

SEP 20 2018

IN AND FOR THE CIRCUIT COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA



Complainant.

SEP 25 2018

DC-18-90064

COMPLAINT OF "MISCONDUCT"
PURSUANT TO 28 USC §351, et seq.

Confidential Pursuant to Applicable Rules of Court and Federal Law

The Uniqueness Presented:

1. A dire and immediate situation presents itself to the judiciary.
2. The integrity of the entire federal judiciary is actively and very publicly under assault.
3. The "public confidence in the integrity and impartiality of the judiciary" is being badly eroded, and an increasing "appearance of impropriety" is being disseminated and amplified worldwide, on a daily schedule. *See*, Canons 1, 2.
4. This is because, from the outset, the leadership of the Senate Judiciary Committee's conduct of their ostensible "advise and consent" obligation for the nomination of sitting Article III Judge Brett M. Kavanaugh of the DC Circuit Court of Appeals has initiated, and then amplified and exacerbated, all manner of questionable acts and omissions by the Committee leadership, such as to bring the entirety of Judge Kavanaugh's nomination rather suddenly to a point of most grave concern for the judiciary; for the Rule of Law; and for Judge Kavanaugh as well.
5. Though not of his own making, Judge Kavanaugh nonetheless now finds himself embroiled in a situation that may soon result (or may have already resulted) in his being at

1 risk of contravention of Canons 1, 2, 2A and 3 of the Code of Conduct for United States
2 Judges. <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>

3 a. Though Complainant is obligated to use the terminology of the Act (“complaint”
4 and “misconduct”), this document is presented not as a complaint per se, but in the
5 nature of an administrative notice of immediate warning and request for action by
6 the Chief Judge of the DC Circuit, pursuant to §351. Further, this document is also
7 not an allegation of “misconduct” as that term is used and required by the Act, but
8 rather a portent of the runaway momentum of the current process and path in
9 which Judge Kavanaugh unfortunately is now fully embroiled – the force of which
10 may push him towards potential “misconduct,” again, as the Act deploys that term
11 (thus it is that this term is placed in quotes in this filing).
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14 6. While the Judiciary is surely loathe to set foot into the political arena in most instances,
15 hence the “political question doctrine,” justiciability is not the situation here. Indeed, the
16 absolute converse is true.

17 7. The Judicial Conduct and Disability Act is an express and direct mandate from Congress
18 to the Judiciary, granting and encouraging the Judiciary to exercise precisely the kind of
19 power called for in this situation, politicized though it may be.
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21 8. From the Judicial Council of the 9th Circuit Court of Appeals, *In Re: Complaint of*
22 *Judicial Misconduct*, No. 03-89037 (Opinion, September 29, 2005)(all emphases added):

23 a. “[I]t is important to note that **the overall purpose of the Judicial Conduct and**
24 **Disability Act is not to punish but to protect the judicial system and the public**
25 **from further acts by a judicial officer** that are detrimental to the fair
26 administration of justice.”
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- b. **“Our goal in these proceedings is to maintain the integrity of the judiciary, not to cater to hurt feelings.”**
 - c. **“Passing judgment on our colleagues is a grave responsibility entrusted to us only recently. In the late 1970s, Congress became concerned that Article III judges were, effectively, beyond discipline because the impeachment process is so cumbersome that it's seldom used. See 126 Cong. Rec. S28091 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini).**
 - d. **“...Congress was aware of the adverse effects on judicial independence if federal judges could be disciplined by another branch of government using means short of impeachment. See S.Rep. No. 96-362, at 6 (1979), reprinted in 1980 U.S.C.C.A.N. 4315, 4320. The compromise reached was to authorize federal judges to discipline each other. See 126 Cong. Rec. S28091.”**
 - e. **“...judicial discipline is the responsibility of the circuit judicial councils – bodies comprised entirely of Article III judges. See Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub.L. No. 96-458, 94 Stat.2035 (1980).”**
9. The white-hot focus of the Committee leadership’s nationally dissected handling of this nomination is but one Article III judge, already sworn to and bound by an extraordinarily high standard of conduct – higher than any elected official or most other federal employees – through the combination of his oath of office, applicable law, ethics, norms, morals and the Code of Conduct.
10. The entire judiciary and Judge Kavanaugh himself have a sacred and grave obligation to protect the integrity of the judiciary and the public’s confidence in that integrity.

1 11. Absent the exercise of statutory authority granted by Congress to the Chief Judge, in this
2 instance we will all stand by while the integrity of the judiciary is increasingly weakened
3 in the eyes of the American public and, indeed, the entire world – and with it the
4 fundamental principle of the Rule of Law.

