

Davis, Mike (Judiciary-Rep)

From: Davis, Mike (Judiciary-Rep)
Sent: Wednesday, August 15, 2018 9:39 PM
To: Davis, Mike (Judiciary-Rep)
Subject: SCOTUS -- Background on Documents Requested for Judge Kavanaugh's Nomination to the Supreme Court
Attachments: Confirmation Process Document Production Rebuttals 08.14.18.pdf; Correspondence.pdf

Below (in reverse-chronological order) are Chairman Chuck Grassley's prepared statements and press releases related to the records that the Senate Judiciary Committee requested for the nomination of Judge Brett Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States.

Please find attached:

1. A background summary of the records requests; and
2. The back-and-forth correspondence among senators, the Archivist of the United States, and President George W. Bush's office related to these records. (NOTE: Due to the file size, I attached a lower-resolution version of the PDF. If you want a higher-resolution copy of any or all of these letters, please let me know.)

This is the cure for insomnia.

Thank you,
Mike Davis

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CHAIRMAN CHUCK GRASSLEY WWW.JUDICIARY.SENATE.GOV

Prepared Floor Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Judiciary Committee
On the upcoming hearing for Supreme Court nominee Judge Brett Kavanaugh
August 15, 2018
([VIDEO](#))

Last week, I announced that the Senate Judiciary Committee will hold a hearing on Judge Kavanaugh's nomination to the Supreme Court starting on September 4. The hearing will begin 57 days after the President announced Judge Kavanaugh's nomination—more than a week longer than the period between announcement and hearing for Justices Sotomayor, Kagan, and Gorsuch.

The Senate has already received more documents from Judge Kavanaugh's time in the Executive Branch than we did for any previous Supreme Court nominee. We have so far received more than 184,000 pages of documents, of which more than 124,000 are currently publicly available.

The team of lawyers who work for the Majority have already reviewed more than 10,000 pages of the 307 judicial opinions that Judge Kavanaugh wrote—along with the hundreds more opinions that he joined—in his twelve years of service on the D.C. Circuit. The team of lawyers who work for the Majority have also already reviewed 110 pages of written answers and over 17,000 pages of materials Judge Kavanaugh submitted to the committee in response to its bipartisan questionnaire—the most robust questionnaire ever submitted to a Supreme Court nominee. And the team of lawyers who work for the Majority have already reviewed every page of the more than 184,000 pages of emails and other records we have received, so far, from Judge Kavanaugh's time as a government lawyer in the White House and with Judge Starr.

I expect we will receive even more documents tonight or tomorrow and that all remaining documents responsive to our request will be produced next week. We will work to make every unrestricted record publicly available as quickly as possible. As I predicted, this confirmation process is the most transparent ever. We have already received more documents from Judge Kavanaugh's Executive Branch service than any nominee in history, with many more to come. And senators have more time to review Judge Kavanaugh's record than they did for the last three Supreme Court nominations.

I am confident that the Committee and the Senate will have ample information and time to carry out their responsibilities.

But some of my colleagues on the other side of the aisle are attempting to manipulate the American people. I just described to you the largest document production in the history of Supreme Court nominations. But guess what the Minority Leader described it as: "unprecedented secrecy." This argument is ridiculous on its face. And the American people aren't buying it. I got a lot of questions at my town meetings across Iowa over the last week or so about the Supreme Court, but hardly any mention of this document issue cooked up by Washington insiders.

Let's not forget how this document issue started. First, liberal dark money groups and their Senate allies announced immediate opposition to Judge Kavanaugh—some even before Judge Kavanaugh was nominated. The minority leader said he would oppose Judge Kavanaugh with everything he's got.

So, their first tactic was to argue that the Senate shouldn't confirm anyone during a midterm election year. They attempted to invoke the Biden Rule—which bars confirmation of a Supreme Court justice during a presidential election year—to make this argument. Of course, this was a ludicrous position unsupported by any precedent. Widely rejected by objective observers and fact-checkers, the Minority Leader and his allies abandoned this argument. But they didn't abandon their goal, which is to stall Judge Kavanaugh's confirmation until after the midterm elections and hope they reclaim the Senate.

That's why the Minority Leader refocused his tactics and manufactured a phony controversy regarding Judge Kavanaugh's White House documents. How do we know it's phony? On the one hand, the Minority Leader has publicly stated he would oppose Judge Kavanaugh's nomination with everything he's got. On the other, he is insisting that the Senate needs millions more pages of documents on top of what we already

have in order to make an informed decision.

Indeed, the Senate Democrats demanded the search of every page of every email and every other record from every one of the hundreds of White House staffers who came and went during every one of the eight years of the Bush Administration. In other words, the Senate Democrats demanded the search of every scrap of White House paper for the entire Bush presidency. As I've stated repeatedly, I'm not going to put the American taxpayers on the hook for the Senate Democrats' fishing expedition.

How much more information do the Minority Leader and his outside dark-money allies need if they've already made their decision to oppose Judge Kavanaugh? They don't care about Judge Kavanaugh's record. They're already voting "no." They simply want to bury us in a mountain of paper, so there is no chance that we can hold a confirmation vote on Judge Kavanaugh's nomination anytime this year.

Let's not forget that Judge Kavanaugh has a twelve-year judicial track record from his time on the D.C. Circuit. During that time, he authored more than 300 opinions and joined hundreds more. These opinions provide the most relevant information for assessing Judge Kavanaugh's legal thinking. Back in 2009, my Democratic colleagues were making this same argument with respect to Justice Sotomayor. Of course, they're flip-flopping now. The current Minority Leader said in 2009 that "everybody knows" a judge's record on the bench "is the best way to evaluate a nominee." He said to Justice Sotomayor, "I want to turn to your record on the bench, which I believe is the best way to get a sense of what your record will be on the bench in the future."

Then-Chairman Leahy said: "We have Judge Sotomayor's record from the federal bench. That is a public record that we had even before she was designated by the President. Judge Sotomayor's mainstream record of judicial restraint and modesty is the best indication of her judicial philosophy. We do not have to imagine what kind of a judge she will be because we see what kind of a judge she has been."

Well, the same logic applies to Judge Kavanaugh's long judicial track record. Despite this record being more than sufficient to assess how Judge Kavanaugh approaches legal issues, I requested hundreds of thousands of additional pages from his time as a government lawyer in the interest of full transparency. But, even the most transparent confirmation process in history is not enough for those who decided to oppose Judge Kavanaugh before they even saw his record.

The document requests for Justice Kagan's confirmation provide strong support for how the Judiciary Committee is proceeding now. Then, the Senate requested Justice Kagan's White House records but not internal documents from the Solicitor General's office. We refrained out of respect for the sensitivity of internal deliberations in that office. We did so even though these documents would have been extremely helpful to our assessment of Justice Kagan's views on the law given that she lacked a judicial record. And Justice Kagan herself testified that senators should look at her time as Solicitor General to evaluate her. But we didn't ask for them.

This precedent supports my decision not to ask for documents from Judge Kavanaugh's time as White House staff secretary. If internal Solicitor General documents were too sensitive to produce, then documents from Judge Kavanaugh's time as staff secretary certainly are as well. The staff secretary serves as the inbox and outbox for the President of the United States. These documents include some of the most sensitive documents in all of our government, implicating our national security and the other core duties of the President. These documents are at the heart of executive privilege.

In addition to being the most sensitive documents, they are the least probative of Judge Kavanaugh's legal thinking. The primary role of the staff secretary is to make sure that President sees advice from a range of

policy advisors across the Executive Branch, not provide his own policy or legal advice.

To recap, Judge Kavanaugh wrote more than 300 judicial opinions and joined hundreds more in twelve years on the bench. Justice Kagan, by contrast, had written or joined zero judicial opinions before her nomination. Despite having less need for Judge Kavanaugh's Executive Branch records—in light of his substantial judicial record—the Senate has already received more such documents than it did for Justice Kagan or any other nominee and will receive many more. In fact, for Judge Kavanaugh, we could receive up to one million pages—which is more than the five prior Supreme Court nominees combined.

Democratic leaders have also tried to argue that Judge Kavanaugh's White House records are being “cherry-picked” by Bill Burck, who they label as a “partisan lawyer.” I guess they've forgotten how the Senate received documents during the last three Supreme Court confirmations. The Senate received documents for Justice Sotomayor's confirmation after they were reviewed by Leslie Kiernan. She represented Obama campaign manager David Plouffe and former Representative Charlie Rangel and eventually became Deputy White House Counsel in the Obama Administration.

As the Wall Street Journal pointed out in an editorial yesterday, the Senate received documents for Justice Kagan after they were reviewed by Bruce Lindsey. Mr. Lindsey overlapped with Justice Kagan in the White House. He also served as President Clinton's national campaign director in 1992, as President Clinton's hyper-partisan senior lawyer and fixer in the White House, and as CEO of the Clinton Foundation for ten years—including when Justice Kagan was nominated. How much more partisan can you get?

Bill Burck is President Bush's Presidential Records Act representative, like Mr. Lindsey was for President Clinton. Mr. Burck has held this position since 2009. He is a partner at one of the most liberal law firms in America. Mr. Burck also served as President Bush's Presidential Records Act representative during the Gorsuch confirmation, but Democrats didn't object to his involvement then. And they didn't object to Ms. Kiernan's or Mr. Lindsey's involvement during the Sotomayor and Kagan nominations. Their objection to Mr. Burck's role now is another opportunistic attempt to discredit the process and avoid talking about Judge Kavanaugh's qualifications.

I'd like to correct one additional misconception. The National Archives are not being cut out of this process. Under the Presidential Records Act, President Bush has the right to request his own administration's documents. He can choose to make a document public or claim that it is protected under executive privilege. That is precisely what he is doing now.

President Bush is providing a valuable public service to the American people at considerable and non-public expense. He is expediting the review process and making sure that the Senate has all the documents it needs to conduct a timely and efficient confirmation process. President Bush and his legal team should be thanked—not scorned—for providing this tremendous service to the American people. Thanks to them, we will have Judge Kavanaugh's papers in time to hold a confirmation hearing and vote this year, just as the American people expect us to do.

Democratic leaders have played up this phony documents controversy to deflect attention from Judge Kavanaugh's extraordinary qualifications and sterling reputation as a judge. In his twelve years on the bench, the Supreme Court has on thirteen occasions adopted a legal position from Judge Kavanaugh's opinions. This is an exemplary track record in the Supreme Court.

Judge Kavanaugh is dedicated to judicial independence. He's not afraid to tell another branch of government when it has exceeded its lawful authority. At the same time, he has great respect for the separation of powers and will interpret the law as it is written by the people's representatives in Congress.

I look forward to hearing from Judge Kavanaugh when he appears before the Judiciary Committee on September 4.

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FOR IMMEDIATE RELEASE

Wednesday, August 15, 2018

Committee Releases Third Batch of Kavanaugh Records

Total Public Records Exceeds 124,000 Pages

WASHINGTON – The Senate Judiciary Committee last night released the third tranche of records from Judge Brett Kavanaugh’s service as a lawyer in the George W. Bush White House. The release totals more than 21,000 pages, bringing the volume of Judge Kavanaugh’s public Executive Branch material to more than 124,000 pages.

The Office of President Bush has produced more than 174,000 pages of material to the committee to expedite the committee’s review while the material is prepared for public release. Last night’s release is the third subset of that material to become public. It includes:

- [Cover Sheet](#)
- [08-09-18 GWB Document Production \(Set 1, Pages 1 - 10,000\)](#)
- [08-09-18 GWB Document Production \(Set 1, Pages 10,001 - 20,000\)](#)
- [08-09-18 GWB Document Production \(Set 1, Pages 20,001 - 21,231\)](#)

Nomination material is being posted [HERE](#) as it becomes available.

The Chairman’s team has already reviewed more than 10,000 pages of the judicial opinions that Judge Kavanaugh wrote or joined in his 12 years of service on the D.C. Circuit, more than 17,000 pages of material Judge Kavanaugh [submitted to the committee](#) in response to its bipartisan questionnaire, more than 174,000 pages of emails and other records from Judge Kavanaugh’s legal service in the White House and nearly 10,000 pages of documents from his service in the Office of the Independent Counsel. The committee has already received a record number of documents from Judge Kavanaugh’s service as a government lawyer, with more on the way.

The Committee expects to continue receiving future productions on a rolling basis from both the [Office of](#)



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Monday, August 13, 2018

NYT, WaPo: Opposition to Judge Kavanaugh Floundering *Anti-Kavanaugh Forces Deflated, Struggle to Organize*

WASHINGTON – As Democratic leaders continue their desperate attempt to find a legitimate reason to oppose Judge Kavanaugh’s nomination to the Supreme Court, reports from the *Washington Post* and the *New York Times* conclude Democrats’ [manufactured document fight](#) and [hysterical, baseless attacks](#) on Judge Kavanaugh’s record aren’t sticking. Following the [latest release](#) of what will be a record number of documents from Judge Kavanaugh’s time as a public servant, the *Washington Post* [noted](#), “A review of the latest trove revealed no obvious bombshells about Kavanaugh.”

In case you missed it...

[Washington Post](#): Democrats all but acknowledge Kavanaugh is headed toward confirmation to Supreme Court

- “...**leaders of the resistance are already delivering post-mortem assessments** and blaming fellow Democrats for a looming failure.”
- “**The fizzling of the campaign to block Kavanaugh underscores the relative weakness of the Democrats...**”
- “...Democrats are likely to watch helplessly as the Senate confirms Trump’s second Supreme Court pick after Justice Neil M. Gorsuch. In addition, Republicans have pushed through 24 circuit court judges, a record number for a president in his first two years in office, and two more are in the queue when the Senate returns next week.”

[New York Times](#): ‘So, So Jaded’: The Campaign to Stop Brett Kavanaugh Struggles for Liftoff

- “...across the country this August, **energizing and sustaining on-the-ground opposition to a nominee whom most Republicans and some moderate Democrats have deemed well qualified has been difficult...**”

- “In Washington, **Democrats have struggled to score points against Judge Kavanaugh**, a 12-year veteran of the federal bench...”
- “Mr. Grassley, for his part, seemed slightly taken aback that he had not met more resistance in his home state. ‘If there were any surprises, it would be surprising that every meeting wasn’t like the meeting we just completed,’ he said after the event in Corning.”

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[WSJ Editorial: “The Kavanaugh Document Fight”](#)

Grassley is following the precedents set by Democrats on Kagan

The Wall Street Journal Editorial Board today commended Chairman Grassley’s vetting process for Supreme Court nominee Judge Brett Kavanaugh and chided Democrats for their excessive and unprecedented demands.

“Document production from [Kagan’s] years in the Clinton White House counsel’s office was supervised by Bruce Lindsey, whose White House tenure overlapped with Ms. Kagan’s...”

“Mr. Burck is playing a similar role to Mr. Lindsey’s. Mr. Bush appointed Mr. Burck as his Presidential Records Act designee in 2009 and Mr. Burck did the same document supervision during the Neil Gorsuch nomination.”

[NOTE: Mr. Lindsey was also serving as the CEO of the [Clinton Foundation](#) at the time of Justice Kagan’s nomination.]

...

“The Obama Administration produced no documents—none—from Justice Kagan’s years in the Solicitor General’s office because they were said to relate to executive-branch deliberations on legal issues. The staff secretary’s documents are much less relevant to legal matters than those from the SG’s office.”

...

“Judge Kavanaugh’s confirmation is fast becoming one of the most transparent in history.”

...

“Mr. Grassley is accommodating Democrats according to their own former standards, and he is right to keep on course for a September vote.”

On Friday, Chairman Grassley [announced](#) that the confirmation hearing for Judge Kavanaugh would begin on September 4, 2018.

SCOTUS RESOURCES:

- [Committee Framework to Review Kavanaugh Records](#)
- [NYT, WaPo: Opposition to Judge Kavanaugh Floundering](#)
- [Grassley on Kavanaugh Document Review Process](#)
- [The Ginsburg Standard: No Hints, No Forecasts, No Previews...And No Special Obligations](#)
- [Editorial Boards Across America Praise Judge Kavanaugh](#)
- [Democrats vs. Reality on SCOTUS Nomination](#)
- [Fact Checked: NYT, WaPo, PolitiFact Debunk Dem Claims on Kavanaugh](#)

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FOR IMMEDIATE RELEASE
Saturday, August 11, 2018

New Batch of Kavanaugh Records Becomes Public

Latest release brings public Exec Branch records to more than 103,000 pages

WASHINGTON – The Senate Judiciary Committee today released another batch of records from Judge Brett Kavanaugh’s service as a lawyer in the George W. Bush White House. Following today’s release more than 103,000 pages of material from Judge Kavanaugh’s Executive Branch service is now public. That’s in addition to nearly 17,500 pages of material Judge Kavanaugh [submitted to the committee](#) in response to its bipartisan questionnaire and more than 10,000 pages from his service on the D.C. Circuit.

The Office of President Bush has produced more than 174,000 pages of material to the committee to expedite the committee’s review while the material is prepared for public release. Today’s release is the second subset of that material to become public. It includes:

- [Cover Letter](#)
- [08-02-18 GWB Document Production \(Set 2, Pages 1 - 10,000\)](#)
- [08-02-18 GWB Document Production \(Set 2, Pages 10,001 - 20,000\)](#)
- [08-02-18 GWB Document Production \(Set 2, Pages 20,001 - 30,000\)](#)
- [08-02-18 GWB Document Production \(Set 2, Pages 30,001 - 40,000\)](#)
- [08-02-18 GWB Document Production \(Set 2, Pages 40,001 - 50,000\)](#)
- [08-02-18 GWB Document Production \(Set 2, Pages 50,001 - 60,000\)](#)

- [08-02-18 GWB Document Production \(Set 2, Pages 60,001 - 70,000\)](#)
- [08-02-18 GWB Document Production \(Set 2, Pages 70,001 - 80,000\)](#)
- [08-02-18 GWB Document Production \(Set 2, Pages 80,001 - 87,798\)](#)

Nomination material is being posted [HERE](#) as it becomes available.

The Committee expects to continue receiving future productions on a rolling basis from both the [Office of George W. Bush and NARA](#).

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FOR IMMEDIATE RELEASE

Friday, August 10, 2018

Grassley: Kavanaugh Hearings to Begin September 4

Committee reviewing unprecedented volume of Exec Branch records

WASHINGTON – Senate Judiciary Committee Chairman Chuck Grassley today announced that the hearing for Judge Brett Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States will begin on September 4. Today’s announcement follows the largest cumulative production of Executive Branch material ever received in the course of evaluating a Supreme Court nominee.

Grassley expects the hearing to last 3 to 4 days. Opening statements by Judiciary Committee members and the nominee will occur on Tuesday, September 4. The questioning of Judge Kavanaugh will begin on Wednesday, September 5. Testimony by those who know Judge Kavanaugh the best, outside legal experts, and the American Bar Association is expected to follow.

“As I said after his nomination, Judge Kavanaugh is one of the most respected jurists in the country and one of the most qualified nominees ever to be considered by the Senate for a seat on our highest court. My team has already reviewed every page of the over 4,800 pages of judicial opinions Judge Kavanaugh wrote, over 6,400 pages of opinions he joined, more than 125,000 pages of records produced from his White House legal service, and over 17,000 pages in response to the most comprehensive questionnaire ever submitted to a nominee. He’s a mainstream judge. He has a record of judicial independence and applying the law as it is written. He’s met with dozens of senators who have nothing but positive things to say. At this current pace, we have plenty of time to review the rest of emails and other records that we will receive from President Bush and the National Archives. It’s time for the American people to hear directly from Judge Kavanaugh at his public hearing,” Grassley said.

This announcement comes after the committee has received the largest number of Executive Branch records ever for the consideration of a Supreme Court nominee. As of today, the committee has received more than 184,000 pages of records from Judge Kavanaugh's work as a White House lawyer and his work for Independent Counsel Kenneth Starr. The committee also expects to receive hundreds of thousands of additional pages of Executive Branch documents. These records will be reviewed in addition to the 307 cases in which Judge Kavanaugh wrote an opinion as an appeals court judge, the hundreds more opinions he joined, and the more than 17,500 pages of material he provided in response to the committee's bipartisan questionnaire.

A September 4 start date for the hearing is 57 days after the announcement of Judge Kavanaugh's nomination. This extends the timeline that was set for the committee's consideration of Justices Sonia Sotomayor, Elena Kagan, and Neil Gorsuch. Hearings for these nominees occurred 48-49 days after the president announced their nominations.

Members of the media seeking to cover the hearing should contact their respective Senate Press Galleries. Information on Judge Kavanaugh's nomination can be [found here](#).

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FOR IMMEDIATE RELEASE
Friday, August 10, 2018

Judiciary Committee Receives Second Batch of Kavanaugh Documents

WASHINGTON – The Senate Judiciary Committee last night received another production of documents in the course of its consideration of Judge Brett Kavanaugh to serve as Associate Justice of the Supreme Court of the United States. This [latest production](#) from the Office of President George W. Bush totals more than 49,000 pages of records relating to Judge Kavanaugh's service in the White House Counsel's Office. This batch represents the second in a series of rolling productions.

On August 2, 2018, the [committee received](#) an initial production of more than 125,000 records from Kavanaugh's time as a White House lawyer in the George W. Bush administration. The committee has since [publicly released](#) 5,735 of those pages, and expects to release more on a rolling basis.

On July 27, 2018, Chairman Chuck Grassley [requested](#) that the National Archives produce documents from Kavanaugh's work in the White House Counsel's Office as well as records related to his nomination to be a

judge on the D.C. Circuit. Chairman Grassley and the committee's ranking member, Senator Dianne Feinstein, also [requested](#) records relating to Judge Kavanaugh's work for Independent Counsel Kenneth Starr.

The committee established a dual track [framework](#) to review relevant documents, under which former President Bush is providing copies of these presidential records on an expedited basis while the National Archives continues its ongoing review.

The National Archives estimates the total production to be up to one million pages. For context, the largest executive branch production for previous Supreme Court nominees was roughly 180,000 pages for Justice Neil Gorsuch.

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Thursday, August 9, 2018

Committee Releases First Production of Kavanaugh Records

More than 125,000 pages to become public

WASHINGTON – The Senate Judiciary Committee today began the release of the first production of Judge Kavanaugh's records from his time as a lawyer in the George W. Bush White House. The rolling production over the next several days is expected to total more than 125,000 pages.

The documents were [initially produced](#) to the Committee on a confidential basis last week pending consultation with the National Archives and Records Administration (NARA). Following [discussions with the NARA](#), the Office of George W. Bush has authorized the public release of its initial document production on a rolling basis. That material will be available [HERE](#).

Today's productions include:

- [08-02-18 GWB Document Production - Pages 1 - 5,735](#)
- [08-02-18 GWB Document Production - REV_00097279](#)

The Committee expects to continue receiving future productions on a rolling basis from both the [Office of George W. Bush and NARA](#).

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AUGUST 05, 2018

Committee Framework to Review Kavanaugh Records Ahead of Hearing

On July 27, 2018, the Senate Judiciary Committee exercised its right under the Presidential Records Act (PRA) to request that the National Archives produce presidential records from Judge Kavanaugh's service as an Executive Branch lawyer. This includes his time in the [White House Counsel's Office](#) and his work for [Independent Counsel Kenneth Starr](#). The Archives has begun an expedited review of those records for release to the Committee and the public.

Earlier in July, President George W. Bush also exercised his right under the same statute to obtain copies of the very same presidential records from the Archives. He and his PRA representatives have been reviewing those documents at a very swift pace, following the highest professional standards and seeking to categorize documents using the same principles that the Archives uses for its own review.

President Bush has offered to provide the committee with copies of the non-privileged presidential records he received—the same records the committee requested—on a rolling basis as he finishes reviewing them. This is a significant public service. It allows the committee to begin quickly performing the important task of reviewing Judge Kavanaugh's record, while also speeding up the timetable for the records' public release, as appropriate under law. President Bush has agreed to perform this service at non-taxpayer expense.

Some have argued that the committee's use of President Bush's copies of the records—the very same presidential records the committee requested from the Archives—means the Archivist has been cut out of the process. This is simply not true, and those making the argument know it. While the committee is reviewing the copies of presidential records received from President Bush, the Archives is going to be reviewing *the very same records that it provided to President Bush* to prepare those documents for formal public release under the PRA and other laws, as the committee requested. When the Archives has finished its review, the committee fully expects that the Archives will provide to the committee and the public any non-privileged presidential record to which the committee is entitled that President Bush has not already provided.

In other words, the committee will get presidential records it requested from two sources. The committee will get copies first from President Bush, who is able to produce records to the committee more quickly than the Archives. Any non-privileged

record to which the committee is entitled that President Bush declines to produce will then be produced from the Archives. This process ensures that no time is wasted and should give added comfort to those seeking access to the documents because it provides yet another means of ensuring committee access to all non-privileged presidential records.

Some have further argued that the committee's use of President Bush's copies of records means that the committee's review will be a partisan process. This is wrong for two reasons. First, the lawyers leading President Bush's review are highly respected lawyers undertaking a professional, not partisan, representation. They are doing what they and their firms do in case after case all across the country: review documents to respond appropriately to requests for records in a manner consistent with applicable law. Second, because the committee will receive records from President Bush *and the Archives*, any non-privileged presidential record withheld by President Bush will be produced to the Committee by the Archives. There is thus a check against any partisan interference.

The path the committee has taken allows access to the requested presidential records on an expedited basis so that committee members can review an unprecedented volume of documents in a timely and efficient fashion. Anyone insisting that the committee review copies of records only from the Archives is a transparent effort to delay and obstruct the confirmation process.

The presidential records requested by Chairman Grassley are already starting to arrive, courtesy of President Bush. The committee received over 125,000 pages of those records Thursday and will soon receive hundreds of thousands more. This initial production alone generated nearly three quarters of the *total* pages produced during each of Justices Kagan's and Gorsuch's nominations. Committee staff are already hard at work reviewing the documents in order to perform the Senate's constitutional duty of advice and consent.

More on the Presidential Records Act

President Bush has a statutory right of access to documents created during his administration, and nothing in the Presidential Records Act (PRA) restricts his ability to review those documents and handle them however he pleases, including making them public or sharing them with Congress. He moreover has a legal right to assert privilege over any document requested by the committee, and documents over which he claims privilege cannot be produced to anyone—including the committee—if President Trump also agrees they are privileged. Any records that the former president declines to share with the committee for reasons other than privilege—e.g., because he believes they are personal, rather than presidential, records or because they contain PRA-restricted material—will be reviewed by the Archivist. The Archivist will review those records that President Bush declined to produce based on their status as personal records or on

PRA grounds and make his own determination about whether they should be withheld. If the Archivist determines they should not be withheld—and President Bush does not assert privilege—the Archivist will provide them to Congress even if President Bush has not.



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Friday, August 03, 2018

Grassley, Feinstein Seek Kavanaugh's Files from Starr Investigation *Committee reviewing first production of the nominee's White House records*

WASHINGTON – Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) and Ranking Member Dianne Feinstein (D-Calif.) today requested records from Judge Brett Kavanaugh's work for the Office of Independent Counsel during the Clinton administration. The request comes as the committee continues its review of more than 125,000 pages received yesterday from Judge Brett Kavanaugh's White House work.

In a [letter today](#) to the National Archives and Records Administration, the senators requested documents from Kavanaugh's service in the Office of Independent Counsel Kenneth Starr, including all emails Kavanaugh sent or received and all documents he authored, edited, revised or approved. The [National Archives estimates](#) the volume of these documents to be 20,000 pages.

Yesterday, the [committee received](#) more than 125,000 records from Kavanaugh's time as a White House lawyer in the George W. Bush administration. The committee expects these records to be made public, pending consultation with the National Archives. Last week, [Grassley requested](#) that the National Archives produce documents from Kavanaugh's work in the White House Counsel's Office as well as records related to his nomination to be a judge on the D.C. Circuit. The National Archives estimates the total production to be up to one million pages. For context, the largest executive branch production for previous Supreme Court nominees was roughly 180,000 pages for Justice Neil Gorsuch.

The committee is also reviewing more than 17,000 pages from Judge Kavanaugh's [public committee questionnaire](#) as well as more than 8,500 pages from cases in which Judge Kavanaugh authored or joined opinions during his 12 years on the D.C. Circuit.

Full text of [today's letter](#) follows:

August 3, 2018

The Honorable David S. Ferriero
Archivist of the United States

National Archives and Records Administration
700 Pennsylvania Avenue NW
Washington, D.C. 20408

Dear Mr. Ferriero:

We ask that you provide documents to the United States Senate Committee on the Judiciary in connection with President Trump's nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States.

Judge Kavanaugh served as an Associate Counsel in the Office of Independent Counsel Kenneth W. Starr from September 6, 1994 until November 20, 1997, and again from April 27, 1998 until December 1, 1998. We request that the documents you identify and provide to the Committee from his service in the Office of Independent Counsel include the following, consistent with the attached guidelines:

- (1) Documents from Brett M. Kavanaugh's service as Associate Counsel in the Office of Independent Counsel, including all documents preserved in his staff files and all documents he authored in whole or in part, edited, revised, or approved;
- (2) All memos, letters, or electronic mail sent by or received by Brett M. Kavanaugh during his tenure in the Office of Independent Counsel, including any such memos, letters, or electronic mail on which he was a carbon copy or blind carbon copy recipient, and including any documents attached to such memos, letters, or electronic mail;

We understand that reviewing these documents as the Freedom of Information Act (FOIA) requires will be a significant undertaking. Nevertheless, in order to expedite your response and to facilitate the Committee's prompt review, please produce documents on a rolling basis as you identify categories responsive to this request.

We recognize the possibility that some documents responsive to our request may be exempt from public disclosure under FOIA. *See* 5 U.S.C. § 552(b); 28 U.S.C. § 594(k)(3)(A). We nevertheless have an important constitutional obligation to examine thoroughly Judge Kavanaugh's record, and the FOIA exemptions are "not authority to withhold information from Congress." 5 U.S.C. § 552(d). We therefore ask that you provide to the Committee on a "Committee Confidential" basis those documents that would otherwise be exempt from public disclosure under 5 U.S.C. § 552(b). In addition, and because there is a significant public interest in understanding the record of any Supreme Court nominee, we hope that you will endeavor to ensure public access to as much of the record as possible. To the extent that these records contain classified national security information or personal privacy information, please contact the Committee so that we can discuss further how those materials might be handled.

We further recognize that some documents responsive to this request may be subject to constitutional or common-law privileges against disclosure. We intend to respect claims of privilege. We hope, however, that the number of responsive documents subject to claims of privilege will be as few as possible.

We recognize that reviewing the archives and producing these documents is a significant task, and we thank you in advance for your efforts.

Sincerely,

Charles E. Grassley
Chairman

Dianne Feinstein
Ranking Member

cc:

Mr. Donald F. McGahn
Counsel to the President
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

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COMMITTEE *on the* **JUDICIARY**
CHAIRMAN CHUCK GRASSLEY WWW.JUDICIARY.SENATE.GOV

FOR IMMEDIATE RELEASE

Friday, July 27, 2018

Grassley Seeks Documents for Supreme Court Nomination

WASHINGTON – Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) today requested special access to documents related to Judge Brett Kavanaugh’s legal work in the White House, as the committee evaluates his nomination to the Supreme Court. In a letter to National Archives staff at the George W. Bush Presidential Library, Grassley sought all emails sent to or from Judge Kavanaugh during his time in the White House Counsel’s Office, all paper files maintained by Judge Kavanaugh in that position and all documents relating to his nomination to the U.S. Court of Appeals for the D.C. Circuit.

“For nearly two weeks, I’ve attempted to seek a good-faith agreement from the Ranking Member to jointly request documents relating to Judge Kavanaugh’s legal work in the White House. For nearly two weeks, I’ve found myself either waiting for a response to my proposals or faced with unprecedented and unreasonable counter-proposals.

“Even when I suggested that we jointly request documents that both sides want while continuing to negotiate other categories, the Ranking Member declined. The Minority rejected out of hand multiple accommodations that I’d offered to assist in targeting material they believe is relevant. Instead, they demanded that we expand the request to require a search of every email from every one of the hundreds of White House staffers who served alongside Judge Kavanaugh for nearly six years, to find records that merely mention his name.

“So today, on behalf of the committee, I submitted a request for documents related to Judge Kavanaugh’s time in the White House Counsel’s Office. I expect the production to be the largest ever in the Senate’s consideration of a Supreme Court nominee. In the meantime, I’m eager to review Judge Kavanaugh’s 307 judicial opinions, the hundreds of other opinions that he joined and the 6,168 pages he already provided to us, which are publicly available right now and will provide the greatest insight into his fitness for the high court. As I have said repeatedly, I am not going to put the American taxpayers on the hook for the Senate Democrats’ fishing expedition.”

Text of [Chairman Grassley’s letter](#) to the archivists at the Bush Library follows:

July 27, 2018

The Honorable Patrick X. Mordente, Brigadier General
Director
George W. Bush Presidential Library and Museum
2943 SMU Boulevard
Dallas, Texas 75205

Dear General Mordente:

Pursuant to 44 U.S.C. § 2205(2)(C), I ask that you provide Presidential records to the United States Senate Committee on the Judiciary in connection with the President’s nomination of Judge Brett M. Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States. Consistent with the Presidential Records Act (PRA), 44 U.S.C. § 2201(2), (3), this request is for access to Presidential records only, not personal records.

Kavanaugh served in the White House under President George W. Bush, first as Associate Counsel from 2001 to 2003 and later as Senior Associate Counsel in 2003. He served as Assistant to the President and Staff Secretary from 2003 to 2006. I request that you provide the following documents to the Committee on an expedited basis, consistent with the guidelines described in this letter:

- (1) Emails sent to or received from Kavanaugh, including emails on which he was a carbon copy or blind carbon copy recipient, during the period Kavanaugh served as Associate Counsel and Senior Associate Counsel to the President, including any documents attached to such emails;
- (2) The textual records contained in Kavanaugh’s office files from the period during which he served as Associate Counsel and Senior Associate Counsel to the President; and
- (3) Documents relating to Kavanaugh’s nomination to the U.S. Court of Appeals for the District of Columbia Circuit

The Committee has previously made official requests of Presidential Libraries in connection with nominees who served in the White House. I believe it appropriate to follow past Committee precedent concerning requests for records from Presidential Libraries in several respects.

