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August 29, 2018

Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, DC 20510

Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

In Re: Opposition to Judge Brett Kavanaugh to the U.S. Supreme Court

Dear Senators Grassley and Feinstein,

I am writing to you both in your capacities as Chairman and Ranking Member of the Senate Judiciary Committee to express my opposition to the confirmation of Judge Brett Kavanaugh as an Associate Justice of the United States Supreme Court. I am a civil rights practitioner based in Chicago Illinois and I have practiced law for 35 years. In 2004 I had the privilege of arguing before the United States Supreme Court in the case of *Jones v. R.R. Donnelly & Sons,* and I have always had great respect for that institution. For the reasons below and in the attached motion seeking Judge Kavanaugh's recusal in a case I handled, I do not believe the Supreme Court would be well-served if Judge Kavanaugh's appointment is confirmed by the Senate.

In 2005 I took on two pro bono cases representing men being held in military detention at Guantanamo Bay, Cuba. As a solo practitioner, the representation of these two men was an enormous and expensive undertaking. Nonetheless, I felt compelled to represent these men because I felt (and still feel) that our Constitution should not be abandoned during difficult times and that it is the most difficult times that test the strength of our Constitution and our commitment to justice and the rule of law. One of my clients was freed from Guantanamo in 2011 and is living a peaceful life in his home country of Libya. However, my other client, an Algerian National, remains detained at Guantanamo as he has been for the last sixteen years. My client's detention continues even though he has never been charged with a crime, and never will be charged with a crime. My client has not, in fact, even broken the law, nor is he accused of having broken the law. My client simply had the misfortune of staying at the same guesthouse in Pakistan as another individual who was wanted by our government. The guesthouse was raided in 2002 and all of the Muslim men were taken into custody and turned over to American authorities. My client has been held in Guantanamo since that time.

My client's habeas petition was denied in 2012 and I appealed that decision to the United States Court of Appeals for the D.C. Circuit (that court affirmed the denial of habeas in a decision written by Judge Kavanaugh, a troubling development as you will shortly see, because there were, and remain, serious issues as to whether Judge Kavanaugh should have had any role in this or any other Guantanamo case). I was aware of controversy regarding Judge Kavanaugh that surfaced following his appointment to the D.C. Circuit. Specifically, Judge Kavanaugh had told Senator Durbin that he had no involvement with Guantanamo issues while serving at the White House during the Bush administration, notwithstanding that

his positions of Associate White House Counsel, Assistant to the President and Staff Secretary almost certainly exposed him to such issues. And indeed, later documents publicly released raised the question of his involvement in those issues. I was also aware that, after his confirmation to the bench, Senator Durbin wrote a letter to then Judge Kavanaugh further questioning his involvement in Guantanamo issues and as far as I am aware Judge Kavanaugh never responded to that letter.

When I learned that Judge Kavanaugh was assigned to the panel hearing the appeal of my client's habeas case, I filed the attached motion asking that he recuse himself from the case because of the unanswered questions surrounding his role in Guantanamo policy, the same unanswered questions raised by Senator Durbin's inquiries. Indeed, the issue of whether Judge Kavanaugh could fairly adjudicate a matter on which he may have formed opinions while he was in service of the Administration that was a party in that matter is not dissimilar to the issues now in public discussion concerning whether Judge Kavanaugh has prejudged issues associated with issues surrounding investigation or potential indictment of the executive. Despite the concerns raised in my motion, an order was entered within 24 hours of the filing of the recusal petition denying that motion. There was no further explanation of the Judge's role in policies relating to Guantanamo at the White House under President Bush, and as you can see from the attached order, there was no explanation as to why Judge Kavanaugh declined to recuse himself.

I did not file the recusal motion lightly, nor do I express my concerns about Judge Kavanaugh's elevation to the Supreme Court lightly. I have dedicated my career to civil rights litigation, and I have great respect for our judicial system and for the vast majority of

American judges who have dedicated their own careers to uphold our system of law. I also feel strongly that judges need to be open about any conflicts, whether actual, potential or even the appearance of a conflict. Judge Kavanaugh's prior lack of candor about his role in Guantanamo policy and his ongoing refusal to answer the questions posed by Senator Durbin raise serious concerns about elevating him to the Supreme Court. I am aware that additional facts have recently surfaced suggesting that Judge Kavanaugh had even more involvement in Guantanamo issues than previously thought and that these additional facts raise even more red flags regarding the ability of Judge Kavanaugh to be honest and independent.

