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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*

September 3, 2018

Donald F. McGahn, II
Counsel to the President
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Mr. McGahn:

This letter is to request that President Trump withdraw his claim of “constitutional privilege” over Judge Kavanaugh’s White House records and ensure that these documents are available to Congress and the public. These records are critical to determining the nominee’s fitness to serve on this nation’s highest court, including whether his prior testimony to the Senate Judiciary Committee was accurate.

In an August 31 letter, Bill Burck informed the Committee for the first time that nearly 102,000 pages of documents from Judge Kavanaugh’s work in the White House Counsel’s Office are being withheld from the Committee and the public based on “constitutional privilege.”

As you know, executive privilege has never before been invoked to block the release of presidential records to the Senate during a Supreme Court nomination. In fact, when Elena Kagan was nominated, President Obama announced he would not invoke executive privilege over any of her White House records. When John Roberts was nominated, President Bush announced he would not invoke executive privilege over any of his White House records. And when Justice Rehnquist was nominated, the Committee refused to go forward with hearings until the White House produced records over which it initially indicated it might claim privilege.

By contrast, the Trump White House is withholding thousands of pages from Brett Kavanaugh’s record from Congress and admits that it is doing so without actually asserting a legal privilege.¹ Rather, taking advantage of the unprecedented process

¹ Chris Geidner, *Republicans Are Fighting To Keep Brett Kavanaugh’s Document From Holding Up His Supreme Court Nomination*, BuzzFeed News (Sept. 2, 2018).

used by Republicans to rush this nomination through the Senate with just a fraction of the nominee’s records, the White House is now asserting that it can withhold whatever documents it wants without formally invoking executive privilege.

The requirements of the Presidential Records Act are not merely a matter of convenience. Rather, the law ensures that executive privilege claims are taken seriously and used sparingly to ensure accountability and public transparency. Under the Act, the President must “personally” assert the privilege over each record and notify the National Archives and Congress the same day.² This ensures that Congress and the public know what records are being withheld and that Congress has an opportunity to engage in the good-faith accommodation process required by the courts as a means of balancing the legitimate needs of both branches.

The decision to hide a significant portion of Judge Kavanaugh’s White House record—announced on the eve of his confirmation hearing for a lifetime appointment to the Supreme Court—is deeply concerning. We have previously expressed our concern that the Committee is receiving only a small fraction of Judge Kavanaugh’s White House record, filtered through an opaque private review process being conducted by outside private lawyers rather than the nonpartisan National Archives. Now, for the first time ever, a sitting President is blocking the release of documents during a Supreme Court nomination without even asserting executive privilege.

We were especially troubled to learn from Mr. Burck’s letter that the bulk of the withheld documents concern Judge Kavanaugh’s involvement in “the selection and nomination of judicial candidates” by the Bush administration. Even based on the limited documents produced to the Committee so far, serious questions have been raised about the accuracy of Judge Kavanaugh’s testimony during his 2004 and 2006 confirmation hearings, including testimony regarding judicial nominations.

The Senate cannot fulfill its constitutional duty if the White House withholds documents necessary for Senators to know whether a nominee has been truthful in testimony before the Committee. President Trump’s unprecedented move to conceal important documents casts a cloud over Judge Kavanaugh’s nomination.

President Trump is free to waive any claims of privilege, like past presidents have done, and we urge him to do so. In particular, before the Senate Judiciary Committee holds hearings this week regarding Judge Kavanaugh’s nomination to

² 44 U.S.C. § 2208.

the Supreme Court, all documents related to his work on judicial nominations should be disclosed.

Sincerely,



DIANNE FEINSTEIN
Ranking Member



PATRICK LEAHY
United States Senator



RICHARD J. DURBIN
United States Senator



SHELDON WHITEHOUSE
United States Senator



AMY KLOBUCHAR
United States Senator



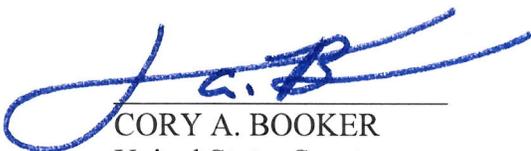
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KAMALA D. HARRIS
United States Senator

cc: Hon. Charles E. Grassley, Chairman
Senate Judiciary Committee