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REPORT
101-382

INVESTIGATION OF SENATOR DAVID F. DURENBERGER

R E P O R T

OF THE

SELECT COMMITTEE ON ETHICS

AND THE

REPORT OF SPECIAL COUNSEL

ON

S. Res. 311

JULY 20 (legislative day, JULY 10), 1990.—Ordered to be printed

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Mr. HELFIN, from the Select Committee on Ethics, submitted the following

REPORT

[To accompany S. Res. 311]

The Select Committee on Ethics, having considered an original Resolution, reports favorably thereon and recommends that the Resolution do pass.

Pursuant to Article I, Section 5, Clause 2 of the United States Constitution, S. Res. 338 (88th Congress), as amended, and Rule 5(f) of the Committee's Supplementary Procedural Rules, the Select Committee on Ethics submits this Report in support of its recommendation to the Senate that Senator Durenberger be denounced.

I. PROCEDURAL HISTORY

On September 27, 1988, the Committee received a complaint against Senator David Durenberger from 39 members of the Minnesota Bar. The complaint alleged that the Senator had violated laws and rules within the Committee's jurisdiction, in part through an arrangement he had with a publisher, Piranha Press. The complaint was referred to the Senator for response on October 28, 1988.

The complaint and the Senator's response were considered by the Committee, which voted unanimously on March 1, 1989 to proceed with a Preliminary Inquiry into the issues raised therein. The following day, Senator Durenberger was advised that such an Inquiry would be undertaken, and he pledged and has since provided his complete cooperation.

Committee staff attorneys conducted the Preliminary Inquiry with the assistance of three investigators from the Office of Special Investigations of the General Accounting Office. Documents and tape recordings were provided by Senator Durenberger in response to the Committee's request. Subpoenas were issued and records were obtained from the publisher and others. Attorney-client privileges were waived by the Senator and the publisher, and records

and testimony were provided by attorneys for the Senator and the publisher.

The Committee staff reported the results on the Preliminary Inquiry on June 19, 1989. On the basis of that report, the Committee unanimously concluded on August 3, 1989 that the evidence provided "reason to believe" that possible violations within the Committee's jurisdiction may have occurred. The Committee also retained Special Counsel, Robert S. Bennett, to assist in conducting an Initial Review.

Following his August 3, 1989 designation as Special Counsel, Mr. Bennett conducted an extensive examination into the facts. Senator Durenberger appeared personally before the Committee on February 8, 1990. On February 6, 1990 and February 20, 1990 Special Counsel submitted reports on the Initial Review.

On February 22, 1990, the Committee determined that there was "substantial credible evidence which provided substantial cause" to conclude that there were possible violations of law or Senate Rules within the Committee's jurisdiction, or that there was possible conduct which may reflect upon the Senate. Accordingly, the Committee voted unanimously to conduct an Investigation pursuant to Committee Rule 5. Senator Durenberger was promptly notified of the Committee's decision. By letter dated March 1, 1990, pursuant to Committee Rule 5(c), the Senator was formally notified of this decision and was provided with a description of the evidence. The Committee's Resolution and letter are attached as Appendix A to this Report.

Specifically, the Committee resolved that there was substantial credible evidence providing substantial cause for the Committee to conclude that violations within the Committee's jurisdiction may have occurred, as follows:

1. Senator Durenberger may have violated the honoraria limits established by 2 U.S.C. 31-1 and 2 U.S.C. 441i by accepting payments in excess of such limits as consideration for speeches or appearances during calendar years 1985 and 1986.

2. Senator Durenberger may have violated the provisions of Senate Rule 34 (The Ethics in Government Act of 1978, as amended) by failing to report in his financial disclosure reports for calendar years 1985 and 1986 the acceptance of reimbursement for the necessary expenses of travel undertaken in connection with appearances related to Piranha Press.

3. Senator Durenberger may have converted a campaign contribution to personal use in violation of Senate Rule 38, paragraph 2, and may have failed to report and deposit a campaign contribution in violation of Section 434(b)(2) of the Federal Election Campaign Act and FEC regulations, by transferring to Piranha Press Inc. a $5,000 check made out to "Durenberger for U.S. Senate."

4. Senator Durenberger may have violated 40 U.S.C. 193d and the Senate Rules Committee's regulation prohibiting the commercial use of Senate space, when he was paid an honorarium or other fee for six appearances in Senate controlled space subject to the statutory and Rules Committee prohibition.

5. Senator Durenberger may have accepted gifts of ground transportation (limousine service) in the Boston area in violation of the Senate Gifts Rule (35) during 1985 and 1986, in connection with personal travel to Concord, Massachusetts.[1]

In December 1989, new allegations concerning Senator Durenberger's ownership and use of a Minneapolis condominium appeared in the Minnesota press. Following the publication of these reports, the Committee unanimously voted to initiate a Preliminary Inquiry concerning the condominium matter, and so notified the Senator.

Special Counsel submitted his Final Report on the Preliminary Inquiry into the condominium matter on May 8, 1990. Thereafter, the Committee unanimously determined that there was "substantial credible evidence providing substantial cause" to conclude that there was possible improper conduct which may reflect upon the Senate by Senator Durenberger, and possible violations of laws or Senate Rules within the Committee's jurisdiction.

Specifically, the Committee resolved on May 9, 1990 that there was substantial credible evidence providing substantial cause for the Committee to conclude that violations within the Committee's jurisdiction may have occurred, as follows:

> Senator Durenberger may have abused his United States Senate Office and misused United States Senate funds through a pattern of improper conduct which has brought discredit upon the United States Senate. Such conduct may have included the submission of misleading travel reimbursement vouchers to the Senate Disbursing Office, the misrepresentation of the ownership of the property for which he was claiming lodging reimbursement and the backdating of real estate transactions and certain documentation relating to those transactions.
>
> Senator Durenberger also may have violated certain provisions of the Ethics in Government Act relating to the administration of his qualified blind trust, including those provisions relating to communications regarding the trust and its assets.

Senator Durenberger was notified of the Committee's decision immediately thereafter. Pursuant to Committee Rule 5(c), the Senator was formally advised of this action by letter dated May 14, 1990. The Committee's Resolution and letter are appended hereto as Appendix B.

The Committee, therefore, announced on May 9, 1990 that the condominium matter also would be the subject of an Investigation. The Committee further announced that the hearings previously scheduled to begin on June 12, 1990 would include all matters under Investigation. On May 16, 1990, the Committee heard further argument from the Senator's counsel, and on May 17, 1990 Senator Durenberger again appeared before the Committee to provide information and respond to questions.

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[1] At the same time, the Committee announced that allegations in the original complaint concerning the use of Senate staff in connection with the Senator's books would not be a part of any Investigation because of an absence of evidence of imporper use of staff, and that allegations about the solicitation of appearances before various Boston groups also would not be a part of any Investigation, because of an absence of evidence of improper unfluence.

Because the Investigations relating to both the Piranha Press and condominium matters were concerned with possible disciplinary action against Senator Durenberger, the hearings held on June 12 and June 13, 1990 were conducted as "adjudicatory" hearings pursuant to the Committee's Supplemental Procedural Rule 6 (c), and the procedures specified in Rule 6(j) were therefore followed.

Senator Durenberger was accorded all the rights and privileges guaranteed to a respondent under Rule 6, including the right to call and examine witness of his own choice and cross-examine other witnesses. In this case, the Committee subpoenaed all twenty-five potential witnesses identified by Senator Durenberger, as well as those thirty-two witnesses named by Special Counsel. At the close of opening statements in the hearing, Senator Durenberger waived his right to call and question witnesses, to testify as a witness, to have further hearings, to cross examine witnesses previously identified by Special Counsel from whom affidavits had been obtained, and any other due process rights provided by the Committee's Rules. The Senator, through counsel, requested that the Committee decide the case upon the written record contained in his and Special Counsel's exhibits.[2]

II. Evidence Gathered by Special Counsel During the Committee's Proceedings

The evidence gathered by Special Counsel and introduced at the hearing in this matter consisted largely of materials produced voluntarily to the Committee by Senator Durenberger, documents subpoenaed from third parties, and witness affidavits. This evidence is summarized in detail in the Report of Special Counsel. The Committee accepts the findings of Special Counsel, and by unanimous consent adopts the Report of Special Counsel which is incorporated herein and attached hereto as Appendix C.

Generally, the evidence shows that in the fall of 1984, Piranha Press published Senator Durenberger's first book, a collection of "white papers" on national defense and security issues entitled *Neither Madmen Nor Messiahs.* In April of 1986, Piranha Press published a second book by the Senator, a collection of speeches on health care topics entitled *Prescription for Change.*

In early 1985, Senator Durenberger entered into an agreement with Piranha Press pursuant to which he made 113 appearances before various trade associations and other businesses across the country in 1985 and 1986 in promotion of these books. These sponsoring organizations paid Piranha Press a fee, typically between $1,000 and $5,000 plus travel expenses, for the Senator's appearance. Pursuant to its agreement with the Senator, Piranha Press then paid Senator Durenberger $100,000 in quarterly payments during the two year period at issue.

The evidence demonstrates that the arrangement between Senator Durenberger and Piranha Press was not a good faith book publishing or promotional contract, but was instead a means of converting into "stipendary income" fees which would otherwise have been treated as honoraria subject to 2 U.S.C. § 31-1 and 2 U.S.C. § 441i. The evidence further demonstrates that the principal purpose of the agreement was not to promote the sale of Senator Durenberger's books, but was rather to permit the Senator to earn fees for speaking engagements. Over the two year term of the arrangement, the Senator's "promotional appearances" generated approximately $248,300 in speaking fees. In contrast, Piranha Press earned only approximately $15,500 in book sales during that same time period.

The evidence further reveals that the Senator's Piranha Press speeches appear uniformly to have been the result of invitations extended to the Senator in his capacity as a United States Senator to deliver what would otherwise have been treated as traditional honoraria speeches. None was the result of invitations to the Senator to speak about or promote his books, nor were any initiated by Piranha Press.

The evidence also shows that, at the Senator's direction, his staff forwarded to the publisher a number of honoraria speech invitations to be handled instead as Piranha Press appearances. In addition, throughout the term of his agreement with Piranha Press, Senator Durenberger personally designated as Piranha Press appearances what were in reality honoraria appearances.

The evidence gathered by Special Counsel reflects that Senator Durenberger did not mention either his books or his publisher during a great many of his Piranha Press appearances. Often, in those instances when he did mention his books, his only reference was extremely brief or was belittling of the book's contents. The evidence further demonstrates that on several occasions, groups before which the Senator made "promotional appearances" were told that it would not be necessary to display the Senator's books at his appearance. Moreover, Senator Durenberger made a number of "promotional appearances" before health care groups well in advance of the publication of his book on health care—at the time, his only published book was a collection of "white papers" on national defense issues. The evidence further reflects that the Senator's Piranha Press speeches were indistinguishable in substance from his traditional honoraria appearances.

On approximately twenty-three occasions, Senator Durenberger spoke at an event addressed by other Members of Congress. While the other Members treated these appearances as traditional honoraria events, and reported fees received as honoraria, Senator Durenberger treated these appearances as Piranha Press "promotional appearances."

The evidence also shows that on several different occasions, members of the Senator's staff or a representative of Piranha Press insisted that a group before which the Senator was to appear pay a fee in excess of $2,000 for the Senator's appearance. Often, the fee charged was as high as $5,000.[3]

[2] Prior to waiving his rights under the Rules, Senator Durenberger was specifically informed that, although Special Counsel had made a recommendation as to the appropriate sanction, the Committee had made no decision and was not precluded from recommeding any sanction, including expulsion.

[3] Section 441i of the Federal Election Campaign Act (2 U.S.C. § 441i) prohibits the acceptance of honorarium of more than $2,000 for each appearance, speech or article.

The evidence reflects that payment for these "promotional appearances" by the Senator typically was made directly to Piranha Press. However, on twenty-six occasions sponsoring organizations paid Senator Durenberger directly. These checks, totalling approximately $56,000, were deposited into the Piranha Press bank account. Twenty-one of these checks reflected Senator Durenberger's personal endorsement to Piranha Press.

Prior to performing any services under his agreement with Piranha Press, Senator Durenberger through counsel requested and received an advisory opinion from the Federal Election Commission ("FEC") stating that income paid to him from the publisher would be considered a "stipend" rather than "honoraria." The evidence reflects that the request for this opinion did not fully disclose or accurately reflect the terms of the Senator's arrangement with Piranha, and in fact was highly misleading. Specifically, the request did not state that the groups before which the Senator would speak would pay a fee to Piranha Press for his appearance. The request also did not reflect that the Senator's appearances would be the result of invitations to deliver traditional "honoraria" speeches extended to him in his capacity as a United States Senator.

The evidence further reflects that in 1985 and 1986 the Senator failed to timely report his receipt of travel expense reimbursement from forty-three organizations before which he made Piranha Press and Boston area appearances.[4] In addition, on six separate occasions in 1985, Senator Durenberger made Piranha Press appearances in United States Capitol and Senate rooms. The sponsoring organizations paid Piranha Press fees ranging from $250 to $2,000 for these appearances.

In addition, on December 5, 1986 Senator Durenberger addressed the annual meeting of the Pathology Practice Association. In connection with this appearance, the Association's federal political action committee sent a check to the Senator's official campaign committee in the amount of $5,000, payable to "Durenberger for U.S. Senate." This campaign contribution was deposited into the Piranha Press account, from which the Senator was paid by Piranha Press for his "promotional appearances."

As to Senator Durenberger's travel in the Boston metropolitan area, the evidence demonstrates that in 1985 the Senator began to have regular meetings for entirely personal reasons with Dr. Armand Nicholi in Concord, Massachusetts. On eleven occasions in 1985 and 1986 the Senator traveled to Boston to meet with Dr. Nicholi in Concord, and later met with a business or other group in the Boston area. On five additional occasions in 1985 the Senator travelled to Boston solely in order to meet with Dr. Nicholi in Concord, and did not meet with representatives of any business or organization. Typically, the Senator travelled from Boston to Concord, and returned to Boston, by rented limousine. The evidence shows that the cost of this and certain other limousine travel unrelated to official business in the Boston area was paid by various

[4] On July 27, 1989, Senator Durenberger filed amended Financial Disclosure Reports for the 1985 and 1986 calendar years, in which he listed reimbursements of travel expenses recieved from thirty-nine organizations. As of the date of the hearing in this matter, however, Senator Durenberger has not disclosed his receipt of travel reimbursements from four organizations for five trips he made in 1985.

businesses or organizations with a direct interest in legislation within the meaning of Senate Rule 35.

Regarding the condominium matter, the evidence reflects that in 1979, Senator Durenberger purchased a one-bedroom condominium in Minneapolis, Minnesota in which he then stayed during his travels to that city. Senator Durenberger has represented that effective July 28, 1983, he formed a partnership with Roger Scherer, the owner of the condominium unit located directly above his. The Senator and Mr. Scherer each contributed their respective condominium units to this entity. Between August 1983 and March 31, 1987, Senator Durenberger rented his condominium from the partnership at a *per diem* rate of $65. Senator Durenberger claimed and received reimbursement from the United States Senate for his stays in the unit.

The evidence demonstrates that the partnership entity was created as a means of permitting Senator Durenberger to claim reimbursement from the Senate for the cost of renting his condominium unit, and that Senator Durenberger knowingly participated in the backdating of the partnership transaction in order to justify his requests for Senate reimbursements. The evidence further reflects that the partnership entity itself was not conceived until the fall of 1983. The documents memorializing the creation of the partnership, and the transfer of the condominium to the partnership, were not created or executed until early 1984.

Even after the formal creation of the partnership, the Senator held a significant ownership interest in the unit. The evidence reflects that with the Senator's knowledge and authorization the name of the partnership was changed from the "Durenberger-Scherer Partnership" to the "703–603 Association." As a result, the Senator's ownership interest in the condominium was concealed from the Senate Disbursing Office.[5]

The evidence also reflects that in June 1985, the Senator deeded the condominium to a blind trust, established pursuant to the Ethics in Government Act, and approved by this Committee in February 1986. Thereafter, the Senator continued to be an active participant in the management of this trust asset. The evidence reflects that Senator Durenberger repeatedly consulted the trustee concerning the condominium, and further that he participated in negotiating the sale of the unit to the Independent Service Company ("ISC"). In addition, Senator Durenberger periodically requested and received financial information regarding the trust holding.

The evidence also reflects that in June 1987, following the termination of the partnership, Senator Durenberger's attorney informed him that he could not opine that the Senator's claims for Senate reimbursements for the period from 1983 through March 1987 were proper. Senator Durenberger failed to take any action at that time to determine the appropriateness of those reimbursements. Senator Durenberger did not undertake such action until 1989, when various press reports questioned these transactions.

The evidence demonstrates that following the termination of the partnership on March 31, 1987, Senator Durenberger structured a

[5] We also note that Senator Durenberger did not disclose his ownership interest in the partnership on his Financial Disclosure Report.

purported sale of the condominium unit to ISC, a Minnesota business operated by Paul Overgaard, the Senator's personal friend and 1982 Campaign Manager. According to Mr. Overgaard, he would not have entered into this transaction were it not for the Senator's agreement to rent the condominium from ISC, which both parties understood would be financed at least in part through Senate reimbursements.

The evidence reflects that the condominium sale to ISC was structured to be "effective" April 1, 1987. The documentation produced to the Committee in this matter, however, evidences that ISC was not identified as a potential purchaser until the summer of 1987, several months after the purported effective date of the sale. The evidence further demonstrates that the sale was made retroactive to April 1, 1987 in order to justify the Senator's claims of Senate *per diem* lodging reimbursement for his condominium stays back to that date. The documentation in this matter also reflects that the Senator and Mr. Overgaard agreed that ISC would reconvey the property to the Senator on demand.

The evidence shows that in December 1987, ISC generated invoices for the Senator's stays in the condominium for the period from April to October 1987. Based on these newly created invoices, in December 1987 the Senator claimed Senate reimbursement for the past lodging costs.

The evidence also shows that the lease agreement between the parties, pursuant to which Senator Durenberger was renting the property from ISC, was not signed by the Senator until April 1989. Although Mr. Overgaard repeatedly requested completed documentation of the transaction throughout 1988 and 1989, the letter agreement memorializing the terms of the sale, the deed and the related real estate documents were not delivered to Mr. Overgaard until October 1989. The evidence further demonstrates that the Senator's lawyer delayed in completing this paperwork because of the Senator's own dissatisfaction with the financial terms of the transaction. Moreover, because the necessary documentation was never filed with the county Registrar of Titles, as of the initiation of the Committee's proceedings in this matter ISC still did not hold legal title to the property.

Finally, the evidence in this matter reflects that Senator Durenberger claimed and received Senate reimbursement for his condominium lodging costs on a fairly regular monthly basis between February 1988 and November 1989. During this period, however, he made only nine lump sum rental payments to ISC. Senator Durenberger therefore had the use of Senate reimbursement funds for substantial periods of time.

III. Senator Durenberger's Response to Special Counsel's Evidence

The evidence introduced by Senator Durenberger during the hearing in this matter consisted largely of documents also marked as exhibits by Special Counsel, and affidavits from former staff members and witnesses to the condominium transaction.

At the hearing, both Senator Durenberger and his counsel addressed the Committee. Senator Durenberger through his counsel

admitted that mistakes were made and that there have been violations of rules. The Senator's counsel asserted, however, that the Senator acted throughout in good faith and upon the advice of lawyers and other advisors, that any mistakes or violations were the result of the Senator having been inattentive and unwise, and that the Senator had no intent to violate the rules.

As evidence that he acted in good faith in entering into his arrangement with Piranha Press, Senator Durenberger emphasized that he obtained an advisory opinion from the FEC approving the arrangement and concluding that the income to him from the publisher would be a "stipend," not honoraria. Senator Durenberger further asserted that he also asked Ethics Committee staff about the arrangement with his publisher and was told that there was no problem, if the FEC approved.

The Senator's counsel asserted that Senator Durenberger relied upon his personal attorney, Michael Mahoney, to insure that the FEC opinion request included all relevant facts. He further asserted that the Senator relied upon Mr. Mahoney to insure that the Piranha Press arrangement complied with applicable laws and rules.

Senator Durenberger's counsel stated that the Senator proceeded in good faith in implementing his arrangement with Piranha Press. He noted that Senator Durenberger sought and received confirmation from Michael Mahoney that the FEC opinion contemplated the referral to Piranha Press of routine speaking requests made to his Senate office.

Senator Durenberger's counsel acknowledged that the Senator did not "promote" his books or his publisher at all of the Piranha Press appearances. He asserted, however, that Senator Durenberger believed that he fulfilled his obligations under the contract with Piranha Press, whether or not he explicitly promoted his books or the publisher, so that income from speeches held under the auspices of his publisher was covered by the "stipendary" arrangement. Counsel also noted that the publisher never told the Senator exactly what he should do to promote his books or complained about his presentations. Therefore, the Senator believed that he was justified in thinking that a good speech or appearance before an audience promoted his publisher and his books, even if neither was mentioned.

As further evidence of his belief that his Piranha Press income was a "stipend" and that he was proceeding in good faith, Senator Durenberger and his counsel noted that there was never an attempt to conceal the Senator's income from the Piranha Press arrangement, and that he disclosed it on his calendar year 1985 and 1986 Financial Disclosure forms. The Senator and his counsel further noted that, during the implementation phase of the Piranha Press arrangement, the Senator described his arrangement to several other Senators as a legitimate way of earning income not subject to the honorarium limits. The Senator's counsel argued that the Senator would not have done so had he believed that the arrangement was in any way unethical or improper.

Senator Durenberger's counsel submitted that the Senator's failure to disclose the travel reimbursements received in connection with the Piranha Press and Boston area appearances was due

solely to the oversight of his lawyers and members of his staff who were handling this matter for him. Further, upon being informed of his "technical" violation, Senator Durenberger amended his reports. Thus, the Senator's counsel argued, no sanction for this mistake in reporting is required.

As to the handling of the campaign contributions from the political action committee of the Pathology Practice Association, Senator Durenberger's counsel asserted that the Senator likely never saw or knew of this check, that Piranha Press should have made some further inquiry upon receiving the check but did not, and that it would be inappropriate to impose a sanction under these facts.

Regarding the limousine services received in connection with his visits to Concord, Massachusetts, the Senator through counsel acknowledged violations of Senate Rule 35. His counsel asserted, however, that the Senator did not discover how expensive the use of these limousines was until this investigation began. Furthermore, the Senator's counsel stated that on many of the occasions when the Senator received such service it facilitated his attendance at an appearance which had brought him to Boston. The Senator's counsel therefore contended that a harsh sanction is not appropriate.

Senator Durenberger's counsel argued that the Senator's six Piranha Press speeches made in U.S. Capitol facilities in 1985 did not violate the law, that the Rules Committee had not specifically prohibited speaking for a fee in these rooms, and that it would therefore be inappropriate to sanction the Senator for this conduct.

As to the condominium matter, Senator Durenberger stated that he sought reimbursement for staying in the Minneapolis condominium in good faith reliance upon the advice of his lawyers and other advisors. Moreover, Senator Durenberger stated that his reliance upon his lawyers and advisors demonstrates his commitment to conduct himself in compliance with the rules.

Specifically, Senator Durenberger noted that he was advised in December 1983 by Randall Johnson that he could claim *per diem* reimbursement from the Senate for his condominium stays. He also pointed to a memorandum from a member of his Senate office staff advising him that the arrangement had been discussed with the staffs of the Senate Rules Committee and Senate Ethics Committee. Finally, the Senator noted that attorneys Richard Langlais, Donald Lattimore, Michael Mahoney and David Steingart all were involved in advising him on various aspects of the partnership arrangement.

Senator Durenberger's counsel also asserted that the Senator and Roger Scherer agreed to place their respective condominiums into some form of "joint business venture" as of July 28, 1983, and that the documents which were later created and signed merely reflected the historical date of that understanding.

Regarding the collection of Senate reimbursement after the termination of the partnership, the Senator stated through counsel, as did Mr. Overgaard in his affidavit, that Mr. Overgaard had agreed in late 1986 to buy the condominium. Although the sale initially was to be effective as of January 1, 1987, because the attorneys were slow to dissolve the partnership it could not be made effective until April 1, 1987.

Mr. Overgaard and Mr. Mahoney stated in affidavits submitted by the Senator that the Senator's agreement with ISC was in the nature of a Contract for Deed. The Senator's counsel stated that the attorneys' failure to prepare the documents in a timely manner does not affect the April 1, 1987 "effective" date of the sale. The Senator also noted that he relied not only upon the advice of his personal attorney, Michael Mahoney, in claiming reimbursement after April 1, 1987, but also upon the advice of Douglas Kelley, his Administrative Assistant at that time and a former Assistant United States Attorney.

As to his conduct in connection with his Qualified Blind Trust, the Senator through counsel admitted to violations of the Ethics in Government Act. The Senator's counsel stated, however, that Mr. Mahoney (the Senator's trustee and attorney) never advised the Senator that he should refrain from any involvement in this real estate sale and that, in fact, Mr. Mahoney consulted with him about the sale. The Senator's counsel acknowledged that the condominium was not an appropriate asset for placement in a blind trust, because the nature of the asset and its continued use defied any notion that the Senator would not have knowledge of it.

IV. Findings of the Committee

The Committee makes the following findings respecting the matters which are the subject of the Committee's Investigation.

Senator Durenberger did not proceed in good faith in instituting his arrangement with Piranha Press and in obtaining an advisory opinion from the FEC. Although the Senator's arrangement with Piranha Press was patently different from a customary author-publisher agreement, the facts which would clearly demonstrate the difference were not included in the FEC opinion request.

The Committee further finds that Senator Durenberger's arrangement with Piranha Press was simply a mechanism to evade the statutory limitations on honoraria, and that the monies paid for the Senator's Piranha Press appearances by the sponsoring organization were in reality honoraria. The Committee has concluded that none of Senator Durenberger's 113 "promotional" fee-earning Piranha Press appearances was initiated through the publisher, nor were any the result of requests for the Senator to appear to "promote" his book or publisher. Instead, each of the Senator's Piranha Press appearances resulted from routine honoraria speech requests made to the Senator personally or through his Senate office.

Senator Durenberger did not proceed in good faith in implementing his arrangement with Piranha Press. The Committee has found no evidence that the Senator made any credible effort to promote either his book(s) or the publisher at his Piranha Press appearances. At the Senator's direction, speaking invitations which were accepted as honoraria events prior to the existence of the Senator's arrangement with Piranha Press were treated as "promotional" appearances, and the money was treated as a "stipend" when in fact it was "honoraria" income. The Committee finds that Senator Durenberger personally designated routine honoraria speaking invitations as Piranha Press "promotional appearances." For exam-

ple, in one early appearance, the Senator arranged the event as an "honorarium" appearance, made no mention of his book or publisher during the appearance, and personally requested that the sponsor pay his appearance fee to Piranha Press.

The Committee finds that Senator Durenberger failed to disclose the receipt of certain reimbursements for trips during calendar year 1985 and 1986 in connection with the Piranha Press arrangement and his Boston area appearances. The disclosure requirement for travel reimbursements is well known to Members. In this regard, the Committee notes that while Senator Durenberger reported reimbursements paid to him in connection with his honorarium appearances, reimbursements received from certain groups which sponsored Piranha Press and Boston area appearances were omitted from his Financial Disclosure Reports.

The Committee further finds that Senator Durenberger knowingly accepted gifts of limousine service between Boston and Concord, Massachusetts and in the Boston area in connection with certain trips to Boston during 1985 and 1986. The Senator knew that the trips to Concord were to conduct personal business, and that the limousine service was not a "necessary expense" of any appearance he was making. The Senator knew or should have known that the groups providing the limousine service had a direct interest in legislation before Congress and that the value of the limousine service exceeded the limits established by the Senate Gifts Rule.

In connection with Senator Durenberger's 1985 appearance before the Pathology Practice Association, the Committee finds that the Association's political action committee paid to the Senator's reelection committee a $5,000 campaign contribution in the form of a check made out to "Durenberger for U.S. Senate". The check was deposited into the account of the Senator's publisher, Piranha Press. The Committee concludes that this campaign contribution was converted to Senator Durenberger's personal use in violation of Senate Rule 38, paragraph 2.

In light of these factual findings and based upon the evidence before it, the Committee has unanimously concluded as follows with respect to the violations as noticed in the Committee's Resolution of February 22, 1990:

1. Senator Durenberger violated the honoraria limits established by 2 U.S.C. § 31–1 and 2 U.S.C. § 441i by accepting payments in excess of such limits as consideration for 113 speeches or appearances during calendar years 1985 and 1986.

2. Senator Durenberger violated the provisions of Senate Rule 34 (The Ethics in Government Act of 1978, as amended) by failing to report on his Financial Disclosure Reports for calendar years 1985 and 1986 the acceptance of reimbursement from forty-three organizations for the necessary expenses of certain travel connected with Piranha Press and Boston area appearances.

3. A campaign contribution was converted to Senator Durenberger's personal use in violation of Senate Rule 38, paragraph 2, by transferring to Piranha Press a $5,000 check made out to "Durenberger for U.S. Senate."

4. Senator Durenberger accepted gifts of ground transportation (limousine service) in the Boston area in violation of the Senate Rule 35 during 1985 and 1986, in connection with personal travel to Concord, Massachusetts.[6]

As to the condominium transactions, the Committee finds that Senator Durenberger's partnership arrangement with Roger Scherer was conceived and structured solely as a mechanism to enable Senator Durenberger to claim Senate reimbursement for overnight stays in his condominium, thereby effectively transferring to the United States Senate and the American taxpayer the cost of maintaining what was essentially his personal Minneapolis residence.

The Committee further finds that Senator Durenberger knowingly participated in the backdating of this transaction, and that he knowingly participated in changing the name of the partnership from the "Durenberger/Scherer Partnership" to "703/603 Association." The clear effect of this name change was to conceal Senator Durenberger's ownership interest in the condominium from the Senate Disbursing Office.

The Committee further finds that Senator Durenberger subsequently structured a purported sale of the condominium to ISC, and knowingly participated in the backdating of that transaction, in order to justify claims for Senate *per diem* lodging reimbursements. The Committee finds that Mr. Overgaard of ISC was induced to purchase the condominium by the Senator's agreement to rent the unit a sufficient number of days to pay all costs associated with the unit. Senator Durenberger entered into this agreement with the express understanding that such rent would be financed largely by Senate *per diem* reimbursement payments. The Committee also finds that Senator Durenberger was in effect only temporarily "parking" the condominium with ISC.

The Committee further finds that in late 1987, Senator Durenberger directed the submission to the Senate Disbursing Office of vouchers, supported by backdated invoices from ISC, claiming Senate reimbursement for his stays in the condominium during the period from April to June 1987, when he was the true owner of the property.

Finally, the Committee finds that after the condominium was placed in the Senator's Qualified Blind Trust, Senator Durenberger was aware on a continuing basis of the status of the condominium trust asset, was an active and knowing participant in the management of this asset, and repeatedly consulted with his trustee regarding the asset.

Finally, the Committee finds that Senator Durenberger did encounter severe emotional strain from events in his personal life. The Committee further finds that the severe emotional and traumatic events in the Senator's personal life impaired his judgement. The Committee finds that these factors do not excuse the Senator's conduct.

In light of these factual findings and based upon the evidence before it, as to the violations noticed in the Committee's Resolution dated May 9, 1990, the Committee has unanimously concluded that

[6] In accordance with the recommendation of Special Counsel, the Committee has concluded that it will not recommend sanction on the basis of the Senator's use of U.S. Senate and Capitol facilities in 1985 for fee-earning Piranha Press appearances.

Senator Durenberger abused his United States Senate Office and misused United States Senate funds through a pattern of improper conduct which has brought discredit upon the United States Senate. As part of his public trust, a Senator has a duty to deal honestly and forthrightly with the Senate and its Members, officers, and employees. This duty embodies an obligation not to conceal relevant information. The Committee concludes that Senator Durenberger violated his public trust in connection with his receipt of reimbursements for staying in a condominium which was essentially his personal residence in Minneapolis. A Senator's obligations to the public should not be subordinated to his personal financial interests. The Committee finds that this occurred here.

The Committee further concludes that Senator Durenberger knowingly communicated and corresponded with the trustee of his Qualified Blind Trust from February 1986 until December 1989, in violation of The Ethics in Government Act, specifically 2 U.S.C. § 702(e)(3)(C)(vi), 2 U.S.C. § 702(e)(3)(C)(vii), and 2 U.S.C. § 702(e)(6)(B).

V. Recommendations and Referrals

A. Recommendation of Denouncement

Based on the findings specified above, the Committee hereby recommends that the Senate agree to the following Resolution:

Resolved: That the conduct of Senator Durenberger in connection with his arrangement with Piranha Press, his failure to report receipt of travel expenses in connection with his Piranha Press and Boston area appearances, his structuring of real estate transactions and receipt of Senate reimbursements in connection with his stays in his Minneapolis condominium, his pattern of prohibited communications respecting the condominium, his repeated acceptance of prohibited gifts of limousine service for personal purposes, and the conversion of a campaign contribution to his personal use, has been reprehensible and has brought the Senate into dishonor and disrepute;

That Senator Durenberger knowingly and willingly engaged in conduct which was in violation of statutes, rules and Senate standards and acceptable norms of ethical conduct;

That Senator Durenberger's conduct was clearly and unequivocally unethical, and;

That, therefore, pursuant to Article 1, Section 5, Clause 2 of the United States Constitution and Senate Resolution 338 of the 88th Congress, as amended, Senator David Durenberger be, and hereby is:

(1) denounced by the United States Senate;

(2) referred to the Republican Party Conference for attention; and

(3) directed to reimburse $29,050 plus interest to the Senate; and to pay to charities with which he has no affiliation $93,730, less state and federal taxes previously paid on that amount, in excess honoraria improperly retained during 1985 and 1986, such payments to be made at the regular intervals over the balance of his United States Senate term.

