

October 3, 2018

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
317 Russell Senate Office Building  
Washington, DC 20510

The Honorable Charles E. Schumer  
Minority Leader  
United States Senate  
322 Hart Senate Office Building  
Washington, DC 20510

Dear Majority Leader McConnell and Minority Leader Schumer:

We write to you regarding information EPIC has just received from the National Archives pertinent to the consideration of Judge Brett Kavanaugh's nomination to the United States Supreme Court. We have just received a communication from the Archives that confirms our view that the vote on the nomination, now pending before the Senate, should be postponed pending the release of the records concerning Judge Kavanaugh's role in controversial White House surveillance programs that implicate the constitutional privacy rights of Americans.

EPIC—a nonpartisan, privacy research organization—routinely comments on nominees to the Supreme Court.<sup>1</sup> Regarding the nomination of Judge Brett Kavanaugh, EPIC wrote earlier to the Chairman and the Ranking Member of the Judiciary Committee to (1) express our concern about Judge Kavanaugh's role in the warrantless wiretapping program and other surveillance activities while he was a top White House aide,<sup>2</sup> and (2) to urge the Committee to postpone the Committee vote pending the release of related records in possession of the Archives.<sup>3</sup> We simultaneously filed a Freedom of Information Act lawsuit for release of these records. *EPIC v. NARA*, No. 18-2150 (D.D.C. filed Sept. 17, 2018). EPIC moved for an injunction and the Archives subsequently agreed to promptly conduct searches for responsive records that are set to be released pursuant to the Presidential Records Act following the special access request by the Senate Judiciary Committee.

In response to EPIC's suit, the Archives has now confirmed that there are hundreds of records concerning Judge Kavanaugh's work, as a top White House aide, on controversial

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<sup>1</sup> See, e.g., Letter from EPIC to Senator Chuck Grassley, Chairman, & Senator Dianne Feinstein, Ranking Member (Mar. 20, 2017) (concerning the nomination of Justice Neil Gorsuch), <https://epic.org/privacy/gorsuch/EPIC-SJC-Gorsuch-Mar2017.pdf>; Letter from EPIC to Senator Patrick Leahy, Chairman, & Senator Jeff Sessions, Ranking Member (June 28, 2010) (concerning the nomination of Justice Elena Kagan), [https://epic.org/privacy/kagan/EPIC\\_Kagan\\_Ltr.pdf](https://epic.org/privacy/kagan/EPIC_Kagan_Ltr.pdf); EPIC, 1972 Alito Princeton Privacy Report (2005), <https://epic.org/privacy/justices/alito/princeton/>; Letter from EPIC to Senator Arlen Specter, Chairman, & Senator Patrick Leahy, Ranking Member (Sept. 9, 2005) (concerning the nomination of Chief Justice John Roberts), <https://epic.org/privacy/justices/roberts/0905letter.pdf>.

<sup>2</sup> Letter from EPIC to Senator Chuck Grassley, Chairman, & Senator Dianne Feinstein, Ranking Member (Sept. 4, 2018), <https://epic.org/privacy/kavanaugh/EPIC-Kavanaugh-SJC1tr-Sept2018.pdf>.

<sup>3</sup> Letter from EPIC to Senator Chuck Grassley, Chairman, & Senator Dianne Feinstein, Ranking Member (Sept. 12, 2018), <https://epic.org/testimony/congress/EPIC-SJC-Kavanaugh-Postponement-Sep2018.pdf>.

surveillance programs during 2001-2003. In a message to EPIC this afternoon,<sup>4</sup> the agency confirmed that Kavanaugh sent eleven emails to John Yoo, the lead attorney on the warrantless wiretapping program that was later curtailed by the U.S. Congress, during the critical period between September 2001 and February 2002 when the program was established. Kavanaugh also sent 227 e-mails discussing “surveillance” programs and the “Patriot Act”(which was secretly expanded during that time); and Kavanaugh sent 119 e-mails on “CAPPS II” (a passenger screening program that was suspended), “Fusion Center” (a government surveillance program), and the “Privacy Act.”

The Archives has processed roughly 300,000 pages of Judge Kavanaugh’s records from the two-and-a-half-year period when he worked in the White House Counsel’s Office. Many of these records are set to be released later this month. We urge the Senate to postpone the vote on Judge Kavanaugh until these records, and other records EPIC is seeking, are made available to the public.

We need to underscore that the Senate curtailed several of these programs that Brett Kavanaugh helped develop.<sup>5</sup>

Sincerely

/s/ Marc Rotenberg  
Marc Rotenberg  
EPIC President

/s/ Alan Butler  
Alan Butler  
EPIC Legal Director

Cc: Charles Grassley, Chairman, U.S. Senate Committee on the Judiciary  
Diane Feinstein, Ranking Member, U.S. Senate Committee on the Judiciary

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<sup>4</sup> The results of the searches are available at <https://epic.org/foia/nara/kavanaugh/#foia>.

<sup>5</sup> The secret expansion of Patriot Act authorities ceased when Congress passed the USA FREEDOM Act in 2015, ending the bulk collection program and amending Section 215. Pub. L. 114-23, 129 Stat. 268 (June 2, 2015). The warrantless wiretapping program ended when Congress passed the FISA Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2436 (July 10, 2008).