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VIA ELECTRONIC MAIL

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

Dear Chairman Grassley:

Pursuant to the Presidential Records Act (PRA), representatives designated by former President George W. Bush requested, and the National Archives and Records Administration (NARA) provided, data and documents relating to Judge Brett M. Kavanaugh's service in the White House Counsel's Office in the Bush Administration. Specifically, NARA provided to us all emails sent or received by Judge Kavanaugh during his time in the White House Counsel's Office, and all of the documents contained within his office files from that same time period, which were requested by the Committee in its July 27, 2018 request to the George W. Bush Presidential Library and Museum. At President Bush's instruction, our team of lawyers from the law firms Baker Botts, Kirkland & Ellis, and Quinn Emanuel has been reviewing those documents and producing them to the Senate Judiciary Committee to facilitate its constitutional obligation to consider Judge Kavanaugh's nomination to the Supreme Court of the United States. We are writing on President Bush's behalf to confirm that, subject to the minor exceptions described below, we have completed our accelerated review and production of President Bush's presidential records concerning Judge Kavanaugh's time in the White House Counsel's Office. President Bush directed us to proceed expeditiously and to err as much as appropriate on the side of transparency and disclosure, and we believe we have done so.

In summary, and as explained in more detail below, we produced to the Committee every page of every reviewable document we received from NARA, with the following exceptions: (a) exact duplicates of electronic records, which were excluded by an automated software process used by a third-party vendor that hosted the data sent to us by NARA; (b) personal documents, to which the Committee is not entitled under the PRA; (c) presidential records that fell outside the

time of Judge Kavanaugh's service in the White House Counsel's Office; and (d) presidential records protected by constitutional privilege. We also redacted personal material, such as social security numbers, cell phone numbers, and private email addresses, as well as other personal information that was mixed in with presidential records, from documents we produced to the Committee or made available for public release. Every document we reviewed, whether it was personal or a presidential record, was also reviewed either by NARA or the Department of Justice.

For personal documents, we returned to NARA all that we identified in our review for NARA to independently assess such documents' proper categorization and treatment under the PRA. NARA has so far agreed with the vast majority of our team's assessments, and where there was disagreement we deferred to NARA's judgment and intend to produce all such documents, subject only to the Department of Justice's final review for constitutional privilege. We will provide a supplemental production once this review has concluded, which we expect to happen shortly. NARA has also informed us that it expects to finish today its review of remaining documents we have designated as personal, at which point we will provide any that NARA marks as presidential records to the Department of Justice for a constitutional privilege review. This review and small additional production will be completed before the scheduled hearing on Judge Kavanaugh's nomination on September 4-7, 2018.

For presidential records, we provided every such document to the Department of Justice so it could conduct its own independent review and consult with the White House about the application of appropriate PRA exemptions and constitutional privileges attendant to the Presidency. Based on that review, the White House and the Department of Justice have identified certain documents of the type traditionally protected by constitutional privilege. The White House, after consultation with the Department of Justice, has directed that we not provide these documents for this reason.

Below is an accounting of how we processed and reviewed the documents received from NARA:

- We received a total of 276,695 distinct documents consisting of 937,176 pages from NARA. NARA informed us that these documents included a full set of emails sent by and to Judge Kavanaugh (including cc's and bcc's) while he was in the White House Counsel's Office and his hard copy records from the same period.[1]

- Among these documents, 96,924 documents (273,359 pages) were exact duplicates of other documents that NARA provided. A reputable and experienced third-party document-processing vendor applied its standard automated process for determining whether a document was an exact duplicate. When its software confirmed that documents were exact

[1] Of these, 10,488 documents (45,412 pages) consisted of hard copy files from Judge Kavanaugh's White House Counsel's Office staff files. In addition, earlier this week we received an additional set of 276 documents (23,054 pages) of hard copy files from Judge Kavanaugh's White House Counsel's Office staff files that had not previously been provided to our third-party document review vendor. We are reviewing these documents expeditiously and expect to produce any responsive, non-privileged documents to the Committee before the hearings begin.

copies of others, the vendor excluded the exact duplicates from the documents to be reviewed by our team. As elsewhere, however, we erred on the side of disclosure regarding what was counted as a duplicate: if even a minor difference was detected by the vendor's software, we elected to include the document within our review, which is why in some instances it appears that we have produced duplicates.

