favoritism,” where judges operate the system to protect their fellow judges. To take account of these competing risks, the Act relies on internal judicial branch investigation of other judges, but “simultaneously insists upon consideration by the chief circuit judge and members of the circuit judicial council, using careful procedures and applying strict statutory standards.” Consequently, it is critical to the operation of the Act that all involved stick strictly to the procedures set forth in the Act and the Rules.

The Breyer Report’s description of the Act and the Rules serves to highlight two critical flaws in the procedure followed by the Council in considering my Complaint: the chief circuit judge never considered the merits of my Complaint (independent of his participation on the Council), and the Council adopted its own procedure for consideration of my complaint in disregard of the “careful procedures” and “strict statutory standards” set forth in the Act and the Rules. The result is exactly that feared by the authors of the Breyer Report: many observers drew the conclusion that the Order was an instance of the federal judiciary protecting its own. For example, Forbes Magazine’s Steve Denning described the Order as

“Kavanaugh’s Get-Out-Of-Jail Free Card” and a rejection of the idea that Supreme Court Justices must comply with “normal standards of judicial ethics.”²

In an effort to understand the procedure followed by the Council in issuing the Order, it will be useful first to outline the procedure for handling judicial misconduct complaints set forth under the Act and the Rules. A judicial misconduct complaint against a judge on a U.S. court of appeal is reviewed in the first instance by the chief judge of that court. The chief judge may then (1) dismiss the complaint on grounds set forth in Rule 11(c), (2) conclude the complaint on the ground that voluntary corrective action has been taken as described in Rule 11(d), (3) conclude the complaint because of “intervening events” described in Rule 11(e), or (4) refer the complaint to a special committee as described in Rule 11(f) (see generally Rule 11(a)). If a complaint against an appellate judge is dismissed under Rules 11(c)-(e), the complainant has a right to appeal the dismissal under Rule 18.

The Council’s role in judicial complaint resolution is normally like that of a court of appeals. There are three ways in which a judicial council 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 appeal the 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 explained in the Order, the Council chose to ignore the procedures outlined above. Instead of having my Complaint first considered by the 10th Circuit’s Chief Judge under Rule 11, the Council itself dismissed my case, claiming to have “assumed the initial role ordinarily assigned to the chief circuit judge” under Rule 11. Unfortunately, the Order contains only the most cursory explanation for the Council’s failure to follow normal procedure. And while the Order refers to the Council acting under Rule 11, there is nothing in the language of Rule 11 authorizing the Council to act as it did.

As best as I read it, the Order appears to claim that a judicial council has a right to deviate from normal procedure in a case it receives under Rule 26. However, there is nothing in Rule 26 to justify such deviation. Instead, Rule 26 expressly states that upon receiving a complaint, a council “may then exercise the powers of a judicial council **under these Rules.**” [emphasis added] Rule 26 does not provide the judicial council with special powers to resolve complaints; instead, it expressly limits what a judicial council can do to what the Rules provide.

In usurping the usual authority of the Chief Judge, the Council cited no language from Rule 26 itself, but instead placed great reliance on part of a Comment to Rule 26, to the effect that a transferee judicial council “shall determine the proper stage at which to begin consideration of the complaint.” From this snippet, the Council seems to have derived the principle that it can concoct its own rules for considering

² <https://www.forbes.com/sites/stevedenning/2019/01/01/council-reviewing-the-kavanaugh-ethics-complaints-punts-back-to-chief-justice-roberts/#7619b689aafe>.

complaints it receives under a Rule 26 transfer. This would be an extraordinary conclusion even if it was supported by the cited Comment. It is not. In full, the Comment reads:

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.

The two examples provided in this portion of the Comment—consideration by the chief judge and appointment of a special committee—are the very steps provided under Rule 11 and bypassed by the Council in its consideration of my Complaint. If this Comment meant to suggest that Rule 26 provides judicial councils with extraordinary powers to ignore ordinary procedures, it would hardly have listed such ordinary procedural steps as examples. Instead, the Comment’s reference to a “proper stage” is a reference to language in Rule 26 allowing a complaint referral to take place “at any stage of the proceeding before a reference to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22.” So if a complaint is referred under Rule 26 after the transferor chief judge had determined to appoint a special committee, the “proper stage” under the Comment might be the transferee chief judge’s formation of a special committee under Rule 11(f). And if a complaint is referred under Rule 26 after completion of a report by a special committee, the “proper stage” under the Comment might be action by the transferee judicial council under Rule 20(b).

