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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 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.