Section 2205 of the Presidential Records Act (PRA), 44 U.S.C. § 2205, provides this Committee access to Presidential records in response to an official Congressional Committee request, notwithstanding the limitations on public disclosure set forth in section 2204 of the PRA, 44 U.S.C. § 2204(a)(1)–(6). Such access is, by statute, subject to “any rights, defenses, or privileges which the United States or any agency or person may invoke.” 44 U.S.C. § 2205(2). While I hope that documents responsive to our request will not raise

these concerns, I also recognize that responsive documents may be subject to statutory or other rights, defenses, or privileges.

Section 2205(2)(C) entitles the Committee to access any non-privileged Presidential record that is responsive to the Committee's special-access request, notwithstanding the limitations on public access set forth in section 2204. I recognize, however, that in the context of prior Supreme Court nominations, the Committee and the Archivist have agreed that some documents containing PRA-restricted material would be produced to the Committee on a "Committee Confidential" basis. The Committee further agreed that such documents could be discussed only during a Closed Session of the Committee. I also acknowledge that the Committee previously has agreed that the Archivist could withhold certain PRA-restricted material in its entirety. In these respects, I intend to adhere to established custom and accept certain PRA-restricted material on a Committee Confidential basis and to permit the Archivist to withhold some PRA-restricted material in its entirety.

I ask that with each production, you similarly abide by established custom and (1) identify the total number of documents produced, (2) identify the number of documents containing PRA-restricted material that the Committee agreed to treat as "Committee Confidential," and (3) identify the number of documents being withheld entirely pursuant to assertions of constitutional privilege or pursuant to the Committee's agreement not to receive certain PRA-restricted material. I further ask that you produce documents on a rolling basis as you identify documents responsive to our request.

I note that in connection with Justice Gorsuch's nomination, the Bush Library attempted to withhold as little as possible and provided portions of documents, rather than withholding entire documents, where possible. I hope you will adopt the same approach. As the Committee has done in the past while considering Supreme Court nominations, I intend to respect the invocation of privilege by a co-equal branch of our government. For the documents requested by this letter, I further intend to abide by the Committee practice of declining to receive materials reflecting classified national security information or personal privacy information.

Please begin the rolling production to the Committee of records responsive to this request no later than August 1, 2018, at 6:00 PM EDT. Please complete the rolling production to the Committee of all remaining records responsive to this request no later than August 15, 2018 at 6:00 PM EDT.

I recognize that reviewing the archives and producing these documents is a significant task. I thank you in advance for your cooperation and efforts.

Sincerely,

Chuck Grassley
Chairman

cc:

Mr. Donald F. McGahn
Counsel to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

The Honorable David S. Ferriero

Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408

The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
United States Senate
Washington, DC 20510

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CHAIRMAN CHUCK GRASSLEY WWW.JUDICIARY.SENATE.GOV

FOR IMMEDIATE RELEASE

Saturday, July 21, 2018

Judge Kavanaugh Returns Senate Judiciary Questionnaire

WASHINGTON – Last evening, Supreme Court nominee Judge Brett Kavanaugh returned the bipartisan Judiciary Committee questionnaire Chairman Chuck Grassley and Ranking Member Dianne Feinstein sent to him on July 13. The questionnaire can be found [HERE](#). Related materials and appendices can be found [HERE](#).

"I appreciate Judge Kavanaugh's diligent and timely response to the broadest and most comprehensive questionnaire ever sent by this Committee. In his 12-plus years on the D.C. Circuit, Judge Kavanaugh has authored more than 300 opinions and joined hundreds of others, all of which are publicly available. Additionally, Judge Kavanaugh's public record includes dozens of speeches and writings. These voluminous materials will provide us a very good understanding of Judge Kavanaugh's qualifications and legal thinking – including how Judge Kavanaugh goes about finding, interpreting, and applying the law. I look forward to reviewing this and other materials, along with hearing from Judge Kavanaugh and the other hearing witnesses, as a part of the Committee's fair, thorough and efficient vetting process," Grassley said.

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FOR IMMEDIATE RELEASE

Wednesday, July 18, 2018

Grassley: Kavanaugh Review Will Be Thorough and Fair, but No Taxpayer-Funded Fishing Expedition

WASHINGTON – Senate Judiciary Committee Chairman Chuck Grassley today released the following statement regarding the committee review of documents relevant to the nomination of Judge Brett Kavanaugh to an Associate Justice of the Supreme Court of the United States.

“This will be my 15th Supreme Court confirmation hearing. It will be the most transparent and thorough process of any of them. We will fulfill our constitutional duty to independently evaluate Judge Kavanaugh’s qualifications. We have 12 years and more than 300 of his judicial writings on the D.C. Circuit, along with hundreds of opinions that he joined. We will also review his many academic writings and speeches. At Judge Kavanaugh’s hearing, we will hear from the people who know him best. We will also have the opportunity to look at relevant and proportional emails and other records from Judge Kavanaugh’s service in the White House. The committee will use sophisticated technology to conduct a thorough review. We will follow the gold standard for lawyers litigating in courthouses across America every day. We will have the manpower, technology and other resources to follow a confirmation timeline similar to the standard for previous Supreme Court nominees.”

“Many Democrats announced their opposition to this nominee before the vetting process ever began. They’ve made clear that their plan will be to obstruct and delay at every corner, and reviewing Judge Kavanaugh’s record will be no different. Rest assured, this process will be fair and thorough. At the same time, I will not allow taxpayers to be on the hook for a government-funded fishing expedition.”

Consistent with the review of White House records of previous Supreme Court nominees, non-privileged records subject to the *Presidential Records Act* may be considered by the committee. Consistent with the federal rules and litigation standards, similar to how judges and lawyers handle e-Discovery in federal courthouse across America, the committee will seek a bipartisan agreement on the proper scope and use an e-Discovery platform to conduct its review of ‘relevant’ and ‘proportional’ records. Federal law permits lawyers for President George W. Bush and President Donald J. Trump to review the documents for privilege and privacy concerns. Records are expected to be provided to the committee on a rolling basis and on an equal basis to the Chairman and the Ranking Member.

For additional context, here are data points for the last three Supreme Court nominees who previously served in the Executive Branch:

| Nominee | Pages of Documents Produced | Number of Written Judicial Opinions |
|--------------|-----------------------------|-------------------------------------|
| John Roberts | ~70,000 | 49 published; 0 unpublished |
| Elena Kagan | ~173,000 | 0 published; 0 unpublished |
| Neil Gorsuch | ~182,000 | 239 published; 618 unpublished |



Confirmation Process / Document Production Key Points

- Judge Kavanaugh's confirmation process is the most transparent ever and will give senators a fair opportunity to assess Judge Kavanaugh's qualifications and legal thinking.
 - In his twelve years as a judge on the D.C. Circuit—considered the second-most powerful court in the country—Judge Kavanaugh authored 307 opinions and joined hundreds more (amounting to more than 10,000 pages). As then-Chairman Leahy said in 2009 with respect to Justice Sotomayor's nomination, Judge Kavanaugh's judicial record is the most relevant part of his background.
 - The Senate received more than 17,000 pages of documents as part of Judge Kavanaugh's Senate Judiciary Committee Questionnaire. This questionnaire was the most expansive ever sent to a Supreme Court nominee.
 - The Senate has received more than 180,000 pages from Judge Kavanaugh's service in the Executive Branch. This is already the largest document production for a Supreme Court nominee ever. More than 100,000 pages are public, and the Committee will continue to make documents publicly available on a rolling basis.
 - We expect to receive up to one million pages of documents from Judge Kavanaugh's time in the Executive Branch. This would be a larger production than the last five Supreme Court nominations combined. By comparison, the Obama White House produced about 170,000 pages of Justice Kagan's White House records.
- Chairman Grassley scheduled the confirmation hearing for September 4-7.
 - There are 57 days between the President's announcement of Judge Kavanaugh's nomination and the first day of the hearing.
 - For Justices Sotomayor, Kagan, and Gorsuch, the period between the announcement and the hearing was 48-49 days.
 - The Chairman is confident that all documents responsive to his request will be produced and reviewed before the hearing begins.
- Democratic leaders are attempting to use a dispute about document production to delay the confirmation process as much as possible.
 - Because many Democratic senators, including Minority Leader Schumer, have already announced their opposition to Judge Kavanaugh's confirmation, it's

obvious that their demands for millions of pages of additional documents on top of the already voluminous record are disingenuous.

- They have demanded access to all of Judge Kavanaugh's documents from his time as White House Staff Secretary. This amounts to millions of pages of White House records, including all emails Judge Kavanaugh sent or received and documents that merely mention Judge Kavanaugh's name.
- The Senate Democrats demanded to search *every* page of *every* email and *every* other record for *every* one of the hundreds of White House aides who came and went during *every* one of the eight years of the Bush Administration.
- The White House Staff Secretary is an important position, but records from the office will not be especially helpful in assessing Judge Kavanaugh's legal thinking and certainly would not be worth the cost to taxpayers to obtain and review. They are both the least probative of his legal thinking and the most sensitive to the Executive Branch.
 - The Staff Secretary is essentially the inbox and outbox to the Oval Office. All papers to and from the President go through the Staff Secretary. These run the gamut from daily press clippings to important national security memos.
 - The Staff Secretary's primary role is administrative: to make sure that the President sees memos and policy papers from offices throughout the Executive Branch and considers the views of a range of policy advisors. The Staff Secretary is an honest broker for the president, but he is not primarily engaged in providing his own substantive policy advice.
 - Judge Kavanaugh's Staff Secretary documents are not particularly probative of his legal thinking, especially in light of his substantial judicial record.
 - These Staff Secretary records also contain some of the most sensitive documents to the Executive Branch. They include policy advice and information that went directly to the President, as well as directives from the President.
 - The purpose of getting documents is to better understand a nominee's legal reasoning, not to re-litigate past policy disputes Democrats had with the Bush Administration. We are determining whether Judge Kavanaugh is qualified to serve on the Supreme Court, not whether to elect President Bush to his third term.
- The document disclosure process for Justice Kagan's nomination does not support a request for Judge Kavanaugh's Staff Secretary documents.

- The Senate did not ask for or receive documents from Justice Kagan’s tenure as Solicitor General. This is so despite Justice Kagan’s testimony in which she singled out her tenure as Solicitor General as a particularly instructive part of her professional background to show what kind of justice she would be.
- Everyone recognized the sensitive nature of internal communications in the Solicitor General’s office. Staff Secretary documents—which contain papers directly to and from the President—are even more sensitive.
- In other words, unlike with Justice Kagan, the Senate will receive *all* of Judge Kavanaugh’s non-privileged official records from his legal service in the Executive Branch.
- This is despite the fact that, when Justice Kagan was nominated, she had not previously served as a judge and accordingly had no judicial record. Her White House records were one of the few sources of insight into her legal thinking.
- By contrast, Judge Kavanaugh has been a federal appellate judge for twelve years, authored more than 300 opinions, and joined hundreds more. In light of this substantial judicial record, senators have a less compelling need for his official records from legal service in the Executive Branch than they did when Justice Kagan was nominated.
- Yet, the Senate will still receive substantially more of those records for Judge Kavanaugh than the Senate did for Justice Kagan. Indeed, the Senate could still receive up to one million pages of records from Judge Kavanaugh’s service as a government lawyer, significantly more than the 170,000 received during Justice Kagan’s nomination.
- In 2009, Democratic leaders resisted calls for disclosure of a narrow range of Justice Sotomayor’s documents, arguing senators should focus on Justice Sotomayor’s record as a judge.
 - Senator Schumer said the Senate should focus on Sotomayor’s judicial record, not on “fishing expeditions” into other records.
 - Chairman Leahy said: “We have Judge Sotomayor’s record from the Federal bench. That is a public record that we had even before she was designated by the President. Judge Sotomayor’s mainstream record of judicial restraint and modesty is the best indication of her judicial philosophy. We do not have to imagine what kind of a judge she will be because we see what kind of a judge she has been.”

- A small number of Justice Sotomayor’s documents were ultimately produced, but the Senate requested a specific and narrow range of documents. This does not provide support for a fishing expedition into millions of pages of White House records, especially in light of Judge Kavanaugh’s judicial record.
- The process for obtaining Judge Kavanaugh’s White House records is fully consistent with the law and will allow the Committee to review them in a timely and efficient way.
 - President George W. Bush’s team is providing the same documents to the Committee that we expect the National Archives to provide in response to the Committee’s request for documents under the Presidential Records Act.
 - The Archivist is not being “cut out” of the process. The National Archives will have the final say regarding the production of any document that President Bush withholds for any reason other than privilege. For the vast majority of documents not being withheld, President Bush’s team is working to get them to the Committee in an expedited manner.
 - President Bush is providing a tremendous public service, at private expense, in making available to the Senate and the public these presidential records in a very expedited fashion, while the National Archives does its own expedited review.
- Bill Burck, who is leading President Bush’s team, is not a “partisan lawyer.”
 - He has been President Bush’s Presidential Records Act representative since 2009.
 - He is a partner at Quinn Emanuel, one of the country’s most liberal law firms. His team includes lawyers from across the political spectrum.
 - He is working very closely with the Obama-appointed Archivist of the United States, along with the Archivist’s self-described liberal lawyer.
 - In 2009, Justice Sotomayor’s records were first reviewed by an outside lawyer, Leslie Kiernan, before the committee received them. She represented Obama campaign manager David Plouffe and former Rep. Charlie Rangel and eventually became Deputy White House Counsel in the Obama Administration.
 - In 2010, Bruce Lindsey reviewed Justice Kagan’s records before they were produced to the Senate. He was the National Campaign Director of President Clinton’s 1992 campaign, worked with Justice Kagan in the Clinton White House, and was CEO of the Clinton Foundation for ten years.

- Unsubstantiated questions about the accuracy of Judge Kavanaugh’s testimony in 2006 do not require the production of millions of pages of Staff Secretary documents.
 - Senator Durbin alleged that Judge Kavanaugh misled the Committee at his 2006 nominations hearing when he testified he was “not involved in the questions about the rules governing detention of combatants.” Subsequently, the media reported that, in 2002, Judge Kavanaugh advised other lawyers in the White House Counsel’s office that Justice Kennedy was unlikely to accept the argument that the government could indefinitely deny American citizens access to counsel.
 - Then-Chairman Leahy referred these allegations to the Department of Justice. The Public Integrity Section determined there was not a sufficient basis to open up a criminal investigation.
 - Judge Kavanaugh’s response must be read in the context of Senator Durbin’s questioning at his nominations hearing. Senator Durbin’s questions related to the Administration’s policies on torture and abusive treatment of detainees. Judge Kavanaugh responded that he was not involved in those policies.
 - Multiple newspaper articles have reported that interrogation policies were highly compartmentalized in the White House and that Judge Kavanaugh was never authorized to know about them.
 - In any event, the allegations are based on Judge Kavanaugh’s time in the White House Counsel’s office. The Committee has already requested documents from this time period.



United States Senate

July 21, 2018

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Dear Mr. Ferriero:

We write to express our concern regarding the processing of presidential records related to the nomination of Judge Brett M. Kavanaugh to be Associate Justice of the Supreme Court of the United States. We also write to ask that the National Archives and Records Administration fulfill its critical, non-partisan role in ensuring that records are preserved and provided to Congress and the public by following current practice and procedures whereby your employees review and produce records related to Judge Kavanaugh's record in a timely and appropriate manner.

Under the Presidential Records Act, records created during every presidency are the property of the United States. These records belong to the American people, not a particular president.¹ The Archivist serves as the steward of these records on behalf of the American public and is charged with responsibility for collecting the records at the end of each administration and appropriately reviewing and processing them for eventual release to the public.

Under the law, presidential records are reviewed and processed by National Archives staff who determine the applicability of restrictions that might affect release of the records. This ensures that non-partisan staff who are experts on the National Archives' standards for document review and processing handle this important task. It is also our understanding that the staff responsible for this initial review hold appropriate security clearances and are reviewing the records in a

¹ 44 U.S.C. § 2202.

secure facility. This avoids mishandling of any classified material that might be contained in the records.

A recent briefing provided to Judiciary Committee staff by representatives of the George W. Bush Presidential Library raises questions about whether legal requirements are being followed with regard to the handling of records related to Judge Kavanaugh's nomination. This briefing revealed several potential and critical departures from the requirements of the Presidential Records Act.

For example, we were told the Kavanaugh process would authorize a large team of outside private lawyers without security clearances to undertake the initial document review and determine whether the documents even qualify as presidential records subject to release to Congress or the public. This outside legal team would then review only the documents that they deemed to be presidential records and determine whether any of the approved statutory restrictions on access to records apply.

Under the Presidential Records Act, all of the documents, which have now been in the possession of the National Archives for nine years, are presumptively presidential records and subject to disclosure unless a statutory restriction on access applies.² At this point, there should not be an initial review by outside private lawyers for the purposes of removing records from consideration for public release but, instead, a more limited review by the National Archives to determine the applicability of statutory restrictions on access. And while the Presidential Records Act recognizes that the Archives will consult with former presidents, the decision on whether "access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist" – not representatives of a former president.³

² The Presidential Records Act authorizes only the Archivist "to dispose of such Presidential records which the Archivist has appraised and determined to have insufficient administrative, historical, information, or evidentiary value to warrant their continued preservation." To remove any records, however, the Archivist must first publish a notice in the Federal Register at least 60 days in advance of the proposed disposal date. 42 U.S.C. §2203(g)(4). Absent the required appraisal and removal by the Archivist, with 60-day notice to the public, the existing documents must be treated as presidential records and reviewed by the Archivist to determine if any statutory restrictions on access apply.

³ 44 U.S.C. § 2204(b). With regard to claims of constitutionally based privilege, the Presidential Records Act also makes the National Archives responsible for consulting with both the former and incumbent presidents, with the incumbent president bearing responsibility for making the final decision on whether to uphold the privilege claim by a former president. 44 U.S.C. § 2208(c). As set forth in Executive Order 13489 of January 21, 2009, the Archivist, in the first instance, "shall identify any specific material, the disclosure of which he believes may raise a substantial question of executive privilege" and, if the former president elects to assert a claim, the Archivist "shall consult with the Attorney General . . . the Counsel to the President, and such other executive agencies as the Archivist deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of

The current process as relayed by the Bush lawyers, replaces non-partisan Archivist staff, whose obligation is to the American people, and substitutes it with private outside lawyers without security clearances who are reviewing these documents in unsecured facilities.

Such an arrangement does not comply with the Presidential Records Act. It also raises questions about compliance with the Anti-deficiency Act. That law prohibits a government agency from accepting voluntary services “except for emergencies involving the safety of human life or the protection of property.” Allowing outside private lawyers to carry out NARA’s statutory obligations may run afoul of this law as well.⁴

To the extent that there is a need for additional resources so that the National Archives can review and process these documents in a timely manner, we suggest that the Archivist create a task force and notify Congress if additional resources are needed.

Obtaining the full record is critical for the Judiciary Committee and full Senate to fulfill our constitutional duty to provide advice and consent on Judge Kavanaugh’s nomination. We simply request that the National Archives follow the process established by the Presidential Records Act in 1978. We are confident that we can obtain the documents that we need in a timely manner that complies with federal law and look forward to working with you on this.

Sincerely,



Dianne Feinstein
Ranking Member
Committee on the Judiciary

cc: The Honorable Charles E. Grassley

privilege or instead to disclose the Presidential records notwithstanding the claim of privilege.” The process explained to Committee staff this week allows outside private lawyers to usurp the role of the National Archives in this regard as well.

⁴ In addition, federal law allows the Archivist to delegate his statutory functions only to officers and employees of NARA, not outside private interests. 44 U.S.C. § 2104.

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
BEN SASSE, NEBRASKA
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MIKE CRAPO, IDAHO
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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

July 23, 2018

The Hon. David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408

Dear Mr. Ferriero:

I write with regard to Ranking Member Feinstein's letter addressed to you and dated July 21, 2018. I wish to comment on the Ranking Member's misreading of the facts and law.

As you well know, the Presidential Records Act of 1978 (PRA) confers on former Presidents and their designated representatives, *see* 44 U.S.C. § 2204(d); 36 C.F.R. § 1270.22(a), a right of special access to Presidential records without regard to any of the six restrictions on public access to those records under the PRA. 44 U.S.C. § 2205(3); *id.* § 2204(a)(1)–(6). We understand that the PRA representatives of former President George W. Bush have made, at President Bush's direction, a request for access to certain records pertaining to Judge Brett Kavanaugh's service in the White House from 2001 to 2006. I further understand that, consistent with the PRA, you turned over those records to the PRA representatives without reviewing them for PRA-restricted material. And, as you know, the PRA imposes no restrictions on the PRA representatives' use of those records once you have turned them over to their custody, subject only to whatever direction they may receive from President Bush.

The Ranking Member claims that "outside private lawyers" are conducting an "initial review . . . for the purposes of removing records from consideration for public release." She claims that these lawyers have "replace[d] non-partisan Archivist staff" in determining which records should be withheld from the public under the PRA, and that this replacement violates the PRA and perhaps the Antideficiency Act, 31 U.S.C. § 1342.

Those claims are false. We understand that outside lawyers are assisting the PRA representatives in reviewing records requested under § 2205(3). Although you have provided those lawyers with NARA's guidance on reviewing Presidential records for PRA restrictions and privilege, this review is not being done at NARA's behest or on NARA's behalf. These lawyers are not deciding whether these records will be eligible for public release in response to a FOIA request—a role

reserved to your office for the period during which the PRA restrictions remain in force. 44 U.S.C. § 2204(b)(3). The Ranking Member is simply incorrect that private lawyers are performing any functions conferred on NARA by the PRA. The review conducted by these lawyers is at the request of President Bush exercising his statutory prerogative under § 2205(3), subject to laws other than the PRA.

The Ranking Member further protests that President Bush’s lawyers lack “security clearances,” which she suggests raises the possibility that “any classified material that might be contained in the records” may be “mishandl[ed].” But, as President Bush’s designated representative explained to the Ranking Member’s staff last week, NARA segregates material labeled as “Classified” from other Presidential records and did not provide material labeled as “Classified” in response to his PRA representatives’ special access request.

More fundamentally, the Ranking Member appears to misunderstand how the PRA operates in the context of a Supreme Court nomination. As you know, the PRA entitles this Committee to special access to Presidential records “notwithstanding any” of the six PRA restrictions during the period in which those restrictions remain operative. 44 U.S.C. § 2205(2)(C).¹ The incumbent and former Presidents may, however, assert constitutional privilege against the handing over of documents to the Committee. *See* 44 U.S.C. § 2205(2) (any special access request is “subject to any rights, defenses, or privileges which the United States or any agency or person may invoke”). In other words, when the Committee requests access to documents under § 2205, it is entitled to any unprivileged records even if PRA restrictions would bar public access to those records. NARA’s only roles in response to a § 2205 request from this Committee are to ascertain whether it has the records requested and to alert the former and incumbent Presidents of the § 2205 request so that each has the opportunity to assert constitutional privilege against the records’ release. Exec. Order No. 13489, 74 Fed. Reg. 4,669 (Jan. 26, 2009); 36 C.F.R. § 1270.44(c), (d). NARA is then obliged to turn over to the Committee all Presidential records responsive to this request that are not subject to claims of constitutional privilege. And the PRA imposes no restrictions on the Committee’s use of those records once it has lawfully taken custody of them—including on the Committee’s ability to make those records public.²

Of course, this Committee has not to date asked you for access to any Presidential records of any kind. The Ranking Member’s “concerns” about the handling of documents therefore are not only misplaced, but premature. President Bush’s PRA representatives are not performing government functions of any kind, on behalf of NARA or any other government official. They are merely performing their duties as his PRA representatives with the assistance of a group of outside lawyers in light of the volume of material to be reviewed. The PRA imposes no restriction on the President’s ability to review records to which he has a lawful right of access—including reviewing them to determine whether he believes those records are subject to PRA restrictions or

¹ The restrictions remain operative until the earlier of 12 years after the end of the Administration in which they were created, or when the former President waives those restrictions. 44 U.S.C. § 2204(b)(2)(A). The 12-year ban does not expire until January 2021.

² This Committee has agreed to restrictions on its access to Presidential records in connection with previous Supreme Court nominations. For example, in the course of the confirmation processes for both Justices Kagan and Gorsuch, the Committee agreed to receive certain records on a “Committee Confidential” basis and not to disclose them to the public. But the PRA itself—as opposed to nondisclosure obligations voluntarily assumed by the Committee—does not constrain on the Committee’s right to make public Presidential records received pursuant to § 2205(2)(C).

constitutional privilege. *See* 44 U.S.C. § 2204(b)(3) (requiring the Archivist to consult with the former President in deciding whether a record is subject to a PRA restriction).

In my view, therefore, NARA, the former President, and his PRA representatives are abiding by the letter and spirit of the PRA, and you need take no action on this issue.

Sincerely,



Chuck Grassley
Chairman

cc:

The Hon. Dianne Feinstein
Ranking Member
United States Senate Committee on the Judiciary



United States Senate

WASHINGTON, DC 20510-0504

<http://feinstein.senate.gov>

July 23, 2018

The Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

It is with concern that I am writing you regarding the document request for Judge Kavanaugh because I know you to have always been fair in your dealings with the Minority and a stalwart champion of transparency. In this instance, however, I believe that we are off to a bad start.

Last Monday, my staff sent a draft document request letter that was identical to the Kagan document request proposed by then-Senator Sessions. I understand your staff responded you would not support such a request, and asserted the document request to be made for Mr. Kavanaugh must be narrower and more limited than what was requested for Ms. Kagan. This is unacceptable.

While our side will agree to submit search terms to assist in prioritizing the order of production, the Committee and the public should not have arbitrary limits on the documents that we are entitled to review as we evaluate this nomination. As you know, the Committee has never put such limits on its requests for past nominations, nor is it advisable to apply limitations when the universe of what is available has not yet even been evaluated.

All that we ask is that the Committee follow the Republican model used to evaluate Justice Kagan. To that end, I am attaching our response to the draft letter that your staff proposed. I hope that you will accept our changes so that we can get this letter out immediately and move forward on the additional requests. The longer we wait to submit requests for documents the longer it will take to review the record.

Sincerely,

A handwritten signature in black ink that reads "Dianne Feinstein".

Dianne Feinstein
United States Senator

Enclosure

DRAFT PRIVILEGED & CONFIDENTIAL

July __, 2018

Mr. Kenneth A. Hersh
President and Chief Executive Officer
George W. Bush Presidential Library and Museum
2943 SMU Boulevard
Dallas, TX 75205

Dear Mr. Hersh:

Pursuant to 44 U.S.C. § 2205(2)(C), we ask that you provide documents to the Senate Judiciary Committee in connection with President Trump's nomination of Judge Brett M. Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States. These documents are necessary to perform the Senate's constitutional role of advice and consent.

Mr. Kavanaugh served in the White House under President George W. Bush, first as Associate Counsel from 2001 to 2003 and later as Senior Associate Counsel in 2003. He also served as Assistant to the President and Staff Secretary from 2003 to 2006. We request that you provide the following documents to the Committee on an expedited and rolling basis, consistent with the guidelines described in this letter:

- (1) All electronic mail (emails) sent by or received by Brett Kavanaugh, including emails on which he was a carbon copy or blind carbon copy recipient, during the period Kavanaugh served as Associate Counsel and Senior Associate Counsel to the President, including any documents attached to such emails;
- (2) Documents from Brett Kavanaugh's service as an Associate Counsel and Senior Associate Counsel to the President, including all documents preserved in his staff files, and those documents created by Mr. Kavanaugh that can readily be found in the files of other White House staff members, the White House Counsel's Office files, other White House offices' files, and the Subject Matter Files maintained by the Staff Secretary and/or the White House Office of Records Management, including, but not limited to, documents Mr. Kavanaugh authored, prepared, or for which he provided edits, revisions, or input, or which were prepared under his supervision or at his direction;
- (3) All emails sent by or received by Brett Kavanaugh, including emails on which he was a carbon copy or blind carbon copy recipient, during the period Mr. Kavanaugh served as Assistant to the President and Staff Secretary, including any documents attached to such emails;
 - a. In order to assist with the expedited processing and production of emails, the Chairman and the Ranking Member will each submit to you search terms to help prioritize your initial search and production by __ [date], with the agreement that search terms and/or categories provided by the Chairman and by the Ranking Member will be afforded equal weight and priority;

DRAFT PRIVILEGED & CONFIDENTIAL

- b. These initial search terms will be provided without prejudice to the ability of the Chairman or Ranking Member to alter or add additional search terms as necessary during the course of the Judiciary Committee's consideration of Mr. Kavanaugh's nomination, and the understanding that use of these search terms does not relinquish the responsibility of providing other documents responsive to this request.
- (4) Documents from Brett Kavanaugh's service as Assistant to the President and Staff Secretary, including all documents preserved in his staff files, and those documents created by Mr. Kavanaugh that can readily be found in the files of other White House staff members, the White House Counsel's Office files, other White House offices' files, and the Subject Matter Files maintained by the Staff Secretary and/or the White House Office of Records Management, including, but not limited to, documents Mr. Kavanaugh authored, prepared, or for which he provided edits, revisions, or input, or which were prepared or edited under his supervision or at his direction;
 - a. In order to assist with the expedited processing and production of these documents, the Chairman and the Ranking Member also will each submit to you search terms to help focus your initial search and production by ___ [date], with the agreement that search terms provided by the Chairman and by the Ranking Member will be afforded equal weight and priority;
 - b. These initial search terms will be provided without prejudice to the ability of the Chairman or Ranking Member to alter or add additional search terms as necessary during the course of the Judiciary Committee's consideration of Mr. Kavanaugh's nomination, and the understanding that use of these search terms does not relinquish the responsibility of providing other documents responsive to this request.
- (5) Documents, including emails, relating to Brett Kavanaugh's nomination to the United States Court of Appeals for the District of Columbia Circuit;
- (6) To the extent they are not included in response to categories (1) through (5), all records containing documents written by, edited by, prepared in whole or part by, under the supervision of, or at the direction of Brett Kavanaugh, as well as documents referencing Mr. Kavanaugh by name, initials, or title, and documents received by or sent to him, including, but not limited to, documents he wrote, prepared, or for which he provided edits, revisions, or input.

The Committee has previously made official requests of Presidential Libraries in connection with nominees who served in the White House. We believe it appropriate to follow past Committee precedent concerning requests for records from Presidential Libraries in several respects.

As in the past, we believe presidential records must be reviewed and processed by National Archives staff who determine both whether a record is responsive to the Committee's requests

and the applicability of restrictions that might affect release of the records. This ensures that non-partisan staff who are experts on the National Archives' standards for document review and processing handle this important task. The Presidential Records Act (PRA) recognizes that the Archives will consult with former presidents as to the applications of statutory exemptions from public release or the assertion of any privileges, and we understand that you will be consulting with President Bush's PRA representatives in responding to our requests for records related to Mr. Kavanaugh. However, we also expect that the decision on whether "access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist."

Section 2205 of the Presidential Records Act (PRA), 44 U.S.C. § 2205, provides for the production of records in response to an official Congressional Committee request, notwithstanding the limitations on public disclosure set forth in Section 2204 of the PRA, 44 U.S.C. § 2204(a). We ask that you seek to expedite the review of responsive documents for "any rights, defenses, or privileges which the United States or any agency or person may invoke" consistent with the PRA.

We intend to follow the practices the Committee, the Archivist, and the Presidential Libraries followed during the nominations of Justice Neil Gorsuch and Justice Elena Kagan with regard to documents for which statutory exemptions from public release are claimed under PRA Section 2204.

In the past, the Archives and Libraries have agreed to provide the documents entitled to statutory protections from public release to the Committee on a "Committee Confidential" basis by agreement of the Chairman. The Committee further agreed that such documents could be discussed only during a Closed Session of the Committee. We expect this will be the practice for this production as well.

As in the past, we ask that with each production, the Archivist identify the total number of documents produced, the number of documents entitled to protection under the PRA that are being produced as "Committee Confidential," and the number of documents being withheld entirely pursuant to "rights, defenses, or privileges," including the restrictions set forth in Section 2204. We ask that for each document withheld from either public production or from the Committee on any basis that you provide a description and explanation of any document withheld, including on the basis of withholding, consistent with paragraph (d) of the guidelines. We further ask that you produce documents on a rolling basis as you identify documents responsive to our request.

We note that in connection with Justice Gorsuch's nomination, the Bush Library attempted to withhold as little as possible and provided portions of documents, rather than withholding entire documents, where possible. Given there is a significant public interest in understanding the record of the nominee, while respecting the PRA, we expect the same process will be followed to ensure public access to as much of the record as possible.

As the Committee has done in the past while considering Supreme Court nominations, we intend to respect the invocation of privilege by a co-equal branch of our government to the extent consistent with fulfilling our own Constitutional advice and consent responsibilities. In addition,

DRAFT PRIVILEGED & CONFIDENTIAL

we expect that a relatively small portion of the documents responsive to our request will contain classified information, to the extent that any documents contain classified information, please contact us in advance to arrange for secure delivery or secure viewing of such documents. Please complete to the Committee the rolling production of all emails sent by or received by Judge Kavanaugh, including emails on which he was a carbon copy or blind carbon copy recipient, during the period he served as Associate Counsel and Senior Associate Counsel to the President, and all documents preserved in his staff files from that same period, no later than August 1, 2018, at 6:00 PM EDT. Please complete the rolling production of all remaining responsive documents to the Committee no later than August 15, 2018 at 6:00 PM EDT.

We recognize that reviewing the archives and producing these documents is a significant task. We thank you in advance for your cooperation and efforts.

Sincerely,

Chuck Grassley
Chairman

Dianne Feinstein
Ranking Member

cc:

Mr. Donald F. McGahn
Counsel to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408

Guidelines

- a) This request is continuing in character. If additional responsive documents come to your attention following your initial production, please provide such documents to the Committee promptly.
- b) As used herein, "document" means the original (or an additional copy when an original is not available), all attached documents, and each distribution copy whether inscribed by hand or by electronic or other means. This request seeks production of all documents described, including all drafts and distribution copies, and contemplates production of responsive documents in their entirety, without abbreviation or expurgation.
- c) In the event that any requested document has been destroyed, discarded, or otherwise disposed of, please identify the document as completely as possible, including the date, author(s), addressee(s), recipient(s), title, and subject matter, and the reason for disposal of the document and the identity of all persons who authorized disposal of the document.
- d) If a claim is made that any requested document will not be produced by reason of a privilege or exemption of any kind, describe each such document by date, author(s), addressee(s), recipient(s), title, and subject matter, and set forth the nature of the claimed privilege or exemption with respect to each.