The only way to read the Rule 26 Comment relied on by the Council is one consistent with the Comment’s cited examples *and* the Rule’s direction that judicial councils proceed “under these Rules.” The “proper stage” for a court’s initial consideration of a transferred judicial misconduct complaint is the one *provided under the Rules* that is appropriate given the progress the transferred complaint has already made in the transferor court. For a complaint such as mine that made no progress in the transferor court, the “proper stage” is consideration by the transferee chief judge under Rule 11.

A review of prior Rule 26 cases supports the above conclusion. In every Rule 26 case I’ve reviewed save one, where the transferor court had not yet begun proceedings under Rule 11, the transferee court began its consideration by having its chief judge consider the case under Rule 11. The only precedent cited by the Council to the contrary is *In re Complaint of Judicial Misconduct*, No. 17-90118 (2nd Cir. 2017) (“Kozinsky Case”). But the order in the Kozinsky Case never stated the proposition asserted in the Order, that a judicial council can resolve “through initial analysis” a judicial misconduct complaint transferred to it under Rule 26. Instead, the Kozinsky Case order relies on the power granted judicial councils *under the Rules* (namely, Rule 20(b)(1)(B)) to act following appointment of a special committee. Of course, there was no special committee appointed in my case, and the Council purported to act under Rule 11 and not Rule 20. As the Council purported to act under a Rule that confers no power on judicial councils, the Council’s reliance on Kozinsky is incorrect.³

³ While no special committee appears to have been appointed by the 2nd Circuit in the Kozinsky Case, a special committee report was prepared when the Kozinsky matter was transferred under Rule 26 to the 3rd Circuit in 2009. See <https://caselaw.findlaw.com/us-3rd-circuit/1057946.html>. Consequently, the best explanation of the Kozinsky Case is *not* that the 2nd Circuit judicial council resolved the matter “through initial analysis,” but instead that it took the previous special committee report into account and determined that the “proper stage” for its consideration was that described in Rule 20.

We must conclude that the Council acted without authority under the Rules or the Act in asserting a Rule 11 power to consider and dismiss my Complaint. At this, some observers might shrug their shoulders and say, “so what?” But while procedural requirements might not be taken seriously by some outside of the judicial system, I think the members of the Council know better. The procedures set forth for judges to follow are important to us all. I’ve already noted the statements from the Breyer Report to the effect that the system created by the Act requires that judges be scrupulous and precise in their adherence to the Rules. We should also note the finding in the Breyer Report, that the most frequent failures under the Act are procedural irregularities in controversial cases.

The Council’s failure to consider my Complaint in accordance with the Rules has effectively denied me rights provided under the Act and the Rules. As the Council is powerless to appoint a special committee, the rights provided for complainants under Rule 16 were never even potentially available to me. As the right of appeal under Rule 18 depends on an order issued by a chief judge, my rights under that Rule are uncertain at best. Finally, my right to petition the Committee on Judicial Conduct and Disability to review the Council’s action is similarly unclear, as such right depends on my ability to determine a provision of Rule 19 or 20 under which the Council purported to act (see Rule 20(b))—and in my case, the Council did not purport to act under either rule. In short: my rights under the Rules depend on the Council *following* the Rules, so the Council’s decision to act outside of the Rules has effectively stripped me of rights.

Some additional consideration of my rights under Rule 18 is in order at this point. Page 2 of the Order provides that the Order “remains subject to any appeal rights available to complainants under the Rules.” As I explained above, the unorthodox way in which the Council handled my complaint may preclude *any* such appeal right. But later on page 10, the Council states that “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).” While my ability to file this petition depends on the existence of this right, I feel compelled to point out that this statement by the Council is incorrect in important respects. As Rule 11(g)(3) makes clear, the right to appeal under Rule 18 applies *only* in cases where a chief judge disposes of a complaint under Rule 11(c), (d) or (e). There is no right under Rule 18 to appeal a decision of a judicial council. I must also point out

Ideally, the 2nd Circuit judicial council should have explained the reasoning it employed for resolving the Kozinsky Case under Rule 20. But it does not fall on me to defend the reasoning (or lack thereof) in the Kozinsky Case order. If it can be argued that the Kozinsky Case is one where the judicial council exercised a Rule 20(b)(1)(B) power it did not possess, that is hardly justification for the Council to proceed outside of the Rules in my case.

