


January 29, 2019

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

Re: **Petition for Review**
of Dismissal Order in the Matter of
 v. Kavanaugh
Judicial Complaint No. 10-18-90086

Dear Mr. Tighe:

I hereby petition the Judicial Council for review of the *Judicial Misconduct Complaint* (“Complaint”) against Judge Brett M. Kavanaugh referenced above.

I am in receipt of your December 18, 2018 letter advising me of the Order dismissing the Complaint. This *Petition for Review* is being filed after careful review of the dismissal Order and related references, as well as the *Code of Conduct for United States Judges, Judicial Conduct and Judicial Disability Proceedings, Judicial Conduct and Disability Act* (Chapter 16, Title 28, United States Code) (the “Act”), *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice*, 239 F.R.D. 116 (Sept. 2006) (“Breyer Committee Report”) and *Tenth Circuit Misconduct Rules for Judicial-Conduct and Judicial-Disability Proceedings* (“Judicial-Conduct Rules”). This *Petition for Review* is intended to conform with Rule 18(b) of the *Judicial Conduct and Judicial Disability Proceedings*.

By not responding directly to any of the allegations raised in the Complaint, the Judicial Council has threatened the integrity of our country’s legal system. The Breyer Committee Report highlights the importance in more public and high-visibility complaints¹ to find ways to “...assure the public that the judicial branch has not ignored the allegations and, more broadly, that it is prepared to deal with substantive allegations.”. It goes on to state that “...a public resolution of publicly aired allegations is also in the subject judge’s interest if the allegations

¹ As support for the high-visibility of the alleged misconduct raised in the Complaint, it has been reported that roughly 20.4 million people watched the September 27, 2018 Senate hearing on the nomination of U.S. Supreme Court nominee Brett Kavanaugh on six broadcast and cable networks. In addition to this number are those who watched the hearing in groups or from recordings after the live hearing, or that read about or heard related analyses.

are untrue.” The Judicial Council has ignored these recommendations by refusing to rule on the allegations in the Complaint.

According to the Order the Judicial Council’s decision to dismiss the Complaint was “[b]ecause Justice Kavanaugh is no longer a circuit district, bankruptcy or magistrate judge, a circuit judicial council no longer has the power or jurisdiction under the Act to review his conduct.”.

The following is provided in dispute of this decision and in support of this *Petition for Review*:

- the Complaint includes allegations of Judge Kavanaugh’s judicial misconduct during his testimony before the Committee on the Judiciary of the United States Senate on September 27, 2018 (“Testimony”)
- the Complaint was filed just four days later, on October 1, 2018
- the Order does not indicate any reason that the Complaint could not have been fully considered if it was considered prior to Judge Kavanaugh’s confirmation to a seat on the Supreme Court
- the Complaint highlights “*With voting on Judge Kavanaugh’s U.S. Supreme Court (“Court”) nomination expected to occur within the week, it is urgent that this Complaint be considered promptly.*”.
- the Judicial Council has the responsible to carry out critical oversight and the authority to “...*make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.*”². There is no indication that the Judicial Council took any actions to consider the Complaint in an expeditious manner.
- the Order declares that “*Because Justice Kavanaugh is no longer a circuit, district, bankruptcy or magistrate judge, a circuit judicial council no longer has the power or jurisdiction under the Act to review his conduct.*”. Please consider:
 - Rule 4 of the Judicial-Conduct Rules reads:

“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.”
 - while actions of a current Supreme Court Justice are not covered under Rule 4 or the Act, the Complaint was filed against Judge Kavanaugh when he was serving as a judge of a United States court of appeals, which is covered.
 - therefore, it appears that the Judicial Council not only had the jurisdiction, but also an obligation, to properly consider the Complaint.
- the seriousness of the allegations in the Complaint were acknowledged in the Order, by confirming that “*The allegations contained in the complaints are serious...*”
- the Order goes on to conclude, by referencing 28 U.S.C. § 352(b)(1)(A)(i), that “... *the complaints must be dismissed because an intervening event-Justice Kavanaugh’s confirmation to the Supreme Court-has made the complaints no longer appropriate for consideration under the Act.*”. This conclusion does not appear to be supported since Judge Kavanaugh was a covered judge under 28 U.S.C. § 351(a) at the time he committed the alleged misconduct and the Judicial Council’s receipt of the Complaint.
- While 28 U.S.C. § 352(b)(2) permits the Judicial Council to dismiss a complaint when there are appropriate “intervening events”, the *Commentary on Rule 18* of the Judicial-Conduct Rules provides an example addressing situations where “... *the chief judge’s*

² 28 U.S.C. § 332(d)(1)

order dismissing a complaint ... concluding that ... intervening events have ... mooted the problems raised by the complaint This example appears to be directly on point for this Complaint, stating that “*Although the subject judge may ostensibly be vindicated by the dismissal ..., the chief judge’s order may include language disagreeable to the subject judge. For example, an order may dismiss a complaint, but state that the subject judge did in fact engage in misconduct.*” (emphasis added). This commentary appears to render the conclusion in the Order that, “*Because it lacks jurisdiction to do so, the Council makes no findings on the merits of the complaints.*” inappropriate, and provides support for the Judicial Council to fully consider the Complaint and render an opinion.

