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# REPORT

OF

# TEMPORARY SPECIAL INDEPENDENT COUNSEL

PURSUANT TO

## Senate Resolution 202

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

## IX. GENERAL ISSUES

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

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

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

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

### A. Confidentiality [344]

Its history shows the fundamental policy of the Senate to be one of open debate and public access to information. With rare exceptions, the Senate has conducted all of its legislative proceedings since 1795 in open session. Since 1929, the Senate has provided for open sessions on the floor for the consideration of nominations and treaties, both of which previously had been treated in confidence. In accord with this fundamental policy, the Senate has acted to make its proceedings fully accessible. Under the Constitution, the Senate "keeps a Journal of its Proceedings, and from time to time publishes the same, excepting such parts as may in their judgment require Secrecy." U.S. Const., art. I, sec. 5, cl. 3. Since 1802, the Senate has provided the press with special access to the Chamber. In 1848, the Senate began directly arranging for publication of Senate floor debate, culminating in the initiation of the Congressional Record beginning in 1873.[345] Since 1986, the Senate's floor proceedings have been broadcast over radio and television.[346]

The Senate also opens the majority of its committee proceedings to the public. By Senate rule, all meetings, including meetings to conduct hearings, of Senate committees "shall be open to the public," unless a committee votes to close a particular meeting or limited series of them for one of several prescribed reasons. Senate rules likewise create a presumption for the broadcast of committee hearings by radio and television.[347]

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

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[344] We acknowledge the thought and assistance of the Senate's Legal Counsel and his staff on this issue. The conclusions are ours.

[345] See Cong. Globe, 30th Cong., 1st Sess. 1065 (1848); Act of April 2, 1872, ch. 79, 17 Stat. 47 (1872).

[346] See S. Res. 28, 99th Cong., 2d Sess. (1986); S. Res. 444, 99th Cong., 2d Sess. (1986).

[347] Senate Rule 26.5, reprinted in S. Doc. No. 102-17, at 38-39.

when confidentiality is essential." [348] In particular situations, and for valid reasons, identifiable and significant interests warrant an institutional judgment that confidentiality is essential to the appropriate discharge of institutional responsibility. Certain of these interests are particularly relevant to the matters which are the subject of the investigation mandated by S. Res. 202.

1. CITIZEN INTERESTS

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

James Madison's remarks when the First Amendment was proposed manifest the intent that the Petition Clause guarantee the right of the people to "communicate their will," not only by "publicly address[ing] their representatives," but also by "privately advise[ing] them." [349] Public values are served by promising confidentiality in order to encourage a citizen's free exchange of ideas with elected representatives. The Senate has an obligation to take all steps necessary to maintain the confidentiality of communications from those private citizens who request it. Indeed, Senate access to relevant but sensitive personal information often will depend upon assurances of confidentiality. It seems certain that breaches of confidentiality by the Senate will diminish the willingness of individuals to come forward.

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

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

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[348] 121 Cong. Rec. at 35187 (1975) (Sen. Roth).
[349] 1 Annals of Cong. 738 (1789) (quoted in McDonald, 472 U.S. at 489 (Brennan, J., concurring).

### 2. INSTITUTIONAL INTEREST

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

An appropriate degree of confidentiality therefore is essential if the historic value of public access is to be maintained and if plain-speaking and candid internal debate is to be encouraged. Beyond even those considerations, some degree of confidentiality must be respected if there is to be cooperation between the Executive and Legislative Branches. Information of vital importance to the Senate often is within the possession of the Executive Branch, and much of that information may be subject to concerns of confidentiality. The risk of unauthorized disclosure of confidential information has become a substantial impediment to open cooperation between the two branches which are, after all, charged by the American public with the obligation to govern effectively. Officials in both the Executive and the Legislative Branches have focused on the risk or actual instance of unauthorized disclosure by Congress as a reason which justifies unilateral decision by the Executive Branch to willfully withhold information from the Congress.[350]

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

## B. LEAKING

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

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[350] See, e.g., Report of the Congressional Committee's Investigating the Iran-Contra affair, S. Rep. No. 216, 100th Cong., 1st Sess. 14 (1987); id. at 575–79 (minority report).

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

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

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

> Every leak is to be condemned. Every leak is to be deplored. The end does not justify the means. And a leak which harms the opponent is just as wrong as a leak which harms a friend. A leak which injures a cause I oppose is just as wrong as a leak which injures a cause I favor.[351]

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

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

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[351] 137 Cong. Rec. at S15129 (daily ed. Oct. 24, 1991).

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

> The seriousness of this violation cannot be overstated. Each member of this panel has been aggrieved by it, as have the parties who brought this case to us for adjudication. Moreover, because one or more of their number has been guilty of a willful breach of trust, this incident must cast a shadow over the dozen or more able young law clerks who had become privy to the preliminary drafts.
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> The hemorrhaging of confidential information has become endemic in the legislative and executive branches of our government, with untold costs to their ability to function. It is essential that we prevent this disease from invading the judiciary, as this would inevitably undermine the public confidence that is one of the major strengths of our legal system.

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

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

### C. The Media

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

#### 1. THE JOURNALISTS

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

2. DECISION TO SUBPOENA JOURNALISTS

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

3. REASONS

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

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

> But freedom of the press, precious and vital though it is to a free society, is not an absolute.
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> Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover the truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.
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> Without question, the exaction of this duty impinges, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or to be silent disappears. But the personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.
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> If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to

> a paramount public interest in the fair administration of justice.

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

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

There has since evolved in the lower federal courts a standard which requires the balancing of two considerations. The first consideration is whether identification of the confidential source is central to the determination of the issue at hand. The second consideration is whether the party requesting disclosure has made reasonable efforts to obtain the same information from alternative sources.[352]

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

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

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

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

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

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

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

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

Dated: May 4, 1992

Respectfully submitted,

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