

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINTS UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

Nos. 10-18-90038 through 10-18-90067,
10-18-90069 through 10-18-90107
and 10-18-90109 through 10-18-90122

Before TYMKOVICH, Chief Circuit Judge, KELLY, BRISCOE, LUCERO, Circuit Judges, BRIMMER, WADDOUPS, SKAVDAHL, and DOWDELL, District Judges^{*}, ^{}**

ORDER

Eighty-three complaints of judicial misconduct were filed against Supreme Court Justice Brett M. Kavanaugh, formerly a circuit judge on the U.S. Court of Appeals for the District of Columbia Circuit. On December 18, 2018, the Judicial Council dismissed those complaints after determining Justice Kavanaugh was no longer a judge covered by the Act. *See In re: Compls. under the Judicial Conduct & Disability Act*, Nos. 10-18-90038 through 10-18-90067, 10-18-90069 through 10-18-90107 and 10-18-90109 through 10-18-90122, Order at 2 (10th Cir. 2018) *relying on* 28 U.S.C. § 352(b)(1)(A)(i).

Following the Judicial Council's dismissal of those complaints, twenty complainants filed petitions for review. Pursuant to the Rules for Judicial-Conduct and

* The Honorable Harris L Hartz, Circuit Judge, is a member of the Judicial Council but did not participate in the consideration of this matter.

** BRISCOE, Circuit Judge, dissenting (attached). LUCERO, Circuit Judge, recuses (attached).

Judicial-Disability Proceedings, and 28 U.S.C. §§ 351–364, the Judicial Council has reviewed the petitions for review and hereby affirms its previous order dismissing the captioned complaints of judicial misconduct.¹ *See* Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rule), Rule 19(b)(1) (Jud. Conf. of the U.S. Mar. 12, 2019).

The Judicial Council has reviewed and considered each of the petitions for review. The petitions primarily raise four arguments: (1) the Judicial Council lacked authority to consider the complaints in the first instance; (2) the Judicial Council members should disqualify themselves from considering the petitions for review; (3) the Judicial Council had jurisdiction to decide the merits of the complaints because Justice Kavanaugh was still a circuit judge when he allegedly engaged in misconduct, and because the complaints were filed while Justice Kavanaugh was a circuit judge; and (4) an intervening event did not occur because the allegations are not moot and remedial action remains possible.

These arguments are addressed below.

¹ Ordinarily, orders in misconduct matters are made public only when final action on the complaint has been taken and any right of review has been exhausted. Nevertheless, because the public is already aware of the existence of this matter and for the purpose of transparency, we have decided to make this order public before appeal rights have been exhausted. *See* Rule 23(a), 24(a); *see also* Rule 2. We are disclosing copies of the petitions for review with petitioners' names and other identifying information redacted. *See* Rule 23(b)(7) & cmt. (previously Rule 23(g) (2015)). They are available at: <https://www.ca10.uscourts.gov/ce/misconduct/kavanaugh-complaints>.

1. Procedure

Petitioners² contend the Judicial Council did not have the authority under Rule 26 to consider the complaints. They assert that by substituting itself in the role of the chief judge, the Council deprived petitioners of the right to a meaningful appeal.

In the Council's initial order, it stated that it "retained the matter and assumed the initial role ordinarily assigned to the chief circuit judge under 28 U.S.C. § 352(a)–(b) and Rule 11." Order at 2. The Council relied on the Commentary to Rule 26 which states, "the transferee judicial council shall determine the proper stage at which to begin consideration of the complaint[.]" Petitioners contend the Council relied on a "mere comment," and that the actual rule says that following transfer, "the transferee judicial council . . . may then exercise the powers of a judicial council under these Rules."