United States Senate

WASHINGTON, DC 20510

July 24, 2018

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley:

I write today to express my concern regarding the planned document request for Judge Kavanaugh. In the nearly two decades I've served with you in the Senate, I've always known you to be fair and to prioritize transparency and openness above all else. That is precisely why I am so troubled by the apparent unwillingness to allow for a full and thorough examination of Judge Kavanaugh's record.

I have heard from some Members of the Majority that Judge Kavanaugh's record as a Judge on the DC Circuit provides all the information Senators need to properly consider his nomination for the Supreme Court. Some have argued that Judge Kavanaugh's record from his time in the White House counsel's office is relevant to his nomination, but his record from his time as Staff Secretary is not. This contention is directly contrary to the Senate's past practice and to the arguments you yourself made about the necessity of reviewing the complete record of previous Supreme Court nominees.¹

The Staff Secretary is one of the most senior officials in the White House. In fact, when he occupied the position, Mr. Kavanaugh was one of only 17 presidential aides to be paid the maximum allowable White House salary. One need look no further than Judge Kavanaugh's own statements to understand why review of his White House Staff Secretary records is so critically important. In 2006, when the Senate was considering Judge Kavanaugh's nomination to the D.C. Circuit, he urged us to look at the entirety of his 16-year career, specifically including his time as Staff Secretary, to determine his fitness to serve as an appellate judge.² In a 2010 speech, Judge Kavanaugh pointed to his three years as Staff Secretary as his most instructive experience for his eventual role as a federal judge.³ He noted that in that role his duties included, among other things, participating in the process of writing and negotiating legislation on issues ranging from terrorism insurance to Medicare prescription drug coverage to immigration reform; drafting and revising Executive Orders; and participating in President Bush's meetings with foreign heads of state. Judge Kavanaugh's belief in the relevance of a judicial nominee's time as Staff Secretary is not limited merely to his own experience. In 2005, then-Staff Secretary

¹ <https://www.gpo.gov/fdsys/pkg/CREC-2010-06-15/pdf/CREC-2010-06-15-pt1-PgS4928.pdf>

² <https://www.gpo.gov/fdsys/pkg/CHRG-109shrg27916/pdf/CHRG-109shrg27916.pdf>

³ [https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%2012\(d\)%20Attachments.pdf](https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%2012(d)%20Attachments.pdf)

Kavanaugh argued that then-Supreme Court nominee Harriet Miers' earlier experience as Staff Secretary was an important qualification for her nomination to be a Supreme Court justice.⁴

Many of our colleagues have also stressed the Staff Secretary role as indicative of one's preparedness to serve on the federal bench. In 2006, Sen. Hatch stated that then-nominee Kavanaugh's background as Staff Secretary "may prove to be particularly good judicial training."⁵ Echoing Sen. Hatch's point, Sen. Cornyn described the position of Staff Secretary as "a job whose title belies the very serious and important responsibilities that that individual performs."⁶ Indeed, Sen. Cornyn reiterated that position two weeks ago when, in detailing Judge Kavanaugh's qualifications to be a Supreme Court Justice, he described the Staff Secretary position as "a very, very important job."⁷ Likewise, Majority Leader McConnell, echoing the sentiments of then-Staff Secretary Kavanaugh, pointed to then-Supreme Court nominee Miers' time as Staff Secretary when detailing her fitness to serve on the Court.⁸

In conclusion, there simply is no basis to withhold Judge Kavanaugh's Staff Secretary record from review by the Senate, nor is there any cause to depart from the scope of the bipartisan document request submitted in connection with Justice Kagan's nomination. It has been more than a week since Senator Feinstein sent you the draft request that is substantively identical to the Kagan request. In order for the public to be informed and the Senate to perform its constitutional obligations in relation to the Kavanaugh nomination, I strongly urge you to sign that request as soon as possible.

Sincerely,



Charles E. Schumer
United States Senator

⁴ <https://www.nytimes.com/2005/10/16/politics/politicsspecial1/plenty-of-praise-for-a-nominee-but-few-details.html>

⁵ <https://www.gpo.gov/fdsys/pkg/CREC-2006-05-25/pdf/CREC-2006-05-25-pt1-PgS5191.pdf#page=10>

⁶ <https://www.gpo.gov/fdsys/pkg/CREC-2006-05-25/pdf/CREC-2006-05-25-pt1-PgS5191.pdf#page=6>

⁷ <https://www.gpo.gov/fdsys/pkg/CREC-2018-07-10/pdf/CREC-2018-07-10-pt1-PgS4848-3.pdf>

⁸ <https://www.gpo.gov/fdsys/pkg/CREC-2005-10-04/pdf/CREC-2005-10-04-pt1-PgS10916-2.pdf#page=10>

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

July 25, 2018

The Honorable Chuck Schumer
Minority Leader
322 Hart Senate Office Building
Washington, D.C. 20510

Dear Minority Leader Schumer:

I write in response to your letter from yesterday urging me to request all documents pertaining to Judge Kavanaugh's service in the White House from 2001 to 2006. I want you to know I appreciate your kind words regarding my commitment to transparency and openness throughout my career. You will be pleased to know that I anticipate Judge Kavanaugh's confirmation will be the most transparent in history and will involve the largest disclosure of White House records of any Supreme Court nomination ever before. I expect we could receive up to one million pages of documents from Judge Kavanaugh's service in the White House Counsel's Office. This is in addition to the thousands of pages of Judge Kavanaugh's most relevant records—those that evidence his legal thinking and qualifications—that are publicly available **right now**, which I discuss in more detail below. The Senate will receive more White House records for Judge Kavanaugh than it did for the previous five Supreme Court nominees combined. I'm proud to serve as Chairman of the Senate Judiciary Committee during this moment of unprecedented transparency.

You urge me to also request all documents pertaining to Judge Kavanaugh's tenure as White House Staff Secretary. Although your letter contains your position as to the importance of the Staff Secretary position, it does not explain how these records will provide senators any meaningful insight into Judge Kavanaugh's legal thinking in light of the fact that Judge Kavanaugh has served as a federal appellate judge for more than twelve years on the D.C. Circuit. During that time, he has written more than 300 opinions and joined hundreds more, weighing in on some of today's most significant legal issues. These materials are by far the most relevant to evaluating Judge Kavanaugh's fitness for the bench.

It is true that I asked to see Justice Kagan's relevant, law-related White House records when she was nominated in 2010. And, for a very good reason, that request does not apply here. Justice Kagan had never served as a judge before. Her White House records from the White House Counsel's Office and from her legal-policy role in the Domestic Policy Council were some of the few sources that could provide senators with some insight into her legal thinking. By contrast, Judge Kavanaugh's extensive writing on the D.C. Circuit affords the Senate a clear picture of how he approaches legal issues as a federal judge. Justice Kagan simply did not have a comparable judicial record—*any* judicial record, in fact. Therefore, senators had a more compelling need for

relevant White House documents. Comparing Judge Kavanaugh's nomination to Justice Kagan's is like comparing apples and oranges.

Despite the fact that Judge Kavanaugh's White House records are less useful to the Senate's consideration of his nomination, given his twelve years of judicial service, I nevertheless anticipate that we will receive a substantially larger volume of White House documents than we did in connection with Justice Kagan's nomination. I expect to receive up to one million pages of White House records from the George W. Bush Presidential Library. By comparison, we received only about 170,000 pages related to Justice Kagan's White House tenure. We will also receive documents from Judge Kavanaugh's time in the Office of the Independent Counsel and the White House's file for his nomination to the D.C. Circuit. And, of course, the Senate has already received 6,168 pages of records from Judge Kavanaugh's Senate Judiciary Committee Questionnaire—the broadest questionnaire ever required of a Supreme Court nominee.

Of all the records you are demanding, documents from Judge Kavanaugh's time as Staff Secretary are the least probative of Judge Kavanaugh's legal thinking and the most sensitive to the Executive Branch. As your letter describes, the Staff Secretary is an extremely important position, controlling the flow of paper in and out of the Oval Office. The papers that pass through the office run the gamut from daily news clippings to memos addressing the day's most pressing national security issues. The Staff Secretary's primary charge is not to provide his own substantive work product. Rather, it is to make sure that the President sees memos and policy papers produced elsewhere in the Executive Branch. As you can imagine, many of the documents that pass through the Staff Secretary's office contain some of the most sensitive information and advice going directly to, and directives coming from, the President. At the end of the day, I am not aware of any precedent whereby the Senate asked for and received essentially all Staff Secretary documents in connection with a nomination.

Justice Kagan's nomination, however, supports my contention that it would be inappropriate to ask for all the Staff Secretary documents. Senators on both sides declined to ask for documents from the Office of the Solicitor General during Justice Kagan's time there, even though those records would have been substantially more probative of her views on the law than documents from Judge Kavanaugh's service as Staff Secretary. Senators recognized the importance of confidentiality to the continued candor and effectiveness of internal deliberations in the office. This was so despite Justice Kagan's own statement that senators should look at her tenure as Solicitor General as indicative of the kind of justice she would be and despite the comparative paucity of other documents probative of her legal thinking. As I noted above, the Senate has access to substantially more documents indicative of Judge Kavanaugh's legal thinking. There is no reason to ask for a massive volume of additional documents that is unlikely to shed additional light on his legal thinking while compromising the most sensitive internal White House communications.

Finally, I am skeptical that your request for Staff Secretary documents is made in good faith. After all, you stated that you will oppose Judge Kavanaugh's confirmation "with everything [you've] got." Just yesterday, another Democratic senator made the galling comment that supporters of Judge Kavanaugh's nomination are "complicit" in "evil." If most Democrats have already made up their minds about Judge Kavanaugh, given the considerable record already available for review,

I fail to see how additional documents will be useful. On top of this, you have refused to meet with Judge Kavanaugh. This refusal is highly irregular. In light of the outright opposition to Judge Kavanaugh from Democratic leadership and many members of your caucus, it is clear to me that your demand for millions of additional pages of comparatively irrelevant documents is an attempt to obstruct the confirmation process.

I am committed to maintaining a process that is both transparent and efficient. Senators already have access to a wide range of the most relevant materials to assess Judge Kavanaugh's qualifications for the Supreme Court. And they will get hundreds of thousands of more pages of emails and other records from Judge Kavanaugh's service in the White House Counsel's Office and the Office of the Independent Counsel. But, as I have made clear, I'm not going to put American taxpayers on the hook for the Democrats' fishing expedition, especially when many on your side have already said that they will oppose Judge Kavanaugh's confirmation.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is written in a cursive, slightly slanted style.

Charles E. Grassley
Chairman

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
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TED CRUZ, TEXAS
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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, Chief Counsel and Staff Director
JENNIFER DUCK, Democratic Chief Counsel and Staff Director

July 26, 2018

The Honorable Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
Washington, DC 20510


Dear Ranking Member Feinstein:

Thank you for your letter of July 23, 2018, including your kind words regarding my treatment of the Minority and my commitment to transparency. I have likewise long admired your willingness to work in good faith with those of us on the other side of the aisle to further the important business of the Senate.

On July 16, 2018, your staff forwarded to my staff a proposed joint letter to the president of the George W. Bush Presidential Center requesting access to records from Judge Kavanaugh's time in the White House. During the course of nearly an hour of negotiations between our staffs on that same day, my staff explained that your request would require the Archives to produce millions of pages of records—many times more than had been produced for all previous nominees combined. My staff explained that this request was wildly overbroad given the unprecedented volume of Judge Kavanaugh's White House records and the unprecedented amount of publicly available documentation of Judge Kavanaugh's legal reasoning. Not only are these records of questionable relevance, the unprecedented amount of federal-government manpower and tax dollars it would take to complete your proposed page-by-page manual review of millions of records would make it impossible to hold a confirmation vote for Judge Kavanaugh this year. As I have said, I am not going to put the American taxpayers on the hook for a fishing expedition, especially when we already have at our finger tips right now over 300 judicial opinions that Judge Kavanaugh has authored during his 12 years of service on the D.C. Circuit, hundreds and hundreds of other judicial opinions that he has joined during that time, and 6,168 pages of speeches, non-judicial writings, financial materials, and other records that Judge Kavanaugh provided to us earlier this week as part of his response to the Senate Judiciary Questionnaire. We will also have the opportunity to hear directly from Judge Kavanaugh, along with those other witnesses who know Judge Kavanaugh best, at his confirmation hearing that I will set in the coming weeks.

This publicly available information alone is more than enough for us to determine whether Judge Kavanaugh is qualified to serve as an Associate Justice, particularly given how many Senate Democrats have already publicly stated that they oppose Judge Kavanaugh's nomination.

Nonetheless, at my direction, my staff proposed a sensible solution by which the Committee could obtain all of Judge Kavanaugh's records from the White House Counsel's Office. We also are willing to request records from Judge Kavanaugh's service in the Office of the Independent Counsel, along with the White House nominations file for Judge Kavanaugh's 2006 nomination to the D.C. Circuit. I am pleased to report that, in the coming weeks, the Senate will receive what will be the largest document production in history for a Supreme Court nomination.

How many more millions of pages of records will the Senate Democrats demand to see—even though they will not have time to examine them all before a hearing—so they can change their votes from “no” to “heck no?” And that leads to my last point.

You demand all of Judge Kavanaugh's records from his time as White House Staff Secretary. But these documents are both the least relevant to Judge Kavanaugh's legal thinking and the most sensitive to the Executive Branch. During the Administration of George W. Bush, the Staff Secretary was the inbox and outbox to the Oval Office. Everything from requests for flying the flag at half-mast to the daily lunch menu to draft speeches to sensitive national security papers all passed through the Staff Secretary's Office. The Staff Secretary's primary charge is not to provide his own substantive work product. The Staff Secretary makes sure the President sees the memos and policy papers produced by the Executive Branch. It's an important job. It requires someone who is smart, hardworking, organized, and talented. But the documents passing through Judge Kavanaugh's office while he was Staff Secretary are not particularly relevant to his legal thinking. It would be like saying the Senate Clerk—someone who has a difficult and demanding job—is responsible for all the positions taken by each of the Senate offices. That would be absurd.

The document production made during Justice Kagan's nomination supports my contention that it would be inappropriate to ask for all the Staff Secretary documents. Senators on both sides declined to ask for documents from the Office of the Solicitor General during Justice Kagan's time there, even though those records would have been substantially more probative of her views on the law than documents from Judge Kavanaugh's service as Staff Secretary. Senators recognized the importance of confidentiality to the continued candor and effectiveness of internal deliberations in the office. This is so despite Justice Kagan's own statement that senators should look at her tenure as Solicitor General as indicative of the kind of justice she would be and despite the comparative paucity of other documents probative of her legal thinking. The Senate presently has access to substantially more documents indicative of Judge Kavanaugh's legal thinking. There is no reason to ask for a massive volume of additional documents that is unlikely to shed additional light on his legal thinking while compromising some the most sensitive internal White House communications.

The Republican members of the Senate Judiciary Committee have told me in no uncertain terms that they believe that these Staff Secretary records are of little, if any, relevance. And they certainly are not sufficiently relevant to justify the time, expense, and delay necessary for President Bush, President Trump, and this Committee to review the tremendous volume of records before a hearing. Nor are they sufficiently relevant to justify the burden on the Executive Branch of giving the Senate access to some of the most sensitive information and advice that went directly to President Bush from a range of policy advisors. We therefore should focus our efforts on

reviewing the many thousands of pages of judicial opinions and other legal writings from Judge Kavanaugh, along with up to an estimated one million pages of records from his service in the White House Counsel's Office. A broad review of Staff Secretary documents would be a waste of time and taxpayer dollars.

Without conceding that these records are even relevant, I nonetheless instructed my team to attempt to negotiate search terms and other ways to limit the universe of Staff Secretary records that the White House would have to produce while also helping you find what you are seeking. In other words, your side is looking for needles in an enormous haystack; I asked only that you narrow your search by pointing us to the specific bales of hay through which you want to look. But your staff has flatly refused this very reasonable and sensible approach—an approach that federal law generally requires in litigation matters in every federal courthouse across America. Instead, your staff has demanded the production of every page of the millions and millions of pages of Judge Kavanaugh's records during his nearly three years of service as White House Staff Secretary. You know full well that the White House cannot produce, and we cannot review, those records in time to hold a hearing this year.

And not only that. Your staff has repeatedly demanded that records from every other White House official who served during Judge Kavanaugh's more than five years of White House service be searched for any document that merely mentions Judge Kavanaugh in some way. When the Senate demanded similar documents during Justice Kagan's confirmation, the Obama Administration—with the unequivocal support of Senate Democrats—refused to provide them. The Republicans acquiesced, and the precedent was set. The demand for potentially millions and millions of pages of these records, even though they were not produced during Justice Kagan's confirmation, does not reflect a good faith effort.

On July 18, 2018, and at my request, William Burck of the law firm Quinn Emmanuel Urquhart & Sullivan—who has served as President George W. Bush's presidential-records representative since 2009—briefed both of our staffs about a review of records from Judge Kavanaugh's White House days that his law firm (and others) had begun undertaking at the behest of President Bush. Mr. Burck candidly and openly answered every question posed by your staff. He further offered to give the Committee access to Judge Kavanaugh's WHCO records in a matter of weeks and to assist the Committee in obtaining top-of-the-line document-review software to assist with the review. After the briefing, our staffs engaged in further negotiations. My staff reiterated our willingness to work with your staff to agree to search terms to provide access to those Staff Secretary records which your staff believed were most relevant.

The very next day, on July 19, 2018, I submitted to you a draft proposed letter requesting access to all emails sent or received by Judge Kavanaugh during his tenure in the White House Counsel's Office; all paper documents in his office files from this same role; his White House confirmation file from his 2006 confirmation to the D.C. Circuit; any email sent to or from Judge Kavanaugh during his tenure as Staff Secretary that hit on agreed-upon search terms; and agreed-upon categories of his Staff Secretary paper documents. My staff asked to meet in person that day to discuss, but your staff asked for more time and assured my staff that they would respond soon.

Rather than respond with a counterproposal, your staff waited until 5pm on Friday, July 20, to send me a draft letter addressed to the Archivist of the United States. The draft letter contended that the review being undertaken by President Bush and his statutory representatives was unlawful. You asked me to join your letter but insisted that you would send it the next day irrespective of whether I joined. Needless to say, I declined. The letter was an unnecessary distraction from our negotiations over the still-unsent records-request letter. Even if I had agreed with the contents of your letter, you offered me nothing approaching sufficient time to review your letter and deliberate over whether to join. You sent that letter to the Archivist on Saturday, July 21 without my signature.

I strongly disagreed with your factual allegations and legal reasoning and made my views clear to the Archivist in a letter I sent on July 23, 2018. As I explained in that letter, there is nothing untoward, much less unlawful, about President Bush's review. He has a statutory right to review those records and is free to offer access to those records to anyone—including members of this Committee and the general public.

The proposed joint letter I received from you on July 23 was substantively unchanged from your initial letter. You requested all of the same records from you first request, including those millions and millions of pages of records that merely mention Judge Kavanaugh—which, again, the Obama Administration with the backing of Senate Democrats refused to produce for Justice Kagan's confirmation. You offered to use search terms merely to prioritize the order in which we received Staff Secretary records but still insisted that the Minority has an absolute right to review every single page of every single one of the millions and millions of pages of records from Judge Kavanaugh's nearly three years as Staff Secretary.

Our staffs met on July 23 for an hour and a half to negotiate. Your staff refused to consider any proposal to limit the universe of records that would ultimately be produced. They even insisted that the Minority had a right to search the records of every White House document custodian during the period of Judge Kavanaugh's service to determine whether those records contained documents merely mentioning Judge Kavanaugh's name. We again had to remind them several times these materials were never produced during Justice Kagan's nomination. Such a search would be unprecedented.

My staff signaled a willingness to grant concessions in various areas and suggested capitalizing on available technology to improve the relevancy of the documents search. My staff repeatedly proposed moving forward for a request for records which we both agree we should receive—the emails and documents from Judge Kavanaugh's service in the White House Counsel's Office. But your answer was always, and remains, "no."

You and I discussed the records issue over the telephone on July 24. You explained that you have long been concerned by the torture issue and that you felt you were entitled to review the Staff Secretary records to see if they contained anything pertaining to torture. I pointed out that the purpose of records requests has always been to gain an understanding of the nominees' legal reasoning and qualifications, not to reignite political fights from previous decades. We are voting on the nomination of Judge Kavanaugh to a Supreme Court—not on a third term for President Bush. I nevertheless suggested using limited search terms as a way to narrow the review of the

Staff Secretary records to the issue about which you feel strongly. We then agreed to have our staffs meet to discuss this proposal.

Our staffs met shortly thereafter but, once again, your staff refused to agree to search terms to limit the scope of the Staff Secretary records request. They again refused to agree to anything less than disclosure of every one of the millions and millions of pages of Judge Kavanaugh's White House records, including, once again, records from other White House officials that merely mention Judge Kavanaugh. And they said that the Minority would oppose sending a joint letter to the Archivist requesting at the very least the records on which I believe we both agree—Judge Kavanaugh's records from the White House Counsel's Office.

Although it is clear we are at an impasse with regard to Staff Secretary records, I believe we agree that the Archivist should produce every non-privileged email sent or received by Judge Kavanaugh during his tenure in the White House Counsel's Office, the hardcopy documents in his office files from the same role, and his White House confirmation file for the 2006 confirmation to the D.C. Circuit. Rather than dwell on our disagreements, I think we should move quickly toward at least a partial resolution of the document issue. Accordingly, I have attached a proposed letter from you and me to the Archivist requesting those very records.

This debate has already caused significant delay and, at least with regard to the Staff Secretary documents, has ceased to be productive. Historically, letters seeking records of Supreme Court nominees are jointly sent from the Chairman and the Ranking Member. But I cannot allow our impasse to further delay this confirmation process. Accordingly, although I strongly prefer that this letter be a joint letter, I will send this letter to the Archivist in my capacity of Chairman of this Committee if you do not agree to join it.

I would appreciate a prompt response that allows us to move forward with a joint records request letter this week. To that end, please advise whether you plan to join the attached proposed letter by noon on July 27, 2018. If you do not agree to join the attached letter by then, I will make a records request on my own.

Sincerely,

Chuck

Chuck Grassley
Chairman

*PS: We can make progress
by doing what we agree on.*

July __, 2018

The Honorable Patrick X. Mordente, Brigadier General
Director
George W. Bush Presidential Library and Museum
2943 SMU Boulevard
Dallas, Texas 75205

Dear General Mordente:

Pursuant to 44 U.S.C. § 2205(2)(C), we ask that you provide Presidential records to the United States Senate Committee on the Judiciary in connection with the President's nomination of Judge Brett M. Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States. Consistent with the Presidential Records Act (PRA), 44 U.S.C. § 2201(2), (3), this request is for access to Presidential records only, rather than personal records.

Kavanaugh served in the White House under President George W. Bush, first as Associate Counsel from 2001 to 2003 and later as Senior Associate Counsel in 2003. He served as Assistant to the President and Staff Secretary from 2003 to 2006. We request that you provide the following documents to the Committee on an expedited basis, consistent with the guidelines described in this letter:

- (1) Emails sent to or received from Kavanaugh, including emails on which he was a carbon copy or blind carbon copy recipient, during the period Kavanaugh served as Associate Counsel and Senior Associate Counsel to the President, including any documents attached to such emails;
- (2) The textual records contained in Kavanaugh's office files from the period during which he served as Associate Counsel and Senior Associate Counsel to the President; and
- (3) Documents relating to Kavanaugh's nomination to the U.S. Court of Appeals for the District of Columbia Circuit.

The Committee has previously made official requests of Presidential Libraries in connection with nominees who served in the White House. We believe it appropriate to follow past Committee precedent concerning requests for records from Presidential Libraries in several respects.

Section 2205 of the Presidential Records Act (PRA), 44 U.S.C. § 2205, provides this Committee access to Presidential records in response to an official Congressional Committee request, notwithstanding the limitations on public disclosure set forth in section 2204 of the PRA, 44 U.S.C. § 2204(a)(1)–(6). Such access is, by statute, subject to “any rights, defenses, or privileges which the United States or any agency or person may invoke.” While we hope that documents responsive to our request will not raise these concerns, we also recognize that responsive documents may be subject to statutory or any other rights, defenses, or privileges.

Section 2205(2)(C) entitles the Committee to access any non-privileged Presidential record that is responsive to the Committee’s special-access request, notwithstanding the limitations on public access set forth in section 2204. We recognize, however, that in the context of prior Supreme Court nominations, the Committee and the Archivist have agreed that some documents containing PRA-restricted material would be produced to the Committee on a “Committee Confidential” basis. The Committee further agreed that such documents could be discussed only during a Closed Session of the Committee. We also acknowledge that the Committee previously has agreed that the Archivist could withhold certain PRA-restricted material in its entirety. In these respects, we intend to adhere to established custom and accept certain PRA-restricted material on a Committee Confidential basis, and permit the Archivist to withhold some PRA-restricted material in its entirety.

We ask that with each production, the Archivist similarly abide by established custom and (1) identify the total number of documents produced, (2) identify the number of documents containing PRA-restricted material that the Committee agreed to treat as “Committee Confidential,” and (3) identify the number of documents being withheld entirely pursuant to assertions of constitutional privilege or pursuant to the Committee’s agreement not to receive certain PRA-restricted material. We further ask that you produce documents on a rolling basis as you identify documents responsive to our request.

We note that in connection with Justice Gorsuch’s nomination, the Bush Library attempted to withhold as little as possible and provided portions of documents, rather than withholding entire documents, where possible. We hope you will adopt the same approach. As the Committee has done in the past while considering Supreme Court nominations, we intend to respect the invocation of privilege by a co-equal branch of our government. For the documents requested by this letter, we further intend to abide by the Committee practice of declining to receive materials reflecting classified national security information or personal privacy information.

Please begin the rolling production to the Committee of records responsive to this request no later than August 1, 2018, at 6:00 PM EDT. Please complete the rolling production to the Committee of all remaining records responsive to this request no later than August 15, 2018 at 6:00 PM EDT.

We recognize that reviewing the archives and producing these documents is a significant task. We thank you in advance for your cooperation and efforts.

Sincerely,

Chuck Grassley
Chairman

Dianne Feinstein
Ranking Member

cc:

Mr. Donald F. McGahn
Counsel to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408

Guidelines

- a) This request is continuing in character. If additional documents responsive to this request come to your attention following your initial production, please provide such documents to the Committee promptly.
- b) As used herein, “document” means the original (or an additional copy when an original is not available), all attached documents, and each distribution copy whether inscribed by hand or by electronic or other means. This request seeks production of all documents described, including all drafts and distribution copies, and contemplates production of responsive documents in their entirety, without abbreviation or expurgation.
- c) In the event that any requested document has been destroyed, discarded, or otherwise disposed of, please identify the document as completely as possible, including the date, author(s), addressee(s), recipient(s), title, and subject matter, and the reason for disposal of the document and the identity of all persons who authorized disposal of the document.

United States Senate
Washington, DC 20510-1304

July 26, 2018

The Honorable Chuck Grassley
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley:

You and I have served on the Senate Judiciary Committee for a long time, and I have enjoyed working together with you on many issues. I have also been upfront with you when we disagree, and that is why I write today.

I am deeply troubled by statements dismissing the need for the Committee to review records from Judge Brett Kavanaugh's three-year tenure as White House Staff Secretary as we consider his Supreme Court nomination. This week on the Senate floor you said that a review of Kavanaugh's Staff Secretary documents would be a "waste of time." You described these documents as "gratuitous and unnecessary paper," and you characterized efforts to obtain these documents as "obstruction" and a "fishing expedition."

Yet Judge Kavanaugh himself has made clear the significance of his work as Staff Secretary and its connection to his judicial approach. On several occasions, he has said that his tenure as Staff Secretary was "in many ways the most instructive" experience he has had for his role as a judge. He said his Staff Secretary duties included participating in the process of putting legislation together, working on drafting and revising executive orders, and negotiating last-minute changes in legislation. This is substantive policy work that goes far beyond serving as a "traffic cop," as some have suggested. The Committee must see these documents so we can know the full range of matters Judge Kavanaugh worked on, what his role was, and how this work has shaped his legal views.

Equally important, I and other Committee members have raised legitimate concerns about Judge Kavanaugh's accuracy and candor that can only be resolved by a full disclosure of documents. I sent Judge Kavanaugh a letter on June 26, 2007—more than eleven years ago—asking him to explain contradictions between his testimony under oath that "I was not involved and am not involved in the questions about the rules governing detention of combatants," and multiple media reports that he participated in a heated 2002 White House meeting about whether detainees should have legal representation. I still have not received a response from Judge Kavanaugh to my letter.

My concerns about Judge Kavanaugh's credibility are heightened by a June 12, 2004 email from then-White House Deputy Chief of Staff Harriet Miers to then-Staff Secretary Kavanaugh that shows that top White House officials wanted Kavanaugh specifically to see talking points about the Administration's policies on torture and interrogation of detainees. Documents like this from Kavanaugh's tenure as Staff Secretary relate directly to the credibility of his sworn testimony. If there are more documents like this, the Committee and the American people need to see them.

I would note that previous Chairmen of this Committee have supported the goal of maximum transparency when it comes to the professional records of Supreme Court nominees. When Committee Republicans sought documents from Justice Sotomayor's work with the Puerto Rican Legal Defense and Education Fund (PRLDEF), then-Chairman Leahy joined then-Ranking Member Sessions in a letter requesting that PRLDEF promptly supply these documents. When Committee Republicans sought all documents and emails relating to Justice Kagan and her work in the White House under President Clinton, then-Chairman Leahy joined then-Ranking Member Sessions in a letter seeking these records.

Access to critical records from a Supreme Court nominee's professional experience is not obstruction. It is essential due diligence, and the American people should expect no less from the Senate Judiciary Committee. I urge you to join Committee Democrats' request for access to these records.

Thank you for your attention to this important matter. Filling this Supreme Court vacancy is an historic responsibility for the Committee you chair. Let's do our job with thoroughness and fairness.

Sincerely,



Richard J. Durbin
United States Senator



NATIONAL
ARCHIVES

ARCHIVIST IN CHIEF
UNITED STATES

DAVID S. FERRELLO

1000 PENNSYLVANIA

AVE. WASHINGTON, DC 20540

202-837-5000

www.archives.gov

26 July 2018

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510-0504

Dear Ranking Member Feinstein:

Thank you for your letter of July 21, 2018, concerning the role of the National Archives and Records Administration (NARA) with respect to Presidential records relating to Judge Brett M. Kavanaugh in light of his nomination to the Supreme Court. I am also in receipt of a July 23 letter from Chairman Grassley, which addresses many of the issues raised in your letter.

From the perspective of the National Archives, we are committed to fulfilling our statutory responsibilities under the Presidential Records Act (PRA), within the limits of our resources, to any request for records relating to Judge Kavanaugh. To date, NARA has not received a request for records from the Senate or a committee or subcommittee thereof, in accordance with the PRA's exception to restricted access, section 2205(2)(c) of the PRA (44 U.S.C. 2205(2)(C)). As my staff has discussed with your staff, the authority of a committee to make requests under this subsection lies exclusively with the Chair of the committee, which NARA has carefully followed since the PRA was enacted.

NARA's George W. Bush Presidential Library has received several Freedom of Information Act (FOIA) requests for Presidential records related to Judge Kavanaugh, under section 2204(c)(1) of the PRA. We have already begun to process those requests, which we are treating on an expedited basis. Because the George W. Bush Library has a very large volume of records – comprised of his paper and email records

NATIONAL ARCHIVES

1000 PENNSYLVANIA AVE.

WASHINGTON, DC 20540

202-837-5000

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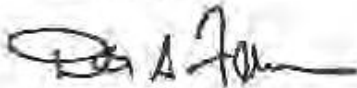
from his service both in the White House Counsel's Office (WHCO) and as Staff Secretary, and records related to his nomination to the U.S. Court of Appeals – we intend to begin with a prioritized subset of the responsive records. We are also processing FOIA requests for other records related to Judge Kavanaugh.

In response to these FOIA requests, our staff has to review for and withhold information subject to the applicable PRA restrictions and FOIA exemptions. Once we have completed our review, we must provide notification to the representatives of the former and incumbent Presidents in accordance with section 2208 of the PRA before we can release them to the public.

As Chairman Grassley's letter notes, NARA has provided copies of a subset of the Kavanaugh related records to the PRA representatives of former President George W. Bush, in accordance with his independent right of access under section 2205(3) of the PRA. We are aware of discussions that have taken place between the former President's representatives and the Senate Judiciary Committee, and we have had discussions with both parties, as well as with your staff, which is our normal practice. Any decisions or agreements that may be reached between former President Bush and the Committee would be independent of NARA's role and responsibilities under the PRA.

Your staff should feel free to continue to discuss these issues with my General Counsel, Gary M. Stern,

Sincerely,



David S. Ferriero
Archivist of the United States

cc: The Honorable Charles E. Grassley
Chairman
U.S. Senate Committee on the Judiciary

United States Senate

WASHINGTON, DC 20510

July 26, 2018

The Honorable George W. Bush
10000 Memorial Drive
Houston, TX 77024

Dear President Bush:

I am writing with a time-sensitive request regarding the nomination of your former aide Judge Brett Kavanaugh to the Supreme Court. I understand and completely respect that you support Judge Kavanaugh's nomination. We have a difference of opinion on whether he is the right person for the Court at this moment, but that is not the reason for my letter. My purpose instead is to ask you to authorize that the complete record of Judge Kavanaugh's service in the White House be made public so that all Americans can be informed about this nomination and the Senate can fulfill its constitutional advice and consent obligations.

Under our most recent precedent in a similar case, when the Senate considered the nomination of Justice Kagan, Republicans and Democrats jointly asked the National Archives and the Clinton Library to provide all of Justice Kagan's records from her White House service. All of those documents were provided to the Senate without any assertions of privilege by President Clinton, and the Archives immediately made them public on its website. Those actions gave the Senate and the public the ability to examine Justice Kagan's full record and eliminated any questions about whether important information about her previous work had been withheld.