Thus, after excluding exact duplicates, the number of documents we received from NARA fell from 276,695 distinct documents (937,176 pages) to 179,771 distinct documents (663,817 pages). We reviewed these documents and have produced or withheld them as follows[2]:

- We produced 80,788 documents (267,834 pages) for public release.[3]

- We produced an additional 47,114 documents (147,250 pages) confidentially for the Committee's (and, as permitted by you as Committee Chairman, the full Senate's) use, for reasons described below.[4]

- We have not provided the remaining 46,250 documents (204,778 pages), which either are personal records, do not fall within the time period requested by the Committee, are State Department records from the 1970s that were in Judge Kavanaugh's White House Counsel's Office files for consultation on FOIA requests (as described below), or have been identified by the White House and the Department of Justice as traditionally protected by constitutional privilege.[5]

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[2] The following figures exclude 1,799 documents (3,724 pages) that NARA has categorized as presidential records and the 276 additional hard copy documents (23,054 pages) referenced in footnote 1, both of which are still in the process of being reviewed by our team and the Department of Justice. In addition, there are 3,358 documents (16,991 pages) that are otherwise still in the process of being reviewed. We expect to finish these reviews and produce any responsive, non-privileged documents to the Committee before the hearings begin.

[3] Some of those documents have certain information redacted to comply with statutory requirements. Specifically, 3,556 documents (16,263 pages) that were made available for public review included some redactions to protect personal privacy information such as social security numbers, cell phone numbers, private email addresses, and the like.

[4] For some of those documents, personal privacy information was redacted, consistent with the Committee's July 27 request, which declined to receive materials containing personal privacy information. Specifically, 2,841 documents (13,211 pages) that were provided on a Committee Confidential basis included some redactions. In addition, certain attachments had technical issues such that they could not be processed by the third-party vendor, either because the file received from NARA was corrupt or because the file was a system file that does not contain user-generated content and is not intended to be opened or reviewed. For these documents, we produced a slipsheet indicating that there was a technical issue and have asked NARA to provide us, if possible, with uncorrupted or otherwise reviewable versions of these files. The number of files with technical issues consists of 1,625 documents (1,625 pages).

[5] There is a smaller category of 186 documents (186 pages) that were withheld because there were technical issues with the documents such that they could not be processed by the third-party

The review team applied three factors in determining how to categorize each document:

- ***Presidential Record***. As an initial matter, we assessed whether a document actually was a presidential record based on the language of the PRA. *See* 44 U.S.C. §§ 2201(2), (3). With respect to documents that we believe are not presidential records—because they are instead wholly private or are otherwise unrelated to the work of the Bush Administration—we have provided NARA each document that we have identified as a non-presidential record so that it can make an independent assessment of the proper categorization and treatment of those documents.

- ***Statutory Exemptions.*** The PRA enumerates six exemptions. *See* 44 U.S.C. § 2204(a). When we determined that one or more of them applied to a document, we proceeded as follows. Where any of PRA exemptions 2 through 5 applied,[6] the document was produced to the Committee on a Committee Confidential basis unless it was identified as traditionally protected by constitutional privilege. Where PRA exemption 6, which protects against the disclosure of personal privacy information, applied, our team redacted the personal privacy information where possible, but otherwise made the document available for either public release or provided the document to the Committee on a Committee Confidential basis. No document was withheld entirely from the Committee solely on the basis that a PRA exemption applied to it.