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6 ***The Statutory Threshold:***

7 12. Complainant files this Complaint of “Misconduct” (“Complaint”) with the Clerk of the
8 DC Circuit Court of Appeals (“Clerk”), pursuant to the authority and jurisdiction granted
9 under 28 U.S.C. §351 (the “Statute”).

10 13. §351(c) of the Statute mandates:

11 a. “Upon receipt of a complaint filed under subsection (a), the clerk **shall promptly**
12 **transmit the complaint to the chief judge** of the circuit... . The clerk shall
13 simultaneously transmit a copy of the complaint to the judge whose conduct is the
14 subject of the complaint.” (emphasis added).

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16 14. Upon receipt, the Statute requires of the Chief Justice an “Expeditious Review [and]
17 Limited Inquiry.” §352(a).

18 a. “The chief judge shall expeditiously review any complaint received under section
19 351(a).”

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21 15. In short, the applicable threshold comes down to the Chief Judge deciding whether: (1)
22 there is “sufficient evidence to raise an inference that misconduct has occurred,” or (2) the
23 “allegations...are [capable] of being established through investigation.”

24 §352(b)(1)(A)(iii).

25 a. Complainant submits that just the evidence now fully in public view, taken as a
26 whole, demonstrates much more than “**an inference that misconduct has**
27 **occurred... .**” (emphasis added).
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1 16. Therefore, Complainant submits that the Statute requires the Chief Judge to initiate the
2 steps set forth in §353(a):

3 “If the chief judge does not enter an order [of dismissal] under section 352(b), the
4 chief judge shall promptly:

5 (1) appoint himself or herself and equal numbers of circuit and
6 district judges of the circuit to a special committee to investigate
7 the facts and allegations contained in the complaint;

8 (2) certify the complaint and any other documents pertaining
9 thereto to each member of such committee; and

10 (3) provide written notice to the complainant and the judge whose
11 conduct is the subject of the complaint of the action taken under
12 this subsection.” (emphasis added).
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15 17. This Complaint suggests that Judge Kavanaugh may have violated, or be about to violate,
16 Canons 1, 2, 2A and 3 of the Code of Conduct and/or violated, or be about to violate,
17 §351 et. seq.

18 18. It is self-evident that the references to thousands of pages of oral and written testimony of
19 the Judge, of documents not directly available to complainant, and facts gathered by
20 journalists and thereafter published in various media cannot be, and are not here, attested
21 to as *per se* true under penalty of perjury by this individual complainant. The underlying
22 facts contained in this Complaint are thus presented by the Complainant on information
23 and belief.
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25 19. However, the highly public nature of the information described here permits the Chief
26 Judge to himself make an independent assessment of whether the totality of the
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1 information available is “sufficient to raise an inference that misconduct has occurred,”
2 thereby triggering the full authority of the Statute.

3 ***The Requisite Brief Statement of Facts:***

4 20. It has been for some time reported out from Senate Judiciary Committee members that
5 only a small fraction of the relevant public documents have been provided to the
6 committee. Just yesterday, Committee Member Harris stated: “this process has been
7 flawed from the very beginning... [only] ten percent of all documents that are available
8 about his [Judge Kavanaugh’s] background” have been made available to the Committee.
9 *Quoting*, Senator Kamala Harris, September 18, 2018, CBS This Morning broadcast.

10 21. Moreover, the relevant information that has been withheld by the acts of the Committee
11 leadership is well within the statutory authority granted by Congress to the Judiciary to
12 conduct its own independent investigation, which notably includes **the independent**
13 **subpoena power** specifically granted to the Special Committee:

14 a. “In conducting any investigation under this chapter, the judicial council, or a
15 special committee appointed under section 353, shall have full subpoena powers as
16 provided in section 332(d).” *Quoting*, §356(a)

17 b. Put differently, the Chief Judge and the Special Committee are empowered – by
18 Congress – to step in, to prevent further damage, to impose due process, to bring
19 transparency and order to bear in this unique situation, precisely because it actively
20 involves an embroiled Judge Kavanaugh, and continues to do so at a rapid pace
21 with the concomitant damage to the integrity of the judiciary.

22 22. When the leadership of the Senate Judiciary Committee undertook to hide public
23 documents, the burden arguably fell to Judge Kavanaugh to forthrightly and publicly state
24 the controlling law and thus legal status of all of the documents created during his years of
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1 service in the Office of the President, as an employee of the American people. The
2 Presidential Records Act of 1978, 44 U.S.C. §2201 et. seq., clearly states that these
3 documents belong to the public.

