APPENDIX B

Report of the Outside Counsel to the Committee on Ethics

In the Matter of Representative Maxine Waters

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EXECUTIVE SUMMARY

After a two-step, year-long review, the Outside Counsel recommends to the Waters Committee that it determine that no violations of Representative Waters' due process rights were committed by the Committee on Ethics (the "Committee") during its handling of this matter. Outside Counsel further recommends to the Committee that there is insufficient evidence in the record to determine that Representative Waters knowingly violated House Rules or other standards of conduct by a clear and convincing standard. As such, Outside Counsel recommends to the Waters Committee that it consider closing the matter against Representative Waters and determine that no further inquiry is warranted.

During the 111th Congress, an investigative subcommittee ("ISC") was empaneled to investigate this Matter. At the completion of its investigation, the ISC adopted a Statement of Alleged Violations alleging three counts of misconduct. Prior to the scheduled adjudicatory subcommittee ("ASC") hearing on this matter, staff received an additional piece of evidence and recommended that the Committee recommit the matter to the ISC for further investigation of that additional evidence. The matter was recommitted and no further action was taken on the matter during the 111th Congress.

Both in the 111th and 112th Congresses, Representative Waters raised several claims alleging that the Committee had violated her due process rights. The Committee itself had also identified various concerns to be addressed that had not initially been raised by Representative Waters. In the 112th Congress, the Committee sought to retain an outside counsel to assist it in resolving these issues and the matter as a whole. Outside Counsel was retained by the Committee to first review the due process allegations. If Outside Counsel recommended that Representative Waters' due process rights were not violated, and the Waters Committee agreed, then Outside Counsel was tasked with conducting a *de novo* review of this matter.

Following a review of the record and interviews of relevant witnesses, Outside Counsel made the following recommendations to the Committee Members serving in the matter of Representative Waters (the "Waters Committee"):

- For purposes of Outside Counsel's legal analysis, the Waters Committee should assume that Representative Waters is entitled to constitutional due process. There is ultimately room for debate over whether Members of the House have constitutional due process rights in House disciplinary proceedings, but there are good reasons to conclude that they do.

- Congress has broad discretion under the Constitution to determine what specific process is required. Outside Counsel believes the existing Committee and House rules governing the Waters matter are constitutionally adequate.

- Representative Waters' specific "due process" arguments, as well as the other arguments identified by the Committee, generally do not raise any constitutional violations.

- Even assuming Representative Waters' factual allegations to be true, and that certain Committee rules were violated, such violations did not affect Representative Waters' rights and will not prejudice her in further proceedings. Any violation that may have occurred can be remedied by the new Committee which has been selected and, if appropriate, an investigatory and adjudicatory process.

Because Outside Counsel ultimately recommended a finding that Representative Waters' due process rights were not violated, a finding that was adopted by the Waters Committee, Outside Counsel proceeded with a *de novo* review of this matter. The substantive allegations in this case involved Representative Waters' alleged assistance to OneUnited bank following the conservatorship of Fannie Mae and Freddie Mac. Representative Waters' husband was a former member of OneUnited's Board of Directors and a current stockholder in the bank. During the relevant time period, Representative Waters placed a call to the former Treasury Secretary and requested a meeting on behalf of the NBA and minority banks, as she believed from conversations with OneUnited executives that minority banks would be affected by the conservatorship. Outside Counsel recommends that there was nothing improper regarding Representative Waters' call to the former Secretary of the Treasury.

At that meeting, OneUnited specifically requested $50 million from Treasury as a buy back for its shares of the preferred stock. It is Outside Counsel's recommendation that the Committee conclude that at some point in September 2008, following the Treasury meeting, Representative Waters approached the Chair of the Financial Services Committee to inform him that she was concerned about providing any specific assistance to OneUnited because of her husband's involvement with the bank, although the exact timing of that conversation is not clear from the record. The record also supports a finding that Representative Waters relayed this conversation to her Chief of Staff in an effort to ensure that he did not assist OneUnited with its specific request, although the timing of that conversation is not clear from the record. Determining the timing of these conversations ultimately requires a credibility determination which is best left to the Members of the Waters Committee.

On September 20, 2008, Treasury circulated the first draft of the Emergency Economic Stabilization Act ("EESA"). The evidence suggests that by this time, both Representative Waters and her Chief of Staff were aware that, in addition to OneUnited, the conservatorship was only a problem or concern to one other minority bank. It appears that both the prior staff and ISC believed that Representative Waters and her Chief of Staff nonetheless assisted in the provisions of EESA intended to assist small and minority banks, knowing that the provision would assist OneUnited and only one other bank. Upon further review of the record, Outside Counsel recommends that the Waters Committee determine that significant contradictory evidence is in the record. Namely, while few minority banks were affected, this was a broad issue to community banks as well, and those community banks also approached Representative Waters and the Financial Services Committee for assistance.

Because this was a broad issue being addressed by Treasury, other Members of the House of Representatives, and the Financial Services Committee, Outside Counsel recommends a finding that both Representative Waters and her staff could assist in the legislative process as it affected a broad class. Nonetheless, Outside Counsel has determined that Representative Waters' Chief of Staff ("COS") sent two emails solely on behalf of OneUnited, and not for the greater class of banks. However, because Representative Waters took the affirmative steps to inform her Chief of Staff of her conflict with OneUnited, we do not recommend that any violation for failure to supervise her staff occurred in this case. Finally, while there is evidence in the record to support that Representative Waters' COS knew or should have known of Representative Waters' conflict at the time he sent these emails, Outside Counsel recommends that the evidence does not meet the clear and convincing standard required to recommend that a knowing violation of the House rules or other standards of conduct was committed by Representative Waters' COS.

OVERVIEW

This Report addresses the findings and recommendations of the Outside Counsel with regard to the allegations made against Representative Waters.

Part I briefly summarizes the Outside Counsel's findings and recommendations in this matter with respect to both its due process review and its *de novo* review of the substantive facts underlying this matter.

Part II (summarized in Subpart A) contains a summary of the review with which Outside Counsel was tasked to perform in this matter. Subpart B contains a discussion of the factual background affecting the due process analysis, while subpart C addresses Representative Waters' arguments arising from the Committee's actions.

Part III provides Outside Counsel's due process analysis in this matter. Subpart A addresses the Constitutional Framework including (in subpart 1) whether the Fifth Amendment's due process clause applies to House disciplinary proceedings and (in subpart 2) the private interests at stake. Subpart B addresses the specific requirements of due process in Congressional disciplinary proceedings including (in subpart 1) the process due, (in subpart 2) the Constitutional Due Process contained in the House and Committee rules including (in subpart a) the House Rules, (in subpart b) the Rules of the Committee), and (in subpart c) House precedent. Subpart C analyzes Representative Waters' arguments including (in subpart 1) a discussion of the Constitutional claims including (in subpart a) claims of entitlement to procedures beyond applicable Committee rules and (in subpart b) claims of undue delay; (in subpart 2) claims that the Committee violated its own rules, (in subpart 3) arguments based on criminal law, (in subpart 4) assumed violations including (in subpart a) confidential documents were leaked to persons outside the Committee, (in subpart b) allegations that improper *ex parte* communications occurred; and (in subpart c) the ASC authorized subpoenas on incomplete representations; and (in subpart 5) allegations of inappropriate and/or racially insensitive comments.

Part IV contains Outside Counsel's conclusions and recommendations regarding its due process analysis.

Part V contains a review of Outside Counsel's factual findings with respect to the substantive allegations in this matter including (in subpart A) a summary of the factual findings; (in subpart B) a discussion of Representative Waters; (in subpart C) a discussion of OneUnited Bank including (in subpart 1) its Senior Management, (in subpart 2) its Board of Directors, and (in subpart 3) a discussion of Representative Waters' husband's service on the OneUnited Board; (in subpart D) a discussion of the National Bankers Association ("NBA") including, (in subpart 1) the NBA staff, (in subpart 2) the NBA board, (in subpart 3) OneUnited officer's service with NBA, (in subpart 4) Representative Waters' relationship with NBA; (in subpart E) a discussion of Fannie Mae, Freddie Mac and OneUnited, including, (in subpart 1) OneUnited's investments in Fannie Mae and Freddie Mac, (in subpart 2) the government conservatorship of the Government Sponsored Entities ("GSEs"), and (in subpart 3) the effect of the conservatorship on OneUnited and other minority and community banks; (in subpart F) a discussion of OneUnited's reaction to the Conservatorship including, (in

subpart 1) initial outreach efforts, (in subpart 2) discussions with Representative Waters and other Members, (in subpart 3) preparations for meeting at Treasury (in subpart 4), the meeting at Treasury; and (in subpart 5) conversation with the Former Treasury Secretary following the meeting; (in subpart G) a discussion of Representative Waters' decision that she should not assist OneUnited in its efforts to directly obtain money; (in subpart H) a discussion of the continued communications with OneUnited and Representative Waters' Office, including (in subpart 1) OneUnited's communications with Representative Waters' COS and the Financial Services Committee, (in subpart 2) the EESA legislative process begins, and (in subpart 3) the legislative solution; (in subpart I) a discussion of the recapitalization of OneUnited including (in subpart 1) the private investment, (in subpart 2) the tax relief, and (in subpart 3) the TARP funds.

Part VI contains a review of the legal analysis regarding the substantive allegations in this matter including (in subpart A) a summary of the legal analysis; (in subpart B) a discussion of the relevant rules and standards of conduct, including (in subpart 1) use of a Member's office for personal benefit, (in subpart 2) contacts with administrative agencies of the federal government, (in subpart 3) responsibility for oversight and administration of congressional staff, and (in subpart 4) a discussion of the clear and convincing standard; (in subpart C) a discussion of the specific recommendations in this matter including (in subpart 1) a recommendation that Representative Waters did not violate any rules or other standards of conduct by arranging the meeting with Treasury, (in subpart 2) a recommendation that Representative Waters recognized that she should not take any official action to assist OneUnited to directly receive money, and (in subpart 3) a recommendation that Representative Waters' Chief of Staff communicated solely on behalf of OneUnited in two circumstances. Part VII contains Outside Counsel's conclusions and recommendations regarding its *de novo* review of this matter.

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VII. CONCLUSIONS REGARDING SPECIFIC SUBSTANTIVE ALLEGATIONS AND RECOMMENDATIONS OF OUTSIDE COUNSEL

I. INTRODUCTION

Outside Counsel submits this Report for the Committee on Ethics' (the "Committee") consideration in the Matter of Representative Maxine Waters.

In July 2009, OCE submitted a report to the Committee, concluding that Representative Waters may have violated House conflict-of-interest rules when she called then-Treasury Secretary Paulson to set-up a meeting with OneUnited Bank. In light of the fact that Representative Waters' husband was a former board member and current stockholder in that bank, the OCE recommended that the Committee further investigate the allegations. An Investigative Subcommittee ("ISC") was empaneled, and on June 15, 2010, the ISC adopted a Statement of Alleged Violations ("SAV") alleging three counts of misconduct based on Representative Waters' staff's continued assistance to OneUnited Bank after Representative Waters herself determined she should no longer work to assist that bank: violations of clauses 1 and 3 of the House Code of Official Conduct (House Rule XXIII), and clause 5 of the Code of Ethics for Government Service. During preparations for the Adjudicatory Subcommittee hearing ("ASC") scheduled for November 21, 2010, Committee staff received an email for the first time, which they believed warranted recommittal of the matter to the ISC for further investigation. The matter was recommitted by a 9-1 vote of the Committee on November 18, 2010. The following day, the Chief Counsel and Staff Director ("Chief Counsel") terminated two staff members at the direction of the Chair.[1] The 111th Congress expired without any further action being taken on this Matter.

In 2011, the Committee agreed, pursuant to Committee Rule 6(g), to seek an Outside Counsel to review the matter and consider various concerns that had been raised both by Representative Waters and the Committee itself. Shortly before the Committee retained Outside Counsel, three internal personnel memos regarding the terminated employees were leaked to the press. Following their release, Representative Waters raised several additional due process allegations, arising largely from information contained in the leaked memoranda. The Committee retained attorney Billy Martin to act as Outside Counsel in this matter and directed him to perform a two-step review in this matter. The first step was to analyze and investigate several due process arguments raised both by Representative Waters and the Committee. Following the completion of the due process review, if either no violations of due process were found or no violations that deprived Representative Waters of her due process rights were identified, and the Committee agreed, then the Outside Counsel was to complete a *de novo* review of the facts and documentary evidence in this Matter. The Outside Counsel began its due process review of this matter in July 2011, pursuant to Committee Rule 18(a). Outside Counsel reviewed documents and interviewed numerous witnesses throughout its due process review. Prior to reporting any findings to the Committee,

[1] Outside Counsel notes that Kenneth P. Jorgensen and Andrew B. Brantingham from the law firm of Dorsey & Whitney LLC assisted with the due process analysis portion of this Report. Outside Counsel further notes that titles and positions of Committee Members and staff discussed in the text and citations of this report generally refer to the persons holding those titles and positions in the 111th Congress, and particularly in the summer and fall of 2010.

Outside Counsel made recommendations regarding a Motion to Disqualify several Members of the Committee, which had been filed by Representative Waters. Upon receiving advice from the Outside Counsel, six Members of the Committee chose to voluntarily recuse themselves from this Matter. The Committee was then reconstituted and six new Members were placed on the Committee solely for the purpose of consideration of the Matter of Representative Waters (the "Waters Committee"). The Waters Committee considered the analysis of Outside Counsel, which concluded and recommended that no violations of due process occurred in the handling of this matter during the 111th Congress, and the Waters Committee voted unanimously to accept the due process recommendations of the Outside Counsel.

