REPORT

OF

TEMPORARY SPECIAL INDEPENDENT COUNSEL

Pursuant to

Senate Resolution 202

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ACKNOWLEDGEMENTS

Lynn Thompson, a Senate veteran, agreed on short notice to undertake the burden of administering the work of our office. Quite aside from the superb performance of her duties, Ms. Thompson, in circumstances sometimes chaotic, has been unfailing in her personal grace, good humor, and dedication to our purpose. We are grateful beyond words.

Carter Bundy, a young man of good will, intelligence, and diligence, has carried out a multitude of paralegal responsibilities which, in our experience, would have required the efforts of at least two persons. His contribution has been essential, his hours have exceeded rational demand, and we can only hope he received from his experience benefits as great as we received from his assistance.

Deborah Akel has handled the word-processing demands of the investigation with great efficiency. Her efforts, and the efforts of Candice Camden, were extraordinary in preparing this final report. FBI agents William Hotop and Holly Heiser, detailed by the Bureau to our office, have been of great assistance. Their insights have been invaluable, and their goodwill and dedication have contributed significantly to our ability to function cohesively as a unit.

Leo D’Amico, Patty Walker, Robert Gettins and Woody Hunt were part of a General Accounting Office team which performed an investigation of the Keating matter for more than a year before we undertook our responsibilities. They were generous with their time and advice.

The Senate is fortunate to have Michael Davidson as its Legal Counsel. His intelligence, sense of balance, and understanding of the Senate’s diverse needs and interests have been of immeasurable assistance. His staff. Morgan J. Frankel, Claire M. Sylvia, Sara Fox Jones, Kathleen Parker, and Barbara Thoreson, reflect Mr. Davidson himself. Although the views expressed in this report are entirely our own, we acknowledge a substantial debt to the Legal Counsel’s office for the lucid descriptions of Senate rules, procedures, and legal precedents which they prepared for our benefit.

I am indebted to Mark O’Donoghue, Samuel Rosenthal, and Michelle Rice, my colleagues and my friends at Curtis, Mallet-Prevost, Colt & Mosle.

PERSONAL STATEMENT OF SPECIAL COUNSEL

I accepted this appointment as a citizen and as a lawyer. I write this personal statement out of a deep sense of concern for any partisan use to which this report may be put.
Some of the questions raised by S. Res. 202 are answered without doubt. Other questions are not answered, but evidence relevant to those questions is presented.

Internally, we have discussed for many hours whether to disclose any evidence in this report which does not lead to a conclusive answer. The considerations are clear. The marshalling of evidence where certainty is unjustified can inflict damage. Yet, to withhold relevant evidence is to suppress evidence.

It has been my decision to disclose relevant evidence even where an ultimate conclusion cannot be reached. This is a fearful decision.

My only instructions in this matter beyond S. Res. 202 have come from the Majority Leader who said, quite simply, “Be fair.” I can only trust the members of this institution, the press and the public will see fit to abide by the same admonition. A search for partisan advantage will, in my view, destroy whatever benefits are to be realized by this institution’s decision to embark on the course mandated by S. Res. 202.

I. INTRODUCTION AND SUMMARY

This report is submitted pursuant to Senate Resolution 202 (“S. Res. 202”) passed on October 24, 1991. It contains the results of the investigation of unauthorized disclosures in connection with the Thomas nomination and the Keating Ethics proceedings. The investigation began on January 2, 1992. In excess of 200 witnesses have been questioned. Thousands of document pages have been reviewed. This report contains the evidence which, in our view, is relevant to the questions posed by S. Res. 202.

A. Senate Documents

The results of the investigation established:


2. On September 25, 1991, Anita F. Hill telefaxed an identical statement to the Judiciary Committee with typographical errors corrected. It was signed and dated September 25, 1991. It did not appear to be notarized.

3. On September 25, 1991, James Brudney, a staff person for Senator Metzenbaum, asked Anita F. Hill to send him either a copy of her statement or a written description of her allegations. Anita F. Hill telefaxed an exact copy of her September 25, 1991 statement to the Judiciary Committee to Brudney on that day. It was not signed or dated or notarized.

4. Anita F. Hill did not supply a copy of her statement to any other person or organization until after the October 6 publication of her allegations in Newsday and on National Public Radio.

5. An FBI report, containing Form 302 interviews of Anita F. Hill, Clarence Thomas, and others, was received by the Judiciary Committee on September 25, 1991.

6. Hard copy of the FBI report on Anita F. Hill’s allegations was not disseminated outside the Senate in whole or in part.
(7) The contents of the FBI report were not disseminated outside the Senate in whole or in part, contrary to the impression created by published and broadcast reports of Anita F. Hill's allegations.

(8) An unauthorized disclosure of hard copy of Anita F. Hill's written allegations to the Judiciary Committee played a significant role in the publication of Anita F. Hill's allegations on National Public Radio.

(9) Contrary to some public speculation, Judge Susan Hoenchner was not responsible for the October 6 publication of Anita F. Hill's allegations.

(10) The inquiry of the Select Committee on Ethics was permeated by disclosures of committee sensitive information. The disclosures were both partisan and strategic in nature.

(11) We are unable to identify any source of these disclosures during the inquiry of the Select Committee on Ethics. The evidence indicates there were multiple sources.

B. Phelps

(1) Timothy M. Phelps is a reporter for Newsday who covered the confirmation proceedings of Judge Clarence Thomas to the Supreme Court.

(2) Prior to September 27, 1991, Phelps heard rumors of sexual harassment allegations associated with Clarence Thomas.

(3) Prior to September 27, 1991, Phelps spoke to Anita F. Hill about Thomas' nomination but did not associate Hill with the sexual harassment rumors.

(4) On September 27, 1991, Phelps learned from "sources" that the Federal Bureau of Investigation had "reopened its background investigation of Thomas to check opponents' allegations of personal misconduct." We have not identified Phelps' "sources."

(5) On or about October 2, 1991, Phelps determined Anita F. Hill was a likely complainant making allegations of sexual harassment against Thomas.

(6) On October 5, 1991, Phelps spoke with Senator Simon about Hill's allegations. The senator did not make unauthorized disclosures to Phelps.

(7) On the evening of October 5, 1991, Newsday published a story by Phelps quoting a "source who has seen [Hill's] statement to the FBI."

(8) Phelps did not have hard copy of the FBI report or Hill's statement.

(9) The information provided by Phelps' "source" derived from Hill's statement, and not from the FBI report.

(10) We have not been able to identify Phelps' "source."

C. Totenberg

(1) Nina Totenberg is the legal affairs correspondent for National Public Radio.

(2) Prior to September 27, 1991, Totenberg heard rumors of sexual harassment associated with Thomas but did not speak to Anita F. Hill.

(3) On or before Wednesday, October 2, 1991, Totenberg obtained hard copy of a document which contained the contents of Hill's
statement to the Judiciary Committee. The document originated from the Senate.

(4) Totenberg spoke to Hill on October 3, 4, and 5, 1991.
(5) Hill did not solicit publication of her allegations by Totenberg.
(6) Prior to the afternoon of October 5, 1991, Hill refused to discuss the details of her allegations on tape unless Totenberg demonstrated possession of Hill’s statement.

(7) On Saturday afternoon, October 5, 1991, Totenberg read the first page of her document to Hill. Hill recognized it as her statement and said so; she then agreed to be interviewed on tape.

(8) Totenberg delayed reading the document until Saturday afternoon because she was not sure it was genuine. Totenberg was not sure her document was genuine either because it was signed and dated but not notarized, or because it was not signed or dated or notarized.

(9) On October 6, 1991, Totenberg broadcast a report on Hill’s allegations and the Judiciary Committee’s handling of those allegations.

(10) Although she quoted sources purporting to describe the FBI report, Totenberg did not have access to the FBI report. Totenberg never had possession of the FBI report.

(11) We do not know whether the document was signed and dated or whether it was unsigned and undated because Totenberg destroyed it and would not answer questions.

(12) We are unable to identify the Senate source of the document delivered to Totenberg.

D. KEATING

(1) On July 12, 1990, the Washington Times reported Special Counsel Robert Bennett’s likely recommendation to the Ethics Committee regarding the five senators under investigation by the Committee.

(2) Prior to the disclosure leading to the July 12, 1990 article, Bennett’s preliminary views were known only to the members of the Ethics Committee, staff assisting the Ethics Committee, and Bennett and his staff.

(3) The committee sensitive information contained in the July 12, 1990 article was not provided to the Washington Times by counsel for the five senators.

(4) On September 29, 1990, the New York Times published an article disclosing Bennett’s preliminary recommendations transmitted in a September 10, 1990 written report to the Ethics Committee. The report was a committee sensitive document.

(5) Prior to the September 29, 1990 article, all counsel for the five senators were generally aware of Bennett’s recommendation as to their own clients.

(6) The New York Times article, on its face, excludes the possibility that counsel for the five senators were the sources of the information contained in that article. The article states that it is based on “several Congressional officials,” none of whom can be identified.

(7) Documents produced to Special Counsel during the ethics investigation were disclosed to the press in October, 1990. These doc-
uments were committee sensitive documents, and were distributed in an attempt to influence the proceedings.

(8) The source or sources of these documents cannot be determined.

(9) Committee deliberations were reported in the press throughout the proceedings. These reports disclosed confidential committee sensitive information and varied as to their accuracy. We have been unable to identify the source of these articles.

(10) On July 15, 1990, Senator Helms advised the Committee he was prepared to issue, as his own report, a report prepared by Bennett and transmitted to the Committee.

(11) The Bennett report was transmitted to the Committee as a confidential document for use by the Committee as a working draft for its own final report.


(13) Senator Helms stated publicly that his own report was based on what he considered to be the "generally excellent" draft of Bennett's report.

II. SENATE RESOLUTION 202

A. BACKGROUND

On July 1, 1991, President Bush nominated Circuit Judge Clarence Thomas to fill the Supreme Court vacancy created by the retirement of Justice Thurgood Marshall.

After extended public hearings, the Senate Judiciary Committee voted on the nomination on Friday, September 27, 1991. The Committee vote was split 7-7, and the nomination was reported out by a 13-1 vote for consideration by the full Senate. The floor vote by the full Senate was scheduled for Tuesday, October 8, 1991.

On Sunday, October 6, Newsday and National Public Radio ("NPR") disclosed allegations of sexual harassment by Judge Thomas which had been reported to the Judiciary Committee and investigated by the Federal Bureau of Investigation ("FBI") prior to the vote on the nomination. The complainant was reported to be Anita F. Hill, a tenured professor at the University of Oklahoma Law School who had worked for Judge Thomas at the Department of Education and the Equal Employment Opportunity Commission ("EEOC") from 1981 to the summer of 1983.

Both reports quoted unnamed sources. The Newsday story, by Timothy M. Phelps, quoted a "source who has seen [Hill's] statement to the FBI," but added that Hill declined to discuss the details of her allegations. NPR's legal affairs correspondent, Nina Totenberg, read from what was described as an affidavit submitted by Hill to the Judiciary Committee, and quoted sources who purported to describe Judge Thomas' statements to the FBI. Although Hill spoke for the record on the NPR broadcast, Totenberg expressly stated that Hill had not come to NPR with the story and had refused to talk until Totenberg obtained a copy of her affidavit.

On October 7, Anita Hill appeared at a press conference and called for a public airing of her charges.
On October 8, the floor vote was adjourned unanimously after Judge Thomas asked for a public hearing.

Televised public hearings on the allegations were held by the Judiciary Committee on October 11, 12, and 13.

On Tuesday, October 15, the nomination of Judge Thomas to the Supreme Court was confirmed by a Senate vote of 52-48.

B. Adoption of the Resolution

The stories by Phelps and Totenberg touched off a debate in which it was charged that Senate opponents of the nominee had deliberately "leaked" the FBI report and the Hill affidavit—both of which had been treated as confidential documents by the Judiciary Committee.

The first call for an investigation of the leaks was made on the Senate floor by Senator Simpson on October 7, 1991. Citing Anita Hill's request for confidentiality and Senate rule 29.5, he expressed a hope that the Ethics Committee would institute an investigation.8

On October 8, Senator Brown placed in the Record, but did not introduce, a draft resolution authorizing the appointment of a special counsel to investigate the "unauthorized disclosure of a confidential Senate committee report" during the Thomas nomination proceedings. The resolution called for special counsel to report the findings and conclusions to the Senate within 30 days.9

During the course of the debate on Judge Thomas, a number of senators voiced support for an investigation into leaks.4

On October 15, 1991, Senator Thurmond announced the unanimous request of all Republican members of the Judiciary Committee for an FBI investigation of the leak of confidential information on Hill’s allegations and the FBI investigation. The request, which was made in an October 12, 1991 letter to Acting Attorney General Barr, asked for a separate investigation "to determine who is responsible for these leaks and how they occurred" and expressed the view that "these leaks were unlawful under several sections of the Privacy Act of 1974."5

On October 16, 1991, Senator Seymour announced his intention to offer an amendment to pending legislation calling for an FBI investigation "into the matter of releasing of confidential documents transmitted to the Senate Committee on the Judiciary regarding Professor Anita Hill of the University of Oklahoma." 6

On the following day, October 17, Senator Brown formally introduced his resolution calling for an investigation of the unautho-

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1 Rule 29.5 provides:

Any Senator or officer of the Senate who shall disclose the secret or confidential business or proceedings of the Senate shall be liable, if a Senator, to suffer expulsion from the body; and if an officer, to dismissal from the service of the Senate, and to punishment for contempt.

See Ex. 1. References in the form "Ex.--" are to exhibits contained in a separate appendix.

4 137 Cong. Rec. at S14570 (Sen. Domenic); at S14628 (Sen. Graseley); at S14672 (Sen. Heflin);
at S14728-29 (Sen. Nunn).
5 137 Cong. Rec. at S14648.
6 137 Cong. Rec. at S14847.
ized disclosure of "a confidential Senate committee report" during the Thomas confirmation proceedings.  

On October 24, Senator Seymour offered his amendment to S. 596, the Federal Facility Compliance Act. Following the reading of the amendment, but before any debate or action on it, Senator Mitchell introduced S. Res. 202 in the form which ultimately carried. Debate focused on the expansion of the investigation to encompass unauthorized disclosures in the course of the proceedings before the Ethics Committee concerning dealings between five senators and Charles Keating. All speakers, however, criticized the leaks in the Thomas and Keating proceedings and voiced support for vigorous efforts to uncover the wrongdoers.

C. SUMMARY OF S. RES. 202

S. Res. 202 provided for appointment of a Temporary Special Independent Counsel ("Special Counsel") to "conduct an investigation of any unauthorized disclosure of non-public confidential information from Senate documents" in connection with:

(1) The consideration of the nomination of Clarence Thomas to be an Associate Justice of the Supreme Court by the Committee on the Judiciary; and

(2) The investigation of matters related to Charles Keating by the Ethics Committee.

The resolution directed Special Counsel to report "the counsel's findings regarding all matters relevant to the investigation" by delivering a report to the Majority Leader and the Minority Leader within 120 days of appointment. It provided that the Leaders, or their designees, would make the report available to all senators, and make determinations on possible referrals to appropriate law enforcement authorities, Senate committees or the executive branch. In addition, upon receipt of the report, the Leaders were to make "recommendations for any changes in Federal law or in Senate rules that should be made to prevent similar unauthorized disclosures in the future."

Section 5 of the resolution directed all "committees, Senators, officers and employees of the Senate" to cooperate with the investigation.

Section 6 empowered Special Counsel to conduct depositions of witnesses under oath and to subpoena documents upon receipt of a written authorization from the President pro tempore, Senator Byrd. Section 6 also directed the chairman and ranking member of the Committee on Rules and Administration ("Rules Committee") to adopt rules for the conduct of the investigation. Objections by witnesses on grounds of privilege, relevance or otherwise were to be resolved by the chairman and ranking member of the Rules Committee, acting jointly, or by referral to the full committee.


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7 107 Cong. Rec. at S14921.
9 The Rules of Procedure are appended to the copy of S. Res. 202 contained in Exhibit 2.
Rule 1 governed the exercise of the subpoena power granted by Section 4 of the resolution. Special Counsel was entitled to authorization of any requested subpoena with the single restriction that the subpoena seek testimony or documents "that may be relevant to the investigation authorized by Senate Resolution 202."

Rule 2 provided for the taking of depositions and for rulings upon any objection to a question or refusal to testify.

Rule 3 provided for return of documentary subpoenas and objections thereto.

Finally, Rule 4 imposed an obligation of confidentiality on Special Counsel and staff except as necessary for the performance of Special Counsel's duties.

III. NATURE AND SCOPE OF THE INVESTIGATION

A. METHODOLOGY

Given the broad scope of this investigation and the Senate's direction that our report be filed within 120 days, all witnesses were asked to submit to interviews on a voluntary basis. Witnesses were not sworn, but were advised of our view that they were subject to the penal sanctions of 18 U.S.C. 1001, which prohibits any false statement "in any matter within the jurisdiction of any department or agency of the United States." 10

Upon completion of the interviews, depositions were conducted where needed. For the most part, the depositions did not duplicate the more lengthy interviews and were focused on discrete issues.

In addition, depositions were conducted of Totenberg, Phelps and other reporters who declined to provide information on a voluntary basis and asserted First Amendment objections. Our application to compel the reporters and news organizations to provide information was denied by Senators Ford and Stevens on March 25, 1992. The senators also sustained the reporters' objections to subpoenas addressed to the telephone company for the toll records of Newsday, NPR, Totenberg and Phelps. 11

Notes of the interviews were summarized and reduced to typed form and provided to witnesses for correction, revision and addition of relevant information. All Senate witnesses were asked to sign a certification, attesting to the accuracy of the information contained in the final version of their interview memorandum, and certifying also that the witness did not disclose information or documents outside the Senate during the Thomas nomination and the Ethics Committee investigation. 12

B. JUDICIARY COMMITTEE

Our investigation focused on the public disclosure of Anita Hill's allegations. However, we also investigated other allegedly unau-
Authorized disclosures identified to us. Each member of the Judiciary Committee, all relevant staff persons, and numerous citizens from the private sector were questioned. In addition, employees of the Department of Justice, FBI and the White House were examined.

Thousands of documents were requested from senators and their staff, and third party subpoenas were served to obtain records of telephone communications.

The questioning of witnesses focused on (1) knowledge of Hill’s allegations; (2) knowledge that Hill had sent a written statement to the Judiciary Committee; (3) knowledge that an FBI investigation had been conducted based upon that statement; (4) contacts with reporters and persons outside the Senate with regard to the Hill allegations only; and (5) knowledge of certain other purported unauthorized disclosures from Senate documents.

C. ETHICS COMMITTEE

The General Accounting Office ("GAO") began an investigation of disclosures in the Keating matter on October 23, 1990. It had virtually completed its investigation by the time of our appointment. GAO had amassed voluminous files which were made available to us and reviewed. Their investigative materials included witness statements which numbered in excess of 70.

Like GAO, our investigation was limited to evidence relevant to the publication of committee sensitive information. Our first task was to identify each publication of this kind. Thereafter, the members of the Ethics Committee, the five senators named in the original complaint and staff members of each of these members were interviewed. Counsel for the subject senators also were interviewed, as was Special Counsel Bennett and members of his staff who worked on his investigation.

In general, the questions focused upon (1) knowledge of information relevant to publication of matters before the Committee in executive sessions; (2) knowledge of documents or exhibits used by Special Counsel in his investigation; and (3) knowledge of the source of the disclosures.

IV. THE NOMINATION OF JUDGE THOMAS

President Bush’s nomination of Clarence Thomas to fill the seat of Associate Justice vacated by Justice Marshall was received by the Senate Judiciary Committee on July 8, 1991.

The Committee held hearings on September 10, 11, 12, 13, 16, 17, 19 and 20 and voted on the nomination on September 27. The vote was 7–7, with all Republicans and one Democrat voting to report favorably on the nomination, and all other Democrats in opposition. The nomination was reported to the full Senate, without recommendation, by a 13–1 vote.14

13 During the floor debate on S. Res. 392, Senator Biden and Senator Mitchell engaged in a colloquy which confirmed that disclosure of the Committee’s confidential document request to Judge Thomas, unauthorized release of confidential committee staff interviews and investigative reports would all be within the scope of the investigation. 187 Cong. Rec. at S15125 (daily ed. October 24, 1991). See infra Section VI.

14 Senator Simon’s dissenting vote was based on his long-standing practice of opposing reports to the full Senate when the nominee did not receive Committee approval.
The eight days of hearings on the Thomas nomination were the third longest set of hearings in history on any Supreme Court nomination. The nominee testified for 24½ hours over five days—the second longest appearance by any Supreme Court nominee.\(^\text{13}\)

It was also among the most contentious proceedings, with vigorous politicking on and off the floor of the Senate. The narrative that follows focuses only on the dissemination of allegations made by Anita F. Hill challenging Judge Thomas’s character. Our focus was on the unauthorized release of “non-public confidential information from Senate documents,” as S. Res. 202 provides. It was not part of our mandate to weigh the merits of the Thomas nomination or the truth of Anita Hill’s allegations. Because of these jurisdictional limits, we made no inquiry into the political or lobbying strategies of public and private participants in the nomination process. At the same time, however, we considered those factors as relevant to the motives of witnesses who had access to the Hill statement and the FBI report.

A. The Judiciary Committee

The structure of the Judiciary Committee is highly decentralized and, to outsiders, confusing. Although reference commonly is made to “Committee staff” and “majority” or “minority staff,” it is more accurate to identify staff by their principals. Senator Biden, as chairman, and Senator Thurmond, as ranking member, appoint the majority and minority “Committee staff” who report to them directly. Each Judiciary Committee Democratic member chairs a subcommittee with his own staff. Each Republican is the ranking member of a subcommittee with his own staff. Subcommittee staffs answer directly to those senators, as opposed to Senator Biden or Senator Thurmond.

Judicial nominations of lower federal court judges are generally handled by staff members of Senators Biden and Thurmond. A Nominations Unit is office in a separate location where FBI reports and other confidential materials are kept in locked safes. Only designated staff with security clearances have access to those FBI reports and investigative materials.

In 1991, the Nominations Unit was headed by Harriet Grant, who reported to Jeffrey Peck, staff director of the Committee.\(^\text{16}\) Their counterparts in Senator Thurmond’s office, who also had security clearances, worked on a professional and generally bi-partisan basis with the Biden staff and reported ultimately to Robert “Duke” Short, Senator Thurmond’s administrative assistant.

While this “Committee staff” also assumed primary responsibility for any investigative issues raised by Judge Thomas’s nomination, there was more active involvement on the part of staff for other members because of the inherent importance of a nomination to the Supreme Court. In addition, staff from other committees and personal staff of individual senators were enlisted to work on a special projects basis with Judiciary staffers.

\(^{13}\) Report on Nomination of Clarence Thomas To Be An Associate Justice Of The United States Supreme Court, Exec. Rept. 102-15, at p. 2.

\(^{16}\) Interview of Jeffrey Peck, December 17, 1991.
B. ANITA HILL'S ALLEGATIONS

1. JULY 1–SEPTEMBER 4

Within weeks after the announcement of Judge Thomas’s nomination, the Alliance For Justice, a public interest group in Washington, heard a rumor that an unnamed woman claimed she had been sexually harassed by Clarence Thomas. The Alliance was told that the woman was teaching at the University of Oklahoma Law School and had worked under Thomas at the Department of Education and the EEOC. After some research, the Alliance identified the potential complainant as Anita F. Hill and obtained her office telephone number.