B. Recommendation Regarding Senate Rules

Pursuant to Supplementary Rule 9(c) the Committee recommends the following changes in Senate Rules and policies.

The Committee's investigation revealed much uncertainty surrounding the interpretation of 40 U.S.C. § 193d, and the Committee on Rules and Administration's "Policy for Use of Senate Rooms, The Russell Rotunda and Courtyard, and The Hart Atrium." To provide clear and unequivocal guidance for the future, the Committee recommends that the Rules Committee's Policy be amended to expressly provide that "honorarium" and other "fee-earning" appearances or speeches are prohibited in Senate controlled space.

C. Reporting to the Federal Election Commission and the Department of Justice

Pursuant to Rule 8(a) of the Committee's Rules, the Committee will refer the matter to the Federal Election Commission and the Department of Justice for their attention.

This Report of the Senate Select Committee on Ethics on the Investigation of Senator David Durenberger is approved for submission to the Senate, and we recommend expeditious consideration of the Resolution contained herein.

Howell Heflin,
Chairman.
Warren B. Rudman,
Vice Chairman.
David Pryor.
Terry Sanford.
Jesse Helms.
Trent Lott.

July 18, 1990.

APPENDIX A

Resolution for Investigation

Whereas, the Select Committee on Ethics on March 1, 1989 initiated a Preliminary Inquiry into allegations of misconduct by Senator David Durenberger, and notified Senator Durenberger of such action on March 2, 1989; and

Whereas, on August 3, 1989, on the basis of information which became available during the Preliminary Inquiry the Committee voted to retain Special Outside Counsel Robert Bennett to conduct an Initial Review into certain of the allegations; and

Whereas, the Committee has received the Final Report of Special Outside Counsel relating to the allegations; and

Whereas, on the basis of such evidence, there are possible violations of law, or violations of Senate Rules within the Committee's jurisdiction under Senate Resolution 338 (88th Congress), as amended, or there is possible improper conduct which may reflect upon the Senate (as contemplated in Section 2(a)(1) of S. Res. 338, 88th Congress, as amended);

It is therefore resolved:

(a) That the Committee determines there is substantial credible evidence which provides substantial cause for the Committee to conclude that violations within the Committee's jurisdiction may have occurred, to wit:

(1) Senator Durenberger may have violated the honoraria limits established by 2 U.S.C. 31–1 and 2 U.S.C. 441i by accepting payments in excess of such limits as consideration for speeches or appearances during calendar years 1985 and 1986.

(2) Senator Durenberger may have violated the provisions of Senate Rule 34 (The Ethics in Government Act of 1978, as amended) by failing to report in his financial disclosure reports for calendar years 1985 and 1986 the acceptance of reimbursement for the necessary expenses of travel undertaken in connection with appearances related to Piranha Press Inc.

(3) Senator Durenberger may have converted a campaign contribution to personal use in violation of Senate Rule 38, paragraph 2, and may have failed to report and deposit a campaign contribution in violation of Section 434(b)(2) of the Federal Election Campaign Act and FEC regulations, by transferring to Piranha Press Inc. a $5,000 check made out to "Durenberger for U. S. Senate."

(4) Senator Durenberger may have violated 40 U.S.C. 193d and the Senate Rules Committee's regulation prohibiting the commercial use of Senate space, when he was paid an honorar-

ium or other fee for six appearances in Senate controlled space subject to the statutory and Rules Committee prohibition.

(5) Senator Durenberger may have accepted gifts of ground transportation (limousine service) in the Boston area in violation of the Senate Gifts Rule (35) during 1985 and 1986, in connection with personal travel to Concord, Massachusetts.

(b) That the Committee shall proceed to an Investigation under Committee Supplementary Procedural Rule 5; and

(c) That Senator Durenberger shall be given timely written notice of this resolution and informed of a respondent's rights pursuant to the Rules of the Committee; and that Special Outside Counsel shall provide to the Chairman and Vice Chairman a preliminary draft of such written notice no later than February 26, 1990.

[BY HAND]

MARCH 1, 1990

Hon. DAVID F. DURENBERGER,
U.S. Senate,
Washington, DC.

DEAR SENATOR DURENBERGER: On Thursday, February 22, 1990, the United States Senate Select Committee on Ethics voted to conduct an Investigation, pursuant to Committee Supplementary Rule 5, of certain matters which previously had been the subject of a Preliminary Inquiry and Initial Review. By this letter, the Committee is providing notice of that decision to you, together with a statement of the possible violations, as required by Committee Supplementary Rule 5(c). Relevant evidence has been marked and is referred to herein as "Special Counsel Ex." Copies of these exhibits are appended hereto.

The Committee has determined that there is substantial credible evidence providing substantial cause for the Committee to conclude that violations within its jurisdiction may have occurred. Accordingly, the Investigation will examine the following matters:

1. Whether you may have violated 2 U.S.C. § 31-1 and 2 U.S.C. § 441i through an arrangement with your publisher, Piranha Press, pursuant to which you made approximately 113 appearances and/or speeches during 1985 and 1986 before various businesses, associations and other organizations, each of which was charged a fee for your appearance, and in exchange for which you received $100,000 from Piranha Press. *See* Special Counsel Exs. 1-32, 34-49, 51-66, 67-78, 80-118, 120-125, 128-150, 152-154, 157-160.

2. Whether you may have violated Senate Rule 34 (The Ethics In Government Act, as amended) by failing to disclose in a timely fashion on your annual financial disclosure forms for 1985 and 1986 the reimbursement of travel expenses related to approximately forty-three appearances and/or speeches. *See* Special Counsel Exs. 4, 6, 9-10, 17, 21, 27, 30, 37, 39, 40, 42, 44, 46, 48, 51, 52, 57, 74, 80-81, 84-87, 92, 95, 100, 103, 106-107, 109, 111, 114, 116-118, 121-123, 125, 129, 131, 135-136, 141-142, 146-150, 152, 160-161.

3. Whether you may have converted a campaign contribution to your personal use in violation of Senate Rule 38, paragraph 2, and failed to report and deposit a campaign contribution in violation of 2 U.S.C. § 434 and 11 CFR § 103.3, by transferring to Piranha Press the Pathology Practice Association Federal Political Action Committee check number 144 in the amount of $5,000, dated December 30, 1986, made payable to "Durenberger for U.S. Senate." *See* Special Counsel Ex. 25.

4. Whether you may have violated 40 U.S.C. § 193d, as interpreted by the Senate Committee on Rules and Administration, by giving speeches in U.S. Capitol and Senate facilities on or about March 3, 1985; March 25, 1985; April 11, 1985; April 24, 1985; September 9, 1985; and November 12, 1985, in exchange for payments directed to Piranha Press totalling approximately $6,250. *See* Special Counsel Exs. 41, 60, 61, 157.

5. Whether you may have violated Senate Rule 35 by accepting gifts of limousine service for round trip transportation between the Boston metropolitan area and Concord, Massachusetts, on approximately 21 occasions in 1985 and 1986 for a total value of approximately $4,935. *See* Special Counsel Exs. 5, 17, 21, 33, 42, 50, 67, 76, 79, 107, 119, 126-127, 151, 155-156, 160.

6. Whether you may have engaged in conduct, as described above, which reflects upon the Senate as set forth in Section 2(a)(1) of Senate Resolution 338, as amended. *See* Special Counsel Exs. 1-161.

The Committee will consider all relevant and probative evidence relating to these matters, including but not limited to that cited above, documents and other materials provided to the Committee by the individuals and organizations listed in Attachment A, deposition testimony of witnesses listed in Attachment B, and materials previously provided to the Committee by you.

You will be afforded all the rights provided by the Committee Supplementary Rules (copy enclosed), including the opportunity to present a statement and to respond to questions from Members of the Committee, Committee staff, or Special Counsel. Finally, should you elect to avail yourself of the right to a hearing pursuant to Rule 5(d), the Committee would ask that your counsel and Special Counsel to the Committee agree on a date for the hearing to commence.

Sincerely,

HOWELL HEFLIN,
Chairman.
WARREN B. RUDMAN,
Vice Chairman.

Attachments.

ATTACHMENT A—ORGANIZATIONS AND INDIVIDUALS THAT PRODUCED DOCUMENTS TO THE U.S. SENATE SELECT COMMITTEE ON ETHICS IN THE MATTER OF SENATOR DAVID F. DURENBERGER

A&A Limousine Renting, Inc.
A.B. Laffer Associates
Abbott Northwestern Hospital
Ackerly Communications, Inc.

Ad Hoc Committee for Western Utilities
American Association of Equipment Lessors
American Association of Nurse Anesthetists
American Association for Respiratory Therapy
American Bankers Association
American Business Conference
American College of Cardiology
American College of Physician Executives
American College of Radiology
American College of Surgeons—Minnesota Chapter
American Council for Capital Formation
American Group Practice Association
American Healthcare Institute
American Healthcare Systems
American Hospital Association
American Insurance Association
American International Automobile Dealers Association
American Medical Association
American Medical Association Auxiliary, Inc.
American Medical Association Political Action Committee (AMPAC)
American Occupational Therapy Association, Incorporated
American Podiatric Medical Association
American Protestant Health Association
American Psychiatric Association
American Society of Association Executives
American Society of Internal Medicine
American Society of Plastic & Reconstructive Surgeons
American Southwest Financial Corp.
American Waterways Operators
Americans for Generational Equity
Annenberg Center for Health Sciences, Eisenhower Medical Center
Arthur Anderson & Co.
Association of Academic Health Centers
Association of Data Processors
Association of Metropolitan Water Agencies
Bartlett, Charles
Bishop, Cook, Purcell & Reynolds
Blue Cross/Blue Shield of Michigan
Blue Cross of California
Bristol-Myers Company
Brown University
Campbell—Raupe Associates, Inc.
Capitol Associates, Incorporated
Carey of Boston
Castroviejo Society—World Congress on the Cornea
Catholic Charities USA
Cedars—Sinai Medical Center
Center for Cost Effective Care (Brigham and Women's Hospital/Harvard Medical School)
Chemical Manufacturers Association
Chicago Council on Foreign Relations
Civil Services, Incorporated
Clark Abt for Congress

Computer & Business Equipment Manufacturers Association (CBEMA)
CooperVision, Incorporated
Coopers & Lybrand
Council of Community Hospitals
Council for Responsible Nutrition
Council of Industrial Development Bond Issuers
Council of Medical Specialty Societies
Curtin, Mahoney, Cairns & Walling
D.C. Society of Internal Medicine
Distilled Spirits Council of the United States, Inc.
Drexel Burnham Lambert, Incorporated
Duffy Wall, Incorporated
Economic Club of Detroit
Employers Council on Flexible Compensation
Equitable Life Assurance Society
Farmland Industries, Incorporated
Federation of American Hospitals
Financial Executives Institute
Fleishman—Hillard, Inc.
Foundation for American Communications
General Electric Company
General Mills
Goldman, Sachs and Company
Graefe, Fred
Grocery Manufacturers of America, Incorporated
Group Health Association of America, Inc.
Hale and Dorr
Harvard School of Health Policy
Health America Corporation
Health Care Financial Management Association
Health Data Institute
Health Industry Distributors Association
Health Industry Manufacturers Association
Herrick and Smith
Hospital Corporation of America
Hospital Council of Central California
Hospital Council of Southern California
Hughes Aircraft Company
Information Resources, Inc.
Invest to Compete Alliance
Investors Marketing Association
John Hancock Mutual Life Insurance Company
Johnson & Johnson
Kaiser Foundation Health Plan of G.A., Inc.
Kendall and Associates
King & Spaulding
Laxalt, Washington, Perito & Dubue
Lewin & Associates, Incorporated
Liberty Mutual Insurance Co.
Life insurance Association of Massachusetts
Liz Robbins Associates
Lockheed Corporation
Mahoney, Michael

Manning, Selvage & Lee
Maryland Hospital Association
Massachusetts Mutual Life Insurance Co.
McDermott, Will & Emery
McGraw-Hill
Medical Group Management Association
Medical Society of the District of Columbia
Medtronic, Incorporated
Midwest Pension Conference, Chicago Chapter
Miller & Schroeder Municipals, Inc.
Mintz, Levin, Cohen, Ferris, Glovsky and Popeo, P.C.
Montgomery County Medical Society
Morgan Guaranty Trust Company
National Association of Alcoholism Treatment Programs, Inc.
National Association of Bond Lawyers
National Association of Chain Drug Stores, Inc.
National Association of Container Distributors
National Association of Realtors
National Association of Senior Living Industries
National Association of Wholesale Distributors
National City Bank of Cleveland
National Council on Alcoholism
National Grocery Association
National Health Lawyers Association
National Homebuilders
National Machine Tool Builders Association (NMTBA)
National Medical Enterprises, Inc.
National Multi-Housing Council
National Restaurant Association
National Rural Electric Cooperative Association (NRECA)
New England Mutual Life Insurance Company
Northrop Corporation
Norwest Bank Midland, N.A.
O'Conner & Hanan
Outdoor Advertising Assoc. of America, Incorporated
Outpatient Ophthalmic Surgery Society
Owens Illinois
Paine Webber
Palo Alto Medicial Foundation
Pathology Practice Associates
Pathology Practice Association Federal Politicial Action Committee
Pfizer, Incorporated
Pitney Bowes, Incorporated
Powers, Pyles, Sutter & O'Hare
Project HOPE
Prudential-Bache Securities
Public Securities Association
Puerto Rico Hospital Association
Puerto Rico, USA Foundation
R.J.R. Nabisco, Inc.
R.J.R. Tobacco, Inc.
Raytheon Company
Renewable Fuels Association
Riverside Methodist Hospital

Rochester Area Hospital Corporation
Russell Reynolds Associates, Inc.
Salomon Brothers, Incorporated
Sarasota Memorial Hospital
Shawmut Bank, N.A.
Securities Industry Association
Stanford University Center for Economic Policy Research
State Government Education and Research Foundation
The Fertilizer Institute
The Health Central Corporation
The Hospital Association of Pennsylvania
The Tobacco Institute
The Washington Campus
Thompson, Hine & Flory
Travenol Laboratories, Incorporated
TRW, Incorporated
U.S. Chamber of Commerce
U.S. Health Corp.
University of Wisconsin World Affairs Seminar
Valve Manufacturers Association
W.R. Grace & Company
Warner Lambert Company
Washington Discussion Group
Weil, Gotshal & Manges
White, Fine & Verville
William & Jensen

Attachment B—Depositions Conducted in the Matter of Senator David F. Durenberger

DEPONENT AND DATE

Diamond, Gary, 4/26/89, 5/24/89; Graefe, Frederick, 1/11/90; Hanbery, Donna, 4/28/89, 5/24/89; Horner, Thomas, 4/27/89, 5/24/89; Kelley, Douglas, 4/27/89, 5/24/89; Mahoney, Michael, 4/27/89, 5/24/89, 2/20/90; Mathison, Jodi, 5/5/89; Roan, Jim, 4/26/89; Schraeder, Jon, 4/28/89; Shaw, Heidi, 5/08/89; Stern, Samuel, 4/26/89; Wilbur, Robert, 12/19/89.

APPENDIX B

RESOLUTION FOR INVESTIGATION

Whereas, the Select Committee on Ethics on December 21, 1989 initiated a Preliminary Inquiry into allegations of misconduct by Senator David Durenberger respecting his receipt of Senate reimbursements for use of a Minneapolis condominium, and notified Senator Durenberger of such action; and

Whereas, the Committee retained Special Counsel Robert S. Bennett to conduct the Inquiry under the direction of the Chairman and Vice Chairman; and

Whereas, the Committee has received the Report of Special Counsel relating to the allegations; and

Whereas, on the basis of such evidence there is possible improper conduct which may reflect upon the Senate (as contemplated in Section 2(a)(1) of S. Res. 338, 88th Congress, as amended) and possible violations of laws or Senate Rules within the Committee's jurisdiction under Senate Resolution 338 (88th Congress);

It is therefore resolved:

(a) That the Committee determines that there is substantial credible evidence which provides substantial cause for the Committee to conclude that violations within the Committee's jurisdiction may have occurred, to wit:

(1) Senator Durenberger may have abused his United States Senate Office and misused United States Senate funds through a pattern of improper conduct which has brought discredit upon the United States Senate. Such conduct may have included the submission of misleading travel reimbursement vouchers to the Senate Disbursing Office, the misrepresentation of the ownership of the property for which he was claiming lodging reimbursement, and the backdating of real estate transactions and certain documentation relating to those transactions.

(2) Senate Durenberger also may have violated certain provisions of the Ethics in Government Act relating to the administration of his qualified blind trust, including those provisions relating to communications regarding the trust and its assets.

(b) That the Committee, pursuant to Committee Supplementary Procedure Rules 3(d)(5) and 4(f)(4), shall proceed to an Investigation under Committee Supplementary Procedural Rule 5; and

(c) That Senator Durenberger shall be given timely written notice of this resolution and informed of a respondent's rights pursuant to the Rules of the Committee.

MAY 14, 1990.

Hon. DAVID F. DURENBERGER,
U.S. Senate,
Washington, DC.

DEAR SENATOR DURENBERGER: On Wednesday, May 9, 1990, the United States Senate Select Committee on Ethics voted to conduct an Investigation, pursuant to Committee Supplementary Rule 5, of a matter which previously had been the subject of a Preliminary Inquiry. By this letter, the Committee is providing notice of that decision to you, together with a statement of the possible violations, as required by Committee Supplementary Rule 5(c).

The Committee has determined that there is substantial credible evidence which provides substantial cause for the Committee to conclude that a violation within its jurisdiction may have occurred. The Investigation concerns certain transactions involving a condominium in Minneapolis, Minnesota, as well as your receipt of Senate reimbursements for using the condominium on certain days between August 1983 and mid-November 1989.

The Investigation will examine whether you may have abused your United States Senate Office, and misused United States Senate funds through a pattern of improper conduct which brings discredit upon the United States Senate. Such conduct may have included the submission of misleading travel reimbursement vouchers to the Senate Disbursing Office; the misrepresentation of the ownership of the property for which you claimed lodging reimbursement from the United States Senate; and the back dating of the "Durenberger-Scherer" partnership, the transfer of the condominium property to that partnership, and the purported sale of the condominium to the Independent Service Company, and documentation relating to those transactions.

The Investigation also will examine whether you may have violated the provisions of the Ethics in Government Act relating to qualified blind trusts, including Sections 702(e)(3)(c) and 702(e)(6) relating to communications regarding the trust and its assets. *See* Special Counsel Exs. 258–352, attached hereto.

The Committee will consider all relevant and probative evidence relating to this matter, including but not limited to that cited above, documents and other materials provided to the Committee by other individuals and organizations, and deposition testimony of witnesses. Copies of these materials have previously been provided to your counsel. The Committee also will consider materials previously provided to the Committee by you.

You will be afforded all the rights provided by the Committee Supplementary Rules (copy attached), including the opportunity to present a statement and to respond to questions for Members of the Committee, Committee Staff, or Special Counsel.

Finally, please be advised that the Committee has voted to conduct public adjudicatory hearings in connection with the Investigation of this matter, and the Investigation into other matters previously announced by the Committee on February 22, 1990 and will be held in Room 216, Hart Senate Office Building, Washington,

D.C. Hearings will commence at 9:30 a.m. on June 12, 1990. Two weeks of hearings have been scheduled.

Cordially,

HOWELL HEFLIN,
Chairman.
WARREN B. RUDMAN,
Vice Chairman.

APPENDIX C

FINAL REPORT OF SPECIAL COUNSEL IN THE MATTER OF SENATOR DAVID F. DURENBERGER

CONTENTS

I. Introduction

Special Counsel submits this Report in the matter of Senator David F. Durenberger pursuant to Rule 5(f)(1) of the Supplementary Procedural Rules of the United States Senate Select Committee on Ethics [1] (the "Committee"). This Report contains findings and recommendations based upon the evidence gathered during the course of the Committee's proceedings in this matter.

Initially, the Report reviews the procedural background of the matters which are the subject of the Committee's Investigation. The scope and extent of the Committee's examination of the evidence relating to each of these matters is discussed, and the proceedings before the Committee during the public adjudicatory hearing are described.

The Report then addresses the scope of the Committee's authority to investigate and sanction misconduct of Members, and briefly reviews Senate precedents. A listing of the laws, Senate rules and other ethical considerations applicable to the Committee's Investigation in this matter also is included.

The Report then discusses in detail the evidence relevant to each of the matters under Investigation. Based upon this evidence, and pursuant to Committee Rule 5(f), Special Counsel makes a number of findings of violations of law and Senate Rules by Senator Durenberger, as well as findings regarding his asserted defenses. Finally, also pursuant to Committee Rule 5(f), Special Counsel submits a recommendation as to the sanction to be imposed on Senator Durenberger for the violations that he committed.

II. Summary

The relevant factual background and Special Counsel's findings in this matter are summarized briefly below.

A. Piranha Press, Gifts Of Limousine Transportation and Related Matters.

1. SENATOR DURENBERGER'S ARRANGEMENT WITH PIRANHA PRESS

Between 1984 and 1986, Piranha Press published two books authored by Senator Durenberger: *Neither Madmen nor Messiahs and Prescription for Change.* Under the terms of his agreement with Piranha Press, Senator Durenberger made approximately 113 book "promotional appearances" before various trade associations, colleges and businesses during 1985 and 1986. Each of these groups paid Piranha Press a fee for the Senator's appearance, typically between $1,000 and $5,000 plus travel expenses. Piranha Press in turn paid the Senator $100,000 in quarterly installments over a two year period.

Special Counsel finds that the arrangement between Senator Durenberger and Piranha Press was simply a means of converting into "stipendiary income" that which would otherwise have been honoraria income, and that Senator Durenberger therefore violated 2 U.S.C. § 31-1 and 2 U.S.C. § 441i. Special Counsel also finds that

[1] Hereinafter cited as the "Committee Rules."

Senator Durenberger knowingly and actively participated in this arrangement, the obvious effect of which was to circumvent statutory limitations on honoraria income.

Specifically, Special Counsel finds as follows:

The Senator's contract with Piranha Press did not constitute a good faith book publishing or promotional arrangement and instead was, in the words of a publishing industry expert, an "extraordinary" arrangement as measured against the norms within the industry.

The principal purpose of the Senator's agreement with Piranha Press was to permit the Senator to earn fees for speaking engagements, rather than to promote the sale of his books. Over the term of the agreement, Senator Durenberger's appearances generated approximately $248,300 in speaker's fees, as compared to approximately $15,500 in book sales.

None of the Senator's 113 Piranha Press appearances was the result of invitations to the Senator to appear and promote his books. Similarly, neither Gary Diamond nor Piranha Press initiated any of these appearances. Instead, all were the result of invitations to deliver a traditional honorarium speech, extended to the Senator in his capacity as a United States Senator.

Throughout the term of his agreement with Piranha Press, Senator Durenberger personally designated as Piranha Press speeches certain honorarium speech invitations received in his United States Senate office.

As Senator Durenberger approached his honoraria income ceiling in 1985, speech invitations simply were forwarded by his United States Senate staff to Piranha Press to be treated as promotional appearances.

Senator Durenberger made a number of "promotional appearances" in which he mentioned neither his books nor his publisher. Often, the groups before which the Senator made these appearances were told that it was not necessary to display the books. Other organizations, after being notified that the Senator's appearance would be in promotion of his books, were unable to obtain copies of those books to distribute to their attendees.

The Senator made a number of "promotional appearances" before health care groups well before the publication of his book on health care topics.

Twenty-six payment checks payable to Senator Durenberger for his appearances, totalling $56,750, were deposited into the Piranha Press bank account—twenty-one of which reflected Senator Durenberger's personal endorsement to Piranha Press.

At twenty-three appearances treated by Senator Durenberger as Piranha Press events, other Members of Congress also spoke. Unlike Senator Durenberger, these other Members reported receipt of honoraria income for their appearances.

On several occasions members of the Senator's staff or representatives of Piranha Press insisted that a group for which the Senator was to appear pay a fee in excess of $2,000 for the Senator's appearance.

Senator Durenberger was cautioned against the arrangement with Piranha Press by several of his advisors.

Special Counsel finds that through this pattern of conduct, Senator Durenberger has brought discredit upon the United States Senate.

2. GIFTS OF LIMOUSINE TRANSPORTATION

In 1985, Senator Durenberger began to have regular meetings for personal reasons with Dr. Armand Nicholi in Concord, Massachusetts, approximately twenty miles from Boston. Senator Durenberger often made the trips from Boston to Concord and back to Boston by limousine, rented from A and A Limousine Renting, Inc. The cost of this limousine travel and other limousine travel in the Boston area, estimated at $3,500, was paid by various organizations with a direct interest in legislation.

Specifically, on eleven occasions in 1985 and 1986 Senator Durenberger traveled to Boston to meet with a company or business and accepted the unnecessary expense of limousine service to and from Concord. On five additional dates when Senator Durenberger received limousine transportation, he met with Dr. Nicholi in Concord, but did not meet with representatives of any business or organization.

Special Counsel finds that Senator Durenberger accepted these gifts of limousine transportation in the Boston, Massachusetts area in 1985 and 1986 in violation of Senate Rule 35. Senator Durenberger, through counsel, has admitted that his conduct violated this Rule.

3. OTHER MATTERS RELATED TO PIRANHA PRESS

a. Failure to Report Reimbursements

On May 15, 1986, Senator Durenberger filed his Financial Disclosure Report for the 1985 calendar year. At that time, the Senator failed to report his receipt of travel expense reimbursements from twenty-seven organizations before which he made Piranha Press or Boston area appearances in 1985. Similarly, Senator Durenberger's 1986 Financial Disclosure Report, filed on May 15, 1987, did not include his receipt of travel expense reimbursements from sixteen organizations before which he made such appearances in 1986.

On July 27, 1989, several months after the Committee initiated these proceedings, Senator Durenberger filed amended Financial Disclosure Reports for the 1985 and 1986 calendar years. These Reports include lists of reimbursements for travel expenses that Senator Durenberger received from thirty-nine organizations in 1985 and 1986. To date Senator Durenberger has failed to disclose reimbursements for travel expenses that he received from four organizations for five trips that he made in 1985.

Special Counsel finds that Senator Durenberger violated Senate Rule 34 by failing to report on his Financial Disclosure Reports for calendar years 1985 and 1986 the acceptance from forty-three organizations of reimbursement for the necessary expenses of travel, in connection with his Piranha Press "promotional appearances" and certain travel to the Boston metropolitan area.

b. Improper Conversion of a Campaign Contribution

Senator Durenberger addressed the Pathology Practice Association's annual meeting on December 5, 1986. The Association did not pay the Senator an honorarium or fee for this appearance. Instead, the Association's Federal Political Action Committee sent a check in the amount of $5,000 and payable to "Durenberger for U.S. Senate" to the Senator's official campaign committee in Minneapolis.

This check, which was intended as a campaign contribution, was deposited without endorsement to the Piranha Press account, from which Senator Durenberger was paid for his many "promotional appearances." Special Counsel finds that this conduct violates Senate Rule 38, paragraph 2, which prohibits the conversion of contributions to personal use.

c. Use of United States Capitol and Senate Facilities

On six separate occasions in 1985, Senator Durenberger made Piranha Press "promotional appearances" in United States Capitol and Senate rooms. For each of these appearances, Piranha Press was paid a fee ranging from $250 to $2,000. It is clear that Senator Durenberger's conduct was contrary to the regulations adopted by the Rules Committee governing the use of these Senate facilities. The Rules Committee has communicated its regulations on this subject numerous times to Members of the Senate in "Dear Senator" letters.

From Special Counsel's investigation, however, it appears that these regulations are not well known or understood by the Senate Members. In addition, there is some question as to whether 40 U.S.C. § 193d governs the Senator's conduct. Accordingly, Special Counsel further recommends that the Committee provide to Senator Durenberger the benefit of the doubt on this issue, and not find a violation or recommend disciplinary sanctions for this conduct.

Special Counsel recommends that, in order to eliminate any further confusion on this issue, pursuant to Committee Rules 8(c) the Committee take such appropriate action as is necessary to clearly and unequivocally prohibit such conduct by all Members in the future.

B. Condominium Transactions

1. OUTLINE OF RELEVANT FACTS

In June 1979, Senator Durenberger purchased a one-bedroom condominium (unit 603) in Minneapolis, which he then used during his frequent travels to that city. In 1983, the Senator began to explore various dispositions of the property, including a possible exchange of condominiums with Roger Scherer and a lease-back of his former unit (#603) from Mr. Scherer. Senator Durenberger has represented that ultimately, "effective" July 28, 1983 he formed an investment partnership with Mr. Scherer, to which both the Senator and Mr. Scherer contributed their respective condominium units. Senator Durenberger rented his unit (#603) from the partnership at a *per diem* rate of $65. The deed conveying the Senator's unit to the partnership was filed with the county Registrar of Titles on May 14, 1984.

In June 1985 Senator Durenberger placed his interest in this partnership into a qualified blind trust established pursuant to the Ethics in Government Act. Subsequently, in his capacity as general partner, he deeded the condominium property to Michael Mahoney as trustee of that trust.[2]

In August 1986, Mr. Scherer notified the Senator of his intent to withdraw from the partnership. Accordingly, the partnership affairs were terminated as of March 31, 1987. "Effective" April 1, 1987, the Senator sold the condominium unit for $52,804 to the Independent Service Company ["ISC"], a Minnesota business owned by Paul Overgaard. Following this sale, the Senator rented the condominium from ISC at a *per diem* rate of $85. The necessary legal documents evidencing this sale were not delivered to Mr. Overgaard until October 1989, and have never been filed with the Registrar of Titles. Accordingly, legal title to the property has never been transferred to ISC.

Throughout this period from August 1983 to mid-November 1989, Senator Durenberger claimed and received $40,055 in Senate travel reimbursements for the costs incurred in renting the condominium from the partnership and ISC.[3]

2. THE PARTNERSHIP TRANSACTION AND SALE TO INDEPENDENT SERVICE COMPANY, INC.

Special Counsel finds that in this matter Senator Durenberger engaged in a pattern of conduct which has served to bring discredit upon the United States Senate. Specifically, the facts evidence that Senator Durenberger participated in the creation of backdated documentation of the real estate transactions at issue.

Special Counsel further finds that these transactions were conceived and orchestrated wholly as a means of permitting the Senator to claim Senate *per diem* reimbursements for staying in what was in essence his Minnesota residence. Finally, Special Counsel finds that at various times the Senator concealed from the Senate Disbursing Office his interest in the condominium property, and thereby misrepresented to that Office the true ownership of the condominium for which he was claiming rental reimbursements.

Specifically, Special Counsel makes the following findings:

> The partnership entity was conceived and structured as a mechanism to enable Senator Durenberger to claim Senate reimbursement for overnight stays in his condominium, and thereby effectively to transfer to the United States Senate and the American taxpayer the cost of maintaining what was essentially his personal Minneapolis residence.
>
> Until the fall of 1983, Senator Durenberger intended simply to exchange condominium units with Roger Scherer, and then lease his former unit from Mr. Scherer. This contemplated ex-

[2] This deed was not filed until August 24, 1988, and a new Certificate of Title was not issued by the county Registrar of Titles until October 26, 1988.

[3] The Senator has refunded $11,005 of this sum, in response to a recent ruling by the Rules Committee.

change was no more than a mechanism to allow the Senator the benefit of Senate reimbursements.

In the fall of 1983 the parties learned that the planned exchange would result in capital gains tax to the Senator, and abandoned that transaction in favor of a partnership. The parties then simply backdated the partnership to July 1983 in order to justify the Senator's acceptance of Senate *per diem* lodging reimbursements from July 1983 forward.

The documents purporting to memorialize the creation of the partnership and the transfer of the condominium to that entity in July 1983 were not created and executed by the parties until early 1984.

Legal title to the condominium ultimately was not transferred to the partnership until May 1984. Even after that date, the Senator held a fifty percent interest in the property by virtue of his position as a general partner.

With the Senator's knowledge, the name of the partnership entity was changed from the "Durenberger-Scherer Partnership" to the "703-603 Association." The effect of that name change was to conceal from the Senate Disbursing Office the Senator's interest in the entity.

As to the sale of the condominium to ISC "effective" April 1, 1987 Special Counsel finds as follows:

ISC was not identified as a buyer for the condominium until the summer of 1987—several months after the purported effective date of the sale to ISC.

The transaction was made retroactive to April 1, 1987, the date immediately following the partnership's termination, in order to permit the Senator to claim Senate *per diem* lodging reimbursement for his condominium stays back to that date.

In December 1987, ISC generated invoices for the Senator's stays in the condominium for the period from April to October 1987. Based on these newly created invoices, in December 1987 the Senator sought Senate reimbursement for these past lodging costs.

Mr. Overgaard would not have entered into the sales transaction if the Senator had not agreed to rent the condominium back from ISC. Mr. Overgaard further understood that this rental was to be financed to a significant extent through Senate reimbursements. This being the case, it appears that Senator Durenberger used the promise of Senate funds to secure personal gain.

The lease agreement was not executed by the Senator or his representatives until April 1989 and the letter agreement reflecting the purchase, the deed and related real estate documents were not delivered to Mr. Overgaard until October 1989—almost three years after the April 1, 1987 "effective" date of the sale.

The documents reflect that the Senator and Mr. Overgaard agreed that Mr. Overgaard would reconvey the condominium to the Senator on demand. It therefore appears that Senator Durenberger in fact did not intend to surrender all rights in the property.

By virtue of the principals' failure to file the necessary documents with the Registrar of Titles, ISC still does not have legal title to the condominium.

