

August 23, 2018

The Honorable Charles E. Grassley  
Chairman  
United States Senate  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Dianne Feinstein  
Ranking Member  
United States Senate  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510



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**Re: Full disclosure of Brett Kavanaugh's records**

Dear Chairman Grassley and Ranking Member Feinstein:

The American Civil Liberties Union urges you to examine the full record of U.S. Circuit Court Judge Brett Kavanaugh as you consider his nomination to the U.S. Supreme Court, and not limit that examination by excluding records from his tenure as Staff Secretary in the Bush White House.

Supreme Court justices don't just follow precedent, they regularly set precedent for all other courts. Unlike lower court judges, they have an outsized role in establishing national policy, sitting at the head of one of the three co-equal branches of government. Given this profound policy role, the Committee must take the full measure of a nominee's approach – by examining his judicial record and respect for precedent as well as his approach to policy development as reflected in all official papers in which he had a hand.

This is especially true here, where there are indications that Judge Kavanaugh may have provided inaccurate or misleading information during his confirmation to the court of appeals about his input into the development of controversial policies when he served as Staff Secretary in the Bush White House and in the Office of White House Counsel.<sup>1</sup> We are pleased that the Committee will examine records from his time in the White House Counsel's office, though we strongly disagree with the decision to restrict public access to those

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<sup>1</sup> A. Shapiro, *Federal Judge Downplays Role in Detainee Case* (NPR, June 26, 2007); *see also* Letter from Senator Richard Durbin to Judge Kavanaugh (June 26, 2007) (hereinafter "Durbin Letter") (*both available at* <https://www.npr.org/templates/story/story.php?storyId=11433231>).



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records.<sup>2</sup> We also disagree with the process whereby political and professional allies of the nominee are vetting the documents before making them available to the senators charged with considering the nomination.<sup>3</sup> We urge the Committee to demand all records of Judge Kavanaugh's time as White House Staff Secretary from 2003 to 2006 and we urge the full disclosure of all records related to any aspect of his government service over the years.

The Senate Judiciary Committee and, indeed, every senator should have as full an understanding as possible of Judge Kavanaugh's approach to policy and how that might govern his views as an associate justice on the Supreme Court. During his tenure as White House Staff Secretary, he guided the decision-making process for any number of controversial policies, including those involving detention, detainee treatment, abortion rights, immigration reform, the so-called faith-based initiative, and LGBT rights, among many others.<sup>4</sup> A full understanding of his work requires consideration of all official records from his time as a top Bush administration official.

#### *A flawed 2006 confirmation process*

Some have argued that Judge Kavanaugh's confirmation to the court of appeals precludes the need for a full review into his complete record. We respectfully disagree. Even if his earlier confirmation process were faultless, elevation to the Supreme Court requires that the public and the Senate be able examine his record in its entirety. But in fact, significant questions have been raised about the earlier process as to the accuracy of information provided by the nominee. Senators Feinstein, Leahy, and Durbin have publicly questioned the

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<sup>2</sup> S. M. Kim, *The Clearinghouse for Brett Kavanaugh's Documents is a Bush White House Lawyer* (Washington Post, Aug. 15, 2018) (available at <http://www.post-gazette.com/news/politics-nation/2018/08/15/The-clearinghouse-for-Brett-Kavanaugh-s-documents-is-a-Bush-White-House-lawyer/stories/201808150176>).

<sup>3</sup> R. Barnes, *New Kavanaugh Documents Prompt Partisan Debate Over Vetting* (Washington Post, Aug. 9, 2018) (former Kavanaugh deputy leading review of documents in lieu of National Archives) (available at [https://www.washingtonpost.com/politics/new-kavanaugh-documents-prompt-partisan-debate-over-vetting/2018/08/09/eac307c8-9be2-11e8-843b-36e177f3081c\\_story.html?noredirect=on&utm\\_term=.7f3c7d60f54b](https://www.washingtonpost.com/politics/new-kavanaugh-documents-prompt-partisan-debate-over-vetting/2018/08/09/eac307c8-9be2-11e8-843b-36e177f3081c_story.html?noredirect=on&utm_term=.7f3c7d60f54b))