In July, Nan Aron, director of the Alliance, passed these and other allegations about Thomas to William Corr, chief counsel to the Judiciary Committee’s Subcommittee on Antitrust, Monopolies and Business Rights chaired by Senator Metzenbaum. Aron told Corr the Alliance had heard that Thomas engaged in sexual harassment while at the EEOC, and that there were several people at the EEOC who might be aware of Thomas’s conduct.

Corr instructed Gail Laster, counsel to the Labor Subcommittee chaired by Senator Metzenbaum, to look into allegations of misconduct which had been made against Thomas, including the claim of sexual harassment of employees at the EEOC.

Laster began by contacting Aron who gave her Hill’s current position and telephone number, as well as the names and numbers of three other former federal employees who had worked at Education and EEOC. Among those other potential witnesses were Judy Winston, an American University law professor, and Allyson Duncan, a professor at the University of North Carolina. Aron said Winston and Duncan might have known about Thomas’s alleged impropriety because they worked at Education and EEOC, respectively, when Thomas was at those agencies.

Laster decided to call Winston and Duncan first. Winston said she did not know Hill. Duncan described her relationship with Thomas as professional and cordial, and expressed her support for Thomas’s nomination. Neither mentioned any inappropriate personal conduct by Thomas.

During the week of August 19, Laster attended a meeting of Metzenbaum staffers who were working on the Thomas nomination. During the meeting, Laster ran through her work on various projects relating to Thomas and, in connection with Hill, described

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17 Nan Aron, the director of the Alliance, was quoted in the ABA Journal as acknowledging that her group was told about Hill by a lawyer who was a former Yale classmate of Hill’s. N. Burleigh, “The Thomas Hearings: Now That It’s Over—Winners and Losers In the Confirmation Process,” 78 ABA J. 50, 52-53 (1992). Both Aron and George Kassouf, director of the Alliance's Judicial Selection Project, told Senate staffers that the information had reached them from a friend of an unidentified friend of Hill’s who had described her allegations at a dinner party. They refused to identify the friend, but did say it was a man living in Washington. Deposition of Bonnie Goldstein, April 21, 1992, pp. 5, 7-13.
18 Interview of Nan Aron, March 5, 1992; Interview of George Kassouf, March 5, 1992; Interview of Gail Laster, January 22, 1992.
20 Id. at 5; Laster Int.
21 Laster Int.
22 Laster Int.
her conversations with Winston and Duncan. It was decided that Laster should contact Hill.23

2. SEPTEMBER 5–SEPTEMBER 12

The hearings on the Thomas nomination were scheduled to begin on Tuesday, September 10, 1991.

Laster did not reach Hill until Thursday, September 5. Laster referred to an allegation that Thomas had harassed female employees. Hill responded that Laster should investigate the charge. Laster asked Hill for names of possible leads. Hill said he would think about it. Laster never asked Hill whether she had been harassed by Thomas. Hill did not volunteer. Laster and Hill concluded their conversation with a discussion of areas of common interest, including their friendship with Kim Taylor, a Yale Law School classmate of Hill's who had supervised Laster at the Public Defender Service in Washington.24

Laster described the conversation to her immediate superior, James Brudney, chief counsel to Senator Metzenbaum's Labor subcommittee.25 Brudney told Laster he recognized Hill's name from law school. Brudney discussed the matter with Corr, who asked him to follow it up. Brudney spoke to Laster and approved her proposal to contact Taylor.26

On the evening of Thursday, September 5, or Friday, September 6, Laster reached Taylor. Laster described her questions to Hill about the sexual harassment rumors. Taylor advised Laster to be direct with Hill if Laster wanted to pursue the matter.27

On Monday, September 9, or Tuesday, September 10, Laster spoke to Brudney about her conversation with Taylor. Brudney told Laster to discontinue her investigation. For Laster, that was the end of the inquiry.28

Meanwhile, Bonnie Goldstein, Senator Metzenbaum's investigator, also had taken an interest in allegations of personal misconduct which had been collected by groups opposing the Thomas nomination. With Corr's approval, she spoke with George Kassouf of the Alliance and received a full account of their information about Thomas, including the sexual harassment rumor associated with Hill.29

In late August, Goldstein met to compare notes on the Thomas nomination with Ricki Seidman, the chief investigator for the Senate Labor and Human Resources Committee chaired by Senator Kennedy. With respect to the Thomas nomination, Seidman's principal interest concerned his travel practices at the EEOC. Seidman asked whether Goldstein could explain his numerous trips to Oklahoma. Goldstein responded by relating the information she had received from the Alliance concerning Hill.30 Seidman then called

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23 Laster Int.
24 Laster Int.
26 Brudney Int.; Corr Int.
28 Laster Int.; Brudney Int
30 Id. at 18–20, Interview of Ricki Seidman, January 21, 1992.
Kassouf herself, asking whether he knew the nature of Hill’s allegations. Kassouf said he did not and added that the Alliance had not spoken to Hill.\footnote{Seidman Int.}

Seidman, after discussions with Carolyn Osolinik, chief counsel to the Judiciary subcommittee headed by Senator Kennedy, spoke to Hill by telephone on Friday afternoon, September 6.

They talked at some length about Judge Thomas. At the end of their conversation, Seidman referred to rumors of sexual harassment at EEOC. Hill said she had been contacted by a Metzenbaum staffer who also had asked about the rumor. She said she would not talk about it. When Seidman asked why, Hill made some oblique comments about victims of sexual harassment. They agreed to talk again on the following Sunday, September 8.\footnote{Seidman Int.}

On September 9, Seidman called Hill. Hill said she had decided to talk about the harassment issue, but had not yet decided how far she wanted the information to go. Seidman said the Committee could accommodate her request for confidentiality. After repeating her unwillingness to give up her privacy, Hill described, without any great specificity, a pattern of alleged conduct by Thomas consisting of repeated requests for dates and sexual comments. Hill also said another person could corroborate her account. Seidman suggested that Hill might be more comfortable discussing the matter with a person she knew, identifying Brudney. Hill agreed.\footnote{Deposition of Ricki Seidman, April 11, 1992, pp. 36–40.}

After hearing from Seidman, Brudney called Hill for the first time on Tuesday morning, September 10. Hill began the conversation by saying she did not wish to testify publicly. She expressed reservations about making allegations if no other women made similar charges. Hill recited in some detail her charges against Thomas. Brudney took extensive notes of this conversation. When the call ended, Brudney understood that Hill was undecided whether she wished to report her allegations to the Committee. Brudney then reported this conversation to Corr and Joel Johnson, Metzenbaum’s chief of staff, both of whom agreed that their senator should be advised immediately.\footnote{Deposition of James Brudney, April 15, 1992, pp. 14–18; Brudney Int.; Corr Dep., p. 9; Deposition of Joel Johnson, April 16, 1992, p. 4.}

The three staff members, joined by Chris Harvie, another Metzenbaum staffer, met with Senator Metzenbaum to brief him on Brudney’s contact. Shortly into Brudney’s recitation, the senator interrupted and said the charges were too serious for a single member or staff. He said the woman, if she wished to go forward, should be referred to Senator Biden, as chairman of the Judiciary Committee. Hill’s name was never mentioned.\footnote{Statement of Senator Howard Metzenbaum, para. 2; Brudney Dep., pp. 19–20; Corr Dep., p. 14; Johnson Dep., pp. 10–12; Interview of Chris Harvie, February 5, 1992.}
Senator Metzenbaum left. The group decided Brudney should call Hill to determine whether she wanted to go forward with the Judiciary Committee. He was told to emphasize that he was neither encouraging nor discouraging her to take such a step.37

Brudney spoke with Hill in mid-afternoon. He described the meeting with Senator Metzenbaum and advised she would have to speak to the Biden staff if she wished to go forward. Hill was non-committal, but called back that day to say she felt a responsibility to go forward and was willing to proceed with Biden’s staff.38

On the following day, September 11, Brudney spoke to Harriet Grant. He identified Hill and said she was prepared to describe certain allegations against Thomas but did not wish to testify publicly. Brudney then called Hill to tell her to expect a call from Grant. Momentary confusion ensued, through no fault of Brudney’s, because Committee procedures required a complainant to initiate contact. Brudney called Hill again, explained the misunderstanding, and, on the morning of September 12, Hill left a message for Grant, making her first direct contact with “Committee staff.”39

3. September 12–September 22

Grant returned Hill’s call in the early afternoon. They spoke for a half hour. Hill explained her allegations and, before leaving for a class, repeated her concern—as previously expressed to Brudney—that a single complainant would not be believed, and that it would be important to have others corroborate her charges.40

Grant called Hill that evening to complete the conversation, mentioning that Brudney had described Hill’s request for confidentiality. Hill repeated her desire for confidentiality and, according to Grant’s contemporaneous notes, said she did not want the nominee to know her name. Grant said little could be done unless Judge Thomas was informed and allowed to respond. Grant’s notes reflect that Hill felt reporting the allegations had “removed responsibility” to go further. Grant did not push her. As the conversation ended, Hill mentioned an unnamed friend who could corroborate Hill, but who also was uncomfortable about coming forward. Hill said she would call the friend to see if the friend would talk to Grant.41

After her conversation with Hill, Grant reported to Peck. Senator Biden was briefed with other staff on Friday, September 13, or the following Monday, September 16. All agreed that nothing further could be done to investigate Hill’s allegations unless Hill agreed Thomas could be told of the charges.42

Meanwhile, having heard nothing from Grant, Brudney called Hill early on Friday, September 13, and again on Sunday evening, September 15. Through his conversations with Hill and reports from Corr (who did speak with Grant), he gained the impression that Hill’s request for confidentiality had been misunderstood. Al-

37 Brudney Int.; Corr Dep., pp. 15–16; Johnson Dep., pp. 11–12; Harvie Int.
38 Brudney Dep., pp. 21–22.
41 Grant Dep., pp. 24–27, 34.
42 Peck Int.; Interview of Ron Klein, January 31, 1992; Grant Dep., p. 23; Interview of Harriet Grant, January 7, 1992.
though enjoined not to encourage Hill in pressing her charges, Brudney says that he felt responsible for Hill because he had placed her in a difficult situation and she was upset with the Committee’s perceived inaction. Most importantly, neither Brudney nor his colleagues wanted Hill to feel Brudney had deserted her.43

Hill concurs that Brudney was concerned about Grant’s misunderstanding about the scope of Hill’s request for confidentiality. However, she disagrees with Brudney’s claim that he was entirely neutral. Although she clearly takes responsibility for her own decision, Hill recalls Brudney’s stance as more persistent and says she told him on several occasions it was her decision to make.44 From Hill’s perspective, the difference in approach was her own experience that allegations of sexual harassment are often disbelieved, whereas Brudney was confident that Hill’s statements, with evidence of a contemporaneous complaint to a friend in 1981, would be credited.

Whatever Hill may have said to Brudney to convey irritation about the Committee’s response, she did not call Grant immediately. Nor did she make any effort to contact her corroborating witness, Susan Hoernchner, about speaking to Grant until Monday, September 16.

Hoernchner reached Grant on the following day, September 17. Although Hoernchner confirmed Hill’s description of her complaints about harassment in 1981, Hoernchner was reluctant to give up her own privacy in dealing with the Committee. She expressed a strong desire for confidentiality and told Grant she preferred to remain nameless because of her position as an appointed judge.45

By this time, the Kennedy staff had heard of Brudney’s concerns about a possible misunderstanding between Hill and Grant.46 Contact was made with Senator Leahy’s chief of staff, Ellen Lovell, and Leahy’s Chief Judiciary staffer, Ann Harkins, with the suggestion that they speak to Brudney and to the Biden staff. Harkins did so and quickly recognized the explosive nature of Hill’s charges, whether true or false.47

After obtaining Senator Leahy’s permission to pursue the matter, Lovell and Harkins met with Senator Biden’s chief of staff, Ted Kaufman, Peck and Grant on Tuesday afternoon, September 17. They told the Biden staffers of Brudney’s concerns and suggested placing another call to Hill for the purpose of determining whether she in fact meant to cut off all Committee activity through her request for total anonymity. Having calculated that ten persons already knew of Hill’s allegations, Harkins warned disclosure could embarrass the Committee if nothing more was done. Grant responded that Hill had appeared to be equivocal and uncertain about publicizing her allegations. Kaufman was adamant that,

43 Brudney Dep., pp. 29–32; Brudney Int.; Johnson Int.
44 Interview of Anita F. Hill, April 22, 1992.
45 Grant Dep., pp. 35–37; Interview of Susan Hoernchner, February 14, 1992. Contrary to some published reports, Hoernchner’s contacts with Hill and the Committee were few and sporadic. By all accounts, she was extremely reluctant to play any part in the matter.
46 Deposition of Carolyn Osoolinik, April 14, 1992, pp. 11, 13–14; Seidman Int.; Cooper Int.
given her request for confidentiality, it would be wrong to push Hill in any way.48

Senator Leahy raised the subject of additional investigative efforts in a brief conversation with Senator Biden that evening, but Biden, too, believed nothing more should be done.49

These concerns were mooted on Thursday, September 19, when Hill called Grant at noon. Grant returned the call that evening. Their conversation was relatively brief. Hill said she was afraid Grant had misunderstood Hill’s concerns about anonymity. Grant’s notes reflect that Hill said she wanted people on the Committee to know of her allegations, and that her name could be used if needed. According to the notes, Hill went on to say she needed to know her options, wanted to make choices, and did not want to abandon the matter.50

Wishing to have clear instructions from her superiors, Grant deferred any response until the next morning, Friday, September 20. After speaking with Peck, Grant called Hill to say that her allegations would be given to the FBI for investigation, which would entail interviews of Hill, Thomas, and any other persons having relevant information.51 Hill asked a number of questions about the proposed procedure, and said she wanted to talk to someone she was using for advice. While Hill said she had no problem talking with the FBI, she wanted to consider its “utility.” 52

Because the regularly scheduled hearings on the Thomas nomination concluded on that Friday, September 20, the Biden staff felt it was urgent to obtain Hill’s response as quickly as possible. Grant called Hill repeatedly until she finally reached Hill in the late afternoon. Hill said she would not have a decision until the next day. They agreed to talk at 2:00 p.m. on Saturday.53

The unnamed adviser whom Hill mentioned in her conversation with Grant was Susan Ross, a law professor at Georgetown University Law Center. Hill had first spoken with Ross on Wednesday, September 18, after Brudney had proposed Ross as a possible adviser familiar with the law of sex discrimination.54 On Friday and

48 Interview of Ted Kaufman, January 23, 1992; Grant Int.; Peck Int.; Lovell Int.; Harkins Int.
49 Interview of Senator Leahy, February 20, 1992; Harkins Int.; Lovell Int.
50 Grant Dep., pp. 40–42.
51 The alternative would have been for the Committee’s own investigators to question Hill and other witnesses. However, the FBI route had been utilized successfully in an earlier nomination, Peck Int.; Grant Int.
52 Grant Dep., pp. 41, 44–45.
53 Grant Dep., pp. 47–48. All references to time are based on Washington time.
54 Brudney had called Ross earlier in the week at the suggestion of Senator Kennedy’s aide, Carolyn Osolinik, who did not know the details of Hill’s allegations and wanted to know whether, if true, they would amount to a violation of law. Osolinik Dep., pp. 10, 15–17; Brudney Dep., pp. 33–34. Brudney says he called Ross and presented the following hypothetical facts: (1) a woman is asked out by her supervisor; (2) the supervisor spoke in graphic sexual terms to the woman over a period of time; and (3) the woman declined to go out with the supervisor and eventually left her job. Brudney claims he did not allude to Thomas or the nomination proceedings. Brudney Dep., pp. 35–36; Brudney Int. Ross recalls the facts involved a judicial nominee and her own conclusion that the nominee was Thomas. Ross Int. After some brief research, Ross told Brudney that the hypothetical conduct might be actionable in some courts, but that she would need to know more about the facts. Brudney Dep., p. 36. Ross also identified several cases in which sexual harassment claims had been sustained under Title VII on the basis of unwanted advances which involved no physical abuse. Ross Int. By now uncomfortable with his own position as a counselor to Hill in her dealings with the Committee and wishing to extricate himself from that role, Brudney asked Ross if she would be willing to consult with the woman involved in the alleged incident and possibly act as the woman’s sounding board. Brudney Dep., pp. 36–38. Ross agreed to do so, and Brudney gave her name to Hill.
Saturday, she spoke with Ross and then Brudney about her concern that her charges against Thomas would be distorted by FBI interviewers.\textsuperscript{55} Ross, in turn, spoke to Osolinik, who confirmed that an FBI interview was a standard procedure used by the Judiciary Committee.\textsuperscript{56} Ross expressed her own concern with the FBI as an intermediary to the Committee. The suggestion was made that Hill prepare a written statement in her own words. With Hill's authorization, Ross sought counsel from Judith Lichtman, president of the Women's Legal Defense Fund, who gave similar advice.\textsuperscript{57}

Grant called Hill at 2:00 p.m. on Saturday, September 21. Hill told Grant she did not want to go through with the FBI investigation because she was not convinced that the information would be communicated to the Committee members in a way with which she was comfortable. She also said she did not know if the FBI was experienced in handling matters of this sort and was skeptical about an interview. Hill asked whether it would be possible to call with another option. Grant said she would be happy to hear from her again. Grant's notes reflect a comment by Hill that publicity was not her "agenda."\textsuperscript{58}

Almost immediately after speaking to Grant, Hill called Brudney at home and reached him at the Library of Congress. The conversation lasted 20 minutes. She told Brudney—with whom she had not spoken since Tuesday—that she was trying to decide whether to submit to an FBI interview. She also told him she had been working on a statement which she could submit to the FBI if she decided to go forward with the FBI interview. She said she was concerned that her story be told "in her words." Brudney says he neither encouraged nor advised Hill in connection with her statement or the FBI process.\textsuperscript{59}

On Sunday evening, September 22, Brudney telephoned Hill at home. They spoke for a half hour. Hill said she had not yet decided to go forward with an FBI interview, but had drafted a statement. Brudney says he called Hill on Sunday evening because he felt that he had been somewhat abrupt with her the prior afternoon. Again, Brudney says Hill did not request his advice, and he did not provide any advice.\textsuperscript{60}

4. SEPTEMBER 23—SEPTEMBER 27

On Monday, September 23, Hill telefaxed a four-page statement to Senator Biden's staff.\textsuperscript{61} The document, captioned "Statement of Anita F. Hill," began with the words "I swear" and was signed and dated. It did not appear to have been notarized.\textsuperscript{62} A copy of the

\textsuperscript{55} Brudney Dep., p. 45; Ross Int.
\textsuperscript{56} Ross Int.; Osolinik Int.
\textsuperscript{57} Ross Int.
\textsuperscript{58} Grant Dep., pp. 45-50.
\textsuperscript{59} Brudney Dep., pp. 48-51.
\textsuperscript{60} Brudney Dep., pp. 52-55.
\textsuperscript{61} Interview of Anita Hill, February 10, 1992; Grant Dep., p. 58; Deposition of Jeffrey Peck, April 2, 1991, pp. 60-61.
\textsuperscript{62} A copy of the statement is attached as Exhibit 5. Hill says she had notarized the September 23 statement before faxing it to Grant. Hill Ints. The original fax was discarded by the Judiciary Committee after the second set of hearings and therefore is not available for examination. Peck Int.; Grant Int. Early generation copies do have faint markings on the last page which could be a notary's seal. Indeed, the White House recipients recall speculating at the time that the mark-Continued
statement was delivered to Senator Thurmond's staff and, through communications with the Department of Justice and the White House, an FBI investigation was initiated immediately.

Hill was interviewed by the FBI that Monday evening. She later called Brudney, told him she had telefaxed what she called an affidavit of her allegations to Grant, that she had been interviewed by two FBI agents, and that the interview had gone well. Hill said she had offered her affidavit to the agents to append to their report of her interview, but had been advised that the FBI already had a copy. Hill also told Brudney the FBI was going to interview Susan Hoerchner. Hoerchner was interviewed that same evening.

The statement which Hill telefaxed on Monday, September 23, contained typographical errors. On Wednesday, September 25, Hill called Grant and said she intended to telefax a duplicate statement with the typographical errors corrected. The corrected statement was transmitted and received by Grant at approximately 5:30 p.m. It was identical in content, was signed Anita F. Hill, and was dated September 25, 1991. It did not appear to have been notarized.

During the same conversation with Grant, Hill asked for an explicit assurance that her statement would be circulated to the members of the Judiciary Committee, as she had previously requested. Not knowing how Senator Biden planned to proceed, Grant said Hill's information would be made available to all members in some form, but added that she could not guarantee circulation of the statement itself. Hill was upset.

Earlier that Wednesday, Brudney called Hill. He told Hill he was preparing a memorandum on sexual harassment for possible use by Senator Metzenbaum. He told her she wished to include a description of the allegations contained in the statement he knew she had faxed to the Committee. He asked Hill to send him a description of those allegations. According to Hill, she questioned Brudney closely about his need for the statement, and the appropriateness of sending it to him outside Committee channels. (At the time, Hill believed that her statement would be circulated to all members of the Committee as soon as the FBI report was completed.) After receiving assurances that he would hold it in confidence, Hill faxed Brudney an exact copy of her statement. However, Hill did not sign or date this copy.

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ings could have reflected a seal. Interview of Steven T. Hart, March 13, 1992; Interview of John P. Schmitz, March 13, 1992; Interview of Lee S. Liberman, March 13, 1992. During our investigation, we reviewed the log of the secretary at the University of Oklahoma who independently confirmed notarizing documents for Hill on September 25, 26. Hill was unable to locate the original statements which were sent to her by a secretary when she was in Washington preparing for her testimony on October 11. Hill Int., April 22, 1992; Interview of Ovetta Vermillion, April 29, 1992.

42 Grant Dep., p. 56; Peck Dep., pp. 68-69; Deposition of Robert J. Short, April 17, 1992, pp. 4-5.

43 The FBI regards the White House as its "client agency" in its background investigations of nominees. For that reason, any investigative assignments requested by the Senate must pass through the White House.

44 Brudney Dep., pp. 60-61; Hoerchner Int.

45 Hill Int.; February 10, 1992; Grant Dep., p. 55; Peck Dep., p. 64.

46 A copy of the September 25 statement is attached as Exhibit 6. Hill says this statement was notarized, too. Hill Int.

47 Grant Dep., pp. 69-75.


The FBI interviewed Allyson Duncan and Nancy Fitch on Tuesday, and Judge Thomas on Wednesday. The completed FBI report was delivered to the Senate in mid-afternoon on Wednesday, September 25.

After briefing Senators Mitchell and Dole, Senator Biden immediately began to notify all Democratic members of Hill's allegations and Judge Thomas's denial. The Senate met late that evening, and he briefed several senators on the floor of the Senate. He spoke to Senators Metzenbaum and Kennedy. His summary was general and conveyed the conflict between Hill and Thomas. He also mentioned the reference to their staffs in the FBI report.\textsuperscript{71}

No senator asked for the FBI report until Thursday afternoon when Senator Simon, after speaking with Hill for reasons described later, called for and reviewed the FBI report in the presence of Peck. Senator DeConcini, an announced supporter of Thomas, learned of the allegations on Thursday. He called for and reviewed the FBI report and Hill's statement in the presence of Peck and Grant early on Friday morning. No other Democratic member reviewed the FBI report prior to October 6.\textsuperscript{72} Each had already announced his intention to vote against Judge Thomas's nomination for reasons unrelated to Hill's allegations.

