



July 6, 2018

VIA Online Portal

Laurie Day
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
1425 New York Avenue NW
Suite 11050
Washington, DC 20530-0001
Via FOIA.gov

Re: Expedited Freedom of Information Act Request

Dear Ms. Day:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Justice (DOJ), 28 C.F.R. Part 16, American Oversight makes the following request for records.

Public reports have drawn attention to the outsized influence individuals outside the executive branch have had on judicial nominations. Two private advocates—Leonard Leo of the Federalist Society and John Malcolm of the Heritage Foundation—have reportedly deeply influenced the pool of potential nominees the president is considering appointing to the Supreme Court.¹ And even current Supreme Court Justices appear to have personal or political connections to the president.²

American Oversight seeks records that have the potential to shed light on the influence of individuals outside the executive branch have had on DOJ's activities in considering potential nominees to the Supreme Court.

¹ See David G. Savage, *Leonard Leo of the Federalist Society is the Man to See if You Aspire to the Supreme Court*, L.A. TIMES (July 6, 2018, 3:00 AM), <http://www.latimes.com/politics/la-na-pol-leo-court-search-20180706-story.html>; THE HERITAGE FOUNDATION, *Heritage Expert Helps Shape Supreme Court Nominee List*, HERITAGE IMPACT (September 14, 2016), <https://www.heritage.org/crime-and-justice/impact/heritage-expert-helps-shape-supreme-court-nominee-list>.

² Betsy Woodruff, *Leaked Emails Show Justice Clarence Thomas's Wife Pushing Travel Ban*, *The Daily Beast*, (Feb. 16, 2017, 1:15 AM), <https://www.thedailybeast.com/leaked-emails-show-justice-clarence-thomass-wife-pushing-travel-ban>; Adam Liptak & Maggie Haberman, *Inside the White House's Quiet Campaign to Create a Supreme Court Opening*, N.Y. TIMES, June 28, 2018, <https://www.nytimes.com/2018/06/28/us/politics/trump-anthony-kennedy-retirement.html>.



Requested Records

American Oversight requests that DOJ produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

All records reflecting communications (including emails, email attachments, notes, hard copy correspondence sent through any medium including courier service, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, talking points, any handwritten or electronic notes taken during any responsive communications, and summaries of any responsive communications,) between the Office of Legal Policy and any of the individuals or entities listed below concerning potential, actual, or suggested nominations to the Supreme Court.

1. Leonard Leo, Executive Vice President, Federalist Society
2. John Malcolm, Heritage Foundation
3. Senator Mitch McConnell, or anyone who works for Senator McConnell
4. Senator Michael Lee, or anyone who works for Senator Lee
5. Any of the nine current Justices * serving on the Supreme Court, or anyone representing any of the nine current Justices

Please provide all responsive records from April 9, 2017, through the date the search is conducted.

*This request encompasses any record reflecting communications with Chief Justice Roberts or Justices Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan or Gorsuch.

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If DOJ uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.³ **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**⁴

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered DOJ’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.**⁵ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but DOJ’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOJ use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption”

³ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

⁴ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

⁵ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

or “disclosure is prohibited by law.”⁶ If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁷ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”⁸ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”⁹

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹⁰ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, DOJ is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and DOJ can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

⁶ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

⁹ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹⁰ *Mead Data Central*, 566 F.2d at 261.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k), American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way.¹¹ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹²

American Oversight requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding” of government operations and activities.¹³ There is significant public interest in understanding who has influenced DOJ actions and recommendations concerning the appointment of Supreme Court justices. The public deserves to know if external interests are influencing DOJ actions on the important work of vetting Supreme Court nominees, especially if those external individuals offered political favors in exchange for the consideration of certain nominees. As discussed below, American Oversight has the capacity and intention to inform a broad audience about government activities that are the subject of these records.

This request is primarily and fundamentally for non-commercial purposes.¹⁴ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight’s financial interest. American Oversight’s mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹⁵ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,¹⁶ American Oversight promptly posted the records to its website and

¹¹ 28 C.F.R. § 16.10(k)(1).

¹² *Id.*

¹³ 28 C.F.R. § 16.10(k)(1), (2)(i)–(ii).

¹⁴ 28 C.F.R. § 16.10(k)(1), (2)(iii).

¹⁵ American Oversight currently has approximately 11,900 page likes on Facebook and 43,900 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 6, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 6, 2018).

