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This study presents findings from a close examination of five days of hearings before the Senate Judiciary Committee on the Nomination of Judge Brett M. Kavanaugh to the Supreme Court of the United States as a historical case study of federal information policy. I examined the shaping of federal information policy by the Senate Judiciary Committee itself, each Committee members' views on Executive power and Executive privilege as well as current and former President's impact on the process. I also examined the record of Judge Kavanaugh on *United States v. Nixon* and his legal and judicial approach to the Executive power and Executive privilege in order to facilitate an understanding of the Senate Judiciary Committee's deliberations.

Headings:

Executive privilege (Government information)

Information policy

Nominations for office

Checks and Balances

Political questions and judicial power

Transparency in government

THE RECORD(S) OF JUDGE BRETT M. KAVANAUGH: A CASE STUDY OF INFORMATION ACCESS, EXECUTIVE PRIVILEGE AND ACCESS TO EXECUTIVE BRANCH INFORMATION IN THE UNITED STATES SENATE JUDICIARY COMMITTEE

by

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Table of Contents

1. INTRODUCTION

Information science is "a discipline that deals with the *processes* of *storing* and *transferring* information." [emphasis mine] Importantly, "It attempts to bring together concepts and methods from various disciplines such as library science, computer science and engineering, linguistics, psychology, and other technologies in order to develop techniques and devices to aid in the handling—that is, in the collection, organization, storage, *retrieval*, *interpretation*, and *use*—of information".[1] This definition paints a picture of a broad field that is interdisciplinary by its very nature. While information science is concerned and focused more on the practicalities of managing information and by extension the media it is stored on, information policy concerns itself with laws, rules, policies and practices that involve information. In 1999, former dean of the School of Library and Information Science and professor emerita Evelyn Daniel defined information policy as "The set of rules, formal and informal, that directly restrict, encourage, or otherwise shape flows of information".[2] A key aspect of information policy espoused in this definition is the control exerted to influence the flow of information. In the 2011 inaugural publication of *The Journal of Information Policy,* Sandra Braham details the history of the field in the late 20th century in her article "Defining Information

[1]Lotha, Gloria. "Information Science." *ENCYCLOPÆDIA BRITANNICA*, edited by The Editors of Encyclopaedia Britannica, 11 June 2015, https://www.britannica.com/science/information-science.
[2] Daniel, Evelyn. "WHAT IS INFORMATION POLICY?" *The School of Information and Library Science at the University of North Carolina at Chapel Hill*, 2 Mar. 1999, https://ils.unc.edu/daniel/InfoPolicy/policy.html.

Policy". In it she provides a more precise definition: "Information policy is comprised of laws, regulations, and doctrinal positions – and other decision making and practices with society-wide constitutive effects – involving information creation, processing, flows, access, and use."[3]

Judiciary committee hearings on Supreme Court nominations are crucibles in which the information policy of the federal government is expressed as a relation between the executive branch and legislative branch on the nature, role and aptitude of the nominee as one of the highest and most important members of the judicial branch. At the heart of the process is the idea that when the President of the United States as leader of the executive branch nominates someone to a position of public service, the Legislative branch of government, the Senate is expected to evaluate the nominee. Those who are responsible for this candidate review and application are the members of the Senate Judiciary committee. This responsibility is the 'advise and consent' role of the Senate and the hearings themselves are sometimes referred to as the "last job interview". 'Advise and consent', the phrase frequently invoked during discussion of executive branch nominees, federal checks and balances, and separation of powers, comes from Article II, Section 2, Clause 2, of the constitution, which refers to the Senate's role in the signing and ratification of treaties. This term appears again in the constitution to describe the Senate's role in the appointment of public officials, right after detailing the president's duty to nominate officials. Article II, Section 2, paragraph 2 of the United States Constitution states:

[3] Braman, Sandra. "Defining Information Policy." *Journal of Information Policy*, vol. 1, 2011, p. 1–5. https://www.jstor.org/stable/10.5325/jinfopoli.1.2011.0001

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[4]

In the last few decades Supreme Court nominations have risen to be the highest profile, and frequently most controversial, nomination processes. These processes have become proxies for powerful interests. The exercise of power is a key vector of analysis in information policy research. However, the members of the Senate Judiciary Committee are not the only agents exercising power in this process. Current and former presidents can exercise power by restricting access to presidential records.

When a prospective new member of the highest court of the land is nominated, a deluge of information is requested, accessed, created and used during the process of Senate review. Nominees have been questioned about not only their judicial rulings and judicial philosophy but also their past, their associations with organizations and individuals, and their actions. Broadly, almost anything can be relevant during this confirmation process because nomination to the Supreme Court is a lifetime appointment.

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[4] *U.S. Constitution*. Article. II, Sec. 2. 1789. Accessed through https://constitutionus.com/

An important question then is how does federal information policy inform the nomination, evaluation, and confirmation of prospective Supreme Court justices? The truth of the matter is that there is no consistent federal information policy. Instead policy is negotiated by empowered agents during these processes. Each nominee has a different record, and therefore each set of nomination hearings provides a different lens through which to view the information policy of the Senate Judiciary Committee.

This masters paper provides a historical case study analysis of the Brett Kavanaugh nomination and the subsequent United States Senate Judiciary Committee nomination hearings as an example of the Executive-Legislative relations shaping of Federal information policy. The primary contributing factor to the richness of such a study is the unique résumé of Kavanaugh as a significant actor in both the Executive and Judicial branch who participated in events and decisions that directly grappled with issues of Executive Power, Executive privilege and specifically of interest executive branch information policy. Kavanaugh worked for a time as Associate Counsel for the Office of Independent Counsel under Kenneth Star and engaged directly with questions of access to the executive branch information of Bill Clinton under the Independent Counsel Statute. He also held positions in the George W. Bush administration as Associate Counsel for the executive branch, Assistant to President George W. Bush and staff secretary. His most recent experience was as a judge on the United States Court of Appeals for the District of Columbia Circuit.

A second unique aspect of the Kavanaugh hearings is the breadth and scope of documents and records that relate to his public service in these positions. This breadth and scope of potentially relevant records resulted in tension in the process of requesting,

accessing and making publicly available documents created or managed by Kavanaugh. Kavanaugh created, produced, and managed documents, records and information for the George W. Bush administration and tension in accessing these records resonates with actions taken by the George W. Bush administration and the "... most aggressive campaign in modern times to expand executive authority at the expense of the nation's key open government and accountability laws." [5]

Of the five areas Sandra Braham lists as being governed by the laws, regulations, and doctrinal positions of information policy - information creation, processing, flows, access, and use - information access is of great interest in this case study. The seemingly simple question, 'What information about Brett Kavanaugh did members of the Senate Judiciary Committee and the public have access to?' is far more complex than it appears on the surface. A more useful question for framing the access to information during the confirmation hearings in information policy terms would be to ask, "How did different individuals and organizations control the flow of information about and created by Brett Kavanaugh?"

This information access aspect is but one facet of larger political conflicts that surrounded the Kavanaugh confirmation hearings; key to understanding access is understanding the actions taken by empowered agents. At the core of these questions lies a constitutional conundrum, i.e., the inherent tension of inter-branch access to information, or more specifically Congressional access to executive branch information that the executive branch seeks to withhold.

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[5] Montgomery, Bruce P. *The Bush-Cheney Administration's Assault on Open Government*. Praeger Publishers, 2008. vii.

2. DEFINITION OF TERMS

I would like to begin by introducing some terms that important for this paper. Many of the key definitions for these terms are found in United States Code, title 44, chapters 21 and 22. These chapters are about the National Archives and Records Administration and Presidential Records respectively. When using somewhat ambiguous terms throughout my paper such as “administration”, I will attempt to clarify whether I’m referring to the National Archives and Records Administration (which I will abbreviate as NARA after its first use in each section) or some presidential administrations (such as the George W. Bush administration, or the Nixon administration). The Senate has its own jargon for conducting business, and after providing an excerpt from the hearing I will contextualize phrases with relevant rules from the Judiciary Committee as well as the Senate itself.

44 U.S. Code Chapter 21 National Archives and Records Administration

§ 2101. Definitions

As used in this chapter—

(1)“Presidential archival depository” means an institution operated by the United States to house and preserve the papers and books of a President or former President of the United States, together with other historical materials belonging to a President or former President of the United States, or related to his papers or to the events of his official or personal life, and may include research facilities and museum facilities in accordance with this chapter;

(2) “historical materials” including books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value;

(3) “Archivist” means the Archivist of the United States appointed under section 2103 of this title; and

(4) “Administration” means the National Archives and Records Administration established under section 2102 of this title.

44 U.S. Code Chapter 22 Presidential Records § 2201. Definitions

As used in this chapter—

(1) The term "documentary material" means all books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio and visual records, or other electronic or mechanical recordations, whether in analog, digital, or any other form.

(2) The term "Presidential records" means documentary materials, or any reasonably seg-regable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term—

(A) includes any documentary materials relating to the political activities of the President or members of the President's staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; but

(B) does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e) of title 5, United States Code); (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

(3) The term “personal records” means all documentary materials, or any reasonably segregable portion thereof, of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term includes—

(A) diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;

(B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

(C) materials relating exclusively to the President’s own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

(5) The term “former President”, when used with respect to Presidential records, means the former President during whose term or terms of office such Presidential records were created.

Senate Judiciary Committee Hearing on the Nomination of Judge Brett M. Kavanaugh Transcript Day 1 September 4, 2018

Members of Congressional committees can call for hearings to be adjourned for a variety of reasons. To put the motion to adjourn to a roll call vote simply means that the member wishes for other members to vote on their idea to end the hearing. The concept of executive session is something that has evolved over time in the Senate, and in particular during Supreme Court nominations. Prior to the 1920s Supreme Court nomination hearings were held behind closed doors in executive session. Suffice to say for now, the rules for the operation of hearings are slightly different when Senators have concerns about privacy. However, in this instance it should be noted that rule IV states, "The Chairman shall entertain a non-debatable motion to bring a matter before the Committee to a vote. If there is objection to bring the matter to a vote without further debate, a roll call vote of the Committee shall be taken, and debate shall be terminated if the motion to bring the matter to a vote without further debate passes with twelve votes in the affirmative, one of which must be cast by the minority."[6] This rule was quoted verbatim by Senator Blumenthal in an attempt to get the motion to adjourn brought to a vote. Chairman Charles Grassley did not call for a roll call vote of the Committee and justified this decision by stating that the rules of the Senate Judiciary Committee do not apply because they were not in executive session. Regular order is a reference to the rules of the Senate in which the business of the Senate is to be conducted in accordance with the rules of both the Senate, the Committee and if applicable, the subcommittee. In this

[6] U.S. Senate. "IV. BRINGING A MATTER TO A VOTE." *Rules of Procedure United States Senate Committee on the Judiciary*, https://www.judiciary.senate.gov/about/rules.

case rule VIII. Order of Business states, “All motions made during the first two hours of a new legislative day to proceed to the consideration of any matter shall be determined without debate, except motions to proceed to the consideration of any motion, resolution, or proposal to change any of the Standing Rules of the Senate shall be debatable.”[7]

SEN. BLUMENTHAL: MR. CHAIRMAN, I MOVED TO ADJOURN. I ASK FOR A ROLL CALL VOTE.

SEN. GRASSLEY: WE ARE NOT IN EXECUTIVE SESSION. WE WILL CONTINUE AS PLANNED.

…

SEN. HIRONO: MR. CHAIRMAN, IT IS ALSO NOT REGULAR ORDER FOR THE MAJORITY

TO REQUIRE THE MINORITY TO PRECLEAR OUR QUESTIONS THE DOCUMENTS AND VIDEOS WE WOULD LIKE TO USE AT THIS HEARING, THAT IS UNPRECEDENTED. THAT IS NOT REGULAR ORDER. SINCE WHEN DO WE HAVE TO SUBMIT THE QUESTIONS ON THE PROCESS THAT WE WISH TO FOLLOW ON THIS NOMINEE? I WOULD LIKE YOUR CLARIFICATION.

SEN. GRASSLEY: SENATOR HIRONO, I ASK THAT YOU STOP SO WE CAN CONDUCT THIS HEARING THE WAY WE HAVE PLANNED IT.

[7] U.S. Senate. “VIII Order of Business.” *United States Senate Committee on Rules and Administration*, https://www.rules.senate.gov/rules-of-the-senate.

3. LITERATURE REVIEW: The Congressional Balance of Powers

It would be a herculean task to attempt to summarize the entirety of interbranch interactions and disputes regarding access to executive branch information from the founding of the United States to present. Instead, I am providing in the following five sections to sketch an overview of the relevant constitutional issues, as well as their origins.

In the first I have focused on outlining the scope, treatment, and Congressional approach of George Washington's pre-Presidential and Presidential records in order to analyze the origins of the concepts of personal ownership of Presidential papers and executive privilege. In the second I have outlined the history of the Senate Judiciary committee and its changing role over time in nominating then evaluating judicial nominees. The third section summarizes the relevant changes to federal information policy that the Nixon Presidency and the Watergate scandal spurred by examining the Supreme Court case and Congressional legislation that arose from each, *United States v Nixon* and the Presidential records act.

The fourth and final section provides a modern context for the case study by examining the ways in which post-Nixon Presidents undermined the Presidential Records act, rehabilitated executive privilege as well as some of those Presidents' nominations to the Supreme Court

I. George Washington, the Personal Ownership of Presidential Papers, and the Origins of Executive Privilege

The first Congress met and began to pass laws in 1789, and the first recordkeeping statute passed by both houses and signed into law in that year was "an Act to provide for the safekeeping of the Acts, Records and Seal of the United States and for other purposes or the Records Act" .[8] It entrusted the Secretary of State with preserving legislation and the creation, custody and use of the seal of the President of the United States. While the title of this act, specifically the inclusion of the word "records", might seem to imply that the Secretary of State was also responsible for the disposition of the papers of the President while in office, this is not the case. The Secretary of State was only responsible for authenticating copies of official records by the seal. Throughout the early history of the United States, correspondence and records generated by the President themselves or their office were considered the personal property of the individual occupying the office. As with many other conventions, this practice became an American norm because of the actions of George Washington. The legacy that we are left with is one of scattered and incomplete collections of Presidential papers. There are several collections of George Washington's papers held by the Library of Congress, the University of Virginia, and by the Mount Vernon Ladies' Association of the Union, a private, non-profit organization. The complicated provenance of his records foreshadows many later complications and constitutional questions about the disposition of presidential records.

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[8] Hunt, Gaillard. "The History of the Department of State." *The American Journal of International Law*, vol. 2, no. 3, 1908, pp. 591–606. *JSTOR*, www.jstor.org/stable/2186332.

In 1776, prior to the British recapture of New York, then commander of the Continental Army George Washington wrote to president of the continental congress John Hancock, "I have thought it advisable to remove all the papers in my hands respecting the Affairs of the States, from this place… They are all contained in a large Box nailed up and committed to the care of lieutenant Colonel Reed . . . to be delivered to Congress, in whose custody I would beg leave to deposit them, until our Affairs shall be so circumstanced as to admit of their return."[9] Washington was aware of both the sensitive nature of these records, and their importance. These papers accompanied Congress when it moved from Philadelphia to Baltimore. While these papers were in the custody of Congress Washington did have access to some records that he frequently referred to. However, this being a temporary agreement Washington reclaimed his papers in 1779. This arrangement set something of a precedent. Congress could (and perhaps should) be entrusted as a body responsible for the disposition of important records relating to the 'affairs of the state' rather than an executive. In fact, today the Library of Congress holds a collection of papers that "constitute the largest collection of original Washington papers in the world. They consist of approximately 65,000 items accumulated by Washington between 1745 and 1799, including correspondence, diaries, and financial and military records".[10]

Before the Revolutionary war ended, Washington also recognized that these papers, "which may be of equal public utility and private satisfaction" remained in loose

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[9] Dorothy S. Eaton, U.S. GPO. Essay for Finding Aid for the "George Washington papers, 1592-1943", citing *Index to the George Washington Papers Library of Congress,*1964. http://findingaids.loc.gov/db/search/xq/searchMfer02.xq?_id=loc.mss.eadmss.ms008068&_faSection=overview&_faSubsection=custodhist&_dmdid=d16618e22

[10] Ibid.

sheets "in the rough manner in which they were first drawn," and that their unarranged state exposed them to damage and loss and made their use inconvenient.[11] This neglect was rectified when the Continental Congress granted Washington permission to hire someone to “arrange and register” his records. Lt. Col. Richard Varick of New York was employed to complete these archival duties. He established 6 initial classes of documents, later adding a seventh for Washington’s private letters. In addition to creating a chronological arrangement, Varick spent a considerable time transcribing these journals and notebooks. There was an interest among several individuals to see and study these papers so that they might better understand the revolution. Washington rebuffed these requests, but in replying to one such interested party said, “"It appears to me impracticable for the best Historiographer living, to write a full & correct history of the present Revolution who has not free access to the Archives of Congress, those of Individual States, the Papers of the Commander in Chief, and Commanding Officers of separate departments. Mine—while the War continues—I consider as a species of Public property, sacred in my hands."”.[12] Therefore, although Washington recognized the value and importance of these records and the publics’ interest and right to access these records he thought it best to retain them for himself. During his life only a select few individuals of Washington’s choosing would be able to see these sacred papers, most of whom were charged with transporting, transcribing or arranging them. These pre-presidential records were boxed up in trunks and left at Mt. Vernon when George Washington returned to New York to assume the office of President of the United States.

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[11] Ibid.
[12] Ibid

The first Congressional Special Committee investigation, i.e., the first time congress investigated the executive branch took place after a failed military expedition. Following the Revolutionary War, the young United States continued to settle the Northwest territory (modern day Ohio, Indiana, Illinois, Michigan and Minnesota). Responding to an earlier retreat, Washington ordered the Governor of the Northwest territory and U.S. Army general Arthur St. Clair to mount a campaign against native tribes organized under the Western Confederacy. Due to low supplies, morale, few troops and a surprise attack St. Claire suffered a devastating defeat; it remains the single worst defeat suffered by the United States Army in its history.[13] George Washington relieved St. Clair of his military command, but the House of Representatives was still motivated to investigate the Washington administration's actions leading up to the defeat. Because this was the first time such an investigation would be undertaken there was uncertainty not only in how to proceed, but also whether Congress had the right to investigate at all. Ronald Shafer writing in the Washington Post wrote that Virginia Representative William Giles suggested that the House instruct President Washington to conduct the investigation, but that was quickly tabled due to objections from other members of Congress who argued that he did not have the authority.[14] He continued with an account of the deliberations of Washington's Cabinet saying they, "… quickly agreed that Congress had the right to conduct the investigation. According to Jefferson, Hamilton had reservations about giving Congress access to executive branch documents because

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[13] Jenkins, Tamahome. "St. Clair's Defeat and the Birth of Executive Privilege." *Babeled.com*, 18 Nov. 2009, https://web.archive.org/web/20101223113510/http://www.babeled.com/2009/11/18/st-clairs-defeat-and-the-birth-of-executive-privilege/. Archived from the original on 23 December 2010.

[14] Shafer, Ronald G. "Target of the First Congressional Probe in U.S. History? George Washington, of Course." The Washington Post, 19 Jan. 2019, https://www.washingtonpost.com/history/2019/01/19/target-first-congressional-probe-us-history-george-washington-course/?noredirect&utm_term=.bb8726a36984,

lawmakers “might demand secrets of a very mischievous nature.” But the Cabinet, including Hamilton, nevertheless agreed that the president should give the committee all papers that “the public good would permit,” but “ought to refuse those the disclosure of which would harm the public”.[15] This final point marks the ideological origins of the concept of executive privilege in the United States.