Senator Thurmond did not advise the Republican members of Hill's allegations or of the FBI report.\textsuperscript{73} Senators Hatch and Simpson heard of the allegations and discussed them briefly with Senators Thurmond and Biden, respectively, but did not see the FBI report or Hill's statement prior to October 6, 1991.\textsuperscript{74} Senator Specter was the lone Republican exception. He learned of Hill's allegations on Thursday night from Senator DeConcini, discussed the matter with Senator Biden, and reviewed Hill's statement and the FBI report in Peck's presence. Specter was scheduled to meet with Judge Thomas early on Friday morning for another purpose, and he discussed the allegations with the nominee directly during that meeting before the Committee vote.\textsuperscript{75}

On Thursday, September 26, Hill called Brudney at 8:22 a.m. She was upset that her statement had not been circulated to the members.\textsuperscript{76}

After speaking with Brudney, Hill unsuccessfully attempted to reach her former roommate and friend, Sonia Jarvis, in Washington. At 11:25 a.m., Hill reached Jarvis in Palo Alto, California, where Jarvis was visiting Kim Taylor, a mutual friend and Stanford law professor. Hill told Jarvis and Taylor, without detail, that she had levelled charges of sexual harassment against Thomas and, at the Judiciary Committee's request, had submitted to an FBI interview. Hill explained that her statement had been forwarded to the Judiciary Committee. Concerned that her statement apparently had not been and might not be disseminated to the members, Hill asked Jarvis and Taylor if there was anything either of them could

\textsuperscript{71} Interview of Senator Biden, February 7, 1992; Peck Dep., pp. 45-46.
\textsuperscript{72} Peck Dep., pp. 36-44.
\textsuperscript{73} Interview of Senator Thurmond, February 3, 1992; Short Dep., pp. 14, 16.
\textsuperscript{74} Interview of Senator Hatch, February 25, 1992; Interview of Senator Simpson, February 4, 1992.
\textsuperscript{75} Brudney Dep., p. 78.
do to help inform the Committee. With Hill’s authorization, Jarvis and Taylor agreed to make inquiry.\footnote{17 Taylor Int.; Interview of Sonia Jarvis, February 28, 1992.}

Jarvis immediately called Senator Simon’s offices and spoke with Susan Kaplan, chief counsel to his Judiciary subcommittee.\footnote{18 Jarvis called Senator Leahy’s office, requesting the person responsible for the Thomas nomination, but never spoke to anyone in a position of responsibility. She also called a colleague, Wade Henderson of the NAACP. Jarvis did not identify Hill; she simply asked whether he had heard about serious allegations made by a woman to the Judiciary Committee. Jarvis Int.}

Kaplan had heard of the allegations from Simon earlier in the day and promptly arranged for him to speak directly to Hill later that afternoon.\footnote{19 Interview of Susan Kaplan, January 14, 1992.}

During their conversation, Hill asked Senator Simon whether he had seen her affidavit. Senator Simon said he had not seen it, but that he was generally aware of her allegations. The specific details were not discussed. The possibility of distributing her statement to all members of the Senate was raised, but Hill decided against such distribution when Simon said it would be impossible to keep her name out of the public eye. Simon made it clear he could not advise Hill on the matter and told her the decision was hers to make.\footnote{20 Statement of Senator Paul Simon, para. 5; Hill Int., February 10, 1992.}

Kim Taylor also took action. On Thursday evening, she and Jarvis reached their friend and Stanford classmate Charles Ogletree, who is a professor of law at Harvard. Hill was not identified by name, but her allegation was described in very general terms. They repeated Hill’s concern that her statement had not been circulated within the Committee.\footnote{21 Taylor Int.; Interview of Charles Ogletree, April 28, 1992.}

Early Friday morning, Ogletree, who was leaving for a Stanford reunion that weekend, called his Harvard colleague, Professor Lawrence Tribe, and passed on Taylor’s message.\footnote{22 Ogletree Int.} Tribe reached Ron Klain, a former student and Senator Biden’s chief counsel on the Judiciary Committee, and relayed Ogletree’s message that “a group of women professors on the West Coast” were concerned that an unidentified woman’s allegation of sexual harassment had not been circulated to the Committee. Klain declined to discuss the subject, but assured Tribe that any allegations had been thoroughly investigated.\footnote{23 Klain Int.; Interview of Lawrence Tribe, January 30, 1992.}

The Committee vote was scheduled for 10:00 a.m. on that day. Early that morning, Klain reported the Tribe call to Senator Biden and recommended distribution of the Hill statement to all Democratic members.\footnote{24 Klain Int.} Under Peck’s direct supervision, copies of Hill’s statement were made and a single copy distributed to each Democratic member. The copies were delivered in sealed envelopes marked “Senator’s Eyes Only.” Each Democratic member read the statement. The Committee hearing concluded at 12:46 p.m. Between 1:30 p.m. and 3:15 p.m., each copy was retrieved by Senator Biden’s office in its original envelope and was destroyed.\footnote{25 Peck Dep., pp. 78, 75.
5. ACTIVITY BY STAFF MEMBERS

The receipt of Hill's statement on Monday, September 23, and the initiation of an FBI investigation were known to senior staffers for Senators Biden and Thurmond, but not disclosed to the Committee generally. Brudney, because of his conversations with Hill, also knew. He told the Kennedy staff that Hill had submitted a statement and had been interviewed by the FBI; and they, in turn, told the Leahy staff.

On Tuesday, Senator Leahy's staffers arranged for Peck and Grant to brief the senator on the status of the investigation. They did so orally without showing him Hill's statement.

On Wednesday morning, as described earlier, Brudney called Hill and told her he was preparing a memorandum on the law of sexual harassment for possible use by Senator Metzenbaum. He told her he wanted to be as accurate as he could about her allegations, and asked her for a written description. Brudney did prepare a memorandum which he completed and delivered to Johnson and Corr in the early evening. He told both Johnson and Corr he had a copy of a written description of Hill's allegations, but never showed it to them. Brudney testified that he had the impression the document Hill sent to him was a draft of her statement. Johnson and Corr testified they knew only that the fax contained a general outline of Hill's allegations.

Brudney was called by Johnson shortly thereafter and told of Senator Metzenbaum's displeasure upon hearing from Senator Biden that Metzenbaum staffers were referred to in the FBI report. The senator's adverse reaction prompted the staffers to take steps the following day to draw back from any active involvement with Hill's allegations.

On Thursday, September 26, after internal conferences, it was agreed that Corr and Brudney would call Lichtman and Wade Henderson, of the NAACP, to make it known that they and other groups should not look to Senator Metzenbaum's office for any initiative on Hill's allegations. They also agreed that Brudney could not continue in contact with Hill and should "disengage" from her in a tactful manner.

The calls to Lichtman and Henderson were made. The Metzenbaum staffers deny any intention to disseminate Hill's allegations outside the Senate. Rather, they say, the calls were intended to avoid later criticism of inaction by interest groups who, according to Corr and Brudney, already knew of Hill's existence and would have expected Senator Metzenbaum to take a more active role. Lichtman did know about Hill's allegations because she had

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88 Seidman Dep., pp. 71-72, 74; Brudney Dep., pp. 91-92.
89 Harkins Int.
90 Harkins Int.; Peck Dep., p. 32.
88 Brudney Dep., pp. 84-89; Hill Ints.
88 Brudney Dep., p. 76; Johnson Dep., pp. 35-36; Corr Dep., p. 56.
88 Brudney Dep., p. 76; Johnson Dep., p. 35; Corr Dep., p. 55.
88 Brudney Dep., p. 76; Johnson Dep., pp. 30-31; Corr Dep., pp. 48-49. The FBI report quoted Hoechner as saying Hill had received calls from Kennedy and Metzenbaum staffers before speaking with Grant. The report also mentioned Brudney by name as someone who may have heard the rumor of sexual harassment attached to Hill's name.
88 Brudney Int.; Corr Dep., p. 50; Johnson Dep., pp. 41-42.
88 Corr Dep., pp. 57-58, 65-68.
been consulted by Susan Ross the prior week and had spoken briefly to Brudney.95 Henderson, however, had not known of the allegations until Jarvis called him at midday that Thursday.96

Corr took notes during these conversations. One note contains a portion attributed to Lichtman which reads "I going after affidavit." 97 Neither Corr nor Lichtman remember her using those precise words.98 Lichtman specifically denies seeking out or obtaining Hill's affidavit at any time.99 For his part, having mentioned to Lichtman that FBI reports are not generally available, Corr recalls his own understanding that Lichtman wanted the affidavit so that it could be used as a vehicle to air the allegations within the Committee.100

Lichtman was upset with the Committee's handling of the issue, but emphasized that little could be done to press the issue with Biden if the woman was unwilling to air her charges publicly.101 Henderson was more reserved. He made no reference to any affidavit. He emphasized the sensitivity of the issue and stressed the need to avoid precipitous action.102

A Corr note of a later call with Brudney reports Lichtman as having said that Hill had spoken with Senator Simon that day and that she had "authorized a friend to talk to Nina," referring to Totenberg.103 When asked about the note in deposition, Lichtman denied talking to Hill, any friend of Hill, or Totenberg about any such authorization on Hill's part. She had no recollection of telling Brudney what the Corr note reflects.104 She did recall an earlier discussion with Susan Ross in which the possibility of speaking to Totenberg had been raised and rejected, suggesting that Brudney may have misinterpreted something Lichtman did say.105

6. SEPTEMBER 28–OCTOBER 6

There is evidence that by Saturday, September 28, knowledge of Hill's allegations and, to some extent, the FBI investigation was beginning to spread among the interested Washington community. The allegations were mentioned during at least two dinner parties on Saturday evening and made their way back to Judiciary Committee staffers.106

95 Deposition of Judith Lichtman, April 15, 1992, pp. 4-5, 34.
96 Interview of Wade Henderson, February 24, 1992.
97 Corr Dep., p. 66.
98 Corr Dep., p. 77; Lichtman Dep., p. 34.
99 Lichtman Dep., pp. 35-36.
100 Corr Dep., pp. 77-78.
101 Corr Dep., pp. 69, 73; Lichtman Dep., pp. 31-34; Lichtman Int.
102 Henderson Int.; Corr Dep., p. 86.
103 Corr Dep., p. 86; Seidman has a similar note of almost identical substance which she cannot specifically attribute to Brudney, but which she believes was made on Thursday, September 25. Seidman Dep., p. 97-98.
104 Lichtman Dep., pp. 40-41.
105 Lichtman Dep., pp. 18-20, 42, 46.
It appears that Lichtman entertained the possibility of raising the issue with Senators outside the Committee on Friday and early the next week. However, Lichtman was told directly by Ross that Hill did not want to go public and, for that reason alone, believed her allegations were a dead issue.

Representatives of other outside groups also acknowledge varying degrees of knowledge of the matter. However, many of those actively opposing Thomas were pursuing other issues, including the controversy associated with Judge Thomas’ leaked draft opinion in the Lamprecht case, and also were lobbying the civil rights legislation which was scheduled for an early vote.

C. Timothy Phelps

Timothy Phelps covered the Thomas nomination for Newsday, a metropolitan New York newspaper which is a part of the Times-Mirror organization. Phelps knew of the Hill allegations as early as July, 1991. Phelps also spoke with Anita Hill on several occasions prior to October, 1991. They discussed various issues having to do with Thomas’ nomination, but Phelps did not ask Hill about any sexual harassment claim. Nor did Phelps publish any article alluding to such claims.

Phelps was, however, the first journalist to discover and report upon the FBI report generated by Hill’s September 23 statement. In a September 28 article dealing with the Committee vote on September 27, Phelps picked up on Senator Biden’s admonition to opponents of Thomas to “stay away from personal attacks.” Phelps wrote:

Biden, who said he cast the tie vote “with a heavy heart” yesterday, said he was in favor of an early vote. He also admonished opponents to stay away from “personal” attacks, an apparent reference to what sources said was a reopening of the FBI background investigation on Thomas to check opponents’ allegations of personal misconduct.

There is no evidence Phelps knew the subject of the new FBI investigation. Yet, notwithstanding the rumors of sexual harassment he had heard and his acquaintance with Hill, Phelps made no immediate attempt to question Hill on the issue.

For whatever reason, on Wednesday, October 2, Phelps called Senator Simon to discuss the coming floor vote and, in the course of that conversation, sprang the name of Anita Hill as a possible new and disruptive issue. Senator Simon does not remember the moment, but it is clear Senator Simon did not discuss Anita Hill or her allegations with Phelps at that time.
This is corroborated by Phelps' conversation with Ricki Seidman on Thursday, October 3. Phelps had spoken with Seidman on several occasions before October 3, and had even floated Anita Hill's name as a possible source on the sexual harassment rumors he had heard prior to September 27. Phelps recounted his Wednesday conversation with Senator Simon and, after describing Senator Simon's silence in response to Phelps' use of Anita Hill's name, told Seidman he thought he "might be on to something." Phelps said he believed he would call Hill and asked Seidman's opinion. Seidman, aware of Hill's desire for confidentiality, says she tried to discourage him, but Phelps said he was calling her.

Phelps did not call Hill until the afternoon of Friday, October 4. He told Hill he was calling about allegations of sexual harassment. Hill recalls Phelps saying he knew of the FBI report and of a statement, but she had the impression he was not distinguishing between the two. He asked her what was in the statement. Hill said she would not comment unless Phelps had it. Hill's impression was that Phelps' source was someone who had seen the statement.

Hill cannot place the time of Phelps' Friday call. Chris Harvie of Senator Metzenbaum's staff remembers Phelps approaching at roughly 2:00 p.m. on Friday, introducing himself to Harvie and asking what Harvie knew about the sexual harassment allegations. Harvie declined to discuss the issue, and Phelps did not press him.

Phelps also called Seidman on Friday. He said he had spoken to Hill, but said Hill had not decided whether she would speak to him.

Phelps called Hill again on Saturday morning, October 5. Hill believes Phelps "probably" said he had spoken to someone who had seen her statement. Hill told Phelps she would not speak to him unless Phelps had a copy of her statement. Phelps said he had spoken with someone with more information about the statement. Phelps admitted he did not have a copy. Phelps again asked about the FBI investigation. Hill conceded she had given a statement to the FBI but went no further.

Phelps called Ricki Seidman on Saturday morning. He said he had spoken to Hill, but that Hill had refused to provide her statement. Phelps told Seidman he was looking for the statement, but added he was getting closer to the story with or without Hill's cooperation.

Later in the day, Phelps called Senator Simon in Nebraska where he was visiting Dana College, which he attended for two years and upon whose Board of Regents he served. Senator Simon

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116 Seidman says she discouraged Phelps from calling Hill by downplaying the likelihood she would have any useful information. Phelps appearing to have been deterred because he admittedly did not raise the issue of sexual harassment with Hill until shortly before his story ran. Seidman Dep., p. 120.
117 Seidman Dep., pp. 118–121.
119 Harvie Int.
120 Seidman Dep., p. 141.
122 Because the Rules Committee denied our application to enforce our subpoenas for toll records of Newday and Phelps, and because Phelps has refused to testify, we do not know whether Phelps' call to Seidman took place before or after his call to Hill.
123 Seidman Dep., pp. 154–155.
had been called by Totenberg on Friday, and he felt she had Hill’s statement. Phelps indicated he was about to run a story on Hill’s allegations and referred to another reporter having the story. His comments left Simon with the impression that he had neither the FBI report nor the Hill statement. Phelps was persistent in asking about the contents of the FBI report; the senator recalls telling him at least three times that he could not divulge information from FBI documents. Senator Simon did say, on the record and mistakenly, that he had not been aware of the Hill allegations when he voted on the nomination.\footnote{Simon Statement, para. 10.}

The call to Simon probably concluded shortly before 6 p.m.\footnote{Simon called his Judiciary counsel Susan Kaplan at the dinner hour because he was concerned he had erred in telling Phelps that he did not see the FBI report until after the Committee vote. Kaplan reminded him of the Peck briefing on September 26, Kaplan Int.} Phelps then made a series of calls to other senators on the Committee, including Senators Hatch and Simpson, while his colleague, Gaylord Shaw, called the White House for comment.\footnote{Peck Dep., p. 13; interview of Doug Davidson, February 12, 1992.} Senator Simpson, in an effort to deflate the story, said he had previously heard of allegations during Thomas’s Court of Appeals nomination.\footnote{Simpson Int.} Senator Hatch, who was in Utah, does not recall Phelps calling, but the later edition of Phelps’ article quotes him as branding the allegations as false and expressing anger at the disclosure.\footnote{Hatch Int.} Phelps did reach Corr between 6:00 and 7:00 p.m. to ask for Senator Metzenbaum’s telephone number. After consulting with Johnson and Metzenbaum, Corr returned Phelps’ call and claimed he had been unable to reach the senator.\footnote{Corr Dep., pp. 121-125. According to Corr, they also discussed the reaction of Senator Hatch, who immediately suspected a Metzenbaum leak. See infra, pp. 75-76.} After initially declining comment, the White House issued a statement that evening confirming the FBI investigation and calling Hill’s allegations unwarranted.

D. NINA Totenberg

Nina Totenberg is a reporter for National Public Radio. Totenberg covers the Supreme Court and covered the Thomas nomination.

Totenberg heard rumors of sexual harassment as early as July, 1991, although she has denied knowing Anita Hill’s name at that time. Because Totenberg has refused to testify, we do not know from Totenberg what caused her to track the Hill story only after the Committee had voted on Friday, September 27.

There is substantial evidence Totenberg came into possession of Hill’s statement in some form as early as Tuesday or Wednesday, October 1 and 2. In a profile of Totenberg which appeared in “Vanity Fair,” William Buzenberg, NPR’s Vice President for News, was reported to have said Totenberg had Hill’s “affidavit” five days before Totenberg “spilled the beans.”\footnote{See Ex. 8.} Moreover, Ann Louise Bardach, who authored the profile and who interviewed Senator
Simon, told Senator Simon that Totenberg had told Bardach the same thing.\textsuperscript{131}

That Totenberg had some version of Hill's statement by mid-week is confirmed by other evidence. As set forth below, virtually every person questioned by Totenberg, including Anita Hill, was either told or sensed Totenberg had Hill's statement at the time Totenberg talked with them. And, a letter written to NPR's listeners, authored by Buzenberg, further supports this view. The letter states NPR discovered Hill's affidavit before Totenberg contacted Hill for the first time:

That investigation, initiated by NPR and lasting over several days, revealed a sworn affidavit filed with the Senate Judiciary Committee by Anita Hill. After investigating Anita Hill's background further and finding outside confirmations of these allegations, NPR interviewed Anita Hill.\textsuperscript{132}

It is clear something had happened by Wednesday, October 2. On that day Aron called Sonia Jarvis.\textsuperscript{133} Aron did not know Jarvis. She asked Jarvis if Anita Hill was "prepared to go public."\textsuperscript{134} Jarvis gave no response. Surprised by Aron's call and her question, Jarvis later called Hill and repeated the conversation. Hill told Jarvis to tell Aron she was wrong and Hill did not want to go public. Jarvis so advised Aron the next day, Thursday, October 3.\textsuperscript{135}

Also on Wednesday, there was a meeting in Senator Metzenbaum's office to discuss lobbying efforts for the floor vote. In attendance were Senators Metzenbaum, Simon and Kennedy, certain of their staffers and various representatives from the groups opposing the nominee. Although there was no discussion of Hill or her allegations at the meeting itself, various staffers recall allusions to the issue in hallway conversations after the meeting concluded. Kaplan, for example, overheard a snippet of a conversation between Senator Simon and Kate Michelman, the head of the National Abortion Rights Action League ("NARAL"), about the "Oklahoma thing."\textsuperscript{136} Brudney had a similar conversation with Henderson.\textsuperscript{137}

Hill tried to reach Brudney on Wednesday, October 23. She says she called to discuss the floor vote and the nomination general-

\textsuperscript{131} Simon Statement, para. 16.
\textsuperscript{132} See Ex. 9.
\textsuperscript{133} Jarvis Int.
\textsuperscript{134} Although Aron refused to answer questions about conversations with reporters, citing her First Amendment right to petition Congress, she did swear she did not receive or disseminate Hill's statement. Affidavit of Nan Aron, sworn to on March 4, 1992, para. 4; Deposition of Nan Aron, April 16, 1992, p. 15.
\textsuperscript{135} Jarvis Int.
\textsuperscript{136} Kaplan Int. Senator Simon recalls a similar incident in which he was surprised by Michelman's reference to the "Oklahoma thing," but he places it in a telephone call from Michelman. Simon Statement, para. 11. Michelman denies any recollection of such a conversation with Simon. Michelman Int. Michelman also denies a purported telephone conversation on the following day to a woman in Illinois, who previously had been identified as a potential fundraiser for NARAL. Michelman Int. According to the woman, Michelman indicated their fundraising efforts would be easier because Anita Hill was coming forward. NARAL's counsel has verified that a search of its telephone records has produced no call to the relevant exchange during the time in question, and Michelman denies making both the call and those comments. Hill's home and office telephone records evidence no contact with Michelman or NARAL.
\textsuperscript{137} Brudney Dep., pp. 103-04.
ly, 138 Brudney returned her call that evening. They spoke for 33 minutes. Brudney says Hill told him, among other things, that Hill had been talking to Nina Totenberg and "friends in D.C.", and was considering giving her allegations to Senator Leahy for circulation to the full Senate.139 Corr and Johnson say Brudney reported this to them on Thursday morning.140

Hill says she did not tell Brudney she was talking to Totenberg or considering any contact with Leahy.141

Brudney spoke to Seidman on Thursday. Seidman says Brudney did not say Hill was speaking to Nina Totenberg. According to Seidman, Brudney said he had spoken with Hill about whether Hill was going to publicize her allegations. Seidman’s impression from this conversation with Brudney was that Hill was undecided about what, if anything, she would do.142

Hill says that Totenberg called her for the first time on Thursday, October 3. She had the strong impression from this first call that Totenberg had considerable information, and knew of her statements to the Committee, the general nature of the allegations, and the FBI report. Based on Totenberg’s comments, Hill thought it was likely that publication of her allegations was imminent. While Hill says she declined to discuss the specifics of her allegations, she gave Totenberg as references the names of two deans and other people who knew her.143

Earlier that day, Hill had spoken for the first time to Charles Ogletree, the Harvard professor contacted by Kim Taylor the prior week. She called him at Taylor’s suggestion. Much of the conversation concerned what had happened with the Committee. Ogletree told her of his own views on Thomas, which were not entirely critical, and asked about her background.144

While Ogletree cannot place the time, he says Hill did ask him for advice about how to respond to Totenberg. She told him she was certain Totenberg knew her allegations and was going with the story. Ogletree warned her not to be “bluffed” and thereby become the source of her own story. He recommended that Hill make no statement unless Totenberg proved possession of the statement.145

That Thursday evening, after a Labor Committee reception, Lichtman stopped by Seidman’s office with Ralph Neas.146 Seid-

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139 Brudney testified Hill told him she was “talking with people in D.C. and speaking with the press” and added: “And, I can’t remember whether she said the press and Nina Totenberg or Nina Totenberg. But, the name of Nina Totenberg came up.” I think I know that the name, Nina Totenberg, was mentioned by somebody that she was in touch with or speaking to. I just can’t recall the specific language she used.
140 Brudney Dep., pp. 85-87. Hill’s telephone records do not show any calls placed to Washington friends between September 28 and October 2.
141 Corr Dep., pp. 113-14; Johnson Dep., p. 65.
143 Seidman Dep., pp. 113-14.
145 Ogletree Int.
146 Id.
147 Neas is the executive director of the Leadership Conference on Civil Rights, a coalition of civil rights groups which had opposed the Thomas nomination. He says he had heard of sexual harassment allegations from a Senate source several weeks earlier but did not know Hill’s name. Interview of Ralph Neas, February 23, 1992. We found no evidence to support a published report that Neas had played some part in the disclosure of Hill’s allegations.
man recalls them talking about rumors that the press was on to Hill's story, and voicing concern about being accused of "ginning up" the allegations if the story did become public. When they began to discuss the political ramifications of a disclosure, Seidman suggested they continue their discussion elsewhere.\footnote{Seidman Dep., pp. 110, 124-125.}