Outside Counsel then began its *de novo* review of the substantive allegations in this case. As part of this review it examined all prior ISC transcripts and interviews, documents produced, and also re-interviewed several key witnesses. Based on the evidence and testimony in this matter, Outside Counsel recommends that the Waters Committee find the following: 1) that Representative Waters did not violate any rules or other standards of conduct by arranging the meeting with Treasury; 2) Representative Waters recognized that she should not take any official action to assist OneUnited to directly receive money; and 3) Representative Waters' Chief of Staff sent two emails solely on behalf of OneUnited, but the evidence in the record does not support by a clear and convincing margin that his actions were knowingly taken following his conversation with Representative Waters regarding her determination not to take any official action on behalf of OneUnited. The Outside Counsel's findings and conclusions for both its due process analysis and *de novo* review are set forth in this Report.

II. DUE PROCESS FACTUAL FINDINGS

In conducting the due process review, Outside Counsel examined the legal issues surrounding the due process allegations in this matter, specifically (1) the applicable constitutional principles and (2) the relevant House and Committee Rules. According to those principles, Outside Counsel then analyzed 12 specific "due process" arguments raised by Representative Waters and the Committee.

The threshold question of whether a Member of the House has constitutional due process rights in House disciplinary proceedings has no clearly established legal answer; there are arguments on both sides of the issue. However, there are compelling reasons to conclude that the Fifth Amendment does apply to congressional disciplinary proceedings, and the Waters Committee assumed for purposes of this analysis that Representative Waters is entitled to constitutional due process.

Even assuming the Fifth Amendment applies to House disciplinary proceedings, under the Constitution's explicit grant of power to the House to discipline Members, Congress undoubtedly has broad discretion to determine what specific process is required. In light of that broad discretion, and in comparison to basic due process principles articulated by the courts in other contexts, Outside Counsel concluded that the existing Committee and House rules governing matters before the Committee, including the Waters matter, are constitutionally adequate.

While the issues will be reviewed in greater detail in this Report, the Outside Counsel recommended, and the Waters Committee ultimately concluded, that Representative Waters' specific "due process" arguments, as well as the other arguments identified by the Committee, do not articulate any constitutional violation. The only Committee Rule that may have been violated relates to the leak of confidential Committee information, however, even that violation would not amount to a violation of Representative Waters' due process rights.[2] Many of Representative Waters' arguments require a factual analysis. While this Report discusses the facts and provides recommendations on the basis of the factual inquiry that has been conducted, to ensure that Representative Waters receives the benefit of the doubt, for purposes of analysis only, this Report assumes *arguendo* that her factual allegations are true. Even under that assumption, however, to the extent Committee rules have been violated, the appropriate remedy would be a new adjudicatory process, and not a dismissal of the allegations or any other procedure denying the Committee jurisdiction to continue its review of this Matter.

A. Summary of Outside Counsel's Review

On July 19, 2011, the Committee entered into a contract with attorney Billy Martin to serve as Outside Counsel to the Committee in its investigation of Representative Waters. In connection with that contract, the Committee identified allegations raised by Representative Waters, and further recognized additional allegations identified by the Committee, which were to be specifically reviewed and addressed by Outside Counsel. Those allegations included the following:

1. The ISC responded to Representative Waters' motions for a bill of particulars and to dismiss the SAV "with alacrity";

2. The ISC denied Representative Waters' request for oral argument on motions for a bill of particulars and to dismiss;

3. The Committee announced the formation of the ASC without simultaneously announcing an initial hearing date for the ASC;

4. Committee counsel collected documents and interviewed witnesses after the ISC transmitted the SAV to the full Committee;

5. The ASC proposed to conduct a *de novo* review of the facts and law at issue;

6. Committee counsel submitted pre-hearing disclosures that allegedly exceeded the amount of evidence Committee counsel could reasonably intend to use in the allotted time for an ASC hearing;

[2] Confidential information was, in fact, leaked. If it was leaked by a Member or staff, it constitutes a violation of Committee Rules. If it was otherwise unlawfully obtained by a non-Member or non-staff, it constitutes a violation of law.

7. The Committee recommitted the matter to an ISC after the ASC had been formed;

8. Confidential documents regarding the investigation were allegedly leaked to persons outside the Committee;

9. The Committee has not acted on Representative Waters' matter nor communicated with her since the recommittal to an ISC;

10. Communications occurred that allegedly violated bifurcation or *ex parte* principles; and

11. The ASC authorized subpoenas on incomplete representations.

At a meeting held on March 28, 2012, the Waters Committee authorized Outside Counsel to also address issues of whether inappropriate, insensitive or racially biased comments may have infected the investigation of Representative Waters.

Consistent with the investigative authority, as part of its due process review Outside Counsel reviewed over 150,000 pages of documents received from the Committee, the designees to the Chairman and Ranking Member, as well as documents received from the Members in response to a request for production of documents by Outside Counsel. In addition, Outside Counsel interviewed all Members of the Committee from the 111th Congress. Relevant members of the staff who were either personally involved in the investigation or may have had knowledge regarding the relevant issues were also interviewed.

B. Background

In 2009 the OCE began investigating allegations that Representative Waters had improperly arranged a meeting between Treasury officials and representatives of the National Banker's Association ("NBA") concerning TARP funding for distressed banks. The meeting allegedly centered on a single entity—OneUnited Bank. Representative Waters' husband had been a member of the board of directors of OneUnited and Representative Waters and her husband owned stock in that bank. In July 2009, OCE submitted a report to the Committee concluding that Representative Waters may have violated House conflict-of-interest rules and recommended that the Committee further investigate the allegations.[3]

Following an investigation by Committee staff pursuant to authority granted by Committee Rule 18(a), the Committee established an Investigative Sub-Committee ("ISC"). The staff assigned to the ISC was then-Director of Investigations and Deputy Chief Counsel ("Director of Investigations") along with two staff attorneys. That team was supervised by the former Chief Counsel.

[3] *See* OCE Report.

At an ISC Meeting on May 20, 2010, the ISC was presented with three options. The first was to adopt a Statement of Alleged Violations ("SAV") and recommend a sanction. The second option was to adopt an SAV and recommend no further action. The third was to adopt a report and recommend the report serve as a public admonishment on the issue of failure to supervise her staff.[4] The ISC was prepared to adopt the report when the Chief Counsel informed the ISC that it was an improper action because Representative Waters was a named Respondent and could not be admonished without the process afforded by the Committee rules.[5] Following this advice, the ISC agreed to schedule a vote for the SAV with the intention of attempting to negotiate a settlement with Representative Waters during that time period.[6] Unfortunately, the attempted settlement negotiations were unsuccessful.

Ultimately, on June 15, 2010, the ISC adopted an SAV alleging three counts of misconduct: violations of clauses 1 and 3 of the House Code of Official Conduct (House Rule XXIII), and clause 5 of the Code of Ethics for Government Service.[7] On June 30, 2010, Representative Waters filed a Motion for Bill of Particulars.[8] The following day, on July 1, 2010, the ISC issued an Order denying the Motion for Bill of Particulars.[9] Subsequently, on July 12, 2010, Representative Waters filed a Motion to Dismiss the SAV.[10] This motion was denied by the ISC on July 15, 2010, and contains a footnote addressing Representative Waters request for oral argument.[11]

On July 28, 2010, the SAV was transmitted to the full Committee. The Committee established an ASC shortly thereafter to conduct a hearing on the SAV. One additional staff attorney was added to the team. That attorney had not worked on the Waters ISC. The review by Outside Counsel revealed that the Chief Counsel took a lesser role in the Waters ASC because at that same time he was acting as the lead counsel on another matter pending before the Committee. Thus, the former Director of Investigations became the lead attorney assigned to the Waters ASC.

Throughout the month of August 2010, the staff interviewed numerous witnesses, and sought voluntary production of documents from various sources. During this time period, pursuant to Committee rules, the staff attempted to schedule a settlement conference with Representative Waters. While corresponding with her Chief

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[4] May 20, 2010, ISC Tr. at 34.

[5] *See id.* at 47.

[6] *See id.* at 52.

[7] *See* Letter dated June 15, 2010, attached hereto as Ex. 1.

[8] *See* Motion for Bill of Particulars (June 30, 2010), attached hereto as Ex. 2.

[9] *See* Order dated July 1, 2010, attached hereto as Ex. 3.

[10] *See* Motion to Dismiss (July 12, 2010), attached hereto as Ex. 4.

[11] *See* Order dated July 15, 2010, attached hereto as Ex. 5.

of Staff, staff noticed that the Chief of Staff used a personal Yahoo! account for official business in addition to his government email. While staff had previously been in possession of emails from that Yahoo! account, staff members testified that they had not connected that account to the Chief of Staff until the correspondence regarding scheduling of a settlement conference. Staff subsequently approached the designees for the Chair and Ranking Member regarding the need for a subpoena for this Yahoo! account.

Also during the August recess, on August 13, 2010, Representative Waters held a press conference addressing the pending investigation. During this press conference, she disclosed confidential information, including excerpts of approximately 24 documents and approximately 4 interview transcripts that were subject to a Non-Disclosure Agreement ("NDA"), which Representative Waters had signed.[12] In addition, Representative Waters' website contained a link to the presentation that contained the same information. In response to this press conference, staff drafted a Contempt Order for the Committee to send to Representative Waters for breaching her NDA. Rather than issue an Order, the former Committee Chair, who stated that her interpretation of the rules gave her authority to decide the issue of how to respond to Representative Waters' violation of the NDA, sent Representative Waters a letter on August 31, 2010, advising her to adhere to the NDA.[13] The two senior members of the Waters ASC staff strongly disagreed with the decision of the Chair and referred to her letter as "weak".[14] At this point, based on numerous interviews and documents reviewed, it is clear that members of the staff, particularly the two senior staff members on the Waters ASC team, began disagreeing with certain decisions made by the former Chair and began communicating with Republican Committee Members regarding their frustrations. Further, those two staff members also began to suspect that the former Chief Counsel was working with the Chair to undermine or postpone the Waters case, a claim refuted by both the former Chair and former Chief Counsel during interviews with Outside Counsel. No evidence was uncovered during Outside Counsel's review that supports that claim.

On August 25, 2010, counsel for Representative Waters submitted a letter objecting to the ongoing investigation by the ASC. Specifically, counsel stated that "[s]uch inquiry violates both this Committee's rules and comparable federal criminal procedures and raises significant questions about the sufficiency of the evidence that the Investigative Subcommittee relied upon when it issued the charges contained in its SAV."[15] Both the Chair and Ranking Member jointly responded to this letter on August 31, 2010, highlighting the fact that Committee Rule 23 contemplates that both the Committee counsel and the Respondent will prepare its case for the adjudicatory

[12] Every Member of the Committee and all staff were also required to sign NDAs.

[13] *See* Letter dated Aug. 31, 2010, attached hereto as Ex. 6.

[14] *See* Email dated Sept. 16, 2010.

[15] *See* Letter dated Aug. 25, 2010, attached hereto as Ex. 7.

hearing, and also reminding counsel that criminal law precedent is not binding on the Committee.[16]

At this same time, the Chair raised concerns about the possibility that the Yahoo! account could not be subpoenaed because it was discovered during settlement negotiations and might violate Committee rules.[17] The Chair also raised scheduling issues with the staff and indicated that she wanted to begin the hearing in September, upon Congress' return from the August recess. Initially, the staff responded that it would be impossible for them to be prepared by September 14, 2010, as the Committee needed to address the draft Order to Show Cause regarding Representative Waters' press conference and still needed subpoena authorization.[18] The Staff later changed its position and stated that they could be ready, but the Chair did not credit this position as they still had not issued witness subpoenas and were seeking additional document subpoenas.[19] The two senior staff members on the Waters ASC team believed that they surprised the Chair by announcing that they were ready and that the Chair simply continued to "stall" because she did not want the hearing to go forward, which was a view shared by several Members of the Committee and other staff as well.[20] In addition, the Director of Investigations also alleged that the Chief Counsel threatened her regarding the start date stating that the Chair and Representative Waters were Members of the same delegation and that the Director of Investigations needed to take that into account with regard to the handling of this case.[21]

Tension began mounting between the two senior staff members on the Waters ASC team, the Chief Counsel, and the Chair. This tension came to a head at an ASC meeting on September 16, 2010. At that meeting, staff, among other things, was requesting several witness subpoenas. There is some dispute regarding what happened next. The Chair stated that she was very unhappy with the level of preparation for that meeting by the staff, particularly the two senior members of the team, who she believed failed to flag important issues for the Committee and did not prepare to the level she

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[16] *See* Letter dated Aug. 31, 2010, attached hereto as Ex. 8.

[17] *See* Email dated Sept. 21, 2010. Committee Rule 26(i) states that "statements or information derived solely from a Respondent or Respondent's counsel during any settlement discussions between the Committee or a subcommittee thereof and the Respondent shall not be included in any report of the subcommittee or the Committee or otherwise publicly disclosed without the consent of the Respondent." Rule 26(i).

[18] *See* Email dated August 16, 2010; Email dated August 17, 2010; *see also* Chair Dep. at 29.

[19] *See* Chair Dep. at 29.

[20] *See* Staffer #1 Dep. at 63; Director of Investigation ("DOI") Dep. at 78; Member #1 Dep. at 34.

[21] *See* DOI Dep. at 97. This allegation is contradicted by the testimony of the Chief Counsel who testified before Outside Counsel that "I don't recall raising a political issue with the Chairwoman, big P politics certainly, and by big P politics, what I would mean is politic specific to either the Democratic or Republican party, one way or the other." (Chief Counsel Dep. at 61.)

expected.[22] According to the former Chair, she became frustrated by the staff and, when votes were called on the floor of the House, she adjourned the meeting.[23] This account was corroborated by the designee to the Chair.[24] To the contrary, the two senior staff members of the Waters ASC both stated that Chair Lofgren berated them and stormed out of the Committee room, even though there were at least 15 minutes before the Members had to leave for votes.[25] This account is consistent with the testimony of several other Members of the Committee as well.[26] The other Members of the Committee did not recall this incident with the same level of detail.