- the seriousness of the allegations in the Complaint were also supported by Judge Karen LeCraft Henderson decision to forward the Complaint to Chief Justice Roberts for transfer and further review, rather than dismissing it as “lacking evidence.”
- since the Complaint was properly filed and received prior to Judge Kavanaugh’s confirmation as a Supreme Court Justice, it was possible for the Judicial Council to have reviewed and considered it prior to the confirmation vote. By holding the Complaint and refusing to act on it until after Judge Kavanaugh was confirmed, may have permitted a judge who committed serious judicial misconduct, to be elevated to a seat on the highest court in the Country.
- while the Order lists a number of prior actions as support of the Judicial Council’s decision in this Complaint, I do not believe that any of them come close to the seriousness of Judge Kavanaugh’s misconduct, especially when taking into account this misconduct occurred during a Supreme Court confirmation hearing before the Committee on the Judiciary of the United States Senate and being viewed live by a reported 20.4 million people. This is especially true when considering that confirming Judge Kavanaugh means that he continues his service at the highest level of the United States justice system, without him being subject to future independent oversight, as he was under the *Judicial Conduct and Disability Act*, at the time he committed his misconduct
- while the Order offers a number of prior decisions as consistent with the conclusion reached by the Judicial Council reached in this Complaint, please consider the following reasons why they may not be valid comparisons:
 - *Complaint Under the Judicial Conduct and Disability Act*, No. 10-17-90008 (10th Cir. 2017)
 - This complaint was dismissed because the subject judge was no longer a judge of the circuit. This may not be a comparable situation if for instance, the subject judge gave up the license to practice law (subject judge’s identity is not disclosed).
 - *Complaint of Judicial Misconduct*, No. 17-90118 (2d Cir. 20 17)
 - This complaint was dismissed because the subject judge permanently and irrevocably relinquished the office of United States circuit judge by retiring – i.e. could no longer cause harm to the public.
 - *Petition of John Doe*, 207 F. 3d (8th Cir. 2000)
 - This petition included complaints against Justice Thomas and was dismissed because he was a Justice of the Supreme Court at the time of the allegations and therefore, not subject to the Act. This matter differs from this Complaint, because, unlike Justice Thomas, Judge Kavanaugh was subject to the Act at the time of his misconduct.

- *Complaint Under the Judicial Conduct and Disability Act*, Nos. 10-16-90009 & 10-16-90017, (10th Cir. 2017).
 - while the Judicial Council in this matter concluded that it lacked authority under the Act to review the subject judge's alleged misconduct, because he was not subject to the Act at the time, it went on to acknowledge that "[t]he complainants are not without other avenues to address impropriety committed by a judge prior to appointment." With regard to the alleged misconduct in my Complaint, there is no other avenue to address Judge Kavanaugh's misconduct.
 - a second point made in the *Memorandum of Decision* in this matter, that was not raised in the Order regarding my Complaint, is the Justice Council statement that "We agree that Judge ██████████ retirement does not preclude him from coverage under the Act. Disability retirement under Section 372(a) is an essential and proper step for judges who can no longer discharge the duties of their office. **It is not, however, a safe harbor from allegations of judicial misconduct.**" (emphasis added). Applying this conclusion to my Complaint, it is appropriate for the Judicial Council, and provides support that they have an obligation to rule on my Complaint.

In order to make sure that no individual or group will have too much power, the *Constitution of the United States* divides the federal government into three branches: Legislative, Executive and Judicial. The legislative branch implemented the Act, bestowing upon the Judicial Council, the responsibility of determining whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts. Therefore, Congress' confirming Judge Kavanaugh to the Supreme Court does not relieve the Judicial Council's obligation to address the judicial misconduct alleged in the Complaint; this responsibility continues to belong to the Judicial Council.

Our Country's belief and trust in the United States' legal system is at stake. It is imperative that the Judicial Council fulfill its obligation to carefully and thoroughly consider each and every valid allegation of judicial misconduct against Judge Kavanaugh, and publicly disclose all findings in this highly visible situation. To ignore serious judicial misconduct could do grave damage our Country's legal system.

I respectfully request that this Complaint be seriously considered, and appropriate action taken. To the extent that it would be helpful, I will be happy to discuss this Complaint with you and/or provide additional details.

I reserve the right to supplement this *Petition for Review* as appropriate.

