

NLWJC - KAGAN

STAFF & OFFICE - D.C. CIRCUIT

BOX 001 - FOLDER 001 DC

Elena Kagan - D.C. Circuit

FOIA MARKER

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Collection/Record Group: Clinton Presidential Records
Subgroup/Office of Origin: Counsel Office
Series/Staff Member: Eric Angel
Subseries:

OA/ID Number: 18280
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Folder Title:
Elena Kagan - D.C. Circuit

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Beth Nolan to Orrin Hatch re: Elena Kagan (3 pages)	ca. 03/2000	P2, P5
002. questionnaire	Supplemental Responses to Senate Judiciary Committee Questionnaire (1 page)	n.d.	P2, P5
003. questionnaire	Supplemental Responses to Senate Judiciary Committee Questionnaire (1 page)	n.d.	P2, P5
004. letter	Beth Nolan to Orrin Hatch re: Elena Kagan (3 pages)	ca. 03/2000	P2, P5
005. questionnaire	Supplemental Responses to Senate Judiciary Committee Questionnaire (2 pages)	n.d.	P2, P5
006. form	Financial Disclosure Report for Calendar Year 1998 (4 pages)	02/05/2000	P6/b(6)
007a. questionnaire	Supplemental Responses to Senate Judiciary Committee Questionnaire (2 pages)	n.d.	P2, P5
007b. form	Financial Disclosure Report for Calendar Year 1998 (4 pages)	02/05/2000	P6/b(6)
008. letter	Beth Nolan to Orrin Hatch re: Elena Kagan (3 pages)	04/24/2000	P2, P5
009. letter	Beth Nolan to Orrin Hatch re: Elena Kagan (3 pages)	04/25/2000	P2, P5

COLLECTION:

Clinton Presidential Records
 Counsel's Office
 Eric Angel
 OA/Box Number: 18280

FOLDER TITLE:

Elena Kagan - D.C. Circuit

2009-1006-F

kh554

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
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IV. ~~CONFIDENTIAL~~

INITIALS: Ph DATE: 5/14/09

1. Full name (include any former names used).
2. Address: List current place of residence and office address(es). List all office and home telephone numbers where you may be reached.
3. Have you ever been discharged from employment for any reason or have you ever resigned after being informed that your employer intended to discharge you?
4. Have you and your spouse filed and paid all taxes (federal, state and local) as of the date of your nomination? Please indicate if you filed "married filing separately". Did you make any back tax payments prior to your nominations? If so, give full details.
5. Has a tax lien or other collection procedure (to include receipt of computer balance due notices) ever been instituted against you by federal, state, or local authorities? If so, give full details.
6. Have you or your spouse ever been the subject of any audit, investigation, or inquiry for either federal, state, or local taxes? If so, give full details.
7. Have you or your spouse ever declared bankruptcy? If so, give particulars.
8. Have you to your knowledge ever been under federal, state, or local investigation for a possible violation of either a civil or criminal statute or administrative agency regulation? If so, give full details. Has any organization of which you were an officer, director, or active participant ever been the subject of such an investigation with respect to activities within your responsibility? If so, give full details.
9. Have you ever been the subject of a complaint to any court, administrative agency, bar association, disciplinary committee, or other professional group for a breach of ethics, unprofessional conduct or a violation of any rule of practice? If so, give particulars.
10. Have you ever been a party (whether plaintiff, defendant or in any other capacity) to any litigation?
11. Please advise the Committee of any unfavorable information that may affect your nomination.

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DETERMINED TO BE AN
ADMINISTRATIVE MARKING
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Counsel's Office
Eric Angel
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lessig@pobox.com, 07:56 AM 01/11/2000 +0100, Re: <no subject>

Page 1 of 3

Date: Tue, 11 Jan 2000 07:56:16 +0100
Subject: Re: <no subject>
User-Agent: Microsoft Outlook Express Macintosh Edition - 5.01 (1630)
Sender: lessig@pobox.com
From: lessig@pobox.com
To: ekagan@law.harvard.edu

yep, court of appeals.