Unless Judge Kavanaugh is willing to be candid on issues that arose from his confirmation to the Circuit Court, it is certainly not appropriate that he be considered for our nation's highest court. Respectfully, I strongly oppose the confirmation of Judge Kavanaugh to the United States Supreme Court.

Thank you for your kind attention.

Very Truly Yours,

H. Candace Gorman

ORAL ARGUMENT SCHEDULED FOR 9.27.13

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABDAL RAZAK ALI **Petitioners,** **vs.** **Barack Obama, *et al*,** **Respondents.**	**No. 11- 5102** **1:10-cv- 1020 (RJL)**

PETITIONER ABDAL RAZAK ALI'S[1] MOTION FOR RECUSAL PURSUANT TO 28 U.S.C. § 455(a)

Now comes the Petitioner, Abdal Razak Ali, through his Counsel H. Candace Gorman, and respectfully requests that Judge Brett Kavanaugh of this Court be recused from any participation in this matter pursuant to 28 U.S.C. § 455(a) and the Judicial Code of Conduct for United States Judges, Canon 1, Canon 3 A (1) and (6) and 3C, for the reasons set forth herein.

INTRODUCTION

Section 28 U.S.C. § 455(a) provides that "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality *might reasonably be questioned.*" (*emphasis added*)

[1] Petitioner's real name is Saeed Bakhouche.

Judicial Code of Conduct Canon 1 provides:

> A Judge should uphold the integrity and independence of the Judiciary.
>
> An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should 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.

Judicial Code of Conduct Canon 2 provides:

> A judge should avoid impropriety and the appearance of impropriety in all activities.... (A) 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.

Judicial code of conduct Canon 3 provides in relevant part

> A. Adjudicative Responsibilities.
>
> (1) A judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism.
>
> C. Disqualification
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> ***** [And] (e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the

> proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

As set forth herein, Judge Kavanaugh has created the appearance of impropriety with respect to the adjudication of issues concerning Guantanamo detainees (and in particular, issues which bear directly on Petitioner's present circumstances) because of his prior government employment as a legal advisor in the White House which may have direct bearing on the circumstances of this case. Counsel for Petitioner is aware of the gravity of the present request and does not present it lightly.

PETITIONER'S BACKGROUND

Petitioner herein (Razak Ali a/k/a SAEED Bakhouche) is being held at the Guantanamo Bay military prison and has been so held *without charge* since June, 2002- a period of more than eleven years. Petitioner's habeas petition was denied on February 28, 2011 in a "hearing" that has called into question the very concept of habeas corpus as it relates to detainees. Petitioner is not a terrorist nor has he ever been charged with engaging in so much as a single act of terrorism.

JUDGE BRETT KAVANAUGH

Judge Kavanaugh was a former assistant to President George W. Bush and staff secretary to the President, and prior to that, served as senior associate White House counsel and counsel to the President, at or about the time that prisoners were first transferred to Guantanamo Bay and at the time that the original protocols for their indefinite detention were established, and at the same time that Petitioner was transferred to Guantanamo Bay. At least for a time, while working in those capacities, Judge Kavanaugh was responsible for coordinating all documents to and from the President. He unquestionably worked on the numerous constitutional, legal, and ethical issues handled by that office. THE WHITE HOUSE ARCHIVE, *Judicial Nominations – Judge Brett M. Kavanaugh.*[1]

At the time of Judge Kavanaugh's nomination hearing before the Senate Judiciary Committee, the following exchange took place:

> Chairman SPECTER: Did you have anything to do with the questions relating to detention of inmates at Guantanamo?
>
> Mr. KAVANAUGH: No, Mr. Chairman.
>
> And later:

[1] *Available at* : http://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/kavanaugh.html (last visited July 22, 2013).

