

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

C.C.D. No. 19-01

IN RE: COMPLAINTS UNDER THE JUDICIAL CONDUCT AND DISABILITY ACT

PROCEEDING IN REVIEW OF THE ORDER
OF THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT
J.C. Nos. 10-18-90038–67, 90069–107, 90109–122

MEMORANDUM OF DECISION

(Filed August 1, 2019)

Present: Judges Anthony J. Scirica, Chair, Sarah Evans Barker, Joel F. Dubina, Joel M. Flaum, Thomas F. Hogan, James E. Gritzner, and Jon O. Newman.

MEMORANDUM OF DECISION

This matter is before the Judicial Conduct and Disability Committee on petitions for review of misconduct complaints filed against Justice (then-Judge) Brett M. Kavanaugh alleging bias and hostility during his confirmation hearings. The Tenth Circuit Judicial Council addressed the complaints and held that Justice Kavanaugh’s resignation as a judge of the United States Court of Appeals for the District of Columbia Circuit and elevation to the Supreme Court of the United States qualified as “intervening events” that required conclusion of the complaints without consideration of their merits. Several complainants have petitioned this Committee for review.

The Committee’s review is governed by the Judicial Conduct and Disability Act, which lays out the procedure for adjudicating misconduct complaints. *See* 28 U.S.C. §§ 351–64. The

Act provides that any person may file a complaint against a circuit, district, bankruptcy, or magistrate judge, but does not include a Justice of the Supreme Court of the United States in the definition of the term “judge” covered by the Act. *Id.* § 351(d). In addition to the Act, the Rules for Judicial-Conduct and Judicial-Disability Proceedings and our precedent unequivocally preclude review of the merits of complaints against a judge who has resigned his or her judicial office and thereafter been confirmed as a Justice of the Supreme Court. Accordingly, the Committee and the Tenth Circuit Judicial Council lack statutory authority to review the merits of the complaints against Justice Kavanaugh.

I.

The complaints underlying these petitions for review raise allegations of misconduct by Justice (then-Judge) Brett M. Kavanaugh. At the time the complaints were filed, Justice Kavanaugh was a judge on the Court of Appeals for the District of Columbia Circuit. President Donald Trump nominated Judge Kavanaugh to the Supreme Court on July 9, 2018, and the Senate Committee on the Judiciary held confirmation hearings from September 4 to September 7, 2018. The Senate Judiciary Committee scheduled an additional hearing to review allegations of misconduct that had become public following the initial hearings, and Judge Kavanaugh testified before the Senate Judiciary Committee again on September 27, 2018. His nomination was approved by the Senate Judiciary Committee, and he was confirmed to the Supreme Court on October 6, 2018.

During that confirmation process, the Court of Appeals for the District of Columbia Circuit received more than a dozen misconduct complaints against Judge Kavanaugh. The D.C. Circuit Judicial Council, invoking Rule 26 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, requested transfer of the complaints to another circuit to avoid

any perception of local bias. The Chief Justice on October 10, 2018 transferred the complaints and any future related complaints to the Tenth Circuit Judicial Council. The Tenth Circuit Judicial Council consolidated the transferred complaints, pending complaints, and subsequently-filed complaints—83 in total—for purposes of review.

Those complaints focus on Justice Kavanaugh’s conduct occurring during the September 27 confirmation hearing, as well as his testimony at prior confirmation hearings.¹ They allege various violations of the Canons of the Code of Conduct for United States Judges, as well as the standards of conduct set forth in the Judicial Conduct and Disability Act and the Rules for Judicial-Conduct and Judicial-Disability Proceedings for making inappropriately partisan statements and behaving in a demonstrably hostile manner during the hearings.² *See In re: Complaints Under the Judicial Conduct & Disability Act*, Nos. 10-18-90038–67, 90069–107, 90109–122, at 3–4 (10th Cir. Judicial Council Dec. 18, 2018).

After reviewing the complaints, the Tenth Circuit Judicial Council “assum[ed] the initial role ordinarily assigned to the chief judge” and dismissed the complaints in a published opinion.