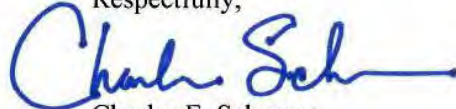
Regrettably, my colleagues in the majority in the Senate are now suggesting the Senate depart from that bipartisan precedent, and have declined to sign a bipartisan document request for Judge Kavanaugh's complete record. It appears that, on a partisan basis, they plan to request a pre-screened subset of Judge Kavanaugh's record, selected not by career officials of the Archives but by a private legal team representing your presidential library. I understand that you have a right to review your Administration's documents before they are released, and there is nothing wrong with that. My concern is that the Archivist of the United States, who is responsible for guiding the review and release of responsive documents, would be cut out of this new process being contemplated by Senate Republicans, and as a result the Senate may receive only documents that have been pre-selected and approved by the private legal team, without any public insight or accountability. This legal team is led by an attorney who, like Judge Kavanaugh, is an alumnus of your White House Counsel's office, but who also has close ties to President Trump through his current representation of Steve Bannon, Reince Priebus and Donald McGahn. If implemented, this irregular approach to the nominee's document production will inevitably raise serious questions about the fairness and impartiality of the process, and about whether crucial information regarding the nominee is deliberately being withheld from public scrutiny.

In order to remedy this unfortunate situation, I respectfully write to ask that you make public Judge Kavanaugh's full White House record, including his years as Staff Secretary. You have been an advocate of transparency regarding your presidential records, and you have previously taken steps to

make portions of your Library's collection of White House documents more available to the public. I believe that making Judge Kavanaugh's complete record public is consistent with your commitment to transparency and is strongly in the public interest. While the country may be divided on whether Judge Kavanaugh should join the Supreme Court, there ought to be no disagreement on whether the process that leads to a confirmation vote should be a fair and impartial one.

Thank you very much for considering this request, which I would be happy to discuss with you directly at any time.

Respectfully,

A handwritten signature in blue ink that reads "Charles E. Schumer". The signature is fluid and cursive, with a long horizontal stroke at the end.

Charles E. Schumer
United States Senator

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

July 27, 2018

The Honorable Richard J. Durbin
711 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Durbin:

Thank you for your recent letter. I too have enjoyed working with you on a wide range of issues over the years. But I disagree with your position that the Senate Judiciary Committee should request records from Judge Kavanaugh's tenure as White House Staff Secretary.

Let me say at the outset that I expect Judge Kavanaugh's confirmation process will be the most transparent in history and will involve the largest disclosure of Executive Branch records of any Supreme Court nomination ever before. The Committee could receive up to one million pages of documents from Judge Kavanaugh's service in the White House Counsel's Office and additional documents from his service in the Independent Counsel's Office. We could receive more White House records for Judge Kavanaugh than we did for the previous five Supreme Court nominees combined. And, of course, we already have access to the most relevant materials from Judge Kavanaugh's record. During his twelve years on the D.C. Circuit, he has authored 307 opinions and joined hundreds more. He also submitted 6,168 pages of materials as part of his Senate Judiciary Committee Questionnaire, which I'll add was the broadest questionnaire ever required of a Supreme Court nominee.

You implore me also to request all documents pertaining to Judge Kavanaugh's tenure as White House Staff Secretary. As your letter notes, the Staff Secretary is a critically important position, controlling the flow of paper in and out of the Oval Office. But your letter does not explain how obtaining these documents will provide senators any meaningful insight into Judge Kavanaugh's legal thinking. The Staff Secretary's primary charge is not to create his own substantive work product. Rather, it is to ensure that the President sees memos and policy papers produced elsewhere in the Executive Branch. In light of Judge Kavanaugh's long judicial record, documents from his tenure as Staff Secretary would not be especially revealing of his jurisprudence.

In addition to providing little insight into Judge Kavanaugh's legal thinking, producing the Staff Secretary records would be extremely burdensome and could compromise some of the Executive Branch's most sensitive documents. The volume of documents that passed through the Staff Secretary's office during the Bush Administration was massive. Every paper that went in and out of the Oval Office went through the Staff Secretary, from daily press clippings and lunch menus to drafts of the President's speeches and memos addressing critical national security issues. Additionally, many of the documents that passed through the Staff Secretary's office contain some

of the most sensitive information and advice from numerous policy advisors that went directly to the President. Requiring disclosure of such documents could chill the candor not only of future Staff Secretaries, but also the wide range of policy makers whose advice passes through the Staff Secretary's office to the President.

Judge Kavanaugh's past statements that his tenure as Staff Secretary was a formative experience for him do not affect the relevance of these documents. I am not surprised that holding the position of Staff Secretary affected Judge Kavanaugh, nor am I surprised that it exposed him to a wide range of policy issues. But those statements do not justify a fishing expedition through the files of the Staff Secretary. Justice Kagan, in response to a question during her confirmation hearing about how senators should evaluate her fitness for the Supreme Court, testified that senators should "look to [her] tenure as Solicitor General and the way [she] tried to approach and handle that responsibility." Despite their admitted relevance, Republicans and Democrats agreed that she should not be required to produce internal documents from the Office of the Solicitor General because of their sensitive nature. They agreed not to demand those documents even though Justice Kagan, unlike Judge Kavanaugh, had no judicial record at all. We have access to much more probative materials for Judge Kavanaugh from his twelve years on the D.C. Circuit, and I have not seen a strong argument for demanding a massive volume of comparatively non-probative Staff Secretary documents.

You also believe that we should request all of Judge Kavanaugh's Staff Secretary documents based on what you describe as "contradictions" between Judge Kavanaugh's testimony during his 2006 confirmation hearing and subsequent media reports. During that hearing, you posed a question to Judge Kavanaugh that mentioned the Bush Administration's "detention and interrogation policies." He stated he was not involved "in the questions about rules governing detention of combatants." Subsequently, the media reported that, in 2002, Judge Kavanaugh advised other White House officials that Justice Anthony Kennedy was unlikely to agree with the position that American citizens held by the United States could be denied representation by counsel.

As an initial matter, the Department of Justice already resolved this issue. The Senate Judiciary Committee referred these allegations to the Department of Justice. The Public Integrity Section of the Criminal Division reviewed the matter and concluded that the allegations were not sufficient to justify even opening up an investigation.

Further, I see no discrepancy between Judge Kavanaugh's testimony and what was subsequently reported in the media. Multiple sources have confirmed that Judge Kavanaugh did not participate in crafting the Bush Administration's detention and interrogation policies and was not even authorized to know about the tightly compartmentalized detainee treatment policies.¹ Moreover, the facts as reported in the media do not support your contention. Judge Kavanaugh was asked for and provided advice as to how Justice Kennedy would react to a specific legal argument that other Administration officials were considering. Providing that advice is not akin to involvement in the crafting of the Administration's detention policies.

¹ Michael Kranish, *Kavanaugh's Role in Bush-Era Detainee Debate Now an Issue in His Supreme Court Nomination*, Washington Post (July 18, 2018), available at https://www.washingtonpost.com/politics/kavanaughs-role-in-bush-era-detainee-debate-now-an-issue-in-his-supreme-court-nomination/2018/07/18/db8eb650-8a06-11e8-a345-a1bf7847b375_story.html?utm_term=.4566f2f319f1.

It's also worth mentioning that the episode reported in the media allegedly occurred while Judge Kavanaugh was Associate Counsel to the President. We requested all relevant documents from Judge Kavanaugh's time in the White House Counsel's Office. Your allegations do not support a request for all documents from Judge Kavanaugh's time as Staff Secretary.

You also point to an email dated June 12, 2004, forwarded by White House Deputy Chief of Staff Harriet Miers to Judge Kavanaugh while he was Staff Secretary. The email, sent to Miers by a White House aide, contains talking points written and approved by the White House Counsel and National Security Council for National Security Advisor Condoleezza Rice and Secretary of State Colin Powell. The aide requested that the talking points be forwarded to Judge Kavanaugh and others.

You claim that this email raises questions about Judge Kavanaugh's testimony. I disagree. The email does not in any way suggest that Judge Kavanaugh was involved in developing the Bush Administration's detention and interrogation policies. It appears to be the type of email I would expect to be forwarded to the Staff Secretary. It contains talking points on the Administration's public position on an important issue. No one should be surprised that the person charged with getting relevant documents to the President would be alerted of talking points on policies being carried out by that President's administration. It does not remotely suggest Judge Kavanaugh's involvement in crafting detention and interrogation policies.

Your letter also draws attention to document requests during the nominations of Justices Sotomayor and Kagan. But those requests do not support the expansive document production you seek today. In 2009, the Senate Judiciary Committee sought and received documents related to Justice Sotomayor's time as a board member of the Puerto Rican Legal Defense and Education Fund. This, however, was a narrow request closely tailored to a specific need for information. It resulted in a production of approximately 100 documents. In contrast, you and other Democratic leaders seek a production of millions of pages of Staff Secretary documents untethered to any specific need for information. Your demand will clearly lead to a fishing expedition.

With respect to Justice Kagan's nomination, the Senate Judiciary Committee requested her relevant, law-related White House records. That request simply does not apply here. Justice Kagan had never served as a judge before her nomination. Her White House records were some of the few sources that could provide senators with some insight into her legal thinking. By contrast, Judge Kavanaugh's hundreds of opinions on the D.C. Circuit, as well as his speeches and other writings, afford the Senate a clear picture of how he approaches legal issues as a federal judge. Justice Kagan simply did not have such a judicial record. This Committee therefore had a more compelling need for relevant White House documents.

Additionally, as noted above, the Committee did not ask for internal office documents from Justice Kagan's time as Solicitor General. As Justice Kagan admitted during her hearing, these materials would have been highly probative of her legal thinking. But Democrats and Republicans agreed not to request these documents because of the sensitive nature of internal communications among government lawyers. This justification applies to Judge Kavanaugh's Staff Secretary records with

even greater force, because those records would include documents containing sensitive policy advice from all over the Executive Branch that went directly to President Bush.

Finally, the Minority Leader has said he would oppose Judge Kavanaugh's confirmation "with everything [he's] got." Just this week, a Democratic member of the Judiciary Committee asserted that supporters of Judge Kavanaugh's nomination are "complicit" in "evil." If most Democrats have already made up their minds about Judge Kavanaugh, given the considerable record already available for review, I fail to see how additional documents will be useful. On top of this, you and other Democratic leaders have refused to meet with Judge Kavanaugh. This refusal is highly irregular and improper. In light of the outright opposition to Judge Kavanaugh from Democratic leadership and many members of your caucus, it is clear to me that the demand for millions of additional pages of comparatively irrelevant documents will only drag out the confirmation process. I will not ask taxpayers to foot the bill for the collection and review of documents when almost all of your side has already decided how they will vote.

I am committed to maintaining a process that is both transparent and efficient. Senators already have access to a wide range of the most relevant materials to assess Judge Kavanaugh's qualifications for the Supreme Court. And they will get hundreds of thousands of more pages of emails and other records from Judge Kavanaugh's service in the White House Counsel's Office and the Office of the Independent Counsel. But, as I have made clear, I'm not going to put American taxpayers on the hook for the Democrats' fishing expedition, especially when many on your side have already said that they will oppose Judge Kavanaugh's confirmation.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is written in a cursive, slightly slanted style.

Charles E. Grassley
Chairman

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
BEN SASSE, NEBRASKA
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CORY A. BOOKER, NEW JERSEY
KAMALA D. HARRIS, CALIFORNIA

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

July 27, 2018

The Honorable Patrick X. Mordente, Brigadier General
Director
George W. Bush Presidential Library and Museum
2943 SMU Boulevard
Dallas, Texas 75205

Dear General Mordente:

Pursuant to 44 U.S.C. § 2205(2)(C), I ask that you provide Presidential records to the United States Senate Committee on the Judiciary in connection with the President's nomination of Judge Brett M. Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States. Consistent with the Presidential Records Act (PRA), 44 U.S.C. § 2201(2), (3), this request is for access to Presidential records only, not personal records.

Kavanaugh served in the White House under President George W. Bush, first as Associate Counsel from 2001 to 2003 and later as Senior Associate Counsel in 2003. He served as Assistant to the President and Staff Secretary from 2003 to 2006. I request that you provide the following documents to the Committee on an expedited basis, consistent with the guidelines described in this letter:

- (1) Emails sent to or received from Kavanaugh, including emails on which he was a carbon copy or blind carbon copy recipient, during the period Kavanaugh served as Associate Counsel and Senior Associate Counsel to the President, including any documents attached to such emails;
- (2) The textual records contained in Kavanaugh's office files from the period during which he served as Associate Counsel and Senior Associate Counsel to the President; and
- (3) Documents relating to Kavanaugh's nomination to the U.S. Court of Appeals for the District of Columbia Circuit

The Committee has previously made official requests of Presidential Libraries in connection with nominees who served in the White House. I believe it appropriate to follow past Committee precedent concerning requests for records from Presidential Libraries in several respects.

Section 2205 of the Presidential Records Act (PRA), 44 U.S.C. § 2205, provides this Committee access to Presidential records in response to an official Congressional Committee request, notwithstanding the limitations on public disclosure set forth in section 2204 of the PRA, 44 U.S.C. § 2204(a)(1)–(6). Such access is, by statute, subject to “any rights, defenses, or privileges which the United States or any agency or person may invoke.” 44 U.S.C. § 2205(2). While I hope that documents responsive to our request will not raise these concerns, I also recognize that responsive documents may be subject to statutory or other rights, defenses, or privileges.

Section 2205(2)(C) entitles the Committee to access any non-privileged Presidential record that is responsive to the Committee’s special-access request, notwithstanding the limitations on public access set forth in section 2204. I recognize, however, that in the context of prior Supreme Court nominations, the Committee and the Archivist have agreed that some documents containing PRA-restricted material would be produced to the Committee on a “Committee Confidential” basis. The Committee further agreed that such documents could be discussed only during a Closed Session of the Committee. I also acknowledge that the Committee previously has agreed that the Archivist could withhold certain PRA-restricted material in its entirety. In these respects, I intend to adhere to established custom and accept certain PRA-restricted material on a Committee Confidential basis and to permit the Archivist to withhold some PRA-restricted material in its entirety.

I ask that with each production, you similarly abide by established custom and (1) identify the total number of documents produced, (2) identify the number of documents containing PRA-restricted material that the Committee agreed to treat as “Committee Confidential,” and (3) identify the number of documents being withheld entirely pursuant to assertions of constitutional privilege or pursuant to the Committee’s agreement not to receive certain PRA-restricted material. I further ask that you produce documents on a rolling basis as you identify documents responsive to our request.

I note that in connection with Justice Gorsuch’s nomination, the Bush Library attempted to withhold as little as possible and provided portions of documents, rather than withholding entire documents, where possible. I hope you will adopt the same approach. As the Committee has done in the past while considering Supreme Court nominations, I intend to respect the invocation of privilege by a co-equal branch of our government. For the documents requested by this letter, I further intend to abide by the Committee practice of declining to receive materials reflecting classified national security information or personal privacy information.

Please begin the rolling production to the Committee of records responsive to this request no later than August 1, 2018, at 6:00 PM EDT. Please complete the rolling production to the Committee of all remaining records responsive to this request no later than August 15, 2018 at 6:00 PM EDT.

I recognize that reviewing the archives and producing these documents is a significant task. I thank you in advance for your cooperation and efforts.

Sincerely,



Chuck Grassley
Chairman

cc:

Mr. Donald F. McGahn
Counsel to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408

The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
United States Senate
Washington, DC 20510

Guidelines

- a) This request is continuing in character. If additional documents responsive to this request come to your attention following your initial production, please provide such documents to the Committee promptly.
- b) As used herein, “document” means the original (or an additional copy when an original is not available), all attached documents, and each distribution copy whether inscribed by hand or by electronic or other means. This request seeks production of all documents described, including all drafts and distribution copies, and contemplates production of responsive documents in their entirety, without abbreviation or expurgation.
- c) In the event that any requested document has been destroyed, discarded, or otherwise disposed of, please identify the document as completely as possible, including the date, author(s), addressee(s), recipient(s), title, and subject matter, and the reason for disposal of the document and the identity of all persons who authorized disposal of the document.



United States Senate
WASHINGTON, DC 20510-0504
<http://feinstein.senate.gov>

July 27, 2018

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Dear Mr. Ferriero:

Thank you for your letter responding to my July 21, 2018 letter concerning the presidential records related to Brett M. Kavanaugh's 2001-2006 tenure in the White House. I write today to express concern that the Archives has not yet started reviewing Mr. Kavanaugh's records for release to Congress, that you are employing a process that deviates from past practices and what is required by statute, and to ask that you start the review process immediately.

In the past—for example, the nominations of Chief Justice John Roberts and Justice Elena Kagan—review of the records under the Presidential Records Act began even before the President had made his nominations. In this case, however, you have stated no advance work has been done—even now, three weeks after the nomination was announced and after your office has been put on notice by both the Majority and Minority that Congressional requests for documents are forthcoming.

Once Judge Kavanaugh was nominated, your review of his records under section 2205(2)(C) of the Presidential Records Act should have begun immediately and on an expedited basis. You have been made aware that requests from the Committee are imminent and there is no reason to delay the review and processing of Mr. Kavanaugh's records during his time as Senior Associate Counsel and Assistant to the President and Staff Secretary.

In your letter, you indicate that the authority to make requests under the special access provision of the Presidential Records Act “lies *exclusively* with the Chair of the committee.” Your unduly restrictive reading of the law results in one political party having complete control over what records the Senate will be able to

see before deciding whether a nominee should receive a lifetime appointment to the Supreme Court of the United States. As the ranking Democrat on the Senate Judiciary Committee, I am shocked that you would provide materials in response to a request from one side and not the other. I have been on the Committee for more than twenty years and have been involved in ten prior Supreme Court nominations. This has never happened before, and a biased denial of document requests to one half of the Committee is unsupported by the law and impedes the minority's ability to discharge its constitutional obligation to provide advice and consent.

As an initial matter, the section of the law that you cite, 44 U.S.C. § 2205(2)(C), does **not** include the word “exclusively.” In fact, this reading is at odds with the goals of the law which, as you know, are to promote public access to documents and ensure that records that have not yet been processed for public release are made available to Congress, the courts, and the sitting and former president when needed to perform official duties.

Your reading of the law is also inconsistent with the position that Chairman Grassley has taken repeatedly with regard to requests from the Ranking Member and from other members of Congress.¹

For example, in a June 9, 2017 letter to the President, Chairman Grassley opposed an Office of Legal Counsel letter that “falsely asserts that only requests from committees or their chairs” should be respected and took the position that the executive branch “should work to cooperate in good faith with all congressional requests to the fullest extent possible.”² In so doing, the Chairman specifically recognized “the confirmation of nominees” as a clear instance where members are entitled to obtain information to fulfill their constitutional responsibilities. In that letter, Chairman Grassley argued forcefully that:

“*Every* member of Congress is a Constitutional officer, duly elected to represent and cast votes in the interests of their constituents. This applies obviously regardless of whether they are in the majority or the minority at the moment and regardless of whether they are in a leadership position on a particular committee. Thus, *all* members need accurate information from the Executive Branch in order to carry out their Constitutional function to

¹ See, e.g., Transcript of Senate Judiciary Committee Hearing on the Nomination of Sen. Sessions to be Attorney General (Jan. 10, 2017), available at <http://www.cq.com/doc/congressionaltranscripts-5017061?0>.

² Letter from Charles E. Grassley, Chair, Senate Judiciary Committee, to President Donald J. Trump (June 7, 2017), available at [https://www.judiciary.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20\(oversight%20requests\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20(oversight%20requests).pdf).

make informed decisions on all sorts of legislative issues covering a vast array of complex matters across our massive federal government.”³

The White House responded, “please know that the OLC Letter does not set forth Administration policy,” and that “the Executive Branch should voluntarily release information to individual members where possible.”⁴

The Chairman has also specifically argued for the rights of all on this Committee to obtain information. As the Chairman made clear, “if Senator Feinstein contacts you, don’t use this excuse, as so many people use it, if you aren’t chairman of a committee, you don’t have to answer the question. I want her questions answered just like you’d answer mine.”⁵

Further, this reading would result in the press and the public having greater access to presidential records under the Freedom of Information Act than members of the minority have under the Presidential Records Act—despite Senators’ obligation to discharge their constitutional duty of advice and consent. That is an absurd outcome and in complete conflict with the plain language and intent of the law. The National Archives should respond to requests for documents in connection with Mr. Kavanaugh’s nomination, whether those come from the Chair or from the Ranking Member of this Committee.

Finally, your letter indicates that the National Archives is retreating from its role as the neutral, nonpartisan decision-maker over what records will be produced to Congress. Instead, under an agreement reached between former President George W. Bush’s lawyers and the Chairman, private, partisan lawyers are being granted decision-making authority as to which records will be provided to Congress. That, too, is in conflict with past practices and the law as written, which does not allow the National Archives to abdicate its role in processing and producing official records to Congress by refusing to respond to requests from a Ranking Member of the Senate Judiciary Committee for documents needed to evaluate a Supreme Court nominee.

The Presidential Records Act makes clear that presidential records belong to the American people, and the Archivist serves as their steward. As you know, this

³ *Id.*

⁴ Letter from Marc Short, White House Director of Legislative Affairs, to Hon. Charles E. Grassley, Chair, Senate Judiciary Committee (July 20, 2017), *available at* <https://www.judiciary.senate.gov/imo/media/doc/2017.07.20%20WH-Short%20Response%20to%20CEG%20re%20Oversight.pdf>

⁵ Transcript of Senate Judiciary Committee Hearing on the Nomination of Sen. Sessions to be Attorney General (Jan. 10, 2017), *available at* <http://www.cq.com/doc/congressionaltranscripts-5017061?0>.

was done in the reaction to the scandal of the Nixon era to ensure the American public would have access to information about the inner workings of their government—including that from the White House. The law requires professional, career archivists to process and review documents in a neutral, nonpartisan manner to decide which records should be included in response to a request from Congress.

According to your letter, you have chosen not to follow this well-established practice. Instead, as your letter confirms, President Bush's private lawyers are reviewing the records from the copies you provided. President Bush's lawyers—not career archivists—may then decide which records from President's Bush's own personal copy will be provided to the Committee under an agreement reached with Chairman Grassley. As we understand it, the records requested and under review by these private lawyers include only documents from Mr. Kavanaugh's tenure in the White House Counsel's office, not his time as Staff Secretary.

This is a dramatic departure from the procedures used for Supreme Court nominees in the past and is an end run around the requirements imposed by Congress when it enacted the Presidential Records Act in response to President Nixon's attempt to destroy the Watergate tapes when he left office. The Committee is entitled to rely on and use official documents that have been reviewed and processed by the National Archives as it considers Mr. Kavanaugh's nomination. We ask that you work with us to ensure that this happens.

Sincerely,



Dianne Feinstein
Ranking Member

cc: Hon. Charles E. Grassley
Chairman, Senate Judiciary Committee

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
BEN SASSE, NEBRASKA
JEFF FLAKE, ARIZONA
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CORY A. BOOKER, NEW JERSEY
KAMALA D. HARRIS, CALIFORNIA

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

July 30, 2018

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue NW
Washington, D.C. 20408

Dear Mr. Ferriero:

I write with regard to Ranking Member Feinstein's letter addressed to you and dated July 27, 2018. I wish again to correct the Ranking Member's misreading of the facts and law.

Before I do, however, please permit me to respond to the Ranking Member's point that you should have begun your review of records relating to Judge Kavanaugh under 44 U.S.C. § 2205(2)(C) as soon as the President nominated him to serve on the Supreme Court. Section 2205(2)(C) authorizes Congress and its committees to seek special access to particular records. As far as I know, no committee requested special access to any records relating to Judge Kavanaugh until I submitted the Committee's request on July 27. Conducting a review of records responsive to a nonexistent request of indeterminate scope would have distracted you and your staff from the important work of responding to FOIA requests, assisting the current Administration in disposing of records, and managing archival facilities. The Ranking Member's criticism of your response to Judge Kavanaugh's nomination is unreasonable and misses the mark.

Moreover, the Ranking Member again misstates the law governing access to presidential records. She claims that your reading of section 2205(2)(C) is "unduly restrictive" because it "results in one political party having complete control over what records the Senate will be able to see." She claims that your interpretation is "biased" and that, as a longtime member of the Committee, she is entitled to whatever records she requests. The Ranking Member points to no legal authority to support her novel theory.

The Presidential Records Act (PRA) enumerates specific individuals and institutions that may obtain special access to presidential records notwithstanding the PRA's limitations on public access: (1) "the Archivist and persons employed" by him; (2) "a court of competent jurisdiction"; (3) "an incumbent President"; (4) "either House of Congress"; (5) "any committee or

subcommittee” of either House of Congress; and (6) “a former President” or his “designated representative.” 44 U.S.C. §§ 2205(1), (2), (3).

Of course, we in Congress wrote the statute so that “either House of Congress” or “any committee or subcommittee thereof” may obtain special access to presidential records. But we did not write the statute to permit an individual senator to obtain special access to presidential records. The Chairman acts on behalf of the Committee in the absence of a contrary vote of the majority of the members.¹ It is well established that individual members do not exercise the powers of Congress or a congressional committee, in the absence of an explicit delegation of authority.² A request for special access from the Ranking Member, unsupported by a majority vote of the Committee, therefore, is not a request from a “committee or subcommittee” of the Senate. Again, the Ranking Member points to no legal authority to the contrary.

Senate precedent further supports your reading of the PRA. During Justice Kagan’s confirmation, for example, then-Ranking Member Sessions wrote a letter to the General Counsel of the National Archives and Records Administration (NARA) asking that NARA produce White House documents that mentioned Justice Kagan. Then-Chairman Leahy refused to join Senator Sessions’ request, and NARA flatly refused to honor it. Similarly, then-Ranking Member Specter and I sought records from the Clinton Library during the confirmation of Eric Holder to serve as Attorney General. Because then-Chairman Leahy refused to sign the request, and even though our signatures “represented 40-plus Republican Senators, [our] request was treated as any other citizen’s request under the Freedom of Information Act” and the Clinton Library refused to hand over documents.³ Neither Senator Sessions nor Senator Specter accused NARA of “bias” when it refused to honor their requests for special access to presidential records. I don’t understand why the Ranking Member now accuses you of “bias” for adhering to NARA’s longstanding, neutrally applied, and correct interpretation of the PRA.

With her reading of the PRA foreclosed by the statute’s text and Senate precedent, the Ranking Member misquotes a letter I wrote to the President in June 2017 as evidence that her reading of the statute is correct. But my letter criticized the Office of Legal Counsel for positing that the Executive Branch does not have to respond to *voluntary* requests for information unless those requests came from committee chairmen. I took *no position* on whether an individual Senator may demand special access to presidential records pursuant to a statute that limits disclosure of those records to requests of a House of Congress or a congressional committee. In that situation, the plain text of the statute governs the access of individual senators. Accordingly, unless the Ranking

¹ See *Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members*, 25 Op. O.L.C. 289 (2001) (interpreting a nearly identically worded congressional-disclosure provision of the Privacy Act to prohibit disclosures to ranking members).

² See *Exxon Corp. v. FTC*, 589 F.2d 582, 593 (D.C. Cir. 1978); see also Alissa M. Dolan et al., Cong. Research Serv., RL30240, *Congressional Oversight Manual* 56 (2014) (“Individual Members, Members not on a committee of jurisdiction, or minority Members of a jurisdictional committee, may, like any person, request agency records. When they do, however, they are not acting pursuant to Congress’s constitutional authority to conduct oversight and investigations.”).

³ *Nomination of Eric H. Holder, Jr., Nominee to be Attorney General of the United States: Hearing before the S. Comm. on the Judiciary*, 111th Cong. 5 (2009) (Statement of Sen. Arlen Specter, Ranking Member, S. Comm. on the Judiciary); see also Letter from Gary M. Stern, General Counsel, NARA, to Sen. Arlen Specter, Ranking Member, United States Senate Committee on the Judiciary (Dec. 22, 2008) (interpreting section 2205 not to include requests from individual Senators).

Member is arguing that the PRA's limitations on any individual senator's demand for special access to Presidential records are *unconstitutional*—an argument for which she provides no authority of any kind—she is not entitled to special access to presidential records in her capacity as an individual senator.⁴

Finally, the Ranking Member accuses you of “retreating from [your] role as the neutral, nonpartisan decision-maker over what records will be produced to Congress.” It is a head-scratcher to suggest—without any evidence—that the Archivist of the United States, whom President Obama happened to appoint to the post in 2009, has turned into a Republican partisan agent.

On July 27, I submitted to the George W. Bush Library a request for special access under section 2205(2)(C) to records relating to Judge Kavanaugh's legal service in the White House. I fully expect that, after Presidents Bush and Trump have undertaken the reviews to which they are entitled, *see* Exec. Order No. 13489, 74 Fed. Reg. 4,669 (Jan. 26, 2009); 36 C.F.R. § 1270.44(c), (d), NARA will produce all non-privileged records responsive to the Committee's request in accordance with procedures similar to those used in connection with previous Supreme Court nominations.

Sincerely,



Chuck Grassley
Chairman

cc:

The Honorable Dianne Feinstein
Ranking Member, United States Senate Committee on the Judiciary
331 Hart Senate Office Building
Washington, D.C. 20510

⁴ The Ranking Member also argues that your reading of the PRA “would result in the press and the public having greater access to presidential records under [FOIA] than members of the minority have under the [PRA].” This argument too is wrong. Any person who is not authorized to obtain special access under § 2205 is subject to § 2204's limitations on public access. Because she is not the Archivist, a court, a former President, the sitting President, a House of Congress, or a congressional committee, the Ranking Member is a member of the public under the PRA and has all of the same access rights as any other member of the public under the PRA. She is therefore as free as any other member of the public to seek access to Presidential records under the PRA and FOIA.

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
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KAMALA D. HARRIS, CALIFORNIA

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

July 31, 2018

The Honorable George W. Bush
43rd President of the United States
Office of George W. Bush
P.O. Box 259000
Dallas, TX 75225

Dear President Bush:

I write today to thank you and the George W. Bush Presidential Library and Museum for your tremendous support in ensuring that the United States Senate Committee on the Judiciary receives up to an estimated one million pages of records related to Judge Kavanaugh's legal service in the White House Counsel's Office during your presidency, along with the records related to your nomination of Judge Kavanaugh to the D.C. Circuit in 2006. Your expedited review of an unprecedented number of records is an incredible service to the American people. It will help to ensure that we have the most transparent and robust review of any Supreme Court nominee in our country's history. It will also significantly shorten to weeks, instead of years, the time required to publicly disclose these presidential records under the Freedom of Information Act (FOIA) and the Presidential Records Act (PRA).

Notwithstanding your performance of this public service, the Senate Minority Leader sent you a letter dated July 26, 2018, simultaneously asking you to release all of the records from Judge Kavanaugh's service in your Administration and objecting to the manner in which you are reviewing the records. In case you have forgotten the partisan ways of our nation's capital, the Senate Minority Leader's letter should remind you that no good deed ever goes unpunished in Washington. Please permit me the opportunity clear up the facts and the law.

The Minority Leader is not a member of this Committee. And, as his letter demonstrates, he appears to be unaware of how my Committee intends to obtain presidential records relating to Judge Kavanaugh's service in your Administration. One would expect, therefore, that the Minority Leader would hesitate before inserting himself into the Committee's affairs. This letter is merely one example of the Minority Leader's ongoing and unprecedented partisan interference in Committee business.

The letter is, unfortunately, not even the worst example. I have learned that, on July 30, the Minority Leader called the Archivist of the United States—an official appointed by President Obama—and attempted to pressure him “to do the right thing” with regard to the documents issue. I was disappointed to learn that the Minority Leader would stoop to pressuring the caretaker of the nation’s most important documents to handle requests for records in a particular way. And I am also disappointed that my Democratic colleagues on the Committee are tolerating the Minority Leader’s behavior.

The Minority Leader falsely accuses me of “declin[ing] to sign a bipartisan request for Judge Kavanaugh’s complete record.” I have offered repeatedly to sign a bipartisan request for records. After days of negotiations between our staffs, the Ranking Member and I agreed that the Committee should obtain records from Judge Kavanaugh’s time in the White House Counsel’s Office. But, incredibly, she declined to join a request for those records unless I acceded to the minority’s demands for millions and millions of pages of additional, irrelevant records. Indeed, the Ranking Member demanded a page-by-page search of every one of the millions and millions of pages of emails and other records of every one of the hundreds of White House staffers who worked for you during Judge Kavanaugh’s more-than-five years of White House service—merely to find documents mentioning Judge Kavanaugh. These demands were unprecedented, unreasonable, and were obviously intended to delay the confirmation process for many months. Any federal judge who follows the law would toss attorneys out of the courtroom if they made such an unreasonable document demand. Accordingly, on July 27, 2018, I sent to the director of your library—appointed to that post by the Archivist of the United States last year—a request for records from Judge Kavanaugh’s time in the White House Counsel’s Office, along with the records related to your nomination of Judge Kavanaugh to the D.C. Circuit in 2006. This request, made pursuant to the PRA, 44 U.S.C. § 2205(2)(C), is the same type of request the Committee made during the confirmations of Justices Kagan and Gorsuch.

Clearly losing on the substantive argument, the Minority Leader has resorted to personally attacking Mr. Bill Burck, your attorney and your designated PRA representative since 2009. As you know, Mr. Burck is a leading partner at one of America’s most respected, and most liberal, law firms. And I’m told that he has insisted that no lawyer be selected to participate in the review on the basis of his or her party affiliation or political ideology. Moreover, Mr. Burck has taken the time to meet personally with the Ranking Member’s staff and answer all of their questions about the document-review process. He has been the consummate professional and contributed considerably to our efforts. It is disappointing that the Senate Minority Leader wants to take political cheap shots at Mr. Burck, but that says more about the Minority Leader than Mr. Burck.

The Minority Leader said during a press conference today that your review “wouldn’t be so bad if we also got a full set of documents from the Archives.” I’m glad to hear him say that because that is precisely what I expect to happen. You have offered to give us access to copies of the documents we requested from the Archivist so that we on the Committee can quickly begin our review of Judge Kavanaugh’s record while the Archives works through our document request.

Finally, I must address the Minority Leader’s request itself. First, his request is reckless. He has asked you to make public “the complete record of Judge Kavanaugh’s service in the White House . . . including his years as Staff Secretary.” Because of the Staff Secretary’s role, however, Judge

Kavanaugh's records surely will include highly sensitive information and analysis sent to you from throughout the Executive Branch, including information relating to the security of our nation. This is precisely the sort of information that *should not* be made public, and it is precisely why we have a statute and regulations which ensure that you and the incumbent President have the opportunity to review documents before they are released.

Second, I do not think that the Minority Leader has made his request in good faith. He has already committed to opposing Judge Kavanaugh's nomination "with everything [he's] got." Many members of his caucus have similarly announced their opposition to Judge Kavanaugh's nomination. One member said that those who support Judge Kavanaugh's nomination are "complicit in evil." With so many of his members having already decided to vote against Judge Kavanaugh's confirmation, I fail to see how any document—including the ones I formally requested on July 27—would be even remotely useful to the Minority Leader. I can conclude only that the Minority Leader's request is a bad-faith attempt to delay the confirmation process. I encourage you to ignore it.

