

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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MANUEL A. MIRANDA )  
534 Third Street, NE )  
Washington, DC 20002, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
THE HON. JOHN D. ASHCROFT )  
Attorney General of )  
the United States )  
Department of Justice )  
950 Pennsylvania Avenue, NW )  
Washington, DC 20530, )  
and all persons and )  
Grand juries, wherever situated, )  
under its direction, and )  
 )  
THE HON. W. RALPH BASHAM, )  
Director of the )  
United States Secret Service )  
950 H Street, NW )  
Washington, DC 20223, )  
and all persons under his direction )  
 )  
Defendants. )  
 )  
Serve: )  
c/o The Hon. Ken Weinstein )  
Acting United States Attorney )  
555 Fourth Street, NW )  
Washington, DC 20001 )  
\_\_\_\_\_ )

Civil Action  
No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff, Manuel A. Miranda, (hereinafter "Plaintiff"), by and through undersigned counsel, hereby alleges as follows:

## PRELIMINARY STATEMENT

1. On November 14, 2003 the *Wall Street Journal* published an editorial containing excerpts from memoranda to Senators Kennedy and Durbin concerning strategies for blocking the confirmation of judicial nominations by the Senate Judiciary Committee (the “Committee”). This began the controversy known as “Memogate.” The originals of these documents were soon after posted, and remain posted at [www.fairjudiciary.com](http://www.fairjudiciary.com).
2. As it would turn out, these memos (and many more that have not been published) had been readily viewed on the Committee’s computer network single database, shared by both Democratic and Republican<sup>1</sup> staff (the “Network”), and were accessible without restriction through “open permissions” by all authorized users of the Network and freely obtainable from the Network server (the “Server”). Rather than focus on the content of these and other discovered memos, however, the media and a Senate internal inquiry followed the lead of the Democratic senators whose embarrassing documents were made public and focused instead on how the memos were discovered and disclosed to the press.
3. Within days, Plaintiff, Counsel to Majority Leader Bill Frist, and another young man, a former Nominations Unit Clerk (the “Nominations Clerk”) who still worked as a legislative aide to the Committee, informed their superiors separately that Democratic documents had been freely accessible for some time on the Network.

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<sup>1</sup> The terms Democratic and Republican are used throughout this pleading because the traditional terms, Minority and Majority, are not descriptive in this set of facts because of the change in control of the Senate that took place in January 2003, as a result of the elections in November 2002.

4. Nevertheless, at the agitated insistence of Democratic senators and under protest from Republican senators, the Committee chairman directed the Senate Sergeant at Arms and Doorkeeper (the “SAAD”), the Senate office responsible for the training and supervision of network administrators, to conduct a Senate internal inquiry (the “Inquiry”), which lasted for the next four months.
5. At its conclusion, the SAAD Inquiry confirmed in greater detail what had been initially volunteered by the Nominations Clerk and the Plaintiff: the Network and the Server were largely “open,” with 80 per cent of its stored documents unprotected and accessible by all authorized users, and that, through evident gross negligence in training and supervision, the Network lacked even the most fundamental security precautions. Plaintiff had no knowledge of the extent or any reasons for the negligence.
6. During the relevant period of time and until the winter of 2003, the Network was administered by Democratic technology staff.
7. Notably, according to a letter dated November 19, 2003, and signed by Committee members Senators Patrick Leahy, Edward Kennedy and Richard Durbin, the “security deficiencies of the [Network] have long been known...” Apparently, neither Senators Leahy nor Hatch did anything about this security problem when they each led the Committee.
8. Likewise, according to the report published at the conclusion of the SAAD Inquiry (the “Pickle Report”), the SAAD had ample reason to know of the negligent administration of the Network.

9. Significantly, the SAAD was also directed, as a second directive, to investigate and determine who had “leaked” these supposedly “confidential” documents to the press. This was done without any finding that, under the Constitution, the Senate Rules, or the case law of this jurisdiction, these documents were in any sense protected from public scrutiny. *See Pearson v. Dodd*, 410 F.2d 701, 706 n. 23 (D.C. Cir. 1969) (expressing doubt that U.S. senator who claimed confidentiality of documents taken by staff from his office files had any private entitlement or right of exclusive possession, and that senator was possibly a bailee or mere custodian).
10. Remarkably, the SAAD was also directed to investigate whether any crime had been committed.
11. Despite Senate rules intended to protect the confidentiality of Senate internal inquiries, within minutes of his meeting with the SAAD, the Plaintiff was surreptitiously identified to the media for public exposure. This media pillory of the Plaintiff by the SAAD, senators and their paid staff continued with increasing intensity for the next four months, with frequent leaks of the SAAD Inquiry, often leaks of false information intended to distract Plaintiff’s supporters from their criticism of senators, and intended to mislead the press.
12. In February 2004, Plaintiff was forced to resign his position as Counsel to the Senate Majority Leader as a result of the improper influence by the SAAD and certain other interested persons, and the threat of targeted media pressure intended to embarrass Senate Majority Leader Bill Frist.