¹ The Tenth Circuit Judicial Council disclosed copies of the complaints, with complainants’ names and other identifying information redacted, at <https://www.ca10.uscourts.gov/ce/misconduct/kavanaugh-complaints>. As the Tenth Circuit Judicial Council summarized the complaints: “Most . . . include allegations that he made false statements under oath, both during his D.C. Circuit confirmation hearings . . . and during his Supreme Court confirmation hearing in 2018.” *In re: Complaints under the Judicial Conduct and Disability Act*, Nos. 10-18-90038–67, 90069–107, 90109–122, at 3 (10th Cir. Judicial Council Dec. 18, 2018).

² *See* Canon 1 (providing “[a] judge should maintain and enforce high standards of conduct”); Canon 2 (providing “[a] judge should avoid impropriety and the appearance of impropriety”); Canon 4 (providing “[a] judge should not participate in extrajudicial activities that . . . reflect adversely on the judge’s impartiality”); Canon 5 (providing “[a] judge should refrain from political activity”); Rule 4(a)(1)(D) (defining misconduct to include making “inappropriately partisan statements”); Rule 4(a)(2)(B) (defining misconduct to include “treating . . . others in a demonstrably egregious and hostile manner”).

Id. at 2. Because the Act does not authorize action against an individual who is no longer a covered “judge” as defined by the Act, the Judicial Council reasoned, Justice Kavanaugh’s confirmation to the Supreme Court was an “intervening event” under 28 U.S.C. § 352(b)(2) and Rule 11(e) that required termination of these proceedings.³ The Judicial Council’s order informed complainants that they could file petitions for review to the Judicial Council under Rule 19.

Twenty complainants petitioned for review to the same Judicial Council. Their petitions raised two main challenges. First, they disputed the Judicial Council’s conclusion that it could not review the merits of the complaints. Second, they objected to the Council’s procedures. Specifically, they asserted the Judicial Council lacked authority to conclude the complaints in the first instance because the Act and Rules delegate that power only to the chief circuit judge, and that this procedural error deprived them of their review rights because the Judicial Council, having already reviewed the complaints, would be asked to review the matter a second time. The complainants further asserted that Rule 25(c), which disqualifies a chief circuit judge from participating in the Judicial Council’s review of their decision to conclude a complaint under Rule 11(e), effectively disqualified the entire Judicial Council from participating in the consideration of the complainants’ petitions for review.

Exercising plenary review over its earlier decision, a majority of the Judicial Council affirmed. *In re: Complaints Under the Judicial Conduct & Disability Act*, Nos. 10-18-90038–67, 90069–107, 90109–122 (10th Cir. Judicial Council Mar. 15, 2019). One judge dissented and another judge recused himself on the ground that, in their view, the Judicial Council was

³ As noted above and explained further below, the Act covers only “circuit judge[s], district judge[s], bankruptcy judge[s], or magistrate judge[s].” 28 U.S.C. § 351(d)(1).

disqualified from considering the petitions for review since it had previously considered the underlying complaints in the first instance. They called for an “independent review of the Council’s original decision.” *Id.* at Dissenting Op. 3.

Nine complainants have filed petitions for review of the Judicial Council’s decision to the Judicial Conduct and Disability Committee. *See* Rule 21(a), (b)(1)(B). Their petitions challenge the Judicial Council’s determination that it was precluded from reviewing the merits of the complaints against Justice Kavanaugh, as well as the Judicial Council’s consideration of the complaints in the first instance and again on review.

II.

We begin our analysis by addressing the question whether the Judicial Conduct and Disability Act authorizes a review on the merits of the misconduct complaints that were filed against Justice Kavanaugh. We conclude, as did the Tenth Circuit Judicial Council, that our Committee, judicial councils, and chief circuit judges all lack statutory authority to review the merits of complaints against an individual no longer covered under the Act. As a Supreme Court Justice, Justice Kavanaugh is not a judge subject to the Act.