George Washington was mindful that many of the actions that he would take as the first President of the United States would be considered foundational and formative for this new nation. After serving two terms in office he stepped down. Importantly for the following administration, “At the end of his term of office, Washington employed Tobias Lear and Bartholomew Dandridge, who had served as his secretaries, to separate from his papers those files which were intended for his successor in office, John Adams, and to pack and send the remainder to Mount Vernon.”[16] The prospect of losing information about a particular department was minimal for two reasons: the federal government at this point was still quite small, and in this first transition Adams retained all cabinet members. Therefore, Lean and Dandridge arranged and registered most of George Washington’s papers, which returned with him in trunks to Mount Vernon.

Washington had already denied access to his records relating to the Revolutionary war to several interested parties when they had inquired. But once he left office he recognized the importance of preparing these records: “Soon after he reached Mount Vernon, Washington wrote James McHenry that he planned to erect a building on the estate "for the accommodation & security of my Military Civil & private Papers which

[15] Ibid.
[16] Superintendent of Documents, U.S. GPO. “George Washington Papers.” Library of Congress, 1964.

are voluminous, and may be interest[ing]".[17] This idea of an institution dedicated to preserving Washington's records predated the establishment of the Presidential Libraries System as we know it by more than 150 years. Unfortunately, nothing came of it and his papers were bequeathed to an heir upon his death. The Fred W. Smith National Library for the Study of George Washington at Mount Vernon has some of these papers and provides dedicated resources for historians. The Library of Congress has the largest portion of these papers. Ultimately, preserving and providing access to executive branch information was not an area of chief focus for the founding fathers of the United States.[18]

[17] Ibid.

[18] Relyea, Harold C. "Access to Government Information in the United States." *CRS Report for Congress*, 7 Jan. 2005, https://fas.org/sgp/crs/97-71.pdf.

II. Early Supreme Court Judicial Nominees and The Senate Judiciary Committee Origins and History

The passage of the Judiciary Act of 1789 created the foundation of the United States Judiciary branch: "The law created 13 district courts in principal cities, with one judge apiece, and three circuit courts to cover the other areas of the eastern, middle and southern United States. Above these it set a Supreme Court, with a Chief Justice and five Associate Justices, as the only court of appeals".[19] Within two days, the first Supreme Court justices were nominated, confirmed and seated on the bench, though it was not long before another associate justice was added to ensure that an odd number of justices could effectively decide cases. These nominations during Washington's first term in office were not controversial and took one or two days for the Senate to confirm except in the case of the successful recess appointment of Thomas Johnson of Maryland. This is because the constitution as it was written, signed, and agreed upon in 1789 gave the President the power to appoint, "judges of the Supreme Court" according to Article 2 Section II clause 2.[20] This Appointment Clause has been thoroughly studied and debated by constitutional scholars, and there is consensus that it was one of the checks and balances that the founding fathers devised to encourage a separation of powers. In this first term of the first administration there was little acrimony and controversy simply because there were very few cases for the Supreme Court to hear, and although there were differences of opinion among members of the federal government of the United

[19] The Supreme Court Historical Society "The Jay Court, 1789-1795." The Supreme Court Historical Society, https://supremecourthistory.org/timeline_court_jay.html.
[20] Constitution of the United States, Article II, Section 2, clause 2. 1789. Accessed through https://constitutionus.com/

States, there were not yet political parties. It would be a few years before the couching language of the Appointment Clause would really come into play. The key context of this language was where the Constitution stated that the President shall nominate, "by and with the Advice and Consent of the Senate… Judges of the supreme Court".[21] Therefore although nominees during Washington's first term were seated without roll call votes, the Constitution still required that the Senate confirmed them. But this gentle treatment of nominees by the Senate was poised to change in Washington's second term due to growing divisions in the country and his cabinet.

In addition to the conflicts and controversies involving some of Washington's second term nominees it is important to note the introduction of a body that was not mentioned in the Constitution but has perhaps had the greatest impact on the federal judiciary of the United States: the Senate Judiciary Committee. This committee was one of the first standing committees in the Senate and traces its origins back to the meeting of 8 Senators during the first meeting of the Senate in 1789.[22] This select committee was responsible for drafting the Judiciary Act of 1789, and in doing so, "established the present three-tiered hierarchy of the federal judiciary, and the Office of the Attorney General."[23]

Later with the expansion of the federal government the Senate voted in 1816 to establish standing committees so that Senators' efforts could be concentrated in vital areas such as foreign relations, ways and means, and of course the judiciary. Reviewing the qualifications of Supreme Court nominees was but one of their responsibilities, and

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[21] Ibid
[22] Senate Judiciary Committee. "History of the Committee on the Judiciary." The United States Senate, https://www.judiciary.senate.gov/about/history.
[23] Ibid.

unlike modern times their deliberations were held behind closed doors until nearly a century later when there would be public hearings on Supreme Court nominations. In one of the most comprehensive examinations of Supreme Court nominations, authors Barry J. McMillion and Dennis Steven Rutkus examined actions taken by each entity sharing power in the constitutional system of checks and balances: the Senate, the Judiciary Committee, and the President.[24] In addition to analyzing long term trends such as the length of hearings in days and Senate Judiciary Committee reporting they also provide a useful table of Supreme Court nominations which I provide as the Appendix D.

While the first few nominees to the judiciary were uncontroversial, the process was always conceptualized in the constitution as a relation of shared power between the Executive and Legislative branches. It is one aspect of checks and balances between the three branches of the federal government of the United States. As the country began to be divided for the first time into factions, first between the administration and the anti-administration cabinet members of Washington then in a more organized way with the federalists and the anti-federalists, contention was introduced. The second chief justice of the Supreme Court, John Rutledge was the first 'victim' of this feud. Following the retirement of the first chief justice John Jay, George Washington gave Rutledge a recess appointment to be served until the next time that Congress met at which point the Senate would then vote on his appointment. Between the time he was given the recess appointment and the next time that Congress met he gave a speech that was highly critical of the Jay treaty. Federalists then used this speech as evidence of the mental

[24] McMillion, Barry J., and Denis S. Rutkus. "Supreme Court Nominations, 1789 to 2017: Actions by the Senate, the Judiciary Committee, and the President." The Congressional Research Service, 6 July 2018, https://fas.org/sgp/crs/misc/RL33225.pdf.

decline of Rutledge and used sympathetic Federalist newspapers to spread this narrative. Consequently, around the same time that the nation was first witnessing the two-party system emerge there was one of the first campaigns by one of those parties to discredit a judicial nominee. In a roll call vote of 10-14 the Senate rejected the appointment of Rutledge as Chief Justice of the Supreme Court.

Washington as well as his Vice President and successor John Adams did not have another unsuccessful nominee. However, there were those who declined the position, as the court was subject to relentless attacks by antifederalists.[25] Adams had the vacancy for Chief Justice of the Supreme Court, and, as Gordon Wood relates, "In 1801 President John Adams had initially wanted to reappoint John Jay, the first chief justice in 1789. But Jay declined, explaining that the Court had none of the necessary "Energy, weight and Dignity" to support the national government and little likelihood of acquiring any."[26] Therefore Adam's second choice was John Marshall. It would be his last Supreme Court appointment, and as he later recalled, "... the proudest act of my life."[27]

Despite the anticipated peaceful first transition of power between political parties after 1800, the judiciary was a major point of anxiety because the sitting justices were thought of as sympathetic to the Federalists who appointed them. In those unprecedented times, rumors swirled about Justices being removed so it was notable that the Supreme Court decided to take up the case that William Marbury of Washington had raised against Secretary of State John Madison. Marbury was attempting to receive his commission as a

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[25] Wood, Gordon S. "Adams Appoints Marshall." *American Heritage*, vol. 59, no. 4, https://www.americanheritage.com/adams-appoints-marshall.
[26] Ibid.
[27] The Supreme Court Historical Society "The Marshall Court, 1801-1835." The Supreme Court Historical Society, https://supremecourthistory.org/timeline_court_marshall.html

justice of the peace for the District of Columbia. This matter arose from the last minute "midnight judges" that Adams appointed as a part of the judicial reforms of the Judiciary Act of 1801.[28] This Act sought to abolish circuit duties for Supreme Court judges and set up new circuit courts with 16 new judges, but it was quickly repealed by the new Congress and replaced with the Judiciary Act of 1802. However, in the case of *Marbury v Madison* the Supreme Court ruled that it had the right of federal judicial review, which alarmed Jefferson and his supporters. Due to these circumstances, the Jeffersonians felt that the time was right to bring charges of impeachment against Supreme Court Associate Justice Samuel Chase. Chase had been a signatory to the Declaration of Independence, but his opponents charged that his relentless trying of Republicans while serving on Circuit courts and open campaigning for Adams amounted to high crimes and misdemeanors.

Ultimately the Senate did not pass the two-thirds threshold required to convict and acquitted Chase. Jefferson called the impeachment "a farce which will not be tried again," and he was right that articles of impeachment would never again be brought against a Supreme Court Justice.[29] This impeachment attempt was an important moment for the United States though, because it helped to define the role of the judiciary and marked an end to attempts to define judicial independence.

This impeachment episode was not examined in McMillion and Rutkus' analysis, since it did not involve a nomination and preceded the creation of the Senate Judiciary Committee. On early nominations they state, "Initially, such nominations were handled without Senate committee involvement. Later, from 1816 to 1868, most nominations to

[28] Ibid.
[29] Ibid.

the Supreme Court were referred to the Judiciary Committee, but only by motion. Since 1868, as the result of a change in its rules, the Senate has referred nearly all Court nominations to the Judiciary Committee".[30] This change over time still conformed to the constitutional principle that the entire Senate was responsible for advising and consenting on nominees, because although the Senate Judiciary Committee would investigate nominees they could only go so far as to make recommendations to the Senate. It was then up to a vote in the Senate which could go one of three ways. The nominee could be confirmed, rejected or the vote could be postponed. There were instances in which nominees were confirmed and then refused their seat on the Supreme Court; however, these refusals became less frequent when Circuit court duties that involved travelling great distances were done away with. It is also possible for the President to withdraw their nominee, which has been done 11 times.

There is no mention of the Judiciary Committee in the Constitution. As the federal government expanded different standing committees were created to handle the business of the Senate and divide and focus the efforts of Senators. Through the weight of tradition these committees took on more responsibilities and more power. The committee chairmen were, and are, powerful individuals in the Senate, though they do not receive their mandate through the Constitution, but rather the peculiarities of Senate rules and procedure. It took some time for our young nation to agree upon and understand the nature and purpose of the Supreme Court, and understandings of the Appointments Clause have changed over time as well. Though there was disagreement about these

[30] McMillion, and Rutkus. "Supreme Court Nominations, 1789 to 2017: Actions by the Senate, the Judiciary Committee, and the President."

institutions and their functions, never did it rise to a constitutional crisis. Our nation would not witness that type of dysfunction until the election of Richard M. Nixon.

III. The Separation of Powers Before, During and After the Nixon Presidency: Watergate, *United States v Nixon*, the Presidential Records Act and Executive Privilege

The actions and behavior of Richard Nixon as President of the United States, as well as the following Supreme Court case *United States v. Nixon*, fomented in the national consciousness a more open notion of information policy in the United States federal government. Put simply, the other two branches of government, the U.S. Congress and the Supreme Court, decided that the President should not have absolute control over information and records generated by the executive branch. For the Supreme Court, this was seen in the decision of *United States v. Nixon*; for Congress it was with the passage of the Ethics in Government Act and the Presidential Records Act. These two acts mandated the disclosure of certain information for public officials and "changed the legal ownership of the official records of the President from private to public, and established a new statutory structure under which Presidents, and subsequently NARA, must manage the records of their Administrations".[31] In the third edition of his book on Executive Privilege Mark Rozell characterizes Nixon's invocation of executive privilege during Watergate as abuse, and states that Nixon went further than previous Presidents in using executive privilege to withhold embarrassing and incriminating executive branch information. Summarizing the holding in *United States v. Nixon* and concluding with a holistic examination of Nixon's pressure and influence on the Supreme Court is key to

[31] NARA Presidential Libraries editor. "Presidential Records Act (PRA) of 1978." National Archives and Records Administration, 27 Apr. 2018, https://www.archives.gov/presidential-libraries/laws/1978-act.html.

understanding the legacy of his Presidency. I will discuss his Supreme Court nominees in the final section since they contextualize the modern nomination process more aptly than they contextualize Nixon's actions during Watergate and the response from the other two branches of the United States federal government.

Watergate is the political scandal to which almost all subsequent scandals have been compared. Some have even been named after it by adding a -gate to the end of whatever is the key subject of the scandal. At the core of the scandal was the White House coverup and denial of association with the Watergate hotel burglary, the assertion of executive privilege over taped recordings and the "smoking gun" recording more specifically. For all the focus, attention, and memory dedicated to the scandal, coverup and exposing of Watergate there is less awareness of the fact that Nixon campaigned in 1968 on conducting an open administration. He responded positively to a request by the chairman of the House Subcommittee on Government Information to reaffirm the official policy of allowing only the President to assert executive privilege, and not to allow subordinate employees in the executive branch to do so. He responded in the affirmative, and with an explanation of his administration position as well as a memo titled "Establishing a Procedure to Govern Compliance with Congressional Demands for Information" in which he explicitly stated,

> "The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this

> administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval".[32]

With our knowledge of the outcome of his Presidency, these actions and statement by Nixon seem to be foreshadowing later troubles. However, even throughout the Watergate scandal itself Nixon attempted to espouse a reasonable position on executive privilege. H. R. Haldeman and Alexander Butterfield testified before the Senate Watergate Committee because Nixon had waived executive privilege for staff aides on potential criminal conduct although Nixon certainly did not expect them to reveal the existence of recording equipment. Rozell relates that the Senate Watergate Committee and Archibald Cox, the Watergate Special Prosecutor, requested 9 tapes.[33] At this point Nixon claimed executive privilege and declined to produce the tapes to either interested party. What came next was contemporaneously described by the Washington Post as, "the most traumatic government upheaval of the Watergate crisis".[34] It began when Nixon ordered Elliot Richardson to fire the Watergate Special Prosecutor Archibald Cox. Richardson had assured the U.S. Senate during his confirmation process that he would only remove Cox for cause, and he refused Nixon's order and resigned in protest. Nixon then went to

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[32] Richard Nixon "Establishing a Procedure to Govern Compliance with Congressional Demands for Information" in Rozell, Mark J. *Executive Privilege: Presidential Power, Secrecy, and Accountability Third Edition, Revised and Updated*. University Press of Kansas, 2010. Page 57.
[33] Ibid, page 62.
[34] Kilpatrick, Carroll. "Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit President Abolishes Prosecutor's Office; FBI Seals Records." The Washington Post, 21 Oct. 1973, https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm?noredirect=on.

Deputy Attorney General William Ruckelshaus and requested the same from him, but Ruckelshaus also refused and resigned. Moving down the line of succession of the Justice Department Nixon ordered Robert Bork the Solicitor General of the United States to fire Cox. Bork, unlike Richardson and Ruckelshaus, had not made any assurances to any Congressional committees that he would not interfere, and in a later interview he stated, "'I was thinking of resigning not out of moral considerations. I did not want to be perceived as a man who did the President's bidding to save my job."[35] Judging the role of Robert Bork in the entire series of events is a complicated matter. His complicity and his motives were debated contemporaneously as well as at his Supreme Court nomination hearings later. These resignations and firing would come to be known as the Saturday night massacre and the fallout and political pressure that was exerted on the White House and Justice department afterwards would result in a second Watergate Special Prosecutor, Leon Jaworski, being appointed. Jaworski requested more tapes than Cox, and once again Nixon invoked executive privilege to justify his refusal to turn over the tapes. The second refusal did not result in a firing, instead it led to a case that would be heard by the Supreme Court and ultimately it would lead to the resignation of a President.

When Nixon refused to turn over tapes after the second request by the second Watergate Special Prosecutor, he put forth the argument that there can be no limitations on the president's use of executive privilege because only the president himself has the authority to limit claims of executive privilege. In Nixon's view Congress and the courts lacked the standing to challenge claims of executive privilege due to article II of the Constitution, which vested all executive powers with the President of the United States. In *United States v. Nixon* however, the court

[35] Noble, Kenneth B. "Bork Irked by Emphasis on His Role in Watergate." The New York Times, 2 July 1987, https://www.nytimes.com/1987/07/02/us/bork-irked-by-emphasis-on-his-role-in-watergate.html.

held that executive privilege is not absolute. More specifically “The Court held that neither the doctrine of separation of powers, nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified, presidential privilege.”[36] Chief justice Warren Burger recognized that this case was a formative moment for the United States and sought to draft a unanimous position on the limits of executive privilege with the other justices. Although there were four justices that had been nominated to the Supreme Court by Nixon, including Chief Justice Burger, only Rehnquist recused himself due to close relationships with Watergate conspirators. These eight members of the court came together, and all signed on to the unanimous opinion that “granted that there was a limited executive privilege in areas of military or diplomatic affairs, but gave preference to "the fundamental demands of due process of law in the fair administration of justice." Therefore, the president must obey the subpoena and produce the tapes and documents.”[37] Thus the court preserved this necessary constitutional power of the Presidency while holding that the President was not above the law.

[36] "United States v. Nixon." *Oyez*, www.oyez.org/cases/1973/73-1766.
[37] Ibid.

IV. The Modern Context: The Rehabilitation of Executive Privilege, the Negation of the Presidential Records Act and Controversies and Campaigns of Supreme Court Nominees

The concept of executive privilege was rehabilitated and restored during the four administrations of Ronald Regan, George H.W. Bush, Bill Clinton and most significantly under George W. Bush. The implementation of the Presidential Records Act also changed through executive orders under Ronald Reagan and George W. Bush. In a somewhat ironic turn, *United States v Nixon* provided a foil for future Presidents' arguments concerning executive privilege. While the presidencies of Gerald Ford and Jimmy Carter can be characterized as 'open', subsequent Presidents have each sought to exert influence in different ways over executive branch information. In addition to providing a brief overview of the relevant episodes involving executive privilege and Presidents since Nixon, I would like to set the stage for an examination of the confirmation hearing of Brett Kavanaugh by examining several recent Supreme Court nominations and the George W. Bush White House.

A. Presidential Administration Trends in Executive Privilege and the Presidential Records Act

When Jimmy Carter was in the White House, he had his administration prepare for the passage of the Presidential Records Act of 1978. There was debate about the details of the act. Different members of Congress drafted several versions of the bill and there was a difference of opinion about how long after a President left office could

restrictions to public access be invoked. The Carter White House had been advocating for a 15-year limit, while the most popular of three bills proposed a 10-year limit. Ultimately, the adopted a compromise of 12 years into the final legislation. This would mean that using any or multiple of the six specific restrictions to public access could only be exercised for a limited time, at which point the public interest would win out. The Carter administration had extensive conversations about how to treat the disposition of records before and after the enactment of the PRA once Carter won reelection. The loss to Ronald Regan rendered these discussions moot, but they offer a glimpse of the optimism for the future embodied by the Carter administration.