¹⁶ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

published an analysis of what the records reflected about DOJ's process for ethics waivers.¹⁷ As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.¹⁸

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 28 C.F.R. § 16.5(e)(1)(ii), (iv), American Oversight requests that DOJ expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief that the information requested is urgently needed in order to inform the public concerning actual or alleged government activity. 28 C.F.R. § 16.5(e)(1)(ii). The president has stated that he will promptly nominate the next justice of the Supreme Court on Monday, July 9, 2018.¹⁹ And Senate Majority Leader Mitch McConnell has stated that the Senate will act quickly to confirm the president's nominee.²⁰ The American public has a substantial and urgent interest in understanding the influence of outside groups on the fast-approaching Supreme Court nomination and confirmation process.

Moreover, I certify to be true and correct to the best of my knowledge and belief, that there is an urgent need to inform the public about communications between DOJ officials and the individuals external to the executive branch identified in this request. There has been substantial and extensive public reporting on the role outside groups and individuals have played in influencing the president's Supreme Court nomination process, and the American people need access to this information with sufficient time to push their elected representatives in the Senate to either vote to confirm or reject the president's nominee to the Supreme Court. The individual the president eventually appoints is likely to have influence over American life for decades.

¹⁷ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

¹⁸ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

¹⁹ Jeff Mason & Richard Cowan, *Trump Narrows Supreme Court List, to Name Nominee July 9*, REUTERS (June 28, 2018, 12:28 PM), <https://www.reuters.com/article/us-usa-court-kennedy-trump/trump-narrows-supreme-court-list-to-name-nominee-july-9-idUSKBN1JP2H4>.

²⁰ Sean Sullivan, *McConnell and Republicans All Smiles with a Supreme Court Vacancy to Fill*, WASH. POST, June 27, 2018, https://www.washingtonpost.com/powerpost/mcconnell-and-republicans-all-smiles-with-a-supreme-court-vacancy-to-fill/2018/06/27/db397654-7a39-11e8-aece-4d04c8ac6158_story.html?utm_term=.12eef3ca0b05.

I further certify that American Oversight is primarily engaged in disseminating information to the public.²¹ American Oversight’s mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,²² American Oversight “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.”²³ American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.²⁴ As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.²⁵

I further certify to be true and correct to the best of my knowledge and belief, that this request concerns “a matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.” 28 C.F.R. § 16.5(e)(1)(iv). The president’s process for nominating a new Supreme Court justice received has received an extraordinary amount of media coverage, and the specific matter of those influencing the nomination process has received “widespread and exceptional” media coverage.²⁶ And these

²¹ 6 C.F.R. § 5.5(e)(1)(ii).

²² See *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

²³ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

²⁴ American Oversight currently has approximately 11,900 page likes on Facebook and 43,900 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited July 6, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight?lang=en> (last visited July 6, 2018).

²⁵ See *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>; *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

²⁶ See, e.g., Savage, *supra* note 1; THE HERITAGE FOUNDATION, *supra* note 2; Jeff Zeleny, *Aggressive Lobbying Push as Trump Nears Choice for Supreme Court Pick*, CNN (July 4, 2018, 5:53 PM), <https://www.cnn.com/2018/07/04/politics/donald-trump-supreme-court-pick/index.html>; Jess Bravin, *Meet the Conservative Activist Who Plays Critical Role in Supreme Court Picks*, WALL ST. J. (July 1, 2018, 5:12 PM), <https://www.wsj.com/articles/meet-the-conservative-activist-who-plays-critical-role-in-supreme-court-picks-1530479576>; Jennifer Bendery, *Trump Isn’t Remaking the Supreme Court. Leonard Leo Is.*, HUFFINGTON POST (July 2, 2018, 5:33 PM), https://www.huffingtonpost.com/entry/leonard-leo-supreme-court-federalist-society-us_5b354230e4b0f3c2219f4082; Bruce Schreiner, *McConnell Touts Thapar for Supreme Court Seat*, AP (June 30, 2018), <https://www.apnews.com/f2aece688c3f4f68afd58fee26439115>; Louise Radnofsky, *Trump Interviews Mike Lee for Supreme Court Seat*, WALL ST. J. (July 3,

reports raise questions about the government's integrity that affect public confidence as the American people would be concerned if a Senator or sitting Supreme Court Justice improperly wielded his or her influence to affect the DOJ's actions affecting the nomination process. The public would likewise be concerned if a small handful of activists exercised outsize control on DOJ's recommendations to the president on an issue as important as a Supreme Court appointment.

Accordingly, American Oversight's request satisfies the criteria for expedition.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with DOJ on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Dan McGrath at foia@americanoversight.org or 202.897.4213. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal line extending to the left.

Austin R. Evers
Executive Director
American Oversight

2018, 5:08 PM) <https://www.wsj.com/articles/trump-interviews-mike-lee-for-supreme-court-opening-1530643814>.