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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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August 28, 2018

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

Dear Ranking Member Feinstein:

I write with regard to the handling of Committee Confidential documents we have received as part of our review of Judge Kavanaugh's record. As you know, I decided to receive documents from President Bush initially on a Committee Confidential basis in order to expedite the Committee's review of those documents. This is hardly unprecedented. During Justice Kagan's confirmation, for example, the National Archives and Records Administration (NARA) offered to provide documents containing material restricted by the Presidential Records Act (PRA) on the condition that they be kept on a Committee Confidential basis. The alternative would have been an *in camera* review of those documents at the Archives. Then-Chairman Leahy agreed to the condition "in order to permit the Committee prompt access to the documents," and to do so in an "easier" way than the *in camera* alternative. During Justice Gorsuch's confirmation, we agreed to maintain PRA-restricted materials from NARA on a Committee Confidential basis. And certain sensitive documents from the Department of Justice were restricted to an *in camera* review for a limited number of Committee staffers.

Like then-Chairman Leahy, I have agreed to receive documents initially on a Committee Confidential basis "in order to permit the Committee prompt access to the documents" and to avoid the serious inconvenience of an *in camera* review. My doing so has given the Committee access to more than 408,000 pages of White House records since I first requested records on July 27—an unprecedented pace of production.

Of course, not all of those documents will remain confidential. While the Committee begins its review of the documents, President Bush's representatives undertake a second review to identify material restricted from public access by the PRA or material exempted from public release by the Freedom of Information Act (FOIA). If the documents do not contain material which the PRA or FOIA shields from public access—including sensitive, confidential advice to the President as well as personal privacy information—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 five public releases of Judge

Kavanaugh's White House Counsel records, totaling nearly 268,000 pages, in addition to the more than 20,000 pages of documents from the Office of the Independent Counsel also available to the public. We have never had as many publicly available Executive Branch records for any other Supreme Court nominee.

If I have departed from precedent, it is because I insist on broader access to Committee Confidential documents than ever before. When we received such documents during Justice Kagan's nomination, NARA limited access to "any Senator on the Senate Judiciary Committee, the Committee Chief Counsels, and the Chief Nominations Counsels for the Chairman and Ranking Member." NARA also offered to provide the documents only "in hard copy" and asked "that they be stored in a centralized location" and not be "disseminated to anyone who does not have access to them." NARA again insisted on the same restrictions during Justice Gorsuch's nomination. In this case, however, I insisted that President Bush permit access to Committee Confidential documents to any Senator on the Committee as well as any Committee staffer. I also insisted that the documents be provided in electronic format so that the Committee could take advantage of the available electronic review technology—which permits simultaneous access by any authorized user.

Notwithstanding my efforts to make confidential documents broadly available, the Minority Leader accused me on the Senate floor of denying non-Committee Members access to the documents. This accusation was false; no Member had ever asked me for access. Nor do I ever recall any Democrat Member accusing then-Chairman Leahy or me of denying access during the nominations of Justices Kagan or Gorsuch. I nevertheless immediately responded that, pursuant to Rule XXVI(10)(a), any Member was welcome to view any document any time. Members needed only to set up a time with my staff to access the documents, and my staff would help them run searches to find whichever documents they wanted to see.

Only one off-Committee Member has asked me for access to the documents—strongly suggesting that the Minority Leader's promise that he'd "work hard, day and night, to go through these documents and see if anything worth questioning Judge Kavanaugh arises in them" was little more than a stunt. And the one Member who made an appointment with my staff to view documents never showed up for that appointment, leaving one of my staff counsels waiting for two hours.

I have learned, however, that your staff gave that Member access to the documents. I do not object to this in principle. I am not requiring that Members who wish to view documents do so exclusively through my staff. I am requiring, however, that the terms of Mr. Burck's letter transmitting the documents be honored. Thus, although any Member may access the documents under Rule XXVI(10)(a), no off-Committee staff may do so. And although Members may take handwritten notes on Committee Confidential documents, they are not permitted to keep a physical or electronic copy of any Committee Confidential documents. And, given that I have been accused of denying access to off-Committee members, I am entitled to a record of every off-Committee member who actually accesses the documents, as well as the time and date of that access.

My staff contacted your staff over the weekend asking them to inform us of what sorts of procedures were in place to ensure that the confidentiality of Committee Confidential documents was maintained when non-Committee Members accessed documents. I also asked that they

provide a record of all non-Committee Members, and anyone else, to whom they have provided access. Your staff responded that they were not obligated to share any information on their process. When my staff responded that I had a responsibility to ensure that the conditions on which the Committee was given access were being honored, your staff failed to reply.

I have therefore become concerned about how Committee Confidential documents are being handled. As I have explained over and over, these documents may contain highly sensitive information—including personal privacy information that could be very damaging if released—that federal law excludes from public access. I therefore believe it is crucial that we as a Committee comply with the reasonable—and exceptionally transparent—conditions on access requested by President Bush and Mr. Burck. Accordingly, I ask that you provide to me an ongoing log of all persons other than Committee Members and Committee staff to whom you have granted access to Committee Confidential documents, and the time and date such access was granted.

I am committed to running the most transparent Supreme Court nomination process in history. I have ensured that more people have access to Committee Confidential documents than have ever had access before. All I ask is that you assist me in protecting the process.

Sincerely,



Chuck Grassley
Chairman