13. Contemporaneously, Plaintiff filed a complaint with the Senate Ethics Committee disclosing (pursuant to the whistleblower provision of the Code of Ethics for Government Service) that he had discovered evidence of public corruption<sup>2</sup> in the unpublished documents he had obtained from the Server. This was based on the discoveries stated in Paragraphs 15 and 16 below. Unrelated persons thereafter filed a similar complaint with the Department of Justice's Office of Public Integrity.
14. Neither of these complaints has been acted upon by either the Senate Ethics Committee or the Department of Justice.
15. The published and still unpublished documents of public importance that Plaintiff read appeared to show, among other things, that: 1) senators used their power to obstruct judicial confirmations in conjunction with promises of campaign funding and election support in 2002 (this was recorded in the Congressional Record); 2) senators may have used Senate staff and resources to raise campaign funds for themselves and used their rejection of judicial nominees as fund raising inducements; 3) senators coordinated with parties to guarantee results in pending litigation; 4) senators and staff kept detailed lists of the ideological make-up of federal circuit courts with an eye to influencing the outcome of pending litigation; 5) senators placed circuit-wide holds on confirmation of 6<sup>th</sup> circuit judges in order to influence the outcome of pending litigation; 6) senators effected a grave deception on the American people by pre-determining confirmation outcomes in collusion with special interest groups and for purely political reasons; 7) senators

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<sup>2</sup> The term "corruption" is used in this Complaint in accordance with the Code of Ethics for Government Service.

picked what judicial nominees would be rejected well in advance of any hearing and allowed special interests actually to determine what nominees would get hearings and votes; and 8) senators had a different standard for Hispanic judicial nominees eligible for elevation to the Supreme Court and an improper design to block Miguel Estrada in particular because he was a Latino who could someday be elevated to higher service.

16. For example, there was evidence that Senator Richard Durbin may have used his Committee staff and Senate resources to raise political funds. Documents appeared to show an effort to block confirmations to the Sixth Circuit, in relation to the then-pending University of Michigan affirmative action case. In the fall of 2002, the most striking corruption was the otherwise unexplained delay of Judge Dennis Shedd's confirmation apparently to satisfy contributors who did not want to see him elevated, so as not to throw a wet blanket on election efforts by Democratic grassroots allies in North Carolina and Louisiana. The documents also showed that the opposition to the confirmation of Justice Priscilla Owen to the 5<sup>th</sup> Circuit was led not by the abortion rights lobby but by the abortion clinics industry, solely because Justice Owen was perceived as being an obstacle to easily obtained and paid-for abortions for minor girls without any parental notification.

17. Despite all this, senators used all their official power and their influence over the press to disguise their own wrongdoing, by systematically accusing Plaintiff of escalating degrees of criminality, while other senators failed to defend the

- Plaintiff, a loyal staff aide, and failed to address the apparent misconduct of their Senate colleagues, appearing more interested in avoiding criticism to themselves.
18. To spare himself criticism from colleagues and the public, one Republican senator spread rumors that there had been a hacking, and had other Republican senators make that false representation to conservative leaders. While another Republican senator was quoted as saying that he would not want his documents made public.
  19. At the conclusion of the SAAD Inquiry, in violation of Senate rules and contrary to their own promises of confidentiality, the SAAD and members of the Committee published the Pickle Report with media attention deliberately garnered by Senate paid staff and using websites and Senate press facilities administered by the SAAD.
  20. In addition to contested assumptions and conclusions of fact and law, and severe examples of negligence and bias, and after violating the First, Fourth and Fifth Amendments of the U.S. Constitution, the Pickle Report concluded with a government indictment of the Plaintiff in the nature of a Bill of Attainder (an act by the legislature, in any form, pronouncing guilt and punishing individuals), alleging violations of federal crimes and other libels, and exposing the Plaintiff to further punishment by media and internet pillory, -- a cruel punishment for an unadjudicated crime.
  21. In effect, under the color of authority of the United States, senators punished Plaintiff by tactically attacking his credibility, damaging his reputation and professional standing through the “brand of infamy” -- an unconstitutional and unauthorized legislative pronouncement of criminal guilt.

22. In sum, senators intentionally misused their power and the resources of the United States to deflect attention from their own wrongdoing, while other senators let them. Subjectively pronouncing their documents to be “confidential,” and that crimes had been committed, senators chilled the press and senate staff, and used the Senate Sergeant at Arms and Doorkeeper as their tool (as has been the case in most other instances of Senate abuse of power historically heard in this jurisdiction).
23. Plaintiff believes that the Inquiry, both in its motive and implementation, was unconstitutional, unlawful, unethical, and highly improper. Senators used the resources of the United States: their press secretaries and staffs, Senate press facilities, and Committee public meetings, for their own political interests, or at a minimum, in reckless disregard of fundamental fairness to Plaintiff, both as a citizen and as a Senate employee.
24. This misuse of power and government resources, whether intentional or reckless, active or passive, caused Plaintiff and his family unspeakable harm.
25. Although the Committee declined to take a position on a referral, the Sergeant at Arms and Doorkeeper, William Pickle, did, in violation of Senate rules, refer his report and Attainder to the Department of Justice that has in turn assigned the matter to the Acting U.S. Attorney for the Southern District of New York.
26. Rather than investigating the substance of the corruption discovered, Plaintiff believes that the Defendants are pursuing Plaintiff for violating the very laws that were the subject of the Senate’s indictment by Attainder, and concentrating their investigation on First Amendment protected activities.