--

Lessig
(9/1/99-7/31/00)
Wissenschaftskolleg zu Berlin
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14193 Berlin
Germany
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419.831.9295 (fax)
<<http://cyber.law.harvard.edu/lessig.html>>
<<http://code-is-law.org>>
<<mailto:lessig@pobox.com>>

> From: Elena Kagan <ekagan@law.harvard.edu>
> Date: Mon, 10 Jan 2000 13:34:29 -0500
> To: lessig@pobox.com
> Subject: Re: <no subject>

>
> I'm confused -- how is it that you have Hatch confirming only 24 judges
> since he's been chair? Are these just circuit court judges?

>
> At 12:05 PM 01/07/2000 +0100, you wrote:

>
>
>
>> I read how your friend Hatch in a press statement issued last week attacked
>> other GOP candidates for "not placing a grater emphasis on the importance of
>> the judicial nominating process - especially as it may impact on our
>> Constitutional government and conservative values."

>>
>> So I did the attached analysis. (the attached file is a Word file). You
>> might find it interesting. The first column is the Chairman of the Judiciary
>> Committee (historical listing below). The second is the number of judges
>> that chairman confirmed. And the third the the average time between
>> nomination and confirmation. As you'll see, Hatch is by far the worst -- 191
>> days, vs the 100 for the next closest (Biden).

>>
>> These numbers are preliminary (they were hard to calculate and can't be
>> published without my checking a few facts), but if you think it would be
>> worth it to put this in an op-ed somewhere (Hatch says he's a great
>> administrator and a great originalist, but no chairman has more clearly

>> turned the system political), I'd be happy to clean it up.
>>
>> Hope you're well.
>>
>>
>> 1816-1817: Dudley Chase (R-VT)
>> 1817-1818: John J. Crittenden (R-KY)
>> 1818-1819: James Burrill, Jr. (F-RI)
>> 1819-1823: William Smith (R-SC)
>> 1823-1828: Martin Van Buren (CRR/J-NY)
>> 1828-1829: John Macpherson Berrien (J-GA)
>> 1829-1831: John Rowan (J-KY)
>> 1831-1832: William Marcy (J-NY)
>> 1832-1833: William Wilkins (J-PA)
>> 1833-1836: John Clayton (AJ-DE)
>> 1836-1838: Felix Grundy (J/D-TN)
>> 1838-1841: Garret D. Wall (D-NJ)
>> 1841-1845: John Macpherson Berrien (W-GA)
>> 1845-1847: Chester Ashley (D-AR)
>> 1847-1857: Andrew Butler (D-SC)
>> 1857-1861: James Bayard, Jr. (D-DE)
>> 1861-1872: Lyman Trumbull (R-IL)
>> 1872-1879: George Edmunds (R-VT)
>> 1879-1881: Allen G. Thurman (D-OH)
>> 1881-1891: George Edmunds (R-VT)
>> 1891-1893: George F. Hoar (R-MA)
>> 1893-1895: James Pugh (D-AL)
>> 1895-1904: George F. Hoar (R-MA)
>> 1905 : Orville Platt (R-CT)
>> 1905-1912: Clarence D. Clark (R-WY)
>> 1912-1919: Charles A. Culberson (D-TX)
>> 1919-1923: Knute Nelson (R-MN)
>> 1923-1924: Frank B. Brandegee (R-CT)
>> 1924-1926: Albert B. Cummins (R-IA)
>> 1926-1933: George W. Norris (R-NE)
>> 1933-1941: Henry F. Ashurst (D-AZ)
>> 1941-1945: Frederick Van Nuys (D-IN)
>> 1945-1947: Pat McCarran (D-NV)
>> 1947-1949: Alexander Wiley (R-WI)
>> 1949-1953: Pat McCarran (D-NV)
>> 1953-1955: William Langer (R-ND)
>> 1955-1956: Harley M. Kilgore (D-WV)
>> 1956-1978: James O. Eastland (D-MS)
>> 1979-1981: Edward M. Kennedy (D-MA)
>> 1981-1987: Strom Thurmond (R-SC)
>> 1987-1995: Joseph R. Biden, Jr. (D-DE)
>> 1995- : Orrin G. Hatch (R-UT)
>>
>>
>>
>>
>> --
>> Lessig
>> (9/1/99-7/31/00)
>> Wissenschaftskolleg zu Berlin
>> Wallotstraße 19
>> 14193 Berlin

lessig@pobox.com, 07:56 AM 01/11/2000 +0100, Re: <no subject>

Page 3 of 3

>> Germany
>> 011.49.30.89001.351 (vx home)
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>> 419.831.9295 (fax)
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>> <<http://code-is-law.org>>
>> <<mailto:lessig@pobox.com>>
>>
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>>
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>

