

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 K. 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*

August 23, 2018

The Honorable Martin Heinrich
United States Senate
303 Hart Senate Office Building
Washington, DC 20510

Dear Senator Heinrich:

I have received your August 21 letter asking me to release “all documents provided to the Committee” relating to “presidential power, presidential war power, judicial independence, the detention and interrogation of suspected terrorists, and the mass surveillance of Americans.” I write to address your demands and mischaracterizations.

You state that you are “troubled by [my] unilateral and unprecedented decision to mark many of the documents ‘Committee Confidential,’ essentially blocking Senators not on the committee from conducting their constitutional due diligence necessary to perform our role of ‘advice and consent.’” These assertions are inaccurate and misinformed.

First, my decision to receive documents from President Bush on a Committee Confidential basis was not unilateral. It was an act of the Committee. The Chairman acts on behalf of the Committee with regard to these matters in the absence of a contrary vote of a majority of its members—just as then-Chairman Leahy did when he exercised his authority as chair to receive documents on a Committee Confidential basis during Justice Kagan’s nomination.

Second, my decision is not unprecedented—just the opposite. When we received documents during the nominations of Justices Kagan and Gorsuch containing material restricted by the Presidential Records Act (PRA) or exempted from public disclosure by the Freedom of Information Act (FOIA), we agreed to keep them on a Committee Confidential basis. Then-Chairman Leahy explained that he did so in 2010 “to permit the committee prompt access to them.”

I am following that precedent here. In order to permit the Committee to begin reviewing Judge Kavanaugh’s record as quickly as possible, President Bush’s representatives have been producing to the Committee documents that contain PRA-restricted and FOIA-exempted material—including sensitive, confidential advice given to the President as well as personal privacy information like Social Security numbers and bank account numbers. I have agreed to receive these documents on a Committee Confidential basis in order to prevent the public exposure of this information. My doing so has given the Committee access to more than 430,000 pages of records since the Committee first requested records on July 27—an unprecedented pace of production.

But these documents do not remain Committee Confidential forever. While the Committee begins its review of the documents, President Bush's representatives undertake a second review to identify PRA-restricted and FOIA-exempted material. If the documents do not contain such material, we quickly release the documents to the public. We thus end up in exactly the same place as we did with Justices Kagan and Gorsuch: Material restricted by the PRA or FOIA is held Committee Confidential, while non-restricted material is released to the public. To date, President Bush's representatives have authorized the release of more than 157,000 pages of White House records, in addition to the more than 20,000 pages of records from the Office of the Independent Counsel released to the public from the National Archives and Records Administration (NARA). I expect more public releases of White House documents this week, and I expect the final public release around Monday, August 27.

Third, your statement that I am "essentially blocking Senators not on the committee from conducting their constitutional due diligence necessary to perform our role of 'advice and consent'" and "mak[ing] a mockery of our nomination process" is both false and offensive. I have repeatedly stated that, as required by Rule 26.10a of the Standing Rules of the Senate, I am happy to provide any Member of the Senate with access to every Committee Confidential document we have received to date. Any Member who wishes to access those documents need only contact my staffer at Andrew.Ferguson@judiciary-rep.senate.gov to schedule a time to access those documents in the Committee front office.

Finally, you ask me to release documents relating to "presidential power, presidential war power, judicial independence, the detention and interrogation of suspected terrorists, and the mass surveillance of Americans" from Judge Kavanaugh's "tenure at the ... Staff Secretary." As I have explained in numerous public statements, documents from Judge Kavanaugh's time as Staff Secretary are the least revelatory of his views on the law and the most sensitive to the Executive Branch. We did not request Justice Kagan's Solicitor General records because of their sensitivity to the Justice Department, even though they would have been the most revelatory of her views on the law in light of her lack of a judicial record. I see no reason, apart from delay and obstruction, to depart from the precedent we established during Justice Kagan's nomination by seeking even more sensitive records from Judge Kavanaugh's non-lawyer work in the White House.

Even though I believe that these documents are irrelevant to Judge Kavanaugh's nomination, I worked hard to find a way to obtain Staff Secretary documents that my Democratic colleagues believed were most important. Specifically, my staff offered to use targeted search terms to help the Minority get the Staff Secretary documents that were of the greatest interest to them. Indeed, those terms could very well have been used to obtain documents on the topics you address in your letter. But the Ranking Member's staff refused our offer of search terms, demanding the search of *every* email and *every* scrap of paper from *every* one of the hundreds of White House aides who came and went for the *entire* eight years of the George W. Bush presidency. They refused to move from this unreasonable and unprecedented position during the course of negotiations. I would not accede to this unreasonable demand, the hardly veiled purpose of which was to delay Judge Kavanaugh's confirmation. As I have said repeatedly, I will not put American taxpayers on the hook for Senate Democrats' fishing expedition.

As a Member of the Senate, you are welcomed and encouraged to search all of the documents this Committee has received from Judge Kavanaugh's time in the White House Counsel's Office for information on any topic of interest to you—including "the separation of powers, the role of an independent judiciary, and the power of the President." I encourage you to read the 307 judicial opinions that Judge Kavanaugh authored and the hundreds more he joined during his twelve years of service on the D.C. Circuit, the second highest court in the country. These amount to more than 10,000 pages of judicial writings publicly available right now. Moreover, I encourage you to read the 17,000+ pages of speeches, articles, and other materials that Judge Kavanaugh submitted with his 120-page written response to the most robust Senate Judiciary Committee Questionnaire ever issued to a Supreme Court nominee. These materials are publicly available right now on the Senate Judiciary Committee's website. So are many letters supporting Judge Kavanaugh's confirmation, including from his former law clerks, law students, state attorneys general, and many others who know Judge Kavanaugh. The Committee's website also includes more than 176,000 pages of emails and other records from Judge Kavanaugh's legal service in the White House Counsel's Office and the Office of the Independent Counsel. I have instructed my staff to make available to any senator, any time (24/7), the remaining approximately 254,000 pages of currently non-public records produced to the Committee.

Your suggestion that I am somehow denying you access to the information you need to make an informed decision on Judge Kavanaugh's nomination is plainly false.

Sincerely,



Chuck Grassley
Chairman