The Act empowers a chief circuit judge, judicial council, or the Committee to review charges of misconduct only against a covered “judge.” *See* 28 U.S.C. § 351(a); *id.* § 351(d)(1); *id.* §§ 352–55. The Act defines a covered “judge” as a “circuit judge, district judge, bankruptcy judge, or magistrate judge”—and leaves no room for the Committee or any judicial council to expand that statutory definition. *Id.* § 351(d)(1). Plainly absent from that list are Supreme Court Justices.

In addition to the Act’s plain text, its history shows that Congress has not authorized review of complaints against Justices of the Supreme Court. Congress considered the possibility

of including in the Act authority to review complaints against Supreme Court Justices, but unambiguously rejected that idea. *See* 125 Cong. Rec. 30,051, 30,094 (1979). Among the reasons cited by Congress for declining to extend the Act to Supreme Court Justices is that the position of Supreme Court Justice is created by the Constitution rather than statute. *See Judicial Tenure Act: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary on S. 1423*, 95th Cong. 63 (1977) (statement of Sen. Joseph D. Tydings) (reasoning the Act’s “jurisdiction to be constitutional should be limited to those judges created by statute and not Justices of the Supreme Court created by Article III of the Constitution”). Judicial Councils have, in following the Act’s plain text and history, declined to review complaints against Supreme Court Justices. *See Petition of John Doe*, 207 F.3d 1102, 1104 (8th Cir. Judicial Council 2000) (“The [Judicial Conduct & Disability Act] process does not apply to Justices of the Supreme Court.”). And the Rules for Judicial-Conduct and Judicial-Disability Proceedings reiterate that the complaint procedures for misconduct apply only to a “covered judge,” as defined in the Act. *See* Rule 1(a)–(b). Since Justice Kavanaugh, the subject of the pending complaints, resigned his post as a covered judge and is currently a Supreme Court Justice, we lack authority to review the merits of any complaints against him.

Petitioners contend that because Justice Kavanaugh was a judge on the Court of Appeals for the District of Columbia Circuit at the time their complaints were filed, the Committee retains authority to act on the merits of their complaints even after his resignation and subsequent elevation to the Supreme Court. But in addition to the institutional concerns that prohibit our review of complaints against a Justice recounted above, the Act’s text, structure, purpose, and application demonstrate that Congress has not given the Committee the authority to act on the merits here. The Act and the Rules expressly contemplate that certain changes in circumstance

pending the review of a complaint preclude reaching the merits of a petition for review. Resignation from the Court of Appeals and elevation to the Supreme Court is such a circumstance.⁴

The Act's text expressly provides that "intervening events" may terminate the Judiciary's power to adjudicate the merits of a complaint. It provides: "After expeditiously reviewing a complaint," the chief judge may "conclude the proceeding if the chief judge finds . . . that action on the complaint is no longer necessary because of intervening events." 28 U.S.C. § 352(b)(2); *see also* Rule 11 (explaining action is no longer necessary when "intervening events render some or all of the allegations moot or make remedial action impossible as to the subject judge"). The Committee and judicial councils have long recognized a judge's departure from "covered" judicial office to be precisely the kind of "intervening event" the Act and Rules contemplate. The Third Circuit Judicial Council, for example, has specifically held that by including the "intervening events" language in the Act, Congress "codified what has been reported to be the general practice of circuit chief judges to dismiss complaints . . . on the ground that a judge had

⁴ In support of their contention that we must look only to whether Justice Kavanaugh was a covered judge at the time the complaints were filed, some of the complainants invoke the rule that "jurisdiction of the court depends upon the state of things at the time the action is brought." *Grupo Dataflux v. Atlas Global Grp.*, 541 U.S. 567, 570–71 (2004) (internal quotations and citations omitted). But the complainants' reliance on the jurisdictional time-of-filing rule is misplaced. That rule governs jurisdiction under Article III of the United States Constitution, which ensures that federal courts' review power is limited to cases or controversies of particular subject matter. Proceedings under the Act and Rules do not involve the resolution of a case or controversy—the Act instead "establishes an administrative, inquisitorial process" designed to ensure "effective and expeditious administration of the business of the courts." Rule 3 Commentary; 28 U.S.C. § 351(a). The Article III rule exists "precisely because the facts determining jurisdiction are subject to change, and because constant litigation in response to that change would be wasteful." *Grupo Dataflux*, 541 U.S. at 580. In this context, by contrast, whether a federal judge is no longer a "covered judge" under the Act due to his or her resignation from the Court of Appeals and elevation to the Supreme Court is self-evident and requires no additional litigation, expense, or delay.