PRELIMINARY RESULTS
DATA HAS NOT BEEN
CHECKED

Chairman	N Judges	Delay
Butler	3	2
Pugh	3	3
Platt	5	4
Cummins	10	7
Nelson	9	9
Hoar	25	14
Culberson	17	14
Van Nuys	11	15
Wiley	9	18
Norris	26	18
Clark	18	19
Ashurst	42	21
Trumbull	9	25
Langer	17	34
Edmonds	20	34
Eastland	152	40
Ashley	1	42
McCarren	12	59
Thurmon	72	60
Kilgore	6	69
Kennedy	52	74
Biden	74	101
Hatch	24	191

HARVARD LAW SCHOOL

FAX COVER SHEET

CENTRAL FAX (617) 495-1110

TO: ERIC ANGE

ORGANIZATION: _____

LOCATION: _____

FAX NUMBER: (202) 456-1647

FROM: Professor Elena Pagan

HLS ADDRESS: Strowell 308

PHONE: (617) 495-9083 Secretary 496-286

TOTAL NUMBER OF PAGES (INCLUDING COVER SHEET): 5

NOTES:

Harvard Law School

**1525 Massachusetts Avenue
Griswold 4 North
Cambridge, Massachusetts 02138**

FAX # (617) 496-5156

TO: ERIC ANGEL

Organization: WHITE HOUSE COUNSEL'S OFFICE

Location: _____

FAX Number: 202-456-1647

FROM: PROF. KAVAN

HLS Address: _____

Telephone: 496-1716

Total # of Pages including cover sheet: 1

Date sent: 5/19/00

PLEASE NOTE: PREVIOUS 8-PAGE
FAX FROM HARVARD LAW
SCHOOL IS FOR MR. ANGEL
(^{THIS} COVER SHEET SEEMS NOT TO
HAVE GONE THROUGH.)



HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

ELENA KAGAN
VISITING PROFESSOR OF LAW

TELEPHONE: 617.495.9083
FAX: 617.495.1110
E-MAIL: EKAGAN@LAW.HARVARD.EDU

May 18, 2000

Hon. Orrin G. Hatch
Chairman, Senate Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Chairman Hatch:

Attached please find supplemental responses to my Senate Judiciary Committee Questionnaire for my nomination to the Court of Appeals for the District of Columbia Circuit. Thank you for your continuing assistance in this matter.

Very truly yours,

A handwritten signature in cursive script that reads 'Elena Kagan'.

Elena Kagan

cc: Hon. Patrick J. Leahy, Ranking Minority Member

Elena Kagan

SUPPLEMENTAL RESPONSES TO
SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

I. Biographical Information

Question 12

I introduced the two speakers at an event sponsored by the Harvard Law Review relating to the Supreme Court's most recent term (12/2/99, Cambridge, MA). I made no substantive remarks, and I have no notes for these introductions.

I gave an after-dinner speech to Harvard Law School's foreign graduate students on the system of separation of powers, especially as it operates in an period of divided government (4/10/00, Cambridge, MA). I have no notes for this speech.

I gave an after-dinner speech to Harvard Law School's Women's Law Association on Harvard Professor Abram Chayes, who had passed away earlier that week (4/18/00, Cambridge, MA). I have no notes for this speech.

II. Financial Data

Question 4

I am attaching an updated financial disclosure report.