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5 23. Not only did Judge Kavanaugh not publicly state this legal fact, but he also actively
6 participated, by act and omission, in the Committee leadership's improper self-selection,
7 non-disclosure, and attempted application of "bogus confidentiality" to the documents that
8 were produced, *quoting*, Committee Member Sen. Blumenthal. These actions appeared to
9 have the sole purpose of hiding documents owned by the American people not just from
10 the American people but also from the members of the Committee.

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12 24. Most of all, Judge Kavanaugh chose not to, even after numerous requests, take the action
13 that is arguably required of an Article III judge finding himself thusly positioned – to
14 himself declare that all public documents relating to his public service and relevant to his
15 candidacy should be produced, at least to the full Committee.

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17 25. Judge Kavanaugh's active participation in a process wherein these public records were
18 concealed is arguably a failure of the Judge to abide by the letter and the spirit of the law,
19 but also by the Code of Conduct.

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21 26. Separately, Judge Kavanaugh has been questioned under oath, orally and in writing, by
22 the Committee regarding other acts or omissions which, along with his sworn testimony in
23 response, create a "sufficient inference of misconduct:"

- 24 a. The possibility of involvement in knowledge, possession or use of documents
25 stolen from an opposing party during his public service as a government employee.
26 In light of the June 5, 2003 email produced in the Senate Judiciary Committee
27 hearing, there is at least the inference that Judge Kavanaugh's testimony before
28 that committee was less than fully truthful. It is noteworthy that Ms. Lisa Graves

1 published an article titled: "I Wrote Some of the Stolen Memos that Brett
2 Kavanaugh Lied to the Senate About." [https://slate.com/news-and-](https://slate.com/news-and-politics/2018/09/judge-brett-kavanaugh-should-be-impeached-for-lying-during-his-confirmation-hearings.html)
3 [politics/2018/09/judge-brett-kavanaugh-should-be-impeached-for-lying-during-](https://slate.com/news-and-politics/2018/09/judge-brett-kavanaugh-should-be-impeached-for-lying-during-his-confirmation-hearings.html)
4 [his-confirmation-hearings.html](https://slate.com/news-and-politics/2018/09/judge-brett-kavanaugh-should-be-impeached-for-lying-during-his-confirmation-hearings.html)

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- 6 b. The possibility of improper discussions with lawyers in the law firm representing
7 the President of the United States in his defense against the investigation being
8 conducted by the Office of the Special Counsel. In response to simple and direct
9 questions about such possible discussions, the Judge's demonstrable unwillingness
10 to be forthright, and what some have called a feigned inability to recall (seen in
11 both the transcript and video of this segment of his sworn testimony) is behavior
12 that would not be well-tolerated by a witness in a federal court proceeding, and
13 surely falls beneath the obligations of an Article III judge, even in an
14 administrative setting. Notably, the day after that testimony, Judge Kavanaugh
15 sought to correct his testimony by admitting that, yes, he had been in conversations
16 with at least one lawyer from the firm representing the President.
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- 18 c. The possibility of impropriety regarding Judge Kavanaugh's reported \$60,000 -
19 \$200,000 credit card debt being paid down below reporting thresholds in the 2016-
20 2017 timeframe, and his source of funds for membership in an expensive country
21 club. Any third-party source of funds, or the extinguishment of debt, benefitting
22 an Article III judge, directly or indirectly, raises myriad well-understood ethical,
23 moral and legal issues.
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- 25 d. The possibility of a level of involvement in the Terrorist Surveillance Program
26 during his time as a government employee greater than he has explained in his
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1 testimony under oath, despite the reported existence of documents that are
2 potentially in contradiction of his testimony.