Although the Senator received Senate reimbursement on a fairly regular monthly basis between February 1988 and November 1989, during that same period he made only nine lump sum rental payments to ISC—thereby effectively having the use of Senate reimbursement funds for substantial periods of time.

The evidence therefore strongly suggests that the Senator intended to do little more than "park" the condominium with Overgaard, so that he could continue to reap the benefits of Senate *per diem* reimbursements. Special Counsel finds that, through this conduct, Senator Durenberger has abused his United States Senate Office and misused United States funds.

Special Counsel also finds that Senator Durenberger repeatedly violated the provisions of the Ethics in Government Act governing qualified blind trusts. Specifically, it is clear that the Senator frequently consulted with the trustee of his blind trust regarding the disposition of the condominium, a principal asset of the trust, in violation of 2 U.S.C. § 703(e)(3)(c)(vi).

He personally negotiated the terms of the condominium sale to ISC, and personally was involved in the efforts to bring that transaction to closure. In addition, Senator Durenberger periodically requested and received financial information regarding the trust holdings, in violation of 2 U.S.C. § 702(e)(3)(c)(viii).

C. Recommendation of Sanction

Special Counsel respectfully submits that through this pattern of reprehensible conduct, Senator Durenberger has violated laws and Senate Rules and has brought discredit upon the United States Senate. Special Counsel therefore recommends that this Committee report to the full Senate a Resolution denouncing Senator Durenberger.

III. Procedural Background

Since these proceedings were initiated approximately sixteen months ago, Committee staff and Special Counsel have conducted an exhaustive investigation seeking to discover all relevant facts. Throughout the Preliminary Inquiry, Initial Review and Investigation stages of the matters under review, documents were subpoenaed from 198 individuals and organizations. An additional twenty-one individuals and organizations provided documents voluntarily to the Committee. Approximately 240 witnesses were interviewed, fourteen witnesses deposed, and eighty-one affidavits obtained. The inquiry culminated in a two day public hearing held on June 12 and June 13, 1990.

A. Preliminary Inquiry Regarding Piranha Press and Related Matters

Allegations involving Senator Durenberger were first brought to the Committee's attention on September 27, 1988, when thirty-nine

members of the Minnesota Bar filed a complaint with the Committee.[4] The principal issues raised in the complaint involved Senator Durenberger's receipt of income from Piranha Press, Inc. ("Piranha Press") for a series of "promotional appearances," and his possible use of improper influence to solicit speaking engagements in the Boston metropolitan area to coincide with scheduled appointments with a counselor. In addition, the complaint alleged that the Senator received gifts of limousine service in connection with these Boston area appearances.[5]

Senator Durenberger was notified of the Committee's receipt of the complaint, and was invited to respond to the complaint in writing. Thereafter, through his counsel James Hamilton, Senator Durenberger submitted a lengthy written response to the complaint.[6]

On March 1, 1989, the Committee voted unanimously to conduct a Preliminary Inquiry into the issues raised in the complaint. Senator Durenberger was notified of this decision on March 2, 1989. Special Counsel Ex. 1. This Inquiry was conducted by Committee staff counsel. As part of the Preliminary Inquiry, the Committee requested and received Senator Durenberger's files relating to the issues under review. Committee staff counsel interviewed twenty witnesses, and obtained affidavits from six of these witnesses. Staff counsel also deposed ten other key witnesses including the Senator's former Administrative Assistants, Thomas Horner and Douglas Kelley; his scheduler, Jodi Mathison; and Heidi Shaw, his bookkeeper. Staff counsel also deposed Michael Mahoney, the Minnesota counsel who negotiated the Senator's agreement with Piranha Press on the Senator's behalf and who later acted as Piranha Press' agent, and Gary Diamond, the president of Piranha Press. In addition, the Committee subpoenaed relevant documents from Piranha Press, as well as certain records from Piranha Press' Minnesota bank.[7]

During the course of the Preliminary Inquiry, additional questions were raised relating to the Senator's relationship with Piranha Press. These questions included whether Senator Durenberger violated Senate Rule 34 by failing to timely report reimbursements for travel expenses received in connection with certain Piranha Press and Boston appearances; whether Senator Durenberger violated Senate Rule 35 by accepting certain travel and entertainment expenses during a trip to Puerto Rico in late December 1985 and early January 1986; whether Senator Durenberger violated Senate

[4] Senator Durenberger noted in the public hearing in this matter that the Committee proceedings were the result of a complaint filed by his political opponents. *Transcript of Hearings Before the United States Senate Select Committee on Ethics, Hearing on the Matter of Senator David Durenberger* (June 13, 1990) at 39, 42 (hereinafter cited as "*Hearing Transcript*"). It must be noted, however, that Special Counsel's findings in this matter are based not upon partisan politics, but upon a review of documents provided to the Committee by the Senator himself, his advisors, and disinterested third parties, and upon statements of the Senator's former staff members, his attorneys and the individuals who arranged the Senator's appearances.

[5] The complaint also alleged that Senator Durenberger misappropriated federal funds by improperly using Senate staff and facilities to produce manuscripts for his books and to arrange for book promotional appearances.

[6] This response is discussed at further length in Section III, D below.

[7] A limited number of organizations and individuals also provided documents to the Committee voluntarily as part of its Inquiry. During the course of the Preliminary Inquiry, Mr. Hamilton was provided with copies of deposition transcripts, affidavits and reports of witness interviews shortly after these became available to Committee staff.

Rule 38, paragraph 2 and the Federal Election Campaign Act by converting to his personal use a campaign contribution; and whether Senator Durenberger violated the regulations of the Senate Committee on Rules and Administration ("Rules Committee") by making Piranha Press appearances in Senate rooms.

After consideration of staff counsel's report of the Preliminary Inquiry, on August 3, 1989 the Committee voted unanimously to proceed to an Initial Review pursuant to Committee Rule 4, and to retain Special Counsel in this matter. Senator Durenberger was notified of these decisions by letter dated August 4, 1989. Special Counsel Exs. 2–4. At that time, Senator Durenberger was advised that the Initial Review would include an examination of whether the Senator violated: (i) the statutory honorarium limitations set forth in 2 U.S.C. § 31–1 and 2 U.S.C. § 441i through his relationship with Piranha Press; (ii) Senate Rule 34 by failing timely to report the receipt of certain travel reimbursements; (iii) Senate Rule 38, paragraph 2 by converting to his personal use a campaign contribution; (iv) Senate Rule 37, paragraph 1 by soliciting sponsors in the Boston area to pay the expenses of personal travel; (v) Senate Rule 35 by accepting payment of personal travel expenses in the Boston area and miscellaneous personal expenses during a trip to Puerto Rico; and (vi) Senate Rules Committee regulations and 40 U.S.C. § 193d by using United States Capitol and Senate rooms for Piranha Press appearances. Special Counsel Ex. 4.

B. Initial Review Regarding Piranha Press and Related Matters

The Initial Review commenced promptly thereafter with an examination of all documents provided by the Senator, in order to identify each group or organization before which the Senator spoke during 1985 and 1986 pursuant to his agreement with Piranha Press, as well as each group with which he met in the metropolitan Boston area. A total of 182 subpoenas then issued to such "sponsoring organizations" and other individuals and groups which participated in the Senator's appearances before these organizations.[8]

Documents also were subpoenaed from Michael Mahoney, Senator Durenberger's Minnesota counsel. In addition, Piranha Press banking records were subpoenaed from the Norwest Bank, N.A. in Minneapolis, Minnesota. Records of a Boston limousine company used by the Senator during his trips to Boston also were subpoenaed. Seven individuals and organizations were asked to produce material voluntarily. Special Counsel also reviewed documents made available to the Committee by the Rules Committee regarding the use of Senate facilities for certain appearances by Senator Durenberger.

Following the review of these materials, 191 witnesses were interviewed.[9] These witnesses included principally individuals em-

[8] In addition, Special Counsel identified a number of organizations which extended invitations or the Senator to speak, but which withdrew their invitations of cancelled the Senator's appearance after some contact with Piranha Press. Special Counsel also identified a number of appearances which at some point were treated by the Senator's staff or his publisher as promotional events, the payment for which ultimately either was not remitted or was reported by the Senator as an honorarium. *See* Special Counsel Exs. 20, 24, 26, 31, 44, 69, 71, 74.

[9] These witnesses were interviewed during both the Initial Review and Investigation stages of the inquiry.

ployed by or affiliated with the organizations which invited the Senator to speak, or before which the Senator spoke, in 1985 and 1986. Special Counsel also interviewed several former members of the Senator's staff, including Jimmie Powell, the Senator's Legislative Director from 1983 to August 1985; Charles Kahn, the Senator's Legislative Assistant for health policy from 1984 to 1986; and Anne Kelly Planning, the Senator's personal secretary and scheduler from late 1983 to 1985. Special Counsel obtained affidavits from seventy-five of the witnesses interviewed.

Two individuals, Robert Wilbur of the Health Industry Manufacturers Association, and Frederick Graefe, Esquire, formerly of the law firm of Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, were deposed. In addition, Michael Mahoney was deposed by Special Counsel. Special Counsel also transcribed and reviewed audio and video tape recordings of thirty-five of Senator Durenberger's "promotional appearances" which were provided either by the Senator or by the various subpoenaed organizations.

Special Counsel provided to Senator Durenberger's counsel copies of all documents received in response to subpoenas and informal requests during the Initial Review and Investigation, copies of the tape transcripts referenced above, and copies of relevant correspondence from the Rules Committee to all Senators.[10]

On February 6, 1990, Special Counsel submitted a Confidential Status Report regarding the Initial Review. On February 20, 1990, Special Counsel submitted a Supplemental Confidential Report to the Committee. Together, these reports constituted Special Counsel's final report of the Initial Review, pursuant to Committee Rule 4(e).

On February 22, 1990, the Committee found "substantial credible evidence providing substantial cause" to find violations of applicable Senate Rules and laws regarding the Senator's receipt of income from Piranha Press, the acceptance of gifts of limousine transportation in the Boston area, the conversion of a campaign contribution, the receipt of fees for appearances in United States Capitol and Senate facilities, and the failure to report certain travel reimbursements received in connection with his Piranha Press "promotional appearances." Accordingly, the Committee voted unanimously to conduct an Investigation of these matters pursuant to Committee Rule 5. Special Counsel Ex. 5. Senator Durenberger was informed of this decision immediately thereafter.

Pursuant to Committee Rule 5(c), Senator Durenberger was formally notified of the Committee's decision and was provided with a description of the evidence supporting the relevant allegations by letter dated March 1, 1990. At that time, the Senator and his counsel also were provided with four volumes of evidentiary materials, including witness affidavits and memoranda of interviews. Special Counsel Ex. 6. An additional three volumes of supplementary evidentiary materials were provided to the Senator's counsel on May 10, 1990. On May 2, 1990, the Committee voted to conduct a public

[10] On January 9, 1990, Special Counsel provided Senator Durrenberger's counsel with copies of all documents received pursuant to subpoena and informal request as of that date. Additional documents were sent to counsel on January 31, 1990. On February 5, 1990, transcripts of tape recordings were provided, followed by three deposition transcripts and additional documents on February 28, 1990.

hearing beginning on June 12, 1990, as part of its Investigation. The Senator was advised of this decision through counsel shortly thereafter. On May 3, 1990, the Committee publicly announced its intention to hold a hearing in this matter.

C. Proceedings Regarding the Condominium Matter

The allegations regarding Senator Durenberger's Minneapolis condominium came to the Committee's attention in December 1989, following numerous press reports on the matter and certain proceedings before the Rules Committee. Generally, the allegations in this matter have focused upon Senator Durenberger's receipt of Senate *per diem* lodging reimbursements for the cost of renting his former condominium property in Minneapolis.

1. PROCEEDINGS BEFORE THE RULES COMMITTEE

On December 1, 1989, Senator Durenberger requested that the Rules Committee review his claims for *per diem* reimbursements for stays in the Minneapolis condominium. The Senator submitted to the Rules Committee a statement of facts and discussion of rules regarding this matter on December 22, 1989. Special Counsel Ex. 294. Senator Durenberger emphasized in this submission that he had relied upon his counsel's conclusion that he was entitled to collect reimbursement for the daily rental costs of the condominium, both when the Senate was and was not in session. The Senator asked that the Rules Committee review this conclusion, and offered to refund to the Senate any reimbursements that were received improperly.

By letter dated January 24, 1990, the Rules Committee advised Senator Durenberger that during the *sine die* and August recesses a Member is not entitled to reimbursement for expenses incurred while at his/her official duty station, deemed during those periods to be the Member's "residence" city in his/her home state. The Committee further clarified that a Member's "residence city" is the Member's usual place of residence. *See* Special Counsel Ex. 295.

In response to this letter, Senator Durenberger has refunded to the Senate $11,005 as repayment of reimbursements which he received for lodging in the condominium during the referenced recess periods between August 1983 and November 1989. Special Counsel Ex. 296.

2. PROCEEDINGS BEFORE THE ETHICS COMMITTEE

On December 21, 1990, this Committee voted unanimously to initiate a Preliminary Inquiry regarding certain real estate and related transactions by the Senator involving the Minneapolis condominium. The Committee notified Senator Durenberger of its decision immediately thereafter.

Subsequently, on December 28, 1989, Minnesota State Senator William Luther filed a complaint with the Committee, alleging generally that Senator Durenberger received Senate reimbursement for staying in the condominium at a time when the Senator was the sole owner of the unit. This complaint also asserted that Senator Durenberger later failed to disclose to the Senate his interest in the partnership from which he rented the condominium, and

that in 1985 he may have placed his interest in the partnership in a blind trust in order to evade Senate disclosure requirements.[11] Special Counsel Ex. 293.

By letter dated January 8, 1990, the Committee requested that Senator Durenberger provide to it certain relevant documents. On January 24, 1990, Senator Durenberger produced to the Committee approximately 3,800 pages of documents in response to this request.[12] In addition, the Committee subpoenaed documents from nine individuals and companies identified as participants in various transactions involving the Senator's condominium from 1983 through 1989. These individuals and companies included the Senator's former partner in the real estate partnership, Roger Scherer; attorneys Randall Johnson, Richard Langlais and Michael Mahoney, each of whom advised the Senator regarding condominium transactions; and Paul Overgaard and the Independent Service Company, the purported purchaser of the condominium in 1987.

In addition, in early March 1990 the Committee subpoenaed documents from Eugene Holderness, Senator Durenberger's former campaign manager. Finally, documents were provided voluntarily to the Committee by Jean Stow, the partnership's bookkeeper. Certain materials also were provided to the Committee by the Senate Disbursing Office.

Between February and April 1990, twelve witnesses were interviewed, including certain former members of the Senator's staff. Subsequently, interviews also were conducted of seven current and former staff members of the Rules and Ethics Committees. Two individuals, Paul Overgaard of the Independent Service Company and Michael Mahoney, were deposed. The deposition transcripts and documents received pursuant to subpoena and informal request were provided to Senator Durenberger's counsel on May 4, 1990.

On May 8, 1990, Special Counsel submitted to the Committee his Confidential Report of the Preliminary Inquiry into this matter.[13] On May 9, 1990, the Committee found "substantial credible evidence providing substantial cause" to find that a violation within its jurisdiction had occurred and voted to conduct an Investigation regarding the condominium matter in accordance with Committee Rules 3(d)(5) and 4(f)(4). Special Counsel Ex. 7. The Committee notified the Senator of this decision immediately thereafter.

Pursuant to Committee Rule 5(c), by letter dated May 14, 1990, the Committee formally notified Senator Durenberger of this decision. The notice stated that the Investigation would examine whether the Senator abused his United States Senate office and misused United States Senate funds, and whether he may have violated provisions of the Ethics in Government Act relating to qualified blind trusts. Special Counsel Ex. 8. Two volumes of evidentiary

[11] Finally, the complaint alleged that Senator Durenberger failed to report properly to the Senate certain transactions involving the condominium, and questioned whether the Senator might have violated the Internal Revenue Code in connection with these transactions.

[12] The Senator's January 24, 1990 submission also included some documents regarding the Piranha Press matter. On April 30, 1990, Senator Durenberger submitted additional documentation regarding the condominium matter.

[13] Special Counsel previously had given the Committee several oral reports regarding the condominium matter.

materials were provided to the Senator with this notification letter.[14] The Committee further notified the Senator that the public adjudicatory hearings previously scheduled to commence on June 12, 1990 would encompass the condominium Investigation. Special Counsel Ex. 8.

D. Senator Durenberger's Presentations to the Committee Prior to the Public Hearing

Throughout these proceedings, Senator Durenberger made numerous presentations to the Committee, both orally and in writing, addressing the allegations and the evidence.

Initially, in a lengthy written response to the original complaint in this matter, the Senator argued that in entering into the agreement with Piranha Press he relied upon an advisory opinion issued by the Federal Election Commission ("FEC") and the advice of his counsel. As to his speeches in the Boston metropolitan area, the Senator admitted that on some occasions his staff solicited meetings for him in the Boston area to coincide with personal travel to Boston. He also acknowledged that on certain occasions his travel expenses were paid by the groups with whom he met. The Senator contended that such dual or multi-purpose trips—*i.e.,* those which serve both business and personal objectives—are not prohibited by Senate Rules.

On December 22, 1989, counsel to the Senator provided to Special Counsel his written submission to the Rules Committee addressing the condominium matter. The Senator and his counsel then met with the Committee in Executive Session on February 8, 1990. Senator Durenberger addressed the Committee, discussing the Piranha Press, Boston limousine and condominium matters during this session.

On May 16, 1990, Senator Durenberger's counsel submitted a lengthy memorandum to the Committee addressing each of the matters under Investigation. In response to the Senator's request, and pursuant to Committee Rule 5(c), the Senator and his counsel also appeared personally before the Committee in Executive Session on May 16 and 17, 1990. At this time, both the Senator and Mr. Hamilton made statements to the Committee and responded to questions by Committee members regarding the Piranha Press, condominium and other matters under review.

E. The Adjudicatory Hearing

As was noted above, on May 2 and May 14, 1990 the Committee notified Senator Durenberger of its intention to hold a public hearing, commencing on June 12, 1990, as part of its Investigation of the Senator's conduct. Because the Investigation concerned possible disciplinary action against Senator Durenberger, this hearing was an "adjudicatory" hearing as defined in Committee Rule 6(c). The procedural protections set forth in Committee Rule 6(j) therefore applied.

[14] At that time Special Counsel also provided to Mr. Hamilton memoranda of interviews of witnesses contacted regarding the condominium matter.

On May 11, 1990, the Committee sent a draft Prehearing Order to Mr. Hamilton and informed him that any objections to the draft Order would be heard at the Committee's May 16, 1990 meeting. The Order provided for the exchange of documents to be introduced as evidence at the hearing; stated that affidavits would be admissible as evidence, subject to the right of Special Counsel and the Respondent to subpoena such witnesses to testify at the hearing; and provided that documents, affidavits and testimony would be admissible at the hearing without formal proof, subject to timely objections during the hearing. No objections were raised by Mr. Hamilton at the Committee's May 16, 1990 meeting and the Order was entered on May 17, 1990. Special Counsel Ex. 9.[15]

At Special Counsel's request, thirty-two subpoenas to testify at the hearing were served between May 21-29, 1990. On May 29, 1990, twenty-five additional subpoenas for witnesses were issued in response to Mr. Hamilton's request. Pursuant to the Prehearing Order and Committee Rule 6(j), on June 4, 1990, Special Counsel provided Mr. Hamilton with the exhibits intended to be introduced as evidence at the hearing. These 447 exhibits, contained in twenty-three volumes, included eighty affidavits, 113 exhibits containing documents relevant to Piranha Press appearances, transcripts of forty-four of the Senator's Piranha Press speeches, eighteen exhibits containing documents related to the Senator's receipt of limousine service in the Boston area, excerpts from deposition transcripts, copies of the Senator's travel vouchers for 1983 through 1989, and other documents related to the matters under Investigation.[16] Also marked as exhibits were the Senator's books, *Neither Madmen Nor Messiahs* (Special Counsel Ex. 448) and *Prescription for Change* (Special Counsel Ex. 449).

On June 9, 1990, Mr. Hamilton provided Special Counsel with 110 exhibits to be introduced at the hearing, including twenty-three affidavits obtained by Mr. Hamilton during the first week of June 1990; thirteen letters to Senator Durenberger regarding his book, *Neither Madmen Nor Messiahs;* excerpts from depositions taken by Committee staff counsel and Special Counsel; and documents related to the Piranha Press and condominium matters, most of which also had been marked as exhibits by Special Counsel.

The hearing commenced on June 12, 1990. Pursuant to Committee Rule 6(j), Senator Durenberger was afforded all rights to which a Respondent is entitled at an adjudicatory hearing. In particular,

[15] By letter to Special Counsel dated May 24, 1990, Mr. Hamilton objected to certain provisions of the Order. Specifically, Mr. Hamilton objected to the requirement that exhibits to be used in cross-examination of witnesses be exchanged prior to the hearing; that affidavits and depositions be admitted into evidence; and that documents be admitted without formal proof, subject to timely objections made during the hearing. Mr. Hamilton requested that Special Counsel forward his comments to the Committee. In response, the Committee informed Mr. Hamilton on May 29, 1990 that its Order would stand, but that any questions or uncertainties about the Order should be discussed with Special Counsel.

Mr. Hamilton then renewed his objections to the admission of evidence by letter to Special Counsel dated June 8, 1990. Special Counsel responded in writing to these objections on June 11, 1990. Mr. Hamilton did not renew these objections during the hearing in this matter, and specifically did not object to the admission of any of Special Counsel's exhibits at that time.

[16] These documents previously had been provided to Mr. Hamilton as they were received and generated during the course of the Initial Review and Investigation.

Senator Durenberger was represented by counsel, and was free to call witnesses on his behalf.

At the outset of the hearing, following statements by the Chairman, Vice Chairman and each Member of the Committee, Special Counsel delivered his opening statement. Special Counsel provided a detailed account of the evidence in these matters, concluding that Senator Durenberger knowingly and willfully engaged in conduct which violated statutes, Senate Rules, and standards and acceptable norms of ethical conduct. *Hearing Transcript* (June 12, 1990) at 106. On the basis of the evidence gathered during the Committee's inquiries, Special Counsel recommended to the Committee that it pass a Resolution calling for the full Senate to denounce Senator Durenberger for conduct which has brought dishonor and disrepute to the Senate. *Id.* at 107.

At the conclusion of Special Counsel's statement, Senator Durenberger's counsel made an opening statement on behalf of Senator Durenberger. The Senator's counsel did not contest the fact that Senator Durenberger violated certain Senate Rules, nor did he contend that a sanction was unwarranted. *Id.* at 109–110. He argued instead that Senator Durenberger acted in good faith, without an intent to violate the Rules, and upon the advice of counsel. *Id.* at 110. He further argued that the sanction of denouncement was not justified. *Id.*

Senator Durenberger's counsel concluded his presentation on the morning of June 13, 1990. At that time, he informed the Committee that Senator Durenberger would submit the matter to the Committee on the basis of the documentary evidence introduced on the Senator's behalf and that submitted by Special Counsel. Senator Durenberger's counsel specifically declined the right to call any witnesses. *Hearing Transcript* (June 13, 1990) at 15.

Senator Durenberger then addressed the Committee, reiterating his counsel's statements that he acted "in good faith, with no intent whatsoever to violate the rules of the Senate" and upon the advice of counsel. *Id.* at 20. Following Senator Durenberger's remarks, Special Counsel concluded his opening statement.

The Chairman then questioned Mr. Hamilton about Senator Durenberger's decision to waive his rights, including the right to call witnesses and to cross-examine Special Counsel's witnesses.[17] The Chairman specifically explained that Special Counsel's recommendation of sanction did not preclude the Committee from recommending a different, and possibly more severe sanction. *Id.* at 72–73. In response, Senator Durenberger's counsel reaffirmed that the Senator was waiving any due process rights, and was specifically waiving the right to call or cross-examine witnesses, as well as the right to any further hearing.

The Chairman then queried Senator Durenberger, who stated that he concurred with his counsel's waiver of his rights available during an adjudicatory hearing. *Id.* at 77. Following this discussion of the Senator's waiver of rights, Special Counsel moved into evi-

[17] The Chairman specifically inquired of the Senator's counsel whether he had any objection to the Senator being called as a witness during the hearing. Such a procedure is authorized by Committee Rule 6(d). In response, the Senator's counsel stated that the Senator wished to submit the matter to the Committee on the existing record.

dence Special Counsel Exhibits 1-447, 448 and 449 (the Senator's books) and 450-452.[18] These exhibits and Senator Durenberger's 112 [19] exhibits were received in evidence without objection. The Committee then excused from their subpoenas the thirty-two witnesses who had been subpoenaed to testify at Special Counsel's request and the additional witnesses subpoenaed at Mr. Hamilton's request. The hearing concluded with the Committee's direction that Special Counsel promptly submit his Final Report.[20]

IV. The Committee's Authority to Investigate and Sanction Misconduct of Members

A. Constitution and Senate Rules

Article I, Section 5, Clause 2 of the United States Constitution provides:

> Each House [of Congress] may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Pursuant to this mandate, in 1964 authority to investigate and report to the Senate possible unethical conduct was delegated to the former Senate Select Committee on Standards and Conduct. In 1977 this authority was delegated to the newly created Select Committee on Ethics.

It is the duty of the Committee, under its authorizing resolution, S. Res. 338, as amended in 1977, to

> receive complaints and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, violations of the Senate Code of Official Conduct and violations of rules and regulations of the Senate, relating to the conduct of individuals in the performance of their duties as Members of the Senate, or as officers or employees of the Senate, and to make appropriate findings of fact and conclusions with respect thereto. . . .

S. Res. 338, 88th Cong., 2d. Sess. § 2(a)(1) (1964), as amended by S. Res. 110, 95th Cong., 1st Sess. § 201 (1977). The legislative history of this Resolution reflects the Senate's intent to delegate substantial authority to the Committee to investigate allegations of misconduct by Members.[21]

[18] Special Counsel Exhibits 450-452 were rebuttal exhibits.

[19] Exhibits 111 and 112 were provided to the Committee by Mr. Hamilton on June 13, 1990.

[20] The Senator's counsel also was informed that he had the right to submit expeditiously a final briefing of the matters under Investigation.

[21] During its consideration of Resolution 338, the Senate Rules Committee rejected Senator Cooper's proposal to create a select committee authorized "to receive complaints of unethical, improper, [and] illegal conduct of members. . . ." S. Rep. No. 1125, 88th Cong., 2d. Sess. 13 (1964). Instead, the Rules Committee reported a resolution which proposed to vest itself with the limited authority "to investigate alleged violations of the rules of the Senate. . . ." S. Rep. No. 1147, 88th Cong., 2d. Sess. 1 (1964).

On the floor, Senator Cooper was able to persuade the full Senate to enact his version of Resolution 338. 110 Cong. Rec. 16930 (1964) Senator Case, speaker in favor of the Cooper substitute, stated that "unlike the resolution in its original form, . . . the [Cooper] proposal would not be limited to alleged violations of Senate Rules, but it would take into account all improper conduct of any kind whatsoever." *Id.* at 16933. Senator Dirksen similarly stated that a "very careful reading . . . of the Cooper amendment will disclose the broad delegation of power it contains with respect to discipline, matters of conduct, performance, standards, and so forth." *Id.* at 16940.

In order to fulfill this mandate, the Committee is authorized to hold hearings, issue subpoenas, administer oaths, take testimony, including by deposition, and retain outside counsel. The Committee further is authorized, with the prior consent of the department or agency involved, to utilize the services, information and facilities (and to employ the services of personnel) of any such department or agency of the government.

Pursuant to the Committee's Rules, the Committee is authorized to address inadvertent, technical, or *de minimus* violations through informal methods. Committee Rule 4(f)(2). The Committee is further authorized to propose remedial actions against a Member for violations which, while not inadvertent or *de minimus,* are not sufficiently serious to warrant imposition of the severe sanctions of expulsion, censure or reporting to the appropriate party conference, specified in S. Res. 338. Committee Rule 4(f)(3).

In those situations in which the violations are sufficiently serious to warrant such severe sanctions, as in the instant case, the Committee is not authorized to discipline the Member unilaterally. Such sanctions may only be imposed by the full Senate. Accordingly, pursuant to S. Res. 338 the Committee is authorized to recommend to the Senate by report or Resolution serious disciplinary action. S. Res. 338, § 2(a)(2).

B. Prior Senate Disciplinary Cases

The Senate has never adopted a fixed set of standards for the imposition of particular sanctions. Instead, the Senate has considered each case on its individual facts. While it is difficult to identify any precise guidelines from the cases in which the Senate has considered disciplinary action against one of its own Members, some general principles emerge from an examination of these precedents. Generally, in cases involving treasonous conduct or disloyalty to the United States, the appropriate Senate committee has recommended expulsion.[22] Similarly, cases involving charges of bribery or receipt of compensation for services rendered before government departments have resulted in recommendations of expulsion.[23]

In contrast, cases involving misues of campaign or office funds, or abuse of senatorial office and authority, have typically resulted in a recommendation of a lesser, but nonetheless very serve sanction. In the case of Senator Thomas Dodd, for example, the Senate imposed a sanction of censure based upon the following findings:

> [F]or having engaged in a course of conduct * * * from 1961 to 1965 of exercising the influence and power of his office as a United States Senator * * *
>
> (a) to obtain, and use for his personal benefit, funds from the pubic through political testimonials and a political campaign, and
>
> (b) to request and accept reimbursements for expenses from both the Senate and private organizations for the same travel,

[22] *E.g.,* Senator William Blount (1797).

[23] John F. Simmons (1862); James W. Patterson (1873); Charles H. Dietrick (1904); Joseph R. Burton (1906); Burton F. Wheeler (1924); Harrison Williams (1982).

> [Senator Dodd] deserves the censure of the Senate; and he is so censured for his conduct, which is contrary to accepted morals, derogates from the public trust expected of a Senator, and tends to bring the Senate into dishonor and disrepute.

S. Rep. No. 193, 90th Cong., 1st Sess. 26–27 (1967).

In the more recent case of Senator Herman Talmadge, the Committee found that the Senator had grossly neglected his duty to faithfully administer the affairs of his office. Specifically, the Committee found that Senator Talmadge either knew or should have known of certain acts or omissions, including the failure to report and the diversion of campaign contributions to non-campaign purposes, the claiming of Senator reimbursements of over $43,000 for official expenses which were not incurred, and the filing of inaccurate Financial Disclosure Reports and candidate's receipts and expenditure reports. Based on these findings of financial improprieties, the Committee voted unanimously on September 15, 1979 to denounce the Senator, characterizing his conduct as "reprehensible." S. Rep. No. 337, 96th Cong., 1st Sess. 17–18 (1979). Senator Talmadage was denounced by the full Senate thereafter. S. Res. 249, 96th Cong., 1st Sess. (1979).[24]

C. Laws, Senate Rules and Other Ethical Considerations Applicable to the Committee's Present Investigation

In its Resolution for Investigation in connection with the Piranha Press and related matters, the Commission set forth the allegations against Senator Durenberger. Special Counsel Ex. 5. That Resolution stated that the Investigation would include an examination of whether Senator Durenberger may have violated the honoraria limitations established by 2 U.S.C. § 31-1 and 2 U.S.C. § 441i through his arrangement with his publisher, and Senate Rule 34 by failing to timely report the receipt of certain travel expense reimbrusements during 1985 and 1986.

The Resolution further stated that the Committee would examine whether Senator Durenberger may have violated Senate Rule 38, paragraph 2 by converting a campaign contribution to personal use and 2 U.S.C. § 434 and FEC regulations by failing to properly report and deposit a campaign contribution; Senate Rules Committee regulations and 40 U.S.C. § 193d by making Piranha Press speeches in U.S. Capitol and Senate facilities; and Senate Rule 35 by accepting payment for the unnecessary expenses of limousine transportation from organizations with a direct interest in legislation before the Congress.

The Resolution for Investigation involving the condominium matter stated that the Investigation would examine whether Senator Durenberger may have abused his United States Senate office and misused United States Senate funds through a pattern of improper conduct which has brought discredit upon the United States Senate as contemplated by Section 2(a)(1) of S. Res. 338, 88th Congress as amended. The Resolution stated that this improper conduct may have included the submission of misleading travel reimbursement vouchers to the Senate Disbursing Office, the misrepresentation of the ownership of the property for which he was claiming lodging reimbursement, and the back dating of real estate transactions and certain documentation relating to those transactions. Special Counsel Ex. 7.

The Resolution further cited possible violations of the Ethics in Government Act, including Sections 702(e)(3)(c) and 702(e)(6), regarding the administration of the Senator's blind trust.

[24] Senate disciplinary precedents are reviewed in greater detail in *Senate Election, Explusion and Censure Cases from 1793 to 1972*, S. Doc. No. 7, 92nd Cong., 1st Sess.

V. Evidence Regarding Senator Durenberger's Relationship With Piranha Press

Between 1984 and 1986, Piranha Press published two books authored by Senator Durenberger: *Neither Madmen Nor Messiahs*, a collection of "white papers" on national security issues released in September 1984, and *Prescription for Change*, a collection of speeches on health care issues released in April 1986. Piranha press was the corporate successor to Fair Enterprises, Inc., which in the 1960s published a photographic book of wrestling holds, and which more recently printed fliers for state fairs.

Under the terms of his agreement with Piranha Press, Senator Durenberger made approximately 113 book "promotional appearances" before various trade associations, colleges and businesses during 1985 and 1986. Each of these groups paid Piranha Press a fee for the Senator's appearance, typically between $1,000 and $5,000, plus travel expenses. Piranha Press in turn paid the Senator $100,000 in quarterly installments over a two year period.

