

**REPORT OF SENATE SPECIAL  
COUNSEL PETER FLEMING  
ON LEAK OF ANITA HILL'S  
CHARGES AGAINST  
JUDGE CLARENCE THOMAS**



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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.

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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, reflects 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:

(1) On September 23, 1991, Anita F. Hill telefaxed a statement of her allegations of sexual harassment to the Judiciary Committee. The document was signed and dated September 23, 1991. It did not appear to be notarized.

(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 Hoerchner was not responsible for the publication of 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.

Keating

(11) We are unable to identify any source of these disclosures. The evidence indicates there were multiple sources.

**B. Phelps**

(1) Timothy M. Phelps is a reporter for Newsday who covered the nomination 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's 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's "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's "source" derived from Hill's statement, and not from the FBI report.

(10) We have not been able to identify Phelps's "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 if the document was signed or dated or whether it was unsigned and undated document 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

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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 documents 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.

(12) On August 5, 1990, Senator Helms issued his own report on the Cranston matter.

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

## 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's 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,<sup>1</sup> he expressed a hope that the Ethics Committee would institute an investigation.<sup>2</sup>

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.<sup>3</sup>

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

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

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<sup>1</sup>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.

<sup>2</sup>137 Cong. Rec. S14474-75 (daily ed. Oct. 7, 1991).

<sup>3</sup>137 Cong. Rec. S14565 (daily ed. Oct. 8, 1991).

<sup>4</sup>137 Cong. Rec. at S14570 (Sen. Domenici); at S14628 (Sen. Grassley); at S14672 (Sen. Heflin); at S14728-29 (Sen. Nunn).

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."<sup>5</sup>

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."<sup>6</sup>

On the following day, October 17, Senator Brown formally introduced his resolution calling for an investigation of the unauthorized disclosure of "a confidential Senate committee report" during the Thomas confirmation proceedings.<sup>7</sup>

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.<sup>8</sup> Debate focused on the expansion of the investigation to encompass unauthorized disclosures in the course

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<sup>5</sup>137 Cong. Rec. at S14648.

<sup>6</sup>137 Cong. Rec. at S14847.

<sup>7</sup>137 Cong. Rec. at S14921.

<sup>8</sup>The Senate approved S. Res 202 by a vote of 86-12. The full text of S. Res. 202 is set forth in Exhibit 2.

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 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 referred to the full committee.

On December 18, 1991, Senators Ford and Stevens published Rules of Procedure governing the investigation.<sup>9</sup>

Rule 1 governed 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.

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<sup>9</sup>The Rules of Procedure are appended to the copy of S. Res. 202 contained in Exhibit 2.

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."<sup>10</sup>

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

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<sup>10</sup>Congress has been held to be such a department "or agency." See United States v. Poindexter, 951 F.2d 369, 386-88 (D.C. Cir. 1991).

the toll records of Newsday, NPR, Totenberg and Phelps.<sup>11</sup>

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.<sup>12</sup>

#### B. Judiciary Committee

Our investigation focused on the public disclosure of Anita Hill's allegations. However, we also investigated other allegedly unauthorized disclosures identified to us.<sup>13</sup> 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.

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<sup>11</sup>We have enclosed with this report a copy of our submission to the Rules Committee on March 24, 1992. Copies of the senators' ruling and public statements are contained in Exhibit 3.

<sup>12</sup>Representative certifications for each investigation are attached as Exhibit 4.

<sup>13</sup>During the floor debate on S. Res. 202, 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. 137 Cong. Rec. S15125 (daily ed. October 24, 1991). See infra Section VI.

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.<sup>14</sup>

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 24-1/2 hours over five days -- the second longest appearance by any Supreme Court nominee.<sup>15</sup>

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.

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<sup>14</sup>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.

<sup>15</sup>Report on Nomination of Clarence Thomas To Be An Associate Justice Of The United States Supreme Court, Exec. Rept. 102-15, at p. 2.

Res. 202 provides. It was no 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 officed 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.<sup>16</sup> 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.

## 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.<sup>17</sup> The Alliance was

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<sup>16</sup>Interview of Jeffrey Peck, December 17, 1991.

<sup>17</sup>Aron 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

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.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup>

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That It's Over -- Winners and Losers In the Confirmation Process," -- ABA J. 50, 52-53 (Jan. 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.

<sup>18</sup>Interview of Nan Aron, March 5, 1992; Interview of George Kassouf, March 5, 1992; Interview of Gail Laster, January 22, 1992.

<sup>19</sup>Deposition of William Corr, April 16, 1992, pp. 3-4.

<sup>20</sup>Id. at 5; Laster Int.

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.<sup>21</sup>

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.<sup>22</sup>

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 her conversations with Winston and Duncan. It was decided that Laster should contact Hill.<sup>23</sup>

## 2. September 5 - September 12

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

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<sup>21</sup>Laster Int.

<sup>22</sup>Laster Int.

<sup>23</sup>Laster Int.

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 that she 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 Defenders Service in Washington.<sup>24</sup>

Laster described the conversation to her immediate superior, James Brudney, chief counsel to Senator Metzenbaum's Labor subcommittee.<sup>25</sup> Brudney told Laster that 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.<sup>26</sup>

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.<sup>27</sup>

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<sup>24</sup>Laster Int.

<sup>25</sup>Laster Int.; Interview of James Brudney, January 22 and 28, 1992.

