

The Honorable Timothy M. Tymkovich  
Tenth Circuit Judicial Council / Tenth Circuit Court of Appeals  
1823 Stout Street  
Denver, CO 80257

In re: Tenth Circuit Judicial Council **Order on Complaints against Brett M. Kavanaugh**,  
numbers 10-18-90038 through 10-18-90067, 10-18-90069 through 10-18-90107,  
and 10-18-90109 through 10-18-90122<sup>1</sup>

Dear Chief Judge Timothy M. Tymkovich, Circuit Judges Paul J. Kelly, Carlos F. Lucero,  
and Mary B. Briscoe, and District Judges Philip A. Brimmer, Scott W. Skavdahl,  
Clark Waddoups, and John E. Dowdell,

I am one of the 83 complainants (10-18-90116). Please accept this letter as my petition for review.

In your Order, you hold that while the “allegations contained in the [83] complaints are serious,” you suggest that the “complaints must be dismissed because of an intervening event.” As near as I can tell, the logic here is that Brett Kavanaugh has escaped justice by becoming a Justice.

The bulk of the Order’s ten pages are devoted to an argument in support of the notion that your Judicial Council does not have jurisdiction. The Order reckons that Mr. Kavanaugh’s elevation to serve on this nation’s highest court has transformed him from a “judge” into a “justice,” and, by this “intervening event,” your Judicial Council is rendered powerless. Judicial intemperance is redeemed by senatorial/executive transubstantiation.

This argument is flawed, in the light of the law and in the light of justice.

Chief Justice John Roberts charged the Tenth Circuit Court of Appeals to “exercise the powers of a judicial council.”<sup>2</sup> This is a tremendous responsibility. Judicial councils are responsible for the ethical integrity of the judicial branch of our government. “Each judicial council shall make all necessary and appropriate orders for the effective and expeditious *administration of justice*.... Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas” (28 U.S.C. § 332(d)(1)). But you held no hearings, took no testimony, issued no subpoenas. Your Council has, in short, failed to do its job. Brett Kavanaugh *was a judge*, not a justice, when he demonstrated an astonishing lack of judicial temperament during his 27 September 2018 testimony to Congress.

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<sup>1</sup> <http://www.uscourts.gov/courts/ca10/10-18-90038-et-al.O.pdf>

<sup>2</sup> [https://www.cadc.uscourts.gov/intranet/home.nsf/Content/Announcement+-+Letter+from+Chief+Justice+Roberts+Transferring+Judicial+Misconduct+Complaints+Filed+Against+Former+Circuit+Judge+Brett+Kavanaugh+to+the+Tenth+Circuit/\\$FILE/Ltr%20to%20Chief%20Judge%20Tymkovich%20Oct%2010%202018.pdf](https://www.cadc.uscourts.gov/intranet/home.nsf/Content/Announcement+-+Letter+from+Chief+Justice+Roberts+Transferring+Judicial+Misconduct+Complaints+Filed+Against+Former+Circuit+Judge+Brett+Kavanaugh+to+the+Tenth+Circuit/$FILE/Ltr%20to%20Chief%20Judge%20Tymkovich%20Oct%2010%202018.pdf)

President Jimmy Carter,<sup>3</sup> Justice John Paul Stevens,<sup>4</sup> Senator Chuck Schumer,<sup>5</sup> as well as more than 2,400 law professors,<sup>6</sup> registered their astonishment and roundly rebuked Judge Kavanaugh for his remarkably intemperate behavior during his Congressional testimony.

On display that day was the exact opposite of what Alexander Hamilton declared was “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.” To wit, that “all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR” (*The Federalist Papers*: No. 78, 1788). Hamilton held that “judges, who, if they behave properly, will be secured in their places for life” (*The Federalist Papers*: No. 79), but those who fail to behave properly will be removed from office.

President Carter stated that “[Judge Kavanaugh showed] he was temperamentally unfit to serve on the Supreme Court because of his outburst during the [Congressional] hearing.”<sup>7</sup>

Justice Stevens stated that he initially believed Judge Kavanaugh deserved to be confirmed, but then “his performance during the [Congressional] hearings caused me to change my mind.”<sup>8</sup>

Senator Schumer, quoting excerpts from Judge Kavanaugh’s testimony, stated that the “testimony Judge Kavanaugh prepared for the Judiciary Committee last Thursday ... showed who he was, and it was steeped in partisan resentment and acrimony. [Kavanaugh] tried to implicate sitting Senators in a ‘calculated and orchestrated political hit’ .... He denounced ‘left-wing opposition groups’ .... [Kavanaugh] portrayed the recent allegations against him as ‘revenge on behalf of the Clintons’ .... He even told Democratic Senators ‘what goes around comes around’—which, to many ears, sounds just like a threat.”<sup>9</sup>

To any reasonable observer, *it was a threat*, a partisan threat from a man with a long record of partisan activity. To be clear, there is nothing inherently wrong with partisan activists, but such individuals should not be allowed to hold government offices that require them to reach impartial, *nonpartisan* decisions intended to benefit the entire nation, rather than just one political fraternity.