Ronald Regan was a different candidate and a different President. Carter and Ford did not change the official policy on executive privilege set out by Nixon in his 1969 memorandum. While Regan offered a redrafting of the "Procedures Governing Responses to Congressional Requests for Information" to the heads of executive departments and agencies, Rozell argues that he did not fundamentally change the guidelines.[38] While Regan did increase government secrecy in many ways, and sought to invoke executive privilege more than his two most recent predecessors, he did not have the public support or political capital in Congress to do so. Also, during the Regan administration the operational paradigm of the traditional separation of powers system provided Congress with tools to fight executive privilege claims. In four cases of executive privilege examined by Rozell, the Regan administration backed down from a more assertive stance after congressional pressure. The case that is of greatest interest to this study, the Rehnquist Memoranda that arose in 1986 during the Chief Justice

[38] Rozell, Mark J. *Executive Privilege: Presidential Power, Secrecy, and Accountability Third Edition, Revised and Updated*. University Press of Kansas, 2010. Page 95.

nomination of Associate Justice of the Supreme Court William H. Rehnquist, will be discussed at the end of this section is that of.

The use of executive privilege in the presidency of George H. W. Bush contrasted with his predecessor. George H. W. Bush differed from Regan in terms of his style of leadership and did not seek to clearly define what his administration's policy goals were. This was apparent from the sound bite in which he characterized the concept of an overarching purpose as "the vision thing". A key indicator to Congress of this approach to executive privilege came when the chair and ranking minority member of a subcommittee of the House Committee on Government Operations wrote to Bush asking for the administration official policy on executive privilege. Despite sending an initial acknowledgement, the administration ultimately ignored the request.[39]

In 1989, Bush's Assistant Attorney General William Barr wrote a guiding department memo on Executive Privilege for the Office of Legal Counsel in which he described executive privilege procedures.[40] He argued that an actual invocation of executive privilege was not necessary unless there was a subpoena, and importantly, "restated the dubious position first elaborated by Attorney General William French Smith that Congress's interest in getting access to executive branch information for oversight is weaker than in the case of lawmaking.[41] The result of the orientation of the George H. W. Bush administration is a normalization of secrecy; the Department of Justice that operated under this administration was efficient in hiding vast amounts of information

[39] Ibid, 109.
[40] Barr, William P. "Congressional Requests for Confidential Executive Branch Information." *Memorandum Opinion for the General Counsel's Consultative Group*, 19 June 1989, https://www.justice.gov/file/24236/download.
[41] Ibid.

from Congress. Rozell claims that in a few episodes the administration "lost some information battles with Congress, but it won the information war by employing innovative and far-reaching secrecy devices".[42]

President Bill Clinton exercised executive privilege more aggressively than any other president since Nixon. It is apparent that the Clinton administration resorted to executive privilege in a manner akin to the Nixon administration covering up incriminating and politically embarrassing information from the public. We know this because of the reports written by Independent Counsel Kenneth Star and his staff, including Brett Kavanaugh, on several investigations of the Clinton administration. Starr's conclusion in his final report in 1998 was that Clinton had, "repeatedly and unlawfully invoked executive privilege to conceal evidence of his personal misconduct from the grand jury".[43] Having served as governor of Arkansas, Bill Clinton was not reluctant to use executive privilege; he viewed it as a legitimate presidential power that had been damaged by Watergate. It is somewhat ironic then that he frequently went beyond the traditional bounds of protecting national security, the candor of advice to the President, and ongoing criminal investigations and only partially succeeded in restoring the standing of executive privilege. However, this revitalization of the concept of executive privilege during the Clinton administration was not part of a larger strategy by his administration to expand executive powers as would be seen in the administration of George W. Bush. Before I address the context of the Bush administration and Brett

[42] Ibid, 121.
[43] The Starr Report 244 (New York: Public Affairs, 1998). In Fisher, Louis. *The Politics of Executive Privilege*. Carolina Academic Press, 2004.

Kavanaugh's role in it, I will first examine Supreme Court nominations leading up to the pivotal presidency of George W. Bush.

B. Controversy and Campaigns for the Supreme Court

There has been a gradual move away from voice vote confirmations of Supreme Court nominees, a lengthening of period between nomination and confirmation (or rejection), and the drastic increase in both the total hours of confirmation hearings and number of official questions for the record. All in all, it seems that the Senate is taking a longer time to consider Supreme Court nominees and using more of their tools to probe and comprehend the judicial philosophy of the nominee before them. This longer process in some ways has begun to look more like modern political campaigns. While the process for the most part has resulted in more information being disclosed to the Senate Judiciary Committee and the public, there has also been a trend since the nomination hearing of Associate Justice Ruth Bader Ginsburg to not answer questions on matters that may come before the court. This is just one example of previous Supreme Court confirmation hearings serving as precedent for future hearings.

Senate Historian Emeritus Don Ritchie lays out in an interview his idea about how specific Supreme Court nominations themselves change the Senate's operations. He points to the fact that in the past nominations were considered in executive session, behind closed doors, by the entirety of the Senate. This was done so Senators could discuss the, "conditions, their standings and their personalities…".[44] He relates that

[44] Ritchie, Don. "Robert Bork and Supreme Court Nominations." *CSPAN*, 10 Nov. 2016, https://www.c-span.org/video/?455863-3/robert-bork-supreme-court-nominations.

Supreme Court nominations were rarely rejected and that generally the President was thought to be allowed to select who he wanted for the Court. This changed in the final year of the Presidency of Lyndon Johnson when he nominated Abe Fortas to be Chief Justice of the Supreme Court. Despite the fact that Fortas was initially confirmed as an associate justice with a voice vote, during his second nomination hearing Senators such as Strom Thurmond began to recognize that Richard Nixon might be elected and they felt that a Republican should be allowed to make that selection.[45] This view is not without dissent, and at the time there were concerns raised about Fortas' close relationship with the president and that "he had taken legal payments for speaking engagements that represented a conflict of interest and then had kept a legal retainer fee for a financier who faced investigations".[46] Regardless of the motivating reason, the Senate successfully blocked the nomination. Since Johnson had nominated Homer Thornberry to fill the associate justice position the filibuster by southern Democrats and subsequent failure of the Fortas nomination left Thornberry with no position to fill. Thus, when Nixon took office, he was able to nominate and seat Warren Burger as Chief Justice and shortly after received an opportunity to fill an associate justice seat on the court when Fortas finally stepped down.[47] White House Counsel for President Nixon John Dean has made the explosive claim that, "[Nixon] created a vacancy by aggressively pursuing a sitting

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[45] Ibid.

[46] National Constitution Center Staff. "On This Day, the Senate Denies a Nixon Supreme Court Nominee." *National Constitution Center*, 21 Nov. 2018, https://constitutioncenter.org/blog/on-this-day-the-senate-denies-a-nixon-supreme-court-nominee.

[47] Leonhardt, David. "The Supreme Court Blunder That Liberals Tend to Make." *The New York Times*, 2 June 2014, *https://www.nytimes.com/2014/06/03/upshot/the-supreme-court-blunder-that-liberals-tend-to-make.html*, https://constitutioncenter.org/blog/on-this-day-the-senate-denies-a-nixon-supreme-court-nominee.

Justice, Abe Fortas, whom he forced from the bench with a threat of a criminal investigation against his wife and a former law partner."[48]

The two nominations that followed the appointment of Burger as Chief Justice however were a much different story. The nomination of Clement F. Haynsworth Jr. was the first nomination after Burger, and his nomination was strongly opposed by organized labor and civil rights groups. During the nomination of Thurgood Marshall, the Senate Judiciary Committee held public hearings for several days. This precedent allowed for, "hearings in 1969 also had extended questions and comments from the Senate Judiciary committee, which was unusual for the time. One issue that was debated was Haynsworth's ownership of stock investments in three companies that were involved in appeals court decisions in which he took part."[49] Ultimately the Democratic majority rejected Haynsworth by a margin of 45-55, and media at the time compared the concerns raised about the financial holdings of Haynsworth to those raised about Fortas. Don Ritchie, however, argued that Haynsworth was in fact a qualified nominee and that the failure of the Fortas nomination had, "poisoned the waters" causing Haynsworth to be rejected.[50]

In somewhat of a retaliation Nixon nominated a conservative southerner in George Harrold Carswell. He was not qualified, however, and although one Senator tried to spin this mediocrity as a positive claiming that, "There are a lot of mediocre people and they deserve representation on the Court" his nomination was rejected by the Senate

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[48] Dean, John. "Nixon's Uses, Abuses and Muses on the Supreme Court." *Verdict*, 25 July 2015, https://verdict.justia.com/2014/07/25/nixons-uses-abuses-muses-supreme-court.
[49] National Constitution Center Staff "On This Day, The Senate Denies a Nixon Supreme Court Nominee."
[50] Ritchie, Don. "Robert Bork and Supreme Court Nominations."

as well.[51] Chief Justice Warren Burger then advised Nixon to nominate Henry Blackmun. This nomination had a lasting impact on the nomination process due to preparations, i.e., Blackmun began meeting with Senators prior to his hearing in order to espouse his judicial philosophy and introduce himself. This novel strategy worked, and the Senate Judiciary Committee met for a single day in which they questioned him, and eventually confirmed Blackmun by a unanimous vote of 94-0.[52]

Lewis Powell was also successfully nominated and confirmed by a nearly unanimous vote of 89-1. However, the next Nixon nomination faced some controversy. William H. Rehnquist had been involved in the administration as the head of the Office of Legal Counsel and was the last associate justice nominated by Richard Nixon. A contemporaneous story in the New York Times lamented this stating,

> "With only one dissenting vote, the Senate has confirmed the nomination of Lewis Powell to the Supreme Court. In this decisive manner, the Senate has shown how false was the imputation that it would not approve Southerner or a conservative. When a nominee is a man of professional stature, wide experience, and with a fundamental belief in the basic guarantees of the Constitution, no regional bias or philosophical disagreement bars his way.
>
> It is a source of profound regret that President Nixon's other nominee for the Court is not of the same quality. Instead, by submitting the name of

[51] McMillion, and Rutkus. "Supreme Court Nominations, 1789 to 2017: Actions by the Senate, the Judiciary Committee, and the President."
[52] Ibid.

> William Rehnquist, the President has once again provoked the turmoil of a confirmation struggle."[53]

This article foreshadows the several strategic moves attempted by the Senate to prevent the confirmation of Rehnquist. On December 10th, 1971 three events occurred. There was a cloture motion that was rejected 52-42, there was a motion to postpone until 1/18/1972 that was rejected 22-70, and finally there was the confirmation vote that resulted in 68-26. This struggle foreshadowed the later controversies that arose during Rehnquist's Chief Justice nomination hearing.

Ronald Regan's first Supreme Court nomination of Sandra Day O'Connor received a unanimous confirmation and had the highest recorded number of Senators voting for her confirmation of any nominee with 99-0.[54] She was the first woman to serve on the Supreme Court. Regan's second term nomination of Rehnquist to the position of Chief Justice however encountered more opposition.

On July 31, 1986 Regan refused to give the Senate Judiciary Committee memos that William Rehnquist had written while serving as head of the Office of Legal Counsel during the Nixon administration even though Rehnquist himself did not object to memos being provided.[55] A majority of the Senate Judiciary committee, eight Democrats and two Republicans, desired to see the documents and the dispute put into jeopardy not only the nomination of Rehnquist, but also that of Antonin Scalia, who was nominated to fill

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[53]The New York Times Archives. "The Rehnquist Nomination." *The New York Times*, 8 Dec. 1971, *https://www.nytimes.com/1971/12/08/archives/the-rehnquist-nomination.html*.

[54] McMillion, and Rutkus. "Supreme Court Nominations, 1789 to 2017: Actions by the Senate, the Judiciary Committee, and the President."

[55] Al Kamen and Ruth Marcus, "Regan Uses Executive Privilege to Keep Rehnquist Memos Secret," Washington Post, August 1, 1986, at A1. In Fisher, Louis. *The Politics of Executive Privilege*. Carolina Academic Press, 2004.

Rehnquist's seat. The Regan administration backed down and allowed Senators access to some documents. After that, each side claimed victory: the Democratic members of the committee rejoiced that they had been able to review the most important documents, and the Justice Department spokesman boasted that they had successfully limited the documents senators had access to.[56] This episode was molehill compared to the mountain of controversy caused by the nomination of former Nixon Solicitor General Robert Bork.

Then Senator Joe Biden sought to prepare the committee for Bork's nomination when he wrote to Attorney General Edward Meese for "certain material in the possession of the Justice Department and the Executive Office of the President".[57] This request covered a range of material including information created by Bork regarding the President's pocket veto power, documents regarding his role during the Watergate investigation (particularly those that addressed his dismissal of Archibald Cox as Special Prosecutor and correspondence with Watergate conspirators) and key documents from Bork's time as Solicitor General with regards to seven cases decided by the Supreme Court. For the most part the Justice Department complied with Biden's request. Some documents were forwarded, others had to be unsealed by order of a federal district court judge, and a few were converted to redacted versions. The department emphasized that it had waived traditional considerations in order to comply with the request for information. The Senate Judiciary Committee then spent 12 days on public hearings grilling Bork on a variety of issues. The Senate Judiciary Committee then sent the nomination to the floor and reported it unfavorably, which had not been done since the nomination of John J.

[56] Rozell, 2010, page 104.
[57] Fisher, 2004, page 74.

Parker during the Hoover administration.[58] Senate Historian Emeritus Don Ritchie points out a similarity and differences between Robert Bork and Antonin Scalia (who had been confirmed the year prior). Ritchie claims that with Democrats controlling the Senate there was more opportunity to examine this 'equally conservative' candidate. He elaborates that nominees have been advised that it is better not to engage with Senators in arguments, and that it was better to attempt to allow Senators to do most of the talking and politely answer their questions. However, Bork could not resist a good argument.[59] The second problem was Bork's public stance on civil rights. He was opposed to the Civil Rights Act of 1964 and was on the record in several articles and public statements. This resulted in some southern Senators who otherwise would have supported a conservative candidate voting against his nomination. Ultimately Bork was rejected by a vote of 42-58.

During the nomination of Elena Kagan, the records requested did not play a role in deliberations about her confirmation. There were sharp criticisms of her credentials and record by Republicans, and she served in both the Clinton and Obama administrations. However, the records from her time as Associate White House Counsel for Bill Clinton were cataloged and are available in the Clinton Library, President Barack Obama also waived executive privilege for records relating to her service as Solicitor General.[60] Although she is a comparable candidate to Brett Kavanaugh in that she served in a previous administration of the same party by which she was nominated, and whose

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[58] McMillion, and Rutkus. "Supreme Court Nominations, 1789 to 2017: Actions by the Senate, the Judiciary Committee, and the President."
[59] Ibid.
[60] Clinton Digital Library. "Elana Kagan Collection." *The William Clinton Presidential Library*, https://clinton.presidentiallibraries.us/collections/show/34.

party held a majority in the Senate during the time she was nominated, the comparison stops there. The policies of the Bush administration regarding executive branch information policy resulted an entirely different tenure for Brett Kavanaugh.

C. The George Bush Administration and Kavanaugh's Role

The George W. Bush administration attempted to expand executive authority in a systematic manner. Bruce P. Montgomery explains that this push was harkened when administration officials took office in 2000 and "declared their intent to reverse what they viewed as thirty years of legislative encroachment onto the constitutional prerogatives of the presidency".[61] For the context of the Brett Kavanaugh confirmation hearing this is the administration that has the greatest relevance. Not only does this administration have the greatest relevance to the recent treatment of the Presidential Records Act and executive privilege, it also is the administration in which Brett Kavanaugh served.

On November 1, 2001, President George W. Bush issued Executive Order 13,233. This order effectively nullified the Presidential Records Act by allowing presidents, vice presidents, and their heirs or representatives to invoke claims of privilege of access to their presidential materials in perpetuity.[62] The most alarming aspect of the directive was the reversal of the ultimate disposition of records into the public domain. The order was essentially revoked by President Barack Obama's Executive Order 13,489 which restored most of the wording of Ronald Regan's Executive Order 12,667. The most notable change was that vice-presidential records were also covered by the executive order. As

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[61] Montgomery, Bruce P. *The Bush-Cheney Administration Assault on Open Government*. Praeger Publishers, 2008.
[62] Montgomery, Bruce P. *Subverting Open Government: White House Materials and Executive Branch Politics* The Scarecrow Press Inc, 2004.

with the Congressmen that drafted the Presidential Records Act however, there was an underestimation as to the lengths that George W. Bush and his representatives would go to shield their records from public scrutiny. Though we are approaching the 12-year mark from the end of the administration, there are serious concerns about records that were not preserved that were hosted on Republican National Committee servers. With the current Republican administration what is to stop an extension of the length of time that records from the George W. Bush administration are kept from the public domain?

Kavanaugh joined Bush's legal team in 2000 when they were attempting to stop the ballot recount in the state of Florida. From there he was hired as an associate by White House Counsel Alberto Gonzales. Brett Kavanaugh had clerked for Supreme Court Associate Justice Anthony Kennedy and utilized a unique perspective to help the administration get judges approved by the Senate Judiciary Committee. He also served as Assistant to the President and White House Staff Secretary. His 2003 nomination to the United States Court of Appeals for the District of Columbia was stalled in the Senate for nearly 3 years, and when he finally had public hearings he was accused by minority members of lying to the committee about his assistance in formulating the Bush administration's detention and interrogation practices. He also denied having knowledge about emails that were stolen from minority members of the Senate Judiciary committee, though that did not factor into his consideration in 2006. Many of these issues reemerged after his nomination in 2018.

4. METHODOLOGY

After spending time reviewing the literature on executive privilege and considering questions about presidential records and Congressional access to executive branch information I was captivated by the nomination, and subsequent confirmation hearings, of Judge Brett M. Kavanaugh. I realized that the hearings touched on much of what I had been considering and even focused some public attention on access to presidential records. When considering what type of research, I would conduct it became apparent early that this was going to be a case study; however, the precise definition of case study is not agreed upon by social science researchers. I examined multiple definitions. In "The Case Study Cookbook" Hayes, Kyer and Weber examine three definitions stating,

> "... case studies should focus "on gaining an in-depth understanding of a particular entity or event at a specific time" (Harvard). A guide on case studies from Colorado State University states that the focus should be on collecting and presenting detailed information (Becker et al., 2012). John Gerring takes another stance, believing that the purpose of such a study, at

> least in part, is to use the collected data to generalize the results over a population".[63]

Each of these three definitions focuses on a different aspect of case study research. I will seek to gain an in depth understanding of the nomination of Brett M. Kavanaugh, and present detailed information about my findings. This case study research is particularly focused on a single, unique confirmation hearing, but there will be some attempt to present generalized findings in the opportunities for further research. The authors offer their definition:

> A case study is a form of observational study that focuses on the collection of data from a single case or multiple cases of a phenomenon. Case studies are used to gather data from one or more sites and can take place at a single point in time or over a period of time lasting up to several years. The goal of such a study is to increase understanding of the studied phenomenon, either
> in the context of a specific instance or generalized over a population.[64]

In this definition there are two discrete options for the goal of studies. Generalization is not appropriate in most case studies in which maturity of the investigation is young, therefore, this case study will seek to increase understanding of federal information policy and the process of requesting and receiving access to federal and presidential

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[63] Hayes, Richard, Brittany Kyer, and Emily Weber. "The Case Study Cookbook." (2015).
[64] Ibid.

records. What are the means that Senators have, specifically minority Senators, to request and access documents that they need to do their duty?