While the above arguments dispose of the Council’s reliance on the Kozinsky Case, the Council might wish to note two additional ways in which Kozinsky is distinguishable from my Complaint. First, the Kozinsky Case began with a referral under Rule 5, while my Complaint was filed under Rule 6. The courts have recognized important procedural differences between Rule 5 and Rule 6 cases. Significantly, there are few procedural requirements in Rule 5 cases—such cases are routinely dismissed in a one-line order. See *In Re: Complaint of Judicial Misconduct No. 10–90096* (9th Cir. 2011) (<https://caselaw.findlaw.com/us-9th-circuit/1567081.html>). It is a grave error to look to a Rule 5 case to justify a procedure never before applied in a Rule 6 case. Moreover, whatever one might think of the order in the Kozinsky Case, the substantive outcome of the order was hardly controversial. It is well settled under the Rules that the retirement or resignation of a judge is an “intervening event” under Rule 11(e).

that when a person is entitled to a right to appeal a legal decision, due process requires that a hearing take place in front of a body *other* than the one that issued the decision. Strictly speaking, if I *do* possess any right under Rule 18, that right in this case is not one of appeal, but of *reconsideration*. If this petition is right and the Council erred in its Order, common sense tell us that the body least likely to recognize and acknowledge the error is the Council. While I hope for due consideration of this Petition by the Council, under no circumstance is the Council's reconsideration of my Complaint the equivalent of the right of appeal guaranteed me under the Act and the Rules.

This Petition must be granted in order to protect my rights under the Act and the Rules, *and* to ensure the proper administration of the Act called for by the Breyer Report. Possible remedies to address the Council's failure to follow Rules procedures are discussed in the final section of this Petition.

The Dismissal of My Complaint Is Not Justified By The Act and the Rules

The Act authorizes any person to file a complaint alleging that a federal judge has engaged in conduct prejudicial to the effective and expeditious administration of the courts. The general rule under the Act is that judicial misconduct complaints are *supposed* to be addressed. As stated in the Breyer Report (p. 1), the Act "requires the chief judge of a circuit to consider each complaint and, where appropriate, to appoint a special committee of judges to investigate further." This requirement under the Act is more particularly stated in the Commentary to Rule 11: "As long as the subject of a complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed." It falls to the Council to justify in its Order why it failed to consider the substance of my Complaint, given that Justice Kavanaugh is still an active judge.

In its order, the Council cited decisions holding that a judicial council cannot discipline a judge who has retired or resigned. But as Justice Kavanaugh has not retired or resigned, these cases do not apply to my Complaint. Instead, the Complaints present us with a question of first impression: can a Supreme Court Justice face discipline under the Act and the Rules for actions that took place prior to his or her confirmation?

In its order, the Council purported to rely on Rules 4 and 11(e) to rule that no such discipline is possible. Unfortunately, neither Rule supports such a conclusion.

The Order placed great reliance on the definition of "judge" found in Rule 4. The Order correctly notes that this definition does not include Supreme Court justices. But this observation hardly disposes of my case. Both at the time of the misconduct alleged in my Complaint *and* at the time my Complaint was signed and mailed to the D.C. Circuit, Brett Kavanaugh was a "judge" within the Act's definition.⁴ Moreover, the Order failed to quote in full the relevant language of Rule 4 determining who are "covered judges" under the Act and Rules:

⁴ The Order appears to place no importance on the timing of the various Complaints. Some of the Complaints were dated, filed and mailed prior to Kavanaugh's confirmation to the Supreme Court, while others were dated, filed and mailed after confirmation. My Complaint falls somewhere in the middle; it was dated and mailed four days before Kavanaugh's nomination, but was not stamped as received until after this confirmation. As all Complaints were consolidated and treated by the Council in the same way, I am assuming that this timing was not relevant to the Council and need not be further discussed here.

A complaint under these Rules may concern the **actions** or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363. [emphasis added]

The language emphasized above was ignored by the Council in its Order, and it is critical to understanding the operation of Rule 4. Rule 4 refers not to the status of a covered judge at the time an order is issued under the Rules, but instead to this status at the time of a covered judge's alleged misconduct. My Complaint is not excluded under Rule 4, because the Complaint concerns Brett Kavanaugh's actions while he was a covered judge.