Ordinarily, complaints are initiated by or immediately referred to the chief judge. Under Rule 26, however, the Chief Justice transfers complaints to another circuit's judicial council, not that circuit's chief judge. The rules do not expressly provide a procedure beyond that point. Given the exceptional circumstances, the Council determined it to be in the public interest and in the interest of justice for more judges to consider the matter in the first instance. *See* Judicial Conduct & Disability Act Study Comm., *Implementation of the Judicial Conduct & Disability Act of 1980: A Report to the Chief Justice*, 239 F.R.D. 116, app. E at 215 (West 2006) ("Breyer Report") ("We leave to others the mechanics of how to effect transfers.").

² Petitioners are referred to in the aggregate throughout the Order.

In a similar circumstance involving a referral from the Chief Justice, the Second Circuit Judicial Council acted collectively to resolve a complaint in the first instance. *See Compl. of Judicial Misconduct*, No. 17-90118, Order at 2–3 (2d Cir. 2017) (resolving complaint against former Circuit Judge Alex Kozinski by judicial council after receiving it by transfer from Chief Justice Roberts pursuant to Rule 26). The Second Circuit Judicial Council’s initial dismissal order had the same functional effect on subsequent process as the Tenth Circuit Judicial Council’s underlying order. *See* Rule 11(g)(3). The Judicial Council reaffirms that it had authority to consider the complaints in the first instance.

2. Disqualification

Petitioners assert that since the Judicial Council assumed the initial role of the chief circuit judge, then under Rule 25(c), it should be disqualified from participating in the consideration of the petitions for review. *See* Rule 25(c) (“If a petition for review of the chief judge’s order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is disqualified from participating in the council’s consideration of the petition.”).

The Council disagrees that disqualification is required. Rule 2(b) provides,

A Rule will not apply if, when performing duties authorized by the Act, a chief judge, a special committee, a judicial council, the Committee on Judicial Conduct and Disability, or the Judicial Conference expressly finds that exceptional circumstances render application of that Rule in a particular proceeding manifestly unjust or contrary to the purposes of the Act or these Rules.

The Commentary to Rule 2(b) notes that the Rule “recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.” This matter, relative to almost any other, is exceptional. And the Council ensured the procedure provided a means for review of the Council’s initial order. Moreover, the Council, in its initial analysis, considered all the arguments and authorities that petitioners now raise.

The idea that judges review their own decisions is not novel. The Federal Rules of Civil Procedure specifically provide for such review in district courts when parties file motions for a judge to reconsider something that he or she has already ruled upon. *See* Fed. R. Civ. P. 59(e); Fed. R. Civ. P. 60(a). Similarly, and perhaps more analogously, it happens routinely at the appellate level. The same panel of appellate judges who considered a matter in the first instance may also consider the matter upon a petition for panel rehearing, *see* Fed. R. App. P. 40(a)(4), or rehearing en banc, *see* Fed. R. App. P. 35(b). Neither the authoring judge nor the original panel is required to recuse in those situations.

Regardless of what role the Council assumed in this matter, the authority of the Judicial Conference Committee to review the Council’s decision on a petition for review remains the same. *See* Rule 21.

3. Jurisdiction

Petitioners argue that because the alleged misconduct happened while Justice Kavanaugh was a circuit judge, and in some cases the complaints were filed before

Justice Kavanaugh was elevated to the Supreme Court, the Council had jurisdiction to decide the merits of the complaints.

The Council’s jurisdiction is limited by the Act and the Rules. The Council cannot create jurisdiction where it does not exist. As explained extensively in the underlying Order, a Supreme Court justice is not a covered judge. Order at 6–8. The lack of jurisdiction over Justice Kavanaugh precludes an investigative and fact-finding process, even over conduct allegedly committed while Justice Kavanaugh was a covered judge. For this reason, the Rule 18 Commentary, which states that a chief judge’s order “may dismiss a complaint, but state that the subject judge did in fact engage in misconduct,” is not applicable. As this Council lacks jurisdiction to entertain the complaints, it cannot investigate or make any findings regarding alleged misconduct.

Accordingly, the Council reaffirms the determination there was no jurisdiction or authority under the Act to review the allegations of misconduct.