This specific instance of the Kavanaugh confirmation hearing was an unprecedented and unique case where several different actions were taken by several different agents, to prevent access to large document caches. Once again, however, the generalization that will be possible will come from examining previous instances in which nominees to the Supreme Court were employees in the executive branch. There may come a time in the future where a Supreme Court nominee has worked previously for a Presidential administration in some capacity. There may come a time where that nominee has created documentary material or records that are held by the National Archives and Records Administration.

> "The case is one among others. In any given study, we will concentrate on the one..."
>
> - Robert Stake (1995)[65]

I intend to frame and study this hearing as a case study among other Supreme Court nomination hearings by addressing the ways in which my research conforms to the definition and scope of a case study. Although Choemprayong and Wildemuth emphasizes that the standardization of the definition and scope of case study are debated, they provide the 11 key characteristics laid out by Benbasat et al. (1987).[66] I would like to

[65] Chapter 7" Case Studies" by Songphan Choemprayong and Barbara M. Wildemuth
[66] Ibid.

go through each of the 11 and illustrate how studying the Kavanaugh confirmation hearing as a case study conforms and sometimes diverges from these characteristics.

1. The phenomenon is examined in a natural setting.

I am reexamining the hearings in the context of watching and listening to the official CSPAN recordings of them. I am also reading extensively about the Senate Judiciary Committee in order to better understand how it functions.

2. Data are collected by multiple means

In addition to observing the hearings themselves I have searched the transcripts in order to more closely examine the mention and reference of important keywords. I have also closely studied many works on executive privilege in order to better understand arguments for and against its application as well as instances in which it was invoked and challenged. I relied heavily upon news articles to build a timeline of events in order to organize and separate different records requests and actions.

3. One or a few entities (person, group, or organization) are examined.

The primary organization examined is the Senate Judiciary Committee.

The persons examined are Brett M. Kavanaugh, Senate Judiciary Committee chairman Charles Grassley, and Senate Judiciary Committee Ranking minority member Dianne Feinstein.

4. The complexity of the unit is studied intensively.

The complexities of this Supreme Court nomination resulted from disagreements about the interpretation of the Constitution, the role of the courts and the system of checks and balances.

5. Case studies are more suitable for the exploration, classification, and hypothesis development stages of the knowledge-building process; the investigator should have a receptive attitude towards exploration.

I have attempted to explore and classify the different types of records requested and discussed as well as information about the Senate Judiciary Committee process.

6. No experimental controls or manipulation are involved.

There was no opportunity for me to manipulate or set experimental controls for this process.

7. The investigator may not specify the set of independent and dependent variables in advance.

Once again it would be impossible for me to specify independent and dependent variables in advance since I am examining this process retroactively.

8. The results derived depend heavily on the integrative powers of the investigator.

My results have been derived from an integration of the transcripts of the hearings themselves, contemporaneous news articles published around the time of the nomination and hearings and correspondence between NARA and Judiciary Committee members.

9. Changes in site selection and data collection methods could take place as the investigator develops new hypotheses.

I have changed my data collection methods slightly over the course of my research but have largely remained consistent in attempting to explore what records were requested and not, what records were given to the Committee and what records were withheld.

10. Case research is useful in the study of *why* and *how* questions because these deal with operational links to be traced over time, rather than with frequency or incidence.

In addition to the what questions raised in the previous reply I have also sought to explain how these records were created, stored, and then transmitted (or not) to the Committee. Some of the *why* questions are obfuscated by political posturing on behalf of Senators on the committee.

11. The focus is on contemporary events.

The confirmation hearing of Brett Kavanaugh is the most recent supreme court nomination hearing that I could have selected.

Coding and Searching Transcripts for Information Policy Issues

My initial goal was to closely examine the entirety of the nomination hearings in order to discern the information policy as it was expressed, discussed and questioned by Senators in real time. My first task before I could begin was to get a transcript of each day's testimony so that I could really approach it. Unfortunately, the official transcript has not yet been published. In order to make my own I went to CSPAN.org and copied over the transcripts that were compiled using closed captioning. It was not perfect, but as I coded, I was able to listen to the hearings at the same time and determine both who was speaking and when errors occurred in the closed captioning.

The first area of interest for coding the hearing was discussion, questions and content related to information policy; the second was US Senate Judiciary Committee rules/procedures. The clearest instance of the former was when Senators brought up their access, or lack thereof, to documents and records that they deemed relevant. The access vector of information policy was the most clear and prominent line of questioning pursued by Senators of each party. The latter focus was evident when Senators of each party spoke of previous nominees, precedent, and procedure. In highlighting each of these two foci, it is my hope that a narrative about the express and desired information policy of this instance of the Senate Judiciary Committee would emerge as well as an intelligible 'timeline' of sorts about the evolution of contemporaneous thought on Brett Kavanaugh, his nomination, and confirmation hearings.

During the process of coding when Senators brought up information policy, I highlighted their statements in yellow. Because information policy is a developing field and the term itself is not commonly used, no Senator referred to information policy

directly. Instead I carefully examined the definition of information policy laid out in Sandra Braman's foundational article, "Defining Information Policy" in the inaugural edition of the *Journal of Information Policy* and determined whether statements dealt with matters that could be considered information policy.[67]

When Senators brought up Senate Judiciary Committee rules/procedure I highlighted their statements in orange. The way these hearings are run is important to understanding the philosophy of the chairman. On the first day many Senators in the minority attempted to raise questions about whether the hearings could proceed. They attempted to raise points of order about the documents received the previous night, they attempted to call the hearing into regular order, and they introduced motions to adjourn. The chairman believed that it was within his right to continue the hearing and ignore procedural question.

I sometimes had difficulty distinguishing whether a Senator was raising an issue that was a matter of Senate Judiciary Committee policy, procedure, rules, or precedent, or whether the issue was a matter of information policy. There was certainly overlap, and when there was, I would either break up the highlighting of a sentence into constituent parts that most closely aligned with each matter or default to highlighting the section yellow as a deference to the generality and greater importance of information policy to my research.

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[67] Braman, Sandra. "Defining Information Policy." *Journal of Information Policy*, vol. 1, 2011, p. 1–5. https://www.jstor.org/stable/10.5325/jinfopoli.1.2011.0001

5. FINDINGS AND DISCUSSION

Access to records created by Brett Kavanaugh while he served in public office relates directly to information policy because these records are associated with his tenure in the White House and, as such, are legally classified as public documents. The information policy of the federal government of the United States can be characterized by examining and describing the flow of information not only between branches, but also to the public. Therefore, the decision making and other processes around access to and use of Kavanaugh's records during his confirmation hearing is an important test of the check that Congress provides in the appointment of Judicial nominees. In their actions and public statements, the National Archives and Records Administration makes clear their position on federal information policy, and by fulfilling their duty in this case they expressed to the American public their idea of the role and nature of the Senate Judiciary Committee.

The prevailing issue of information policy that the public came to witness and understand first was the delivery of 42,000 pages to members of the Senate Judiciary Committee on the night before the first day of the scheduled hearing. Minority Senators brought up this issues first thing because they took great umbrage with this "document dump" and therefore made several efforts to adjourn the meeting. The actor most responsible for this delivery of 42,000 pages (as part of 5,148 documents) was William

A. Burck.[68] Burck was the lawyer who led the team of lawyers hired by George W. Bush to be his representatives under the Presidential Records Act. The Senate Judiciary Committee twitter account announced mere hours after the documents were released to members that the majority had concluded its review of "each and every one of these pages". This was countered during the hearing the following day when, "Sen. Sheldon Whitehouse (D-R.I.) noted … that reviewing that many documents so quickly would require majority staffers to process documents at a rate of 7000 pages per hour".[69] Not only were these documents given to members in a time frame in which it would be impossible for a comprehensive review, Burck also requested that members keep these documents from the public and classified them "committee confidential". This document dump was flashy and caused a lot of concern by members of the committee, the media, and the public. While it is an excellent metaphor for the entire process (in that minority members were excluded, and the majority expressed total satisfaction with information provided) it only scratches the surface of the struggle that took place in the weeks leading up to the hearings. Since there are a large number of documents, many actors who influenced this process, and several letters sent back and forth between the National Archives and Records Administration and members of the Senate Judiciary Committee it is best to go through the process of document requests before the hearing chronologically. The document dump was the last major event to take place before the hearing.

On July 9th, 2018 President Donald Trump nominated Brett Kavanaugh to the Supreme Court, and his nomination paperwork was officially submitted to the Senate a

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[68] Fogel, Mikhaila. "Day 1 of Brett Kavanaugh Hearings: Documents Delayed and Documents Denied." *Lawfare*, 4 Sept. 2018 https://www.lawfareblog.com/day-1-brett-kavanaugh-hearings-documents-delayed-and-documents-denied

[69] Ibid.

day later. Shortly thereafter he began meeting with Republican members of Congress. In keeping with the tradition begun by Nixon nominee Harry Blackmun as a way to smooth the way towards confirmation after three unsuccessful Supreme Court nominations in Fortas, Haynsworth and Carswell. Kavanaugh was guided by former member of the Senate Judiciary Committee Jon Kyl and White House Counsel Don McGahn.[70] Of note is that fact that Senate Judiciary Committee chairman Charles Grassley sat down with Kyl the day prior to their first round of Senate meetings on Monday July 9th, informed him of who the nominee would be and by the next day, "one of Kyl's lobbying clients, the conservative Judicial Crisis Network, had unveiled a 30-second TV spot touting Kavanaugh's biography and a $1.4 million initial advertising buy in the home states of four centrist Democrats seen as potential votes for confirmation: Joe Manchin III of West Virginia, Joe Donnelly of Indiana, Heidi Heitkamp of North Dakota and Doug Jones of Alabama".[71] From the first day of this nomination process powerful interests groups were already organizing and launching efforts to help Brett Kavanaugh get confirmed to the Supreme Court.

In addition to the hearings themselves I closely read the correspondence that Senate Judiciary members exchanged with the National Archives and Records Administration. (This correspondence is currently located on a webpage in the larger NARA website, beneath a section on the Freedom of Information Act.[72]) Shortly after Kavanaugh was nominated Ranking member Senator Dianne Feinstein and Chairman

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[70] Hawkings, David. "Why Former Sen. Jon Kyl Got Tapped to Guide Brett Kavanaugh." *Roll Call,* 11 July 2018, https://www.rollcall.com/news/hawkings/former-sen-jon-kyl-got-tapped-guide-brett-kavanaugh.
[71] Ibid.
[72] "Congressional Correspondence Related to the Nomination of Brett M. Kavanaugh to the U.S. Supreme Court." *National Archives and Records Administration,* 10 Oct. 2018, https://www.archives.gov/foia/congressional-correspondence-related-to-the-nomination-of-brett-kavanaugh.

Charles Grassley began to engage in conversations via an exchange of a series of letters with Archivist of the United States David Ferriero and NARA General Counsel Gary M. Stern. These letters illustrate each party's understanding and arguments about the Presidential Records Act.

On July 21st, 2018 Judiciary Committee ranking member Dianne Feinstein wrote to the National Archives and Records Administration to express concern about the way records were being processed and prepared for the Senate Judiciary Committee. She mentions a briefing of the Senate Judiciary Committee by representatives of the George W. Bush Presidential Library that caused her to question whether or not, "legal requirements are being followed…". She went on to state "This briefing revealed several potential and critical departures from the requirements of the Presidential Records Act".[73] She summarized that the representatives at the briefing indicated that a team of private lawyers would be responsible for the initial document review and determination of which documents would be released to Congress or the public. Feinstein argues that this was inappropriate since NARA has already had custody of these documents for nine years and advocated for "a more limited review by the National Archives to determine the applicability of statutory restrictions on access".[74] In her conclusion she reiterates her argument that the hiring of outside lawyers is not only inappropriate but illegal and emphasizes that, "Obtaining the full record is critical for the Judiciary Committee and full

[73] July 21, 2018 Letter from Sen. Dianne Feinstein regarding "Processing Kavanaugh-related presidential records for access" from "Congressional Correspondence Related to the Nomination of Brett M. Kavanaugh to the U.S. Supreme Court." *National Archives and Records Administration*, 10 Oct. 2018, https://www.archives.gov/foia/congressional-correspondence-related-to-the-nomination-of-brett-kavanaugh.
[74] Ibid.

Senate to fulfill our constitutional duty to provide advice and consent on Judge Kavanaugh's nomination".[75]

Before David Ferriero had a chance to reply Chairman of the Judiciary Committee, Charles Grassley, responded to Senator Feinstein with a letter addressed to the Archivist of the United States. He began by expressing "I wish to comment on the Ranking Member's misreading of the facts and law".[76] He continues by stating that the Presidential Records Act confers "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" and "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".[77] Grassley here is expressing a view of the Presidential Records Act that grants the President and his representatives preemptive authority. He continues with a statement that can only be characterized as the most broad and expansive view of the powers of PRA representatives. "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 chairman then accuses the ranking member of misunderstanding how the PRA operates in the context of a Supreme Court nomination and claims that her

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[75] Ibid.
[76] July 23, 2018 Letter from Sen. Charles Grassley regarding "Response to Sen. Feinstein's July 21 letter to NARA" from "Congressional Correspondence Related to the Nomination of Brett M. Kavanaugh to the U.S. Supreme Court." *National Archives and Records Administration*, 10 Oct. 2018
[77] Ibid.

concerns are premature since there had not yet been a records request by the Senate Judiciary Committee.

On July 26th, 2018 David Ferriero responded to these two letters, but primarily responded to ranking member Dianne Feinstein. Critically he states, "As my staff has discussed with your staff, the authority of a committee to make requests under this subsection lies exclusively with the Chair of the committee, which NARA has carefully followed since the PRA was enacted".[78] The Archivist was keeping with precedent. A difference, however, is that in the past ranking members have been included in the process with the Senate Judiciary committee Chairman and the scope of the records requested were agreed upon in advance of the official records request. The Archivist reassures ranking member Feinstein that "We are also processing FOIA requests for other records related to Judge Kavanaugh. In response to these FOIA requests, our staff has to review for and withhold information subject to the applicable PRA restrictions and FOIA exemptions. Once we have completed our review, we must provide notification to the representatives of the former and incumbent Presidents in accordance with section 2208 of the PRA before we can release them to the public".[79] This can be read as an attempt to placate Feinstein since the Archivist is informing her that the minority party of the Judiciary Committee has no standing above that which regular citizens have.

On July 27th, 2018 Ranking member Dianne Feinstein expressed her dissatisfaction to the Archivist on his narrow reading of the Presidential Records act. She states that this position is inconsistent with the position that Chairman Grassley has taken

[78] July 26, 2018 Letter from David Ferriero, Archivist regarding "Response to Sen. Feinstein's July 21 letter to NARA" Congressional Correspondence Related to the Nomination of Brett M. Kavanaugh to the U.S. Supreme Court." *National Archives and Records Administration*, 10 Oct. 2018.
[79] Ibid.

about requests from regular members of Congress and the Ranking member.[80] She also summarized the Archivist's previous letter as essentially giving the authority to decide which records will be provided to Congress.

On the same day, Chairman Charles Grassley sent the official records request to Patrick Mordente, the Director of the George W. Bush Presidential Library. It is important to examine the precise phrasing of which records were included in this request:

> (1) Emails sent to or received from Kavanaugh, including emails on which he was a carbon copy or blind carbon copy recipient, during the period Kavanaugh served as Associate Counsel and Senior Associate Counsel to the President, including any documents attached to such emails;
>
> (2) The textual records contained in Kavanaugh' s office files from the period during which he served as Associate Counsel and Senior Associate Counsel to the President; and
>
> (3) Documents relating to Kavanaugh's nomination to the U.S. Court of Appeals for the District of Columbia Circuit

The records request neglects entirely to ask for any records that relate to Kavanaugh's time as White House Staff Secretary. This was pointed out in Ranking member Dianne

[80] Transcript of Senate Judiciary Committee Hearing on the Nomination of Sen. Sessions to be Attorney General in July 27, 2018 Letter from Dianne Feinstein about "Response to July 26, 2018 letter" in Congressional Correspondence Related to the Nomination of Brett M. Kavanaugh to the U.S. Supreme Court." *National Archives and Records Administration*, 10 Oct. 2018.

Feinstein's previous letter, so presumably she received this official records request before it was sent to the George W. Bush Presidential Library director.

The correspondence between Senate Judiciary committee Chairman Charles Grassley, Ranking member Dianne Feinstein, Archivist David Ferriero, NARA General Counsel, G.W. Bush Library representatives and Democratic Senators continued up until the first day of hearings. Essentially the National Archives and Records Administration did not recognize the authority of Ranking member Dianne Feinstein to request records as part of her constitutional duty to advise and consent the President on his Supreme Court nominee. Minority members responded by coming together and filing a FOIA request for Kavanaugh's records from his service as Assistant to the President and Staff Secretary, but the Director and Supervisory Archivist for the G.W. Bush Presidential Library reiterated that the requested records were covered under the Presidential Records Act.

Legacy of the George W. Bush Administration Assault on Open Government

According to the Presidential Records act executive branch information (or presidential records) belong to the American public. It follows then that when a former executive branch employee is nominated to the Supreme Court, and the Senate Judiciary Committee exercises its constitutional duty to advise the current President on that nominee then they should have access to all presidential records generated by the executive branch employee. This is not what happened in the Kavanaugh confirmation hearing. Instead the process was subverted when the majority leader of the Senate Judiciary Committee diverged from tradition and did not consult with the minority member on which records to request. The Archivist of the United States had a difficult decision to make when confronted with disparate requests from the chairman and the ranking member. This process was further tainted when the Bush-Cheney administration was allowed to continue their assault on open government by hiring William A. Burck and a team of outside lawyers to decide which documents were relevant, which relevant documents of those were permissible to be released to the public and which were to be designated ‘committee confidential’. Burck then decided that it was appropriate to produce nearly 42,000 pages of documents that he designated committee confidential the night before the first day of the hearing. There were an additional 27,110 documents from the White House counsel’s office, totaling 101,921 pages, that were completely withheld from the Senate Judiciary Committee because of intervention by the Trump White House and the Justice Department.

Constitutional Complications of Oversight of Executive Branch Information: Informal Influences on Information Policy and Establishing Narratives

Although *U.S. Nixon* is recognized as a key court case for the balance of powers, a consensus on its actual implications for the current operations of the federal government is nonexistent. At the core the tension arises from the constitutional system of checks and balances provided for in the Appointments Clause. There is a potential for conflict because the goals and aims of the President, the Senate and the public are not going to always align. The modern context of our two-party political system and asymmetrical political polarization caused a unique position in the Senate where the majority was highly motivated to seat this nominee. The constitutional separation of powers that is the foundation of the Appointments Clause as laid out in Article II Section 2 of the Constitution is intended to prevent an abuse of power by the President appointing unqualified nominees. One of the most important nominations that the Senate meets to advise and consent on is those judicial nominees that sit on the highest courts. In the context of the modern judiciary that translates to judges on both the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit Court is a key because so many judges are nominated to the Supreme Court from this lower Court.

As stated in the introduction the most important aspect of information policy that was raised during these hearings was *access* to the record of Judge Brett M. Kavanaugh by the Senate Judiciary Committee, and by extension the American public. After noticing something of a pattern I went back to specifically search the transcripts for several terms. I was hearing multiple Senators using similar words to describe the same sentiments.