On Friday, October 4, Totenberg placed several relevant calls. She first called Seidman. Totenberg did not tell Seidman she already had spoken with Hill. Instead, Totenberg told Seidman she "had been contacted by someone calling for Anita Hill," asked Seidman what Seidman knew about Hill, and whether the story was worth "pursuing." Seidman says she did not provide any information to Totenberg.\footnote{Id. at 130-131.}

Totenberg next reached Senator Simon in Nebraska. A message from Totenberg was awaiting him at his motel. Totenberg pressed the senator for information about the Hill allegations. Simon, who was convinced from Totenberg's questions that Totenberg had a copy of Hill's statement, refused to comment on the allegations or on the FBI report. Simon mistakenly did tell Totenberg he had not seen the Hill statement until after the Committee vote. Totenberg used his mistaken comments in her broadcast on October 6 to give the appearance that members of the Judiciary Committee had not known of Hill's allegations before the Committee vote.\footnote{Simon Statement, paras. 10-14. This impression was misleading as far as the Democratic members were concerned. The Republican senators, however, had not been briefed.}

Totenberg next tried to reach Hill in Oklahoma. She called twice on Friday afternoon. She left a call-back request on both occasions. Her second call-back request included the message "have a little bit of information."\footnote{Hill Ints.}

Unable to reach Hill, Totenberg next called the Dean of the Oklahoma University Law School, David Swank. Swank returned the call at 4:04 p.m. Totenberg told Swank she was "going with the story." She also said she had or had seen Hill's statement (Swank could not recall which, although he tended to believe Totenberg said she "had" Hill's statement), and she wanted to check Hill's character and credibility. Swank vouched for both.\footnote{Interview of David Swank, February 10, 1992. Totenberg received a similar recommendation from Hill's former dean at Oval Roberts, John Stanford. Totenberg called another Hill reference on Saturday, October 5. Interview of John Stanford, March 16, 1992.}

Hill returned Totenberg's two calls at 4:56 p.m. The call was brief, and Hill does not recall the specifics of this call. It is probable Totenberg told Hill she "was going with the story" because, later that afternoon, Hill visited Dean Swank and told him she probably would be subpoenaed to appear in Washington. Swank, based upon his conversation with Totenberg, concurred.\footnote{Swank Int.}

Later that afternoon, Totenberg called Seidman again. Totenberg told Seidman she had spoken to Hill, and that Hill was not sure she wanted to go forward with the story. Totenberg led Seidman to believe that she would only broadcast the story if Hill agreed to do the story. Totenberg also said she had spoken to the dean of the law school who had vouched for Hill's credibility.\footnote{Seidman Dep., pp. 134-137.}
Totenberg next attempted to reach Senator Leahy, who returned her call from his home in Vermont. Senator Leahy recalls this as a strange conversation. Totenberg said she had an affidavit from Hill and asked to read it to Senator Leahy to see if he recognized it as something that had been considered by the Committee. Totenberg then read to Senator Leahy language which seemed to come from Hill's statement and surely had to do with Hill's allegations. Senator Leahy refused any comment. Totenberg then asked him a hypothetical question concerning sexual harassment allegations. Senator Leahy refused to respond.\(^{154}\)

Hill called Sonia Jarvis at home that evening and talked about the press calls. Both she and Jarvis say Hill was still unwilling to go public.\(^{155}\)

At 10:24 p.m., Hill called Totenberg in a 20-minute conversation which she believes was a continuation of the late afternoon call. Hill says she was trying to "buy time" as Totenberg repeated that the story was going to run. She says she remained unwilling to talk about specifics unless Totenberg had her statement. Hill believes this call also included an account of Totenberg's own experience as a victim of sexual harassment and a discussion of the issue generally.\(^{156}\)

On Saturday morning, Hill called family members to tell them for the first time that a story might run.\(^{157}\) She also called a former EEOC colleague, Michael Middleton, to ask whether he knew anything of the press stories. Middleton had heard nothing and learned for the first time Hill had made allegations against Thomas. She said she would be talking to NPR later that day. His impression was that Hill was agonizing over the prospect of her allegations becoming public.\(^{158}\)

At 10:50 a.m., Hill called Totenberg and they spoke for 13 minutes. She does not recall herself whether she was returning Totenberg's call or following up from the prior evening. Hill says she again told Totenberg she would not cooperate unless Totenberg had a copy of the statement to the Judiciary Committee.\(^{159}\)

Although Totenberg will not answer questions about this conversation, Hill's version of this call is corroborated by a Saturday, October 5, call from Totenberg to Ricki Seidman. Totenberg reached Seidman at her Senate office late that morning. Totenberg said she had spoken with Hill, who was willing to answer questions but unwilling to provide her statement. Totenberg asked Seidman if she knew who had a copy. Seidman said she did not know who had it and, as far as she knew, only senators had seen it.\(^{160}\)

Seidman called Brudney at the Library of Congress immediately after she spoke to Totenberg. She told Brudney Totenberg had spoken to Hill and said Hill would answer questions but would not provide her affidavit. They discussed the fact that Totenberg was

\(^{154}\) Leahy Int.

\(^{155}\) Hill Int., April 22, 1992; Jarvis Int.

\(^{156}\) Hill Int., April 22, 1992.

\(^{157}\) Id.

\(^{158}\) Interview of Michael Middleton, April 30, 1992.

\(^{159}\) Hill Int., April 22, 1992.

\(^{160}\) Seidman Dep., p. 150. Lichtman remembers a similar call from Totenberg on Saturday. Lichtman Dep., p. 50. She told Neas of the calls at the same time. Neas Int.
moving toward the story. Seidman then remarked that she did not understand the significance of Hill’s statement and why Hill would not provide it. Brudney said her allegations contained a number of sensitive matters and related some of their substance. He made no reference to the unsigned Hill statement which he had in his possession. Seidman assumed his information came from his conversations with Hill.161

Brudney remembers Seidman saying that Totenberg was about to break the story. He does not recall Seidman saying Totenberg was looking for Hill’s statement. To answer Seidman’s questions regarding the specifics of the allegations, Brudney says he relied both on his notes of his first conversation with Hill and on his draft copy of her statement. He is not sure if he so advised Seidman. Brudney explains that he was carrying both documents in his briefcase because he did not want to leave them in his office.162

Hill spoke to Totenberg again at 2:26 p.m. The call lasted for 41 minutes and Hill recalls it being a return call to Totenberg. It was during this conversation that Totenberg said she had the affidavit. Hill told her to read it to her. Confronted with words from her affidavit, Hill agreed to cooperate and answered Totenberg’s questions.163

Hill spoke again with Totenberg later in the afternoon when Hill went to her office to work and was taped in a call placed by Totenberg. A portion of that tape was played on NPR’s broadcast the next morning.164

Totenberg called Seidman late in the day and reported she had the story and would run it the following day.165 She made a similar call to Lichtman.166

Late that afternoon, after leaving the Library of Congress, Brudney spoke to Johnson and told him that Totenberg was going with the story.167

Totenberg called the White House at approximately 5:30 p.m. for a reaction.168 The White House released a statement that evening. Totenberg’s calls to Senator Biden’s staff started around dinner time. She ultimately reached Peck late in the evening and juxtaposed Senator Simon’s mistaken comments with Peck’s statement that all Democratic members had been briefed on Hill’s allegations prior to the September 27 vote.169

V. ANALYSIS OF PRESS REPORTS

A. THE PHELPS ARTICLE

The initial disclosure was Phelps’s article, which went to the press at 8:31 p.m. on Saturday, October 5, 1991, for inclusion in the Sunday edition of Newsday.170 The story was released to the Los
An Oklahoma University law professor has recently told the FBI that she was sexually harassed by Supreme Court nominee Clarence Thomas while working for him at the Equal Employment Opportunity Commission.

The professor, Anita F. Hill, told the FBI that Thomas repeatedly discussed sexual matters with her in a suggestive way while she worked for the job discrimination monitoring agency in Washington, according to a source who has seen her statement to the FBI. Thomas was separated from his first wife at the time.

Hill confirmed yesterday that she had told agents she was harassed by Thomas, but declined to discuss with Newsday the details.

"He made suggestions to her about what kind of sex she engaged in, asking her in great detail about different forms of sex," said the source.

While Thomas implicitly pressured Hill to have sex with her, he never told her explicitly that she would lose her job if she did not, the source said.

Thomas could not be reached immediately for comment yesterday. White House spokesman Doug Davidson, asked about the law professor's statement to the FBI said he had no comment. He said he did not know whether White House officials had been informed of the woman's allegations by the FBI or the Justice Department.

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Sen. Paul Simon (D-Ill.), reached last night at a college reunion in Nebraska, called for a postponement of the Senate's scheduled vote Tuesday on Thomas's nomination.

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Simon said he and most other Members of the Senate Judiciary Committee were not aware of the allegations when they voted on the nomination, though he has since read the FBI report.

"I would say that it adds to the credibility concern," Simon said, referring to allegations that Thomas had tailored his testimony to suit the Committee. But he said he could not go into detail "It's difficult to discuss because I'm not able to discuss the FBI report," he said.

Hill apparently did not file a formal complaint at the time—the federal agency charged with investigating such complaints was the EEOC—but confided in a friend. The FBI has interviewed the unidentified friend who corroborated her account, the source said.

* * * * * * *

One senator, an opponent of Thomas who read the report and an accompanying statement by Hill, said he thought it could make a substantial difference when the
Senate votes on Thomas. A thin majority of Republicans and conservative Democrats have already indicated they plan to vote in favor of Thomas. He said that because of its confidentiality little could be done with the information because she had not come forward publicly.

A later Newsday edition carried an expanded version of the story which carried the text of a White House statement describing the FBI investigation as “full, thorough and expeditious” and reaffirming the President’s support for the nominee. The later story contained comments from Senators Hatch and Simpson, and stated that Senator Hatch “was furious that the report was made public.” The story also included comments by Hill made “last night”—referring to Saturday, October 5—on various subjects. 171 It quoted Hill as saying:

I really had no intention of going public to the press with this statement,” she said, adding that she did not want to discuss such intimate details in public. “I had really only wanted and only intended to speak to the committee. My efforts to do that were not followed through on as promised by the committee as far as I could tell.

In an interview with C-Span’s Brian Lamb, Phelps later said that Hill agreed to speak with him after “it became clear that the cat was out of the bag.” 172

B. ANALYSIS OF THE PHELPS ARTICLE

1. POSSESSION OF SENATE DOCUMENTS

It is clear from the text of his articles that Phelps did not have physical possession of the FBI report or the Hill statement. He did not purport to quote or summarize either document, and he did not report any of Hill’s more explicit allegations—as Totenberg did in her broadcast—and as he surely would have done if he had the FBI report or statement in his possession.

In public remarks to the Society of Professional Journalists on November 5, 1991, Phelps admitted he never had a copy of the FBI report and implied he knew of Hill’s statement but did not have it. His comments—the truth of which he affirmed during his deposition—are worth quoting at length:

I have always slightly resented the characterization of this story as a leak. Certainly, I got some last minute information that enabled me to go with the story. But I first heard Anita Hill’s name fairly early on and I’d been trying to get the story for several months before it finally occurred.

* * * * *

One thing that’s not been paid a lot of attention to is what was leaked, if anything. While the Republicans and some others talked about the leak of an FBI report, there

171 The full text of the story and the accompanying photograph and caption are contained in Exhibit 11.
172 See Ex. 12.
is nothing in the record that I know that indicates that the
FBI report was ever made available to the press. I'm ad-
vised by counsel not to say exactly what it is we had, but I
think if you look at both news reports, there's no sugges-
tion that the FBI report was ever made available.

There was an additional document, an affidavit that
Anita Hill gave to the Senate committee, that may or may
not have been made available, but that's a very different—
legally and perhaps ethically, that's a very different
affair.173

2. DISCLOSURES FROM SENATE DOCUMENTS

The information attributed to Phelps' "source" was:

(1) that "Hill told the FBI that Thomas repeatedly discussed
sexual matters with her in a suggestive way;"

(2) that Thomas "made suggestions to her about what kind of
sex she engaged in, asking her in great detail about different
forms of sex;"

(3) that "[w]hile Thomas implicitly pressured Hill to have sex
with her [sic], he never told her explicitly that she would lose
her job if she did not;"

(4) that the "FBI interviewed the unidentified friend who
corroborated her account."

The informant is described as "a source who has seen her [Hill's]
statement to the FBI." This language lends itself to two inter-
pretations which were brought to Phelps' attention in deposition
and which he refused to clarify. First, the language could refer to a
source who had seen the FBI's form FD-302 report of its interview
of Hill on September 23. Second, the language also could mean a
source who had seen Hill's statement to the Judiciary Committee
and knew a copy of that statement had been given to the FBI.

Phelps refused to identify "the source" for this information, and
no person has admitted he or she was Phelps' "source." However,
there are facts which can be stated.

The evidence indicates that Phelps' source was a person who had
seen Hill's statement but had not seen the FBI report. First, only
five members read the FBI report—Senators Biden, Thurmond,
DeConcini, Specter, and Simon. Phelps spoke only to Senator
Simon. Phelps himself, during deposition, confirmed the accuracy
of his quotation of Senator Simon in the article as telling Phelps:

It's difficult to discuss because I'm not able to discuss
the FBI report.174

We have no reason to doubt Phelps on this issue or to doubt Sen-
ator Simon's own testimony that he did not discuss the contents of
the FBI report with Phelps or anyone else.

Second, there is no evidence to suggest that Phelps spoke to any
other senator who had read the FBI report, and strong reason to
believe that he did not. For the most part, the members who had
read the FBI report were Thomas supporters with no interest in re-
vealing Hill's allegations. The only exception was Senator Biden,

173 See Ex. 18. Phelps testified that his remarks were accurate. Phelps Dep., pp. 30-34.
who voted against Thomas but clearly had no reason to disclose allegations which would subject him to the criticism he subsequently received.\textsuperscript{175}

Third, the specific disclosures of content attributed to “the source” do not closely compare with the content of the FBI report. At least one disclosure—the absence of any threat to fire Hill—is not found in the FBI report.

We find that Phelps’ unidentified source was a person who had seen Hill’s statement to the Senate.

A number of senators fall within this category but only Senator Simon spoke to Phelps. Simon denies he was the unidentified source. He spoke on the record to both Totenberg and Phelps, but limited his comments to procedural matters. He expressly refused to discuss the contents of the FBI report and we have no reason to believe he would then go off the record and discuss Hill’s statement.

The only staff persons who have admitted speaking with Phelps are Seidman, Chris Harvie, and Bill Corr. All of the available evidence indicates they had never seen Hill’s statement and therefore could not have been Phelps’ “source who had seen her statement * * *.”

The only evidence on identification of the “source” comes from Corr. He testified that he received a telephone call from Phelps on Saturday evening between 6 and 7 p.m. asking for Senator Metzenbaum’s comment on a story about sexual harassment allegations. The senator said he did not want to speak to Phelps but suggested Corr ask Phelps what he wanted to know. According to Corr, Phelps said in the second conversation that Phelps had spoken to Senators Hatch and Simpson about the allegations, and Senator Hatch’s response to him was that “Metzenbaum and Neas” did it. Corr testified that he then asked Phelps:

I said, do you believe, something to the effect, I can’t say these were my precise words, but do you believe what Hatch has told you to be true. He said, no, I know it’s not true, I know where I got my information.\textsuperscript{176}

Corr testified that he had a similar conversation with Phelps in January, 1992, when Phelps called to interview Corr for a book he is writing on the Thomas nomination:

I said I would be happy to see you as long as we don’t discuss anything involving Anita Hill. I said, if you are going to write a book though, and you are going to have a chapter about Anita Hill and you have any question about what role Metzenbaum had, would you please call us before you write it and give us a chance, if you have got it wrong, to tell you what is right.

He said that he didn’t have any question about our role, because he knew where he got his information and that as the conversation progressed, he made the statement that he had used one of the oldest tricks in the reporter’s book.

\textsuperscript{175} The same is true of senior staff for Senators Biden and Thurmond who saw the FBI report.
\textsuperscript{176} Corr. Dep., p. 125.
of calling someone and stating that you know something and having the other person, by responding, confirm that they knew it, and that he had done that in his conversations with Senator Hatch and Senator Simpson. I didn’t probe him further. \(^{177}\)

Phelps did call those senators on Saturday evening, and they did speak to him about Hill’s allegations. But, while it may be said they “confirmed” by protesting the leak, they were in no position to provide information about Hill’s allegations because neither had seen Hill’s statement or the FBI report prior to October 6. \(^{178}\) In the same sense, the White House “confirmed” the story by issuing its statement. We do not believe that Phelps’ source for the quoted remarks could have been a Republican.

We are unable to identify Phelps’ source.

C. THE TOTENBERG BROADCAST

Totenberg’s broadcast ran on NPR’s “Weekend Edition” program which aired at 9 a.m. on Sunday, October 6. \(^{179}\) It said in its most relevant part:

This is “Weekend Edition” I’m Liane Hansen.

A woman who served as personal assistant to Clarence Thomas for over two years has accused him of sexually harassing her. National Public Radio has learned that the woman brought her accusation to the Senate Judiciary Committee last month [September] but it was not investigated until the week of the Committee’s vote. Thomas’s nomination to the Supreme Court is scheduled for a vote in the full Senate Tuesday night, but some senators believe the vote should be delayed while the accusation is investigated further. NPR’s Nina Totenberg reports.

Nina Totenberg reporting:

In an affidavit filed with the Senate Judiciary Committee, law professor Anita Hill said she had much in common with Clarence Thomas and that she initially believed that common background was one of the reasons he hired her as his personal assistant 10 years ago.

Hill was raised in poverty on a farm in Oklahoma, she said, the youngest of 13 children with strict disciplinarian parents. Like Thomas, she graduated from Yale Law School and, after a brief stint in a law firm, was hired by Thomas as his personal assistant at the Department of Education in 1981.

According to Hill’s affidavit, Thomas soon began asking her out socially and refused to accept her explanation that she did not think it appropriate to go out with her boss. The relationship, she said, became even more strained when Thomas, in work situations, began to discuss sex. On those occasions, she said, Thomas would call her into his

\(^{177}\) Id. at 196–97.

\(^{178}\) Hatch Int.; Simpson Int

\(^{179}\) In the Washington area, “Weekend Edition” aired at 11 a.m.
office to discuss work or, if his schedule was full, would ask her to go to a government cafeteria for lunch to discuss work. 180

Totenberg's broadcast to this point constituted a thorough synopsis of the information contained in the first page of Hill's statement to the Judiciary Committee. This supports a conclusion that, as Totenberg implied during her broadcast, Totenberg had hard copy of Hill's statement to the Committee. The broadcast continued:

According to Hill's affidavit, Thomas, after a brief work discussion, would, quote, "turn conversation to discussions about his sexual interests. His conversations," she said, "were vivid. He spoke about acts he had seen in pornographic films involving such things as women having sex with animals and films involving group sex or rape scenes. He talked about pornographic materials depicting individuals with large penises or breasts involved in various sex acts."

This part of Totenberg's broadcast, which followed her synopsis of the first page of Hill's statement, is an accurate word-by-word quotation of the first full paragraph appearing on the second page of Hill's statement. This is further evidence that Totenberg had hard copy of Hill's statement to the Senate. The broadcast continued:

Hill said she repeatedly told Thomas she did not want to discuss those kinds of things but sensed that her apparent disgust only urged him on. "After some months," she said, "the conversations ended." Thomas had a girl friend, and she thought the episode was over. When Thomas became head of the EEOC, Hill said, she moved with him, but some months after she went to the EEOC, said Hill, Thomas resumed his advances. He never touched her, she acknowledged in an interview, and he never directly threatened her job. But, she said, she was 25, and she began to worry that she would soon suffer professionally if she did not submit.

This portion of Totenberg's broadcast, except where noted otherwise, again closely tracks Hill's statement to the Committee.

The broadcast then turned from the "affidavit" and presented portions of a tape-recorded conversation with Hill. There followed comments reported by Totenberg which presented an inaccurate picture of the FBI report.

Thomas, according to Senate sources, told the FBI he had asked Hill to go out with him, but when she declined, he said, he dropped the matter. According to sources who've seen the FBI report, nothing in it contradicted Hill's story except nominee Thomas, who denied any harassment.

180 See Ex. 14.
After further description of Anita Hill, a reference to Dean Swank, a response from the White House, and minor portions of a taped interview with Senator Simon, the following was broadcast:

HANSEN: Nina, we'd like you to stay with us for just a moment. You've asked a lot of questions, but your report raises a lot more. The first one is, did Anita Hill come to us with the story?
TOTENBERG: No, she didn't. I heard about it from a number of sources. I did reach her. She refused to talk to me at all until I obtained a copy of her affidavit, the affidavit that she submitted to the Judiciary Committee. She then confirmed its authenticity and agreed to talk.

D. ANALYSIS OF TOTENBERG BROADCAST

Totenberg's broadcast conveyed the impression that Totenberg possessed a copy of an "affidavit" which had been submitted to the Judiciary Committee by Hill and, through an anonymous source, also had information lifted from the FBI report.

1. THE FBI REPORT

Totenberg did not have hard copy of the FBI report. Totenberg swore at her deposition:

At no time did I receive a copy of any FBI report in whole or in part with respect to the Thomas nomination. 181

Contrary to the clear language of her broadcast, Totenberg also did not have access through a source to the contents of the FBI report.

In her broadcast, Totenberg said:

Thomas, according to Senate sources, told the FBI he had asked Hill to go out with him, but when she declined, he said, he dropped the matter. According to sources who've seen the FBI report, nothing in it contradicted Hill's story except nominee Thomas, who denied any harassment.

But, Totenberg swore at her deposition that the following written statement disseminated to NPR's listeners and written by William Buzenberg was accurate:

First, I'd like to correct some misinformation. National Public Radio did nothing illegal or unethical in its reporting on this story. Nor, contrary to a few published reports and statements from Capitol Hill, did NPR disclose or obtain the contents of any FBI report.

Buzenberg also was deposed. Like Totenberg, Buzenberg swore this disclaimer of disclosure was true and accurate. 182

Moreover, Totenberg's broadcast was inaccurate insofar as it purported to disclose the contents of the FBI report. Judge Thomas did

181 Totenberg Dep., p. 6.
not tell the FBI “he had asked Hill to go out with him, but when she declined he dropped the matter.” The FBI report reflects—and the interviewing agents confirm—that he unequivocally denied Hill’s allegations.

Further, and also contrary to Totenberg’s broadcast, evidence in the FBI report other than Judge Thomas’s denial contradicted Hill’s account. The FBI interviewed two women, Allyson Duncan and Nancy Fitch, who denied knowledge of any impropriety on Thomas’s part.

2. HILL’S STATEMENT

Totenberg did have hard copy of Hill’s statement. Her source could only have been a person within the Senate or Executive Branch, or Anita Hill herself, directly or indirectly.

3. ANITA HILL

Based upon the evidence, we find Totenberg’s source was a person within the Senate, and not Anita Hill. First, in her deposition, when reading from her statement prepared to be given under oath, and in the presence of her counsel, Totenberg said under oath:

I obtained the contents of the affidavit as a result of my unequivocal promise that I would not identify my source or sources.

* * * * * * * *

If you believe that Judge Thomas was a decent man, unfairly maligned by the charges leveled by Professor Hill, then he was perhaps the victim of a politically inspired leak. If you believe Professor Hill’s charges were accurate or even if they were initially or insufficiently investigated by the Senate, you may view the person or persons as whistle blowers.

