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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

March 10, 2022

VIA ELECTRONIC TRANSMISSION

The Honorable Charles Breyer
Acting Chairman
Thurgood Marshall Federal Judiciary Building
1 Columbus Circle, NE
Washington, D.C. 20544

The Honorable David S. Ferriero
Archivist of the United States
700 Pennsylvania Avenue, NW
Washington, D.C. 20408

Dear Judge Breyer and Mr. Ferriero:

I write to request certain documents in connection with President Biden's nomination of Judge Ketanji Brown Jackson to serve as an Associate Justice of the Supreme Court of the United States. Judge Jackson served as Vice Chair of the United States Sentencing Commission from February 2010 to December 2014. Consistent with the processes described in this letter, I request that you identify and provide to the Committee the following documents on an expedited basis:

- (1) Documents from Ketanji Brown Jackson's service as Vice Chair and Member of the United States Sentencing Commission, including all documents preserved in her commissioner files and all documents she authored, excluding documents authored or sent by federal judges serving on the Commission or career staff working for the Commission; and
- (2) All electronic mail sent by or received by Judge Jackson during her United States Sentencing Commission tenure, including any documents attached to such emails, between February 11, 2010, and March 25, 2013, excluding emails sent by federal judges serving on the Commission or career staff working for the Commission.

To expedite your response and to facilitate the Committee's review, please produce documents on a rolling basis as you identify categories responsive to this request.

Fortunately, these documents should already be processed and available in a single electronic database according to the Sentencing Commission’s annual report to the National Archives.¹ The “permanent” records are transferred either (1) when they have been in existence for more than 30 years, or (2) based on a transfer schedule specified in a NARA-approved records schedule adopted by the agency.² According to the United States Sentencing Commission Records Disposition Schedule, the electronic records are transferred to the National Archives every five years, while paper records are transferred after thirty years.³ The schedules were “reviewed and approved” by the Commission.⁴ The files made available so far online for previous commissioners show communications with outside groups interested in sentencing policy as well as internal reports and documents drafted by commissioners.⁵

The Commission may choose not to disclose its records for up to 30 years from the date the records were created. The Archivist may, however, disclose records after the expiration of “any shorter period agreed to by the originating Federal agency”—in this case, the Commission.⁶

The Sentencing Commission is an independent agency led by commissioners that are appointed by the president. The members are responsible for significant policymaking decisions that bear on her nomination. The White House has repeatedly referenced Judge Jackson’s time on the Commission as an important part of her experience that makes her qualified to serve on the Supreme Court.⁷ And Senate Democrats have argued that Judge Jackson will “draw on” this experience when she is deciding cases on the Supreme Court.⁸ They’re right to say that this

¹ National Archives, *Senior Agency Official for Records Management 2020 Annual Report* (2020), <https://www.archives.gov/files/records-mgmt/agency/ussc-saorm-2020.pdf> (“As of the filing of this report, the Commission has completed the process of scanning all historical, paper-based permanent records. The Commission has also transferred its previously-created electronic files (e.g., pdf, Word, Word Perfect, Excel, and Power Point files) into the eCommission system – including all files that qualify as permanent records. Lastly, the Commission has instituted a process by which all contemporaneous permanent records are maintained and uploaded into eCommission in electronic format. The Metadata and filetype are maintained and each records also creates a PDF-A version of itself.”) (last accessed Mar. 10, 2022).

² See 36 C.F.R. §§ 1235.10, 1235.12.

³ See United States Sentencing Commission, *United States Sentencing Commission Comprehensive Records Disposition Schedule, April 5, 2010, FINAL DRAFT (Post NARA Inspection)*, at 10 (Apr. 5, 2010) https://www.archives.gov/files/records-mgmt/rcs/schedules/judicial-and-legislative/rg-0539/n1-539-10-001_sf115.pdf (last accessed Mar. 10, 2022).

⁴ *Id.* at 3.

⁵ See, e.g., National Archives, *Commissioner Files*, <https://catalog.archives.gov/id/40978278> (last accessed Mar. 10, 2022).

⁶ See 44 U.S.C. § 2107(b)(2)(A).

⁷ See, e.g., *Supreme Court Nominee Judge Ketanji Brown Jackson*, The White House, <https://www.whitehouse.gov/kbj/> (last accessed Mar. 10, 2022); *Remarks by President Biden on his Nomination of Judge Ketanji Brown Jackson to Serve as Associate Justice of the U.S. Supreme Court*, The White House (Feb. 25, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/25/remarks-by-president-biden-on-his-nomination-of-judge-ketanji-brown-jackson-to-serve-as-associate-justice-of-the-u-s-supreme-court/> (last accessed Mar. 10, 2022).

⁸ See, e.g., *Durbin: Judge Jackson Will Be A Supreme Court Justice In The Mold Of Justice Breyer*, Senator Dick Durbin (Mar. 1, 2022), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-judge-jackson-will-be-a-supreme-court-justice-in-the-mold-of-justice-breyer> (last accessed Mar. 20, 2022) (“She will draw on her broad range of experience on the United States Sentencing Commission, as a federal public defender, as a litigator in civil lawsuits, and private practice.”).

experience is relevant, and that's why it's important we be able to review records related to her service.

I recognize the possibility that some documents responsive to this request would not otherwise be available to the public under law, even after the passage of time. Nevertheless, Senators have an important responsibility rooted in the Constitution to review Judge Jackson's record. I thus ask that you provide to the Committee on a "Committee Confidential" basis those documents that would otherwise be protected from public disclosure, even after the passage of time. Such documents will be discussed only during a Closed Session of the Committee, unless the Commission agrees those documents could be publicly disclosed. For the documents requested by this letter, I intend to abide by the Committee's practice of declining to receive classified national security information or personal privacy information in connection with its consideration of a Supreme Court nomination. I recognize that some documents responsive to this request may be protected under constitutional or common law privileges, which I intend to respect. Nevertheless, I hope that the number of documents responsive to our request and subject to such privileges—and for which the Commission is unable to waive privilege for institutional reasons—will be as few as possible.

Here, the Committee's interest is in Judge Jackson's legal reasoning and views as they pertain to far-reaching policy decisions, not those of other members of the Commission. Although it might assist in our review, we understand that there may be concerns about releasing documents that disclose the views of staff or other members of the Commission who have not been nominated. That is why we have intentionally not requested documents or emails sent by federal judges serving on the Commission or sent by Commission staff. Consistent with that understanding, the Commission could redact those portions of email chains or other documents that were written by or attributable to Commission staff or judges serving on the Commission. I note that, in connection with requests under the Presidential Records Act for previous Supreme Court nominees, the presidential libraries attempted to withhold as little as possible and provided portions of documents, rather than withholding entire documents, where possible. I request that you adopt the same approach with respect to preferring redacting a document over withholding a document entirely. As the Committee has done in the past while considering Supreme Court nominations, I intend to respect the invocation of privilege by a co-equal branch of our government.

I recognize that reviewing the archives and producing these documents is a significant task, particularly under the timeframe set for this nomination hearing. I thank you in advance for your cooperation and efforts.

Sincerely,



Chuck Grassley
Ranking Member
Senate Judiciary Committee

cc:

Ms. Dana Remus
Counsel to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Ms. Kathleen C. Grilli
General Counsel
Thurgood Marshall Federal Judiciary Building
1 Columbus Circle, NE
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Gary Stern
General Counsel
National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, D.C. 20408

Guidelines

- a) This request is continuing in character. If additional responsive documents 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), addresses(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.