



United States Senate
WASHINGTON, DC 20510-0504
<http://feinstein.senate.gov>

July 27, 2018

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Dear Mr. Ferriero:

Thank you for your letter responding to my July 21, 2018 letter concerning the presidential records related to Brett M. Kavanaugh's 2001-2006 tenure in the White House. I write today to express concern that the Archives has not yet started reviewing Mr. Kavanaugh's records for release to Congress, that you are employing a process that deviates from past practices and what is required by statute, and to ask that you start the review process immediately.

In the past—for example, the nominations of Chief Justice John Roberts and Justice Elena Kagan—review of the records under the Presidential Records Act began even before the President had made his nominations. In this case, however, you have stated no advance work has been done—even now, three weeks after the nomination was announced and after your office has been put on notice by both the Majority and Minority that Congressional requests for documents are forthcoming.

Once Judge Kavanaugh was nominated, your review of his records under section 2205(2)(C) of the Presidential Records Act should have begun immediately and on an expedited basis. You have been made aware that requests from the Committee are imminent and there is no reason to delay the review and processing of Mr. Kavanaugh's records during his time as Senior Associate Counsel and Assistant to the President and Staff Secretary.

In your letter, you indicate that the authority to make requests under the special access provision of the Presidential Records Act “lies *exclusively* with the Chair of the committee.” Your unduly restrictive reading of the law results in one political party having complete control over what records the Senate will be able to

see before deciding whether a nominee should receive a lifetime appointment to the Supreme Court of the United States. As the ranking Democrat on the Senate Judiciary Committee, I am shocked that you would provide materials in response to a request from one side and not the other. I have been on the Committee for more than twenty years and have been involved in ten prior Supreme Court nominations. This has never happened before, and a biased denial of document requests to one half of the Committee is unsupported by the law and impedes the minority's ability to discharge its constitutional obligation to provide advice and consent.

As an initial matter, the section of the law that you cite, 44 U.S.C. § 2205(2)(C), does **not** include the word “exclusively.” In fact, this reading is at odds with the goals of the law which, as you know, are to promote public access to documents and ensure that records that have not yet been processed for public release are made available to Congress, the courts, and the sitting and former president when needed to perform official duties.

Your reading of the law is also inconsistent with the position that Chairman Grassley has taken repeatedly with regard to requests from the Ranking Member and from other members of Congress.¹

For example, in a June 9, 2017 letter to the President, Chairman Grassley opposed an Office of Legal Counsel letter that “falsely asserts that only requests from committees or their chairs” should be respected and took the position that the executive branch “should work to cooperate in good faith with all congressional requests to the fullest extent possible.”² In so doing, the Chairman specifically recognized “the confirmation of nominees” as a clear instance where members are entitled to obtain information to fulfill their constitutional responsibilities. In that letter, Chairman Grassley argued forcefully that:

“Every member of Congress is a Constitutional officer, duly elected to represent and cast votes in the interests of their constituents. This applies obviously regardless of whether they are in the majority or the minority at the moment and regardless of whether they are in a leadership position on a particular committee. Thus, all members need accurate information from the Executive Branch in order to carry out their Constitutional function to

¹ See, e.g., Transcript of Senate Judiciary Committee Hearing on the Nomination of Sen. Sessions to be Attorney General (Jan. 10, 2017), available at <http://www.cq.com/doc/congressionaltranscripts-5017061?0>.

² Letter from Charles E. Grassley, Chair, Senate Judiciary Committee, to President Donald J. Trump (June 7, 2017), available at [https://www.judiciary.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20\(oversight%20requests\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20(oversight%20requests).pdf).

make informed decisions on all sorts of legislative issues covering a vast array of complex matters across our massive federal government.”³

The White House responded, “please know that the OLC Letter does not set forth Administration policy,” and that “the Executive Branch should voluntarily release information to individual members where possible.”⁴

The Chairman has also specifically argued for the rights of all on this Committee to obtain information. As the Chairman made clear, “if Senator Feinstein contacts you, don’t use this excuse, as so many people use it, if you aren’t chairman of a committee, you don’t have to answer the question. I want her questions answered just like you’d answer mine.”⁵

Further, this reading would result in the press and the public having greater access to presidential records under the Freedom of Information Act than members of the minority have under the Presidential Records Act—despite Senators’ obligation to discharge their constitutional duty of advice and consent. That is an absurd outcome and in complete conflict with the plain language and intent of the law. The National Archives should respond to requests for documents in connection with Mr. Kavanaugh’s nomination, whether those come from the Chair or from the Ranking Member of this Committee.

Finally, your letter indicates that the National Archives is retreating from its role as the neutral, nonpartisan decision-maker over what records will be produced to Congress. Instead, under an agreement reached between former President George W. Bush’s lawyers and the Chairman, private, partisan lawyers are being granted decision-making authority as to which records will be provided to Congress. That, too, is in conflict with past practices and the law as written, which does not allow the National Archives to abdicate its role in processing and producing official records to Congress by refusing to respond to requests from a Ranking Member of the Senate Judiciary Committee for documents needed to evaluate a Supreme Court nominee.

The Presidential Records Act makes clear that presidential records belong to the American people, and the Archivist serves as their steward. As you know, this

³ *Id.*

⁴ Letter from Marc Short, White House Director of Legislative Affairs, to Hon. Charles E. Grassley, Chair, Senate Judiciary Committee (July 20, 2017), *available at* <https://www.judiciary.senate.gov/imo/media/doc/2017.07.20%20WH-Short%20Response%20to%20CEG%20re%20Oversight.pdf>

⁵ Transcript of Senate Judiciary Committee Hearing on the Nomination of Sen. Sessions to be Attorney General (Jan. 10, 2017), *available at* <http://www.cq.com/doc/congressionaltranscripts-5017061?0>.

was done in the reaction to the scandal of the Nixon era to ensure the American public would have access to information about the inner workings of their government—including that from the White House. The law requires professional, career archivists to process and review documents in a neutral, nonpartisan manner to decide which records should be included in response to a request from Congress.

According to your letter, you have chosen not to follow this well-established practice. Instead, as your letter confirms, President Bush's private lawyers are reviewing the records from the copies you provided. President Bush's lawyers—not career archivists—may then decide which records from President's Bush's own personal copy will be provided to the Committee under an agreement reached with Chairman Grassley. As we understand it, the records requested and under review by these private lawyers include only documents from Mr. Kavanaugh's tenure in the White House Counsel's office, not his time as Staff Secretary.

This is a dramatic departure from the procedures used for Supreme Court nominees in the past and is an end run around the requirements imposed by Congress when it enacted the Presidential Records Act in response to President Nixon's attempt to destroy the Watergate tapes when he left office. The Committee is entitled to rely on and use official documents that have been reviewed and processed by the National Archives as it considers Mr. Kavanaugh's nomination. We ask that you work with us to ensure that this happens.

Sincerely,



Dianne Feinstein
Ranking Member

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