Clearly, no promise of confidentiality was given by Totenberg to Hill. Hill was identified on the broadcast and interviewed. Nor can Hill properly be described as a “whistle blower,” or as a “leak,” terms reserved for insiders. Totenberg’s sworn statement essentially identifies her source as within Government. There is no evidence of any disclosure from the Executive Branch and, given its support for Judge Thomas, motive is totally lacking. The same cannot be said of the Senate.

Totenberg’s broadcast also tends to evidence that Hill was not Totenberg’s source. In response to a question as to whether Anita Hill came to NPR with the story, Totenberg said Hill had not. Totenberg’s conduct prior to her broadcast also evidences Hill was not her source. Totenberg had Hill’s statement well before her October 6 broadcast. Buzenberg, NPR’s Vice President, and Totenberg herself told Vanity Fair that Totenberg “had the affidavit five days before she spilled the beans.” Senator Simon and Dean Swank

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184 See Ex. 15.
both were under the impression that Totenberg had the affidavit when she called them on Friday, October 4. On Friday evening, October 4, Totenberg asked Senator Leahy to listen to what she described as an affidavit. Senator Leahy recognized what Totenberg read as resembling Hill’s statement. Finally, in the letter to NPR listeners previously quoted, NPR reported that its investigation “revealed” Hill’s affidavit before Hill was interviewed. Totenberg spoke with Hill for the first time on Thursday, October 3.

Totenberg’s conduct is inexplicable if Hill were the source of her own statement. Totenberg spoke with Hill on Thursday, October 3, twice on Friday, October 4, and three times on Saturday, October 5. It was not until Saturday afternoon that Totenberg confronted Hill with whatever was in Totenberg’s possession. The floor vote was scheduled for Tuesday, October 8. Totenberg knew a competitor, Phelps, also was tracking the story. If Hill provided Totenberg with her statement, Totenberg would have gone on the air well before Sunday, October 6.

It likewise makes no sense that Hill, had she provided her affidavit to Totenberg, would have waited for Totenberg to call, and then waited until Saturday afternoon to “authenticate” the document for Totenberg.

Totenberg’s delay also indicates she was not sure she had Hill’s actual statement. Indeed, reading under oath from her prepared statement and in the presence of her counsel, Totenberg described what she had as follows in words which evidence ambiguity. In her broadcast, Totenberg spoke of obtaining “a copy of her affidavit, the affidavit she submitted to the Judiciary Committee.” In deposition, Totenberg testified:

During the continuing process of covering the Thomas nomination, I obtained the contents of an affidavit filed by Professor Anita Hill with the Senate Judiciary Committee.

(Emphasis added)

That Totenberg had only “contents,” together with her delay, suggests Totenberg was not certain her document was genuine, as does her call to Senator Leahy on Friday evening when she asked him to listen to her read what she described as Hill’s affidavit.

Finally, we have found no evidence that, prior to October 6, 1991, Hill provided a copy of her statement to any person or organization other than the Judiciary Committee and Brudney.

Hill acknowledges having telecopied three copies of her statement to persons prior to October 6, 1991. All three fax transmissions have been documented. One was to the Judiciary Committee on September 23, 1991. A second was to the Judiciary Committee on September 25, 1991. And the third transmission was to James Brudney, also on September 25, 1991.

We first searched the records of all transmissions at the two machines used to send these copies of her statement to Brudney and the Judiciary Committee. No unexplained transmissions were found. Then, records for the entire months of September and October were searched for every telecopy machine available to Hill at

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186 Senator Leahy’s response to Totenberg was to call the affiant herself if she had questions about it. Leahy Int.
either the University of Oklahoma Law School, or the University Prevost’s Office where she worked. There are no unexplained transmissions by Hill at any of those machines.

We also searched records of the Federal Express overnight service utilized by the University of Oklahoma Law School to the remainder of the country for the entire month of September and the first week of October. None were found for Hill.

Finally, we have obtained Hill’s telephone records, as well as the telephone records for every telephone at the University of Oklahoma Law School. We have interviewed every person Hill called during this period who would have been in a position to speak with the press. All stated Hill did not send them a copy of the statement. There also is no evidence any of these persons spoke to the press.

We also deposed Totenberg and Phelps who refused to answer our questions.

We also spoke with persons who spoke with Hill after October 6, 1991 to see whether they knew of anyone who had obtained a copy of Hill’s statement prior to the Phelps article or the Totenberg broadcast. Other than those three copies which we have accounted for, no one has identified any other copy of the Hill statement.

There is simply no evidence that Hill provided her statement to anyone prior to October 6, 1991, other than to Brudney and the Judiciary Committee. Nor is that conclusion affected by Brudney’s sworn assertions that Hill told him that she had spoken with Totenberg on October 2, 1991.\textsuperscript{186}

The issue is not whether Hill spoke with Totenberg prior to October 6, 1991; Hill’s records confirm that she did and she does not dispute that she was in communication with Totenberg. That is a far cry from asserting that Hill provided her statement to Totenberg—a conclusion which is at odds with every shred of evidence available to us.

Every witness who had contact with Hill during the time leading up to the October 6 disclosures has told us that Hill had no desire to go public with her allegations and indeed feared that possibility. Although friends and supporters of Hill, these witnesses are themselves people of stature and position who would be unlikely to dissemble with such consistency and conviction.

It is probable that Hill was anxious and confused personally as Totenberg and Phelps importuned her prior to Saturday, October 5. But Charles Ogletree confirms Hill was fearful of publicity and sought his counsel. He advised Hill to refrain from any comment—and not be “bluffed”—unless the reporters proved conclusively that they had obtained her statement. His advice was to provide no details until then.

4. THE SENATE

Hill telefaxed two statements to the Judiciary Committee. Both were signed and dated. On September 25, she telefaxed a duplicate\textsuperscript{186} As we have noted, the hearsay remarks attributed to Lichtman in Corr’s September 26 notes may well refer to Ross’s suggestion of going to the press with a story which did not reveal Hill’s name. However, both Ross and Lichtman agree that the idea was discarded because of Hill’s insistence on confidentiality. Ross Int.; Lichtman Int.
statement to Brudney, at his request. It was unsigned and undated. It is necessary, therefore, to recite the evidence relevant to each.

a. Senator Biden’s Judiciary Committee Staff

Shortly before 9:00 a.m. on Monday, September 23, 1991, Hill advised Harriet Grant, chief counsel of the Nominations Unit of the Judiciary Committee, that she had prepared of a statement of her allegations against Judge Thomas that she would swear to and have notarized. Hill said she wanted the statement to be available to the members of the Committee and, “if necessary,” would submit to an interview with the FBI. At Grant’s request, Hill transmitted the statement to the Judiciary Committee at 12:19 p.m. Grant personally intercepted Hill’s statement at the facsimile machine and, with Jeffrey Peck, immediately xeroxed five copies of the document. She kept the original document and one copy of the document in her possession or in a safe in the Dirksen office of the Nominations Unit. Peck also retained one copy of the statement. Grant and Peck then provided copies of the statement to Ron Klain, Senator Biden’s chief counsel of the Committee, and Duke Short and Melissa Riley, of Senator Thurmond’s staff.

Klain testified that he made no copies of the statement he received from Grant, and either returned it to Grant or disposed of it immediately upon its receipt.

On September 25, 1991, Hill faxed a corrected statement to Grant. Grant took the statement from the fax machine and examined it for the minor typographical corrections. This statement was never copied, and the original was kept at all times in Grant’s safe.

No additional copies of Hill’s statement were made or provided to anyone else until September 27, 1991, when the statement dated September 23, 1991 was circulated at Senator Biden’s direction to all of the Democratic members of the Committee. Even then, only two other Biden staffers had access to the statement. Mark Schwartz was shown, but not provided, a copy by Grant. In addition, Tammy Fine, Peck’s executive assistant, was asked to circulate the statement before the commencement of the executive session and vote and retrieve the statement after the conclusion of the Committee vote. Because she did not have a security clearance and believed from Peck’s comments that clearance was required to read the document, Fine did not read the contents of the statement prior to its circulation or after its retrieval.

On September 27, once the decision was made to disseminate the statement, Peck asked Fine to make copies of Hill’s September 23 statement and put them into envelopes which contained each of the senators’ names and the designation “Personal and Confiden-
tial. For Senator’s Eyes Only.” Grant delivered envelopes to Senators Kennedy, Metzenbaum and Leahy, all of whom are officed in the Russell Building. Fine made the deliveries in the Hart and Dirksen Buildings to Senators Heflin, Kohl, Simon and DeConcini. All of the deliveries were made prior to the commencement of the Committee hearing at 10:05 a.m.

During the hearing, Senators DeConcini and Leahy returned their copies to Peck. Between 1:15 p.m. and 3:15 p.m., the remaining five statements were retrieved from the personal offices of the other Democratic senators.

At 3:35 p.m., Fine signed in at the Intelligence Committee to use its shredder. Fine removed the statements from their envelopes and separately shred each document. She signed out of the Intelligence Committee at 3:40 p.m.

b. Senator Thurmond’s Judiciary Committee staff

As mentioned above, copies of the statement of Anita Hill were delivered to Duke Short, Senator Thurmond’s chief of staff, and Melissa Riley, an investigator for the Judiciary Committee, on September 23, 1991. Short, in response to Peck’s request to initiate an FBI investigation into the allegations contained in the statement, made one copy of the statement for Acting Attorney General William Barr, and one copy for Steve Hart at the White House.

Short returned his remaining copy to Melissa Riley. Riley testified that she maintained a confidential file on the nominee, and that this file was kept in her office which is locked at all times. Riley also testified that she made a copy of Anita Hill’s statement for Terry Wooten, Senator Thurmond’s chief counsel on the Committee. Riley advised no one, other than Short or Wooten, of the contents of her confidential Thomas file.

Senator Thurmond was generally briefed on the contents of the statement, but was never provided with a copy of the statement. Terry Wooten testified he did not provide his copy of the statement to anyone and did not discuss the contents of the statement with anyone outside of Senator Thurmond’s office.

c. Senator DeConcini’s office

Fine delivered the envelope either to Nancy Suter, executive assistant, or Rachel Ruben, personal secretary, to Senator DeConcini’s office. Although neither recalls the delivery that day, one of them then handed the sealed envelope to Karen Robb, Senator DeConcini’s chief counsel of his Judiciary subcommittee.

Robb, who was aware of the senator’s briefing on the FBI report by Grant and Peck earlier that morning, contacted the Committee
to determine whether the contents of the envelope were the same materials reviewed by the senator earlier that morning. She was told that the envelope did not contain the same materials. Upon learning this, Robb kept the envelope but did not unseal it.\textsuperscript{207}

Robby immediately left for an Appropriations conference the senator was chairing in the Capitol. At approximately 11:00 a.m., she called the senator out of the conference so that he could deliver his statement on the Thomas nomination at the Judiciary Committee hearing.

After the senator made his statement and just prior to the vote itself, he joined Robb in the anteroom off the Russell Caucus Room. She handed him the still unopened envelope. The senator reviewed the statement, told Robb that it was the complainant’s affidavit, and gave it back to her in the envelope which the senator ressealed. Immediately after the committee vote, Robb saw Jeff Peck, who took the envelope from her.\textsuperscript{208}

Robby testified that she did not see the statement or affidavit of Anita Hill prior to the disclosures on October 6, 1991.\textsuperscript{209}

d. Senator Heflin’s office

Tammy Fine made the delivery to Senator Heflin’s office and, upon her arrival, was escorted into the senator’s office personally. She gave him the unopened envelope.\textsuperscript{210}

After the hearing, Senator Heflin returned the envelope to the Committee. No one, including the senator, recalls how he effected this delivery, but he stated under penalty of 18 U.S.C. 1001 that he neither made copies of the statement nor provided it to anyone.\textsuperscript{211}

e. Senator Kennedy’s office

Harriet Grant hand-delivered the sealed envelope containing the Hill statement to Jackie Agnolet, Senator Kennedy’s special assistant.\textsuperscript{212} After signing for the envelope, Agnolet returned to her office and placed the unopened envelope on Senator Kennedy’s desk.\textsuperscript{210}

Senator Kennedy, who arrived shortly thereafter, picked up the sealed envelope and took it with him to the hearing on the Thomas nomination.\textsuperscript{214}

Sometime after the hearing had concluded, Senator Kennedy placed the now opened envelope and a stack of other documents and notebooks on the ledge of Jeannie Kedas, his personal assistant. Kedas picked up the materials and asked Ranny Cooper, Senator Kennedy’s chief of staff, what should be done with the documents. Cooper removed the Judiciary Committee envelope and asked the senator if it could be returned to the Committee. After the senator said yes, Cooper instructed Kedas to seal up the envelope.

\textsuperscript{207} Robb Dep., pp. 8-10.
\textsuperscript{208} Robb Dep., pp. 9-12.
\textsuperscript{209} Robb Dep., pp. 13-14.
\textsuperscript{210} Fine Dep., p. 12.
\textsuperscript{211} Certification of Senator Heflin, sworn to on April 10, 1992.
\textsuperscript{212} Grant Dep., pp. 77-78; Deposition of Jacqueline Agnolet, April 8, 1992, pp. 6-7.
\textsuperscript{213} Agnolet Dep., p. 7.
\textsuperscript{214} Deposition of Frances Cooper, April 8, 1992, pp. 9, 14-15, 18-19.
lope and to contact the Committee for its retrieval. Kedas did so and, shortly thereafter, Peck came by the office to pick it up. 215

f. Senator Kohl’s office

Finkle delivered the envelope to Arlene Branca, Senator Kohl’s executive assistant. 216 Branca walked back to her office and placed the sealed envelope on the senator’s desk. Branca also advised Robert Seltzer, Senator Kohl’s legislative director, that an envelope from the Committee had been delivered. The senator had not yet arrived. 217

When the senator came in that morning, he read the statement and asked Seltzer to review it. After Seltzer had done so, he returned the statement to the senator. Seltzer left Senator Kohl’s office and, shortly thereafter, the senator left for the hearing. 218

During the hearing, Seltzer went into Senator Kohl’s office on another matter and noticed that the Committee envelope, with the statement inside of it, was on the senator’s desk. Seltzer placed the envelope in the senator’s top drawer of his desk. 219

After the Committee vote, Peck called Branca and told her that he would be coming by their office to retrieve the envelope. Branca then found the envelope, probably after Seltzer told her where he had placed it, and gave it to Peck. 220

In Senator Kohl’s office, only Branca and Seltzer knew that an envelope had been delivered that day. Both Branca and Seltzer have stated that they made no copies of the document in the envelope. 221 Branca further testified she never learned the contents of the envelope. 222 Seltzer testified he did not describe the contents of the statement to anyone. 223

g. Senator Leahy’s office

Harriet Grant hand carried the envelope to Senator Leahy’s office. 224 There, she handed it to Leah Gluskoter, Senator Leahy’s personal assistant, for delivery to the senator. Gluskoter took the envelope and told Ann Harkins, Senator Leahy’s chief counsel on his Judiciary subcommittee, that an envelope had arrived from Judiciary. Gluskoter did not open the envelope before giving it to Harkins. 225

Harkins carried the still unopened envelope to Senator Leahy, who was already at the hearing in the Russell Caucus Room. Senator Leahy opened the envelope, reviewed its contents, placed the document back in the envelope, and handed it to Peck who had walked over to talk to Harkins on a different matter. 226

215 Cooper Dep., pp. 10-11, 13, 18, 20; Deposition of Jeannie Kedas, April 8, 1992, pp. 11-15;
Agnesei Dep., pp. 11-12.
216 Finkle Dep., p. 15.
218 Deposition of Robert Seltzer, April 2, 1992, pp. 4-6.
219 Seltzer Dep., p. 7.
220 Branca Dep., pp. 9-10; Seltzer Dep., p. 8.
221 Seltzer Dep., p. 9; Branca Dep., p. 10-11.
222 Branca Dep., p. 10.
223 Seltzer Dep., p. 10.
224 Grant Dep., pp. 77-78.
225 Deposition of Leah Gluskoter, April 2, 1992, pp. 7-10; Harkins Dep., p. 6.
226 Harkins Dep., pp. 8-9.
Harkins testified that she neither saw the contents of the envelope nor had any opportunity to make a copy of its contents prior to its return to Peck.\textsuperscript{227}

\textit{h. Senator Metzenbaum’s office}

Jill DiNino, Senator Metzenbaum’s personal secretary, was handed the envelope by Harriet Grant. DiNino signed for the envelope in the Senator Metzenbaum’s front office and immediately gave the senator the unopened envelope upon her return to the office.

Senator Metzenbaum reviewed the statement alone in his office prior to the Committee hearing and vote, and then resealed the envelope and returned it to DiNino, instructing her to retain it. DiNino placed the envelope, without ever reviewing its contents, in her “to file” bin on top of her file cabinet. DiNino testified that no one looked at the contents of her filing bin, and that she did not leave her desk until the envelope had been retrieved. DiNino testified that she did not make any copies of the document.\textsuperscript{229}

After the committee vote, Peck picked up the envelope from DiNino. Sometime thereafter, Senator Metzenbaum asked DiNino for the document he had given her that morning. When she told him she had returned it to Judiciary, he expressed some irritation that she acted without advising him first. DiNino offered to call the Committee to retrieve the document, but the senator said that would not be necessary.\textsuperscript{231}

\textit{i. Senator Simon’s office}

At Senator Simon’s office, Fine asked for Kathleen Donohue, the senator’s scheduler. Donohue signed for the envelope and placed it unopened on her desk for later delivery to the senator.\textsuperscript{233}

After the conclusion of the Committee vote, between 2:00 p.m. and 2:30 p.m., Peck spoke to Jackie Williams, Senator Simon’s personal secretary, and told her that he would be coming by to pick up the envelope delivered earlier that day. Williams, who knew nothing of the delivery, then attempted to locate the envelope.\textsuperscript{235}

After speaking with the receptionist, Williams learned that a Judiciary Committee envelope earlier had been accepted by Donohue. Williams asked Donohue for the envelope, which was then given to her unopened. Immediately thereafter, Williams provided the sealed envelope to Senator Simon.\textsuperscript{236}

Within 10 to 15 minutes, the senator gave the opened envelope to Williams and instructed her to return it to the Judiciary Committee. Williams is generally authorized by the senator to review all documents sent to his attention; she read the statement before she

\textsuperscript{227} Harkins Dep., pp. 7, 8, 11.
\textsuperscript{228} Grant Dep., pp. 77-78.
\textsuperscript{229} Deposition of Jill DiNino, April 21, 1992, pp. 10-16.
\textsuperscript{230} Peck Dep., pp. 79-80.
\textsuperscript{232} Fine Dep., p. 16.
\textsuperscript{233} Deposition of Kathleen Crowell Donohue, April 8, 1992, pp. 6, 8.
\textsuperscript{234} Peck Dep., pp. 51-52.
\textsuperscript{235} Deposition of Jacqueline M. Williams, April 8, 1992, pp. 9-10.
\textsuperscript{236} Williams Dep., pp. 10-11.
contacted Peck. At approximately 3:00 p.m., Tammy Fine went to Senator Simon's office to retrieve the envelope.

Besides the senator, only Williams had access to the statement. Williams testified that she made no copies of the statement; however, she acknowledged discussing the general contents of the statement with her mother and with a former Simon staffer prior to October 6, 1991. Based on our interviews with Williams's mother and friend—both of whom live in Illinois—we are satisfied that her disclosure played no part in the publication of the news reports on October 6, 1991.

* * * * *

We cannot ignore the possibility that a copy of the statement was made in a member's office before it was retrieved by Senator Biden's staff after the Committee vote. There is no evidence that this was done.

5. BRUDNEY

Brudney called Hill early on Wednesday, September 25, and requested a written description of her allegations for a memorandum on sexual harassment he was preparing for Senator Metzenbaum. He denies asking specifically for the statement, although he assumed what he later received was a draft of the statement sent to the Committee. According to Hill, he did ask for the statement and questioned Brudney about why he needed it.

The unsigned and undated statement was faxed to the Labor Subcommittee office shortly after noon. Brudney completed his memorandum in early evening and delivered it to Johnson and Corr. He offers no explanation for why he retained his copy of Hill's statement—obviously a sensitive document—after its purpose had been exhausted with the completion of his memorandum on sexual harassment on Wednesday, September 25.

He testified that he made no copies, showed it to no one, and kept it in his possession or locked briefcase until Monday, October 7, the day after the Totenberg and Phelps reports. On that Monday, Senator Metzenbaum's administrative assistant, Joel Johnson, asked Brudney whether he still had the fax from Hill. At Johnson's request, Brudney gave it to him. Johnson threw away the fax before leaving the office that evening.

Johnson did not conceal his conduct. Prior to the hearings, on Tuesday, October 8, he advised Senator Metzenbaum that Brudney had received a copy of Hill's statement during the week prior to the Committee vote and kept it until Monday, October 7, when Johnson took and discarded it.

An unsigned, undated written statement more closely resembles the "contents" of an affidavit of what Totenberg believed was an affidavit than does the same statement which is signed and dated.

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338 Fine Dep., pp. 96-97.
339 Williams Dep., pp. 16, 19-22.
340 Brudney Dep., pp. 66-68, 130.
342 Brudney Dep., pp. 132-34; Johnson Dep., pp. 92-94.
343 Johnson Dep., pp. 92; Metzenbaum Statement, para. 9.
but is not notarized. However, Brudney denies he gave a copy of his document to anyone. For the most part, Brudney maintained Hill's confidentiality and acted in a circumspect manner—even to the point of not mentioning her name in his initial briefing of Senator Metzenbaum. We must also consider the risk to which Brudney would expose himself in disseminating his copy of Hill's statement. His name already was implicated in the Hill matter by reason of its mention in the FBI report, a fact which had angered Senator Metzenbaum, a long-standing opponent of Judge Thomas. He also risked subjecting Hill to the public exposure which Hill did not desire. Finally, we have no evidence of communication between Brudney and Totenberg or any other journalist.

VI. OTHER UNAUTHORIZED DISCLOSURES OF SENATE DOCUMENTS

During the debate on S. Res. 202, Senator Biden engaged in the following colloquy with Senator Mitchell:

Mr. BIDEN. * * * It is my understanding that the resolution authorizes an investigation of all unauthorized disclosures—violation of Senate rules or Federal law—relating to the Senate's consideration of the Thomas nomination. This would include matters beyond the disclosure of Professor Hill's charges, as I understand it.

For example, the disclosure of the committee's confidential document request to Judge Thomas; any unauthorized release of confidential committee staff interviews; and any unauthorized publication of confidential investigative reports would all be within the scope of the investigation.

That is my understanding of the majority leader's intention with respect to this resolution, and I applaud it.

Is that correct?

Mr. MITCHELL. Yes, the Senator is correct.244

Although the Hill matter was recognized as of primary importance and therefore consumed most of our resources, we did question witnesses in both the Senate and the Executive Branch concerning their knowledge of other unauthorized disclosures. Three additional potential unauthorized disclosures were identified to us:

(1) the disclosure in the Wall Street Journal of excerpts of the Judiciary Committee's confidential document request issued to Clarence Thomas;

(2) the press reports of the contents of the deposition of Angela Wright; and

(3) the public disclosure that Brudney's name was mentioned in the FBI report.

