United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

July 30, 2018

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue NW
Washington, D.C. 20408

Dear Mr. Ferriero:

I write with regard to Ranking Member Feinstein's letter addressed to you and dated July 27, 2018. I wish again to correct the Ranking Member's misreading of the facts and law.

Before I do, however, please permit me to respond to the Ranking Member's point that you should have begun your review of records relating to Judge Kavanaugh under 44 U.S.C. § 2205(2)(C) as soon as the President nominated him to serve on the Supreme Court. Section 2205(2)(C) authorizes Congress and its committees to seek special access to particular records. As far as I know, no committee requested special access to any records relating to Judge Kavanaugh until I submitted the Committee's request on July 27. Conducting a review of records responsive to a nonexistent request of indeterminate scope would have distracted you and your staff from the important work of responding to FOIA requests, assisting the current Administration in disposing of records, and managing archival facilities. The Ranking Member's criticism of your response to Judge Kavanaugh's nomination is unreasonable and misses the mark.

Moreover, the Ranking Member again misstates the law governing access to presidential records. She claims that your reading of section 2205(2)(C) is "unduly restrictive" because it "results in one political party having complete control over what records the Senate will be able to see." She claims that your interpretation is "biased" and that, as a longtime member of the Committee, she is entitled to whatever records she requests. The Ranking Member points to no legal authority to support her novel theory.

The Presidential Records Act (PRA) enumerates specific individuals and institutions that may obtain special access to presidential records notwithstanding the PRA's limitations on public access: (1) "the Archivist and persons employed" by him; (2) "a court of competent jurisdiction"; (3) "an incumbent President"; (4) "either House of Congress"; (5) "any committee or

subcommittee" of either House of Congress; and (6) "a former President" or his "designated representative." 44 U.S.C. §§ 2205(1), (2), (3).

Of course, we in Congress wrote the statute so that "either House of Congress" or "any committee or subcommittee thereof" may obtain special access to presidential records. But we did not write the statute to permit an individual senator to obtain special access to presidential records. The Chairman acts on behalf of the Committee in the absence of a contrary vote of the majority of the members.[1] It is well established that individual members do not exercise the powers of Congress or a congressional committee, in the absence of an explicit delegation of authority.[2] A request for special access from the Ranking Member, unsupported by a majority vote of the Committee, therefore, is not a request from a "committee or subcommittee" of the Senate. Again, the Ranking Member points to no legal authority to the contrary.

Senate precedent further supports your reading of the PRA. During Justice Kagan's confirmation, for example, then-Ranking Member Sessions wrote a letter to the General Counsel of the National Archives and Records Administration (NARA) asking that NARA produce White House documents that mentioned Justice Kagan. Then-Chairman Leahy refused to join Senator Sessions' request, and NARA flatly refused to honor it. Similarly, then-Ranking Member Specter and I sought records from the Clinton Library during the confirmation of Eric Holder to serve as Attorney General. Because then-Chairman Leahy refused to sign the request, and even though our signatures "represented 40-plus Republican Senators, [our] request was treated as any other citizen's request under the Freedom of Information Act" and the Clinton Library refused to hand over documents.[3] Neither Senator Sessions nor Senator Specter accused NARA of "bias" when it refused to honor their requests for special access to presidential records. I don't understand why the Ranking Member now accuses you of "bias" for adhering to NARA's longstanding, neutrally applied, and correct interpretation of the PRA.

With her reading of the PRA foreclosed by the statute's text and Senate precedent, the Ranking Member misquotes a letter I wrote to the President in June 2017 as evidence that her reading of the statute is correct. But my letter criticized the Office of Legal Counsel for positing that the Executive Branch does not have to respond to *voluntary* requests for information unless those requests came from committee chairmen. I took *no position* on whether an individual Senator may demand special access to presidential records pursuant to a statute that limits disclosure of those records to requests of a House of Congress or a congressional committee. In that situation, the plain text of the statute governs the access of individual senators. Accordingly, unless the Ranking

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[1] *See Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members*, 25 Op. O.L.C. 289 (2001) (interpreting a nearly identically worded congressional-disclosure provision of the Privacy Act to prohibit disclosures to ranking members).

[2] *See Exxon Corp. v. FTC*, 589 F.2d 582, 593 (D.C. Cir. 1978); *see also* Alissa M. Dolan et al., Cong. Research Serv., RL30240, *Congressional Oversight Manual* 56 (2014) ("Individual Members. Members not on a committee of jurisdiction, or minority Members of a jurisdictional committee, may, like any person, request agency records. When they do, however, they are not acting pursuant to Congress's constitutional authority to conduct oversight and investigations.").

[3] *Nomination of Eric H. Holder, Jr., Nominee to be Attorney General of the United States: Hearing before the S. Comm. on the Judiciary*, 111th Cong. 5 (2009) (Statement of Sen. Arlen Specter, Ranking Member, S. Comm. on the Judiciary); *see also* Letter from Gary M. Stern, General Counsel, NARA, to Sen. Arlen Specter, Ranking Member, United States Senate Committee on the Judiciary (Dec. 22, 2008) (interpreting section 2205 not to include requests from individual Senators).

Member is arguing that the PRA's limitations on any individual senator's demand for special access to Presidential records are *unconstitutional*—an argument for which she provides no authority of any kind—she is not entitled to special access to presidential records in her capacity as an individual senator.[4]

Finally, the Ranking Member accuses you of "retreating from [your] role as the neutral, nonpartisan decision-maker over what records will be produced to Congress." It is a head-scratcher to suggest—without any evidence—that the Archivist of the United States, whom President Obama happened to appoint to the post in 2009, has turned into a Republican partisan agent.

On July 27, I submitted to the George W. Bush Library a request for special access under section 2205(2)(C) to records relating to Judge Kavanaugh's legal service in the White House. I fully expect that, after Presidents Bush and Trump have undertaken the reviews to which they are entitled, *see* Exec. Order No. 13489, 74 Fed. Reg. 4,669 (Jan. 26, 2009); 36 C.F.R. § 1270.44(c), (d), NARA will produce all non-privileged records responsive to the Committee's request in accordance with procedures similar to those used in connection with previous Supreme Court nominations.

Sincerely,

Chuck Grassley

Chuck Grassley
Chairman

cc:

The Honorable Dianne Feinstein
Ranking Member, United States Senate Committee on the Judiciary
331 Hart Senate Office Building
Washington, D.C. 20510

[4] The Ranking Member also argues that your reading of the PRA "would result in the press and the public having greater access to presidential records under [FOIA] than members of the minority have under the [PRA]." This argument too is wrong. Any person who is not authorized to obtain special access under § 2205 is subject to § 2204's limitations on public access. Because she is not the Archivist, a court, a former President, the sitting President, a House of Congress, or a congressional committee, the Ranking Member is a member of the public under the PRA and has all of the same access rights as any other member of the public under the PRA. She is therefore as free as any other member of the public to seek access to Presidential records under the PRA and FOIA.