This understanding of the meaning of Rule 4 is supported in the case law. For example, in *In Re: Complaint of Judicial Misconduct*, Nos. 10-16-90009 & 10-16-90017 (10th Cir. 2017), this Council held that Rule 4 precluded consideration of a judicial misconduct complaint referencing actions taken before a subject judge became a judge. In similar fashion, it is well understood that actions taken by a Supreme Court Justice *after* confirmation (such as Justice Alito's mouthing of "not true" at the 2010 State of the Union and Justice Ginsburg's criticism of Donald Trump in 2016) are also precluded from consideration by Rule 4. See also *Petition of John Doe*, 207 F.3d 1102 (8th Cir. 2000) (dismissal of complaint alleging misconduct by Justice Thomas after his appointment to the Supreme Court). Rule 4 requires that a complaint focus solely on actions of a judge while he or she is a covered judge; actions before or after this time fall outside of Rule 4, and as a result outside of the Act, even if the judge *is* a covered judge at the time of the complaint. In like manner, Rule 4 applies to actions taken by a judge while a covered judge, even if the covered judge *is not* a covered judge at the time of the complaint or order.

The above reading of Rule 4 is not only consistent with the Rule's wording, but also makes common sense. If the application of Rule 4 depended on the status of the subject judge at the time of an order, then this application might turn on how quickly a complaint is considered and decided. Here, it should be noted that the earliest of the Complaints was filed with the D.C. Circuit a month prior to Kavanaugh's confirmation as Supreme Court Justice, and could easily have been ruled upon prior to this confirmation.⁵ It would violate all notions of due process, not to mention the purpose of the Act, to interpret Rule 4 in a way that potentially strips complainants of rights as a result of a delay in considering their complaints.

The second rule relied on by the Council in dismissing my Complaint is Rule 11(e). In full, Rule 11(e) reads as follows:

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.

The Council treated Rules 4 and 11(e) as if they could be read together, but the rules should be understood separately. A critical difference between these two rules is one involving the timing of their application. As I discussed above, the timing question under Rule 4 is whether a subject judge was covered under the Act and the Rules at the time of the events alleged in a judicial misconduct complaint.

⁵ See discussion in note 1 *supra*.

But Rule 11(e) looks instead to the later date when a chief judge is called to act under Rule 11. Rule 11(e) properly asks, has action pursuant to this complaint been rendered moot or impossible owing to events prior to such action?

Unfortunately, the Order conflates Rules 4 and 11(e), and as a result misapplies the latter. The Council wrote in the Order that “a misconduct proceeding can be concluded because of ‘intervening events,’ namely, circumstances where an individual is no longer a covered judge.” But that’s not what Rule 11(e) provides. Rule 11(e) does not ask whether the judge named in a complaint has continued to be a covered judge up to the time the complaint is decided—the clear language of this Rule asks instead whether something has happened prior to this time that would render the allegations in the complaint moot or make remedial action impossible. So, Rule 11(e) requires dismissal of a complaint against a retired judge, not because the judge is no longer covered under Rule 4, but because the retirement is seen to render the complaint moot. (See the quoted language of the Breyer Report below.)

Both the Breyer Report and the Commentary to Rule 11 provide critical guidance to understanding what is an “intervening event” under Rule 11(e). Both interpret Rule 11(e) to provide that “As long as the subject of a complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed.” From this, it is obvious that Justice Kavanaugh’s appointment to the Supreme Court is *not* an “intervening event” under Rule 11(e), because Justice Kavanaugh continues to perform judicial duties. To get around the clear language of the Breyer Report and the Commentary, the Order tries to argue that the Breyer Report’s reference to “judicial duties” should be read in conjunction with the definition of “judge” in 28 U.S.C. § 351(d)(1), so that only judges covered under Rule 4 can perform “judicial duties.” This reasoning leads to the conclusion that Supreme Court justices do not perform judicial duties, a conclusion that appears absurd on its face.