Special Counsel finds that the arrangement between Senator Durenberger and Piranha Press was simply a means of converting into "stipendiary income" that which would otherwise have been honoraria income, and that Senator Durenberger therefore violated 2 U.S.C. § 31-1 and 2 U.S.C. § 441i.[25] Special Counsel also finds that Senator Durenberger knowingly and actively participated in this arrangement, the obvious effect of which was to circumvent the statutory limitations on honoraria income.

The groups before which Senator Durenberger made speeches pursuant to this arrangement did not invite him to promote his books, and only rarely characterized his appearance as a promotional event. *See* Special Counsel Exs. 45, ¶ 8; 80, ¶¶ 4–5. In addition, the Senator frequently failed to mention either his books or his publisher at these appearances. When he did, the references were often only fleeting and did little more than belittle the books or the publisher.

Moreover, the principal outcome of Senator Durenberger's arrangement with Piranha Press was to produce income in the form of speaker's fees, not book sales. Available financial records show that Piranha Press earned approximately $248,300 in speaker's fees between 1985 and early 1987, as compared to approximately

[25] In 1985 2 U.S.C § 31-1 imposed an annual cap on honoraria income of thirty percent of a Member's salary. Effective in 1986, this percentage was raised to forty percent. Section 441i of the Federal Election Campaign Act (2 U.S.C. § 411i) prohibits the acceptance of an honorarium of more than $2,000 for each appearance, speech or article.

$15,000 in book sales.[26] Not surprisingly, the Senator never received any royalties from the book sales. The books therefore appear to have been little more than a pretext for the Senator's speaking engagements that would otherwise have been treated as traditional honoraria events.

A. Contractural Arrangement Between Senator Durenberger and Piranha Press

The evidence in this matter demonstrates that the Senator's contract with Piranha Press did not constitute a good faith book publishing or promotional agreement. The written agreement between the Senator and Piranha Press varied in many key respects from a standard book publishing contract. Most importantly, the agreement obligated the Senator to make "special appearances to discuss, speak on or otherwise promote the [books] as are mutually agreed upon by Publisher and Author." [27] Special Counsel Exs. 252, 253. The agreement further provided that the Senator was to be paid by Piranha Press in consideration "of the rights to the [book] granted by the author to publisher hereunder, and in consideration of the author's services to be rendered in promoting the [book] and the author." *Id.*

While authors frequently make public appearances in an effort to promote their publications, they typically are not compensated by their publishers for such appearances. In his affidavit in this matter, Samuel Vaughan, the Senior Vice President and Editor of the Trade Department at Random House, Inc., described the usual industry practice as follows:

> Publishers do not customarily or traditionally pay an author to promote the author's books. Although an author may make some promotional appearances on behalf of his/her book, and the publisher usually pays all or some of the travel expenses associated with such appearances, no fees or other compensation are normally paid to the author.

Special Counsel Ex. 81.

In at least this respect the "promotional appearance" provisions of the Piranha Press agreement more closely resembled a "speaker's bureau" contract than a traditonal book publishing agreement.[28]

[26] *See* Special Counsel Ex. 277. The analysis of Piranha Press cash disbursements and receipts reprinted as Special Counsel Exs. 277 and 278 were prepared by Special Counsel. These documents are based on a review of Piranha Press bank account records produced by the publisher and his banking institution in response to Committee subpoenas, as well as a limited number of documents produced by B. Dalton Bookseller, which purchased 1,600 copies of the Senator's first book.

[27] The parties apparently never reached any agreement on the actual number of appearances which would be made by Senator Durenberger. In agreeing to pay quarterly installments of $12,500, Mr. Diamond estimated that the Senator would make approximately fifty appearances each year. Special Counsel Ex. 433 at 47. Mr. Mahoney, in contrast, testified that the parties agreed to approximately only twelve appearances each year. Deposition of M. Mahoney (4/27/89) at 57.

[28] Pursuant to such agreements, the "speaker's bureau" typically makes all arrangements for appearances by its client, and collects all speaker's fees for these events. The client is then paid a percentage of the speaker's fees collected by the "speaker's bureau."

It is interesting to note that on at least one occasion, a representative of Piranha Press characterized the publisher's role as that of a "speaker's bureau." Susan Dempsey of the Healthcare Financial Management Association ("HFMA") recalled the following conversation with a representative of Piranha Press:

> [T]he representative . . . explained that Piranha Press acted as a "speakers' bureau" and that Piranha's payments to Senator Durenberger were separate from HFMA's payment to the publisher.

Special Counsel Ex. 25, ¶ 6.

Continued

The agreement between the Senator and Piranha Press also structured these appearances and payments over a two year period running from the date of the agreement, without any reference whatsoever to the publication date of the books themselves. Mr. Vaughan of Random House, Inc. characterized such an agreement as "extraordinary." *Id.* As Mr. Vaughan further explained, appearances by an author to promote book sales typically are concentrated within the several month period surrounding the official publication or release date of the book. *See Id.* In contrast, many of the Senator's "promotional appearances" occurred well after the publication of his first book, and well before the publication of his second book.[29]

Materials produced to the Committee by Mr. Mahoney suggest that from its inception the principal purpose of the Senator's agreement with Piranha Press was to permit the Senator to earn fees for speaking engagements, rather than to promote the sale of his books. From the outset the parties seem to have recognized little if any hope of earning money from the actual sale of the book.

In an August 13, 1984 memorandum to Mr. Mahoney from Thomas Horner, the Senator's Administrative Assistant, Mr. Horner requested "specific advice on setting up fee-earning appearances in connection with the Senator's defense book, *Neither Madmen Nor Messiahs.*" Special Counsel Ex. 247. Significantly, Mr. Horner acknowledged in this memorandum that the parties did not expect that the books would actually generate any income through sales:

> The book will be distributed for sale in 40-some B. Dalton Bookstores in Minnesota and in the Washington, D.C., area. *Income from the sale of the books will go to Gary [Diamond of Piranha Press], although he does not expect to break even.* His goal was to get into publishing and to help the Senator.
>
> Please advise on how we should structure speaking events connected with the promotion of the book that could potentially be income-producing to the Senator; is there an advantage to the Senator providing some of the funds for promotion; etc.

Id. (emphasis added).

Early the following month, Mr. Horner forwarded to Mr. Mahoney a draft author-publisher agreement prepared by Piranha Press' counsel. Again, Mr. Horner emphasized the importance of a provision for fee-earning appearances:

[29] Unlike a typical book publishing agreement, which provides for royalties based on the retail price of the book, the agreement prepared by Senator Durenberger's counsel provided for royalty payments based on the net profits resulting from the sale of the book. In his affidavit, Mr. Vaughan stated that such a royalty agreement tied to net sale profits is not customary in either general or trade publishing. *See* Special Counsel Ex. 81.

> [W]e would like a paragraph inserted in which it is made clear that the publisher or some other entity may pay the Senator a fee for the series of speeches or other promotional activity. This would be along the lines of your earlier conversations with the Senator.

Special Counsel Ex. 248.[30] As ultimately structured and administered, the arrangement between Piranha Press and the Senator accommodated this goal strikingly well. The income generated by the Senator's "promotional appearances" over the two year period of the agreement far exceeded the income generated in book sales—approximately $248,300 in speaking fees as compared to only approximately $15,500 in book sales. *See* Special Counsel Exs. 277, 278.

The quoted memoranda also clearly reflect Senator Durenberger's personal involvement in the structuring of the contract with Piranha. The Senator is shown as a copy recipient on the August 13, 1984 memorandum from Mr. Horner, seeking Mr. Mahoney's advice on structuring fee-earning speeches. *See* Special Counsel Ex. 247. The subsequent September memorandum specifically references conversations between Mr. Mahoney and the Senator about such an arrangement.[31] *See* Special Counsel Ex. 248.

Moreover, both Mr. Horner and Mr. Mahoney testified that the Senator participated in discussions concerning the arrangement throughout the contract drafting period. *See* Special Counsel Exs. 438 at 14; 442 at 9–10, 177–178; Durenberger Ex. 103 at 144. The evidence therefore demonstrates that Senator Durenberger actively participated in the creation of this "extraordinary" promotional contract.

B. The Nature of the Senator's Appearances

As was noted above, during 1985 and 1986, Senator Durenberger made 113 "promotional appearances" pursuant to his arrangement with Piranha Press. On none of these 113 occasions was the Senator invited to appear for the purpose of promoting or discussing his book.[32] Moreover, none of these appearances was the result of an inquiry made of Gary Diamond or Piranha Press. Instead, the Senator's Piranha Press appearances uniformly were the result of invitations extended to the Senator in his capacity as a United States Senator, either directly or through his Senate staff.

Generally, in response to an invitation to deliver an honorarium address, an organization was advised of the Senator's relationship with Piranha Press, either by the Senator's staff or the publisher. Piranha Press then typically sent a two page form letter to the sponsoring organization, summarizing the terms and conditions of

[30] Shortly thereafter, Mr. Horner spoke with Donna Hanbery, Mr. Mahoney's partner, about these arrangements. Ms. Hanbery's notes of that conversation reflect that she too was asked to structure a contract between the Senator and Piranha Press in which the Senator would do promotions "for a fixed fee." Special Counsel Ex. 249.

[31] Mr. Horner testified generally that the concept of promotional appearances may have originated with Mr. Mahoney. Special Counsel Ex. 438 at 13–14. The referenced documents, however, suggest that the concept originated in the Senator's office.

[32] Throughout the course of the Committee's proceedings, Special Counsel repeatedly asked Senator Durenberger's counsel to provide any available evidence of invitations to the Senator to promote his books. No such evidence was proffered.

the Senator's scheduled appearance. Although this form letter began with a statement that the addressee had "inquired regarding a promotional appearance by Senator Durenberger," as was noted above Special Counsel has found no instance in which a sponsoring organization actually invited the Senator to appear to promote his book.[33]

Instead, organizations before which Senator Durenberger spoke invited him, not because of his role as an author, but because of his position as a United States Senator. Often, the representative of the organization responsible for selecting Senator Durenberger as a speaker did not even know of the Senator's books. *See, e.g.,* Special Counsel Exs. 23, ¶ 3; ¶ 30, ¶ 3; 50, ¶ 3. Most frequently, the Senator appears to have been selected as a speaker because of his membership on the Senate Finance Committee or the Health Subcommittee of the Finance committee. *See, e.g.,* Special Counsel Exs. 12, ¶ 2; 18, ¶ 3; 61, ¶ 3; 68, ¶ 2. In short, Senator Durenberger was invited by groups to give what, absent the Senator's arrangement with Piranha Press, would have been treated as traditional honoraria speeches.

The evidence demonstrates that Senator Durenberger knew that his "promotional appearances" were the result, not of requests for book promotions, but instead of speech invitations extended to him as a United States Senator. Throughout the term of his agreement with Piranha Press, Senator Durenberger personally designated as Piranha Press "promotional events" certain honorarium speech invitations received in his Senate office. *See* Special Counsel Ex. 440 at 37–38.

For example, on February 18, 1986, Senator Durenberger received an invitation to address a policy conference sponsored by Capitol Associates, Inc., which offered the Senator a $2,000 honorarium. Senator Durenberger wrote on the invitation, "OK D PP." indicating his direction that the speech be treated as a Piranha Press "promotional appearance." Special Counsel Ex. 121 at B. The Senator made similar notations on invitations for traditional honorarium appearances extended by the American Society of Association Executives (Special Counsel Ex. 113 at A), the Association of Metropolitan Water Agencies (Special Counsel Ex. 118 at B), the Council of Industrial Development Bond Issuers (Special Counsel Ex. 130 at A), the Washington Campus (Special Counsel Ex. 151 at B), the National Association of Bond Lawyers (Special Counsel Ex. 163 at A), and the Singer Company (Special Counsel Ex. 191 at A).

Anne Kelly (now Planning), the Senator's scheduler until August 1985, described the process of selecting and scheduling Piranha Press events as follows:

> I placed all written invitations for speeches in a folder for Senator Durenberger's review.
>
> * * * * *
>
> Senator Durenberger then returned the invitation folder to me with his notations on the invitation, reflecting

[33] *See, e.g.,* Special Counsel Exs. 14, ¶ 2; 23, ¶ 3; 57, ¶ 3; 63, ¶ 3, 82, ¶ 4. In fact, Special Counsel repeatedly was informed by witnesses that the Piranha Press form letter was in error in this respect. *See, e.g.,* Special Counsel Exs. 60, ¶ 7; 66, ¶ 5; 82, ¶ 8.

> whether he would accept the speech. Sometimes he would seek the guidance of a legislative aide as to whether or not he should speak to the group. *If he ultimately accepted the speech and if the organization was paying a fee, he would also indicate whether the speech was to be treated as an honorarium speech or as a Piranha Press speech.*

Special Counsel Ex. 65, ¶¶ 4, 5 (emphasis added). Jodi Mathison, the scheduler who assumed Ms. Kelly's responsibilities, similarly testified that Senator Durenberger himself designated some speech invitations received in his U.S. Senate office as Piranha Press appearances. Deposition of J. Mathison (5/5/89) at 18.[34]

In fact, as the Senator approached his honoraria income ceiling in 1985, speech invitations simply were forwarded by his United States Senate staff to Piranha Press to be treated as "promotional appearances." On February 15, 1985, shortly before the Senator made his first Piranha Press appearance, his Administrative Assistant forwarded to Mr. Mahoney a set of speech invitations which as of that date had already been accepted as honorarium speeches. Mr. Horner stated:

> At the direction of Senator Durenberger I am forwarding to you the upcoming invitations that have been accepted on his behalf. These invitations were accepted prior to the agreement between the Senator and his publisher; therefore, the honoraria agreed upon is $2,000 or less, the limit allowed by the U.S. Senate.

Special Counsel Ex. 258.

A listing of the Senator's honoraria speeches created in 1985 by Anne Kelly, his scheduler, reflects that by the end of February of that year, the Senator had collected a total of $22,500 in speaking fees—$19,500 in honoraria and $3,000 in fees paid to Mr. Mahoney. Ms. Kelly's handwritten note on this list states: "After this amount was collected, Mahoney took over with speaking fees." Special Counsel Ex. 263. In her affidavit, Ms. Kelly stated:

> I came to understand that after Senator Durenberger had almost reached his limitation on honoraria income for 1985, most speeches for which he was to receive an honorarium were to be handled as Piranha Press speeches.

Special Counsel Ex. 65, ¶ 6.

The Senator's Financial Disclosure Report for 1985 tends to confirm this understanding. That Report reflects eleven separate honoraria speeches, generating $19,500 in honoraria income, between January 21, 1985 and February 22, 1985. Special Counsel Ex. 266. The Senator reported receipt of an honorarium from only one additional speech, in December of that year, bringing his total disclosed honoraria income to $21,500, just under the cap imposed by law.[35]

Yet the Senator actually made fifty-eight additonal fee-earning speeches in 1985. Fees for all these events—totaling approximately $129,000—were paid to Piranha Press. There does not appear to be any basis for the characterization of these other speaking fees as book promotions rather than honoraria, other than the fact that the Senator had come close to his limit on honoraria by the end of February 1985.[36]

> On May 15, 1986, five days prior to the Senator's scheduled engagement [before the conference], I received a telephone call from Jodi Mathison of Senator Durenberger's office. . . . On or about that date, I spoke with a staff member from the Senator's office. Although I do not specifically recall, I believe that this conversation was with Ms. Mathison. *This staff member informed me that Senator Durenberger had exceeded his honorarium limit and as a result we should pay the honorarium we had agreed to pay for the Senator's appearance to his publisher.* This staff member stated that they would treat this trip as a book promotion appearance. This staff member indicated that someone from the Senator's publisher would be contacting me to arrange for payment of the speaking fee to the publisher.

Special Counsel Ex. 44 ¶ 5 (emphasis added). Mr. Kelley objected strenuously to this arrangement, and the Conference ultimately did not pay either the Senator or Piranha Press for the Senator's speech.

The lack of any meaningful distinction between an honorarium speech and a Piranha Press appearance by Senator Durenberger is also evident from a review of the Senator's copanelists and speakers. At twenty-three of the events at which Senator Durenberger made a Piranha Press "promotional appearance," other Members of Congress also spoke—in exchange for traditional honorarium payments.[37] For example, in July 1986, the Equitable Life Assur-

[34] Jimmie Powell, the Senator's Legislative Director from 1983 to August 1985, confirmed this procedure. In his affidavit, Mr. Powell stated:

> My understanding of the scheduling procedures with respect to the publishing contract is that when an organization invited Senator Durenberger to speak and offered an honorarium payment, the invitation was forwarded to Michael Mahoney and arranged as a Piranha Press appearance. If no honorarium payment was available, the Senator's personal secretary and scheduler, Anne Kelly, handled the appearance.

Special Counsel Ex. 67, ¶ 7.

[35] In 1985, 2 U.S.C. § 31-1 imposed an annual limit of 30 percent of a Senator's Senate salary, or $22,530, that could be earned through honoraria income.

[36] The lack of a meaningful distinction between the Senator's honoraria and "promotional" appearances also is demonstrated by the fact that the Senator sometimes gave addresses to an organization's annual meeting for several years, designating some of these speeches as honoraria and others as Piranha Press events. For example, the Senator addressed the American Protestant Health Association Forum in 1985, 1986 and 1988. Although the Senator's speeches have been characterized as being very similar, the Senator received a standard honorarium payment for the 1988 speech, but directed that the payments for the 1985 and 1986 speeches be made to Piranha Press. *See* Special Counsel Ex. 64, ¶ 12.

[37] These events are: American Association of Nurse Anesthetists (Special Counsel Exs. 82, ¶13; 95); American Group Practice Association (Special Counsel Exs. 29, ¶13;101); American Hospital Association (Special Counsel Exs. 104, 275); American International Automobile Dealers Association (Special Counsel Ex. 106); American Medical Association (Special Counsel Exs. 107, 271); American Protestant Health Association—April 24, 1985 (Special Counsel Exs. 64, ¶ 7; 110); American Protestant Health Association—April 16, 1986 (Special Counsel Exs. 64, ¶ 9; 111); American Society of Association Executives (Special Counsel Exs. 113, 272); Association of Metropolitan Water Agencies (Special Counsel Ex. 118); Catholic Charities, U.S.A. (Special Counsel Ex. 123); The Equitable Life Assurance Society (Special Counsel Exs. 54, ¶; 138; 275); Federation of American Hospitals (Special Counsel Ex. 140); General Electric Company (Special Counsel Exs. 62, ¶ 7; 146; 273); Health Industry Manufacturers Association (Special Counsel Exs. 72, ¶ 7; 150); National Association of Senior Living Industries (Special Counsel Ex. 167); National Gro-

Continued

ance Society sponsored a Group Health Policy Forum Breakfast, which was attended by approximately ten high level officials of the Equitable and the Health Care Financing Administration. Both Senator Durenberger and Congressman Pete Stark addressed the breakfast and each was paid a $2,000 honorarium. However, Senator Durenberger endorsed his honorarium check to Piranha Press. Special Counsel Exs. 54, 275.

Similarly, in February 1986 both Senator Durenberger and Senator Dale Bumpers spoke at the American Medical Association conference, "Participation '86." While Senator Bumpers reported receipt of a $2,000 honorarium on his Financial Disclosure Report, Senator Durenberger had his $2,000 payment made payable to Piranha Press. Special Counsel Exs. 63, 75, 107. Roy Pfautch, one of the organizers of the event, stated in his affidavit: "I considered the payment to Piranha Press to be an honorarium payment, idential in all respects to the honorarium payment to Senator Bumpers." Special Counsel Ex. 63, ¶ 9.

C. The Role of the Senator's Books at his "Promotional Appearances"

The lack of any clear substantive distinction between the Senator's own honorarium speeches and his "promotional appearances" is underscored by the fact that the Senator made a number of "promotional appearances" during which he did not mention either his books or his publisher. As was noted above, on those occasions on which he did mention either or both of his books, the references were extremely brief.[38] Often, they were disparaging of the books' contents.

For instance, in an apparent reference to his book *Prescription for Change* during a November 1986 speech before the U.S. Health Corporation, Senator Durenberger said:

> But I'm trying to write a real book on health policy, so that these speeches would be shorter, but it's really hard to do. I mean, things are happening so quickly out here, and they're so hard to understand, that I can't get my book done.
>
> So this is a book. But what this really is, is 44 speeches. . . .

Special Counsel Ex. 237, p. 6. On another occasion, the Senator's only mention of his books was his observation that they did not sell as well as Lee Iacocca's book. *See* Special Counsel Ex. 223, p. 10. During several speeches he made light of the name of his publisher, and admitted that the audience would have trouble finding the book in any place but his office. *See, e.g.*, Special Counsel Exs. 205,

cers Association (Special Counsel Ex. 169); National Multi Housing Council (Special Counsel Exs. 173, 270); National Restaurant Association (Special Counsel Ex. 174); Owens-Illinois (Special Counsel Exs. 179, 275); Prudential-Bache Securities (Special Counsel Ex. 184, 274); Securities Industry Association (Special Counsel Exs. 76, ¶ 8; 190); Washington Campus—March 25, 1985 (Special Counsel Exs. 89, ¶ 10; 151); Washington Campus—November 12, 1985 (Special Counsel Exs. 89, ¶ 21; 152).

[38] These references were often so brief that, when questioned as part of Special Counsel's inquiry, many witnesses present at these speeches stated taht they had no recollection that the Senator had mentioned his book(s). *See, e.g.*, Special Counsel Exs. 11, ¶ 6; 35, ¶ 8; 64, ¶ 9.

p. 15; 218, p. 23. These comments hardly seem intended to encourage the public to purchase his books.[39]

Of the 113 "promotional appearances" made by Senator Durenberger during 1985 and 1986, Special Counsel has found only three in which the sponsoring organization purchased the Senator's books.[40] In addition, Special Counsel has found only one appearance, the July 1986 meeting of the Outpatient Ophthalmic Surgery Society, at which the Senator's books were actually sold at the event itself. *See* Special Counsel Ex. 70, ¶ 21. The Senator occasionally held up a single copy of his book during his speech; on a few other occasions, additional copies were on display.[41]

On several occasions, sponsoring organizations were told that it was not necessary to display the Senator's books, notwithstanding the request for such space in the standard Piranha Press confirmation letter. *See* Special Counsel Exs. 28, ¶¶ 7; 57, ¶¶ 10; 66, ¶ 6; 86, ¶ 6. In addition, while many groups were willing to display the Senator's books they were unable to obtain copies of the books. *See, e.g.*, Special Counsel Exs. 29, ¶ 8; 50 ¶ 11; 58 ¶¶ 5, 11.

For instance, the Senator was invited to give a traditional honorarium speech at the November 1985 Business Issues Seminar sponsored by the State Government Education and Research Foundation. Martha McNelis, who managed the Seminar, learned that the Senator was to publish a book on health care issues. She hoped to make the book available to Seminar participants. Despite efforts to obtain copies of the Senator's books, no books were made available to the Foundation. Ms. McNelis stated: "I recall being frustrated, disappointed and somewhat confused that our original plans to distribute the Senator's books were unsuccessful." Special Counsel Ex. 58, ¶ 11.

The Invest to Compete Alliance, before which the Senator spoke in February 1986, similarly was unsuccessful in its efforts to acquire the Senator's books. Jeanne Campbell, a lobbyist who coordinated the activities of the Alliance, was instructed by a member of the Senator's staff to purchase copies of the Senator's books instead of paying an honorarium for the Senator's appearance. Ms. Campbell stated in her affidavit that sometime after the $2,000 payment was made to the publisher:

> I called the Senator's office because copies of the Senator's books had not been received and was told to contact Piranha Press. I telephoned Piranha Press and believe that I spoke with Gary Diamond who told me he would

[39] The lack of any clear nexus between the Senator's books and the groups before which he was speaking may account for the often trivial character of the Senator's speech references to his books.

[40] Massachusetts Mutual Life Insurance Company purchased 100 copies of *Neither Madmen Nor Messiahs* in connection with the Senator's appearance on May 15, 1985, and 100 copies of *Prescription for Change* in connection with his appearance on September 15, 1986. Special Counsel Ex. 34. The National Association of Senior Living Industries (NASLI) purchased and distributed approximately 143 copies of *Prescription for Change*, in connection with the Senator's appearance on May 19, 1985. Special Counsel Ex. 47. However, NASLI's Executive Director Robert Kramer stated in his affidavit that he was instructed to make a $1,000 honorarium payment and a $1,001 payment for the purchase of books, Mr. Kramer further stated: "At no time did I or NASLI request to receive the Senator's book, *Prescription for Change*. I did not want the books and would not have purchased $1,001 of *Prescription for Change* other than to have Senator Durenberger speak." Special Counsel Ex. 47, ¶ 9.

[41] *See, e.g.*, Special Counsel Exs. 12, ¶ 15; 16, ¶ 5; 29, ¶ 9; 45, ¶ 8; 79, ¶ 8.

> look into the matter. The books were not received nor did I ever hear back from Mr. Diamond.

Special Counsel Ex. 15, ¶ 7.

Piranha Press also promised in its standard confirmation letter to provide to the sponsoring organization "all necessary promotional literature." No such literature has been provided to the Committee by the Senator, his Minnesota counsel or Piranha Press as part of the Committee's proceedings in this matter. Special Counsel has not discovered a single occasion on which Gary Diamond or Piranha Press actually provided promotional literature to the sponsoring group. *See, e.g.,* Special Counsel Exs. 29, ¶ 8; 32, ¶ 8; 75, ¶ 6.

In fact, Gary Diamond admitted in his affidavit that he rarely provided any materials to the organizations before which Senator Durenberger spoke:

> On a few occasions, I forwarded copies of the Senator's books to organizations that agreed to display them at the Senator's appearances. However, in the majority of cases, I did not provide copies of the books or other promotional materials to the organizations.

Durenberger Ex. 3, ¶ 6.

D. The Nature of the Groups Before Which the Senator Appeared

The transparent character of the Senator's "promotional" arrangement with Piranha Press is apparent from a simple comparison of the groups before which he spoke and the subject matter of the books which he claims to have been promoting. The Senator's first book, a collection of white papers on national security and defense policy issues entitled *Neither Madmen Nor Messiahs,* was published on September 10, 1984. His second book, a collection of speeches on health care issues entitled *Prescription for Change,* was not released until April 1986.

Yet between February 1985 and April 1986, many of the Senator's "promotional appearances" were before health care groups or groups interested in the Senator's views on tax reform—not national defense policy. During this time period, the Senator made two speeches, both now characterized as "promotional appearances," before defense contractors. Although these organizations might have provided an appropriate forum for promotion of the Senator's defense book, in both cases the contractors declined to pay Piranha Press. Instead, the contractors issued checks payable to Senator Durenberger—which he then endorsed to Piranha Press. *See* Special Counsel Exs. 19, 156 at O-P, 196 at BB-CC. One of these defense contractors, TRW, explicitly rejected the proposal that the Senator's appearance be treated as a book promotion.[42] *See* Special Counsel Ex. 19.

The incongruity of making "promotional appearances" before health groups without having published a health book appears to have been obvious at the time to both the Senator's staff and his

[42] During this same time period, Senator Durenberger also appeared before representatives of Northrop and Hughes Aircraft Company. Both of these defense contractors expressly rejected proposed book promotion by Piranha Press. *See* Special Counsel Exs. 13, 88. The Senator reported his income from these appearances as honoraria.

counsel.[43] On May 23, 1985, Mr. Mahoney forwarded a memorandum to Douglas Kelley in which he stated: "It is extremely important that the Senator complete a book on health matters for distribution by Piranha Press to groups that the Senator speaks to under the terms and conditions of his contract with Piranha Press." Special Counsel Ex. 260. In fact, Mr Mahoney went so far as to say that this book "need not be of the same caliber" as one written by a professional author. *Id.* This memorandum reflects Mr. Mahoney's sensitivity to the fact that the Senator was making appearances that were characterized as book promotions before numerous health issues groups, but had not yet authored a book on topics of interest to these groups.

No health book was produced in 1985, however, and at the end of the year the matter was raised by Jon Schroeder, a member of the Senator's staff in Minneapolis. In a memorandum to Mr. Kelley and Kitty Gamble, also of the Senator's Minneapolis staff, Mr. Schroeder summarized his thoughts on the need to assemble and publish a health care book. He stated:

> I understand and agree with the necessity of doing this, because of the desirability of broadening the audience of the Senator's health speeches and enhancing his role and perception as the "Health Senator" and to *make sure we have a sound justification for the compensation which he is receiving from Piranha for delivering health speeches around the country.*
>
> *I believe the linkage between the speeches, the book, and the compensation is important in explaining 1985 compensation from Piranha.*
>
> * * * * *
>
> *Along the way, we have to remember that this is something of a "quick and dirty."* It has to get out within a certain timeframe, it is not the "ultimate" Dave Durenberger piece on health issues. . . . But again, it must not be an embarrassment; *and it must justify the compensation involved to the Senator.*

Special Counsel Ex. 262 (emphasis added). The health care book ultimately published by the Senator in the spring of 1986 was simply a collection of speeches which he had previously given on health care issues.[44] Ironically, four of these speeches were Piranha Press "book promotions" that had been presented by the Senator during the previous fourteen months.[45]

[43] In fact, the Sentor apparently had made some effort to author a health care book as early as the summer of 1984, when he hired William Swanson as a professional ghost writer. Mr. Swanson completed a manuscript in early 1985, which was never published. Special Counsel was informed that Mr. Swanson was paid $15,000 for these efforts by the Durenberger Volunteer Committee.

[44] This book was largely assembled and edited by Mr. Schroeder, whose Senate salary was reduced to reflect time devoted to the book, and who was paid $3,944 by Piranha Press for his services.

[45] These were as follows: Association of Academic Health Centers—October 5, 1985 (Special Counsel Ex. 117); Brown University—March 13, 1985 (Special Counsel Ex. 120); Employers Council on Flexible Compensation—February 28, 1985 (Special Counsel Ex. 137); Pfizer, Inc.—April 3, 1985 (Special Counsel Ex. 182).

E. Payments to Piranha Press

In many instances, the Senator did not designate a speech as a "book promotion" until after the speech itself. Not surprisingly, therefore, the Senator frequently was compensated by the sponsoring organization as if his appearance were a traditional honorarium speech—by paying the Senator directly.

Twenty-six separate payment checks made payable to Senator Durenberger, totalling $56,750, were deposited into the Piranha Press bank account—twenty-one of which reflected Senator Durenberger's personal endorsement to Piranha Press.[46] Four of these checks reflected on their face the payer's designation as "honorarium." *See* Special Counsel Exs. 122, 167, 188, 201.

Three of these organizations were contacted by Piranha Press only after the Senator's appearance. *See* Special Counsel Exs. 112, 136, 174. Ten of these organizations had no contact with Piranha Press, and were never told of the arrangement between Piranha Press and the Senator.[47] Until they reviewed their cancelled payment check, they often had no knowledge that the Senator had characterized his speech before their group as a book promotion. *See, e.g.,* Special Counsel Ex. 30, ¶¶ 5–7.

Moreover, on several occasions these same organizations had expressly rejected a proposed "promotional appearance," instead insisting that the Senator's appearance be handled as a traditional honorarium event. *See, e.g.,* Special Counsel Exs. 12, 19, 23, 33, 46, 54. For example, John Carter, Jr., of TRW, Inc., who arranged for Senator Durenberger to visit several defense contractor facilities in California in January 1986, stated in his affidavit:

> Prior to the visit, I recall being contacted by someone from Piranha Press, advising me that they were handling the Senator's speaking engagements. They also indicated that payment for the Senator's appearance was to be made to Piranha Press, and that part of the visit would include promotion of his book . . . . I advised the individual from Piranha Press that the Senator's visit to TRW would be handled as a straight honorariumn visit, and we would make payment directly to the Senator. I also indicated that the visit to TRW would not include promotion of the Senator's book.

Special Counsel Ex. 19., Notwithstanding this insistence, the Senator endorsed this honorarium check to Piranha Press. *See,* Special Counsel Ex. 196 at BB–CC.

On at least two separate occasions, Senator Durenberger delivered a speech in which he did not mention either his books or his publisher, and later personally instructed the sponsoring organizations to make payment to Piranha Press. *See,* Special Counsel Exs. 21, 51.

The majority of the groups before which the Senator spoke made payment for the Senator's appearance to Piranha Press as requested. On more than one occasion, a member of the Senator's staff, a representative of Piranha Press, or Mr. Mahoney attempted to coax groups that had invited the Senator to speak to increase the payment offered, often to as much as $5,000.[48] For example, Robert Lively of the National Rural Electric Cooperative Association was told by a representative of Piranha Press that Senator Durenberger would not appear before his group unless a $5,000 fee were paid, instead of the $2,000 honorarium offered. Special Counsel Ex. 50, ¶¶ 7–8. *See, also,* Special Counsel Exs. 30, ¶¶ 9, 12; 50, ¶ 7, 60, ¶ 5; 87, ¶ 7.[49] Many organizations acceded to these requests, in order to assure that a United States Senator would address their meetings. *See, e.g.,* Special Counsel Exs. 60, ¶ 5; 30, ¶ 12.

Some organizations found Mr. Mahoney's request for a higher payment to be "heavy-handed." Some refused to comply, in part because they were aware of the $2,000 per appearance limitation on an honorarium payment. *See, e.g.,* Special Counsel Ex. 14, ¶ 3. For instance, Mary Samoszuk of the Council of Community Hospitals ("CCH") was informed by a repesentative of Piranha Press that a $5,000 payment to the publisher was required to secure the Senator's appearance. Ms. Samoszuk stated in her affidavit: "I was concerned that this arrangement might be a way to avoid some limit on honoraria income." Special Counsel Ex. 71, ¶ 8.

