

MISCONDUCT PETITION

January 2, 2019

Mr. David Tighe
ReCircuit Executive
U.S. Court of Appeals for the Tenth Circuit
1823 Stout Street
Denver, Colorado 80257

Dear Mr. Tighe, Judge Tymkovich, and the Tenth Circuit Judicial Council,

I hereby petition the Judicial Council for review of its Dec. 18, 2018, Order dismissing my complaint regarding “inappropriately partisan statements” made by Judge Brett Kavanaugh on Sept. 27, 2018.

I thank the Council for its promptness in responding to my complaint. In concluding this letter, I will offer a view on why the circumstances of the complaint and the environment in which it arose present the Council with a compelling opportunity to preserve and enhance public trust in the nation’s federal courts. My petition is written in that spirit.

Background. This petition concerns a single complaint (10-18-90048), received by the DC Circuit on Oct. 2. That date is important. I am not a lawyer. I represent no group. I have no standing other than that of a private citizen. I take that role seriously; in October 2018, I provided recommendations, in writing and in public testimony, to the Judicial Conference committees considering improvements to the Code of Conduct for United States Judges (the Code) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (the Rules). I have not coordinated with any other complainant. For reasons that will become apparent, I respectfully ask that you review this petition on its own merits and in the sole context of the “inappropriately partisan statements” that it alleges.

Summary. The Judicial Council has chosen to retreat to the false safety of an opinion that relies on a *novel and excessively generous interpretation* of 28 U.S.C. § 351-364 (the Act). The Council has mistakenly applied the intent and logic of an “intervening event” *retroactively*, thus barring even a cursory review of the merits of a covered judge’s conduct. An “intervening event” bars corrective action after the event; it does not bar inquiry and fact-finding beforehand, as if the conduct never occurred. Thus, the Order errs in stating that this complaint “must” be dismissed in its entirety.

I make three basic points. First, under the Rules, when a complaint is filed in a timely manner against a then-covered judge who later ceases to be covered because of an “intervening event,” the Council is permitted to find facts and opine on the merits (and should have done so in this case). Only the need for corrective action is eliminated as *future* action barred by an “intervening event.” Further, the Council has an obligation to express a view on the merits based on the Code’s mandate that judges act to preserve public trust in the judiciary, especially in

“high-visibility” cases. In addition, the Council’s novel interpretation rules out the guidance on ethical issues that judges, *including Supreme Court justices*, say they need (see Chief Justice Roberts’s 2011 *Year-End Report on the Federal Judiciary*.) A Supreme Court justice who exhibited partisan bias as a lower-court judge, but was never guided on the boundaries of the conduct via the complaint process, can hardly be expected to disqualify himself (recuse) appropriately. The absence of any inquiry deprives colleagues of ethics guidance and the public of any assurance that instances of alleged bias are being taken seriously.

Second, if the Council insists on remaining silent, it should forward this complaint to the Judicial Conference. The Rules permit such a result; a reasonable interpretation of one relevant Rule *requires* it. If the Council is unwilling to act as a guardian of the judiciary’s legitimacy, the federal courts’ highest body for deciding questions of judicial ethics should be handed the responsibility of reviewing allegations of misconduct by a circuit judge nominated to the Supreme Court that occurred on live television before tens of millions of Americans.

Finally, the nature and timing of this complaint point to a grave flaw in the misconduct process that allows for actual abuse or the appearance of abuse. Under the Council’s opinion, when an “intervening event” is *anticipated or scheduled*, a timely complaint against a covered judge can be rendered *entirely moot* by bureaucratic or judicial procrastination or intentional delay.

Procedure. Before substantiating these conclusions, I raise a procedural question: who is reviewing this petition? The Order states that when the complaint was transferred from the DC Circuit, the Judicial Council of the Tenth Circuit “assumed the initial role ordinarily assigned to the chief circuit judge.” However, Rule 25(c) states that “the chief judge is disqualified from participating in the council’s consideration of the petition.” A judge evaluating his own decision on appeal has an inherent conflict. The Commentary to Rule 19 states that a council “should ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal.”