4. Intervening Event

Petitioners contend an intervening event did not occur because the allegations are not moot (that is, Justice Kavanaugh is still performing judicial duties) and remedial action is possible (such as censure or reprimand). Petitioners cite the Rule 11 Commentary and the Breyer Report to support their assertion that a judge remains subject to the Act so long as he or she “performs judicial duties,” *see* Rule 11 cmt.

But an individual who is not a circuit, district, bankruptcy or magistrate judge is not covered by the Act or Rules, regardless of his or her functions or duties—even if these include judicial duties. *See* Order at 7. The Breyer Report only bolsters this

conclusion. The Report states that “[o]rdinarily stepping down from an administrative post such as *chief judge* or *judicial council member* or *court committee chair* does not constitute an event that would render unnecessary any further action on a complaint alleging misconduct.” 239 F.R.D. 116, app. E at 245 (emphasis added). Each of the examples provided in the Breyer Report are judges covered under the Act both before and after they have taken on administrative duties (that is, they remain appellate, district, bankruptcy, or magistrate judges). None includes judges who are simply not covered under the Act and the Rules.

Finally, because the intervening event in this matter resulted in the loss of jurisdiction, this Council does not have the authority to investigate or make findings upon which to base any remedial action.

The Council has considered all other arguments raised in the petitions and finds them unpersuasive.

Accordingly, the Council denies the petitions for review and reaffirms its determination that an intervening event precluded further review of the complaints by the Judicial Council.

The petitions for review are hereby DENIED.

So **ORDERED**, March 15, 2019, and
Entered on behalf of the Judicial Council
of the Tenth Circuit

By: 

David Tighe
Circuit Executive and Secretary to the Judicial Council of the Tenth Circuit

IN RE: COMPLAINTS UNDER THE JUDICIAL CONDUCT AND DISABILITY ACT
(Nos. 10-18-90038 through 10-18-90067, 10-18-90069 through 10-18-90107 and 10-18-90109 through 10-18-90122)

BRISCOE, Circuit Judge, dissenting

I respectfully dissent. In my view, the Tenth Circuit Judicial Council (the Council), having reviewed and dismissed the complaints in the first instance, is disqualified from considering the current petitions for review. The proper procedure, in my view, is for a different body, namely the Judicial Conference Committee on Judicial Conduct and Disability, to consider the petitions for review.

A

When a complaint is filed pursuant to the Judicial Conduct and Disability Act (the Act), 28 U.S.C. § 351 *et seq.*, it is processed pursuant to the Rules for Judicial-Conduct and Judicial-Disability Proceedings. Generally speaking, Rule 11(a) requires the chief judge of the circuit to review the complaint and determine whether it should be dismissed, concluded, or referred to a special committee. If the chief judge dismisses or concludes the complaint, Rule 18(a) authorizes the complainant to petition the judicial council of the circuit to review the chief judge's order. Notably, Rule 25(c) provides that “[i]f a petition for review of the chief’s judge’s order . . . is filed with the judicial council in accordance with Rule 18, the chief judge is disqualified from participating in the council’s consideration of the petition.”

B

Here, a number of complaints of judicial misconduct were filed with the Judicial Council of the D.C. Circuit against now-Supreme Court Justice Brett M. Kavanaugh. In

response to a request from the Judicial Council of the D.C. Circuit, the Chief Justice of the United States, acting pursuant to Rule 26, transferred the complaints to the Council. After receiving and consolidating those complaints with additional complaints filed directly in the Tenth Circuit, the Council assumed the initial role ordinarily assigned to the chief circuit judge under Rule 11. Specifically, the Council reviewed the complaints and concluded that they should all be dismissed because the subject of the complaints, Justice Kavanaugh, is no longer a judge covered by the Act.

C

Twenty of the complainants have filed petitions for review of the Council’s order of dismissal. The Council majority now proceeds to review and deny those petitions and “reaffirm[]” its prior order of dismissal. Order at 7. In my view, however, it is improper for the Council to sit in review of its own order of dismissal.

