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October 24, 2018

Office of the Clerk
U.S. Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver CO 80257-1823

A Complaint Regarding Justice Kavanaugh's Testimony at the September 27, 2018 Judiciary Committee Hearing

Dear Sir/Madam:

I am writing to file a complaint under the Judicial Conduct and Disability Act, 28 U.S.C. 351 *et seq.* regarding former District of Columbia Court of Appeals Judge Brett Kavanaugh.

I am sending this complaint directly to the Tenth Circuit due to my understanding that on October 10, 2018, Chief Justice John Roberts forwarded a number of complaints regarding Justice Kavanaugh from the Judicial Council of the District of Columbia Circuit to you, and that in his cover letter he stated that he had selected your Court to "exercise the powers of a judicial council with respect to the identified complaints and any pending or new complaints relating to the same subject matter." Please consider this a new complaint regarding the same subject matter. Please advise me if I have erred in filing with your office.

This complaint concerns Judge Kavanaugh's lack of truthfulness and candor in his September 27, 2018 testimony to the Senate Judiciary Committee. I have been a lawyer for over 30 years. As a practicing member of several federal court bars, I feel a responsibility to provide my concerns to you.

I believe that a reasonable assessment of Judge Kavanaugh's testimony in front of the Senate Judiciary Committee on Thursday September 27, 2018, shows that he deliberately made more than twenty (20) false statements, and that during that hearing he showed no allegiance to the truth.

I submit these false statements, while under oath, violated 28 U.S.C. 351, in that by making false statements Judge Kavanaugh has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts. I submit that these false statements violate the Code of Conduct for United States Judges, Canon 2, which states that "[a] judge should avoid impropriety and the appearance of impropriety in all activities." Canon 2, Section A provides:

Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The Commentary to Canon 2A provides in part that:

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. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges.

I believe that some of Justice Kavanaugh's falsehoods are obvious, while most are shown by the greater weight of the current information available on the issues presented. As to information available to me at present, I am referring to the video of the hearing testimony; the transcript of Justice Kavanaugh's hearing testimony; the police report of a bar fight from September, 1985, during his Yale University days, a partial copy of which was attached to an article in the New York Times (10/1/18); and the quotes from his high school and college contemporaries during television interviews and in news coverage in the days surrounding the hearing. That is the best information I have at the moment. I have no access to the FBI reports.

Judge Kavanaugh's testimony on September 27 also showed us his pervasive evasiveness—evasions which displayed his disrespect for the Supreme Court nomination process (including that hearing which he had said he wanted once the allegations against him were raised) and disrespect for the elected officials Constitutionally charged with vetting his suitability for our highest Court. The pervasiveness of the evasions may also violate 28 U.S.C. 351, in that Judge

Kavanaugh's refusal to answer many direct questions while under oath could be prejudicial to the effective administration of the work of the any court.

I do not address herein Judge Kavanaugh's partisan remarks or issues of judicial temperament.

The False Statements (hereafter "FS")

FS No. 1-3. Made in his opening Statement, Sen. Blumenthal's and Senator Whitehouse's questioning—Judge Kavanaugh discussed his yearbook use of "alumnus" in reference to a female high school friend, Renate Dolphin. Judge Kavanaugh said the term was "clumsily intended to show affection and that she was one of us" and that "it was not related to sex."¹

Judge Kavanaugh's characterization of "alumnus" is refuted directly by four or more former classmates, who told the NY Times that the "alumni" comment meant a sexual conquest; (NY Times 9/28/18) and is undercut by the 13 other references to Renate and "alumni" in the yearbook, including a group photo labeled "Renate Alumni"; by the poem stating "you need a date/and its getting late/so don't hesitate/ call Renate"; and by the statement issued by Renate Dolphin herself, who said the yearbook reference to her was "horrible, hurtful and simply untrue", and who then withdrew her support from Judge Kavanaugh.