If the Council is right and the Breyer Report intends “judicial duties” to refer to the duties of a “judge” as defined in 28 U.S.C. § 351(d)(1), then for certain the Breyer Report would only use the term “judge” to refer to judges as so defined. But this is not the case. The Breyer Report uses the term “judge” to refer to state judges on p. 13. (I won’t detail when “judge” is used in the Breyer Report as a verb.) In addition, the Breyer Report does not always use the word “judicial” to refer exclusively to the federal judiciary. It would make no sense to read the Report’s reference to programs addressing “judicial disability” (see p. 9) to exclude programs open to state judges. And the reference on page 13 in the Breyer Report to “Charles Geyh’s analysis of methods of judicial discipline other than those provided in the Act” would make no sense if “judicial discipline” referred *only* to the discipline provided in the Act. If “judge” in the Report is not “judge” as defined in the Act, and if “judicial” in the report does not mean things done by a “judge” as defined in the Act, then there is no reason to think that “judicial duties” in the Report refers only to the duties of “judges” as defined in the Act. And of course, it is this discussion of “judicial duties” in the Breyer Report that formed the basis for the subject Commentary to Rule 11.

I hate to belabor the obvious, but there’s nothing in the Breyer Report or the Commentary to Rule 11 to indicate that its ordinary language should be read in anything other than an ordinary way, in accordance with its ordinary meaning (except when defined terms like “Act” and “Commission” are clearly in use), and in a way consistent with ordinary context. Even a casual reading of the Breyer Report reveals that it uses the term “judicial duties” in the ordinary sense of a judge who hears cases, interprets laws and

otherwise does the things judges do. For example, consider this from the Breyer Report [emphasis added in all cases]:

A number of chief judges and judicial councils have ruled that leaving the bench renders a misconduct complaint moot because there is no forward-looking purpose to examining the conduct of someone who will no longer exercise *judicial duties*. Former chief judges who continue to exercise *judicial duties*, however, have frequent opportunities to interpret and apply rules designed to protect litigants and the public from abuses of judicial power.

I see no way to read this passage consistently with the Council's understanding that the term "judicial duties" excludes the activities of Supreme Court justices. The Report's language clearly equates "no longer exercising judicial duties" with "leaving the bench," regardless of where the bench might be found. Justice Kavanaugh continues to have "frequent opportunities to interpret and apply rules" and to "protect litigants and the public." For these reasons, Brett Kavanaugh's appointment to the Supreme Court is not an "intervening event" under Rule 11(e).

Let's reiterate: Rule 11(e) states that an "intervening event" is one that renders a complaint "moot" or makes remedial action impossible. Justice Kavanaugh's ascension to the Supreme Court satisfies neither of these requirements. The [REDACTED] published an editorial on Justice Kavanaugh's alleged judicial misconduct in the [REDACTED] in late December, and this editorial received more than 4,000 comments and 1 million page views. Obviously, this matter is not "moot." Nor is it impossible to order remedial action in this case. Justice Kavanaugh might recuse himself from certain highly partisan court cases, or he might issue a more fulsome apology than previously.

The cases cited by the Order under Rule 11(e) are all easily distinguished. *In re: Complaint Under the Judicial Conduct and Disability Act*, No. 10-17-90008 (10th Cir. 2017) and *In re Complaint of Judicial Misconduct*, No. 17-90118 (2d Cir. 2017) both concern complaints brought against judges who had retired or resigned prior to the order in question. Justice Kavanaugh has neither retired nor resigned. *In re: Complaint Under the Judicial Conduct and Disability Act*, Nos. 10-16-90009 and 10-16-90017 (pre-appointment conduct is not cognizable within the scope of the Act) and *Petition of John Doe*, 27 F.3d 1102 (8th Cir. 2000) (conduct of a Supreme Court Justice taking place after that Justice's confirmation is not cognizable within the scope of the Act) have already been discussed above.

The Order argues that the Act and the Rules are not intended to cover every conceivable case of judicial misconduct. This is true. The Act and the Rules restrict cognizable judicial misconduct complaints by means of Rules 4 and 11(e). But these restrictions do not apply in my case, and there is no applicable exception under the Act and the Rules to the Council's consideration of my Complaint. The Council's refusal to consider the merits of my Complaint was thus in error, and the Council should order reconsideration of the merits of my Complaint as required by the Act and the Rules.

Remedies

It is not clear whether a petition such as this one can or should include a discussion of remedies. However, the facts of my Complaint are so unusual, and the errors of the Council so egregious, that it makes sense to include at least a brief discussion of remedies here.

Assuming that this Petition is granted, the logical step might be to refer the Complaints back to the chief judge of the 10th Circuit for consideration under Rule 11. A Rule 11 review by the chief judge was the original right starting point for consideration of my Complaint, as I've argued above. However, it is not likely that the 10th Circuit chief judge could legitimately consider my Complaint de novo, as if no prior review and determination had been made by the Council (and by the chief judge as a member of the Council). It is uncertain that my Complaint can be given a fair hearing in the 10th Circuit at this point. Even giving due consideration to the good faith and judicial skill of the judges on this Circuit, the temptation there would be very strong to justify the Order by denying my Complaint upon reconsideration.