After the adjournment of the meeting there was a verbal altercation among the two senior members of the Waters ASC and the Chief Counsel while several Members were still present in the room. The two senior members of the Waters ASC team argued that the Chief Counsel undermined them and did not support them with the Chair.[27] During this verbal altercation, the Ranking Member, who believed that the Chief Counsel was preoccupied with the other matter he was working on[28] and was impeding the work of the Waters staff, told the Chief Counsel to "stay out" of further involvement with the Waters matter.[29] The Ranking Member also stated that he later found the Chair on the House Floor and told her that she needed to set a different tone with the Committee.[30]

The following day an email was sent to the entire ASC by one of the attorneys on the Waters team providing information on the areas that were not covered at the meeting. This email was edited by the entire Waters team, but according to the Director of Investigations, it was her practice to direct a particular member of the team to send various communications to the Committee. Despite the fact that this was sent from a

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[22] *See* Email dated Sept. 23, 2010; Chair Dep. at 40-42.

[23] *See* Chair Dep. at 40-42.

[24] *See* Chair Designee Dep. at 29-30.

[25] *See* Staffer #1 Dep. at 62-65; DOI Dep. at 140-141.

[26] *See* Member #2 Dep. at 24; Member #3 Dep. at 24; Ranking Member ("RM") Dep. at 58-60; Member #1 Dep. at 30. The Members who recalled this incident with detail include the former Chair, Ranking Member, and other Members of the Republican party. With the exception of the Chair, no democratic Members of the Committee recalled this incident in any great detail.

[27] *See* Staffer #1 Dep. at 63-65; Member #2 Dep. at 24; RM Dep. at 75-76; DOI Dep. at 144-147; Member #1 Dep. at 32.

[28] At this time, the Committee had an unprecedented two ASC's sitting at the same time. The Chief Counsel was the lead attorney for the other ASC, while the Director of Investigations was the lead attorney for the Waters ASC.

[29] *See* RM Dep. at 75.

[30] *See id. at* 59.

more junior member of the team, one Member of the Committee responded only to the two most senior members of the Waters ASC staff stating "nicely done."[31]

The Chair continued to raise concerns regarding staff preparation, scheduling issues, as well as the subpoena issue, in a September 22, 2010, email that the Chair sent to both the Ranking Member and the Chief Counsel.[32] The Chief Counsel forwarded this email to the Director of Investigations so that she could be prepared for the upcoming ASC meeting. The Director of Investigations ultimately forwarded the email to the Ranking Member's designee.

By late September 2010, a hearing date for the Waters matter had still not been set. The Chair stated that she had been trying to set a hearing date before the general election, but that the ASC staff had not been ready.[33] The two senior members of the Waters ASC team both testified that they had been ready but they believed that the Chair did not want to set a hearing date until after the election.[34] Outside Counsel's review did not uncover any evidence to support their belief. Republican Committee Members also stated that they were frustrated that the Chair would not set a hearing date and, ultimately, on September 28, 2010, the Ranking Member issued a press release (signed by all Republican Representatives on the Committee) urging the Chair to set a hearing date.[35]

Two days later, the ASC held a brief meeting to authorize the document subpoenas sought by staff. During the course of Outside Counsel's review, Members of the ASC that recalled this issue advised that they received sufficient information from the staff who assisted them during consideration of the subpoena issue, and were prepared to, and did take, official action and vote in support of the issuance of the subpoena.[36] Although the Chair noted that she was generally unhappy with the staff, she stated that she would not have voted for the subpoenas if she did not feel she had sufficient information to do so, and further noted that the approval of subpoenas was a ministerial act.[37]

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[31] *See* Email dated Sept. 17, 2010.

[32] *See* Email dated Sept. 23, 2010.

[33] *See* Chair Dep. at 29.

[34] *See* Staffer #1 Dep. at 63; DOI Dep. at 161; Staffer #2 Dep. at 126; *but see* Chief Counsel Dep. at 60 (testifying that the Chair never asked, implied or suggested that the hearings be delayed).

[35] *See* Email dated Sept. 28, 2010.

[36] *See* Member #4 Dep. at 22-23; Member #5 Dep. at 33-34; Member #3 Dep. at 35-37; RM Dep. at 72-73; Member #2 Dep. at 33-34.

[37] *See* Chair Dep. at 43.

On October 7, 2010, the Chair, believing the rules permitted the Chair to unilaterally decide the issue of the ASC hearing date,[38] responded to the September 28, 2010, press release and issued a statement setting the hearing dates for both the Matter of Representative Waters and another matter pending before the Committee at that time.[39] The Chair set the Waters hearing for November 21, 2010. One of the senior attorneys on the Waters ASC selectively forwarded the statement of the Chair, which was public, from her personal Gmail account to three of the Republican Representatives on the Committee, as well as to the Republican designee working on the separate ASC pending before the Committee.[40]

On October 12, 2010, the Chair sent a letter to Representative Waters in which she informed Representative Waters that her adjudicatory hearing would convene on Monday, November 29, 2010.[41] The letter also indicated that each side would be given 6 hours to present their respective cases, exclusive of opening and closing statements.[42] The Chair testified that while she had tried to collaborate on setting a schedule, after she was "blasted" in the press release issued by the Republicans for not setting a hearing, she went back to the rules which state that the "Chair shall" set the hearing date, and unilaterally set the hearing date and ground rules.[43]

Both of the senior members of the Waters ASC team were unhappy about the time constraints set for the hearing, as the Waters team had estimated that the hearing would take 20 business days.[44] Therefore, on October 13, 2010, the most junior staff attorney on the Waters ASC team sent an email to the Members of the ASC expressing the staff's need for more time. Staff members testified that, as with previous emails sent by staff, the drafting of the email was a collaborative effort by all of the staff assigned to the Waters matter.[45] The junior staff attorney testified that she had not been the primary drafter of the email, but had been directed to send this email by the Director of Investigations, and that she did not want to send it because she did not agree with it.[46] This same email was leaked to the Washington Post and cited in an article dated

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[38] While the Rules do seemingly permit the Chair to act unilaterally, it has been the consistent practice of this Committee for the Chair and Ranking Member to act jointly.

[39] *See* Email dated Oct. 7, 2010.

[40] *Id.*

[41] *See* Letter to Representative Waters (Oct. 12, 2010), attached hereto as Ex. 9.

[42] *Id.*

[43] *See* Chair Dep. at 31-32; *but see supra* n.34.

[44] *See* Email dated August 19, 2010.

[45] *See* Email dated Oct. 13, 2010.

[46] *See* Staffer #2 Dep. at 136-137.

December 16, 2010.[47] The staff attorney who was directed to send the email was so distraught by the leak of this email that she authored a memorandum memorializing her concerns over this e-mail, which stated that she was concerned about sending the email for 3 reasons: 1) she didn't agree with every statement in the email, and had voiced these concerns with both of the senior members of the Waters ASC team; 2) because she believed the email to be controversial, she believed it was the Director of Investigations' responsibility to send it; and 3) she did not want the perception that she had drafted and sent the email to Committee Members on her own initiative.[48] During interviews with the Outside Counsel, both Republican and Democratic Members of the Committee agreed that 6 hours per side was not enough time.[49] Ultimately, on October 15, 2010, the Waters ASC team filed formal objections to the Chair's procedures, which the Chair denied on October 20, 2010.[50] The Chair modified the scheduling order on October 22, 2010, and allowed the staff until October 25, 2010, to provide Representative Waters with copies of the evidence, their intended witness list, and a summary of the witnesses' expected testimony.[51]

Committee staff produced documents to Representative Waters as directed on October 25, 2010, and two days later Representative Waters filed objections arguing that staff produced all documents in its possession, many of which were unrelated to the charges in the SAV.[52] On October 28, 2010, the Chair overruled all objections, with the exception of two discrete witness summaries that were ordered to be revised.[53] Staff on the Waters ASC team provided the revised witness summaries as ordered on October 29, 2010. In that same production, they produced an email to counsel for Representative Waters that they had recently received for the first time during a witness interview conducted in preparation for the upcoming hearing (the "newly discovered email").

On November 3, 2010, one of the senior staff attorneys on the Waters ASC team sent an email to the entire Committee attaching this newly discovered email.[54] This

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47 *See* Ethics Probe of Rep. Waters Derailed by Infighting, Sources Say (Washington Post, Dec. 16, 2010), attached hereto as Ex. 10.

48 *See* Memorandum dated December 17, 2010.

49 *See* RM Dep. at 62; Member #5 Dep. at 29-30; Member #1 Dep. at 27.

50 *See* Committee Counsel's Objections to the Chair's Proposed Adjudicatory Hearing Procedures (Oct. 15, 2010), attached hereto as Ex. 11; Letter to Director of Investigations from Chair (Oct. 20, 2010), attached hereto as Ex. 12.

51 *See* Letter to Representative Waters & Director of Investigations from Chair (Oct. 22, 2010), attached hereto as Ex. 13.

52 *See* Respondent's Objections to Committee Counsel's Rule 23(f)(1) Production (Oct. 27, 2010), attached hereto as Ex. 14.

53 *See* Letter to Representative Waters' Counsel from Chair (Oct. 28, 2010), attached hereto as Ex. 15.

54 *See* Email dated Nov. 3, 2010.

communication outlined many reasons why the newly discovered email was important to the case and argued that the matter should be recommitted to the ISC.[55] The Waters ASC team did not consult with the Chief Counsel prior to sending this email. In notes taken by one of the junior members of the Waters ASC team, it appears that another member of the Waters ASC team raised concerns that sending this email could possibly violate the Committee's "bifurcation rule".[56] However, the Director of Investigations testified that they were not concerned with the bifurcation issue, but rather were concerned that the Chair would try to exclude this email from the hearing.[57] The other senior member of the Waters ASC team stated that she did not even know what the bifurcation rule was at that time.[58]

On November 15, 2010, the Waters ASC team sent a formal motion to the ASC to recommit the matter to the ISC (the "Recommital Motion") on the ground that newly discovered evidence suggested Representative Waters may have had more direct involvement with assisting OneUnited than previously suspected or believed.[59]

The following day, Representative Waters filed a response to the Recommital Motion.[60] Based on the Recommital Motion, the Chair sent a letter indicating that the scheduled pre-hearing conference was inappropriate.[61] The following day, the Committee held a sanctions hearing in another matter, which was followed immediately by a Waters ASC meeting. At that meeting, notebooks were provided to the Members and certain Members observed that the notebooks for the Republican Members appeared to have been tabbed and highlighted, while no such tabs or notations were provided for the Democratic Members. Later that night, the Chief Counsel, along with the designee for the Chair, reviewed the binders and the Chief Counsel stated that he believed the handwriting in the annotated binders belonged to Ms. Kim.[62]

During the course of the Outside Counsel's review, Outside Counsel located and reviewed what Outside Counsel believes are those very notebooks. Outside Counsel

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[55] *See id.*

[56] *See* Notes dated Nov. 3, 2010. The Committee's "bifurcation rule", Committee Rule 8(a), states that with the exception of the Chair and Ranking Member, "evidence in the possession of an investigative subcommittee shall not be disclosed to other Committee members except by a vote of the subcommittee." Rule 8(a).

[57] *See* DOI Dep. at 174-175.

[58] *See* Staffer #1 Dep. at 131.

[59] *See* Committee Counsel's Motion to Recommend Recommital of the Matter to the Investigative Subcommittee (Nov. 16, 2010), attached hereto as Ex. 16.

[60] *See* Respondent's Response to Committee Counsel's Motion to Recommend Recommital of the Matter to the Investigative Subcommittee (Nov. 16, 2010), attached hereto as Ex. 17.

[61] *See* Letter dated Nov. 17, 2010, attached hereto as Ex. 18.

[62] *See* Chair Designee Dep. at 51.

determined that only one tab and minimal highlighting was placed on the notebooks in question. In addition, the designee to the Ranking Member testified that she had highlighted the binders to assist the Republican Members to more easily locate the documents that were going to be discussed at the meeting.[63] As this was done by the designee to the Ranking Member, who was acting within the scope of her services and authority,[64] and not by a staff member to assist one party, there is nothing noteworthy about the highlighted binders. At the November 18, 2010, meeting, the Committee voted to recommit the Waters matter.[65]

The following day, November 19, 2010, at the direction of the Chair, the Chief Counsel fired both of the senior members of the Waters ASC team.[66] Both individuals testified that they were shocked and had no notice that this was going to happen. After they were fired, the Committee's Administrative Staff Director escorted them out of the offices. Each contacted the designee to the Ranking Member to advise her that they had been fired.[67] The Ranking Member's designee, in turn, contacted the Ranking Member who was still in Washington, and had not been informed that either staff member was being terminated. The Chair testified that a few days prior to the termination, the Chief Counsel had brought several emails to her attention that indicated, in her opinion, that there had been inappropriate *ex parte* communication between the two senior members of the Waters ASC staff and Republican Members of the Committee, including the Ranking Member, which is why she did not consult him in her decision.[68]

Later in the evening of November 19, 2010, upon learning of the terminations, the Ranking Member immediately returned to the Committee offices and interviewed the staff members who remained in the offices. He testified before Outside Counsel that he also tried several times to contact the Chair and consulted with the Parliamentarian about whether the Chair had the authority to unilaterally fire any staff members. Ultimately, the Ranking Member contacted the sergeant at arms to lock down the Committee offices and told all staff to stay out of the offices. He further ordered the systems administrator to move the computers from the two senior staff attorneys' offices into a locked room so that no one would access them, due to the fact that he had reason to believe the Chief Counsel had accessed their computers following the terminations, despite the Chief Counsel's statements that he had not done so.[69]

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[63] *See* RM Designee Dep. at 38-39.