<sup>26</sup>Brudney Int.; Corr Int.

<sup>27</sup>Laster Int.; Interview of Kim Taylor, February 17, 1992.

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.<sup>28</sup>

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.<sup>29</sup>

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.<sup>30</sup> Seidman then called Kassouf herself, asking whether he knew the nature of Hill's allegations. Kassouf said he did not and added that the

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<sup>28</sup>Laster Int.; Brudney Int.

<sup>29</sup>Goldstein Dep., pp. 5, 7-13.

<sup>30</sup>Id. at 18-20; Interview of Ricki Seidman, January 21, 1992.

Alliance had not spoken to Hill.<sup>31</sup>

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.<sup>32</sup>

Seidman reported the conversation to Osolinik. After Osolinik spoke to Ranny Cooper, Senator Kennedy's chief of staff, Seidman, who had learned that Hill's attendance at Yale Law School overlapped with Brudney's, suggested that Brudney might be a more appropriate person to speak to Hill.<sup>33</sup>

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

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<sup>31</sup>Seidman Int.

<sup>32</sup>Seidman Int.

<sup>33</sup>Seidman Int.; Interview of Carolyn Osolinik, January 21, 1992; Interview of Frances Cooper, January 21, 1992.

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.<sup>34</sup>

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.<sup>35</sup>

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

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<sup>34</sup>Deposition of Ricki Seidman, April 11, 1992, pp. 36-40.

<sup>35</sup>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.

Judiciary Committee. Hill's name was never mentioned.<sup>36</sup>

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.<sup>37</sup>

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.<sup>38</sup>

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

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<sup>36</sup>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.

<sup>37</sup>Brudney Int.; Corr Dep., pp. 15-16; Johnson Dep., pp. 11-12; Harvie Int.

<sup>38</sup>Brudney Dep., pp. 21-22.

"Committee staff."<sup>39</sup>

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.<sup>40</sup>

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 also was uncomfortable about coming forward. Hill said she would call the friend to see if the friend would talk to Grant.<sup>41</sup>

After her conversation with Hill, Grant reported to Peck. Senator Biden was briefed with other staff on Friday,

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<sup>39</sup>Brudney Dep., p. 23-24, 27-28.

<sup>40</sup>Deposition of Harriet Grant, April 13, 1992, pp. 20-23, 27-29.

<sup>41</sup>Grant Dep., pp. 24-27, 34.

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.<sup>42</sup>

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. Although 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.<sup>43</sup>

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.<sup>44</sup> From Hill's

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<sup>42</sup>Peck Int.; Interview of Ron Klain, January 31, 1992; Grant Dep., p. 23; Interview of Harriet Grant, January 7, 1992.

<sup>43</sup>Brudney Dep., pp. 29-32; Brudney Int.; Johnson Int.

<sup>44</sup>Interview of Anita F. Hill, April 22, 1992.

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 Hoerchner, about speaking to Grant until Monday, September 16.

Hoerchner reached Grant on the following day, September 17. Although Hoerchner confirmed Hill's description of her complaints about harassment in 1981, Hoerchner 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.<sup>45</sup>

By this time, the Kennedy staff had heard of Brudney's concerns about a possible misunderstanding between Hill and Grant.<sup>46</sup> Contact was made with Senator Leahy's chief of staff, Ellen Lovell, and Leahy's Chief Judiciary staffer, Ann Harkins,

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<sup>45</sup>Grant Dep., pp. 35-37; Interview of Susan Hoerchner, February 14, 1992. Contrary to some published reports, Hoerchner'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.

<sup>46</sup>Deposition of Carolyn Osolinik, April 14, 1992, pp. 11, 13-14; Seidman Int.; Cooper Int.

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.<sup>47</sup>

After obtaining Senator Leahy's permission to pursue the matter, Lovell and Harkins met with Senator Biden's chief of staff, Ted Kaufman, and 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, given her request for confidentiality, it would be wrong to push Hill in any way.<sup>48</sup>

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.<sup>49</sup>

These concerns were mooted on Thursday, September 19,

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<sup>47</sup>Interview of Ellen Lovell, February 6, 1992; Interview of Ann Harkins, February 6, 1992; Interview of Carolyn Osolinik, January 21, 1992.

<sup>48</sup>Interview of Ted Kaufman, January 23, 1992; Grant Int.; Peck Int.; Lovell Int.; Harkins Int.

<sup>49</sup>Interview of Senator Leahy, February 20, 1992; Harkins Int.; Lovell Int.

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.<sup>50</sup>

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.<sup>51</sup> 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."<sup>52</sup>

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

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<sup>50</sup>Grant Dep., pp. 40-42.

<sup>51</sup>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.

<sup>52</sup>Grant Dep., pp. 41, 44-45.

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.<sup>53</sup>

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.<sup>54</sup> On Friday and Saturday, she spoke with Ross and then Brudney about her concern that her charges against

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<sup>53</sup>Grant Dep., pp. 47-48. All references to time are based on Washington time.

<sup>54</sup>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.

Thomas would be distorted by FBI interviewers.<sup>55</sup> Ross, in turn, spoke to Osolinik, who confirmed that an FBI interview was a standard procedure used by the Judiciary Committee.<sup>56</sup> 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.<sup>57</sup>

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."<sup>58</sup>

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 -- she was trying to decide

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<sup>55</sup>Brudney Dep., p. 48; Ross Int.

