

August 20, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Grassley:

I share the concerns expressed by Ranking Member Feinstein and my Committee colleagues, Senators Leahy and Durbin, about the unprecedented lack of transparency regarding Brett Kavanaugh's extensive record as we prepare for his confirmation hearing a mere two weeks from now. Even the limited set of documents that has been produced for our review by Judge Kavanaugh's former deputy has been marked by him as "committee confidential." To my knowledge, there has never been a committee action to designate these documents as "committee confidential," nor has there been a committee action to make public a subset of them, as you have done unilaterally.

By allowing these documents to be marked "committee confidential," you have placed them in a state of procedural limbo: available for review by Committee members and staff but presumably unavailable for public review or to be used during Judge Kavanaugh's hearing. I take little comfort in the assurance you gave to Ranking Member Feinstein on August 16 that you "will work with [her] to make sure Committee confidential records are available," because you qualified that assurance by noting the various layers of review by the National Archives, the Bush Presidential Library, and the White House that must occur before documents are made available to the public. The National Archives has already said its review will take until the end of October. This cramped timeline is of the Majority's own making, and forecloses the ability of Committee members to fully exercise their constitutional responsibility to provide advice and consent on this nomination.

In light of this predicament, I write today to request you take all steps at your disposal as Chairman to make publicly available all documents in Judge Kavanaugh's files related to his decades-long association with Leonard Leo and/or the Federalist Society. It has been widely reported that President Trump outsourced the selection of his Supreme Court nominees to unaccountable private individuals and organizations. That process has been driven by the Federalist Society and its Executive Vice President, Leonard Leo. In a 2016 interview, then-candidate Donald Trump stated: "We're going to have great judges, conservative, all picked by the Federalist Society."¹ In early 2016, then-candidate Trump released a list of eleven potential

¹ Kate Harloe, *How Donald Trump Is Remaking the Federal Courts in His Own Image*, MOTHER JONES, Nov. 9, 2017, <https://www.motherjones.com/politics/2017/11/how-donald-trump-is-remaking-the-federal-courts-in-his-own-image/>.

Supreme Court nominees, culled with the help of Mr. Leo and the Federalist Society.² He released another list of 21 judges in September 2016, and then a list of 25 judges in November 2017 when he was President.

Despite his prominent position on the District of Columbia Circuit Court of Appeals and deep ties to the Federalist Society, Judge Kavanaugh appeared only on the third list. Indeed, according to his Judiciary Committee questionnaire, Judge Kavanaugh has been a member of the Federalist Society since 1988 and has spoken at Federalist Society events over 50 times. This suggests some circumstance changed over the past year to trigger Judge Kavanaugh's inclusion and ultimate selection by the President.

During that period, the Federalist Society played an integral role in the selection of judicial nominees, and Mr. Leo appears to be playing as significant a role as anyone in that process. As he did for the nomination of Justice Gorsuch, Mr. Leo is currently on leave from the Federalist Society to assist the White House with Judge Kavanaugh's nomination.³ On July 30, Mr. Leo warned ultra-rich donors to the Koch political network that the "left is far more engaged" on this nomination,⁴ creating the impression that he is actively soliciting political donations to support Judge Kavanaugh's nomination. History has shown us that these political efforts will take place in the shadows behind the cloak of anonymity from 501(c)(4) organizations and shell corporations.

Mr. Leo's role in this process is of particular interest given reporting about his financial ties to the Trump administration. Mr. Leo serves as the attorney for the BH Group LLC and as president of the BH Fund. The BH Group donated \$1 million to President Trump's inaugural committee.⁵ The Federalist Society also received a \$750,000 payment from the Wellspring Committee, a secretive political nonprofit which provided a nearly \$24 million donation to the right-wing Judicial Crisis Network.⁶ This web of secret donations and disguised relationships, with Mr. Leo at its center, casts a troubling shadow over the entire selection process.

Even with the slow production of documents from the limited universe you requested, I am already aware of a substantial number of Kavanaugh documents referencing or related to Mr. Leo, evidencing his longstanding relationship with Mr. Kavanaugh, and demonstrating Mr. Leo's direct influence over Republican judicial appointments dating back to at least the Bush administration. Americans should understand how and why – and on whose behalf – a person is selected to fill a life-tenured seat on our nation's highest court. Our Committee has but one

² Joel Achenbach, *How Trump and two lawyers narrowed the field for his Supreme Court choice*, THE WASHINGTON POST, July 8, 2018, https://www.washingtonpost.com/politics/how-trump-narrowed-the-field-for-his-supreme-court-pick/2018/07/08/b9d3b16a-808c-11e8-b660-4d0f9f0351f1_story.html?utm_term=.b699fdd432d6.

³ Staff Bio of Leonard Leo, The Federalist Society, <https://fedsoc.org/staff/leonard-leo>.


⁴ James Hohmann (@jameshohmann), Twitter (July 30, 2018, 11:04am), <https://twitter.com/jameshohmann/status/1023992654713872384>.

⁵ Andrew Perez, *Revealed: Mystery \$1M inaugural donation linked to Trump judicial adviser*, FAST COMPANY, May 15, 2018, <https://www.fastcompany.com/40572666/revealed-mystery-1m-inaugural-donation-linked-to-trump-judicial-adviser>.

⁶ Robert Maguire, *\$1 million mystery gift to Trump inauguration traced to conservative legal activists*, OpenSecrets.org, May 14, 2018, <https://www.opensecrets.org/news/2018/05/mystery-gift-to-trump-inauguration-from-conservative-activists/>.

opportunity to ascertain these facts. I urge you to commit to making available all documents related to Mr. Leo, perhaps the most integral private individual in the selection Judge Kavanaugh, before September 4.

Sincerely,



Sheldon Whitehouse
United States Senator

cc: The Honorable Dianne Feinstein