



September 12, 2018

Office of Disciplinary Counsel  
The Board on Professional Responsibility  
District of Columbia Court of Appeals  
515 Fifth Street, N.W.  
Building A, Room 117  
Washington, D.C. 20001

To Whom It May Concern:

On behalf of People For the American Way, I submit this complaint about District of Columbia attorney (and federal judge) Brett Kavanaugh to the Office of Disciplinary Counsel. Kavanaugh has violated Rule 8.4(c) of the Rules of Professional Conduct, which was adopted to protect the integrity of the legal profession.

Brett M. Kavanaugh, currently sitting as a judge on the D.C. Circuit Court, provided false and misleading testimony under oath to the Senate Judiciary Committee in violation of the D.C. Rules of Professional Conduct. He did so on three occasions: (1) his first confirmation hearing for his current position on the D.C. Circuit Court on April 27, 2004; (2) his second confirmation hearing for his current position on the D.C. Circuit Court on May 9, 2006; and (3) his Supreme Court confirmation hearings on Sept. 5-6, 2018. The false and misleading nature of his testimony in 2004 and 2006 has become clear only after the recent revelation of materials made public in connection with his pending nomination to the Supreme Court.

Each incident constituted a violation of Rule 8.4(c): It is professional misconduct under that rule for a lawyer to “[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

**False Testimony About Stolen Material:  
Rule 8.4(c)**

From 2001-2003, Mr. Kavanaugh worked in the White House Counsel’s office to advance then-President George W. Bush’s judicial nominees through the Senate confirmation process. A number of the nominees generated intense opposition from Senate Judiciary Committee Democrats, and this remained a major area of confrontation throughout Mr. Bush’s presidency. In his role at the White House Counsel’s office in advancing judicial nominations, Mr. Kavanaugh worked closely with Senate Judiciary Committee Republican staff, including senior Republican staff member Manuel Miranda.

In 2003, it was reported that Mr. Miranda had discovered that confidential Democrats’ emails and files could be accessed by Republican staff, contrary to what Democratic staff had believed, and that he had long been surreptitiously accessing them. A full investigation by the Senate Sergeant of Arms revealed the details and concluded that Miranda had obtained extensive access to confidential Democratic documents from late 2001 through much of 2003.<sup>1</sup> When Kavanaugh

was nominated to the D.C. Circuit, senators of both parties asked him at his confirmation hearings in 2004 and 2006 if he'd received stolen information from Miranda. Kavanaugh testified under oath that he had had no idea about the spying until it was reported in the press. But contemporaneous emails released this month in connection with his Supreme Court nomination reveal those statements were false.

For instance, on July 28, 2002, Miranda sent Kavanaugh an email with information clearly obtained illicitly from confidential Democratic emails: Miranda's email to Kavanaugh specifically stated:

I would ask that no action be taken by any of your offices on this for now except as I request. It is important that it be confidential to the recipients of this email and up your chains of authority only. As I mentioned on Friday, Senator Leahy's staff has distributed a "confidential" letter to Dem Counsel on Thursday from Collyn Peddie, who served as the attorney for "Jane Doe" in some or several of the Texas bypass cases. According to either the letter or the Leahy staff Ms. Peddie sent this letter in the strictest confidence because she is up for partner, and believes she will be fired if it is publicized. Several members of her firm are lead supporters of the Owen nomination. Leahy's staff is only sharing with Democratic counsels.<sup>ii</sup>

Since Sen. Leahy's staff was only sharing the letter with Democratic counsels, Miranda had clearly obtained the confidential email without the permission or knowledge of the Democrats. That explained his strong request that his own email not be shared and that White House officials take no action on it without his permission.

On July 18, 2002, Miranda sent Kavanaugh an email with obviously confidential information that he had clearly obtained by accessing the Democratic staff's emails.

Brett,

It looks like Biden's staff is asking him not to attend the hearing. This does not bode well. It means that they will depend on paper since they have refused to meet with her. This increases reliance on Leahy's staff.

Think thru what options you all have down there. If we think that it is better for him to be there, perhaps Hatch could call him but Hatch may not want to. Hatch may need a butch from the WH to call Biden. Is any direct pressure on Biden possible ... a Gonzales meeting?