left the bench,” for whatever reason. *In re Complaint of Judicial Misconduct*, 10 F.3d 99, 99 (3d Cir. 1993). Resignation may be an “intervening event” that moots complaints, as has been noted by several judicial councils and this Committee. *See In re: Complaint of Judicial Misconduct*, C.C.D. No. 16-01, at 2 (Comm. on Judicial Conduct and Disability Jan. 26, 2017); *In re Complaint of Judicial Misconduct*, No. 17-90118, at 2 (2d Cir. Judicial Council Feb. 5, 2018); *In re Charge of Judicial Misconduct*, 91 F.3d 90, 91 (9th Cir. Judicial Council 1996); *In re Complaint of Judicial Misconduct*, 10 F.3d at 100.⁵

When a judge resigns from covered judicial office to be appointed to the Supreme Court, the chief circuit judge acts within his or her statutory authority to conclude any complaints based on those intervening events. Indeed, the chief circuit judge is required to do so. A Supreme Court Justice no longer exercises the assigned duties as a “covered judge,” and the conclusion of those duties terminates any authority under the Act to review the merits of complaints against the Justice. The Commentary to Rule 11(e) states that “[a]s long as the subject of a complaint retains the judicial office and remains a covered judge as defined in Rule 1(b), a complaint must be addressed”—indicating that, in the inverse, when a subject judge no longer retains the judicial office as a “covered judge,” the merits of a complaint must not be addressed. *See also* Rule 1 Commentary (same).⁶ As discussed, the Act vests the Judiciary with the power to review and remedy “conduct prejudicial to the effective and expeditious administration of the business of”

⁵ *See also* 28 U.S.C. § 371(a).

⁶ Other sections in the Rules make clear that qualifying intervening events can transpire even after the chief circuit judge refers the complaint to a special committee on the merits. Under Rule 20(b)(1)(B), the special committee is also authorized to “conclude the proceeding because . . . intervening events have made the proceedings unnecessary.”

circuit, district, magistrate, and bankruptcy courts. 28 U.S.C. § 351(a), (d)(1). The authority to review the conduct of a Supreme Court Justice is conspicuously absent from that list.

We agree with the reasoning of the Tenth Circuit Judicial Council and conclude the Act does not authorize review of the merits of the complaints against Justice Kavanaugh.

III.

Petitioners separately challenge the specific procedures followed by the Tenth Circuit Judicial Council leading to the dismissal of the complaints. Though the Rules recommend a different procedure than the Tenth Circuit Judicial Council followed, we conclude, based on our independent review and affirmance of the Judicial Council’s determination, that any procedural error has caused no prejudice.

The Act lays out procedures to be followed in the review of misconduct and disability complaints, and that process is mirrored in the Rules. A complaint is first submitted to the chief circuit judge of the circuit where the subject judge sits. *See* 28 U.S.C. § 351(a). The Act directs the chief circuit judge to review the complaint and to conclude it if “intervening events” have rendered action on the complaint unnecessary or without legal authorization. *Id.* § 352(b)(2); Rule 11(e). The chief circuit judge’s conclusion of the complaint is subject to review by the judicial council of that circuit. 28 U.S.C. § 352(c); Rules 18(a), 19(b). “If the chief judge does not enter [a dismissal] order under section 352(b),” the Act directs the chief judge to appoint a special committee to oversee an investigation of the complaint, whose report in turn is to be submitted for review to the circuit judicial council. 28 U.S.C. § 353(a)(1), (c); *id.* § 354. The Rules also provide that where the chief circuit judge concludes a complaint under Rule 11(e), “the chief judge is disqualified from participating in the council’s consideration of the petition” for review. Rule 25(c).