- ***Constitutional Privilege***. Given the confidentiality of White House communications to which a senior White House attorney is a party, it was important to assess whether certain privileges—including the presidential communications privilege, the attorney-client communications privilege, and the deliberative process privilege—apply to these documents. Judge Kavanaugh, an Associate and Senior Associate White House Counsel, dealt with some of the most sensitive communications of any White House official. Every presidential record we reviewed was also provided to the Department of Justice for an independent assessment of its proper categorization and treatment. After completing this review, the Department of Justice and the White House have identified certain documents traditionally protected by constitutional privilege that have not been included in our productions to the Committee on that basis. Accordingly, the White House, after consultation with the Department of Justice, has directed that we not provide these documents. The most significant portion of these documents reflect deliberations and candid advice concerning the selection and nomination of judicial candidates, the confidentiality of which is critical to any President's ability to carry out this core constitutional executive function. The remaining documents not provided likewise reflect functions within the Executive Office of the President the confidentiality of which has traditionally been considered at the core of a President's constitutional privileges, including: advice submitted directly to President Bush; substantive communications between White House staff about communications with President Bush; and substantive,

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vendor. For these documents, we have asked NARA to provide us, if possible, with uncorrupted versions of these files.

[6] PRA exemption 1, which protects against the disclosure of classified information, did not apply to any documents our team reviewed.

deliberative discussions relating to or about executive orders or legislation considered by the Executive Office of the President.

Every document provided to us by NARA has been reviewed through those lenses using neutral criteria consistent with the highest-quality document-review practices. As a numerical matter, here is how the documents have been processed:

- **Excluded for Lack of Responsiveness**: 19,140 documents (102,857 pages) have not been provided, as follows:

    a. 11,189 documents (27,534 pages) were personal, and thus not presidential records under the PRA. As previously described, NARA has concurred that the vast majority of these documents are not presidential records under the PRA.[7] 7,489 documents (73,796 pages) were from documents that exceeded the relevant time period—*i.e.*, documents dating from on or after July 7, 2003, when Judge Kavanaugh left the White House Counsel's Office. Chairman Grassley's request was limited solely to documents from Judge Kavanaugh's time in the White House Counsel's Office. We have confirmed with NARA that these documents were inadvertently included in the set of material it provided to us for review.

    b. 462 documents (1,527 pages) were documents from a set of hardcopy files originating in the State Department and dating from the 1970's that were in Judge Kavanaugh's White House Counsel's Office files for consultation in connection with FOIA requests. Because it was unclear on the face of the documents which have been cleared for public disclosure and which may still be subject to applicable protections from disclosure, we have referred these documents back to NARA for any further appropriate treatment.

- **Excluded for Constitutional Privilege**: 27,110 documents (101,921 pages) have not been provided because, as described above, they have been identified as traditionally protected by constitutional privilege, and the White House, after consultation with the Department, has directed that we not provide these documents for this reason.

- **Produced to the Committee**: 127,902 documents (415,084 pages), of which 80,788 documents (267,834 pages) are now public, have been made available to the Committee and, as permitted by you as Committee Chairman, the entire Senate.

We believe we have faithfully followed President Bush's instruction to review these documents accurately, neutrally, expeditiously, and with a presumption of disclosure, notwithstanding Judge Kavanaugh's position at the time as a senior lawyer advising President Bush and senior White House staff on many privileged matters. The standards we applied to the

[7] We are awaiting NARA's views on a remaining 2,393 documents. Upon completion of this review, we will produce any documents that NARA may deem to be presidential records and that are not identified by the White House and the Department of Justice as traditionally protected by constitutional privilege.

documents given to us by NARA are the same ones we would have applied had NARA instead conducted its own review first and then consulted with President Bush's PRA representatives and the current Administration pursuant to Executive Order 13489. The only difference we perceive is that, before NARA had finished its own review, our team reviewed all of the material for which NARA has an obligation to seek the views of President Bush or his PRA representatives and the current Administration. Because we have sought, received, and followed NARA's views on any documents withheld as personal documents, and we have deferred to the White House, in consultation with the Department of Justice, on any documents not provided on constitutional privilege grounds, the resulting production of documents to the Committee is essentially the same as if NARA had conducted its review first and then sought our views and the current Administration's views, as required by law.

We would like to personally extend our gratitude to you, your staff, and other members of the Committee and their staff for making the process as smooth as possible.

Respectfully,

William A. Burck
Quinn Emanuel Urqhart & Sullivan LLP

Brigham Q. Cannon
Kirkland & Ellis LLP

Evan A. Young
Baker Botts LLP

cc: The Honorable Dianne Feinstein