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Harvard Law School

1525 Massachusetts Avenue
Griswold 4 North
Cambridge, Massachusetts 02138

FAX # (617) 496-5156

TO: Eric Angel
Organization: White House
Location: _____
FAX Number: 202 456 1647

FROM: Elena Kagan
HLS Address: _____
Telephone: 495-9083
Total # of Pages including cover sheet: 9
Date sent: _____

ELENA KAGAN
VISITING PROFESSOR OF LAW

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May 12, 2000

Hon. Orrin G. Hatch
Chairman, Senate Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Chairman Hatch:

Attached please find supplemental responses to my Senate Judiciary Committee Questionnaire for my nomination to the Court of Appeals for the District of Columbia Circuit. Thank you for your continuing assistance in this matter.

Very truly yours,

Elena Kagan

cc: Hon. Patrick Leahy, Ranking Minority Member

Elena Kagan

SUPPLEMENTAL RESPONSES TO
SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

I. Biographical Information

Question 12

I introduced the two speakers at an event sponsored by the Harvard Law Review relating to the Supreme Court's most recent term (12/2/99, Cambridge, MA). I made no substantive remarks, and I have no notes for these introductions.

I gave an after-dinner speech to Harvard Law School's foreign graduate students on the system of separation of powers, especially as it operates in an era of divided government (4/10/00, Cambridge, MA). I have no notes for this speech.

I gave an after-dinner speech to Harvard Law School's Women's Law Association on Harvard Professor Abram Chayes, who had passed away earlier that week (4/18/00, Cambridge, MA). I have no notes for this speech.

II. Financial Data

Question 4

I am attaching an updated financial disclosure report.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
007a. questionnaire	Supplemental Responses to Senate Judiciary Committee Questionnaire (2 pages)	n.d.	P2, P5

COLLECTION:

Clinton Presidential Records
Counsel's Office
Eric Angel
OA/Box Number: 18280

FOLDER TITLE:

Elena Kagan - D.C. Circuit

2009-1006-F
kh554

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
007b. form	Financial Disclosure Report for Calendar Year 1998 (4 pages)	02/05/2000	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Eric Angel
OA/Box Number: 18280

FOLDER TITLE:

Elena Kagan - D.C. Circuit

2009-1006-F
kh554

RESTRICTION CODES

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Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
008. letter	Beth Nolan to Orrin Hatch re: Elena Kagan (3 pages)	04/24/2000	P2, P5

COLLECTION:

Clinton Presidential Records
Counsel's Office
Eric Angel
OA/Box Number: 18280

FOLDER TITLE:

Elena Kagan - D.C. Circuit

2009-1006-F
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Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
009. letter	Beth Nolan to Orrin Hatch re: Elena Kagan (3 pages)	04/25/2000	P2, P5

COLLECTION:

Clinton Presidential Records
Counsel's Office
Eric Angel
OA/Box Number: 18280

FOLDER TITLE:

Elena Kagan - D.C. Circuit

2009-1006-F
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**THE WHITE HOUSE
WASHINGTON**

April 7, 2000

Honorable Don Young
Chairman
Committee on Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Young:

This responds to your letter to White House Chief of Staff John Podesta dated March 22, 2000, regarding the Committee's Warner Creek inquiry. Your letter requests the production of any e-mails not previously produced to the Committee, as well as documents with respect to which the White House previously has sought an accommodation from the Committee.

As you know, we recently learned that two computer programming errors affected the electronic archiving of incoming e-mail to certain user accounts within the Executive Office of the President. In addition, while investigating these programming errors, we also learned that e-mail on the computer server of the Office of the Vice President has not been fully managed by the White House archiving system. We are taking steps to address these matters, including retaining the services of private contractors who will restore backup tapes containing un-archived e-mail records to a keyword-searchable format. When the affected e-mail is searchable, we will review and produce to the Committee any additional documents that may be responsive to the Warner Creek subpoena.

During the course of this investigation, the White House has requested an accommodation with respect to just four documents: (1) multiple copies of a memorandum to the President and Vice President of the United States; (2) talking points for the President of the United States; (3) undated notes of a telephone conversation between Elena Kagan and Dinah Bear regarding the timber-Oregon situation; and (4) notes of Elena Kagan dated July 12, 1996, regarding Warner Creek. When we provided the Committee with a log of these documents, we invited discussion of the matter, and reiterated our desire to reach an accommodation shortly thereafter. See 6/18/99 and 8/17/99 Letters from Senior Associate White House Counsel Steven

Honorable Don Young

April 7, 2000

Page 2

F. Reich to Majority Counsel Doug Fuller. Regrettably, our efforts to reach an accommodation have been met with the Committee's refusal even to discuss the subject.