FS No. 4-5. In the Opening Statement and Sen. Blumenthal questioning—Kavanaugh contended, "As the woman (referring again to Renate Alumnus) noted to the media on the record, she and I never had any sexual interaction at all." Yet Judge Kavanaugh's lawyer, Alexandra Walsh, told the NY Times before the hearing

¹ On October 3, 2018, the *New Yorker* magazine's online news service (www.newyorker.com/news/news-desk/will-the-fbi-ignore-testimonies-from-kavanaughs-former-classmates) ran an article by Jane Mayer and Ronan Farrow entitled THE FBI PROBE IGNORED TESTIMONIES FROM FORMER CLASSMATES OF KAVANAUGH. The article reproduced a Declaration given under penalty of perjury by a Georgetown Preparatory School's four-year classmate of Brett Kavanaugh's (from 1979 to 1983). The Declarant stated that the class size was less than 100 at the school while he was a classmate of Brett Kavanaugh. The name of the Declarant was redacted as were certain of the 79 numbered statements. At statements Nos. 77, 78 and 79, the Declarant set forth his willingness to testify under oath that any judicial proceeding involving this matter. The Declarant further indicated (No. 78) he went on the day of his Declaration to a local F.B.I. office, asking to be interviewed. However, he was told he would have to file an online or telephoned report, which he did. The Declarant further indicated to having on contact with the press.

At statements Nos. 34-42, the Declarant addressed Brett Kavanaugh's multiple high school references to a young woman name "Renate." The Declarant stated, *inter alia*, that the Declarant had a specific recollection which "...left an indelible mark in my memory" (statement No. 42) of Brett Kavanaugh singing in a Georgetown Prep hallway between classes a rhyme pointedly using the name of "Renate" as someone available, as a last resort, for sex.

that Judge Kavanaugh and Renate had gone out once, and kissed afterwards. (NY Times 9/28/18) Renate Dolphin disputed this, saying they had never gone out.

FS No. 6-7. In the Sen. Leahy, and Klobuchar questioning Sen. Leahy asked Judge Kavanaugh whether he would want his friend, Mark Judge, called as a witness, and in reply Judge Kavanaugh stated “he’s already provided sworn testimony.” That is false. In fact, as of the hearing, Mark Judge had not provided any sworn statement; instead a lawyer acting on Mr. Judge’s behalf had provided a letter to Congress containing assertions made on Mr. Judge’s behalf. (VanGelder Letter of Sept. 18, 2018). Judge Kavanaugh repeated this false statement multiple times in the hearing.

FS No. 8-10. In the Sen. Coons, Blumenthal and Booker questioning. Judge Kavanaugh stated to Blumenthal, “[t]he core of why we are here is an allegation to which the four witnesses present have all said it didn’t happen,” to Coons, “all four witnesses who were alleged to have been at the event say it didn’t happen, they say it under penalty of perjury” and finally, to Booker, “the witnesses who were there said it didn’t happen.”

These statements by Judge Kavanaugh are both false and misleading: in fact, none of the witnesses say what Dr. Ford described did not happen. Ford’s friend, Ms. Keyser, said that she didn’t know Judge Kavanaugh nor remember being at a party with him, but that she believed Dr. Ford’s allegation. Washington Post, 9/22/18. Mr. Smyth said that “I have no knowledge of the party in question; nor do I have any knowledge of the allegations of improper conduct she has leveled against Brett Kavanaugh.” Mr. Judge’s attorney’s letter stated that “I have no memory of this alleged incident” and “I do not recall the party described in Dr. Ford’s letter.” (VanGelder Letter of Sept. 18, 2018).

FS No. 11. In the Sen. Coons questioning. Senator Coons asked Judge Kavanaugh, “whether you have ever gotten aggressive while drinking.....”

Kavanaugh responded:

I think the answer to that is basically no. I don’t really know what you mean by that... like what are you talking about?”

Coons: “Well the reason I ...”

Judge Kavanaugh, “I guess. I mean, I--I don’t mean it that way, but... No is the basic answer unless you are talking about something where, that I, I’m am not aware of that you are going to ask about.”

Kavanaugh’s denial of aggression and belligerence while drinking is false. A 1985 New Haven, CT, police report shows that Kavanaugh (then at Yale University) was accused of starting a bar fight by throwing ice on a man. (NY Times, Oct. 1, 2018) Kavanaugh’s friend, Chris Dudley, followed up by throwing a glass at the man’s head, cutting his ear. Dudley was arrested by the police, and the victim was treated at a hospital. Significantly, the police report states that when Kavanaugh was asked by the police if he had thrown ice on the patron, Kavanaugh “didn’t want to say if he threw the ice or not.” Kavanaugh’s classmate, North Carolina State University professor Chad Ludington, states that he was present for the altercation, and that in response to an expletive from the victim, Kavanaugh cursed and threw the ice at the patron (CNN video, 10/2018)