<sup>4</sup> J. Gresko, *Senators Spar on Access to Kavanaugh's Staff Secretary Work* (AP, Jul. 27, 2018) (available at <https://www.apnews.com/4e272e40fe914e19a1d67212bae99056/Senators-spar-on-access-to-Kavanaugh%27s-staff-secretary-work>); see also J. Podesta and T. Stern, *Staff Secretaries Aren't Traffic Cops* (Washington Post, Jul. 30, 2018) (available at [https://www.washingtonpost.com/opinions/republicans-are-obstructing-a-fair-vetting-of-brett-kavanaugh/2018/07/30/9d823d00-9410-11e8-80e1-00e80e1fdf43\\_story.html?utm\\_term=.84e106044fb0](https://www.washingtonpost.com/opinions/republicans-are-obstructing-a-fair-vetting-of-brett-kavanaugh/2018/07/30/9d823d00-9410-11e8-80e1-00e80e1fdf43_story.html?utm_term=.84e106044fb0)).



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veracity of Judge Kavanaugh's 2006 confirmation testimony.<sup>5</sup> In that testimony, he said that he had no involvement in torture or detention policy, but emails suggest that he had review authority over administration messaging on issues involving rendition and interrogation. His position in the Office of White House Counsel in the aftermath of 9/11 when the Bush administration was in the initial phases of developing its controversial policies on torture, rendition, and warrantless detention, suggests there may be good reason to delve further into his involvement in policy development in those areas after his appointment as White House Staff Secretary.<sup>6</sup>

The Staff Secretary controls the flow of documents to and from the president. That position has control over the range of views the president is exposed to and decides who in the administration gets to weigh in on policy debates. The Staff Secretary directs presidential inquiries to the appropriate people and thus helps determine the nature of responses that will be generated.<sup>7</sup> In Judge Kavanaugh's case, he also played a role in the speechwriting process and in formulating legislation and executive orders.<sup>8</sup> Aside from the issues surrounding detainee treatment, during Judge Kavanaugh's time as Staff Secretary, the Bush administration was involved with other controversial issues such as the so-called partial birth abortion ban and an attempt to craft an amendment banning marriage for same-sex couples.<sup>9</sup> Judge Kavanaugh himself has noted that the position helped to prepare him for being an appeals court judge.<sup>10</sup> It seems ludicrous to suggest that there is no value in examining the records from this period of Judge Kavanaugh's professional career.

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<sup>5</sup> See Durbin Letter (June 26, 2007); Letter from Senators Feinstein, Leahy, and Durbin to Senator Grassley (Aug. 16, 2018) (available at <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=08DE592F-2C5C-48A8-A492-963BD836AC83>).

<sup>6</sup> D. Graham, *How Kavanaugh's Last Confirmation hearing Could Haunt Him* (The Atlantic, Jul. 17, 2018) (available at <https://www.theatlantic.com/politics/archive/2018/07/how-kavanaughs-last-confirmation-hearing-could-haunt-him/565304/>).

<sup>7</sup> Report 2017-23: *The Office of the Staff Secretary*, White House Transitions Project/Baker Institute for Public Policy (2017) (available at <http://whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP2017-23-Staff-Secretary.pdf>).

<sup>8</sup> See J. Gresko, *Senators Spar on Access to Kavanaugh's Staff Secretary Work* (AP, Jul. 27, 2018) (available at <https://www.apnews.com/4e272e40fe914e19a1d67212bae99056/Senators-spar-on-access-to-Kavanaugh%27s-staff-secretary-work>).

<sup>9</sup> *Id.*

<sup>10</sup> A. Rogin, *Senate Republicans Clash with Democrats over Access to Kavanaugh's White House Records* (ABC News, Jul. 25, 2018) (available at <https://abcnews.go.com/Politics/senate-republicans-clash-democrats-access-kavanaughs-white-house/story?id=56813039>).

## *Bipartisan commitment to transparency is the best course*

The ACLU does not endorse or oppose Supreme Court nominees, but we do have a long history of demanding full examination of the qualifications of nominees for high office, regardless of party. We demanded an examination of the records of John Brennan prior to his appointment as C.I.A. Director under President Obama.<sup>11</sup> We sought the release of records associated with Gina Haspel as she was being considered for the same position in the current administration.<sup>12</sup> We sought deeper examination of records regarding Michael Mukasey in the Bush administration prior to his confirmation as Attorney General and we sought to delay the nomination of David Barron as a federal appeals court judge until there was a full consideration of his involvement in preparing legal memos authorizing expanded use of drone strikes.<sup>13</sup>



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Chairman Grassley and colleagues on both sides of the aisle have long been supporters of making government more open, including by supporting legislation in the last Congress that codified the idea that the default response to a request for government records should be “yes.”<sup>14</sup>

There is no good reason not to seek the records from Judge Kavanaugh’s time as White House Staff Secretary, and many good reasons to think that such records would enlighten the public and the Senate about the nominee’s approach to policy-making. They will also offer insight into the values he would bring to the Supreme Court if he were confirmed and the kinds of circumstances under which he might forego precedent and set a new course.