From the beginning of this investigation, we have sought to work cooperatively with the Committee. Indeed, it is the policy of the White House "to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch." Memorandum from President Reagan for the Heads of Executive Departments and Agencies Regarding Procedures Governing Responses to Congressional Requests for Information at 1 (Nov. 4, 1982). See also United States v. American Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977) ("each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. This aspect of our constitutional scheme avoids the mischief of polarization of disputes"). As President Reagan observed, when there is a dispute arising out of a congressional request for information, "good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches." Id. Thus, when the Executive Branch seeks to protect an interest in documents sought by Congress, it does not immediately invoke executive privilege, but instead attempts -- as we have done here -- to negotiate a good faith resolution of the conflict.

Over the past months, the Committee's refusal even to consider an accommodation of our interest in these documents has had the unfortunate effect of creating conflict where none need have existed. Because we remain committed to avoiding an unnecessary constitutional confrontation, I reiterate our desire to reach an accommodation in this matter. More specifically, we remain willing to allow the Committee and/or designated staff to review the documents at a time and place of the Committee's choosing. I respectfully suggest that a review of the documents by the Committee would avoid escalation of this conflict, and would serve the interests of both the Executive and Legislative Branches by finally bringing this dispute to a close.

Sincerely,



Beth Nolan
Counsel to the President

cc: Honorable George Miller
Ranking Minority Member

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

April 13, 2000

Mr. John Podesta
Chief of Staff
The White House
Washington, D.C. 20500

Dear Mr. Podesta:

It has now been nearly a month since I wrote to you raising serious concerns about the White House response to a subpoena for documents in the Warner Creek matter. I gave you until April 7, 2000, to respond. I have received a response not from you, but from White House counsel Beth Nolan. Since you were the recipient of both the subpoena and of my March 22 letter, I was disappointed not to receive a response from you personally. I hope you understand the seriousness of this matter, and its potential consequences.

I write today to correct some of the misstatements of fact and law in Ms. Nolan's letter, which I can only attribute to her being misinformed, and to offer a potential solution. First, Mr. Reich's letter withholding the documents merely said they were being withheld, period, and if we have any questions to call him. See June 18, 1999, letter from White House Counsel Steven Reich to Committee Counsel Doug Fuller. That is not, as Ms. Nolan characterized it, an effort to reach an accommodation.

Second, the law does not require an accommodation in every instance. Ms. Nolan implies that, since courts have in the past imposed accommodations in some instances, it is incumbent on this Committee either to come to the White House hat in hand, requesting an accommodation, or to simply drop the matter altogether. The law prefers accommodations – but only in cases where there is validity to the need for withholding the documents, and only when those concerns have been adequately articulated to the Committee seeking the documents. Unfortunately, neither is the case here.

In this matter, the Committee requires the documents to conduct its legislative duties under Articles I and IV of the United States Constitution. As a direct result of the way the White House handled the Warner Creek matter, legislation has been proposed to require the Forest Service to restructure the line of authority for law enforcement, which had previously been changed by Congress in the FY1994 Appropriations Act. If Congress is not allowed to review the results of past legislation, and to consider the appropriateness of future legislation, then

Mr. John Podesta

April 13, 2000

Page 2

Articles I and IV have no meaning. To consider properly whether such legislation is necessary, the Committee needs to review the way the White House handled the law enforcement matter that gave rise to the proposed legislation. Further, the White House has not shown any valid legal or Constitutional justification for the documents' being withheld. There simply is no valid privilege under which the Kagen notes can be withheld, particularly since they involve information concerning allegations of criminal conduct. Such information simply must be disclosed, both to the Committee and to the appropriate law enforcement agencies. To my knowledge, no such disclosure has occurred.

However, in the interests of comity and progress on this unnecessarily drawn-out matter, the Committee is willing to accept the following limited accommodations, and only the following accommodations. After months of needless delay and stonewalling by the Administration, I have neither the time nor the inclination to engage in any negotiation on these points.