<sup>56</sup>Ross Int.; Osolinik Int.

<sup>57</sup>Ross Int.

<sup>58</sup>Grant Dep., pp. 48-50.

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.<sup>59</sup>

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.<sup>60</sup>

#### 4. September 23 - September 27

On Monday, September 23, Hill telefaxed a four-page statement to Senator Biden's staff.<sup>61</sup> 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.<sup>62</sup> A copy of the statement was delivered to Senator

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<sup>59</sup>Brudney Dep., pp. 48-51.

<sup>60</sup>Brudney Dep., pp. 52-55.

<sup>61</sup>Interview of Anita Hill, February 10, 1992; Grant Dep., p. 53; Deposition of Jeffrey Peck, April 2, 1991, pp. 60-61.

<sup>62</sup>A copy of the statement is attached as Exhibit 5. Hill says she had both 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

Thurmond's staff<sup>63</sup> and, through communications with the Department of Justice and the White House, an FBI investigation was initiated immediately.<sup>64</sup>

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.<sup>65</sup>

The statement which Hill telefaxed on Monday, September 23, contained typographical errors. On Wednesday, September 25,

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page which could be a notary's seal. Indeed, the White House recipients recall speculating at the time that the markings 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 23 and 25. 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.

<sup>63</sup>Grant Dep., p. 56; Peck Dep., pp. 68-69; Deposition of Robert J. Short, April 17, 1992, pp. 4-5.

<sup>64</sup>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.

<sup>65</sup>Brudney Dep., pp. 60-61; Hoerchner Int.

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.<sup>66</sup> It was identical in content, was signed Anita F. Hill, and was dated September 25, 1991. It did not appear to have been notarized.<sup>67</sup>

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.<sup>68</sup> 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 he wished to include a description of the allegations contained in the statement he knew she had faxed to the Committee.<sup>69</sup> 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

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<sup>66</sup>Hill Int., February 10, 1992; Grant Dep., p. 55; Peck Dep., p. 64.

<sup>67</sup>A copy of the September 25 statement is attached as Exhibit 6. Hill says this statement was notarized, too.

<sup>68</sup>Grant Dep., pp. 69-75.

<sup>69</sup>Brudney Dep., pp. 66-67.

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.<sup>70</sup>

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.<sup>71</sup>

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

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<sup>70</sup>Hill Int., April 22, 1992.

<sup>71</sup>Interview of Senator Biden, February 7, 1992; Peck Dep., pp. 45-46.

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.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup>

On Thursday, September 26, Hill called Brudney at 8:22 a.m. She was upset that her statement had not been circulated to

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<sup>72</sup>Peck Dep., pp. 36-44.

<sup>73</sup>Interview of Senator Thurmond, February 3, 1992; Short Dep., pp. 14, 16.

<sup>74</sup>Short Dep., pp. 17-18; Interview of Senator Hatch, February 25, 1992; Interview of Senator Simpson, February 4, 1992.

<sup>75</sup>Interview of Senator Specter, February 6, 1992.

the members.<sup>76</sup>

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 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 do to help inform the Committee. With Hill's authorization, Jarvis and Taylor agreed to make inquiry.<sup>77</sup>

Jarvis immediately called Senator Simon's offices and spoke with Susan Kaplan, chief counsel to his Judiciary subcommittee.<sup>78</sup> Kaplan had heard of the allegations from Simon earlier in the day and promptly arranged for him to speak

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<sup>76</sup>Brudney Dep., p. 78.

<sup>77</sup>Taylor Int.; Interview of Sonia Jarvis, February 28, 1992.

<sup>78</sup>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.

directly to Hill later that afternoon.<sup>79</sup>

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.<sup>80</sup>

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.<sup>81</sup>

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.<sup>82</sup> Tribe reached Ron Klain, a former student and Senator Biden's chief counsel on the Judiciary Committee, and passed on

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<sup>79</sup>Interview of Susan Kaplan, January 14, 1992.

<sup>80</sup>Statement of Senator Paul Simon, para. 5; Hill Int, February 10, 1992.

<sup>81</sup>Taylor Int.; Interview of Charles Ogletree, April 23, 1992.

<sup>82</sup>Ogletree Int.

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.<sup>83</sup>

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.<sup>84</sup> 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."<sup>85</sup> 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.

#### 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

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<sup>83</sup>Klain Int.; Interview of Lawrence Tribe, January 30, 1992.

<sup>84</sup>Klain Int.

<sup>85</sup>Peck Dep., pp. 73, 75.

the FBI,<sup>86</sup> and they, in turn, told the Leahy staff.<sup>87</sup>

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.<sup>88</sup>

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.<sup>89</sup> Brudney did prepare a memorandum which he completed that evening and delivered it to Johnson and Corr in the early evening.<sup>90</sup> 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.<sup>91</sup>

Brudney was called by Johnson shortly thereafter and

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<sup>86</sup>Seidman Dep., pp. 71-72, 74; Brudney Dep., pp. 91-92.

<sup>87</sup>Harkins Int.

<sup>88</sup>Harkins Int.; Peck Dep., p. 32.

<sup>89</sup>Brudney Dep., pp. 64-69; Hill Ints.