A. THE COMMITTEE'S DOCUMENT REQUEST

On July 2, 1991, immediately following Thomas's nomination to the Supreme Court, the Wall Street Journal reprinted the entire document request Thomas received from the Senate Judiciary Committee when he was nominated to the U.S. Court of Appeals in

Washington, D.C. On September 5, 1991, the Wall Street Journal printed excerpts of the document request Clarence Thomas received from the Judiciary Committee in connection with his Supreme Court nomination. On the same day, in an editorial entitled "Thomas in the Coliseum," the Wall Street Journal commented:

The Senators' latest "Document Request," is an unprecedented fishing expedition for some misstep somewhere along the way in Judge Thomas's career. (The last time we printed one of these outrageous requests, parts of the Washington press corps demanded a Justice Department investigation of the "leak," so we repeat our standard explanation: The source was not the nominee, but we invite any nominee who must go before Congress's investigators to send us similar questionnaires.)

The request is also testimony to Judge Thomas' broad qualifications for the job: complying with the request consumed much of the summer for his former colleagues in the offices of the Missouri Attorney General, Senator Jack Danforth, the Education Department, the Equal Employment Opportunity Commission and the federal appeals court in Washington where he sits.

At the EEOC alone, 12 lawyers spent approximately 30 days fulfilling the Senate's massive request for documents

The Wall Street Journal editorial illustrates the enormity of the task of uncovering this particular "leak." Identifying the "source"—if, indeed, there was a single source—of the disclosure of the document request is difficult, if not impossible, because the Administration necessarily notified the agencies and government offices for whom Judge Thomas had worked in order to respond to the requests. Moreover, within each office, a number of individuals were charged with the responsibility to gather the documents for production to the Senate. In short, there was a substantial universe of individuals who had both access to the document request and a motive to provide it to the Wall Street Journal.

We did question individuals in the Department of Justice and the White House who worked on the Thomas nomination. They strenuously denied any role in leaking the document request and maintained the leak was counterproductive to their efforts to win Committee's support for Judge Thomas. We uncovered no evidence contradicting their statements to us.

B. THE DEPOSITION OF ANGELA WRIGHT

On Thursday, October 10, 1991, in preparation for the second round of hearings pertaining to the allegations of Anita Hill,
telephonic deposition of Angela Denise Wright was taken by staff representatives from the offices of Senators Biden, Leahy, Heflin, Thurmond, Hatch and Specter. The deposition commenced at 10:43 a.m. and concluded at 12:35 p.m. Wright’s deposition was taken because she had worked with Thomas at the EEOC and allegedly had experienced verbal harassment by Thomas similar to that complained of by Anita Hill.

The transcript of the deposition, which was made available to the Committee before 5:00 p.m. on the same day, was treated as “committee confidential” work product. Thus, the transcript could not be released to anyone outside of the Committee until a decision was made by Senator Biden to remove the confidential designation. In fact, the confidential designation was not lifted until approximately midnight on October 13 when Senator Biden decided to append the deposition transcript to the hearing record. Although it is not clear whether Committee rules or customs prohibit the disclosure of the contents—as opposed to release of the transcript—of the Wright deposition, the disclosure of the fact of the deposition clearly was public knowledge.

On the evening of October 10—the day of the deposition—the Associated Press reported that the White House had issued the following statement:

The White House has been notified by the Judiciary Committee staff that they intend to call another witness to testify against Judge Thomas.***

There was no indication in the article that the White House had seen or had been provided with a copy of the transcript of the deposition.

On October 11, 1991, two articles appeared in the Charlotte Observer, the newspaper where Wright was employed. Those articles contained quotes from an interview of Wright during which she related some of the testimony she had given to the Committee. Again, there was nothing in the articles suggesting that the White House had been given the transcript of the deposition.****

The Washington Times similarly reported that a surprise witness had been announced late the previous evening at a caucus of Republican members of the Judiciary Committee. The article went on to state that Capitol Hill sources said Republican backers of Thomas were concerned by the surprise announcement of a second witness, but that other Republican sources indicated the testimony could be overcome. A senior Bush administration official predicted that the Democratic “ambush” would fail. The same official also stated that Wright’s testimony would not be a “smoking gun” which would torpedo Thomas’s nomination.*****

We are unable to conclude that such disclosures were unauthorized. First, Wright herself did not request confidentiality for her deposition and spoke to the media about her experiences with Thomas as reported to the Committee. Second, the fact of the depo-

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*** Interview of Cynthia Hogan, March 20, 1992.
**** See Ex. 10.
***** See Ex. 20.
****** See Ex. 22.
C. REFERENCES TO JAMES BRUDNEY

In an editorial dated October 8, 1991 and titled "Bork Got Off Easy," the Wall Street Journal reported:

We understand that the FBI report refers to a James Brudney, who attended Yale Law School with Ms. Hill and is now a top Labor Committee aide to Senator Metzenbaum. This reference to Brudney appears to have been the first time Brudney was identified in the press as having been mentioned in the FBI report.

Notwithstanding the insider's tone of the editorial—"We understand"—Brudney's identity was readily identifiable from the floor debate on October 7, 1991. During the debate, Senator Metzenbaum stated:

[On September 9, James Brudney, the chief counsel of my Labor Subcommittee, received a message that Anita Hill, who Mr. Brudney knew from having attended Yale Law School with her, wished to speak with him about the Thomas nomination. In response, Mr. Brudney contacted Professor Hill on September 10, and at that time, Ms. Hill first made the allegations against Mr. Thomas. After discussing it with me, the following morning, on September 11, he having talked with her on the night of September 10, I directed my staff to turn the report of the allegation over to the staff of the full committee in accordance with normal committee procedures.

At the conclusion of Senator Metzenbaum's statement, Senator Simpson addressed the Senate, saying:

Mr. President, the FBI was given this charge to perform by the committee when Ms. Hill came forward, and they did so. And the dates of the information in the FBI file are clear, and there were many employees who were interviewed. The principals were interviewed; Mr. Thomas was interviewed; Ms. Hill was interviewed; an associate of hers was interviewed; a law school classmate was interviewed; and other people were interviewed. It was a case, as I believe it was reported, and it is certainly not my language,
that it represented basically “one’s word against another’s word,” and so nothing came of it. That is not my language, that is what was reported as the assessment of the FBI report.

But in the FBI report, there was a mention of the name of a man who is on the staff of the Senator from Ohio as the individual who sought out Ms. Hill, and who had evidently been in school with Ms. Hill. That is in the file. And I think the Senator has addressed that in saying that he had a member of his staff, who was not part of the Judiciary Committee staff, making those inquiries. They were made, and we know that took place.

During our investigation, a number of witnesses candidly acknowledged that references were made to the FBI report which, in less heated circumstances, would not have been sanctioned under the agreement between the Committee and the White House. This was apparent from the public statements of senators at the October 11-13 hearings, and requires no additional documentation.

VII. ETHICS COMMITTEE INVESTIGATION

On October 13, 1989, Common Cause filed a complaint with the Select Committee on Ethics (“Ethics Committee”) alleging improper conduct on the part of Senators Cranston, DeConcini, Glenn, McCain and Riegle. The essence of those allegations was that the five senators, purportedly because of Charles Keating’s direct and indirect political contributions, had attempted to intervene on Keating’s behalf with federal regulators engaged in an investigation of Keating and various Keating-controlled entities.

The allegations raised issues of great difficulty and of partisan interest. Keating was a major figure in the savings and loan industry which had just become the subject of enormously costly federal bailout legislation. Blame for the industry’s collapse had become a political issue.

The Ethics Committee inquiry into Keating’s association with the five senators began in November, 1989 and terminated two years later, in November 1991. The Ethics Committee inquiry was permeated by leaks of committee sensitive information and documents. Before the ultimate hearing even began, the Committee authorized an investigation by the GAO. Even this decision was described in the press before a public announcement.

GAO was unable, during a year of diligent investigation, to identify the source of any unauthorized disclosure. Our efforts also have been essentially unsuccessful. There follows a narrative of the repeated disclosures, together with whatever evidence of sources we have been able to uncover. Even some of that evidence is less than reliable.

We reach no conclusions. Inferences based upon possible motives are always evidentiary, but surely are insufficient to fix blame. It would, in our view, serve this institution best to put the matter behind us.

Ironically, and perhaps most importantly, the disclosures, in our view, resulted in large part because of the Committee’s proper concern for the due process rights of the five senators under investigation. Considerable efforts were made to assure that each of these senators was advised of his status and the evidence upon which Special Counsel was relying. This may have allowed leaks to occur by placing material in the hands of persons intent upon publicizing such matters or, alternatively, by providing those already having possession of such information or materials the ability to point blame elsewhere.

Yet we find no fault with the Committee’s procedures. Fairness was essential to the inquiry, and the Committee deserves praise for the pursuit of fairness at what may well have been its own reputational expense.

In this sense, the Senate may benefit in the future from this experience. Because it demonstrates the tension which exists between fairness and confidentiality, it should serve as a case study for the development of procedures designed to satisfy both needs.

A. The Ethics Committee

Composed of three Democrats and three Republicans, the Ethics Committee is charged with responsibility for reviewing the ethical conduct of all senators. Throughout the period relevant to the Keating inquiry, the chairman of the Committee was Senator Heflin, and the vice-chairman was Senator Rudman. The Democratic members were Senators Pryor and Sanford; the Republicans were Senators Helms and Lott.

The Ethics Committee staff is a non-partisan staff. The senior staff included Wilson R. Abney, the staff director and principal counsel, and Victor Baird, Karen Bovard, and David Apol, staff counsel.

B. The Committee Procedures

As a general matter, the Ethics Committee undertakes a preliminary inquiry upon receiving a complaint. Its purpose is to establish whether there exists “independent credible evidence that tends to corroboreate the information received and may also include discussions or correspondence with the complainant, if any and the respondent, if any.” 257 After that inquiry is completed, the chairman and vice-chairman receive a full report of the Committee’s findings.

If it is determined that there is “reason to believe on the basis of the information before the Committee that the improper conduct or violation may have occurred” and is within the jurisdiction of the Committee, the matter may move to the next stage, an initial review. 258 The purpose of the initial review is to determine “whether there is substantial credible evidence which provides substantial cause for the Committee to conclude that a violation within the jurisdiction of the Committee has occurred.” 259 The

257 Ethics Rule 3(c)(3).
258 Ethics Rule 3(d)(1)(B).
259 Ethics Rule 4(b)(3).
Committee may then move to formal adjudicatory hearings in public or executive session.

However, in this matter, in light of the complexity and political significance of the investigation, the Committee retained an outside lawyer, Robert Bennett, as special counsel on November 17, 1989. Bennett conducted an investigation and, on September 10, 1990, provided the Committee with written recommendations. On October 23, 1990, the Committee decided that it would hold public fact-finding hearings involving all five senators. The hearings were televised and received substantial public attention. The Committee issued a report on November 20, 1991.

Bennett used the staff of his law firm, Dunnells, Duvall, Bennett & Porter, until he left to join Skadden, Arps, Slate, Meagher & Flom in April, 1990. During the relevant time period, the investigation and work by Bennett was conducted at Skadden’s offices.

C. PRESS COVERAGE OF THE INQUIRY

As early as September, 1989, there was substantial press coverage of the relationship of the five senators to Keating. These articles undoubtedly contributed to the filing of the Complaint by Common Cause. As the Ethics Committee was eventually to write when it issued its final report on November 20, 1991:

Allegations involving Senators Cranston, DeConcini, Glenn, McCain and Riegle first were brought to the Committee’s attention in September 1989 with the receipt of numerous complaints based on newspaper accounts. These accounts focused on two meetings held in April 1987 between Federal Home Loan Bank Board ("FHLBB") officials and the Senators to discuss Lincoln Savings & Loan Association ("Lincoln"), and on the fact that Lincoln’s owner, Charles H. Keating Jr., had arranged for substantial sums to be contributed to campaign committees or other organizations closely affiliated with the Senators.269

Within days of the Common Cause complaint, on October 16, 1989, Senator McCain held a press conference in Arizona. During that press conference he asserted that, while he had attended meetings in order to determine whether Charles Keating and his company, American Continental, had been treated fairly, he never attempted to exercise improper influence or negotiate on behalf of Keating. Senator McCain offered no suggestion that any other senator had acted improperly, but instead pointed out that “[i]t was a case that several U.S. Senators [found] plausible enough to look into.” 261

The next day, on October 17, 1989, the Arizona Republic ran two stories about Keating. It contained one article discussing McCain’s press conference and McCain’s admission that while he may have “made poor judgments” in agreeing to meetings on Keating’s behalf, he had never negotiated for Keating. This was to become

269
Investigation of Senator Alan Cranston, Report of the Select Committee on Ethics, United States Senate, November 20, 1991 ("Cranston Report").

261
McCain’s defense to the charges that he improperly assisted Keating and was reiterated by him throughout the proceedings. The second article ran on the same page and conveyed a different message. Under the headline “DeConcini Staffer’s Memo Bared,” it discussed in detail a memorandum by a DeConcini staffer Laurie Sedlmayr. In contrast to McCain’s statement that he had not negotiated on Keating’s behalf, the Sedlmayr memo described “[w]hat American Continental wants from [regulator] Gray for concessions.” The article also went on to discuss how the memo “backs McCain’s version that Keating did in fact ask for improper assistance in dealing with Gray and others.” The Sedlmayr memo had come to the press from Senator McCain’s office, and the juxtaposition of the two articles is disturbing.

D. SECRECY OF COMMITTEE DELIBERATIONS AND PROCEEDINGS

The inquiry formally began on December 21, 1989, when the Committee voted unanimously to conduct a preliminary inquiry into the allegations. Special Counsel’s investigation, and the deliberations of the Ethics Committee, were understood to be confidential unless and until treated otherwise, much like a grand jury charged with investigating criminal conduct. Rule 1(i), entitled “Secrecy of Executive Testimony and Action and of Complaint Proceedings,” applies to all such investigations. It states:

(1) All testimony and action taken in executive session shall be kept secret and shall not be released outside the Committee to any individual or group, whether governmental or private, without the approval of a majority of the Committee.

(2) All testimony and action relating to a sworn complaint shall be kept secret and shall not be released by the Committee to any individual or group, whether governmental or private, except the respondent, without the approval of a majority of the Committee, until such time as a report to the Senate is required under Senate Resolution, 338, 88th Congress, as amended, or unless otherwise permitted under these Rules.

Further, the Ethics Committee Rules contain a broad definition of material designated as “committee sensitive” which cannot be divulged without express approval. Ethics Committee Rule 9(d)(1) expressly requires that matters presented to it be maintained in a confidential fashion. It provides, in pertinent part, that “no member of the Select Committee on Ethics, its staff, or any person engaged by contract or otherwise to perform services for the Select Committee on Ethics shall release * * *", reveal by writing, work, conduct, or disclose * *", any * * * Committee Sensitive information, document or material.* * *"

Ethics Rule 9(d)(1) does not, by its terms, apply to non-Committee members. However, where non-members obtain access to committee sensitive materials, their conduct is governed by Rule 9(c)(3),

262 See Ex. 24.
263 Arizona Republic, Stanton, October 17, 1989. See Ex. 25.
264 Cranston Report at 2.
which requires that such persons refrain from disclosing such material or information without Committee authorization.

E. Discovery and Investigation

During the spring of 1990, each of the five senators under investigation appeared before the Committee, answered questions and produced documents to Bennett. During the discovery phase of the investigation, no committee sensitive materials appeared in the press.

F. Bennett’s Preliminary Views

Early in his investigation, Bennett began to form the view that Senators McCain and Glenn had not committed any violation of Senate Rules. On April 19, 1990, during executive session, Bennett asked his preliminary view of the evidence to that date. He indicated that grounds existed to continue the inquiry as to Senators Cranston, DeConcini, and Riegle, all Democrats, but not as to Senator Glenn, a Democrat, and Senator McCain, the only Republican member accused of improper conduct on Keating’s behalf.

In executive session on June 6, 1990, Bennett again was asked his views. Bennett said while he had a lot more work to do, if he were “making [his] cut [that day], * * * [he] would cut Senator McCain and Senator Glenn * * *.” 265 Bennett explained that whether it was “stupid political judgment” [for McCain and Glenn] to attend meetings to discuss Keating’s plight, “he was “not terribly offended by attendance at these meetings. * * *”. 267 Bennett went on to explain his views regarding the three remaining senators. He said he was “most troubled by Senator Cranston.” * * *” and said DeConcini was “different from Cranston.” * * *” 268 And while troubled about Riegle, Bennett confessed he “would have a very difficult time explaining to you why I want Senator Riegle in that hearing.” 269 Bennett promised he would supply a report to the Committee “sometime in August with [his] recommendations as to who [the Committee] should cut, how many [the Committee] should cut,” and a recommendation as to whether to have a hearing. 270

G. The July 12 Article

On July 12, 1990, an article by Paul Rodriguez, a reporter for the Washington Times, disclosed Bennett’s preliminary views of the evidence. 271 Rodriguez’s article was Headlined: “GLENN, MCCAIN LIKELY TO BE CLEARED BY FALL.”

The Rodriguez article accurately predicted that Bennett would not meet his expected completion date of August, as promised to the Executive Committee in June, 1990, and reported—correctly—

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265 Interview of Steve Gordon, April 9, 1992.
266 Id.
267 Id. at 66.
268 Id. at 70.
269 Id.
that Bennett would report in “early September” to the Committee. Rodriguez also accurately described Bennett’s thinking as expressed to the Ethics Committee on June 6:

The Keating Five is expected to become the Keating Three by the end of the summer, according to sources close to the Senate Ethics Committee.

The sources said that based on the investigation to date of the five Senators’ ties to Phoenix millionaire Charles H. Keating, owner of a failed savings and loan, the Committee’s Special Counsel will recommend dropping further inquiries of Sen. John Glenn, Ohio Democrat, and Sen. John McCain, Arizona Republican.

“I expect the Special Counsel [Robert Bennett] will report to the Committee in early September on the progress of the Keating investigation, and at that time I think he’ll tell the members there is insufficient evidence to continue any investigation of Glenn and McCain,” said one Senate source. At the same time, said another source close to the probe, the panel will be presented with a “fair amount of dirt” on at least one of the remaining Senators and “substantial questions involving poor judgment” by another.

Bennett’s preliminary views were again reported in the August 13, 1990 issue of Newsweek. 272 Under the headline “THEN THERE WERE THREE,” Newsweek reported:

Republican National Committee spokesman Charles Black even talks about the “Keating Three,” anticipating the exoneration of McCain, the only Republican in the group. The GOP could then use the Keating case against the Democrats.

Black has told us that his statement was partisan and intended to deflect criticism of the S & L crisis from the Republican administration. When interviewed during our investigation, Black could not place the source of his information or his use of the phrase “The Keating Three.” However, when shown the Rodriguez article, he opined the basis for his comments and his use of that phrase might well have come from the Rodriguez article. 273

H. THE BENNETT RECOMMENDATION

Bennett’s 345-page written report was delivered to the Ethics Committee on September 10, 1991. It was to be kept confidential under the Committee’s rules. The chairman and vice-chair advised all Committee members and staff:

Any * * * unauthorized release or disclosure [of the Bennett recommendations] is a violation of Committee Regulations, would seriously impair the Committee’s ability to perform its duties, and would be improper conduct re-

272 Newsweek, August 13, 1990. See Ex. 27.
273 Interview of Charles Black, April 6, 1992.
fecting upon the Senate and tending to bring the Senate into dishonor and disrepute.\textsuperscript{274}

The Bennett report recommended continued investigation of Senators Cranston, DeConcini, and Riegle, and the exoneration of Senators Glenn and McCain. Just nine days later, on September 19th, Richard Berke of the New York Times reported that Bennett had filed his report, but did not disclose Bennett’s recommendations that Senators Glenn and McCain be dropped.\textsuperscript{275}

Senator McCain made increasingly vocal demands that Bennett release his report to the public. On September 24, 1990, McCain’s counsel, John Dowd, wrote to the Committee complaining that the “failure to resolve this case now because of the activities of others would be a grave injustice to Senator McCain, his family and the people of Arizona.”\textsuperscript{276} Dowd demanded “[r]elease of Mr. Bennett’s report to the public this week.”\textsuperscript{277}

At the executive session on September 27, 1990, Bennett argued within the Committee that at least as to Senators Cranston, Riegle and DeConcini, the Committee had no choice but to proceed to a public hearing. Bennett explained that the Committee would be paying an “enormous price” by avoiding a hearing because much of the information that had been given to counsel would, in all likelihood, ultimately be “leaked” to the press.\textsuperscript{278}

Also on September 27, 1990, the Committee agreed to invite all five senators to appear in executive session separately to answer questions. Dowd wrote the Committee the next day, on September 28, 1990, and asked that his upcoming “meeting with the Committee be open to the public and not in Executive Session.”\textsuperscript{279} Dowd wrote: “Senator McCain renews his request that [the Committee] release Mr. Bennett’s report to the public and that you resolve his case on October 4, 1990.”

The next day, an article appeared, also by Berke of the New York Times.\textsuperscript{280} It was remarkably specific. It was headlined:

ETHICS COMMITTEE URGED TO CLEAR 2 SENATORS IN ITS S&L INQUIRY

Evidence is inadequate on Glenn and McCain, Special Counsel says.

The first paragraph of the Berke article reported that Bennett had recommended that the Ethics Committee clear two of the five senators under investigation—“Congressional officials said today.”

The political implications were not ignored. Berke wrote:

\textsuperscript{274} Memorandum from Senators Heflin and Rudman to Committee Members and Employees, September 10, 1990.
\textsuperscript{276} Dowd Letter to Senators Heflin and Rudman, September 24, 1990.
\textsuperscript{277} Id. During our investigation, Dowd denied that when he wrote the letter he had any knowledge from Bennett that Bennett had recommended dropping further proceedings against either Glenn or McCain. Dowd Deposition, April 1, 1992, pp. 25-28.
\textsuperscript{278} September 27, 1990 Exec. Session at 33.
\textsuperscript{279} Dowd Letter to Senators Heflin and Rudman, September 28, 1990.
In a confidential report submitted to the Committee on September 10, the Special Counsel, Robert S. Bennett, concluded that there was not adequate evidence to merit a full-scale investigation of John Glenn, an Ohio Democrat, and John McCain, an Arizona Republican, several officials said.

If Mr. McCain is dropped from the investigation, the political implications could be significant. He is the only Republican under scrutiny, and Republicans could portray the scandal as a Democratic one.

There is disagreement among the panel members on whether to accept Mr. Bennett’s recommendation, according to the officials, who said this was holding up a vote on the matter. The panel has met at least three times since Mr. Bennett made his recommendation more than a week ago. The last meeting was on Thursday.281

The political implications of Bennett’s supposedly confidential recommendations were also noted in the Wall Street Journal on October 1, 1990:

If the panel votes to clear Sens. Glenn and McCain, only Democratic senators would be left to face what could be politically devastating public hearings into charges of influence peddling on behalf of Mr. Keating. With the S&L scandal becoming a key issue in the November elections, any move to clear Mr. McCain now would give the GOP the potential to portray the Keating ethics case as a Democratic scandal.282

I. THE DISSEMINATION OF DOCUMENTS

At the start of the investigation, Bennett had obtained thousands of pages of documents bearing upon the allegations against each of the five senators. These documents were maintained, first, by a paralegal at Dunnells, Duvall and, after April, 1990, by a paralegal employed by Skadden Arps.

After Bennett left Dunnells, Duvall, he took the single set of documents with him to the Skadden offices. That set was maintained at the Skadden offices in locked cabinets.283 Only the paralegal and a senior associate regularly had access to the documents.284 When other attorneys assigned to the case requested documents, the original document was taken from the file, and then returned after the document had been reviewed.