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<sup>3</sup> Caroline Kenny, “Jimmy Carter: Kavanaugh’s confirmation to Supreme Court a ‘very serious mistake,’” CNN, October 2018. <https://www.cnn.com/2018/10/18/politics/jimmy-carter-brett-kavanaugh-unfit/index.html>

<sup>4</sup> “Kavanaugh does not belong on Supreme Court, retired Justice Stevens says,” Reuters, 4 October 2018. <https://www.reuters.com/article/us-usa-court-kavanaugh-stevens/kavanaugh-does-not-belong-on-supreme-court-retired-justice-stevens-says-idUSKCN1ME2P8>

<sup>5</sup> Chuck Schumer, “Schumer Floor Remarks on Senator McConnell & Republican Hypocrisy on Supreme Court Nominations, Trump’s Attack on Dr. Ford, and the Need for Clarity in the Kavanaugh FBI Investigation,” U.S. Senate, 3 October 2018. <https://www.democrats.senate.gov/news/press-releases/schumer-floor-remarks-on-sen-mcconnell-and-republican-hypocrisy-on-supreme-court-nominations-trumps-attack-on-dr-ford-and-the-need-for-clarity-in-the-kavanaugh-fbi-investigation>

<sup>6</sup> Susan Svrluga, “‘Unfathomable’: More than 2,400 law professors sign letter opposing Kavanaugh’s confirmation,” *Washington Post*, 4 October 2018. The *Post*’s direct link to that letter: [https://www.scribd.com/document/390196814/Open-Letter-to-the-U-S-Senate?secret\\_password=loF5vZqqJ5zO5QjtuuTk#](https://www.scribd.com/document/390196814/Open-Letter-to-the-U-S-Senate?secret_password=loF5vZqqJ5zO5QjtuuTk#)

<sup>7</sup> Carter, *supra* note 2.

<sup>8</sup> Stevens, *supra* note 3.

<sup>9</sup> Schumer, *supra* note 4.

The letter signed by more than 2,400 law professors deserves to be quoted at length:

“We are law professors who teach, research, and write about the judicial institutions of this country. Many of us appear in state and federal court, and our work means that we will continue to do so, including before the United States Supreme Court. We regret that we feel compelled to write to you to provide our views that at the Senate hearings on Thursday, September [27], 2018, the Honorable *Brett Kavanaugh displayed a lack of judicial temperament that would be disqualifying for any court, and certainly for elevation to the highest court of this land.*

“The question at issue was of course painful for anyone. But Judge Kavanaugh exhibited a lack of commitment to judicious inquiry. Instead of being open to the necessary search for accuracy, Judge Kavanaugh was repeatedly aggressive with questioners. Even in his prepared remarks, Judge Kavanaugh located the hearing as a partisan question, referring to it as ‘a calculated and orchestrated political hit,’ rather than acknowledging the need for the Senate, faced with new information, to try to understand what had transpired. Instead of trying to sort out with reason and care the allegations that were raised, *Judge Kavanaugh responded in an intemperate, inflammatory, and partial manner, as he interrupted and, at times, was discourteous to questioners.*”<sup>10</sup>

Your Judicial Council has taken account of none of these serious, thoughtful, articulate objections to Judge Kavanaugh’s disqualifying behavior.<sup>11</sup> The inescapable truth is that his disqualifying behavior was *the behavior of a circuit judge*, which, as you point out (under 28 U.S.C. § 351(d)(1)), is clearly one type of “judge” that is covered by the Judicial Conduct and Disability Act of 1980.

The Council is derelict in its duty if it does not conduct a thorough inquiry into, and evaluation of, the behavior of Brett Kavanaugh *when he was a judge*, and submit that to the appropriate authorities. Determining whom those authorities are—given the “confirm first; ask questions later” procedure of the Senate, and the legislative lacuna regarding misconduct reviews of Supreme Court justices—is admittedly not straightforward. As many have noted, our current situation is unprecedented.

I urge you to reexamine this matter. We, the people, can hold our judges and justices in high regard *only if* those individuals display the impartiality and judicial temperament that our founders revered, and a plain reading of “a nation of laws, not men” requires. Please generate a Report that addresses this governmental systems failure, and submit it to Congress, the Supreme Court, and the people. Please help the people reclaim their faith in our judicial system, before it’s too late.

Sincerely,



<sup>10</sup> “More than 2,400 law professors,” *supra* note 6.

<sup>11</sup> “A judge should ... act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. ... Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code.” *Code of Judicial Conduct for U.S. Judges*, Judicial Conference of the United States, 2014. 3, 17.  
[https://www.uscourts.gov/sites/default/files/vol02a-ch02\\_0.pdf](https://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf)