

21 West Street Apt. 21J
New York, New York 10006-2931
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Judicial Conference Committee on Judicial Conduct and Disability
Attn: Office of the General Counsel
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Petition for Review of Order Dismissing Misconduct Complaint No. 10-18-90050

Your Honors,

This is a petition for review of an Order (March 15, 2019 (“March Order”)) by which the Tenth Circuit Judicial Council affirmed an Order (December 18, 2018 (“December Order”)) that dismissed a misconduct complaint (No. 10-18-90050 (“Complaint”)) that I filed against The Honorable Brett Kavanaugh under the Judicial Conduct and Disability Act (the “Act”). For ease of reference, I number the paragraphs that follow.

1. This petition gives the Committee an opportunity to clarify the law of federal judicial-misconduct proceedings and to make it more uniform with other federal and state law.
2. In the March Order, the Council affirmed the dismissal of the Complaint because the subject judge has become an Associate Justice of the United States. The Complaint was filed, however, *before* Justice Kavanaugh was promoted to the Supreme Court—in other words, while he *was* still a circuit judge, and while he *was* still subject to the Act.
3. Therefore this petition raises a key question: Is jurisdiction of a judicial-misconduct complaint governed by the time-of-filing rule? The answer to this question should be yes.
4. Federal courts depart from the time-of-filing rule if jurisdictional facts are not subject to post-filing manipulation. Yet manipulation is exactly what happened here: the promotion of a subject judge was rushed through the Senate. That very political process ought not determine federal subject-matter jurisdiction. For if the rule were that such a promotion sufficed to divest courts of jurisdiction, then politically connected judges would be able to evade federal jurisdiction in ways that most American citizens cannot. Indeed, most *lawyers* cannot evade *attorney-misconduct* proceedings by *resigning* from *state bars*. Why should federal *judges* be able to evade discipline through *promotion* to the *Supreme Court*?
5. Therefore the Committee should hold that if a misconduct complaint is filed against a judge who is subject to the Act at the time of filing, then any subsequent promotion to the Supreme Court does not oust the courts of subject-matter jurisdiction to consider the complaint.
6. Having held this much, the Committee should then reverse the Council’s March Order and remand the Complaint for further proceedings under the Act.

FACTS

Filing of the Complaint on October 1, 2018

7. I filed the Complaint with the United States Court of Appeals for the District of Columbia Circuit on October 1, 2018. The Office of the Circuit Executive for that Court assigned the Complaint number DC-18-90069 on October 4, 2018. (*See* date stamps on Complaint.)
8. On October 5, 2018, the Deputy Circuit Executive for the District of Columbia Circuit forwarded the Complaint to the Chief Justice of the United States.

Elevation of the Subject Judge Five Days Later

9. Only on the next day, October 6, 2018, was Justice Kavanaugh confirmed by the Senate and sworn in as an Associate Justice of the United States. In other words, the Complaint was pending against the subject judge, while he was a circuit judge, for five days.
10. On October 10, 2018, the Chief Justice of the United States, The Honorable John Roberts, assigned the Complaint to the Council. The Chief Justice’s letter of transfer—dated October 10, 2018—did not describe any jurisdictional flaw in the Complaint.

The December Order Dismissing the Complaint on Jurisdictional and Other Grounds

11. On December 18, 2018, the Council issued the December Order dismissing the Complaint, and also dismissing 82 other judicial-misconduct complaints against Justice Kavanaugh.
12. In the December Order, the Council initially stated that the Complaint “must be dismissed” because “Justice Kavanaugh *is* no longer a judge covered by the Act.” (December Order at 2 (*italics added*.) According to the December Order, the Council “[l]ack[ed] statutory authority to do anything more” and “lack[ed] jurisdiction” to make findings on the merits of the Complaint. (December Order at 9.)
13. Elsewhere, however, the Council’s reasoning was less jurisdictional. The December Order stated that consideration of the Complaint was “no longer *appropriate*.” (*Id.* at 9 (*italics added*.) The Council stated that the Act “*effectively precludes*” action against anyone “who is no longer a circuit, district, bankruptcy or magistrate judge.” (*Id.* at 6–7 (*italics added*.)
14. On December 20, 2018, I wrote Chief Justice Roberts, copying all eight Associate Justices, a letter that read in part as follows:

Unlike the circuit courts, this Court does not seem to have posted on its website any judicial-misconduct rules or other guidance for a potential complainant who wishes to lodge a complaint.

Could the Court please therefore inform me (1) how I may file a judicial-misconduct complaint in this Court and (2) what procedural rules would govern such a complaint?
15. As of today—April 26, 2019—I have not received any response to my December 20 letter, whether from the Chief Justice, any Associate Justice, or any member of that Court’s staff.

The March Order Affirming the December Order on Jurisdictional Grounds

16. On January 29, 2019, I petitioned for review of the Council’s December Order (“Petition”). The Petition generally raised two points of error.
17. First, the Petition pointed out that the Complaint arose under the Act while Justice Kavanaugh was a circuit judge. (Petition at 3.) Therefore, under the time-of-filing rule, by which federal subject-matter jurisdiction is almost always determined, the federal courts had jurisdiction of the Complaint on the day it was filed. (*Id.*) Moreover, no subsequent event operated to oust the federal courts of this jurisdiction, because no subsequent event rendered adjudication of the Complaint any less necessary. (*Id.* at 3.)
18. Second, the Petition argued that the December Order was “grossly inequitable.” (*Id.* at 4.)
19. In the March Order, six members of the Council affirmed its December Order. One member of the Council, Circuit Judge Briscoe, dissented. One member of the Council, Circuit Judge Lucero, recused himself.
20. The March Order did not say anything about whether consideration of the Complaint would be appropriate. It appears to be largely a jurisdictional holding. (*See* March Order *passim.*)
21. But in discussing subject-matter jurisdiction, the March Order did not even mention the time-of-filing rule. Nor did the March Order explain why the federal jurisdiction that existed on October 1, 2018, had been ousted in any way.
22. Instead, the March Order treated the Petition’s jurisdictional argument as turning on whether Justice Kavanaugh “is” now a covered judge. The March Order entirely failed to analyze the real issue—whether judicial-misconduct jurisdiction is determined at the time of filing:

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. . . . 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 that there *was* no jurisdiction or authority under the Act to review the allegations of misconduct.

(March Order at 6 (italics added); *see also id.* at 7 (“[B]ecause *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.”) (italics added).)

23. So the March Order raises a clear issue for this Committee. If a misconduct complaint is filed and subject-matter jurisdiction vests, then does a later promotion of the subject judge oust the federal courts of jurisdiction? The Committee should answer this question, “No.”

ARGUMENT

24. The March Order should be reversed because it rests on a matter-of-law error.

I. The March Order Is Erroneous Because It Violates the Time-of-Filing Rule.

25. “It has long been the case that ‘the jurisdiction of the court depends upon the state of things at the time of the action brought.’” *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) (Scalia, J.) (quoting *Mollan v. Torrance*, 9 Wheat. 537, 539 (1824)).

26. Moreover, the jurisdiction of the federal courts, once vested, “cannot be ousted by subsequent events.” *Mollan*, 9 Wheat. at 539 (Marshall, C.J.).

27. Therefore “[w]here there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit.” *Grupo Dataflux*, 541 U.S. at 574 (quoting *Conolly v. Taylor*, 27 U.S. 556, 565 (1829)).

28. This time-of-filing rule is “hornbook law . . . taught to first-year law students in any basic course on federal civil procedure.” *Grupo Dataflux*, 541 U.S. at 570–71.

A. The federal courts apply the time-of-filing rule in contexts where jurisdictional facts are subject to parties’ post-filing manipulation.

29. Federal and state courts unite in describing the time-of-filing rule as one that is intended to defeat forum-shopping or other strategic behavior by parties that are trying to manipulate jurisdictional facts.

30. The First Circuit at first suggested that *Grupo Dataflux* “restricted the time-of-filing rule to diversity cases.” *ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 92 (1st Cir. 2008). In 2015, however, the First Circuit suggested that the time-of-filing rule is inapposite to the federal-question context only if “there are no allegations of manipulative abuse of the rule.” *United States ex. rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 5 (1st Cir. 2015).

31. The Fifth Circuit also declined to adopt the *ConnectU* suggestion. *16 Front St., L.L.C. v. Miss. Silicon, L.L.C.*, 886 F.3d 549, 558 (5th Cir. 2018) (“We do not hold that the Supreme Court’s decision in *Grupo Dataflux* restricts the time-of-filing rule to diversity cases.”).

32. And the Federal Circuit has observed that “appellate courts generally allow the government to defeat jurisdiction by post-complaint action only in the presence of some specific indication of Congressional intent that such action would defeat jurisdiction.” *Ford Motor Co. v. United States*, 688 F.3d 1319, 1326 (Fed. Cir. 2012). “Absent such an indication,” the Federal Circuit wrote, “the federal appellate judiciary has not hesitated to apply the general jurisdictional guidance of the time-of-filing rule.” *Id.* (citing cases). In that case, the Federal Circuit did not decide “whether post-filing actions by a defendant can ever defeat jurisdiction in a federal question case under the time-of-filing rule.” *Id.*

33. This is the question that the March Order raises, in the judicial-misconduct context.

B. In order to discourage jurisdictional manipulation, the Committee should apply the time-of-filing rule to judicial-misconduct complaints.

34. Courts agree that the time-of-filing rule is designed to defeat strategic behavior by parties that can alter jurisdictionally important facts. *See, e.g., Hill v. Kwan*, 962 A.2d 963 (Me. 2009) (“Federal courts rely on the time-of-filing rule to curtail forum shopping and other strategic behavior by the parties.”) (citing *ConnectU and New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1503 (3d Cir. 1996)).
35. Unfortunately, recent events demonstrate that judicial-misconduct proceedings are subject to the kind of jurisdictional manipulation that the time-of-filing rule is designed to prevent.
36. Allegedly at the urging of President Donald Trump, the nomination of Justice Kavanaugh was rushed through the Senate by its Republican majority, aided by a Chairman of the Judiciary Committee who allowed only *one* instance of alleged misconduct to be the subject of a hearing (at which the Complaint alleges Justice Kavanaugh lied repeatedly).
37. **The federal courts must not allow a majority of the United States Senate to alter a jurisdictional fact in a pending case.** Such legislative meddling in the judicial process is analogous, in constitutional terms, to a bill of attainder, which the Constitution expressly prohibits. *See United States v. Brown*, 381 U.S. 437, 440 (1965) (“The Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simply – trial by legislature.”).
38. Here, if the dismissal of the Complaint is affirmed only because Justice Kavanaugh was promoted, the Committee will effectively allow the Senate to try, and then to dismiss, judicial-misconduct complaints against judges who become Justices of the Supreme Court.
39. Any such permission would be contrary to the Framers’ vision. They contemplated a judicial power that is separate from the legislative power. *See James Madison, Federal Number 44 (1788)* (“[L]egislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators.”).
40. Concerns about abuse of power are also present in resignations. President Trump’s sister, The Honorable Maryanne Trump Barry, just became “the latest powerful federal judge to escape an ethics inquiry with her pension intact by stepping down from the bench.” Jimmy Hoover, *Move by Trump’s Sister Draws Attention to Judicial Loophole*, Law360 (April 12, 2019). At the time, Judge Barry was the subject of misconduct complaints about tax matters.
41. The Honorable Alex Kozinski in 2017 similarly resigned. At the time, Judge Kozinski was the subject of allegations of sexual harassment and related misconduct.
42. The public therefore sees a pattern of high-ranking federal judges (and their partisans) evading misconduct complaints by altering the jurisdictional facts. The time-of-filing rule is designed to prevent such evasions and abuses.

C. Applying the time-of-filing rule to federal judicial-misconduct complaints would make such proceedings more congruent with attorney-misconduct proceedings.

43. One of the many ironies of the March Order—which created a time-of-filing exception in favor of a high-ranking federal judge—is that the March Order is in tension with rules that govern hundreds of thousands of ordinary lawyers around the country.
44. In most American jurisdictions, attorneys—that is, low-ranking officers of courts—may not evade misconduct proceedings by the simple expedient of resigning from the bars of which they are members. The established norm in the legal profession—often a rule written and enforced by judges—is that resignation cannot defeat disciplinary enforcement.
45. This is why Rule 6 (“Jurisdiction”) of the ABA Model Rules for Lawyer Disciplinary Enforcement provides that “Any lawyer admitted to practice law in this jurisdiction, *including any formerly admitted lawyer with respect to acts committed prior to resignation, suspension, disbarment, or transfer to inactive status* [italics added] . . . is subject to the disciplinary jurisdiction of this court and the board.”
46. It is also why the New York Rules for Attorney Disciplinary Matters provide that an attorney who is the subject of a pending disciplinary investigation or proceeding may resign only if the attorney attests that the attorney “cannot successfully defend against the charges or allegations of misconduct.” N.Y. Uniform Rules for Attorney Disciplinary Matters § 1240.10(a)(2); *see also id.* App. A (form of affidavit for application to resign).
47. In other words, most state attorney-disciplinary bodies are loath to give up jurisdiction over ordinary attorneys who are subject to misconduct allegations. Why should this Committee countenance any different rule for federal judges who are promoted to the Supreme Court?

CONCLUSION

48. The federal courts had subject-matter jurisdiction of the Complaint on the day it was filed. This Committee should apply the time-of-filing rule, reverse the Council’s March Order, and remand the Complaint for further proceedings under the Act.

Respectfully submitted,



Jeremy C. Bates¹

¹ I appreciate the Council’s redaction of personal details in my Complaint. The Committee has my permission, however, to use my name in any caption as to this petition.