They would use hyperbole to describe Kavanaugh as one of the most, and sometimes even the most qualified candidate ever nominated. They would similarly describe his academic record as in hyperbolic terms such as “impeccable” and “unparalleled”. The Democratic members had a pattern of mentioning documents that were denied to the committee.

6. OPPORTUNITIES FOR FURTHER RESEARCH

Using the research method of a historical case study, I hope that I have demonstrated that within each nomination hearing three things that touch on information policy occur. The first is that Members of the Senate Judiciary Committee raise questions that directly and indirectly address issues of information policy. Nominees are asked and expected to comment on and illustrate their opinions and perspectives about information policy. The second is that the Senate Judiciary committee is required to perform an exercise in information policy when the Chairman requests information about a nominee. With this case the request for records was a central debate between members of the majority and minority. In other cases, it may not be as important. And the third is that Many of the issues which inform judicial philosophy touch on information policy.

I have not explicitly intended for the research methodology outlined here to be generalizable to other Supreme Court Confirmation Hearings. However, it would seem plausible that these methods could be used as a guideline for developing research questions and a means of analyzing future Supreme Court Confirmation Hearings. The first topic of questions of information policy raised by Senate Judiciary Committee members will continue to be relevant so long as nominees are questions about their judicial philosophy and would therefore be a ripe and relevant topic of inquiry for most if not all Supreme Court nominees. However, the second topic of information policy expressed by the Senate Judiciary Committee expressed via the request for records

created by the nominee will be relevant only if the nominee worked in the Federal government, and potentially only so if the nominee worked for a former President or generally within the executive branch. The records request that is submitted to the National Archives and Records Administration is an incredibly important aspect of this process.

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Appendices

A. 44 U.S. Code Chapter 21 - NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

§ 2101. Definitions

As used in this chapter—

(1) “Presidential archival depository” means an institution operated by the United States to house and preserve the papers and books of a President or former President of the United States, together with other historical materials belonging to a President or former President of the United States, or related to his papers or to the events of his official or personal life, and may include research facilities and museum facilities in accordance with this chapter;

(2) “historical materials” including books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value;

(3) “Archivist” means the Archivist of the United States appointed under section 2103 of this title; and

(4) “Administration” means the National Archives and Records Administration established under section 2102 of this title.

§ 2102. Establishment

There shall be an independent establishment in the executive branch of the Government to be known as the National Archives and Records Administration. The Administration shall be administered under the supervision and direction of the Archivist.

§ 2103. Officers

(a) The Archivist of the United States shall be appointed by the President by and with the advice and consent of the Senate. The Archivist shall be appointed without regard to political affiliations and solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office of Archivist. The Archivist may be removed from office by the President. The President shall communicate the reasons for any such removal to each House of the Congress.

(b) The Archivist shall be compensated at the rate provided for level III of the Executive Schedule under section 5314 of title 5.

(c) There shall be in the Administration a Deputy Archivist of the United States, who shall be appointed by and who shall serve at the pleasure of the Archivist. The Deputy Archivist shall be established as a career reserved position in the Senior Executive Service within the meaning of section 3132(a)(8) of title 5. The Deputy Archivist shall perform such functions as the Archivist shall designate. During any absence or disability of the Archivist, the Deputy Archivist shall act as Archivist. In the event of a vacancy in the office of the Archivist, the Deputy Archivist shall act as Archivist until an Archivist is appointed under subsection (a).

§ 2104. Administrative provisions

(a) The Archivist shall prescribe such regulations as the Archivist deems necessary to effectuate the functions of the Archivist, and the head of each executive agency shall cause to be issued such orders and directives as such agency head deems necessary to carry out such regulations.

(b) Except as otherwise expressly provided by law, the Archivist may delegate any of the functions of the Archivist to such officers and employees of the Administration as the Archivist may designate, and may authorize such successive redelegations of such functions as the Archivist may deem to be necessary or appropriate. A delegation of functions by the Archivist shall not relieve the Archivist of responsibility for the administration of such functions.

(c) The Archivist may organize the Administration as the Archivist finds necessary or appropriate.

(d) The Archivist is authorized to establish, maintain, alter, or discontinue such regional, local, or other field offices as the Archivist finds necessary or appropriate to perform the functions of the Archivist or the Administration.

(e) The Archivist shall cause a seal of office to be made for the Administration of such design as the Archivist shall approve. Judicial notice shall be taken of such seal.

(f) The Archivist may establish advisory committees to provide advice with respect to any function of the Archivist or the Administration. Members of any such committee shall serve without compensation but shall be entitled to transportation expenses and per diem in lieu of subsistence in accordance with section 5703 of title 5.

(g) The Archivist shall advise and consult with interested Federal agencies with a view to obtaining their advice and assistance in carrying out the purposes of this chapter.

(h) If authorized by the Archivist, officers and employees of the Administration having investigatory functions are empowered, while engaged in the performance of their duties in conducting investigations, to administer oaths.

§ 2105. Personnel and services

(a)

(1) The Archivist is authorized to select, appoint, employ, and fix the compensation of such officers and employees, pursuant to part III of title 5, as are necessary to perform the functions of the Archivist and the Administration.

(2) Notwithstanding paragraph (1), the Archivist is authorized to appoint, subject to the consultation requirements set forth in paragraph (f)(2) of section 2203 of this title,[1] a director at each Presidential archival

depository established under section 2112 of this title. The Archivist may appoint a director without regard to subchapter I and subchapter VIII of chapter 33 of title 5, United States Code, governing appointments in the competitive service and the Senior Executive Service. A director so appointed shall be responsible for the care and preservation of the Presidential records and historical materials deposited in a Presidential archival depository, shall serve at the pleasure of the Archivist and shall perform such other functions as the Archivist may specify.

(b) The Archivist is authorized to obtain the services of experts and consultants under section 3109 of title 5.

(c) Notwithstanding the provisions of section 973 of title 10 or any other provision of law, the Archivist, in carrying out the functions of the Archivist or the Administration, is authorized to utilize in the Administration the services of officials, officers, and other personnel in other Federal agencies, including personnel of the armed services, with the consent of the head of the agency concerned.

(d) Notwithstanding section 1342 of title 31, United States Code, the Archivist is authorized to accept and utilize voluntary and uncompensated services.

§ 2106. Reports to Congress

The Archivist shall submit to the Congress, in January of each year and at such other times as the Archivist finds appropriate, a report concerning the administration of functions of the Archivist, the Administration, the National Historical Publications and Records Commission, and the National Archives Trust Fund. Such report shall describe—

(1) program administration and expenditures of funds, both appropriated and nonappropriated, by the Administration, the Commission, and the Trust Fund Board;

(2) research projects and publications undertaken by Commission grantees, and by Trust Fund grantees, including detailed information concerning the receipt and use of all appropriated and nonappropriated funds;

(3) by account, the moneys, securities, and other personal property received and held by the National Archives Trust Fund Board, and of its operations, including a listing of the purposes for which funds are transferred to the National Archives and Records Administration for expenditure to other Federal agencies; and

(4) the matters specified in section 2904(c)(8) of this title.

§ 2107. Acceptance of records for historical preservation

(a)In General.—When it appears to the Archivist to be in the public interest, the Archivist may—

(1) accept for deposit with the National Archives of the United States the records of a Federal agency, the Congress, the Architect of the Capitol, or the Supreme Court determined by the Archivist to have sufficient historical or other value to warrant their continued preservation by the United States Government;

(2) direct and effect the transfer of records of a Federal agency determined by the Archivist to have sufficient historical or other value to warrant their continued preservation by the United States Government to the National Archives of the United

States, as soon as practicable, and at a time mutually agreed upon by the Archivist and the head of that Federal agency not later than thirty years after such records were created or received by that agency, unless the head of such agency has certified in writing to the Archivist that such records must be retained in the custody of such agency for use in the conduct of the regular business of the agency;

(3) direct and effect, with the approval of the head of the originating Federal agency, or if the existence of the agency has been terminated, with the approval of the head of that agency's successor in function, if any, the transfer of records, deposited or approved for deposit with the National Archives of the United States to public or educational institutions or associations; title to the records to remain vested in the United States unless otherwise authorized by Congress; and

(4) transfer materials from private sources authorized to be received by the Archivist by section 2111 of this title.

(b)Early Transfer of Records.—The Archivist—

(1) in consultation with the head of the originating Federal agency, is authorized to accept a copy of the records described in subsection (a)(2) that have been in existence for less than thirty years; and

(2) may not disclose any such records until the expiration of—

(A) the thirty-year period described in paragraph (1);

(B) any longer period established by the Archivist by order; or

(C) any shorter period agreed to by the originating Federal agency.

§ 2108. Responsibility for custody, use, and withdrawal of records

(a) The Archivist shall be responsible for the custody, use, and withdrawal of records transferred to him. When records, the use of which is subject to statutory limitations and restrictions, are so transferred, permissive and restrictive statutory provisions with respect to the examination and use of records applicable to the head of the agency from which the records were transferred or to employees of that agency are applicable to the Archivist and to the employees of the National Archives and Records Administration, respectively. Except as provided in subsection (b) of this section, when the head of a Federal agency states, in writing, restrictions that appear to him to be necessary or desirable in the public interest with respect to the use or examination of rec-ords being considered for transfer from his custody to the Archivist, the Archivist shall, if he concurs,,[1] impose such restrictions on the records so transferred, and may not relax or remove such restrictions without the written concurrence of the head of the agency from which the material was transferred, or of his successor in function, if any. In the event that a Federal agency is terminated and there is no successor in function, the Archivist is authorized to relax, remove, or impose restrictions on such agency's records when he determines that such action is in the public interest. Statutory and other restrictions referred to in this subsection shall remain in force until the records have been in existence for thirty years unless the Archivist by order, having consulted with the head of the transferring Federal agency or his successor in function, determines, with respect to specific bodies of records, that for reasons consistent with standards established in relevant statutory law, such restrictions shall remain in force for a longer period. Restriction on the use or examination of records deposited with the National Archives of the United States imposed by section 3 of the National Archives Act, approved June 19, 1934, shall continue in force regardless of the expiration of the tenure of office of the official who imposed them but may be removed or

relaxed by the Archivist with the concurrence in writing of the head of the agency from which material was transferred or of his successor in function, if any.

(b) With regard to the census and survey rec-ords of the Bureau of the Census containing data identifying individuals enumerated in population censuses, any release pursuant to this section of such identifying information contained in such records shall be made by the Archivist pursuant to the specifications and agreements set forth in the exchange of correspondence on or about the date of October 10, 1952, between the Director of the Bureau of the Census and the Archivist of the United States, together with all amendments thereto, now or hereafter entered into between the Director of the Bureau of the Census and the Archivist of the United States. Such amendments, if any, shall be published in the Register.

§ 2109. Preservation, arrangement, duplication, exhibition of records

The Archivist shall provide for the preservation, arrangement, repair and rehabilitation, duplication and reproduction (including microcopy publications), description, and exhibition of records or other documentary material transferred to him as may be needful or appropriate, including the preparation and publication of inventories, indexes, catalogs, and other finding aids or guides to facilitate their use. He may also prepare guides and other finding aids to Federal records and, when approved by the National Historical Publications and Records Commission, publish such historical works and collections of sources as seem appropriate for printing or otherwise recording at the public expense.

§ 2110. Servicing records

The Archivist shall provide and maintain facilities he considers necessary or desirable for servicing records in his custody that are not exempt from examination by statutory or other restrictions.

§ 2111. Material accepted for deposit

(a)In General.—When the Archivist considers it to be in the public interest the Archivist may accept for deposit—

(1) the papers and other historical materials of a President or former President of the United States, or other official or former official of the Government, and other papers relating to and contemporary with a President or former President of the United States, subject to restrictions agreeable to the Archivist as to their use; and

(2) recorded information (as such term is defined in section 3301(a)(2) of this title) from private sources that are appropriate for preservation by the Government as evidence of its organization, functions, policies, decisions, procedures, and transactions.

(b)Exception.—

This section shall not apply in the case of any Presidential records which are subject to the provisions of chapter 22 of this title.

§ 2112. Presidential archival depository

(a)

(1) When the Archivist considers it to be in the public interest, the Archivist may—

(A)

(i) accept, for and in the name of the United States, land, a facility, and equipment offered as a gift to the United States for the purpose of creating a Presidential archival depository;

(ii) take title to the land, facility, and equipment on behalf of the United States; and

(iii) maintain, operate, and protect the land, facility, and equipment as a Presidential archival depository and as part of the national archives system;

(B)

(i) make agreements, upon terms and conditions the Archivist considers proper, with a State, political subdivision, university, institution of higher learning, institute, or foundation to use as a Presidential archival depository land, a facility, and equipment of the State, subdivision, university, or other organization, to be made available by it without transfer of title to the United States; and

(ii) maintain, operate, and protect the depository as a part of the national archives system; and

(C) accept, for and in the name of the United States, gifts offered for the purpose of making any physical or material change or addition to a Presidential archival depository.

(2) The Archivist shall promulgate architectural and design standards applicable to Presidential archival depositories in order to ensure that such depositories (A) preserve Presidential records subject to chapter 22 of this title and papers and other historical materials accepted for deposit under section 2111 of this title and (B) contain adequate research facilities.

(3) Prior to accepting and taking title to any land, facility, or equipment under subparagraph (A) of paragraph (1), or prior to entering into any agreement under subparagraph (B) of such paragraph or any other agreement to accept or establish a Presidential archival depository, the Archivist shall submit a written report on the proposed Presidential archival depository to the President of the Senate and the Speaker of the House of Representatives. The report shall include—

(A) a description of the land, facility, and equipment offered as a gift or to be made available without transfer of title;

(B) a statement specifying the estimated total cost of the proposed depository and the amount of the endowment for the depository required pursuant to subsection (g) of this section;

(C) a statement of the terms of the proposed agreement, if any;

(D) a general description of the types of papers, documents, or other historical materials proposed to be deposited in the depository to be created, and of the terms of the proposed deposit;

(E) a statement of any additional improvements and equipment associated with the development and operation of the depository, an estimate of the costs of such improvements and equipment, and a statement as to the extent to which such costs will be incurred by any Federal or State government agency;

(F) an estimate of the total annual cost to the United States of maintaining, operating, and protecting the depository; and

(G) a certification that such facility and equipment (whether offered as a gift or made available without transfer of title) comply with standards promulgated by the Archivist pursuant to paragraph (2) of this subsection.

(4) Prior to accepting any gift under subparagraph (C) of paragraph (1) for the purpose of making any physical or material change or addition to a Presidential archival depository, or prior to implementing any provision of law requiring the making of such a change or addition, the Archivist shall submit a report in writing on the proposed change or addition to the President of the Senate and the Speaker of the House of Representatives. The report shall include—

(A) a description of such gift;

(B) a statement specifying the estimated total cost of the proposed physical or material change or addition and the amount of the deposit in an endowment for the depository required pursuant to subsection (g) of this section in order to meet the cost of such change or addition;

(C) a statement of the purpose of the proposed change or addition and a general description of any papers, documents, or historical materials proposed to be deposited in the depository as a result of such change or addition;

(D) a statement of any additional improvements or equipment for the depository associated with such change or addition;

(E) an estimate of the increase in the total annual cost to the United States of maintaining, operating, and protecting the depository that will result from such change or addition; and

(F) a certification that the depository, and the equipment therein will, after such change or addition, comply with the standards promulgated by the Archivist pursuant to paragraph (2) of this subsection.

(5) The Archivist may not—

(A) accept or take title to land, a facility, or equipment under subparagraph (A) of paragraph (1) for the purpose of creating a Presidential archival depository;

(B) enter into any agreement under subparagraph (B) of such paragraph or any other agreement to accept or establish a Presidential archival depository; or

(C) accept any gift under subparagraph (C) of such paragraph for the purpose of making any physical or material change to a Presidential archival depository,

until the expiration of a period of 60 days of continuous session of Congress beginning on the date on which the Archivist transmits the report required under paragraph (3) of this subsection with respect to such Presidential archival depository or the report required under paragraph (4) of this subsection with respect to such change or addition, as the case may be.

(b) When the Archivist considers it to be in the public interest, he may deposit in a Presidential archival depository papers, documents, or other historical materials accepted under section 2111 of this title, or Federal records appropriate for preservation.

(c) When the Archivist considers it to be in the public interest, he may exercise, with respect to papers, documents, or other historical materials deposited under this section, or otherwise, in a Presidential archival depository, all the functions and responsibilities otherwise vested in him pertaining to Federal records or other documentary materials in his custody or under his control. The Archivist, in negotiating for the deposit of Presidential historical materials, shall take steps to secure to the Government, as far as possible, the right to have continuous and permanent possession of the materials. Papers, documents, or other historical materials

accepted and deposited under section 2111 of this title and this section are subject to restrictions as to their availability and use stated in writing by the donors or depositors, including the restriction that they shall be kept in a Presidential archival depository. The restrictions shall be respected for the period stated, or until revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf. Subject to the restrictions, the Archivist may dispose by sale, exchange, or otherwise, of papers, documents, or other materials which the Archivist determines to have no permanent value or historical interest or to be surplus to the needs of a Presidential archival depository. Only the first two sentences of this subsection shall apply to Presidential records as defined in section 2201(2) of this title.

(d) When the Archivist considers it to be in the public interest, he may cooperate with and assist a university, institution of higher learning, institute, foundation, or other organization or qualified individual to further or to conduct study or research in historical materials deposited in a Presidential archival depository.

(e) When the Archivist considers it to be in the public interest, he may charge and collect reasonable fees for the privilege of visiting and viewing exhibit rooms or museum space, or for the occasional, non-official use of rooms and spaces (and services related to such use), in a Presidential archival depository.

(f) When the Archivist considers it to be in the public interest, he may provide reasonable office space in a Presidential archival depository for the personal use of a former President of the United States.

(g)

(1) When the Archivist considers it to be in the public interest, the Archivist may solicit and accept gifts or bequests of money or other property for the purpose of maintaining, operating, protecting, or improving a Presidential archival depository. The proceeds of gifts or bequests, together with the proceeds from fees or from sales of historical materials, copies or reproductions, catalogs, or other items, having to do with a Presidential archival depository, shall be paid into an account in the National Archives Trust Fund and shall be held, administered, and expended for the benefit and in the interest of the Presidential archival depository in connection with which they were received, and for the same purposes and objects, including custodial and administrative services for which appropriations for the maintenance, operation, protection, or improvement of Presidential archival depositories might be expended.

(2) The Archivist shall provide for the establishment in such Trust Fund of separate endowments for the maintenance of the land, facility, and equipment of each Presidential archival depository, to which shall be credited any gifts or bequests received under paragraph (1) that are offered for that purpose. Income to each such endowment shall be available to cover the cost of facility operations, but shall not be available for the performance of archival functions under this title.