<sup>90</sup>Brudney Dep., p. 70; Johnson Dep., pp. 35-36; Corr Dep., p. 56.

<sup>91</sup>Brudney Dep., p. 76, 130; Johnson Dep., p. 35; Corr Dep., p. 55.

told of Senator Metzenbaum's displeasure upon hearing from Senator Biden that Metzenbaum staffers were referred to in the FBI report.<sup>92</sup> 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.<sup>93</sup>

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.<sup>94</sup> Lichtman did know about Hill's allegations because she had been consulted by Susan Ross the prior week and

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<sup>92</sup>Brudney Dep., p. 79; Johnson Dep., pp. 30-31; Corr Dep., pp. 48-49. The FBI report quoted Hoerchner 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.

<sup>93</sup>Brudney Int.; Corr Dep., p. 50; Johnson Dep., pp. 41-42.

<sup>94</sup>Corr Dep., pp. 57-58, 65-68.

had spoken briefly to Brudney.<sup>95</sup> Henderson, however, had not known of the allegations until Jarvis called him at midday that Thursday.<sup>96</sup>

Corr took notes during these conversations. One note contains a portion attributed to Lichtman which reads "I going after affidavit."<sup>97</sup> Neither Corr nor Lichtman remember her using those precise words.<sup>98</sup> Lichtman specifically denies seeking out or obtaining Hill's affidavit at any time.<sup>99</sup> 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.<sup>100</sup>

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.<sup>101</sup> Henderson was more reserved. He made no reference to any affidavit. He emphasized the sensitivity of the issue and

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<sup>95</sup>Deposition of Judith Lichtman, April 15, 1992, pp. 4-5, 34.

<sup>96</sup>Interview of Wade Henderson, February 24, 1992.

<sup>97</sup>Corr Dep., p. 66.

<sup>98</sup>Corr Dep., p. 77; Lichtman Dep., p. 34.

<sup>99</sup>Lichtman Dep., pp. 35-36.

<sup>100</sup>Corr Dep., pp. 77-78.

<sup>101</sup>Corr Dep., pp. 69, 73; Lichtman Dep., pp. 31-34; Lichtman Int.

stressed the need to avoid precipitous action.<sup>102</sup>

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.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

#### 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.<sup>106</sup>

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<sup>102</sup>Henderson Int.; Corr Dep., p. 86.

<sup>103</sup>Corr Dep., p. 95. 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 26. Seidman Dep., pp. 97-99.

<sup>104</sup>Lichtman Dep., p. 40-41.

<sup>105</sup>Lichtman Dep., pp. 18-20, 42, 46.

<sup>106</sup>Klain Int.; Interview of Cathy Russell, February 19, 1992.

It appears that Lichtman entertained the possibility of raising the issue with senators outside the Committee on Friday and early the next week.<sup>107</sup> 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.<sup>108</sup>

Representatives of other outside groups also acknowledge varying degrees of knowledge of the matter.<sup>109</sup> However, many of those actively opposing Thomas were pursuing other issues, including the controversy associated with Judge Thomas's leaked draft opinion in the Lamprecht case, and also were lobbying the civil rights legislation which was scheduled for an early vote.<sup>110</sup>

### 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.<sup>111</sup> They discussed various issues having to do with Thomas's nomination, but Phelps

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<sup>107</sup>Harkins Int.

<sup>108</sup>Ross Int.; Lichtman Dep., pp. 14-15.

<sup>109</sup>Interview of Kate Michelman, March 4, 1992; Interview of Ralph Neas, February 24, 1992; Interview of Tony Podesta, March 3, 1992; Henderson Int.; Aron Int.

<sup>110</sup>Lichtman Dep., pp. 27-28.

<sup>111</sup>See Ex. 12.

did not ask Hill about any sexual harassment claim.<sup>112</sup> 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.<sup>113</sup>

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 call 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.<sup>114</sup> Senator Simon

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<sup>112</sup>Hill Int.; see Ex. 12.

<sup>113</sup>See Ex. 7.

<sup>114</sup>Seidman Dep., p. 118.

does not remember the moment,<sup>115</sup> but it is clear Senator Simon did not discuss Anita Hill or her allegations with Phelps at that time.

This is corroborated by Phelps's 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.<sup>116</sup> Phelps recounted his Wednesday conversation with Senator Simon and, after describing Senator Simon's silence in response to Phelps's 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.<sup>117</sup>

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.

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<sup>115</sup>Simon Statement, para. 12.

<sup>116</sup>Seidman says she discouraged Phelps from calling Hill by downplaying the likelihood she would have any useful information. Phelps appears to have been deterred because he admittedly did not raise the issue of sexual harassment until shortly before his story ran. Seidman Dep., p. 120.

<sup>117</sup>Seidman Dep., pp. 118-121.

Hill's impression was that Phelps's source was someone who had seen the statement.<sup>118</sup>

Hill cannot place the time of Phelps's 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.<sup>119</sup>

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.<sup>120</sup>

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.<sup>121</sup>

Phelps called Ricki Seidman on Saturday morning.<sup>122</sup> He

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<sup>118</sup>Hill Int., February 10, 1992.

<sup>119</sup>Harvie Int.

<sup>120</sup>Seidman Dep., p. 141.

<sup>121</sup>Hill Int., February 10, 1992.