> Senator DURBIN: .....What was your role in the original Haynes nomination and decision to renominate him? And at the time of the nomination, what did you know about Mr. Haynes's role in crafting the administration's detention and interrogation policies?
>
> Mr. KAVANAUGH. Senator, I did not—I was not involved and am not involved in the questions about the rules governing detention of combatants or—and so I do not have the involvement with that.
>
> *Confirmation Hearing on the Nomination of Brett Kavanaugh to be Circuit Judge for the District of Columbia Circuit: Hearing Before the Committee on the Judiciary of the united States Senate.* 109th Cong. 20, 27.[2]

Both responses by Judge Kavanaugh were limited to particular categories of involvement regarding detention and Guantanamo. In the first question he was asked if he had anything to do *relating to detention of inmates at Guantanamo* and the Judge responded "no." In response to the second question the Judge did not respond to the actual question asked of him- "what did you know about Mr. Haynes's role in crafting the administration's detention and interrogation policies?" but instead responded by stating that he was not involved in questions about the *rules governing detention of combatants*. Unfortunately those responses left open the question of not only the Judge's knowledge about the crafting of the detention and interrogation policies but also about the extent and nature of

[2] *Available at*: http://www.gpo.gov/fdsys/pkg/CHRG-109shrg27916/pdf/CHRG-109shrg27916.pdf (last accessed on July 22, 2013).

the Judge's advice, knowledge and involvement in other aspects of detention policy (other than the rules governing detention of combatants) including the Judge's advice or involvement in the establishment and implementation of policies regarding interrogations and the running of the detention camp itself.

In 2007, for example, a report surfaced claiming that Judge Kavanaugh was involved in providing legal advice as to the policy of allowing detainees to obtain legal counsel. According to the *Washington Post* report confirmed sources related that Judge Kavanaugh had provided legal advice regarding the need to allow detainees to have legal counsel and an opportunity to be heard or that the administration would lose Justice Kennedy's vote in the Supreme Court. Barton Gellman and Jo Becker, *Pushing the Envelope on Presidential Power,* THE WASHINGTON POST, June 25,2007.[3]

The statements attributed to Judge Kavanaugh led to the Judge being himself accused by at least two U.S. Senators (Sens. Leahy and Durbin) of providing a misleading response to the questions posed to him at his Senate nomination hearing regarding his role in the establishment and

[3] *Available at*: http://blog.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/index.html (last accessed on July 22, 2013).

implementation of the very detention policy that undergirds Petitioner's case. Michael Sung, *Durbin urges federal appeals judge to recuse himself,* JURIST, June 27, 2007. [4]

Even to this date, the appearance of impropriety in Judge Kavanaugh's sitting on any of these cases remains, because it certainly appears that Judge Kavanaugh played *some* role in the policy decisions related to the individuals captured during the "war on terror" during the Bush Administration because of the legal advice that he provided and the involvement he had with key officials including President Bush. Unfortunately, because he was already confirmed to serve on this Court when the 2007 report surfaced, we do not know the full extent of that role. Unless and until the full extent of Judge Kavanaugh's role in advising, formulating and/or implementing policies relating to Petitioner's confinement, including, perhaps the very "intelligence gathering" that forms the "evidence" at issue on appeal, the appearance of impropriety warrants that he recuse himself from any appeal involving the Petitioner

[4] *Available at:* http://jurist.org/paperchase/2007/06/durbin-urges-federal-appeals-judge-to.php (last accessed on July 22, 2013).

here, as a reasonable person would conclude that there is an appearance of unfairness.

As further described below, Judge Kavanaugh has also created a controversy regarding his failure to disclose the precise scope of his own personal extra-judicial knowledge and his own personal role in the formation and establishment of the very policies and processes for not merely the operation of indefinite detention facilities maintained by our government, but quite possibly, the gathering of intelligence of the kind being offered in justification of Petitioner's detention, and the government's legal rationale for its actions.

ARGUMENT

1. As the Supreme Court has explained, the relevant test for recusal is objective, and is not dependent on the judge's intentions or actually evincing bias "but its appearance." *Liteky* v. *United States*, 510 U.S. 540, 548 (1994). "This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000). Thus, the inquiry to be made is "whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis *other than the*

merits." Hook v. McDade, 89 F.3d 350, 354 (7th Cir.1996)(*emphasis added)* (citation omitted). This inquiry is made based on a reasonable person standard, as opposed to "a hypersensitive or unduly suspicious person." *Id.* (citation omitted)