The Minority Leader's request is also ironic. On July 27, the Ranking Member of the Committee wrote to the Archivist of the United States to insist that it would be improper for you to share your documents with the Committee. I cannot square that argument with the Minority Leader's request that you share your documents not just with the Committee, but with the whole world.

This will be my fifteenth Supreme Court confirmation hearing and, even in the face of Democratic obstruction, I believe that this confirmation process will rank among the fairest and most transparent. We already have ample material—307 opinions written by Judge Kavanaugh, hundreds more that he has joined, and more than 6,000 pages of material responding to the Committee questionnaire—to assess Judge Kavanaugh's qualifications and views on the law. And I expect the Committee's records request will yield up to one million additional pages. We will have all that we need to perform our constitutional duty to advise and consent.

Sincerely,



Chuck Grassley
Chairman

CC:

The Honorable Charles E. Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

United States Senate
Washington, DC 20510-1304

July 31, 2018

The Honorable Chuck Grassley
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley:

Thank you for your July 27 response to my letter. I must express my profound disappointment that shortly after receiving your response, I learned that you had submitted a request to the George W. Bush Presidential Library for Judge Kavanaugh's documents that did not seek any documents from his 2003 to 2006 tenure as White House Staff Secretary. This is an abdication of the Judiciary Committee's responsibility to conduct a thorough and fair evaluation of a Supreme Court nominee's professional record.

You make several arguments in your letter that merit a response.

First, you claim that Judge Kavanaugh's Staff Secretary documents will not provide any meaningful insight into his legal thinking since the Staff Secretary's "primary charge" is not to create his own substantive work product. This argument can be rebutted with Judge Kavanaugh's own words. In a May 17, 2010 speech, Kavanaugh made clear that his charge as Staff Secretary involved substantive policy work including "participat[ing] in the process of putting legislation together," "work[ing] on drafting and revising executive orders," and "negotiating last minute changes in legislation." Kavanaugh has said on multiple occasions that his Staff Secretary work was "most instructive" to his work as a judge. This work involved, for example, the highly controversial subject of using Presidential signing statements to override legislation, an issue that Kavanaugh has not considered as a judge which has direct bearing on how he will approach cases involving President Trump's sweeping assertions of executive power.

Moreover, as Sunday's *New York Times* reported, when there are policy disagreements between the President's advisors, the Staff Secretary often writes a cover memo explaining the issue. Rajesh De, who served as President Obama's Staff Secretary, explained that, "This is the last person to review, comment on, or adjudicate differences with respect to material sent to the president, and may need to synthesize or explain differing points of view on issues of significance."

Additionally, Judge Kavanaugh has already admitted on at least one occasion to being biased in favor of a proposal he worked on while at the White House. In a law school panel discussion on April 13, 2016, Judge Kavanaugh discussed a Bush Administration proposal for judicial nominees to get a vote within 180 days of their nomination. Judge Kavanaugh said, "I'm a little biased on this because I helped work on it." It is perhaps understandable for a person to be a

little biased in favor of policies that he or she worked on. But that is all the more reason for the Senate and the American people to see the full record of everything that Judge Kavanaugh worked on at the White House. When a sitting judge and Supreme Court nominee makes a comment like this about bias, we have to make sure our vetting is thorough.

Second, you say in your letter that “producing the Staff Secretary records would be extremely burdensome and could compromise some of the Executive Branch’s most sensitive documents.” I have never before seen this Committee shy away from doing hard work, and I am confident we can shoulder the burden of reviewing a large number of records. Additionally, this Committee knows how to handle sensitive information and to provide maximum transparency for the American people while respecting appropriate claims of privilege. These are familiar challenges; they are not excuses for the Committee to fail to do its work.

Third, you cite Justice Kagan’s documents from her tenure as Solicitor General and say that “[d]espite their admitted relevance, Republicans and Democrats agreed that she should not be required to produce internal documents from the Office of the Solicitor General because of their sensitive nature.” I fail to see how this argument should excuse the Committee from our responsibility to review Staff Secretary records. The work of the Solicitor General’s Office litigating before the Supreme Court on behalf of the United States is qualitatively different from “participat[ing] in the process of putting legislation together,” “work[ing] on drafting and revising executive orders,” and “negotiating last minute changes in legislation,” which Judge Kavanaugh has admitted to doing as Staff Secretary.

Furthermore, Judge Kavanaugh also worked in the Office of the Solicitor General, and Democrats are not seeking access to Kavanaugh’s Solicitor General documents, in keeping with the Kagan standard. This is despite the fact that any documents from Kavanaugh’s tenure in the Office of Solicitor General are likely much less sensitive because Kavanaugh was a junior attorney in the office more than a decade ago while Justice Kagan was the sitting Solicitor General with active litigation before the Supreme Court at the time of her nomination. Nonetheless, I have heard no credible argument why precedent regarding Office of the Solicitor General documents should govern access to White House Staff Secretary documents.

Fourth, you make several arguments in response to my concerns that Judge Kavanaugh misled our Committee in his 2006 testimony, which I raised in a June 26, 2007 letter that Kavanaugh has never answered.

You claim that “the Department of Justice already resolved this issue” in apparent reference to a March 19, 2008 letter from then-Principal Deputy Assistant Attorney General Brian Benczkowski saying that “[t]he Public Integrity Section of the Criminal Division reviewed this matter and determined that there was not a sufficient basis to initiate a *criminal* investigation” (emphasis added). Of course, the question of whether Kavanaugh may have committed a crime does not resolve the question of whether he was candid, accurate, and credible in his sworn testimony before this Committee. Not every witness who has misled this Committee is subject to criminal investigation by the Justice Department, as we were recently reminded when Attorney General Sessions gave grossly inaccurate and misleading testimony under oath about his communications with Russians.

You also claim that you “see no discrepancy between Judge Kavanaugh’s testimony and what was subsequently reported in the media” because, in your view, Kavanaugh’s providing advice about Justice Kennedy’s reaction to denying detainees access to counsel “is not akin to involvement in the crafting of the Administration’s detention policies.” Here you are misstating what Judge Kavanaugh actually said in his testimony. Kavanaugh did not testify that he had no involvement in the “crafting” of detention policies; he testified that he had no involvement whatsoever in the rules governing detention of combatants. (“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.”) Your letter concedes that he was involved in such questions, despite his sworn testimony otherwise.

You then dismiss Kavanaugh’s continuing involvement in questions about the rules governing detention of combatants during his Staff Secretary tenure, as demonstrated by the June 12, 2004 email I mentioned from Harriet Miers to then-Staff Secretary Kavanaugh (attached). You say that this email “does not remotely suggest Judge Kavanaugh’s involvement *in crafting* detention and interrogation policies.” (emphasis added). Again, Kavanaugh did not tell me under oath that he had no involvement in “crafting” these policies, and Senators should not reward his misleading testimony by trying to re-write and limit it. This 2004 email clearly shows that there are documents from Kavanaugh’s Staff Secretary tenure regarding his involvement in questions about the rules governing detention of combatants. The number and nature of these documents will help Senators evaluate Kavanaugh’s views on this critical issue and the accuracy and credibility of Kavanaugh’s 2006 sworn testimony, which perhaps explains the effort to conceal them.

Finally, in your letter you note that some Senators have announced they will oppose Judge Kavanaugh’s nomination to the Supreme Court, and you cite this as an excuse for the Judiciary Committee not to do a full and thorough evaluation of Judge Kavanaugh’s record. The American people deserve transparency and a thorough evaluation of a Supreme Court nominee’s record regardless of how any particular Senators say they might vote. Some Republican Senators have already said they will vote for Kavanaugh’s nomination, but that does not mean our Committee should fail to do its work. Furthermore, I have not announced how I will vote on Judge Kavanaugh’s nomination, because as a member of the Judiciary Committee I value the opportunity to question the nominee under oath first. Yet I am being denied the opportunity to view records which bear directly on the credibility of this nominee who I believe has already misled me and the Committee under oath.

Reviewing records from Judge Kavanaugh’s tenure as Staff Secretary is essential due diligence. We owe it to the American people to do this work. Please, Mr. Chairman, issue a new letter requesting production of the Staff Secretary records and let our Committee do its job.

Sincerely,



Richard J. Durbin
United States Senator

From: "Miers, Harriet"
To: "Kavanaugh, Brett M."
Subject: Fw: let me know when you get this...thx
Received(Date): Sat, 12 Jun 2004 18:10:14 -0500

Brett, fyi.

-----Original Message-----

From: Jim Wilkinson [P6/(b)(6)]
To: Miers, Harriet <Harriet_Miers@who.eop.gov>
Sent: Sat Jun 12 19:08:40 2004
Subject: let me know when you get this...thx

These were written by WH Counsel and NSC legal (approved by both)...they have also been approved by Wilkinson, Bartlett, Rove...Steve Hadley also wanted Harriet, Brett, and Andy to see them...I am on my cell at [P6/(b)(6)]...these are for use by Condi and Powell for tomorrow's Sunday shows...

Ã* The President believes we must do everything possible to protect the American people from terrorism. Gathering intelligence about the plans of terrorists is critical to defending America.

Ã* In all aspects of our nation's war on terror, including the conflict in Iraq, the President has insisted our government must comply with U.S. laws and treaty obligations.

Ã* He has repeatedly made clear that torture of detainees is not permitted under U.S. policy, and he has never considered the possibility of authorizing torture.

Ã* The abuses of Abu Ghraib are a violation of the President's policies - not a result of them - and these violations are being investigated and will be punished. The President has been and remains firmly committed to our military's observance in Iraq of the Geneva conventions and our other international agreements.

Ã* To help ensure our government follows the law, the executive branch receives legal opinions. The Department of Justice in a legal analysis discussed the possibility that under some circumstances could be legally defensible. The lawyers were considering a situation in which the information gained from an interrogation

might prevent future attacks by foreign enemies. However, the President has never considered authorizing torture under any circumstances.

Ã* Interrogation techniques must be kept confidential so we do not give away information that would signal to our adversaries what they could anticipate if captured, allowing them to prepare for it and potentially counter it. As required by law, we brief the appropriate Congressional leadership on authorized interrogation techniques.

United States Senate

WASHINGTON, DC 20510

July 31, 2018

The Honorable Patrick X. Mordente, Brigadier General
Director
George W. Bush Presidential Library and Museum
2943 SMU Boulevard
Dallas, Texas 75205

Dear General Mordente:

We ask that you provide documents to the Senate Judiciary Committee in connection with President Trump's nomination of Brett M. Kavanaugh to be Associate Justice of the Supreme Court of the United States.

Mr. Kavanaugh served as Senior Associate Counsel to President Bush from 2001 to 2003 and as Assistant to the President and Staff Secretary from 2003 to 2006. We request that the documents you identify and provide to the Committee from his service in the White House include the following, consistent with the attached guidelines:

- (1) Records from Mr. Kavanaugh's service as a Senior Associate Counsel to the President, including all records preserved in his staff files, and those records created by Mr. Kavanaugh that can readily be found in the files of other White House staff members, the White House Counsel's Office files, other White House offices' files, and the Subject Matter Files maintained by the Staff Secretary and/or the White House Office of Records Management;
- (2) Records from Mr. Kavanaugh's service as Assistant to the President and Staff Secretary, including all records preserved in his staff files, and those records created by Mr. Kavanaugh that can readily be found in the files of other White House staff members, the White House Counsel's Office files, other White House offices' files, and the Subject Matter Files maintained by the Staff Secretary and/or the White House Office of Records Management;
- (3) Records relating to Mr. Kavanaugh's nomination to the United States Court of Appeals for the District of Columbia Circuit;
- (4) All electronic mail sent by or received by Mr. Kavanaugh in his White House tenure, including any documents attached to such emails;
- (5) To the extent they are not included in response to categories (1) through (4), all records containing documents written by, edited by, prepared in whole or part by, under the supervision of, or at the direction of Mr. Kavanaugh, as well as documents referencing Mr. Kavanaugh by name, initials, or title, and documents received by or sent to him.

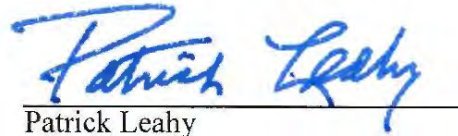
If any document is withheld on the basis of any privilege, please include a description and

explanation consistent with paragraph (e) of the guidelines. In order to expedite your response to this request, we ask that you produce documents to us on a rolling basis as you identify categories and documents responsive to this request. Please note that documents provided to Congress, in contrast to those released to the public, are not governed by the Freedom of Information Act.


We recognize that reviewing the archives and producing these documents is a significant task, and thank you in advance for your efforts.

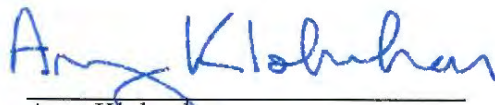
Sincerely,

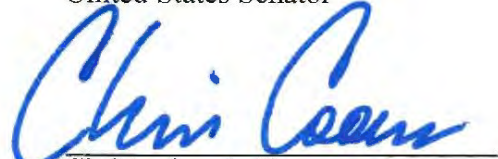

Dianne Feinstein
Ranking Member



Patrick Leahy
United States Senator



Richard J. Durbin
United States Senator

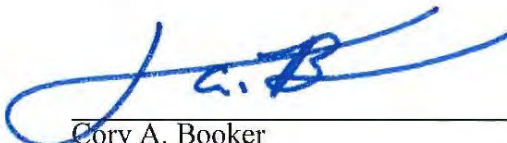

Sheldon Whitehouse
United States Senator

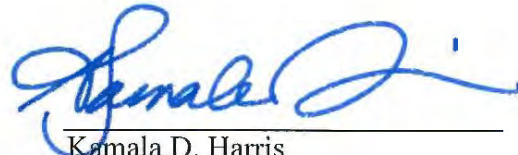

Amy Klobuchar
United States Senator


Christopher A. Coons
United States Senator


Richard Blumenthal
United States Senator


Mazie K. Hirono
United States Senator


Cory A. Booker
United States Senator


Kamala D. Harris
United States Senator

cc: Hon. Charles E. Grassley, Chairman
Senate Judiciary Committee

Mr. Donald F. McGahn
Counsel to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408

Encl.

Guidelines

- a) This request is continuing in character. If additional responsive documents come to your attention following your initial production, please provide such documents to the Committee promptly.
- b) As used herein, “documents” or “records” includes electronic mail messages (“Email”).
- c) As used herein, “document” means the original (or an additional copy when an original is not available), all attached documents, and each distribution copy whether inscribed by hand or by electronic or other means. This request seeks production of all documents described, including all drafts and distribution copies, and contemplates production of responsive documents in their entirety, without abbreviation or expurgation.
- d) In the event that any requested document has been destroyed, discarded, or otherwise disposed of, please identify the document as completely as possible, including the date, author(s), addressee(s), recipient(s), title, and subject matter, and the reason for disposal of the document and the identity of all persons who authorized disposal of the document.
- e) If a claim is made that any requested document will not be produced by reason of a privilege of any kind, describe each such document by date, author(s), addressee(s), recipient(s), title, and subject matter, and set forth the nature of the claimed privilege with respect to each.

WRITER'S DIRECT DIAL NO.
(202) 538-8120

WRITER'S EMAIL ADDRESS
williamburck@quinnemanuel.com

August 2, 2018

VIA ELECTRONIC MAIL

The Honorable Charles Grassley
Chairman, United States Senate Committee on
the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley:

On behalf of former President of the United States George W. Bush, we enclose an initial production of 45,083 documents totaling 125,035 pages from the presidential records of the Bush Administration. These documents were collected from data and documents relating to Judge Brett M. Kavanaugh's service in the White House Counsel's Office during the Bush Administration that were provided by the National Archives and Records Administration (NARA).

As you know, President Bush is under no obligation to produce records of his Administration but has authorized this production to assist the United States Senate Committee on the Judiciary in its assessment of Judge Kavanaugh's nomination to the United States Supreme Court and to advance education and research about his Administration. We believe you will find that the documents are responsive to your July 27, 2018 request to the Honorable Patrick X. Mordente, Director of the George W. Bush Presidential Library and Museum. Based on our assessment of their contents, the documents in this initial production are not covered by a Presidential Records Act (PRA) exemption or other privilege that would restrict access. Accordingly, President Bush has no objection to making these presidential records available to the public, subject to any concerns that NARA may have in that respect. To this end, we are simultaneously providing this

production to NARA for its assessment and are temporarily providing these documents on a “Committee Confidential” basis pending NARA’s views.

We anticipate making additional productions on a rolling basis. We note that documents produced in subsequent productions may be subject to greater restrictions on access to the extent they contain information covered by a PRA exemption or applicable privilege.

Sincerely,

s/ William A. Burck

William A. Burck

Enclosure

cc: The Honorable Dianne Feinstein



NATIONAL
ARCHIVES

August 2, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

This letter is in response to your July 27, 2018, letter to Patrick X. Mordente, Director of the George W. Bush Presidential Library and Museum, requesting George W. Bush Presidential records concerning Judge Brett M. Kavanaugh. The George W. Bush Library is part of the National Archives and Records Administration (NARA). The request is being processed in accordance with the Presidential Records Act (PRA), 44 U.S.C. § 2205(2)(C), which provides for an exception to restricted access for records that are requested by a committee or subcommittee in the conduct of the business of Congress, as well as under NARA's regulations at 36 C.F.R. Part 1270 and Executive Order 13489.

Your letter requests three categories of records:

- (1) Emails sent to or received from Kavanaugh, including emails on which he was a carbon copy or blind carbon copy recipient, during the period Kavanaugh served as Associate Counsel and Senior Associate Counsel to the President, including any documents attached to such emails;
- (2) The textual records contained in Kavanaugh's office files from the period during which he served as Associate Counsel and Senior Associate Counsel to the President; and
- (3) Documents relating to Kavanaugh's nomination to the U.S. Court of Appeals for the District of Columbia Circuit

NARA estimates that the first category includes roughly 170,000 emails. Because we estimate that email records in this collection (which frequently include attachments) average approximately five pages per email, there could be as many as 850,000 pages of email records. (The emails may also include personal and other non-PRA record, and duplicate materials; in addition, this volume does not include emails in which Kavanaugh is only mentioned). NARA

NATIONAL ARCHIVES *and*
RECORDS ADMINISTRATION
8601 ADELPHI ROAD
COLLEGE PARK, MD 20740-6001
www.archives.gov

GARY M. STERN
GENERAL COUNSEL
Suite 3110
t. 301.837.3026
garym.stern@nara.gov

estimates that the second category includes roughly 60,000 pages, and the third category includes a little over 3,800 pages.

Thus, the total volume of your request could be more than 900,000 pages. By way of contrast, the total volume of records that NARA reviewed for the nomination of Justice Roberts was approximately 70,000 pages, and the volume for Justice Kagan's nomination was 170,000 pages.

You have asked that NARA "begin rolling production to the Committee . . . no later than August 1, 2018," and "complete the rolling production . . . no later than by August 15, 2018." However, your letter also states that you "intend to adhere to established custom and accept certain PRA-restricted material on a Committee Confidential basis and to permit the Archivist to withhold some PRA-restricted material in its entirety," including classified national security information or personal privacy information. Based on discussions with your staff, our review would also include information subject to other applicable PRA restrictions and FOIA exemptions.

NARA began the process of reviewing these records as soon as we learned of Judge Kavanaugh's nomination, prior to receiving your request. To that end, on August 1, 2018, we completed the review of Kavanaugh's nomination files, per part 3 of your request, and provided the required notification to the PRA representatives of the incumbent and former Presidents, for both special access and public access disclosure, in accordance with 44 U.S.C. § 2208, 36 C.F.R. § 1270.46, and Executive Order 13489. We will let you know as soon as the PRA representatives have completed their review and we can provide those records to the Committee.

However, please note that we will not be able to complete our review of all of the records that you have requested by August 15, 2018. Rather, we estimate that we can complete our review of the textual records and the subset of White House Counsel Office emails "from" Kavanaugh (approximately 49,000 emails) – totaling roughly 300,000 pages – by approximately August 20, 2018, and currently expect to be able to complete the remaining 600,000 pages by the end of October 2018, all of which would then be followed by notification to the PRA representatives.

If you have any questions concerning this request, please feel free to have your staff contact me at 301-837-3026.

Sincerely,



GARY M. STERN
General Counsel

cc: The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
United States Senate

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH
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JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
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KAMALA D. HARRIS, CALIFORNIA

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*

JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

August 3, 2018

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue NW
Washington, D.C. 20408

Dear Mr. Ferriero:

We ask that you provide documents to the United States Senate Committee on the Judiciary in connection with President Trump's nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States.

Judge Kavanaugh served as an Associate Counsel in the Office of Independent Counsel Kenneth W. Starr from September 6, 1994 until November 20, 1997, and again from April 27, 1998 until December 1, 1998. We request that the documents you identify and provide to the Committee from his service in the Office of Independent Counsel include the following, consistent with the attached guidelines:

- (1) Documents from Brett M. Kavanaugh's service as Associate Counsel in the Office of Independent Counsel, including all documents preserved in his staff files and all documents he authored in whole or in part, edited, revised, or approved;
- (2) All memos, letters, or electronic mail sent by or received by Brett M. Kavanaugh during his tenure in the Office of Independent Counsel, including any such memos, letters, or electronic mail on which he was a carbon copy or blind carbon copy recipient, and including any documents attached to such memos, letters, or electronic mail;

We understand that reviewing these documents as the Freedom of Information Act (FOIA) requires will be a significant undertaking. Nevertheless, in order to expedite your response and to facilitate the Committee's prompt review, please produce documents on a rolling basis as you identify categories responsive to this request.

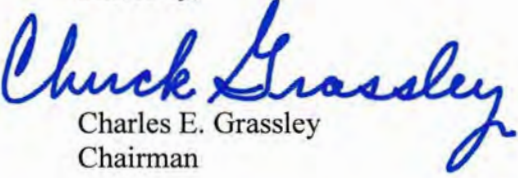
We recognize the possibility that some documents responsive to our request may be exempt from public disclosure under FOIA. *See* 5 U.S.C. § 552(b); 28 U.S.C. § 594(k)(3)(A). We nevertheless have an important constitutional obligation to examine thoroughly Judge Kavanaugh's record, and the FOIA exemptions are "not authority to withhold information from Congress." 5 U.S.C. § 552(d). We therefore ask that you provide to the Committee on a "Committee Confidential" basis those documents that would otherwise be exempt from public disclosure under 5 U.S.C. § 552(b). In addition, and because there is a significant public interest in understanding the record of any Supreme Court nominee, we hope that you will endeavor to ensure public access to as much of the record as possible. To the extent that these records contain classified national security information

or personal privacy information, please contact the Committee so that we can discuss further how those materials might be handled.

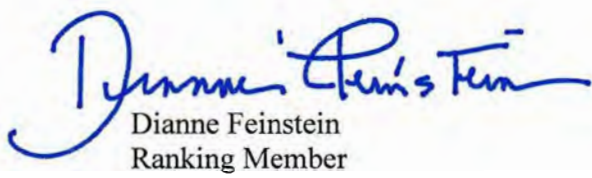
We further recognize that some documents responsive to this request may be subject to constitutional or common-law privileges against disclosure. We intend to respect claims of privilege. We hope, however, that the number of responsive documents subject to claims of privilege will be as few as possible.

We recognize that reviewing the archives and producing these documents is a significant task, and we thank you in advance for your efforts.

Sincerely,



Charles E. Grassley
Chairman



Dianne Feinstein
Ranking Member

cc:

Mr. Donald F. McGahn
Counsel to the President
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Guidelines

- a) This request is continuing in character. If additional responsive documents come to your attention following your initial production, please provide such documents to the Committee promptly.
- b) As used herein, “documents” or “records” includes electronic mail messages (“Email”).
- c) As used herein, “document” means the original (or an additional copy when an original is not available), all attached documents, and each distribution copy whether inscribed by hand or by electronic or other means. This request seeks production of all documents described, including all drafts and distribution copies, and contemplates production of responsive documents in their entirety, without abbreviation or expurgation.
- d) In the event that any requested document has been destroyed, discarded, or otherwise disposed of, please identify the document as completely as possible, including the date, author(s), addressee(s), recipient(s), title, and subject matter, and the reason for disposal of the document and the identity of all persons who authorized disposal of the document.
- e) If a claim is made that any requested document will not be produced by reason of a privilege of any kind, describe each such document by date, author(s), addressee(s), recipient(s), title, and subject matter, and set forth the nature of the claimed privilege with respect to each.

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

August 3, 2018

The Honorable Richard J. Durbin
711 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Durbin:

I write in response to your second letter to me, dated July 31, 2018, regarding my decision not to request documents from Judge Kavanaugh's tenure as White House Staff Secretary.

As I explained in my first letter to you, dated July 27, 2018, and in several statements on the Senate floor on July 24, 25, and 31, 2018, Judge Kavanaugh's Staff Secretary documents are both the least relevant to assessing his legal thinking and the most sensitive to the Executive Branch. Senators already have access to more than 300 opinions Judge Kavanaugh authored in his twelve years on the D.C. Circuit, the hundreds more opinions he joined during that period, and the more than 17,000 pages he submitted in connection with his Senate Judiciary Committee Questionnaire. I have also requested up to one million pages of documents from Judge Kavanaugh's time as an attorney in the Office of Independent Counsel and White House Counsel's Office. We have already received more than 125,000 pages of those records, which we have begun reviewing. In short, this is the most expansive and transparent confirmation process in history.

Contrary to the assertions made in your letter, how the Senate Judiciary Committee handled document requests in connection with Justice Kagan's nomination provides strong precedent for not requesting Judge Kavanaugh's Staff Secretary documents. Democrats and Republicans agreed not to ask for documents from Justice Kagan's time at the Solicitor General's office because of the importance of confidentiality to the integrity and thoroughness of intra-office deliberations. Justice Kagan agreed with this decision, testifying as to "how important confidentiality within the office is to effective decision-making" and how disclosure "would very much inhibit that kind of appropriate deliberation about legal questions."

This justification applies with even greater force to documents from the Staff Secretary's office. You say that documents from the Staff Secretary's office are "qualitatively different" than those from the Solicitor General's office. I agree; the former are more sensitive and, thus, there's a stronger case for not disclosing them. As former White House Counsel C. Boyden Gray explained in a recent op-ed in *The Hill*, "[s]ubjecting all of these deliberative documents to public scrutiny would chill communications between future presidents and their staff, which could be disastrous for the country." He further explained, "Like the solicitor general and her staff, the president's inner circle must have confidence that they can offer their best ideas and candid opinions without fear that they will someday be aired in a former colleague's confirmation hearing."

You point to statements made by Judge Kavanaugh that his time as Staff Secretary was a formative one for him and that he worked on important matters while in that position. I'm not surprised by these statements. But they are inconsequential. Justice Kagan also worked on the most significant constitutional and other legal matters affecting our nation while she was Solicitor General. Documents potentially indicative of her legal thinking would have been extremely useful for the committee in light of her lack of a judicial record. Justice Kagan even testified that her tenure as Solicitor General would be instructive in evaluating her fitness for the bench.

Nevertheless, there was bipartisan consensus that the need to protect the integrity of deliberations within the Solicitor General's office overrode the Senate's need for additional information about Justice Kagan. The calculus is even more lopsided with respect to Judge Kavanaugh. Judge Kavanaugh has authored more than 300 judicial opinions and joined hundreds of others in his twelve years on the bench (compared to zero for Justice Kagan when she was nominated). And the Senate could receive up to one million pages of documents from Judge Kavanaugh's service in the Executive Branch (compared to approximately 170,000 for Justice Kagan). On the other hand, the sensitivity of the documents that went through the Staff Secretary's office is significantly greater than those from the Solicitor General's office. Indeed, these documents that went through the President's inbox and outbox are at the very core of executive privilege.

In short, the Senate has less need for additional documents now than when Justice Kagan was nominated, especially when we could receive as much as five times as many White House emails and other records for Judge Kavanaugh than we did for Justice Kagan. And the documents you seek related to the White House Staff Secretary are much more sensitive than the ones related to the Solicitor General—which both sides agreed were too sensitive to disclose during Justice Kagan's nomination. How the document issue was handled during Justice Kagan's confirmation process provides strong support for my position that the committee will not request Staff Secretary documents.

You also express a need for Judge Kavanaugh's Staff Secretary documents to see the matters on which he worked and his potential legal conflicts or biases. I'm not aware of any precedent for such a request. Federal law and the Judicial Code of Conduct guide judges on their decisions whether to recuse from a case. It's not the practice of this committee to compile inventories of judicial nominees' previous matters.

You continue to express concerns about whether Judge Kavanaugh's testimony to the committee in 2006 was "candid, accurate, and credible." I'm sure Judge Kavanaugh is ready and willing to address your concerns in a face-to-face meeting. Yet you and most of your Democratic colleagues have so far refused to schedule meetings with Judge Kavanaugh. You will also have the opportunity to question Judge Kavanaugh during his public confirmation hearing and after reviewing hundreds of thousands of pages of documents from his time in the White House Counsel's office—which is the time period relevant to your allegations.

With respect to the substance of your allegations, I continue to believe Judge Kavanaugh's testimony was truthful and consistent with what was subsequently reported in the media. Your description of Judge Kavanaugh's testimony leaves out some significant details. Specifically, your

question to Judge Kavanaugh concerned his relationship with an official who you describe as an “architect of the Administration’s discredited detention and interrogation policies” and someone “involved in crafting detention and interrogation policies.” You also graphically described several abusive interrogation techniques this official allegedly recommended directly to Secretary of Defense Donald Rumsfeld. In context, I understand Judge Kavanaugh’s response to be an attempt to disclaim this sort of involvement in crafting detention and interrogation policies—specifically with respect to the abusive practices you described.

Therefore, Judge Kavanaugh’s testimony appears to be consistent with subsequent reporting that, when asked, he told colleagues Justice Kennedy was unlikely to accept the argument that the government could indefinitely deny American citizens access to counsel. Offering such an opinion on a legal position being considered by other officials does not constitute involvement in crafting detention and interrogation policies, especially the ones your question described. But, again, you can ask Judge Kavanaugh about this in your one-on-one meeting or at his public hearing.

Nor does Judge Kavanaugh’s testimony conflict with the fact that he was once forwarded an email containing finalized talking points prepared by others on the Administration’s public positions on counter-terrorism issues. Being aware of the Administration’s public positions on major issues would have been a key part of his job as Staff Secretary.

Again, you have every opportunity to raise your concerns with Judge Kavanaugh personally if you would agree to meet with him. You will also have the opportunity to question Judge Kavanaugh publicly and under oath about this issue. But I will not put American taxpayers on the hook for a fishing expedition based on unfounded allegations regarding Judge Kavanaugh’s testimony.

Sincerely,



Chuck Grassley
Chairman



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2 August 2018

The Honorable Charles E. Schumer
Minority Leader
United States Senate
Washington, DC 20510

Dear Minority Leader Schumer:

On Monday, July 30, 2018, you called me to discuss how the National Archives and Records Administration (NARA) responds to requests from the ranking minority member of a committee for non-public Presidential records under the Presidential Records Act (PRA).

Our conversation referenced my correspondence with Senate Judiciary Committee Ranking Member Feinstein concerning section 2205(2)(C) of the PRA, 44 U.S.C. § 2205(2)(C), which provides that otherwise restricted presidential records may be made available "to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof." I informed Senator Feinstein, in my letter dated July 26, 2018, that this section requires such "special access" requests to come from the Chair of the Committee, and that NARA has always followed this requirement. In her letter of July 26, 2018, Senator Feinstein questioned NARA's "unduly restrictive reading" of the special access authority under section 2205 of the PRA. Chairman Grassley also sent a letter to me on July 30, 2018, addressing this issue.

In our conversation, you noted that the minority staff of the Judiciary Committee believe that the special access section of the PRA could be interpreted to include requests from the ranking minority member. You then asked if I would seek a new interpretation of this provision, and I responded that we would seek further guidance on this issue. Accordingly, following our conversation, I directed my General Counsel to consult with the Department of Justice on this matter.

NARA's longstanding practice of responding only to requests from committee chairs under section 2205(2)(C) is based on who in Congress can act on behalf of a "committee or subcommittee" of either House of Congress. We have always understood that such authority rests only with the chair of the committee (or the committee itself), unless it has been specifically delegated to the ranking minority member. The PRA was passed by Congress in 1978. The relevant language in section 2205(2)(C) is

identical to the language in 5 U.S.C. § 552a(b)(9) of the Privacy Act, which was passed by Congress in 1974. Both statutes establish specific conditions of disclosure for otherwise non-public information "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee."

In 2001, the Department of Justice, Office of Legal Counsel (OLC), issued a Letter Opinion for the General Counsel, Department of the Treasury, on the "Application of Privacy Act Congressional-Disclosure Exception to Ranking Minority Members." 25 Op. O.L.C. 289 (2001). This OLC opinion concluded that "the Privacy Act prohibits the disclosure of the Privacy Act-protected information to the ranking minority member." *Id.* The opinion noted further that "the essential analysis underlying our conclusion is that although the congressional-disclosure exception to the Privacy Act disclosure prohibition is available for disclosures to either House of Congress or to a committee of Congress, ranking minority members generally do not act on behalf of congressional committees." *Id.* The opinion went on to state that this conclusion "follows the longstanding Executive Branch practice on this question," and noted that "the Congressional Research Service takes the same view as we do concerning the lack of authority of ranking minority members, as a general matter, to act on behalf of congressional committees." *Id.* at 290 (citing to CRS Rpt. 95-464A).

Because the relevant language in the PRA is identical to the Privacy Act language addressed in the 2001 OLC opinion, NARA has relied on the parallel interpretation of the Privacy Act as the legal basis for not recognizing requests under section 2205(2)(C) from ranking minority members. For example, as noted in Chairman Grassley's July 30 letter, NARA has declined to process such requests from former Judiciary Committee Ranking Member Spector in connection with the nomination of Attorney General Holder and from former Judiciary Committee Ranking Member Sessions in connection with the nomination of Justice Kagan. NARA's position here is therefore consistent with its prior application of section 2205(2)(C) across presidential administrations.

Per your request, my General Counsel has consulted with the Department of Justice about whether a different interpretation of the PRA is possible. The Department confirmed that the reasoning and conclusion of the 2001 OLC opinion on the Privacy Act would apply equally to the same language in the PRA – i.e., a request from a committee under section 2205(2)(C) must be from the chair (or the committee itself), unless specifically delegated by the committee to the ranking minority member.