(In the NY Times article of 10/1/18 Ludington stated that Kavanaugh threw a beer in the patron’s face). Ludington adds that he came forward because he believed that Kavanaugh had mischaracterized the extent of his drinking while at Yale. Ludington and several of Kavanaugh’s classmates have disclosed their own drinking histories in conjunction with their statements that Kavanaugh was an angry and belligerent drunk, NY Times 10/1/18. Kavanaugh’s roommate stated that “although Brett was normally reserved he was a notably heavy drinker, even by the standards of the time, and he became aggressive and belligerent when he was drunk.”

FS No. 12-16: In the Sen. Blumenthal, Coons, Klobuchar, Hirono, and Booker Questioning

Klobuchar asked Judge Kavanaugh, “was there ever a time you drank so much that you couldn’t remember what happened or a part of what happened the night before?” Kavanaugh answered, “[n]o, I remember what happened, and I think you probably had beers Senator...” Klobuchar asked again, “You’re saying there’s never been a case where you drank so much you didn’t remember what happened the night before, or part of what happened?” Kavanaugh then tried to change the question, stating “It’s you’re only asking about you know, blackout—I don’t know—have you?”

Klobuchar asked “Could you answer the question Judge? I just, so you-that has not happened, is that your answer?” Judge Kavanaugh, “Yeah, and I’m curious if you have.”

Sen. Coons asked if Judge Kavanaugh had ever forgotten an evening after drinking. Judge Kavanaugh contended he already answered the question.

Sen. Hirono referred to Judge Kavanaugh's Fox news interview, in which she noted that he said he never drank so much he couldn't remember what happened the night before, and asked, "would you say the same thing about college life?"

Judge Kavanaugh's response was "Yes."

Sen. Blumenthal asked about a Judge Kavanaugh speech at Yale, (to the Federalist Society, in April 2014) about an event he organized, which Judge Kavanaugh described as a bus trip to a baseball game and going out afterwards, doing "group chugs" of a keg on the bus, and "falling out of the bus onto the front steps of the Yale Law School at 4:45 a.m." and that "you tried to quote 'piece things back together' end quote, to recall what happened that night." Blumenthal asked, "doesn't that imply to you that you had to piece things back together, you had to ask others what happened that night?"

Judge Kavanaugh's response was "definitely not. I know exactly what happened, it was a great night of fun...."

The conclusion that Judge Kavanaugh had gaps in memory caused by drinking is supported by numerous statements from Judge Kavanaugh's classmates.

Dr. Liz Swisher, Yale college classmate and now a physician, stated "I drank a lot. Brett drank more." NY Times 9/28/18. She stated, "Brett was a sloppy drunk, and I know because I drank with him. I watched him drink more than a lot of people. He'd end up slurring his words, stumbling... it's not credible for him to say that he had no memory lapses in the nights he drank to excess. "

Daniel Livan, a dormmate, stated that he "definitely saw him [Kavanaugh] on multiple occasions stumbling drunk where he could not have rational control over his actions or clear recollection of them. His depiction of himself is inaccurate." NY Times, 9/28/18.

Lynn Brookes, an undergrad classmate at Yale, stated that "he frequently drank to excess. I know because I frequently drank to excess with him" (NY Times 9/28/18.) She added that there was "no way" Judge Kavanaugh remembered all of his behavior on a fraternity pledge night, a night on which everyone was "ridiculously drunk" and she observed him unable to stand straight. And James

Roche, Kavanaugh's freshman roommate states that "Kavanaugh was frequently incoherently drunk." The NY Times cited "nearly a dozen people" who recalled Kavanaugh as a heavy drinker.

FS No. 17: In the Sen. Whitehouse questioning: Sen. Whitehouse asked Judge Kavanaugh about the meaning of words in his yearbook, including the word "Boofed". Judge Kavanaugh wrote to his friend Mark Judge, "Judge, have you boofed?" Judge Kavanaugh testified that this referred to flatulence. Judge Kavanaugh's classmates said that "boof" refers to anal sex. (NY Times 9/28/18). The Urban Dictionary (while not a contemporary account) also defines "Boofing" as referring to insertion of drugs or alcohol into the anus to get a better high.

