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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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