<sup>122</sup>Because the Rules Committee denied our application to enforce our subpoenas for toll records of Newsday and Phelps, and because Phelps has refused to testify, we do not know whether

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.<sup>123</sup>

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 had been called by Totenberg on Friday and 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.<sup>124</sup>

The call to Simon probably concluded shortly before 6 p.m.<sup>125</sup> Phelps then made a series of calls to other senators on

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Phelps's call to Seidman took place before or after his call to Hill.

<sup>123</sup>Seidman Dep., pp. 154-155.

<sup>124</sup>Simon Statement para. 15.

<sup>125</sup>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.

the Committee, including Senators Hatch and Simpson, while his colleague, Gaylord Shaw, called the White House for comment.<sup>126</sup> Senator Simpson, in an effort to deflate the story, said he had previously heard of allegations during Thomas's Court of Appeals nomination.<sup>127</sup> Senator Hatch, who was in Utah, does not recall Phelps calling, but the later edition of Phelps's article quotes him as branding the allegations as false and expressing anger at the disclosure.<sup>128</sup> 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's call and claimed he had been unable to reach the senator.<sup>129</sup>

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

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<sup>126</sup>Peck Dep., p. 13; Interview of Doug Davidson, February 12, 1992.

<sup>127</sup>Simpson Int.

<sup>128</sup>Hatch Int.

<sup>129</sup>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.

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."<sup>130</sup> Moreover, Ann Louise Bardach, who authored the profile and who interviewed Senator Simon, told Senator Simon that Totenberg had told Bardach the same thing.<sup>131</sup>

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

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<sup>130</sup>See Ex. 8.

<sup>131</sup>Simon Statement para. 16.

Anita Hill's background further and finding outside confirmations of these allegations, NPR interviewed Anita Hill.<sup>132</sup>

It is clear something had happened by Wednesday, October 2. On that day Aron called Sonia Jarvis.<sup>133</sup> Aron did not know Jarvis. She asked Jarvis if Anita Hill was "prepared to go public."<sup>134</sup> 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.<sup>135</sup>

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

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<sup>132</sup>See Ex. 9.

<sup>133</sup>Jarvis Int.

<sup>134</sup>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 10, 1992, p. 15.

<sup>135</sup>Jarvis Int.

of the National Abortion Rights Action League ("NARAL"), about the "Oklahoma thing."<sup>136</sup> Brudney had a similar conversation with Henderson.<sup>137</sup>

Hill tried to reach Brudney on Wednesday, October 23. She says she called to discuss the floor vote and the nomination generally.<sup>138</sup> 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.<sup>139</sup> Corr and Johnson

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<sup>136</sup>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.

<sup>137</sup>Brudney Dep., pp. 103-04.

<sup>138</sup>Hill Int., April 22, 1992.

<sup>139</sup>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 mean, I just -- 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.

say Brudney reported this to them on Thursday morning.<sup>140</sup>

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

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.<sup>142</sup>

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 statement 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.<sup>143</sup>

Earlier that day, Hill had spoken for the first time to

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Brudney Dep., pp. 86-87. Hill's telephone records do not show any calls placed to Washington friends between September 26 and October 2.

<sup>140</sup>Corr Dep., pp. 113-14; Johnson Dep., p. 65.

<sup>141</sup>Hill Int., April 22, 1992.

<sup>142</sup>Seidman Dep., pp. 113-14.

<sup>143</sup>Hill Int., April 22, 1992.

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.<sup>144</sup>

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.<sup>145</sup>

That Thursday evening, after a Labor Committee reception, Lichtman stopped by Seidman's office with Ralph Neas.<sup>146</sup> Seidman 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

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<sup>144</sup>Ogletree Int.

<sup>145</sup>Id.

<sup>146</sup>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 non-Senate sources several weeks earlier but did not know Hill's name. Interview of Ralph Neas, February 25, 1992. We found no evidence to support a published report that Neas had played some part in the disclosure of Hill's allegations.

elsewhere.<sup>147</sup>

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.<sup>148</sup>

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.<sup>149</sup>

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

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<sup>147</sup>Seidman Dep., pp. 110, 124-125.

<sup>148</sup>Id. at 130-131.

<sup>149</sup>Simon Statement, paras. 13-14. This impression was misleading as far as the Democratic members were concerned. The Republican senators, however, had not been briefed.

message "have a little bit of information."<sup>150</sup>

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.<sup>151</sup>

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.<sup>152</sup>

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

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<sup>150</sup>Hill Ints.

<sup>151</sup>Interview of David Swank, February 10, 1992. Totenberg received a similar recommendation from Hill's former dean at Oral Roberts, John Stanton. Totenberg called another Hill reference on Saturday, October 5. Interview of John Stanford, March 16, 1992.

<sup>152</sup>Swank Int.

to the dean of the law school who had vouched for Hill's credibility.<sup>153</sup>

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.<sup>154</sup>

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.<sup>155</sup>

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

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<sup>153</sup>Seidman Dep., pp. 134-137.

<sup>154</sup>Leahy Int.

<sup>155</sup>Hill Int., April 22, 1992; Jarvis Int.

and a discussion of the issue generally.<sup>156</sup>

On Saturday morning, Hill called family members to tell them for the first time that a story might run.<sup>157</sup> 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.<sup>158</sup>

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.<sup>159</sup>

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

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<sup>156</sup>Hill Int., April 22, 1992.

<sup>157</sup>Id.