(3) The Archivist shall not accept or take title to any land, facility, or equipment under subparagraph (A) of subsection (a)(1), or enter into any agreement to use any land, facility, or equipment under subparagraph (B) of such subsection for the purpose of creating a Presidential archival depository, unless the Archivist determines that there is available, by gift or bequest for deposit under paragraph (2) of this subsection in an endowment with respect to such depository, an amount for the purpose of maintaining such land, facility, and equipment equal to—

(A) the product of—

(i) the total cost of acquiring or constructing such facility and of acquiring and installing such equipment, multiplied by

(ii) 20 percent; plus

(B)

(i) if title to the land is to be vested in the United States, the product of—

(I) the total cost of acquiring the land upon which such facility is located, or such other measure of the value of such land as is mutually agreed upon by the Archivist and the donor, multiplied by

(II) 20 percent; or

(ii) if title to the land is not to be vested in the United States, the product of—

(I) the total cost to the donor of any improvements to the land upon which such facility is located (other than such facility and equipment), multiplied by

(II) 20 percent; plus

(C) if the Presidential archival depository will exceed 70,000 square feet in area, an amount equal to the product of—

(i) the sum of—

(I) the total cost described in clause (i) of subparagraph (A); plus

(II) the total cost described in subclause (I) or (II) of subparagraph (B)(i), as the case may be, multiplied by

(ii) the percentage obtained by dividing the number of square feet by which such depository will exceed 70,000 square feet by 70,000.

(4) If a proposed physical or material change or addition to a Presidential archival depository would result in an increase in the costs of facility operations, the Archivist may not accept any gift under subparagraph (C) of paragraph (1) for the purpose of making such a change or addition, or may not implement any provision of law requiring the making of such a change or addition, unless the Archivist determines that there is available, by gift or bequest for deposit under paragraph (2) of this subsection in an endowment with respect to such depository, an amount for the purpose of maintaining the land, facility, and equipment of such depository equal to the difference between—

(A) the amount which, pursuant to paragraph (3) of this subsection, would have been required to have been available for deposit in such endowment with respect to such depository if such change or addition had been included in such depository on—

(i) the date on which the Archivist took title to the land, facility, and equipment for such depository under subparagraph (A) of subsection (a)(1); or

(ii) the date on which the Archivist entered into an agreement for the creation of such depository under subparagraph (B) of such paragraph,

as the case may be; minus

(B) the amount which, pursuant to paragraph (3) of this subsection, was required to be available for deposit in such endowment with respect to such depository on the date the Archivist took such title or entered into such agreement, as the case may be.

(5)

(A) Notwithstanding paragraphs (3) and (4) (to the extent that such paragraphs are inconsistent with this paragraph), this subsection shall be administered in accordance with this paragraph with respect to any Presidential archival depository created as a depository for the papers, documents, and other historical materials and Presidential records pertaining to any President who takes the oath of office as President for the first time on or after July 1, 2002.

(B) For purposes of subparagraphs (A)(ii), (B)(i)(II), and (B)(ii)(II) of paragraph (3) the percentage of 60 percent shall apply instead of 20 percent.

(C)

(i) In this subparagraph, the term "base endowment amount" means the amount of the endowment required under paragraph (3).

(ii)

(I) The Archivist may give credits against the base endowment amount if the Archivist determines that the proposed Presidential archival depository will have construction features or equipment that are expected to result in quantifiable long-term savings to the Government with respect to the cost of facility operations.

(II) The features and equipment described under subclause (I) shall comply with the standards promulgated by the Archivist under subsection (a)(2).

(III) The Archivist shall promulgate standards to be used in calculating the dollar amount of any credit to be given, and shall consult with all donors of the endowment before giving any credits. The total dollar amount of credits given under this paragraph may not exceed 20 percent of the base endowment amount.

(D)

(i) In calculating the additional endowment amount required under paragraph (4), the Archivist shall take into account credits given under subparagraph (C), and may also give credits against the additional endowment amount required under paragraph (4), if the Archivist determines that construction features or equipment used in making or equipping the physical or material change or addition are expected to result in quantifiable long-term savings to the Government with respect to the cost of facility operations.

(ii) The features and equipment described under clause (i) shall comply with the standards promulgated by the Archivist under subsection (a)(2).

(iii) The Archivist shall promulgate standards to be used in calculating the dollar amount of any credit to be given, and shall consult with all donors of the endowment before giving any credits. The total dollar amount of credits given under this paragraph may not exceed 20 percent of the additional endowment amount required under paragraph (4).

§ 2113. Depository for agreements between States

The Archivist may receive duplicate originals or authenticated copies of agreements or compacts entered into under the Constitution and laws of the United States, between States of the Union, and take necessary actions for their preservation and servicing.

§ 2114. Preservation of audio and visual records

The Archivist may make and preserve audio and visual records, including motion-picture films, still photographs, and sound recordings, in analog, digital, or any other form, pertaining to and illustrative of the historical development of the United States Government and its activities, and provide for preparing, editing, titling, scoring, processing, duplicating, reproducing, exhibiting, and releasing for non-profit educational purposes, motion-picture films, still photographs, and sound recordings in the Archivist's custody.

§ 2115. Reports; correction of violations

(a) In carrying out the duties and responsibilities under chapters 21, 25, 29, 31, and 33 of this title, the Archivist may obtain reports from any Federal agency on such agency's activities under such chapters.

(b) When the Archivist finds that a provision of any such chapter has been or is being violated, the Archivist shall (1) inform in writing the head of the agency concerned of the violation and make recommendations for its correction; and (2) unless satisfactory corrective measures are demonstrably commenced within a reasonable time, submit a written report of the matter to the President and the Congress.

§ 2116. Legal status of reproductions; official seal; fees for copies and reproductions

(a) When records that are required by statute to be retained indefinitely have been reproduced by photographic, microphotographic, digital, or other processes, in accordance with standards established by the Archivist the indefinite retention by the photographic, microphotographic, digital, or other reproductions constitutes compliance with the statutory requirement for the indefinite retention of the original records. The reproductions, as well as reproductions made under regulations to carry out chapter 21, 29, 31, and 33 of this title, shall have the same legal status as the originals.

(b) There shall be an official seal for the National Archives of the United States which shall be judicially noticed. When a copy or reproduction, furnished under this section, is authenticated by the official seal and certified by the Archivist, the copy or reproduction shall be admitted in evidence equally with the original from which it was made.

(c) The Archivist may charge a fee set to recover the costs for making or authenticating copies or reproductions of materials transferred to the Archivist's custody. Such fee shall be fixed by the Archivist at a level which will recover, so far as practicable, all elements of such costs, and may, in the Archivist's discretion, include increments for the estimated

replacement cost of equipment. Such fees shall be paid into, administered, and expended as a part of the National Archives Trust Fund. The Archivist may not charge for making or authenticating copies or reproductions of materials for official use by the United States Government unless appropriations available to the Archivist for this purpose are insufficient to cover the cost of performing the work.

§ 2117. Limitation on liability

When letters and other intellectual productions (exclusive of patented material, published works under copyright protection, and unpublished works for which copyright registration has been made) come into the custody or possession of the Archivist, the United States or its agents are not liable for infringement of copyright or analogous rights arising out of use of the materials for display, inspection, research, reproduction, or other purposes.

§ 2118. Records of Congress

The Secretary of the Senate and the Clerk of the House of Representatives, acting jointly, shall obtain at the close of each Congress all the noncurrent records of the Congress and of each congressional committee and transfer them to the National Archives and Records Administration for preservation, subject to the orders of the Senate or the House of Representatives, respectively.

§ 2119. Cooperative agreements

(a)Authority.—

The Archivist may enter into cooperative agreements pursuant to section 6305 of title 31 that involve the transfer of funds from the National Archives and Records Administration to State and local governments, other public entities, educational institutions, or private nonprofit organizations (including foundations or institutes organized to support the National Archives and Records Administration or the Presidential archival depositories operated by it) for the public purpose of carrying out programs of the National Archives and Records Administration.

(b)Limitations.—

Not more than $25,000 may be transferred under a cooperative agreement entered into as authorized by subsection (a). Not more than a total of $75,000 may be transferred under such agreements in any fiscal year.

(c)Report.—

Not later than December 31st of each year, the Archivist shall submit to the Committee on Government Reform of the House of Representatives and the Committee on Governmental Affairs of the Senate a report on the provisions, amount, and duration of each cooperative agreement entered into as authorized by subsection (a) during the preceding fiscal year.

§ 2120. Online access of founding fathers documents

The Archivist may enter into a cooperative agreement to provide online access to the published volumes of the papers of—

(1) George Washington;

(2) Alexander Hamilton;

(3) Thomas Jefferson;

(4) Benjamin Franklin;

(5) John Adams;

(6) James Madison; and

(7) other prominent historical figures, as determined appropriate by the Archivist of the United States.

B. 44 U.S. Code Chapter 22 - PRESIDENTIAL RECORDS

§ 2201. Definitions

As used in this chapter—

(1) The term “documentary material” means all books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio and visual records, or other electronic or mechanical recordations, whether in analog, digital, or any other form.

(2) The term “Presidential records” means documentary materials, or any reasonably seg-regable portion thereof, created or received by the President, the President’s immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term—

(A) includes any documentary materials relating to the political activities of the President or members of the President’s staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; but

(B) does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e) [1] of title 5, United States Code); (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

(3) The term “personal records” means all documentary materials, or any reasonably segregable portion therof,[2] of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term includes—

(A) diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;

(B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

(C) materials relating exclusively to the President’s own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

(4) The term “Archivist” means the Archivist of the United States.

(5) The term “former President”, when used with respect to Presidential records, means the former President during whose term or terms of office such Presidential rec-ords were created.

§ 2202. Ownership of Presidential records

The United States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered in accordance with the provisions of this chapter.

§ 2203. Management and custody of Presidential records

(a) Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records pursuant to the requirements of this section and other provisions of law.

(b) Documentary materials produced or received by the President, the President's staff, or units or individuals in the Executive Office of the President the function of which is to advise or assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.

(c) During the President's term of office, the President may dispose of those Presidential records of such President that no longer have administrative, historical, informational, or evidentiary value if—

(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

(2) the Archivist states that the Archivist does not intend to take any action under subsection (e) of this section.

(d) In the event the Archivist notifies the President under subsection (c) that the Archivist does intend to take action under subsection (e), the President may dispose of such Presidential records if copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

(e) The Archivist shall request the advice of the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Oversight and the Committee on Government Operations of the House of Representatives with respect to any proposed disposal of Presidential records whenever the Archivist considers that—

(1) these particular records may be of special interest to the Congress; or

(2) consultation with the Congress regarding the disposal of these particular records is in the public interest.

(f) During a President's term of office, the Archivist may maintain and preserve Presidential records on behalf of the President, including records in digital or electronic form. The President shall remain exclusively responsible for custody, control, and access to such Presidential records. The Archivist may not disclose any such records, except under direction of the President, until the conclusion of a President's term of office, if a President serves consecutive terms upon the conclusion of the last term, or such other period provided for under section 2204 of this title.

(g)

(1) Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this chapter.

(2) The Archivist shall deposit all such Presidential records in a Presidential archival depository or another archival facility operated by the United States. The Archivist is authorized to designate, after consultation with the former President, a director at each depository or facility, who shall be responsible for the care and preservation of such records.

(3) When the President considers it practicable and in the public interest, the President shall include in the President's budget transmitted to Congress, for each fiscal year in which the term of office of the President will expire, such funds as may be necessary for carrying out the authorities of this subsection.

(4) The Archivist is authorized to dispose of such Presidential records which the Archivist has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation. Notice of such disposal shall be published in the Federal Register at least 60 days in advance of the proposed disposal date. Publication of such notice shall constitute a final agency action for purposes of review under chapter 7 of title 5, United States Code.

§ 2204. Restrictions on access to Presidential records

(a) Prior to the conclusion of a President's term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record, within one or more of the following categories:

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relating to appointments to Federal office;

(3) specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code), provided that such statute (A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of material to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) confidential communications requesting or submitting advice, between the President and the President's advisers, or between such advisers; or

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(b)

(1) Any Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President under subsection (a) shall be so designated by the Archivist and access thereto shall be restricted until the earlier of—

(A)

(i) the date on which the former President waives the restriction on disclosure of such record, or

(ii) the expiration of the duration specified under subsection (a) for the category of information on the basis of which access to such record has been restricted; or

(B) upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably segregable portion thereof, has been placed in the public domain through publication by the former President, or the President's agents.

(2) Any such record which does not contain information within a category restricted by the President under subsection (a), or contains information within such a category for which the duration of restricted access has expired, shall be exempt from the provisions of subsection (c) until the earlier of—

(A) the date which is 5 years after the date on which the Archivist obtains custody of such record pursuant to section 2203(d)(1); [1] or

(B) the date on which the Archivist completes the processing and organization of such records or integral file segment thereof.

(3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in the Archivist's discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or the Archivist's designee, within 30 working days after receipt of such an appeal, setting forth the basis for such determination.

(c)

(1) Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration. Access to such records shall be granted on nondiscriminatory terms.

(2) Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.

(d) Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter, except section 2208, shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist.

(e) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.

(f) The Archivist shall not make available any original Presidential records to any individual claiming access to any Presidential record as a designated representative under section 2205(3) of this title if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.

§ 2205. Exceptions to restricted access

Notwithstanding any restrictions on access imposed pursuant to sections 2204 and 2208 of this title—

(1) the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to Presidential records in the custody of the Archivist;

(2) subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available—

(A) pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(B) to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President's office and that is not otherwise available; and

(C) to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available; and

(3) the Presidential records of a former President shall be available to such former President or the former President's designated representative.

§ 2206. Regulations

The Archivist shall promulgate in accordance with section 553 of title 5, United States Code, regulations necessary to carry out the provisions of this chapter. Such regulations shall include—

(1) provisions for advance public notice and description of any Presidential records scheduled for disposal pursuant to section 2203(f)(3);

(2) provisions for providing notice to the former President when materials to which access would otherwise be restricted pursuant to section 2204(a) are to be made available in accordance with section 2205(2);

(3) provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have; and

(4) provisions for establishing procedures for consultation between the Archivist and appropriate Federal agencies regarding materials which may be subject to section 552(b)(7) of title 5, United States Code.

§ 2207. Vice-Presidential records

Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records. The duties and responsibilities of the Vice President, with respect to Vice-Presidential records, shall be the same as the duties and responsibilities of

the President under this chapter, except section 2208, with respect to Presidential records. The authority of the Archivist with respect to Vice-Presidential records shall be the same as the authority of the Archivist under this chapter with respect to Presidential records, except that the Archivist may, when the Archivist determines that it is in the public interest, enter into an agreement for the deposit of Vice-Presidential records in a non-Federal archival depository. Nothing in this chapter shall be construed to authorize the establishment of separate archival depositories for such Vice-Presidential records.

§ 2208. Claims of constitutionally based privilege against disclosure

(a)

(1) When the Archivist determines under this chapter to make available to the public any Presidential record that has not previously been made available to the public, the Archivist shall—

(A) promptly provide notice of such determination to—

(i) the former President during whose term of office the record was created; and

(ii) the incumbent President; and

(B) make the notice available to the public.

(2) The notice under paragraph (1)—

(A) shall be in writing; and

(B) shall include such information as may be prescribed in regulations issued by the Archivist.

(3)

(A) Upon the expiration of the 60-day period (excepting Saturdays, Sundays, and legal public holidays) beginning on the date the Archivist provides notice under paragraph (1)(A), the Archivist shall make available to the public the Presidential record covered by the notice, except any record (or reasonably segregable part of a record) with respect to which the Archivist receives from a former President or the incumbent President notification of a claim of constitutionally based privilege against disclosure under subsection (b).

(B) A former President or the incumbent President may extend the period under subparagraph (A) once for not more than 30 additional days (excepting Saturdays, Sundays, and legal public holidays) by filing with the Archivist a statement that such an extension is necessary to allow an adequate review of the record.

(C) Notwithstanding subparagraphs (A) and (B), if the 60-day period under subparagraph (A), or any extension of that period under subparagraph (B), would otherwise expire during the 6-month period after the incumbent President first takes office, then that 60-day period or extension, respectively, shall expire at the end of that 6-month period.

(b)

(1) For purposes of this section, the decision to assert any claim of constitutionally based privilege against disclosure of a Presidential record (or reasonably segregable part of a record) must be made personally by a former President or the incumbent President, as applicable.

(2) A former President or the incumbent President shall notify the Archivist, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate of a privilege claim under paragraph (1) on the same day that the claim is asserted under such paragraph.

(c)

(1) If a claim of constitutionally based privilege against disclosure of a Presidential record (or reasonably segregable part of a record) is asserted under subsection (b) by a former President, the Archivist shall consult with the incumbent President, as soon as practicable during the period specified in paragraph (2)(A), to determine whether the incumbent President will uphold the claim asserted by the former President.

(2)

(A) Not later than the end of the 30-day period beginning on the date on which the Archivist receives notification from a former President of the assertion of a claim of constitutionally based privilege against disclosure, the Archivist shall provide notice to the former President and the public of the decision of the incumbent President under paragraph (1) regarding the claim.

(B) If the incumbent President upholds the claim of privilege asserted by the former President, the Archivist shall not make the Presidential record (or reasonably segregable part of a record) subject to the claim publicly available unless—

(i) the incumbent President withdraws the decision upholding the claim of privilege asserted by the former President; or

(ii) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(C) If the incumbent President determines not to uphold the claim of privilege asserted by the former President, or fails to make the determination under paragraph (1) before the end of the period specified in subparagraph (A), the Archivist shall release the Presidential record subject to the claim at the end of the 90-day period beginning on the date on which the Archivist received notification of the claim, unless otherwise directed by a court order in an action initiated by the former President under section 2204(e) of this title or by a court order in another action in any Federal court.

(d) The Archivist shall not make publicly available a Presidential record (or reasonably segregable part of a record) that is subject to a privilege claim asserted by the incumbent President unless—

(1) the incumbent President withdraws the privilege claim; or

(2) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(e) The Archivist shall adjust any otherwise applicable time period under this section as necessary to comply with the return date of any congressional subpoena, judicial subpoena, or judicial process.

§ 2209. Disclosure requirement for official business conducted using non-official electronic messaging accounts

(a)In General.—The President, the Vice President, or a covered employee may not create or send a Presidential or Vice Presidential record using a non-official electronic message account unless the President, Vice President, or covered employee—

(1) copies an official electronic messaging account of the President, Vice President, or covered employee in the original creation or transmission of the Presidential record or Vice Presidential record; or

(2) forwards a complete copy of the Presidential or Vice Presidential record to an official electronic messaging account of the President, Vice President, or covered employee not later than 20 days after the original creation or transmission of the Presidential or Vice Presidential record.

(b)Adverse Actions.—

The intentional violation of subsection (a) by a covered employee (including any rules, regulations, or other implementing guidelines), as determined by the appropriate supervisor, shall be a basis for disciplinary action in accordance with subchapter I, II, or V of chapter 75 of title 5, as the case may be.

(c)Definitions.—In this section:

(1)Covered employee.—The term “covered employee” means—

(A) the immediate staff of the President;

(B) the immediate staff of the Vice President;

(C) a unit or individual of the Executive Office of the President whose function is to advise and assist the President; and

(D) a unit or individual of the Office of the Vice President whose function is to advise and assist the Vice President.

(2)Electronic messages.—

The term “electronic messages” means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals.

(3)Electronic messaging account.—

The term “electronic messaging account” means any account that sends electronic messages.