27. Having used United States resources through the SAAD Inquiry to chill, and indeed freeze Plaintiff's speech rights and those of others, through private meetings and letters to the Justice Department, senators and Mr. Pickle now urge a criminal prosecution to do more of the same. Upon information and belief, both Senators Orrin Hatch and Patrick Leahy have scheduled meetings with the assigned prosecutor.
28. The politically infused referral of this matter to the Attorney General, and the assignment of the case to the U.S. Attorney's Office for the Southern District of New York will, if an indictment results, cause immediate and irreparable harm to Plaintiff. It will also harm members of the media who are protected by the First Amendment from investigation and who have been silenced by the repressive fear of prosecution for receiving or publishing the memos at issue, all as a result of the false legal conclusions of the SAAD Inquiry and the continuing political tactics of Committee senators interested in distracting attention from their embarrassing papers.
29. This effort to chill Plaintiff's First Amendment rights is not a partisan matter. As noted above, to spare himself criticism from colleagues and the public, one Republican senator spread rumors that there had been a hacking, and had other Republican senators repeat that false representation to conservative leaders, and more recently his staff has sent emails to White House and Department of Justice personnel and other Senate offices demanding that Republicans stop communicating or meeting with the Plaintiff. The same Senator has complained to members of the press about their publishing Plaintiff's articles.

## NATURE OF THE CASE

30. Plaintiff prays for relief from any pending investigation or prosecution and for the damage done to him by the Senate's highly improper and abusive criminal investigation and published Bill of Attainder, an indictment of Plaintiff in violation of his most fundamental constitutional rights. This is an action for declaratory judgment that Plaintiff did not violate certain laws of the United States, namely Sections 1030(a)(2)(B), Section 641, and Section 1001(c) of Title 18, that certain of these laws are unconstitutional, or unconstitutional as applied to the Plaintiff, or nonjusticiable, and that Plaintiff is immune from prosecution or testimony under these laws pursuant to the Speech and Debate Clause.
31. The Court may rule upon these three statutes because they each contain elements that present questions solely of law.
32. This action requests an expedited preliminary injunction and a permanent injunction to order the Secret Service, and the Department of Justice or any federal grand jury under its direction from pursuing an investigation, indictment or prosecution of Plaintiff so as to prevent immediate and irreparable harm to him and to his family, and to others, including media persons who may be viewed as "unpopular" as defined by the U.S. Supreme Court in its First Amendment jurisprudence.
33. To grant Plaintiff the full relief he requests, the Court is asked, at the very least, to declare that 18 U.S.C. § 1030(a)(2)(B) applies only to circumstances where there is a hacking (as stated in the website of the Department of Justice), and that the discovered and unprotected documents were not "confidential," nor legally or

constitutionally protected as some senators would have the American people believe. This Court should also declare that the Plaintiff was entitled to read the subject documents and, therefore, did not violate Section 1030(a)(2)(B) in doing so. The Court is also asked to declare that the Inquiry was not an authorized investigation conducted consistent with Senate rules as the new subsection of 18 U.S.C. § 1001(c) contemplates. *See United States v. Pickett*, 353 F.3d 62 (D.C. Cir. 2004) (case based on Sergeant at Arms referral dismissed because necessary 18 U.S.C. § 1001(c) element showing an authorized investigation was absent from face of grand jury indictment).

34. With regard to Section 1030(a)(2)(B), this Court is invited to determine the constitutionality of the statute, i.e. whether it punishes speech and the publication of matters of public importance in the absence of a compelling state interest and without the application of “less restrictive means,” in this case, cheaply available technology and competent training. *See Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783 (2004) (criminal statute held unconstitutional when technology available to obtain legislator’s intent); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (statute unconstitutionally enforced against publication of matters of public importance).

35. The Court is also invited by this action to consider questions of great constitutional importance concerning open access to information involving the Congress under Article I, the limits upon senators and senatorial cabals to protect themselves from scrutiny by the American people, and, in so attempting, to

misuse the resources of the United States and their power to chill First Amendment interests of the highest order.

### **JURISDICTION AND VENUE**

36. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, as this matter challenges the constitutionality of federal statutes under the Secrecy Clause (Article I, Section 5) and the First and Fifth Amendments, and it implicates the Speech and Debate Clause (Article I, Section 6), the Advice and Consent Clause (Article II, Section 2) and other Constitutional provisions. The abusive acts involving the Committee and the SAAD took place in the District of Columbia.

