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September 12, 2018

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:

We understand certain Members of the Committee have expressed several misconceptions about the process we used to review and produce records concerning Judge Brett M. Kavanaugh's service in the White House Counsel's Office. We believe these misconceptions fall into four general categories that we address below.

Misconception #1: The Bush review team "cherry-picked" documents for production to the Committee.

Reality: The Bush team made no political judgments about what to produce to the Committee—our job was to efficiently categorize documents according to the neutral criteria set out in the law. We gave to the Committee every page of every document given to us by the National Archives and Records Administration (NARA), except personal documents—which the Committee did not request and which NARA agreed should not be produced—and constitutionally privileged documents identified by the Department of Justice—which the current Administration directed that we not provide.[1] The following points explain in greater detail how and why we undertook this work.

[1] As described in our letters dated August 31, 2018 and September 6, 2018, we also did not produce documents that were automatically removed from our review using industry-standard software, because they were exact duplicates of other documents that we did review; documents that were dated on or after July 7, 2003, when Judge Kavanaugh left the White House Counsel's

- Judge Kavanaugh was nominated on July 9, 2018. It was widely understood that Judge Kavanaugh's service in the Bush Administration would come into play during his confirmation hearings and, therefore, some of his records maintained by NARA would be requested by the Committee.

- Once NARA receives a request for presidential records of the Bush Administration, it must consult with President Bush or his Presidential Records Act (PRA) representatives prior to releasing records that may be subject to restrictions on disclosure.[2] Anticipating NARA's eventual consultation, on July 12, 2018, three days after Judge Kavanaugh's nomination, President Bush's representatives requested from NARA copies of Judge Kavanaugh's White House Counsel records so we could commence our review without delay. President Bush—or his designated PRA representative—has full authority to access copies of any presidential records from his Presidency at any time.[3]

- We limited our request to Judge Kavanaugh's White House Counsel records because there was uncertainty at the time about whether the Committee would even request his Staff Secretary documents. There was no uncertainty about his White House Counsel documents, however—it was widely understood they would be requested.

- On July 27, 2018, the Committee requested Judge Kavanaugh's White House Counsel documents from the George W. Bush Presidential Library and Museum (the "Bush Library") and asked that any non-privileged material be produced by mid-August. The professional archivists at NARA are in charge of handling this request.

- On August 2, 2018, NARA informed the Committee that it could not meet the requested timeline and would be unable to finish its own review until approximately the end of October. NARA had informally notified us of this time constraint prior to its August 2 letter to the Committee.

- By August 2, our team of lawyers had already reviewed hundreds of thousands of pages of documents and had identified about 125,000 pages that we believed could be provided to the Committee consistent with the criteria set out in the PRA. As a courtesy to the Committee, President Bush authorized us to produce these

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Office; State Department documents dating from the 1970's that were in Judge Kavanaugh's White House Counsel's Office hard copy files; documents with technical issues such that they could not be processed by our third-party vendor and thus were referred back to NARA to determine if NARA could provide reviewable copies; and documents which were either redacted or, in a few cases, withheld entirely on the basis that they contained personal privacy information, such as Social Security numbers, cell phone numbers, private email addresses, and personal medical or financial information.

[2] 44 U.S.C. §§ 2204(a), (b)(3), 2208; E.O. 13489.

[3] 44 U.S.C. § 2205(3).

documents directly to the Committee so that the Members could begin their own review.

- We temporarily designated all of these documents "Committee Confidential" pending NARA's review of the documents to determine which were appropriate for public release and which should be reviewed confidentially by the Committee and other members of the Senate, consistent with the Committee's past practice for handling documents protected by law from public disclosure. We did this out of respect for NARA's expertise. While the law permits the Committee to have access to any records it requests from the Bush Library—with the exception of constitutionally privileged records[4]—the public release of those documents may be more limited and is generally within the discretion of NARA, after consultation with the incumbent and former Presidents.[5]

- Accordingly, we sent these documents to NARA to advise us of its views on whether they should be publicly released. But NARA informed us soon thereafter that it did not have the resources to review them because it was working on the Committee's July 27 request.

- President Bush had instructed us to assist the Committee in any way we could and to err on the side of transparency. Accordingly, on August 8, we began producing to the Committee publicly releasable versions of records that were not restricted from public view based on the PRA restrictions.[6] The Committee then began publishing those documents on its website.