An alternative remedy would be to ask the Committee on Judicial Conduct and Disability to review my Complaint. This remedy would be consistent with the Committee's responsibility under the Rules to review actions of judicial councils. Unfortunately, it's not clear whether such a review is possible. Rule 21(b) requires such a review of decisions made by judicial councils under Rules 19 and 20, but as the Council did not act in my case in a usual fashion, the applicability of Rule 21 to my case is uncertain. It might be possible for the Council to petition the Committee for review of my Complaint, but I haven't any way to determine whether such a petition would be considered.

A better remedy in this case would be to treat the Order not as a dismissal of my Complaint, but as a refusal by the Council to accept the October 10, 2018 transfer of my Complaint under Rule 26. Arguably, such a refusal *would* be within the Council's power (where its assumption of authority under Rule 11 was not). This would give the Chief Justice the opportunity to refer my Complaint to a different Court of Appeal that could provide a true de novo review—this time in accordance with the Rules.

To be certain, it would be extraordinary for the Chief Justice to re-refer my Complaint under Rule 26. But unfortunately, the Order has muddied the waters, and left us without a better path to move forward. The Council's assumption of Rule 11 powers in my case raises the question: why was such an extraordinary action taken? The logical answer is one that recognizes the unusual politics swirling around the Complaints: *any* action taken by the 10th Circuit Chief Judge would have subjected him to harsh criticism (either from Kavanaugh's supporters or his opponents), and it was understandable (if procedurally unsupportable) to ask the Council as a whole to issue the Order and take the resultant political heat. Given these politics, it's simply not reasonable to ask the 10th Circuit chief judge to step forward at this late date and face the greater political scrutiny that would follow a remand of this case under Rule 11. With all due respect to the extraordinarily difficult prospect of considering a judicial misconduct complaint against a Supreme Court Justice under the harsh glare of politicized public scrutiny ... a chief judge reluctant to follow the Rules last year is simply not the right person to carry my Complaint forward this year.

Finally, I note the request set forth in the Order 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." Pursuant to this request, I ask that the Council forward this Petition to the Committee on Judicial Conduct and Disability, the Chairman and Ranking Member of the Senate Committee on the Judiciary, the Speaker of the House of Representatives, and the Chairman of the House Judiciary Committee.

Conclusion

The Breyer Report stated the following:

The proper handling of high-visibility complaints has particular importance. Because the matters at issue have received publicity, the public is particularly likely to form a view of the judiciary's handling of all cases upon the basis of these few. And the mishandling of these cases may discourage those with legitimate complaints from using the Act.

The Breyer Report went on to observe that the judicial misconduct complaints most frequently mishandled are high-visibility cases, and this mishandling most often results from a failure to follow procedures required under the Act and the Rules.

Unfortunately, the Breyer Report was prescient in how well it anticipated the handling of the Complaints. Resolution of the Complaints took longer than the 30-60 days established as the outside limit in the Illustrative Rules and the Guidelines. The Council abandoned the procedures required under the Rules, effectively denying critical rights to me and the other complainants. The Council ignored its own precedent governing Rule 4, that this Rule is satisfied so long as a judicial misconduct complaint alleges misconduct taking place while a judge is a covered judge. The Council confused the timing of Rule 4 with that of Rule 11(e), and ignored how Rule 11(e) turns on an examination of whether a given judicial misconduct complaint has been rendered moot by subsequent events. The Council misunderstood the precedent of the Kozinsky case. The Council read the meaning of "judicial duties" in the Rules and the Breyer Report in such an artificial way that not even Justice Kavanaugh (who has assumed the highest of judicial duties) can be said to be performing such duties. As a result of all this, the misconduct alleged in my Complaint was never even addressed by the Council ... and the public confidence in the federal judiciary has been lowered a notch or two as a result.

The Council (or some other body with responsibility for the due administration of the Act) must step in to rectify this matter. I hereby petition the Council to consider my discussion of available remedies, and to order action it deems appropriate to remand my Complaint for proper consideration on the merits, in a manner consistent with my rights under the Act and proper procedure under the Rules.

