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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*

July 27, 2018

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

Dear Senator Durbin:

Thank you for your recent letter. I too have enjoyed working with you on a wide range of issues over the years. But I disagree with your position that the Senate Judiciary Committee should request records from Judge Kavanaugh's tenure as White House Staff Secretary.

Let me say at the outset that I expect Judge Kavanaugh's confirmation process will be the most transparent in history and will involve the largest disclosure of Executive Branch records of any Supreme Court nomination ever before. The Committee could receive up to one million pages of documents from Judge Kavanaugh's service in the White House Counsel's Office and additional documents from his service in the Independent Counsel's Office. We could receive more White House records for Judge Kavanaugh than we did for the previous five Supreme Court nominees combined. And, of course, we already have access to the most relevant materials from Judge Kavanaugh's record. During his twelve years on the D.C. Circuit, he has authored 307 opinions and joined hundreds more. He also submitted 6,168 pages of materials as part of his Senate Judiciary Committee Questionnaire, which I'll add was the broadest questionnaire ever required of a Supreme Court nominee.

You implore me also to request all documents pertaining to Judge Kavanaugh's tenure as White House Staff Secretary. As your letter notes, the Staff Secretary is a critically important position, controlling the flow of paper in and out of the Oval Office. But your letter does not explain how obtaining these documents will provide senators any meaningful insight into Judge Kavanaugh's legal thinking. The Staff Secretary's primary charge is not to create his own substantive work product. Rather, it is to ensure that the President sees memos and policy papers produced elsewhere in the Executive Branch. In light of Judge Kavanaugh's long judicial record, documents from his tenure as Staff Secretary would not be especially revealing of his jurisprudence.

In addition to providing little insight into Judge Kavanaugh's legal thinking, producing the Staff Secretary records would be extremely burdensome and could compromise some of the Executive Branch's most sensitive documents. The volume of documents that passed through the Staff Secretary's office during the Bush Administration was massive. Every paper that went in and out of the Oval Office went through the Staff Secretary, from daily press clippings and lunch menus to drafts of the President's speeches and memos addressing critical national security issues. Additionally, many of the documents that passed through the Staff Secretary's office contain some

of the most sensitive information and advice from numerous policy advisors that went directly to the President. Requiring disclosure of such documents could chill the candor not only of future Staff Secretaries, but also the wide range of policy makers whose advice passes through the Staff Secretary's office to the President.

Judge Kavanaugh's past statements that his tenure as Staff Secretary was a formative experience for him do not affect the relevance of these documents. I am not surprised that holding the position of Staff Secretary affected Judge Kavanaugh, nor am I surprised that it exposed him to a wide range of policy issues. But those statements do not justify a fishing expedition through the files of the Staff Secretary. Justice Kagan, in response to a question during her confirmation hearing about how senators should evaluate her fitness for the Supreme Court, testified that senators should "look to [her] tenure as Solicitor General and the way [she] tried to approach and handle that responsibility." Despite their admitted relevance, Republicans and Democrats agreed that she should not be required to produce internal documents from the Office of the Solicitor General because of their sensitive nature. They agreed not to demand those documents even though Justice Kagan, unlike Judge Kavanaugh, had no judicial record at all. We have access to much more probative materials for Judge Kavanaugh from his twelve years on the D.C. Circuit, and I have not seen a strong argument for demanding a massive volume of comparatively non-probative Staff Secretary documents.

You also believe that we should request all of Judge Kavanaugh's Staff Secretary documents based on what you describe as "contradictions" between Judge Kavanaugh's testimony during his 2006 confirmation hearing and subsequent media reports. During that hearing, you posed a question to Judge Kavanaugh that mentioned the Bush Administration's "detention and interrogation policies." He stated he was not involved "in the questions about rules governing detention of combatants." Subsequently, the media reported that, in 2002, Judge Kavanaugh advised other White House officials that Justice Anthony Kennedy was unlikely to agree with the position that American citizens held by the United States could be denied representation by counsel.

As an initial matter, the Department of Justice already resolved this issue. The Senate Judiciary Committee referred these allegations to the Department of Justice. The Public Integrity Section of the Criminal Division reviewed the matter and concluded that the allegations were not sufficient to justify even opening up an investigation.

Further, I see no discrepancy between Judge Kavanaugh's testimony and what was subsequently reported in the media. Multiple sources have confirmed that Judge Kavanaugh did not participate in crafting the Bush Administration's detention and interrogation policies and was not even authorized to know about the tightly compartmentalized detainee treatment policies.<sup>1</sup> Moreover, the facts as reported in the media do not support your contention. Judge Kavanaugh was asked for and provided advice as to how Justice Kennedy would react to a specific legal argument that other Administration officials were considering. Providing that advice is not akin to involvement in the crafting of the Administration's detention policies.