Prior to transmittal of his report, on August 31, 1990, the Committee received all relevant exhibits. Bennett sent 15 boxes of material to the Ethics Committee staff. Each box contained one complete set of all deposition transcripts and deposition exhibits of each senator.285 Two copies of each set of materials, together with

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283 Interview of Wendy Greve, April 15, 1992.
284 Id.
two copies of Bennett’s written recommendations, were distributed to each member of the Committee; the Committee staff retained three copies of such materials.286

Principally at the suggestion of Chairman Heflin, and to ensure a fair hearing of any charges, the Committee decided that exhibits should be delivered to each of the five senators under investigation and their counsel.

On September 21, 1990, each counsel was provided with a set depositions of all five senators, together with exhibits accompanying each deposition.287 On September 24, 1990, each of the five counsel was provided with copies of Special Counsel exhibits 1–272 which had accompanied Bennett’s written recommendations to the Committee.288

Prior to the distribution of documents, nothing other than a description of Bennett’s preliminary and final recommendations, together with some reference to Committee deliberations, had appeared in the press. Specifically, no documentary evidence had been the subject of public disclosure. Beginning on October 5, 1990, that changed dramatically. A flood of documents ensued. Disclosures of these documents were timed with great precision.

On October 4, 1990, Senator McCain appeared before the Committee in executive session. On October 9, 1990, an article appeared in the Arizona Republic detailing Senator McCain’s appearance before the Committee and captioned “Source: Nothing New Found Against McCain.” The article gave a favorable recitation of McCain’s appearance, and consistent with its headline, explained that no new evidence had been found against McCain. It cited a “congressional source, speaking on the condition of anonymity.” 289

1. BRADLEY ROLAND LETTER

Senator DeConcini was scheduled to appear before the Committee on October 11. On October 5, 1990, an article by Sam Stanton was published in the Arizona Republic.290 It described a letter dated August 18, 1989 from Keating’s son-in-law, Bradley Roland, to Senator DeConcini. Stanton accurately described the Boland letter as “the first document to surface publicly from a report submitted last month by a special counsel conducting the ethics probe.” The Boland letter purported to thank Senator DeConcini for his assistance to Keating and American Continental Corporation. It stated:

Just a short note to let you know how much Elaine and I appreciate all that you have done for her dad and our company, American Continental Corporation ... (Unfortunately, I wish the same were true for my former employer, John McCain, who is probably the biggest disappointment in my life.) 291

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286 Id.
287 Letters dated September 21, 1990 from Robert S. Bennett to each counsel.
289 Arizona Republic, Marguerak, October 9, 1990. See Ex. 31.
290 Arizona Republic, Stanton, October 5, 1990. See Ex. 32.
291 See Ex. 33.
2. JOY JACOBSEN MEMO

Senator Cranston was scheduled to appear in executive session on October 16, 1990.

On October 5, 1990, an attorney for Joy Jacobsen was called by reporter Charles Babcock of the Washington Post and advised that he was in possession of committee sensitive documents relating to Cranston.

On October 7, 1990, Babcock wrote an article entitled “Fund-Raising Memos Outline Cranston-Keating Dealings.” The article discussed in detail a memorandum from Jacobsen, a fund-raiser for Senator Cranston. Babcock’s article reported:

In a January 1987 “confidential” memorandum to Sen. Alan Cranston, (D-Calif.), a Cranston fund-raiser wrote that savings and loan executive Charles H. Keating Jr. was among campaign supporters who “rightfully expect” some resolution of pending requests for help from the Senator.

Over the next few months Cranston met several times with Keating and twice with federal thrift regulators on Keating’s behalf to discuss their inquiries into Keating’s Irvine, Calif. operation, Lincoln Savings and Loan. Then in September the year the fund-raiser Joy Jacobsen, told Cranston she had set up another meeting with the S & L owner, adding, “You should ask Keating for $250,000.”

The lengthy Babcock article went on to discuss other memoranda written to Senator Cranston. Babcock’s article mentioned no source for the memoranda, anonymous or otherwise.

3. DISCLOSURES ON RIEGLE

Senator Riegle was scheduled to appear before the Committee on October 17, 1990. On October 11, 1990, Charles Babcock called Senator Riegle’s press secretary and asked about committee sensitive documents showing fundraising activities on Riegle’s part.

The day following Riegle’s appearance before the Committee, on October 18, 1990, Babcock’s article about Riegle was published by the Washington Post. The article was entitled “Panel Reveals Riegle-Keating Meetings.” It also discussed Riegle’s appearance before the Committee the day before and contained differing descriptions of events surrounding the Keating fundraising memos.

After providing one version by a source supposedly familiar with the investigation, and giving a view favorable to Senator Riegle, the article stated:

Another source, who is familiar with Keating’s description of events, said the meetings were held to keep Riegle up to date on Keating’s battle with federal regulators, noting that Keating met thrift regulators on those two dates. The offer for a second fund-raiser was not rejected until a Feb. 28 Detroit News story detailed the circum-

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292 Memorandum from Joy Jacobsen to Senator Cranston, September 6, 1987. See Ex. 34.
293 Washington Post, October 7, 1990. See Ex. 35.
294 Washington Post, Babcock, October 18, 1990. See Ex. 36.
stances of the 1987 fund-raiser and the senator’s 1987 meeting with regulators, this source said.\textsuperscript{295}

4. EXECUTIVE SESSION DELIBERATIONS

An executive committee meeting was scheduled for October 18, 1990. It was expected that the Committee would again discuss important questions regarding how it would proceed and against whom. The question of a public hearing was still open.

The day before the meeting, on October 17, 1990, a Wall Street Journal editorial characterized the proceedings as a “Keating Cover-Up?” This editorial was based on leaked documents. The editorial called for public hearings based on “what Mr. Bennett has uncovered.”\textsuperscript{296}

Other articles similarly appeared to have been timed to coincide with discussions in executive session over whether to proceed against DeConcini or Riegle if McCain and Glenn were dropped.

On October 17, 1990, the day before the scheduled executive committee session, the Washington Times ran the headline “Riegle, DeConcini Probe Broadened.”\textsuperscript{297} The article included allegations that Riegle had improperly attempted to assist Lee Henkel and another nominee for positions on the Federal Home Loan Bank Board (“FHLBB”). Strangely, while there had been a series of interviews conducted by Bennett’s office regarding Henkel’s appointment, none of these interviews mentioned Riegle. Nor was further investigation of DeConcini’s activities regarded at that juncture as significant by Bennett, who had not even participated or assigned his principal attorneys to these interviews relating to the Henkel nomination.\textsuperscript{298}

In fact, nothing was occurring at the time that could be considered a substantial “broadening” of the investigation. Use of Riegle’s name and the statement that the investigation had “broadened” can only be described as an attempt by someone close to the investigation to influence the deliberations on DeConcini and Riegle.

Also, on October 17, 1990, reporters advised Senator DeConcini they were in possession of more leaked documents.\textsuperscript{299} Sure enough, on October 18, 1990, Associated Press writer Larry Margasak, wrote an article that began by stating:

Senate documents show Sens. Alan Cranston, Donald W. Riegle Jr. and Dennis DeConcini had more extensive dealings with the owner of the failed Lincoln Savings and Loan than previously acknowledged.\textsuperscript{300}

Another document was an affidavit obtained by Bennett during the investigation. The affidavit described calls from Senators DeConcini and Cranston on behalf of Keating to Roger Martin, a former member of the FHLBB.\textsuperscript{301} The Martin affidavit had been

\textsuperscript{295} Id.
\textsuperscript{296} Wall Street Journal, October 17, 1990. See Ex. 37.
\textsuperscript{297} Washington Times, October 17, 1990. See Ex. 38.
\textsuperscript{298} Interview of Robert Bennett, April 24, 1992.
\textsuperscript{299} Letter of Senator DeConcini to Senators Jeffin and Rudman, October 17, 1990.
\textsuperscript{300} Associated Press, Margasak, October 18, 1990. See Ex. 39.
\textsuperscript{301} Special Counsel Bennett’s Exs. 17 and 18.
provided by Bennett on August 31, 1990 to the Committee staff for
distribution to each member, and had been provided to all counsel
on September 24, 1990.

The same day, October 18, 1990, the Wall Street Journal ran an
article reporting that the documents utilized in Margasak's article
for AP had been obtained the previous evening. The article stated
that "[i]n individual close to the investigation also said the ethics
committee is 'taking a fresh look' at strenuous lobbying efforts by
Sens. Riegle and DeConcini to secure the nomination of Lee
Henkel. ** ** **" 302

The New York Times, in an article by Richard Berke, also re-
ported on October 18, 1990 that:

Three United States Senators made extraordinary ef-
forts to help Charles H. Keating Jr. protect his failing sav-
ings and loan institution and had more frequent contact
with him over a longer period than had been thought, docu-
ments examined by the Senate Ethics Committee show. 303

It was amid this sea of fresh leaks, all of which were aimed at
DeConcini, Cranston and Riegle, that the Committee discussed in
executive session who, if anyone, should be dropped from the inves-
tigation. Bennett acknowledged that the articles had gone far
beyond his evidence on Riegle, but added that because his recom-
endations had been leaked, the public might well conclude that
there had been "some sort of behind-the-scenes deal or trade" if
DeConcini or Riegle were cut. 304 Bennett also argued for a public
resolution, again arguing that "[i]f the [Committee resolves the
matter] behind closed doors, this Committee and the Senate is
going to be hurt a great deal." 305

J. THE ISSUE GOES TO THE FLOOR

The Committee was unable to decide what course to take at its
meeting on October 18, 1990 and adjourned a scheduled meeting for
October 19, 1990. On October 20, 1990, an article appeared in the
Washington Post, revealing Senator Lott's frustration over the
Committee's delay. Senator Lott was quoted as saying that he was
"furious" over the Committee's indecision. The article also indi-
cated that Lott was "pessimistic" about the chances for action before
Congress adjourned the next week. 306

On October 23, 1990, the Ethics Committee instructed GAO to
begin an investigation of all leaks of committee confidential infor-
mation. 307 The first discussion by the Committee of that investiga-
tion was during the executive session on October 23, 1990. Ironical-
ly, this instruction to GAO also was leaked to the press prior to the
Committee's decision to engage GAO and public announcement of
that decision. The Washington Times article, authored by Jerry
Seper, appeared on October 23, before the Committee had even
met. Seper reported:

304 Id. at 36.
Senate Ethics Committee investigators are looking into allegations that Sen. John McCain has been a source of leaks to the news media concerning the Committee's probe of savings and loan kingpin Charles H. Keating Jr.

"There is concern that Mr. McCain may have leaked secret and confidential information to the media about the Committee probe," said a source close to the Committee.\footnote{Washington Times, October 23, 1990. See Ex. 43.}

The article also reported that "Investigators, according to the sources, have talked with Mr. Dowd at least twice about the allegations." According to the article, Dowd denied leaking the documents and said he had been told by Bennett that Bennett was simply calling around to all of the lawyers to see if they had leaked information.\footnote{Id.} In fact, no one—other than Bennett—had called Dowd, and Bennett had done so on only one occasion.\footnote{Id.}

On October 23, 1990, the Committee also took up debate again on whether to hold a public hearing and, if so, whether to include all five senators. Bennett again urged that Senators McCain and Glenn be cut. When asked whether he would be willing to proceed to a public hearing on all five senators, Bennett noted that because his "findings and recommendations [were] already out * * *," he did not want to be in the position of pretending that he had reached no conclusion as to them.\footnote{Obviously, the article contains misinformation. Neither GAO nor Bennett confirmed that Dowd had been approached on multiple occasions. This misinformation would appear to be an attempt by someone to exaggerate facts in order to identify Dowd as the source of unauthorized disclosures.} Bennett agreed, however, that it was still possible to have a fact-finding hearing or a full exposition of the facts as to all five senators.\footnote{October 23, 1990 Exec. Session at 14.} After extensive discussion, the Committee adopted a resolution calling for a public fact-finding hearing.

Reports of "leaked" committee sensitive documents stopped immediately.

K. PUBLIC HEARINGS

Public hearings began on November 15, 1990 and concluded on January 16, 1991.\footnote{Id. at 22.} During those hearings, one leak appeared to have occurred on December 3, 1990. The San Francisco Chronicle ran an article, revealing that it had been provided with a letter written on October 26, 1990 by David Stevens, former tax director at American Continental, to Senator Heflin. Stevens complained, inter alia, that he had information bearing upon Senator McCain's travel arrangements with Keating, but had never been contacted by Bennett.\footnote{Cranston Report, at 4.}

Committee deliberations began in January, 1991. There followed a number of articles purporting to report the substance of the deliberations and disputes within the Ethics Committee.

\footnote{San Francisco Chronicle, Williamson, December 3, 1990. See Ex. 44.}
On January 8, 1991, Senator Lott publicly revealed at least one likely outcome from Committee deliberations. The Tucson Citizen reported on January 29, 1991:

Sen. Trent Lott, R-Miss., one of six members of the Senate Ethics Committee, said publicly Jan. 8 that he would be amazed if the committee did not send the case against at least one of the Keating Five senators to the full Senate. Lott would not identify the senator he was referring to, but the sources said that he was referring to Cranston.  

The article went on to say that Lott had indicated that the Committee would ask the full Senate to censure or condemn the senator or expel him.  

Bennett delivered his post-hearing brief to the Committee on January 28, 1991. Gannett News Service reported on February 17, 1991 that the Committee was close to a conclusion. "Sources close to the committee" were said to have reported that the Committee members were "near agreement" that Cranston should be censured, and that Democrats, "especially" Chairman Heflin, wanted some punishment against McCain, or at least the same punishment as that handed out against DeConcini. The New York Times carried a similar story.  

On February 27, 1991, the Committee issued a statement regarding its determination as to each of the five senators. Further proceedings were found to be warranted only as to Senator Cranston, who was notified of his right to an additional hearing pursuant to Committee Rules. Cranston declined such procedures and submitted his case to the Committee on the existing record.

Following the hearings, Bennett submitted a draft final report which he had prepared on his word processing system at Skadden. The document did not express Bennett's personal views, with respect to all of the participants, but did represent what he hoped to be the Committee's final view. The Committee used Bennett's report as a working draft.

Senator Helms wrote the Committee on July 15, 1991. Helms argued that the Committee should issue a report that fully discussed the facts presented at the public hearings. Helms further wrote that the report prepared by Bennett "fairly, fully and accurately reflects my conclusions in this case. It is my hope that the committee will adopt this report as its report. If the committee is unwilling to do that, I am prepared to issue it, with some modifications, as my report. . . ."

On August 5, 1990, the Washington Post reported that Senator Helms, under his own name, disseminated "his" own final report. With some changes, Senator Helms's report was in large part the same as Bennett's Final Report, the contents of which had re-
mained confidential and was a committee sensitive document. The Washington Post and other articles also disclosed the contents of Senator Helms's letter of July 15, in which he previously had advised the Committee that he had been prepared to issue—"with some modifications"—Bennett's final report as his own.

Senator Helms issued a press release which stated in part:

I properly used the Special Counsel's generally excellent draft report as a basis for preparing my own report bearing my name and signature.

After release of the Helms report, Senator Rudman and Senator Sanford issued a statement condemning the release of the report.

L. Unauthorized Disclosures

We have identified the following unauthorized disclosures attributed to unnamed sources in press accounts:

(a) the Washington Times article on July 12, 1990, correctly predicting that Bennett would issue his report in early September and recommending no further proceedings against McCain and Glenn;

(b) the New York Times article on September 29, 1990, correctly reporting that Bennett had transmitted his report to the Ethics Committee and stating that Bennett had recommended no further proceedings against Glenn and McCain;

(c) the October 5, 1990 article in the Arizona Republic, reporting the content of the Bradley Boland letter, which was sent by Bradley Boland to Senator DeConcini in August, 1989;

(d) the October 7, 1990 article in the Washington Post, describing the content, inter alia, of the Joy Jacobsen memorandum and other material pertaining to Senator Cranston;

(e) the October 9, 1990 article in the Arizona Republic, correctly reporting the appearance of Senator McCain in executive session on October 4, 1990;

(f) the October 17, 1990 article in the Washington Times, incorrectly describing the probe against Senator Riegle and DeConcini as having "broadened";

(g) the October 18, 1990, Wall Street Journal article, describing, only in partially correct terms, the investigation;

(h) the October 18, 1990 article by AP reporter Margasak, correctly describing documents disclosed to the Committee during the course of the investigation; and

(i) the October 23, 1990 article by the Washington Times, incorrectly describing McCain and his counsel, Dowd, as being investigated for having leaked documents.

We discuss below several of these incidents in more detail. During the course of investigation, information was provided to us regarding three additional disclosures. These include:

325 Statement of Senators Sanford and Rudman, released August 6, 1991. See Ex. 50.
(a) the October, 1989 disclosure of Laurie Sedlmayr’s memorandum to the Arizona Republic;
(b) the disclosure of an incident involving Senator Riegle which was reported in the Wall Street Journal in December, 1989; 326 and
(c) the disclosure of a letter written by David Stevens to the Chairman of the Ethics Committee, and reported in the San Francisco Chronicle.

We have investigated these incidents and have determined that they do not involve committee sensitive information.

M. ANONYMOUS SOURCES

No conclusive evidence has been offered showing which senators, staff members or counsel leaked any committee sensitive information. Each has been interviewed subject to the sanction of 18 U.S.C. 1001. Each has denied any disclosure to any journalist or to any person outside the Ethics Committee.

1. THE WASHINGTON TIMES ARTICLE

The July 12, 1990 article in the Washington Times correctly reported that Bennett would recommend no further proceedings against Glenn and McCain; predicted—again correctly—that Bennett would not transmit his report in August or prior to the return of the members in September; and referred only to Bennett’s possible evidence against two of the three remaining Democrats, possibly reflecting—also correctly—Bennett’s uncertainty over how to proceed against the third.

The only persons privy to Bennett’s recommendations prior to July 12, 1990 were: (1) Bennett and his staff; (2) members of the Ethics Committee and their personal staffs; (3) the Staff of the Ethics Committee; and (4) Senator Dole, who was briefed as an ex officio member of the Committee. All have denied disclosing Bennett’s preliminary recommendation to anyone. Yet the disclosure in the first instance had to come from the Committee, its staff, or Bennett’s office.

It is highly unlikely, however, that the disclosures were made by the Ethics Staff, which consists of a group of non-partisan attorneys. While all attorneys involved in the investigation had the opportunity to provide information to the press, none appear to have had any motive for doing so. All have denied that they did so.

Others did have a motive for publicizing the recommendations. A point made throughout the news coverage of the investigation was that elimination of McCain—the only Republican—and Glenn could leave the Keating scandal as a Democratic problem. It underscored the Newsweek comments by Republican spokesman Charles Black. It stated that once the investigation turned into the “Keating Three,” the “GOP could use the Keating case against the Democrats.” 327 The same point was made on September 29, 1990, when a New York Times article reported Bennett’s recommendation that Glenn and McCain be dropped.

327 Newsweek, August 13, 1990, at 3.
The Arizona press contained similar comments:

But Republican strategists are reveling in the possibility that McCain, the only Republican involved, might be dropped, giving them a powerful weapon with which to attack Democrats.

"Obviously when you drop from the Keating five to the Keating three all three are Democrats * * * Republicans come out in a strong position," Gary Koops, spokesman for the National Republican Congressional Committee, said Monday. 228

Nevertheless, motive alone provides an insufficient basis for any conclusion. We have been unable to determine who disclosed Bennett’s preliminary views. We can, however, eliminate private counsel who did not know Bennett’s recommendation prior to July 12, 1990.

2. THE SEPTEMBER 29, 1990 NEW YORK TIMES ARTICLE

The September 29, 1990 article in the New York Times correctly described that Bennett had transmitted his report to the Committee, and that it had in fact recommended no further proceedings against Glenn and McCain.

By the time the second Berke article ran, there was substantial evidence that counsel for each of the five senators knew Bennett’s recommendation, at least as to their own clients. Bennett reported to the Committee on October 1, 1990 that he had complied with the Chairman’s directive, and that all five lawyers were aware of the recommendation.

John Dowd, who represented Senator McCain, denied knowing Bennett’s recommendation as to McCain. Yet, he had reported to William Taylor, Cranston’s lawyer, that he too had been informed of Bennett’s recommendation not to proceed against McCain.

Nevertheless, Dowd and the other private counsel could not have been the sources for the September article. The September 29 article stated that information about Bennett’s recommendation had been received from “Congressional officials.” Counsel for the senators could not be described in such a fashion.

The senators under investigation were similarly aware of Bennett’s recommendation, at least as to themselves, and unlike their lawyers, could be described as “Congressional sources.” However, Senators Riegle, DeConcini or Cranston presumably had no motive for publicizing the adverse recommendation as to each of them.

Senator Glenn presumably stood to benefit by disclosure of the favorable recommendation. Yet he and his counsel both stated that their policy was to avoid all public comment and disclosures—a policy largely corroborated by the absence of statements to the press. There is simply a total absence of evidence implicating Glenn.

Senator McCain, his staff, as well as his counsel all deny that they knew Bennett’s recommendation. These denials are contradicted by the evidence. By October 1, 1990, McCain said enough to

228 Phoenix Gazette, August 24, 1990. See Ex. 52.
Senator Rudman to convince Rudman that McCain knew Bennett’s recommendation as to him. 229 On September 29, an Arizona newspaper reported that McCain’s press secretary had said that McCain had been notified that the senator could be cut from the investigation. 230 Also, McCain’s lawyer, John Dowd, told one lawyer and led another to believe that he in fact had been told of Bennett’s recommendation. 231 Finally, both McCain and Dowd pressed for release of Bennett’s report shortly after it was filed.

However, there is no direct evidence to show that McCain made the disclosures to the New York Times.

N. THE BRADLEY BOLAND LETTER

The first document which was the subject of a press report was the letter from Bradley Boland to Senator DeConcini. This press report did not appear until copies of the Bradley Boland letter had been distributed to each of the five senators and their counsel. On its face, the contents of the Bradley Boland letter benefitted Senator McCain and Senator McCain only.

Because of its content, the natural inclination is to assume that Senator McCain leaked the Bradley Boland letter. However, the reporters from the Arizona Republic responsible for the Boland story provided Senator DeConcini with their copy of the Boland letter. The copy delivered to DeConcini had been examined by FBI document experts and compared with copies of the letter as distributed to counsel and the Committee during the inquiry.

The FBI analysis—while not conclusive—casts strong doubt on any conclusion that the copy of the Boland letter in the possession of the Arizona Republic had been derived from the exhibit copies provided to all counsel, including counsel for Senator McCain.

O. DOCUMENTS RELEASED IN OCTOBER 1990

The timing of the documents released to the New York Times and to the Washington Post is significant. These documents seemed to emerge as the Committee moved toward a decision whether to proceed against Senators Riegle and DeConcini.

There is substantial evidence that these documents were released on October 17, 1990 to several newspapers and that the “source” intended to generate the widest possible publicity of the information damaging to Riegle and DeConcini. The New York Times article on October 18, 1990 referred to many of the same documents, including the Martin affidavit, and stated only that the documents had been “made available by people involved in the investigation on condition that they remain anonymous * * *.” 232 The Wall Street Journal article dated October 18, 1990 revealed that the documents had been released the previous evening to AP reporter Larry Margasak. 233

229 October 1, 1990 Exec. Session at 17.
231 Interview of Leslie Berger, March 5, 1992; Interview of William Taylor, April 16, 1992;
Interview of Charles Ruff, April 19, 1992.
These disclosures seemed designed to attempt to influence Committee deliberations. One might ask whether the disclosures were made by someone who was privy to the Committee's deliberations. Beyond that, no information is available to determine the source.

P. THE OCTOBER 9 ARTICLE

In September, 1990, the Ethics Committee agreed to invite each of the five senators to appear individually with counsel to present their position to the Committee before any decision was made as to which, if any, would be the subject of formal charges in a public hearing.