Many organizations objected to the arrangements proposed by Piranha Press. *See, e.g.,* Special Counsel Exs. 13; 44, ¶¶ 5–7; 88. For example, James Doherty, President of The Group Health Association of America, Inc. ("GHAA"), reacted as follows after receiving an initial memorandum from Piranha Press: "I recall that the memorandum struck me as harsh, abrupt, and heavy handed." Spe-

[46] These twenty-one payments were provided to Senator Durenberger by American Bankers Association (Special Counsel Ex. 96 at F–G); American Hospital Association (Special Counsel Ex. 104 at G–H); American Insurance Association (Special Counsel Ex. 105 at B–C); American Psychiatric Association (Special Counsel Ex. 112 at V–W); American Society of Association Executives (Special Counsel Ex. 113 at I–J); Annenberg Center for Health Sciences (Special Counsel Ex. 116 at O–P); The Chicago Council on Foreign Relations (Special Counsel Ex. 126 at N–O); The Economic Club of Detroit–Blue Cross/Blue Shield of Michigan (Special Counsel Ex. 136 at S–T); The Equitable Life Assurance Society (Special Counsel Ex. 138 at F–G); The Fertilizer Institute (Special Counsel Ex. 142 at G–H); Grocery Manufacturers of America, Inc. (Special Counsel Ex. 147 at D–E); Lockheed Corporation (Special Counsel Ex. 156 at O–P); Memorial Hospital (Special Counsel Ex. 159 at B–C); National Association of Senior Living Industries (Special Counsel Ex. 167 at Q–R); National Restaurant Association (Special Counsel Ex. 174 at G–H); Owens-Illinois (Special Counsel Ex. 179 at G–H); Renewable Fuels Association (Special Counsel Ex. 188 at L–M); Stanford University Center for Ecomomic Policy Research (Special Counsel Ex. 192 at J–K); TRW, Inc. (Special Counsel Ex. 196 at BB–CC); Washington Discussion Group (Special Counsel Ex. 201 at I–J); and Williams & Jensen (Special Counsel Ex. 202 at E–F);

The five checks made payable to Senator Durenberger and deposited without endorsement to Piranha Press were provided by American Association of Equipment Lessors (Special Counsel Ex. 93 at B–C); The Castroviejo Society (Special Counsel Ex. 122 at F–G); Drexel Burnham Lambert, Inc. (Special Counsel Ex. 134 at H–I); National Association of Realtors (Special Counsel Ex. 166 at G–H); and Pathology Practice Association (Special Counsel Ex. 181 at H–K);

[47] *See* Special Counsel Exs. 93, 96, 104, 105, 126, 147, 159, 166, 188, 192.

[48] Senator Durenberger's Counsel has argued that the $2,000 per appearance limitation on honoraria (2 U.S.C. 441i) was not violated because Senator Durenberger received, on average, only $1,000 per appearance from Piranha Press. *Hearing Transcript* (June 12, 1990) at 131. Special Counsel submits that the relevant payments are those that would have been paid to the Senator, and which instead were channeled through the publisher. Twenty checks, each in excess of the $2,000 cap, were deposited into the Piranha Press account. *See,* Special Counsel Exs. 94 ($5,000), 98 ($5,000), 102 ($2,500), 108 ($3,000), 116 ($5,000 payable to Senator Durenberger), 117 ($5,000), 134 ($5,000 payable to Senator Durenberger), 148 ($5,000), 149 ($2,500), 150 ($4,000), 157 ($4,000), 164 ($5,000), 168 ($2,500), 178 ($5,000), 181 ($5,000), 185 ($5,500), 186 ($2,500), 189 ($5,000), 198 ($5,000), 199 ($4,000).

[49] Although the agreement betwen the parties apparently contemplated that the Senator's staff would not be involved in the negotiation of speaking fees (*see,* Special Counsel Exs. 252, 253), in practice the staff members did occassionally become involved in this process. *See, e.g.,* Special Counsel Ex. 60, ¶ 5. For example, Charles Kahn, the Senator's Health Legislative Aide in 1985 and 1986, stated in his affidavit that his duties included making assessments regarding the amount of money specific groups could pay for the Senator's appearance. Special Counsel Ex. 42,

cial Counsel Ex. 26, ¶ 8. Mr. Doherty then received the standard confirmation letter from the publisher. He described his reaction to this letter as follows:

> This letter made me very angry. Mr. Diamond's letter presumed that GHAA had inquired about the Senator doing a book promotion, and that the Senator's appearance at the June 1986 GHAA conference would be a book promotion. GHAA, however, had invited the Senator to speak about health care. I believed that GHAA was being "hustled" by Piranha Press.

Id., ¶ 11.

Some organizations objected so strenously to the terms required by Piranha Press for the Senator's appearance that they withdrew their invitations. *See, e.g.,* Special Counsel Exs. 31, 26, 69, 71 and 74. For instance, Ms. Samoszuk of CCH stated: "I decided that it would not be feasible or proper to have the Senator speak at the conference, given the conditions imposed by the attorney for the publisher." Special Counsel Exc. 71, ¶ 10.

F. Representative Appearances During 1985 and 1986

Summarized below are the relevant facts concerning four separate "promotional appearances" by Senator Durenberger during 1985 and 1986. These appearances are illustrative of the Senator's conduct during this time frame, and serve to demonstrate the lack of meaningful distinction between the promotional and honoraria appearances that he made.

1. MARCH 1985 AMERICAN PSYCHIATRIC ASSOCIATION SPEECH

In January 1985, the American Psychiatric Association ("APA") invited the Senator to deliver the keynote address at the APA's Federal Legislative Institute in March of that year. Jay Cutler, Special Counsel and Director of Government Relations for the APA, stated in an affidavit that the Senator was invited to participate in this event because of his position as Chairman of the Health Subcommittee of the Senate Finance Committee. Special Counsel Exc. 23, ¶ 3.

In a series of telephone conservations prior to the Senator's appearance between Anne Kelly of the Senator's staff and Linda Hughes of the APA staff, arrangements were made for the payment of a $2,000 honorarium to the Senator. Ms. Hughes stated in her affidavit that there was no mention of the Senator's books during any of these conversations. Special Counsel Exc. 39, ¶ 6. Neither Mr. Cutler nor Ms. Hughes, both of whom were present for the Senator's speech, recalls any mention by the Senator of his book or his publisher during his speech. In addition, both stated in their affidavits that the Senator's books were neither sold nor displayed during the APA meeting. Special Counsel Exs. 23, ¶ 6; 39, ¶ 5.

Immediately following the Senator's speech, Ms. Hughes was informed by a member of the Senator's staff that the honorarium payment was to be made payable to Piranha Press. Mr. Cutler was troubled by this proposed payment because, in his words, he "knew

that the Senator's address [to the APA] was not a book promotion. The Senator did not speak about his book(s) and no books were sold." Special Counsel Ex. 23, ¶ 9. Accordingly, Mr. Cutler consulted with Joel Klein, the APA General Counsel, who advised the APA not to make the payment in this manner, precisely because of his concern that the arrangement represented an effort to evade the honoraria limitations. Special Counsel Exc. 46, ¶ 3.

In January of the following year, Gary Diamond wrote to Mr. Cutler demanding payment for the Senator's appearance. Mr. Cutler referred this letter to Mr. Klein, who in turn wrote to Mr. Diamond to request, among other things, a legal opinion from Piranha Press counsel sanctioning the payment. In response, Mr. Klein received a copy of the FEC advisory opinion from Mr. Mahoney's office. In his affadavit, Mr. Klein summarized his reaction to these events as follows:

> Notwithstanding this communication, in light of my understanding that the APA had not promoted, displayed or purchased the Senator's book(s), it was my view that payment should not be made to Piranha Press. Accordingly, I advised the APA to issue a check payable to Senator David Durenberger as payment for his speech at the 1985 Legislative Institute.

Special Counsel Ex. 46, ¶ 7.

Consistent with this advice, the APA issued a check in the amount of $2,000 to Senator Durenberger. As the cancelled check reflects, the Senator endorsed this payment check to Piranha Press, and it was deposited into the Piranha Press bank account. *See* Special Counsel Ex. 112 at V-W.

2. MARCH 1985 THE TOBACCO INSTITUTE SPEECH

Senator Durenberger was invited to speak at a breakfast meeting of twenty-five to thirty members of the Government Operations Committee of the Tobacco Institute on March 21, 1985 by former Senator Marlow Cook.[50] Senators Cook and Durenberger discussed that the Institute would pay an honorarium of $2,000 in connection with his appearance. Special Counsel Ex. 21, ¶ 3. Senator Durenberger did not advise Senator Cook of his arrangement with Piranaha Press during this discussion, nor did he even mention his book. *Id.* Senator Cook, who attended the breakfast meeting, described Senator Durenberger's speech as follows:

> While I did not specifically recall the substance of Senator Durenberger's remarks, I do recall that they related generally to then current legislative issues. I do not recall Senator Durenberger mentioning either his book(s) or his publisher during his remarks before the Institute. The Senator did not display any of his books at the meeting, or otherwise offer those books for sale at the meeting.

Special Counsel Ex. 21, ¶ 4.[51]

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[50] Senator Cook served in the United States Senate from 1968 to 1975.

[51] Robert Lewis, the Institute's Senior Vice President for Federal Relations, also attended the breakfast meeting and does not recall any mention or display of the Senator's books. Mr. Lewis

Continued

At the conclusion of the meeting, Senator Durenberger apparently was offered a Tobacco Institute check in the amount of $2,000. Senator Durenberger then asked Senator Cook to have a replacement check in the amount of $2,000 issued payable to Piranha Press. Special Counsel Ex. 21, ¶ 5. Although Senator Cook found this request to be "somewhat unusual," he compiled with Senator Durenberger's wishes and on March 28, 1985 the Tobacco Institute sent a check in that amount to Piranha Press. Special Counsel Ex. 21, ¶ 6.

3. APRIL 1986 MIDWEST PODIATRY CONFERENCE SPEECH

In February 1986, Senator Durenberger was invited by the American Podiatric Medical Association ("APMA") to address a Midwest Podiatry Conference in Chicago, Illinois. The Senator was invited to speak at this event because of his position as Chairman of the Health Subcommittee of the Senate Finance Committee. Special Counsel Ex. 18, ¶ 3. John Carson, Director of Governmental Affairs for the APMA, coordinated the logistics of the Senator's appearance. Mr. Carson was informed by the Senator's staff of the Senator's relationship with Piranha Press and subsequently received the standard Piranha Press confirmation letter. As requested, the APMA made payment to Piranha Press within ten days of the letter, approximately three weeks in advance of the conference.

Several weeks before the event, Mr. Carson contacted Piranha Press to discuss the book display. In his affidavit, Mr. Carson described the ensuing events as follows:

> The person with whom I spoke—I believe it was Gary Diamond—informed me that it would be necessary for the APMA to make a table available at its annual meeting for a display of the Senator's book(s). I was both willing and prepared to act on this request . . . . However, I then received a telephone call from Jodi Mathison or someone from Piranha Press informing me that there was no need to display or otherwise promote the Senator's book(s) at the annual meeting.

Special Counsel Ex. 18, ¶ 6. Not surprisingly, the APMA did not display or sell the Senator's books at its meeting. Senator Durenberger did not mention his book or his publisher, or any plans to publish books, at his speech for the APMA. Special Counsel Ex. 18, ¶ 8.

It is noteworthy that the Senator also spoke before the APMA's annual Leadership Conference in March 1987. Mr. Carson again was responsible for arranging the logistics of the Senator's appearance. Although the Senator's speech at the 1987 APMA was described by Mr. Carson as very similar to his 1986 speech, the APMA was not asked to and did not make payment for the Senator's 1987 appearance to Piranha Press. Special Counsel Ex. 18, ¶ 11.

characterized the Senator's appearance as "a traditional honorarium event." Special Counsel Ex. 49, ¶ 4.

4. NOVEMBER 1986 NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION SPEECH

Senator Durenberger also was invited to speak before the National Rural Electric Cooperative Association ("NRECA") Cooperative Leadership Orientation Conference on November 18, 1986. In its letter of invitation, NRECA offered an honorarium payment of $2,000. *See* Special Counsel Ex. 175, p. B. This invitation was accepted by the Senator through Ms. Mathison of his staff. Robert Lively of the NRECA staff and Ms. Mathison discussed the details of the Senator's appearance, including the $2,000 honorarium payment. Special Counsel Ex. 50, ¶ 5. Ms. Mathison informed Mr. Lively generally of the Senator's arrangement with Piranha Press. She did not, however, mention the Senator's books during this conversation. *Id.*

Sometime thereafter, Mr. Lively received a memorandum from Piranha Press regarding the arrangements for the Senator's appearance. He then had three separate conversations with a representative of the publisher. The representative indicated that the $2,000 honorarium previously agreed upon would not be sufficient under the terms of the Senator's arrangement with Piranha Press. She further informed Mr. Lively that the fee would be $5,000 and the NRECA would be required to purchase 500 of the Senator's books. *Id.*, ¶ 7.

On behalf on NRECA, Mr. Lively objected strenuously to this request. As Mr. Lively stated in his affidavit, he felt that Piranha Press was pressuring NRECA. *Id.*, ¶ 9. Ultimately, the representative from Piranha Press agreed to the $2,000 figure, and further agreed that NRECA would not be required to purchase any books. *Id.*, ¶ 10.

Bob Bergland,[52] the Executive Vice President and General Manager of NRECA, stated in his affidavit that Senator Durenberger had been invited to speak before NRECA's Cooperative Leadership Orientation Conference because he was a member of the Senate Subcommittee on Intergovernmental Relations of the Committee on Governmental Affairs. Special Counsel Ex. 11, ¶ 3. Mr. Bergland stated in his affidavit as follows:

> The Senator never discussed his book(s) or his publisher with me privately. While I do not specifically recall the topic of the Senator's speech, I know that he did not discuss his book(s) or publisher during his speech. I did not see any display of the Senator's book(s) at the Conference, nor to my knowledge were his book(s) available for sale. The Senator's appearance before NRECA was not a book promotion. NRECA treated his appearance in the same manner as any traditional honorarium event.

Special Counsel Ex. 11, ¶ 6. It should be noted that there is no apparent nexus between NRECA's interests in energy matters and the Senator's role on the Governmental Affairs Committee on the

[52] Mr. Bergland served as the member of the United States House of Representatives from Minnesota's Seventh Congressional District from 1971 to 1977, and then as the Secretary of the U.S. Department of Agriculture from 1977 to 1981.

one hand, and the Senator's books on national defense and health policy issues on the other.

G. Advice to Senator Durenberger Counseling Against his Relationship With Piranha Press

Many of Senator Durenberger's advisors and staff members were troubled by his arrangement with Piranha Press. Several personally cautioned the Senator against his continued participation in that arrangement.

Jimmie Powell, the Senator's Legislative Director from 1983 to August 1985, stated in his affidavit that he was concerned that the arrangement "would have the appearance of avoiding the overall limitation on honoraria income." Special Counsel Ex. 67, ¶ 2. Mr. Powell discussed these concerns with his staff colleagues, Messrs. Horner and Kahn, whom he understood shared his concern. The Senator's arrangement with Piranha Press was one of the factors that ultimately contributed to Mr. Powell's decision to leave the Senator's staff. *Id.*, ¶ 11.

Mr. Kahn stated in his affidavit that he received complaints about Mr. Mahoney's approach in negotiating the Senator's book promotion appearances and discussed the issue with Messrs. Mahoney and Kelley, and perhaps with the Senator himself. Special Counsel Ex. 42, ¶ 8. In particular, Mr. Kahn stated that he received complaints about Mr. Mahoney's efforts "to negotiate for the highest promotional fee possible for the organizations in question." *Id.*

Michael Bromberg, a campaign fundraiser for Senator Durenberger, reacted similarly to the Senator's arrangement with his publisher. Mr. Bromberg was so concerned that he raised the matter with the Senator personally in 1985. He specifically told the Senator that the business community was being antagonized by Mr. Mahoney's dealings with them on Piranha Press' behalf, and that the arrangement created an appearance of impropriety. Special Counsel Ex. 14 ¶ 9.

This view apparently was shared by many of the Senator's advisors. Dr. Donald Fisher, once a member of the Senator's re-election Steering Committee, stated in his affidavit that the Senator's arrangement with his publisher had been discussed during Steering Committee meetings, and that many of the Committee members were uncomfortable with the Senator's relationship with Piranha Press. Special Counsel Ex. 29, ¶¶ 5, 6. Similarly, Frederick Graefe, an attorney and friend of the Senator, testified that he recommended that the Senator terminate his relationship with Piranha Press. Special Counsel Ex. 435 at 102–104. Inasmuch as the questionable character of the Senator's promotional arrangement seemed obvious to those around him, one might fairly question why the Senator himself allowed it to continue.[53]

[53] Senator Durenberger acknowledged in his presentation to the Committee that his relationship with Piranha Press "sure as heck looks like a way of getting around the law limiting honoraria . . . . I should have know it and I should have avoided it." *Hearing Transcript* (June 13, 1990) at 43.

VI. Evidence Regarding the Condominium Transactions

Following his election to the Senate in June 1979, Senator Durenberger purchased a one-bedroom condominium (#603) located at 1225 LaSalle Avenue in Minneapolis for $48,000, which he used during his frequent travels to that city. Senator Durenberger has represented that effective July 28, 1983 he formed an investment partnership with Roger Scherer, a personal friend and the owner of the unit (#703) directly above the Senator's. Both the Senator and Mr. Scherer contributed their respective condominium units to the partnership entity. Senator Durenberger then rented his unit (#603) from the partnership at a *per diem* rate of $65.

In June 1985 Senator Durenberger placed his interest in his partnership into a qualified blind trust established pursuant to the Ethics in Government Act. In his capacity as general partner, the Senator deeded the property to Michael Mahoney as trustee of that trust.

On March 31, 1987, in response to Mr. Scherer's request, the partnership was terminated. The Senator then sold the condominium unit to the Independent Service Company ("ISC"), a Minnesota business owned by Paul Overgaard, "effective" April 1, 1987. Following this sale, the Senator rented the condominium from ISC at a *per diem* rate of $85. Because the deed and related documents evidencing this sale have never been filed with the county Registrar of Titles, legal title to the property has never been transferred to ISC.

Through this entire period, from August 1983 to mid-November 1989, Senator Durenberger claimed and received $40,055 in Senate travel reimbursements for the costs incurred in renting the condominium from the partnership and ISC.[54]

Special Counsel finds that in these matters, Senator Durenberger engaged in a pattern of improper conduct which has brought discredit upon the United States Senate. Special Counsel specifically finds that Senator Durenberger was a participant in the back dating of the two real estate transactions here at issue, and that these transactions were conceived and orchestrated wholly as a means of permitting the Senator to claim Senate *per diem* reimbursement for staying in what was in essence his Minnesota residence.

The effect of these transactions was to transfer to the Senate, and ultimately the American taxpayer, the cost of maintaining property which served as the Senator's second home.[55] Indeed, it would seem that the character of the Senator's use of the condominium essentially has not changed since he purchased the property in 1979. Since that time, the Senator has maintained his personal belongings in the condominium, stayed in the unit during his

[54] Senator Durenberger has refunded $11,005 of this sum to the Senate. *See* Special Counsel Ex. 296.

The Senator also received $7,755 in reimbursements from the Durenberger Volunteer Committee, his official election committee, as payment for the condominium rental costs incurred during travel to Minnesota. *See* Special Counsel Ex. 407.

[55] In his statement to the Committee, Senator Durenberger stated that the partnership was not "a financial windfall for me." *Hearing Transcript* (June 13, 1990) at 33–34. However, reimbursements received from the Senate inured directly to the Senator's benefit by helping to pay the mortgage on the Senator's condominium.

travel to Minneapolis, and generally had unrestricted access to the property at all times.

Finally, Special Counsel finds that at various times the Senator's interest in the condominium was concealed from the Senate Disbursing Office. The true ownership of the condominium for which the Senator was claiming rental reimbursements was thereby misrepresented to that Office.

Special Counsel finds that Senator Durenberger's conduct in these matters reflects an abuse of his United States Senate office and a misuse of United States government funds. Taken collectively, this conduct is of such a nature as to bring discredit upon the United States Senate.

A. The Condominium Transactions with Roger Scherer

Special Counsel finds that the real estate partnership between Senator Durenberger and Mr. Scherer was conceived and structured expressly for the purpose of permitting Senator Durenberger to receive Senate *per diem* lodging reimbursement. Special Counsel further finds that Senator Durenberger participated in what was in essence the back dating of this entire transaction. Finally, it is obvious that through the partnership vehicle the Senator retained a significant ownership interest in a condominium unit which served as his personal residence in Minneapolis, and that this ownership interest effectively was concealed from the Senate Disbursing Office.

1. CONTEMPLATED EXCHANGE OF CONDOMINIUMS

Following the November 1982 election, Eugene Holderness, Senator Durenberger's personal friend and 1982 Campaign Manager, advised the Senator to sell his Minneapolis condominium as a means of reducing his monthly expenses. Durenberger Ex. 7, ¶ 4.[56] Roger Scherer, who apparently was aware of Senator Durenberger's efforts to minimize his personal expenses, subsequently began to explore with Senator Durenberger ways in which the Senator could reduce the costs of maintaining his condominium residence. Durenberger Ex. 21, ¶¶ 4–5.[57]

By the end of July 1983 Mr. Scherer and the Senator had agreed to enter into some form of business venture with regard to their respective condominium units.[58] However, it is clear from the documents produced to the Committee in this matter that the parties originally did not contemplate a partnership or similar joint business venture. Instead, the parities intended to exchange their respective condominium units pursuant to § 1031 of the Internal Revenue Code, which permits the tax free exchange of like properties. Senator Durenberger then would lease unit 603, his former condominium, from Mr. Scherer and would finance this lease in large part through Senate reimbursement payments.

[56] Mr. Holderness also suggested to the Senator that, during his future travel to Minneapolis, he instead stay in a hotel or similar public lodging. *See* Durenberger Ex. 7, ¶ 4.

[57] During the course of the Preliminary Inquiry in this matter, Special Counsel interviewed a number of the participants in the relevant transactions, including Eugene Holderness, Douglas Kelley, Lori Krage (now Edstrom), Richard Langlais, Roger Scherer and Heidi Shaw. Recollections of these witnesses as provided to Special Counsel during those interviews will be referred to periodically throughout this Report.

[58] *See* Durenberger Exs. 21, ¶ 5; 7, ¶ 5.

In connection with these plans, Mr. Holderness sought the advice of Randall Johnson, a former attorney for the Federal Election Commission and the Senator's 1982 Campaign Treasurer, concerning the Senate *per diem* reimbursement regulations. *See* Durenberger Ex. 9, ¶¶ 3–4. Those regulations generally allow reimbursement for lodging expenses incurred on official Senate business. In accordance with those regulations, however, Members are not permitted to claim reimbursement for costs of staying in their "residence cities in their home states" during adjournment *sine die* or the traditional August recess. *See United States Senate Travel Regulations* § I(C) (1980).[59]

Mr. Johnson concluded that the Senator could claim Senate reimbursement for his overnight lodging in Minneapolis if he changed his voting registration to Avon, Minnesota, a small town in rural Minnesota in which the Senator's parents lived. *See* Durenberger Exs. 7, ¶ 6; 8, ¶ 5. Avon would then be deemed to be the Senator's "residence city" in Minnesota, and according to Mr. Johnson, the Senator would be eligible to receive Senate reimbursement for the cost of overnight lodging in Minneapolis, even if the Senator was simply renting back his former unit from Mr. Scherer.[60]

Thus, in a June 28, 1983 letter to the Senator, Mr. Johnson stated:

> Gene Holderness and Roger Sherer [sic] have talked to me about the proposed transactions involving the condominium. I told them that I am ready to proceed with the papers as soon as you give the word. *In order to minimize any possible concern about receiving reimbursement out of Senate funds for nights spent at the condominium, I believe it is important for you to list your new unit immediately and sell it within a reasoanble period of time.* You will have to change your legal and voting residence to somewhere outside the Twin Cities area. I think Gene suggested that you will probably use your parents' address, which is perfectly acceptable under Minnesota law.

[59] The relevant regulation provides in pertinent part:

> Traveling expenses which will be reimbursed are confined to those expenses essential to the transaction of the official business while away from the official station or post of duty.
>
> The official duty station of all Senate Members and employees shall be considered to be the metropolitan area of Washington, D.C. . . . For this purpose, the official duty station of Senators shall be considered to be their residence cities in their home States during adjournment sine die or the adjournment period authorized in odd-numbered years by Public Law 91–510, approved October 26, 1970.

United States Senate Travel regulations § I(C) (1980). As was noted above, the Senate Rules Committee recently has opined that this regulation does not permit reimbursement for expenses incurred while a Member is residing in his/her usual place of residence in his/her home state during the *sine die* or traditional August recesses authorized by Public Law 91–510.

[60] It is interesting to note that in a series of opinions interpreting the Federal Travel Regulations, the Comptroller General has held that an employee on temporary duty may not be reimbursed for the expenses of staying in a personally owned rental property, absent clear and convincing evidence that but for his temporary lodging in the premises, the premises would have been rented to some third party. *See, e.g., In re Doubtful or Fraudulent Travel Claims,* B–230385 (unpublished opinion of Comptroller General, January 16, 1990).

Special Counsel Ex. 298 (emphasis added).[61] Obviously, Mr. Johnson recognized that the contemplated exchange of properties could be viewed as no more than a gimmick to allow the Senator to claim reimbursement for the costs of renting his own former residence. He therefore cautioned the Senator to dispose of his new unit quickly.

Thereafter, the parties took several steps in an effort to accomplish the planned exchange of condominiums. On or about July 15, 1983, Senator Durenberger and Mr. Scherer executed a form "Contract of Exchange of Land." *See* Special Counsel Ex. 299. As required by that contract, in early August 1983 the parties also executed deeds conveying to one another their respective condominium units, and Senator Durenberger executed a form "Certificate of Real Estate Value." *See* Special Counsel Exs. 300, 301.[62]

In addition, Mr. Johnson drafted a residential lease agreement between Mr. Scherer and the Senator, providing for the daily rental of unit 603 at a *per diem* rate of $65. *See* Special Counsel Ex. 302.[63] Although this agreement was signed by the Senator, it apparently was not executed by Mr. Scherer. In September, the Senator and Mr. Scherer submitted the exchange contract to the condominium building Board of Trustees for approval. By letter dated September 26, 1983, Senator Durenberger registered with the Minneapolis Comptroller as the new owner of unit 703.

Throughout this period, Senator Durenberger claimed and received Senate reimbursements for the cost of renting the condominium, ostensibly from Mr. Scherer. In support of these Senate reimbursement vouchers, Senator Durenberger proffered rental invoices generated by "Area Advisors," a local rental agency which previously had managed the rental of Mr. Scherer's unit 703. *See, e.g.,* Special Counsel Ex. 408 at 15–17.

In the fall of 1983, however, the parties abandoned their plans to exchange condominiums because of tax considerations entirely unrelated to Senate reimbursements. As a result, the documentation required to effect a change in title was never filed with the county Registrar of Titles.[64] Accordingly, Senator Durenberger held legal title to the condominium throughout 1983.[65] Thus, because the transaction never was completed and legal title to the property never was surrendered by Senator Durenberger, during this period Senator Durenberger essentially was claiming and accepting Senate monies for the cost of "renting" what was legally his own unit.

[61] Special Counsel submits that Senator Durenberger should have known that a change in his voting residence to a city in which he rarely stayed, in order to justify the receipt of *per diem* reimbursements, was improper.

[62] It also appears that in September and November 1983 the Senator paid the condominium association fee for unit 703. *See* Special Counsel Ex. 304. However, as is noted in Section VI, A, 3 below, the Senator continued to make mortgage and association fee payments on unit 603 as well.

[63] As is discussed more fully in Section VI, A, 4 below, this rental rate apparently reflected the parties' understanding of the applicable government *per diem* reimbursement rates.

[64] In fact, it does not appear that the documentation required under Minnesota law to effect a change in legal title to the property was ever executed by Mr. Scherer.

[65] As is discussed in Section VI, A, 3 below, Senator Durenberger held legal title to the property until May 16, 1984.

2. THE PARTNERSHIP TRANSACTION

Special Counsel finds that Senator Durenberger participated with others in the execution of a series of backdated and misleading documents in connection with the creation of the partnership, which he then cited in support of his past claims for Senate reimbursements.

As was noted above, in the fall of 1983, the Senator's advisors recognized that the proposed exchange of properties with Mr. Scherer would not qualify as a tax-free transaction under the Internal Revenue Code, and therefore would trigger taxable capital gain to the Senator. Richard Langlais, the Senator's tax counsel, then suggested that a partnership entity be used to accomplish the previously identified goals, and that the Senator and Mr. Scherer contribute their respective condominiums as partnership assets.[66] *See* Durenberger Ex. 21, ¶ 6. According to Mr. Langlais, in October 1983 he directed Donald Lattimore, an attorney working in his firm, to draft a written agreement. Durenberger Ex. 12, ¶ 4.[67]

Several months later, in December 1983, Mr. Lattimore prepared a draft partnership agreement. *Id.*, ¶ 5. This draft agreement recites that the parties had "entered into an oral agreement on or about the 28th day of July, 1983, regarding the sharing of profits of [condominium unit] 603 and [condominium unit] 703," and further agreed "to share and specially allocate profits beginning July 28, 1983." A revised version of this agreement, forwarded to the Senator by letter dated December 30, 1983, deleted this language and inserted in its place a recitation to the effect that the parties had "entered into an oral agreement on or about the 28th day of July, 1983, regarding the leasing of 603 and 703" and that "a partnership was formed and began business on July 28, 1983." *See* Special Counsel Ex. 311.[68]

The parties also contemplated that the Senator would lease unit 603 from the partnership, and would claim Senate reimbursement for his condominium lodging costs. Again, the parties discussed with Randall Johnson the effect of the transaction on the Senator's

[66] An undated handwritten note produced to the Committee by the Senator, possibly in Lori Krage's handwriting, states:

> Per Randy Johnson the exchange of property is not the best plan for the Senator. Mr. Langlais thinks that a limited partnership would be a much better idea. Therefore the partnership will own both condos but allocation will be such that Roger is allocated #603, and the Senator #703.

Special Counsel Ex. 305.

Mr. Langlais stated in his recently executed affidavit that he was informed in July 1983 that the Senator and Mr. Scherer had agreed to form a partnership. Durenberger Ex. 12, ¶ 4. It is striking to Special Counsel that not even Mr. Scherer, a principal to the transaction, made this specific factual assertion in his affidavit in this matter.

[67] Mr. Langlais' recollection is squarely contradicted by the documents produced to the Committee by the Senator. Those documents reflect that in September 1983, Senator Durenberger registered with the Minneapolis Comptroller as the new owner of unit 703. Mr. Scherer's former unit, and submitted the condominium exchange contract to the building Board of Trustees for approval. These documents, although not previously marked as Special Counsel Exhibits, were provided to the Committee by Senator Durenberger and are therefore presumably well known to him and his counsel. Obviously, as of the dates of those documents, the Senator and Mr. Scherer were planning simply to exchange properties, and had no intent whatsoever for form a partnership entity.

Intent to form a partnership is an essential element in establishing the existence of a partnership. *See Nelson* v. *Seaborad Surety Co.*, 269 F.2d 882 (8th Cir. 1959) (applying Minnesota law). "It is the intent to do the things that constitute a partnership which determines whether the partnership relation exists." *Id.* at 887.

[68] As produced to the Committee, this document was missing page 5.

right to claim Senate reimbursement. Mr. Johson advised that the Senator could continue to claim reimbursement if a partnership was created, but cautioned about the need to reduce the parties' agreement to writing as quickly as possible.

Thus, in a letter to the Senator dated December 29, 1983, Mr. Johnson stated:

> It is important that you conclude the condominium transaction in order to justify the per diem reimbursement you received during the August recess. As I mentioned to you before, I believe the straight exchange with Roger bears some risk of being disallowed by the Internal Revenue Service. I am more concerned about the partnership transaction and the allocations proposed by Dick Langlais, but he is your income tax specialist. In any event, from the standpoint of Senate Rules and IRS Regulations, I believe you can claim the per diem reimbursement—but the paperwork on this should be completed immediately if you have not done so already. Everything should be dated before August 1st, reflecting the oral agreement between you and Roger.

Special Counsel Ex. 310

In December 1983, Senator Durenberger retained Michael Mahoney, his Minnesota counsel, to oversee and close the transaction.[69] *See* Special Counsel Ex. 443 at 116–117; Durenberger Ex. 14, ¶ 2. Sometime after January 1, 1984 David Steingart, a third year law student working as a law clerk in Mr. Mahoney's firm, reviewed the agreement previously prepared by Richard Langlais and drafted a revised partnership agreement.[70] *See* Deposition of M. Mahoney (4/17/90) at 125–127; Durenberger Ex. 14, ¶ 4. This document represented that the parties had "entered into an oral agreement on or about the 28th day of July, 1983, regarding the leasing of 603 and 703," and that pursuant to that agreement a partnership was formed and began business on July 28, 1983. *See* Special Counsel Ex. 316.

Mr. Mahoney's firm also drafted a number of additional documents necessary to effect the transaction, including quitclaim deeds, by which the Senator and Mr. Scherer were to convey their respective units to the partnership (Special Counsel Exs. 317, 318); Certificates of Real Estate Value, for the Senator's and Mr. Scherer's signatures (Special Counsel Exs. 319, 320); Affidavits of Purchaser of Registered Land, also for the Senator's and Mr. Scherer's signatures as general partners (Special Counsel Exs. 321, 322); and a lease agreement pursuant to which the Senator would

[69] Mr. Mahoney recalled that during their first meeting on this matter, the Senator expressed frustration over the failure of his various advisors to bring the partnership matter to closure. Special Counsel Ex. 433 at 117–119.