- From then on we followed a straightforward process: we produced records on a rolling basis to the Committee initially on a "Committee Confidential" basis so that Members and their staff could begin reviewing them at their convenience, and then we would produce publicly releasable versions of most of the documents (redacting private personal information only) for the Committee to publish on its website.

- The records that remained "Committee Confidential" were those that our reviewers determined should remain confidential and available only to the Committee by applying the criteria set out in the PRA. This approach is consistent with the Chairman's request to the Bush Library, which noted the Committee's past practice of receiving documents protected by PRA exemptions on a "Committee Confidential" basis. The final breakdown between publicly releasable versus "Committee Confidential" documents was 62% public and 38% confidential—but all Senators, as well as the staff for Members of the Committee, had full access to all of the documents.

- NARA's review of the same documents our team reviewed continues, but NARA has already provided us its views on personal documents we withheld from the

[4] 44 U.S.C. § 2205(2)(C).
[5] 44 U.S.C. § 2204(b)(3); E.O. 13489.
[6] 44 U.S.C. § 2204(a).

Committee. We have followed NARA's advice in every case, even when our initial view was different. NARA will reach its own conclusions about the remaining documents and consult with us, as required by the law.

- In short, we have provided all of Judge Kavanaugh's White House Counsel's Office records to the Committee other than personal documents (which were not requested by the Committee and with which NARA agrees) and records the Department of Justice determined are of the type traditionally protected by constitutional privilege. This means that the Committee has received—months earlier than it otherwise would have—the same records, either for public release or on a "Committee Confidential" basis, that it would have received through NARA's own review process. NARA would have withheld the same personal documents and would have been required to follow the direction of the current Administration with respect to constitutionally protected documents. The sole difference that may arise has nothing to do with which documents are produced to the Committee, but only whether those documents are also made public. If differences do arise between what our team designated for public release and what NARA ultimately determines, we will discuss our position with NARA—but it will be NARA that makes the final decision on what records become public beyond the 272,000 or so pages we have already released to the public (with the exception, again, of constitutionally privileged documents, for which the current Administration makes the final determination).

Misconception #2: President Bush's review team made disclosure decisions on its own.

Reality: The Bush team reached agreement with—or deferred to—either the Department of Justice or NARA on every document produced or withheld.

- Every single page of every document our team reviewed was also reviewed either by the Department of Justice, or NARA, or both.

- The PRA lists six types of records that are restricted from public access for a period of up to 12 years after the conclusion of President Bush's term in office.[7] This period expires a little over two years from now in January 2021.

- We instructed our lawyers to review the records and neutrally apply the PRA's criteria, in accordance with the highest professional standards, to determine which could be made public and which should be "Committee Confidential"—and without regard for helping or hurting Judge Kavanaugh's prospects for confirmation.

- The Department of Justice reviewed every presidential record we reviewed. And every single decision on what documents to make public and which ones to limit to

[7] 44 U.S.C. § 2204(a).

the Senate as "Committee Confidential" was made in consultation with the Department of Justice.

- Moreover, we deferred to the Department of Justice on whether any documents should be withheld entirely on the ground they are of the type traditionally protected by constitutional privilege. The current Administration directed that we not provide such documents.

- We gave NARA every document we believed was personal and therefore not subject to the Committee's request or disclosure under the PRA. NARA agreed with the vast majority of our determinations, but where it did not, we deferred to NARA's judgment and treated the document as a presidential record.

- In short, we made no unilateral decisions about what to produce or not to produce. In every instance, we consulted with either the Department of Justice (for presidential records) or NARA (for personal records), or we deferred to those government agencies on what to produce or withhold.

Misconception #3: The Presidential Records Act restricts public release of only classified information or personal medical information.

Reality: The Act specifically restricts access to six different types of information, including, as relevant to our review, records relating to appointments to Federal office, confidential communications seeking or giving advice between the President and his advisers or between those advisers, and personal privacy information.

- Some Members of the Committee have asserted it was inappropriate to restrict public access to records that did not contain classified information or personal medical information. While these types of records are restricted,[8] the law *also* restricts four other types of records and a broader class of personal private information.

