

United States Senate  
WASHINGTON, DC 20510

August 16, 2018

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

Dear Chairman Grassley:

We have repeatedly expressed our serious concerns about the unprecedented lack of transparency and partisan process that is being used to hide Brett Kavanaugh's record from the Senate Judiciary Committee, the Senate as a whole, and the American people. Although Judge Kavanaugh amassed a substantial record during his five years in the Bush White House, to date, less than 3% of his record has been made available to the Committee, and 98.4% of his record is being withheld from the full Senate and the public. By comparison, for Elena Kagan's nomination, 99% of her White House records were made available to Congress and the public.

We have stated all along that the unprecedented, partisan process being used for Judge Kavanaugh's nomination is a disservice to the Senate and to the American people. Now, we are seeing firsthand the problems that result from attempts to hide Judge Kavanaugh's record. In particular, from the limited set of documents available, we have already seen records that call into serious question whether Judge Kavanaugh was truthful about his involvement in the Bush Administration's post-9/11 terrorism policies when he testified before this Committee during his 2006 nomination hearing.

As you know, in 2006, Judge Kavanaugh told the Committee under oath that he was "not aware of any issues" regarding "the legal justifications or the policies relating to the treatment of combatants"<sup>1</sup>; had nothing to do with issues related to rendition;<sup>2</sup> and was unaware of, and saw no documents related to, the warrantless wiretapping program conducted without congressional authorization.<sup>3</sup>

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<sup>1</sup> 2006 Tr. at 20 (Sen. SPECTER: Did you have anything to do with the questions relating to detention of inmates at Guantanamo? Mr. KAVANAUGH: No, Mr. Chairman.); 2006 Tr. at 27 (Sen. DURBIN: What was your role in the original Haynes nomination and decision to renominate him? And at the time of the nomination, what did you know about Mr. Haynes's role in crafting the administration's detention and interrogation policies? Mr. KAVANAUGH: Senator, I did not—I was not involved and am not involved in the questions about the rules governing detention of combatants or—and so I do not have the involvement with that. And with respect to Mr. Haynes's nomination, I've—I know Jim Haynes, but it was not one of the nominations that I've handled.)

<sup>2</sup> 2006 Tr. at 20 (Sen. SPECTER: Did you have anything to do with the questions of rendition? Mr. KAVANAUGH: No, Mr. Chairman.)

<sup>3</sup> 2006 Tr. at 42 (Sen. LEAHY: Did you see documents relating to the President's NSA warrantless wiretapping program? Mr. KAVANAUGH: Senator, I learned of that program when there was a New York Times story—reports of that program when there was a New York Times story that came over the wire, I think on a Thursday night in mid-December of last year. Sen. LEAHY: You had not seen anything, or had you heard anything about it prior to the New York Times article? Mr. KAVANAUGH: No. Sen. LEAHY: Did you see documents of the President relating to the NSA's warrantless wiretapping program? Mr. KAVANAUGH: No.)

However, at least two documents that are publicly available on the Bush Library website from Judge Kavanaugh's time as Staff Secretary suggest that he was involved in issues related to torture and rendition after 9/11. In one, just days after the existence of the Office of Legal Counsel "torture memos" was publicly revealed, then-Deputy White House Chief of Staff Harriet Miers forwarded to Judge Kavanaugh a set of talking points addressing the memos and U.S. torture policy.<sup>4</sup> The forwarded email makes clear that then-Deputy National Security Adviser Stephen Hadley had personally asked for Judge Kavanaugh's review. Similarly, another email shows that Judge Kavanaugh was included on an email chain circulating talking points on rendition and interrogation.<sup>5</sup> These emails and talking points demonstrate why we need access to Judge Kavanaugh's full record as Staff Secretary.

In addition, documents that have been produced to the Committee as part of the partisan process that you have brokered with Bill Burck further undercut Judge Kavanaugh's blanket assertions that he had no involvement in or knowledge of post-9/11 terrorism policies. These documents are currently being withheld from the public at your insistence, but they shed additional light on Judge Kavanaugh's involvement in these matters and are needed to question him in a public hearing.

After all, Judge Kavanaugh was an Associate White House Counsel on 9/11. Over the next several months and years, the White House sought legal opinions from the Office of Legal Counsel and advised the President on the legality of several controversial programs. For example, just six days after the 9/11 attack, Office of Legal Counsel lawyer John Yoo drafted a memorandum evaluating the legality of a program that would allow warrantless wiretapping of American's e-mails and phone calls.<sup>6</sup> Mr. Yoo, described in a public Inspector General's report as "'very well connected' with officials in the White House," addressed his memo to Deputy White House Counsel Timothy Flanigan, Judge Kavanaugh's likely supervisor at the time. It is important for the public and full Senate to understand whether Judge Kavanaugh was involved in their communications, despite having told the Committee in 2006 that he had not seen or heard anything about the President's warrantless wiretapping program until December 2005.<sup>7</sup>

Whether Judge Kavanaugh misled this Committee in 2006 and his involvement in these White House policies are critically important to our consideration of his fitness for a lifetime appointment to the highest court in the land. These are serious questions that could easily be addressed if we were given access to his records. As it stands, however, you have refused to join our request for Judge Kavanaugh's Staff Secretary records and have sought to keep his White House Counsel documents secret as well.

We firmly believe that Judge Kavanaugh's nomination cannot be considered unless these documents are available, including to the public and the Senate as a whole. We therefore urge you to join our request for Judge Kavanaugh's Staff Secretary records and to publicly release

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<sup>4</sup> Email for Brett Kavanaugh from Harriet Miers, *Fw: let me know when you get this...thx* (June 12, 2004).

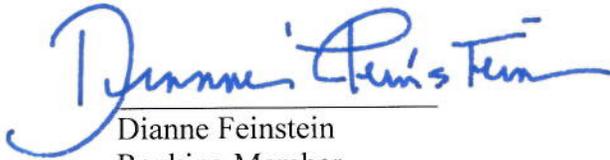
<sup>5</sup> Email for Dan Bartlett and Brett Kavanaugh from Scott McClellan, *possible questions* (Mar. 15, 2005).

<sup>6</sup> Offices of the Inspector General, Annex to the Report on the President's Surveillance Program, Vol. III, at 25 (July 10, 2009), available at <https://oig.justice.gov/reports/2015/PSP-09-18-15-vol-III.pdf>.

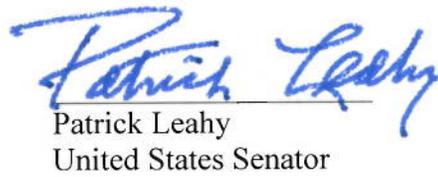
<sup>7</sup> *Supra* n.4.

documents from Judge Kavanaugh's time in the White House in the same manner as was done for all previous Supreme Court nominees. The truth should not be hidden from the Senate or the American people.

Sincerely,



Dianne Feinstein  
Ranking Member



Patrick Leahy  
United States Senator



Richard J. Durbin  
United States Senator