[64] *See* Committee Rule 6(j).

[65] *See* Letter dated Nov. 19, 2010, attached hereto as Ex. 19.

[66] *See* Chief Counsel Dep. at 69.

[67] *See* Email dated November 19, 2010; Staffer #1 Dep. at 166-167.

[68] *See* Chair Dep. at 53.

[69] *See* RM Dep. at 91-99.

The next day, the Chief Counsel emailed the designee to the Chair and the Chair's Chief of Staff, outlining the issues for the employment action stating that the primary issue was "ex parte, adversarial contacts with Members of the Committee on substantive matters and the repeated failure, after notice, to follow my instructions."[70] The next day, November 21, 2010, the evidence indicates that the Chief Counsel forwarded several emails from both of the terminated senior staff attorneys' email accounts to the Chair's designee; it is unclear how or when he obtained these emails.[71] Outside Counsel's review was unable to determine whether the Chief Counsel accessed the terminated employee's accounts after the Ranking Member ordered their computers to be locked, as the Chief Counsel invoked his Fifth Amendment privilege when asked whether he had accessed the computers after the Ranking Member's order.[72] Whether he accessed the computers after the Ranking Member's Order or not, it is clear from a review of the evidence that he had been accessing the email accounts from the two senior members of the Waters ASC staff for some time.[73]

Shortly after the two staff members were fired, several internal Committee emails were leaked and the Washington Post published an article discussing the Waters matter and alleging that "infighting" derailed the investigation. It specifically discussed the concern regarding the scheduling of the Waters hearing. More importantly, the article quoted both internal staff emails and a September 16, 2010, Committee hearing.[74]

After several tense meetings between the Chair and Ranking Member, the two staff members who had been unilaterally terminated were instead placed on administrative leave from the Committee. The Chief Counsel authored two memoranda and one set of personnel notes, which seemed to provide the basis for the personnel action taken against the two individuals.[75] The Chief Counsel testified that these documents were created after the termination of the two employees.[76] These three documents were leaked to and publicized by Politico.com. During the course of witness

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[70] Email dated November 20, 2010.

[71] *See* Emails dated Nov. 21, 2010.

[72] *See* Chief Counsel Dep. at 73.

[73] *See, e.g.*, Email dated August 2, 2010; Email dated August 3, 2010; Email dated November 16, 2010. Outside Counsel's review of the Chief Counsel's emails was limited to those emails that were provided from other sources as the Chief Counsel's emails were no longer accessible at the time of Outside Counsel's review.

[74] *See* Ethics Probe of Rep. Waters Derailed by Infighting, Sources Say (Dec. 16, 2010), attached hereto as Ex. 10.

[75] *See* Memo to Chair Lofgren RE: Recent Personnel Action ("the First Personnel Memo"; Memo to Chair Lofgren RE: Personnel Issues Related to the Matter of Rep. Maxine Waters ("the Second Personnel Memo"); Additional Personnel Notes ("the Personnel Notes").

[76] *See* Chief Counsel Dep. at 65-67.

interviews, the Chief Counsel invoked his Fifth Amendment right not to incriminate himself when responding to all questions regarding the leaked documents.

For purposes of our analysis only as we review the issue of due process as it relates to Representative Waters' claims, and without drawing any final conclusion, the Waters Committee assumed that a staff member may have violated their agreement to keep Committee information confidential, as well as House and Committee Rules.

The personnel matters carried over to the 112th Congress, when the former Ranking Member became the Committee Chair and wanted to re-hire both of the employees who were placed on administrative leave. The current Ranking Member, who was not a Member of the Committee in the 111th Congress, objected to the re-hiring based on what she had learned about the two individuals from both the former Chair and her then-designee, who also currently serves as the designee to the Ranking Member in the 112th Congress. Ultimately, an agreement was reached in which the two individuals were told they would be re-hired, and then they simultaneously tendered their resignations.

As a result of Outside Counsel's review indicating that an atmosphere of suspicion and mutual distrust arose between the Republican Members of the Committee and the Committee Chair in the 111th Congress, Outside Counsel recommended that the five Republican Members of the 112th Congress, who also served in the 111th Congress, recuse themselves from this matter, along with the Ranking Member, due to her involvement in the personnel action.[77] All Democratic Members that served on the 111th Congress were replaced in the 112th Congress.

All six members accepted the recommendation of Outside Counsel and they voluntarily recused themselves from any consideration of the Waters matter. The recusals occurred prior to Outside Counsel providing any recommendation on either the due process portion of the review or any recommendation regarding the underlying substantive allegations. The Waters Committee that considered the issues in this matter is comprised solely of Members who had no prior involvement in the Waters Matter before the Committee during the 111th Congress.

C. Representative Waters' Arguments Arising from the Committee's Actions

Following the recommital of the Matter, Representative Waters objected to the ISC's resumption of its investigation, arguing that the SAV could be amended only *before* transmittal to the Committee and insisting that the only appropriate course would be to proceed through an adjudicatory hearing limited to the allegations in the original SAV. On December 22, 2010, the 111th Congress adjourned without the Committee concluding the Matter.

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[77]During interviews with the Outside Counsel, with the exception of the Chair, the other Democratic Members of the Committee during the 111th Congress denied knowing of any atmosphere of suspicion that existed within the Committee.

In general, Representative Waters did not articulate the legal basis for her arguments. In particular, it is often unclear whether she alleges a violation of Committee or House rules, of the Constitution, or of some other source of law. Broadly speaking, however, Representative Waters' arguments may be understood as falling into two categories—claims that the Committee's actions have violated the U.S. Constitution, specifically due process requirements; and arguments that the Committee has violated its own procedural rules (some arguments may fall into both categories).

This Report will first analyze the constitutional facets of Representative Waters' arguments, then turn to the House and Committee rules. Finally, for purely analytical purposes, we assume arguendo that Representative Waters' factual allegations are true, and then analyze the appropriate remedy for any violations that may have occurred.

III. DUE PROCESS ANALYSIS

A. The Constitutional Framework

Representative Waters assumes, without legal support, that Members in House ethics proceedings are entitled to certain due process rights under the U.S. Constitution. That proposition is not necessarily justified. Two threshold questions must be answered before it is possible to consider any of Representative Waters' specific claims of due process violations. First, does the Fifth Amendment's Due Process Clause apply to House disciplinary proceedings at all? Second, if the Due Process Clause applies in the abstract, do such proceedings threaten a protected liberty or property interest so as to trigger due process rights?

Existing authorities provide no definitive resolution of either question. There are sufficiently compelling reasons to answer each affirmatively. Therefore, for purposes of this analysis, the Committee should at least assume that the Fifth Amendment does apply to its proceedings and that Members are entitled to some constitutional due process.

1. Whether the Fifth Amendment's Due Process Clause Applies to House Disciplinary Proceedings

Federal courts have, with relative consistency, recognized two general constitutional principles governing internal procedural rules of Congress, including disciplinary rules. The first is that the Constitution explicitly grants Congress broad power in this area: Article I, section 5, clause 2 of the Constitution (sometimes called the Rulemaking Clause) provides that "[E]ach House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrences of two thirds, expel a member." In light of this clear textual authority, as well as separation-of-powers principles, the courts recognize that Congress has nearly plenary

power to establish its own procedural rules, and they often conclude that challenges to those rules are nonjusticiable.[78]

The second principle is that Congress's power under the Rulemaking Clause (like all congressional powers) is subject to certain overriding constitutional constraints. "Congress may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained."[79] Thus, specific constitutional provisions, particularly those protecting "fundamental rights," constrain congressional authority under the Rulemaking Clause.[80]

Many of the fundamental rights enshrined in the Constitution are not precisely defined, however. Consequently, while Congress must respect these rights, it also enjoys significant discretion to define their specific content. In other words, while there are outer bounds to its power under the Rulemaking Clause, where the Constitution does not mark out those bounds precisely, Congress may do so itself. As the Supreme Court stated in *Ballin*:

> [W]ithin these [constitutional] limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. . . . The power to make rules . . . is always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.[81]

Procedural due process is surely among the fundamental rights Congress is constitutionally bound to respect.[82]

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[78] *See, e.g., Metzenbaum v. Federal Energy Regulatory Comm'n*, 675 F.2d 1282, 1287 (D.C. Cir. 1982); *see also Nixon v. United States*, 506 U.S. 224, 229 (1993) (holding challenge to Senate impeachment procedures nonjusticiable under art. I, § 3, cl. 6). It is important to distinguish between justiciability—which concerns the federal courts' jurisdiction and power to grant relief—and the question whether, as a matter of law, the Constitution imposes due process constraints on Congress regardless of whether a court would enter judgment on that basis. *See, e.g., Vander Jagt v. O'Neill*, 699 F.2d 1166, 1172-73 (D.C. Cir. 1983). This Report is concerned with the latter question, as the Committee's primary interest is in the duties imposed upon it by the Constitution itself rather than the likely result of any judicial review.

[79] *United States v. Ballin*, 144 U.S. 1, 5 (1892); *see also Vander Jagt*, 699 F.2d at 1172-73; *cf. Powell v. McCormack*, 395 U.S. 486, 551 (1969) (concluding that "in judging the qualifications of its members [under art. I, § 5, cl. 1] Congress is limited to the standing qualifications prescribed in the Constitution").

[80] *Ballin*, 144 U.S. at 5.

[81] *Id.* at 5.

[82] *See County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *see also Hastings v. United States*, 802 F. Supp. 490, 504 (D.D.C. 1992) (concluding that Fifth Amendment applied to impeachment proceedings against federal judge, and such proceedings "must be conducted in keeping with the basic

2. The Private Interests at Stake

Even if it is true that the Fifth Amendment applies to House disciplinary proceedings as a general matter, a second threshold question arises before a Member can claim any specific due process rights. The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law."[83] Accordingly, a preliminary issue in all cases is whether government action threatens one of these protected interests.[84] It is far from clear whether Members of Congress hold a constitutionally cognizable interest in their offices (or the benefits associated with their offices) giving rise to due process rights. There is no clear judicial authority on the question, the constitutional text is open to conflicting interpretations, and historical practice does not give a definitive answer.[85]

In addition, the wide range of potential sanctions complicates consideration of the interests at stake in House disciplinary proceedings. Members of Congress accused of ethical violations face possible sanctions up to and including expulsion from the House.[86] Some of the available sanctions may implicate a constitutionally cognizable interest and others may not.

Despite this uncertainty, Committee proceedings likely implicate protectable interests in several ways. Consequently, Outside Counsel recommends that the Waters Committee assume for purposes of the present analysis that the proceedings implicate Representative Waters' cognizable liberty and/or property interests so as to give rise to due process rights.

As a preliminary matter, a Member of Congress probably has no cognizable private interest in the powers of his/her office, and the threat of expulsion from the House alone does not give rise to due process rights. While the Supreme Court has not directly addressed the question whether an elected federal official holds a cognizable property interest in his/her office, it has in several cases reaffirmed that "unlawful denial by state action of a right to state political office is not a denial of a right of

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principles of due process that have been enunciated by the courts and . . . by Congress itself"), *vacated on other grounds*, 988 F.2d 1280 (D.C. Cir. 1993); *Michael J. Gerhardt*, Book Review: The Utility and Significance of Professor Amar's Holistic Reasoning, 87 Geo. L.J. 2327, 2342-43 (1999) ("Members of Congress are still persons and thus entitled to at least some protections of the Fifth Amendment Due Process Clause.").

[83] U.S. Const. amend. V.

[84] *See, e.g., Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 569 (1972) (applying 14th Amendment).

[85] *See, e.g.*, Gerhardt, 87 Geo. L.J. at 2339-40 (considering textual and historical evidence relevant to question whether President holds a property interest in his office giving rise to 5th Amendment rights in impeachment proceedings).

[86] *See* Comm. R. 24(e) (listing potential sanctions including expulsion, censure, reprimand, fine, and "[a]ny other sanction determined by the Committee to be appropriate").

property or of liberty secured by the due process clause."[87] In the first such case, *Taylor v. Beckham*,[88] the Governor of Kentucky alleged that he had been deprived of his office without due process of law through a fraudulent vote recount. The Court rejected his due process claim, stating:

> The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. . . . [G]enerally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right.[89]

In addition, more recent Supreme Court decisions have—albeit in different contexts—reaffirmed the basic principle that the "legislative power . . . is not personal to the legislator but belongs to the people; the legislator has no personal right to it."[90]

While a Member may not hold a property interest in the political powers of his/her office, she may hold a protectable interest in the salary that goes along with it.[91] With respect to their salaries, Members of Congress may be analogized to public employees who can only be terminated under certain circumstances (in the case of a Member, only in accordance with House and Committee rules), and who thus hold a property interest in continued employment.[92]

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[87] *Snowden v. Hughes*, 321 U.S. 1, 7 (1949).

[88] 178 U.S. 548 (1900).

[89] *Id.* at 577; *see also Velez v. Levy*, 401 F.3d 75, 86 (2d Cir. 2004) ("The Court's pronouncements in *Taylor* and *Snowden* have since been echoed in numerous decisions."). It should be noted that in the decades since the *Snowden* decision in 1949, the Court has taken a significantly more expansive view of what constitutes a cognizable property interest, and consequently "intervening cases may cast a shadow over *Taylor* and *Snowden*." *Id.* at 86. In particular, to the extent *Taylor* suggests a public official has no constitutionally cognizable interest in the emoluments of his/her office absent a contractual right to them, it has probably been abrogated by the Court's subsequent due process jurisprudence, which recognizes property interests in certain contexts even absent contractual rights.