FS No. 18: In the Sen. Whitehouse questioning: Whitehouse asked Kavanaugh about the meaning of the term "Devil's triangle." Judge Kavanaugh testified that this referred to "drinking game." This is a false statement. Georgetown Prep classmates say that "devil's triangle" refers to sex between a woman and two men (NY Times 9/28/18). This meaning is corroborated by the Urban Dictionary as well.

FS No. 19: In the Sen. Hirono questioning: In response to a question from Hirono, Judge Kavanaugh asserted that he got into Yale law school and "I had no connections there. I got there by busting my tail in college." In fact, Kavanaugh's grandfather, Everett Edward Kavanaugh, attended Yale. *Newsweek*, 9/30/18.

FS No. 20: In the Rachel Mitchell Questioning: Rachel Mitchell, the special prosecutor hired to question the witnesses on behalf of the Republican members, asked Kavanaugh if he drank alcohol "during your high school years." Judge Kavanaugh stated that drinking was legal for seniors during the time that he was in high school. This is a false statement. Judge Kavanaugh was 17 at the time of the alleged incident in the summer of 1982, and the drinking age in Maryland changed to 21, in July, 1982, before Judge Kavanaugh turned 18, and thus before he was a senior (NY Times, 9/28/18). In other words, drinking was not legal during the time of the alleged incident, nor during the "Beach Week" he listed on his calendar.

FS No. 21. Judge Kavanaugh stated that "I never attending a gathering like the one that Dr. Ford describes in her allegation." This is a false, or at best misleading, statement. Judge Kavanaugh's calendar entry for July 1, 1982, reflects a "gathering like the one Dr. Ford described." His calendar depicts a small party, where beer drinking was taking place, (he admitted that "go to Timmy's for skis" meant drink beer), and that included a small group of people, including three of the

five people Ford identified as being at the party at which she alleged Judge Kavanaugh attacked her- Kavanaugh, Mark Judge and P.J.

The Evasive Responses (Hereafter “ER”)

ER No. 1: In the Sen. Leahy questioning. Sen. Leahy questioned Judge Kavanaugh regarding Mark Judge’s book, “Wasted” asking Kavanaugh about the book’s character “Bart O’Kavanaugh.” “Is that you he’s talking about?” (In the book, the character Bart vomited in a car during Beach week and passed out— notable because Kavanaugh testified that he went to Beach week in summer 1982 and that he vomited repeatedly because he had a weak stomach. Moreover, Judge Kavanaugh’s 1983 letter to his Beach week housemates was signed “Bart,” NY Times 10/2/18)

Judge Kavanaugh’s response, “Senator, Mark Judge was... I’ll explain if you let me. ... Mark Judge was a friend of ours in high school who developed a serious drinking problem...” Judge Kavanaugh then went on for a considerable time about Mark Judge’s history, without answering the question. It should be recalled that senators were only allowed five (5) minutes for their questions and the witness’ response. This rambling, non-responsive answer raises the issues of whether the nominee was deliberately evasive, trying to “run out the clock” rather than responding to a direct question.

ER No. 2. In the Sen. Leahy questioning. Leahy tried again to find out if Judge was referring to Kavanaugh in his book, asking “you don’t know whether that’s you or not?” Judge Kavanaugh’s response this time was — “[w]e can sit here and you, like make--make fun of some guy who has an addiction” (although any review of this part of the testimony shows that Leahy was not in any fashion “making fun” of Mark Judge, but simply asking direct questions to the nominee. The use of such a time-consuming and blatant “straw argument” by the nominee underlines the evasiveness of Judge Kavanaugh’s answer.)

ER No. 3. In the Sen. Leahy questioning. Leahy tried a third time, asking “are you Bart O’Kavanaugh he’s referring to, yes or no?” Judge Kavanaugh— “You’d have to ask him.” The yearbook shows that the two friends referred to each other and questioned each other in their yearbook entries, and that Judge Kavanaugh asked Judge “have you boofed?” and Mark Judge asked, “Bart have you boofed?” thus showing in the yearbook that Kavanaugh was referred to as “Bart,” the character in Mark Judge’s book, *Wasted*. See ER No. 1, *supra*. Moreover, Judge Kavanaugh’s 1983 letter to his beach week housemates was signed “Bart.”

ER No. 4. In the Sen. Leahy questioning. Leahy questioned Judge Kavanaugh, “In your yearbook, you talked about drinking and sex exploits, did you not?”