Council members named in the Order should not review their own opinion on appeal. Will an entirely new Council be named? By whom or by what process? To untie this procedural straitjacket, the Council is permitted to forward all petitions for review in the Kavanaugh matter to the Judicial Conference. Under § 354(b)(2)(B), “special circumstances” that render a case “not amenable to resolution by the judicial council” *require* a council to forward the matter to the Judicial Conference. An unwitting Catch-22 need not place a cloud over this process.

Argument on the Order. The Council’s reasoning in dismissing this complaint outright rests on two intertwined conclusions: the Act does not cover Supreme Court justices, and in any case, the matter is now moot because the subject judge became a Supreme Court justice via an “intervening event.” The former conclusion is only made possible by the latter. Thus, the effect of the “intervening event” is pivotal.

The structure of the complaint process is not in doubt. The Rules lay out a two-step process for complaints filed against *sitting covered judges*: fact-finding and, if warranted, corrective action. Complaints can be “dismissed” at the end of fact-finding or “concluded” at any time in the process if an “intervening event,” such as retirement or resignation, renders the subject judge non-covered. The event bars action against the judge from that point forward. Why so? Because the main purpose of the complaint process is to weed out bad apples without undue dispute and controversy and to instruct other judges. The purpose is not to punish.

The Kavanaugh matter involves wholly novel circumstances. The Act and Rules offer no guidance for a non-frivolous complaint against a circuit judge nominated to the Supreme Court who is confirmed before the allegation is adjudicated. No one imagined such a scenario—not Congress in writing the Act, not the Judicial Conference in writing the Code and Rules, and not the 2006 Breyer Committee report, which analyzed the complaint process in depth. No instance of judicial misconduct has ever occurred in real time before such a vast national audience. Moreover, we have likely never witnessed partisan remarks by a federal judge more shockingly inappropriate than those uttered by Judge Kavanaugh on Sept. 27, 2018.

No one can doubt that misconduct proceedings initiated against a *sitting Supreme Court justice* are impermissible under the Act’s definition of “covered judge.” As the Council notes, Rule 8(c) states: “If the circuit clerk receives a complaint about a person not holding an office described in Rule 4 [covered judges], the clerk must not accept the complaint under these Rules.” (A great many of the 83 complaints dismissed by this Council were filed *after* Judge Kavanaugh had been sworn in. Generous as it might have seemed to the Council, its “liberalized” standards for accepting complaints [footnote 2 of the Order] exceeded the Council’s authority and now prejudice this petition.)

Any reasonable reader of the Act, the Rules, and the Breyer Committee report sees that the process envisions *phases* whereby complaints may be *concluded* midstream when a covered judge ceases to be covered. They do not envision a process where a complaint is *dismissed in its entirety without inquiry* because a once-covered judge was no longer covered when a chief judge happened to reach into his in-box and read a complaint. The “intervening event” concept exists because the Act and Rules must account for the reality that a covered judge may resign, retire, or die during the complaint process. Such an “intervening event” only bars *corrective action* that might have been contemplated during the fact-finding phase. The Council’s opinion misinterprets the role of an “intervening event,” *giving it retroactive weight where none is described or intended* in the Act or Rules. Rule 11(e) states, under the rubric “Intervening Events”:

The chief judge may conclude a complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible.

Note that a proceeding is “concluded” not “dismissed,” and “remedial action” is treated as a *separate* phase of the proceeding. The Act itself is even clearer: § 352(b)(2) states that a chief

judge may “conclude” a proceeding if corrective action “is no longer necessary because of intervening events.” As the phrase “no longer necessary” implies, the process unfolds over time and only corrective action is set aside. There is no hint of the Council’s conclusion that intervening events *apply retroactively*. Further, Rule 11(e)’s use of the phrase “some or all” underscores that an intervening event *need not erase all allegations*.

The Council’s notion that Rule 11(e) “effectively precludes action against an individual who is no longer a circuit..judge” relies on a tenuous assumption that the mere inquiry into the allegation, before deciding whether corrective action is warranted, is inherently punitive. Use of the word “conclude” in the rule, rather than “dismiss,” is significant. To suggest retroactivity stretches the meaning into illogical territory.

Importantly, the Commentary to Rule 18 states that Chief Judges are permitted *to address the conduct of a subject judge* even while concluding a complaint. It states:

Although the subject judge may ostensibly be vindicated by the dismissal or conclusion of a complaint, 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.