- (1) The Committee is willing to provide limited latitude for production of the outstanding e-mail traffic, but requires a specific and reasonable timetable for search for and production of relevant e-mails in the batch of recently "discovered" e-mails in the White House and the Office of the Vice President. A mere statement that the e-mails will be searched and produced at some future time is not sufficient. Please remember that the final production from you must include a written certification that all e-mails have been searched, and all relevant documents produced.
- (2) The Committee will accept the offer of the White House to allow Committee staff to review the withheld documents on the following conditions: (a) staff conducting the review are to be selected by me; (b) all currently withheld documents are provided for review, without restriction; (c) notes are allowed to be taken; (d) that the review is scheduled and accomplished no later than April 21, 2000; and (e) that you and the White House understand and agree that this accommodation in no way removes or rescinds the subpoena for their production. In the event that I decide, based on this review, that production is unnecessary for the purposes of this inquiry, this accommodation may help resolve the matter – otherwise, I may decide to continue the demand for the documents, and may take action to compel their production.

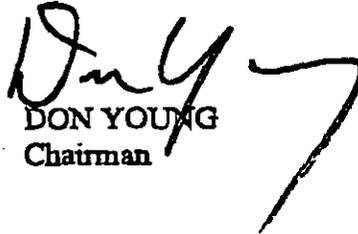
The Committee remains quite serious about obtaining these records, and reserves the right to take steps to enforce the subpoena if such action proves to be necessary. This matter involves allegations of interference with law enforcement, and of a possible cover-up at the highest levels of government. It also involves information necessary for this Committee to fulfill its legislative duties. Our interests should be the same here – to get all the facts on the table as

Mr. John Podesta
April 13, 2000
Page 3

quickly as possible, so that the appropriate remedial actions can be taken in both branches of government.

If you accept the accommodation outlined above, please provide written notification to the attention of Committee Counsel Doug Fuller, Committee on Resources, 1324 Longworth House Office Building, Washington, D.C. 20515. If the Committee does not receive a written acceptance of this offer from you before 4:00 p.m. Monday, April 17, 2000, I will conclude that the White House does not wish to reach an accommodation, and I will take appropriate action. If you have any questions, please contact Mr. Fuller at (202) 226-3924.

Sincerely,


DON YOUNG
Chairman

cc: Beth Nolan
White House Counsel

THE WHITE HOUSE
WASHINGTON

April 25, 2000

Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing about the nomination of Elena Kagan to serve on the United States Court of Appeals for the District of Columbia Circuit. As you know, the President nominated Professor Kagan in June of last year to fill one of the two current vacancies on the D.C. Circuit. Specifically, I would like to respond to the letter and report submitted to you on August 5, 1999, by Chairman Don Young of the House Committee on Resources. The Administration believes strongly that the matters raised by Chairman Young should not delay Professor Kagan's confirmation.

Chairman Young's letter followed an investigation by a Majority-Member-only Task Force of the House Resources Committee into the Administration's response to an occupation and protest by environmentalists at Warner Creek, located in the Willamette National Forest in Oregon. Although the Task Force apparently never asked to meet with or question Professor Kagan, two major criticisms of her nevertheless are expressed in Chairman Young's letter: (1) that while she served in the White House Counsel's Office, she learned of a rumor that law enforcement information had been leaked to the protesters by a White House official, but failed to take appropriate action in response to the allegations; and (2) that during the Task Force's investigation, she did not act to force the White House to produce documents that were the subject of potential White House privilege claims made in response to a Task Force subpoena.

Although I was not Counsel to the President at the time, my staff and I have reviewed these claims, and I am confident that both of these criticisms are completely unfounded. First, Chairman Young's own report acknowledges that Professor Kagan's immediate superior was aware of the allegations and took steps to determine whether they were true, and that a high-

Honorable Orrin G. Hatch

April 25, 2000

Page 2

ranking official of the Department of Justice knew about the charges and actually talked to the White House employee who was the subject of them. Second, before asserting claims of potential privilege, the White House did not seek the legal opinion of Professor Kagan – by then a former Counsel's Office employee – on the merits of that assertion. I discuss each of these matters more fully below.