<sup>158</sup>Interview of Michael Middleton, April 30, 1992.

<sup>159</sup>Hill Int., April 22, 1992.

she did not know who had it and, as far as she knew, only senators had seen it.<sup>160</sup>

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 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.<sup>161</sup>

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.<sup>162</sup>

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<sup>160</sup>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.

<sup>161</sup>Seidman Dep., pp. 156-157; Seidman Int.

<sup>162</sup>Brudney Dep., pp. 113-118, 121.

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.<sup>163</sup>

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 broadcast the next morning.<sup>164</sup>

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

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

Totenberg called the White House at approximately 5:30 p.m. for a reaction.<sup>168</sup> The White House released a statement that evening.

Totenberg's calls to Senator Biden's staff started

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<sup>163</sup>Hill Int., April 22, 1992.

<sup>164</sup>Id.

<sup>165</sup>Seidman Dep., pp. 161-63.

<sup>166</sup>Lichtman Dep., pp. 63-64.

<sup>167</sup>Brudney Dep., p. 123; Johnson Dep., pp. 74-75.

<sup>168</sup>Peck Dep., p. 13-14.

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.<sup>169</sup>

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<sup>169</sup>Peck Dep., pp. 14-15.

## 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.<sup>170</sup> The story was released to the Los Angeles Times-Washington Post News Service at approximately 8:45 p.m., triggering numerous inquiries that evening by other news organizations. It read in its most relevant parts:

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

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<sup>170</sup>Marro Dep., pp. 21-22. The full text of the Phelps story appears at Exhibit 10.

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.

\* \* \*

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.<sup>171</sup> 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."<sup>172</sup>

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<sup>171</sup>The full text of the story and the accompanying photograph and caption are contained in Exhibit 11.

<sup>172</sup>See Ex. 12.

## 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 is nothing in the record that I know that indicates that the FBI report was ever made available to the press. I'm advised by counsel not to say exactly what it is we had, but I think if you look at both news reports, there's no suggestion 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.<sup>173</sup>

## 2. Disclosures From Senate Documents

The information attributed to Phelps's "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 interpretations which were brought to Phelps's 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.

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<sup>173</sup>See Ex. 13. Phelps testified that his remarks were accurate. Phelps Dep., pp. 90-94.

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

The evidence indicates that Phelps's 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.<sup>174</sup>

We have no reason to doubt Phelps on this issue or to doubt Senator 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 revealing Hill's allegations. The only exception was Senator Biden, who voted against Thomas but clearly had no reason to disclose allegations which would subject him to the criticism he subsequently received.<sup>175</sup>

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<sup>174</sup>Phelps Dep., pp. 58-59.

<sup>175</sup>The same is true of senior staff for Senators Biden and Thurmond who saw the FBI report.

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's 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's "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.<sup>176</sup>

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 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.<sup>177</sup>

Phelps did call those senators on Saturday evening, and they did speak to him about Hill's allegations. But, while it

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<sup>176</sup>Corr. Dep., p. 125.

<sup>177</sup>Corr. Dep. at 126-27.

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.<sup>178</sup> In the same sense, the White House "confirmed" the story by issuing its statement. We do not believe that Phelps's source for the quoted remarks could have been a Republican.

We are unable to identify Phelps's 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.<sup>179</sup> 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

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<sup>178</sup>Hatch Int.; Simpson Int.

<sup>179</sup>In the Washington area, "Weekend Edition" aired at 11 a.m.

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 office to discuss work or, if his schedule was full, would ask her to go to a government cafeteria for lunch to discuss work.<sup>180</sup>

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

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<sup>180</sup>See Ex. 14.

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.

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.<sup>181</sup>

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.<sup>182</sup>

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

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<sup>181</sup>Totenberg Dep., p. 6.

<sup>182</sup>Buzenberg Dep., p. 25.

Thomas did 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.<sup>183</sup>

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

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<sup>183</sup>Peck confirmed this himself at Senator Biden's request in connection with the second set of hearings. Peck Int.

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.<sup>184</sup>

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 both were under the impression that Totenberg had the affidavit when she called them on Friday, October 4. On Friday evening, October 4, Totenberg

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<sup>184</sup>See Ex. 15.

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.<sup>185</sup>

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

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<sup>185</sup>Senator Leahy's response to Totenberg was to call the affiant herself if she had questions about it. Leahy Int.

of September and October were searched for every telecopy machine available to Hill at either the University of Oklahoma Law School, or the University Prevo'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.<sup>186</sup>

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

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<sup>186</sup>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. 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 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.<sup>187</sup> 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.<sup>188</sup> Peck also retained one copy of the statement.<sup>189</sup> Grant and Peck then provided copies of the statement to Ron Klain, Senator

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<sup>187</sup>Grant Dep., pp. 51-53.

<sup>188</sup>Grant Dep., pp. 55-56, 58; Peck Dep., p. 69.

<sup>189</sup>Peck Dep., p. 69.

Biden's chief counsel of the Committee, and Duke Short and Melissa Riley, of Senator Thurmond's staff.<sup>190</sup>

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.<sup>191</sup>

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.<sup>192</sup>

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.<sup>193</sup> 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.<sup>194</sup> Because she did not have a security clearance and believed from Peck's

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<sup>190</sup>Grant Dep., p. 56; Peck Dep., p. 69.