[70] In his deposition in this matter Mr. Mahoney testified that the partnership agreement prepared by his firm, as well as the legal documents relating to the transfer of title to the condominium to the partnership, may have been drafted as early as late December. Special Counsel Ex. 443 at 163. Mr. Mahoney's recollection on this issue is simply not credible. As was noted above, on December 30, 1983 Mr. Langlais forwarded to the Senator a revised version of his draft agreement. This certainly suggests that as of that date the Senator was still working with Mr. Langlais to bring the matter to closure—and that Mr. Steingart did not undertake to draft a revised agreement until sometime in early 1984.

rent unit 603, his former personal residence, from the partnership at a *per diem* rate of $65 (Special Counsel Ex. 323).[71]

Senator Durenberger executed the partnership agreement, memorialzing the parties' intent to form a partnership and defining the parameters of their agreement. The Senator also signed the appropriate quitclaim deed, Certificate of Real Estate Value, and Affidavit of Purchaser of Registered Land, all of which were required to effect a legal transfer of title to the condominium to the partnership.[72] In addition, the Senator's signature is reflected on the referenced lease agreement. Each of these documents is dated, or reflects an effective date of, July 28, 1983.[73]

The witness affidavits introduced by the Senator during the hearing in this matter evidence that these documents were not executed until early 1984. Mr. Mahoney's affidavit reflects his understanding "that the basic partnership documents were executed between December 1983 and February 1984." [74] Durenberger Ex. 14, ¶ 5. Mr. Scherer stated in his affidavit that he executed the "necessary documents" in February 1984—some seven months after the purported effective date of the partnership. Durenberger Ex. 21, ¶ 7.[75]

As these facts demonstrates, an historical and entirely fictitious effective date for the partnership and the transfer of the condominium to that partnership was created. As part of this plan, Senator Durenberger participated in the execution of a series of back dated and misleading documents, which he then cited in support of his past claims for Senate reimbursements.

[71] Documents produced to the Committee in this matter strongly suggest that these materials were created sometime after January 4, 1984. On that date, Donald Lattimore of Mr. Langlais' office forwarded to Mr. Scherer a copy of the partnership agreement and real estate documents which Lattimore has prepared, with the request that Mr. Scherer and the Senator sign these documents. *See* Special Counsel Ex. 313. This suggests that, as of that date, Mr. Mahoney's firm had not prepared any substitute materials.

[72] In his statement during the hearing on June 12, 1990, Mr. Hamilton, citing *Travelers Ins. Co. v. Horseshoe Lake Farms, Inc.*, 1990 Minn. App. LEXIS 548, stated that, under Minnesota law, the effective date of the transfer of property can be earlier than the date that the deed transferring the property is executed if the parties so intend. The holding of that case rests on narrow statutory grounds that are inapplicable here. *Travelers Ins. Co.* interprets Minn. Stat. § 500.24, subd. 6(a), which requires that a corporation that acquires agricultural land through foreclosure give a right of first refusal to the preceding owner before selling the property. This statutory right is applicable for five years from the date that the corporation acquires the land. The court in *Travelers Ins. Co.* held that the fact finder may consider the parties' intent in determining the date of which a corporation acquired land, and that the term "acquire" in the statute should be defined broadly to support the legislative goals of the Act. 1990 Minn. App. LEXIS 548 at 10–11.

[73] The partnership agreement itself recites that it is "made effective the 28th day of July, 1983." *See* Special Counsel Ex. 316. The signatures on the agreement are not dated, nor apparently were they witnessed.

[74] These recollections are corroborated by certain independent documentation. For example, it appears that Mr. Steingart provided some or all of these documents to Randall Johnson, presumably in draft form, for his review and that Mr. Johnson returned them to Mr. Steingart with suggested additions by letter dated February 27, 1984. *See* Special Counsel Ex. 314. Assuming that Mr. Steingart would not have had the parties sign the documents in an incomplete form, these materials support Mr. Scherer's recollection.

[75] The deeds and the purchaser's Affidavits, however, reflect Randall Johnson's notarization of July 28, 1983, purporting to evidence that the parties signed the documents on that date. *See* Special Counsel Exs. 317, 318, 321, 322. Mr. Johnson informed Special Counsel that he received the documents from Mr. Mahoney's office in February 1984. He further acknowledged that he did not witness the signatures of the parties reflected on the deeds or the referenced Affidavits, and that he notarized the documents when they were sent to him in February 1984. Durenberger Ex. 9, ¶ 7. However, Mr. Johnson stated that neither Senator Durenberger nor Mr. Scherer was present when he notarized the documents, and according to Mr. Johnson he did not discuss the notarization date with Senator Durenberger. Durenberger Exs. 9, ¶ 7; 21, ¶ 7.

3. SENATOR DURENBERGER'S CONTINUED OWNERSHIP INTEREST IN THE CONDOMINIUM

Special Counsel finds that, even after the formation of the partnership, Senator Durenberger retained a significant ownership interest in the condominium property. The deeds and purchaser's Affidavits reflecting an "effective" July 1983 transfer of the condominiums to the partnership were not filed with the Hennepin County Registrar of Titles until May 15, 1984. *See* Special Counsel Exs. 317, 318. A new Certificate of Title documenting the partnership's ownership of the property was issued by the Registrar on May 16, 1984.[76] *See* Special Counsel Ex. 328. As a matter of Minnesota law, therefore, legal title to the condominium continued to be in Senator Durenberger's name until the latter date.[77]

Moreover, it is obvious that even after the formation of the partnership Senator Durenberger continued in effect to own the condominium property. The parties' own partnership agreement expressly acknowledged this fact. In setting forth the parties' understanding concerning the allocation of taxable income or loss, the agreement states: "Taxable Income or Loss shall be allocated equally between the Partners (on the basis that each Partner owns an undivided one-half interest in all Partnership Property)." *See* Special Counsel Ex. 316 at 8.[78]

It also appears from the documents that there was an effort, with Senator Durenberger's knowledge, to disguise the Senator's ownership interest in the partnership entity. Each of the partnership agreements and real estate documents described above identifies the business entity as the "Durenberger/Scherer Partnership." In late March 1984, however, the name of the partnership formally was changed to the "703/603 Association," denominating the unit numbers of the condominiums contributed to the entity by Mr. Scherer and the Senator.

The reasons for this change are set forth in a memorandum to the Senator from Lori Krage (now Edstrom) of his staff:

[76]In Minnesota, land such as the Senator's condominium which is registered under the Torrens system can be conveyed only upon the issuance of a Certificate of Title by the county Registrar of Titles. *See* Minn. Stat. Ann. § 508.47. Special Counsel was informed that a Certificate of Title issues after the following documents are filed with the Registrar: 1) a deed of conveyance; 2) the Grantor's Certificate of Title; 3) an Affidavit of the Purchaser of Registered Land; and 4) if the grantor is a trust, a copy of the trust document.

[77]In June 1985, the Senator established a qualified blind trust pursuant to the Ethics in Government Act, and in his capacity as General Partner deeded the condominium property to Mr. Mahoney as trustee of that trust. This deed, however, was not filed with the county Registrar of Titles until the fall of 1988 and a new Certificate of Title did not issue until October 1988. *See* Special Counsel Ex. 385. The partnership therefore was the legal owner of the condominium until October 1988.

[78]As a result of the parties' failure to establish a partnership account, the Senator apparently paid all the operating costs of the condominium at least through March 1984. Thus, in a letter to Eugene Holderness dated March 7, 1984, Senator Durenberger represented that since approximately July 1983 he had paid "mortgage, real estate tax, insurance, condo fee, utility and repair expenses" for unit 603. Special Counsel Ex. 315.

The materials produced to this Committee by the Senator do not include copies of checks or similar payment documents evidencing regular mortgage and condominium fee payments. They do, however, reflect the Senator's payment of the November 1983 mortgage payment, the 1983 real estate taxes due on October 31, 1983, and a number of miscellaneous repair and utility bills. *See* Special Counsel Exs. 306, 307, 308. Moreover, typed notes apparently prepared by the Senator's staff suggest that the Senator paid the condominium mortgage between August and December 1983. *See* Special Counsel Ex. 312.

> The name of the partnership will be "703/603 Partnership" and that name will be reflected on the invoices. (I didn't think it looked good to have Durenberger/Scherer [sic] Partnership on the invoices that were being submitted to the Senate—Tom agreed. Roger S. suggested this name for the partnership, and unless you object Dave Steingart will process the legal paperwork.)

Special Counsel Ex. 324. The Senator instructed Mr. Steingart to effect this name change, and an amendment to the partnership agreement effective March 1, 1984 was thereafter signed by the parties.[79] *See* Special Counsel Exs. 452 at 158–159; 326.[80]

While the witnesses have denied that this change represented a conscious effort to mislead the Senate, the obvious effect of the change was to conceal the Senator's interest in the partnership from the Senate Disbursing Office. Moreover, it is clear from the very language of the quoted document that the Senator's staff understood the appearance of impropriety surrounding the transaction, and communicated that understanding directly to the Senator.

4. THE LEASING OF THE CONDOMINIUM FROM THE PARTNERSHIP AND THE SENATOR'S CLAIMS FOR SENATOR REIMBURSEMENTS

Special Counsel further finds that, whatever its effective date, the partnership was not a *bona fide* investment transaction and was instead motivated solely by the Senator's interest in obtaining Senator lodging reimbursement. In fact, absent the receipt of these reimbursement monies, it appears that the partnership would have been of no financial advantage whatsoever to the Senator.

As was noted above, from the outset the parties contemplated that the Senator would lease back from the partnership his former condominium residence (#603), and that the obligations of this lease would be satisfied in large part through Senate reimbursements. The parties ultimately also understood that these payments would finance the continued operating costs of the condominium.

Thus, as part of both the contemplated condominium exchange and the ultimate partnership transaction, the Senator entered into a lease agreement from the rental of unit 603.[81] The partnership lease provided for the rental of the property on the following terms:

> Lessee shall pay rent at the rate of $65 for each day he occupies the Apartment, with a quarterly minimum rent of $1575. Lessee shall pay rent monthly within 15 days of receipt of a bill from Lessor.

[79]The word processing "tag" line in the lower left corner of this document indicates that the amendment was created on March 28, 1984.

[80]Senator Durenberger's counsel contends that this memorandum must be read in conjunction with Ms. Krage's March 13, 1984 memorandum reflecting her contacts with the Rules and Ethics Committees' staffs. This reading, he contends, demonstrates that Ms. Krage was always completely forthcoming with the appropriate "watchdog" committees. Special Counsel submits, however, that were Ms. Krage's disclosures to the Committee staffs in early March completely forthcoming, there would have been no need two weeks later to change the title of the partnership so that Senator Durenberger's name would not appear on invoices submitted to the Senate Disbursing Office.

[81]As was noted above, the Senator and Mr. Scherer apparently did not execute this agreement until early 1984.

See Special Counsel Ex. 323.[82] The parties apparently continued to operate under the terms of the lease until the termination of the partnership in March 1987.

The witnesses interviewed by Special Counsel during the Preliminary Inquiry in this matter generally agreed that the *per diem* rental rate reflected in the lease agreement was established by reference to the parties' understanding of the Senate reimbursement regulations.[83] Mr. Holderness informed Special Counsel that the $65 rental rate was the amount of reimbursement permitted by the Senate for lodging expenses.[84] Thomas Horner similarly recalled that at his request Lori Krage, the Senator's bookkepper, contacted the Senate Rules Committee to determine the appropriate rate for lodging reimbursement. Mr. Horner further recalled that it was this rate which was used in the lease agreement.

Special Counsel was further informed by Mr. Holderness that the parties anticipated that the mortgage and other expenses for unit 603 would be serviced by this Senate reimbursement income. Thus, although Senator Durenberger would be obligated personally to pay the quarterly minimum rent specified in the lease agreement, these rental costs would be offset by funds received from the Senate as reimbursement for *per diem* lodging costs.

Accordingly, in a May 29, 1984 letter to Mr. Scherer, Ms. Krage noted:

> Dave S. suggested you may want to revaluate the number of nights required in the association documents. He does not know how this number was determined (and neither does the Senator) and feels it may put too much risk on the Senator.

Special Counsel Ex. 330. Indeed, Mr. Scherer reported that it was his understanding that the sole purpose of the lease was to produce income sufficient to cover the partnership's operating costs.

Mr. Holderness also informed Special Counsel that the $65 rental rate did not specifically relate to the operating costs of the condominium. The documents clearly reflect, however, that the Senator, his staff and advisors were keenly aware that at that daily rate, the Senator needed to stay in the condominium approximately 100 days per year in order to cover its annual operating costs. In the above referenced May 29, 1984 letter to Mr. Scherer, Ms. Krage

[82]These lease terms are identical to those of the draft lease prepared as part of the contemplated condominium exchange discussed above. *See* Special Counsel Ex. 302. Indeed, Mr. Mahoney suggested that his staff may have been provided with the information from that earlier draft to use in preparing the lease agreement between the partnership and the Senator. Deposition of M. Mahoney (4/17/90) at 139, 141. Accordingly, witness recollections regarding the lease agreement proposed as part of the condominium exchange are included in this discussion.

[83]The rental figures reflected in the lease also may have represented the parties' approximation of the fair market value of the condominium. In this regard, it should be noted that the quarterly rental rate of $1,575 specified in the lease represents a monthly rate of $525, the rate used by Mr. Scherer for his previous rentals on unit 703.

[84]However, in a January 11, 1983 memorandum addressed to the Senator, Mr. Holderness advised that "[g]overnment expense policy allows you $75 per diem for room and board. Food is about $25 so you have $50 left for room." *See* Special Counsel Ex. 297. The $75 rate cited by Mr. Holderness apparently comes, not from the Senate *per diem* regulation, but instead from the travel regulations promulgated by the General Services Administration. At that time, those regulations specified an inclusive *per diem* rate of $75 for travel in Minneapolis. 47 Fed. Reg. 37545, 37546 (1982). This rate was adopted by the Rules Committee as a maximum *per diem* for all Senate travel on October 1, 1980. *See* "Dear Colleague" letter from The Honorable Clairborne Pell, dated October 1, 1980. This rate subsequently has been increased.

noted: "The thing we need to watch for is that the number of nights the Senator spends in #603 per quarter equals at least twentyfive." *Id.* Similarly, by memorandum to the Senator, Mr. Scherer and Mr. Steingart dated April 19, 1985, the partnership's bookkeeper noted: "If Dave doesn't stay an average of 8½ days per month in the condo, we will have a cash shortage." Special Counsel Ex. 329.

Approximately three months later, Ms. Krage provided to Senator Durenberger a listing of his condominium Senate reimbursements through June 29, 1985. The Senator apparently returned this listing with the following notation: "How many are *req'd* to 'break-even' for the year? . . . That's $552.50 expenses per month . . . ." In response, Ms. Krage informed the Senator that he would "need *102* nights at the condo to 'break even' for '85." Special Counsel Ex. 332. In fact, during the seven year period which is the subject of this investigation, Senator Durenberger stayed in the condominium an average of ninety days per year.[85]

As planned, between August 1983 and March 31, 1987 the Senator claimed and received from the partnership Senate reimbursement for the costs of renting the condominium that he formerly owned in its entirety. In support of the vouchers submitted for the period from August 1983 to approximately March 1984, the Senator supplied invoices generated by "Area Advisors," a local rental agency. *See* Special Counsel Exs. 408, 409. Thereafter, the Senator submitted invoices generated by the "703/603 Association" in support of these Senate vouchers. *See, e.g.,* Special Counsel Ex. 409. Each of these vouchers was paid in the amounts requested.[86]

A tax and accounting analysis of the transaction suggests that, absent this receipt of *per diem* reimbursements, the partnership simply was of no financial benefit to the Senator. *See* Special Counsel Ex. 340. This alone indicates that the partnership was simply a mechanism by which the Senator could personally benefit from Senate reimbursements.

Special Counsel submits that if the taxpayer is to bear the cost, the Senator's use of the condominium should be dictated by the needs of Senate business, not the operating costs of the property. In short, Durenberger—not the taxpayer—should pay his own rent.

[85] At one time the parties apparently contemplated fewer stays by the Senator, such that the leasing costs would only be partially defrayed by reimbursement monies. In a September 15, 1983 letter to the Senator, Mr. Holderness stated:

> You will pay Roger $525/mo. *less* any recovery. Assuming 45 nites at $65/nite recovery that reduces *your* rent bill for #603 from $6300 to $3375.

Special Counsel Ex. 303. Mr. Holderness informed Special Counsel that the term "recovery" referred to Senate reimbursements.

[86] In fact, it appears that Senator Durenberger may have claimed and received reimbursement for one date when he did not stay in the condominium. Senator Durenberger received Senate reimbursement for use of the condominium on February 15, 1986. However, the Senator's daily appearance schedule for that date reflects that he left Minneapolis for California early that morning. The schedule is corroborated by a copy of an airline ticket produced to the Committee by the American Association of Equipment Lessors ("AAEL") in connection with the Piranha Press inquiry. The ticket shows that the Senator departed Minneapolis at 9:35 a.m. on February 15, 1986 for California. The Senator then met with an AAEL official on February 16th and addressed the organization on the 17th. Piranha Press received $5,000 from AAEL for this appearance by Senator Durenberger. *See* Special Counsel Ex. 335.

B. Sale of the Condominium to the Independent Service Company

Senator Durenberger has represented that ownership of the condominium unit was transferred by the partnership to ISC, a Minnesota business owned by Paul Overgaard, effective April 1, 1987. The evidence demonstrates that this "sale" was designed to allow the Senator the continued financial benefits of Senate *per diem* reimbursement, and was back dated to April 1987 for that very purpose. In fact, in a letter to the Senator dated September 1989, Mr. Overgaard himself described the sale in a manner which supports Special Counsel's view that it was not a good faith transaction. In this very revealing letter, Mr. Overgaard wrote that one could conclude that the transaction was a mechanism to allow the Senator to collect *per diem* reimbursements from the Senate on a residence which the Senator actually owned. *See* Special Counsel Ex. 394.[87]

Specifically, Special Counsel finds as follows:

ISC was not identified as a buyer for the condominium until the summer of 1987—several months after the purported effective date of the sale to ISC.

The transaction was made retroactive to April 1, 1987, the date immediately following the partnership's termination, in order to permit the Senator to claim Senate *per diem* reimbursement for his condominium stays back to that date.

In approximately December 1987, ISC generated invoices for the Senator's stays in the condominium from April to October 1987. Based on these newly created invoices, the Senator sought Senate reimbursement for these rental costs.

But for the Senator's agreement to rent the condominium from ISC, which was to be financed to a significant extent through Senate reimbursements, Mr. Overgaard would not have entered into the sales transaction. Senator Durenberger thus used the promise of Senate funds to secure personal gain.

The parties apparently agreed that Mr. Overgaard would reconvey the condominium to the Senator on demand. It therefore does not appear that Senator Durenberger intended to surrender his rights in the property.

The letter agreement reflecting the purchase, the deed and related real estate documents, and the lease agreement were not delivered to Mr. Overgaard until October 1989, almost three years after the April 1, 1987 "effective" date of the sale.

By virtue of the principals' failure to file the necessary documents with the Registrar of Titles, ISC still does not have legal title to the condominium. Instead, legal title to the property is in the name of the trustee of the Senator's qualified blind trust.

Although the Senator received reimbursement from the Senate on a fairly regular monthly basis between February 1988 and November 1989, he made only nine lump sum rental payments to ISC—thereby effectively having the use of Senate reimbursement funds for substantial periods of time.

[87] In his deposition in this matter, Mr. Overgaard endeavored to distance himself from this correspondence. *See* Special Counsel Ex. 445 at 12–13. Special Counsel submits, however, that the meaning of the letter is patently clear on its face.

Special Counsel finds that Senator Durenberger intended to do little more than "park" the condominium with Mr. Overgaard, as a means of enabling him to continue to reap the benefits of Senate *per diem* reimbursements.

1. THE TIMING OF THE PARTIES' AGREEMENT

As has been noted above, the Senator has represented that his condominium was sold to ISC effective April 1, 1987. The documents produced to the Committee in this matter, however, reflect that Mr. Overgaard was not even introduced as a potential purchaser until the summer of 1987, several months after the "effective" date of the sale.

In response to Mr. Scherer's expressed intent to withdraw from the partnership in the fall of 1986, Senator Durenberger and Douglas Kelley asked Mr. Mahoney to address the effect of the partnership termination on the Senator's continued ability to claim Senate reimbursement for condominium expenses. *See* Durenberger Exs. 11, ¶ 9; 14, ¶ 13. The parties seemed to understand at this juncture that by virtue of that termination the Senator would be deemed to be the sole owner of the condominium unit. *See* Special Counsel Ex. 338.

Mr. Kelley told Special Counsel that he and the Senator were informed that the Senator could not claim Senate reimbursement for the cost of staying in a property, such as the condominium, that he owned.[88] Mr. Mahoney recommended to Senator Durenberger that, in order to claim such reimbursement in the future, he sell the condominium to a third party and rent the condominium unit from that purchaser. Deposition of M. Mahoney (4/17/90) at 207–208; *see also* Durenberger Ex. 14, ¶ 14.

The witnesses have stated that Paul Overgaard was identified as a purchaser for the condominium as a result of these discussions, and that the Senator and Mr. Overgaard had an oral agreement regarding the sale of the condominium in late 1986 or early 1987. In his deposition in this matter Mr. Overgaard testified that toward the close of 1986 he had a "loose agreement" with the Senator for the sale of the condominium effective January 1, 1987.[89] Special Counsel Ex. 445 at 29. Mr. Overgaard also testified that the purchase agreement was *not* conceived until after the effective date of the sale. *Id.* at 87. Mr. Mahoney similarly testified that following a series of conversations during the latter part of 1986, Mr. Overgaard and Senator Durenberger reached an oral agreement concerning the sale of the condominium. Durenberger Ex. 106 at 215–216, 230–231.

[88] *See also* Special Counsel Ex. 343.
Mr. Mahoney tasked Jeffrey Robbins of his firm to research the question posed by Mr. Kelley. As reflected in his file memorandum dated November 12, 1986, Robbins initially concluded that "[n]othing in the Senate Travel Regulations indicates that termination of the partnership will affect Durenberger's ability to receive the per diem lodging reimbursement amount." *See* Special Counsel Ex. 338. Both Mr. Mahoney and Mr. Kelley informed Special Counsel, however, that the parties largely disregarded this written opinion, apparently on the basis that it was too "narrow." *See* Deposition of M. Mahoney (4/17/90) at 201–205.

[89] In response to Special Counsel's questions, however, Mr. Overgaard was unable to state as of what date he had an enforceable "handshake deal" with the Senator. Special Counsel Ex. 445 at 30.

The documents, however, reflect that Mr. Overgaard had not been identified as a purchaser as of June 1987. The documents also evidence that Mr. Overgaard was approached and agreed to purchase the property sometime thereafter, and that the parties did not begin to negotiate the terms of the purchase until late July or early August of that year.

On June 17, 1987, Senator Durenberger dictated a note asking his bookkeeper to confirm that claims for condominium reimbursement had been submitted to the Senate for both May and June 1987. Special Counsel Ex. 342. Mr. Kelley, the Senator's Administrative Assistant, responded on the bookkeeper's behalf as follows:

> As you know M[ichael] M[ahoney] gave us the legal opinion that we cannot be reimbursed. Consequently, I have held up those vouchers. H[eidi] S[haw] is now re-doing them minus condo. MM is supposed to advise on alternative proposals.

Id.

It appears that immediately thereafter, the Senator, Mr. Kelley and Mr. Mahoney reviewed the history of the condominium transactions as well as various disposition options. Among the documents produced by the Senator is a series of the Senator's handwritten notes titled "MAHONEY" and apparently dated June 18, 1987. These notes read as follows:

> orig target=get DD per diem reimb by renting from jt venture
> Randy Johnson's proposal.
> Mahoney rejected & created partnership.
> Scherer left the partnership.
> Q = Does this change DD's ability to get reimbursed?
> A = No.
> DK Q = Can DD be reimbursed for expenses of owned unit?
> MM A = No.
> DK = I don't like conclusion.
> MM = contacted Rules. (Dougherty)
> ? MM = buy it.—no
> ? John Deal [buy it]—no
> ? D2 [buy it]—no
> MM A = Separate DD from the unit by transferring ownership and taking *lease-back* with right to buy for $1.
> Would be backed up by letter from Rules.
> DD sells unit to D2 Comm.
> DD agrees to lease for X days per mo and *pay* an amt = to costs (mtg,tax,fee)
> D2 picks up any shortfall.

Special Counsel Ex. 343. It is particularly significant that neither Mr. Overgaard nor ISC is mentioned in these notes. In fact, the document suggests that an entirely different pool of potential buyers was being discussed at this time.[90] It thus is clear that as of

[90] Mr. Mahoney testified that, once Mr. Overgaard was identified as a purchaser for the condominium, no consideration was given to other possible purchasers. Special Counsel Ex. 443 at

Continued

June 1987 the Senator was not considering ISC as a purchaser for the condominium.

By letter dated June 18, 1987, the Senator then sought the advice of Eugene Holderness and The Honorable Paul Magnuson on this matter. That letter indicates that as of that date the Senator did not have an agreement, oral or otherwise, with Mr. Overgaard. In fact, the letter reflects that the Senator may have learned only shortly before that the partnership actually already had terminated. The letter further reflects the Senator's understanding that he was, or would soon be, the sole owner of the condominium unit.[91]

Senator Durenberger wrote:

> For the last five years I have had the benefit of renting my former condominium at 1225 LaSalle from a partnership with Roger Scherer. I now discover that my legal advice was either shaky or misleading; that Roger Scherer very much wants to dispose of his partnership interest or has already disposed of it; and that since March of 1987 my monthly expenses have therefore increased by approximately $550.00 or an annual, non-deductible, living expense increase of $6,600.00.

Special Counsel Ex. 344. Again, neither Mr. Overgaard nor ISC is identified in this letter as a potential buyer for the condominium. It seems clear, therefore, as of June 1987 the Senator did not believe that he had a sales agreement of any sort with Mr. Overgaard.[92]

It would appear that as a result of these events, the Senator and his advisors focused on the need to structure a new ownership arrangement for the condominium. The documents produced to the Committee by the Senator suggests that the Senator and Mr. Overgaard did discuss a possible purchase agreement in late July. A note in the Senator's handwriting, dated simply "7/31," reflects the following notation:

> Edina Realty says hi-dollar sale price = $65,000; few sales; more likely 60–63,000.
> Overgaard d'n want to pay hi $; suggested somewhere between it and purchase price with 5–10,000 down (higher if CORP. buys) + balance at 1 pt over my interest. Agreed to reconvey.

Special Counsel Ex. 346. The Senator apparently forwarded this note to Mr. Kelley, with the request that he "put this together." [93] A complete set of sales documents ultimately was generated in late

221. This too suggests that Mr. Overgaard had not been identified as a buyer as of the June 1987 date of these handwritten notes.

[91] In fact, documents produced to the Committee by the Senator reflect that Senator Durenberger personally paid the condominium mortgage for the months of January, February, March and April 1987. *See* Special Counsel Ex. 341. It should be noted, however, that other documents suggest that these payments were made from the partnership account, rather than Senator Durenberger's account. *See* Special Counsel Ex. 339.

[92] When shown this document during his deposition, Mr. Overgaard agreed with this conclusion. Special Counsel Ex. 445 at 87.

[93] Mr. Kelley responded with the following notation:

> Sen, I talked w MM Friday & he said it was progressing. I'll send him your note.

Special Counsel Ex. 346.

August 1987 [94] and was forwarded by Mr. Mahoney to Mr. Overgaard for his review and signature. *See* Special Counsel Exs. 350, 351.

These facts evidence that Mr. Overgaard was not identified as a possible purchaser until the summer of 1987, that the Senator did not have a purchase agreement of any character with him prior to April 1, 1987, and that the sale of the condominium to ISC subsequently was back dated to that date.

2. KEY TERMS OF THE PARTIES' ORIGINAL AGREEMENT

From the documents produced to the Committee in this matter, it appears that the parties agreed at the outset that Mr. Overgaard would reconvey the condominium to Senator Durenberger on demand at his own purchase price. In an undated handwritten note to the Senator, Mr. Overgaard wrote:

> I hope these items will clear up any questions you may have. *My intent is that you get it back when you want it at the same price.* I only want to help you stay clear w/ the ethics questions.

Special Counsel Ex. 405 (emphasis added). While denying that he had any such agreement with the Senator, in his deposition in this matter Mr. Overgaard acknowledged that the note accurately reflected his intent at the time it was written. Special Counsel Ex. 445 at 95.

In fact, the Senator's own handwritten note of his "7/31" conversation with Mr. Overgaard is consistent with that understanding. The final line of that note, quoted in full above, reads: "Agreed to reconvey." *See* Special Counsel Ex. 346. While Senator Durenberger and Mr. Overgaard have disputed this conclusion, Special Counsel believes that it is fair to conclude the Senator did not intend to surrender all right to his condominium, and instead simply planned to "park" the property in Mr. Overgaard's custody for some finite period of time.

It is also clear that Mr. Overgaard would not have purchased the condominium were it not for the Senator's agreement to lease back the property. During his deposition in this matter, Mr. Overgaard testified that he understood from the outset that the Senator would stay in the condominium during his visits to Minneapolis, and that he would receive payment from the Senator for those stays. Special Counsel Ex. 445 at 22. Indeed, among the documents generated and forwarded to Mr. Overgaard in August 1987 is a draft residential lease between ISC and the Senator. *See* Special Counsel Ex. 351.[95]

[94] This first documentary evidence of a formal purchase agreement is a one page draft letter agreement dated August 13, 1987, prepared by Mr. Mahoney. *See* Special Counsel Ex. 349. This letter reflects a purchase price of $55,000, to be paid through the assumption of an existing first mortgage in the amount of $34,807; a cash payment in the amount of $7,442; and a five-year promissory note in the amount of $10,250. Each of these figures has been written into the document in Paul Overgaard's handwriting (Special Counsel Ex. 445 at 32), suggesting that as of August 13th the agreement was still very much in draft form.

[95] Mr. Overgaard testified that he was interested in purchasing the Senator's condominium in part so that he could use it during his weekday business trips to Minneapolis. Durenberger Ex. 15, ¶ 3. Mr. Overgaard also testified, however, that he does not personally use the condominium without first checking with Senator Durenberger's office to see that the Senator will not be using it. Special Counsel Ex. 445 at 58–59. A review of the ISC rental invoices reflects that

Continued

Mr. Overgaard also testified that he was aware at the time that the Senator would in turn be reimbursed for those costs. Special Counsel Ex. 445 at 24–25.

Absent an understanding that the Senator would rent the condominium on a regular basis, Mr. Overgaard testified that he would not have agreed to purchase the condominium. *Id.* at 9, 22. thus, Senator Durenberger used the promise of a rental agreement, financed by Senate reimbursement funds, as an inducement to Mr. Overgaard to purchase the property.

3. NEGOTIATION OF THE TERMS OF THE TRANSACTION AND EXECUTION OF THE REQUIRED DOCUMENTATION

Special Counsel finds that the parties were negotiating the material terms of the agreement as late as February 1988, long after the supposed effective date of April 1, 1987, and that the documentation necessary to transfer title to the condominium to ISC was not delivered to Mr. Overgaard until October 1989. Finally, because the appropriate legal documents never were filed with the Registrar of Titles, ISC still does not hold legal title to the property.

As was noted above, in August 1987 Mr. Mahoney forwarded to Mr. Overgaard certain documentation regarding the sale. The terms of the sale varied considerably over the next several months. The parties' agreement initially contemplated a sale effective as of January 1, 1987. The agreement signed by Mr. Overgaard in August 1987 therefore stated that the condominium would be sold effective January 1, 1987 at a price of $52,500, paid as follows: assumption of the existing first mortgage in the amount of $35,134; cash payment of $7,350; and a five year promissory note payable to Senator Durenberger in the amount of $9,995.[96] As of August 1987, the parties also apparently contemplated a lease agreement between Mr. Overgaard and the Senator's official election committee. *See* Special Counsel Ex. 351.

In October 1987, however, ISC was informed that the partnership had paid operating costs on the condominium through March 31, 1987 and had received rental payments from the Senator for that same time period. *See* Special Counsel Ex. 356. Realizing that the sales agreement therefore could not be dated January 1, 1987, Mr. Overgaard wrote Douglas Kelley in early November 1987:

> Things are really going from bad to worse with regard to the Condo. Much remains to be done regarding the sale; no accounting of per diem due has been forthcoming; associa-

almost one-third of the days in which the Senator stayed in the condominium from 1987 to 1989 were weekdays (excluding Fridays). This obviously would have cut significantly into the availability of the unit to Mr. Overgaard.

[96] Mr. Mahoney testified that the agreement was in the nature of a "contract for deed." Special Counsel Ex. 443 at 260–62. *See also* Durenberger Ex. 14, ¶ 17. Generally, a contract for deed anticipates that the purchaser will not be entitled to the deed to the property until certain financial contingencies, typically payment of a promissory note, have been satisfied. *See* R. Larson & B. Harwood, *Minnesota Real Estate* 162 (1984). In this case, a contract for deed presumably would have required that the deed be delivered to Mr. Overgaard at the time of his final 1992 payment on the promissory note executed as part of the transaction. The documents memorializing the sale to ISC do not reference such a contract. In addition, the deed to the property was delivered to Mr. Overgaard in October 1989, well before the promissory note to the Senator had been paid in full.

In any event, if Mr. Mahoney's testimony on this issue is accurate, it arguably would only defeat the Senator's claim that Mr. Overgaard actually owned the property as of April 1987.

> tion dues are three or more months in arrears and we have been advised that the association has first right of refusal on any sales contract.
>
> The sale was to be done effective January 1st and now I find out payments were made to the partnership at least thru March.