Accordingly, NARA remains unable to respond to PRA special access requests from ranking minority members.

Sincerely,



DAVID S. FERRIERO
Archivist of the United States

cc: The Honorable Charles E. Grassley
Chairman
Senate Committee on the Judiciary

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary

United States Senate

WASHINGTON, DC 20510

August 6, 2018

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Dear Mr. Ferriero:

I have received your letter stating that the Archives will not respond to requests from minority members of the Senate Judiciary Committee for presidential records related to the nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States. As the Ranking Member of the Senate Judiciary Committee, I am alarmed that you would deny Committee Democrats the materials necessary to fulfill their constitutional duty to provide advice and consent, while providing the materials requested by the Republicans. I urge you to reconsider your position.

Under your overly restrictive reading of the Presidential Records Act, minority members of the Senate Judiciary Committee now have no greater right to Mr. Kavanaugh's records than members of the press and the public. Yet these Committee members have an express constitutional duty to provide advice and consent, which your analysis does not take into account. That outcome conflicts with the plain language and intent of the Presidential Records Act, which specifically recognizes the need for Congress to have special access to presidential records for such purposes.

In particular, the congressional access provision of that law, 44 U.S.C. § 2205(2)(C), makes clear that presidential records "shall be made available" to "any committee" of Congress "if such records contain information that is needed for the conduct of its business[.]" Nowhere does that provision limit the definition of the term "committee" to the Chairman, and there is no support elsewhere in the text of the statute for such a strained reading.

The Justice Department's analysis, upon which you rely, instead rests on its own misunderstanding of Committee rules, which it claims limit the meaning of

the term “committee” to only the Chairman.¹ First, it is worth noting the Executive Branch has no authority to issue binding interpretations of Senate rules. Importantly, even if it did, the Justice Department’s suggestion that Committee rules preclude the Ranking Member from requesting the production of information is erroneous. In fact, no Judiciary Committee rule expressly prohibits the Ranking Member from requesting information on the Committee’s behalf or provides that the Chairman has exclusive authority.

Given the context, this reading of the rules and the law ought to be even more apparent. Senators on the Committee have made a request for documents necessary to carry out their advice and consent obligation—this obligation is no less simply because the Senators’ party is in the minority. Even the Trump White House has made clear that “the Executive Branch should voluntarily release information to individual members where possible.”²

Indeed, any other policy would impede the ability of duly elected Senators to perform their constitutional duty to provide advice and consent on the most important nomination that comes before them. While the 2001 Office of Legal Counsel opinion on which you rely concludes that only chairmen of congressional committees have the authority to request Executive Branch material, this opinion specifically references this limitation in the context of Congress’s *oversight* function. It makes no such claim regarding the *advice and consent* function—a core constitutional function that all Senators, both majority and minority, are obligated to fulfill.³

In addition, the Office of Legal Counsel opinion that you cite interprets the Privacy Act—an entirely different statute with a different purpose from the Presidential Records Act. The Privacy Act’s primary purpose is to protect individuals against the unwarranted invasion of their privacy resulting from federal

¹ See *Application of Privacy Act Congressional-Disclosure Exception to Ranking Minority Members*, 25 Op. O.L.C. 289, 289 (2001) (describing the Office of Legal Counsel’s understanding of congressional procedure as “the essential analysis underlying our conclusion”); see also *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, 41 Op. O.L.C. 1, 2 (May 1, 2007) (purporting to interpret “existing congressional rules”).

² Letter from Marc Short, White House Director of Legislative Affairs, to Hon. Charles E. Grassley, Chair, Senate Judiciary Committee (July 20, 2017), available at <https://www.judiciary.senate.gov/imo/media/doc/2017.07.20%20WH-Short%20Response%20to%20CEG%20re%20Oversight.pdf>

³ See *Application of Privacy Act Congressional-Disclosure Exception to Ranking Minority Members*, 25 Op. O.L.C. at 289 (expressly referring to the exercise of Congress’s “investigative and oversight authority”); see also *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, 41 Op. O.L.C. at 1 (specifically addressing “the authority of individual members of Congress to conduct oversight of the Executive Branch”).

agencies' disclosure of their personal information.⁴ As a result, its default policy is to prohibit the use and disclosure of individuals' information except in certain limited circumstances.⁵ In sharp contrast, as you know, the primary purpose of the Presidential Records Act is to promote government transparency.⁶ It furthers this purpose by enabling public access to documents and ensuring that records are made available to Congress, the courts, and the sitting and former president when needed to perform official duties.

Unlike the Privacy Act, the Presidential Records Act's provisions relating to the disclosure of information should be read broadly in light of this underlying policy and intent of the law. This law was enacted specifically to prevent former presidents from blocking public and congressional access to presidential records. To respond to one party and not the other flies in the face of this intent. In particular, the congressional access provision should never be interpreted in a manner that thwarts members of Congress from fulfilling their constitutional duties.

For all of these reasons, I ask that you reconsider the position set forth in your August 2 letter. These records are crucially important to the Senate's understanding of Mr. Kavanaugh's full record, and withholding them prevents the minority from satisfying its constitutional obligation to provide advice and consent on his nomination.

Sincerely,



Dianne Feinstein
Ranking Member

cc: Hon. Charles E. Grassley
Chairman, Senate Judiciary Committee

⁴ See *Overview of the Privacy Act of 1974*, U.S. Department of Justice, <https://www.justice.gov/opcl/policy-objectives>.

⁵ See 5 U.S.C. § 552a(b).

⁶ See David S. Ferriero, *NARA's Role under the Presidential Records Act and the Federal Records Act*, *Prologue Magazine*, vol. 49, no. 2 (summer 2017), <https://www.archives.gov/publications/prologue/2017/summer/archivist-pra-fra>.

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WRITER'S EMAIL ADDRESS
williamburck@quinnemanuel.com

August 8, 2018

VIA ELECTRONIC MAIL

The Honorable Charles Grassley
Chairman, United States Senate Committee on
the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley:


On behalf of former President George W. Bush, we made an initial production on August 2, 2018 to the Committee of records relating to Judge Brett M. Kavanaugh's service in the White House Counsel's Office. As we noted at the time, we had asked the National Archives and Records Administration (NARA) to review the production for its views on whether public release of the documents would be appropriate.

Earlier this week, I spoke to representatives of NARA who informed me that NARA is unable to conduct the requested review at this time because its available resources are committed to the Committee's special access request for records relating to Judge Kavanaugh's White House Counsel's Office service to the George W. Bush Presidential Library and Museum, dated July 27, 2018.

In light of the constraints on NARA's resources, and in the interest of expediting appropriate access to President Bush's presidential records in furtherance of education and research about the Bush Administration, we are producing to the Committee on a rolling basis commencing today publicly releasable versions of documents that, in our view, do not contain information covered by a Presidential Records Act exemption or applicable privilege. We are making the first set of these documents available via FTP link to the designated Committee staff,

with the “Committee Confidential” stamp removed from these documents. They may be released immediately to the public if the Committee so chooses.

Respectfully,

A handwritten signature in blue ink, appearing to read 'W. A. Burck', with a long horizontal flourish extending to the right.

William A. Burck

cc: The Honorable Dianne Feinstein

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August 9, 2018

VIA ELECTRONIC MAIL

The Honorable Charles Grassley
Chairman, United States Senate Committee on
the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley:

On behalf of former President of the United States George W. Bush, we enclose our second production of 16,641 documents totaling 49,344 pages from the presidential records of the Bush Administration. These documents were collected from data and documents relating to Judge Brett M. Kavanaugh's service in the White House Counsel's Office during the Bush Administration that were provided to us by the National Archives and Records Administration (NARA).

We are providing these documents on the condition that the Committee treats these records as "Committee Confidential," within the meaning of your July 27, 2018 letter to the Bush Library, with access limited to any Senator on the Senate Committee on the Judiciary, any member of Committee staff, and any others agreed upon by the Chairman and Ranking Member. Consistent with the process followed for our August 2, 2018 production, while NARA continues its review of the materials requested by the Committee, we are in the process of determining which of these documents are, in the view of the attorneys reviewing the materials on behalf of President Bush,

quinn emanuel urquhart & sullivan, llp

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appropriate for public release. We will provide publicly releasable copies to the Committee on a rolling basis as a courtesy to the Committee and to further education and research about the Bush Administration.

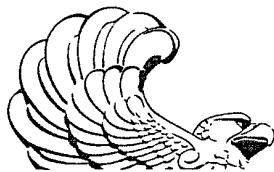
Sincerely,

s/ William A. Burck

William A. Burck

Enclosure

cc: The Honorable Dianne Feinstein



NATIONAL
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August 9, 2018

The Honorable Charles E. Grassley, Chairman
The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

This letter is in response to your August 3, 2018, letter to David S. Ferriero, Archivist of the United States, requesting Office of Independent Counsel Kenneth W. Starr (Starr OIC) records concerning Judge Brett M. Kavanaugh, who served as an Associate Counsel in the Office of Independent Counsel Kenneth W. Starr from September 6, 1994 until November 20, 1997, and again from April 27, 1998 until December 1, 1998. You requested the following records:

- (1) Documents from Brett M. Kavanaugh's service as Associate Counsel in the Office of Independent Counsel, including all documents preserved in his staff files and all documents he authored in whole or in part, edited, revised, or approved;
- (2) All memos, letters, or electronic mail sent by or received by Brett M. Kavanaugh during his tenure in the Office of Independent Counsel, including any such memos, letters, or electronic mail on which he was a carbon copy or blind carbon copy recipient, and including any documents attached to such memos, letters, or electronic mail.

In light of pending FOIA requests and litigation, NARA has already begun to process for public release, on an expedited basis, all of the Starr OIC records that we can identify as related to Judge Kavanaugh, based on the information available to us on these records. To date, we have posted on our website 2,088 pages of these records, with some information withheld in part or in full in accordance with relevant and applicable FOIA exemptions, which so far are: exemption (b)(3), for grand jury information; exemption (b)(4), for confidential commercial information; exemption (b)(6), for personal privacy information; exemption (b)(7)(C), for law enforcement privacy information; and exemption (b)(7)(D), for information concerning law enforcement confidential sources. Please note that no information is being withheld on the basis of any constitutional or common-law privileges.

Your letter noted that, “[t]o the extent that these records contain classified national security information or personal privacy information, please contact the Committee so that we can

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GARY M. STERN
GENERAL COUNSEL

Suite 3110
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garym.stern@nara.gov


discuss further how those materials might be handled.” Accordingly, we discussed this issue with both of your staffs, and agreed that NARA will provide to the Committee the records in the same form that we are releasing them to the public, recognizing that the Committee reserves the right subsequently to request, on a “Committee Confidential” basis, specific documents that would otherwise be exempt.

The enclosed DVDs (a copy set for each of you) represents the first release of responsive records to the Committee. The discs contain copies of the 9,714 pages of records that we have processed to date – in which 5,596 pages are released in full, 4,118 pages are withheld (i.e., redacted) in full or in part (each page withheld in full is represented by a withdrawal sheet that indicates the applicable FOIA exemption). A separate disc contains a spreadsheet that lists each of the folders, the total number of pages, the number of pages redacted, and the applicable FOIA exemptions. These DVDs include the 2,088 pages that we have already posted on our website, and we expect to be able to post the remaining 7,626 pages on Friday, August 10, 2018.

We will continue to provide the Committee with additional responsive records on a rolling basis until we have completed our review.

If you have any questions concerning this request, please feel free to have your staff contact me at 301-837-3026.

Sincerely,



GARY M. STERN
General Counsel

Enc.

cc:

Mr. Donald McGahn
Counsel to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

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August 10, 2018

VIA E-MAIL

Gary M. Stern
General Counsel
National Archives and Records Administration
8601 Adelphi Road,
College Park, MD 20740-6001

Dear Gary:

As you know, President George W. Bush through his designated Presidential Records Act (PRA) representatives made a special access request to the National Archives and Records Administration (NARA) on July 12, 2018 for records relating to Judge Brett M. Kavanaugh's work in the White House Counsel's Office. NARA provided these documents to us shortly thereafter.

As we have discussed, I have been leading a team of lawyers reviewing the documents NARA provided. In the course of the review, the lawyers have come across certain documents they do not believe qualify as presidential records within the meaning of the PRA because they are personal in nature or otherwise do not appear to relate to the work of the White House Counsel's Office, the White House, or more broadly the Bush Administration.

As President Bush's PRA representative, I request that NARA review the documents that the lawyers working on behalf of President Bush have designated as non-presidential records after their initial review. NARA's expertise on whether these documents do or do not qualify as presidential records is important to President Bush to ensure the proper administration and categorization of records held by the George W. Bush Presidential Library and Museum, so that the historical record of the Bush Administration is properly managed and preserved. My team provided examples of some of those documents to NARA earlier this week on Monday, August 6, to obtain NARA's views on their proper categorization.

For your convenience, we are now sending to you an FTP link containing all of the documents the reviewers have so far designated as non-presidential records. I can confirm to you that these

quinn emanuel urquhart & sullivan, llp

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documents are identical copies of those that NARA sent to us in response to the July 12, 2018 special access request. We will also provide for NARA's consideration any additional documents that our team designates as non-presidential records as the review continues.

Please let me know if you have any questions or would like to discuss this request for review by NARA.

Sincerely,



William A. Burck

CHARLES E. GRASSLEY, IDWA, CHAIRMAN

ORRIN G. HATCH, UTAH
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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

August 10, 2018

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

Dear Ranking Member Feinstein:

I have received your letter dated today objecting to my decision to accept documents from President Bush on a Committee Confidential basis while his representatives prepare those same documents for public release.

I confess I am quite surprised to hear these objections now. My staff repeatedly reached out to your staff this week to discuss Committee Confidentiality issues. Each request, however, went entirely unanswered until your staff emailed your letter to my staff. With no indication of your interest in even discussing Committee Confidentiality, I decided to exercise my authority as Chairman to receive these documents on a Committee Confidential basis so that the Committee could begin reviewing documents as soon as possible.

It is clear that you misunderstand the process. President Bush has moved with tremendous speed to get documents to this Committee so that we may begin our review of Judge Kavanaugh's record as quickly as possible. These documents may include certain material that the Committee can review under the Presidential Records Act, *see* 44 U.S.C. § 2205, but that the public cannot, *see* 44 U.S.C. § 2204(a)—including Social Security numbers, birthdays, addresses, and banking information. To ensure that such sensitive information is not publicly released while still allowing the Committee to quickly begin its work, President Bush offered documents to the Committee on the condition that they be held on a Committee Confidential basis while his representatives continue reviewing those documents to ensure that the publicly released versions contain no sensitive information. As Mr. Burck explained in his August 8 letter, President Bush's representatives are providing the Committee versions of these documents suitable for public release after they have been reviewed to ensure that they contain no information restricted from public release by the PRA. We have already received one production of publicly releasable documents, and I expect another tomorrow.

To be frank, I don't understand your objection to this practice. I for one want to begin reviewing Judge Kavanaugh's record as soon as possible. Indeed, my staff has that process well underway. But I do not want anyone's private data to be made public by this Committee. Nor do I want to disclose to the public any material which Congress in the PRA saw fit to keep from the public's view. Mr. Burck is not hiding anything. President Bush's PRA representatives are ensuring only that material ineligible for public release under the PRA will not be publicly released. Your insistence that we make information public immediately without ensuring that it does not contain this sort of information strikes me as deeply irresponsible.

Perhaps most disappointing is your suggestion that I have departed from "longstanding Committee practice." This is untrue. During the nominations of both Justices Kagan and Gorsuch, this Committee accepted documents containing material restricted from public access under the PRA on a Committee Confidential basis. Here, we agreed to accept documents on this basis in order to permit the Committee to begin reviewing documents as quickly as possible. By the time this process is complete, however, I fully expect that the only material that the public will not see will be PRA-restricted materials—just as in previous nominations.

You also suggest there is something extraordinary about my decision to accept documents from President Bush on the condition that they be held on a Committee Confidential basis. This too is untrue. During Justice Kagan's confirmation, then-Ranking Member Sessions wrote a letter to then-Chairman Leahy before any documents had been produced objecting to potential restrictions on access to documents produced to the Committee.¹ NARA then produced records to the Committee, including some on the condition that they be held on a Committee Confidential basis.² Senator Leahy responded that "[a]fter our staffs briefly discussed the matter, I accepted the documents on that basis in order to permit the Committee prompt access to them."³ That is precisely what I did here, and for precisely the same reason. The only difference is that my staff tried to discuss the matter with yours, but yours declined.

Insofar as I have departed from longstanding Committee practice, that departure has been in favor of transparency. During the nominations of both Justices Kagan and Gorsuch, the Committee accepted documents "on the condition that the Committee treat[] these records as 'Committee Confidential,' with access limited to any Senator on the Senate Judiciary Committee, the Committee Chief Counsels, and the Chief Nominations Counsels for the Chairman and Ranking Member."⁴ I have accepted these documents pursuant to a much narrower restriction on access—

¹ See Letter from Sen. Jeff Sessions, Ranking Member, Senate Judiciary Committee, to Sen. Patrick Leahy, Chairman, Senate Judiciary Committee (June 1, 2010).

² Letter from Gary Stern, General Counsel, National Archives & Records Administration, to Sen. Patrick Leahy, Chairman, Senate Judiciary Committee, and Sen. Jeff Sessions, Ranking Member, Senate Judiciary Committee (June 4, 2010).

³ Letter from Sen. Patrick Leahy, Chairman, Senate Judiciary Committee, to Sen. Jeff Sessions, Ranking Member, Senate Judiciary Committee (June 7, 2010).

⁴ See, e.g., Letter from Gary Stern, General Counsel, National Archives & Records Administration, to Sen. Patrick Leahy, Chairman, Senate Judiciary Committee, and Sen. Jeff Sessions, Ranking Member, Senate Judiciary Committee (June 4, 2010); Letter from Gary Stern, General Counsel, National Archives & Records Administration, to Sen. Patrick Leahy, Chairman, Senate Judiciary Committee, and Sen. Jeff Sessions, Ranking Member, Senate Judiciary Committee (June 11, 2010); Letter from Gary Stern, General Counsel, National Archives & Records Administration, to Sen.

“any Senator on the Senate Committee on the Judiciary, any member of Committee staff, and any others agreed upon by the Chairman and Ranking Member.”⁵ If, however, you would prefer broader restrictions on access to the Committee Confidential documents we have thus far received, I am happy to discuss that with you.

I look forward to seeing you at the hearing on September 4.

Sincerely,



Charles E. Grassley
Chairman

Patrick Leahy, Chairman, Senate Judiciary Committee, and Sen. Jeff Sessions, Ranking Member, Senate Judiciary Committee (June 18, 2010); Letter from Gary Stern, General Counsel, National Archives & Records Administration, to Sen. Patrick Leahy, Chairman, Senate Judiciary Committee, and Sen. Jeff Sessions, Ranking Member, Senate Judiciary Committee (June 19, 2010); Letter from Gary Stern, General Counsel, National Archives & Records Administration, to Sen. Charles E. Grassley, Chairman, Senate Judiciary Committee, and Sen. Dianne Feinstein, Ranking Member, Senate Judiciary Committee (Mar. 10, 2017).

⁵ Letter from William Burck to Sen. Charles E. Grassley, Chairman, Senate Judiciary Committee (Aug. 9, 2018).



United States Senate
WASHINGTON, DC 20510-0504
<http://feinstein.senate.gov>

August 10, 2018

The Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

I am concerned with the lack of transparency in this Committee's consideration of Brett Kavanaugh to the U.S. Supreme Court. As you know, Judiciary Democrats have asked for access to his full record during his tenure in the White House, as was done most recently with the nomination of Elena Kagan. Unfortunately, our request has not been supported by your side of the aisle. Now, I understand that even among the limited documents that are being provided by President Bush's private attorney, Republicans are requesting that the majority of these documents also not be made available to the public and be treated as "Committee Confidential." I cannot support such a request.

The longstanding practice of this Committee and the Senate is to ensure as much transparency as possible, and to ensure that the American people and the Senate have access to a nominee's full record. In fact, during Elena Kagan's nomination, 99% of her White House record was provided to the Committee and the public.

As stated in prior letters, those on this side of the aisle strongly object to changes in how documents are produced to the Committee and the public. For the first time, the Committee is not receiving presidential library documents from the Archivist, and instead is relying on George W. Bush's personal lawyer Bill Burck—who also worked as Kavanaugh's deputy in the Bush White House—to pick and choose which documents are distributed.

Specifically, of the approximately 900,000 pages you requested, Mr. Burck has so far produced roughly 174,000 pages of documents to this Committee—a small fraction of your request (19%) and an even smaller portion of the total pages

relevant to Mr. Kavanaugh's work in the Bush White House (2%). Now, we learn that Mr. Burck has requested that of all of the documents he has chosen to produce, only 5,700 pages should be provided to the American public—about .08% of Mr. Kavanaugh's total record.

Simply stated, this is unacceptable. The Senators and the public must have access to Mr. Kavanaugh's full record. Additionally, this Committee has never allowed a third party to control what information is kept confidential, and should not do so now when we are considering a lifetime appointment to the U.S. Supreme Court. As you know, under longstanding Committee practice, information received by this Committee is never automatically treated as "Committee Confidential"; rather, the Chairman and Ranking Member must agree on what information is to be kept confidential on a case-by-case basis. This is something you have insisted upon, as it is consistent with your longstanding position on keeping Committee information confidential only as absolutely necessary and with your commitment to transparency.

In this instance, I write to inform you I cannot agree to keep Mr. Kavanaugh's records from his tenure in the White House hidden from the public. Obviously, as has been done historically, the Committee must protect certain records that contain personal information or other sensitive material, and I have directed my staff to work with your staff on this. However, a blanket assertion that documents must be hidden from the public is contrary to the Committee's longstanding practice and undermines the public interest in transparency.

A full understanding of Mr. Kavanaugh's White House record, the positions he has taken, and the choices he has made throughout his career is essential to enable the Senate to carry out its constitutional duty to provide advice and consent on his nomination. It's also necessary to allow the public to make up its own mind about whether Mr. Kavanaugh is suitable for a lifetime appointment to the Supreme Court. The Senate and the American people deserve no less.

Sincerely,



Dianne Feinstein
Ranking Member

WRITER'S DIRECT DIAL NO.
(202) 538-8120

WRITER'S EMAIL ADDRESS
williamburck@quinnemanuel.com

August 11, 2018

VIA ELECTRONIC MAIL

The Honorable Charles Grassley
Chairman, United States Senate Committee on
the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley:

On behalf of former President George W. Bush, we enclose our second production of publicly releasable versions of records that were initially produced to the Committee on August 2, 2018 relating to Judge Brett M. Kavanaugh's service in the White House Counsel's Office. We are making these documents available via FTP link to the designated Committee staff, with the "Committee Confidential" stamp removed from these documents. They may be released immediately to the public if the Committee so chooses. The public production of these records requested by the Committee does not constitute a waiver of any privileges that may apply in any other context to the subject matters to which these records relate.

Respectfully,



William A. Burck

cc: The Honorable Dianne Feinstein



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10 August 2018

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510-0504

Dear Ranking Member Feinstein:

Thank you for your letter of August 6, 2018, requesting that I reconsider the position set forth in my August 2, 2018, letter to Minority Leader Schumer concerning NARA's interpretation of and practice under section 2205(2)(C) of the Presidential Records Act (PRA), 44 U.S.C. § 2205(2)(C).

As discussed in my letter to the Minority Leader, we sought further legal guidance on this issue from the Department of Justice, and DOJ confirmed our legal interpretation of section 2205(2)(C). My August 2 letter also noted NARA's longstanding and consistent practice of responding only to requests from committee chairs under this section.

Accordingly, I am not in a position to change our understanding of the law or our practice in this particular instance.

Sincerely,

David S. Ferriero
The Archivist of the United States

cc: The Honorable Charles E. Grassley
Chairman
U.S. Senate Committee on the Judiciary

1000 COLLEGE AVENUE, COLLEGE PARK, MD 20740

TEL: 202-237-5900 FAX: 202-337-6000

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August 14, 2018

VIA ELECTRONIC MAIL

The Honorable Charles Grassley
Chairman, United States Senate Committee on
the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley:

On behalf of former President George W. Bush, we enclose a production of publicly releasable versions of records that were initially produced to the Committee on August 9, 2018 relating to Judge Brett M. Kavanaugh's service in the White House Counsel's Office. We are making these documents available via FTP link to the designated Committee staff, with the "Committee Confidential" stamp removed from these documents. They may be released immediately to the public if the Committee so chooses. The public production of these records requested by the Committee does not constitute a waiver of any privileges that may apply in any other context to the subject matters to which these records relate.

Respectfully,



William A. Burck

cc: The Honorable Dianne Feinstein

quinn emanuel urquhart & sullivan, llp

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From: Davis, Mike (Judiciary-Rep (b) (6))
Sent: Friday, August 24, 2018 7:26 PM
To: Davis, Mike (Judiciary-Rep)
Subject: RE: Senate Judiciary Committee Status Update
Attachments: SJC Status Update.pdf

1. Chairman Chuck Grassley is continuing to fulfill his commitment to process the lower-court and other non-SCOTUS nominees, while the Senate Judiciary Committee considers the nomination of Judge Brett Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States.

2. Yesterday, Chairman Chuck Grassley and the Senate Judiciary Committee held its 22nd markup meeting of 2018, in which they:

a. Reported (voted) to the floor the following 3 U.S. Attorney nominees:

1. Ariana Fajardo Orshan (S.D. Fla.) (reported to floor on 8/23/2018)
2. Peter G. Strasser (E.D. La.) (reported to floor on 8/23/2018)
3. G. Zachary Terwilliger (E.D. Va.) (reported to floor on 8/23/2018)

b. "Burned the hold" (see page 12 of the attached) on the following 12 judicial nominees (2 circuits and 10 districts), so we can report (vote) them to the Senate floor (for a confirmation vote) at our next markup meeting (likely next Thursday, August 30th, if the Senate stays in session):

1. Ryan Nelson (CA9 / ID) (hearing held on 7/11/2018; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)
2. Richard Sullivan (CA2 / NY) (hearing held on 8/1/2018; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)
3. Stephen Clark (E.D. Mo.) (hearing held on 7/11/2018; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)
4. John O'Connor (N.D., E.D., W.D. Okla.) (hearing held on 7/11/2018; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)
5. Joshua Wolson (E.D. Pa.) (hearing held on 7/11/2018; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)
6. Diane Gujarati (E.D.N.Y.) (hearing held on 8/1/2018; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)
7. Eric Ross Komitee (E.D.N.Y.) (hearing held on 8/1/2018; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)
8. Rachel P. Kovner (E.D.N.Y.) (hearing held on 8/1/2018; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)
9. Lewis J. Liman (S.D.N.Y.) (nomination received on 5/15/2018) (hearing held on 8/1/2018; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)
10. John L. Sinatra, Jr. (W.D.N.Y.) (nomination received on 5/15/2018) (hearing held on 8/1/2018; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)
11. Mary Kay Vyskocil (S.D.N.Y.) (nomination received on 5/15/2018) (hearing held on 8/1/2018; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)
12. Gary Richard Brown (E.D.N.Y.) (hearing already held on 10/21/2015; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)

c. "Burned the hold" on the following Executive Branch nominee, so we can report (vote) them to the Senate floor (for a confirmation vote) at our next markup meeting (likely next Thursday, August 30th, if the Senate stays in session):

1. James Carroll, Director of the Office of National Drug Control Policy, Executive Office of the President (hearing held on 7/11/2018; hold burned on 8/23/2018; expect to report to floor on 8/30/2018)
3. On Wednesday, Chairman Chuck Grassley and the Senate Judiciary Committee held its 14th of up to 20 nominations hearings of 2018. Senator Tillis served as acting chairman. The nominees included:

Panel I

Jonathan A. Kobes, to be United States Circuit Judge for the Eighth Circuit

Panel II

Kenneth D. Bell, to be United States District Judge for the Western District of North Carolina

Carl J. Nichols, to be United States District Judge for the District of Columbia

Martha Maria Pacold, to be United States District Judge for the Northern District of Illinois

Mary M. Rowland, to be United States District Judge for the Northern District of Illinois

Steven C. Seeger, to be United States District Judge for the Northern District of Illinois

Chairman Chuck Grassley and the Senate Judiciary Committee can report (vote) these 6 nominees to the Senate floor as soon as the markup meeting slated for Thursday, September 20th.

4. On Wednesday, Senate Majority Leader Mitch McConnell filed cloture petitions (limit floor debate) on 1 Main Justice and 12 district-court nominees:
 1. Joseph Hunt, nominee for Assistant Attorney General for the Civil Division (reported to floor on 4/19/2018; cloture petition filed on 8/22/2018)
 2. Terry Moorer (S.D. Ala.) (reported to floor on 12/7/2017; re-reported to floor on 1/18/2018) (cloture petition filed on 8/22/2018)
 3. Charles Goodwin (W.D. Okla.) (reported to floor on 1/18/2018) (cloture petition filed on 8/22/2018)
 4. Stan Baker (S.D. Ga.) (reported to floor on 1/18/2018) (cloture petition filed on 8/22/2018)
 5. Barry Ashe (E.D. La.) (reported to floor on 2/8/2018) (cloture petition filed on 8/22/2018)
 6. James Sweeney II (S.D. Ind.) (reported to floor on 2/8/2018) (cloture petition filed on 8/22/2018)
 7. Marilyn Horan (W.D. Pa.) (reported to floor on 2/15/2018) (cloture petition filed on 8/22/2018)
 8. Susan Baxter (W.D. Pa.) (reported to floor on 2/15/2018) (cloture petition filed on 8/22/2018)
 9. William Jung (M.D. Fla.) (reported to floor on 3/15/2018) (cloture petition filed on 8/22/2018)
 10. Dominic Lanza (D. Ariz.) (reported to floor on 4/19/2018) (cloture petition filed on 8/22/2018)
 11. C.J. Williams (N.D. Iowa) (reported to floor on 4/19/2018) (cloture petition filed on 8/22/2018)
 12. Robert Summerhays (W.D. La.) (reported to floor on 5/10/2018) (cloture petition filed on 8/22/2018)
 13. Alan Albright (W.D. Tex.) (reported to floor on 5/24/2018) (cloture petition filed on 8/22/2018)

Under the Senate rules, the Senate Democrats could require up to 30 hours of floor debate for each of these nominees, before a confirmation vote on each nominee. Unless the Senate Democrats wish to work through the Labor Day weekend, Chairman Chuck Grassley wants all 13 of these nominees confirmed next week. If the Senate confirms these 12 judicial nominees, the Senate will have confirmed 65 of President Trump's judicial nominees (26 circuit judges and 39 district judges).

5. Attached is the latest status update of every nominee pending in, or processed through, the Senate Judiciary Committee this Congress.

6. There are currently 64 nominees—1 circuit court, 42 district court, 2 Article I court, 3 Main Justice officials, 4 US Attorney, 8 US Marshals, 3 members of the Privacy and Civil Liberties Oversight Board, and 1 other Executive Branch nominee—processed through the Senate Judiciary Committee and awaiting a vote by the full Senate.
7. Chairman Chuck Grassley has long called on the Senate to work full workweeks – and evenings and weekends, as needed – to confirm the backlog of nominees pending on the Senate floor.
8. Today, Fred Barnes at the Weekly Standard published the following feature story on Chairman Chuck Grassley:

Chuck Grassley's Moment

FRED BARNES

- [@FREDBARNES](#)

August 24, 2018 at 3:00 AM

The chairman of the Judiciary Committee is no longer Senator Bipartisan.

Corning, Iowa

Senator Chuck Grassley seems out of place in Washington. He loves to eat at Perkins, the Midwest restaurant chain. But the nearest one from Washington is 60 miles away in Winchester, Virginia—too far for dinner. For dessert, there's Dairy Queen, but not on Capitol Hill. His favorite summer interlude is a day at the Iowa state fair. "It's a kind of reminder of everything we have in Iowa and not just agriculture," he says. He gives tours of the massive fairgrounds to out-of-staters from time to time.

Next to being a Republican senator, Grassley is best known as the nation's foremost critic of the History Channel. He loved the old shows about World War II but says the channel airs too little

actual history now. “When I turned it on in July, I got a show about pawnbrokers,” he says. So he tweets about history instead and calls his Twitter feed “the real history channel.”

But forget the charming folkways. Grassley is now, in his 38th year in the Senate, one of the strongest players on Capitol Hill—and one of the boldest. He once was Senator Bipartisan, but he’s put that phase behind him. Confronted by Democrats’ unprincipled, no-holds-barred opposition to Supreme Court nominee Brett Kavanaugh and other Republican initiatives, he had to. Grassley also had a reputation for being deliberate, but an adviser refers to him these days as “aggressive.”

As chairman of the Senate Judiciary Committee, he’ll run the hearings, starting September 4, on the confirmation of Kavanaugh, who will almost certainly become the fifth conservative on the Supreme Court, replacing the retiring Anthony Kennedy.

Democrats are apoplectic and have reason to be. They’ve been crushed by Grassley’s forceful response to their attacks. It helps that Kavanaugh, a judge on the U.S. Court of Appeals for the District of Columbia, is an impressive jurist. But what’s striking is the commanding position Grassley has put Kavanaugh in to get through the Senate confirmation process unscathed.

Even before Kavanaugh was nominated, Democrats insisted the “Biden rule” should apply to any High Court choice by President Trump. As interpreted by Senate minority leader Chuck Schumer, this means a Supreme Court nominee should not be considered in an election year like 2018, just as Senate majority leader Mitch McConnell invoked the rule in 2016, declining to hold hearings on President Obama’s choice for the court.

This notion was quickly shot down by Grassley, with an assist from *Washington Post* fact checker Glenn Kessler. Joe Biden, then a Democratic senator from Delaware, had been clear when he

enunciated the rule in 1992 that he was talking about *presidential* election years. Grassley knew this. He's been in the Senate for 37 years, and he was on the Judiciary Committee when Biden was chairman. In a flash, the Biden rule vanished as a talking point.

The day after President Trump named Kavanaugh, Republican senators and their aides were bombarded with background material from Grassley. The idea here—part of it anyway—was to arm Republicans to push back against Democratic attacks. That was followed by a barrage of statements and letters of support for Kavanaugh.

Democrats had trouble keeping up with Grassley's fast pace. They now plan to talk about issues like abortion and Obamacare, but that's where they started. There's a name for this: returning to square one. It's not a sign you're making progress.

