

September 12, 2018

Senator Chuck Grassley, Chairman
Senator Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

Dear Chairman Grassley, Ranking Member Feinstein, and Members of the Judiciary Committee:

We write on behalf of the Electronic Privacy Information Center. EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues.¹ EPIC participates in a wide range of activities, including research and education, litigation, and advocacy. The EPIC Advisory Board includes leading experts in law, technology, and public policy.² We believe that privacy is a bipartisan issue that concerns all Americans, Republicans and Democrats alike.

We write to you today regarding the Committee's upcoming Executive Business Meeting to consider the nomination of Judge Brett Kavanaugh's nomination for Associate Justice of the U.S. Supreme Court. While we take no position for or against the nominee, we are concerned about the ongoing secrecy surrounding documents from Judge Kavanaugh's years as White House Associate Counsel and then as Staff Secretary.

The release of these documents is necessary to resolve questions that continue to surround Judge Kavanaugh regarding his role in the post-9/11 surveillance programs, and how his view of the Fourth Amendment and the Constitutional rights of Americans may impact his future opinions.

During Judge Kavanaugh's time in the White House, the Administration pursued a vast array of surveillance programs that impacted the privacy rights of Americans, including warrantless wiretapping, Total Information Awareness, airport body scanners,³ passenger profiling,⁴ and the secret collection of call detail records of Americans, beyond the scope of the Patriot Act. These programs met with wide public condemnation when they became known, and were subsequently revised or scrapped.⁵

¹ EPIC, *About EPIC*, <https://www.epic.org/epic/about.html>.

² EPIC, *EPIC Advisory Board*, https://www.epic.org/epic/advisory_board.html.

³ EPIC, *Whole Body Imaging Technology and Body Scanners ("Backscatter" X-Ray and Millimeter Wave Screening)* (2018), <https://epic.org/privacy/airtravel/profiling.html>.

⁴ EPIC, *Passenger Profiling* (2017), <https://www.epic.org/privacy/airtravel/profiling.html>.

⁵ See generally Charlie Savage, Alicia Parlapiano & Sarah Wheaton, *Electronic Surveillance Under Bush and Obama*, N.Y. Times (June 7, 2013), <https://archive.nytimes.com/www.nytimes.com/interactive/2013/06/07/us/07nsa-timeline.html>.

There is strong evidence that Judge Kavanaugh played a role in shaping and defending these programs. For instance, according to a document recently released by the Committee, Judge Kavanaugh drafted talking points in support of the Patriot Act that were later incorporated into President Bush's signing statement.⁶ Those talking points misstated the actual impact of the law. Further, an email provided to the *New York Times* last week shows that Kavanaugh communicated with John Yoo, the Department of Justice lawyer who would write the memo providing the legal justification for the warrantless surveillance program, about the Fourth Amendment implications of such a program just days after 9/11.⁷ The fact that Judge Kavanaugh was in touch with Yoo, who played a key role in the Bush Administration's system of broad presidential authorization, reveals how close he was to those issues. The revelations contained in this email are especially troubling considering that Judge Kavanaugh had previously denied knowledge of the warrantless surveillance program during his confirmation hearing for the D.C. Circuit.⁸

There is thus legitimate reason to seek the public release of documents related to Judge Kavanaugh's role in these programs. There is also the delayed publication of the *New York Times* report on the warrantless wiretapping program. According to the *New York Times*, White House officials convinced the paper to hold the story for over 13 months.⁹ Emails from Judge Kavanaugh's time at the White House could reveal whether he helped convince the *Times* to delay the story and keep Americans in the dark about infringements on their right to privacy.

Full disclosure of Judge Kavanaugh's role in these surveillance programs is also critical to understanding how he might rule on future Fourth Amendment cases before the Supreme Court. In all of his previous Fourth Amendment opinions, Judge Kavanaugh has sided with government surveillance and police searches over both constitutional and statutory privacy rights. This bias poses a threat to our constitutional freedoms and possibly our democracy. Of particular concern is his opinion in *Klayman v. Obama*, in which Judge Kavanaugh stated that the government's "bulk collection of telephony data" is "entirely consistent with the Fourth Amendment."¹⁰ When Sen. Leahy questioned him about this opinion during the confirmation hearing last week, Judge Kavanaugh admitted that *Carpenter v. United States* was a "game changer" for the part of the opinion based on the third-party doctrine of *Smith v. Maryland*, but failed to address his application of the special needs doctrine in the face of overwhelming evidence that the national security benefits

⁶ E-mail from Brett Kavanaugh, Associate Counsel, White House to Edmund A. Walsh, Speechwriter, White House 688-90 (Oct. 24, 2001), <https://www.judiciary.senate.gov/imo/media/doc/08-02-18%20GWB%20Document%20Production%20-%20Pages%201%20-%20205,735.pdf>; George W. Bush, *Remarks on Signing the USA PATRIOT ACT of 2001* (Oct. 26, 2001), <http://www.presidency.ucsb.edu/ws/?pid=63850>.

⁷ E-mail from Brett Kavanaugh to John Yoo (Sep. 17, 2001), <https://int.nyt.com/data/documenthelper/264-purported-kavanaugh-e-mail-to/702e332fddd3bf0416f3/optimized/full.pdf#page=1>.

⁸ *Confirmation Hearing on the Nomination of Brett Kavanaugh to be Circuit Judge for the District of Columbia Circuit: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 73 (2006), <https://www.congress.gov/109/chrq/shrg/27916/CHRG-109shrg27916.htm>.

⁹ James Risen, *The Biggest Secret*, *The Intercept* (Jan. 3, 2018), <https://theintercept.com/2018/01/03/my-life-as-a-new-york-times-reporter-in-the-shadow-of-the-war-on-terror/>. See also, Paul Fahri, *At the Times, a Scoop Deferred*, *Wash. Post* (Dec. 17, 2005) ("the Times said in its story that it held off publishing the 3,600-word article for a year after the newspaper's representatives met with White House officials."), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/16/AR2005121601716.html>.

¹⁰ *Klayman v. Obama*, 805 F.3d 1148 (2015).

of the surveillance program were practically nonexistent.¹¹ His willingness to favor abstract and unsupported national security concerns over concrete privacy interests is highly troubling, and could stem from his involvement in the inception of these programs.

We thus urge the Senate Judiciary Committee to postpone the vote in the Executive Business Meeting on the nomination of Judge Brett Kavanaugh, pending the release of documents concerning the development, defense, and promotion of surveillance programs during the period 2001-2006. The documents are necessary for a full consideration of the qualifications of the nominee to serve on the United States Supreme Court.

Thank you for your consideration of EPIC's views. We would be pleased to provide you and your staff any additional information you may need.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Alan Butler

Alan Butler
EPIC Senior Counsel

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

/s/ Megan Iorio

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¹¹ C-SPAN, *Senator Leahy Pursues Questions about Privacy with Judge Kavanaugh* (Sep. 7, 2018), <https://www.c-span.org/video/?c4748241/senator-leahy-pursues-questions-privacy-judge-kavanaugh>.