1. Procedure

The Council majority first attempts to justify reviewing its own order of dismissal by stating that, once a complaint is transferred pursuant to Rule 26, “[t]he rules do not expressly provide a procedure beyond that point.” Order at 3. Although the majority does not directly say so, it seems to be suggesting that if a matter is deemed by the Chief Justice to involve “exceptional circumstances” and transferred to another judicial council pursuant to Rule 26, then Rule 2(b) is automatically invoked and the normal procedural rules do not apply thereafter to that matter.

As I read them, however, Rules 2(b) and 26 function independently. Of course, both Rules refer to “exceptional circumstances.” But Rule 2(b) also requires the “chief

judge, a special committee, a judicial council, the Committee on Judicial Conduct and Disability, or the Judicial Conference [to] expressly find[] that exceptional circumstances render application of [a particular] Rule in a particular proceeding manifestly unjust or contrary to the purposes of the Act or these Rules.” Nothing in Rule 2(b) states that this requirement is met simply because a matter has been transferred pursuant to Rule 26.

Here, it was presumably the disqualification of the entire Judicial Council of the D.C. Circuit that constituted the “exceptional circumstances” that warranted transfer under Rule 26. Those “exceptional circumstances” were effectively remedied by the transfer to the Tenth Circuit. It is not clear to me what other “exceptional circumstances” exist that warrant deviating from the normal procedural rules that apply to complaints of judicial misconduct. Indeed, to the extent there are other “exceptional circumstances” that exist—including, perhaps, the subject and nature of the complaints—I believe those circumstances justify an independent review of the Council’s original decision.

2. Disqualification

As I have noted, Rule 25(c), in the normal course of events, disqualifies a chief judge “from participating in [a] council’s consideration of [a] petition” for review of a chief judge’s order dismissing or concluding a complaint. I see no reason why the same principle should not apply where, as here, a judicial council addresses and dismisses or concludes a complaint in the first instance.

The majority offers four rationales why its disqualification is not required. First, the majority asserts that “[t]his matter, relative to almost any other, is exceptional.” Order at 4. Although the majority does not explain why this is so, I will simply assume

this to be true due to the subject and nature of the complaints. In my view, however, the importance or exceptionality of this matter warrants strict adherence to the Rules, rather than disregard of them. Second, the majority states that it “ensured the procedure provided a means for review of the Council’s initial order.” Id. But that does not explain why the Council’s disqualification is unnecessary. Third, the majority states that “in its initial analysis, [it] considered all the arguments and authorities that petitioners now raise.” Id. But that is typically true when a chief judge dismisses or concludes a complaint, and thus this rationale fails to explain why disqualification is unnecessary. Lastly, the majority states that “[t]he idea that judges review their own decisions is not novel.” Id. In support, the majority points to the Federal Rules of Civil and Appellate Procedure allowing for motions for reconsideration, panel rehearing, and rehearing *en banc*. Those rules, however, are clearly different than Rule 18 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. In particular, the rules allowing for reconsideration and rehearing are limited in terms of their scope of the review and, in turn, those procedures are not the equivalent of appeals. Likewise, the rule allowing for rehearing *en banc* is limited to exceptional cases and, again, is not the equivalent of an appeal. Rule 18, in contrast, applies to all complaints and effectively affords a complainant full appellate review, by a different body, of an initial order dismissing or concluding a complaint.

D

I am left to conclude that the entire Council should be disqualified from participating in consideration of the current petitions for review. And, in turn, I conclude

that the petitions for review should be considered by a different body, specifically the Judicial Conference Committee on Judicial Conduct and Disability. *See generally* Rule 22(a).¹

¹ In light of my dissent, petitioners can presumably petition the Judicial Conference Committee on Judicial Conduct and Disability for review of the Council's order. *See* Rule 21(b)(1)(B).

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LUCERO, Circuit Judge.

For the reasons stated by Judge Briscoe in her dissent, I consider myself disqualified in the matter and therefore recuse. I would reassign the petitions to the Chief Justice of the United States for further referral to the Judicial Council of another Circuit pursuant to Rule 26 for independent consideration of the appeals or for other disposition as he may determine.