United States Senate
WASHINGTON, DC 20510

August 6, 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:

I have received your letter stating that the Archives will not respond to requests from minority members of the Senate Judiciary Committee for presidential records related to the nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States. As the Ranking Member of the Senate Judiciary Committee, I am alarmed that you would deny Committee Democrats the materials necessary to fulfill their constitutional duty to provide advice and consent, while providing the materials requested by the Republicans. I urge you to reconsider your position.

Under your overly restrictive reading of the Presidential Records Act, minority members of the Senate Judiciary Committee now have no greater right to Mr. Kavanaugh's records than members of the press and the public. Yet these Committee members have an express constitutional duty to provide advice and consent, which your analysis does not take into account. That outcome conflicts with the plain language and intent of the Presidential Records Act, which specifically recognizes the need for Congress to have special access to presidential records for such purposes.

In particular, the congressional access provision of that law, 44 U.S.C. § 2205(2)(C), makes clear that presidential records "shall be made available" to "any committee" of Congress "if such records contain information that is needed for the conduct of its business[.]" Nowhere does that provision limit the definition of the term "committee" to the Chairman, and there is no support elsewhere in the text of the statute for such a strained reading.

The Justice Department's analysis, upon which you rely, instead rests on its own misunderstanding of Committee rules, which it claims limit the meaning of

the term "committee" to only the Chairman.[1] First, it is worth noting the Executive Branch has no authority to issue binding interpretations of Senate rules. Importantly, even if it did, the Justice Department's suggestion that Committee rules preclude the Ranking Member from requesting the production of information is erroneous. In fact, no Judiciary Committee rule expressly prohibits the Ranking Member from requesting information on the Committee's behalf or provides that the Chairman has exclusive authority.

Given the context, this reading of the rules and the law ought to be even more apparent. Senators on the Committee have made a request for documents necessary to carry out their advice and consent obligation—this obligation is no less simply because the Senators' party is in the minority. Even the Trump White House has made clear that "the Executive Branch should voluntarily release information to individual members where possible."[2]

Indeed, any other policy would impede the ability of duly elected Senators to perform their constitutional duty to provide advice and consent on the most important nomination that comes before them. While the 2001 Office of Legal Counsel opinion on which you rely concludes that only chairmen of congressional committees have the authority to request Executive Branch material, this opinion specifically references this limitation in the context of Congress's *oversight* function. It makes no such claim regarding the *advice and consent* function—a core constitutional function that all Senators, both majority and minority, are obligated to fulfill.[3]

In addition, the Office of Legal Counsel opinion that you cite interprets the Privacy Act—an entirely different statute with a different purpose from the Presidential Records Act. The Privacy Act's primary purpose is to protect individuals against the unwarranted invasion of their privacy resulting from federal

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[1] *See Application of Privacy Act Congressional-Disclosure Exception to Ranking Minority Members*, 25 Op. O.L.C. 289, 289 (2001) (describing the Office of Legal Counsel's understanding of congressional procedure as "the essential analysis underlying our conclusion"); *see also Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, 41 Op. O.L.C. 1, 2 (May 1, 2007) (purporting to interpret "existing congressional rules").

[2] 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

[3] *See Application of Privacy Act Congressional-Disclosure Exception to Ranking Minority Members*, 25 Op. O.L.C. at 289 (expressly referring to the exercise of Congress's "investigative and oversight authority"); *see also Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, 41 Op. O.L.C. at 1 (specifically addressing "the authority of individual members of Congress to conduct oversight of the Executive Branch").

agencies' disclosure of their personal information.[4] As a result, its default policy is to prohibit the use and disclosure of individuals' information except in certain limited circumstances.[5] In sharp contrast, as you know, the primary purpose of the Presidential Records Act is to promote government transparency.[6] It furthers this purpose by enabling public access to documents and ensuring that records are made available to Congress, the courts, and the sitting and former president when needed to perform official duties.

Unlike the Privacy Act, the Presidential Records Act's provisions relating to the disclosure of information should be read broadly in light of this underlying policy and intent of the law. This law was enacted specifically to prevent former presidents from blocking public and congressional access to presidential records. To respond to one party and not the other flies in the face of this intent. In particular, the congressional access provision should never be interpreted in a manner that thwarts members of Congress from fulfilling their constitutional duties.

For all of these reasons, I ask that you reconsider the position set forth in your August 2 letter. These records are crucially important to the Senate's understanding of Mr. Kavanaugh's full record, and withholding them prevents the minority from satisfying its constitutional obligation to provide advice and consent on his nomination.

Sincerely,

Dianne Feinstein
Ranking Member

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

[4] *See Overview of the Privacy Act of 1974*, U.S. Department of Justice, https://www.justice.gov/opcl/policy-objectives.
[5] *See* 5 U.S.C. § 552a(b).
[6] *See* David S. Ferriero, *NARA's Role under the Presidential Records Act and the Federal Records Act*, Prologue Magazine, vol. 49, no. 2 (summer 2017), https://www.archives.gov/publications/prologue/2017/summer/archivist-pra-fra.