Grassley tries to visit each of Iowa's 99 counties at least once a year. In early August, he made five appearances around Iowa. In Conroy, he dealt with hostile questioners—no problem. Grassley has mastered the Q&A. He answers in two or three sentences, then turns immediately to the next questioner, leaving no time in between for boos or heckling.

Kavanaugh isn't the only big-time issue Grassley has on his mind—that is, an issue that attracts national media attention for weeks or months. The senator has moved where the Republican-led Senate Intelligence Committee has feared to tread and where Democrats refuse to. Grassley is investigating the FBI to find out why it submitted a dossier with tales of collusion between the Trump campaign and Russians to gain approval to wiretap a low-level Trump adviser.

In effect, he's joined forces with Rep. Devin Nunes (R-Calif.), the chairman of the House Intelligence Committee. Democrats and the media loathe Nunes, but Grassley likes him. It was the

Nunes committee that subpoenaed the bank records that revealed the Hillary Clinton campaign and the Democratic National Committee paid for the dossier.

As a Senate committee chairman, Grassley hasn't had to endure harsh treatment—so far. The Washington press corps is wary of taking on Grassley, Senator Lindsey Graham (R-S.C.), and the committee's powerhouse investigative staff. The lonely chairman of the House committee is fair game to the brave journalists in the anti-Nunes cabal.

But Grassley has paid a price for joining the Nunes side. He has split with his longtime friend, the ranking Democrat on the Judiciary Committee, California senator Dianne Feinstein. They're the two oldest senators. Feinstein is 85, Grassley 84. Senate rules require the approval of both the committee chairman and the ranking minority member to authorize an investigation with subpoena power. She refused. By Capitol Hill standards, it was a historic rupture.

Senate Democrats are still on a quest for evidence of Trump collusion with Russia during the 2016 presidential campaign, but so far they're holding an empty bag. The GOP probe is alive and well and scares Democrats. They're desperate to block it, for partisan reasons. Feinstein is running for reelection. And Obama administration officials could be implicated in spying on the Trump campaign, a Watergate-sized transgression.

Grassley lacks subpoena power, but Nunes has it. (In the House, the chairman has sole subpoena power.) Working as a team, the two can swap information. The dossier, by the way, has turned out to be nothing more than a tip sheet—a poor one at that. Sued for libel in London, its author Christopher Steele said under oath that the dossier contained “raw intelligence.” Its “unverified” leads “warranted further investigation.” Steele couldn't vouch for the dossier's truthfulness.

Grassley, along with Graham and other committee Republicans, didn't buckle. He and Graham have asked the Justice Department to investigate Steele, ostensibly to see if he lied to the FBI. That's a pretext. Grassley wants to learn more, especially about who ordered surveillance of a low-level Trump adviser. Feinstein wants everyone to know less.

One might never suspect it, but Grassley has a sense of humor. And guess who he makes fun of? Yes, the hapless Chuck Schumer. Grassley published a piece in the *Wall Street Journal* in early August that recalled Schumer's vow to oppose Kavanaugh "with everything I've got." Schumer was just being honest, according to Grassley. Yet Democrats are demanding more and more and more Kavanaugh documents. How many more do Schumer and Democrats need, he asked, "when they're already voting no?"

All this leads to a big question: Why has Grassley been so effective in guiding Kavanaugh

toward confirmation as a justice of the Supreme Court? Grassley is not a lawyer. He's a farmer by trade, growing corn and soybeans on his farm in northeast Iowa. He graduated from the University of Northern Iowa, not Yale or Harvard. He's been influenced by the right people. He filled the seat of H. R. Gross when he was elected to the House in 1974, bucking a Democratic tide. Don't remember H. R. Gross? He was the congressman who was always on the floor when the House was in session, challenging excessive spending. Grassley was then elected to the Senate in the Reagan landslide of 1980.

If he's not the hardest-working member of Congress, he's close. He doesn't have time to read newspapers during the week when he's working on Capitol Hill. So he saves all the papers and reads them on the weekend. He hasn't missed a Senate vote since 1993. He's been on the Judiciary Committee for all 37 years of his Senate career. Kavanaugh's hearing will be the 15th for a Supreme Court nominee he's participated in. He says the most impressive was Robert Bork.

Grassley is smarter, better prepared, more clever, and, more often than not, more experienced than his opponents. In 2016, he joined Mitch McConnell in refusing to take up Obama's Supreme Court nominee. He had breakfast with Judge Merrick Garland, the unlucky pick, but held no hearing. Democrats howled, but they would have done the same had they controlled the Senate with a lame-duck Republican as president.

Grassley was also running for reelection in 2016, and Democrats sought to capitalize on the lack of a hearing. They recruited former Iowa lieutenant governor Patty Judge to run against him. As usual, the media took its cue from Democrats and declared Grassley in trouble. The Democratic challenger's theme was "Do your job." Judge said she was the "one judge" Grassley could not ignore. Grassley won, 60 percent to 36 percent.

In the Senate, Grassley has been a respected figure for decades. He's carved out issues of his own—ethanol, wind farming, whistleblowers, criminal justice reform, tax fairness, spending restraint. Most of his issues don't thrill the national press. But a Supreme Court fight does—even the dry issue of what Kavanaugh documents and how many should be made public, and how long the period should last between the nomination and the vote on confirmation. Democrats were

interested in these matters because they offered a way to drag out the process past the midterm election. Delay is their only hope. If that happens, the Kavanaugh nomination might be doomed.

Grassley was ready. So were his staff, McConnell, the White House, the Kavanaugh team, and well-heeled conservative groups. They were loaded with numbers that Grassley has trotted out early and often. They showed the nomination was not being rushed to a vote, nor was Grassley skimping on documents. Kavanaugh, for instance, has released more documents than the past five nominees.

The numbers killed Schumer. After Schumer declared in July that Kavanaugh would threaten “the rights and freedoms” that Americans enjoy, Grassley told him, “Loosen up, Chuck.” Good advice then, good advice now.



FRED BARNES

is executive editor of The Weekly Standard.

9. Today, Chairman Chuck Grassley issued the following press release:



COMMITTEE *on the* **JUDICIARY**
CHAIRMAN CHUCK GRASSLEY WWW.JUDICIARY.SENATE.GOV

FOR IMMEDIATE RELEASE

Friday, August 24, 2018

Historic Transparency: Volume of Kavanaugh’s Public Exec Branch Material Tops Levels of Past SCOTUS Nominees

With latest release, more than 200,000 pages now public

WASHINGTON – Public material from Judge Brett Kavanaugh’s Executive Branch legal service now exceeds that of any previous Supreme Court nominee. The Senate Judiciary Committee today released more than 25,400 pages from Judge Kavanaugh’s service as a White House lawyer, bringing the total volume of public Executive Branch materials to more than 200,000 pages. The previous high water mark for such material was roughly 180,000 pages released during the committee’s consideration of Justice Neil Gorsuch.

The Committee has received more Executive Branch records in its consideration of Judge Kavanaugh’s nomination than for any previous Supreme Court nominee. The material was initially produced to the committee by President George W. Bush on a confidential basis while it was prepared for public release. Today’s release is the fifth subset of that material to become public. It includes:

- [Cover Sheet](#)
- [08-02-18 GWB Document Production \(Set 3, Pages 1-10,000\)](#)
- [08-02-18 GWB Document Production \(Set 3, Pages 10,001-20,000\)](#)
- [08-02-18 GWB Document Production \(Set 3, Pages 20,001-25,486\)](#)

Nomination material is being posted [HERE](#) as it becomes available.

The Chairman’s team has already reviewed more than 95 percent of the 408,000-plus pages of material submitted by President Bush, as well as more than 22,000 pages of documents from the Office of Independent Counsel Ken Starr provided by the National Archives and Records Administration. That’s in addition to reviewing other public material, including more than 10,000 pages of the judicial opinions that Judge Kavanaugh wrote or joined in his 12 years of service on the D.C. Circuit and more than 17,000 pages of academic writings, speeches and other material Judge Kavanaugh [submitted to the committee](#) in response to its bipartisan questionnaire. At this current pace, the Chairman’s team will read every page of Judge Kavanaugh’s complete record well before the committee hearing begins on September 4th.

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10. Yesterday, Chairman Chuck Grassley delivered the following prepared statement:



COMMITTEE *on the* **JUDICIARY**
CHAIRMAN CHUCK GRASSLEY WWW.JUDICIARY.SENATE.GOV

Prepared Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Judiciary Committee
Executive Business Meeting

August 23, 2018

Good morning. Today, we have twelve judicial nominees on the agenda as well as the nominee to serve as Director of National Drug Control Policy. At the request of the minority, we will hold over these nominees. If we have enough members, we'll also vote on three U.S. Attorney nominees.

Before we turn to today's agenda, I'd like to speak briefly on the Supreme Court nomination. Over the past few days, several of my Democratic colleagues issued statements demanding that Judge Kavanaugh's confirmation hearing be delayed. They claim this is necessary because President Trump's former lawyer recently pleaded guilty to criminal violations of campaign finance law, allegedly at President Trump's direction. But the Senate Democrats are not united on their demand for delay. Senator Manchin, for example, wants Judge Kavanaugh's hearing to proceed as planned. I agree.

I'm not going to delay Judge Kavanaugh's confirmation hearing.

There's no precedent for delaying a hearing in these circumstances. In fact, there's clear precedent pointing the other way. In 1994, President Clinton nominated Justice Breyer to the Supreme Court. President Clinton was, at the time, under investigation by Independent Counsel Robert Fiske in connection with the Whitewater land deal. Indeed, President Clinton's own records were under a grand jury subpoena. Yet the Senate confirmed Justice Breyer during all this by a vote of 87-9.

Moreover, President Clinton was under investigation for much of his presidency and was eventually impeached for committing perjury. But the Senate didn't stop confirming his lifetime appointments to the bench. President Trump is not even close to being in the same situation as President Clinton.

My colleagues' pleas to delay the hearing ring hollow. I'll tell you why. Liberal outside groups and Senate Democratic leaders decided to oppose the President's Supreme Court nominee by any means necessary. Some even announced their opposition before Judge Kavanaugh was nominated. Minority Leader Schumer said he'd fight Judge Kavanaugh with everything he's got. Some Members of this Committee announced their opposition before giving him any consideration whatsoever. The goal has always been the same: delay the confirmation process as much as possible and hope Democrats take over the Senate in the midterm elections.

I'd like to address a few other inaccuracies about the confirmation process. Yesterday, my friend, the senator from Illinois, said that only 6% of Judge Kavanaugh's Executive Branch documents are available to the public. That's some fuzzy math. To get to this absurd figure, you have to assume that the universe of documents includes emails sent by other people in the White House merely mentioning Brett Kavanaugh's name during the eight years of the Bush Administration.

Why would my friend use that figure in his calculations? After all, we didn't receive documents merely mentioning Justice Kagan's name—only those documents to and from her. When you use the actual numbers of documents we requested versus documents we've made public, it's clear that a substantial number of Judge Kavanaugh's documents are available to the public.

My friends on the other side also claim that 99% of Justice Kagan's documents were disclosed. Not true. They apply a different standard than the one they apply to calculate Judge Kavanaugh's figure. They don't include the 60,000 or so documents mentioning Justice Kagan's name in their calculations. But they include mentions of Judge Kavanaugh's name in saying we've only seen 6% of his documents. They also don't include Justice Kagan's Solicitor General documents, saying they're only looking at White House records.

This is just pure partisan math. All to distract from the fact that we have received almost three times the number of pages for Judge Kavanaugh than we received for Justice Kagan. This is on top of the fact that we have Judge Kavanaugh’s twelve-year judicial record to look at, while we didn’t have any judicial writings to review for Justice Kagan. This is the most transparent and open Supreme Court confirmation process of all time. You’re entitled to your own opinions about Judge Kavanaugh, but you’re not entitled to your own facts about the transparency of this confirmation process.

We are working to make as many of the documents we receive publicly available as soon as possible. It’s common practice to receive documents as “committee confidential”. We’ve done it in each of the last two Supreme Court confirmations. Here, we are holding documents confidential until we can assure ourselves that we won’t disclose sensitive, confidential information to the public.

My goal is to make as many publicly available as possible. I have instructed my staff to work with the legal teams for President Bush and President Trump to waive “committee confidentiality” for specific documents that my colleagues would like to use at the confirmation hearing. This is also consistent with how the Judiciary Committee has handled this issue in the past.

And, of course, all my Senate colleagues are welcome to review “committee confidential” documents at their convenience. We already have several computer stations setup for any senator to go—anytime, 24/7—and read any of the documents produced to the committee. Simply get in touch with my staff. They will make sure that each member has full access to the range of “committee confidential” documents.

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11. On Wednesday, Chairman Chuck Grassley delivered the following floor speech:



Prepared Floor Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Judiciary Committee
SCOTUS | Kavanaugh Hearing on Track for Sept 4
August 22, 2018
[\(VIDEO\)](#)

Over the past day, several of my colleagues issued statements calling for Judge Kavanaugh’s confirmation hearing to be delayed. They claim it’s because President Trump’s former lawyer recently pleaded guilty to criminal violations of campaign finance law, allegedly at President Trump’s direction.

I’m not going to delay Judge Kavanaugh’s confirmation hearing. There’s no precedent for delaying a hearing in these circumstances. In fact, there’s clear precedent pointing the other way. In 1994, President Clinton

nominated Justice Breyer to the Supreme Court. President Clinton was, at the time, under investigation by Independent Counsel Robert Fiske in connection with the Whitewater land deal. Indeed, President Clinton's own records were under a grand jury subpoena. Yet the Senate confirmed Justice Breyer by a vote of 87-9 during all this.

In fact, President Clinton was under investigation for much of his presidency and was impeached for committing perjury. But the Senate didn't stop confirming his lifetime appointments to the bench. President Trump is not even close to being in the same legal situation as President Clinton. My colleagues' pleas to delay the hearing ring false. I'll tell you why.

Liberal outside groups and Senate Democratic leaders decided to oppose the President's Supreme Court nominee by any means necessary. Some even announced their opposition before Judge Kavanaugh was nominated. The Minority Leader said he'd fight Judge Kavanaugh with everything he's got.

Members of the Judiciary Committee announced their opposition before giving him any consideration whatsoever. One member said voting for Judge Kavanaugh is "complicit in evil." Another member said Judge Kavanaugh threatens "destruction of the Constitution of the United States."

The goal has always been the same: delay the confirmation process as much as possible and hope Democrats take over the Senate in the midterm elections. The Ranking Member's hometown newspaper reported on this strategy recently, calling it an attempt to stall. The strategies might change, but the goal to obstruct the confirmation process remains unchanged.

First, Democratic leaders tried to apply the Biden Rule—which bars confirmations in presidential election years and which many Democrats previously said doesn't even exist—to midterm election years. When this failed—because it was flatly false—they changed strategies.

They tried pushing for an unprecedented disclosure of Judge Kavanaugh's Executive Branch documents, even though we've already received more pages of such documents than any previous Supreme Court nominee. And this is on top of his twelve-year judicial track record and other more relevant publicly available materials.

Now, they're trying to latch onto the legal troubles of President Trump's former associates. But, as I just explained, there's no precedent or logical reason for the Senate to decline to proceed on Judge Kavanaugh's nomination in these circumstances. It's just another attempt to block Judge Kavanaugh's confirmation by any means necessary.

On a related note, we are working to make as many of the documents we receive publicly available as soon as possible. It's common practice to receive documents as "committee confidential" until we can assure ourselves that we won't disclose sensitive, confidential information to the public.

Chairman Leahy did this during Justice Kagan's confirmation process, and I'm doing the same thing. This gives Judiciary Committee members a jump start on reviewing documents. The goal is to make as many publicly available as possible. I have promised to work with President Bush and President Trump to waive "committee confidentiality" for specific documents that my colleagues would like to use at the confirmation hearing. This is also consistent with how the Judiciary Committee has handled this issue in the past.

And, of course, all my Senate colleagues are welcome to review “committee confidential” documents at their convenience. Simply get in touch with my staff. They will make sure you have full access to the range of “committee confidential” documents.

One of my colleagues tweeted:

Chairman Grassley unilaterally deemed Kavanaugh records “committee confidential”. Penalty for release could include “expulsion” from the Senate, which hasn’t happened since the Civil War, for disloyalty to the Union. GOP is going that far to keep them secret.

This is absurd. He’s acting like the Senate has never received “committee confidential” documents before. It’s common practice. And it’s happened in previous Supreme Court nominations, under Democratic chairmen.

It’s regrettable that some of my colleagues on the other side of the aisle have politicized this process so much, and have such short memories. I yield the floor.

-30-



Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
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From: Davis, Mike (Judiciary-Rep)

Sent: Friday, August 17, 2018 12:30 AM

To: Davis, Mike (Judiciary-Rep) (b) (6)

Subject: RE: Senate Judiciary Committee Status Update

1. Chairman Chuck Grassley is fulfilling his commitment to continue processing the lower-court and other non-SCOTUS nominees, while the Senate Judiciary Committee considers the nomination of Judge Brett Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States.
2. On Thursday (8/16), following a committee hearing and vote by Chairman Chuck Grassley and the Senate Judiciary Committee, the Senate voted to confirm 2 more circuit judges:
 - a. **Judge A. Marvin Quattlebaum of South Carolina** to serve as a **Circuit Judge** on the **United States Court of Appeals for the Fourth Circuit**. The Senate voted **62-28**. The vote tally is here: https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=000183.

- b. **Judge Julius N. Richardson of South Carolina** to serve as a **Circuit Judge** on the **United States Court of Appeals for the Fourth Circuit**. The Senate voted **81-8**. The vote tally is here: https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=000185.

These 2 new circuit judges are President Trump's **25th and 26th circuit judges** – and **52nd and 53rd federal judges** – confirmed during the 115th Congress.

Of note, Senators Sherrod Brown (D-OH), Bob Casey (D-PA), and Debbie Stabenow (D-MI) voted against Judge Quattlebaum's nomination, even though 18 Senate Democrats put partisanship aside and supported his nomination. The other 7 Trump-state Democrats facing their voters this year voted for Judge Quattlebaum's nomination.

3. Attached is a spreadsheet of how each Senate Democrat has voted – or dodged voting – on President Trump's 53 judicial nominees confirmed by the Senate during the 115th Congress.
4. Below is how 10 Trump-state Democrats have voted on President Trump's appellate judges:
 - **Senator Tammy Baldwin (D-WI)** voted against Justice Gorsuch. Senator Baldwin has only voted for **7 of the 26 (26.9% = F) circuit judges** confirmed this Congress.
 - **Senator Sherrod Brown (D-OH)** voted against Justice Gorsuch. Senator Brown has only voted for **5 of the 26 (19.2% = F) circuit judges** confirmed this Congress.
 - **Senator Bob Casey (D-PA)** voted against Justice Gorsuch. Senator Casey has only voted for **7 of the 26 (26.9% = F) circuit judges** confirmed this Congress.
 - **Senator Joe Donnelly (D-IN)** has only voted for **15 of the 26 (57.6% = F) circuit judges** confirmed this Congress.
 - **Senator Heidi Heitkamp (D-ND)** has only voted for **16 of the 26 (61.5% = D-) circuit judges** confirmed this Congress.
 - **Senator Joe Manchin (D-WV)** has only voted for **16 of the 26 (61.5% = D-) circuit judges** confirmed this Congress. He even **skipped 3 votes**.
 - **Senator Claire McCaskill (D-MO)** voted against Justice Gorsuch. Senator McCaskill has only voted for **12 of the 26 (46.1% = F) circuit judges** confirmed this Congress. She even **skipped 4 votes**.
 - **Senator Bill Nelson (D-FL)** voted against Justice Gorsuch. Senator Nelson has only voted for **10 of the 26 (38.4% = F) circuit judges** confirmed this Congress. He even **skipped 2 votes**.
 - **Senator Debbie Stabenow (D-MI)** voted against Justice Gorsuch. Senator Stabenow has only voted for **7 of the 26 (26.9% = F) circuit judges** confirmed this Congress. She even **skipped a vote**.
 - **Senator Jon Tester (D-MT)** voted against Justice Gorsuch. Senator Tester has only voted for **11 of the 26 (42.3% = F) circuit judges** confirmed this Congress.
5. Chairman Chuck Grassley is continuing to help **shatter the all-time records for the confirmation of circuit judges**, while simultaneously helping to lead the efforts to confirm two new Supreme Court justices.

- a. Last year, Chairman Chuck Grassley helped lead the effort in setting the **all-time record for circuit judges confirmed during a president's first year in office, at 12 circuit judges confirmed.**
 - b. Earlier this year, Chairman Chuck Grassley helped lead the effort in setting the **all-time record for circuit judges confirmed during a president's first two years in office, at 23 circuit judges confirmed.**
 - c. Chairman Chuck Grassley intends to help lead the effort to **confirm at least 30 circuit judges during President Trump's first two years in office.**
 - d. Last year, Chairman Chuck Grassley helped lead the confirmation effort for **Justice Neil Gorsuch.**
 - e. This year, Chairman Chuck Grassley is helping to lead the confirmation effort for **Judge Brett Kavanaugh.**
6. Attached is the latest status update of every nominee pending in, or processed through, the Senate Judiciary Committee this Congress.
 7. There are currently 61 nominees—1 circuit court, 42 district court, 2 Article I court, 3 Main Justice officials, 1 US Attorney, 8 US Marshals, 3 members of the Privacy and Civil Liberties Oversight Board, and 1 other Executive Branch nominee—processed through the Senate Judiciary Committee and awaiting a vote by the full Senate.
 8. Chairman Chuck Grassley has long called on the Senate to work full workweeks – and evenings and weekends, as needed – to confirm the backlog of nominees pending on the Senate floor.
 9. On Thursday (8/16), Chairman Chuck Grassley delivered the following prepared statement:



Prepared Statement by Senator Chuck Grassley of Iowa
 Chairman, Senate Judiciary Committee
 Executive Business Meeting
 August 16, 2018

[First Paragraph Omitted]

Before we turn to today's agenda, I'd like to speak briefly on the Supreme Court nomination. I announced last week that Judge Kavanaugh's confirmation hearing will begin on September 4. Senators will have had 57 days between the announcement of Judge Kavanaugh's nomination and the start of the hearing. This is a longer period than senators had for Justices Sotomayor, Kagan, and Gorsuch.

This longer period of time is just another example of how this is the most transparent confirmation process of all time. In his twelve years on the D.C. Circuit, Judge Kavanaugh issued more than 300 opinions and joined hundreds more. As Senators Schumer and Leahy said during Justice Sotomayor's confirmation process, a nominee's judicial record is the best way to evaluate a nominee. Judge Kavanaugh also submitted more than 17,000 pages with his bipartisan Judiciary Committee questionnaire—the most robust questionnaire ever sent to a nominee.

We've also received nearly 250,000 pages of documents from Judge Kavanaugh's service in the Executive Branch. This is already more than any previous Supreme Court nominee, with many more documents to come. Most are already publicly available, and we're working to make the vast majority of them publicly available as quickly as possible. We have plenty of time to review all these materials before the hearing. In fact, the majority staff has already reviewed nearly 80 percent of them.

Unfortunately, some have tried to criticize what is the most transparent confirmation process in history. But they're failing. And they're failing because Democratic leaders have made their true goal obvious: stall the confirmation as long as possible in the hope that Democrats take over the Senate in the midterm elections.

They tried unsuccessfully to apply the Biden Rule—which bars confirmations during presidential election years and which they used to say didn't even exist—to midterm election years. When that fell flat, they generated a phony controversy about documents in a desperate attempt to delay the confirmation.

Lest there be any doubt, we are following the precedent established during Justice Kagan's confirmation. Like with Justice Kagan, we are requesting a very significant number of Judge Kavanaugh's documents from his time in the Executive Branch. But both sides agreed not to ask for internal documents from Justice Kagan's time in the Solicitor General's Office because of their sensitivity. Likewise, we are not asking for Judge Kavanaugh's documents from his time as staff secretary. These documents are even more sensitive, because they contain advice sent directly to the President and are at the heart of executive privilege.

Some have said that we need these documents because Judge Kavanaugh stated that his time as staff secretary was formative for him. Well, Justice Kagan described her time as solicitor general as indicative to how she would serve as a justice. We still didn't ask for her SG papers, and we won't ask for Judge Kavanaugh's staff secretary papers.

Additionally, some of my colleagues have forgotten that we had a more compelling need for Justice Kagan's documents because she had no judicial record—she had issued zero opinions and joined zero opinions at the time she was nominated. Judge Kavanaugh, by contrast, has issued over 300 opinions and joined hundreds more in twelve years on the bench. Despite having a less compelling need for them, the Senate is still going to receive hundreds of thousands of more pages of documents from Judge Kavanaugh's time as a government lawyer than we did for Justice Kagan.

There have been some criticisms of the way in which the review is being handled. These criticisms are groundless. First of all, the National Archives are not being cut out of the process. President Bush is legally authorized to review his administration's documents and decide which ones to release to the Senate and claim that others are privileged. That's exactly what his team is doing now.

Additionally, some have labeled Bill Burck, the lawyer leading this review for President Bush, a "partisan lawyer." He's not. He's a partner at one of the most liberal law firms in the country and has been President Bush's Presidential Records Act representative since 2009. Mr. Burck handled the initial review of Justice Gorsuch's documents, and there were no complaints then.

I also don't recall complaints of "partisan lawyers" reviewing Justice Kagan's and Justice Sotomayor's documents.

Bruce Lindsey—who was national director of President Clinton's 1992 campaign, senior lawyer and "fixer" in the White House, and longtime CEO of the Clinton Foundation—reviewed Justice Kagan's documents. Leslie

Kiernan, also prominent in Democratic politics, reviewed Justice Sotomayor's documents before the Senate received them. If these individuals could review nominees' documents before producing them to the Senate, Mr. Burck can as well.

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10. On Thursday (8/16), Chairman Chuck Grassley released the following statement:



FOR IMMEDIATE RELEASE

Thursday, August 16, 2018

Committee Receives New Production of Kavanaugh Records

Grassley calls on NARA to prioritize specific documents ahead of hearing

WASHINGTON – The Senate Judiciary Committee last night received another production of documents related to Judge Brett Kavanaugh's service as a White House lawyer, as the committee continues to evaluate his nomination to the U.S. Supreme Court. The [latest production](#) from the Office of President George W. Bush totals more than 64,312 pages. The committee now has more than 248,000 pages of Executive Branch material related to Judge Kavanaugh. The previous high water mark for similar material during consideration of Supreme Court nominees was roughly 180,000 pages related to Justice Neil Gorsuch.

In an extraordinary act of transparency, President Bush's Presidential Records Act (PRA) representative also provided to the committee a list of records produced by the National Archives and Records Administration (NARA) to President Bush that his representatives have decided to withhold from the committee on the ground that they are "personal records" under the PRA to which the Committee is not entitled. In a [letter today](#), Senate Judiciary Committee Chairman Chuck Grassley asked NARA immediately to prioritize its review of the material identified on that list and make its own determination as to whether those documents are responsive to the Committee's request.

"The Committee requests that you prioritize your review of the documents identified on the enclosed manifest and produce to the Committee any responsive documents identified on that manifest on a rolling basis as soon as possible, consistent with the production procedures set forth in the Committee's section 2205 request," Grassley said in the letter.

Even without Grassley's prioritization request, NARA will review all of the documents identified on the list supplied by President Bush during the course of its review of materials requested by the committee. As part of that review, NARA will make its own, independent determination whether the documents are non-responsive personal records or responsive Presidential records. Grassley has requested only that NARA prioritize its review of the documents on the list and make its independent determination as to the documents' responsiveness no

later than August 31. This request will ensure that the committee is able to review all non-privileged material responsive to the committee's request before the confirmation hearing, which begins September 4.

The committee requested records from Judge Kavanaugh's service as an Executive Branch lawyer and records related to his nomination to the U.S. Court of Appeals for the D.C. Circuit. Under the PRA, the committee is entitled to Presidential records that the current and former Presidents determine are not privileged. President Bush is providing the committee with Presidential records that are not privileged. Under today's request, records that Bush's team believe are not Presidential records will be reviewed by NARA and provided to the committee if NARA determines them to be official records under the PRA. More on the committee's review process is available [HERE](#).

Grassley's letter to the NARA follows:

August 16, 2018

Mr. Gary M. Stern
General Counsel
National Archives and Records Administration
8601 Adelphi Road, Suite 3110
College Park, MD 20740-6001

Dear Mr. Stern:

I write with regard to this Committee's request pursuant to 44 U.S.C. § 2205(2)(C) for special access to certain Presidential records from Judge Brett M. Kavanaugh's service in the White House from 2001 to 2003. I submitted that request to NARA on July 27, 2018, and you initially responded to that request on August 2, 2018.

I thank you and your NARA colleagues who are working on the Committee's section 2205 request. I understand that NARA has devoted unprecedented resources to that request.

The Committee's section 2205 request did not ask NARA to produce documents in any particular order. The Committee now believes, however, that prioritizing the production of certain documents would best facilitate the Committee's review of Judge Kavanaugh's record. Enclosed with this letter is a manifest of document control numbers. It is the Committee's understanding that these control numbers correspond to certain documents housed within NARA's archives. The Committee requests that you prioritize your review of the documents identified on the enclosed manifest and produce to the Committee any responsive documents identified on that manifest on a rolling basis as soon as possible, consistent with the production procedures set forth in the Committee's section 2205 request. In your production transmittal letter, I ask that you identify specifically any document from the enclosed manifest that is responsive to the Committee's section 2205 request. If none of the documents identified on the enclosed manifest is responsive, please inform the Committee of that fact as soon as your review of those documents is complete. Finally, I ask that you complete the rolling production of responsive documents identified on the enclosed manifest to the Committee no later than August 31, 2018.

I recognize that reviewing the documents identified on the enclosed manifest and producing any responsive records will be a significant task. I also recognize that completing the rest of your response to the Committee's section 2205 request will also be a tremendous undertaking. I thank you in advance for your cooperation and

efforts, and in particular for your willingness to prioritize your response to the Committee's section 2205 request in the manner that best facilitates the Committee's review of Judge Kavanaugh's record.

Sincerely,

Charles E. Grassley
Chairman

Enclosures

cc:

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

Mr. Donald F. McGahn
Counsel to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

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Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
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Senator Chuck Grassley (R-IA), Chairman
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From: Davis, Mike (Judiciary-Rep)

Sent: Friday, August 03, 2018 10:08 PM

To: Davis, Mike (Judiciary-Rep) (b) (6)

Subject: RE: Senate Judiciary Committee Status Update

1. Tomorrow, the Washington Post will publish in its paper an op-ed penned by Chairman Chuck Grassley:

<https://wapo.st/2KrfjsjM>

I'm ready to work to confirm Kavanaugh. I invite Democrats to join me.

Sen. Chuck Grassley op-ed Washington Post August 4, 2018

A good judge is more than someone who simply understands the law. The job requires a keen intellect and an ability to appreciate multiple sides of complex issues. It requires the right temperament — a dedication to fairness and a commitment to leaving personal preferences and politics out of the courthouse. And it requires judicial modesty — an understanding that a judge’s job is to interpret and apply the law and the Constitution based on the facts at hand, not to make policy from the bench.

As the Senate Judiciary Committee continues to evaluate Judge Brett M. Kavanaugh’s fitness for the Supreme Court, these are some of the attributes we will explore.

The best way to determine how a nominee would serve as a justice is to examine how he has served as a judge. Kavanaugh has spent the past 12 years on the powerful U.S. Court of Appeals for the District of Columbia Circuit. During that time, he has written more than 300 opinions and joined hundreds more. These opinions offer ample insight into his legal acumen, temperament and judicial approach.

The committee doesn’t always have the luxury of an expansive judicial record when evaluating nominees. Justice Elena Kagan had no judicial record when she was nominated to the Supreme Court in 2010. The committee had to rely on records from her executive-branch service to gain insight into her legal thinking.

When asked at her confirmation hearing how the Senate should evaluate her given her bare judicial record, Kagan said, “You can certainly look to my tenure as solicitor general and the way I have tried to approach and handle that responsibility.”

Nevertheless, Republicans and Democrats on the committee agreed not to seek records from her time as solicitor general, given their sensitive nature and the fact that disclosure could undermine the candor of internal deliberations.

Today, we have a nominee with an extensive judicial record and legal writings that provide far more insight into his judicial philosophy than any executive-branch record would. On top of that, the Judiciary Committee has requested up to 1 million pages of documents from his time as a government lawyer. All told, the volume of executive-branch documents we review could be more than the last five nominees combined. This is in addition to the more than 17,000 pages of materials that Kavanaugh submitted in response to the most thorough and robust committee questionnaire ever required of a Supreme Court nominee.

But Democratic leaders are arguing that this isn’t enough.

Though many of them have already voiced their opposition to the nominee, they’re demanding to review emails from any White House aide that merely mention Kavanaugh’s name, including records he’s never seen. In my 14 previous Supreme Court confirmations, we’ve never reviewed such material.

Democrats are also demanding to see Kavanaugh’s records as White House staff secretary, pointing to his comments that it was a formative experience. I’m sure skills Kavanaugh sharpened in that post have proven useful on the bench. It required distilling complex material into concise memos for the president, and it required being an honest broker when relaying competing arguments from advisers across the executive branch.

But these documents are not particularly revealing of Kavanaugh’s legal thinking. This is especially true in light of the much more relevant material from his judicial record, his time as an executive-branch lawyer and the questionnaire.

Furthermore, his staff-secretary records also include some of the executive branch’s most sensitive documents. The staff secretary is essentially the president’s inbox and outbox, handling materials prepared for the president by numerous policy advisers across the administration.

If records of internal communications in the solicitor general’s office were too sensitive to share with Congress during Kagan’s nomination, documents from the staff secretary’s office should be even more closely guarded.

Democratic leaders are keen to call for following the same document review for Kavanaugh as we did for Kagan. That means that we don’t get the materials simply mentioning the nominee’s name, and we don’t get records that jeopardize the candor of internal administrative deliberations. That is precisely what my document request accomplishes.

Given the political left's broad opposition to Kavanaugh, it is clear that their document demands are nothing more than an attempt at a taxpayer-funded fishing expedition. The Democratic leadership's true goal is to delay the Senate's work and re-litigate the George W. Bush presidency instead of evaluating Kavanaugh's credentials.

For my part, I'm going to focus on conducting the most thorough and transparent confirmation process of any Supreme Court nominee to date. I invite my Democratic colleagues to set aside election-year posturing and join me in this process.

