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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
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July 23, 2018

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

Dear Mr. Ferriero:

I write with regard to Ranking Member Feinstein's letter addressed to you and dated July 21, 2018. I wish to comment on the Ranking Member's misreading of the facts and law.

As you well know, the Presidential Records Act of 1978 (PRA) confers on former Presidents and their designated representatives, *see* 44 U.S.C. § 2204(d); 36 C.F.R. § 1270.22(a), a right of special access to Presidential records without regard to any of the six restrictions on public access to those records under the PRA. 44 U.S.C. § 2205(3); *id.* § 2204(a)(1)–(6). We understand that the PRA representatives of former President George W. Bush have made, at President Bush's direction, a request for access to certain records pertaining to Judge Brett Kavanaugh's service in the White House from 2001 to 2006. I further understand that, consistent with the PRA, you turned over those records to the PRA representatives without reviewing them for PRA-restricted material. And, as you know, the PRA imposes no restrictions on the PRA representatives' use of those records once you have turned them over to their custody, subject only to whatever direction they may receive from President Bush.

The Ranking Member claims that "outside private lawyers" are conducting an "initial review . . . for the purposes of removing records from consideration for public release." She claims that these lawyers have "replace[d] non-partisan Archivist staff" in determining which records should be withheld from the public under the PRA, and that this replacement violates the PRA and perhaps the Antideficiency Act, 31 U.S.C. § 1342.

Those claims are false. We understand that outside lawyers are assisting the PRA representatives in reviewing records requested under § 2205(3). Although you have provided those lawyers with NARA's guidance on reviewing Presidential records for PRA restrictions and privilege, this review is not being done at NARA's behest or on NARA's behalf. These lawyers are not deciding whether these records will be eligible for public release in response to a FOIA request—a role

reserved to your office for the period during which the PRA restrictions remain in force. 44 U.S.C. § 2204(b)(3). The Ranking Member is simply incorrect that private lawyers are performing any functions conferred on NARA by the PRA. The review conducted by these lawyers is at the request of President Bush exercising his statutory prerogative under § 2205(3), subject to laws other than the PRA.

The Ranking Member further protests that President Bush’s lawyers lack “security clearances,” which she suggests raises the possibility that “any classified material that might be contained in the records” may be “mishandl[ed].” But, as President Bush’s designated representative explained to the Ranking Member’s staff last week, NARA segregates material labeled as “Classified” from other Presidential records and did not provide material labeled as “Classified” in response to his PRA representatives’ special access request.

More fundamentally, the Ranking Member appears to misunderstand how the PRA operates in the context of a Supreme Court nomination. As you know, the PRA entitles this Committee to special access to Presidential records “notwithstanding any” of the six PRA restrictions during the period in which those restrictions remain operative. 44 U.S.C. § 2205(2)(C).¹ The incumbent and former Presidents may, however, assert constitutional privilege against the handing over of documents to the Committee. *See* 44 U.S.C. § 2205(2) (any special access request is “subject to any rights, defenses, or privileges which the United States or any agency or person may invoke”). In other words, when the Committee requests access to documents under § 2205, it is entitled to any unprivileged records even if PRA restrictions would bar public access to those records. NARA’s only roles in response to a § 2205 request from this Committee are to ascertain whether it has the records requested and to alert the former and incumbent Presidents of the § 2205 request so that each has the opportunity to assert constitutional privilege against the records’ release. Exec. Order No. 13489, 74 Fed. Reg. 4,669 (Jan. 26, 2009); 36 C.F.R. § 1270.44(c), (d). NARA is then obliged to turn over to the Committee all Presidential records responsive to this request that are not subject to claims of constitutional privilege. And the PRA imposes no restrictions on the Committee’s use of those records once it has lawfully taken custody of them—including on the Committee’s ability to make those records public.²

Of course, this Committee has not to date asked you for access to any Presidential records of any kind. The Ranking Member’s “concerns” about the handling of documents therefore are not only misplaced, but premature. President Bush’s PRA representatives are not performing government functions of any kind, on behalf of NARA or any other government official. They are merely performing their duties as his PRA representatives with the assistance of a group of outside lawyers in light of the volume of material to be reviewed. The PRA imposes no restriction on the President’s ability to review records to which he has a lawful right of access—including reviewing them to determine whether he believes those records are subject to PRA restrictions or

¹ The restrictions remain operative until the earlier of 12 years after the end of the Administration in which they were created, or when the former President waives those restrictions. 44 U.S.C. § 2204(b)(2)(A). The 12-year ban does not expire until January 2021.

² This Committee has agreed to restrictions on its access to Presidential records in connection with previous Supreme Court nominations. For example, in the course of the confirmation processes for both Justices Kagan and Gorsuch, the Committee agreed to receive certain records on a “Committee Confidential” basis and not to disclose them to the public. But the PRA itself—as opposed to nondisclosure obligations voluntarily assumed by the Committee—does not constrain on the Committee’s right to make public Presidential records received pursuant to § 2205(2)(C).

constitutional privilege. *See* 44 U.S.C. § 2204(b)(3) (requiring the Archivist to consult with the former President in deciding whether a record is subject to a PRA restriction).

In my view, therefore, NARA, the former President, and his PRA representatives are abiding by the letter and spirit of the PRA, and you need take no action on this issue.

Sincerely,



Chuck Grassley
Chairman

cc:

The Hon. Dianne Feinstein
Ranking Member
United States Senate Committee on the Judiciary