Special Counsel Ex. 354.

In early 1988 Mr. Overgaard directed his accountant to review the various payments made by both Mr. Overgaard and Senator Durenberger since the initiation of the transaction, and to arrive at revised purchase figures reflecting these payments. These calculations resulted in an adjustment of the purchase price itself, from $52,500 to $52,804, as well as an increase in the amount of the promissory note to be executed as part of the transaction. *See* Special Counsel Ex. 371.[97]

Mr. Overgaard then forwarded these calculations to Mr. Mahoney, with the request that he

> prepare a new note for $10,299.96 *dated April 1, 1987*; redo the contract for deed to *reflect an April 1st purchase*; get condo clearance for the sale and return my note in the amount of $9,995.66.

Id. (emphasis added). Mr. Mahoney provided the requested material, all dated "April 1, 1987" on February 24, 1988.[98] *See* Special Counsel Ex. 373. Thus, it was not until February of 1988 that the parties agreed to an "effective" sale date of April 1, 1987.

Even as of that date, however, the parties did not have an agreement on the remaining terms of the transaction. After consulting with counsel, Mr. Overgaard revised the lease and the letter agreement to provide that Senator Durenberger would be obligated to pay the total costs of owning and operating the apartment, regardless of the amount of time which he spent in the apartment each month. *See* Special Counsel Ex. 374. In early March 1988, Mr. Overgaard forwarded these materials to Mr. Mahoney for his review. Special Counsel Ex. 375. Mr. Overgaard also sent a copy of all these materials directly to the Senator, with some explanation of the suggested changes. *See* Special Counsel Ex. 376. Apparently, neither Mr. Mahoney nor the Senator was willing to agree to these terms at that time, as neither executed the agreements as revised by Mr. Overgaard.

As of early 1989, the sale still had not fully been reduced to writing. On January 11, 1989 Mr. Overgaard sent the following letter to Senator Durenberger:

[97] By the fall of 1987, both the mortgage and condominium association dues on Unit 703 were in arrears. In early December 1987, ISC issued a check to the Eberhardt Management Company in the amount of $1,285.56 to cover association dues and late penalties for the months of July through December 1987. *See* Special Counsel Ex. 364. In addition, in August 1987 ISC issued a check to the Commercial State Bank in the amount of $2,993.12. After some confusion, in November 1987, $1,844.62 of this amount was applied to the outstanding condominium mortgage payments due through October 1987; the remainder was applied to back due taxes. *See* Special Counsel Ex. 361.

[98] In fact, it appears that the identity of the parties to the agreement varied over time. The letter agreement forwarded to Mr. Overgaard in January 1987 identified the partnership as the seller. *See* Special Counsel Ex. 351. In contrast, the letter agreement dated April 1, 1987, forwarded to Mr. Overgaard in February 1988, identified the Senator's blind trust as the seller of the premises. *See* Special Counsel Ex. 373.

> It is now nearly three years since we entered into an agreement that Independent Service Company would buy your condominium unit. ISC made the agreed-to payments, executed the contracts provided and assumed payments to the bank management company for monthly service and payment of taxes.
>
> *To date, we have received no executed document showing the transaction to be completed.* Tax statements still come in your name. The bank loan is still in your name and nothing seems to be happening.

Special Counsel Ex. 386 (emphasis added).[99]

In response to this letter, the Senator arranged a meeting with Mr. Overgaard to discuss the transaction, and subsequently directed Mr. Mahoney's staff to deliver the requested documents to Mr. Overgaard. *See* Special Counsel Ex. 387. It was only after this meeting, in April 1989, that the Senator signed the lease agreement dated April 1, 1987 on the basis of which he had been "renting" the property from Mr. Overgaard. *See* Special Counsel Ex. 391.

Despite these efforts, executed sales documents still were not forthcoming to Mr. Overgaard. Finally, in September 1989, Mr. Overgaard wrote to Senator Durenberger as follows:

> Please excuse the handwritten letter but I prefer to keep this totally confidential. The purpose of this letter is to ask that we terminate the condo sale at the earliest possible date. I have just closed my corporate books for the third time since we entered into the purchase agreement and still do not have the necessary documents to prove purchase.
>
> Beginning with our fiscal year end May 31, 1987 I have paid an audit fee in excess of $3,000.00 annually for a certified audit which would demonstrate fiscal soundness for clients who request such information. Each of those reports has been footnoted because the auditor cannot prove ownership of the condo unit. I don't understand what you and Mahoney are accomplishing by refusing to complete the transaction. Whatever the reason, I want out. *The last thing I need is to get involved in your ethics investigation and be accused of participating in a sham transaction by which you collect per diem from the Senate on a residence you actually own.* That is certainly a conclusion that could be reached as things stand now.
>
> * * * * *
>
> Now it is my turn to feel used. You and Mahoney must have some reason for not giving me the signed sale documents. I can't figure out the reason and obviously the two of you aren't going to let me in on those reasons. You have

[99] It is interesting to note that while Mr. Overgaard was attempting unsuccessfully to obtain evidence of the sale of the condominium to ISC, Mr. Mahoney filed with the Registrar of Titles the documents necessary to transfer title to the condominium from the partnership to himself as trustee of the Senator's blind trust. A Certificate of Title, showing Mr. Mahoney to be the legal owner of the property in his capacity as trustee, was issued on October 26, 1988. Special Counsel Ex. 385.

> the cash flow information I gave you so you must know by now that it's no big profit for ISC. You also must be aware that you have collected more per diem than you have paid to ISC. I presume that's because of your concern that you're being overcharged.
>
> Dave, this thing has dragged along for so long that I'm just weary of the whole thing. I'll gladly settle for the return of my downpayment and call it quits. There are some things just not worth hassling about and this is certainly one of them.

Special Counsel Ex. 394 (emphasis added).[100]

In his recently executed affidavit, Mr. Overgaard has denied that the transaction was a "sham." Durenberger Ex. 15, ¶ 11. Special Counsel submits, however, that Mr. Overgaard's September 1989 letter is far more credible than his more recent affidavit. Unlike that affidavit, which was written for public consumption as part of these proceedings, the quoted letter was a confidential communication between friends, which Mr. Overgaard did not anticipate would be held up for public scrutiny. Instead, the letter was intended to prompt Senator Durenberger into action—a purpose which would not be served by a baseless charge of unethical conduct. Far from being outraged at its contents, however, Senator Durenberger apparently was concerned about the letter's intent and effect.

Indeed, as a result of this letter, Mr. Mahoney, Mr. Kelley and Mr. Overgaard met in early October 1989. *See* Special Counsel Ex. 396. Mr. Mahoney delivered the requested documentation to Mr. Overgaard at that time, thereby concluding the protracted sales transaction. Yet, as of the initiation of the Committee's Preliminary Inquiry in this matter, those documents still have not been filed with the Hennepin County Registrar of Titles. Thus, ISC still does not have legal title to the condominium property.

4. THE SENATOR'S CLAIMS FOR SENATE REIMBURSEMENT

Special Counsel finds that the sales agreement between Senator Durenberger and Mr. Overgaard was back dated to April 1, 1987 in order to permit the Senator to claim Senate *per diem* lodging reimbursement to that date. Heidi Shaw, the Senator's staff Bookkeeper, routinely prepared Senate reimbursement vouchers for submission to the Disbursing Office. Ms. Shaw initially did not receive rental invoices, either from the partnership or ISC, for the period after March 31, 1987—the partnership termination date. Accordingly, she prepared vouchers for this period using her own handwritten notes of the dates the Senator stayed in the condominium.[101]

Because the Senator had been advised by Mr. Mahoney that he could not receive Senate reimbursement for the expenses of staying in property which he owned, Mr. Kelley instructed Ms. Shaw to

[100] At the time of this letter there was not yet an "ethics investigation" of the condominium matter. Apparently, therefore, Mr. Overgaard was referring to the pending Piranha Press inquiry—and obviously was expressing his concern that that inquiry might be expanded to include the condominium issue.

[101] *See, e.g.,* Special Counsel Ex. 412. Ms. Shaw also reported that she knew that she could not submit vouchers for these expenses unless she had an invoice reflecting the costs to attach to the vouchers.

delete from Senate reimbursement vouchers any claims for condominium lodging expenses. In response to Mr. Kelley's instructions, Ms. Shaw simply crossed through these amounts on the voucher forms and supporting handwritten notes, *See, e.g.,* Special Counsel Ex. 412. These vouchers then were submitted to the Disbursing Office, and payments were made by that Office in the amounts requested.

In November 1987, Mr. Mahoney's staff informed the ISC staff how to generate invoices for the Senator's stays in the condominium. Thus, by letter dated November 11, 1987, Tamara Hardy of Mr. Mahoney's office wrote to Joan Sorenson of ISC:

> Enclosed also find an example of the form of bill previously submitted to Heidi at Senator Durenberger's office in Washington, D.C. *In order that reimbursement can be obtained from the Senate, a similar type of bill is necessary and should be sent to the attention of Heidi Shaw,* 154 Russell Senate Office Building, Washington, DC 20505.

Special Counsel Ex. 359 (emphasis added).[102]

In December 1987, ISC forwarded to Ms. Shaw rental invoices for the entire period from April through October 1987 in the required format. Special Counsel Ex. 445 at 88–89; *see* Special Counsel Ex. 365. After receiving these invoices, at Mr. Kelley's direction Ms. Shaw then prepared revised Senate vouchers for submission to the Senate Disbursing Office. These "revouchers" included the newly documented condominium rental costs, and were supported by the newly created ISC rental invoices. *See, e.g.,* Special Counsel Ex. 412. Senator Durenberger personally reviewed and signed each of these "revouchers" before they were submitted to the Disbursing Office.

In submitting these materials to the Disbursing Office, Senator Durenberger represented to the Senate that he had rented the condominium from ISC on the dates reflected in the vouchers and supporting invoices.

It is clear from the documentation of the transaction as a whole, however, that there was no *bona fide* agreement to sell the condominium to ISC until at least August 1987, and that ISC effectively had no relationship to the property until that time. It is equally clear that ISC did not hold legal title to the condominium during any of the time periods at issue. Indeed, it is evident that the documentation of the ISC transaction ultimately reflected an April 1, 1987 effective date so that the Senator could claim Senate reimbursement for his condominium stays after that date.

5. DELAYED RENTAL PAYMENTS TO ISC

The evidence in this matter also demonstrates that Senator Durenberger regularly claimed and received Senate reimbursement for the "costs" of renting his former condominium—yet made only nine lump sum rental payments to ISC during the almost two year

[102] The previous month, Ms. Shaw prepared a listing of dates on which the Senator had stayed in the condominium through August 1987. This listing was updated in early November 1987 and was forwarded to Mr. Mahoney with the request that he in turn provide it to Ms. Sorenson. *See* Special Counsel Ex. 360. Ms. Shaw also informed us that the ISC invoices were provided to her after this information was forwarded to ISC.

period from January 1988 and November 1989.[103] Senator Durenberger thereby retained the use of Senate reimbursement funds for substantial periods of time.

As part of the sales transaction, Senator Durenberger agreed to lease the condominium from ISC at a daily rate of $85.[104] As was noted above, in December 1987 ISC sent invoices to the Senator for his stays in the condominium between April and October 1987; in February 1988, ISC invoiced the Senator for his condominium stays through January of that year. *See* Special Counsel Ex. 372. Thereafter, ISC invoiced the Senator fairly regularly on a monthly basis, based on a listing of dates provided by Heidi Shaw of the Senator's staff.[105] Based on these invoices, the Senator submitted vouchers to the Senate for lodging reimbursement on a fairly regular monthly basis.[106]

A review of the documentation produced to the Committee in this matter reveals that, with a few limited exceptions,[107] Senator Durenberger received reimbursement checks from the Senate on a regular monthly basis for the almost two year period from February 1988 to December 1989. According to Ms. Shaw, these checks were regularly deposited into either the Senator's checking or savings account. Although he regularly was accepting these Senate reimbursement monies, and depositing them into his personal accounts, Senator Durenberger made only nine "rental" payments to ISC during the twenty-two month period from February 1988 to November 1989.[108] *See* Special Counsel Ex. 407; *see also* Special Counsel Ex. 395.

Thus, to the extent that he received and held Senate funds for several months between payments to ISC, the Senator was benefitting from the use of Senate monies owed to a third party.[109] This, Special Counsel, submits is simply inappropriate for one charged with the administration of the public trust.

C. Senator Durenberger's Qualified Blind Trust

In June 1985, Senator Durenberger placed his interest in the partnership into a newly established qualified blind trust pursuant to the Ethics in Government Act. At that time, in his capacity as

[103] In October 1989, the Senator was advised by Mr. Mahoney that these delays were "inappropriate" under numerous statutes. *See* Special Counsel Ex. 403.

[104] In an April 18, 1988 letter to the Senator, Mr. Overgaard explained that this rate was calculated to cover both the out-of-pocket operating expenses of the unit *and* "a reasonable return" on Mr. Overgaard's investment in the property. *See* Special Counsel Ex. 378.

[105] In fact, beginning in June 1989 ISC sent invoices to the Senator on an average of twice each month.

[106] The relevant vouchers do not reflect the dates on which they were submitted to the Disbursing Office. Ms. Shaw, however, informed Special Counsel that she submitted vouchers to the Disbursing Office on a fairly regular basis, and that she typically received payment checks from the Senate within a few weeks of submitting a voucher. Based on a review of the Senate reimbursement checks, it would appear that Ms. Shaw typically submitted vouchers on a monthly basis.

[107] The Senator's condominium stays between July 1988 and early November 1988 were reimbursed by his official election committee. *See* Special Counsel Ex. 407.

[108] These payments were made in February 1988 ($5,780), April 1988 ($2,550), May 1988 ($680), August 1988 ($1,190), September 1988 ($2,975), March 1989 ($3,000), May 1989 ($2,124), July 1989 ($2,500) and November 1989 ($5,925). *See* Special Counsel Ex. 407.

[109] Certain documents reflect the Senator's concern that ISC charges were excessive relative to the out-of-pocket operating costs of the premises. *See, e.g.,* Special Counsel Ex. 380. This may account for the delay in the Senator's payments to ISC.

general partner, Senator Durenberger also deeded the condominium property to Michael Mahoney as the trustee.[110]

The Ethics in Government Act restricts both the activities of the trustee in managing trust assets and communications regarding the trust among the trustee, the Member of Congress, and others.[111] Special Counsel finds that Senator Durenberger violated the statutory requirements governing qualified blind trusts since the Senator's trust became effective on February 24, 1986. Most significantly, the facts evidence Senator Durenberger's constant involvement in the management of one of the trust's principal assets—the Minneapolis condominium unit.

1. FACTUAL BACKGROUND

On June 18, 1985, Senator Durenberger established a qualified blind trust pursuant to the Ethics in Government Act and named Michael Mahoney as trustee. Several months later, copies of the Revocable Trust Agreement and Senator Durenberger's statement regarding the trust assets and qualifications of the trustee were sent to the Ethics Committee. Special Counsel Ex. 333. On February 10, 1986, the Committee was provided with a statement of the assets placed in the trust. Special Counsel Ex. 334. These assets included: 1) all interests in Money Market Portfolio at Piper, Jaffray & Hopwood, Inc.; 2) all interests in Dynamic Enterprises; and 3) all interests in "706-607 Partnership."[112]

After reviewing these documents, the Committee informed the Senator on February 24, 1986 that it found the trust to be a qualified blind trust, pursuant to the Ethics in Government Act. 2 U.S.C. § 702(e).[113] Special Counsel Ex. 336.

2. THE TRUST ASSETS

As was noted above, among the original assets placed in the trust by the Senator was his interest in the condominium partnership. Senator Durenberger then deeded the condominium itself to Mahoney as trustee. The Senator, however, continued to stay in the condominium on a regular basis. Because he received bills from and made payments to both the 703-603 Association and ISC for his use of the condominium, Senator Durenberger was personally aware of the status of the holdings of the qualified blind trust, thereby undermining the very purpose of the trust.

In his opening statement to the Committee on June 13, 1990, Senator Durenberger's counsel acknowledged this fact: "It was . . . nonsensical to put into this trust the interest relating to the condominium where Senator Durenberger stayed when he went back to Minneapolis." *Hearing Transcript* (June 13, 1990) at 4.

[110] This deed was not recorded until 1988.

[111] The purpose of a qualified blind trust is a "total lack of knowledge by the Government official with respect to the holdings held in trust. . . ." S. Rep. No. 639, 95th Cong., 2d Sess. 13 (1978).

[112] At the time this statement was sent to the Committee, the partnership was known as "703-603 Association."

[113] A qualified blind trust is defined as "any trust in which a reporting individual [Member of Congress], his spouse, or any dependent child has a beneficial interest in the principal or income" and which meets certain requirements. 2 U.S.C. § 702(e)(3).

3. IMPROPER COMMUNICATIONS REGARDING THE TRUST

Special Counsel finds that Senator Durenberger not only was aware on a continuing basis of the status of the condominium trust asset, but also was an active participant in the management of this asset. The Ethics in Government Act states that a trustee "in the exercise of his authority and discretion to manage and control the assets of the trust shall not consult or notify any interested party."[114] 2 U.S.C. § 702(e)(3)(C)(i). In addition, communications between the trustee and interested party regarding the trust are restricted severely.[115] 2 U.S.C. § 702(e)(3)(C)(vi).

During the period from February 1986 to the initiation of this inquiry, Senator Durenberger repeatedly consulted with his trustee, Mr. Mahoney, regarding the trust. *See, e.g.*, Special Counsel Exs. 343, 352, 369, 380, 390, 393, 404. Indeed, the Senator's counsel acknowledged in his June 13th opening statement that the laws regarding blind trusts were broken:

> The Rules are clear, that the trustee and the beneficiary generally can't communicate about the assets in the trust. Putting the interest relating to the condominium where Senator Durenberger stayed in this trust virtually ensured from the beginning that the rules about communication would be broken. . . . Indeed, the record shows that Mr. Mahoney engaged Senator Durenberger in conversations about [the condominium], sought his advice about it, particularly when they were considering selling this condominium to Mr. Overgaard.

Hearing Transcript (June 13, 1990) at 4.

The evidence demonstrates numerous instances of prohibited communications. For example, following the termination of the partnership on March 31, 1987, Senator Durenberger discussed with Mr. Mahoney several alternative dispositions of the condominium property. Special Counsel Ex. 343. He personally negotiated the sales price for the condominium with Mr. Overgaard, *see* Special Counsel Ex. 369, and retained Mr. Mahoney to draft the necessary legal documents. He subsequently demanded from Mr. Mahoney an explanation of the rental costs for the condominium by Mr. Overgaard. Special Counsel Ex. 380.

In April 1989, the Senator received from Mr. Mahoney's assistant a copy of the April 1, 1987 letter agreement for the sale of the condominium to Paul Overgaard, and was specifically asked to provide his comments on the agreement. The telecopier cover letter transmitting this document included the following notation:

> Pursuant to your instructions we are preparing documents to forward to Paul Overgaard. In reviewing the letter of understanding, we noted a paragraph had been amended. Such paragraph has been marked on the attached page. Please review and call myself or Michael with comments. *We are not forwarding this letter until we have your comments.*

Special Counsel Ex. 390 (emphasis added).

In August 1989, Senator Durenberger wrote to Mr. Mahoney to direct him to take certain actions regarding the sale to Overgaard:

> Please sign the original of the enclosed April 1, 1987 letter agreement as amended by Paul Overgaard and send to him at Independent Service Co., along with the executed original of the quit claim deed (copy enclosed).

Special Counsel Ex. 393.

The Ethics in Government Act also prohibits an interested party from making efforts to obtain information regarding trust holdings, 2 U.S.C. § 702(e)(3)(C)(vii), and from knowingly or negligently soliciting or receiving any information regarding the trust, which may not be disclosed according to the Act. 2 U.S.C. § 702(e)(6)(B). Despite these prohibitions, Senator Durenberger often received information regarding the condominium, on occasion in response to his specific request. *See, e.g.*, Special Counsel Exs. 339, 343, 370, 379 and 388.

For example, the Senator periodically received financial statements detailing partnership income and expenses. *See, e.g.*, Special Counsel Ex. 339. In addition, in April 1988 Senator Durenberger asked Mr. Overgaard to provide him with a "written explanation of the [condominium sale] transaction and my obligations." Special Counsel Ex. 379. Mr. Overgaard sent a detailed letter explaining the financial transaction and the basis for the lease terms. Special Counsel Ex. 378. Disclosure of such information to the Senator is prohibited by 2 U.S.C. § 702(e)(3)(C)(v).[116]

VII. Evidence Regarding Gifts of Limousine Transportation

Special Counsel finds that Senator Durenberger accepted gifts of limousine transportation in the Boston, Massachusetts area in 1985 and 1986 in violation of Senate Rule 35.[117] In the hearing in this matter, Senator Durenberger's counsel admitted that the Senator's receipt of this limousine transportation violated Senate Rule 35. *Hearing Transcript* (June 13, 1990) at 7.

In 1985, Senator Durenberger began to have regular meetings for personal reasons with Dr. Armand Nicholi in Concord, Massachusetts, approximately twenty miles from Boston. These meetings typically were held on Monday mornings from 8:00 a.m. until 12:00

[114] An interested party is defined as a reporting individual (Member of Congress), his spouse and any dependent child with a beneficial interest in the principal or income of a qualified blind trust. 2 U.S.C. § 702(e)(3)(D).

[115] The only communications that are allowed are requests for distributions and written communications regarding the general financial interest of the Member of Congress, notification that law prohibits an asset from being held in the trust, and directions to the trustee to sell any of the trust's original assets because of a conflict of interest. 2 U.S.C. § 702(e)(3)(C)(vi).

[116] A trustee also is required to inform a Senator and the Ethics Committee when an asset of the trust is disposed of or when the value of an asset is less than $1,000. 2 U.S.C. § 702(e)(C)(iii). Although the parties to the purported sale of the condominium claim that ISC owns the condominium, and has done so since April 1987, there has been no formal notification to the Committee of this purported transfer of ownership.

[117] Senate Rule 35 prohibits a Senator from accepting "directly or indirectly, any gift or gifts having an aggregate value exceeding $100 during a calendar year directly or indirectly from any person, organization, or corporation having a direct interest in legislation before the Congress. . . ." Gifts, according to Rule 35, are defined to include reimbursement for "other than necessary expenses." A person or entity that is registered to lobby pursuant to the Federal Regulation of Lobbying Act is deemed to have a direct interest in legislation before the Congress, as is an entity that retains a registered lobbyist. Senate Rule 35 and Interpretive Rule 373 (1983), S. Rep. No. 18, 101st Cong., 1st Sess. 215 (1989).

noon. Senator Durenberger often made the trips from Boston to Concord and back to Boston by limousine, rented from A and A Limousine Renting, Inc. The limousines usually waited for the Senator during his four hour meetings. The cost of this limousine travel and other unnecessary limousine travel in the Boston area, estimated at $3,500 was paid by various organizations with a direct interest in legislation, with which Senator Durenberger sometimes met on these trips.

Specifically, on eleven occasions in 1985 and 1986 Senator Durenberger traveled to Boston to meet with a company or business and accepted limousine service to and from Concord. That transportation to and from Concord was necessitated solely by the Senator's personal meetings with Dr. Nicholi. The total value of this limousine travel is estimated at $2,640.[118] These eleven occasions, and the organizations which paid for the transportation, are as follows:

June 8, 1985; September 16, 1985, and June 9, 1986—New England Mutual Life Insurance Company (Special Counsel Exs. 53, 416, 419, 429).

September 23, 1985—National Machine Tool Builders Association (Special Counsel Exs. 52, 420).

November 4, 1985; Feburary 10, 1986; and March 31, 1986—Pitney Bowes, Inc. (Special Counsel Exs. 78, 423, 425, 427).

January 20, 1986—Mintz, Levin, Cohen, Glovsky & Popeo, P.C. (Special Counsel Exs. 77, 424).

March 17, 1986—American Association of Equipment Lessors (Special Counsel Exs. 30, 426).

July 21, 1986—W.R. Grace & Company (Special Counsel Ex. 431).

September 15, 1986—Massachusetts Mutual Life Insurance Company (Special Counsel Exs. 34, 432).

Each of these organizations is or retains a registered lobbyist pursuant to the Federal Regulation of Lobbying Act, and therefore has a direct interest in legislation within the meaning of Senate Rule 35. *See* Special Counsel Exs. 283–289.

On five additional dates, Senator Durenberger met with Dr. Nicholi in Concord, but did not meet with representatives of any business or organization. On these five occasions, however, limousine transportation in the Boston area[119] and to and from Concord, valued at $849, was paid for by the New England Mutual Life Insurance Company ("New Emgland Life")—although the Senator met with neither New England Life officials nor apparently with officials of any other organization on these occasions.[120]

[118] Because most of the invoices reflecting these trips include non-itemized charges for transportation within the Boston area, which appears to have been necessary to the Senator's meetings with organizations, an average value of $236.81 was assigned for service to and from Concord. This figure is based upon invoices that reflect only travel to and from Concord.

[119] Because Senator Durenberger did not meet with New England Life officials during these five trips, none of the limousine service provided constitutes a necessary expense. Therefore, transportation to and from Concord and within Boston, such as to the airport or the Senator's hotel, is included.

[120] These dates are as follows: May 10, 1985 (Special Counsel Ex. 415); October 9–10, 1985 (Special Counsel Ex. 421); and October 18–19, 1985 (Special Counsel Ex. 422). *See also* Special Counsel Ex. 53.

Senator Durenberger also received limousine transportation in the Boston area on four other occasions. These dates, and the organization with which the Senator met if any, are as follows:

July 7–8, 1985 (Special Counsel Ex. 417).

July 15, 1985—Herrick & Smith (Special Counsel Ex. 418).

May 12, 1986—National Machine Tool Builder's Association (Special Counsel Ex. 428).

June 23, 1986—Hale & Dorr (Special Counsel Ex. 430).

The estimated total value of this transportation is $1,287. Once again, this limousine transportation was necessitated by the Senator's meetings with Dr. Nicholi. While evidence about which organization paid for the limousine service on these dates is unavailable.[121] Senator Durenberger has not put forward any evidence suggesting that he paid for these expenses himself.[122] In light of the circumstances described above, it is not unreasonable to assume that a company or business with a direct interest in legislation paid for this travel, and that the Senator's receipt of this limousine service would also have violated Senate Rule 35.

VIII. Other Matters Related to Piranha Press

A. Failure to Report Reimbursements

Special Counsel finds that Senator Durenberger violated Senate Rule 34[123] by failing to report on his Financial Disclosure Reports for calendar years 1985 and 1986 the acceptance from forty-three organizations of reimbursement for the necessary expenses of travel, in connection with his Piranha Press "promotional appearances" and certain travel to the Boston metropolitan area.[124]

On May 15, 1986, Senator Durenberger filed his Financial Disclosure Report for the 1985 calendar year. At that time, the Senator failed to report his receipt of travel expense reimbursements from twenty-seven organizations before which he made appearances in 1985. *See* Special Counsel Ex. 266. Similarly, Senator Durenberger's 1986 Financial Disclosure Report, filed on May 15, 1987, did not include his receipt of travel expense reimbursements from sixteen organizations before which he made appearances in 1986. *See* Special Counsel Ex. 268.

On July 27, 1989, several months after the Committee initiated its Preliminary Inquiry into the Senator's relationship with Piranha Press, Senator Durenberger filed amended Financial Disclo-

[121] Documents obtained from A and A Limousine Renting, Inc. demonstrate that New England Life was to be billed for the transportation on three of these dates. *See* Special Counsel Exs. 417, 418 and 428. New England Life, however, was unable to find any evidence of payment to A and A Limousine for limousine transporation on those occasions.

[122] It is possible that the cost of the limousine service on these dates was simply absorbed by A and A Limousine Renting, Inc., which does not have a direct interest in legislation within the meaning of Senate Rule 35. However, the Senator's failure to report transportation received on three of these four dates on 1985 and 1986 Financial Disclosure Reports would constitute a violation of Rule 34. *See* Special Counsel Exs. 266–269.

[123] Senate Rule 34 (adopting the Ethics in Government Act of 1978, as amended) requires that every Senator disclose on May 15th of each year "[t]he identity of the source and a brief description of reimbursements received from any source aggregating $250 or more in value and received during the preceding calendar year."

[124] Reimbursements from three organizations were made in connection with appearances arranged as Piranha Press events, but payment to Piranha Press was not made. *See* Special Counsel Exs. 24, 44, 70. Reimbursements from two organizations were made in connection with the Senator's appearances in Boston, Massachusetts. *See* Special Counsel Exs. 53, 292

sure Reports for the 1985 and 1986 calendar years. Special Counsel Exs. 267, 269. These Reports are labeled "Reimbursements Related to Book Promotion Speeches," and include lists of reimbursements for travel expenses that Senator Durenberger received from thirty-nine organizations in 1985 and 1986. Senator Durenberger was required to file this information *not* in 1989, but in 1986 and 1987, the years immediately following those during which he received these travel expenses. His failure to do so violated Senate Rule 34.

In addition, to date Senator Durenberger has failed to disclose reimbursements for travel expenses that he received from four organizations for five trips that he made in 1985. These expenses are as follows:

> In connection with his appearance before Blue Cross/Blue Shield of Michigan on May 6, 1985, the Economic Club of Detroit provided the Senator's airfare, lodging and ground transportation (Special Counsel Ex. 136).
>
> New England Mutual Life Insurance Company provided ground transportation, lodging and meals in connection with the Senator's June 7, 1985 meeting with Mr. Mackay and airfare, lodging and ground transportation for his September 16, 1985 meeting with New England Life officials (Special Counsel Exs. 53, 416, 419).
>
> Senator Durenberger received lodging, meals and ground transportation from the Palo Alto Medical Foundation in connection with his "promotional appearance" before that group on April 13, 1985 (Special Counsel Ex. 180).
>
> The State Government Education and Research Foundation paid for Senator Durenberger's airfare, meals, lodging and ground transportation, which were necessary expenses related to his appearance before that organization on November 24, 1985 (Special Counsel Exs. 58, 193).

Special Counsel finds that Senator Durenberger's failure to report receipt of these travel expenses, valued at more than $3,000, violated Senate Rule 34.

B. Improper Conversion of a Campaign Contribution

Special Counsel finds that Senator Durenberger violated Senate Rule 38, paragraph 2[125] by converting to his personal use a campaign contribution from the Pathology Practice Association Federal Political Action Committee. In August 1986, the President of the Pathology Practice Association (PPA) invited Senator Durenberger to address the Association's annual meeting on December 5, 1986. Special counsel Ex. 181 at B. Although the Association did not request a book promotion appearance, the Senator's staff forwarded the information about the appearance to Michael Mahoney on October 23, 1986, to be handled as a Piranha Press appearance. Special Counsel Ex. 181 at A.

The Association did not pay Senator Durenberger an honorarium or fee for his speech on December 5, 1986. Instead, several weeks after the Senator's appearance, the Association's Federal Political

[125] Senate Rule 38, paragraph 2 provides: "No contribution . . . shall be converted to the personal use of any Member or any former Member."

Action Committee ("PAC") issued a check in the amount of $5,000, made payable to "Durenberger for U.S. Senate." Special Counsel Ex. 181 at H-I. This check was sent to the Senator's campaign committee in Minneapolis.[126] Special Counsel Ex. 181 at P.

The Association's registered lobbyist, Paul Johnson, explained in his affidavit that this payment was intended as a campaign contribution:

> Senator Durenberger did not request an honorarium, and the PPA PAC made a $5,000.00 contribution to his re-election campaign. The PPA's check dated December 30, 1986 clearly demonstrates that this was a campaign contribution, as it is made payable to "Durenberger for U.S. Senate" and has the PAC's identifying Federal Election Commission number thereon.

Special Counsel Ex. 41.

This contribution, however, was not reported to the FEC as required by 2 U.S.C. § 434, nor was it deposited with the campaign committee as required by 11 C.F.R. § 103.3 Instead, the check was deposited without endorsement to the Piranha Press account, from which Senator Durenberger was paid for his many "promotional appearances." Special Counsel Ex. 181 at H-K. Special Counsel finds that the Senator's conduct violates Senate Rule 38, paragraph 2.

C. Senator Durenberger's Use of United States Capitol and Senate Facilities

On six separate occasions in 1985, Senator Durenberger made Piranha Press "promotional appearances" in United States Capitol and Senate rooms. For each of these appearances, Piranha Press was paid a fee ranging from $250 to $2,000, in accordance with the Senator's arrangement with that group.[127] These payments ultimately funded, in part, the quarterly payments that Piranha Press made to Senator Durenberger.

It is clear that Senator Durenberger's conduct was contrary to the regulations adopted by the Rules Committee governing the use of these Senate facilities.[128] Initially, in March 1984, the Commit-

[126] In his presentation to the Committee during the hearing, Mr. Hamilton stated that the Association did not send its check to Piranha Press "as it should have done" and that the check was sent "somewhere," apparently not to the campaign committee. *Hearing Transcript* (June 12, 1990) at 134. Although Piranha Press may have considered the $5,000 payment as a fee for a "promotional appearance," the Association clearly did not. In addition, documents filed with the FEC by the Association's PAC reflect that the check was sent to the Senator's official campaign committee. *See* special Counsel Ex. 181.

[127] These appearances were as follows: March 3, 1985, Room 385 of the Russell Senate Office Building, National Conference on Catholic Charities ($250 fee) (Special Counsel Ex. 123); March 25, 1985, Room 385 of the Russell Senate Office Building, The Washington Campus ($1,000 fee) (Special Counsel Ex. 151); April 11, 1985, Room 385 of the Russell Senate Office Building, The Washington Campus ($1,000 fee) (Special Counsel Ex. 176); April 24, 1985, Room 211 of the U.S. Capitol, American Protestant Health Association ($1,000 fee) (Special Counsel Ex. 110); September 9, 1985, Room 207 of the U.S. Capitol, Farmland Industries ($1,000 fee) (Special Counsel Ex. 139); November 12, 1985, Room 385 of the Russell Senate Office Building, The Washington Campus ($2,000 fee) (Special Counsel Ex. 152).