On a related note, the Nation article linking Owen to Rove is being distributed by the Leahy staff.

Manny<sup>iii</sup>

As another example, on March 18, 2003, Kavanaugh received an email from Miranda with the subject line "For use and not distribution," directing him to "please see information below."

What followed was a seven-page memo clearly written by Democrats with a point-by-point rebuttal they were planning to make against the White House over its refusal to release certain documents relating to a circuit court nominee.<sup>iv</sup>

Yet Kavanaugh testified under oath that he had not only not received any stolen documents (although Miranda had sent him a Democratic senator's draft memo), he had not even received anything *referring* to stolen information. He had the following exchange with Sen. Orrin Hatch at his 2004 confirmation hearing:

Chairman HATCH. Now, this is an important question. Did Mr. Miranda ever share, reference, or provide you with any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee?

Mr. KAVANAUGH. No, I was not aware of that matter ever until I learned of it in the media late last year.

Chairman HATCH. Did Mr. Miranda ever share, reference, or provide you with information that you believed or were led to believe was obtained or derived from Democratic files?

Mr. KAVANAUGH. No. Again, I was not aware of that matter in any way whatsoever until I learned it in the media.<sup>v</sup>

At the same hearing, he was directly asked by Sen. Chuck Schumer if he had received any non-public Democratic memos, and he gave a false answer:

Senator SCHUMER. Had you seen them in any way? Did you ever come across memos from internal files of any Democratic members given to you or provided to you in any way?

Mr. KAVANAUGH. No.<sup>vi</sup>

He made the identical false claim under oath at his 2006 hearing. In response to a question from Sen. Dick Durbin, Kavanaugh stated flatly:

I did not know about any memos from the Democratic side.<sup>vii</sup>

These and other emails became public during his September 2018 Supreme Court confirmation hearing. Yet as before, he continued to provide false information under oath about how he obtained highly sensitive information about Democratic senators' planned strategies, internal memos, conversations with staff and outside organizations, and material explicitly said to be shared only among Democratic staff. He testified at his September 2018 hearing that:

[M]y understanding of this process is that the staffs do talk with one another, that they're not camps with no communication. And that was my experience when I worked in the White House.

...

[P]eople have friends across the aisle who they talk to – at least this was my experience back then; maybe it's changed. And there was a lot of bipartisanship on the committee. There was a lot of bipartisanship among the staffs. There were a lot of friendships and relationships where people would talk to -- oh, I've got a friend on Senator Kennedy's, Ted Kennedy staff, or I have a friend on Senator Hatch's staff or I have a friend on Senator Specter's staff. That kind of conversation and information sharing was common. So did it not raise red flags.<sup>viii</sup>

This testimony is simply not credible. Kavanaugh was working for the White House as a high-level attorney in an area of intense antagonism between Republicans and Democrats. Kavanaugh and other Republicans were working their hardest to get nominees confirmed to lifetime positions on circuit courts, and Democrats were working as intensely as they could to defeat those nominations. While Democratic and Republican staffers certainly had some communications, it was unsupported and false for Kavanaugh to suggest that the detailed, private, and strategic information he was receiving from Manuel Miranda had simply been shared by the Democratic side of the committee as part of common information-sharing.

Importantly, none of Mr. Kavanaugh's false statements were made in the course of representing the White House, but were made in his capacity as any other individual attorney nominated to a Senate-confirmable position. Nor were they made in an effort to protect client confidentiality, since neither Mr. Miranda nor anyone else associated with the Senate Judiciary Committee was his client.

Lying or making misrepresentations under oath at a congressional hearing implicates Rule 8 of the D.C. Rules of Professional Conduct, Maintaining the Integrity of the Profession. Specifically, in 2004, 2006, and 2018, Kavanaugh violated Rule 8.4(c) both in the pre-2007 rules and the current rules:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Although this misconduct by Mr. Kavanaugh was uncovered only after the recent revelation of the emails discussed above, it should be noted that Rule XI Section 1(c) of the D.C. Bar's Rules and Bylaws provides that:

Disciplinary proceedings against an attorney shall not be subject to any period of limitation.

In addition, Rule XI Section 2(b) makes clear that Kavanaugh's actions constitute professional misconduct subject to discipline even though he was not acting in the course of representing a client:

*Misconduct.* Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the attorney's oath of office or the rules or code of professional conduct currently in effect in the District of Columbia shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney- client relationship.