C. Timeline of Senate Judiciary Committee Members Correspondence with NARA and Brett Kavanaugh

July 21, 2018	Sen. Dianne Feinstein	David Ferriero, Archivist	Processing Kavanaugh-related presidential records for access
July 23, 2018	Sen. Charles Grassley	David Ferriero, Archivist	Response to Sen. Feinstein's July 21 letter to NARA
July 26, 2018	David Ferriero, Archivist	Sen. Dianne Feinstein	Response to Sen. Feinstein's July 21 letter to NARA
July 27, 2018	Sen. Dianne Feinstein	David Ferriero, Archivist	Response to July 26, 2018 letter
July 27, 2018	Sen. Charles Grassley	Patrick Mordente, Director, G.W. Bush Library	Judiciary Committee Chairman's request for records
July 30, 2018	Sen. Charles Grassley	David Ferriero, Archivist	Response to Sen. Feinstein's July 27 letter to NARA
July 31, 2018	Minority Senate Judiciary Committee members	Patrick Mordente, Director, G.W. Bush Library	Minority Judiciary Committee members' request for records
Aug. 2, 2018	Gary M. Stern, NARA General Counsel	Sen. Charles Grassley	Response to Sen. Grassley's July 27 letter to G.W. Bush Library
Aug. 2, 2018	David Ferriero, Archivist	Sen. Charles Schumer	Letter to Senate Minority Leader concerning Section 2205 of the PRA

Aug. 3, 2018	Sen. Charles Grassely and Sen. Dianne Feinstein	David Ferriero, Archivist	Committee's request for access to records from Office of Independent Counsel Kenneth W. Starr
Aug. 6, 2018	Sen. Dianne Feinstein	David Ferriero, Archivist	Response to Archivist's Aug. 2, 2018 letter to Senate Minority Leader concerning Section 2205 of the PRA
Aug. 8, 2018	Minority Senate Judiciary Committee members	Gary M. Stern, NARA General Counsel	FOIA request for Kavanaugh PRA records
Aug. 9, 2018	Gary M. Stern, NARA General Counsel	Sen. Charles Grassely and Sen. Dianne Feinstein	First Response to Committee's request for access to records from Office of Independent Counsel Kenneth W. Starr
Aug. 10, 2018	Shannon Jarrett, Supervisory Archivist, G.W. Bush Library	Sen. Richard Blumenthal	Response to Aug. 8 FOIA request for Kavanaugh PRA records
Aug. 10, 2018	David Ferriero, Archivist	Sen. Dianne Feinstein	Response to Aug. 6 letter concerning interpretation of Section 2205 of the PRA
Aug. 16, 2018	Sen. Charles Grassley	Gary M. Stern, NARA General Counsel	First request to prioritize review of particular documents
Aug. 17, 2018	Gary M. Stern, NARA General Counsel	Sen. Charles Grassely and Sen. Dianne Feinstein	Second Response to Committee's request for access to records from Office of Independent Counsel Kenneth W. Star
Aug. 28, 2018	Sen. Charles Grassley	Gary M. Stern, NARA General Counsel	Second request to prioritize review of particular documents
Aug. 29, 2018	Gary M. Stern, NARA General Counsel	Sen. Charles Grassley	Response to July 27, 2018 request for records

Sept. 12, 2018	Shannon Jarrett, Supervisory Archivist, G.W. Bush Library	Sen. Richard Blumenthal	Response to Aug. 8, 2018 FOIA request for Kavanaugh PRA records
Sept. 21, 2018	Gary M. Stern, NARA General Counsel	Sen. Charles Grassely and Sen. Dianne Feinstein	Third response to Committee's request for access to records from Office of Independent Counsel Kenneth W. Star
Oct. 9, 2018	Sen. Charles Grassely	Gary M. Stern, NARA General Counsel	Withdrawal of July 27, 2018 request for records

Table 1. Nominations to the Supreme Court of the United States, 1789-2017

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
John Jay of New York (Chief Justice, hereinafter C. J.)	Washington	09/24/1789	Nomination predated creation of Judiciary Committee in 12/10/1816. No record of other committee referral.			09/26/1789	Confirmed	—	—	2
John Rutledge of South Carolina	Washington	09/24/1789				09/26/1789	Confirmed	—	—	2
William Cushing of Massachusetts	Washington	09/24/1789				09/26/1789	Confirmed	—	—	2
Robert Harrison of Maryland	Washington	09/24/1789				09/26/1789	Confirmed (Nominee declined)	—	—	2
James Wilson of Pennsylvania	Washington	09/24/1789				09/26/1789	Confirmed	—	—	2
John Blair Jr. of Virginia	Washington	09/24/1789				09/26/1789	Confirmed	—	—	2
James Iredell of North Carolina	Washington	02/09/1790 (Nom. Date 02/08/1790)				02/10/1790	Confirmed	—	—	1

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Thomas Johnson of Maryland	Washington	*Recess Appointment, 08/05/1791*								
		11/01/1791 (Nom. Date 10/31/1791)	Nomination predated creation of Judiciary Committee in 12/10/1816. No record of other committee referral.			11/07/1791	Confirmed	—	—	6
William Paterson of New Jersey	Washington	02/27/1793				02/28/1793	Withdrawn	—	—	1
William Paterson of New Jersey	Washington	03/04/1793				03/04/1793	Confirmed	—	—	0
John Rutledge of South Carolina (C. J.)	Washington	*Recess Appointment, 07/01/1795*								
		12/10/1795	Nomination predated creation of Judiciary Committee in 12/10/1816. No record of other committee referral.			12/15/1795	Rejected (10-14)	—	—	5
William Cushing of Massachusetts (C. J.)	Washington	01/26/1796				01/27/1796	Confirmed (Nominee declined)	—	—	1
Samuel Chase of Maryland	Washington	01/26/1796				01/27/1796	Confirmed	—	—	1
Oliver Ellsworth of Connecticut (C. J.)	Washington	03/03/1796				03/04/1796	Confirmed (21-1)	—	—	1

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Bushrod Washington of Virginia	J. Adams	*Recess Appointment, 09/29/1798*								
		12/19/1798	Nomination predated creation of Judiciary Committee in 12/10/1816. No record of other committee referral.			12/20/1798	Confirmed	—	—	1
Alfred Moore of North Carolina	J. Adams	12/04/1799				12/10/1799	Confirmed	—	—	6
John Jay of New York (C. J.)	J. Adams	12/18/1800				12/19/1800	Confirmed (Nominee declined)	—	—	1
John Marshall of Virginia (C. J.)	J. Adams	01/20/1801				01/27/1801	Confirmed	—	—	7
William Johnson of South Carolina	Jefferson	03/22/1804				03/24/1804	Confirmed	—	—	2
H. Brockholst Livingston of New York	Jefferson	*Recess Appointment, 11/10/1806*								
		12/15/1806 (Nom. date 12/13/1806)	Nomination predated creation of Judiciary Committee in 12/10/1816. No record of other committee referral.			12/17/1806	Confirmed	—	—	2
Thomas Todd of Kentucky	Jefferson	02/28/1807				03/02/1807	Confirmed	—	—	2
Levi Lincoln of Massachusetts	Madison	01/02/1811				01/03/1811	Confirmed (Nominee declined)	—	—	1
Alexander Wolcott of Connecticut	Madison	02/04/1811	No record of hearing	Select Committee, 02/13/1811	Reported	02/13/1811	Rejected (9-24)	—	9	9

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
John Quincy Adams of Massachusetts	Madison	02/21/1811	Nomination predated creation of Judiciary Committee in 12/10/1816. No record of other committee referral.			02/22/1811	Confirmed (Nominee declined)	—	—	1
Joseph Story of Massachusetts	Madison	11/15/1811				11/18/1811	Confirmed	—	—	3
Gabriel Duvall of Maryland	Madison	11/15/1811				11/18/1811	Confirmed	—	—	3
Smith Thompson of New York	Monroe	*Recess Appointment, 09/01/1823*								
		12/08/1823 (Nom. date 12/5/1823)	Nomination was not referred to Judiciary Committee.			12/09/1823	Confirmed	—	—	1
Robert Trimble of Kentucky	J. Q. Adams	04/12/1826 (Nom. date 04/11/1826)	Motion to refer to Judiciary Committee rejected by Senate, 05/09/1826 (7-25)			05/09/1826	Confirmed (27-5)	—	—	27
John Crittenden of Kentucky	J. Q. Adams	12/18/1828 (Nom. date 12/17/1828)	No record of hearing	01/26/1829	Reported with recommen-dation not to act	02/12/1829	Postponed (23-17)	—	39	56
John McLean of Ohio	Jackson	03/06/1829	Nomination was not referred to Judiciary Committee.			03/07/1829	Confirmed	—	—	1
Henry Baldwin of Pennsylvania	Jackson	01/05/1830 (Nom. date 01/04/1830)	Nomination was not referred to Judiciary Committee.			01/06/1830	Confirmed (41-2)	—	—	1
James M. Wayne of Georgia	Jackson	01/07/1835 (Nom. date 01/06/1835)	No record of hearing	01/09/1835	Reported	01/09/1835	Confirmed	—	2	2

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Roger B. Taney of Maryland	Jackson	01/15/1835	Nomination was not referred to Judiciary Committee.			03/03/1835	Postponed (24-21)	—	—	47
Roger B. Taney of Maryland (C. J.)	Jackson	12/28/1835	No record of hearing	01/05/1836	Reported	Motion to proceed, 03/14/1836 (25-19)		—	8	78
						03/15/1836	Confirmed (29-15)			
Philip P. Barbour of Virginia	Jackson	12/28/1835	No record of hearing	01/05/1836	Reported	Motion to proceed, 03/15/1836 (25-20)		—	8	78
						03/15/1836	Confirmed (30-11)			
William Smith of Alabama	Jackson	03/03/1837	No record of hearing	03/08/1837	Reported	03/08/1837	Confirmed (23-18) (Nominee declined)	—	5	5
John Catron of Tennessee	Jackson	03/03/1837	No record of hearing	03/08/1837	Reported	03/08/1837	Confirmed (28-15)	—	5	5
John McKinley of Alabama	Van Buren	*Recess Appointment, 04/22/1837*								
		09/19/1837 (Nom. date 09/18/1837)	No record of hearing	09/25/1837	Reported	09/25/1837	Confirmed	—	6	6
Peter V. Daniel of Virginia	Van Buren	02/27/1841 (Nom. date 02/26/1841)	Nomination was not referred to Judiciary Committee.			03/02/1841	Confirmed (22-5)	—	—	3
John C. Spencer of New York	Tyler	01/09/1844 (Nom. date 01/08/1844	No record of hearing	01/30/1844	Reported	01/31/1844	Rejected (21-26)	—	21	22

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Reuben H. Walworth of New York	Tyler	03/13/1844	No record of hearing	06/14/1844	Reported	Tabled, 06/15/1844 (27-20)		—	93	96
						06/17/1844	Withdrawn			
Edward King of Pennsylvania	Tyler	06/05/1844	No record of hearing	06/14/1844	Reported	06/15/1844	Tabled (29-18)	—	9	10
John C. Spencer of New York	Tyler	06/17/1844	Nomination was not referred to Judiciary Committee.			06/17/1844	Withdrawn	—	—	0
Reuben H. Walworth of New York	Tyler	06/17/1844	Nomination was not referred to Judiciary Committee.			Motion to proceed objected to, 06/17/1844. Senate adjourned on same day, with no record of further action.		—	—	—
Reuben H. Walworth of New York	Tyler	12/10/1844 (Nom. date 12/04/1844)	No record of hearing	01/21/1845	Reported	Tabled, 01/21/1845		—	42	58
						02/06/1845	Withdrawn			
Edward King of Pennsylvania	Tyler	12/10/1844 (Nom. date 12/04/1844)	No record of hearing	01/21/1845	Reported	Tabled, 01/21/1845		—	42	60
						02/08/1845	Withdrawn			
Samuel Nelson of New York	Tyler	02/06/1845 (Nom. date 02/04/1845)	No record of hearing	02/08/1845	Reported	02/14/1845	Confirmed	—	2	8
John M. Read of Pennsylvania	Tyler	02/08/1845 (Nom. date 02/07/1845)	No record of hearing	02/14/1845	Reported	No record of action		—	6	—

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
George W. Woodward of Pennsylvania	Polk	12/23/1845	No record of hearing	01/20/1846	Reported	Motion to postpone rejected, 01/22/1846 (21-28)		—	28	30
						01/22/1846	Rejected (20-29)			
Levi Woodbury of New Hampshire	Polk	*Recess Appointment, 09/20/1845*								
		12/23/1845	No record of hearing	01/03/1846	Reported	01/03/1846	Confirmed	—	11	11
Robert C. Grier of Pennsylvania	Polk	08/03/1846	No record of hearing	08/04/1846	Reported	08/04/1846	Confirmed	—	1	1
Benjamin R. Curtis of Massachusetts	Fillmore	*Recess Appointment, 09/22/1851*								
		12/12/1851 (Nom. date 12/11/1851)	No record of hearing	12/23/1851	Reported	12/23/1851	Confirmed	—	11	11
Edward A. Bradford of Louisiana	Fillmore	08/21/1852 (Nom. Date 08/16/1852)	No record of hearing	08/30/1852	Reported	08/31/1852	Tabled	—	9	10
George E. Badger of North Carolina	Fillmore	01/10/1853 (Nom. Date 01/03/1853)	Nomination was not referred to Judiciary Committee.			02/11/1853	Postponed (26-25)	—	—	32
William C. Micou of Louisiana	Fillmore	02/24/1853 (Nom. Date 02/14/1853)	No record of hearing	Referred to Judiciary Committee on 02/24/1853. Senate ordered committee discharged of nomination on same day; no record of Senate consideration after discharge.				—	—	—
John A. Campbell of Alabama	Pierce	03/21/1853	No record of hearing	03/22/1853	Reported	03/22/1853	Confirmed	—	1	1

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Nathan Clifford of Maine	Buchanan	12/09/1857	No record of hearing	01/06/1858	Reported	01/12/1858	Confirmed (26-23)	—	28	34
Jeremiah S. Black of Pennsylvania	Buchanan	02/06/1861 (Nom. Date 02/05/1861)	Nomination was not referred to Judiciary Committee.			02/21/1861	Motion to proceed rejected (25-26)	—	—	15
Noah H. Swayne of Ohio	Lincoln	01/22/1862 (Nom. Date 01/21/1862)	No record of hearing	01/24/1862	Reported	01/24/1862	Confirmed (38-1)	—	2	2
Samuel F. Miller of Iowa	Lincoln	07/16/1862	Nomination was not referred to Judiciary Committee.			07/16/1862	Confirmed	—	—	0
David Davis of Illinois	Lincoln	*Recess Appointment, 10/17/1862*								
		12/03/1862 (Nom. date 12/01/1862)	No record of hearing	12/05/1862	Reported	12/08/1862	Confirmed	—	2	5
Stephen J. Field of California	Lincoln	03/07/1863 (Nom. date 03/06/1863	No record of hearing	03/09/1863	Reported	03/10/1863	Confirmed	—	2	3
Salmon P. Chase of Ohio (C. J.)	Lincoln	12/06/1864	Nomination was not referred to Judiciary Committee.			12/06/1864	Confirmed	—	—	0
Henry Stanbery of Ohio	A. Johnson	04/16/1866	No record of hearing	Referred to Judiciary Committee on 04/16/1866. No record of committee vote, and no record of Senate action after referral.				—	—	—
Ebenezer R. Hoar of Massachusetts	Grant	12/15/1869 (Nom. date 12/14/1869)	No record of hearing	12/22/1869	Reported adversely	02/03/1870	Rejected (24-33)	—	7	50

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			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Edwin M. Stanton of Pennsylvania	Grant	12/20/1869	Nomination was not referred to Judiciary Committee			12/20/1869	Confirmed (46-11) (Nominee died before assuming office)	—	—	0
William Strong of Pennsylvania	Grant	02/08/1870 (Nom. date 02/07/1870)	No record of hearing	02/14/1870	Reported favorably	02/18/1870	Confirmed	—	6	10
Joseph P. Bradley of New Jersey	Grant	02/08/1870 (Nom. date 02/07/1870)	No record of hearing	02/14/1870	Reported favorably	Postponed, 03/02/1870 (31-26)		—	6	41
						Motion to postpone rejected, 03/02/1870 (23-28)				
						03/21/1870	Confirmed (46-9)			
Ward Hunt of New York	Grant	12/06/1872 (Nom. date 12/03/1872)	No record of hearing	12/11/1872	Reported favorably	12/11/1872	Confirmed	—	5	5
George H. Williams of Oregon (C. J.)	Grant	12/02/1873 (Nom. date 12/01/1873)	No record of hearing	12/11/1873	Reported favorably	Recommitted, 12/15/1873		—	9	37
			Closed hearings[d] 12/16/1873 12/17/1873	—	—	01/08/1874	Withdrawn			
Caleb Cushing of Massachusetts (C. J.)	Grant	01/09/1874	No record of hearing	01/09/1874	Reported favorably	01/14/1874	Withdrawn	—	0	5

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Morrison R. Waite of Ohio (C. J.)	Grant	01/19/1874	No record of hearing	01/20/1874	Reported favorably	01/21/1874	Confirmed (63-0)	—	1	2
John Marshall Harlan of Kentucky	Hayes	10/17/1877 (Nom. date 10/16/1877)	No record of hearing	11/26/1877	Reported favorably	11/29/1877	Confirmed	—	40	43
William B. Woods of Georgia	Hayes	12/15/1880	No record of hearing	12/20/1880	Reported favorably	12/21/1880	Confirmed (39-8)	—	5	6
						Tabled motion to reconsider, 12/22/1880 (36-3)				
Stanley Matthews of Ohio	Hayes	01/26/1881	No record of hearing	Considered , 02/07/1881		No record of action		—	19	—
				02/14/1881	Postponed					
Stanley Matthews of Ohio	Garfield	03/18/1881 (Nom. date 03/14/1881)	No record of hearing	05/09/1881	Reported adversely (6-1)	05/12/1881	Confirmed (24-23)	—	52	55
Horace Gray of Massachusetts	Arthur	12/19/1881	No record of hearing	12/20/1881	Reported favorably	12/20/1881	Confirmed (51-5)	—	1	1
Roscoe Conkling of New York	Arthur	02/24/1882	No record of hearing	03/02/1882	Reported favorably	03/02/1882	Confirmed (39-12) (Nominee declined)	—	6	6
Samuel Blatchford of New York	Arthur	03/13/1882	No record of hearing	03/22/1882	Reported favorably	03/22/1882	Confirmed	—	9	9

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Lucius Q. C. Lamar of Mississippi	Cleveland	12/12/1887 (Nom. date 12/06/1887)	No record of hearing	01/10/1888	Reported adversely (5-4)	01/16/1888	Confirmed (32-28)	—	29	35
Melville W. Fuller of Illinois (C. J.)	Cleveland	05/02/1888 (Nom. date 04/30/1888)	No record of hearing	07/02/1888	Reported without recommen-dation	07/20/1888	Confirmed (41-20)	—	61	79
David J. Brewer of Kansas	Harrison	12/04/1889	No record of hearing	12/16/1889	Reported favorably	Motion to postpone rejected, 12/18/1889 (15-54)		—	12	14
						Motion to postpone rejected, 12/18/1889 (25-45)				
						12/18/1889	Confirmed (53-11)			
Henry B. Brown of Michigan	Harrison	12/23/1890	No record of hearing	12/29/1890	Reported favorably	12/29/1890	Confirmed	—	6	6
George Shiras Jr. of Pennsylvania	Harrison	07/19/1892	No record of hearing	07/25/1892	Reported without recommen-dation	07/26/1892	Confirmed	—	6	7
Howell E. Jackson of Tennessee	Harrison	02/02/1893	No record of hearing	02/13/1893	Reported favorably	02/18/1893	Confirmed	—	11	16
William B. Hornblower of New York	Cleveland	09/19/1893	No record of hearing	Considered, 09/25/1893 and 10/25 & 30/1893		No record of action		—	—	—