### **THE PARTIES**

37. Plaintiff Manuel A. Miranda is an attorney who until February 2004 had been employed for two years by the United States Senate. Before working for the Senate, Plaintiff was an international finance attorney. A graduate of Georgetown University and the University of California, he began his practice in New York City with the firm of Winthrop Stimson Putnum & Roberts and was last with the Washington office of White & Case. In 1998, he left practice to head, without remuneration, the Cardinal Newman Society for Catholic Education. Continuing a pursuit of public service and never having worked in government, Mr. Miranda accepted a position with the Senate and was assigned from December 1, 2001 until February 5, 2003 to serve as Nominations Counsel,

later as Senior Nominations Counsel to the Committee, and was subsequently assigned as Judicial Affairs Counsel to the Office of the Senate Majority Leader from February 6, 2003 through February 6, 2004. In each of his positions with the Senate, Mr. Miranda won high praise, some of it published. While on the Senate staff, Mr. Miranda made over 100 radio and television appearances on the issue of judicial nominations. An immigrant fluent in Spanish, Plaintiff made many presentations on this and other civics issues to Hispanic audiences. (More on Plaintiff's role in the Senate is described below.) In his advocacies, Plaintiff has a long list of published articles on issues of public importance, including in the defense of the First Amendment. *See* "Bush Must Make It Clear," op-ed page, *The Washington Times*, August 6, 2004. Plaintiff is a resident of the District of Columbia.

38. Defendant John D. Ashcroft is the Attorney General of the United States and head of the U.S. Department of Justice. Defendant Ralph Basham, is the Director of the U.S. Secret Service granted jurisdiction by Congress to investigate possible crimes under 18 U.S.C § 1030.

## **FACTUAL ALLEGATIONS**

39. Plaintiff incorporates and realleges the allegations in Paragraphs 1 through 38 as though fully alleged herein.

### **Facts Pertaining to Speech and Debate Immunity and All Counts**

40. Plaintiff was employed until February 2004 by the United States Senate as a senior aide and assigned as a Nominations Counsel on the Republican staff of the Committee, later as a Senior Nomination Counsel, and in February 2003 as Counsel in charge of judicial confirmation for the Senate Majority Leader.
41. While Counsel to the Majority Leader, Plaintiff conceived, organized and led several extraordinary Senate floor debates and events, including two historic floor events involving almost all 51 Republican senators, and the “40 Hour Grand Debate” in November 2003, lasting two nights and three days and involving almost all 100 senators. Plaintiff also led the effort surrounding the unprecedented six week debate for circuit court nominee Miguel Estrada in the winter of 2003. These events doubled in one year the number of Americans surveyed who said they were informed on the issues facing federal judicial nominations.
42. Through his various responsibilities in assisting in the Senate’s Advice and Consent duty, Plaintiff was necessarily informed by the information he had obtained in the discovered, unprotected documents from the Server.
43. One of Plaintiff’s chief responsibilities, in the highly adversarial, partisan environment of judicial nominations, was to obtain information for Republican

- senators on issues concerning judicial nominees and to keep those senators informed through memoranda and direct counsel.
44. While on the Committee staff, plaintiff led Republican counsel and staff in preparing their senators for the defense of several embattled judicial nominees, among them Brooks Smith (confirmed), Dennis Shedd (confirmed), Priscilla Owen (rejected and later filibustered) and Miguel Estrada (delayed and later filibustered).
  45. While Counsel to the Majority Leader and also while on the Committee staff, Plaintiff informally staffed other Republican senators on several occasions and ghost wrote a number of published articles on judicial nominations for them.
  46. One of Plaintiff's chief duties was to write speeches for Senator Orrin Hatch and Senator Bill Frist, and talking points used widely by them and other Republican senators. These speeches are preserved in the Congressional Record and in the transcripts of the Committee.
  47. These speeches, articles, and talking points were necessarily informed by the information obtained from the Server and by what Plaintiff had read. Through these speeches and talking points, Plaintiff exercised his rights under the First Amendment and his legislative duties under the Speech and Debate Clause.
  48. In several of these speeches, articles and talking points, Plaintiff disclosed the corruption that was confirmed in the discovered, unprotected Democratic documents to the Senate, its staff and to the American people through the media.

49. Plaintiff disclosed what he had read from the discovered documents in and through the senators for whom he wrote, in the exercise of their Speech and Debate rights.
50. The duties of opposition research, informing senators, and writing speeches and talking points converged in many instances, given that both Senators Hatch and Frist, like other senators are often informed when draft speeches and talking points are presented to them by the staff that is supposed to be informed on the subject. Sometimes this occurs minutes before they deliver the material to the public, on the Senate floor, or in committee meetings. Senator Frist always reads and marks up his speeches and talking points, but Senator Hatch does not, and in most cases reads what is put in front of him without his prior review, relying heavily on his staff in speech and debate.
51. While on the staff of the Committee, Plaintiff had authority to work with the Hispanic media on Advice and Consent matters. As soon as he joined the Majority Leader's staff, Plaintiff had near unlimited authority to work with the media, making over 100 radio and television appearances in English and Spanish language.
52. To say the least, media work is a "legislative function" uniquely important to the current state of the Advise and Consent process, which is modernly affected by public opinion in a way the Framers could not have imagined. This work goes well beyond the separate "informing function."