**Misleading Statements About Warrantless Surveillance:  
Rule 8.4(c)**

During his 2006 confirmation hearing, Kavanaugh also misled senators about his knowledge of warrantless surveillance by the Bush administration, part of which had become public through press reports in 2005.

Senator LEAHY. Did you see documents relating to the President's NSA warrantless wiretapping program?

Mr. KAVANAUGH. Senator, I learned of that program when there was a New York Times story—reports of that program when there was a New York Times story that came over the wire, I think on a Thursday night in mid-December of last year.

Senator LEAHY. You had not seen anything, or had you heard anything about it prior to the New York Times article?

Mr. KAVANAUGH. No.

Senator LEAHY. Nothing at all?

Mr. KAVANAUGH. Nothing at all.<sup>ix</sup>

In fact, emails released this month indicate that Kavanaugh's response was false. Administration attorney John Yoo sent Kavanaugh an email on September 17, 2001, long before the New York Times article, indicating that Kavanaugh had been very much involved in the legal analysis of what became the NSA warrantless wiretapping program:

Any results yet on the 4A implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence?<sup>x</sup>

That is inconsistent with seeing and hearing “nothing at all” about the program.

This month, Kavanaugh—again under oath—attempted to explain the discrepancy by saying he had not been read into that particular program.<sup>xi</sup> But even so, he clearly was very much involved in the program's legal underpinnings, even if he was not read into the specific programs that sprang from his research.


Since he was acting on his own behalf and not representing a client in any of his appearances before the Judiciary Committee, zealous representation of a client cannot be used as an excuse for withholding information that one is clearly being asked about.

At best, his responses were misleading. Unfortunately, such misrepresentations have created a terrible reputation for the legal profession as a whole of being untrustworthy and misleading. Kavanaugh's misleading testimony, delivered under oath, has strengthened that stereotype in the eyes of the public, to the disrepute of attorneys and the D.C. Bar.

### Conclusion

People For the American Way urges the Office of Disciplinary Counsel to investigate Judge Kavanaugh for the above violations of the Rules of Professional Conduct and to take appropriate disciplinary action.

Sincerely,



Paul R. Gordon  
Senior Legislative Counsel

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<sup>i</sup> "Report on the Investigation Into Improper Access to the Senate Judiciary Committee's Computer System," <http://news.findlaw.com/hdocs/docs/senate/pickle30404rpt1.html>.

<sup>ii</sup> [https://www.judiciary.senate.gov/download/09-06-18-gwb-document-production\\_leahy-coons-blumenthal-booker-1](https://www.judiciary.senate.gov/download/09-06-18-gwb-document-production_leahy-coons-blumenthal-booker-1) ("Committee Confidential"), p. 24.

<sup>iii</sup> *Id.* at 9.

<sup>iv</sup> *Id.* at 35-42.

<sup>v</sup> *Confirmation Hearing on the Nomination of Brett M. Kavanaugh to be Circuit Judge for the District of Columbia Circuit* (April 7, 2004), S. HRG. 108-878, <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg24853/pdf/CHRG-108shrg24853.pdf>, p. 46.

<sup>vi</sup> *Id.* at 47.

<sup>vii</sup> *Confirmation Hearing on the Nomination of Brett M. Kavanaugh to be Circuit Judge for the District of Columbia Circuit*, S. HRG 109-435 (May 9, 2006), <https://www.gpo.gov/fdsys/pkg/CHRG-109shrg27916/pdf/CHRG-109shrg27916.pdf>, p. 27.

<sup>viii</sup> *Senate Judiciary Committee Holds Hearing on the Nomination of Brett Kavanaugh to be Associate Justice on the Supreme Court, Morning Session, Day Three* (hearing transcript, September 6, 2018), Congressional Quarterly, <http://www.cq.com/doc/congressionaltranscripts-5383991> (subscription required).

<sup>ix</sup> 2006 confirmation hearing transcript, *supra*, at 42-43.

<sup>x</sup> Committee Confidential, *supra*, at 1.

<sup>xi</sup> Supreme Court Confirmation Hearing Day 3, Morning Session, *supra*.