- The Act broadly restricts public access to records containing information "relating to appointments to Federal office."[9] Such appointments include the federal judiciary. As is widely known, Judge Kavanaugh was deeply involved in advising President Bush and his other senior advisors on selecting President Bush's nominees to the federal judiciary and was involved in a number of the ensuing confirmation proceedings. It should be unsurprising, then, that many of the documents we produced to the Committee but asked that they remain "Committee Confidential" fall into this category.

- The Act also restricts public access to records of "confidential communications requesting or submitting advice, between the President and the President's advisers,

[8] 44 U.S.C. §§ 2204(a)(1), (a)(6). We note that our team did not review classified material. We requested, and NARA provided us, only unclassified documents.
[9] 44 U.S.C. § 2204(a)(2).

or between such advisers."[10] Judge Kavanaugh was a senior lawyer in the White House and routinely provided advice (and often sought it out) in the course of his regular duties. Because of his role, there are many documents that fall into this category, and we restricted access to them to the Committee under the criteria set out in the Act.

- As to personal privacy information, the Act restricts public access not only to personal medical information but also to "personnel … files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[11] In order to protect this type of information, we redacted Social Security Numbers, cell phone numbers, personal email addresses, and other purely personal information that appeared in presidential records.

- Our review team made every effort to apply these criteria neutrally and accurately. We do not pretend to be perfect, however, and invited Members and their staff to identify any errors they encountered in our production. Whenever errors were identified, we worked quickly to correct them.

Misconception #4: Senators did not have enough time to review "Committee Confidential" documents or decide which ones they wanted to make available to the public at the hearing.

Reality: We completed about 90% of our total production two weeks before the hearing and 99.8% before the hearing started.

- Our team moved as expeditiously as possible to complete its review before the hearing started on September 4, 2018. We completed about 90% of our total production—about 408,000 pages—by August 21, 2018, two weeks before the hearing. And we finished 99.8% by September 3, 2018, before the hearing started. During the hearing itself, we produced only about 1,000 new pages, or about 0.2% of the roughly 458,000 total pages provided to the Committee.

- As you know, you gave access to all documents, including "Committee Confidential" records, to any Senator who wished to see them, not just the Members of the Committee. And you established a process—the same process you and Ranking Member Feinstein followed last year for the nomination of Justice Gorsuch—for Members of the Committee to identify prior to the hearing any document restricted as "Committee Confidential" that he or she wished to make public. To our knowledge, only Senator Klobuchar took advantage of this process before the hearing began.

- Prior to the hearing, the Bush team and the current Administration agreed to publicly release the documents identified by Senator Klobuchar. And during the hearing itself, several Members identified additional "Committee Confidential" documents they wished to make public. In every instance, the Bush team and the

[10] 44 U.S.C. § 2204(a)(5).
[11] 44 U.S.C. § 2204(a)(6).

current Administration agreed to release them publicly as an accommodation to the Committee.

- We have continued to remain willing to review "Committee Confidential" documents and to consent to Members' requests for public disclosure, when appropriate. In some instances, we have already made the documents public prior to the request; in others, we have readily agreed to public release.

- We understand that, despite our willingness to accommodate, one Member has unilaterally "released" over 40 "Committee Confidential" documents without seeking consent from you, the Bush team, or the current Administration. We have the benefit of NARA's assessment of 18 of these documents (we do not yet know NARA's assessment of the others), and consistent with our review team, NARA determined 17 of them should be restricted from public release. The one NARA would have released publicly is attached to this letter.

- Even so, and consistent with our continued accommodation of the Committee, we can advise you that, had we been consulted about these unilaterally-released documents, we would have consented to their public disclosure.

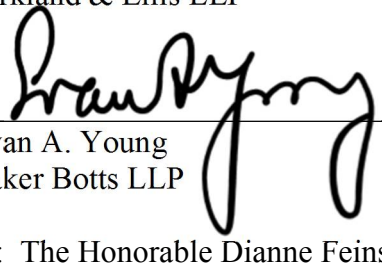
- In short, the Bush team and the current Administration have consented to the disclosure of every "Committee Confidential" document that Senators have requested be released to the public.

On behalf of President Bush and our team, we are sincerely grateful to you and your staff for the courtesy and assistance you have provided to us in accomplishing our assignment.

Respectfully,

William A. Burck
Quinn Emanuel Urquhart & Sullivan LLP

Brigham Q. Cannon
Kirkland & Ellis LLP



Evan A. Young
Baker Botts LLP

cc: The Honorable Dianne Feinstein

Enclosures