<sup>191</sup>Deposition of Ronald A. Klain, April 10, 1992, pp. 6-7.

<sup>192</sup>Grant Dep., pp. 69, 76.

<sup>193</sup>Interview of Mark Schwartz, January 8, 1992.

<sup>194</sup>Peck Dep., p. 72-73.

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.<sup>195</sup>

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 Confidential, For Senator's Eyes Only."<sup>196</sup> Grant delivered envelopes to Senators Kennedy, Metzenbaum and Leahy, all of whom are officed in the Russell Building.<sup>197</sup> Fine made the deliveries in the Hart and Dirksen Buildings to Senators Heflin, Kohl, Simon and DeConcini.<sup>198</sup> 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.<sup>199</sup> 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.<sup>200</sup>

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<sup>195</sup>Deposition of Tammy Sue Fine, April 8, 1992, p. 33; Interview of Tammy Fine, January 16, 1992.

<sup>196</sup>Peck Dep., p. 73; Fine Dep., pp. 9, 33-35.

<sup>197</sup>Grant Dep., p. 77.

<sup>198</sup>Fine Dep., p. 11-12.

<sup>199</sup>Peck Dep., p. 76; Deposition of Ann Marie Harkins, April 2, 1992, p. 9; Deposition of Karen Robb, April 16, 1992, p. 10-11.

<sup>200</sup>Peck Dep., pp. 76-85; Fine Dep., p. 24-26.

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.<sup>201</sup> 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.<sup>202</sup>

Senator Thurmond was generally briefed on the contents of the statement, but was never provided with a copy of the

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<sup>201</sup>Short Dep., p. 10; Deposition of Melissa Nolan Riley, April 10, 1992, pp. 13-14.

<sup>202</sup>Riley Dep., pp. 13-16.

statement.<sup>203</sup>

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.<sup>204</sup>

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.<sup>205</sup> 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.<sup>206</sup>

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.<sup>207</sup>

Robb 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

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<sup>203</sup>Short Dep., p. 10.

<sup>204</sup>Deposition of Terry Lynn Wooten, April 3, 1992, pp. 11-12.

<sup>205</sup>Fine Dep., pp. 19-20.

<sup>206</sup>Robb Dep., pp. 5-7.

<sup>207</sup>Robb Dep., pp. 8-10.

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 resealed. Immediately after the committee vote, Robb saw Jeff Peck, who took the envelope from her.<sup>208</sup>

Robb testified that she did not see the statement or affidavit of Anita Hill prior to the disclosures on October 6, 1991.<sup>209</sup>

#### 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.<sup>210</sup>

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.<sup>211</sup>

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<sup>208</sup>Robb Dep., pp. 9-12.

<sup>209</sup>Robb Dep., pp. 13-14.

<sup>210</sup>Fine Dep., p. 12.

<sup>211</sup>Certification of Senator Heflin, sworn to on April 10, 1992.

e. Senator Kennedy's Office

Harriet Grant hand-delivered the sealed envelope containing the Hill statement to Jackie Agnolet, Senator Kennedy's special assistant.<sup>212</sup> After signing for the envelope, Agnolet returned to her office and placed the unopened envelope on Senator Kennedy's desk.<sup>213</sup>

Senator Kennedy, who arrived shortly thereafter, picked up the sealed envelope and took it with him to the hearing on the Thomas nomination.<sup>214</sup>

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 and to contact the Committee for its retrieval. Kedas did so and, shortly thereafter, Peck came by the office to pick it up.<sup>215</sup>

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<sup>212</sup>Grant Dep., pp. 77-78; Deposition of Jacqueline Agnolet, April 8, 1992, pp. 6-7.

<sup>213</sup>Agnolet Dep., p. 7.

<sup>214</sup>Deposition of Frances Cooper, April 8, 1992, pp. 9, 14-15, 18-19.

<sup>215</sup>Cooper Dep., pp. 10-11, 13, 18, 20; Deposition of Jeannie Kedas, April 8, 1992, pp. 11-15; Agnolet Dep., pp. 11-12.

f. Senator Kohl's Office

Fine delivered the envelope to Arlene Branca, Senator Kohl's executive assistant.<sup>216</sup> 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.<sup>217</sup>

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.<sup>218</sup>

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.<sup>219</sup>

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

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<sup>216</sup>Fine Dep., p. 15.

<sup>217</sup>Deposition of Arlene Claire Branca, April 2, 1992, pp. 5, 7.

<sup>218</sup>Deposition of Robert Seltzer, April 2, 1992, pp. 4-6.

<sup>219</sup>Seltzer Dep., p. 7.

told her where he had placed it, and gave it to Peck.<sup>220</sup>

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.<sup>221</sup> Branca further testified she never learned the contents of the envelope.<sup>222</sup> Seltzer testified he did not describe the contents of the statement to anyone.<sup>223</sup>

g. Senator Leahy's Office

Harriet Grant hand carried the envelope to Senator Leahy's office.<sup>224</sup> 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.<sup>225</sup>

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

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<sup>220</sup>Branca Dep., pp. 9-10; Seltzer Dep., p. 8.

<sup>221</sup>Seltzer Dep., p. 9; Branca Dep., p. 10-11.

<sup>222</sup>Branca Dep., p. 10.

<sup>223</sup>Seltzer Dep., p. 10.

<sup>224</sup>Grant Dep., pp. 77-78.

<sup>225</sup>Deposition of Leah Gluskoter, April 2, 1992, pp. 7-10; Harkins Dep., p. 6.

walked over to talk to Harkins on a different matter.<sup>226</sup>

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.<sup>227</sup>

#### h. Senator Metzenbaum's Office

Jill DiNino, Senator Metzenbaum's personal secretary, was handed the envelope by Harriet Grant.<sup>228</sup> 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.<sup>229</sup>

After the committee vote, Peck picked up the envelope from DiNino.<sup>230</sup> Sometime thereafter, Senator Metzenbaum asked

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<sup>226</sup>Harkins Dep., pp. 8-9.

<sup>227</sup>Harkins Dep., pp. 7, 8, 11.

<sup>228</sup>Grant Dep., pp. 77-78.

<sup>229</sup>Deposition of Jill DiNino, April 21, 1992, pp. 10-16.

<sup>230</sup>Peck Dep., pp. 79-80.

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.<sup>231</sup>

#### i. Senator Simon's Office

At Senator Simon's office, Fine asked for Kathleen Donohue, the senator's scheduler.<sup>232</sup> Donohue signed for the envelope and placed it unopened on her desk for later delivery to the senator.<sup>233</sup>

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.<sup>234</sup> Williams, who knew nothing of the delivery, then attempted to locate the envelope.<sup>235</sup>

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

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<sup>231</sup>DiNino Dep., pp. 14-15, 20-23.

<sup>232</sup>Fine Dep., p. 16.

<sup>233</sup>Deposition of Kathleen Crowell Donohue, April 8, 1992, pp. 6, 8.

<sup>234</sup>Peck Dep., pp. 81-82.

<sup>235</sup>Deposition of Jacqueline M. Williams, April 8, 1992, pp. 9-10.

the sealed envelope to Senator Simon.<sup>236</sup>

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 contacted Peck.<sup>237</sup> At approximately 3:00 p.m., Tammy Fine went to Senator Simon's office to retrieve the envelope.<sup>238</sup>

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.<sup>239</sup> 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.

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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.

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<sup>236</sup>Williams Dep., pp. 10-11.

<sup>237</sup>Williams Dep., pp. 14-15.

<sup>238</sup>Fine Dep., pp. 26-27.

<sup>239</sup>Williams Dep., pp. 16, 19-22.

## 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.<sup>240</sup> According to Hill, he did ask for the statement and she questioned Brudney about why he needed it.<sup>241</sup>

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

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<sup>240</sup>Brudney Dep., pp. 66-68, 130.

<sup>241</sup>Hill Int., April 22, 1992.

evening.<sup>242</sup>

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.<sup>243</sup>

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 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 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.

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<sup>242</sup>Brudney Dep., p. 132-34; Johnson Dep., pp. 92-94.

<sup>243</sup>Johnson Dep., pp. 92; Metzenbaum Statement, para. 9.

## 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 -- violative 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.<sup>244</sup>

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

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<sup>244</sup>137 Cong. Rec. S15125 (daily ed. Oct. 24, 1991).

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.<sup>245</sup> 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.<sup>246</sup> 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 inquisitors to send us similar questionnaires.)

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<sup>245</sup>See Ex. 16.

<sup>246</sup>See Ex. 17. The principal request was contained in a letter, dated August 7, 1991, from Senator Biden to the Justice Department. Senator Metzenbaum sent a supplemental request by letter dated August 12, 1991.

The request is also testimony to Judge Thomas's 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...<sup>247</sup>

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

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<sup>247</sup>See Ex. 18.

evidence contradicting their statements to us.<sup>248</sup>

**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, the 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.<sup>249</sup> 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

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<sup>248</sup>Duberstein Int.; Liberman Int.; Cox Int.

<sup>249</sup>Interview of Cynthia Hogan, March 20, 1992.

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...<sup>250</sup>

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.<sup>251</sup>

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

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<sup>250</sup>See Ex. 19.

<sup>251</sup>See Ex. 20.

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.<sup>252</sup>

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 deposition was shared with all Committee members and their staffs, consistent with the procedure utilized for all of the witnesses appearing at the hearings. Third, none of the articles quote from the deposition of Wright nor give the impression that the news media had a copy of her deposition. Fourth, these articles do not indicate that the White House had or had seen a copy of the transcript.<sup>253</sup>

#### C. References to James Brudney

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

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<sup>252</sup>See Ex. 22.

<sup>253</sup>Within the Committee, there was disagreement as to whether it would have been inappropriate for the transcript to be shared with the White House. Terry Wooten, Senator Thurmond's chief counsel, testified that, although he did not do so, the deposition transcript of a potentially devastating witness should be made available to the White House because it is their nominee. Wooten also stated that there was an agreement between the Biden and Thurmond staffs that they would not make the transcript available to the press. Wooten Dep., pp. 28, 35-38.

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.<sup>254</sup>

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:

[O]n 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...<sup>255</sup>

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

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<sup>254</sup>See Ex. 23.

<sup>255</sup>137 Cong. Rec. S14473 (Statement by Senator Metzenbaum).

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 these inquiries. They were made, and we know that took place...<sup>256</sup>

(Emphasis added)

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.

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<sup>256</sup>137 Cong. Rec. S14474 (Statement by Senator Simpson) (emphasis added).

