

September 4, 2018

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

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

We write on behalf of the Electronic Privacy Information Center. EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues.¹ EPIC participates in a wide range of activities, including research and education, litigation, and advocacy. The EPIC Advisory Board includes leading experts in law, technology, and public policy.² EPIC regularly files amicus briefs in the U.S. Supreme court,³ and EPIC routinely shares its views with the Senate Judiciary Committee regarding nominees to the Supreme Court.⁴

We write to you now regarding the nomination of Judge Brett M. Kavanaugh to the United States Supreme Court. Although we take no position for or against the nominee, EPIC

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

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

³ See, e.g., amicus curiae briefs of EPIC in *United States v. Microsoft*, 138 S. Ct. 1186 (2018) (arguing that human rights law and privacy standards should govern law enforcement access to personal data stored abroad); *Dahda v. United States*, 138 S. Ct. 1491 (2018) (arguing that it is not for the courts to create atextual exceptions to federal privacy laws); *Byrd v. United States*, 584 U.S. ___ (2018) (arguing that relying on rental contracts to negate Fourth Amendment standing would undermine legitimate expectations of privacy); *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (arguing that evidence obtained via suspicionless identification should be suppressed); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (arguing that the violation of a consumer's privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing); *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (arguing that hotel guest registries should not be made available for inspection absent judicial review); *Riley v. California*, 134 S. Ct. 2473 (2014) (arguing that the search of a cell phone incident to arrest requires a warrant); *United States v. Jones*, 132 S. Ct. 945 (2012) (arguing that a warrant is required for the use of GPS tracking techniques); *Sorrell v. IMS Health Inc.*, 564 U.S. 52 (2011) (arguing that the privacy interest in medical records justifies regulating datamining of prescription records). See generally EPIC, *EPIC Amicus Curiae Briefs: Supreme Court*, <https://epic.org/amicus/?c=Supreme+Court>.

⁴ See, e.g., Letter from EPIC to Senator Chuck Grassley, Chairman, & Senator Dianne Feinstein, Ranking Member (Mar. 20, 2017) (concerning the nomination of Justice Neil Gorsuch), <https://epic.org/privacy/gorsuch/EPIC-SJC-Gorsuch-Mar2017.pdf>; Letter from EPIC to Senator Patrick Leahy, Chairman, & Senator Jeff Sessions, Ranking Member (June 28, 2010) (concerning the nomination of Justice Elena Kagan), https://epic.org/privacy/kagan/EPIC_Kagan_Ltr.pdf; EPIC, *1972 Alito Princeton Privacy Report* (2005), <https://www.epic.org/privacy/justices/alito/princeton/>; Letter from EPIC to Senator Arlen Specter, Chairman, & Senator Patrick Leahy, Ranking Member (Sept. 9, 2005) (concerning the nomination of Chief Justice John Roberts), <https://epic.org/privacy/justices/roberts/0905letter.pdf>.

has strong concerns about Judge Kavanaugh's views regarding the privacy rights of Americans. In *Klayman v. Obama*, Judge Kavanaugh went out of his way to set out theories to defend the suspicionless surveillance of the American public that surprised even conservative legal scholars.⁵

We are also very troubled by the ongoing secrecy concerning documents from Judge Kavanaugh's years in the White House. That was a period that witnessed a dramatic increase in government surveillance programs in the United States, some of which were revised or scrapped after their true scope became known.⁶ There is strong evidence that Brett Kavanaugh was a central figure in these activities, including specifically the renewal of the unlawful warrantless wiretapping program and the secret expansion of the PATRIOT Act.⁷ We urge the Committee members, and the Senate, to review these documents before conducting the hearing.

We have prepared a detailed memo⁸ that reviews Judge Kavanaugh's view on several key issues. In all of his Fourth Amendment opinions, Judge Kavanaugh has sided with government surveillance and police searches over both Constitutional and statutory privacy rights. This bias poses a threat to our Constitutional freedoms and possibly our democracy. Judge Kavanaugh's views are also out of step with a series of recent Supreme Court opinions that carry forward Fourth Amendment protections to the digital age on such issues as GPS tracking,⁹ cell phone searches,¹⁰ and cell site location data.¹¹

Americans are rightly concerned about the scope of government surveillance, the impact of new technologies, and the protection of Constitutional freedoms.¹² Judicial independence is critical to the effective protection of Constitutional liberties and the Acts of Congress that safeguard the rights of the people. Judge Kavanaugh's opinions on the bench and the memos from his White House years raise substantial concerns that this nominee is out of step with the views of the American people and the Court.

⁵ *Klayman v. Obama*, 805 F.3d 1148 (2015).

⁶ See generally Charlie Savage, Alicia Parlapiano & Sarah Wheaton, *Electronic Surveillance Under Bush and Obama*, N.Y. Times (June 7, 2013), <https://archive.nytimes.com/www.nytimes.com/interactive/2013/06/07/us/07nsa-timeline.html>.

⁷ Judge Kavanaugh worked directly for Attorney General Gonzalez at the time the warrantless surveillance program was launched. Released documents of Judge Kavanaugh's time in the White House also reveal that he helped draft the Presidential signing statement for the Patriot Act. See E-mail from Brett Kavanaugh, Associate Counsel, White House to Edmund A. Walsh, Speechwriter, White House 688-90 (Oct. 24, 2001), <https://www.judiciary.senate.gov/imo/media/doc/08-02-18%20GWB%20Document%20Production%20-%20Pages%201%20-%20205,735.pdf>.

⁸ Memo from EPIC to Senate Judiciary Comm. (Sept. 4, 2018), <https://epic.org/privacy/kavanaugh/EPIC-Kavanaugh-memo-Sept2018.pdf>.

⁹ See *United States v. Jones*, 565 U.S. 400 (2012).

¹⁰ See *Riley v. California*, 134 S. Ct. 2473 (2014).

¹¹ See *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

¹² Abigail Geiger, *How Americans Have Viewed Government Surveillance and Privacy Since Snowden Leaks*, Pew Research Center (June 4, 2018), <http://www.pewresearch.org/fact-tank/2018/06/04/how-americans-have-viewed-government-surveillance-and-privacy-since-snowden-leaks/>.

The Senate Judiciary Committee should pursue questions with the nominee about these issues, particularly whether Judge Kavanaugh still believes that his opinion in *Klayman* was correct.

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

Sincerely,

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