

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
MIKE CRAPO, IDAHO
THOM TILLIS, NORTH CAROLINA
JOHN KENNEDY, LOUISIANA
DIANNE FEINSTEIN, CALIFORNIA
PATRICK J. LEAHY, VERMONT
RICHARD J. DURBIN, ILLINOIS
SHELDON WHITEHOUSE, RHODE ISLAND
AMY KLOBUCHAR, MINNESOTA
CHRISTOPHER A. COONS, DELAWARE
RICHARD BLUMENTHAL, CONNECTICUT
MAZIE HIRONO, HAWAII
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*

April 27, 2018

Donald F. McGahn
Counsel to the President
The White House
Washington, D.C. 20500

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

Dear Mr. McGahn and Mr. Stern:

We write today regarding recent reporting in the media that White House officials are being required to sign non-disclosure agreements (NDA).

To protect the ability of whistleblowers to report waste, fraud, and abuse, Congress enacted several laws to allow executive branch employees to make good faith disclosures of potential wrongdoing. Congress also took steps to require the elimination of any anti-gag provisions in U.S. government non-disclosure policies, forms, or agreements.

In particular, the Whistleblower Protection Enhancement Act requires that any U.S. government non-disclosure policy contain an explicit statement notifying employees that any such policy does not trump employees' rights or obligations under the law relating to communications to Congress, reporting misconduct to an Inspector General, or any other whistleblower protections.¹ Failure to include specific provisions in non-disclosure agreements recognizing the rights of employees to make protected disclosures also renders such agreements unenforceable.² Additionally, federal officials who deny or interfere with the rights of federal employees to communicate directly with Congress are not entitled to have their salaries paid by taxpayer dollars.³

¹ 5 U.S.C. § 2302(b)(13).

² Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 744, 131 Stat. 135, 389 (2017).

³ Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 713, 131 Stat. 135, 379-80 (2017).

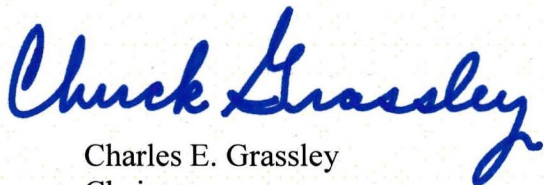
It remains unclear whether any NDAs signed by White House officials seek to extend beyond President Trump's tenure, allow President Trump or his personal representatives to seek monetary penalties for violations, or directly address the rights of executive branch employees to make protected disclosures to Congress, Inspectors General, and other entities. Without explicit language to the contrary, any such NDAs could leave the misimpression that the White House is attempting to prevent lawful disclosures and discourage employees from exercising their statutory and constitutional rights.

In order to dispel any ambiguity, we ask that the White House provide to us copies of any non-disclosure agreements signed by any White House officials during President Trump's tenure. In addition, should any NDAs for White House officials exist that do not comply with the Whistleblower Protection Enhancement Act or other legal or constitutional requirements, we ask that you revise any such agreements to conform to the law and inform these officials of their rights to make protected disclosures.

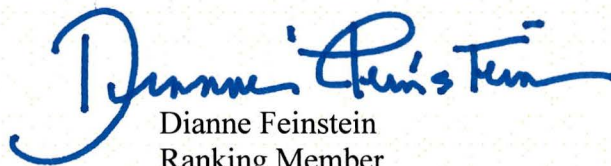
We also ask that the National Archives review records from previous administrations to determine whether other administrations have similarly used non-disclosure agreements or other confidentiality agreements with White House officials.

Thank you in advance for ensuring your response arrives no later than May 11, 2018. Should you have any questions regarding this letter, please contact DeLisa Lay of Chairman Grassley's staff at (202) 224-5225 and Heather Sawyer of Ranking Member Feinstein's staff at (202) 224-7703.

Sincerely,



Charles E. Grassley
Chairman



Dianne Feinstein
Ranking Member