### **Facts Pertaining To All Counts**

53. Plaintiff joined the staff of the Committee in December 2001 and was assigned as counsel to the Nominations Unit of the Republican staff then in the minority.
54. In May 2002, Plaintiff was told by the Nominations Clerk that there were old documents drafted by the Democratic staff, consisting of memoranda, talking points, and speeches, most of them outdated, which could be read on the Network. The Nominations Clerk offered Plaintiff a few of these documents to read.
55. At this time and until the winter of 2003, the Network was administered by Democratic technology staff. Notably, according to a letter dated November 19, 2003, and signed by Committee senators Patrick Leahy, Edward Kennedy and Richard Durbin, the “security deficiencies of the [Network] have long been known...” Apparently, neither Senators Leahy nor Hatch did anything about this concern when they each led the Committee.
56. Likewise, according to the Pickle Report, the SAAD had ample reason to know of the negligent administration of the Network.
57. Specifically, the Pickle Report explains the gross negligence that gave rise to the open Network and Server as follows:

The forensic review of the Judiciary Committee servers that was conducted is consistent with the [Nominations Clerk's] explanation of how he was able to access Democratic files...

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"...

[T]his 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.

Pickle Report, pages 10-11.

\* \* \*

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.

Pickle Report, page 28

\* \* \*

Our investigation revealed that some user home directories were set to "open" permissions and other home directories were set to "strict" permission...

Users accounts created prior to August 2001 were generally created with "strict" permissions; those established after that date were "open."

Pickle Report, page 30.

58. Plaintiff never knew the number of available unprotected documents or the extent of the Network administrator's negligence. This was revealed to him only by the Pickle Report. At some point, in July or August 2002, Plaintiff, who is not

- computer savvy, attempted to find the unprotected documents himself, and did find a few files, but not to the extent described to him by the Nominations Clerk.
59. Notwithstanding the hysteria of Memogate, Plaintiff had only a limited interest and limited exposure to the unprotected documents and only saw a relative few of what was available, according to the Pickle Report, most of which were outdated and concerned matters already in the public record.
60. Initially, the discovered documents did not reveal anything of note and only confirmed what was already surmised: namely, that Democratic senators colluded with special interests to block or reject certain of the President's judicial nominees.
61. Some of the earliest documents from the files of counsel to Senator Richard Durbin were the most colorful, including references to the President's nominees as "Nazis" and arguing that Texas Supreme Court Justice Priscilla Owen, nominated to the 5<sup>th</sup> Circuit Court of Appeals, should be rejected because she was a friend of President George W. Bush.
62. Soon thereafter, in May or early June, the Nominations Clerk showed Plaintiff unprotected memos that were more current and that indicated the *only* practically useful information in the performance of Plaintiff's Advice and Consent duties, -- information withheld by Democrats from their Republican colleagues, but freely shared by Democratic staff with the Democrat-allied special interest groups that devote their resources to vilifying the President's judicial nominees: the schedule of future hearings from June to October 2002. In particular, Plaintiff learned that, unexpectedly, Democrats planned to give Judge Dennis Shedd a hearing in June

2002. Plaintiff had responsibility for that nomination. Plaintiff also learned that Justice Priscilla Owen was to be given a hearing in July and, that Senator Patrick Leahy had already decided to reject her nomination in Committee. Plaintiff learned of other dates, especially hearing plans for nominees Michael McConnell and Miguel Estrada after the August recess.
63. In keeping with his duties, Plaintiff shared this information with Senator Hatch, other senators and their staffs.
64. Other than hearing dates, which could allow the Republican staff to prepare and plan their work, the documents presented to Plaintiff by the Nominations Clerk were not of much interest, except to confirm what was already known from the websites of the liberal special interest groups, including lines of attack on the various judicial nominees. Plaintiff did not immediately read many of the documents that the Nominations Clerk gave him and kept most unread until the winter of 2003. Plaintiff threw out most of these documents, with many of them unread.
65. A few of the documents were noteworthy or interesting, but only over time did it become clear that some were damning.
66. After the rejection in Committee of Justice Priscilla Owen in September 2002, the only matter of interest was in knowing whether Chairman Patrick Leahy would keep his promises on giving hearings and votes on the nominations of Dennis Shedd, Michael McConnell, and Miguel Estrada in the fall, as he had promised. In early 2003, the only matter of interest was whether Democrats would use the

Senate filibuster in an unprecedented manner to obstruct votes on judicial confirmations.

**Facts Pertaining to 18 U.S.C. § 1030 (a)(2)B) and 18 U.S.C. § 641 and All Counts**

67. Between May and November 2002, and again from January to April 2003, Plaintiff did “obtain information” from the Network Server.
68. This information was obtained either directly by Plaintiff or, for the most part, passed on to him by the Nominations Clerk, who also had authorized access to the Network.
69. The “information” obtained came from unprotected Democratic staff documents both freely accessible and discoverable by anyone with authorized access to the Network database. In fact, knowledge of the open Network was discovered by others as well.
70. As recited in paragraphs 15 and 16 above, the obtained information consisted of matters of public importance.
71. Whether by Plaintiff or the Nominations Clerk who made the initial discovery, the information was read by someone with authorization to access the Network and to retrieve information from the Server.
72. Neither the Nominations Clerk nor Plaintiff utilized any special knowledge or device to obtain information. Nor was the reading surreptitious, but rather could easily have been detected by the most primitive network security logging technology.

