

August 27, 2018

Senator Charles Grassley
Chairman, Senate Judiciary Committee
135 Hart Senate Office Building
Washington, DC 20510

Senator Dianne Feinstein
Ranking Member, Senate Judiciary Committee
331 Hart Senate Office Building
Washington, DC 20510

Re: Access to records relevant to Brett Kavanaugh Supreme Court nomination

Dear Chairman Grassley and Ranking Member Feinstein,

As organizations committed to open government and accountability, we are increasingly concerned over the lack of transparency and restricted access to records relating to Supreme Court nominee Judge Brett Kavanaugh.ⁱ Secrecy and selective availability of information continue to plague public confidence in the Senate's ability to conduct a fair and impartial review of Judge Kavanaugh's background and qualifications.ⁱⁱ We urge you work across party lines to ensure maximum transparency, protect the public's right to know, and allow the National Archives and Records Administration (NARA) to complete its review of nomination records before proceeding with the confirmation hearings.ⁱⁱⁱ

While NARA is working to review and disclose records in accordance with Presidential Records Act (PRA), members of the Senate Judiciary Committee are accessing a narrow set of records directly from President George W. Bush's PRA representative.^{iv} Within this limited document collection, information is being marked confidential and disclosed only in a restricted way to members of the Judiciary Committee and to the public.^v Of great concern, in an unprecedented circumvention of records access laws, President George W. Bush's PRA representative is providing copies of the White House Counsel's nomination records directly to the Senate Judiciary Committee,^{vi} and Republican senators are choosing which records to make available to the public.^{vii}

By relying on this parallel track outside of the PRA, the Senate Judiciary Committee is creating a problematic assumption of privilege, eliminating the requirement that a president must give notice of the documents over which he asserts the claim.^{viii} If this process continues, there will be no legal remedy to challenge the withholding of all privileged records, and the Senate and the public will never know what information is missing from the review.^{ix}

You both have indicated that unequal access to records relating to Supreme Court nominees is a problem that spans administrations.^x Democratic senators denounce the fact that requests for records have omitted important information on Judge Kavanaugh's role in controversial policies,^{xi} and that the majority of the documents made available are being treated as "Committee Confidential."^{xii} Republican leaders argue that the records made available are sufficient to assess Judge Kavanaugh's career, and assert they are following precedent set by the Democrats during prior nominations.^{xiii}

We ask that all Senators rise above partisan politics and ensure maximum transparency for all reviews of Supreme Court nominees. Senator Grassley, we ask that you work to fulfill the July 31st request from Democratic senators for access to records on Judge Kavanaugh's career, and allow NARA to complete its full review of remaining nomination records.^{xiv} Senator Feinstein, we ask that you work to negotiate the feasibility of this request and commit to honoring all future requests from Republicans for documents should the party in the majority change in the future.

In order for the Senate to carry out its constitutional duty to provide advice and consent on Supreme Court nominee Judge Kavanaugh, it is critical to have a full understanding of his White House record, his positions, and policy choices. We call on you to guarantee that all senators are adequately informed prior to making a decision that has vast and long-lasting ramifications for the nation.

Thank you for your attention to these requests. For more information, please contact Lisa Rosenberg at Open the Government, lrosenberg@openthegovernment.org or 202-332-6736.

Sincerely,

American-Arab Anti-Discrimination Committee (ADC)
American Oversight
Campaign for Accountability
Center for Media and Democracy
Center for Victims of Torture
Defending Rights & Dissent
Demand Progress
Electronic Privacy Information Center (EPIC)
Government Information Watch
In the Public Interest
Japanese American Citizens League (JAACL)
National Coalition Against Censorship (NCAC)
Open the Government
Pesticide Action Network (PAN)
Project On Government Oversight
Sunlight Foundation

ⁱ *Coalition calls for greater transparency and full access to records on Supreme Court nominee*, Open the Government, August 8, 2018: <https://bit.ly/2w40gVx>.

ⁱⁱ *Uncovering the Truth about Supreme Court Nominee Kavanaugh*, American Oversight, August 14, 2018: <https://bit.ly/2BxBt1r>; Jordain Carney, *Democrats question if Kavanaugh lied about work on terrorism policy*, The Hill, August 17, 2018: <https://bit.ly/2BoleCs>.

ⁱⁱⁱ The National Archives estimates that they will not complete the review of a remaining 600,000 pages of nomination records in response to Senator Grassley's special access request and FOIA requests until the end of

October. Letter from National Archives General Counsel Gary M. Stern to Senator Grassley, August 2, 2018: <https://bit.ly/2MnJDyl>.

^{iv} *National Archives Works to Release Records Related to Judge Kavanaugh*, National Archives and Records Administration, August 15, 2018: <https://bit.ly/2MnJDyl>.

^v Letter to Senator Charles Grassley from Senator Diane Feinstein, August 10, 2018: <https://bit.ly/2wdob4c>.

^{vi} *National Archives Works to Release Records Related to Judge Kavanaugh*, National Archives and Records Administration, August 15, 2018: <https://bit.ly/2MnJDyl>.

^{vii} Senate Committee on the Judiciary, Majority News, *More of Kavanaugh's Starr Investigation Records Become Public*, August 20, 2018: <https://bit.ly/2wm7Z0K>.

^{viii} While the Presidential Records Act (PRA) gives a former President the right to review copies of his own records and consult with the Archives in response to a congressional request, it does not give him control over the Archives' official review or production to Congress. The PRA confers the review process to the Archivist of the United States to determine which documents should be classified as presidential records, and a former President can withhold a release to Congress only if he asserts a claim of executive privilege and the current President agrees. 44 U.S.C. Chapter 22 § 2208: <https://bit.ly/2m8SSAn>.

^{ix} The Presidential Records Act (PRA) provides the right for the public to force production and challenge the withholding of the restricted Presidential records through the courts. See National Archives and Records Administration, *Guidance on Presidential Records*, <https://bit.ly/2gHduiS>. The process currently underway, taking place outside the authority of the National Archives, provides the public no such right.

^x Letter to Archivist David S. Ferreiro from Senator Feinstein, July 27, 2018: <https://bit.ly/2M3hBY8>; Letter to the Archivist from Senator Grassley, July 30, 2018, available at: <https://bit.ly/2KmOcmv>.

^{xi} Jordain Carney, *Democrats question if Kavanaugh lied about work on terrorism policy*, The Hill, August 17, 2018: <https://bit.ly/2BoleCs>.

^{xii} Letter from Senator Feinstein to Senator Grassley, August 10, 2018: <https://bit.ly/2wdob4c>.

^{xiii} Letter from Senator Grassley to Senators Feinstein, Leahy, and Durbin, August 18, 2018: <https://bit.ly/2OW2gGf>.

^{xiv} Letter to George W. Bush Presidential Library & Museum, July 31, 2018: <https://bit.ly/2Aq13oi>.