3 e. The possibility of a level of involvement in the candidacy of The Honorable
4 William Pryor greater than he has disclosed under oath, despite the reported
5 existence of documents that are potentially in contradiction of his testimony.
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7 27. Now, as of September 19, 2018, a woman has put her name to public allegations of
8 attempted rape, at the age of 15 by the then-17-year-old Brett Kavanaugh. *Without*
9 *opining one way or the other on the actual truth of the matter*, and taking full account of
10 the Judge's denials of any and all such misconduct, the fact remains that the Judge's
11 continuing and voluntary participation in the Committee leadership's planned "process"
12 for resolving this issue again places Judge Kavanaugh at dire risk of participating in a
13 process that may violate standards applicable to an Article III judge. For example, one
14 might expect an Article III judge in this instance to demand – as is his right as the
15 nominee, if not his obligation as a judge – that careful, deliberate and due process be
16 provided to both parties, no matter how long that might take, political concerns of elected
17 officials about upcoming elections or otherwise, wholly notwithstanding.
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19 28. The astonishing lack of decorum, legitimate process, if not procedural due process, as well
20 as fundamental fairness that has emerged in this nomination was most certainly not
21 initiated by Judge Kavanaugh.
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23 29. However, by remaining silent and thus appearing fully complicit, and arguably motivated
24 by the possibility of personal gain, Judge Kavanaugh finds himself creating, at minimum,
25 the appearance of impropriety. Taken together, Code of Conduct Canons 1, 2, 2A and 3:

26 a. "An independent and honorable judiciary is indispensable to justice in our society.
27 A judge should maintain and enforce **high standards of conduct and should**
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personally observe those standards, so that the integrity and independence of the judiciary may be preserved. **The provisions of this Code should be construed and applied to further that objective.**” Canon 1;

b. “A judge should...act at all times in a manner that **promotes public confidence in the integrity and impartiality of the judiciary.**” Canon 2;

c. “A judge should neither lend the prestige of the judicial office to advance the **private interests of the judge...**” Canon 2;

d. “An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge’s honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.” Canon 2A;

e. “A judge **must avoid all impropriety and appearance of impropriety.**” Canon 2A;

f. “The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary **applies to all the judge’s activities**, including the discharge of the judge’s adjudicative and administrative responsibilities.” Canon 3A(3)(all emphases added).

30. The continuation, if not amplification, of this process in which Judge Kavanaugh now finds himself fully embroiled has now become, at least in part, his responsibility to manage, or cure, in accordance with his obligations as an Article III judge.

31. He and he alone is in a position – and obligated by his oath, the Code and the law – to act. He can independently demand due process, demand release of all public records from his government service, answer all questions fairly put to him with the utmost clarity and

1 truthfulness, wherever the chips may fall – and then to stand on and defend his record and
2 his answers.

3 32. This is but one correct process under our Rule of Law, and it is incumbent on an Article
4 III judge to insist on it, particularly where another branch, politicized and dysfunctional,
5 will not.

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7 33. This obligation arises because of higher burden of conduct placed on and accepted by an
8 Article III judge, to protect the integrity and public confidence in the judiciary.

9 34. It was this significantly higher burden that Judge Kavanaugh willingly and knowingly
10 accepted when took the role as an Article III judge on the DC Circuit, took the oath,
11 understood the Code of Conduct, the related laws, rules and opinions governing his
12 conduct at all times, and thus holding him to a far higher standard than the merely political
13 operatives with whom he now finds himself surrounded.

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15 35. Judge Kavanaugh, despite chance after chance after chance, has now arguably fallen short,
16 or is at risk of soon falling short, of meeting the obligations of a sworn Article III judge.

17 36. The Judge is arguably quite aware that his inaction, in furtherance of his private interests
18 and in the face of several options, exacerbates the deepening damage to the integrity and
19 public's confidence in the judiciary. The Judge's acts and omissions may have already
20 violated the Canons, as well as the oath, rules and norms of an Article III judge.

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22 ***Conclusion:***

23 37. It is unfortunate that Judge Kavanaugh finds himself in a situation, not fully of his own
24 making, that now places him in danger of violating his obligations as a sitting Article III
25 judge of this Court. But in this position he does now squarely reside.

26 38. Nothing – nothing – in this Complaint is intended to even assert, much less conclude, that
27 Judge Kavanaugh is guilty of any of the factual allegations leveled against him in this
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process, including but not limited to (i) knowingly withholding relevant information or (ii) testifying in an incomplete or misleading manner.

39. But demonstrable guilt of these ultimate allegations is not the issue, much less the standard, to be applied here by the Chief Judge in conducting his “Expeditious Review and Limited Inquiry.”

40. The first threshold is simpler than that: Congress gave this Court the power to bring due process and transparency to the activities of an Article III judge. As unusual as it may be, the current circumstances call for this Court to deploy that power and protect:

- a. The Judiciary;
- b. Judge Kavanaugh;
- c. The American people;
- d. The Rule of Law; and
- e. America’s standing in the world.

The above statements and presentation of publicized information, some made of direct knowledge and some made on information and belief, are presented to this Court by Complainant in ultimate good-faith by an officer of the court and under penalty of perjury.

Respectfully submitted,