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
William B. Hornblower of New York	Cleveland	12/06/1893 (Nom. date 12/05/1893)	No record of hearing	Considered, 12/11, 14 & 18/1893 01/08/1894	Reported adversely	01/15/1894	Rejected (24-30)	—	33	40
Wheeler H. Peckham of New York	Cleveland	01/22/1894	No record of hearing	On question of reporting favorably, committee vote divided, 02/12/1894 (5-5) 02/12/1894	Reported without recommen-dation	02/16/1894	Rejected (32-41)	—	21	25
Edward D. White of Louisiana	Cleveland	02/19/1894	Nomination was not referred to Judiciary Committee			02/19/1894	Confirmed	—	—	0
Rufus W. Peckham of New York	Cleveland	12/03/1895	No record of hearing	12/09/1895	Reported favorably	12/09/1895	Confirmed	—	6	6
Joseph McKenna of California	McKinley	12/16/1897	No record of hearing	01/13/1898	Reported favorably	01/21/1898	Confirmed	—	28	36
Oliver Wendell Holmes of Massachusetts	T. Roosevelt	12/02/1902	No record of hearing	12/04/1902	Reported favorably	12/04/1902	Confirmed	—	2	2
William R. Day of Ohio	T. Roosevelt	02/19/1903	No record of hearing	02/23/1903	Reported favorably	02/23/1903	Confirmed	—	4	4
William H. Moody of Massachusetts	T. Roosevelt	12/03/1906	No record of hearing	12/10/1906	Reported favorably	12/12/1906	Confirmed	—	7	9

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Horace H. Lurton of Tennessee	Taft	12/13/1909	No record of hearing	12/16/1909	Reported favorably	12/20/1909	Confirmed	—	3	7
Charles Evans Hughes of New York	Taft	04/25/1910	No record of hearing	05/02/1910	Reported favorably	05/02/1910	Confirmed	—	7	7
Edward D. White of Louisiana (C. J.)	Taft	12/12/1910	Nomination was not referred to Judiciary Committee.			12/12/1910	Confirmed	—	—	0
Willis Van Devanter of Wyoming	Taft	12/12/1910	No record of hearing	12/15/1910	Reported favorably	12/15/1910	Confirmed	—	3	3
Joseph R. Lamar of Georgia	Taft	12/12/1910	No record of hearing	12/15/1910	Reported favorably	12/15/1910	Confirmed	—	3	3
Mahlon Pitney of New Jersey	Taft	02/19/1912	No record of hearing	03/04/1912	Reported favorably	03/13/1912	Confirmed (50-26)	—	14	23
James C. McReynolds of Tennessee	Wilson	08/19/1914	No record of hearing	08/24/1914	Reported favorably	08/29/1914	Confirmed (44-6)	—	5	10

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Louis D. Brandeis of Massachusetts	Wilson	01/28/1916	02/09/1916 02/10/1916 02/15/1916 02/16/1916 02/17/1916 02/18/1916 02/24/1916 02/25/1916 02/26/1916 02/29/1916 03/01/1916 03/02/1916 03/03/1916 03/04/1916 03/06/1916 03/07/1916 03/08/1916 03/14/1916 03/15/1916	05/24/1916	Reported favorably (10-8)	06/01/1916	Confirmed (47-22)	12	117	125
John H. Clarke of Ohio	Wilson	07/14/1916	No record of hearing	07/24/1916	Reported favorably	07/24/1916	Confirmed	—	10	10
William Howard Taft of Connecticut (C. J.)	Harding	06/30/1921	Nomination was not referred to Judiciary Committee.			06/30/1921	Confirmed (60-4) [e]	—	—	0
George Sutherland of Utah	Harding	09/05/1922	Nomination was not referred to Judiciary Committee.			09/05/1922	Confirmed	—	—	0
Pierce Butler of Minnesota	Harding	11/23/1922 (Nom. date 11/21/1922)	No record of hearing	11/28/1922	Reported favorably	Placed on Executive Calendar, 11/28/1922, with no record of further action		—	5	—

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			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Pierce Butler of Minnesota	Harding	12/05/1922	Closed hearings 12/09/1922 12/13/1922	12/18/1922	Reported favorably	Motion to recommit defeated, 12/21/1922 (7-63)		—	13	16
						12/21/1922	Confirmed (61-8)			
Edward T. Sanford of Tennessee	Harding	01/24/1923	No record of hearing	01/29/1923	Reported favorably	01/29/1923	Confirmed	—	5	5
Harlan F. Stone of New York	Coolidge	01/05/1925	Closed hearing 01/12/1925[f]	Reported favorably 01/21/1925		Recommitted 01/26/1925		—	28	31
			01/28/1925 (after 01/26/1925 recomt'l) [f]	02/02/1925	Reported favorably	02/05/1925	Confirmed (71-6)	23		
Charles Evans Hughes of New York (C. J.)	Hoover	02/03/1930	No hearing held	02/10/1930	Reported favorably (10-2)	Motion to recommit rejected, 02/13/1930 (31-49)		—	7	10
						02/13/1930	Confirmed (52-26)			
John J. Parker of North Carolina	Hoover	03/21/1930	04/05/1930	04/21/1930	Reported adversely (10-6)	05/07/1930	Rejected (39-41)	15	31	47
Owen J. Roberts of Pennsylvania	Hoover	05/09/1930	No hearing held	05/19/1930	Reported favorably	05/20/1930	Confirmed	—	10	11
Benjamin N. Cardozo of New York	Hoover	02/15/1932	02/19/1932	02/23/1932	Reported favorably	02/24/1932	Confirmed	4	8	9

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			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Hugo L. Black of Alabama	F. Roosevelt	08/12/1937	No hearing held	08/16/1937	Reported favorably (13-4)	Motion to recommit rejected, 08/17/1937 (15-66)		—	4	5
						08/17/1937	Confirmed (63-16)			
Stanley F. Reed of Kentucky	F. Roosevelt	01/15/1938	01/20/1938	01/24/1938	Reported favorably	01/25/1938	Confirmed	5	9	10
Felix Frankfurter of Massachusetts	F. Roosevelt	01/05/1939	01/10/1939 01/11/1939 01/12/1939	01/16/1939	Reported favorably	01/17/1939	Confirmed	5	11	12
William O. Douglas of Connecticut	F. Roosevelt	03/20/1939	03/24/1939	03/27/1939	Reported favorably	04/04/1939	Confirmed (62-4)	4	7	15
Frank Murphy of Michigan	F. Roosevelt	01/04/1940	01/11/1940	01/15/1940	Reported favorably	01/16/1940	Confirmed	7	11	12
Harlan F. Stone of New York (C. J.)	F. Roosevelt	06/12/1941	06/21/1941	06/23/1941	Reported favorably	06/27/1941	Confirmed	9	11	15
James F. Byrnes of South Carolina	F. Roosevelt	06/12/1941	Nomination was not referred to Judiciary Committee.			06/12/1941	Confirmed	—	—	0
Robert H. Jackson of New York	F. Roosevelt	06/12/1941	06/21/1941 06/231941 06/27/1941 06/30/1941	06/30/1941	Reported favorably	07/07/1941	Confirmed	9	18	25
Wiley B. Rutledge of Iowa	F. Roosevelt	01/11/1943	01/22/1943	02/01/1943	Reported favorably	02/08/1943	Confirmed	11	21	28

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			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Harold H. Burton of Ohio	Truman	09/18/1945	No hearing held	09/19/1945	Reported favorably	09/19/1945	Confirmed	—	1	1
Fred M. Vinson of Kentucky (C. J.)	Truman	06/06/1946	06/14/1946	06/19/1946	Reported favorably	06/20/1946	Confirmed	8	13	14
Tom C. Clark of Texas	Truman	08/02/1949	08/09/1949 08/10/1949 08/11/1949	08/12/1949	Reported favorably (9-2)	08/18/1949	Confirmed (73-8)	7	10	16
Sherman Minton of Indiana	Truman	09/15/1949	09/27/1949	10/03/1949	Reported favorably (9-2)	Motion to recommit rejected, 10/04/1949 (21-45)		12	18	19
						10/04/1949	Confirmed (48-16)			
Earl Warren of California (C. J.)	Eisenhower	*Recess Appointment, 10/02/1953*								
		01/11/1954	02/02/1954 02/19/1954	02/24/1954	Reported favorably (12-3)	03/01/1954	Confirmed	22	44	49
John M. Harlan II of New York	Eisenhower	11/09/1954	No hearing held	Referred to Judiciary Committee on 11/09/1954. No record of committee vote or Senate action.				—	—	—
John M. Harlan II of New York	Eisenhower	01/10/1955	02/25/1955[a]	03/10/1955	Reported favorably (10-4)	03/16/1955	Confirmed (71-11)	46	59	65
William J. Brennan Jr. of New Jersey	Eisenhower	*Recess Appointment, 10/15/1956*								
		01/14/1957	02/26/1957 02/27/1957	03/04/1957	Reported favorably	03/19/1957	Confirmed	43	49	64
Charles E. Whittaker of Missouri	Eisenhower	03/02/1957	03/18/1957	03/18/1957	Reported favorably	03/19/1957	Confirmed	16	16	17

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			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Potter Stewart of Ohio	Eisenhower	*Recess Appointment, 10/14/1958*								
		01/17/1959	04/09/1959 04/14/1959	04/20/1959	Reported favorably (12-3)	05/05/1959	Confirmed (70-17)	82	93	108
Byron R. White of Colorado	Kennedy	04/03/1962	04/11/1962	04/11/1962	Reported favorably	04/11/1962	Confirmed	8	8	8
Arthur J. Goldberg of Illinois	Kennedy	08/31/1962	09/11/1962 09/13/1962	09/25/1962	Reported favorably	09/25/1962	Confirmed	11	25	25
Abe Fortas of Tennessee	L. Johnson	07/28/1965	08/05/1965	08/10/1965	Reported favorably	08/11/1965	Confirmed	8	13	14
Thurgood Marshall of New York	L. Johnson	06/13/1967	07/13/1967 07/14/1967 07/18/1967 07/19/1967 07/24/1967	08/03/1967	Reported favorably (11-5)	08/30/1967	Confirmed (69-11)	30	51	78
Abe Fortas of Tennessee (C. J.)	L. Johnson	06/26/1968	07/11/1968 07/12/1968 07/16/1968 07/17/1968 07/18/1968 07/19/1968 07/20/1968 07/22/1968 07/23/1968 09/13/1968 09/16/1968	09/17/1968	Reported favorably (11-6)	Cloture motion rejected, 10/01/1968 (45-43)[h]		15	83	100
						10/04/1968	Withdrawn			

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			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Homer Thornberry of Texas	L. Johnson	06/26/1968	07/11/1968 07/12/1968 07/16/1968 07/17/1968 07/18/1968 07/19/1968 07/20/1968 07/22/1968 07/23/1968 09/13/1968 09/16/1968	Referred to Judiciary Committee, 06/26/1968. No committee vote taken.		10/04/1968	Withdrawn	15	—	100
Warren E. Burger of Virginia (C. J.)	Nixon	05/23/1969	06/03/1969	06/03/1969	Reported favorably	06/09/1969	Confirmed (74-3)	11	11	17
Clement F. Haynsworth Jr. of South Carolina	Nixon	08/21/1969	09/16/1969 09/17/1969 09/18/1969 09/19/1969 09/23/1969 09/24/1969 09/25/1969 09/26/1969	10/09/1969	Reported favorably (10-7)	11/21/1969	Rejected (45-55)	26	49	92
George Harrold Carswell of Florida	Nixon	01/19/1970	01/27/1970 01/28/1970 01/29/1970 02/02/1970 02/03/1970	02/16/1970	Reported favorably (13-4)	04/08/1970	Rejected (45-51)	8	28	79
Harry A. Blackmun of Minnesota	Nixon	04/15/1970	04/29/1970	05/06/1970	Reported favorably (17-0)	05/12/1970	Confirmed (94-0)	14	21	27

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			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Lewis F. Powell Jr. of Virginia	Nixon	10/22/1971	11/03/1971 11/04/1971 11/08/1971 11/09/1971 11/10/1971	11/23/1971	Reported favorably (16-0)	12/06/1971	Confirmed (89-1)	12	32	45
William H. Rehnquist of Arizona	Nixon	10/22/1971	11/03/1971 11/04/1971 11/08/1971 11/09/1971 11/10/1971	11/23/1971	Reported favorably (12-4)	Cloture motion rejected, 12/10/1971 (52-42)[i]		12	32	49
						Motion to postpone until 01/18/1972 rejected, 12/10/1971 (22-70)				
						12/10/1971	Confirmed (68-26)			
John Paul Stevens of Illinois	Ford	12/01/1975 (Nom. Date 11/28/1975)	12/08/1975 12/09/1975 12/10/1975	12/11/1975	Reported favorably (13-0)	12/17/1975	Confirmed (98-0)	7	10	16
Sandra Day O'Connor of Arizona	Reagan	08/19/1981	09/09/1981 09/10/1981 09/11/1981	09/15/1981	Reported favorably (17-1)	09/21/1981	Confirmed (99-0)	21	27	33
William H. Rehnquist of Arizona (C. J.)	Reagan	06/20/1986	07/29/1986 07/30/1986 07/31/1986 08/01/1986	08/14/1986	Reported favorably (13-5)	Cloture invoked, 09/17/1986 (68-31)[i]		39	55	89
						09/17/1986	Confirmed (65-33)			
Antonin Scalia of Virginia	Reagan	06/24/1986	08/05/1986 08/06/1986	08/14/1986	Reported favorably (18-0)	09/17/1986	Confirmed (98-0)	42	51	85

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			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Robert H. Bork of District of Columbia	Reagan	07/07/1987	09/15/1987 09/16/1987 09/17/1987 09/18/1987 09/19/1987 09/21/1987 09/22/1987 09/23/1987 09/25/1987 09/28/1987 09/29/1987 09/30/1987	Motion to report favorably rejected, 10/06/1987 (5-9)		10/23/1987	Rejected (42-58)	70	91	108
				10/06/1987	Reported unfavorably (9-5)					
On 10/29/1987, following the Senate's rejection of the nomination of Robert H. Bork, President Ronald Reagan announced his intention to nominate Douglas H. Ginsburg of the District of Columbia to be Associate Justice. Ginsburg, however, withdrew his name from consideration on 11/07/1987, before an official nomination had been made.										
Anthony M. Kennedy of California	Reagan	11/30/1987	12/14/1987 12/15/1987 12/16/1987	01/27/1988	Reported favorably (14-0)	02/03/1988	Confirmed (97-0)	14	58	65
David H. Souter of New Hampshire	G. H. W. Bush	07/25/1990	09/13/1990 09/14/1990 09/17/1990 09/18/1990 09/19/1990	09/27/1990	Reported favorably (13-1)	10/02/1990	Confirmed (90-9)	50	64	69
Clarence Thomas of Virginia	G. H. W. Bush	07/08/1991	09/10/1991 09/11/1991 09/12/1991 09/13/1991 09/16/1991 09/17/1991 09/19/1991 09/20/1991 10/11/1991 10/12/1991 10/13/1991	Motion to report favorably failed, 09/27/1991 (7-7)[k]		UC agreement reached, 10/08/1991, to reschedule vote on confirmation from 10/08/1991 to 10/15/991, to allow for additional hearings		64	81	99
				09/27/1991	Reported without recommen-dation	10/15/1991	Confirmed (52-48)			

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
					(13-1)					
Ruth Bader Ginsburg of New York	Clinton	06/22/1993	07/20/1993 07/21/1993 07/22/1993 07/23/1993	07/29/1993	Reported favorably (18-0)	08/03/1993	Confirmed (96-3)	28	37	42
Stephen G. Breyer of Massachusetts	Clinton	05/17/1994	07/12/1994 07/13/1994 07/14/1994 07/15/1994	07/19/1994	Reported favorably (18-0)	07/29/1994	Confirmed (87-9)	56	63	73
John G. Roberts Jr. of Maryland	G. W. Bush	07/29/2005	Referred to Judiciary Committee, 07/29/2005. No hearing held and no committee vote taken.			09/06/2005	Withdrawn	—	—	39
John G. Roberts Jr. of Maryland (C. J.)	G. W. Bush	09/06/2005	09/12/2005 09/13/2005 09/14/2005 09/15/2005	09/22/2005	Reported favorably (13-5)	09/29/2005	Confirmed (78-22)	6	16	23
Harriet E. Miers of Texas	G. W. Bush	10/07/2005	Referred to Judiciary Committee, 10/07/2005. No hearing held and no committee vote taken.			10/28/2005	Withdrawn	—	—	21
Samuel A. Alito Jr. of New Jersey	G. W. Bush	11/10/2005	01/09/2006 01/10/2006 01/11/2006 01/12/2006 01/13/2006	01/24/2006	Reported favorably (10-8)	Cloture invoked, 01/30/2006 (72-25)		60	75	82
						01/31/2006	Confirmed (58-42)			

Nominee	President	Date received in Senate[a]	Senate committee actions			Final action by Senate or President		Days from date received in Senate to:		
			Public hearing date(s)	Final vote date[b]	Final vote	Date	Final action[c]	First public hearing date	Committee final vote date	Final action by Senate or President
Sonia Sotomayor of New York	Obama	06/01/2009	07/13/2009 07/14/2009 07/15/2009 07/16/2009	07/28/2009	Reported favorably (13-6)	08/06/2009	Confirmed (68-31)	42	57	66
Elena Kagan of Massachusetts	Obama	05/10/2010	06/28/2010 06/29/2010 06/30/2010 07/01/2010	07/20/2010	Reported favorably (13-6)	08/05/2010	Confirmed (63-37)	49	71	87
Merrick B. Garland of Maryland	Obama	03/16/2016	No hearing held	Referred to Judiciary Committee on 03/16/2016. With no subsequent committee vote or Senate action taken, nomination returned to President on 01/03/2017 at final adjournment of 114th Congress.				—	—	—
Neil M. Gorsuch of Colorado	Trump	02/01/2017	03/20/2017 03/21/2017 03/22/2017 03/23/2017	04/03/2017	Reported favorably (11-9)	Cloture motion rejected 04/06/2017 (55-45); Upon reconsideration, cloture invoked (55-45)[l] 04/07/2017	Confirmed (54-45)	47	61	65
Median number of days from date received in Senate, 1789-2017								15	11	10
Median number of days from date received in Senate, 1789-1966								10	9	7
Median number of days from date received in Senate, 1967-2017								27	51	68

Sources: U.S. Congress, Senate, *Journal of the Executive Proceedings of the Senate of the United States of America* (hereinafter, *Senate Executive Journal*), various editions from the 1st Congress through the 110th Congress; Senate Committee on the Judiciary, *Legislative and Executive Calendar*, various editions from the 77th Congress through the 103rd Congress; various newspaper accounts accessed on-line through ProQuest Historical Newspapers (the primary source for recorded vote tallies in committee prior to the 1980s); CRS Report RL31171, *Supreme Court Nominations Not Confirmed, 1789-August 2010*, by Henry B. Hogue; and "Nominations" database in the Legislative Information System, available at http://www.congress.gov/nomis/.