This plainly establishes that in some cases (perhaps exceptional ones), the need to address the misconduct overcomes the urge to flatly dismiss a complaint without comment. It is odd that the Council states in its opinion that it “lacks jurisdiction” to make findings on the merits. The Act and Rules clearly suggest otherwise. Where a formerly covered judge is beyond the reach of any sanction, as is the case with a Supreme Court justice, important lessons can still be taught, examples can still be set, the public can still better understand judicial ethics and gain trust in the judiciary.

To be clear, the scenario outlined above, where a covered judge is the subject of a complaint that is not addressed until after he or she becomes non-covered, does not open the door to any and all complaints filed after the intervening event. A complaint *can only be valid if it is received while the subject is a covered judge*. (See Rule 8(c) above.) This was the case with my complaint.

It is worth recalling that the foundation of the complaint process is the Constitution. Article III requires *all* judges to act ethically: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.” This calls for definitions. As a practical matter, misconduct opinions are necessary for a full understanding of the Code, the Act, and the Rules. By barring any review, investigation, inquiry, consideration, or opinion related to the merits of this complaint, the Council thwarts the intent of the Act, the Rules, the Code, and the Constitution itself. It also invites legislative branch intervention. No partisan statement by a judge will ever be considered “inappropriate” unless that word is given practical meaning.

The Breyer Committee underscores the fact that leaving misconduct unexplained fails the process. Its case studies of high-visibility complaints are noteworthy. In case C-4 (page 75), the committee concluded that the chief judge avoided an inquiry into “troublesome publicly aired

allegations,” thus “leaving the public with no authoritative conclusion from the circuit council as to whether misconduct occurred.” All that is required of the Tenth Circuit’s Council is to conduct a brief inquiry and conclude the complaint while at the same time assuring the public, in unvarnished language, that misconduct occurred and judges are on notice that any such partisan statements in the future will require corrective action. This step, while potentially embarrassing, does not rise to the level of a formal reprimand or encroach on judicial independence. It mandates nothing and is in keeping with the Code’s admonition that “a judge must expect to be the subject of constant public scrutiny.”

As an instructive example, the Council might ask itself what an imaginary Chief Judge should do in the following scenario: “Circuit Judge Smith” is retiring on Friday. Everyone knows it. On Monday morning of the same week, he is presiding at a trial. A defense attorney makes a pointed objection, and Smith loses his temper. “Listen, Rodriguez,” he says, “stop the whining or go back to your country. You people are a bunch of rapists and murderers let into the United States by the idiot Federalists.” A reporter present writes an article, and social media vastly broadens the audience. On Tuesday, Rodriguez’s brother leads protesters to the Courthouse and files a misconduct complaint against Smith, citing hostile and partisan statements barred by the Code. What is the wisest course? The Chief Judge could do and say nothing until after Friday, then issue an order saying his hands are tied because Smith isn’t a “covered judge.” He could immediately “identify” a complaint (create one internally) and tell Smith the Judicial Council is meeting by phone on Wednesday to consider a reprimand but Smith could first acknowledge the violation publicly and apologize. Or he could issue an announcement Tuesday afternoon that there will be a misconduct inquiry based on the brother’s complaint. Then the Chief Judge would post an Order the following Monday stating that the comments constituted misconduct and will not be tolerated and close the matter because Smith is retired from the bench.

The Tenth Circuit Council’s choice was the first option: silence and delay. The Council had and still has the authority to review and consider the merits of Judge Kavanaugh’s conduct. It also had the authority (and responsibility) to state, for the benefit of fellow judges and the public, that what they saw and heard on Sept. 27 was inappropriate, a violation of the Code, and behavior that must be avoided in the future. The Council should remand the Order by the “chief judge” for correction and then properly inform and educate the judiciary and the public. If it is unwilling to do so, the Council should transfer the complaint to the Judicial Conference under § 354(b) of the Act:

...the judicial council may, in its discretion, refer any complaint under section 351, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

Missteps and Delay. I turn now to the particulars of this complaint, because context is critical to the argument. This complaint was rendered moot, under the council’s interpretation, by the inaction of the judiciary as a known, anticipated “intervening event” loomed. A chief judge or Council, knowing that an “intervening event” is pending, can ponder complaint options until the clock runs out and a covered judge is no longer covered. That is the appearance left by the facts.

