

U.S. House of Representatives

COMMITTEE ON ETHICS

Washington, DC 20515

June 6, 2012

The Honorable Maxine Waters
U.S. House of Representatives
2344 Rayburn House Office Building
Washington, DC 20515

Re: In the Matter of Representative Maxine Waters

Dear Colleague:

As you are aware, the Committee on Ethics (the “Committee”) hired attorney Billy Martin to assist the Committee as outside counsel in your matter, which is currently pending before the Committee. One of the tasks assigned to Mr. Martin was to conduct a thorough review of the allegations you raised through counsel regarding the possible deprivation of your due process rights. Indeed, the Committee invited you to submit all allegations you felt warranted review by the outside counsel. In addition to the due process allegations you raised, the Committee identified additional issues that outside counsel reviewed.

The Committee has now completed the due process review. Throughout the process, outside counsel reviewed over 100,000 pages of documents, conducted legal research, and interviewed 26 individuals with potentially relevant information, including all Members of the Committee from the 111th Congress, all Members of the Investigative Subcommittee (“ISC”) in this matter, staff, and former staff. The Committee has concluded that the due process to which Respondents before this Committee are entitled is notice and the opportunity to be heard, as embodied in the House and Committee Rules. During your matter, you were afforded these rights. Outside counsel has concluded, and this Committee has unanimously found, that none of the individual allegations raised, nor the totality of the circumstances of those claims, amount to a deprivation of your due process rights.

In conducting this review, the threshold question to be addressed was whether a Member of the House of Representatives has constitutional due process rights in House disciplinary proceedings. Such a question has no clearly established legal answer; there are arguments on both sides of the issue and the Committee has not attempted to provide a legal answer to this constitutional question. Rather, outside counsel recommended, and the Committee agrees, that there are compelling reasons for this Committee to assume that the Fifth Amendment does apply to congressional disciplinary proceedings, and we followed that assumption during the review of this matter.

Even assuming the Fifth Amendment applies to House disciplinary proceedings, under the Rulemaking Clause of the Constitution, Congress clearly has the right to establish its own rules, provided those rules do not violate the Constitution. Both Congress and this Committee have, in fact, established procedural rules governing disciplinary proceedings and we have concluded that these rules are constitutionally sufficient. Specifically, the House and Committee rules meet the constitutional requirements of notice and an opportunity to be heard. It is, therefore, concluded that the specific due process arguments you raised do not establish any constitutional violation.

As part of the due process review, the Committee considered twelve allegations. The first eight allegations were understood to be contentions that certain of the Committee's procedures were unconstitutional, regardless of whether they were permitted by House or Committee Rules. Specifically, the allegations were that (1) the ISC responded to your motions for a bill of particulars and to dismiss too quickly; (2) the ISC denied your request for oral argument on your motions; (3) the Committee announced the formation of the Adjudicatory Subcommittee ("ASC") without simultaneously announcing an initial hearing date for the ASC; (4) Committee counsel collected evidence after the ISC transmitted the Statement of Alleged Violations ("SAV") to the full Committee; (5) the ASC proposed to conduct a *de novo* review of the facts and law; (6) Committee counsel submitted an unreasonable volume of pre-hearing disclosures; (7) the Committee recommitted the matter to an ISC after the ASC had been formed; and (8) the Committee has not acted on the matter since recommitment to the ISC.

The Committee has found that none of the alleged conduct violated Committee Rules. Moreover, none of these objections concern the essential constitutional requirements of notice and the opportunity to be heard, which we determined you have received. Even at the investigatory stage, the House and Committee Rules provide for written notice of significant Committee actions and the disclosure of relevant evidence. The rules also guarantee a Respondent's right to make a statement to the ISC. In this case, you received notice of the Office of Congressional Ethics' ("OCE") report and were given an opportunity to respond to that report. You were also given notice of the SAV, and provided with an opportunity to make a presentation before the ISC with your counsel present. You also had the opportunity to file, and have the ISC consider, both a motion for bill of particulars and a motion to dismiss.

At the adjudicatory stage, the House and Committee Rules require, among other things, pre-hearing disclosure of all evidence, compulsory process to obtain additional evidence, and the right to cross-examine witnesses, should you choose to do so. As these rules provide for notice and an opportunity to be heard, there is no constitutional entitlement to any procedural protections beyond those afforded by the existing House and Committee Rules.

You also argued that this matter has been unduly delayed, but did not articulate a violation of either the Constitution, or of House or Committee Rules. As this Committee has previously advised you through your counsel, the Sixth Amendment does not apply to Committee proceedings, and you thus do not have the same right to a speedy "trial" that a criminal defendant has. While an unreasonable delay could in theory amount to a due process violation, here the delay has resulted primarily from the legitimate need for further investigation, and in any event the proceedings are within the time limit established by the House itself.

You also raised three allegations which we understood to assert both violations of Committee Rules and your constitutional due process rights. These alleged violations include: (1) confidential documents were leaked to persons outside the Committee; (2) improper *ex parte* communications occurred; and (3) the ASC authorized subpoenas on incomplete representations.