The current situation is similar to the demand for transparency into the lengthy record of government service of Justice Kagan prior to her confirmation. In the spring of 2010, Chairman Grassley and then-Senator Sessions sought the broad release of documents from her time in federal government and 99 percent of those records were

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<sup>11</sup> ACLU, *Brennan Nomination to Head CIA Raises Concerns* (Jan. 7, 2013) (available at <https://www.aclu.org/news/brennan-nomination-head-cia-raises-concerns>).

<sup>12</sup> E. Schor, *ACLU Demands Internal CIA Records on Haspel Push* (Politico, May 4, 2018) (available at <https://www.politico.com/story/2018/05/04/aclu-gina-haspel-cia-records-569668>).

<sup>13</sup> ACLU, Letter to Senators Leahy and Specter (Oct. 12, 2007) (available at <https://www.aclu.org/letter/letter-senate-judiciary-committee-leadership-mukasey-nomination>); ACLU, Letter to U. S. Senate (May 5, 2014) (available at <https://www.aclu.org/other/letter-senators-regarding-nomination-david-barron-us-court-appeals-first-circuit>).

<sup>14</sup> J. Gerstein, *Obama Signs FOIA Reform Bill* (Politico, June 30, 2016) (available at <https://www.politico.com/blogs/under-the-radar/2016/06/obama-signs-foia-reform-bill-225010>).



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provided.<sup>15</sup> In 2018, the same should be true. Groups from across the spectrum agree that there is everything to gain and nothing to lose by obtaining the records of Judge Kavanaugh's White House service.<sup>16</sup>

Because the records bear directly on Judge Kavanaugh's qualification for the Supreme Court and attitude toward overruling precedent, because there is no countervailing argument to suggest there is a reason to withhold such records, and because this is one of the most significant decisions the Senate undertakes, we urge you to take immediate action to obtain the records of Judge Kavanaugh's time as White House Staff Secretary.

They are inherently valuable to the Committee's role in assessing the nomination and to the Senate's constitutional role in providing advice and consent. A refusal to seek such records would be seen as a willful attempt to obfuscate the record and hide important and relevant information from those charged with this task. Respect for the institutions of our government demands nothing less than full transparency for the official records of Judge Kavanaugh's government service.

If you have any questions or comments about our support for full disclosure of records related to Judge Kavanaugh's government experience, please contact Faiz Shakir at 202-675-2304 or [fshakir@aclu.org](mailto:fshakir@aclu.org).

Sincerely,

Faiz Shakir  
National Political Director

cc: Members of the Senate Judiciary Committee

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<sup>15</sup> See Senate Session, Part 2 (C-SPAN, June 15, 2010) (Grassley outlining need for all of Kagan's documents) (*available at* <https://www.c-span.org/video/?c4741788/grassley-kagan-documents>); Senate Session (C-SPAN, May 24, 2010) (Sessions demands all Kagan documents before hearing) (*available at* <https://www.c-span.org/video/?c4741946/sessions-demands-kagan-documents-hearing>); see also *Why Are Republicans Covering Up Brett Kavanaugh's Past* (NY Times, Aug. 17, 2018) (99 percent of Kagan records provided) (*available at* <https://www.nytimes.com/2018/08/17/opinion/republicans-brett-kavanaugh-senate.html?smtyp=cur&smid=tw-nytopinion>).

<sup>16</sup> See, e.g., Letter to Senators Grassley and Feinstein (Aug. 8, 2018) (open government groups call for full access to records) (*available at* <https://www.openthegovernment.org/sites/default/files/Letter%20to%20Senate%20Judiciary%20re%20Kavanaugh.pdf>); NAACP, Civil Rights Leaders Call for Full Examination (Aug. 17, 2018) (*available at* <https://naacp.org/latest/civil-rights-leaders-call-full-examination-kavanaughs-record-meeting-senate-leaders/>).