73. No documents or anything else of value were taken in the mere reading of the discovered, unprotected documents. Nothing was erased or damaged, and no one was deprived of their possession of any property.
74. The reading of the documents in the Network database violated no Senate rule or any workplace restriction.
75. The discovered, unprotected documents were not “classified” under federal law and were neither “secret” nor “confidential” under either the U.S. Constitution or the rules of the Senate.
76. The discovered, unprotected documents were solely partisan, political memos and talking points, most of them outdated and already a matter of public record. None represented the official business of the United States Senate pursuant to Senate Rule 29.5.

**Facts Pertaining to the New 18 U.S.C. § 1001(c) and All Counts**

77. The internal SAAD Inquiry was not a legislative investigation, and was not an oversight review, as contemplated under the amended version of 18 U.S.C § 1001(c). The Inquiry was also neither authorized nor conducted consistent with Senate rules as contemplated by 18 U.S.C. § 1001(c).
78. Although the authorization for the Inquiry was somewhat murky, as stated in the Pickle Report, the SAAD Inquiry was authorized by the chairman of the Committee, under protest from several Committee senators.
79. The SAAD Inquiry was likewise bereft of any of the procedural safeguards or respect for fair treatment required by that the U.S. Constitution and the controlling case law on Senate abuse of power.

80. The Inquiry was particularly intrusive into First Amendment rights and was conducted as a criminal investigation, in each case in violation of the Constitution and the controlling case law on Senate abuse of power.
81. The SAAD improperly conducted a criminal investigation of a possible violation of 18 U.S.C. § 1030(a)(2)(B), a matter that Congress has placed expressly within the jurisdiction of the U.S. Secret Service.
82. The Inquiry, which concluded that the Committee Network lacked the most fundamental security precautions as a result of gross negligence and poor training, was conducted by the very office responsible for the supply of security technology, training to systems administrators, and oversight of the Network – the SAAD.
83. In the course of the internal Inquiry, Senate officials repeatedly violated several Senate rules, including Rule 29.5 protecting the confidentiality of internal inquiries. They also violated promises of confidentiality made to the Plaintiff and others.
84. The Pickle Report was made public with media attention deliberately garnered by senate paid staff and using senate press facilities administered by the SAAD. The Pickle Report was published on Senate websites and soon recopied on other websites with potentially perpetual life.
85. In addition to incorrect assumptions, false conclusions of fact and law, and severe examples of negligence and bias, and after violating the First, Fourth and Fifth Amendments of the U.S. Constitution, the SAAD Inquiry concluded in the Pickle Report with a government indictment of the Plaintiff in the nature of a Bill of

Attainder (an act by the legislature, in any form, pronouncing guilt and punishing individuals), alleging violations of federal crimes and other libels, and exposing the Plaintiff to further punishment by media pillory, -- a cruel punishment for an unadjudicated crime.

86. The Attainder portion of the Pickle Report concludes with this indictment of the Plaintiff:

### **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 [sic] access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser 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. Miranda 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.

87. The Court should note that, as a result of the SAAD Inquiry, Plaintiff has had to respond to frivolous Bar ethics charges brought by a liberal activist group asserting the allegations made publicly by Democratic senators and by the SAAD himself (including to The Associated Press) even before the supposedly confidential Inquiry was completed, as repeated in the Pickle Report. Of course, legal ethics rules (inapplicable to this case) concerning the reading of opposition documents inadvertently disclosed are predicated on a client confidentiality that does not apply to public service and government attorneys, and courts have ruled that the ethical duty is on the party claiming confidential status to protect their document and not on the party who discovers them through another's inadvertence. In fact, Bar ethics decisions have long stated that it takes a great deal, and not even the interest in protecting client confidences, to overcome the

requirement of Canon 7 of the lawyer's Code of Ethics to be "zealous" in one's cause.

**COUNT I**  
**FIRST AMENDMENT**

88. Title 18 U.S.C. § 1030 (a)(2)(B), on its face and as applied to Plaintiff, violates the First Amendment in that it prohibits and criminally punishes the acquisition, discussion and dissemination of computer based information of public importance: (1) without requiring the use of the least restrictive means of protecting such information, including the use of cheaply available computer security technology such as blocking software, password protection, secure servers, firewalls, separate servers, and other standard security technology; (2) that was lawfully obtained from computer files available to all users of the Committee Network and Server without any restriction; and (3) pursuant to statutory language so vague and inadequately defined so as to have a chilling effect, indeed a freezing effect, upon the exercise of First Amendment rights.

**COUNT II**  
**FIFTH AMENDMENT: 18 U.S.C. § 1030(a)(2)(B)**

89. Title 18 U.S.C. § 1030(a)(2)(b) and (e)(6), on their face and as applied to Plaintiff, violate the Due Process Clause of the Fifth Amendment. Failing as they do to give adequate notice of the conduct which is criminally proscribed, they are unconstitutionally vague.

**COUNT III**  
**THE SECRECY CLAUSE**

90. Title 18 U.S.C. § 1030(a)(2)(B) is unconstitutional, on its face and as it applies to Plaintiff, to the extent it is used to prevent access to, and the free flow of information of public importance from the Congress, and to protect the Congress from public scrutiny.