Judge Kavanaugh’s response “Senator, let me—let me take a step back and explain high school. I was number one in the class...”

Leahy tried to ask again, but only managed “And I thought...” when Kavanaugh said “No, no, no, no.” Kavanaugh then said “you’ve got all this...I am going to talk about my high school record if you are going to sit here and mock me.” Kavanaugh then spoke at much length about high school, sports, and work, once again using a straw argument and not directing himself to a fact-finder’s question.

Kavanaugh again never answered the Senator’s question before the time limit ran.

ER No. 5. In the Sen. Durbin’s questioning. Durbin asked Judge Kavanaugh, if he would support an FBI investigation. Judge Kavanaugh said “I will do whatever the committee wants to... ” without responding to Durbin’s request, either affirmatively or negatively.

ER No. 6: In the Sen. Durbin’s questioning. Durbin tried again, and asked Judge Kavanaugh, “do you think that’s (an FBI investigation) the best thing for us to do?” Kavanaugh’s response now was silence, and then “[l]ook Senator, I said I wanted a hearing, and ... I’m innocent.”

ER No. 8: In the Sen. Whitehouse questioning. After establishing that the yearbook reference to Beach week Ralph Club referred to “vomiting”, Senator Whitehouse asked Judge Kavanaugh if the reference in his yearbook to “Ralph”ing referred to vomiting “related to the consumption of alcohol.”

Judge Kavanaugh never answered this question. Instead, he said “Senator, I was at the top of my class academically.” Judge Kavanaugh went on to talk about his high school accomplishments. Whitehouse tried again, “did the word, did it relate to alcohol?” The response, “I already answered the question.” And “I like beer. I like beer, I don’t know if you do.” Judge Kavanaugh then asked Whitehouse what he liked to drink. Judge Kavanaugh’s recently released letter from 1983 regarding that year’s Beach Week, stated that whoever arrived first should “warn the

neighbors that we're loud, obnoxious drunks with prolific pukers among us." (NY Times 10/3/18).

ER No. 9: In the Sen. Hirono questioning. Hirono noted that Judge Kavanaugh's roommate stated that "although Brett was normally reserved he was a notably heavy drinker, even by the standards of the time and he became aggressive and belligerent when he was drunk." Hirono asked Judge Kavanaugh, "is your former college roommate lying?" Judge Kavanaugh did not answer the question except to say that "I would refer you to what I said in the" redacted prior testimony.

ER No. 10: In the Rachel Mitchell questioning. Rachel Mitchell, the special prosecutor hired to question the witnesses on behalf of the Republican members, asked Judge Kavanaugh, "what do you consider to be too many beers?" as a follow-up to his testimony that he sometimes had too many beers. Judge Kavanaugh's response "I don't know. You know, we—whatever the chart says, a blood-alcohol chart."

Conclusion

Judge Kavanaugh's false statements in the hearing of September 27 were so many, and his evasiveness was so pervasive, that his credibility is irreparably damaged. This damage to the credibility of a judge violates 28 U.S.C. 351 and the Code of Conduct for United States Judges, because it is highly prejudicial to the effective and expeditious administration of the business of the courts.

Moreover, Judge Kavanaugh's evasions were clearly designed to avoid making any damaging admissions—thus, he refused to answer the question about whether he had vomited due to alcohol, as that would show a level of inebriation consistent with memory lapses, and/or blackouts. His obfuscation in responding to Sen. Coons' questions about his whether he ever became aggressive while drinking is telling. His twisted, rambling response shows the fear he must have been feeling that the Yale bar fight, or perhaps other events yet uncovered, would be disclosed.

His confrontation with Sen. Klobuchar—asking her if she had ever blacked out—is similarly indication of his fear, perhaps that the truth would show that his drinking did indeed reach memory impairing levels, thus casting doubt on his denial of Dr. Ford's allegations. The police report from Connecticut—when Kavanaugh stated he did not want to say whether he threw the ice or not, shows that even then, Brett Kavanaugh did not want to admit any failures that could reflect poorly on him. This lack of candor is also prejudicial to the effective and expeditious administration

of the business of the courts. Further, Judge Kavanaugh's repeated false statements and evasions under oath before the Committee erode public confidence in the federal judiciary.

Thank you.

Very truly yours,