Senator McCain and Mr. Dowd, his counsel, appeared before the Committee on October 4, 1990. On October 9, 1990, an article by Larry Margazak appeared in the Arizona Gazette. It was headlined: "Source: Nothing New Found Against McCain."

The article reported upon Senator McCain's confidential appearance before the Ethics Committee on October 4. Its source was stated to be a congressional source. The article was accurate to a point approaching transcript form. It reported in seriatim:

1. The questioning of McCain covered the same facts that led to the dismissal recommendation. This was true.

2. Senator Heflin did most of the questioning. This was true.

3. The questions dealt with two crucial meetings McCain and his colleagues held with banking regulators on Keating's behalf and trips the senator took on Keating's airplanes. This was true.

4. Also discussed were an investment by McCain’s wife in a Keating shopping center. This was true.

5. Also discussed was McCain's philosophy on what constitutes proper behavior for a senator. This was true.

6. When asked what constituted proper behavior for a senator in a case like the one under investigation, McCain said it was appropriate to see that a constituent was treated fairly by regulators, but that negotiating for a constituent would be improper. This was true.

Senator McCain and his staff had reason to want such an article. As reflected in the headline—"Nothing New Found Against McCain"—the article was not designed merely to report what had occurred before the Committee, but also to reflect the fact that Senator McCain’s testimony was exculpatory.

Q. RODRIGUEZ AND SEPER

Senator DeConcini said he was approached by Paul Rodriguez, who stated that he had received confidential information from Senator McCain. DeConcini is unable to determine whether this claim was true, or merely a ploy on Rodriguez’s part, because Rodriguez ended the conversation by saying that, if DeConcini wanted, he could provide information as well.

Later, in October, a Washington Times reporter, Jerry Seper, called DeConcini aide, Karen Robb, to talk about non-Keating matters. During the course of that conversation, Seper told Robb that Senator McCain had provided information to Seper's colleague, Paul Rodriguez, at the Washington Times, and that Seper had heard a taped conversation between McCain and Rodriguez. Seper
also indicated that the Washington Times, the New York Times and the Wall Street Journal had agreed with McCain that favorable news coverage and editorial comment would be published in return for committee sensitive information.

Around that time, Seper also had a conversation with DeConcini press secretary, Robert Maynes, and related the same information. Both Maynes and Robb were entirely credible and leave no doubt that Seper made such comments.

Jerry Seper appeared pursuant to a subpoena, but declined to testify on the ground that the First Amendment protected him from having to testify to conversations which he had with third parties in which he might have disclosed to those persons another reporter’s source. Seper did not deny that the conversations took place, but refused to answer altogether. Accordingly, Seper’s assertion of privilege left statements by Robb and Maynes uncontradicted, while depriving Senator McCain of potentially exculpatory information.

While we can measure the credibility of Maynes and Robb, we have no way of measuring Seper. Like Rodriguez’s conversation with Senator DeConcini, Seper’s calls could easily have been designed to elicit information about the investigation from Maynes and Robb. The information he provided could also be untrue. Credible evidence that Seper made the calls described by Maynes and Robb cannot therefore provide the basis for any conclusion as to Senator McCain.

Further, Senator McCain was willingly both interviewed and questioned under oath. So, too, was his counsel, John Dowd. Both denied any involvement in the disclosure to either the Washington Times or the New York Times. Their testimony and their good reputations must be weighed heavily in assessing the evidence. It must be remembered also that each was deprived of critical evidence, which may well have been exculpatory, by our inability to question the two journalists, Rodriguez and Seper.

* * * * * *

We reach no conclusions as to the source or sources of the many leaks in the Keating inquiry. Partisanship appears to provide motive for the disclosures of Bennett’s preliminary views in June and final recommendations in September. The document leaks appear to have been designed to prejudice the appearance of DeConcini, Riegel, and Cranston before the Committee in October. Finally, the mid-October charges of “cover-up,” based upon leaked documents, appear to have been designed to provoke a public hearing. We can add nothing more.

VIII. SENATE RULES

In the Thomas matter, all witnesses conceded the FBI report and Hill statements were confidential documents whose disclosure would have been unauthorized and improper.

In the Keating matter, the Ethics Committee has detailed rules prohibiting the disclosure of internal deliberations and recommendations, as well as committee sensitive documents.
We present this summary as a convenience only, and without making any recommendations for determinations by the Leaders or their designees.

A. ETHICS COMMITTEE

Under the Ethics Committee's rules, any testimony and action taken in a closed session of the Committee, and "[a]ll testimony and action" relating to a sworn complaint, is confidential and may not be disclosed "without the approval of a majority of the Committee." In addition, the Committee's rules prohibit the disclosure of any information pertaining to or copies of any Committee report or other document which purports to express the views of the Committee concerning any of its proceedings, without Committee authorization.

Committee Rule 9(d)(1) prohibits any member of the Committee, its staff, or anyone performing services for the Committee from disclosing any "committee sensitive" information, unless authorized by the Committee. The rule prohibits all forms of unauthorized disclosure by providing that no member or staff may "release, divulge, publish, reveal by writing, word, [or] conduct" protected information. Committee rules designate any information or material in the Committee's possession relating to the alleged improper conduct of a member, employee or officer of the Senate or to the Committee's proceedings, including specifically any "preliminary inquiry," as "committee sensitive."

B. JUDICIARY COMMITTEE

By contrast, the Judiciary Committee has no formal rules which address the handling of confidential information or investigative materials. Nonetheless, the Committee does have well-established guidelines and practices regarding the treatment of FBI reports and investigative materials. That these customs and practices are widely known and adhered to is evidenced by the fact that, without exception, every senator and staff person we interviewed characterized the statement of Anita Hill and the supplemental FBI report as "confidential" documents whose disclosure would be improper.

The absence of specific rules does not mean that disclosure would be proper under Senate rules. As the Select Committee on Ethics wrote last year:

The Senate has disciplined its Members for conduct that was unethical or improper, regardless of whether it violated any law or Senate rule or regulation. As it adopted new rules governing Members' conduct, the Senate has recognized that the rules did not "replace that great body of unwritten but generally accepted standards that will, of course, continue in effect."
Moreover, there is a general Senate rule against disclosure of confidential information, Senate Rule 29.5, which provides:

Any Senator or officer of the Senate who shall disclose the secret or confidential business or proceedings of the Senate shall be liable, if a Senator, to suffer expulsion from the body; and if an officer, to dismissal from the service of the Senate, and to punishment for contempt.

It was a principal tenet of the journalists' attack on our subpoenas that no Senate rule specifically prohibited the disclosure of confidential committee documents in the Hill/Thomas matter. NPR's counsel relied, in particular, on a private letter dated January 29, 1991, from Senators Heflin and Rudman in an unrelated matter. While the facts of that case were quite different from the disclosures encompassed by S. Res. 202, the mere fact of the journalists' argument points out the ambiguity in the rule.

Although the common understanding dictates otherwise, as we understand the argument, ambiguity may be said to exist in Rule 29.5 because the rule is captioned "Executive Sessions" and does not explicitly cover committee proceedings. This interpretation, however, is at odds with custom and history.

Paragraph 6 of Rule 29.5, which was adopted in 1904 and which on its face applies to both committee and floor proceedings, was introduced by Senator George F. Hoar of Massachusetts, who explained that the Executive Branch sometimes furnished confidential communications on the qualifications of appointees at the request of the Senate and its committees. Noting that there was some doubt as to whether such material was to be treated as confidential, Senator Hoar stated that he hoped the rule would clarify the matter by providing that "when any communications are sent to committees of the Senate in regard to matters which are themselves confidential by the President or any Department, those communications shall be treated as confidential unless the Senate shall order otherwise." In addition, in 1955, the Committee on Rules and Administration, when reporting on Rules of Procedure for Senate Investigating Committees, S. Rep. No. 2, 84th Cong., 1st Sess. (1955), included Rule 29.5 in a list "Procedural Rules Affecting Senate Committees," and noted, parenthetically, that "the Senate now has the power to punish members or employees for disclosure of secret or confidential proceedings of the Senate," citing what is now paragraph 5 of Senate Rule 29.5.

As a technical matter, there may be benefit to revising Rule 29.5 to eliminate any possible ambiguity in its application to the business or proceedings of Senate committees.

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340 See Ex. 53.
341 The text of Rule 29.6 is as follows:
"Whenever, by the request of the Senate or any committee thereof, any documents or papers shall be communicated to the Senate by the President or the head of any department relating to any matter pending in the Senate, the proceedings in regard to which are secret or confidential under the rules, said documents and papers shall be considered as confidential, and shall not be disclosed without leave of the Senate.

342 37 Cong. Rec. 4027 (1904).
In addition, while we find no basis for criticizing the procedures of the Judiciary Committee or otherwise attributing the Hill disclosures to any shortcomings in its internal practices, it may be worthwhile for all committees to review their existing procedures in handling confidential materials and to consider the utility of written guidelines.

IX. GENERAL ISSUES

S. Res. 202, by its very nature, implicates issues of importance which may well transcend the specific question of who, if anyone, was responsible for the unauthorized disclosure of information from Senate documents in connection with the Ethics Committee’s investigation or the nomination of Judge Thomas.

(1) Does the Senate, historically an institution of open debate, have any need or right to confidentiality?

(2) If so, should the Senate condone breaches of confidentiality?

(3) Does the media’s claim of its own right of confidentiality take primacy over the Senate’s right to police itself?

A. CONFIDENTIALITY

Its history shows the fundamental policy of the Senate to be one of open debate and public access to information. With rare exceptions, the Senate has conducted all of its legislative proceedings since 1795 in open session. Since 1929, the Senate has provided for open sessions on the floor for the consideration of nominations and treaties, both of which previously had been treated in confidence. In accord with this fundamental policy, the Senate has acted to make its proceedings fully accessible. Under the Constitution, the Senate “keeps a Journal of its Proceedings, and from time to time publishes the same, excepting such parts as may in their judgment require Secrecy.” U.S. Const., art. I, sec. 5, cl. 3. Since 1802, the Senate has provided the press with special access to the Chamber. In 1848, the Senate began directly arranging for publication of Senate floor debate, culminating in the initiation of the Congressional Record beginning in 1873. Since 1986, the Senate’s floor proceedings have been broadcast over radio and television.

The Senate also opens the majority of its committee proceedings to the public. By Senate rule, all meetings, including meetings to conduct hearings, of Senate committees “shall be open to the public,” unless a committee votes to close a particular meeting or limited series of them for one of several prescribed reasons. Senate rules likewise create a presumption for the broadcast of committee hearings by radio and television.

All of this, however, cannot mean that confidentiality is never required and, when imposed, is not to be respected. As expressed by one member, there is the hope that by “ridding the government of unnecessary secrecy, there will be greater respect for the times

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344 We acknowledge the thought and assistance of the Senate’s Legal Counsel and his staff on this issue. The conclusions are ours.
when confidentiality is essential." In particular situations, and for valid reasons, identifiable and significant interests warrant an institutional judgment that confidentiality is essential to the appropriate discharge of institutional responsibility. Certain of these interests are particularly relevant to the matters which are the subject of the investigation mandated by S. Res. 202.

1. CITIZEN INTERESTS

Private citizens have both an interest and a right to communicate with elected representatives with the assurance of confidentiality. The First Amendment guarantees the right of the public to "petition the Government for a redress of grievances." As the Supreme Court has stated, "this right is implicit in 'the very idea of government, republican in form,'” McDonald v. Smith, 472 U.S. 479, 42 (1985) (quoting United States v. Cruikshank, 92 U.S. 542, 552 (1876), and, this right to petition the government "requires stringent protection" and "substantial 'breathing space.'" Id. at 486 (Brennan, J., concurring) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964)).

James Madison's remarks when the First Amendment was proposed manifest the intent that the Petition Clause guarantee the right of the people to "communicate their will," not only by "publicly address[ing] their representatives," but also by "privately advise[ing] them." Public values are served by promising confidentiality in order to encourage a citizen's free exchange of ideas with elected representatives. The Senate has an obligation to take all steps necessary to maintain the confidentiality of communications from those private citizens who request it. Indeed, Senate access to relevant but sensitive personal information often will depend upon assurances of confidentiality. It seems certain that breaches of confidentiality by the Senate will diminish the willingness of individuals to come forward.

Nor can the Senate ignore the substantial personal cost imposed on private citizens whose confidentiality is breached. Members and staff persons, because of the positions they occupy and the role they play in the formulation of policy, have no more right to breach a promise of confidentiality than does any other individual or entity in our society. Simple fairness requires that the Senate keep its promises, and that obligation runs to all who work within the institution regardless of rank or status.

A duty of fairness runs also to those who may be the subject of untested allegations delivered to the Senate in confidence. We cannot distinguish the principles which should govern the investigation of a nominee for the United States Supreme Court from the principles which govern any governmental investigation, including grand jury proceedings, where confidentiality is required in order to assure "that persons who are accused but exonerated * * * will not be held up to public ridicule." Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979).

349 1 Annals of Cong. 788 (1789) (quoted in McDonald, 472 U.S. at 489 (Brennan, J., concurring).
2. INSTITUTIONAL INTEREST

The Senate itself requires "breathing space" in order to encourage candid internal consideration of sensitive matters and alternative policies. As with any organization, plain-speaking and individual candor within the Senate depend upon institutional acceptance of the importance of confidentiality in given circumstances. The Supreme Court has observed that, "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process," and has found the importance of protecting from public disclosure "communications from high Government officials to those who advise and assist them in the performance of their manifold duties * * * too plain to require further discussion." United States v. Nixon, 418 U.S. 683, 705 (1974).

An appropriate degree of confidentiality therefore is essential if the historic value of public access is to be maintained and if plain-speaking and candid internal debate is to be encouraged. Beyond even those considerations, some degree of confidentiality must be respected if there is to be cooperation between the Executive and Legislative Branches. Information of vital importance to the Senate often is within the possession of the Executive Branch, and much of that information may be subject to concerns of confidentiality. The risk of unauthorized disclosure of confidential information has become a substantial impediment to open cooperation between the two branches which are, after all, charged by the American public with the obligation to govern effectively. Officials in both the Executive and the Legislative Branches have focused on the risk or actual instance of unauthorized disclosure by Congress as a reason which justifies unilateral decision by the Executive Branch to willfully withhold information from the Congress.359

Finally, there is the question of public confidence. Violation of what the public perceives as accepted norms of conduct, including breaches of confidentiality, breeds a loss of faith and respect for the Senate. Any disagreement on this point evidences a serious misunderstanding of our people's sense of fairness and what is right. There must be concern for the argument, frequently heard, that the Senate cannot be trusted to legislate rules of public conduct when the Senate itself is unable or unwilling to act with appropriate care. The Senate is more than an institution. The Senate is a public example of proper conduct. A failure of the Senate to act in accord with its own rules, and within ordinary norms of decency, will surely produce an erosion in public confidence which is essential to effective representative government.

B. LEAKING

The practice of leaking destroys these interests in confidentiality. If it is correct, as the New York Times opined—"the Senate runs on leaks"—then its members must ask if this should continue. Institutional behavior begins with the members. It is they who are

responsible for the sense of ethics and the environment within which staff persons work. How the Senate runs is up to its members.

There exists in any institution, whether written or not, a contract between employer and employee that information confidential to the institution shall not become public property. In the Senate, it is a contract which serves the public interest because it provides an environment within which open discourse can lead to the consensual resolution of issues. Leaking breaks that contract.

It is difficult to find a policy consideration which would justify institutional acceptance of leaking. The members of this institution should not be deceived. Leaking is viewed publicly as partisan and political. It is not viewed as honorable or productive or in the public interest. We agree with the words of Senator Mitchell when, on October 24, 1991, he stated:

Every leak is to be condemned. Every leak is to be deplored. The end does not justify the means. And a leak which harms the opponent is just as wrong as a leak which harms a friend. A leak which injures a cause I oppose is just as wrong as a leak which injures a cause I favor.301

Those who leak violate more than institutional trust. He or she violates the confidence and friendship of those with whom they work. By demanding confidentiality as the price of disclosure, the anonymous source of a leak casts an unfair shadow of suspicion over all who have or are suspected to have had access to the same information. Throughout the course of this investigation, we have met and questioned tens of unusual men and women, many on the threshold of their careers, each possessed with intelligence, a high quotient of decency, and a true dedication to the commonweal. While their views undoubtedly differ on matters of public consequence, we have no doubt their views are well-informed and heartfelt. We speak of Senate staff persons and of those private persons who, far more than most Americans, give of their time and minds to issues, the resolution of which shall affect all of our futures. We speak also of the members of the Senate to whom too little public credit is given for carrying out the responsibilities of governance, the burden of which few of us are willing to assume. By condemning the anonymous source, the Senate will protect those who keep their trust. Each deserves this much.

A Senate in which leaking is tolerated, and even approved, will inevitably become a Senate within which free speech truly is inhibited. The expression of ideas in the course of reasonable debate will be stifled for fear that one’s ideas—perhaps unpopular or contrarian—will become the fodder of public dialogue and criticism through anonymous disclosures. If the Senate implicitly condones the practice, it shall impair the freedom of open and honest debate and, over time, shall diminish and even lose its ability to decide the great issues that face us. It is this which provides the real threat to that freedom of speech for which the First Amendment stands.

It is precisely to this issue that Circuit Judge Buckley recently spoke in *Lamprecht v. FCC*, No. 88-1395 (D.C. Cir. Feb. 19, 1992). In *Lamprecht*, preliminary drafts of the majority and dissenting opinions in a sensitive case were leaked in connection with the Thomas nomination. The final opinion of the Court issued on February 19, 1992. In words endorsed specifically by six of the other 11 Circuit Court Judges, Judge Buckley wrote, slip op. at 2-3:

The seriousness of this violation cannot be overstated. Each member of this panel has been aggrieved by it, as have the parties who brought this case to us for adjudication. Moreover, because one or more of their number has been guilty of a willful breach of trust, this incident must cast a shadow over the dozen or more able young law clerks who had become privy to the preliminary drafts.

The hemorrhaging of confidential information has become endemic in the legislative and executive branches of our government, with untold costs to their ability to function. It is essential that we prevent this disease from invading the judiciary, as this would inevitably undermine the public confidence that is one of the major strengths of our legal system.

S. Res. 202 squarely confronted the practice of leaking. It is for the Senate to determine whether the intent of S. Res. 202 is to become the rule of this institution.

The argument is made that leaks serve the public interest as a means of monitoring the conduct of public officials. It is a view based upon a presumption that respect for any idea of confidentiality will result in abuse of the public trust. We question this view which, we believe, increasingly has shackled and therefore diminished the ability of government to reach reasoned decisions. We believe history shows that, as a nation, we fared better when a presumption of trust was the rule.

C. The Media

The media views leaking from a different perspective. It may fairly be said the American media is addicted to leaks. It argues that leaks are essential to fulfilling its obligation as public watchdog. The passage of S. Res. 202 placed the Senate's interest in confidentiality on a collision course with this point of view.

1. The Journalists

Early in this investigation, we requested interviews of Phelps and Totenberg, the journalists who authored and broadcast the October 6 disclosures. Our requests were rejected publicly in print and on the air. Accordingly, subpoenas were issued to these and other journalists for testimony and documents. The media's response was swift, universal, exaggerated, inaccurate, and unfair to the Senate.
2. DECISION TO SUBPOENA JOURNALISTS

The decision to subpoena journalists was made independently by Special Counsel and his staff. No member was consulted. No member approved the decision. Under the rules enacted to govern this investigation, the President pro tempore was required to authorize the subpoenas because they clearly sought relevant evidence. Not could the Rules Committee block the subpoenas. Its power was limited to ruling on objections to questions already asked. Ultimately, it exercised that power against Special Counsel.

3. REASONS

The journalists possessed the evidence which was most relevant to fulfilling the mandate of S. Res. 202. The law affords no testimonial privilege. The Supreme Court has never recognized the privilege which the journalists claimed. Lower federal courts have never recognized the privilege where the evidence sought was relevant and a reasonable effort had been made to obtain that evidence from other sources. Further, a cloud of suspicion hung over the members of this institution and their staff persons. We believed—and continue to believe—that the interests of this institution and the public interest required that all lawful means be employed to lift that cloud and determine the truth.

The First Amendment does not elevate journalists to a position above all other citizens. Called upon to give relevant testimony in a proper forum, the law requires that journalists do so. Our position on this issue is fully set forth in papers submitted to the Rules Committee, copies of which are incorporated by reference as a part of this report. We there cited the words of then Circuit Judge Potter Stewart, in Garland v. Torre, 259 F.2d 545, 548-49, cert. denied, 358 U.S. 910 (1958):

But freedom of the press, precious and vital though it is to a free society, is not an absolute.

* * * * *

Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover the truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.

* * * * *

Without question, the exaction of this duty impinges, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or to be silent disappears. But the personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.

If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to
a paramount public interest in the fair administration of justice.

The Supreme Court has spoken most recently on this issue in *Branzburg v. Hayes*, 408 U.S. 665, 698–99 (1972), where Mr. Justice White wrote:

> We are admonished that refusal to provide a First Amendment reporter’s privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.

There has since evolved in the lower federal courts a standard which requires the balancing of two considerations. The first consideration is whether identification of the confidential source is central to the determination of the issue at hand. The second consideration is whether the party requesting disclosure has made reasonable efforts to obtain the same information from alternative sources.362

Both considerations were satisfied in this investigation. There is no doubt that identification of confidential sources is relevant and goes to the very heart of the mandate of S. Res. 202. Nor can there be any claim of a failure to exhaust alternative sources of information. In excess of 200 witnesses were questioned in both matters, all under the penal sanction of 18 U.S.C. 1001. These included senators and staff persons with access or reasonably possible access to the information in question in both matters, private counsel in the Keating investigation, private sector individuals, Anita Hill herself, and each member of the Executive Branch, including the White House, Department of Justice, and the FBI, who had access or reasonably possible access to the information in question in the Thomas matter.

Just as there exists a conflict between the Senate’s right of confidentiality and the media’s pursuit of the news, there exists a tension between a journalist’s choice of silence and the rule of law which governs all citizens. This tension cannot and should not be eased or resolved by accommodation. History teaches that enforcement of the law has provided the appropriate and lasting means for either the validation or change of existing law. The appropriate process has been judicial. If journalists are to receive a testimonial protection not accorded other citizens, then this protection must

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362 See, e.g., *In Re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir.), cert. denied, 459 U.S. 909 (1982), cited by NPR in opposition to enforcement of our subpoenas:

> "The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists’ sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."

spring either from informed judicial decision or legislative enactment of appropriate shield laws.

A free and democratic society does not rest on the notion that all information shall be made available for public debate. It is worthwhile to remember that the framers themselves insisted on privacy for the deliberations from which our Constitution itself emerged. For reasons already stated, confidential deliberation is a necessary component of conscientious governance. A balance must be maintained between a multitude of competing interests. It is this truth which the media ignores in its claim of primacy.

Senate acceptance of the media’s insistence that its interests are foremost, and acquiescence in the media’s claim of a superior right, will sanction the continued ability and perhaps even the right of senators and staff persons to disclose confidential information with a certainty that their anonymity will be secure. This is a thoughtless proposition which the passage of S. Res. 202 seemed clearly to reject.

Further, when we consider the needs of this institution, it is difficult to find a policy consideration which can justify anonymity as a legitimate demand by those who seek to disclose confidential Senate information. If the decision to breach confidence is based upon a genuine perception of the public interest, then no person should wish to be anonymous. The decision to speak with attribution lends both weight and honor to the claim that it is the public interest which is at heart. From Boston Harbor to the streets of Selma, open protest has been our people’s way of effecting change.

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Respectfully submitted,

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