Judge Kavanaugh's Sept. 27 Judiciary Committee testimony should have been noted by the DC Circuit on Sept. 27 *and could have been resolved informally* in a phone call, assuming agreement was reached on corrective action proportionate to the violation. (In 2016, Justice Ginsburg publicly apologized four days after her statements in the press critical of a presidential candidate, ones that violated the Code, though she was not subject to it.) The core allegation in this complaint arose solely from Judge Kavanaugh's remarks; it makes no assertions related to prior statements or truthfulness under oath. Video of the day's testimony and reliable transcripts were available on the Internet. As such, *no inquiry was required*. The question of appropriateness is entirely subjective; a judge either sees inappropriate partisanship or does not. It was a departed colleague of yours who enshrined the phrase, "I know it when I see it." In short, the judges of the DC Circuit could have taken swift action. They did not.

Nine complaints alleging other misconduct (perjury, chief among them) had already been filed by Sept. 27 (the first was Sept. 10). The DC Circuit's chief judge, Merrick Garland, recused for obvious reasons, and Judge Karen LeCraft Henderson became the acting circuit chief judge for purposes of the Kavanaugh matter. These were "extraordinary circumstances"—a Supreme Court nominee accused in serious, non-frivolous complaints of engaging in misconduct during the confirmation process. The Commentary to Rule 23 permitted public disclosure of the nine complaints:

In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or controversial cases is to reassure the public that the judiciary is capable of redressing judicial misconduct or disability.

No disclosure was made.

There can be little doubt that Judge Henderson knew on Sept. 27 that the testimony had given rise to serious questions. On that day, she should have *identified* a complaint under the Rules (i.e., initiated a complaint internally without waiting for an external complaint). The Commentary to Rule 5 states:

In high-visibility situations, it may be desirable for a chief judge to identify a complaint without first seeking an informal resolution ... in order to assure the public that the allegations have not been ignored.

The Commentary to Rule 5 also notes the importance of promptness:

The availability of this procedure should encourage attempts at swift remedial action before a formal complaint is filed.

No complaint was identified. (If evidence of misconduct under the Code was "clear and convincing" to Judge Henderson, as I believe any reasonable observer would have concluded, she had a *duty* under Rule 5 to identify a complaint.) Shortly after Sept. 27, the DC Circuit received several complaints specifically alleging or generally alluding to inappropriately partisan statements. This complaint was among them. Again, the DC Circuit failed to act promptly, as required by § 352(a) of the Act:

The chief judge shall expeditiously review any complaint received under section 351(a) or identified under section 351(b).

The complaint before you conformed with every procedural standard. The circumstances were “exceptional.” It was a “high-visibility matter.” The complaint was marked “received” on Oct. 2. Judge Kavanaugh was a covered judge on that day and remained covered for four more days. A confirmation vote was scheduled. But the judiciary took no action. On the morning of Oct. 6, the DC Circuit posted an announcement on its website (and journalists were alerted) that complaints had been filed. Only a few hours later, Judge Kavanaugh was confirmed and sworn in as an Associate Justice. At that moment, according to this Council’s opinion, a gate barring any consideration, thought, discussion, or guidance to fellow judges and the public on the meaning of “inappropriately partisan statements” automatically closed and locked, and the judiciary’s opportunity to “assure the public that the allegations have not been ignored” ended.

The early handling of this and other complaints did not inspire confidence in the misconduct process and resulted in an insufficient and ineffective response by this Council. The facts are plain: this complaint was presented to the judiciary at a time when Judge Kavanaugh was a covered judge for conduct occurring while he was a covered judge. The judiciary took no steps then to review the complaint expeditiously and has now handcuffed itself from taking productive steps. This stance exists even in the face of Rule 18’s permission to find misconduct while “concluding” a complaint because, as the Act states, corrective action “is no longer necessary.”

Precedent. The Order offers precedents. None speak to the exceptional circumstances of this complaint. If a precedent exists that parallels the first option in the “Judge Smith” example above, we are not aware of it, and the Council would surely have cited it. With respect to the intent of Congress, I know of no instance where a bill or debate offered insight into the unanticipated circumstance of non-frivolous complaints against a covered judge arising during the Supreme Court confirmation process. For now, Congress agrees only that *an already sitting Supreme Court justice* should remain outside the boundary of contemporaneous external ethics enforcement; the legislative body is silent on the handling of misconduct by proto-justices.