[128] The Committee's Resolution authorizing this Investigation, also cited 40 U.S.C. § 193d in connection with these activities by Senator Durenberger. That statute provides:

Continued

tee on Rules [129] adopted Rules for the Regulation of the Senate Wing of the United States Capitol. Rule XII of those rules provides as follows:

> *Peddling, begging, and the solicitation of books or other subscriptions are strictly forbidden in the Senate Wing of the Capitol,* and no portion of said Wing shall be occupied by signs or other devices for advertising any article whatsoever, excepting such signs as may be necessary to designate the entrances to the Senate Restaurant.

Senate Manual 179–80 (1885) (emphasis added). As here relevant, this Rule remains in force today. S. Doc. No. 1, 100th Cong., 1st Sess. 181 (1988). Moreover, Rule XVI of the current Rules provides that the Rules are applicable as far as practicable to the Senate Office Buildings. *Id.*

The Rules Committee has communicated its regulations on this subject numerous times to Members of the Senate in "Dear Senator" letters. For example, a September 22, 1981 letter from then Rules Committee Chairman Charles McC. Mathias, Jr. advised all Members as follows:

> It is the long-settled policy of the Rules Committee that no commercial or profit-making purpose should be served by the use of Senate rooms or facilities.

Special Counsel Ex. 290.

The United States Senate edition of the *Congressional Handbook*, S. Pub. 99–10 (1984), similarly sets forth "procedures" and "rules and regulations" established by the Rules Committee for the use of Senate rooms. The *Handbook* states:

> *No products may be sold on the premises or displayed for future sale. No commercial, political, or profit-making purpose whatsoever may be served by the use of the Senate rooms. The sponsoring Senator will be held accountable for the enforcement of this clause.*

S. Pub. 99–10 at I–36 (emphasis in original). This proscription was communicated almost verbatim in a May 22, 1985 "Dear Senator" letter. *See* Special Counsel Ex. 291. Senator Durenberger's conduct was plainly inconsistent with these proscriptions. Moreover, it is unconscionable that an organization such as Piranha Press can realize profit from activities occurring in Senate buildings.

It is forbidden to offer or expose any article for sale in said United States Capitol Grounds; to display any sign, placard, or other form of advertisement therein; to solicit fares, alms, subscriptions, or contributions therein.

In response to the arguments of Senator Durenberger's counsel, Special Counsel has reexamined the legislative history of this Act. Special Counsel has concluded that the better reasoned view may be that the cited statute does not reach conduct with the Capitol Buildings.

In 1967, Congress extended the scope of 40 U.S.C. § 193f, prohibiting the possession or discharge of weapons, to include the Capitol Buildings. At the same time, Congress amended Section 193m of the Act to redefine the term "Capitol Buildings," and in so doing eliminated the former language restricting the scope of the entire Act to the Capitol Grounds. Because Section 193f was the only substantive provision of the original Act which as amended referred to the Capitol Buildings, the amendment to Section 193m arguably reaches only that section.

This reading of the Act's legislative history is consistent with the traditional regulation of conduct within the Capitol Buildings by the respective Houses of Congress. As the text above makes clear, the Senate has long prohibited conduct of the type here at issue through its own Rules.

[129] Predecessor to the present Senate Committee on Rules and Administration.

From Special Counsel's investigation, however, it appears that there is some misunderstanding about these regulations among the Members of the Senate. The cited authorities apparently are not well known among all Members; those Members who are aware of them may be somewhat confused about their scope. For these reasons, Special Counsel recommends that the Committee not find a violation or impose any disciplinary action on the basis of the conduct at issue. Accordingly, Special Counsel's recommendation of a sanction of Senator Durenberger set forth in Section XI below is not based upon the Senator's use of Senate or Capitol facilities in these instances.

Special Counsel further recommends that, in order to eliminate any further confusion on this issue, pursuant to Committee Rules 8(c) the Committee take such appropriate action as is necessary to clearly and unequivocally prohibit such conduct by all Members in the future.

IX. Senator Durenberger's Defenses

Senator Durenberger has raised several general defenses to the charges against him. Specifically, Senator Durenberger has asserted that he acted in good faith and without any intent to violate the law or Senate Rules, and that his responsibility for the misconduct here at issue therefore should be diminished. Senator Durenberger also repeatedly has stressed his reliance on the advice of counsel, the staffs of the Rules and Ethics Committees, and the FEC.

Finally, with respect to his Piranha Press contract, Senator Durenberger argues that even if he gave no actual book promotions, the compensation he received from Piranha Press would still be justified under federal election law pursuant to a contract for certain other "continuing services." These defenses are without merit.

While Senator Durenberger does not contest the facts, he minimizes his own involvement and seeks to blame others. However, the overwhelming weight of the evidence shows that the responsibility for the conduct at issue must be placed on the Senator because it was he who knowingly and intentionally participated in a pattern of conduct which was unethical. Moreover, while Special Counsel does not find that Senator Durenberger acted with venality, it is also true that he did not act in good faith.[130]

A. The Senator's Intent

In his statement at the hearing in this matter, Senator Durenberger argued:

> First, in all these activities to the degree that it was humanly possible, I acted in good faith, with no intent whatsoever to violate the rules of the Senate.

Hearing Transcript (June 13, 1990) at 20. Senator Durenberger's counsel stressed the same point in his statement to the Committee:

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[130] If Special Counsel had concluded that Senator Durenberger acted with venality, the recommendation of sanction would have been more severe.

> [A] basic question that you must focus on is: Do the facts show some type of venal intent, some type of intent to unlawfully circumvent the honorarium rules?

Id. (June 12, 1990) at 122. Senator Durenberger apparently does not contest that he sought to circumvent the rules, but only that he did so in an *unlawful* manner. In effect, the Senator contends that he did not act with any specific intent to violate the law or rules.[131]

The Senate, however, need not find that Senator Durenberger actually intended to violate a law or rule in order to impose the disciplinary action recommended by Special Counsel in this matter. Indeed, the Committee's own procedural rules permit the imposition of some disciplinary measures for inadvertent, and therefore presumably unintentional, violations of Senate rules. *See* Committee Rule 4(f)(2). This reflects the recognition that, as holders of a unique public trust, Members of the United States Senate appropriately can be held to a higher ethical standard of conduct than that which governs the general public.

Indeed, specific intent—that is, proof that an individual knowingly performed an act with the express purpose of violating the law—is required in only a narrow category of criminal cases. Within the criminal context, liability generally may be imposed based on proof that the accused voluntarily committed the acts in question, irrespective of whether he or she knew that those actions violated any law. In fact, in some situations, criminal liability may be imposed based merely on proof that the accused acted in reckless disregard of the facts, or otherwise deliberately avoided learning the facts. *See, e.g., United States v. Jewell*, 532 F.2d 697 (9th Cir.) (*en banc*), *cert. denied*, 426 U.S. 951 (1976).

The Rules of this Committee, as well as available Committee precedent, are consistent with these general precepts. The Committee has previously recommended the sanction of a Member even absent evidence that the Member had actual knowledge of the wrongdoing at issue. In that matter, the Committee recommended and the Senate voted to denounce Senator Herman Talmadge based on evidence that he knew or should have known of misconduct on the part of his staff. *Report of the Select Committee on Ethics, Herman E. Talmadge Investigation*, S. Rep. No. 337, 96th Cong., 1st Sess. 17 (1979). The Committee further determined that Senator Talmadge should be held responsible for that misconduct by virtue of his own "gross neglect" of his duty to faithfully and carefully administer the affairs of his office. *Id.*

Special Counsel, however, finds that Senator Durenberger's actions and conduct were both knowing and intentional and were not carried out negligently, inadvertently or on the basis of a mistake of law or fact. Senator Durenberger knowingly and intentionally designated certain honorarium invitations as Piranha Press events; gave speeches at these events in which he mentioned neither his book nor his publisher; endorsed to Piranha Press checks that had been made payable to him and that were marked clearly with the notation "honorarium"; and signed and submitted reimbursement requests to the Senate Disbursing Office for stays in a condominium which he co-owned. Indeed, the Senator was personally involved in the minutia of the transactions at issue.

[131] Many of the affidavits submitted by Senator Durenberger contain statements to the effect that, to the best of the affiant's knowledge, Senator Durenberger did not intend unlawfully to circumvent Senate Rules or laws. For example, Gary Diamond stated as follows in his affidavit: "I have no knowledge that Senator Durenberger had any intent unlawfully to avoid statutory honorarium limitations." *See also* Durenberger Exs. 4, ¶ 5; 5, ¶ 8; 7, ¶ 8; 8, ¶ 9; 11, ¶ 14; 12, ¶ 8; 13, ¶ 6; 15, ¶ 12; 112, ¶ 10. Such a statement is nothing more than an opinion of a participant in the scheme at issue as to the ultimate issue, and has no probative value.

In light of the evidence discussed herein, Special Counsel rejects the notion that Senator Durenberger acted in good faith. Throughout these proceedings, Senator Durenberger has urged the Committee to adopt a lesser rather than a higher standard of ethical conduct. Special Counsel submits that Senator Durenberger's conduct was unethical by any standard. As Special Counsel has earlier stated, it is the Senator's moral compass that was broken. As the House Committee on Standards of Official Conduct noted in its report on the Korean Influence Investigation, "Members of Congress are expected to adhere to standards of conduct far more demanding than the bare minimum standards established by our criminal laws." *Manual of Offenses and Procedures, Korean Influence Investigation, House Committee on Standards of Official Conduct*, 95th Cong., 1st Sess. 35 (1977).

In sum, whether Senator Durenberger had the specific intent to violate law or Senate Rules is not at issue here. Such a finding is unnecessary to the imposition of Senate sanctions. Senator Durenberger clearly intended to commit the acts that constitute violations of law and Senate Rules and should be held accountable for his conduct.

B. Reliance on the Advice of Others

Claims of reliance on the advice and assurances of others have been a major theme in Senator Durenberger's defense of his actions.[132] In his public statement to the Committee, for example, Senator Durenberger asserted:

> [A]ll the key decisions were based on the advice of outside, independent counsel, often two or three attorneys, and reaffirmed by contacts with the Ethics Committee, the Rules Committee, or the Federal Elections Commission, whichever had jurisdiction.

Hearing Transcript (June 13, 1990) at 20; *see also id.* (June 12, 1990) at 110–11 (statement of counsel).

1. RELIANCE ON COUNSEL

The Senator's reliance on counsel defense is both legally and factually inadequate. The defense is available in only a narrow range of criminal cases—typically those requiring specific intent. In those cases, reliance on counsel may be relevant in showing the absence of a vital element in the prosecution's case: an intent to break the

[132] Senator Durenberger suggested in his statement to the Committee that the good names of his attorneys and friends were unfairly tarnished by Special Counsel's presentation. It is the Senator who throughout these proceedings has blamed his lawyers and friends. It is the Senator who in real time involved them in his schemes to circumvent the rules. Accordingly, his efforts to support them now are disingenuous and are totally inconsistent with the positions he has taken throughout these proceedings.

law. Confining the reliance on counsel defense to these narrow circumstances is supported by policy concerns of not permitting "those desiring to circumvent the law . . . [to] shop around for bad advice." 1 W. Lafave & A. Scott, Jr., Substantive Criminal Law 595 (1986). Because it is unnecessary in Senator Durenberger's case to show specific criminal intent, the defense of reliance on counsel is not legally relevant.

Perhaps more importantly, Senator Durenberger is himself a lawyer and was, at the very time of some of the conduct at issue here, a member of the Senate Committee on Ethics. He is thus in a very different position from the ordinary layman who must, by necessity, rely upon the advice of lawyers.

In support of his reliance on counsel defense, however, Senator Durenberger has cited two opinion letters provided by Mr. Mahoney. *Hearing Transcript* (June 13, 1990) at 38; *id.* (June 12, 1990) at 115 (statement of counsel). These opinion letters do not fairly reflect the actual agreement between the Senator and Piranha Press, nor do they state the facts of that arrangement as known to the parties as of the dates of the letters. Neither of the opinion letters states that the groups before which the Senator would make "promotional appearances" would pay a fee to the publisher in consideration of the Senator's appearance. *See* Durenberger Exs. 30, 31. Nor does either of the letters refer to the fact that the "promotional appearances" envisioned under the contract would be the result of traditional honoraria speech invitations extended to the Senator through his U.S. Senate office. *Id.* Given the disparity between the arrangement as it was actually carried out, Senator Durenberger cannot claim to have relied upon the letters in good faith.

Moreover, the facts of the Piranha Press arrangement show that Senator Durenberger did not rely on the advice of disinterested counsel. Where the lawyer upon whom reliance is claimed is himself integrally involved in the transaction at issue, the client may not invoke reliance on counsel as a defense. *United States v. Carr*, 740 F.2d 339, 347 (5th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). Although Senator Durenberger claims that he relied on independent counsel, Mr. Mahoney was centrally involved in carrying out the Piranha Press arrangement. Perhaps the best description of Mr. Mahoney's role was offered by Senator Durenberger's counsel, Mr. Hamilton:

> Now Mr. Mahoney of course who is in the middle of the implementation of the Piranha Press contract was acting both as Senator Durenberger's lawyer and as Piranha's agent. . . . Mr. Mahoney was arranging for the appearances. He was communicating and negotiating with groups as to fees. In short, he was the principal organizer of all of this.

Hearing Transcript (June 12, 1990) at 123.

Mr. Mahoney profited directly from the Senator's Piranha Press contract by acting simultaneously as counsel for Senator Durenberger and agent for Piranha Press. Indeed, Mr. Mahoney received nearly $25,000 in fees from Piranha Press for his services as agent. *See* Special Counsel Ex. 277. Under these circumstances, Mr. Mahoney's legal advice could not be considered truly disinterested,

and Senator Durenberger was not entitled to place unfettered reliance upon it.

In any event, Senator Durenberger has not presented any evidence to suggest that Mr. Mahoney or anyone else advised him that he could claim book promotion fees for traditional honoraria events. Had such advice been given, it would have been so obviously wrong that the Senator, as a lawyer and former member of this Committee, would have been obliged to ignore it.

Not surprisingly, on several occasions Senator Durenberger did ignore the advice of his counsel and other advisors when it conflicted with his self-interest. For example, Mr. Mahoney testified in this deposition in this matter than he advised Senator Durenberger that Piranha Press "promotional appearances" by the Senator had to include a display of the Senator's books or a mention by the Senator of the books or his publisher. Special Counsel Ex. 442 at 137–38. Notwithstanding this advice, Senator Durenberger treated as promotional appearances numerous speeches in which he mentioned neither this publisher nor his book. Senator Dureberger also was warned in 1985 by Michael Bromberg, a personal friend, that his arrangement with Piranha Press created an appearance of impropriety. Special Counsel Ex. 14, ¶ 9. The Senator also ignored this advice.

Finally, in late 1986, the Senator's chief of staff asked Mr. Mahoney to ascertain whether the Senator's claims for reimbursement for the costs of staying in the condominium would be affected by the termination of the Senator's real estate partnership with Mr. Scherer. Special Counsel Ex. 443 at 189–196, 204–205. Mr. Mahoney advised Senator Durenberger that he could find no basis for the Senator's past claims for lodging reimbursement during the tenure of the partnership, and therefore could not opine that those reimbursements were proper. *Id.* at 205. While this surely should have raised some question in Senator Durenberger's mind, the Senator did not bring the matter to the attention of either the Senate Disbursing Office or the Senate Rules Committee at that time. Instead, he continued to claim such reimbursement through March 31, 1987, the date on which the partnership was terminated.

Special Counsel submits that the impropriety of his conduct should have been readily apparent to Senator Durenberger. A number of people who were neither trained in federal election law nor familiar with the Senate Rules of Conduct recognized that Senator Durenberger's arrangement concerning Piranha Press was, at the very least, irregular. *See, e.g.*, Special Counsel Ex. 435 at 103–104 (attorney Frederick Graefe); 67, ¶ 2 (Jimmie Powell, Senator Durenberger's Legislative Director).

A number of the groups before which Senator Durenberger made "promotional appearances" questioned the legitimacy of the arrangement. *See, e.g.*, Special Counsel Ex. 44, ¶ 6; 54, ¶ ¶ 4–9. It is difficult to see how Senator Durenberger, a lawyer and former Member of this Committee, could not see what was so apparent to others—that his conduct in connection with Piranha Press raised serious ethical and legal questions. Under such circumstances, Senator Durenberger cannot evade responsibility by claiming reliance on counsel.

2. RELIANCE ON THE FEC OPINION

Senator Durenberger also places great emphasis upon the advisory opinion he obtained from the Federal Election Commission ("FEC"), which he says "approved the [Piranha Press] arrangement without any question," (*Hearing Transcript* (June 13, 1990) at 38–39) and which his counsel considers "a central document in this whole proceeding." *Id.* (June 12, 1990) at 119. The Senator's reliance is unfounded.

The request for an advisory opinion submitted to the FEC by Senator Durenberger's counsel omitted several crucial facts about the Senator's proposed arrangement with Piranha Press. It did not state that the groups to which the Senator would speak would pay a fee for his appearance, although this fact was plainly known to all parties at the time. The request also failed to note that certain "promotional appearances" would result from traditional honorarium speech invitations extended to the Senator, although this too was contemplated by the parties at the time. *See* Special Counsel Ex. 254.

Senator Durenberger has suggested that fault for any omissions in his request for an opinion lies with Mr. Mahoney. When it came to requesting the advisory opinion, Senator Durenberger "left it up to Mr. Mahoney to do this correctly." *Hearing Transcript* (June 12, 1990) at 117. The evidence suggests, however, that Senator Durenberger was very likely personally involved in the submission to the FEC. While the letter seeking that opinion was drafted by the Senator's counsel (*see* Special Counsel Ex. 254), Thomas Horner—the Senator's Administrative Assistant—was provided with a copy of that request letter in advance of its submission to the Commission. *See* Special Counsel Ex. 250. Mr. Horner testified that, in accordance with his usual practice, he would have reviewed this material with the Senator. *See* Special Counsel Ex. 439 at 13, 15. Mr. Mahoney's office also provided to Mr. Horner an advance copy of the final FEC opinion, and Senator Durenberger discussed the opinion with Mr. Mahoney's partner. *See* Special Counsel Exs. 255, 257. The Senator, therefore, presumably was well aware of the limited factual basis for that opinion.

As a result of these omissions, the arrangement proposed in Mr. Mahoney's letter to the FEC was significantly different from the arrangement actually implemented by the Senator and Piranha Press. The opinion that ultimately was issued by the FEC was premised upon the Senator's appearance at genuine book promotions. The single, overwhelming fact that Senator Durenberger has never adequately responded to is that he did not do what the FEC opinion authorized. One cannot rely on an opinion discussing book promotions when there are no book promotions. The FEC never was advised that the Senator would not mention his books or his publisher, or would mention them only derisively in passing at his Piranha "promotional appearances."

These disparities render the FEC advisory opinion ineffective as a shield for the plan that Senator Durenberger ultimately carried out with Piranha Press. The Federal Election Campaign Act permits reliance upon an FEC advisory opinion only if the transaction at issue is "indistinguishable in all its material aspects from the transaction or activity . . . [about] which such advisory opinion [was] rendered." 2 U.S.C. § 437f(c)(1)(B).[133] In this case there is no similarity between the facts addressed in the opinion and the facts as they unfolded. The FEC advisory opinion in this case, therefore, issued in response to a letter that did not accurately describe the "promotional appearances" that took place, is inapplicable.

Senator Durenberger's response to this plain statutory bar to his reliance argument is two-fold. First, his counsel has argued that the omissions in the Senator's request letter are excused because "the request for an advisory opinion specifically referenced the contract [between Senator Durenberger and Piranha Press] which revealed that these groups would be charged a fee." *Hearing Transcript* (June 12, 1990) at 119. Although it is true that the request letter did include a reference to Senator Durenberger's contract with Piranha Press, the contract was *not enclosed* with the letter. The letter's omissions cannot be excused by the fact that some of the material information the letter omitted may have been included in a separate contract which was only referenced, but not included with the request to the FEC. Again, the Senator's contract called for a series of book promotions—yet the 113 appearances made by the Senator in fact were not book promotions.

Second, Senator Durenberger's counsel argued that it was the FEC's responsibility to correct any omissions by asking for follow-up information. *Id.* at 117. However, FEC regulations squarely place the burden of providing all relevant facts on the party requesting the opinion. Section 112.1(c) of those regulations provides:

> Advisory opinion requests *shall include* a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made.

11 C.F.R. § 112.1(c) (emphasis added).

The purpose of the regulation is clear. Because the party submitting the request for an opinion is in the best position to know the material circumstances surrounding the intended transaction, he or she has the burden to provide all relevant facts. It would be unreasonable to expect an agency such as the FEC to speculate about the possible omissions in a request submitted to it by a United States Senator and to demand correction. The FEC in this case was asked to give an opinion on a set of facts and it complied. That Senator Durenberger chose to engage in conduct different from that described in the opinion renders the FEC opinion meaningless.[134]

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[133] *See also FEC v. National Conservative Political Action Comm.*, 647 F. Supp. 987, 995 (S.D.N.Y. 1986) (defendant not entitled to rely on advisory opinion obtained from FEC where there exist substantial "distinctions between the facts as they actually unfolded and the facts addressed in the FEC's advisory opinion").

[134] Senator Durenberger's counsel acknowledged as much in his statement before the Committee:

> If a Member engages in other or different conduct [from the intended conduct described in the request for an advisory opinion], this doesn't necessarily mean that he has violated the rule. . . . It only means that he can't rely on the advisory opinion for protection."

Hearing Transcript (June 12, 1990) at 127.

3. RELIANCE ON CONTACTS WITH ETHICS AND RULES COMMITTEE STAFFS

Senator Durenberger also has said that he relied upon assurances provided to him and his staff by Ethics Committee staff counsel. The Senator's counsel, Mr. Hamilton, stated to the Committee:

> [N]ot only did Senator Durenberger seek the advice of the FEC and his lawyer's advice, he sought advice from the staff of this Committee. The Senator approached a staff member named Clendon Lee about the [Piranha Press] arrangement in 1984, and in early 1986 his Administrative Assistant, Doug Kelley, sought out another staff member whose name is William Canfield.

Hearing Transcript (June 12, 1990) at 120. These former Committee staff members are said to have assured Senator Durenberger that his Piranha Press dealings presented no ethics problem, assuming the arrangement had already been approved by the FEC. *See Hearing Transcript* (June 12, 1990) at 121.

The Senator, however, has not indicated specifically what facts, if any, were provided to Mr. Lee at the time, and Mr. Lee has no recollection of the conversation. *See* Special Counsel Ex. 48, ¶ 4. In addition, any assurance by Mr. Lee was founded on the assumption that the FEC had fully reviewed the matter and had approved it. Thus, for the very reasons that the FEC advisory opinion cannot be invoked because of the material omissions upon which it was founded, the purported assurance of Mr. Lee premised upon the FEC's approval of the transaction can have no application to the Piranha Press arrangement as it was actually administered.

The contact between the Senator's Administrative Assistant, Mr. Kelley, and Mr. Canfield similarly does not support the Senator's position. Mr. Kelley did not provide Mr. Canfield with all of the facts needed for a full assessment of the Piranha Press arrangement. In his deposition in this matter, Mr. Kelley testified that he did not discuss with Mr. Canfield the details of the Senator's agreement with Piranha Press. Special Counsel Ex. 440 at 126–27. Specifically, he did not disclose that the groups before which the Senator would appear would pay a fee to the publisher, nor did he disclose that traditional honorarium speech invitations would be treated as requests for Piranha Press "promotional appearances." [135] Accepting the very material character of these omitted facts, the Senator cannot fairly rely upon Mr. Canfield's conclusions.

The Senator also has submitted an affidavit of another of his former staff member, Lori Krage Edstrom, who reported that she called the Ethics Committee's chief counsel, Wilson Abney, to ask his advice regarding the condominium matter. Durenberger Ex. 4, ¶ 4. Mr. Abney is said to have assured Ms. Krage Edstrom that it was permissible for Senator Durenberger to seek Senate reimbursement for his stays at the condominium. [136]

Mr. Abney has categorically denied ever having been informed of the facts of the Senator's condominium arrangement. Special Counsel Ex. 451, ¶ 6. Moreover, he stated in his affidavit that had he been told of the facts, he would have advised that the reimbursement was improper. *Id.*

C. The Piranha Press Arrangement as a Contract for Continuing Services

If Senator Durenberger can be said to have promoted his books simply by appearing before a group and speaking well, there is no difference between a "promotional appearance" payment which is exempt from the honoraria limits and a traditional honorarium event.

Perhaps recognizing this, Senator Durenberger's counsel has argued that even if Senator Durenberger's Piranha Press appearances were not book promotions, his compensation could still be justified by treating the Senator's contract with Piranha Press as one for some other type of "continuing services." Mr. Hamilton articulated the argument as follows:

> Now the FEC told Senator Durenberger that payments for book promotions would be a stipend for continuing services and not honoraria. If Senator Durenberger's appearances were in fact not book promotions, there is no statutory safe harbor. But the payment is nonetheless a stipend if it was for some type of continuing service.

Hearing Transcript (June 12, 1990) at 128. Mr. Hamilton elaborated:

> Now, however you want to characterize Senator Durenberger's conduct, you must conclude that Piranha paid him for continuing services. That is, for making appearances before various groups for which Piranha was paid a fee, and for helping to establish Piranha as a book publishing company . . . .

Id.

This, of course, strikes at the very core of the Senator's argument. If Senator Durenberger was not providing continuing promotional services, what type of continuing services was he providing? Special Counsel submits that he was doing no more than making a continuing series of legislative speeches—in short, a continuing series of honoraria speeches, payments for which were channeled through Piranha Press to avoid the honorarium limitations. [137]

Taken to its logical conclusion, the Senator's argument would rob the statutory limitations on honoraria income of any meaning. If the Senator can fairly be said to have entered into a valid "con-

[135] This is consistent with Mr. Canfield's own recollection. In his affidavit, Mr. Canfield indicated:

> I do not recall during the conversation being made aware by Doug Kelly [sic] that Senator Durenberger's publisher charged a fee to the groups before whom the Senator appeared to promote his book. Neither do I recall being made aware that the Senator's office referred requests for the Senator's appearance to the book publisher so that a promotional appearance could be arranged.

Special Counsel Ex. 450, ¶ 5.

[136] During her earlier interview by Special Counsel, Ms. Krage indicated that she was uncertain about with whom she had spoken.

[137] As the Senator has acknowledged, he frequently mentioned neither his books nor his publisher during these speeches. His only plausible effort therefore to help establish Piranha Press as a legitimate book publishing company was his status as a Piranha Press author. Needless to say, this effort ended with the publication of his book.

tinuing services" arrangement, income from which is a "stipend" rather than an "honorarium," there is truly no distinction between a stipendary speech and an honorarium speech.

X. Findings of Violations as Noticed and Specified in the Committee's Resolutions

Special Counsel makes the following specific findings as to the violations noticed and specified in the Committee's resolutions of February 22, 1990 and May 9, 1990 respectively. Special Counsel Exs. 5, 7.

A. Violations as Noticed in the Committee's Resolution of February 22, 1990

As to the violations noticed in the Committee's Resolution February 22, 1990, Special Counsel finds that:

1. Senator Durenberger knowingly and intentionally violated the honoraria limitations established by 2 U.S.C. § 31-1 and 2 U.S.C. § 441i through his arrangement with Piranha Press.

2. Senator Durenberger violated Senate Rule 34 (the Ethics in Government Act, as amended) by failing to timely report the receipt of travel expenses reimbursements from forty-three organizations during 1985 and 1986.

3. Senator Durenberger violated Senate Rule 38, paragraph 2 by forwarding to Piranha Press a campaign contribution made by the Pathology Practice Association Federal Political Action Committee, and thereby converting that campaign contribution to his own personal use.

4. Senator Durenberger knowingly and intentionally violated Senate Rule 35 by accepting unnecessary limousine transportation from organizations with a direct interest in legislation before the Congress.

In addition to these findings and those set forth in Section V, VII and VIII above, which are incorporated herein by reference, Special Counsel finds that through this pattern of improper conduct Senator Durenberger has demonstrated an insensitivity to the ethical standards of his office, and has brought discredit upon the United States Senate.

B. Violations as Noticed in the Committee's Resolution of May 9, 1990

As to the violations noticed in the Committee's Resolution of May 9, 1990, in addition to the findings set forth in Section VI above, which are incorporated herein by reference, Special Counsel finds that Senator Durenberger participated in the back dating of the partnership transaction with Roger Scherer and the subsequent transfer of his condominium to Independent Service Company; that he conceived of and structured these transactions as a means of claiming Senate *per diem* lodging for staying in what was essentially his Minnesota residence; that he submitted misleading travel reimbursement vouchers to the Senate Disbursing Office; and that at certain times he misrepresented to the Disbursing Office the ownership of the property for which he claimed lodging reimbursements. These actions were knowing and intentional.

Special Counsel finds that through this pattern of clearly improper conduct, Senator Durenberger has abused his United States Senate office and misused United States Senate funds, and in so doing has brought discredit upon the United States Senate.

Special Counsel further finds that Senator Durenberger violated statutory requirements governing his qualified blind trust, as set forth in the Ethics in Government Act, as amended. Special Counsel specifically finds that Senator Durenberger violated Section 702(e)(3)(c) and Section 702(e)(6)(B) of that Act.

XI. Recommendation as to Sanction

Pursuant to Committee Rule 5(f)(1), Special Counsel reports to the Committee as follows:

Special Counsel recommends that this Committee report to the full Senate a Resolution denouncing Senator David F. Durenberger for conduct which is reprehensible, and which has brought the Senate into dishonor and disrepute.

In making this recommendation, Counsel has reviewed prior disciplinary cases since 1793. Special Counsel has considered the results of the lengthy and detailed investigation previously described, and has carefully considered the oral and written submissions of Senator Durenberger and his able counsel, Mr. Hamilton.

The most serious sanction which the Senate may impose is that of expulsion. Expulsions in the Senate historically have concerned cases of perceived disloyalty to the United States Government or a violation of serious criminal statutory law involving the abuse of one's official position. No Senator has been expelled since 1862. In 1981, this Special Counsel recommended that Senator Harrison Williams of New Jersey be expelled from the United States Senate. This Committee carefully reviewed the matter and reported to the full Senate a Resolution of Expulsion. After six days of debate on the Senate floor, Senator Williams, just prior to the Senate vote, resigned from the Senate.

In that case, the recommendation of expulsion was based in part on a detailed factual record which showed that Senator Williams violated several federal criminal statutes including conspiracy to defraud, bribery, conflict of interest and interstate travel in aid of racketeering.

Special Counsel submits to the Committee that while very serious, the conduct of Senator Durenberger is distinguishable from that of Senator Williams. The essential difference is that there is insufficient evidence supporting a finding that Senator Durenberger acted with criminal intent, malice or with specific intent to break the law. Because of the criminal conduct engaged in by Senator Williams, Special Counsel and this Committee thought it appropriate to recommend the removal of a Senator chosen by his constituents. Such a decision to interfere with the choice of the people should only be made in the most aggravated situations. By not recommending the expulsion of Senator Durenberger, Special Counsel is not minimizing the wrongdoing engaged in by Senator Durenberger. Special Counsel is simply saying that the decision to

remove him from the Senate, if such a decision is to be made at all, should only be made by those who elected him to his high office.

While Special Counsel rejects the notion that this is an expulsion case, he equally rejects the view that this is a case only warranting admonishment, disapproval, reprimand or any of the other sanctions that do not require action by the full Senate. Such sanctions would be totally inadequate in this case. Senator Durenberger's conduct was not inadvertent, unintentional or based on mistake of fact, ignorance of the law, negligence or misplaced reliance on others. Instead, Senator Durenberger knowingly and willfully engaged in conduct which violated statutes, rules and Senate standards, and acceptable norms of ethical conduct. His conduct was clearly and unequivocally unethical.

During his presentation to the Committee, Senator Durenberger quoted Professor Dennis F. Thompson of Harvard University:

> Public Officials . . . have an ethical obligation to do all they can to make sure that citizens do not have any reasonable basis for believing that they or their colleagues are violating their own ethics rules. There is an ethical obligation to protect the appearances of propriety almost as great as to produce its reality.

Hearing Transcript (June 13, 1990) at 45. Senator Durenberger has failed in both regards.

Special Counsel submits that the reprehensible conduct engaged in by Senator Durenberger warrants a sanction of denouncement by the full United States Senate. Special Counsel further submits that what the sanction is called is less important than the language the Committee uses to describe the offending conduct and the Committee's response to it.

Senator Durenberger's conduct must be fully and fairly revealed to the public. This Committee should pronounce its judgment that Senator Durenberger's conduct is reprehensible and that it will not be condoned. Finally, this matter should be put before the full United States Senate for the imposition of its sanction of Senator Durenberger for his repeated pattern of unethical conduct.

For these reasons, Special Counsel recommends that this Committee pass a Resolution calling for the full Senate to denounce Senator Durenberger publicly for knowingly engaging in unethical conduct which has brought dishonor and disrespect to this institution. Further, Special Counsel notes that the Committee may recommend to the Senate that it refer to the Republican party conference a recommendation regarding Senator Durenberger's seniority or positions of responsibility, and may recommend that Senator Durenberger make appropriate financial restitution.

Respectfully Submitted,

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JULY 2, 1990.

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