[90] *Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011).

[91] *See Powell*, 395 U.S. at 498 (rejecting contention of mootness because Congressman Powell retained a live claim that he had been unconstitutionally deprived of his congressional salary); *Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result) ("[N]o officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest," but "[t]hey have a private right to the office itself . . . and to the emoluments of the office.") (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and *Powell*).

[92] *Cf. Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 538-39 (1985).

House disciplinary proceedings may also threaten a Member's private property interests in a much simpler and more direct way—any fine imposed would plainly amount to a deprivation of property and thus trigger due process rights.

In addition to potentially threatening property interests, House ethics proceedings may implicate Members' liberty interests insofar as they inherently threaten respondents' reputations in conjunction with the threat of expulsion or other concrete sanctions.

A person's interest in her reputation—and particularly her professional reputation—is one of the facets of the right to "liberty" contemplated by the Due Process Clause.[93] But government defamation standing alone is not a constitutional violation. In *Paul v. Davis*,[94] the Supreme Court held that "injury to reputation by itself [is] not a 'liberty' interest protected under the Fourteenth Amendment."[95] The Court explained in Paul that reputational harm only rises to the level of a constitutional violation if in connection with it some other concrete "right or status [is] altered or extinguished."[96] Based on this principle, the courts have developed what has come to be known as a "stigma plus" due process claim.[97]

The archetypal example of a stigma-plus case is when a government actor publicly accuses an employee of wrongdoing in the course of terminating her employment, without affording an adequate opportunity for the employee to clear her name. In conjunction with the concrete harm of a lost job, the public stigmatization amounts to a deprivation of liberty without due process of law.[98]

While the Supreme Court has not applied this theory to the context at issue here, the Second Circuit has on more than one occasion considered stigma-plus claims by elected officials.[99]

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93 *See Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (stating that due process is implicated "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him").

94 424 U.S. 693 (1976).

95 *Siegert v. Gilley*, 500 U.S. 226, 233 (1991) (*citing Paul*).

96 *Paul*, 424 U.S. at 712.

97 *Siegert*, 500 U.S. at 234.

98 *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 631 (1980); *see also McGhee v. Draper*, 639 F.2d 639, 643 (10th Cir. 1981) (stating that reputational damage infringes upon a liberty interest when it is "entangled with some other 'tangible interests such as employment'") (*quoting Paul*, 424 U.S. at 701).

99 *See Velez*, 401 F.3d at 90 (concluding that plaintiff stated stigma-plus claim based on removal from elected school board position on allegedly false charges); *Monserrate v. New York State Senate*, 599 F.3d 148, 158 (2d Cir. 2010) (analyzing state senator's due-process challenge to expulsion from office for ethical violations under stigma-plus theory).

In the context of House ethics proceedings, expulsion could very likely constitute the requisite "plus," even if Members do not hold a property interest in their offices or the associated benefits.[100] Other less severe sanctions potentially could constitute the requisite "plus" as well, depending on the particular burden imposed on the respondent.

Finally, it bears emphasis that Congress's own views as to the applicability of constitutional due process principles in congressional disciplinary proceedings are entitled to significant weight. The judicial precedents discussed above may provide the most detailed guidance with respect to the relevant legal principles, but the proceedings at issue are of course internal disciplinary proceedings explicitly committed to Congress's discretion by the Constitution. In light of this, it is significant that the Rules of the House specifically require the Committee to adopt rules protecting the "due process rights of respondents."[101] While there is of course no explicit indication that this obligation stems from the Fifth Amendment, the House's employment of the phrase "due process" is likely no accident. It suggests an institutional sense that Congress bears a fundamental obligation to provide procedural protections to those who face accusation and punishment.

Although there are arguments to the contrary, the foregoing considerations suggest that the Fifth Amendment applies to congressional disciplinary proceedings and that Members of Congress enjoy some constitutional due process rights in such proceedings. At the least, the Committee should assume for purposes of the present inquiry that this is the case; the contrary position cannot be lightly adopted.

Reaching this conclusion only begins the inquiry, however, for due process is a fluid concept, subject to variation in different contexts. "Once it is determined that due process applies, the question remains what process is due."[102]

B. The Specific Requirements of Due Process in Congressional Disciplinary Proceedings

1. The Process Due

While there is virtually no judicial authority directly addressing what procedural protections are constitutionally required in congressional disciplinary proceedings, general due process principles as well as case law on impeachment and analogous proceedings provide some guidance. These sources strongly suggest that the Constitution does not impose rigid technical requirements in congressional disciplinary

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[100] The requisite "plus" need not be an independently cognizable property interest or other constitutional right. *See, e.g., Velez*, 401 F.3d at 87, 90 (holding that plaintiff's removal from office constituted "plus" for purpose of liberty interest claim even though plaintiff had not cognizable property interest in the office).

[101] H.R. R. XI cl. 3(p).

[102] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

proceedings, and that the Committee and the House have broad discretion to determine the appropriate procedures subject only to minimal constitutional constraints.

The Constitution's text establishes no specific procedural requirements. It says simply that "each House may . . . punish its members for disorderly behavior."[103] There is accordingly no textual basis for the notion that the Constitution requires certain specific procedures or, as some of Representative Waters' arguments seem to suggest, something akin to a criminal trial.

Indeed, the Supreme Court has declined to impose such procedural requirements in the analogous area of impeachment proceedings. In *Nixon v. United States*, an impeached federal judge challenged the Senate's use of a fact-finding committee in his impeachment, arguing that the constitutional mandate to "try all Impeachments," U.S. Const. art. I, § 3, cl. 6, required something akin to a traditional judicial trial in the full Senate.[104]

The Court held the case nonjusticiable, concluding that the Constitution vested in the Senate sole authority to determine the required procedure.[105] Justice White, concurring in the judgment, rejected Nixon's argument on the merits. Quoting Justice Story's statement that "the strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments," he concluded that the Constitution did not require a full trial in the nature of a judicial proceeding.[106] Justice White also gave special weight to the Rulemaking Clause. "Particularly in light of the Constitution's grant to each House of the power to 'determine the Rules of its Proceedings,'" he wrote, "the existence of legislative and judicial delegation [in historical practice] strongly suggests that the Impeachment Clause was not designed to prevent employment of a fact-finding committee."[107]

Here, as in *Nixon*, there is no reason to conclude that the Constitution imposes rigid procedural requirements on the Committee. Indeed, because such proceedings are at the heart of Congress's explicit power to "punish its members for disorderly behavior," the basic requirements of due process should be at their most flexible and subject to the broad discretion of the House.[108]

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[103] Art. I, § 5, cl. 2.

[104] 506 U.S. at 229.

[105] *See id.* at 237-38.

[106] *See id.* at 249 (quoting 1 J. Story, Commentaries on the Constitution of the United States § 765, at 532 (3d ed. 1858)).

[107] *Id.* at 250.

[108] *Cf.* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 140 (2d ed. 2000) ("Even if the Fifth Amendment due process clause applied to the impeachment context . . . it is not likely that it would mandate any different procedures from those already applicable.").

In light of that broad discretion, the basic constitutional requirements of due process are neither highly technical nor particularly stringent. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."[109] In determining what procedures are required, the House and Committee must consider "the private interests at stake . . . , the governmental interests involved, and the value of procedural requirements."[110]

The Second Circuit recently had occasion to apply these principles in a context similar to this one, and its decision provides some guidance here. In *Monserrate v. New York State Senate*,[111] the New York State Senate had voted to expel a senator because of his commission of domestic violence offenses.[112] The senator advanced a stigma-plus claim, contending that the expulsion deprived him of his liberty interest in his reputation without due process of law.[113] He specifically claimed that his due process rights were violated when (1) he was not given copies of all materials relied on by the senate committee; (2) he was not allowed to cross-examine all of the witnesses; and (3) several of the committee's sessions were held in executive session.[114]

Recognizing that both the private and governmental interests were significant, the Second Circuit focused on the procedural requirements, holding they were constitutionally adequate notwithstanding *Monserrate's* specific procedural complaints. The court began with the observation that the "touchstone of due process . . . is the requirement that a person in jeopardy of serious loss be given notice of the case against him and an opportunity to meet it."[115] It noted the various procedural obstacles *Monserrate* had faced, but simply concluded that he "nevertheless received a sufficient opportunity to clear his name—and that is all the Constitution requires."[116]

2. The House and Committee Rules Afford Constitutional Due Process

Ultimately, the Constitution requires that the House and the Committee provide a respondent in disciplinary proceedings with meaningful notice of the charges and

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[109] *Morrissey*, 408 U.S. at 481.

[110] *Washington v. Harper*, 494 U.S. 210, 229 (1990).

[111] 599 F.3d 148 (2d Cir. 2010).

[112] *Id.* at 153.

[113] *Monserrate*, 599 F.3d at 158.

[114] *Id.* at 159.

[115] *Id.* (quoting *Spinelli v. New York*, 579 F.3d 160, 169 (2d Cir. 2009) (citing *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976)).

[116] *Id.* at 159-60.

evidence and "a meaningful opportunity to present [her] case."[117] As set forth above, the House's power to punish its members—and its concomitant interest in exercising that power effectively—strongly support the conclusion that the House and the Committee enjoy broad discretion in establishing the specific procedures necessary to establish these basic protections.

In fact, both bodies have adopted robust procedural rules that adequately serve to protect these basic due process interests in disciplinary proceedings.

a. The House Rules

House Rule XI governs procedures of committees. It requires them to adopt written rules of procedure consistent with the House Rules and the provisions of Rule XI "to the extent applicable."[118] Rule XI cl. 1(b)(1) confirms that committees enjoy a significant degree of investigatory discretion with respect to issues within their respective jurisdictions, providing that "[e]ach committee may conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X."[119]

Rule XI cl. 3 establishes further specific rules and procedures for the Committee on Ethics. It provides:

> The committee may investigate . . . an alleged violation by a Member . . . of the Code of Official Conduct or of a law, rule, regulation, or other standard of conduct applicable to the conduct of such Member . . . . After notice and hearing . . . the committee shall report to the House its findings of fact and recommendations, if any, for the final disposition of any such investigation and such action as the committee may consider appropriate in the circumstances.[120]

This rule thus recognizes the basic constitutional requirement of "notice and hearing." The remainder of Rule XI provides more specific requirements establishing the precise nature of the notice and hearing to be provided.

Most saliently, Rule XI cl. 3(p) establishes specific "due process rights of respondents," which the Committee rules are required to adopt. These rules are set forth in their entirety below:

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[117] *Mathews*, 424 U.S. at 349.

[118] H.R. Rule XI cl. 2(a)(1)(C).

[119] Rule XI cl. 1(b)(1) (Rule X provides that the jurisdiction of the Committee on Ethics is "The Code of Official Conduct.").

[120] Rule XI cl. 3(a)(2).

(1) not less than 10 calendar days before a scheduled vote by an investigative subcommittee on a statement of alleged violation, the subcommittee shall provide the respondent with a copy of the statement of alleged violation it intends to adopt together with all evidence it intends to use to prove those charges which it intends to adopt, including documentary evidence, witness testimony, memoranda of witness interviews, and physical evidence, unless the subcommittee by an affirmative vote of a majority of its members decides to withhold certain evidence in order to protect a witness; but if such evidence is withheld, the subcommittee shall inform the respondent that evidence is being withheld and of the count to which such evidence relates;

(2) neither the respondent nor the counsel of the respondent shall, directly or indirectly, contact the subcommittee or any member thereof during the period of time set forth in paragraph (1) except for the sole purpose of settlement discussions where counsel for the respondent and the subcommittee are present;

(3) if, at any time after the issuance of a statement of alleged violation, the committee or any subcommittee thereof determines that it intends to use evidence not provided to a respondent under paragraph (1) to prove the charges contained in the statement of alleged violation (or any amendment thereof), such evidence shall be made immediately available to the respondent, and it may be used in any further proceeding under the rules of the committee;

(4) evidence provided pursuant to paragraph (1) or (3) shall be made available to the respondent and the counsel of the respondent only after each agrees, in writing, that no document, information, or other materials obtained pursuant to that paragraph shall be made public until—

(A) such times as a statement of alleged violation is made public by the committee if the respondent has waived an adjudicatory hearing; or

(B) the commencement of an adjudicatory hearing if the respondent has not waived an adjudicatory hearing;

but the failure of respondent and the counsel of the respondent to so agree in writing, and their consequent failure to receive the evidence, shall not preclude the issuance of a statement of alleged violation at the end of the period referred to in paragraph (1);

(5) a respondent shall receive written notice whenever—

(A) the chair and ranking minority member determine that information the committee has received constitutes a complaint;

(B) a complaint or allegation is transmitted to an investigative subcommittee;

(C) an investigative subcommittee votes to authorize its first subpoena or to take testimony under oath, which occurs first; or

(D) an investigative subcommittee votes to expand the scope of its investigation;

(6) whenever an investigative subcommittee adopts a statement of alleged violation and a respondent enters into an agreement with that subcommittee to settle a complaint on which that statement is based, that agreement, unless the respondent requests otherwise, shall be in writing and signed by the respondent and respondent's counsel, the chair and ranking minority member of the subcommittee, and the Outside Counsel, if any;

(7) statements or information derived solely from a respondent or the counsel of a respondent during any settlement discussions between the committee or a subcommittee thereof and the respondent shall not be included in any report of the subcommittee or the committee or otherwise publicly disclosed without the consent of the respondent; and

(8) whenever a motion to establish an investigative subcommittee does not prevail, the committee shall promptly send a letter to the respondent informing the respondent of such vote.

