

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

August 28, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley:

We are writing to clearly state our objection to the process that has been implemented to evaluate the nomination of Judge Brett Kavanaugh and to express our support for making all the documents from his tenure in the White House public prior to his confirmation hearing.

Unfortunately, the Judiciary Committee is currently engaged in a process to evaluate a Supreme Court nominee that has never been used before and is woefully inadequate. Historically, when the Committee requests information on a bipartisan basis regarding a Supreme Court nominee's tenure in the White House, documents are produced by the National Archives under a transparent, nonpartisan process set out in the Presidential Records Act. Here, you refused to request Judge Kavanaugh's full White House record, asked only for documents from his service in the White House Counsel office, and discouraged the National Archives from responding to our separate request for his records as Staff Secretary from 2003 to 2006. While the Archives has agreed to provide Judge Kavanaugh's White House Counsel documents in response to your request, Republicans have chosen to reject this process in order to move the nominee through the confirmation process at a rapid pace.

This means the White House Counsel documents that have come to the Committee have been pre-selected by Bill Burck, President Bush's private attorney. This has caused several problems, including documents being withheld, redacted, or possibly even altered without any explanation.

In addition, in the past, the Majority and the Minority have agreed on not only which documents to request, but also which documents should remain confidential. These agreements have been based on the nonpartisan Archivist's recommendations as to which documents are purely private or contain information that falls within a legitimate exception under the Presidential Records Act. Such decisions have never been delegated to a private attorney operating outside of this nonpartisan process, as has been done here with Mr. Burck.

Unfortunately, in a departure from past practices, Republicans have refused to wait for the National Archives to complete its work. Instead, without consulting the Minority, you have unilaterally asserted that documents produced to the committee should be deemed "Committee Confidential" and withheld from the public, unless Mr. Burck decides otherwise. As you know, on August 10, 2018, Senator Feinstein wrote a letter emphasizing that she did not agree to such a blanket designation and instead requested your staff work with her staff to identify any documents that would be appropriately designated confidential, as done in the past.

In response, you sent a letter confirming your decision to implement this new process. As you know, under the Senate rules, Mr. Burck has no authority to deem any document "Committee Confidential." In addition, nothing in the Senate Standing Rules or in the rules of the Committee grants the Chair of this Committee sole authority to designate documents "Committee Confidential" or prohibit their public release.

Historically, a designation of "Committee Confidential" has been used sparingly as a tool to acquire information while the National Archives completes its work. It has not functioned, whether intended or not, as a tool to limit the Members' ability to use documents during a confirmation hearing or to obscure critical information from the public as the confirmation process proceeds.

At this point, we have less than one week before the hearing date you have set. Yet the Committee still has received less than 6% of Judge Kavanaugh's White House record and only 4% is available to the public. Of the documents that you requested, from Judge Kavanaugh's time in the White House Counsel's Office, the Committee has received less than 50% -- approximately 500,000 pages have still not been produced. And of the documents produced, approximately 141,000 pages remain marked "Committee Confidential" so as not to be available

to the public or for use at the hearing. Perhaps unsurprisingly, the vast majority of the documents that we would like to use at the hearing remain in this category.

Republicans have now proposed an additional hurdle that establishes an arbitrary deadline of today, August 28th, by which Democrats would provide a list of documents we intend to use at Judge Kavanaugh's hearing or wish to discuss publicly. Under this new vetting mechanism, your staff, Mr. Burck, and President Trump would evaluate whether you agree to allow Mr. Kavanaugh's White House documents to be used at the hearing or provided to the public. Sidelining the nonpartisan National Archives and giving one party complete veto power to determine which documents the other party may use to evaluate a nominee is also unprecedented.

Moreover, several Senators both on and off Committee have already made limited requests in writing for specific documents to be made public and those requests have been denied.

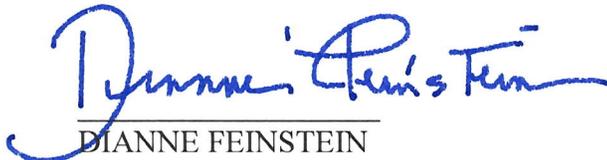
Further, setting an arbitrary deadline of August 28th ensures that nearly 70% of the documents from Kavanaugh's tenure in the White House Counsel office and 100% of his Staff Secretary records remain hidden.

Finally, your office has already made the unilateral decision on several occasions to post documents and make them available to the public without consulting the minority. Given there is no Senate rule, no Committee rule, no guidance from the nonpartisan National Archives, no bipartisan agreement governing the designation, and your office has taken action to release documents itself, it is clear the documents do not retain a blanket "Committee Confidential" designation.

By law, the records from Judge Kavanaugh's tenure in the White House from 2001 to 2006 will become public no later than January 20, 2021 – just over two years from now. There is no reason why they should not be made available to the public concurrently with the Committee's process to evaluate this nomination, especially given this is a lifetime appointment to the Supreme Court. We therefore support the full public release of the documents and believe the Senate cannot perform its constitutional role to provide advice and consent by hiding Judge Kavanaugh's White House record from public view.

The Senate and the American people should not be left in the dark about Judge Kavanaugh as we consider his nomination to our highest court.

Sincerely,


DIANNE FEINSTEIN
Ranking Member


PATRICK J. LEAHY
United States Senator


RICHARD J. DURBIN
United States Senator


SHELDON WHITEHOUSE
United States Senator


AMY KLOBUCHAR
United States Senator


CHRISTOPHER A. COONS
United States Senator


RICHARD BLUMENTHAL
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MAZIE K. HIRONO
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CORY A. BOOKER
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KAMALA D. HARRIS
United States Senator