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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*  
JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

August 3, 2018

The Honorable Richard J. Durbin  
711 Hart Senate Office Building  
Washington, D.C. 20510

Dear Senator Durbin:

I write in response to your second letter to me, dated July 31, 2018, regarding my decision not to request documents from Judge Kavanaugh's tenure as White House Staff Secretary.

As I explained in my first letter to you, dated July 27, 2018, and in several statements on the Senate floor on July 24, 25, and 31, 2018, Judge Kavanaugh's Staff Secretary documents are both the least relevant to assessing his legal thinking and the most sensitive to the Executive Branch. Senators already have access to more than 300 opinions Judge Kavanaugh authored in his twelve years on the D.C. Circuit, the hundreds more opinions he joined during that period, and the more than 17,000 pages he submitted in connection with his Senate Judiciary Committee Questionnaire. I have also requested up to one million pages of documents from Judge Kavanaugh's time as an attorney in the Office of Independent Counsel and White House Counsel's Office. We have already received more than 125,000 pages of those records, which we have begun reviewing. In short, this is the most expansive and transparent confirmation process in history.

Contrary to the assertions made in your letter, how the Senate Judiciary Committee handled document requests in connection with Justice Kagan's nomination provides strong precedent for not requesting Judge Kavanaugh's Staff Secretary documents. Democrats and Republicans agreed not to ask for documents from Justice Kagan's time at the Solicitor General's office because of the importance of confidentiality to the integrity and thoroughness of intra-office deliberations. Justice Kagan agreed with this decision, testifying as to "how important confidentiality within the office is to effective decision-making" and how disclosure "would very much inhibit that kind of appropriate deliberation about legal questions."

This justification applies with even greater force to documents from the Staff Secretary's office. You say that documents from the Staff Secretary's office are "qualitatively different" than those from the Solicitor General's office. I agree; the former are more sensitive and, thus, there's a stronger case for not disclosing them. As former White House Counsel C. Boyden Gray explained in a recent op-ed in *The Hill*, "[s]ubjecting all of these deliberative documents to public scrutiny would chill communications between future presidents and their staff, which could be disastrous for the country." He further explained, "Like the solicitor general and her staff, the president's inner circle must have confidence that they can offer their best ideas and candid opinions without fear that they will someday be aired in a former colleague's confirmation hearing."

You point to statements made by Judge Kavanaugh that his time as Staff Secretary was a formative one for him and that he worked on important matters while in that position. I'm not surprised by these statements. But they are inconsequential. Justice Kagan also worked on the most significant constitutional and other legal matters affecting our nation while she was Solicitor General. Documents potentially indicative of her legal thinking would have been extremely useful for the committee in light of her lack of a judicial record. Justice Kagan even testified that her tenure as Solicitor General would be instructive in evaluating her fitness for the bench.

Nevertheless, there was bipartisan consensus that the need to protect the integrity of deliberations within the Solicitor General's office overrode the Senate's need for additional information about Justice Kagan. The calculus is even more lopsided with respect to Judge Kavanaugh. Judge Kavanaugh has authored more than 300 judicial opinions and joined hundreds of others in his twelve years on the bench (compared to zero for Justice Kagan when she was nominated). And the Senate could receive up to one million pages of documents from Judge Kavanaugh's service in the Executive Branch (compared to approximately 170,000 for Justice Kagan). On the other hand, the sensitivity of the documents that went through the Staff Secretary's office is significantly greater than those from the Solicitor General's office. Indeed, these documents that went through the President's inbox and outbox are at the very core of executive privilege.

In short, the Senate has less need for additional documents now than when Justice Kagan was nominated, especially when we could receive as much as five times as many White House emails and other records for Judge Kavanaugh than we did for Justice Kagan. And the documents you seek related to the White House Staff Secretary are much more sensitive than the ones related to the Solicitor General—which both sides agreed were too sensitive to disclose during Justice Kagan's nomination. How the document issue was handled during Justice Kagan's confirmation process provides strong support for my position that the committee will not request Staff Secretary documents.

You also express a need for Judge Kavanaugh's Staff Secretary documents to see the matters on which he worked and his potential legal conflicts or biases. I'm not aware of any precedent for such a request. Federal law and the Judicial Code of Conduct guide judges on their decisions whether to recuse from a case. It's not the practice of this committee to compile inventories of judicial nominees' previous matters.

You continue to express concerns about whether Judge Kavanaugh's testimony to the committee in 2006 was "candid, accurate, and credible." I'm sure Judge Kavanaugh is ready and willing to address your concerns in a face-to-face meeting. Yet you and most of your Democratic colleagues have so far refused to schedule meetings with Judge Kavanaugh. You will also have the opportunity to question Judge Kavanaugh during his public confirmation hearing and after reviewing hundreds of thousands of pages of documents from his time in the White House Counsel's office—which is the time period relevant to your allegations.

With respect to the substance of your allegations, I continue to believe Judge Kavanaugh's testimony was truthful and consistent with what was subsequently reported in the media. Your description of Judge Kavanaugh's testimony leaves out some significant details. Specifically, your

question to Judge Kavanaugh concerned his relationship with an official who you describe as an “architect of the Administration’s discredited detention and interrogation policies” and someone “involved in crafting detention and interrogation policies.” You also graphically described several abusive interrogation techniques this official allegedly recommended directly to Secretary of Defense Donald Rumsfeld. In context, I understand Judge Kavanaugh’s response to be an attempt to disclaim this sort of involvement in crafting detention and interrogation policies—specifically with respect to the abusive practices you described.

Therefore, Judge Kavanaugh’s testimony appears to be consistent with subsequent reporting that, when asked, he told colleagues Justice Kennedy was unlikely to accept the argument that the government could indefinitely deny American citizens access to counsel. Offering such an opinion on a legal position being considered by other officials does not constitute involvement in crafting detention and interrogation policies, especially the ones your question described. But, again, you can ask Judge Kavanaugh about this in your one-on-one meeting or at his public hearing.

Nor does Judge Kavanaugh’s testimony conflict with the fact that he was once forwarded an email containing finalized talking points prepared by others on the Administration’s public positions on counter-terrorism issues. Being aware of the Administration’s public positions on major issues would have been a key part of his job as Staff Secretary.

Again, you have every opportunity to raise your concerns with Judge Kavanaugh personally if you would agree to meet with him. You will also have the opportunity to question Judge Kavanaugh publicly and under oath about this issue. But I will not put American taxpayers on the hook for a fishing expedition based on unfounded allegations regarding Judge Kavanaugh’s testimony.

Sincerely,



Chuck Grassley  
Chairman