The House Rules thus guarantee the essential rights of notice and hearing, and provide certain specific requirements particularly directed to guaranteeing respondents have adequate notice of the specific charges and evidence against them.

b. The Rules of the Committee on Ethics

The Rules of the Committee on Ethics incorporate and elaborate upon the procedural protections established by House Rule XI. Part II of the Committee Rules contains the provisions governing the Committee's investigative and adjudicatory capacities.

Committee Rule 19 governs the procedures of investigative subcommittees, and incorporates several provisions that protect the due process rights of respondents. Rule 19(a)(2) requires that the respondent be notified of the membership of an ISC and have the right to object to participation of any member. Subsection (b)(3) provides that the respondent has the right to make a statement to the ISC, orally or in writing, regarding the allegations against her and any relevant issues. Subsection (b)(2) guarantees the respondent's and witnesses' right to counsel in ISC proceedings.

After the ISC adopts a Statement of Alleged Violation, Rule 22 provides the respondent with formal mechanisms to challenge its allegations.[121] Specifically, it

[121] The ISC may amend its Statement of Alleged Violation at any time before it has been transmitted to the Committee, in which case the respondent has 30 days to submit an answer to the amended SAV. Committee Rule 20.

requires the respondent to submit an answer, allows her to file a motion to dismiss, and allows her to file a motion for a bill of particulars.[122]

If the respondent does not admit to the allegations in the SAV, she has the opportunity to present her case in an adjudicatory proceeding, governed by Rule 23. This rule includes several specific provisions protecting the due process rights of respondents, notably:

- The respondent must be notified of the membership of the adjudicatory subcommittee and may object to the participation of any member.[123]
- Allegations against the respondent must be proven by "clear and convincing evidence,"[124] and the burden of proof is on Committee counsel.[125]
- The ASC must notify the respondent in writing of her and her counsel's right to inspect all documents and tangible evidence to be used at the hearing. The respondent must be given access to such evidence and must receive witness lists at least 15 days before any hearing. "Except in extraordinary circumstances," no witness or evidence may be introduced unless the respondent has had prior access under this rule.[126]
- Upon request, the respondent must be given access to any other testimony, statement or document evidence in the committee's possession "which is material to the respondent's defense."[127]
- The respondent may apply to the committee for issuance of subpoenas to obtain evidence she is not otherwise able to obtain.[128]
- The respondent may cross-examine witnesses.[129]

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[122] *See* Comm. Rule 22(b), (c).

[123] Comm. Rule 23(a).

[124] Comm. Rule 23(c).

[125] Comm. Rule 23(n).

[126] Comm. Rule 23(f)(1).

[127] Comm. Rule 23(f)(3).

[128] Comm. Rule 23(h).

[129] Comm. Rule 23(j)(4).

In addition, Rule 25 specifically requires disclosure to a respondent (or potential respondent in the case of a complaint) of any exculpatory information received by the Committee or any subcommittee.

Finally, Rule 26 establishes "rights of respondents and witnesses" that are protected in both the investigatory and adjudicatory contexts. With some structural changes, Rule 26 incorporates the provisions of House Rule XI cl. 3(p)(1) ("due process rights of respondents") verbatim:

- The respondent must receive 10 days' notice and disclosure of relevant evidence before an investigatory subcommittee can vote on a Statement of Alleged Violation.[130]

- If, after issuance of an SAV, the Committee or any subcommittee determines that it intends to use evidence not previously disclosed, that evidence must be immediately disclosed to the respondent.[131]

- The respondent must receive written notice of receipt of a complaint; transmittal of a complaint to an ISC; an ISC's first vote to take testimony or issue a subpoena; and the Committee's vote to expand the scope of the inquiry of an ISC.[132]

- Witnesses must be furnished a copy of the Committee's Rules of Procedure and the House Rules applicable to witness rights before their testimony is taken.[133]

c. House Precedent

While the Committee has not previously encountered the specific issues raised by Representative Waters, prior disciplinary proceedings at least illustrate the application of the procedural rules. For example, in July 2002, an adjudicatory subcommittee of the Committee on Standards of Official Conduct (the predecessor to the Committee on Ethics) held an adjudicatory hearing on the Statement of Alleged Violations against Representative James Traficant. The Chairman opened the hearing by stating that it would be governed by the Committee Rules (specifically Rule 24, which governed adjudicatory hearings under the version of the Rules then in effect) and that Committee counsel bore the burden to prove the charges by clear and convincing evidence.[134] The

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[130] Comm. Rule 26(c).

[131] Comm. Rule 26(e).

[132] Comm. Rule 26(g).

[133] Comm. Rule 26(l).

[134] *See In the Matter of Representative James A. Traficant, Jr.*, H.R. Report No. 107-594, at 221-22 (2002).

Chairman further specified that the "adjudicatory hearing will be conducted subject to the rules and the decorum of the House of Representatives."[135] At the close of the hearing, the Chairman reiterated and explained the standard of proof.[136]

The Committee followed similar procedures in hearings concerning Congressman Charles Rangel. As in the *Traficant* hearings, the Chair opened the ASC session by specifying that the hearing was "authorized by House rule 11, clause 3, and committee rule 23."[137] She went on to explain the roles of the respective subcommittees, the burden of proof and basic procedures, and specified that the hearing would "follow the procedures established by the rules of the committee."[138]

The impeachment trial of Judge Thomas Porteous, although not conducted under the same rules as those applicable in the Committee, provides another illustration of the types of procedural protections available to respondents in congressional disciplinary proceedings. Like the *Traficant* proceedings, the *Porteous* evidentiary hearing began with the Chair's recitation of the governing rules, in this case Rule 11 of the Senate rules of Procedure and Practice for impeachments.[139]

The record in each of these cases reflects clarity on the governing rules and practice both in the adjudicatory hearings and in extensive pre-hearing written procedure. In each case the respondent had ample notice of the allegations and evidence and had ample opportunity to mount a defense.

In addition, these prior proceedings lend some precedential support to the application of the House and Committee rules in Representative Waters' case. That is, given Congress's broad discretion to determine what procedures appropriately protect due process interests, its employment of similar rules in prior cases reflects an established institutional consensus about the types of procedures required.[140]

C. Analysis of Representative Waters' Arguments

1. Constitutional Claims

a. Claims of Entitlement to Procedures Beyond Applicable Committee Rules

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[135] *Id.* at 224.

[136] *See* id. at 903-04.

[137] *In the Matter of Representative Charles B. Rangel*, H.R. Rep. No. 111-661, at 428 (2010).

[138] *See id.* at 429-30.

[139] *See On the Articles of Impeachment against Judge Thomas Porteous, Jr.*, S. Hrg. No. 111-691, vol. 2, at 5-6 (2010).

[140] *See Yellin v. United States*, 374 U.S. 109, 116-17 (1963) ("Weight should be given [the] practice of [a congressional] Committee in construing its rules.").

To the extent Representative Waters contends that the Constitution requires procedural rules different from or in addition to the House and Committee Rules that governed the proceedings against her, her arguments are not persuasive. As set forth above, the Constitution does not impose rigid procedural requirements on the Committee, and the existing House and Committee rules provide robust due process protections that are more than constitutionally adequate.

While Representative Waters does not neatly categorize her "due process" arguments, most of the arguments identified for our analysis can be understood as contentions that certain of the Committee's procedures were unconstitutional, regardless of whether they were permitted by Committee rules. Specifically, Representative Waters argues that (1) the ISC responded to her motions for a bill of particulars and to dismiss too quickly; (2) the ISC denied her request for oral argument on her motions; (3) the Committee announced the formation of the ASC without simultaneously announcing an initial hearing date for the ASC; (4) Committee counsel collected evidence after the ISC transmitted the 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.

None of these objections concerns the essential constitutional requirements of notice and the opportunity to be heard. The Constitution does not require the decision maker to act on a specific time frame or to employ a specific standard of review. It does not necessarily require oral argument on all issues.[141] And it does not require precise procedures for gathering evidence or apportioning responsibilities between subcommittees.[142]

As explained above, constitutional due process requires only basic protections to guarantee that a respondent is afforded notice of the charges and evidence and an opportunity to refute them. Even at the investigatory stage, the House and Committee rules provide for written notice of significant committee actions and relevant evidence, and guarantee the respondent's right to make a statement to the ISC. At the adjudicatory stage, they require, among other things, pre-hearing disclosure of all evidence (including all exculpatory information), compulsory process to obtain additional evidence, and the right to cross-examine witnesses. Representative Waters has not articulated any specific way in which the existing Committee Rules fail to meet the basic constitutional requirements, nor has she demonstrated constitutional entitlement to any procedural protections beyond those afforded by the existing rules.

b. Claims of Undue Delay

[141] *See Loudermill*, 470 U.S. at 546.

[142] *Cf. Nixon*, 506 U.S. at 249-51.

Among Representative Waters' most fundamental contentions is that the delay in the Committee's resolution of the allegations against her has violated her due process rights.[143] This argument can be understood in two ways.

First, Representative Waters may be relying on an (unarticulated) analogy to the Sixth Amendment's guarantee of a speedy trial. To the extent she does so, however, her argument bears very little legal weight. There can be no serious contention that the Sixth Amendment applies to Committee proceedings; the "Sixth Amendment right of the accused to a speedy trial has no application beyond the confines of a formal criminal prosecution."[144]

Even for the limited purpose of guidance by analogy, Sixth Amendment principles do not support the notion that the proceedings against Representative Waters have been impermissibly delayed. First, Sixth Amendment rights only attach upon formal indictment.[145] The analogous event in these proceedings would be adoption of the SAV on June 15, 2010. While a delay of several years is not insignificant, in this case it is largely attributable to the need for additional investigation and to respond to Representative Waters' own motions filed in this Matter and public complaints made by Representative Waters (as well as Congress's calendar, which is of course more limited than a court's). In addition, Representative Waters has not articulated any specific prejudice to her defense attributable to the delay, such as loss of evidence and/or witness testimony. Where prosecutorial delay is based on a legitimate purpose and the defendant suffers limited prejudice, a delay of a few years does not violate the Sixth Amendment.[146] In short, the Sixth Amendment offers no support for Representative Waters' arguments, even by analogy.

Second, Representative Waters suggests that delay may raise due process concerns. As a general proposition, this is correct. The Supreme Court has recognized (at least in the criminal context) that even outside the scope of the Sixth Amendment, the "Due Process Clause has a limited role to play in protecting against oppressive delay."[147] Nevertheless, there is little reason to conclude that the delay in the proceedings thus far has violated Representative Waters' due process rights. The requirements of the Due Process Clause are not rigorous in this context; prosecutorial delay only rises to the level of a constitutional violation if it offends "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and

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[143] *See* Letter from Representative Waters to Chair and Ranking Member (May 9, 2011), attached hereto as Ex. 20.

[144] *Doggett v. United States*, 505 U.S. 647, 655 (1992).

[145] *United States v. Lovasco*, 431 U.S. 783, 788-89 (1977).

[146] *Cf. Doggett*, 505 U.S. at 656 (stating that 8½-year delay between indictment and trial would not violate Sixth Amendment if Government had "pursued [the defendant] with reasonable diligence").

[147] *Lovasco*, 431 U.S. at 789.

which define 'the community's sense of fair play and decency.'"[148] Where, as here, the delay has been occasioned by the need for further investigation and to address the Respondent's own motions and public complaints, and the Respondent has articulated little or no prejudice to her defense, there is no due process violation.[149]

Furthermore, the proceedings against Representative Waters are within the time limit established by the House itself. Addressing the problem of delay in the criminal context, the Supreme Court has ascribed more significance to statutes of limitations than to the ill-defined protections of the due process clause, describing statutes of limitations as the "primary" bulwark against undue delay.[150] The House has a provision analogous to a statute of limitations for ethical violations. House Rule XI cl. 3(b)(3) provides: "The [C]ommittee may not undertake an investigation of . . . an alleged violation that occurred before the third previous Congress unless the [C]ommittee determines that the alleged violation is directly related to an alleged violation that occurred in a more recent Congress." Thus, pursuant to the Rule, the Committee has jurisdiction over this Matter through the conclusion of the 113th Congress.

This rule both protects respondents and evidences an institutional consensus that proceedings taking place within three Congresses of the alleged violation are not unreasonably delayed. Committee precedent bolsters this conclusion. For example, the Committee investigated allegations of ethical violations by Representative Bud Shuster for some two-and-a-half years before finally adopting an SAV.[151]

The time period to resolve the proceedings against Representative Waters may have taken longer than Representative Waters would like, but it has been caused by the Committee's legitimate investigatory needs and the need to respond to Representative Waters' own motions and public complaints. It does not amount to a deprivation of due process.

2. Claims that the Committee Has Violated Its Own Rules

In addition to her apparent constitutional claims, Representative Waters contends in some instances that the Committee violated its existing procedural rules. Representative Waters has not consistently articulated her arguments with clear reference to specific Committee rules. Indeed, some of her contentions—such as the claim that the Committee could not recommit her matter to an ISC—might be interpreted as alleging both constitutional and rule-based violations. Any such latent

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[148] *Lovasco*, 431 U.S. at 790 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) and *Rochin v. California*, 342 U.S. 135, 173 (1974)).

[149] *Cf. id.* at 796 ("[T]o prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.").

[150] *See id.*

[151] *See In the Matter of Representative E.G. "Bud" Shuster*, H.R. Rep. 106-979, at 3B (2000).

constitutional concerns are addressed above, and this section will accordingly focus on the Committee's own rules.

As a preliminary matter, it must be noted that the Committee's violation of one of its own rules would not necessarily constitute deprivation of constitutional due process. Rules of Congress and committees are of course binding and generally are judicially cognizable,[152] but their violation does not necessarily amount to a violation of the Constitution.[153] Under limited circumstances, a legislative body's violation of its own procedural rules could rise to the level of a constitutional due process violation if, for example, "an individual has reasonably relied on [such rules] promulgated for his guidance or benefit and has suffered substantially because of their violation."[154] Ordinarily, however, unless the rules in question are themselves constitutionally required or necessary to protect fundamental fairness,[155] their violation does not raise a constitutional issue.[156]

Representative Waters' filings with the Committee advance three discernible rule-based arguments, analyzed in turn below.