Chuck Grassley, an Iowa Republican, is chair of the Senate Judiciary Committee.

2. Today, Chairman Chuck Grassley issued the following press release:



FOR IMMEDIATE RELEASE

Friday, August 03, 2018

Grassley, Feinstein Seek Kavanaugh's Files from Starr Investigation *Committee reviewing first production of the nominee's White House records*

WASHINGTON – Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) and Ranking Member Dianne Feinstein (D-Calif.) today requested records from Judge Brett Kavanaugh's work for the Office of Independent Counsel during the Clinton administration. The request comes as the committee continues its review of more than 125,000 pages received yesterday from Judge Brett Kavanaugh's White House work.

In a [letter today](#) to the National Archives and Records Administration, the senators requested documents from Kavanaugh's service in the Office of Independent Counsel Kenneth Starr, including all emails Kavanaugh sent or received and all documents he authored, edited, revised or approved. The [National Archives estimates](#) the volume of these documents to be 20,000 pages.

Yesterday, the [committee received](#) more than 125,000 records from Kavanaugh's time as a White House lawyer in the George W. Bush administration. The committee expects these records to be made public, pending consultation with the National Archives. Last week, [Grassley requested](#) that the National Archives produce documents from Kavanaugh's work in the White House Counsel's Office as well as records related to his nomination to be a judge on the D.C. Circuit. The National Archives estimates the total production to be up to one million pages. For context, the largest executive branch production for previous Supreme Court nominees was roughly 180,000 pages for Justice Neil Gorsuch.

The committee is also reviewing more than 17,000 pages from Judge Kavanaugh's [public committee questionnaire](#) as well as more than 8,500 pages from cases in which Judge Kavanaugh authored or joined opinions during his 12 years on the D.C. Circuit.

Full text of [today's letter](#) follows:

August 3, 2018

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue NW
Washington, D.C. 20408

Dear Mr. Ferriero:

We ask that you provide documents to the United States Senate Committee on the Judiciary in connection with President Trump's nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States.

Judge Kavanaugh served as an Associate Counsel in the Office of Independent Counsel Kenneth W. Starr from September 6, 1994 until November 20, 1997, and again from April 27, 1998 until December 1, 1998. We request that the documents you identify and provide to the Committee from his service in the Office of Independent Counsel include the following, consistent with the attached guidelines:

- (1) Documents from Brett M. Kavanaugh's service as Associate Counsel in the Office of Independent Counsel, including all documents preserved in his staff files and all documents he authored in whole or in part, edited, revised, or approved;
- (2) All memos, letters, or electronic mail sent by or received by Brett M. Kavanaugh during his tenure in the Office of Independent Counsel, including any such memos, letters, or electronic mail on which he was a carbon copy or blind carbon copy recipient, and including any documents attached to such memos, letters, or electronic mail;

We understand that reviewing these documents as the Freedom of Information Act (FOIA) requires will be a significant undertaking. Nevertheless, in order to expedite your response and to facilitate the Committee's prompt review, please produce documents on a rolling basis as you identify categories responsive to this request.

We recognize the possibility that some documents responsive to our request may be exempt from public disclosure under FOIA. *See* 5 U.S.C. § 552(b); 28 U.S.C. § 594(k)(3)(A). We nevertheless have an important constitutional obligation to examine thoroughly Judge Kavanaugh's record, and the FOIA exemptions are "not authority to withhold information from Congress." 5 U.S.C. § 552(d). We therefore ask that you provide to the Committee on a "Committee Confidential" basis those documents that would otherwise be exempt from public disclosure under 5 U.S.C. § 552(b). In addition, and because there is a significant public interest in understanding the record of any Supreme Court nominee, we hope that you will endeavor to ensure public access to as much of the record as possible. To the extent that these records contain classified national security information or personal privacy information, please contact the Committee so that we can discuss further how those materials might be handled.

We further recognize that some documents responsive to this request may be subject to constitutional or common-law privileges against disclosure. We intend to respect claims of privilege. We hope, however, that the number of responsive documents subject to claims of privilege will be as few as possible.

We recognize that reviewing the archives and producing these documents is a significant task, and we thank you in advance for your efforts.

Sincerely,

Charles E. Grassley
Chairman

Dianne Feinstein
Ranking Member

cc:
Mr. Donald F. McGahn
Counsel to the President
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

-30-



Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510

(b) (6) (direct)

(b) (6) (cell)

202-224-9102 (fax)

(b) (6)

From: Davis, Mike (Judiciary-Rep)
Sent: Thursday, August 02, 2018 9:57 PM
To: Davis, Mike (Judiciary-Rep) (b) (6)
Subject: RE: Senate Judiciary Committee Status Update

One correction: Senator Heidi Heitkamp (D-ND) also voted to confirm Judge Britt Grant.

So, Senator Chuck Schumer apparently only permitted 3 Senate Democrats – Senators Heitkamp, Manchin, and Tester, who are all Trump-state Democrats facing tough reelections this fall – to cross party lines to support Judge Grant’s nomination.

Good night,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building

Washington, DC 20510

(b) (6) (direct)

(b) (6) (cell)

202-224-9102 (fax)

(b) (6)

From: Davis, Mike (Judiciary-Rep)

Sent: Thursday, August 02, 2018 9:18 PM

To: Davis, Mike (Judiciary-Rep) (b) (6)

Subject: Senate Judiciary Committee Status Update

Duplicative Material (Document ID: 0.7.22222.133163)

Bennett, Catherine T (OAG)

From: Bennett, Catherine T (OAG)
Sent: Monday, August 27, 2018 2:25 PM
To: Allen, Alexis (OAG); Whitaker, Matthew (OAG); Barnett, Gary E. (OAG); Cutrona, Danielle (OAG); Tucker, Rachael (OAG); Morrissey, Brian (OAG); Hamilton, Gene (OAG); Bumatay, Patrick (OAG)
Cc: Wiles, Morgan (OAG)
Subject: FW: Notification of Records Search to be Conducted in Response to the FOIA, Evers, OIP No. DOJ-2018-007115 (AG)
Attachments: 01. Initial Request (7.24.18).pdf

All,

You will be receiving FOIA request emails, such as this one, for your information only, and as a courtesy, from analysts in the Office of Information Policy (OIP). If you have classified information pertaining to any subject matter, please inform me and I will contact the OIP analyst. An explanation for these searches can be found in the email below. If you have any questions whatsoever, please direct them to Doug Hibbard, Senior Advisor, Initial Request Staff, (b) (6). Thank you.

Alexis: Please note you and AG are listed below. **You will need to search AG's files if you feel he has classified material(s) to submit.**

From: Kochurka, Kimberley (OIP)
Sent: Friday, August 24, 2018 10:15 AM
To: Bennett, Catherine T (OAG (b) (6))
Cc: Villanueva, Valeree A (OIP (b) (6))
Subject: Notification of Records Search to be Conducted in Response to the FOIA, Evers, OIP No. DOJ-2018-007115 (AG)

The purpose of this email is to notify you that the records of the below-listed officials will be searched in response to the attached Freedom of Information Act (FOIA) request.

The requester, Austin Evers, is seeking:

- All communications between the Department of Justice and specific individuals and organizations regarding judicial nominees
- See attached request for list of individuals and organizations.
- Timeframe: Since January 20, 2017.

The officials that will be searched for this request are:

- Attorney General Jeff Sessions
- Matthew Whitaker
- Gary Barnett
- Danielle Cutrona
- Rachael Tucker
- Alexis Allen
- Brian Morrissey

- Gene Hamilton
- Patrick Bumatay
- Please advise our office if any of the above custodians should be removed, or additional custodians should be included in this search.

The FOIA requires agencies to conduct a reasonable search in response to FOIA requests. For your information, this search will encompass the email and computer files (e.g. C or H drive) maintained by the officials listed above. We have also initiated a search in the Offices of the Deputy Attorney General, Associate Attorney General, Legal Policy, and Legislative Affairs as well as the Departmental Executive Secretariat.

To the extent officials within your office maintain other types of records, such as paper records or material maintained within a classified system that would be responsive to this request, but would not be located as a result of OIP's unclassified electronic search, please indicate so in response to this email as soon as possible. OIP staff will make arrangements to conduct those searches as necessary. Similarly, if your office would not maintain any records responsive to this request and/or you can readily identify the officials, be they either current or former employees, who would maintain records responsive to this request, you may indicate so in response to this email.

Please note that the Federal Records Act, as amended in 2014 and [DOJ Policy Statement 0801.04](#) provide that government employees should not use a non-official account including, but not limited to, email, text, or instant message, for official business. However, should this occur, the communication must be fully captured in a DOJ recordkeeping system – either by copying any such messages to one's official account or forwarding them to one's official account within twenty days. Should any records custodians have official records responsive to this FOIA request, which are maintained only in a non-official account, and not copied into an official account, then those records should be provided to OIP.

If you have any questions concerning this matter, please feel free to call me (b) (6) or by replying to this email.

Attachment



July 24, 2018

VIA Online Portal

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
1425 New York Avenue NW
Suite 11050
Washington, DC 20530-0001
Via FOIAOnline

Re: Expedited Freedom of Information Act Request

Dear Mr. Hibbard:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Justice (DOJ), 28 C.F.R. Part 16, American Oversight makes the following request for records.

Public reports have drawn attention to the outsize influence individuals and entities outside the executive branch have had on judicial nominations. Leonard Leo of the Federalist Society for example, has been called “an informal advisor to [President] Trump on courts,” and his organization, along with the Heritage Foundation, have reportedly influenced the President’s list of nominees to the Supreme Court and other federal courts.¹ Various reports speculate that additional organizations and individuals have influenced federal judicial nominations, as well.²

¹ See Charlie Savage, *Trump is Rapidly Reshaping the Judiciary. Here’s How*, N.Y. TIMES, Nov. 11, 2017, <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html>; Kimberly Strawbridge Robinson, *Federal Judiciary May be Trump’s Most ‘Durable’ Legacy*, BLOOMBERG, June 15, 2017, <https://www.bna.com/federal-judiciary-may-n73014461421/>.

² See, e.g., *Inside How the Federalist Society & Koch Brothers are Pushing for Trump to Reshape Federal Judiciary*, DEMOCRACY NOW!, Mar. 21, 2017, <https://www.democracynow.org/2017/3/21/inside-how-the-federalist-society-koch>; Kelly Cohen, *Gabby Giffords’ Gun Group Sues Trump Administration over for [sic] NRA-related Documents*, WASH. EXAMINER (Dec. 23, 2017, 10:38 AM), <https://www.washingtonexaminer.com/gabby-giffords-gun-group-sues-trump-administration-over-for-nra-related-documents>.



Other organizations have offered endorsements and financial assistance in support of nominee confirmation efforts.³

American Oversight seeks records that have the potential to shed light on the influence of individuals outside the executive branch have had on DOJ's activities in considering potential nominees to the federal judiciary.

Requested Records

American Oversight requests that DOJ produce the following within twenty business days:

All records reflecting communications (including emails, email attachments, notes, hard copy correspondence, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, talking points, any handwritten or electronic notes taken during any responsive communications, and summaries of any responsive communications) between DOJ and any of the individuals or entities listed below concerning potential, actual, recommended, or suggested nominations to the federal judiciary, or concerning the process for identifying potential judicial nominees. This request also seeks records reflecting communications between the individuals listed below and entities other than DOJ if those records were subsequently forwarded, or otherwise sent, to DOJ.

1. Federalist Society (including but not limited to emails sent from addresses ending in @fedsoc.org)
2. Heritage Foundation (including but not limited to emails sent from addresses ending in @heritage.org)
3. Heritage Action for America (including but not limited to emails sent from addresses ending in @heritageaction.com)
4. Judicial Crisis Network (including but not limited to emails sent from addresses ending in @judicialnetwork.com)
5. Wellspring Committee
6. American Center for Law and Justice (including but not limited to emails sent from addresses ending in @aclj.org)
7. Great America Alliance
8. National Rifle Association (including but not limited to emails sent from addresses ending in @nra.org)
9. NRA Institute for Legislative Action
10. Leonard Leo
11. Jonathan Bunch
12. John Malcolm

³ See Burgess Everett, *Conservative Group Drops Another \$1.4 Million to Confirm Kavanaugh*, POLITICO (July 16, 2018, 1:42 PM), <https://www.politico.com/story/2018/07/16/brett-kavanaugh-judicial-crisis-network-ads-724067>.

13. Ann Corkery (including but not limited to the following email address:
acorkery@steinmitchell.com)
14. Neil Corkery
15. Jay Sekulow
16. Jordan Sekulow
17. Nathanael Bennett
18. Eric Beach
19. Dan Backer
20. Ed Rollins
21. Ed Feulner
22. Jim DeMint
23. Kay Cole James
24. Ed Meese (also known as Edwin Meese III)
25. Angela Sailor
26. Hans von Spakovsky
27. Thomas Jipping
28. Genevieve Wood
29. Cleta Mitchell
30. Todd Adkins
31. James Atkinson
32. Brian Calabrese
33. Benjamin Cassidy
34. Chris Cox
35. James Holland
36. Wayne LaPierre
37. Jason Lawrence
38. David Lehman
39. Jason Ouimet
40. Brandi Pensoneau
41. Jack Thompson
42. Christopher Zealand
43. Gordon Speed
44. Matthew Schafle
45. Erica Rhoades

Please provide all responsive records from January 20, 2017, through the date the search is conducted.

American Oversight requests that DOJ search, at a minimum, the following offices for records responsive to this request:

1. The Office of Legal Policy
2. The Office of the Attorney General (search may be limited to political appointees*)

3. The Office of the Deputy Attorney General (search may be limited to political appointees)
4. The Office of the Associate Attorney General (search may be limited to political appointees)
5. The Office of Legislative Affairs (search may be limited to political appointees)

DOJ should also search other offices that it determines are likely to have records responsive to this request.

*“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a non-career SES, any Schedule C employees, or any persons hired under Temporary Non-Career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If DOJ uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. No category of material should be omitted from search, collection, and production.

Please search all records regarding agency business. You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts. Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.⁴ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been

⁴ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁵

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered DOJ’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.⁶ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but DOJ’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOJ use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”⁷ If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is

⁵ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

⁶ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

⁷ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

actually exempt under FOIA.”⁸ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”⁹ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹⁰

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹¹ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, DOJ is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and DOJ can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k), American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a

⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁰ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹¹ *Mead Data Central*, 566 F.2d at 261.

significant way.¹² Moreover, the request is primarily and fundamentally for non-commercial purposes.¹³

American Oversight requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding” of government operations and activities.¹⁴ There is significant public interest in understanding who has influenced DOJ actions and recommendations concerning nominations to the federal judiciary, particularly given the number of vacancies President Trump is expected to fill before his term is up.¹⁵ The public deserves to know if external interests are influencing DOJ actions on the important work of vetting federal judicial nominees, especially if those external individuals offered political favors in exchange for the consideration of certain nominees. As discussed below, American Oversight has the capacity and intention to inform a broad audience about government activities that are the subject of these records.

This request is primarily and fundamentally for non-commercial purposes.¹⁶ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight’s financial interest. American Oversight’s mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹⁷ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,¹⁸ American Oversight promptly posted the records to its website and

¹² 28 C.F.R. § 16.10(k)(1).

¹³ *Id.*

¹⁴ 28 C.F.R. § 16.10(k)(1), (2)(i)–(ii).

¹⁵ *See, e.g.,* Kim Soffen, *Trump’s Judicial Influence Could go far Beyond Putting Gorsuch on the Supreme Court*, WASH. POST, Feb. 1, 2017, <https://www.washingtonpost.com/graphics/politics/judge-appointments/>; *How Trump is Making a Lasting Impact on Nation’s Courts*, CBS NEWS (Jan. 24, 2018, 8:22 AM), <https://www.cbsnews.com/news/trump-impact-supreme-court-district-judges-appointments/>.

¹⁶ 28 C.F.R. § 16.10(k)(1), (2)(iii).

¹⁷ American Oversight currently has approximately 11,900 page likes on Facebook and 43,900 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 24, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 24, 2018).

¹⁸ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

published an analysis of what the records reflected about DOJ's process for ethics waivers.¹⁹ As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.²⁰

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with DOJ on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Katherine Anthony at foia@americanoversight.org or 202.897.3918. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,



Austin R. Evers
Executive Director
American Oversight

¹⁹ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

²⁰ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

O'Callaghan, Edward C. (ODAG)

From: O'Callaghan, Edward C. (ODAG)
Sent: Thursday, August 30, 2018 4:45 PM
To: Flores, Sarah Isgur (OPA)
Cc: Boyd, Stephen E. (OLA); Cutrona, Danielle (OAG); Whitaker, Matthew (OAG)
Subject: Re: Bloomberg: Trump Says Sessions Is Safe at Least Until the November Election

Amazing

Edward C. O'Callaghan

(b) (6)

On Aug 30, 2018, at 4:37 PM, Flores, Sarah Isgur (OPA) <siflores@jmd.usdoj.gov> wrote:

Trump Says Sessions Is Safe at Least Until the November Election

Bloomberg

John Micklethwait, Margaret Talev & Jennifer Jacobs

August 30, 2018 – 4:25 PM

[https://www.bloomberg.com/news/articles/2018-08-30/trump-says-sessions-is-safe-at-least-until-the-november-election?](https://www.bloomberg.com/news/articles/2018-08-30/trump-says-sessions-is-safe-at-least-until-the-november-election?utm_medium=social&utm_source=twitter&utm_content=politics&cmpid%3D=socialflow-twitter-politics&utm_campaign=socialflow-organic)

[utm_medium=social&utm_source=twitter&utm_content=politics&cmpid%3D=socialflow-twitter-politics&utm_campaign=socialflow-organic](https://www.bloomberg.com/news/articles/2018-08-30/trump-says-sessions-is-safe-at-least-until-the-november-election?utm_medium=social&utm_source=twitter&utm_content=politics&cmpid%3D=socialflow-twitter-politics&utm_campaign=socialflow-organic)

- *The attorney general has resisted Trump's pressure to resign*
- *Special counsel Mueller was named after Sessions's recusal*

President Donald Trump said Attorney General Jeff Sessions's job is safe at least until the midterm elections in November.

"I just would love to have him do a great job," Trump said Thursday in an Oval Office interview with Bloomberg News. Asked if he'd keep Sessions beyond November, he declined to comment.

Trump has repeatedly attacked Sessions in private and in public for recusing himself in March 2017 from the investigation of Russian interference in the 2016 presidential election. Deputy Attorney General Rod Rosenstein then appointed Robert Mueller as special counsel to conduct what's become a wide-ranging probe, including whether people around Trump conspired with the Russians and whether the president sought to obstruct justice.

Trump also has ridiculed Sessions, a former Republican senator and an early supporter of his

presidential candidacy, as “weak” for failing to aggressively pursue Republican allegations of anti-Trump bias in the Justice Department and FBI. Trump has tried to no avail to pressure Sessions to quit, which would open the way to appointing a successor who could oust Mueller or rein in his inquiry.

Sessions’s inability to “control” his department was “a regrettable thing,” Trump said in an interview last week with Fox News, adding that the Justice Department seems “to go after a lot of Republicans.”

Sessions responded then in a defiant statement, saying, “While I am attorney general, the actions of the Department of Justice will not be improperly influenced by political considerations.”

Trump’s comments Thursday were in keeping with the predictions of some key Republicans in Congress, who are now saying they expect the president to oust Sessions after the elections in November despite warning him in the past that the Senate wouldn’t muster the votes to confirm a successor.

Senator Lindsey Graham of South Carolina said Tuesday that the relationship between Trump and Sessions is “beyond repair” and that the issues are “deeper” than the attorney general’s recusal.

“He is not the only man in the country that can be attorney general. He is a fine man. I’m not asking for him to be fired. But the relationship is not working,” Graham said on NBC’s “Today.” “Is there somebody who is highly qualified that has the confidence of the president, and will also understand their job is to protect Mueller? Yes, I think we can find that person after the election if that is what the president wants.”

Davis, Mike (Judiciary-Rep)

From: Davis, Mike (Judiciary-Rep)
Sent: Saturday, September 1, 2018 8:53 PM
To: Davis, Mike (Judiciary-Rep)
Subject: SCOTUS -- latest 4 Grassley press releases



FOR IMMEDIATE RELEASE

Saturday, September 01, 2018

Bush Presidential Records Team Provides Full Accounting of Judge Kavanaugh's White House Records Requested by Judiciary Committee

WASHINGTON – Representatives for President George W. Bush provided the Senate Judiciary Committee with a full accounting of its documents related to Judge Brett Kavanaugh's service as a White House lawyer. In a [letter to Senate Judiciary Committee Chairman Chuck Grassley](#), President Bush's Presidential Records Act representative William Burck outlined the processes for evaluating those records, the applicable laws governing their handling and a breakdown of his team's findings and actions for all of the records provided by the National Archives and Records Administration – the very same records [requested by the committee](#) on July 27.

The review of documents by President Bush's team and the Department of Justice is nearly complete. Though the document review is ongoing, President Bush's team has already produced a record number of pages to the Judiciary Committee and a record volume of that material is publicly available. Bush's team expects to complete its review before the hearing on Judge Kavanaugh's nomination to the U.S. Supreme Court begins next week.

In the interest of transparency, Grassley has expanded access to confidential material beyond that for any other Supreme Court nominee. Unlike the process for prior nominees, all committee staff members and all non-committee senators can access confidential material at any time in a searchable digital format. During the evaluation of previous nominees, confidential records were provided in non-searchable paper format and access was limited to committee members and certain committee staff.

Grassley also offered to [help facilitate the public release](#) of specific confidential records that members wish to discuss during the open session of the confirmation hearing. Only [one senator](#) has taken him up on this offer, and the requested documents have since been publicly released at Grassley's request.

For context, here's a breakdown of the estimated pages of Executive Branch material provided to the committee for the evaluation of past Supreme Court nominees:

| | |
|--|--|
| | |
|--|--|

| | |
|----------------------------|----------|
| Judge Brett Kavanaugh* | 440,500* |
| Justice Neil Gorsuch | 182,000 |
| Justice Elena Kagan | 173,000 |
| Justice Sonia Sotomayor | 6,350 |
| Justice Samuel Alito | 2,300 |
| Chief Justice John Roberts | 76,000 |

*Productions for Judge Brett Kavanaugh records are nearly complete.

Burck's letter to Grassley is available [HERE](#):

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COMMITTEE *on the* **JUDICIARY**
 CHAIRMAN CHUCK GRASSLEY WWW.JUDICIARY.SENATE.GOV

FOR IMMEDIATE RELEASE

Friday, August 31, 2018

More Documents Released Following Klobuchar's Targeted Request

WASHINGTON – Presidents Bush and Trump approved the release of confidential records provided to the Senate Judiciary Committee following a specific request by Sen. Amy Klobuchar. In a [letter to his committee colleagues](#), Chairman Grassley offered to help facilitate access to specific [confidential records](#) that members wish to discuss during the open session of the confirmation hearing. Sen. Klobuchar was the only committee member to submit a request.

“During Justice Gorsuch’s confirmation, I worked closely with my Democratic colleagues to assist them in asking the Administration to waive the [Presidential Records Act] restrictions and [Freedom of Information Action Act] exemptions on a reasonable number of Committee Confidential documents that those colleagues intended to use at the confirmation hearing,” Grassley said in the letter last week to his colleagues.

“As I did last year, I stand ready to work with President Trump and President Bush to request that they waive the PRA restrictions and FOIA exemptions for a reasonable number of documents that individual Members intend specifically to use at the confirmation hearing.”

The release pursuant to Sen. Klobuchar’s request includes four documents totaling 12 pages:

- [Cover Sheet](#)
- [08-31-18 GWB Document Production - Klobuchar](#)

Records are designated as “committee confidential” if they contain material legally restricted from public release under the Presidential Records Act or the Freedom of Information Act. This includes sensitive

personal information, such as full names, dates of birth, social security numbers, purely personal communications with family members, and the like, along with government information that federal law has deemed too sensitive at this time for public disclosure. Following his trademarks of fairness and transparency, Grassley has taken the unprecedented steps of making every “committee confidential” document available to any senator and all Judiciary Committee aides at any time and in digital searchable format.

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FOR IMMEDIATE RELEASE

Thursday, August 30, 2018

Committee Receives, Releases Additional Docs Ahead of Kavanaugh Hearing

Latest productions include material from Pres. Bush, National Archives

WASHINGTON – The Senate Judiciary Committee has received the fifth production from President Bush of material from Judge Kavanaugh’s service as a White House lawyer. The committee also received Judge Kavanaugh’s D.C. Circuit nomination file from the National Archives and Records Administration. Subsets from both productions are now publicly available. Following these productions, the committee has received more than 440,500 pages of Judge Kavanaugh’s Executive Branch material. That’s more than the combined volume of similar material for the last five nominees confirmed to the Supreme Court.

A subset of the latest production of records from Judge Kavanaugh’s service in the White House Counsel’s Office during the George W. Bush Administration includes:

- [Cover Sheet](#)
- [08-29-18 GWB Document Production \(Pages 1 - 46\)](#)

The committee also received material from the National Archives and Records Administration related to Judge Kavanaugh’s nomination to the U.S. Circuit Court of Appeals for the District of Columbia. This includes:

- [Cover sheet](#)
- [08-29-18 NARA Nomination File Production](#)

Nomination material is being posted [HERE](#) as it becomes available.

The Chairman’s team has completed its initial review of more than 440,000 pages of Executive Branch documents from Judge Kavanaugh’s work as a government lawyer. This includes more than 415,000 pages

of White House Counsel's Office documents submitted by President Bush, as well as more than 22,000 pages of documents from the Office of the Independent Counsel provided by the National Archives and Records Administration (NARA) and more than 3,500 pages from Judge Kavanaugh's D.C. Circuit nomination file provided by NARA. That's in addition to reviewing other public material, including more than 10,000 pages of the judicial opinions that Judge Kavanaugh wrote or joined in his 12 years of service on the D.C. Circuit and more than 17,000 pages of academic writings, speeches and other material Judge Kavanaugh [submitted to the committee](#) in response to its bipartisan questionnaire.

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Bipartisan Kavanaugh Advocates Send Flurry of Letters Supporting Nomination

WASHINGTON – The Senate Judiciary Committee continues to receive a steady stream of letters supporting Judge Brett Kavanaugh's nomination to serve as Associate Justice on the U.S. Supreme Court. The supporters range from legal professionals from across the political spectrum to faith and community leaders sharing first-hand accounts of the nominee's character. Below are just a few of the letters received in recent days.

[Bob Bennett, former attorney to President Bill Clinton](#): *"Brett is the most qualified person any Republican President could possibly have nominated. Were the Senate to fail to confirm Brett, it would not only mean passing up the opportunity to confirm a great jurist, but it would also undermine civility in politics twice over: first in playing politics with such an obviously qualified nominee, and then again in losing the opportunity to put such a strong advocate for decency and civility on our Nation's highest court."*

[POLITICO](#): "President Donald Trump's Supreme Court nominee Brett Kavanaugh has picked up an unlikely endorsement: a nod from Bob Bennett, a lawyer to President Bill Clinton during the Monica Lewinsky controversy two decades ago."

[Members of Harvard Black Law Students Association](#): *"The Judge not only graciously offered his time for that panel, but also has continued to mentor numerous Harvard students whom he has taught or worked with in a number of capacities."*

[Wash. Free Beacon](#): Several members of the Harvard Law School chapter of the Black Law Students Association sent a letter Wednesday to the Senate Judiciary Committee extolling the mentorship they received from Supreme Court justice nominee Brett Kavanaugh and expressing support for his confirmation.

[Bipartisan group of Supreme Court Lawyers](#): *“Based on our experience with Judge Kavanaugh and his work over 12 years of distinguished judicial service, we are confident that he possesses the character, temperament and intellect that will make him an asset to our nation’s highest court.”*

[Daily Caller](#): A bipartisan coalition of elite Supreme Court lawyers submitted a letter to the Senate Judiciary Committee supporting Judge Brett Kavanaugh’s confirmation to the Supreme Court.

[Washington Times](#): Conservative legal superstars threw their support behind Supreme Court nominee Judge Kavanaugh Monday, urging lawmakers to back his confirmation to the high court. The stars include former Solicitor General Paul Clement, former appeals court nominee Miguel Estrada and prominent lawyer Michael Carvin, as well as 38 other members of the Supreme Court’s bar.

[Msgr. John Enzler, President of Catholic Charities of Archdiocese of Washington, D.C.](#): *“I also know him to be someone who is well-loved by his neighbors as ‘the guy next door’ -- no pretense, no need to flout his background or intellectual skills, he just continues to live by those school mottos, doing the best he can in whatever he does, and doing that on behalf of the community in which he lives, and the nation he serves so well.”*

[Washington Examiner](#): Supreme Court nominee Brett Kavanaugh’s ties to the Catholic Church and his dedication to faith and family are being singled out for praise by those in the Washington area who have seen him go from altar boy to winning a championship as “Coach K” of a church girls basketball team. In two letters to the Senate Judiciary Committee that next week will begin hearings on the federal appeals court judge and former Bush aide, Kavanaugh was portrayed as an unpretentious “guy next door.”

[Black Farmers and Agriculturalists Association](#): *“In October of 2017 Judge Kavanaugh rendered a decision in favor of black farmers on the merits of the evidence. We know all too well the challenges and inequalities the black farmers and 1890 Land Grant Universities still face today. Black farmers are entrepreneurs and we, like other black owned businesses, still face a lack of access to capital and markets.”*

[Washington Examiner](#): President Trump’s nomination of Brett Kavanaugh to fill the seat of retiring Supreme Court Justice Anthony Kennedy has won the support of a group that advocates for social justice for 17,000 black farmers.

[Eighty-Four female colleagues in the Bush Administration](#): *“We are women who served with Brett Kavanaugh in White House staff positions during President George W. Bush’s Administration. We are united in our admiration for Judge Kavanaugh as a public servant and as a person. He would be an exceptional Associate Justice of the Supreme Court. We strongly urge the Senate to confirm him promptly.”*

[The Hill](#): The nearly two dozen colleagues note that they saw how Kavanaugh handled his roles as a staff secretary and lawyer. "He was extraordinarily skilled, diligent, and honorable, with a respectful temperament. He demonstrated balance, fairness, careful listening, personal decency and humility, and a gift for unpretentious personal interaction," they wrote.

[Local D.C. Basketball Parents](#): *“In addition to his long list of professional and academic accomplishments, we hope that the Committee will also consider Brett Kavanaugh’s contributions as a volunteer youth basketball coach—and the service, selflessness, dedication, and commitment his coaching exhibits—to our community.”*

[Washingtonian](#): Brett Kavanaugh's nomination to the US Supreme Court got some support Friday from local parents. More than 30 people from DC's Shrine of the Most Blessed Sacrament in Chevy Chase

[Concerned Women for America](#): *"Judge Kavanaugh's extensive judicial record alone gives a clear and most accurate picture of the type of judge he is. It shows he is a thoughtful, impartial jurist who respects his limited role as set forth by the U.S. Constitution. But beyond that, the unprecedented amount of material available for consideration, outside of his more than 300 opinions, only corroborates that he should be confirmed without delay."*

[The Hill](#): Penny Nance, the CEO and President of Concerned Women for America Legislative Action Committee, told Grassley and Feinstein that it "is time to put aside political maneuverings and consider this nominee on his own merits."

[Former colleagues at Kirkland & Ellis law firm](#): *"Although we hold a broad range of political views, we all believe that Brett is well suited by his talent, collegial demeanor, and integrity to be an outstanding justice on the Supreme Court. We strongly support his nomination and urge his confirmation by the Senate."*

[Wash. Free Beacon](#): Supreme Court nominee Brett Kavanaugh's former colleagues at the Kirkland & Ellis law firm sent a letter Monday to the chairman and ranking member of the Senate Judiciary Committee urging his confirmation by the Senate.

[Yale Law School classmates](#): *"Based on our years of knowing Judge Kavanaugh, we are firmly convinced that his allegiance as a Supreme Court justice would be only to the Constitution and laws of the United States and not to any partisan interests."*

[Weekly Standard](#): About two dozen Yale Law classmates of Supreme Court nominee Brett Kavanaugh say the judge is a fair-minded jurist whose allegiance is not to politics, but to the Constitution. The bipartisan group said that at law school Kavanaugh did not mark himself as "ideological" or "a person with an agenda." Kavanaugh was and is well-liked and respected, they said, "a thoughtful classmate and loyal friend."

[Former law clerks to Justice Kennedy](#): *"If he is confirmed as a Supreme Court justice, we believe that Judge Kavanaugh would continue to serve his country with distinction—like the Justice for whom we clerked."*

[The Hill](#): Seventy-two former Kennedy law clerks voiced their support for Kavanaugh in a Thursday letter to Senate Judiciary Committee Chairman [Chuck Grassley](#) (R-Iowa) and ranking member [Dianne Feinstein](#) (D-Calif.)

[Former colleagues in the White House Counsel's Office](#): *"We personally witnessed how Judge Kavanaugh performed his duties as Associate Counsel to the President and as Staff Secretary. He was extraordinarily skilled, diligent, and honorable, with a respectful temperament. He demonstrated balance, fairness, careful listening, personal decency and humility, and a gift for unpretentious personal interaction."*

[The Hill](#): "Twenty one of Kavanaugh's former White House counsel colleagues sent a letter to Sens. Chuck Grassley (R-Iowa) and Dianne Feinstein (D-Calif.), the top two members of the Senate Judiciary Committee, saying that while they don't agree with "every substantive view" of Kavanaugh's they all "agree that Judge Kavanaugh is superbly qualified."

[Three Hundred and Eight State Lawmakers](#): *"Judge Kavanaugh has a proven track record of strict constitutionalism. He applies the law as written. He is a judge who will enforce the text, structure and*

original understanding of the Constitution.”

The Hill: Hundreds of state legislators from across the country are urging the Senate to confirm Brett Kavanaugh, [President Trump](#)'s nominee to the Supreme Court. "There is no attribute of Judge Kavanaugh's character, intellect or life of public service that should preclude his immediate installment to the Supreme Court of the United States," the legislators add.

Iowa State Lawmakers: *"We firmly believe the role of a judge in our government is to interpret the law as it is written," the letter continued. "Judge Kavanaugh has a long record of doing just that and interpreting the Constitution as it was originally intended."*

The Gazette: All 29 members of the Iowa Senate Republican caucus have signed a letter supporting the confirmation of Brett Kavanaugh to the United States Supreme Court.

Letters are posted [HERE](#) as they are received.

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Thank you,
Mike Davis

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