91. The Constitution, Article I, Section 5, provides that each House of Congress “shall keep a Journal of its Proceedings, and shall from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy;...” This clause has been, for over 200 years, the anchor of the Senate’s fundamental policy of open access. The Secrecy Clause mandates a collective decision to make documents and matters confidential. Over the centuries, the Senate has carved out few matters that require “Secrecy.”

92. As cited in the Attainder of the Pickle Report quoted in Paragraph 86 above, the legislative history of 18 U.S.C. § 1030(a)(2)(B) indicates that Congress intended to criminalize the obtaining of information from Congress that is deemed by an unstated person using an unstated subjective criterion to be “sensitive and confidential” — even **after** the information was obtained. This, Congress cannot do.

**COUNT IV**  
**SEPARATION OF POWERS**

93. The Senate has, under the Rulemaking Clause, adopted Senate Rule 29.5 to protect internally those very limited areas that the Senate seeks to protect as “secret” and “confidential.”
94. To the extent that 18 U.S.C. § 1030(a)(2)(B) aims to criminalize the violation of that rule or to criminalize the obtaining of information from the Congress of a political nature and of public importance, the statute violates the Separation of Powers Doctrine.

**COUNT V**  
**PLAINTIFF DID NOT VIOLATE 18 U.S.C. §1030**

95. As cited in the Attainder of the Pickle Report quoted in Paragraph 86 above, 18 U.S.C. § 1030(a)(2)(B) provides:

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.

18 U.S.C. § 1030(e)(6) provides:

the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.

96. As stated by the Department of Justice in the legislative analysis of Section 1030(a)(2)(B) promulgated on its website at:  
[www.usdoj.gov/criminal/cybercrime/1030\\_anal](http://www.usdoj.gov/criminal/cybercrime/1030_anal), the Act “does *not* punish the *mere* acquisition of information (which might unduly impede the free flow of

ideas),...” (Emphasis added.) The Justice Department explains that the offense requires the intent to access a government computer improperly and **then** to obtain information.

97. As the Pickle Report makes clear, there was no hacking by Plaintiff or by the Nominations Clerk. The “permissions” settings allowed nearly complete access to all authorized users. As the Justice Department puts it: “[I]t is important to note that the elements of the offense include not just taking the information, but abusing one’s computer authorization to do so.”
98. Moreover, Plaintiff was also entitled to read anything on the Committee’s Network to which he had authorized access. That affirmative entitlement came from the spirit and letter of the whistleblower provision of the Code of Ethics for Government Service, adopted by the Congress in 1958.
99. The Code of Ethics states that a government employee has a permissive duty (“should”) to disclose any evidence of corruption “wherever discovered.” That duty carries with it a mandate. The term “wherever” must be given its full effect.
100. In addition, pursuant to the well established maxim of administrative law, Plaintiff was entitled to read what he did because he was not expressly prohibited by any rule of the Senate or workplace restriction. Notably, Plaintiff is not aware that either the Senate or the Committee is galloping to adopt any such rule or restriction.
101. Finally, Senate Rule 29.5, which indicates what the Senate considers secret and confidential business (as explained by its legislative history: national security matters, senate legislative investigations, and internal inquiries) does not

describe political activities of either party in Congress as protected. The United States Supreme Court has likewise excluded such activity from the protections of the Speech and Debate Clause.

**COUNT VI**  
**NONJUSTICIABILITY OF 18 U.S.C. §§ 1030(a)(2)(B) and (e)(6)**

102. To the extent that 18 U.S.C. § 1030(a)(2)(B) invites the courts to determine or interpret Senate rules that are ambiguous by interpreting the term “entitled” under 18 U.S.C. § 1030 (e)(6), the Court may hold that a prosecution for obtaining information from Congress under the facts of this case would be nonjusticiable.

**COUNT VII**  
**PLAINTIFF DID NOT VIOLATE 18 U.S.C. § 641**

103. Contrary to the Attainder of the Pickle Report quoted in Paragraph 86 above, Plaintiff did not steal, burgle, purloin, pilfer, convert, take, or otherwise violate 18 U.S.C. § 641, on its plain language, under a well established body of case law, and as common sense dictates. *See Pearson v. Dodd*, 410 F.2d 701, 706 n. 23 (D.C. Cir. 1969) (expressing doubt that U.S. senator who claimed confidentiality of documents taken by staff from his office files had any private entitlement or right of exclusive possession, and that senator was possibly a bailee or mere custodian).

104. Moreover, by reading unprotected documents of a merely political nature, Plaintiff did not deprive anyone of possession to property, cause damage or

harm to any property, or act for personal gain. *Cf. United States v. Czubinski*, 106 F.3d 1069 (1<sup>st</sup> Cir. 1997) (leading case, analogous statutes).

**COUNT VIII**  
**FIFTH AMENDMENT: 18 U.S.C. § 1001(c)**

105. Title 18 U.S.C. § 1001(c), on its face and as applied to Plaintiff, violates the Due Process Clause of the Fifth Amendment. Failing as it does to give adequate notice of the conduct which is criminally proscribed, it is unconstitutionally vague.