First, Representative Waters contends that the Committee violated Rules 19(e) and (f) and 20(a) by continuing to gather information after the ISC transmitted the SAV to the Committee in June 2010.[157] Specifically, Representative Waters alleges that:

> Committee Rules 19 and 20 plainly establish that an investigative subcommittee must complete its investigation prior to the issuance of the SAV. Indeed, in writing Rule 20 the drafters clearly contemplated a situation where an investigative subcommittee acquires additional information requiring it to amend its SAV before transmission to the full Committee. What the rules do not authorize, however, is the post-issuance investigation that the Committee is currently conducting in this matter.[158]

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[152] *See Yellin*, 374 U.S. at 114.

[153] *See id.* at 111, 125 (granting relief where House committee violated its procedural rules, but declining to reach constitutional issues).

[154] *United States v. Caceres*, 440 U.S. 741, 752-53 (1979) (citing *Raley v. Ohio*, 360 U.S. 423, 437-38 (1959)).

[155] *See, e.g., Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945).

[156] *See Caceres*, 440 U.S. at 751-52 (finding IRS officials' violation of IRS surveillance regulations did not raise constitutional issues because "the IRS was not required by the Constitution to adopt these regulations").

[157] *See* Letter from Counsel Chair and Ranking Member (Aug. 25, 2010), at Ex. 7; Respondent's Reply to Committee Counsel's Response to Respondent's Second Set of Objections to Committee Counsel's Production 3 (Nov. 8, 2010), attached hereto as Ex. 21.

[158] *See* Letter from Counsel to Chair and Ranking Member (Aug. 25, 2010), at Ex. 7.

This argument is not persuasive for two reasons. First, the rules Representative Waters cites do not clearly establish the limitation on the Committee's authority that she asserts. Rule 20(a) specifically governs amendment of an SAV—not further investigation—and thus by its terms does not apply to the issue of further investigation. Rules 19(e) and (f) do suggest that ordinarily an ISC will have completed its investigation before transmitting an SAV, but no Committee Rule specifically says that all investigatory activity must cease after transmittal of an SAV. Thus, nothing in the rules suggests that the Committee exceeded its authority.

Second, as the Committee noted in responding to this argument initially, Rule 23(i) provides that all relevant evidence is admissible in adjudicatory hearings, and Rule 26(e) provides for post-transmittal disclosure of evidence the Committee determines to use in proving the charges in an SAV. Both rules thus contemplate that evidence not relied upon in the ISC may be introduced in subsequent adjudicatory proceedings. Contrary to Representative Waters' argument, there is no express or implied requirement in the Committee Rules that all investigatory activity must cease upon transmittal of an SAV.

Representative Waters' second rule-based argument is her objection to Committee Counsel's production under Rule 23(f)(1) of evidence to be used at the adjudicatory hearing. The Committee thoroughly addressed this argument in ruling on Congresswoman Waters' objections.[159] Representative Waters' fundamental objection was that Committee Counsel produced more evidence than it could reasonably have intended to introduce during the adjudicatory hearing. As the Committee noted in overruling the objection, however, the parties were not limited to offering evidence during the hearing itself, and Committee Counsel's production violated no express or implied limitation in Rule 23.[160] The Committee's interpretation and application of the rule was entirely tenable.

Finally, Representative Waters argues that the Committee violated its rules by voting to recommit her matter to an ISC after transmittal of the original SAV. This argument is closely related to the argument raised above insofar as it goes to the scope of proceedings permissible after transmittal of the original SAV. It fails for many of the same reasons. First, Representative Waters points to no clear provision in the rules prohibiting formation of a new ISC. Second, Committee Rule 1(c) provides that "[w]hen the interests of justice so require," the Committee may "adopt any special procedures, not inconsistent with these rules, deemed necessary to resolve a particular matter before it." When a Special Procedure is adopted copies of the procedure must be furnished to all parties in the matter.[161] In this case, while the recommital was not technically voted on as a "special procedure" pursuant to the authority of Rule 1(c), the full Committee voted to recommit the matter to the ISC and Representative Waters received notice of

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[159] *See* Letter from Committee on Standards of Official Conduct to Counsel (Oct. 28, 2010), at Ex. 15.

[160] *See id.* at 2.

[161] *See* Rule 1(c).

this vote.[162] The recommital followed the procedure outlined in Rule 1(c), and it, therefore, cannot be said that the Committee exceeded its authority or otherwise violated its rules by recommitting the matter to the ISC.

Representative Waters' argument also fails to the extent that it rests entirely on Rule 20(a)'s provision for amendment of an SAV only before transmittal. Her assumption that recommittal to an ISC amounts to amendment of the SAV is unfounded, however. The Committee is authorized under Rule 10(a)(2) to form a new—in effect superseding—ISC, and nothing in that Rule or elsewhere limits the scope of the new ISC's investigation or suggests that formation of a new ISC would equate to an improper "amendment" of the prior SAV.

Sound policy considerations also further support the Committee's actions. The public has a clear interest in full and fair investigation and adjudication of ethical violations by elected officials. That interest would be severely undermined if the Committee were prevented from acting on additional information it uncovers during the course of the proceedings. Representative Waters has offered no compelling reason why the Committee should be forced to proceed through adjudication of its original SAV no matter what additional information comes to light. Certainly the Committee Rules by their plain terms do not require that result, and policy considerations do not support Representative Waters' strained interpretation of them.

Finally, to the extent the language of the Rules is subject to more than one reasonable interpretation, there is no legal basis to challenge the Committee's interpretation and application of them. As set forth above, Congress has broad and explicit authority to discipline its Members under Article I, section 5, clause 2 of the Constitution. The Committee has drafted and adopted its Rules pursuant to that authority, and those same Rules explicitly authorize the Committee to adapt its procedures "[w]hen the interests of justice so require."[163] A court would defer to the Committee's own interpretation if in doubt.[164] Here, the Committee's interpretations are solidly grounded in the language of the Rules and supported by relevant policy concerns, and they are not inconsistent with Committee or House precedent. For all these reasons, the Committee's interpretation and application of the Rules in this proceeding should stand undisturbed.

3. Arguments Based on Criminal Law

In addition to contending that the Committee violated its own rules, Representative Waters asserts that it violated analogous principles of federal criminal procedure when the ASC was permitted to investigate subsequent to the transmittal of

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[162] *See* Letter to Representative Waters from Chair and Ranking Member (Nov. 19, 2010), at Ex. 19.

[163] Comm. R. 1(c).

[164] *See Yellin*, 374 U.S. at 116-17.

the SAV. In particular, she contends that this continued investigation violated rules analogous to those governing federal grand juries.

This argument fails for two reasons. First, as the Committee has made clear, analogies to criminal law can provide some guidance in interpreting and establishing appropriate Committee procedures, but Committee proceedings are not criminal matters, and principles of criminal law are not binding on the Committee.[165] Put simply, the Committee cannot "violate[] . . . federal criminal procedures,"[166] because those procedures do not apply to the Committee.

Second, to the limited extent that analogies from the criminal context provide any guidance with respect to Committee proceedings, federal grand jury practice and procedure provide no reason to conclude that the Committee could not or should not recommit the matter to an ISC. Representative Waters argues from analogy to the principle that prosecutors may not use the grand jury to continue gathering evidence against a defendant once that defendant has been indicted.[167] Even if this analogy were apt, Representative Waters overstates the scope of the principle. The correct legal analysis demonstrates that it is only "improper for the Government to use the grand jury for the sole or dominant purpose of *preparing for trial under a pending indictment.*"[168] In contrast, "good faith inquiry into other charges not included in the indictment is not prohibited even if it uncovers further evidence against an indicted person."[169]

The Committee's decision to recommit the SAV terminated the ASC's jurisdiction and cancelled the scheduled adjudicatory hearing.[170] The Committee thus did not use the ISC to continue gathering evidence in preparation for a pending adjudication—instead it reopened the investigation to examine new evidence that may support additional charges. If any analogy to federal criminal procedure were appropriate, it would be to the common—and wholly permissible—practice of obtaining a superseding indictment.[171]

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[165] *See* Letter from Committee on Standards of Official Conduct to Counsel (Aug. 31, 2010), attached hereto as Ex. 8.

[166] Letter from Counsel to Chair and Ranking Member (Aug. 25, 2010) (attached at Ex. 7).

[167] *See id.* at 2.

[168] *United States v. Leung*, 40 F.3d 577, 581 (2d Cir. 1994) (emphasis added).

[169] *United States v. Moss*, 756 F.2d 329, 332 (4th Cir. 1985) (internal quotation marks and alterations omitted). It must also be noted that the 111th Congress expired without concluding this matter. By way of analogy, if a grand jury expired without taking action on a matter, the matter is not simply dismissed. Rather, the matter would await action or inaction by a new grand jury.

[170] *See* Letter from Committee on Standards of Official Conduct to Representative Waters (Nov. 19, 2010), at Ex. 19.

[171] *See, e.g.*, 24 Moore's Federal Practice § 607.06[1] (3d ed.) (stating that a "common reason to supersede [an indictment] is when the government has developed evidence since the first indictment to support additional charges against the defendant").

In short, Representative Waters' arguments based on federal criminal law cannot succeed. Rules of criminal procedure clearly are not binding on the Committee. And, even for the limited purpose of guidance by analogy, the Committee's actions are consistent with analogous criminal procedures.

4. Assumed Violations

Representative Waters' remaining arguments are that (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. These claims turn on factual issues, and will be discussed individually below.

a. Confidential Documents Were Leaked to Persons Outside the Committee

This allegation is likely based on the internal Committee emails and hearing transcript that were leaked to the Washington Post, which formed the basis of the article discussing conflicts regarding the scheduling of the Waters hearing.[172] The emails and transcript were not published until after the Committee voted to recommit the Waters matter to the ISC. Outside Counsel's review did not uncover the identity of the individual or individuals that leaked the information to the press. However, it is clear that if documents were leaked by a Member or staff member, the individual who leaked the information violated his/her oath of confidentiality to the Committee. Thus, the leak of this information clearly violated Committee rules if committed by a Member or staff. If the leak was done by an individual who is neither staff nor a Member, that individual could possibly face criminal penalties depending on the manner in which he obtained the documents. The question to address in this Report, therefore, is whether this violation of a Committee rule affects any of Representative Waters' rights as a Respondent in this action.

In analyzing whether a leak of confidential documents by an unknown person or persons within the Committee violates any of Representative Waters' constitutional rights, it is helpful to consider constitutional principles governing the problem of leaks and publicity in criminal trials and the rule of grand jury secrecy. Of course, these principles of criminal law are not binding on the Committee, but are rather reviewed here for guidance.

i. Pretrial Publicity

Even though someone improperly publicized confidential information related to the proceedings against Representative Waters, such publicity did not violate her constitutional rights.

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[172] *See* Ethics Probe of Rep. Waters Derailed by Infighting, Sources Say (Dec. 16, 2010), attached hereto as Ex. 10.

In analyzing this question, it is useful to consider the constitutional principles governing the problem of publicity in criminal trials. Excessive publicity is of constitutional dimension and concern insofar as it can affect a defendant's Sixth Amendment right to an impartial jury and his right to a fair trial as a matter of basic due process.[173] Excessive publicity may threaten these rights to the extent it biases a jury or leads it to base its verdict on information not properly introduced in open court.[174]

Pretrial publicity does not per se violate a defendant's right to a fair proceeding, however. The fundamental concern is whether the defendant is prejudiced by the jury's exposure to improper information. The courts will presume such prejudice only in "extreme case[s]."[175] Ordinarily, a court will examine the circumstances of the case and the publicized information, and will carefully voir dire the jury to determine whether it has actually been infected with prejudice.[176]

Where the potential for prejudice is apparent, the available solutions are practical and rather obvious. When a particular juror is unable to render an impartial verdict, he or she must be dismissed. When publicity renders it unlikely that an impartial jury can be seated, the trial court should transfer the case to another venue or continue it until the prejudicial publicity subsides.[177] And, when a defendant has been convicted by a jury improperly influenced by outside information, the remedy is a new trial.[178]

Taking guidance from these principles, several conclusions about Representative Waters' claims may be reached. First, the mere fact of publicity does not necessarily render a proceeding fundamentally unfair. Second, if the trier of fact—here the ASC or potentially the House itself—has been influenced by media coverage, the remedy is not, as Representative Waters appears to suggest, simply to dismiss the charges. The remedy is to find a new, unbiased trier of fact who can give the respondent a fair hearing.

There are obvious limitations to the analogy between House disciplinary proceedings and criminal trials with respect to the issue of publicity. In particular, the same remedies are not available. There can be no change of venue, and the pool of potential alternative "jurors" is obviously limited to Members of Congress. These limitations do not demonstrate, however, that Representative Waters cannot receive a fair hearing. Instead, they highlight a fundamental point: While due process

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[173] *See Skilling v. United Sates*, 130 S. Ct. 2896, 2912-13 (2010).

[174] *See id.* at 2913.

[175] *Id.* at 2915; *see also Sheppard v. Maxwell*, 384 U.S. 333 (1966) (presuming prejudice where press coverage created a "carnival atmosphere" at trial).

[176] *See id.* at 2917.

[177] *See Sheppard*, 384 U.S. at 363.

