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COMMITTEE ON THE JUDICIARY - RANKING MEMBER
SELECT COMMITTEE ON INTELLIGENCE
COMMITTEE ON APPROPRIATIONS
COMMITTEE ON RULES AND ADMINISTRATION

United States Senate

July 21, 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:

We write to express our concern regarding the processing of presidential records related to the nomination of Judge Brett M. Kavanaugh to be Associate Justice of the Supreme Court of the United States. We also write to ask that the National Archives and Records Administration fulfill its critical, non-partisan role in ensuring that records are preserved and provided to Congress and the public by following current practice and procedures whereby your employees review and produce records related to Judge Kavanaugh's record in a timely and appropriate manner.

Under the Presidential Records Act, records created during every presidency are the property of the United States. These records belong to the American people, not a particular president.[1] The Archivist serves as the steward of these records on behalf of the American public and is charged with responsibility for collecting the records at the end of each administration and appropriately reviewing and processing them for eventual release to the public.

Under the law, presidential records are reviewed and processed by National Archives staff who determine the applicability of restrictions that might affect release of the records. This ensures that non-partisan staff who are experts on the National Archives' standards for document review and processing handle this important task. It is also our understanding that the staff responsible for this initial review hold appropriate security clearances and are reviewing the records in a

[1] 44 U.S.C. § 2202.

WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

secure facility. This avoids mishandling of any classified material that might be contained in the records.

A recent briefing provided to Judiciary Committee staff by representatives of the George W. Bush Presidential Library raises questions about whether legal requirements are being followed with regard to the handling of records related to Judge Kavanaugh's nomination. This briefing revealed several potential and critical departures from the requirements of the Presidential Records Act.

For example, we were told the Kavanaugh process would authorize a large team of outside private lawyers without security clearances to undertake the initial document review and determine whether the documents even qualify as presidential records subject to release to Congress or the public. This outside legal team would then review only the documents that they deemed to be presidential records and determine whether any of the approved statutory restrictions on access to records apply.

Under the Presidential Records Act, all of the documents, which have now been in the possession of the National Archives for nine years, are presumptively presidential records and subject to disclosure unless a statutory restriction on access applies.[2] At this point, there should not be an initial review by outside private lawyers for the purposes of removing records from consideration for public release but, instead, a more limited review by the National Archives to determine the applicability of statutory restrictions on access. And while the Presidential Records Act recognizes that the Archives will consult with former presidents, the decision on whether "access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist" – not representatives of a former president.[3]

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[2] The Presidential Records Act authorizes only the Archivist "to dispose of such Presidential records which the Archivist has appraised and determined to have insufficient administrative, historical, information, or evidentiary value to warrant their continued preservation." To remove any records, however, the Archivist must first publish a notice in the Federal Register at least 60 days in advance of the proposed disposal date. 42 U.S.C. §2203(g)(4). Absent the required appraisal and removal by the Archivist, with 60-day notice to the public, the existing documents must be treated as presidential records and reviewed by the Archivist to determine if any statutory restrictions on access apply.

[3] 44 U.S.C. § 2204(b). With regard to claims of constitutionally based privilege, the Presidential Records Act also makes the National Archives responsible for consulting with both the former and incumbent presidents, with the incumbent president bearing responsibility for making the final decision on whether to uphold the privilege claim by a former president. 44 U.S.C. § 2208(c). As set forth in Executive Order 13489 of January 21, 2009, the Archivist, in the first instance, "shall identify any specific material, the disclosure of which he believes may raise a substantial question of executive privilege" and, if the former president elects to assert a claim, the Archivist "shall consult with the Attorney General . . . the Counsel to the President, and such other executive agencies as the Archivist deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of

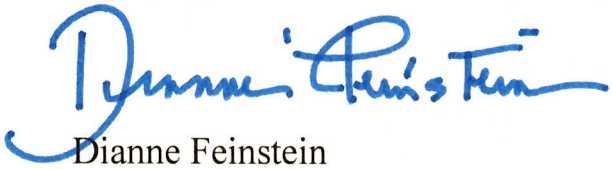
The current process as relayed by the Bush lawyers, replaces non-partisan Archivist staff, whose obligation is to the American people, and substitutes it with private outside lawyers without security clearances who are reviewing these documents in unsecured facilities.

Such an arrangement does not comply with the Presidential Records Act. It also raises questions about compliance with the Anti-deficiency Act. That law prohibits a government agency from accepting voluntary services "except for emergencies involving the safety of human life or the protection of property." Allowing outside private lawyers to carry out NARA's statutory obligations may run afoul of this law as well.[4]

To the extent that there is a need for additional resources so that the National Archives can review and process these documents in a timely manner, we suggest that the Archivist create a task force and notify Congress if additional resources are needed.

Obtaining the full record is critical for the Judiciary Committee and full Senate to fulfill our constitutional duty to provide advice and consent on Judge Kavanaugh's nomination. We simply request that the National Archives follow the process established by the Presidential Records Act in 1978. We are confident that we can obtain the documents that we need in a timely manner that complies with federal law and look forward to working with you on this.

Sincerely,



Dianne Feinstein
Ranking Member
Committee on the Judiciary

cc: The Honorable Charles E. Grassley

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privilege or instead to disclose the Presidential records notwithstanding the claim of privilege." The process explained to Committee staff this week allows outside private lawyers to usurp the role of the National Archives in this regard as well.

[4] In addition, federal law allows the Archivist to delegate his statutory functions only to officers and employees of NARA, not outside private interests. 44 U.S.C. § 2104.