Common Cause
Holding Power Accountable

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Dear Senator,

The Senate's power and responsibility to provide its informed "advice and consent" to the president's lifetime Supreme Court appointments carries enormous significance for the nation's confidence in its rule of law. We urge the Senate to use this power judiciously, in keeping with each senator's solemn obligation to defend the Constitution from all threats, both foreign and domestic. One of those threats is the decline of trust in government and other democratic institutions. If plummeting trust in government infects a polarized public's confidence in the Supreme Court, our country suffers.

Common Cause urges the Senate to withhold its consent to lifetime Supreme Court appointments until a full and complete record of what is at stake is laid bare. Withholding consent, including for Judge Brett Kavanaugh, is the most prudent course to take. It comports with the Senate's role as the deliberative body of a co-equal branch of government. A rush to judgment will risk undermining confidence in the Supreme Court. Only the Senate has the power to put brakes on the confirmation process. We urge you to use them.

Common Cause does not come to this decision lightly. For nearly 50 years, including the tenure that Archibald Cox, fired Watergate Special Prosecutor, served as our Chairman, we have pursued our mission to protect democracy, its processes, and the integrity of government. We lament how broken the judicial confirmation process has become in recent decades. There are many to blame. But the extraordinary circumstances surrounding a Supreme Court appointment at this time—including an incomplete record of the nominee's professional papers and incomplete Department of Justice (DOJ) investigations concerning President Trump and alleged corruption of the electoral process—compel us to urge a delay.

First, the absence of a complete record from Judge Kavanaugh's tenure in the George W. Bush administration does not allow the Senate to fulfill its constitutional responsibility to provide informed advice and consent. The American people deserve to have access to this material, too.

According to the National Archives and Records Administration (NARA), the "several million pages of records related to Judge Kavanaugh [are] significantly more than for prior Supreme Court nominees who worked in the White House–for example, NARA processed and released roughly 70,000 pages on Justice Roberts and 170,000 pages on Justice Kagan." Although the confirmation hearings are scheduled to begin on September 4, NARA released a statement two weeks ago that it cannot complete its review of documents that Chairman Grassley requested until "the end of October." According to NARA, those responsive documents number approximately 900,000 pages.
Even those documents will provide an under-inclusive set of materials to vet the nominee. For example, Chairman Grassley did not request documents related to Judge Kavanaugh's nearly three-year tenure

as staff secretary to President Bush, a professional experience that Judge Kavanaugh himself called "most useful" and "most instructive" to his role as a judge. NARA estimates that the staff secretary materials number into the millions of pages. Ten of your colleagues on the Judiciary Committee have taken the unprecedented step of filing a Freedom of Information Act request for responsive materials from Judge Kavanaugh's time as staff secretary. You, and the American people, should have access to these relevant materials before providing your advice and consent.

The information deficit outlined above should not be your sole concern, however. As you know, there are incomplete Department of Justice investigations related to President Trump and the electoral process. Their nature is of utmost importance.

Special Counsel Robert Mueller was charged by the DOJ with investigating the attack by a foreign power on the 2016 election and any links to the Trump campaign. It has so far resulted in nearly three dozen indictments, five guilty pleas, and one jury conviction of the president's campaign chairman, Paul Manafort.

In a separate matter in the Southern District of New York, President Trump's former personal lawyer, Michael Cohen, pleaded guilty to eight criminal charges, including two federal campaign finance felony violations that Common Cause raised in complaints filed with the DOJ in January and February of this year. Cohen told a federal judge, under oath, that he committed his election-related crimes "in coordination with and at the direction of" then-candidate Donald Trump. If confirmed, this links the president to criminal conduct that violated the laws intended to protect the integrity of the electoral process and guard against corruption.

We do not pre-judge the president's guilt or innocence or the outcome of the proceedings. Still, the president routinely attacks the Mueller investigation as illegitimate and frequently excoriates the Attorney General for insufficient loyalty. This is relevant to your consideration of confirming a Supreme Court nominee.

The Supreme Court may have to resolve constitutional disputes arising out of DOJ probes that involve the president's conduct. It did during Watergate. Issues could include, among other things, whether a sitting president can be criminally indicted; whether the pardon power includes self-pardons or family pardons; whether the president must comply with subpoenas, submit to depositions or cooperate with criminal investigations; and whether the president has obstructed the Special Counsel's investigation.

Judge Kavanaugh has opined on some of these issues in other contexts. He suggested that *United States v. Nixon*, the unanimous Supreme Court decision obligating President Nixon to disclose the Oval Office tapes, was "wrongly decided." Two years ago, he told an audience at the American Enterprise Institute that he would "put the final nail in" *Morrison v. Olson*, the Supreme Court decision that upheld the now-expired Independent Counsel Act. Of course, at any hearing of this nominee, these issues must be among those held to your highest scrutiny.

Because the DOJ's proceedings are incomplete, the president and DOJ investigators are in the best position to assess the scope of the president's potential legal liability. But only the president would

know what specifically to seek in a nominee's background that would lead him to approve any future defenses the president might assert. This means the president may know of relevant issues that are as yet unknown to the Senate. This is another reason for developing a more complete record.

In addition to these DOJ probes, the president is the defendant in civil lawsuits alleging that his ongoing ownership of the Trump Organization has resulted in violations of the constitution's Emoluments Clause – a legal issue that may well end up before the Supreme Court.

For all these reasons, a cloud hangs over the very constitutional officer who is vested with the power to choose a person for a lifetime appointment to the highest court in our judicial system and who may later sit in judgment of them. Once confirmed, the appointment cannot be undone by a majority vote.

If a nominee confirmed under the current circumstances participates in future decisions arising out of the DOJ probes and does not recuse themselves, the Supreme Court's independence – and appearance of independence – will be compromised. The public may view any resulting decisions from the Court as tainted by a conflict-of-interest.

The Advice and Consent clause was intended by the Framers of the Constitution to be a serious and deliberative process, not one that is rushed, or timed to achieve maximum political leverage on key members of the Senate who are up for election in November, or logrolled through a vote of a simple majority of the Senate, as if there is little at stake.

The constitutional duty before you now, as senator and representative of your constituents, is whether to provide or withhold consent to the confirmation. Your judgment would be better informed if rendered later, after more information about the nominee's record and aforementioned DOJ investigations is public. You will then be able to evaluate more fully the bases of the president's decision to choose a specific nominee for a lifetime seat on the high court.

In our system of checks and balances and co-equal branches of government, the president nominates an individual to the Supreme Court for a lifetime appointment, and the Senate decides whether to confirm that nominee. Withholding advice and consent, pending further resolution of the serious issues discussed in this letter, will best protect public confidence in the independence and integrity of the Supreme Court and the Senate.

Democracy is resilient, but it takes our constant vigilance to uphold its promise.

Sincerely,

Karen Hobert Flynn
President
Common Cause