**COUNT IX**  
**PLAINTIFF DID NOT VIOLATE 18 U.S.C. § 1001(c) AS A MATTER OF LAW**

106. Section 1001(c) of Title 18 is new and it requires as a threshold legal element for its invocation a showing that there was a Senate investigation conducted: (1) pursuant to proper authority, and (2) consistent with applicable rules of the United States Senate. Neither was the case with the SAAD Inquiry.

107. The plain language of new Section 1001(c) makes clear that not all inquiries conducted in Congress are “legislative investigations” as the attainer of the Pickle Report would have the public believe. *See* ¶ 86 above; *cf. United States v. Pickett*, 353 F.3d 62 (D.C. Cir. 2004) (case based on Sergeant at Arms referral dismissed because Section 1001(c) element of authorized investigation absent from face of grand jury indictment).

108. The legislative history of new Section 1001(c) comports with the plain meaning of the language discussed above precisely and with no ambiguity.

109. Another element of Section 1001 lacking in this case, given that the SAAD Inquiry concerned possible Section 1030 violations, was the Section 1001 requirement that the investigation concern a matter “within the jurisdiction” of the investigating entity. Congress has expressly vested such jurisdiction in either the Secret Service or the Federal Bureau of Investigation, not the SAAD. *See* 18 U.S.C. § 1030(d).

110. There is doubt that any statement made during the SAAD Inquiry, even if Section 1001 was otherwise valid, had the capacity to influence a proper decision or outcome. The SAAD Inquiry was directed at “exposure for exposure’s sake,” especially to the extent it intruded on First Amendment activity.

**COUNT X**  
**THE SAAD INQUIRY VIOLATED THE U.S. CONSTITUTION**

111. The undergirding assumption of Section 1001(c)(2) must be that the investigation in question does not violate the U.S. Constitution. Sadly, the SAAD Inquiry did violate the U.S. Constitution.

112. The case law of this jurisdiction and of the Supreme Court is clear that not all investigations and inquiries by Congress are either constitutional or proper, particularly not when they amount to a criminal investigation, offend First Amendment liberties or violate the Fourth and Fifth Amendment, as the SAAD Inquiry did.

113. The Inquiry was not an investigation “with a legislative intent,” as evidenced by the Pickle Report’s recommendations quoted above.

**COUNT XI**  
**NONJUSTICIABILITY OF 18 U.S.C § 1001(c)**

114. To the extent that new Section 1000(c) invites the courts to determine or interpret Senate rules and lines of authority that are ambiguous, the Court may hold that a prosecution under the facts of this case would be nonjusticiable.

**COUNT XII**  
**THE SPEECH AND DEBATE AND ADVICE AND CONSENT CLAUSES**

115. Plaintiff is absolutely immune under the Speech and Debate Clause because he violated no laws and should not have to bear the cost of further defending himself.

116. The Speech and Debate clause affords absolute immunity for congressional aides from prosecution for acts done in the performance of their legislative duties, and seeks to protect the legislative person from even the cost of having to defend oneself and from the throes of a politicized prosecution by the Executive. It also provides a testamentary immunity when legislative acts are implicated.

117. The Advice and Consent Clause vests solely in Congress and the Executive Branch all issues related to the confirmation of federal judges, and not in the Judiciary. Advice and Consent is an express delegation of a legislative function to the Senate.

118. The Supreme Court and the case law in this jurisdiction make it clear that Speech and Debate immunity is not lost because a legislative person comes into

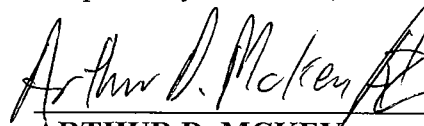
possession of documents even if improperly obtained, which is not the case here.

119. Plaintiff is absolutely immune with regard to 18 U.S.C. §§ 1030 and 641 because each statute contains an element that represents a legislative act in the execution of Plaintiff's duties under the Advice and Consent Clause. Plaintiff has testamentary immunity with regard to 18 U.S.C. § 1001(c) to the extent that prosecution under this section would implicate his Advice and Consent Clause work.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays this Court enter a Declaratory Judgment in favor of the Plaintiff on each and every claim, or any of them, as set forth above, and to issue a preliminary and permanent injunction enjoining Defendants, their employees, agents, grand juries and all persons in active concert or participation with any of them from investigating, indicting or prosecuting the Plaintiff under 18 U.S.C. §§ 1030, 641, or 1001; and from investigating, indicting or prosecuting any member of the Press or other media , or the public under 18 U.S.C. § 1030 (a)(2)(B) or otherwise under the facts of this case; for an award of attorneys fees and costs pursuant to the Equal Access for Justice Act and for such other relief as this Court deems proper.

Respectfully submitted,

 with permission

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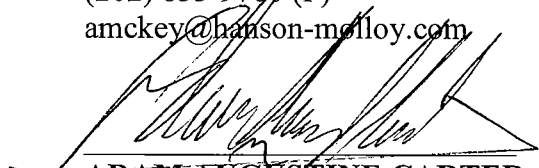
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