With respect to the first allegation of disclosure of confidential Committee documents in violation of House and Committee Rules, the Committee is aware of three instances in which confidential Committee information was disclosed. One of these was your own August 13, 2010, press conference, in which you disclosed documents containing significant evidentiary information regarding your matter. The review has not uncovered the identity of the person(s) who disclosed confidential Committee documents to the press in the other two instances. However, during the course of witness interviews, one witness, who was a former member of the staff of the Committee, invoked the Fifth Amendment right against self incrimination when responding to questions regarding the leaked documents. Therefore, for purposes of our analysis only, and without drawing any final conclusion, the Committee must assume that a staff member may have violated an agreement to keep Committee information confidential, as well as House and Committee Rules. With that assumption, the Committee has unanimously made the following findings regarding the unauthorized disclosures.

First, the unauthorized disclosures occurred after the issuance of the SAV. Therefore, the Committee finds that the SAV could not have been affected by any alleged rules violation.

Second, even though apparently a violation of Committee Rules, the unauthorized disclosures in this case could only raise constitutional concerns if they led to prejudice or bias among Committee or House Members so as to deprive you of a fundamentally fair hearing. There is no reason to suspect that they did or will do so. Members of Congress can be expected to abide by their duty to base any decision only on appropriate information, just as in bench trials when members of the judiciary are presumed to act appropriately when they make determinations regarding admissibility of evidence and still ultimately decide the case based only on admitted evidence. Moreover, while clearly not mandated by law or factually necessary in this case, Members of the Committee who were on the Committee in the 111th Congress have voluntarily recused themselves from this matter in the 112th Congress. Consequently, any further investigation and possible hearing will be conducted by a new panel of Members.

Finally, it must be noted that the Committee's violation of one of its own rules would not necessarily constitute a deprivation of constitutional due process. Rules of Congress and committees are of course binding, but their violation does not necessarily amount to a violation of the Constitution. Ordinarily, unless the rules in question are themselves constitutionally required or necessary to protect constitutional fairness, their violation does not raise a constitutional issue. While the Committee takes its confidentiality rules very seriously, it does not believe that they are constitutionally mandated.

For all these reasons, even though the Committee assumes that a former staff member may be responsible for some of the unauthorized disclosures, we find that such disclosures do not amount to a violation of your due process rights.

The next allegation involves improper *ex parte* communications, which allegedly occurred between staff and Members of the Committee. You cited no Committee or House rule that prohibits such communications. Indeed, the concept of an *ex parte* communication in the judicial branch evolved in the United States because of the tri-partite system that exists. Here, however, the Committee is not part of the judicial system, so any comparison to judicial *ex parte* communications is not appropriate in this setting.

Your *ex parte* communications argument seems to be based on the assumption that during the ASC phase of an investigation, the staff becomes a party to the adjudication akin to prosecutors, separate and apart from the ASC Members. Such an assumption is not only incorrect, but wholly improper under House Rules. Staff members work for the Committee Members. Staff does not and cannot become independent operators pursuant to House Rules. As such, an *ex parte* rule would be unworkable in this Committee, since the non-partisan staff must serve all Members, as the Members (other than the Chairman and Ranking Member) are not allowed to have assistance from staff in their personal offices on Committee matters. It is, therefore, clear that Members of the Committee must be permitted to speak with Committee staff regarding Committee matters.

Such communications occurred in this matter. Some of those communications were between staff and Members of only one party or the other. While such communications can raise concerns about the appearance of staff partisanship, such concerns do not override the requirement that the Members must be able to communicate with staff. Outside counsel and this Committee have considered these issues and the communications in this matter and have determined that the communications did not impact the ability of the Members to provide you a fair hearing of the allegations against you. The Committee has, therefore, concluded that none of these communications constitute either a violation of House or Committee Rules or of your due process rights.

The Committee also authorized outside counsel to consider whether subpoenas were authorized on incomplete representations. During the course of the review, it was determined that all Members who voted to authorize the subpoenas had adequate information to approve the subpoenas. Consequently, this allegation does not support a finding that either your due process rights or House or Committee Rules were violated.

The final allegation that was reviewed, at the request of the Committee, was whether any inappropriate and/or racially insensitive remarks may have biased the investigation of this matter. The investigation revealed some evidence of insensitive remarks by a former Committee staff member. While the Committee finds such remarks to be inappropriate, the outside counsel concluded, and the Committee unanimously found, that any such insensitivity did not affect any decision-making of the Members of the Committee with respect to your case.

As discussed, the outside counsel has concluded, and the Committee has unanimously found that you have been afforded notice and the opportunity to be heard. As such, there has been no violation of the due process rights to which you are entitled. Even when the allegations are considered in their totality, there is still no violation of the process which you are due, and the Committee is entitled to continue its consideration of your matter.

Sincerely,



Robert Goodlatte
Acting Chairman



John Yarmuth
Acting Ranking Member

cc: Stanley Brand, Esq.