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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 18, 2018

Hon. Dianne Feinstein
Hon. Patrick Leahy
Hon. Richard J. Durbin
United States Senate
Washington, DC 20510

Dear Senators Feinstein, Leahy, and Durbin:

I write in response to your letter to me, dated August 16, 2018, regarding my decision not to request documents from Judge Kavanaugh's tenure as White House Staff Secretary.

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. Justice Kagan even testified that senators should look to her time as Solicitor General in evaluating whether to confirm her to the Supreme Court.

Judge Kavanaugh, by contrast, has served as a judge for twelve years on the D.C. Circuit and 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." Despite the low probative value of Judge Kavanaugh's Executive Branch documents in light of his substantial judicial record, I nevertheless authorized the request of the largest number of documents this committee has ever received in connection with a Supreme Court nomination. To date, we have received nearly 250,000 pages from Judge Kavanaugh's time in the Executive Branch with many more to come. By contrast, we received only 173,000 total pages from Justice Kagan's time in the Executive Branch. Most of the documents we have received are already public, and we will continue to make the documents publicly available as quickly as possible.

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. They don't

reveal Judge Kavanaugh's legal thinking, because the Staff Secretary's role is to serve as the inbox and outbox to the Oval Office. He is primarily responsible for making sure the President receives advice from a range of policy advisors across the Executive Branch rather than providing his own advice. 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, the more than 17,000 pages he submitted as part of his committee questionnaire, and the hundreds of thousands of pages we received and will continue to receive from Judge Kavanaugh's service as a government lawyer. Additionally, consistent with then-Chairman Leahy's Kagan Standard, I declined to expose sensitive documents to public scrutiny and threaten to undermine the candor of future internal deliberations.

I will add also that the documents we have received from Judge Kavanaugh's time in the Executive Branch are more useful than the ones we received in connection with Justice Kagan's nomination. Nearly all of the documents we requested are from Judge Kavanaugh's time as a government lawyer. By contrast, a substantial portion of the documents we received from Justice Kagan's Executive Branch service are from her time in a non-legal position. Indeed, while Justice Kagan's most relevant legal work remained hidden from the Senate and the American public, the only documents we are not requesting are from Judge Kavanaugh's service in a non-legal position.

You claim that the Senate needs access to documents from Judge Kavanaugh's time as Staff Secretary in order to assess "whether Judge Kavanaugh was truthful about his involvement in the Bush Administration's post-9/11 terrorism policies" in the testimony he gave during his 2006 nominations hearing. I disagree. As your own letter states, you have concerns with Judge Kavanaugh's involvement in a memorandum drafted "six days after the 9/11 attack." Judge Kavanaugh was serving in the White House Counsel's Office at that time and continued to serve there for nearly two more years. I have requested all relevant documents from Judge Kavanaugh's time in the White House Counsel's Office, and the committee has so far received nearly 250,000 pages of such documents, with many more to come. These documents should be more than enough to assess Judge Kavanaugh's involvement in the Bush Administration's post-9/11 terrorism policies.

You also cite two emails from Judge Kavanaugh's time as Staff Secretary that show he received copies of the Bush Administration's talking points on its rendition and interrogation policies. I don't find it surprising that the Staff Secretary—President Bush's inbox and outbox—received talking points on some of the President's most publicly debated policies. In fact, I would find it surprising if the Staff Secretary were not included on such emails. But receiving public talking points does not in any way suggest involvement with the underlying policies.

More than a month ago, my staff told the Ranking Member's staff that I was willing to request some Staff Secretary documents in an effort to compromise with the minority. I did so while maintaining that these documents are irrelevant to assessing Judge Kavanaugh's legal thinking.

My staff made it clear that the majority and minority could work together to target the records that the Ranking Member thought she needed, while also not putting the American taxpayers on the hook for a fishing expedition that would delay the confirmation vote beyond this year. My staff offered to work with the Ranking Member's staff to identify search terms and other search aids to narrow the range of documents for review and production, while avoiding flooding the Senate with millions and millions of pages of extraneous documents. Indeed, the Ranking Member expressed specific interest in documents related to interrogation. I was willing to reach an agreement on this issue and request Staff Secretary documents containing the terms most important to the minority.

But the Ranking Member's staff demanded the search of every White House email and document from every White House employee over the course of all eight years of the Bush presidency for the mere mention of Brett Kavanaugh's name. The Senate didn't even receive such documents in connection with Justice Kagan's nomination. And, over the course of multiple rounds of negotiations, the Ranking Member's staff refused to budge from their extremist position. The Ranking Member's staff would agree to search terms only to prioritize the production of White House documents, not to reasonably limit the range of documents for review and production. This proposed course of action would have taken months, if not years, to complete.

After nearly two weeks of negotiations without any progress on reaching an agreement on search terms or other search aids, it became clear that this was all an exercise in obstruction. I therefore exercised my authority as Chairman to request White House documents from Judge Kavanaugh's service as a White House lawyer. Just yesterday, in what I can only describe as a political stunt, the Ranking Member's staff sent to my staff and the general counsel of the National Archives a list of proposed search terms for the first time. Unfortunately, it is too late in the process to reopen the possibility of requesting Staff Secretary documents. Nothing prevented the Ranking Member's staff from sending us this list of search terms last month when we could have obtained a narrow set of Staff Secretary documents before the confirmation hearing. The minority staff's weeks-long refusal to budge from its unreasonable negotiating position and this late-breaking request to reopen negotiations on the issue of search terms are dilatory tactics meant to delay the confirmation process. Their actions evidence bad faith and politicized what could have been—and should have been—a bipartisan process.

Finally, you falsely state that I am keeping Judge Kavanaugh's documents "secret." As an initial matter, the majority of the documents we have received have already been publicly released. Second, I authorized the receipt of these documents as "committee confidential" in order to give the committee access to them as quickly as possible. This is for the benefit of both Democratic and Republican members and, ultimately, our constituents.

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, where 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.

I hope that my colleagues on the other side of the aisle put aside politics and reconsider their reckless demands for the immediate release—for the whole world to see—of documents that contain full names, dates of birth, social security numbers, bank account numbers, personal communications with spouses and children, other sensitive matters affecting personal privacy, and, of course, some of the most sensitive issues related to the President's core constitutional duties.

Sincerely,



Chuck Grassley
Chairman