Consolidation of Complaints. For its Order, the Council consolidated 83 complaints. To insist now on maintaining consolidation in the review phase is inappropriate and prejudicial to this petition. The argument in this petition applies only to situations *where a complaint is received while the subject is a covered judge*. To include any of the complaints filed after Oct. 6 mixes bona fide complaints with impermissible ones. Including complaints alleging perjury mixes issues of potential criminality, where no “guidance” to judges and the public is needed, with those where guidance is a desired outcome.

Conclusion. I am not naive. As federal judges, you were predisposed to close this highly visible and sensitive matter. Rejection of this petition, however, will not close it. Justice Kavanaugh has never acknowledged that his behavior on Sept. 27, upon reflection, violated the Code of Conduct

for United States Judges. He has not apologized or expressed an understanding that, in the eyes of a great many Americans, the bias he revealed accompanied him to the Supreme Court. He works under a cloud. (The justice might argue that he “voluntarily self-corrected” with the publication of his essay in *The Wall Street Journal* on Oct. 4 in which he said he “might have been too emotional at times” and promised to “keep an open mind in every case.” There is no correction without an acknowledgement of a violation and an apology.)

As I write, the legislative branch of the United States is a cauldron of partisanship that has stained the Supreme Court with respect to two of the last three nominations. The executive branch, under its current leadership, publicly flouts the rule of law and the principle of an independent judiciary with frightening regularity. The judicial branch must not allow itself to be swallowed by this bog. As Justice Kavanaugh himself has noted, the judiciary is “the last line of defense.” When the Chief Justice of the United States feels compelled to issue a public statement in reaction to the President’s verbal attacks on the courts, when *The New York Times* publishes a front-page article on the Chief Justice’s struggle to maintain the “polite fiction” of a Supreme Court devoid of partisan bias, when a Supreme Court justice is mocked in a 13-minute “Saturday Night Live” sketch that attracts more than 24 million views on YouTube, and when a retired Supreme Court justice says the Court’s newest member “has demonstrated a potential bias involving enough potential litigants before the court that he would not be able to perform his full responsibilities,” the federal judiciary has a serious problem.

Public trust is the sole guarantor of the judiciary’s legitimacy, and that legitimacy is under threat. Justice Kavanaugh is bound to face recusal demands, in all likelihood many of them over many years. How long might it be before a like-minded group of governors decides in concert to ignore a narrowly decided Supreme Court ruling viewed by most of their constituents as not fully legitimate? What confidence does the public have that the next Supreme Court nominee won’t resort to tactics that violate the Code in order to win sufficient confirmation votes—knowing that ethics enforcement immunity awaits? With this Order, the Council leaves the door wide open.

The Code and Rules place a premium on “voluntary self-correction.” It would be an act of momentous political healing, and indeed heroic, if Justice Kavanaugh publicly acknowledged that on the question of partisan statements, he failed to treat the Code with sufficient respect, if he expressed regret to his fellow judges and citizens, and if he vowed to take this acknowledgement into full account in any highly contentious case involving government policy where the political parties are at odds. The nation would be well served and grateful.

It is unfortunate that judges who were authorized and obligated to act expeditiously when the conduct occurred stood mute and frozen. This Order leaves the strong impression that the judiciary prefers to retreat to a strained legal concept, maintain business as usual, remain silent, and hope that the world moves on. *Plessy* was the law of the land for 58 years until, with courage and vision, the Supreme Court produced *Brown v Board*. If there is a single judge on this Council who feels the weight of the Code’s admonition that misconduct “injures our system of

government under law,” and has the wisdom and foresight to find that this order is, on reflection, misguided and insufficient, now is the time to stand and dissent.

I respectfully urge the Council to revisit the Rules, remand this Order for appropriate correction, and prepare a thoughtful public response that serves the highest needs of the judiciary and those who depend on it -- or send this matter forward to the Judicial Conference.

Thank you for your attention, consideration, and service in challenging times. I wish you all a healthy and fulfilling 2019.

Sincerely,

Paul F. Horvitz
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