The Task Force's contention that Professor Kagan failed to take appropriate action after learning of the alleged leak is refuted by its own report. The report does not claim that Professor Kagan possessed evidence of wrongdoing on the part of the White House employee in question. Professor Kagan knew only, from a conversation with the employee, that an allegation of wrongdoing had been made, and that the employee strongly denied it. Moreover, Professor Kagan was aware that other government officials knew of and were looking into the allegation. The report itself makes clear that Professor Kagan's immediate superior in the White House Counsel's Office, Deputy White House Counsel Kathleen Wallman, was told of the rumored leak and looked into the matter. Ms. Wallman so testified before the Task Force: "There came a time sometime during the summer [of 1996] when somebody – I will try to remember who – I don't remember who brought me this information, but somebody said to me that there was a rumor that someone [at the White House] . . . might be passing information in one direction or another." Asked whether she followed up on the rumor, Ms. Wallman testified that "I thought it was the responsible thing to do to check it out[.]" and that she asked the immediate superior of the affected White House employee to look into it. Eventually, Ms. Wallman was advised that the rumor was "ridiculous" and "not true[.]" and she concluded that there was no basis for pursuing the matter further. Moreover, the report acknowledges that Peter Coppelman, a Deputy Assistant Attorney General at the Department of Justice, knew about the purported leak and actually spoke to the person who allegedly was its source. Given these facts, the Task Force's contention that Ms. Kagan should have taken additional action is meritless.

The claim that Professor Kagan was remiss in allowing the White House to assert potential privileges in response to a Task Force subpoena is equally baseless. The documents at issue are four pages of handwritten notes taken by Professor Kagan while she was an Associate White House Counsel, and two documents prepared for the President that are unrelated to Professor Kagan. At the time the privilege issue was raised, Professor Kagan was no longer a member of the Counsel's Office staff (although she continued to work at the White House in a different capacity). As you know, initial decisions about whether to assert potential privileges are made by the White House Counsel's Office and not by former employees of the Counsel's Office such as Professor Kagan. In this case, I am informed that although the Counsel's Office necessarily consulted Professor Kagan about the nature and content of these documents before responding to the Task Force's subpoena, the Counsel's Office did not solicit her legal opinion on whether to assert potential privileges. Moreover, because the Counsel's Office made its decision based on the law and the important constitutional and legal principles involved, Professor Kagan's individual views on the legal merits of its position would not have changed that decision. Although the Task Force may disagree with the decision we made, it would be unfair to saddle Professor Kagan with responsibility for a decision wholly out of her control.

Honorable Orrin G. Hatch
April 25, 2000
Page 3

Although we continue to believe that Professor Kagan's notes raise potential privilege issues, we have previously made clear to the Task Force that we would like to reach an accommodation that would allow the Task Force to review them. By letter dated April 17, 2000, I reiterated our desire to reach an accommodation in this matter, and offered to allow the Committee on Resources and/or designated staff to review the relevant documents at the time and place of the Committee's choosing. On April 24, 2000, we engaged in an accommodation with respect to these documents in which Committee staff reviewed the documents in question, with the understanding that the review was without prejudice to the Committee's ability to insist on full compliance with its subpoena. As part of the Judiciary Committee's analysis of Professor Kagan's record, we would also like to make her notes available for review by you or a staff member designated by you. I feel confident that if you review these notes you will conclude that they cast absolutely no doubt on Professor Kagan's conduct in this matter or her fitness to serve on the D.C. Circuit.

I am aware that the Members of the Warner Creek Task Force disagree with the Administration's handling of the Warner Creek matter. I ask that you not allow Professor Kagan to become a casualty of those differences. If you wish to review Professor Kagan's notes, or have any additional questions about Professor Kagan's background or record, I hope you will feel free to have your staff contact me or Senior Counsel for Nominations Sarah Wilson.

I look forward to continuing to work with you this year on the important task of filling judicial vacancies.

Sincerely,



Beth Nolan
Counsel to the President

cc: Honorable Patrick J. Leahy
Ranking Minority Member