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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
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August 22, 2018

The Honorable Tom Udall
Vice Chairman
Committee on Indian Affairs
United States Senate
531 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Udall:

I write in response to your letter from August 15, 2018 requesting documents pertaining to Judge Kavanaugh's involvement in Native American matters during his time in the White House Counsel's Office and as White House Staff Secretary.

Let me begin by saying that Judge Kavanaugh's confirmation process is already the most transparent in history and involves the largest disclosure of White House records of any Supreme Court nomination ever before. To date, we have received more than 430,000 pages from Judge Kavanaugh's time in the Executive Branch. More than 176,000 pages are currently publicly available, and we will continue to make the documents publicly available as quickly as possible. These documents are in addition to Judge Kavanaugh's extensive judicial record from his twelve years as a judge on the D.C. Circuit. In that time, Judge Kavanaugh has written more than 300 opinions and joined hundreds more. As then-Chairman Leahy said during Justice Sotomayor's confirmation process, her judicial record "is the best indication of her judicial philosophy. We do not have to imagine what kind of a judge she will be because we see what kind of a judge she has been."

As I have explained in numerous public statements, I am following the precedent established by then-Chairman Leahy during Justice Kagan's confirmation to request a substantial number of documents from Judge Kavanaugh's time in the Executive Branch but not all of them. As you might recall, then-Chairman Leahy requested internal documents from Justice Kagan's time at the White House Counsel's Office and Domestic Policy Council, but he did not request such documents from her time in the Office of the Solicitor General. The reason he did not do so was because senators recognized the importance of maintaining the confidentiality of deliberations within that office. Republicans agreed with this decision even though these documents would have been extremely useful in evaluating Justice Kagan's legal thinking in light of the fact that she lacked a judicial record.

I did not request documents from Judge Kavanaugh's time as Staff Secretary, because they are the least revealing of his legal thinking and the most sensitive to the Executive Branch. The Staff

Secretary's primary role is to serve as the inbox and outbox to the Oval Office. The Staff Secretary is responsible for making sure the President receives advice from a range of policy advisors across the Executive Branch. At the same time, the documents that go across the Staff Secretary's desk are among the most sensitive to the Executive Branch, containing advice sent directly to the President on any number of pressing issues. If releasing internal documents from the Office of the Solicitor General would threaten the candor of deliberations in that office, then all the more so for documents containing advice for the President. These documents are at the core of executive privilege.

In short, the Senate Judiciary Committee does not need Judge Kavanaugh's Staff Secretary documents in light of his substantial judicial record (more than 10,000 pages of judicial writings), the more than 17,000 pages he submitted as part of his Committee questionnaire, and the hundreds of thousands of pages we have received and will continue to receive from Judge Kavanaugh's service as an Executive Branch lawyer. All told, the Senate has access to nearly 500,000 pages of Judge Kavanaugh's record. Additionally, consistent with then-Chairman Leahy's Kagan Standard, I declined to expose sensitive documents from the Staff Secretary's Office to public scrutiny and threaten to undermine the candor of future advice to the President.

In response to your request that I ask the National Archives for all documents related to Native American affairs from Judge Kavanaugh's time in the White House Counsel's Office, I would note that I have already requested *all* documents from Judge Kavanaugh's time in the White House Counsel's Office. We have received more than 430,000 pages of documents from Judge Kavanaugh's time as a government lawyer (including his time in the White House Counsel's Office), of which more than 176,000 pages are currently available to the public. We will continue to release more documents to the public as the Committee receives authorization to do so.

The Committee receives documents as Committee Confidential in order to expedite our receipt of them. The documents we receive may contain material that the Presidential Records Act ("PRA") restricts from public access, including sensitive, confidential advice given to the President as well as personal information like Social Security numbers and bank account numbers. After producing the documents to the Committee, a second review is done to ensure that those documents don't contain anything the PRA restricts from public access. If they don't contain restricted material, then President Bush authorizes the Committee to release the documents, and we put them on the Committee website as quickly as we can. If they contain restricted material, the Committee keeps them on a confidential basis to ensure that material the PRA requires be kept nonpublic does not become public.

My decision to receive PRA-restricted material is consistent with the Committee's practice during the Kagan and Gorsuch nominations, when we received PRA-restricted material on a confidential basis. We even agreed not to receive some PRA-restricted materials at all. And, when then-Chairman Leahy explained his decision to receive documents on a Committee Confidential basis, he said that he did so "to permit the Committee prompt access to them." I am following this same approach, which allows the Committee to receive documents more quickly and will allow for the public release of all materials that are not PRA-restricted.

You are welcome at any time to come to our offices to review the documents that we have received as Committee Confidential. You only need to contact my staff to set up a time to do so.

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 have access to hundreds of thousands of 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 a fishing expedition, especially when many on your side have already said that they will oppose Judge Kavanaugh's confirmation.

I want you to know I appreciate the Committee on Indian Affairs' important role in overseeing issues that impact the lives of Native Americans. I believe more than enough material is publicly available and will continue to be made publicly available to adequately assess Judge Kavanaugh's qualifications.

Sincerely,



Chuck Grassley
Chairman