2. The issues raised herein beg the ultimate question of how confident Petitioner can be that he will be accorded a fair hearing over the ultimate question of the lawfulness of his detention where one of the judges appears to have had a role, potentially even a significant one, in formulating or advancing the very policies that led to Petitioner's detention in the first instance. Subsection 455(b)(2) of 28 U.S.C. requires disqualification "[w]here in private practice [the judge] served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served" *See, United States v. Jackson,* 430 F.2d 1113, 1115 (9th Cir. 1970); *In re Hatcher* 150 F.3d 631, 635 (7th Cir. 1998). As set forth herein, subsection (E)(1) of Canon 3 also mandates recusal in precisely the circumstances here--- where a judge was involved in facts and circumstances relevant to the case before him while in prior government service. Such knowledge from his previous position is considered extrajudicial. The point of distinguishing between "personal knowledge" and knowledge gained in a judicial capacity is that

information from the latter source enters the record and may be controverted or tested by the tools of the adversary process. Knowledge received in other ways, which can be neither accurately stated nor fully tested, is "extrajudicial." *Edgar vs. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996)

3. The very purpose of section 455 (a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. Violations that cast doubt on the integrity of the judicial process may well give rise to a violation under section 455(a). This Court held in *United States vs. Microsoft* 253 F.3d 34, 109-117 (D.C. Cir. 2001) that disqualification is mandatory for conduct that calls a judge's impartiality into question (citing to 28 U.S.C. § 455a *and In re School Asbestos Litig.*, 977 F2d 764, 783 (3rd Cir. 1992)). Clearly, based on his possible involvement in advising, formulating and/or advancing the government's detention policies in the first place, it appears that Judge Kavanaugh's impartiality has been clearly and unequivocally called into question.

4. The corollary to §455(b)(3) in the Code of Conduct for United States Judges is Canon 3C(1)(e), which provides in relevant part that:

> 1. A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

> (e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

5. Canon 3C(1)(e)—was amended in 2009 to make its applicability to former government service explicit, by requiring disqualification when "the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding."

6. Due to the fact that Judge Kavanaugh has not clarified in any public forum exactly what role he had in any of the policies relating to detention and Guantanamo and that he further refused to respond to questions from Senators after he was nominated to serve on this Court and after it was learned that he had provided at least some legal advice regarding questions that might ultimately end up before the U.S. Supreme Court in relation to Guantanamo and detention issues, in the absence of such clarity, Petitioner believes that Canon 3C(1)(e) mandates his recusal here.

7. Counsel for Petitioner has no doubt that being a Circuit Court Judge in these cases is a difficult job. Appeals regarding the writ of habeas

corpus will never be easy, and they were not so intended. They were however meant to be fair and to give individuals the opportunity for freedom from unlawful restraint. As Justice Kennedy stated in *Boumediene vs. Bush* 128 S. Ct. 2229, 171 L.Ed.2d 41 (2008) "the Great Writ is a fundamental precept of liberty" and "we do consider it uncontroversial, [ ] that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law. *St. Cyr*, 533 U. S., at 302. (*Boumediene* at 2238) The Supreme Court also recognized that this Court's task in reviewing habeas decisions is not easy. As Justice Kennedy held, "Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances. See 3 Blackstone *131 (describing habeas as "the great and efficacious writ, in all manner of illegal confinement"); see also *Schlup* v. *Delo*, 513 U. S. 298, 319 (1995) (Habeas "is, at its core, an equitable remedy"); *Jones* v. *Cunningham*, 371 U. S. 236, 243 (1963) (Habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). (*Boumediene* at 2267) Because Petitioner's very liberty is at stake he must be assured that he is provided a fair and meaningful

opportunity to demonstrate in this appeal, the fundamental unfairness and the erroneous application of law that marred his habeas hearing.

WHEREFORE, because of the appearance of impropriety based upon Judge Kavanaugh's prior government service in potentially advising, formulating and/or advancing the policies underpinning the very detention whose legality he must ultimately determine in the present appeal, his impartiality has been called into question and a reasonable person would perceive a significant risk that the judge will not resolve the case based on the Petitioner's meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law and hence, requires that said Judge be recused from further participating in Petitioner's appeal.

Dated: July 22, 2013

Respectfully submitted,

/s/ H. Candace Gorman

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CERTIFFICATE OF SERVICE

I, H. Candace Gorman, certify that I today caused a true and accurate copy of Petitioner's Motion to the individuals listed below via the Circuit Court's Electronic Case Filing System:

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This 22nd day of July, 2013.

/s/ H. Candace Gorman
Counsel for Petitioner

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5102 **September Term, 2012**

1:10-cv-01020-RJL

Filed On: July 23, 2013

Abdul Razak Ali, Detainee,

Appellant

v.

Barack Obama, President, et al.,

Appellees

ORDER

Upon consideration of appellant's motion for recusal pursuant to 28 U.S.C. § 455(a), it is

ORDERED that the motion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk