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Rao, Neomi

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CADC (Court of Appeals DC Circuit) Kavanaugh [3]

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001	List	[Draft Answers to Senators Questions]	4	07/14/2004	P5;

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CADC (Court of Appeals DC Circuit) Kavanaugh [3]

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### RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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## Brett Kavanaugh – Elian Gonzalez

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**Allegation:** Mr. Kavanaugh challenged the Clinton administration's decision to return Elian Gonzalez, a Cuban citizen, to his legal guardian – his father in Cuba.

**Facts:**

- Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian and his American relatives after the Eleventh Circuit had ruled against Elian. Mr. Kavanaugh was involved in filing a petition for rehearing *en banc* by the Eleventh Circuit, as well as an application for a stay and a petition for writ of certiorari from the U.S. Supreme Court. Mr. Kavanaugh was asked to work on the case by an associate in his law firm who had been contacted.
- The narrow question before the court was not whether or not Elian should be returned to Cuba, but whether it was proper for the INS to make a decision to return Elian without even considering the merits of his case – without a hearing of any kind.
  - ✓ After his mother died at sea while attempting to bring Elian to the United States, Elian filed for political asylum through his “next friend” on several grounds, including that he feared persecution at the hands of the communist-totalitarian Cuban government if he was returned.
  - ✓ Under 8 U.S.C. 1158, “[a]ny alien who is physically present in the United States . . . may apply for asylum.” However, the INS determined that because of Elian’s age, the application had no legal effect and it therefore did not have to consider the merits of the application or reach the question of whether Elian’s fears of persecution were well founded.
  - ✓ The Lawyers’ Committee for Human Rights explained in its amicus brief before the 11<sup>th</sup> Circuit, “the implications” of the INS’s no-hearing, no-interview procedure for minor asylum applicants are “quite serious.” Amicus brief of Lawyers’ Committee for Human Rights, at 19.
- The Eleventh Circuit recognized the merits of the arguments set forth by Mr. Kavanaugh on behalf of his clients. Nevertheless, the court upheld the INS’s authority to interpret the law because of the great deference that it had to grant an executive branch agency. In rendering its opinion, the court expressed serious concerns with the action taken by the agency:

“We have not the slightest illusion about the INS’s choices: the choices—about policy and about application of the policy—that the INS made in this case are choices about which reasonable people can disagree.” *Gonzalez v. Reno*, 212 F.3d 1338, 1356 (2000) (emphasis added).

“The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance . . . to justify the consideration of a six-year-old child’s asylum . . . . We acknowledge, as a widely-accepted truth, that Cuba does violate human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba.” *Id.* at 1353.

“But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here.” *Id.* at 1354.

- The representation of Elian Gonzalez and his American relatives was nonpartisan. In fact, lawyers who brought Mr. Kavanaugh into the case included Manny Diaz, currently the Democrat Mayor of Miami, and Kendall Coffey, a prominent Miami Democrat and former U.S. Attorney in the Clinton Justice Department.

## Brett Kavanaugh – Privilege Arguments v. Work on E.O. 13233

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**Allegation:** While working for Independent Counsel Kenneth Starr, Brett Kavanaugh fought the Clinton Administration for access to confidential communications. As Associate White House Counsel in the Bush Administration, however, Mr. Kavanaugh helped to draft Executive Order 13233, which dramatically limits public access to presidential records. Such a stark inconsistency demonstrates Mr. Kavanaugh's ideological and partisan agenda.

**Facts:**

- **Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.**
  - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information **relevant to a federal criminal investigation.**
  - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that the attorney-client privilege, once a client was deceased, did not apply with full force in **federal criminal proceedings**, and that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in **federal criminal proceedings.**
  - ✓ The federal courts agreed with Mr. Kavanaugh's position in those cases.
  - ✓ **Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.**
- Executive Order 13233 simply **establishes policies and procedures** to govern requests for presidential records and the assertion of constitutionally-based privileges. **It does not purport to set forth those circumstances under which an assertion of executive privilege should be made and/or would be successful.**
  - ✓ **Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges.** See Section 2(b).
  - ✓ In his *Georgetown Law Journal* article, which was authored during the Clinton Administration, Mr. Kavanaugh specifically recognized the difference between asserting executive privilege in a criminal context and outside of a criminal context.
  - ✓ He argued that a presumptive privilege for Presidential communications existed and that "it may well be absolute in civil, congressional, and FOIA proceedings." See Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J.

2133, 2171 (1998). *Id.* at 2171. Mr. Kavanaugh wrote: "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." *Id.*

- **While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues has been consistent and evenhanded, whether the issue at hand involved the Bush Administration or the Clinton Administration.**
  - ✓ For example, Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his presidency.
  - ✓ Mr. Kavanaugh likewise was involved in the Bush Administration's assertion of executive privilege to withhold from Congress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

## Brett Kavanaugh – Experience

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**Allegation:** Brett Kavanaugh is not qualified to be a federal appellate judge because he lacks the necessary experience.

**Facts:**

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials and significant legal experience in the federal courts.**
- **The ABA, the Democrat’s “Gold Standard,” has rated him “Well Qualified” to serve as a judge on the DC Circuit.**
  - ✓ He has practiced law in the private and public sectors for 14 years. He was a partner at the law firm of Kirkland & Ellis, specializing in appellate litigation, and has an outstanding reputation in the legal community.
- **Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.**
  - ✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.
- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**
  - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit.
  - ✓ He clerked on the Ninth Circuit for Judge Alex Kozinsky of the U.S. Court of Appeals.
  - ✓ Mr. Kavanaugh was a law clerk to U.S. Supreme Court Justice Anthony Kennedy.
  - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General’s office represents the United States before the Supreme Court.
- **Only 3 of the 18 judges confirmed to the D.C. Circuit since President Carter’s term began in 1977 previously had served as judges.**

- ✓ Democrat-appointed D.C. Circuit judges with no prior judicial experience include: **Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel, and Patricia Wald.**
- In his 2001 *Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist argued that “we must not drastically shrink the number of judicial nominees who have substantial experience in private practice.” The Chief Justice also noted in his Report that “the federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice.”
- ✓ Supreme Court Justice **Louis Brandeis** spent his whole career in private practice before he was named to the Supreme Court in 1916.
- ✓ Supreme Court Justice **Byron White** spent fourteen years in private practice and two years at the Justice Department before his appointment to the Court by President Kennedy in 1962.
- ✓ Supreme Court Justice **Thurgood Marshall** had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall had served in private practice and as Special Counsel and Director of the NAACP prior to his appointment.
- **President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the DC Circuit.**

**Confirmed Clinton Appeals Court Judges Without Prior Judicial Experience**

<b>Name</b>	<b>Circuit</b>	<b>Confirmed</b>
M. Blane Michael	Fourth	September 30, 1993
Robert Henry	Tenth	May 6, 1994
Guido Calabresi	Second	July 18, 1994
Michael Hawkins	Ninth	September 14, 1994
William Bryson	Federal	September 28, 1994
David Tatel	DC	October 6, 1994
Sandra Lynch	First	March 17, 1995
Karen Moore	Sixth	March 24, 1995
Carlos Lucero	Tenth	June 30, 1995
Diane Wood	Seventh	June 30, 1995
Sidney Thomas	Ninth	January 2, 1996
Merrick Garland	DC	March 19, 1997
Eric Clay	Sixth	July 31, 1997



Arthur Gajarsa	Federal	July 31, 1997
Ronald Gilman	Sixth	November 6, 1997
Margaret McKeown	Ninth	March 27, 1998
Chester Straub	Second	June 1, 1998
Robert Sack	Second	June 15, 1998
John Kelly	Eighth	July 31, 1998
William Fletcher	Ninth	October 8, 1998
Robert King	Fourth	October 9, 1998
Robert Katzmann	Second	July 14, 1999
Raymond Fisher	Ninth	October 5, 1999
Ronald Gould	Ninth	November 17, 1999
Richard Linn	Federal	November 19, 1999
Thomas Ambro	Third	February 10, 2000
Kermit Bye	Eighth	February 24, 2000
Marsha Berzon	Ninth	March 9, 2000
Timothy Dyk	Federal	May 24, 2000
Robert Tallman	Ninth	May 24, 2000
Johnnie Rawlinson	Ninth	July 21, 2000
Roger Gregory	Fourth	May 9, 2001

## Brett Kavanaugh – *Georgetown Law Journal* Article

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**Allegation:** In a 1998 article for the *Georgetown Law Journal*, Brett Kavanaugh argued for a narrow interpretation of executive privilege and specifically stated that courts could only enforce executive privilege claims with respect to national security and foreign affairs information. As Associate White House Counsel, however, Mr. Kavanaugh was involved with asserting executive privilege in a variety of other contexts, including documents relating to Vice President Cheney’s energy policy task force, the Enron investigation, and the Marc Rich pardon.

### **Facts:**

- **The positions taken by Mr. Kavanaugh as Associate White House Counsel are completely consistent with the views regarding executive privileges that he expressed in his *Georgetown Law Journal* article.**
  - ✓ In his *Georgetown Law Journal* article, Mr. Kavanaugh was addressing only claims of executive privilege **in response to grand jury subpoenas or criminal trial subpoenas** when he stated that courts would only enforce such claims in the context of national security or foreign affairs information. *See* Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2162 (1998).
  - ✓ Mr. Kavanaugh also argued, however, that a presumptive privilege for Presidential communications existed, not limited to the areas of national security and foreign affairs, and that “it may well be absolute in civil, congressional, and FOIA proceedings.” *Id.* at 2171. Mr. Kavanaugh clarified that “it is only in the discrete realm of criminal proceedings where the privilege may be overcome.” *Id.*
  - ✓ As Associate White House Counsel, **Mr. Kavanaugh has never worked on a matter where the President invoked or threatened to invoke executive privilege in responding to a grand jury subpoena or a criminal trial subpoena.** There is thus no contradiction between the views expressed in his *Georgetown Law Journal* article and his actions while working at the White House.
- **Mr. Kavanaugh’s article presented a thoughtful examination of the problems associated with the independent counsel statute and offered a moderate and sensible set of recommendations for reform.**
  - ✓ Among the difficulties Mr. Kavanaugh identified with the independent counsel system existing at the time were the length and politicization of independent counsel investigations. *Id.* at 2135.
  - ✓ He also argued that the appointment and removal provisions pertaining to independent counsels, both in theory and in fact, led to unaccountable independent counsels. *Id.*

- ✓ To solve these problems, Mr. Kavanaugh set forth several proposals. For example, Mr. Kavanaugh suggested that independent counsels should be nominated by the President and confirmed by the Senate, and that the President should have absolute discretion over whether and when to appoint an independent counsel. *Id.* at 2135-36.
- ✓ Jerome Shestack, the President of the American Bar Association at the time that Mr. Kavanaugh's article was published, **complimented his "well-reasoned and objectively presented recommendations"** and noted his **"most scholarly and comprehensive review of the issues of executive privilege."** Jerome J. Shestack, *The Independent Counsel Act Revisited*, 86 Geo. L.J. 2011, 2019 (1998).
- **Mr. Kavanaugh's *Georgetown Law Journal* article demonstrates his impartiality and ability to analyze issues without respect to ideological or partisan concerns.**
- ✓ While President Clinton was in office and thus subject to possible criminal indictment for perjury and obstruction of justice, Mr. Kavanaugh called on Congress in his article to clarify that a sitting President is not subject to criminal indictment while in office. Kavanaugh, 86 Geo. L.J. at 2157.

## Brett Kavanaugh – *Good News Club v. Milford Central School*

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**Allegation:** In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Brett Kavanaugh demonstrated his hostility to the separation of church and state and religious freedom when he argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria.

### **Facts:**

- **The U.S. Supreme Court, including Clinton appointee Justice Stephen Breyer, agreed with the position taken by Mr. Kavanaugh on behalf of his client.**
- **In *Good News Club*, Mr. Kavanaugh filed an amicus brief on behalf of his client with the U.S. Supreme Court and argued for the principle that religious perspectives should be given equal, but not favored, treatment in the public sphere.**
  - ✓ Although the school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes as well as “other uses pertaining to the welfare of the community,” **it specifically forbade school premises from being used for “religious purposes.”**
  - ✓ Mr. Kavanaugh’s brief argued that the school district’s policy was unconstitutional because it targeted “religious speech for a distinctive burden.”
- **Looking to past U.S. Supreme Court precedent, Mr. Kavanaugh’s brief merely argued for the equal treatment of religious organizations.** It pointed out that the school district “would not be favoring (and thereby endorsing) religion over non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter.”
  - ✓ The U.S. Supreme Court concluded that the New York School District’s “exclusion of the [Good News] Club from use of the school . . . constitute[d] impermissible viewpoint discrimination.” *Good News Club*, 533 U.S. at 112.
  - ✓ The U.S. Supreme Court also held that permitting the Good News Club to meet on school premises, just as a variety of other clubs were allowed to use school facilities after school hours, would not violate the Establishment Clause. See *Good News Club*, 533 U.S. at 119.
- **Five Democratic State Attorneys General joined an amicus brief in *Good News Club* taking the same position that Mr. Kavanaugh took on behalf of his client.**
  - ✓ Democratic Attorneys General Tom Miller of Iowa, Richard Ieyoub of Louisiana, Mike Moore of Mississippi, Paul Summers of Tennessee, and Jan Graham of Utah joined a brief on behalf of their respective states arguing that the New York school district’s discrimination against religious speech was unconstitutional.

- **A diverse range of religious organizations advocated the same position in their amicus briefs as Mr. Kavanaugh did on behalf of his client.**
  - ✓ The National Council of Churches, Baptist Joint Committee on Public Affairs, American Muslim Council, General Conference of Seventh-Day Adventists, Reorganized Church of Jesus Christ of Latter Day Saints, First Church of Christ, Scientist, General Assembly of the Presbyterian Church (U.S.A.), General Board of Church & Society of the United Methodist Church, Union of Orthodox Jewish Congregations of America, and A.M.E. Zion Church all agreed that the New York school district's decision to discriminate against religious organizations violated the First Amendment.
  
- Mr. Kavanaugh submitted an amicus brief on behalf of his client Sally Campbell in *Good News Club*. As Ms. Campbell's attorney, Mr. Kavanaugh had a duty to zealously represent his client's position and make the best argument on her behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.
  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

## **Brett Kavanaugh – Products Liability**

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**Allegation:** In *Geier v. American Honda Motor Company*, Mr. Kavanaugh filed an amicus brief on behalf of the Alliance of Automobile Manufacturers to preclude a woman who received serious injuries in a car accident from recovering damages from the car manufacturer. The car manufacturer had not installed airbags in the car even though Washington, D.C. law required such airbags. 529 U.S. 861 (2000).

**Facts:**

- **In an opinion written by Justice Breyer, the U.S. Supreme Court agreed with a position taken by Mr. Kavanaugh's client in its brief.**
  - ✓ The Supreme Court held that safety standards promulgated by the Department of Transportation, pursuant to an Act of Congress, preempted the D.C. law requiring airbags, and that therefore the plaintiff could not bring an action under the D.C. law. *Geier v. American Honda Motor Company*, 529 U.S. 861, 875 (2000).
  - ✓ The Federal Motor Vehicle Safety Standard (FMVSS) 208 required that auto manufacturers equip some but not all of their 1987 vehicles with passive restraints.
  - ✓ Because a universal airbag requirement like that in place in D.C. would directly conflict with the safety purposes behind enactment of FMVSS 208, the long-standing principle of preemption applied and the D.C. requirement could not be enforced.
  - ✓ The plaintiff's car in this case contained a restraint system explicitly authorized by Standard 208, and thus was in full compliance with the Federal regulation.
- **All of the circuit courts to consider the issue, including the 9<sup>th</sup> Circuit, agreed with either the implied or express preemption arguments set forth in the brief Mr. Kavanaugh filed on behalf of his client.**
  - ✓ Judge William Bryant, appointed by President Johnson, granted American Honda summary judgment in this case based on the express preemption argument later set forth in the brief.
  - ✓ The D.C. Court of Appeals affirmed the lower court decision on implied preemption grounds in a unanimous opinion written by Clinton appointee Judge Judith Rogers.
  - ✓ Four other circuits came to the same conclusion as the D.C. Circuit.

- ✓ The 9<sup>th</sup> Circuit adopted the express preemption argument set forth in the brief submitted by Mr. Kavanaugh, that the Motor Vehicle Safety Act expressly preempted state tort suits brought on the basis of a lack of an airbag.
- **The Clinton Administration, through the office of Solicitor General, also argued in its brief that the state law claims were impliedly preempted by the federal standards promulgated by the Department of Transportation.**

## Brett Kavanaugh – Product Liability

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**Allegation:** In *Green v. General Motors Corp.*, Mr. Kavanaugh once again represented big business attempting to overturn a jury verdict in favor of a 24-year-old who became a quadriplegic due to the defective design of the car manufactured by defendant.

### Facts:

- Relying on a recent Third Circuit opinion, Mr. Kavanaugh argued that the judge had improperly instructed the jury not to consider evidence of accident severity and speed in determining liability for collapse of the rear roof on the T-Top Camaro.
  - ✓ The defendant argued that the jury should have been able to consider the plaintiff's own negligence in speeding, which was conceded by the defendant.
  - ✓ The defense urged the Superior Court of New Jersey to accept a Third Circuit holding that juries had to be allowed to consider factors such as speed and the plaintiff's driving. *Huddell v. Levin*, 537 F.2d 726, 741 (3rd Cir. 1976).
  - ✓ Ultimately, the Superior Court of New Jersey "respectfully disagreed" with the Third Circuit's speed analysis. *Green v. General Motors Corp.*, 310 N.J. Super. 507, 523 (1998).
- The court ruled in favor of Mr. Kavanaugh's clients, General Motors, on a number of issues that were argued on appeal.
  - ✓ The appellate court agreed with Mr. Kavanaugh's client's position that the trial court had wrongly awarded prejudgment interest on future medical expenses and lost earnings. This amount had exceeded \$8.5 million. *Id.* at 533.
- As a member of the appellate team, Mr. Kavanaugh had a duty to zealously advance his client's positions.
  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.



## Brett Kavanaugh – Product Liability

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**Allegation:** Mr. Kavanaugh took the side of big business by filing an amicus brief before the Supreme Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11<sup>th</sup> Cir. 1998), in an attempt to deny recovery to a family who lost its daughter when she fell off a boat and was killed by the propeller.

**Facts:**

- **The amicus brief filed by Mr. Kavanaugh’s client, General Motors Corporation, was consistent with the unanimous opinion of the court below – the Eleventh Circuit – and with the decisions of many other courts across the country.**
  - ✓ The Eleventh Circuit held that the Georgia law was impliedly preempted because the Coast Guard – which had exclusive authority in boat and equipment safety standards – determined that propeller guards should not be required because their use could actually increase the danger to boaters.
- Numerous courts, both state and federal, already had adopted the position taken by Mr. Kavanaugh in the amicus brief – that state common law claims for negligence or product liability were either expressly or impliedly preempted by the Federal Boat Safety Act.
  - ✓ At the time the amicus brief was submitted, courts in California, Georgia, Connecticut, Ohio, Illinois, and Michigan had come to the conclusion argued in the brief filed by Mr. Kavanaugh.
  - ✓ The district court judge in *Lewis v. Brunswick*, Carter appointee Judge Dudley Bowen, also came to the conclusion that the plaintiff’s negligence and strict liability claims based on the lack of a propeller guard were preempted by the Boat Safety Act.
  - ✓ The U.S. Supreme Court did not decide the case because the parties settled the claims before a decision was issued.
- Mr. Kavanaugh’s client was interested in the case only because it manufactured vehicles subject to the Motor Vehicle Safety Act, which included language identical to the Boat Safety Act preemption language at issue in *Lewis v. Brunswick*.
  - ✓ Congress, in the legislative history of the Boat Safety Act, explained that the preemption provision “also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements.” *Id.* at 1503 (citing S.Rep. No. 92-248).
- Although nearly four years later the Supreme Court did effectively overrule this Eleventh Circuit decision in another case, *Sprietsma v. Mercury Marine*, 537 U.S. 52 (2002), the

Court did state that the arguments made by Mr. Kavanaugh's clients in the *Lewis* case - that such claims are implicitly preempted by the statute and by the Coast Guard decision not to regulate propeller guards - "[b]oth are viable pre-emption theories." *Id.* at 64.

## Brett Kavanaugh – Race

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**Allegation:** In a friend of the court brief, Kavanaugh joined Robert Bork in opposing a voting scheme that was intended to assist native Hawaiians by ensuring that only they could vote for board members overseeing a trust for the benefit of native Hawaiians. *Rice v. Cayetano*, 528 U.S. 495 (2000). Before the case was heard, he was quoted as saying that “this case is one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of the government.” Warren Richey, *New Case May Clarify Court’s Stand on Race*, THE CHRISTIAN SCIENCE MONITOR (Oct. 6, 1999).

### **Facts:**

- The Supreme Court agreed with the position taken by Mr. Kavanaugh’s client, that limiting voting for candidates to a statewide office that disbursed state and federal funds based on racial ancestry violated the Constitution. The Fifteenth Amendment guarantees that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any other State on account of race, color, or previous condition of servitude.” U.S. CONST. Amend. XV § 1.
  - ✓ In a 7 to 2 decision, with the majority including Justices Breyer, Souter, and O’Connor, the Court reaffirmed the basic premise upon which the brief was based: that “[t]he National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race.” *Rice*, 120 S. Ct. at 1054.
  - ✓ The Court explained, “The State’s position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment.” *Rice* at 523.
  - ✓ The Court added, “Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others.” *Id.*
- The brief submitted by Mr. Kavanaugh on behalf of his clients sought to enforce the Fifteenth Amendment against a state law that prohibited citizens from voting in a statewide election based on their race.
  - ✓ When Hawaii was admitted as the 50<sup>th</sup> State of the Union in 1959, the state adopted the Hawaiian Homes Commission Act, passed by Congress, as part of its Constitution. The Act set aside 200,000 acres of public lands and granted the state over 1.2 million additional acres of land to be held “as a public trust.”

- The proceeds and income from the lands were to be used for one or more of five purposes: (1) support of public schools and other public educational institutions, (2) betterment of native Hawaiians, (3) development of farm and home ownership, (4) public improvements, and (5) provisions of land for public use.
- ✓ In 1978, Hawaii established the Office of Hawaiian Affairs (OHA) to administer special trust revenues “for the betterment of the conditions of native Hawaiians,” and any appropriations that were made for the benefit of “native Hawaiians” and/or “Hawaiians.”
  - The term “native Hawaiian” and “Hawaiian” are defined as descendants of aboriginal peoples or races inhabiting the Hawaiian Islands previous to 1778.
- ✓ The Hawaii Constitution limited membership on the OHA board of trustees to “Hawaiians,” and explicitly provided that the trustees shall be “elected by ... Hawaiians.”
- ✓ Although petitioner was a citizen of Hawaii, and his ancestors were residents of the Hawaiian Islands prior to U.S. annexation in 1959, he did not meet the statutory definitions and was thus precluded from voting.
- The racial qualification in the Hawaiian law categorically excluded members of certain racial minorities, such as African-Americans and Japanese-Americans, who were members of groups historically discriminated against in the U.S.
- One of Mr. Kavanaugh’s clients on the brief was the New York Civil Rights Coalition, a non-profit organization seeking to achieve a society where the individual enjoys the blessings of liberty free from racial prejudice, stigma, caste or discrimination.
- In *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003), where the Supreme Court upheld the University of Michigan Law School’s race-conscious admissions policy, Justice O’Connor stated: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

## Brett Kavanaugh – *Santa Fe Independent School District v. Doe*

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**Allegation:** In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), Brett Kavanaugh once again demonstrated his hostility to the separation of church and state by defending a high school's broadcasting of prayers over its public address system before football games. The U.S. Supreme Court decisively rejected Mr. Kavanaugh's radical argument, holding that the pre-game prayers in question violated the First Amendment's Establishment Clause.

### **Facts:**

- **In *Santa Fe Independent School District*, Mr. Kavanaugh filed an amicus brief on behalf of his clients with the U.S. Supreme Court and argued for the principle that a public school is not required to discriminate against a student's religious speech.**
  - ✓ The school district permitted high school students to choose whether a statement would be delivered before football games and, if so, who would deliver that message.
  - ✓ A speaker chosen to deliver a pre-game message **was allowed to choose the content of his or her statement.**
  - ✓ As Mr. Kavanaugh's brief pointed out, **the school district's policy did "not require or even encourage the student speaker to invoke God's name, to utter religious words, or to say a 'prayer' of any kind. Nor, on the other hand [did] the school policy prevent the student from doing so.** The policy [was] thus entirely neutral toward religion and religious speech."
  - ✓ Mr. Kavanaugh therefore argued on behalf of his clients that the school district's policy did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement. **His brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."**
- **Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).**
- **In the amicus brief that Mr. Kavanaugh filed on behalf of his clients, he carefully distinguished between individual religious speech in schools, which is protected by the Constitution, and government-required religious speech in schools, which is prohibited by the Constitution.**

- ✓ **Mr. Kavanaugh's brief acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.**
- **Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.**
  - ✓ Democratic Attorneys General Richard Ieyoub of Louisiana, Mike Moore of Mississippi, and Paul Summers of Tennessee joined an amicus brief on behalf of their respective states urging the U.S. Supreme Court to uphold the constitutionality of the school district's policy regarding pre-game messages.
- **Mr. Kavanaugh submitted an amicus brief on behalf of his clients, Congressman Steve Largent and Congressman J.C. Watts in *Santa Fe Independent School District*. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.**
  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

## Brett Kavanaugh – Florida School Vouchers

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**Allegation:** Brett Kavanaugh demonstrated his hostility both to the separation of church and state and to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools. *Bush v. Holmes*, 767 So. 2d 668 (2000).

**Facts:**

- **While an attorney in private practice, Mr. Kavanaugh was part of a large team of lawyers representing Florida state officials in defending Florida's opportunity scholarship program, which provided children in failing public schools with access to a high-quality education and has improved the quality of Florida's public schools.**
  - ✓ The opportunity scholarship program is a **limited program** that allows **students at failing public schools** to transfer to a better public school or a private school at public expense.
  - ✓ The **opportunity scholarship program is carefully tailored** to give choice to those parents who need it and to spur public school improvement through competition.
  - ✓ **Religious and non-religious private schools** are allowed to participate in the program on an equal basis and all public funds **are directed by the private and independent choices of parents.**
  - ✓ In two separate evaluations, researchers have found that **Florida's opportunity scholarship program has raised student achievement in Florida's worst public schools.** A 2003 study specifically found that **"voucher competition in Florida is leading to significant improvement in public schools"** and that "Florida's low-performing schools are improving in direct proportion to the challenge they face from voucher competition."
- **A three-judge panel of Florida's Court of Appeal for the First District unanimously agreed with the position taken by Florida officials.** *See Bush v. Holmes*, 767 So. 2d 668 (2000). All three of these judges were appointees of Lawton Chiles, the former Democratic Governor of Florida. The Florida Supreme Court refused to review the Court of Appeal's decision.
- **The Florida officials were not arguing for an extension in the law. For decades Florida's K-12 system made use of contracts with private schools to educate tens of thousands of students in private schools.**
- **During Mr. Kavanaugh's involvement in this litigation, the main issue was whether the Florida Constitution prohibited the use of state funds to pay for the K-12 education of students attending private schools, regardless of whether they were religious or nonsectarian.**

- ✓ The team of lawyers representing Florida officials, including Mr. Kavanaugh, argued that the Florida Constitution's affirmative mandate for the State to provide for "a uniform, efficient, safe, secure, and high quality system of free public schools" did not preclude the use of public funds for private school education, particularly where the Legislature found such use was necessary.
- ✓ The Florida program has specific safeguards to protect against discrimination and coerced religious activity. Participating private schools must agree to comply with Federal anti-discrimination laws and not compel any opportunity scholarship student to profess a specific ideological belief, to pray, or to worship.
- **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population. The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.**
- **The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).**
  - ✓ The U.S. Supreme Court held in 2002 that Cleveland's school voucher program was consistent with the First Amendment's Establishment Clause because it treated religious and non-religious private schools equally and all funds were guided by the private and independent choices of parents.
  - ✓ The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his client.
- **In this litigation Mr. Kavanaugh was defending the constitutionality of the opportunity scholarship program on behalf of his clients. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.**
  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.



## Brett Kavanaugh – Defense of Ken Starr

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**Allegation:** Brett Kavanaugh has vocally defended his former boss, Independent Counsel Kenneth Starr. He has called Starr “an American hero,” written that Starr’s “record is one of extraordinary accomplishment and integrity,” and praised Starr for “consistently perform[ing] with the highest skill and integrity.” This staunch defense of the overzealous Independent Counsel constitutes compelling evidence of Kavanaugh’s right-wing views.

### **Facts:**

➤ **Mr. Kavanaugh’s defense of Starr was an appropriate response to and supported by the public record of vicious and unwarranted public criticism directed at Independent Counsel Kenneth Starr.**

✓ Ronald Rotunda, professor at George Mason University School of Law and assistant counsel for Democrats on the Senate Watergate Committee, explained in December 1996 that the attacks on Judge Starr’s integrity were belied by the fact that President Clinton’s attorney General continued to assign him new matters to investigate and had the power to fire Judge Starr if he acted unethically. Peter Baker, *Did President Order Attack on Investigator?*, Seattle Times, Dec. 4, 1996, at A3.

▪ Rotunda stated: “This is basically a blatantly political attack on Starr that is inconsistent within the administration itself.” *Id.*

✓ In a prescient editorial published shortly after Judge Starr’s appointment, law professor Garrett Epps – a self-described liberal and supporter of President Clinton – wrote: “If Starr’s investigation turns up no evidence of wrongdoing, he may blight his own career prospects, which would be a loss to the nation. But if he does produce indictments, many Democrats will believe that he is the agent of a partisan conspiracy. If he obtains convictions, the defendants can claim to be victims of political persecution.” Garrett Epps, Editorial, *Take My Word, Starr Will Be Fair*, PORTLAND OREGONIAN, Aug. 17, 1994, at C7.

➤ **Kenneth Starr was a fair and impartial Independent Counsel with a substantial record of accomplishment.**

✓ The Washington Post editorial page said, upon Judge Starr’s appointment, “he is also a respected practitioner precisely because of his performance as judge and solicitor general, and he was on Clinton Attorney General Janet Reno’s own short list of likely candidates for independent counsel when she picked Mr. Fiske.” Editorial, Kenneth Starr for Robert Fiske, WASH. POST, Aug. 7, 1994, at C8.

✓ Upon Judge Starr’s appointment as Independent Counsel, Mark Gitenstein, chief Democratic counsel to the Senate Judiciary Committee when Judge Starr was appointed to the federal bench, said: “Starr was a good, fair judge, and I think he will be fair in this proceeding.” Nancy Roman, *Starr Hailed as Fair, Moderate*, WASH. TIMES, Aug. 6, 1994, at A6.

- ✓ Carter judicial appointee, Judge Patricia Wald said of Judge Starr: "Ken is definitely a conservative ... but he's wholly undeviating and never tries to slip anything by." *National Briefing Whitewater I: Delay Seen as Biggest Danger*, THE HOTLINE, Aug. 8, 1994.
- ✓ Time magazine's chief political correspondent, Michael Kramer, wrote about Judge Starr's appointment in his column: "[Ken Starr's] integrity and honesty have never been seriously questioned. When even a dues-paying liberal like the legal director of the American Civil Liberties Union says, 'I'd rather have Starr investigate me than almost anyone I can think of,' the case for bias is virtually closed." Michael Kramer, *Fade Away, Starr*, TIME, Aug. 29, 1994, at 37.
- **Kenneth Starr initiated criminal prosecutions only where he uncovered strong evidence of criminal wrongdoing. Where he did not find overwhelming evidence of illegal behavior, he appropriately exercised prosecutorial restraint.**
  - ✓ In his investigations of the death of Vince Foster, the firing of White House travel office employees, the Clinton White House's potential misuse of FBI files, and the Clintons' involvement in Whitewater and Madison Guaranty Savings and Loan, Kenneth Starr did not bring any criminal charges.
  - ✓ In those areas, however, where he did find persuasive evidence of wrongdoing, Starr brought charges against and successfully obtained convictions of 14 individuals, including Jim and Susan McDougal, Arkansas Governor Jim Guy Tucker, and former Associate Attorney General Webster Hubbell.
- **Independent Counsel Starr prevailed in court in nearly every dispute between the Office of the Independent Counsel and those seeking to withhold evidence by asserting various privileges.**
  - ✓ Federal appellate courts sided with Independent Counsel Starr in rejecting:
    - the creation of a "protective function privilege" that would authorize Secret Service agents to refuse to testify before a federal grand jury. *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998);
    - the claim that government lawyers may rely on attorney-client or work-product privilege to withhold information subpoenaed by a federal grand jury. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8<sup>th</sup> Cir. 1997); and,
    - the claim that government attorneys could invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).
- **Independent Counsel Starr was required by law to refer to the House of Representatives any substantial and credible information that may have constituted grounds for impeachment, and his referral was clearly justified as demonstrated by subsequent events.**

- ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of “any substantial and credible information” uncovered during the course of his investigation that might constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).
- ✓ The Independent Counsel’s report detailed substantial and credible information that might constitute grounds for impeachment. It summarized specific evidence supporting the charges that President Clinton lied under oath and attempted to obstruct justice.
- **The Independent Counsel’s report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that may constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**
  - ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.
  - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.
  - ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for “giving false, misleading, and evasive answers that were designed to obstruct the judicial process” in Paula Jones’s sexual harassment lawsuit and ordered him to pay a fine of \$90,000.
  - ✓ In January 2001, President Clinton admitted to giving “evasive and misleading answers, in violation of Judge Wright’s discovery’s orders” during his deposition in Paula Jones’s sexual harassment lawsuit. As a result, he agreed to pay a \$25,000 fine and give up his law license for five years.
- **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton “gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings.”** S.Res. 44, 106<sup>th</sup> Cong. (1999).
  - ✓ Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).
  - ✓ Then-Congressman Schumer, as Senator-elect stated that “it is clear that the President lied when he testified before the grand jury.”

## Brett Kavanaugh – Starr Report

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**Allegation:** Brett Kavanaugh was a co-author of Independent Counsel's Ken Starr's lurid report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

### **Facts:**

- **According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled in detail President Clinton's sexual encounters with Monica Lewinsky.**
- **Mr. Kavanaugh has since criticized the House of Representatives for releasing the report to the public before reviewing it. See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.**
- **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law, and the allegations contained in that section were confirmed by subsequent events.**
  - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. See 28 U.S.C. § 595(c).
  - ✓ According to press reports, Mr. Kavanaugh co-authored the section of the Independent Counsel's report that explained the substantial and credible information that may constitute grounds for impeachment. This section summarized the specific evidence supporting the allegations that President Clinton made false statements under oath and attempted to obstruct justice.
- **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that may constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**
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- Then-Congressman Schumer, as Senator-elect stated that “it is clear that the President lied when he testified before the grand jury.”

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✓ In January 2001, President Clinton admitted to giving “evasive and misleading answers, in violation of Judge Wright’s discovery’s orders” during his deposition in Paula Jones’s sexual harassment lawsuit. As a result, he agreed to pay a \$25,000 fine and give up his law license for five years.

➤ **The U.S. Senate has already confirmed judicial nominees who worked for Independent Counsel Ken Starr. If these nominees’ work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.**

✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.

✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001 by a vote of 97 to 0.

✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002 by a voice vote.

✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed to be the U.S. Attorney for the Northern District of Georgia on November 6, 2001, by a voice vote. Mr. Duffey recently was nominated for a seat on the United States District Court for Northern District of Georgia and was voted out of the Senate Judiciary Committee on February 5, 2004, by unanimous consent.

- ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003 by a voice vote.
- ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the General Counsel of the Department of Health and Human Services on August 3, 2001, by a voice vote.
- ✓ Eric Dreiband served as Associate Independent Counsel from 1997 to 2000 and was confirmed to be General Counsel of the Equal Employment Opportunity Commission on July 31, 2003, by a voice vote.
- ✓ Julie Myers served as Associate Independent Counsel from 1998 to 1999 and was confirmed to be an Assistant Secretary of Commerce on October 17, 2003, by a voice vote.

## Brett Kavanaugh – Vince Foster Investigation

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**Allegation:** Brett Kavanaugh's work for Independent Counsel Kenneth Starr while he investigated the Clinton Administration demonstrates Mr. Kavanaugh's partisan, right wing agenda. In particular, Mr. Kavanaugh investigated the circumstances surrounding former Deputy White House Counsel Vince Foster's death for three years after four separate investigations already had concluded that Mr. Foster committed suicide.

### **Facts:**

- **Mr. Kavanaugh's work on the investigation of Vince Foster's death demonstrates his fairness and impartiality.**
  - ✓ While working for Independent Counsel Kenneth Starr, Mr. Kavanaugh was the line attorney responsible for the Office of Independent Counsel's investigation into Vince Foster's death. Mr. Kavanaugh also prepared the Office of the Independent Counsel's report on Vince Foster's death.
  - ✓ **In the report prepared by Mr. Kavanaugh, the Office of the Independent Counsel concluded that Vince Foster had committed suicide, thus debunking alternative conspiracy theories advanced by critics of the Clinton Administration.**
  - ✓ Mr. Kavanaugh's role in the Vince Foster investigation evidences his ability to assess evidence impartially and refutes any allegation that his decision-making is driven by ideological or partisan considerations.
- **Mr. Kavanaugh's work on the investigation of Vince Foster's death was careful and thorough and demonstrates his outstanding skills as a lawyer.**
  - ✓ In investigating Vince Foster's death, Mr. Kavanaugh was required to manage and review the work of numerous FBI agents and investigators, FBI laboratory officials, and leading national experts on forensic and psychological issues.
  - ✓ Mr. Kavanaugh conducted interviews with a wide variety of witnesses concerning both the cause of Vince Foster's death and his state of mind.
  - ✓ While some have complained that the Independent Counsel's investigation of Vince Foster's death took too long and was unnecessary, a careful, thorough, and detailed investigation was necessary under the Independent Counsel's mandate.
- **The report prepared by Mr. Kavanaugh demonstrated sensitivity to Vince Foster's family.**
  - ✓ Although photographs taken of Vince Foster's body after his death were relevant to the investigation, they were excluded from the report prepared by Mr.

Kavanaugh because “[t]he potential for misuse and exploitation of such photographs [was] both substantial and obvious.” See *Report on the Death of Vincent W. Foster Jr., By the Office of Independent Counsel, In re: Madison Guaranty Savings & Loan Ass'n, to the Special Division of the United States Court of Appeals for the District of Columbia Circuit* (filed July 15, 1997), Section III.D.

➤ **The Office of the Independent Counsel’s investigation into the death of Vince Foster was compelled by its court-assigned jurisdiction.**

- ✓ The Special Division of the United States Court of Appeals for the District of Columbia Circuit asked the Office of the Independent Counsel to investigate and prosecute matters “relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.”
- ✓ The death of Vince Foster fell within the Office of the Independent Counsel’s jurisdiction both because of the way Whitewater-related documents from Mr. Foster's office were handled after his death, and because of Mr. Foster's possible role or involvement in Whitewater-related events under investigation by the Office of Independent Counsel.

➤ **The U.S. Senate has confirmed judicial nominees who worked for Independent Counsel Ken Starr. If these nominees’ work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should be disqualified because of his work for Independent Counsel Starr.**

- ✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.
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Testimony  
United States Senate Committee on the Judiciary  
**Executive Business Meeting**  
March 4, 2004

*—*  
*Miranda*  
*Issue*

**The Computer Report**

REPORT ON  
THE INVESTIGATION INTO IMPROPER ACCESS TO THE SENATE JUDICIARY  
COMMITTEE'S COMPUTER SYSTEM

Prepared by:  
Sergeant at Arms  
U.S. Senate

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## I. The Scope and Methodology of the Investigation

### A. Events Preceding the Investigation

On Friday, November 14, 2003, a Wall Street Journal editorial set forth excerpts of five documents that the Journal described as Democratic "staff strategy memos." The following day the Washington Times reported that it had obtained 14 internal Democratic staff memoranda. The article specifically states the 14 documents "did not come from a Senate staffer." (The two articles are attached to this report as Attachment "A.") On Tuesday, November 18, 2003, 28 pages of material represented to be "the Democrat [sic] memos on judicial nominations," including those referenced in the Wall Street Journal and Washington Times articles over the weekend, were posted on the Coalition for a Fair Judiciary's website at [www.fairjudiciary.com](http://www.fairjudiciary.com). (The 19 relevant documents from the website are attached to this report at Attachment "B.")

On Saturday, November 15, 2003, the Deputy Sergeant at Arms was first notified by Senator Kennedy's Chief Counsel for the Subcommittee on Immigration, Border Security and Citizenship, Mr. \_\_\_\_\_, that there was a potential security problem with the Judiciary Committee computer system. At the request of Mr. \_\_\_\_\_, the Deputy Sergeant at Arms arranged for a member of the Assistant Sergeant at Arms - Chief Information Officer's staff to meet Mr. \_\_\_\_\_ at his office to provide him technical assistance in assessing the situation.

Later that weekend, in consultation with the Deputy Sergeant at Arms, the Majority and Minority Staff Directors for the Committee agreed to place the Committee's server backup tapes in the custody of the United States Capitol Police (USCP) for preservation. The Committee's System Administrator gathered the backup tapes and just after midnight on Sunday, November 16, 2003, the USCP took into custody a box containing 20 tapes, two access cards that allow users to remotely access the network, and an envelope containing 3 pieces of paper with what appeared system administrator passwords noted. At this time, the door to the Committee's computer room, SD 222, was sealed with police tape.

### B. The Beginning of the Investigation

The Sergeant at Arms initiated this investigation after receiving requests to do so from Senate Judiciary Committee Chairman Hatch and Senators Leahy, Kennedy, and Durbin of the Committee. Specifically, a letter dated November 17, 2003, from Senator Durbin asked that the Sergeant at Arms, as the Senate's "chief law enforcement officer and also the principal administrative manager for most support services in the Senate, including oversight of computer systems" investigate the "circumstances surrounding the theft of these documents and their distribution" beyond members of his staff. (Attachment "C.") A subsequent letter that same date from Senators Leahy, Kennedy, and Durbin asked the Sergeant at Arms to have an independent computer forensics and security expert help identify who retrieved and released the Democratic documents, assess weaknesses in the Committee's computer network, and make recommendations to help prevent unauthorized access from occurring in the future. (Attachment "D.") On November 20, 2003, a letter from Chairman Hatch authorized the investigation into whether there was any unauthorized access to the Committee documents referenced in the Wall Street Journal and Washington Times. Chairman Hatch also specifically requested: (1) the continued safekeeping of daily backup tapes; (2) a description of the accounts on the system and of the privileges these accounts and security groups have - or had - to network resources from January 1, 2001, to the present; (3) the retrieval of the old hard drives of the servers that were recently replaced; and, (4) replacement of the hard drives of the current servers and establishment of separate local area networks for majority and minority staffs. Chairman Hatch also indicated that he had directed his staff to interview all majority staff, "to determine whether they have

any knowledge of actual or potential transgressions related to these documents.” (Attachment “E.”) The Sergeant at Arms, having consulted with Majority Leader Frist and Democratic Leader Daschle and receiving their approval, immediately commenced an investigation. The USCP continued to take custody of the Committee’s daily backup tapes for safekeeping. Additionally, SAA staff determined that the “old hard drives” of the servers were still being used and could not be taken into custody without shutting down the Committee’s computer system.

On Friday, November 21, 2003, staff for Chairman Hatch who had been conducting interviews of all majority staff on the Committee advised the Sergeant at Arms that a clerk in the Nominations Unit - Mr. \_\_\_\_\_ - had admitted to them that day that he had accessed Democratic files over the Committee’s computer system. Mr. \_\_\_\_\_’s desktop computer was immediately taken into custody. Mr. \_\_\_\_\_’s desktop computer in the office of Majority Leader Frist was also taken into custody for analysis.

Also on November 21, 2003, Chairman Hatch gave the SAA permission to take the Committee’s servers’ hard drives. SAA staff conducted a site survey to ascertain the physical and logical layout of the Committee’s servers and over the weekend of November 22-23, 2003, the four Committee servers were disconnected, their hard drives removed and preserved, and the Committee’s data was restored to new hard drives.

On December 3, 2003, the file server from the Majority Leader’s office was imaged and the copy secured for forensic analysis. A backup tape of that office’s e-mail server from November 17, 2003, was provided to investigators, but proved to be blank. Subsequently, the System Administrator provided backup tapes from September 29, 2003, and January 12, 2004. These tapes were readable and analyzed by the forensic experts.

#### C. Investigative Resources

The request for the Sergeant at Arms to conduct this investigation was, as best can be determined, unprecedented. To ensure a thorough investigation, the Sergeant at Arms supplemented his staff’s resources with an independent computer forensics firm and additional investigators.

The services of a qualified, outside computer forensics company were obtained pursuant to an existing contract the SAA had in place for Information Technology Support. The Statement of Work for the analysis asked for: (1) a matrix of access permissions assigned to security groups, and individual accounts and the network resources to which they had access, as can best be reconstructed, back to January 2001; (2) an audit of all available and reconstructed logs to look for anomalies in login failures, account logins compared to machine names, file access, and copying, with special emphasis on the documents identified as being from the Judiciary Committee computer system; and, (3) an analysis of probable methods by which these files could have been obtained by other than permitted users. Each of the company’s employees who worked on this analysis was required to sign a non-disclosure certification. The work of the forensics analysis and recovery team was overseen by the SAA’s lead investigator, the Assistant Sergeant at Arms for Police Operations.

In addition to the forensics analysis of the Judiciary Committee servers, available backup tapes, and the desktops of relevant staff members, this investigation consisted primarily of interviews of those individuals who had access to the Judiciary Committee server. Over 160 interviews were conducted of current and former Judiciary Committee staff members and other individuals who were identified during interviews as possibly having information relating to the investigation. Employees of the SAA technology staffs were also interviewed. Four agents from the United States Secret Service were detailed to the SAA to assist in this investigation. They reported to the SAA lead investigator. All of those interviewed were asked a standard set of questions as well as individualized questions based on the investigation to date, or as follow up to their answers to the standard questions. Interviewees were allowed to have counsel during the interviews; six individuals chose to have attorneys present.

It would not have been possible to conduct this investigation without the cooperation of the majority and minority Members of the Judiciary Committee and their staffs. Since the inception of the

investigation, Chairman Hatch and Senator Leahy have encouraged their staffs to cooperate with the SAA. Staff Directors Mr. \_\_\_\_\_ and Mr. \_\_\_\_\_ have been invaluable in providing information and helping with the logistics of locating former employees and arranging interviews. The original copy of the final version of this report and the work product of this investigation will be kept by the Sergeant at Arms. Copies of this report have been made and distributed to the Chairman and Ranking Minority Member of the Committee.

## II. Overview of Findings

Investigators interviewed over 160 individuals, primarily those who had access to the Judiciary Committee computer system. In addition, five servers, four workstations and multiple e-mail backup tapes from the Judiciary Committee and Majority Leader Frist's office were analyzed by forensic experts. Individuals who were interviewed did so voluntarily and were advised that this was an administrative, fact-finding inquiry. This report presents the findings of the investigation.

The report begins by outlining the structure of the Judiciary Committee's computer network then addresses whether the Democratic documents disclosed in the press were from the Committee's computer system. It then outlines the admissions of two former Committee staff members who accessed Democratic files, including the scope of that access, and sets forth the forensic verification of how they were able to access other users' files over an extended period of time. The report also examines the statements of other individuals who were identified as knowing that access to Democratic documents was available, addresses a possible source of the disclosures to the press, analyzes other possible means of access to the computer system, and finally, makes recommendations for the future.

Investigators were provided critical information early in the investigation (Friday, November 21, 2003) when staff for Chairman Hatch who had been conducting interviews of majority staff on the Committee advised the Sergeant at Arms that a clerk in the Nominations Unit had admitted to them that day that he had accessed Democratic files over the Committee's computer system. His desktop computer was immediately taken into custody by the SAA.

The forensic review confirmed that 18 of the documents at issue resided on the Nominations Unit clerk's desktop. The documents in question were found within a large, password protected compressed file with either the exact name, or a close approximation. The documents at issue were also found on the Judiciary Committee server in the authors' folders, or the folders of other Democratic staff members to whom the author sent the document.

The Nomination Unit clerk was interviewed on November 23, 2003, as part of this investigation and subsequently re-interviewed twice, with counsel present, later in the investigation. His version of events remained consistent each time he was interviewed and the investigation verified much of what he told investigators. He and his counsel remained cooperative throughout the investigation.

The clerk first became aware that he could access the files of Democratic staff some time in October or November of 2001. He made this discovery after watching the Committee's Systems Administrator perform some work on his computer. An admittedly curious person, the clerk attempted to duplicate what the System Administrator had done. In so doing, he was able to observe all of the network's other users' home directories. He then clicked on different folders to see which ones he could access; he was able to access some folders, but not others. The folders that he could access, he stated, belonged to both Republican and Democratic staff.

The Nominations Unit clerk reported that he had access to the home directories of other users shortly after beginning his employment in the fall of 2001 until the spring of 2003. Initially he printed approximately 100-200 pages of documents pertaining to Judge Pickering's nomination and gave them to one of his supervisors. Two days later that supervisor and another admonished him not to use the Democratic documents and those that he had given his supervisor were shredded.

Mr. \_\_\_\_\_ joined the staff of the Judiciary Committee in December 2001. A short time after Mr. \_\_\_\_\_ was hired, the clerk showed him how he could access Democratic files. The clerk who initially discovered how to access the files told investigators that he was not sure what to look for in the files,

so Mr. \_\_\_\_\_ would guide him as to what information was helpful. Mr. \_\_\_\_\_ would often suggest which directories he should concentrate on and would sometimes tell him that there was something new in a particular folder and ask the clerk to print it for him. Mr. \_\_\_\_\_ admitted accessing the computer files of Democratic staff himself on one or two occasions.

The Nominations Unit clerk explained that he frequently searched the folders of some Democratic staff on an almost daily basis while working on the nomination of Judge Priscilla Owen. In fact, over the course of accessing other users' files for approximately 18 months, the clerk downloaded thousands of documents. Forensics analysis of a compressed zip folder from his workstation where he kept these documents identified 4,670 files, the majority of which appeared to be from folders belonging to Democratic staff. During the approximately 18 months the clerk accessed other users' files, he stated that he had four or five different computers assigned to him and that regardless of the hardware he used he was able to access this information.

In January 2003, Mr. \_\_\_\_\_ left the Judiciary Committee and took a position in the office of Majority Leader Frist. The Nominations Unit clerk and Mr. \_\_\_\_\_ both admitted that the clerk continued to provide Democratic - and also Republican - documents to Mr. \_\_\_\_\_ after he left the Judiciary Committee. Forensic analysis of the e-mail traffic between the two confirms this. In March or April 2003, the clerk was re-assigned to another Unit in the Judiciary Committee. About the same time (April 2003) the Committee's server was upgraded and the clerk believed that prevented him from being able to access other users' files on the server.

While there was extensive analysis of servers and individual workstations in this investigation, the results were limited due to the absence of proactive security auditing on the Committee's computers. The fact that not all security events were audited significantly inhibited this investigation because permission changes could not be analyzed on any computer.

Because the Committee was not auditing permission changes, the forensic review was not able to provide a history of who had access to the files containing the Democratic documents at issue.

The forensic review of the Judiciary Committee servers that was conducted is consistent with the clerk's explanation of how he was able to access democratic files. The forensic analysis provided investigators with two "snapshots" of the network's permission settings - one from July 2003 (when a file copied from the older server in April was deleted) and one from November 2003 when the server was imaged for this investigation.

The forensic analysis indicated that a majority of the files and folders on the server were accessible to all users on the network. Any user on the network could read, create, modify, or delete any of the files or folders within these folders. The investigation revealed that users whose network profiles were established prior to August 2001 - when a new System Administrator was hired by the Committee - were generally established correctly and had strict permissions; those established after the date were "open." The investigators do not believe that the Committee's System Administrator acted maliciously, or that he himself inappropriately accessed any user's files. Rather, this significant security vulnerability appears to have been caused by the System Administrator's inexperience, and a lack of training and oversight. This System Administrator left the Committee in July 2003, but permissions remained "open." Forensic analysis of the Judiciary Committee server when this investigation began in November 2003 indicates that the system was even more open to all users on the network at that time.

Despite this significant lack of security, the investigation did not reveal any evidence that users continued to access other users' files after the Nominations Unit clerk stopped doing so in April 2003. Other than the Democratic documents in question, no one who was interviewed brought forth any other documents that they believed had been compromised from the computer system.

The investigation did not identify any individuals, other than the clerk and Mr. \_\_\_\_\_, who were accessing other users' files on the Judiciary Committee computer network. While the clerk admitted to accessing and printing approximately 100-200 pages of documents and providing them to his supervisor in October or November of 2001, they did not know how he had obtained the documents or



that he continued to access additional Democratic documents. Additionally, the supervisors did not bring the matter to the attention of the Staff Director. A forensic analysis of the hard drives of both supervisors was conducted and none of the Democratic documents at issue resided on either drive. The Nominations Unit clerk identified other Judiciary Committee staff members within the Nominations Unit whom he believed knew Democratic computer files were accessible.

Investigators interviewed all of those individuals that were identified as having knowledge about access to Democratic files. Of those interviewed, only one - the Committee's former System Administrator who was working part-time on developing a database for the majority - knew that any users' folders were inappropriately open to others. This individual did not know the extent of the problem and thought the System Administrator was just "sloppy" with setting some users' permissions. He did not advise the System Administrator of his discovery.

In the interviews that were conducted, to date no other individuals on either the Republican or Democratic staffs admitted that they knew that access could be obtained to the other's files. There was speculation among those interviewed that if Mr. \_\_\_\_\_ learned how to get access to Democratic files, others on the Committee were probably doing the same thing. The Democratic staff working on judicial nominations clearly did not know there was a vulnerability. If they had, presumably they would have protected their files.

Members of the press and the Coalitions who had possession of the document at issue declined to be interviewed. Without their cooperation, the investigation faced a significant impediment to identifying the source of the disclosure. Several individuals who were interviewed, both Republicans and Democrats, implicated Mr. \_\_\_\_\_. While there is no definitive evidence pointing to Mr. \_\_\_\_\_ as the individual who gave the documents to the press, or a party outside of the Senate, there is circumstantial evidence implicating him.

When the Nomination Unit clerk, who considered Mr. \_\_\_\_\_ a friend, was asked how the Democratic documents were disclosed to the press, he identified Mr. \_\_\_\_\_ as the likely source. He described a conversation with Mr. \_\_\_\_\_ shortly after the documents were excerpted in the press where he understood Mr. \_\_\_\_\_ to acknowledge giving the documents to a third party who then gave them to the press.

The report does not make any recommendation for referral of individuals for Senate or legal ethics or criminal violations. It does set forth some of the options the Judiciary Committee may be considering. It also recommends immediate steps that the Committee should take to enhance its computer security and sets forth measures the SAA will be recommending to the Senate leadership to enhance the computer security network-wide.

### III. The Judiciary Committee Computer Network

#### A. Organizational Background

The SAA provides Information Technology support to the entire Senate, including Committees. Office Automation support is accomplished via the current SAA contractor, Signal Solutions. The SAA provides Senate offices with a variety of computer hardware and software, including networks, workstations, peripherals and all products associated with a computer system connected to a Local Area Network (LAN), including software such as Operating Systems (usually a variant of Windows NT) and other functional packages and office suites. Software setup and Operating System configuration is usually conducted by SAA staff following configuration specifications requested by the office's System Administrator.

Almost all Senate offices, including Committees, employ their own Systems Administrator. These individuals have a broad range of technical skills, ranging from the bare minimum to advanced technical understanding. The SAA provides training (through the Joint Office of Education and Training), guidance, and/or direct support to Systems Administrators when requested to do so.

#### B. History of the Judiciary Committee's Network and Systems Administrators

It was determined from interviews of SAA employees that the Judiciary Committee migrated from a mini-computer system to a Local Area Network prior to October 31st, 1991. The specific date is not

known, nor is the name of the Systems Administrator at the time.

On August 14th, 1995, the Judiciary Committee computer software system was upgraded from Microsoft (MS) LAN Manager Version 1.1 to MS Windows NT Server 3.51. In December 1999, another upgrade was completed resulting in the software installation of MS Windows NT Server 4.0. In July 1999, Mr. \_\_\_\_\_ left the Judiciary Committee after serving as its Systems Administrator. According to SAA staff, Mr. \_\_\_\_\_ was very independent and rarely used their customer support. In August 1999, an SAA team installed new Y2K-compliant workstations within the Committee. This caused a number of network issues to surface as a result of the System Administrator's nonstandard configurations on the servers and customized, non-standard, individual logon script files. In late 1999, the Judiciary Committee requested assistance from the SAA to bring its computer network back to a standard configuration and into Y2K compliance. An SAA contractor assisted the Committee for approximately 2 months during the transition to a new Systems Administrator, Mr. \_\_\_\_\_. SAA Service Center tickets which track service requests to the Help Desk show that in December 1999 Mr. \_\_\_\_\_ requested specific assistance from the SAA Help Desk with regard to the Judiciary computer server upgrade. According to these records, Mr. \_\_\_\_\_ "successfully changed and synchronized server passwords for proper security measures."

On June 21, 2001, Mr. \_\_\_\_\_ resigned as the Committee's System Administrator and Mr. \_\_\_\_\_, the System Administrator for Senator Leahy's personal office, performed those duties "unofficially" for the Committee until Mr. \_\_\_\_\_ was hired on July 17, 2001. This position was first job after obtaining his college degree.

The Committee received new computer hardware ordered by Mr. \_\_\_\_\_ on February 20, 2003. (Service Center ticket 92377). The service ticket's notes indicate that Mr. \_\_\_\_\_ declined to schedule a pre-installation meeting with SAA staff and declined the SAA's offer to configure the system. He requested that the equipment be delivered in the original boxes and indicated that he would handle the installation himself. After this installation Mr. \_\_\_\_\_ called the SAA Help Desk on April 18, 2003, with questions about how to copy files from one server to another. He was advised of the proper procedures and, according to the Help Desk report, was able to copy the files successfully. Three days later Mr. \_\_\_\_\_ called the Help Desk regarding problems associated with the new Windows 2000 server he had built to use as a file server. He reported encountering login problems on workstations when users attempted to connect to the server and contacted the SAA Help Desk for assistance. The SAA provided technical assistance and on April 30, 2003, Mr. \_\_\_\_\_ advised the Help Desk staff that he was not having any further difficulties.

On May 29, 2003, Mr. \_\_\_\_\_ assumed the System Administrator position for the Committee. He remains in this position today. Mr. \_\_\_\_\_ left the Committee on July 21, 2003. A timeline reflecting the tenure of the Committee's recent System Administrators is attached at "G."

Like some other Senate offices, the Judiciary Committee has historically been staffed with Systems Administrators who preferred to perform most computer-related tasks themselves. This has been true even if they had only minimal technical experience before becoming the Committee's System Administrator. There is no minimum level of proficiency required to obtain a System Administrator position, and there was a considerable variance in the proficiency levels of the Committee's different system administrators. Notably, the records of the Senate Joint Office of Education and Training reflect that Mr. \_\_\_\_\_ only attended two technical training classes during his tenure, neither relating to the NT Administration.

### C. The Architecture of the Judiciary Committee Network

The Judiciary Committee Computer network, when it was imaged at the beginning of this investigation, consisted of a Primary Domain Controller (PDC) Server known as "JUDAK," a Backup Domain Controller (BDC), a Print Server known as "JUDPT," and a File Server which is referred to as "JUDFS01". Collectively, these servers are simply known as the Judiciary Committee File and Print Servers. The network configuration also included an e-mail server that was not taken into custody because backup tapes were available. A diagram of the Judiciary Committee Local Area

Network as of November 2003 is attached as "H."

The "JUDAK" server was the primary domain controller (PDC) for the Committee. The server ran the Windows NT 4.0 Operating System and controlled all servers, computer workstations, users, printers, scanners and other computer hardware on the network. PDCs are considered critical infrastructure machines and act as the central management point for the entire network and all its users.

The print server "JUDPT" was the central managing point for all printers and computers that printed. This connected all servers and workstations to all printers and managed the printing of all documents. The file server "JUDFS01" acted as the central file repository point for all users on the network. The file server allowed users to save and retrieve their files and folders from a central location. This central location offered a large amount of hard drive space (over 200 gigabytes) for data storage by the over 140 user accounts. Administrators generally backup the entire file server periodically as a single entity providing for the recovery of lost data.

The Committee's servers were configured in a way that a Local drive/partition contains the Server Operating System and related utilities, this is known as the server "C:" drive. There also exists a server "E:" drive. This particular local drive/partition contains data files, such as user home directories and shared directories. The System Administrator is responsible for security settings or permissions on the various folders on this drive or partition to allow (or not allow) them to be "shared" with users on the network. The practice in the Judiciary Committee is to "share" certain files among staff working for the same Senator. Users access the folders by mapping them to a drive letter (e.g., H: or S:) that they use just like a drive on their individual workstations.

Specific to each user's desk workstation is a Local "C:" drive that contains the workstation Operating System, applications, and data files. Additionally, the "H:" drive (as stated above) is also seen and is "mapped" to a user's home directory on the file/print server. An "S:" drive is also "mapped" to the shared folder on the file/print server.

Each user should have exclusive access to his or her own directory. As the name implies, more than one user typically has access to any shared folders on the server. Access to home directories and shared folders is controlled by permissions set by the system administrator.

The diagram below reflects the Committee's server and desktop configurations.

A detailed explanation of each drive is attached at "I."

#### IV. The Documents Disclosed to the Press Resided on the Judiciary Committee Computer Network

The Democratic staff documents excerpted in the press and published on the internet appeared initially to have been taken from the Judiciary Committee's computer system. Specifically, one of the authors of a memorandum to Senator Kennedy advised investigators that the document posted on the public website was not the final version of the memorandum printed and disseminated. Likewise, the author of the document that does not have a heading (the first page posted on the website with an "02" in the upper right corner) indicated that it was typed as an outline of thoughts, not intended to be read by anyone else and, therefore, never printed.

The forensic review confirmed that 18 of the documents at issue resided on the Judiciary Committee server. The one document that was not found was identified to investigators as written by Mr. \_\_\_\_\_, Counsel for Senator Biden, and was posted on the website with "p.20" in the upper right corner. The forensic review searched all files and folders - even those that had been deleted - on all of the servers and workstations taken into custody. Printed copies and, in some cases filenames, of the Democratic staff documents that were provided to the forensic consultants. Additionally, unique mathematical computations for each file were created by the forensic experts and used to search for the documents. All of the found documents resided on desktop. The documents in question were found within a large, password protected compressed file with either the exact name of the original document, or a close approximation. The documents were also found on the Judiciary Committee server in the authors' home directories, or the home directories of other Democratic staff members to whom the author sent the document. A list of the folders where the documents were found is attached at "J" (Memos in Question Analysis).

The forensic analysis revealed no matches for the documents in question on any of the other computer analyzed.

#### V. A Judiciary Committee Staff Member Accessed the Computer Files of the Documents' Authors

##### A. Mr. \_\_\_\_\_ Initial Access

As noted earlier in this report, counsel for Senator Hatch who were conducting interviews the week of November 17th brought to the attention of the Sergeant at Arms that Mr. \_\_\_\_\_, a nominations clerk for the Senate Judiciary Committee, had acknowledged accessing Democratic files on the Judiciary Committee's computer system. Mr. \_\_\_\_\_ was interviewed on November 24, 2003, as part of this investigation and subsequently re-interviewed, with counsel present, later in the investigation. His version of events remained consistent each time he was interviewed and the investigation verified much of what he told investigators. Importantly, prior to the initial media reports referencing the Democratic documents at issue, Mr. \_\_\_\_\_ had already been accepted to graduate school in accounting in Texas and was planning on leaving employment with the Judiciary Committee. He was put on administrative leave the day of his admission to Senator Hatch's counsel and left for Texas on January 7, 2004.

Mr. \_\_\_\_\_ began working for the majority in the Nominations Unit of the Judiciary Committee on September 19, 2001. He was interviewed and hired by Mr. \_\_\_\_\_, the Republican Staff Director for

the Committee at that time. Mr. \_\_\_\_\_'s responsibilities involved the handling and processing of nominations paperwork. Later he was given additional responsibilities, including researching for the Committee's attorneys and speaking with the Department of Justice's Legislative Affairs and Legal Policy representatives. He stated that he worked for Ms. \_\_\_\_\_ and Mr. \_\_\_\_\_. According to Mr. \_\_\_\_\_, he became aware that he could access the files of Democratic staff some time in October or November of 2001. He made this discovery after watching the Committee's Systems Administrator, Mr. \_\_\_\_\_, perform some work on his computer. An admittedly curious person, Mr. \_\_\_\_\_ attempted to duplicate what the System Administrator had done after Mr. \_\_\_\_\_ left his workspace. According to Mr. \_\_\_\_\_, he accessed "My Network Places/Entire Network/Judak." In so doing, he was able to observe all of the users' home directories. He then clicked on different folders to see which ones he could access; he was able to access some folders, but not others. The folders that he could access, he stated, belonged to both Republican and Democratic staff.

Mr. \_\_\_\_\_ reported that he had access to other users' home directories shortly after beginning his employment in the fall of 2001 until the spring of 2003. Mr. \_\_\_\_\_ recalled that the nomination of Judge Charles Pickering to a seat on the Fifth Circuit was the "hot topic" within the Judiciary Committee in the fall of 2001. As a result, he began navigating the server and searching for information about Judge Pickering. He printed approximately 100-200 pages of documents pertaining to Judge Pickering's nomination and gave them to Ms. \_\_\_\_\_ in an attempt to get on good terms with her. According to Mr. \_\_\_\_\_, Ms. \_\_\_\_\_ appeared pleased with the information and thanked him. He reported that two days later Mr. \_\_\_\_\_ and Ms. \_\_\_\_\_ admonished him not to use the Democratic documents and Ms. \_\_\_\_\_ shredded the materials he had given her.

#### B. Mr. \_\_\_\_\_'s Possession of Democratic Documents

In December of 2001 Mr. \_\_\_\_\_ joined the Judiciary Committee as a counsel for the Nominations Unit. Mr. \_\_\_\_\_ stated that a short time after Mr. \_\_\_\_\_ was hired, he showed Mr. \_\_\_\_\_ how to access Democratic staff files and explained that Mr. \_\_\_\_\_ and Ms. \_\_\_\_\_ had instructed him not to use Democratic materials. Mr. \_\_\_\_\_'s response, according to Mr. \_\_\_\_\_, was that everyone knew about the open access and that he did not have to follow the directions given by Mr. \_\_\_\_\_ and Ms. \_\_\_\_\_. Furthermore, Mr. \_\_\_\_\_ recalled that Mr. \_\_\_\_\_ told him that Senator Hatch wanted the staff to use any means necessary to support President Bush's nominees.

According to Mr. \_\_\_\_\_, he was not sure what to look for in the files, so Mr. \_\_\_\_\_ would guide him as to what information was helpful. Mr. \_\_\_\_\_ explained that Mr. \_\_\_\_\_ would often suggest which directories he should concentrate on and would sometimes tell him that there was something new in a particular folder and request that Mr. \_\_\_\_\_ print it out for him. When Mr. \_\_\_\_\_ printed out documents, he would either hand them to Mr. \_\_\_\_\_ or leave them in Mr. \_\_\_\_\_'s top desk drawer. He recalled specifically leaving documents in the desk drawer without a handle.

In his second interview, Mr. \_\_\_\_\_ explained that Mr. \_\_\_\_\_ was his supervisor, (a relationship not corroborated by anyone else, including Mr. \_\_\_\_\_), and when asked by Mr. \_\_\_\_\_ to look for specific Democratic information he believed he was being directed to do so by his supervisor. Mr. \_\_\_\_\_ believed that Mr. \_\_\_\_\_'s instructions superseded those he had been given earlier by Ms. \_\_\_\_\_ and Mr. \_\_\_\_\_. Mr. \_\_\_\_\_ also stated that Mr. \_\_\_\_\_ told him there was nothing wrong, or illegal with accessing the Democratic files.

In January 2003, Mr. \_\_\_\_\_ left the Judiciary Committee and took a position in the office of Majority Leader Frist. He continued to have access to the Judiciary Committee server until at least February 12, 2003, when he e-mailed himself (from his Judiciary Committee account to his account on the Frist server) more than 45 documents over three days. Mr. \_\_\_\_\_ and Mr. \_\_\_\_\_ both admitted that Mr. \_\_\_\_\_ continued to provide Democratic - and also Republican - documents to Mr. \_\_\_\_\_ after he left the Judiciary Committee. E-mail traffic between Mr. \_\_\_\_\_ and Mr. \_\_\_\_\_ confirms this. For example, on February 24, 2003, Mr. \_\_\_\_\_ replied to an e-mail from Mr. \_\_\_\_\_ with the subject matter "please send asap" by attaching over 30 documents to Mr. \_\_\_\_\_. And, a March 3, 2003 e-mail

from Mr. \_\_\_\_\_ to Mr. \_\_\_\_\_ with the subject "lots of chatter" attaches ten documents, the majority of which appear to be written by Democratic staff.

### C. The Scope of Access

Mr. \_\_\_\_\_ explained that he frequently searched the folders of Mr. \_\_\_\_\_ (Sen. Kennedy), Mr. \_\_\_\_\_ (Sen. Durbin), Mr. \_\_\_\_\_ (Sen. Feinstein), Ms. \_\_\_\_\_ (Sen. Leahy), Mr. \_\_\_\_\_ (Sen. Biden), Mr. \_\_\_\_\_ (Sen. Feingold), and Ms. \_\_\_\_\_ (Sen. Leahy). He acknowledged that most of the documents he accessed were from the files of Ms. \_\_\_\_\_ and Mr. \_\_\_\_\_. He admitted accessing these files on an almost daily basis while working on the nomination of Texas Supreme Court Judge Priscilla Owens to the District Court. He stated he accessed the files much less frequently after October 2002 when his mother was murdered. Mr. \_\_\_\_\_ provided investigators with a two-page printout of a computer screen with Judiciary Committee staff folders and indicated which folders he could access and those he could not. (Attachment "K.")

According to Mr. \_\_\_\_\_, when he learned of the vulnerability of the computer server he took steps to safeguard his own files. He did this by contacting a friend outside the Senate, whom he thought to be very good in computer security issues. This individual guided Mr. \_\_\_\_\_ through the necessary steps at his desktop. An interview with this individual confirmed that Mr. \_\_\_\_\_ advised him that others could read his files and asked for assistance in preventing this access. Mr. \_\_\_\_\_'s friend helped him "right click on properties" and establish permissions on his files. Mr. \_\_\_\_\_ stated that he also secured the files of Mr. \_\_\_\_\_ and Mr. \_\_\_\_\_, another member of the Nominations Unit, from their workstations.

In March or April 2003, about the same time Mr. \_\_\_\_\_ left the Nominations Unit and moved to the Civil Division, the server was upgraded and Mr. \_\_\_\_\_ believes that prevented him from being able to access other users' files on the server. During the approximately 18 months Mr. \_\_\_\_\_ accessed other users' files, he stated that he had four or five different computers assigned to him and that regardless of the hardware he used he was able to access this information.

The investigation revealed that over the course of accessing other users' files for approximately 18 months, Mr. \_\_\_\_\_ downloaded thousands of documents. He stated that he created a password protected "zip folder" on his desktop computer once he realized there was going to be an investigation and moved the relevant documents to that folder. He provided investigators with the password for the folder. The forensics analysis revealed that the compressed zip folder contained 4, 670 files, the majority of which appeared to be from folders belonging to Democratic staff. Over 2,000 of these files appear to belong to one individual, a former counsel for Senator Durbin. Mr. \_\_\_\_\_ told investigators that the only copy of these documents that he possessed other than those found on his workstation was given to his attorneys. Mr. \_\_\_\_\_'s counsel provided investigators with two discs which included the contents of Mr. \_\_\_\_\_'s H: drive, including the zipped files. The attorneys also provided investigators with approximately 500 pages of documents including Democratic documents, Republican talking points and issue papers on judicial nominations, and press and website reports about judicial nominees and this investigation. They represented this to be the complete results of Mr. \_\_\_\_\_'s production to them of any documents he had in his possession relating to this investigation. Mr. \_\_\_\_\_ confirmed that he had given everything over to his counsel.

## VI. Forensic Verification and Analysis

### A. Limitation of Analysis

While there was extensive forensic analysis of servers and individual workstations in this investigation, the results were limited due to the absence of proactive security auditing. Each server and workstation contains three main logs; an application log which tracks programs and what they are doing on the network, a system log which tracks any remarkable system, operating system events, and a security log which tracks successful and failed access attempts to system resources. System Administrators can use the security log to apply both reactive and proactive measures to potential and

actual security incidents. The security log can audit successful and failed log ons and log offs, file accesses, user rights, security policy changes and computer restarts.

Prior to the Committee's server upgrade in April 2003, only failed log-on and log-offs were audited. As a result, the forensic review was unable to determine whether any users changed their user rights, attempted to access files to which they did not have access to, or the exact date and time of each log on and log off.

The fact that not all security events were audited significantly inhibited this investigation because permission changes could not be analyzed on any computer. When a user account is created, the System Administrator assigns that user access to certain privileges and resources on the network. If the system is not properly configured, users may be able to change their level of access and privileges. Because the System Administrators were not auditing permission changes, the forensic review was unable to produce a history of who had access to the files containing the Democratic documents at issue. This trend of not fully logging security events began before the the Committee's server upgrade in April of 2003. When the Committee migrated from Windows NT to Windows 2000 in April 2003, the same log settings were preserved and, as a result, the logging continued to be inadequate for a comprehensive security audit.

#### B. Open Permissions

The forensic review of the Judiciary Committee servers is consistent with Mr. \_\_\_\_\_'s explanation of how he was able to access files that were owned by Democrat staff of the Committee. The files on the Committee's server (JUDAK) were copied to the new server (JUDIC-FS01) on April 18, 2003 and deleted in July 2003. Forensic experts were able to recover most of these deleted files and analyze file permissions as they were set at the time of deletion.

The forensic analysis indicated that a majority of the files and folders on the server were accessible to all users on the network. Specifically, in 84 out of 144 of the home directories analyzed, the permission assignment was "open," indicating that the "EVERYONE" group had full control. This means that any user on the network could read, create, modify, or delete any of the files or folders within these folders. The remaining folders had a "strict" permission assignment, which meant that a specific user(s) were assigned to the folder, typically the owner of the home directory and the System Administrator. The folder permission analysis is attached to this report at "L".

The folder permission analysis verified Mr. \_\_\_\_\_'s statements that he was able to access the home directories, or H: drives, of Ms. \_\_\_\_\_, Mr. \_\_\_\_\_, Ms. \_\_\_\_\_, Mr. \_\_\_\_\_, Ms. \_\_\_\_\_, and Mr. \_\_\_\_\_. These files were among those open to everyone on the Judiciary Committee server.

Additionally, the forensic review confirmed that access was restricted to the files belonging to Mr. \_\_\_\_\_, Mr. \_\_\_\_\_, and Mr. \_\_\_\_\_. This finding is consistent with Mr. \_\_\_\_\_'s report that he took steps to protect these users' files.

The Windows 2000 operating System is built on Windows NT technology and has similar security. As a result, the open permission settings that existed before the Judiciary Committee's server upgrade in April 2003 were inherited by the new server unless the System Administrator took specific steps to change them. Nevertheless, the conversion to the Windows 2000 Operating System left Mr. \_\_\_\_\_ unable to navigate access to other users' files. Part of the explanation for this is that the Windows 2000 server has a setting (unlike the previously used

Windows NT) that does not show the list of all users' folders. As a result, while the Democratic files Mr. \_\_\_\_\_ had been accessing were still technically open, the path to get to them had changed and it appeared to him that access was no longer available.

#### C. Pattern of Open Permissions

Our investigation revealed that some user home directories were set to "open" permissions and other home directories were set to "strict" permission. This appears to be a result of the Judiciary Committee Network having two System Administrators during the time frame in question. One System Administrator had very strict account policies in place and the other did not. An analysis of the creation date and permissions of various user accounts was performed and supports this. (Attached

at "M" is a chart H: Drive Permissions Analysis Including Start/Creation Dates).

Users accounts created prior to August 2001 were generally created with "strict" permissions; those established after that date were "open." Of the 126 users whose folders were available for forensic analysis, there were only nine exceptions to this general pattern. Four of these exceptions were Nominations Unit staff whose files Mr. \_\_\_\_\_ admitted protecting. Of the remaining five exceptions, only two had strict permissions that should have, according to the pattern, been open - Ms. \_\_\_\_\_, counsel for Senator Kyl since August 2003 (formerly counsel for Senator Sessions from August 2002 - August 2003) and counsel for Senator Brownback. Judiciary Committee leave records indicate that Mr. \_\_\_\_\_ was on leave when Ms. \_\_\_\_\_ and Mr. \_\_\_\_\_ began their employment with the Committee. It is likely that their user profiles were established by Mr. \_\_\_\_\_ in Mr. \_\_\_\_\_'s absence. They both were interviewed and denied any knowledge of being able to access other user files, or of the Democratic documents in question.

The Committee's recent System Administrators were interviewed on multiple occasions. Mr. \_\_\_\_\_ was the Committee's System Administrator from December 1999 to June 21, 2001. At that time Mr. \_\_\_\_\_, the System Administrator from Senator Leahy's personal office took over the duties unofficially until Mr. \_\_\_\_\_ began on July 17, 2001. Mr. \_\_\_\_\_ remained in the position until Mr. \_\_\_\_\_ assumed the duties on May 29, 2003.

Investigators interviewed Mr. \_\_\_\_\_ in person early in the investigation and had subsequent telephone and e-mail conversations with him. After explaining to investigators how he set up a user profile, Mr. \_\_\_\_\_ called to correct his response and subsequently sent an e-mail on February 18, 2003, which stated, in part:

In the final step of the process, [sic] I said I would go into the newly created user folder, enable the share, and restrict permission to full access by the particular user. I want to clarify that this was only done under the system I put in place in Spring 2003.

In conversations I've had with Mr. \_\_\_\_\_ since we spoke, it has come to light that I was not instructed to set such user permissions on each folder under the old system. This was an oversight in teaching me how to set up the accounts. My assumption was that these permissions were restricted by some other means, and as I was taking over an already functioning system, I did not think to double check this area of security.

This statement explains why permissions were open for users who came to work for the Judiciary Committee after July 2001. The investigators do not believe that Mr. \_\_\_\_\_ acted maliciously, or that he himself inappropriately accessed any user's files. Rather, this significant security vulnerability appears to have been caused by Mr. \_\_\_\_\_'s inexperience, and a lack of training and oversight. Despite Mr. \_\_\_\_\_'s assertions that he properly set permissions after April 2003, forensic analysis of the Judiciary Committee server when this investigation began in November 2003 indicates that the system was even more open to all users on the network at that time. Two-thirds of the folders analyzed were created on April 18, 2003, when they were copied from the old server (JUDAK) to the new server. The majority of the folders on the new server (JUDIC-FS01) have no permissions set. Access to these files would require a user to manually map to another user's drive (as opposed to clicking on folders as Mr. \_\_\_\_\_ did).

Because the servers in the Judiciary Committee Network remained open from August 2001 through November 2003 it is plausible to assume that additional users may have escalated their privileges, and therefore would have been able to view files belonging to other users. Despite this significant lack of security, the investigation did not reveal any evidence that users continued to access other users' files after Mr. \_\_\_\_\_ stopped doing so in April 2003. Other than the Democratic documents in question, no one who was interviewed brought forth any documents that had been improperly acquired from the computer systems in question. The next section of this report will address the knowledge of the individuals identified by Mr. \_\_\_\_\_ as having knowledge of the ability to access Democratic files.



## VII. Other Individuals Identified as Having Knowledge

### A. Ms. \_\_\_\_\_ and Mr. \_\_\_\_\_ in the Fall of 2001

As previously discussed in this report, Mr. \_\_\_\_\_ admitted to accessing and printing approximately 100-200 pages of documents and providing them to Ms. \_\_\_\_\_ and Mr. \_\_\_\_\_ in October, or November of 2001. Ms. \_\_\_\_\_ and Mr. \_\_\_\_\_ confirmed that Mr. \_\_\_\_\_ brought them a stack of documents that appeared to be written by Democratic staff. Ms. \_\_\_\_\_ stated that she did not know how Mr. \_\_\_\_\_ had received these documents, but that her impression at that time was that they came from a computer that Mr. \_\_\_\_\_ inherited from a former Democratic staffer. She remembers recognizing that one of the documents was an internal Democratic memorandum at which point she decided not to do anything with them and placed them in her top desk drawer. The next day she shredded the documents and told Mr. \_\_\_\_\_ to shred every copy he made and admonished him that it was not appropriate to read them - "this is not the way they do things here."

Mr. \_\_\_\_\_'s account of receiving the documents is very similar to that of Ms. \_\_\_\_\_. Mr. \_\_\_\_\_ recounts that it was late in the day when Mr. \_\_\_\_\_ presented a manila folder of documents that appeared to be written by Democratic staff. Mr. \_\_\_\_\_ did not know that Mr. \_\_\_\_\_ had access to the files. He stated that later in the evening as he thought about the documents, he concluded that it was wrong to have or use them. The next day he told Ms. \_\_\_\_\_, "I don't think it's right, we need to get rid of them." They then asked Mr. \_\_\_\_\_ into Ms. \_\_\_\_\_'s office and told him to destroy any hard copies that he had and advised him to delete the files if they were on his computer.

Ms. \_\_\_\_\_ and Mr. \_\_\_\_\_ both stated that they thought they had resolved the problem and did not feel it was necessary to bring the matter to the attention of their supervisor, Staff Director, Mr. \_\_\_\_\_. Mr. \_\_\_\_\_ is no longer a Senate employee, but was interviewed for this investigation. He denies having access to Democratic files or knowing that anyone else had access. The investigation also revealed that it is unlikely that Mr. \_\_\_\_\_ shared with Mr. \_\_\_\_\_ the fact that he could access Democratic files. Interviews revealed that the two gentlemen did not have a close or friendly working relationship. The forensics analysis of both Ms. \_\_\_\_\_'s and Mr. \_\_\_\_\_'s Judiciary Committee hard drives was conducted. This analysis revealed that none of the Democratic documents at issue resided on either drive. Furthermore, the analysis determined that neither Ms. \_\_\_\_\_, nor Mr. \_\_\_\_\_ altered the manner in which they saved their documents, which they might have done if they understood that Mr. \_\_\_\_\_ and others could access files through the Judiciary Committee server.

Investigators found Ms. \_\_\_\_\_ and Mr. \_\_\_\_\_ to be credible and cooperative in this investigation. In fact, on February 23, 2004, Ms. \_\_\_\_\_ called investigators after she discovered one of the Democratic documents at issue in her possession when she was unpacking her files at a new job. She told investigators she had received the document from Mr. \_\_\_\_\_, counsel for Majority Whip McConnell, in February or March of 2003. She does not remember the exact conversation, but she had the impression the document came from Mr. \_\_\_\_\_. When Mr. \_\_\_\_\_ was re-interviewed he indicated Mr. \_\_\_\_\_ may have shown him an "opposition document" early in the year, but denied any recollection of the giving the specific document to Ms. \_\_\_\_\_; although, he acknowledged that it was possible he did so.

### B. Nominations Unit Staff

Mr. \_\_\_\_\_ was questioned by investigators about whether he was aware of anyone else who knew that Democratic files were accessible. He initially stated that, "Everybody knew," but when questioned further he named only several Judiciary Committee staff within the Nominations Unit, specifically, Ms. \_\_\_\_\_, Mr. \_\_\_\_\_, Mr. \_\_\_\_\_, and Mr. \_\_\_\_\_. Mr. \_\_\_\_\_ indicated that he was also able to access these files from Ms. \_\_\_\_\_'s computer. Mr. \_\_\_\_\_ stated that the other individuals he named had knowledge of being able to access Democratic files because Mr. \_\_\_\_\_, a former System Administrator for the Committee who was re-hired in November 2001 to develop a database for the majority, demonstrated how access could be obtained. The investigators interviewed all of those individuals that were identified by Mr. \_\_\_\_\_ as having knowledge about access to Democratic files. Ms. \_\_\_\_\_ was employed by the Judiciary Committee in July 1998 as a legislative correspondent

and later its nominations clerk. After a break in service she returned to the Committee from August 2001 through September 2003, first as the Nominations Unit investigator and later as a counsel in the Unit. In her first interview, Ms. \_\_\_\_\_ recalled overhearing a conversation between Ms. \_\_\_\_\_, Mr. \_\_\_\_\_, and Mr. \_\_\_\_\_, in which she heard Mr. \_\_\_\_\_ say that he could access Democratic files. She believed this was possible because he had inherited a computer previously used by Democratic staff. She further stated that if Mr. \_\_\_\_\_ had shown colleagues how to access files, it was only because he was shocked or startled that it was possible; he was not showing them so that they could access the files.

When Ms. \_\_\_\_\_ was re-interviewed she was asked again about the "demonstration" Mr. \_\_\_\_\_ told investigators that Mr. \_\_\_\_\_ had conducted and her knowledge of Mr. \_\_\_\_\_'s ability to access Democratic files. Ms. \_\_\_\_\_'s recollection of events is not clear. She initially stated during the second interview that Mr. \_\_\_\_\_ told her directly that he could access other individual's files on the server and at one point had shown her how he could do it, using his own workstation. She later indicated that it could have been that Mr. \_\_\_\_\_ showed her on her own computer. Ms. \_\_\_\_\_ also stated that she does not have specific recollection of a demonstration by System Administrator. She stated that it is possible that it happened and that she does not remember it because she did not think it was significant at that time. Overall, Ms. \_\_\_\_\_ was not helpful in determining whether others within the Nominations Unit knew that access was available to Democratic files. She acknowledged that events "could have happened" the way Mr. \_\_\_\_\_ described them to investigators, but had no specific recollection. Mr. \_\_\_\_\_, conversely, is certain that Ms. \_\_\_\_\_ knew how to access Democratic files, but had no specific knowledge that she had ever done so.

When Mr. \_\_\_\_\_ was the Committee's System Administrator from December 1999 to June 2001 he stated that he was meticulous about security permission. Investigators interviewed Mr. \_\_\_\_\_ three times. While he was nervous and guarded with investigators initially he eventually was forthcoming and essentially confirmed Mr. \_\_\_\_\_'s recollection of events. He denied accessing Democratic files and had never seen the documents at issue.

When Mr. \_\_\_\_\_ returned to the Committee in November 2001 to create a database he remembers discovering that Mr. \_\_\_\_\_, then the Committee's System Administrator, was being "sloppy with permissions." Mr. \_\_\_\_\_ denies ever giving a "demonstration" as Mr. \_\_\_\_\_ reported, but does recall that when he was working on Ms. \_\_\_\_\_'s computer (she did not have an H: drive and was helping her fix that problem) he was able to view folders belonging to other Judiciary Committee staff. He remembers trying to open "a couple" folders and that they were only "Hatch stuff." He recalls that Ms. \_\_\_\_\_, Mr. \_\_\_\_\_, and Mr. \_\_\_\_\_ were present at the time and that he may have said something like, "I can't believe he left it open." This discovery occurred while he was working on Ms. \_\_\_\_\_'s computer. When asked whether he thought Ms. \_\_\_\_\_ might have been able to remember the steps he had taken to access other users' folders he stated, "If \_\_\_\_\_ could remember steps, I'd give you a hundred dollars. She is the most technologically illiterate person I know."

Mr. \_\_\_\_\_ does not recall ever notifying Mr. \_\_\_\_\_ of the fact that he was able to access folders that should have been closed. During this investigation Mr. \_\_\_\_\_, still a Senate employee, sent an e-mail to Senator Hatch's counsel responding to a Boston Globe report that a Republican "computer technician informed his Democratic counterpart of the glitch, but Democrats did nothing to fix the problem" by stating:

... my firmest recollection is that I did not have a conversation with Mr. \_\_\_\_\_ about what, at the time, I could only have deemed him as being sloppy with some permission and not some problem that of which others would take advantage. What I can remember is leaving him a message to call me about a concern and he didn't return my call.

The only individual interviewed who alleged that Mr. \_\_\_\_\_ told the Committee's System Administrator about open access to user files was Mr. \_\_\_\_\_. He claimed to have learned about this from Mr. \_\_\_\_\_. However, Mr. \_\_\_\_\_ denied telling Mr. \_\_\_\_\_ this and stated he did not know

whether Mr. \_\_\_\_\_ was apprised of the situation.

Mr. \_\_\_\_\_, a law clerk for the Committee in the summer of 2002 and currently Investigations Counsel, initially told investigators that he had never been shown how to access Democratic files. In a second interview focusing on the "demonstration" Mr. \_\_\_\_\_ said took place, Mr. \_\_\_\_\_ stated that he had no recollection of a "demonstration" by Mr. \_\_\_\_\_, but that it could have happened. Mr. \_\_\_\_\_ thought it was possible that he could have been present while Mr. \_\_\_\_\_ was showing something on the computer, and he may not have known what was going on. Mr. \_\_\_\_\_ denies accessing the files of Democratic staff.

Mr. \_\_\_\_\_, also a law clerk for the Committee in the summer of 2002 and no longer employed by the Senate, was interviewed telephonically and denied accessing Democratic files. He stated that he was not aware that the possibility of doing so existed; it was not common knowledge in the office. He also denied being present at a "demonstration" by Mr. \_\_\_\_\_.

Testimony  
United States Senate Committee on the Judiciary  
**Executive Business Meeting**  
March 4, 2004

**Computer Report #2**

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C. Other Judiciary Committee Staff

In the interviews that were conducted, no other individuals on either the Republican, or Democratic staffs admitted that they knew that access could be obtained to the other's files. There is speculation among those interviewed that if Mr. \_\_\_\_\_ learned how to get access to Democratic files, others on the Committee were probably doing the same thing. The Democratic staff working on judicial nominations clearly did not know there was a vulnerability. If they had, presumably they would have protected their files.

Other than the supposed "demonstration" by Mr. \_\_\_\_\_, neither Mr. \_\_\_\_\_, nor Mr. \_\_\_\_\_ identified anyone who they thought knew about accessing Democratic files. It is believable that they would not have told others. Notably, excerpts from e-mails between the two men set forth later in this report indicate their desire to keep secret the fact they had access to these documents. Mr. \_\_\_\_\_ was thought of by his peers as having "a mole" on the other side and would smile when he was asked how he knew what appeared to be insider Democratic information.

There was speculation, by Republican staff that were interviewed, that the Democrats had been reading their memoranda. Each time this was mentioned, the investigators asked the person being interviewed to identify documents that he/she thought had been compromised and none was ever identified.

Unfortunately, forensic analysis cannot determine which users accessed specific files and/or folders. As explained earlier in this report, the audit logs that would show this were not turned on in the Judiciary Committee system. While the system has this type of tracking capability, in the Senate it is typically used only as an incident response and it is standard procedure to leave the logs off during normal operation. For this same reason, forensics cannot tell us whether a user was successful or unsuccessful in attempting to access something he/she was not authorized to access.

VIII. A Possible Source of the Disclosure to the Press

During the investigation several individuals acknowledged having seen hard copies of the Democratic documents. Investigators spoke with anyone that was identified as having a copy of the documents to ascertain how they came into their possession. Most individuals who had hard copies had downloaded them from the Coalition for a Fair Judiciary website. The one exception to this was Mr. \_\_\_\_\_, counsel for Senator Kyl, who told investigators that he received the documents from Mr. \_\_\_\_\_ of the Wall Street Journal on November 14, 2003.

Counsel for the Wall Street Journal declined to make Mr. \_\_\_\_\_, or Ms. \_\_\_\_\_, available for interviews. Mr. \_\_\_\_\_, the author of the Washington Times article on November 15, 2003, stated that he received the documents in hard copy, but not from a staff person on the Hill. He declined to name his source.

Ms. \_\_\_\_\_, President of the Coalition for a Fair Judiciary, whose website initially posted the documents, also declined to be interviewed citing the Sergeant at Arms' lack of "jurisdiction" over her, or the Coalition. Mr. \_\_\_\_\_, Executive Director for the Committee for Justice, who Mr. \_\_\_\_\_ believed to be the middle-man between Mr. \_\_\_\_\_ and the press, declined to be interviewed after investigators refused to give him a list of questions in advance. He also returned investigators' call to interview Mr. \_\_\_\_\_, Chairman of the Committee for Justice, reporting that Mr. \_\_\_\_\_ declined to be interviewed.

Without the press, or Coalitions being willing to reveal their source of the Democratic documents, the

investigation faced a significant impediment to identifying the source of the disclosure. Additionally, because this was a fact-finding, administration investigation, law enforcement tools such as grand jury subpoenas to compel testimony and offers of prosecutorial immunity were not available to investigators. However, several individuals who were interviewed, both Republican and Democratic, implicated Mr. \_\_\_\_\_. While there is no definitive evidence pointing to Mr. \_\_\_\_\_ as the individual who gave the documents to the press, or a party outside of the Senate, there is a substantial amount of circumstantial evidence implicating him. Additionally, Mr. \_\_\_\_\_'s statements contradicted forensic evidence on two occasions and at other times were inconsistent with the recollection of other, reliable individuals.

Mr. \_\_\_\_\_ has admitted to accessing Democratic files on his computer. Initially he told investigators that Mr. \_\_\_\_\_ has tried to demonstrate this to him, but he was unsuccessful because he was not very computer savvy. Later, he admitted to accessing the files from his workstation on two occasions. In his press statement the day he resigned, Mr. \_\_\_\_\_ stated, "Although I came to learn how to access two or three of these files easily enough, I did so few times and initially to ascertain that Democrats could access Republican files as well."

When the Democratic documents first appeared on the Coalition for a Fair Judiciary website on November 18, 2003, the last document that was posted was an e-mail containing the directory path of Mr. \_\_\_\_\_ at the bottom. A forensic review helped determine this document was an e-mail from a web page that was viewed and printed by Mr. \_\_\_\_\_ with Internet Explorer. Mr. \_\_\_\_\_ could not offer an explanation for this, other than noting that the document was not a Democratic staff memorandum. When he was advised his directory path was on a document on the website, he called and asked that it be removed and a new version without his directory path was subsequently posted. When Mr. \_\_\_\_\_ was asked how the Democratic documents were disclosed to the press, he identified Mr. \_\_\_\_\_ as the likely source. Mr. \_\_\_\_\_ stated that he met Mr. \_\_\_\_\_ in the Senate Chef (an eatery in the Dirksen building) early in the week of November 17, 2003, shortly after the story broke. Mr. \_\_\_\_\_ stated that he specifically asked Mr. \_\_\_\_\_ if he had leaked the documents to the press and that Mr. \_\_\_\_\_ said "No." Mr. \_\_\_\_\_ told investigators that he then asked Mr. \_\_\_\_\_ whether he gave them to Mr. \_\_\_\_\_ who gave them to the press. Mr. \_\_\_\_\_'s response, according to Mr. \_\_\_\_\_, was to nod his head affirmatively.

When investigators presented Mr. \_\_\_\_\_ with this information, he confirmed meeting Mr. \_\_\_\_\_ in the Senate Chef, but denied giving the documents to Mr. \_\_\_\_\_, or indicating to Mr. \_\_\_\_\_ that he did so.

Mr. \_\_\_\_\_ recalled having seen nine of the Democratic documents that were posted on the website before they were made public. He may have seen the others, but stated that he did not specifically recall them. He denied giving the documents to the press in his initial interview and when asked in his second interview whether he had ever given them to anyone else, he answered "no - not to my recollection." In his third interview, Mr. \_\_\_\_\_ continued to deny giving the documents to the press and had no specific recollection of giving them to anyone else, although he admitted he often shared "opposition information" with colleagues and could not say for sure whether he had given them to anyone else.

Also in his second interview, Mr. \_\_\_\_\_ told investigators that most of the documents Mr. \_\_\_\_\_ printed for him were useless and he would just throw them out. The ones he thought might be useful he kept in a folder that he later lost. He speculated this might have happened when he moved from the Judiciary Committee to the Majority Leader's offices. In his third interview he indicated he believes he lost the folder in the Majority Leader's office.

In Mr. \_\_\_\_\_'s interview with investigators on January 15, 2004, he admitted to receiving memoranda while in the Senate Majority Leader's office, but denied actively soliciting it. The e-mail traffic below directly contradicts Mr. \_\_\_\_\_'s statement to investigators:

From: \_\_\_\_\_, \_\_\_\_\_ (Frist)

Sent: Wednesday, April 09, 2003 3:27 pm  
To: \_\_\_\_\_, \_\_\_\_\_ (Judiciary)  
Subject: anything

On what Feinstein is doing re: Owen. Info on meeting she has had. Her Tps?[sic]

From: \_\_\_\_\_, \_\_\_\_\_  
Sent: Wednesday, April 09, 2003 3:40 PM  
To: \_\_\_\_\_, \_\_\_\_\_ (Frist)  
Subject: RE: anything

This all I could find (most of it from \_\_\_\_\_).

Mr. \_\_\_\_\_ asserted to investigators that his conduct in accessing Democratic files was not unauthorized and that it was appropriate to make these documents public because they were left available to others by the Democrats. He does not believe that he has committed any wrongdoing. A review of the e-mail traffic between Mr. \_\_\_\_\_ and Mr. \_\_\_\_\_, however, indicates that they actively sought to keep what they were doing from others and acted covertly. For example, in the e-mail exchange between the two set forth below in March 2003 regarding a set of Republican documents referred to as the "Amex binder," Mr. \_\_\_\_\_ does instruct Mr. \_\_\_\_\_ to send documents to a third party.

From: \_\_\_\_\_, \_\_\_\_\_ (Frist)  
Sent: Thursday, March 06, 2003 10:48 AM  
To: \_\_\_\_\_, \_\_\_\_\_ (Judiciary)  
Subject: Am Ex  
Importance: High

\_\_\_\_\_,

Can I ask you to undertake a discreet mission. Mr. \_\_\_\_\_ should get a complete relpcate [sic] of the Ame Ex binder. He needs to get up to speed with outr [sic] best info as he build [sic] relationships with the press.

Let me know how soon...assuming you accept, Mr.Phelps.

\_\_\_\_\_

From: \_\_\_\_\_, \_\_\_\_\_ (Judiciary)  
Sent: Thursday, March 06, 2003 11:09 AM  
To: \_\_\_\_\_, \_\_\_\_\_ (Frist)  
Subject: Am Ex  
Importance: High

\_\_\_\_\_,

Of course I would be happy to assist in this covert action. The question is: exactly how much should I

provide? You know, we have loads on [sic] information.

---

From: \_\_\_\_\_, \_\_\_\_\_ (Frist)  
 Sent: Saturday, March 08, 2003 3:50 PM  
 To: \_\_\_\_\_, \_\_\_\_\_ (Judiciary)  
 Subject: Am Ex  
 Importance: High

Whatever is in the binder and whatever gives him a sense of the facts in rebuttal to the recurring themes.

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From: \_\_\_\_\_, \_\_\_\_\_ (Judiciary)  
 Subject: Follow up on previous e-mail  
 Date: Fri, 07 March 2003 15:20  
 To: \_\_\_\_\_, \_\_\_\_\_ (Frist)

As is the usual practice, please don't let anyone here know that I know all this.

---

On March 21, 2003, Mr. \_\_\_\_\_ e-mailed Mr. \_\_\_\_\_ 169 documents represented to be the "Am Ex" folder.

Another example of Mr. \_\_\_\_\_ taking steps to protect others from finding out that he had accessed Democratic files occurred when he left the Judiciary Committee.

From: \_\_\_\_\_, \_\_\_\_\_ (Judiciary)  
 Subject: Old Files  
 Date: Wednesday, March 5, 2003 4:20 PM  
 To: \_\_\_\_\_, \_\_\_\_\_ (Frist)

It seems \_\_\_\_\_ has removed your old file folders you didn't want others to see-which is good because people here have started to access your old files. You should check the e-mail I just bcc'd you on because \_\_\_\_\_ and \_\_\_\_\_ asked for the Dear Colleague letter. I had no choice but to forward it to them. Good luck with everything!

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Another example from earlier that same date:

From: \_\_\_\_\_, \_\_\_\_\_ (Judiciary)  
 Sent: Wednesday, March 5, 2003 2:42 PM  
 To: \_\_\_\_\_, \_\_\_\_\_ (Frist)  
 Subject: FILES

You may need to e-mail \_\_\_\_\_ separately (just bcc: me on it) and instruct him to permanently remove the personal, confidential files from the system contained in the folders named "Rose" and "Personal." Everyone now has access to these files. I have already copies [sic] these onto my computer as your backup just in case. If there is anything else you need off of there before he deletes

any more files, let me know and I'll get you taken care of. But you should probably express your concern that you don't want your private files available to everyone and just ask him to delete those two folders. I'll monitor the situation and let you know what happens.

\_\_\_\_\_

Six minutes later Mr. \_\_\_\_\_ e-mails Mr. \_\_\_\_\_:

From: \_\_\_\_\_, \_\_\_\_\_ (Frist)  
 Sent: Wednesday, March 05, 2003 2:48 PM  
 To: \_\_\_\_\_, \_\_\_\_\_ (Judiciary)  
 Subject: Files

Please delete my personal files from the stored files. They are in folders marked 'Personal' and "Rose" and "fillib".

\_\_\_\_\_ responds:

From: \_\_\_\_\_, \_\_\_\_\_ (Judiciary)  
 Sent: Wednesday, March 05, 2003 2:51 PM  
 To: \_\_\_\_\_, \_\_\_\_\_ (Frist)  
 Subject: RE: Files

No problem \_\_\_\_\_. I've deleted them.

Mr. \_\_\_\_\_ advised investigators that "Rose" was the folder where Mr. \_\_\_\_\_ put the Democratic documents that Mr. \_\_\_\_\_ e-mailed to him. A review of the contents of this folder confirmed it contained Democratic documents. The e-mail exchange set forth above indicates that after Mr. \_\_\_\_\_ left the Judiciary Committee the System Administrator followed the Committee's usual practice and moved the documents from a former staff member's home directory into a folder in the shared directory. When this was discovered, Mr. \_\_\_\_\_ had the System Administrator delete the folder containing Democratic documents. In his last interview, Mr. \_\_\_\_\_ denied that he had ever downloaded any of the Democratic documents from Democratic folders, or Mr. \_\_\_\_\_'s e-mails to him. Instead, he stated that "Rose" contained possibly scanned copies of Democratic files he received from Mr. \_\_\_\_\_, or notes he made about those documents. The contents of "Rose" contradict Mr. \_\_\_\_\_'s statement.

After the Wall Street Journal article appeared on November 14, 2003, and the documents were posted on the public website, Mr. \_\_\_\_\_, Chief of Staff to Majority Leader Frist, called Mr. \_\_\_\_\_ into his office where Mr. \_\_\_\_\_ stated that he had accessed Democratic files in the past, but that he had not accessed anything since he had come to the Majority Leader's office.

As outlined by the e-mails set forth above, Mr. \_\_\_\_\_ continued to receive Democratic documents from Mr. \_\_\_\_\_ after he left the Judiciary Committee even though he was not able to access the files himself after he was taken off the Judiciary Committee's computer network. According to Mr. \_\_\_\_\_, Mr. \_\_\_\_\_ during that meeting said, "I made a mistake." Mr. \_\_\_\_\_ denies this.

In his final interview Mr. \_\_\_\_\_ mentioned for the first time that a backup disc, made while he was at the Majority Leader's office, had just come into his possession. He told investigators that a friend of his from outside the Senate had made a backup disc for him and had recently reminded him of that. He declined to give investigators the name of the friend stating that he did not want to prolong this investigation. He also refused to give investigators the names of his White House legislative contacts for the same reason. The existence of this backup disc and the lost file of Democratic documents leaves open the possibility that Mr. \_\_\_\_\_ has Democratic documents in his possession.

IX. Analysis of Other Possible Methods of Access to Documents from the Judiciary Committee



## Computer System.

While it is clear to investigators that the Democratic documents disclosed to the press in this case originated with Mr. \_\_\_\_\_'s accessing the files of Democratic staff who had open permissions, the investigation revealed other possible theories of how these documents might have become public. This section of the report addresses several of those theories and starting with the premise that the documents were, at least initially, taken from the computer system, presents several possible methods through which access could have been gained. This section of the report addresses some of the possible ways this might have occurred.

### A. Hacking Into the System From the Outside

The SAA employs a number of technical, management and operational controls at the boundaries of the Senate network. These controls are designed to:

- Prevent unauthorized access to computers located inside the SAA;
- Allow controlled remote access by authorized Senate employees and vendors;
- Prevent interconnection between offices; and,
- Detect anomalies which may be indicative of potential security events.

The controls are both preventive and detective in nature. Multiple technologies provide these controls and they are deployed according to an overall "defense in depth" strategy. A diagram of the Senate's layered information security approach is attached at "N."

Some technical controls are monitored by network operations staff and some are monitored by an outside information technology security contractor. When potential security events are noted by either party, SAA staff is alerted. Despite not detecting any failure in these controls, the SAA periodically engages outside parties to evaluate their efficiency and effectiveness.

Remote access is provided only to authorized personnel upon request. Technical controls used for remote access include a two-factor authentication consisting of a time synch physical token (SecurID) and a personal identification number. These tokens are issued to Senate office representatives, who are then responsible for distributing and tracking them within their offices. Remote users are routed to their office subnet only. These remote connections are also monitored by the SAA's enterprise-wide detective controls. When anomalous behavior is detected (such as when a remote user's computer or laptop is believed to be infected with a virus or computer worm), the SAA identifies the user ID attached to the remote connection and notifies the proper System Administrator.

The SAA has not encountered any incident where unauthorized access by an outside intruder occurred to a Senate computer within its network boundaries.

### B. PcAnywhere presented a security risk.

When the Committee's servers were being imaged for this investigation, pcAnywhere started up on the Primary Domain Controller. This led investigators to question whether this software was in any way involved in giving unauthorized users access to the Judiciary Committee network.

PcAnywhere is part of the standard SAA template installed on desktop workstations and laptop computers, primarily to allow the System Administrator, or the SAA Help Desk, to access the machines for troubleshooting purposes. As part of the standard installation, it is configured to require the workstation owner's express permission each time a System Administrator, or the Help Desk needs access. It is common to see pcAnywhere on a Senate user's workstation and the Judiciary Committee did allow the SAA's Help Desk to assist its staff by utilizing this application. PcAnywhere was most likely installed by the Committee's System Administrator because the servers were delivered by the SAA without software and the SAA does not have any records indicating that it subsequently installed the application.

The forensic explanation of why the pcAnywhere application automatically started during imaging of the Judiciary Committee server is that it was most likely part of a start-up routine established by the System Administrator, or a process that was set to start up at a specific time. The application was

running silently in the background and was scheduled to be activated and begin "listening" for remote connections at the time it started up.

While it is not likely that pcAnywhere contributed to the disclosures in this case, the forensic review notes that it did present a vulnerability for the Judiciary Committee network. The program requires strict rules for obvious security reasons and the application on the Judiciary Committee server was explicitly configured less secure and contrary to its producer's recommendations. Unfortunately, because pcAnywhere did not log any user or program information, there was no way to determine if an unauthorized user attempted to break into the server.

#### C. The Anthrax Incident in October 2001

Some of those who were interviewed for this investigation speculated that the involvement of the SAA during the anthrax incident in October 2001 may have resulted in the relaxation of security controls for the Committee. According to the ASAA-CIO, the Judiciary Committee computer systems were unaffected by the Anthrax incident on October 15, 2001. During the temporary relocation of some Judiciary Committee staff to the Postal Square Building from November 2001 through January 2002, the SAA provided access to the Judiciary Committee network from Postal Square to accommodate workstations that were set up there for the use of the Judiciary Committee staff. This involved setting up a separate subnet for the Committee's workstations in Postal Square and then giving that subnet access through the Senate network routers to the Judiciary Committee subnet. The setup did not include, or require any changes to the host-based security on the Judiciary Committee servers. Anyone who wanted to access a resource on the Judiciary Committee network still had to log on to the server with a valid user name and password and have the appropriate permissions.

It is also important to note that the Nominations Unit, located at this time in the Dirksen building, did not require relocation. Mr. \_\_\_\_\_ worked at his same workstation throughout the incident.

Additionally, because the Committee's servers were located in the Dirksen Building, the System Administrator still had physical access to the server to perform whatever administrative tasks needed to be done.

#### D. Poor Physical Security/Computer Security Controls

Throughout the course of this investigation, several systemic flaws in both the physical security and computer security practices within the Judiciary Committee were identified as potential compromise points for sensitive documents. While the investigation has revealed that these vulnerabilities did or currently do exist, in no way did the investigation reveal that they contributed to the particular accessing and compromise of the documents in this case. Nevertheless, this report will note the security deficiencies identified in interviews of current and former Judiciary Committee staff to advise the Committee of potential vulnerabilities.

The Committee has never had documented computer security rules. While the Sergeant at Arms offers training and recommendations to the Systems Administrators assigned to Senate offices, there is no requirement that a Systems Administrator abide by those recommendations, or attend training.

One of the consistent computer security problems identified was the issuance and maintenance of passwords needed to access the Judiciary Committee server. Interviews with numerous Committee staff members revealed that many of them were issued predictable passwords that were identical to their username. For example, a staff member named John Doe would be issued a username of "JohnD," and his password would also be "JohnD." The individual would never be prompted to change, or customize his password. Interviews revealed that, while some staff members took it upon themselves to change their passwords, many did not (even as this inquiry was ongoing). In contrast, access to the e-mail server set up by the SAA staff requires a more stringent alphanumeric password, and the system forces the user to change his/her password after a preset number of days.

Another common password weakness identified was the issuance of generic and predictable passwords for interns, such as "intern1," "intern2," etc. Finally, there seemed to be a pattern of staff members sharing passwords. An administrative assistant for one subcommittee kept a list of user names and passwords for all staff members who worked for one Senator. Other staff members said

that they would sometimes share their passwords with co-workers for various reasons, while others indicated that they would leave their passwords on, or near their workstation.

Another common computer security flaw identified was staff members not logging off the Judiciary Committee server, or not turning off their computers when leaving their workstations. The majority of staff members interviewed said they did not regularly turn off their computers upon leaving their workstations, including when they left work at the end of the day. This is particularly problematic because, unlike many current system configurations, the Judiciary Committee server does not automatically log a user off the system after a predetermined period of inactivity.

When this investigation commenced the Committee did not have an up-to-date list of which staff members had access to the network through remote access via SecureID. SAA records indicated the Committee had 16 active remote access cards, but the SAA does not track the names of individuals within the Committee who are given the cards. When this investigation began, the Committee's System Administrator was unable to account for all of the active remote access cards. While this is a potential vulnerability, users with remote access still need a valid username and password to access the network so it is unlikely the lack of inventory control contributed to access by an unauthorized person.

Another security vulnerability identified was that, upon leaving for other jobs, staff members would sometimes download several, if not all, of their files onto compact discs, or other types of storage media. At least one of the authors of the compromised memoranda posted on the internet in this case had done so, although the author said the compact disc containing the questioned files was accounted for.

Several vulnerabilities were also identified in terms of physical security of documents within the Judiciary Committee offices. Interviews revealed that most offices did not have a system for disposing of sensitive documents. Most documents (draft copies of memos, etc.) were just thrown in the regular trash. Other than classified material such as FBI files, no distinction was made in the sensitivity of other documents. There was no regular practice of using locking waste bins, burn bags, shredders, or any other devices to enhance operational security. In fact, many of those interviewed indicated that sensitive documents were regularly left out on desks. Additionally, several staff reported that office doors were left unlocked at night.

## X. Recommendations for the Future

### A. Referral for Sanctions

Upon receipt and review of this report the Committee will have before it decisions to make about whether to refer individuals identified in this report for disciplinary, or criminal sanctions. The Chairman's letter authorizing the Sergeant at Arms to conduct this investigation requested only fact-finding and it is beyond the scope of this report to recommend any particular sanction for individuals identified in this report as having access to Democratic files. However, it is clear that one of the considerations before the Committee is what steps should be taken next. The Chairman and Senator Leahy have specifically asked whether a crime has been committed. Accordingly, this section of the report will address the criteria for possible referrals for disciplinary action and for criminal prosecution to the Department of Justice. It should be noted that any referral to a non-Senate entity - whether made by an individual, the Committee, or the Senate - could be problematic if that outside entity decides to conduct further investigation, or inquiry in a manner deemed inappropriate by Members.

#### 1. Possible Ethics Committee Referral

Rule 29.5 of the Standing Rules of the Senate provides:

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

When this Rule was amended in 1992 by Sen. Res. 363 to include the protection of business of committees, Senator Mitchell outlined the reasons why the protections afforded confidential business, or proceedings of the Senate should be expanded to cover committees, subcommittees, and offices. He stated:

...candid discussions among Members depend upon a trust that is based, in part, on a willingness of all Members to abide by the practices of the Senate. Those practices place responsibility for certain decisions, such as the decision whether to release confidential information, in the hands of the Senate as a whole, or in committees of the Senate, rather than in individual Senators. The unilateral decision by a Member or employee to release confidential committee information is inconsistent with the Senate's practice of making such decisions openly and collectively. Arrogation of this responsibility by individuals can destroy mutual trust among Members and be harmful to the institution. Congressional Record, October 8, 1992, p. 17836.

The legislative history of this amendment also explains that while the Select Committee on Ethics would have jurisdiction to consider an allegation of Rule 29.5, "[almost always, questions about leaks should be addressed first by Members or committees or offices themselves." Id.

The Select Committee on Ethics also investigates unethical and improper conduct which may reflect upon the Senate, even though that conduct does not violate a written law, Senate rule, or regulation. S. Res. 338, 88th Cong., 2d. Sess. (1964), as amended by S. Res. 110, 95th Cong., 1st Sess. (1977).

The Ethics Committee procedures may provide the Judiciary Committee with an avenue for determining whether a criminal referral to the Justice Department is appropriate. While it would not be able to exercise jurisdiction over former Senate employees, it may be willing to consider reviewing the report of this investigation for possible criminal referral.

## 2. State Bar Attorney Disciplinary Boards

Model Rule 8.4 of the American Bar Association's Model Rules of Professional Conduct states that it is professional misconduct for a lawyer to, among other things, "(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The comments to this Rule are instructive:

(2)...a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

This investigation did not identify the states where any of the attorneys interviewed are licensed to practice law. The Committee may decide to refer attorneys subject to a rule similar to 8.4 to the attorney disciplinary boards where they are licensed to practice law. One significant note of caution in considering type of referral is that it may open doors to state disciplinary boards asserting jurisdiction over Senate attorneys where in the past they have not. Additionally, the Committee would be expected to cooperate in any subsequent investigation, the details and avenues of which may be beyond what it originally anticipated.

## 3. The Justice Department

If the Committee were to refer this report to the Justice Department, prosecution might be considered under the Computer Fraud and Abuse Act. The provision of this law most likely to apply in this case is 18 U.S.C. section 1030(a)(2)(B). It provides:

(a) Whoever -

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains -

(B) information from any department or agency of the United States;  
shall be punished under subsection (c) of this section.

For purposes of 18 U.S.C. section 1030:

- the term "exceeds unauthorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the access-er is not entitled so to obtain or alter; 18 U.S.C. section 1030(e)(6).

- the term "department of the United States" means the legislative, or judicial branch of the Government, or one of the executive departments enumerated in section 101 of title 5; 18 U.S.C. section 1030(e)(7).

When Congress amended 18 U.S.C. section 1030 in 1996 by adding section (a)(2)(B), it meant to address a gap in the law's coverage. The legislative history states:

The second gap is the significant limitation on the privacy protection given to information held on Federal Government computers. Specifically, the prohibition only applies to outsiders who gain unauthorized access to Federal Government computers, and not to Government employees who abuse their computer access privileges to obtain Government information that may be sensitive and confidential. Senate Report 104-357, 104th Cong., 2d Sess., August 27, 1996, p. 4.

The legislative history also indicates that section (2)(B) was meant to cover government employees who "obtain information" by merely reading it. *Id.*

18 U.S. C. section 1030(a)(2)(B) is a misdemeanor punishable by a fine and/or not more than one year imprisonment. A referral to the Department of Justice could be made by either contacting the United States Attorneys' office for the District of Columbia or the Criminal Division's Computer Crimes and Intellectual Property Section. A prosecution under this section could result in litigation involving the article I, section 6 of the Constitution (speech and debate), the First Amendment (freedom of the press issues), the Fourth Amendment (issues relating to the search of computer records), and the definition of "unauthorized access" under the statute. And, while a criminal investigation could commence upon referral to the Department of Justice, a Senate Resolution would be needed to introduce documents or testimony into a Grand Jury or at trial. See Senate Rule 11.

In informal briefings prior to the issuance of this report, Committee Members asked about the possibility of pursuing a false statement case against Mr. \_\_\_\_\_ for being untruthful with investigators. The relevant statute, 18 U.S.C. section 1001, provides:

(A) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –

(2) makes any false, fictitious, or fraudulent statement or representation;  
shall be fined under this title or imprisoned not more than 5 years, or both.

The statute specifically addresses false statements in the context of legislative investigations:

(C) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to –

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission, or office of the Congress, consistent with applicable rules of the House or Senate.

Members have also inquired about whether persons who received copies of the Democratic documents violated the law by receiving stolen property. The relevant statute under which prosecution might be considered provides:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted --

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$1000, he shall be fined under this title or imprisoned not more than one year, or both. 18 U.S.C. section 641.

In addition to the statutes set forth above, a referral for prosecution may raise issues of whether any laws of the District of Columbia were violated in this matter. While this report does not intend to present an exhaustive consideration of all possibly applicable criminal statutes, the District's prohibition against taking property without right is another statute that local prosecutors might consider. It provides:

A person commits the offense of taking property without right if that person takes and carries away the property of another without right to do so. A person convicted of taking property without right shall be fined not more than \$300 or imprisoned not more than 90 days, or both. DC ST 22-3216 (1981).

A prosecution under a District of Columbia or any federal statute would implicate many of the same issues outlined above as likely to be presented by a prosecution under 18 U.S.C. section 1030. In deciding whether to pursue a prosecution arising from the facts of this investigation, prosecutors will apply the usual standard of review in considering whether to pursue or decline the case: whether there is evidence of a prima facie case and a reasonable probability of conviction, i.e., whether the admissible evidence will probably be sufficient to obtain and sustain a conviction. Other considerations influencing prosecution include whether there is a substantial federal interest affected and if there exists an adequate, noncriminal alternative to prosecution. United States Attorney Manual, section 9-27.220.

#### B. Immediate Steps to Enhance Computer Security for the Committee

Separate servers were provided to the Judiciary Committee during the pendency of this investigation. The Committee now has two System Administrators - one for the Republican staff and one for the Democratic staff. This will eliminate any concern that users' files have open permissions allowing those of the other party to view their documents. It does not, however, ensure that permissions are set properly to secure users' home directories from the view of other users on the same server, or that other vulnerabilities addressed in this report will not recur. To ensure the future security of the Committee's computer system, the SAA recommends additional training, enhanced security practices and a complete, prospective security audit.

The Committee leadership should require that its System Administrators' enroll in additional training programs with an emphasis on security policies. This training is provided on a regular basis by the Senate's Joint Office of Education and Training Office. Additionally, the Committee should require mandatory and recurring user training also with an emphasis on security policies and best practices. Users generally did not understand the difference between their home directories, shared folders, and their local hard drives, how to protect their passwords, or the importance of not leaving their computer running when away from their desks. This training could be provided by the System Administrator's or through the Joint Office of Education and Training. The Committee should also consider incorporating ethics training into an orientation program for new employees to ensure they understand the Senate's expectations for ethical conduct that meets the highest professional standards.

There are several security practices that should be implemented by the Committee immediately if it has not already done so:

- Review permissions setting to ensure proper restrictions;
- Establish and enforce strict password policies;

- Ensure that operating system logs are capturing the required security information;
  - Start a Security Awareness Campaign to educate users; and
- Develop a tracking system for inventory of hardware, remote access cards and other computer-related assets.

Regardless of the efforts of the Committee to enhance security since the beginning of this investigation, the SAA strongly recommends a prospective audit of the network by a party outside of the Committee. The audit would be focused on security and compromise protection. It will provide an assessment of the efficiency and effectiveness of current physical and logical controls over the computerized information systems and recommendations for improvement. The SAA believes this proactive review is necessary for the Committee to maintain a consistently available network with efficiency and security in mind. The audit could be conducted by the SAA, the General Accounting Office, or a private contractor. On February 20, 2004, the Chairman and Ranking Member sent a letter to the General Accounting Office to commence this important audit.

#### C. Measures to Enhance the Security of Computer Networks Senate-Wide

It is incumbent upon the SAA to take all steps necessary to ensure that the vulnerabilities identified during this review of the Judiciary Committee do not exist elsewhere among the Senate offices. As a result of the lessons learned during this investigation, the SAA will ask the leadership of the Senate to consider the following:

- Establishment of a technical skills assessment and certification program for current System Administrators
- A continuing technical education requirement for System Administrators
- Minimal qualification standards for new System Administrators A Computer Security Best Practices Manual for the Senate developed by the Sergeant at Arms in conjunction with the Committee on Rules and Administration
- Mandatory Ethics and Professional Responsibility training for all new employees
- Mandatory Computer Security Training for all new employees

## XI. Conclusion

This investigation depended entirely on the voluntary cooperation of those who were asked to be interviewed. While investigators followed leads and interviewed many individuals as a result of learning their names during interviews, it remains possible that there are other current or former members of the Senate community who have knowledge of the open nature of the Judiciary Committee computer system who have not come forward or been identified. This was evidenced most recently in press reports on March 2, 2003, when a former Grassley intern was reported to have knowledge of Committee computer security system vulnerabilities. His name was not been provided to investigators when they asked for all employees (paid, interns, and detailees) who worked for the Committee from June 2002 to the present. There are likely to be other individuals who had access to the Committee's computer system whose were not provided to investigators.

The tremendous amount of computer data in this case also leaves open the possibility that additional evidence could be discovered by investing substantially more time and money in analyzing individual workstations, print logs, and e-mails.

**Starr: A Reassessment (2002)**  
**By Benjamin Wittes**



commonly imagined. Starr was certainly sincere in his efforts to assemble a staff whose range of experience could approximate that of the Justice Department, and he hired many respected career prosecutors who could reasonably be expected to advance that goal. Indeed, the Justice Department itself would have been proud to have done much of their work, particularly the prosecution of Arkansas Governor Jim Guy Tucker and the Clintons' former business partners, James and Susan McDougal. Unlike Fiske, however, Starr also brought in people who pushed the investigation toward a more open-ended inquest. The most important of these hires was W. Hickman Ewing Jr.

Ewing became, over the course of the Starr investigation, a particular target of Starr's critics. This was partly because he was a central-casting stereotype of a prosecutor working for Starr: born-again Christian, conservative, and displaying a charming — if somewhat alarming — candor in acknowledging that he was not approaching the investigation with a presumption that the Clintons were innocent of wrongdoing. "After you've been doing this kind of work for ten, fifteen, twenty years," writer Jeffrey Toobin quotes him as saying, "it doesn't take too long to determine whether somebody has committed a crime. You draw your preliminary conclusions, and then you shut this down or you proceed. We proceeded."<sup>9</sup> For Clinton's defenders, Ewing came to embody the culture-war dimension of the fight the White House was waging against Starr's office. White House aide Sidney Blumenthal once called him a "religious fanatic" — a remark for which he later had to apologize.<sup>10</sup> For many of Starr's foes, Ewing symbolized Starr's inner redneck; appropriately nicknamed "Hick," he was the unpolished zealot beneath Starr's own presentable exterior.

More interesting than the fire it drew from Clinton's defenders, Ewing's approach as Starr's deputy in Little Rock was

highly controversial within Starr's office itself. Ex-staffers described him to me with radically differing levels of sympathy, and some even suspected him of political motivation. Several of Starr's staff reported feeling anxious about the scope and aggressiveness of his approach. Still others defended him strongly. In almost all of the descriptions, however, certain common themes emerged. Ewing, his former colleagues said, did not believe in focusing investigations narrowly on specific criminal allegations but in casting a wide net and keeping investigations open. As former Starr prosecutor Brett Kavanaugh described it, Ewing had learned "from long experience that you had cases where things just turn up if you keep at it long enough."<sup>11</sup> John Bates, who served as Starr's Washington deputy, added that Ewing's approach was to "look broadly, to keep things open, to look for the interconnected aspects, to keep one thing open beyond what the facts would warrant because of the possibility that it might interconnect" with another allegation.<sup>12</sup> Another former Starr prosecutor summarized Ewing's philosophy a touch less generously: "Everyone's guilty until proven innocent. In order to maintain pressure, never close anything until the last day" on which a case could be brought. Noted this source with evident disgust, Ewing — who played football in high school and had planned to be a coach like his father — "used to draw football diagrams on the wall with everyone close to the Clintons as layers of defenses."<sup>13</sup>

Simply dismissing Ewing as a Clinton hater is probably too simplistic. Both Bates and Kavanaugh, for example, disputed the contention that Ewing's approach flowed out of hatred of the president. Bates described Ewing's hard-charging style as "his fundamental perspective as a prosecutor."<sup>14</sup> Ewing, unsurprisingly, denied that he began the probe with animus toward the president, though he acknowledged that

relevant to Mr. Foster's state of mind," Bond wrote. "If we are to believe Special Counsel Fiske, Whitewater issues were not a significant factor in Mr. Foster's suicide. The special counsel's report, however, raises significant questions regarding this issue."<sup>42</sup>

To Starr, who took over the probe as the debate over the Fiske report was raging, that questions had arisen about the suicide was alone enough to justify reopening the matter. Starr took up the Foster death both because he felt obliged to address every issue Fiske had examined and because, in his judgment, the attacks on the Fiske report demanded a response. Starr described the Fiske report respectfully, saying that it "well stated a conclusion and a process."<sup>43</sup> On reading the report, he said, "I talked to Rod[erick] Lankler, the principal author of the report, . . . and I was satisfied that it had been done in a professional way."<sup>44</sup> Starr also noted, however, that Fiske's report "did not go through an elaborate, deeply detailed, fact-based, rigorous analysis."<sup>45</sup> Criticisms of the report, consequently, "were cascading in, . . . extraordinarily direct assaults on it." It is worth stressing that Starr himself was never conspiracy-minded about Foster's death. He said he had "no reason to doubt [Fiske's] ultimate conclusion."<sup>46</sup> He described the furor that followed its release, moreover, as composed of "all kinds of outlandish, unfounded allegations."<sup>47</sup> Kavanaugh, the prosecutor responsible for actually conducting much of the Foster investigation under Starr, said he "tried to keep an open mind" about how Foster died, but he saw the probe's purpose as "ruling out a crime." The bottom line, he said, is that "you have a dead person with a gun in his hand and a wound in his head. You have a presumption that it is a suicide but you're looking at it as though it could be something else."<sup>48</sup> Ewing, who also participated in the investigation, likewise said he was convinced "pretty early on"

that Foster killed himself.<sup>49</sup> Had Starr been trying to prove a murder, he presumably would have shown more tolerance for the work of Miquel Rodriguez, a civil rights prosecutor in the office who, as Starr put it, “just was convinced that something had, in fact, happened.” Rodriguez, whose hiring Starr described as “an unfortunate start” to the Foster investigation, found no sympathy, however. After he insinuated to a grand jury that one of the Park Police officers may have been involved in Foster’s death, then-Washington deputy Mark Tuohey III quickly reined him in and Rodriguez left the office shortly thereafter.<sup>50</sup>

But if conspiracy-mongering was not driving the Foster death investigation, neither was any prosecutorial instinct. Starr believed he had to settle the outstanding historical questions for the sake of posterity, however unlikely those questions were to result in criminal prosecutions. In his view, public doubts about the suicide were “corrosive” in the face of “the potential historical significance of the death of an individual so close to the president and first lady,” an event he saw as the “most significant death in office since that of [Truman administration Defense] Secretary James Forrestal.”<sup>51</sup> Because of the seriousness of the matter and the “withering scrutiny” he knew his own work would face, Starr believed that he “had to have this absolutely air-tight.” His role, he believed, “was [to] put this to rest to the fullest extent possible.” He regarded this role, which he likened to that of the Warren Commission’s investigation of John F. Kennedy’s assassination, as “very important for the well-being of the country” and flowing out of “the uniqueness of the independent counsel, who is sort of a blue-ribbon grand jury kind of person who issues reports on issues of public moment.”<sup>52</sup>

John Bates, the Washington deputy who oversaw the latter part of the Foster death probe, acknowledged that the

decision to use the inquiry to settle historical questions made it exceptionally difficult to close. "A reasonable decision was made that it had to be reexplored. There were some forensic questions that really required some independent examination by this independent counsel," Bates told me. The persistence of conspiracy theorizing among "the fringe elements convinced [Starr] that he had to issue a thorough, exhaustive report that would settle the questions." Starr, he said, "realized that this was not the traditional role of a prosecutor, as did some of us in the office, and we were frustrated that the case put us in that position." Starr, however, "felt that it was incumbent upon him to come out with a thorough and dispositive report."<sup>53</sup> As such, said Kavanaugh, speed was not the priority that it had been for Fiske. Starr's "goals in the investigation were to not worry about carping that this was taking too long but to produce something we could be proud of ten, twenty years later. To do that, he felt we had to take all steps within reason."<sup>54</sup>

"All steps within reason" took nearly three years. By the autumn of 1995, Kavanaugh said, the office had conducted a much broader set of interviews than Fiske had done, including interviews with Foster's children and his mother. At that point, he and Tuohey assessed their progress and gave Starr a status report. Starr, however, "was still not satisfied in terms of going the extra mile," Kavanaugh recalled. In response, they went back and conducted an ultra-thorough search of Fort Marcy Park for the bullet that killed Foster (which they never found). They did carpet-fiber tests, and the office brought in its own outside forensic specialist.<sup>55</sup> Ewing recounted that Starr even went so far as to suggest, on the advice of the late Republican Representative Steve Schiff, that he interview Foster conspiracy theorists Christopher Ruddy, Ambrose Evans-Pritchard, and Reed Irvine.<sup>56</sup> This led to what Ewing

all of the issues the case presented before leaving Starr's employment near the end of 1996. According to John Bates, Dubelier's memo represented a "close-to-final" write-up of the matter.<sup>134</sup> Yet the office proved unable to finish the investigation for years to come.

Various factors kept the investigation alive. An entire appendix of Ray's report is devoted to White House non-cooperation with the investigation.<sup>135</sup> But this does not suffice to explain the additional three years. According to Bates, the Travel Office matter was kept open, in part, because other matters pending before the office related to the first lady's truthfulness under oath, matters including Whitewater, the disappearance of the billing records, and the handling of materials from Foster's office. It was, he said, "difficult for [Starr] to close out the Travel Office when these other things were still open." The issues were "to some extent interrelated [and] involv[ed] the same high-level person." The "major explanation" for the delay, Bates said, is that this reluctance on Starr's part lengthened even further the office's "thorough and lengthy process" of vetting the Dubelier memorandum. Bates suggested that the slowness was less the mark of the truth commission instinct than the result of "certain inefficiencies" combined with "a laudable care" on Starr's part for getting things right. Starr, he said, "is a very careful person in every respect, including his conduct as a prosecutor."<sup>136</sup>

This analysis certainly tells a significant component of the story. When Dubelier left, the work was picked up by other prosecutors — Solomon Wisenberg, in particular — who felt they had to satisfy themselves that his analysis held water. Some of the delay resulted less from the need to get at some deeper level of truth than from the need for new people to get up to speed and become sufficiently familiar with the case to make their own judgments about its merits. Given the stakes

in a high-profile investigation of the first lady, the impulse to be thorough, even within a traditional prosecutorial framework, is understandable. However strong Dubelier's work may have been—and it was uniformly admired among the Starr prosecutors I spoke with—it may ask too much to expect that those prosecutors who inherited Dubelier's memorandum would simply have adopted his conclusions as their own. Particularly since the memo suggested that no cases be brought in a matter that the office had previously regarded as potentially leading to Mrs. Clinton's indictment, there was a strong impulse to reassess the evidence carefully to determine its amenability to a different reading.

The impulse to prosecutorial thoroughness, however, explains only so much, and Bates conceded that Starr's truth-seeking instinct was evident in aspects of the delay as well. During the investigation, he recalled, "substantial issues" arose as to the veracity of "some witnesses." Bates said there were different perspectives within the office regarding how serious a problem this was: "Some might feel that a prosecutor has to stand up for the prosecutorial process and that people should be prosecuted for lies to the investigation. Others say that you can't have an investigation without people lying." Starr, Bates said, "was very concerned about [lies to the investigation] and he took that very seriously."<sup>137</sup> Starr's view, according to Kavanaugh, was that "it was within [his] mandate and he was offended by lying and perjury. Some prosecutors might be more instrumental regarding the little fish."<sup>138</sup> Another prosecutor in the office put it more bluntly: "A lot of people were not telling the truth, and that drove Starr out of his mind."<sup>139</sup> The office, therefore, ended up spending a fair bit of energy considering whether or not to prosecute ancillary figures in the case, even though their purported misstatements had little bearing on the underlying case, or

lack thereof, against Watkins or Hillary Clinton. Once again, Starr's focus on truth caused him to fixate on the interaction of witnesses with the investigation, even at the expense of resolving the big questions in a timely fashion.

The Travel Office investigation bore another, more public, signature of the truth commission: the decision to litigate all the way to the Supreme Court the question of whether the attorney-client privilege survives the death of the client. Foster had, shortly before killing himself, met with a lawyer named James Hamilton concerning the various investigations of the Travel Office firings, in which Foster had been involved. In the course of the meeting, Starr's office later learned, Hamilton had taken three pages of notes. Starr's interest in these notes originally grew not out of the Travel Office case but out of his investigation of how Foster's office and papers were handled after his death.<sup>140</sup> Indeed, the grand jury subpoena for the notes was issued in December 1995, weeks before the Watkins memorandum was finally delivered.<sup>141</sup> Yet the notes understandably acquired a certain importance once Starr had assumed jurisdiction over the Travel Office. To be sure, investigators did not know what those notes said, though they developed "several hypotheses," according to Kavanaugh, who argued the Supreme Court case.<sup>142</sup> Moreover, any evidence they contained would almost surely have been deemed inadmissible hearsay. The notes nonetheless presented a body of evidence, albeit a small one, that Starr believed he should not ignore. After all, if a depressed Foster were going to reveal that he had been covering up Hillary Clinton's having given a direct order to fire the Travel Office employees, his prospective lawyer was an obvious person to tell. The office was also aware that Foster had been, in his final days, deeply anxious about the Travel Office matter. The notes were, therefore, legitimately tantalizing. Making them all the more tantalizing was the fact



Ted,

Here are the articles I found. Most of them are from the *Washington Post* and speak very highly of Kegan. She is mentioned most often in connection with the Estrada nomination as an example of a Republican failure to confirm Clinton's nominees. There were also quite a few articles announcing her appointment as dean of Harvard Law. I did not include these because they essentially just short news blurbs.

Tim

*Michael J. Gerhardt. The Washington Post. Washington, D.C.: Mar 2, 2003. pg. B.01*

Full Text (1695 words)

*Copyright The Washington Post Company Mar 2, 2003*

I do not know Miguel Estrada. Nor do Democratic senators. Many were confounded when President George W. Bush first nominated Estrada in May 2001 to the nation's second-most powerful court, the U.S. Court of Appeals for the District of Columbia Circuit. Estrada, nominated at the tender age of 39, had practiced law for less than a decade. At his confirmations hearings, he said little about his judicial philosophy. After his appointment languished in the Democratic-controlled Senate and Bush renominated him this year, Estrada appeared again before the Judiciary Committee and failed to dispel the mystery surrounding his views.

Estrada has been singled out by Senate Democrats, who are filibustering to block a vote on his nomination. Yet in other respects, Estrada is not unique. Like many of Bush's other appellate court nominees, he is relatively young. Like many of these younger nominees, he has left virtually no paper trail, making it difficult to attack his record in confirmation hearings.

Statistics show the growing importance of younger nominees in the selection of judges for the nation's federal courts of appeal. In the modern era, the average age of a circuit court nominee at the time of confirmation has gone from a high of 55.9 years under President Dwight D. Eisenhower to a low of 48.7 years under the first President Bush. The average age of President George W. Bush's confirmed circuit court nominees was 50.5 during the 107th Congress, but his more recent choices show that he wants to follow his father's example. His circuit court nominees include not only Estrada, but Jeffrey S. Sutton (40 when first nominated to the U.S. Court of Appeals for the Sixth Circuit), Steve Colloton (39 when nominated to the Eighth Circuit) and Priscilla Owen (46 when first nominated to the Fifth Circuit). The average age of the nominees awaiting confirmation to appellate seats is 50.1.

Relative youth is not the only virtue the Bush administration is seeking in its nominees. The people counseling Bush on judicial appointments are convinced that his father erred in appointing some judges, notably David Souter, who has become a reliable vote for the Supreme Court's moderate wing and cast a pivotal vote for reaffirming *Roe v. Wade*. Consequently, Bush's counselors conduct extensive interviews with prospective nominees about their judicial philosophies. Many of the nominees have been active members of the Federalist Society, established in the early 1980s to organize, cultivate and sharpen conservative thinking about the Constitution. Activity within the Federalist Society constitutes important -- and sometimes the only -- evidence of a young conservative's ideological commitment.

Armed with that commitment, a young judge might help Bush establish a conservative legacy that could outlast his presidency by decades. Yet with Republicans now in control of the Senate, judicial

nominees have no incentive to testify openly about their views before the Judiciary Committee.

Democrats have seen other nominees display reticence in talking about judicial ideology, such as during the Supreme Court confirmation hearings for staunch conservatives Antonin Scalia and Clarence Thomas. Since Bush mentioned during the 2000 presidential campaign that Scalia and Thomas would be his models if he were to appoint a Supreme Court justice, Democrats worry that Estrada, and many of his fellow nominees, would share the hostility those justices have shown toward abortion rights, affirmative action, strict separation of church and state, and broad federal power to regulate the economy.

Democrats have cried foul, accusing the administration and Republican lawmakers of pursuing an ideological agenda that they never openly defend. Republicans have pointed to Estrada's sterling resume and accused Democrats of making the Honduran immigrant -- who graduated at the top of his classes at Columbia University and Harvard Law School, clerked for Justice Anthony Kennedy and served as an assistant in the solicitor general's office -- the latest victim of a vicious cycle of payback.

Some trace that cycle back to Republican senators who believed that President Jimmy Carter packed the lower federal courts with women who would use their judicial power to advance liberal social policies. Others believe President Ronald Reagan poisoned the process by pledging to appoint judges and justices who would overturn liberal decisions on abortion rights and federalism -- the balance between federal and state authority. Some view the then-Democratic Senate's rejection of Robert Bork's nomination to the Supreme Court as a watershed event for which the Republicans have sought revenge.

In fact, the cycle of payback and ideological agendas can be traced to the earliest days of the nation. Every national leader has cared about the likely ideologies of nominees to the federal bench. The only way to ensure that nominees will perform satisfactorily is to adopt reliable selection criteria, because, once confirmed, federal judges serve for life, wield enormous power and are immune to political retaliation for their decisions. President George Washington selected Supreme Court nominees based on their fidelity to the new Constitution and broad interpretations of federal power. President Andrew Jackson based his choices on nominees' political fealty and strong support for state sovereignty. President Franklin D. Roosevelt sought commitment to upholding the New Deal's constitutional foundations, and President Lyndon B. Johnson wanted support for the vigorous protection of civil rights. Presidents Reagan and George H.W. Bush based their judicial selections in large part on nominees' variance with liberal opinions and devotion to the use of original intent as a primary source of constitutional meaning.

In every era, senators have checked presidents' efforts to shape the composition and direction of the federal courts. After Republicans had forced Abe Fortas off the Supreme Court because of ethical improprieties, Democrats scuttled his would-be replacement, President Richard M. Nixon's nominee Clement Haynsworth, for his own ethical lapses. Republicans blocked dozens of President Bill Clinton's judicial nominees, including Elena Kagan, a Harvard law professor nominated to the same court to which Bush has nominated Estrada. One Clinton nominee, Michigan state judge Helene White, waited four years without ever getting a hearing before the Judiciary Committee. Clinton's nominees were opposed because of concerns about their propensity to read their personal policy preferences into the law. Republican senators blocked Clinton's nominees with procedural tactics. Democrats at that time complained that every judicial nominee was entitled to a final vote on the Senate floor. Republicans responded that the Senate's failures to take final action on nominations were expressions of its constitutional obligation to give its "advice and consent" on them. They also claimed that the rules of the game had been constant for decades. For instance, President Reagan had nominated Jeff Sessions -- now a senator from Alabama -- to a federal district judgeship, but the Judiciary Committee rejected his nomination and never forwarded it to the full Senate.

Over the past two decades, the judicial selection process and confirmation battles have become more public. Interest groups now mount campaigns on judicial nominations, as some groups are doing by running television ads for and against Estrada's appointment. Bush courts Hispanic voters by chastising Democrats for opposing Estrada, while few Democrats believe that Bush genuinely cares about diversifying the federal judiciary.

Estrada's reticence raises anew the questions of what senators are entitled to know about the views of a judicial nominee and how they can find out. Estrada and others argue that judicial canons of ethics preclude them from giving answers that would indicate how they would rule in cases likely to come before them as judges. The ethical rules protect judicial independence and guard against judges' prejudging matters likely to come before them. Senators have largely (but not always) shown their respect for judicial independence by framing their questions to elicit information about nominees' ideologies and approaches, but not how they would rule in particular cases.

It is hard to see how the questions Estrada has declined to answer would jeopardize his independence. He would not identify a single Supreme Court case with which he disagreed, and initially wouldn't even name judges he admires (though he cited three in writing later). Other Bush judicial nominees have answered such questions. Reagan and Bush White House officials asked them of people under consideration for nomination. Republican senators have quizzed numerous Democratic nominees about the Supreme Court precedents with which they disagree. Democratic senators are now asking judicial nominees the same questions.

There are non-controversial answers to the question of which precedents nominees support or question. The high court's unanimous 1954 decision in *Brown v. Board of Education*, striking down state-mandated segregation in public education, is an obvious choice as a case to admire, while one obviously wrong decision was *Korematsu v. United States*, in which the court upheld the forced internment of Japanese Americans on the West Coast after the attack on Pearl Harbor.

Judicial philosophy -- or ideology -- matters, and nominees should be asked their preferred approaches to constitutional interpretation and the criteria they would employ for construing Supreme Court precedent and determining errors in earlier decisions that might call for new rulings. The Bush administration is correct (and amply supported by many former Democratic officials) in refusing to supply internal memoranda from the Justice Department. But no one is entitled to be a federal judge simply because he or she overcame adversity, attended a fine law school and collected some solid work experience. Senators have the legitimate authority to weigh the judgment of a nominee who, if confirmed, will for years be entrusted with the final word on many of the important regulatory and constitutional questions that routinely come before the nation's second-most powerful court.

Estrada brings a golden resume. Rather than make its nominee's philosophy a matter of public record, the administration has sought to make it a matter of guesswork. In the Estrada case, the administration has chosen not to engage in the ideological fray, but to simply avoid it. In the elusive youthful Estrada, Bush has found the model judicial candidate for an era in which ideology matters deeply, so deeply that it can't be revealed. Michael Gerhardt teaches constitutional law at the College of William and Mary, and is the author of "The Federal Appointments Process: A Constitutional and Historical Analysis," a revised edition of which is

## They Started It:[FINAL Edition]

E. J. Dionne Jr. The Washington Post Washington, D.C.: Feb 21, 2003. pg. A.27

Full Text (770 words)

Copyright The Washington Post Company Feb 21, 2003

So why are Senate Democrats filibustering President Bush's nomination of Miguel Estrada to one of the nation's most important courts?

Certainly Estrada has lived an admirable life. He came to the United States from Honduras at age 17, graduated from Harvard Law School and clerked for Supreme Court Justice Anthony Kennedy. He was an assistant U.S. attorney, served as an assistant solicitor general under President Clinton and went on to a distinguished law firm.

To say the guy is no slouch is an understatement. But the fight over Estrada's nomination to the U.S. Court of Appeals for the District of Columbia Circuit is not simply about him. It is about a concerted effort to pack our courts with representatives of a single point of view. If Democrats just rolled over on Bush's judicial nominations, they would be guilty of oppositional malpractice.

To understand this battle, you could go back to Richard Nixon's campaign against liberal judges. But let's just look at what happened to Bill Clinton's effort to get two highly qualified nominees onto the D.C. Circuit.

Elena Kagan, who served in the Clinton White House, graduated at the top of her class at Estrada's law school and now teaches there, saw her nomination languish in the Republican Senate for 18 months. Allen Snyder clerked for that well-known left-winger, U.S. Chief Justice William Rehnquist, and was also at the top at Harvard Law School. His nomination languished for 15 months.

If Republicans believe in voting for quality -- their argument for Estrada -- why didn't they confirm Kagan and Snyder? The answer is obvious: We have before us, sadly, a fierce political struggle for control of the courts.

It's not good enough to say that the way out of this politicized process is for Democrats to ignore the past and cave in to the Republicans. To do that would be to reward a determined conservative effort to control the courts for a generation. Stage One involved obstructing Clinton's nominees. Stage Two involves using any means necessary -- including outrageous charges of ethnic bias -- to ram conservative choices through.

The stakes go beyond any single nominee. Do we want courts entirely dominated by one side, or do we want a fair and balanced judiciary?

Consider these statistics, gathered by the Democratic staff of the Senate Judiciary Committee. There are 13 circuits: 11 regional plus the D.C. Circuit and the federal court that handles specialized cases. If all of Clinton's nominees had been approved, the circuits would have been evenly balanced in partisan terms by the time he left office. Six would have had majorities appointed by Democratic presidents, six by Republicans, and one would have been evenly split.

But if Bush succeeds in filling every open seat, some of them vacant because Clinton nominees were blocked, 11 of the 13 circuits will have Republican-appointed majorities. In eight of the 13, Republican nominees would have majorities of 2 to 1 or more. Is that a formula for careful, balanced decision-

making?

To push attention away from this fundamental question, Republicans who say they don't want a politicized nominating process -- and who regularly accuse Democrats of "playing the race card" -- are doing all they can to turn the Estrada fight into an ethnic imbroglio.

"If we deny Mr. Estrada the position on the D.C. Circuit, it would be to shut the door on the American dream of Hispanic Americans everywhere," Sen. Chuck Grassley (R-Iowa) said in January. Last year, Republican Sen. Trent Lott of Mississippi said of the Democrats: "They don't want Miguel Estrada because he's Hispanic."

Never mind that eight of the 10 Hispanic appellate judges were appointed by Clinton. And never mind that Republicans had no problem blocking such Hispanic Clinton nominees as Enrique Moreno, Jorge Rangel and Christine Arguello.

But the Democrats will not win this argument if they just focus their opposition on individual nominees. The point of filibusters should be to seek a solution involving consultation across party lines. The goal would be moderate judges that both sides could agree on or, failing that, balanced slates of judges who could guard the country against a judiciary utterly dominated by one party.

Orrin Hatch, the Republican chairman of the Senate Judiciary Committee, is frustrated by what the Democrats are doing. "The system's going to be irreparably damaged if we allow this to go on," he said recently. A fair point, except that the system was damaged long ago, and the solution isn't to ram through Republican nominees. It's to seek compromise, balance and moderation. Then someone like Miguel Estrada might get through without any fighting at all.

## Too Smart to Be a Judge:[FINAL Edition]

Benjamin Wittes. The Washington Post. Washington, D.C.: Jun 11, 2002. pg. A.25

Full Text (786 words)

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Judge David Tatel has a dubious distinction: Confirmed in 1994, he is the last nominee to the D.C. Circuit Court of Appeals to have moved through the Senate quickly and without significant controversy.

Since Judge Tatel's appointment, Presidents Clinton and Bush have nominated five people to the court that is often called the second most important in the land. All have been qualified, most overwhelmingly so. Yet of the five, only Merrick Garland actually sits on the court, and he waited 17 months to be confirmed. Two of the others, Clinton nominees Allen Snyder and **Elena Kagan**, saw their nominations die with Clinton's presidency. And the other two, Bush nominees John Roberts and Miguel Estrada, are currently waiting -- and waiting -- for hearings.

The fact that neither party can predictably get its qualified people on the courts of appeals suggests that the problem of judicial nominations is more institutional than is acknowledged by partisans who play the blame game over judges. The Senate has long been expected simply to confirm lower-court nominees who are qualified and honest, but it has recently been asserting a more robust role in the process. The expectation that the president will get wide leeway has given way under bipartisan agreement to an expectation that he will get that leeway only if his party controls the Senate. When he is not so lucky, judicial nominations -- like the budget and legislative matters -- become a fair subject for partisan warfare.

And in a partisan war, the other side's talent is to be feared. The result, as Chief Judge J. Harvie Wilkinson of the 4th Circuit has put it, is that "we have reached the point in the confirmation process where both sides of the aisle consider intellectual distinction a threatening characteristic in a judicial nominee." The last five D.C. Circuit nominees provide a particularly instructive example.

Consider, first, the Clinton nominees. There was no plausible case to be made against the universally admired Garland, so Republicans didn't directly oppose him. They claimed instead that new judges weren't needed on the court at all and produced 23 "no" votes following a protracted fight.

Snyder wasn't so lucky. Also highly regarded, he had committed the unpardonable crime of having once represented White House aide Bruce Lindsey. Between that and the workload issue, he never got a vote. Meanwhile, nobody even talked about **Kagan**, so remote were the chances she would ever be considered.

Now Democrats have turned the tables and are attacking Roberts and Estrada as right-wing fanatics itching to impose a conservative agenda from the bench. The public career of neither man seems to support the caricatures. Both have histories of taking on surprising clients given their supposedly rigid conservative ideologies. Estrada represented a Virginia death row inmate before the Supreme Court. And when Roberts -- among the city's preeminent appellate lawyers -- was nominated, an environmental lawyer in town joked to me that he hoped Sen. Patrick Leahy "would hold him up long enough for him to argue Tahoe-Sierra" -- an important Supreme Court case that Roberts recently handled on the environmentalist side. Sen. Leahy obliged, and Roberts delivered what this lawyer describes as one of the environmental community's "most important victories before the Supreme Court in two decades."

The irony of the war on quality is that the courts of appeals are not nearly as riven as the partisans seem to believe. The high-profile cases in which right-left splits represent the salient fault lines in fact paint a highly distorted picture and in any event, are the very cases most likely to be reviewed by the Supreme Court.

Between 1995 and 2001, for example, the D.C. Circuit has never had more than 3 percent of its cases produce dissents in any one year, and they are growing rarer: Last year less than 1 percent of cases produced dissents.

A court once famous for its ideological divisions has become a love fest. As the partisans have been yelling about abortion, affirmative action and whether Bruce Lindsey has a right to counsel, its judges have been quietly discussing such questions as whether federal energy regulations are arbitrary and capricious -- and they are overwhelmingly agreeing about the answers.

There is an alternative, in short, to Jacobin opposition to high-quality nominees of the other party: treating the courts with a presumption that excellence in law can and must transcend political differences. Both sides pay lip service to this notion, but these days both regard it as naive. Unless that cynicism can be overcome, we are bound to make the courts into exactly the political battlegrounds we already imagine them to be.

The writer is a member of the editorial page staff.

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**LENGTH:** 365 words

**HEADLINE:** Fifty years after admitting women, law school hires woman dean

**BYLINE:** By Seth Stern

**BODY:**

The federal court's loss is Harvard Law School's gain. Two years after the US Senate let **Elena Kagan's** nomination to a federal circuit court lapse, the law school has selected her as its first female dean.

Few are more pleasantly surprised by the appointment than the handful of women who graduated in the first class that accepted women exactly 50 years ago.

"It sends a real message," says Charlotte Armstrong, who was among the first batch of women to attend the school.

During their orientation in 1953, Harvard Law's dean asked why the women bothered showing up. More than a decade later, certain professors would only recognize women students on Ladies' Day, recalls Mary Mullarkey, who went on to serve as chief justice of the Colorado Supreme Court after graduating from Harvard Law in 1968.

Yet Ms. Armstrong says that

Ms. **Kagan's** gender is far from her best qualification. "She's brilliant, she's energetic, she's focused, and she's passionate about the law school," Armstrong says.

**Even at a school famous for churning out overachievers, Kagan's resume stands out.**

Just 20 years after graduating, **Kagan** clerked for Supreme Court Justice Thurgood Marshall, served as President Clinton's second-highest ranking domestic policy adviser, and taught at both the University of Chicago and Harvard, where she became a visiting professor in 1999.

On taking over her new post, **Kagan** pledges to continue cutting first-year class sizes and increasing faculty-student interaction as current dean Robert Clark has done. In the process, the school has begun to shed its reputation as cut-throat and impersonal.

Moving plans may also top her agenda if Harvard's president Lawrence Summers decides to shift Harvard Law across the Charles River into Boston.

If approved, though, Kagan says that the move itself wouldn't happen until after she has already stepped down.

Some lawyers may consider a seat on the federal bench the pinnacle of their career, but **Kagan** says she is grateful the Senate Judiciary Committee let her nomination expire.

"There's no place I'd rather be," she says, "and no job that I'd rather have."



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