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<sup>1</sup> Michael Kranish, *Kavanaugh's Role in Bush-Era Detainee Debate Now an Issue in His Supreme Court Nomination*, Washington Post (July 18, 2018), available at [https://www.washingtonpost.com/politics/kavanaughs-role-in-bush-era-detainee-debate-now-an-issue-in-his-supreme-court-nomination/2018/07/18/db8eb650-8a06-11e8-a345-a1bf7847b375\\_story.html?utm\\_term=.4566f2f319f1](https://www.washingtonpost.com/politics/kavanaughs-role-in-bush-era-detainee-debate-now-an-issue-in-his-supreme-court-nomination/2018/07/18/db8eb650-8a06-11e8-a345-a1bf7847b375_story.html?utm_term=.4566f2f319f1).

It's also worth mentioning that the episode reported in the media allegedly occurred while Judge Kavanaugh was Associate Counsel to the President. We requested all relevant documents from Judge Kavanaugh's time in the White House Counsel's Office. Your allegations do not support a request for all documents from Judge Kavanaugh's time as Staff Secretary.

You also point to an email dated June 12, 2004, forwarded by White House Deputy Chief of Staff Harriet Miers to Judge Kavanaugh while he was Staff Secretary. The email, sent to Miers by a White House aide, contains talking points written and approved by the White House Counsel and National Security Council for National Security Advisor Condoleezza Rice and Secretary of State Colin Powell. The aide requested that the talking points be forwarded to Judge Kavanaugh and others.

You claim that this email raises questions about Judge Kavanaugh's testimony. I disagree. The email does not in any way suggest that Judge Kavanaugh was involved in developing the Bush Administration's detention and interrogation policies. It appears to be the type of email I would expect to be forwarded to the Staff Secretary. It contains talking points on the Administration's public position on an important issue. No one should be surprised that the person charged with getting relevant documents to the President would be alerted of talking points on policies being carried out by that President's administration. It does not remotely suggest Judge Kavanaugh's involvement in crafting detention and interrogation policies.

Your letter also draws attention to document requests during the nominations of Justices Sotomayor and Kagan. But those requests do not support the expansive document production you seek today. In 2009, the Senate Judiciary Committee sought and received documents related to Justice Sotomayor's time as a board member of the Puerto Rican Legal Defense and Education Fund. This, however, was a narrow request closely tailored to a specific need for information. It resulted in a production of approximately 100 documents. In contrast, you and other Democratic leaders seek a production of millions of pages of Staff Secretary documents untethered to any specific need for information. Your demand will clearly lead to a fishing expedition.

With respect to Justice Kagan's nomination, the Senate Judiciary Committee requested her relevant, law-related White House records. That request simply does not apply here. Justice Kagan had never served as a judge before her nomination. Her White House records were some of the few sources that could provide senators with some insight into her legal thinking. By contrast, Judge Kavanaugh's hundreds of opinions on the D.C. Circuit, as well as his speeches and other writings, afford the Senate a clear picture of how he approaches legal issues as a federal judge. Justice Kagan simply did not have such a judicial record. This Committee therefore had a more compelling need for relevant White House documents.

Additionally, as noted above, the Committee did not ask for internal office documents from Justice Kagan's time as Solicitor General. As Justice Kagan admitted during her hearing, these materials would have been highly probative of her legal thinking. But Democrats and Republicans agreed not to request these documents because of the sensitive nature of internal communications among government lawyers. This justification applies to Judge Kavanaugh's Staff Secretary records with

even greater force, because those records would include documents containing sensitive policy advice from all over the Executive Branch that went directly to President Bush.

Finally, the Minority Leader has said he would oppose Judge Kavanaugh's confirmation "with everything [he's] got." Just this week, a Democratic member of the Judiciary Committee asserted that supporters of Judge Kavanaugh's nomination are "complicit" in "evil." If most Democrats have already made up their minds about Judge Kavanaugh, given the considerable record already available for review, I fail to see how additional documents will be useful. On top of this, you and other Democratic leaders have refused to meet with Judge Kavanaugh. This refusal is highly irregular and improper. In light of the outright opposition to Judge Kavanaugh from Democratic leadership and many members of your caucus, it is clear to me that the demand for millions of additional pages of comparatively irrelevant documents will only drag out the confirmation process. I will not ask taxpayers to foot the bill for the collection and review of documents when almost all of your side has already decided how they will vote.

I am committed to maintaining a process that is both transparent and efficient. Senators already have access to a wide range of the most relevant materials to assess Judge Kavanaugh's qualifications for the Supreme Court. And they will get hundreds of thousands of more pages of emails and other records from Judge Kavanaugh's service in the White House Counsel's Office and the Office of the Independent Counsel. But, as I have made clear, I'm not going to put American taxpayers on the hook for the Democrats' fishing expedition, especially when many on your side have already said that they will oppose Judge Kavanaugh's confirmation.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is written in a cursive, slightly slanted style.

Charles E. Grassley  
Chairman