In the case before us, the Judicial Council (to whom the complaints were referred in the first instance), rather than the chief circuit judge, reviewed and concluded the complaints under Rule 11(e). In doing so, the Judicial Council emphasized it had received the complaints by way of transfer under Rule 26, which provides that “[i]n exceptional circumstances,” the Chief Justice may transfer complaints “to *the judicial council* of another circuit.” Rule 26 (emphasis added). The Judicial Council specifically referenced the Commentary to that Rule, which states “the transferee judicial council shall determine the proper stage at which to begin consideration of the complaint.” Citing the “exceptional circumstances” of this case, the Judicial 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.” *In re: Complaints Under the Judicial Conduct and Disability Act*, Nos. 10-18-90038–67, 90069–107, 90109–122, at 3 (10th Cir. Judicial Council Mar. 15, 2019).

The Chief Judge’s and Judicial Council’s attention to public interest and the benefit of initial full Judicial Council review was not unreasonable and, in our view, was commendable. As the Judicial Council noted, transfer under Rule 26 involves the Chief Justice’s selection of a “transferee judicial council” of another circuit and authorization of that judicial council to “determine the proper stage” to begin consideration of the complaint. The Rule provides no other procedural guidance on this matter.

The structure of the Act and Rules, however, counsel that in future proceedings a judicial council should not assume the role of a chief circuit judge to conclude a complaint under Rule 11(e). As Petitioners note, a judicial council’s dismissal of a complaint in the first instance may frustrate the review rights provided for elsewhere by the Rules. A petition given initial consideration by the judicial council does not lead to precisely the same second-level review as

would occur if the chief circuit judge had made the initial decision. The disqualification provision in Rule 25 supports the preference for this procedure by requiring the chief circuit judge, following the conclusion of a complaint under Rule 11(e), to abstain from participating in the review process. Here, arguably because the entire Judicial Council participated in the decision to conclude the complaints under Rule 11(e), Rule 25(c) would require that the entire Judicial Council be disqualified from reviewing the Rule 11(e) decision. Such an anomalous result underscores the importance of following the procedures prescribed in the Rules. Stated simply, the judicial council is not authorized to review a complaint in the first instance under Rule 11—a chief circuit judge should do so, and the full judicial council may then review that determination in appropriate circumstances.⁷

This Committee is vested with the authority to review petitions from judicial council decisions where, as here, one or more members of the judicial council dissented from the dismissal order. *See* Rule 21(a), (b)(1)(B). And even without a dissent, the Committee would have reviewed this matter under Rule 2(b), *sua sponte* and at our discretion.⁸ We need not invoke our Rule 2(b) authority here because we already have review authority under Rule 21. Our independent review has brought us to the same conclusion reached by the Tenth Circuit Judicial Council. Accordingly, we hold that any procedural error by the Tenth Circuit Judicial Council has caused no prejudice and, in any event, has been remedied by our review. Further, because the

⁷ The Rules are clear that in reviewing a complaint in the first instance a chief circuit judge may seek assistance from or consult with “other judges who may be helpful regarding the performance” of functions assigned to the chief circuit judge under the Act. Rule 23(b)(10).

⁸ Rule 2(b) empowers only “a chief judge, a special committee, a judicial council, the Committee on Judicial Conduct and Disability, [and] the Judicial Conference” to “expressly find[] that exceptional circumstances” merit deviation from the Rules. Neither that Rule nor any other Rule enables complainants to petition the Committee to exercise exceptional review authority or challenge the Committee’s decision not to do so.

same result is required under any procedural framework, it would be of no remedial value to remand for purposes of following a different procedure.

IV.

Because the Act does not apply to a judge who has resigned from a covered judicial office and thereafter been confirmed as a Supreme Court Justice, we will deny the petitions for review.