

January 28, 2019

Office of the Circuit Executive
United States Courts for the Tenth Circuit
1823 Stout Street
Denver, CO 80257-1823
(303) 844-3157

Re: Misconduct Petition
Judicial Complaint No. 10-18-90110

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. 10-18-90110 (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 10th Circuit Court of Appeals on October 25, 2018, they 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."

The Complaints set forth significant and troubling allegations concerning the conduct of then-Judge Kavanaugh during his Senate confirmation meeting which took place 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." However as is well documented, the complaint refers to activities undertaken by Judge Kavanaugh before his elevation to the 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.

I would argue that the entire country watched the confirmation hearings and can attest to the fact that the activities in question happened before the "intervening event" of the actual confirmation which happened within hours of the Senate vote thus depriving citizens of their lawful right to issues complaints to what under any circumstances was deeply unjudicial behavior

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. 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 no 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.

Very truly yours,