[178] *See id.*

undoubtedly requires a fundamentally fair and unbiased proceeding, the constitutional implications of publicity must be evaluated in light of the unique constitutional context of this proceeding. Congressional disciplinary proceedings by definition take place within a small community in which publicity is virtually guaranteed (given the prominence of Members in the public eye) and in which the pool of available "jurors" is both limited and likely to be aware of public information about the charges. These are inherent attributes of congressional disciplinary hearings that result from the design of the Constitution. It would be incoherent to conclude that the same attributes render disciplinary proceedings unconstitutional.

Regardless, in this investigation, because her matter was recommitted and Members of the Committee that were on the Committee in the 111th Congress have either been replaced by other Members in the 112th Congress, or voluntarily recused themselves from this matter, Representative Waters will have an investigation and possible hearing conducted by unbiased "jurors."

Of course, should the Committee ultimately conclude that a sanction is warranted in this case, it must be voted on by the entire House. Therefore, recusal or appointment of new Members does not cure any possible exposure to the improperly leaked material that was accessed by the entire House membership. This issue can be analyzed by looking to the law governing pre-trial exposure by prospective jurors and judges. Again, there are several strong reasons to conclude that the leak does not present any significant threat to Representative Waters' constitutional rights.

First, as indicated above, the fundamental concern with pretrial publicity is prejudice to the defendant, and publicity alone does not *per se* generate prejudice. Obviously, whether publicity causes or threatens prejudice depends on the actual information publicized. News stories may be problematic, for example, when they report a defendant's "confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight."[179]

Clearly this is not the case here. The Washington Post article underlying Representative Waters' concerns contains no information that could reasonably be expected to lead other Members to prejudge the case against her. The focus of the article is the problems with the Committee's investigation, not the evidence against Representative Waters, and it contains only a basic and essentially neutral description of the allegations against her. In short, there is virtually no reason to believe the article will prejudice Representative Waters in future proceedings.

Second, even when pretrial publicity includes some potentially prejudicial information, several measures are available to mitigate the effects of the publicity and ensure the defendant a fair proceeding. One is delay, and that has already happened here. The article in question was published nearly 18 months ago, and it is not likely to inflame the passions of Members who may be called upon to vote on a sanction months

[179] *Skilling*, 130 S. Ct. at 2915-16.

from now.[180] Another mitigating measure is to determine through voir dire the extent to which jurors have been affected by outside information, and whether they are able to render a fair verdict nevertheless. Importantly, courts will generally accept a juror's assurance that he can act impartially notwithstanding exposure to potentially prejudicial information.[181] Finally, absent extraordinary circumstances, instructions to the jury that they must base their verdict only on appropriate information help to minimize prejudice to the defendant.[182]

Again (except for the passage of time since the leak), these exact remedies are not available in a congressional disciplinary proceeding. But they highlight a fundamental point: the decision maker need not be completely isolated from all outside information in order to make a proceeding fair. As the Supreme Court has emphasized, "[p]rominence does not necessarily produce prejudice, and juror impartiality . . . does not require ignorance."[183] The law places a certain amount of trust in people's ability to set aside their preconceptions and base a decision only on the information appropriately considered in the proceeding at hand. Where the facts reasonably indicate that a decision maker can do this, the fact that he or she was exposed to some outside information does not mean the proceeding is rendered unfair.

This is particularly true when the decision makers are reasonably sophisticated individuals like Members of Congress, who are likely to be more conversant in legal concepts than the average juror. In this context Members are perhaps better analogized to judges than to jurors. Judges in bench trials routinely make evidentiary rulings, including decisions to exclude evidence, and it is presumed that they can compartmentalize both their roles and review of the evidence and then base their decisions only on properly admitted evidence.[184] Indeed, it appears Congress has taken a similar view with respect to evidentiary issues in impeachment proceedings. "Members of Congress have generally decided not to follow any particular rules of evidence in impeachment proceedings, because they have concluded that they are more sophisticated than . . . typical jurors . . . and thus can appreciate the potential unreliability of some kinds of evidence, such as hearsay."[185] Consequently, while voir dire or curative instructions are not available here, they are probably not necessary.

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[180] *See id.* at 2917.

[181] *See id.* at 2922-23.

[182] *See id.* at 2918 n.21.

[183] *Id.* at 2914-15.

[184] *Cf. Vatyan v. Mukasey*, 508 F.3d 1179, 1187 (9th Cir. 2009) (Clifton, J. dissenting) ("'The rules of evidence are designed to protect unsophisticated members of a jury and hence are not appropriate for hearings in which the trier of fact is sophisticated and usually expert in the area of the factual controversy.'") (quoting 2 Admin. L. & Prac. § 5.52 (2d ed. 2007)).

[185] Gerhardt, 87 Geo. L.J. at 2344 n.61.

Members of Congress no doubt understand their duties, and should know what information is appropriately considered in voting on a recommended sanction.

In light of these considerations, there can be no serious contention that the leak of confidential Committee information has deprived or will deprive Representative Waters of a constitutionally fair disciplinary proceeding. The content of the leak is minimally prejudicial to her—if at all—and even if it contained some problematic information, Members of Congress can be expected to limit their consideration of any potential sanction decision to appropriate information.

ii. Grand Jury Secrecy

Representative Waters also argues that her due process rights were violated by leaks of confidential information to persons outside the Committee and/or by improper leaks of information to Members of the ASC. Again, useful guidance may be found in analogy to criminal procedure, in particular the rule of grand jury secrecy.

It is a long-established rule that grand jury proceedings must be kept secret, subject to carefully circumscribed exceptions. A knowing violation of this rule is punishable by contempt.[186]

A violation of the secrecy rule can implicate a defendant's rights in at least two ways. First, it could influence the grand jury itself and thus lead to an improper indictment.[187] Second, a "breach of grand jury secrecy can jeopardize the defendant's right to a fair trial before a petit jury" insofar as it may introduce improper information to and therefore prejudice the petit jury.[188] In either case, however, the question is whether the violation influenced the decision maker. Breach of the secrecy rule does not *per se* violate a defendant's rights; indeed, some breaches do not affect a defendant in any significant way at all.

The Supreme Court has held that violations of Fed. R. Crim. P. 6(e) should be reviewed for harmless error, and "dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations."[189] Similarly, a defendant seeking reversal of his conviction on the ground of "alleged grand jury abuse must show prejudice or bias."[190]

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[186] *See* Fed. R. Crim. P. 6(e)(7).

[187] *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 257 (1988).

[188] *United States v. Eisen*, 974 F.2d 246, 261 (2d Cir. 1992); *see also United States v. Eisenberg*, 711 F.2d 959, 961 (11th Cir. 1983) (stating that one purpose of secrecy rule is "preventing adverse pretrial publicity about a person who may be indicted and subsequently tried").

[189] *Bank of Nova Scotia*, 487 U.S. at 256 *(quoting United States v. Mechanik*, 475 U.S. 66, 78 (1986)).

[190] *Eisen*, 974 F.2d at 261.

In either case, a violation of the grand jury secrecy rule virtually never allows a defendant to avoid adjudication of the charges against her. Courts rarely, if ever, dismiss indictments because of violations of the secrecy rule. Indeed, it appears that "no indictment has been dismissed [or at least no dismissal upheld on appeal] for prejudicial preindictment publicity."[191] If an indictment were dismissed on the basis of a secrecy violation, there is no requirement that it be dismissed with prejudice. Ordinarily the government could seek another indictment from a new, untainted grand jury. Similarly, if a convicted defendant could show that improperly disclosed information from grand jury proceedings prejudiced his petit jury, the remedy would at most be a new trial.[192] The problem is essentially the same as that posed by trial publicity in general; the solutions are essentially the same as well.

These considerations ultimately suggest that the violation of confidentiality rules by Committee staff, if actually prejudicial, may be cured by beginning the proceedings against Representative Waters anew. To the extent any such violation affected the decision to adopt an SAV, a conclusion unsupported by the record, the solution is to begin the process again with a new Committee untainted by violations, which is exactly what is happening in this case. Obviously, no violation could have affected the decision of the ASC since no decision was reached, and, in the event that this matter reaches the House floor, Members are sophisticated enough to only base their decisions on the information presented on the House floor.

b. Allegation that Improper *Ex Parte* Communications Occurred

While Representative Waters alleges that improper *ex parte* communications occurred between staff and certain Members of the Committee, she cites no Committee or House rule that supports this allegation. The Committee staff is a non-partisan, professional staff that serves all Committee Members. There is no prohibition on *ex parte* contact between Committee Members and staff.

The concept of an *ex parte* communication in the judicial branch evolved in the United States because of the tri-partite system that exists. Generally, *ex parte* communications, which are those communications between only one party to a legal action and the trier of fact to the exclusion of the other party, are prohibited during the course of legal proceedings.

Here, however, the Committee is not part of the judiciary system and its staff serves both the ISC and ASC, so any comparison to *ex parte* communications are not relevant. The only rule in place governing communication by staff with the Committee

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[191] 24 Moore's Federal Practice §606.05[2][g] (3d ed.) (citing cases); *see, e.g., United States v. Dunham Concrete Prods., Inc.*, 475 F.2d 1241, 1249 (5th Cir. 1973) (where convicted defendants alleged secrecy violation, "the remedy in any case would not be to dismiss the indictment;" rather, "a contempt citation [is] adequate to halt any impropriety and to protect grand jury secrecy").

[192] *See, e.g., United States v. Bazzano*, 570 F.2d 1120, 1128 (3d Cir. 1977) (holding that particular prosecutorial violation of secrecy rule at issue did not require that defendants receive a new trial, but that in general "a violation of Rule 6(e) may well require a new trial").

is the "Bifurcation Rule."[193] The "Bifurcation Rule" prohibits the staff from sharing evidence outside of the ISC without authorization from the ISC. During the course of Outside Counsel's review, the issue of bifurcation arose with respect to the November 3, 2010, email that was sent to the Committee regarding the newly discovered evidence that staff believed supported recommital of the Waters matter.[194] A review of the rules demonstrates that once the ISC is no longer in possession of its evidence, the bifurcation rule is no longer operable. Committee Rule 26(c) requires the ISC to provide the respondent with all evidence it intends to use to prove the charges in the SAV 10 days before the vote on the SAV. Clearly the transmittal of the SAV to the Committee necessarily is accompanied by the evidence in the possession of the ISC intended to be used to prove the SAV.

This interpretation is supported by Committee Rule 26(e), which requires the Committee or any subcommittee thereof, to make any additional evidence it intends to use to prove the SAV available to the Respondent.[195] Likewise, Committee Rule 23(f)(1) also contemplates that the ASC may have evidence different from the Respondent. Therefore, with respect to the November 3 email, there is no bifurcation violation for two reasons: 1) the newly discovered evidence attached to the email was never in possession of the ISC; and 2) the information contained in the November 3 email is information from the evidence that had been released by the ISC consistent with Rule 26(c) and thereby, Rule 8(a) as well. This email raises no other potential violations either as the attachment was provided to Representative Waters and, further, the arguments included in the November 3 email is derived from evidence that had previously been transmitted to Representative Waters.

In addition, it is also important to note that the "Bifurcation Rule" does not prohibit the same staff serving both subcommittees. The Committee has always interpreted its rules this way. In fact, at a Committee meeting on March 6, 1991, a Congressman then serving on the Committee had the following exchange with the former Chief Counsel:

[Congressman]: Is there any bifurcation of the staff under these functions or is it the same staff used for investigation and adjudication?

[Chief Counsel]: It is the same staff.

[Congressman]: The person who sits with the investigating committee, that staff person would sit with the adjudicatory committee?

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[193] *See* Committee Rule 8(a).

[194] *See* Email to Committee dated Nov. 3, 2010.

[195] *See* Committee Rule 26(e).

[Chief Counsel]: They would present the case to the adjudicatory subcommittee.[196]

However, because Staff serves all Committee Members, it is useful to review the ethical rules that apply to lawyers representing organizational clients, such as the Committee, as Committee Staff are also bound by these rules. Rule 1.13 of the D.C. Rules of Professional Conduct, entitled Organization as Client, provide that a lawyer representing an organization represents the organization acting through its duly authorized constituents. The duties defined in Rule 1.13 apply equally to unincorporated associations. "Other constituents" as used in the Comment to Rule 1.13 means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations. Comment [8] provides that the duties defined in Rule 1.13 encompass the representation of governmental organizations.

D. C. Rule 1.4 establishes the ethical duties relating to client communication. Specifically, Rule 1.4 (b) states that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Comment [4] recognizes that when the client is an organization, it may not be practical or even possible to communicate with every one of the organization's Members about its legal affairs, but in such circumstances directs the lawyer to "address communications to the appropriate officials of the organization." (emphasis added). Oftentimes organizations have individuals or committees that possess specific or sometimes general authority to act for the entire organization or direct counsel (e.g. Chief Executive or Operating Officers, Executive Committees, Operating Managers, or Executive Directors). Absent such authority, a lawyer should not selectively communicate with or advise only certain organizational Members to the exclusion of others who possess similar or concurrent authority to act for the organization or direct counsel. Comment [5] to Rule 1.4 prohibits lawyers from withholding information to serve the lawyer's own interest or convenience. Thus, in this circumstance, if advice or assistance was intentionally provided by counsel on a partisan or selective basis, then the lawyer may not have complied with his or her ethical duty to communicate with the client. However, if staff was merely responding to a Member's question or request, no violation has likely occurred. Likewise, if staff has reason to believe that one side is acting in a partisan manner and reaches out to the other side to protect the process, no violation likely exists. It appears to only be a violation of the ethical rules if the communication was solely for a partisan purpose.

Since the Committee acts as a body, with each member possessing the same authority, all substantive communications, advice and assistance should be made available to all Committee Members. Moreover, any assistance to selected Members based upon party affiliation would suggest that some interest, other than that of the organization (Committee), interfered with or was placed above the organization's interest in contravention of the Ethics Rules if there was no other basis for the selective conversations.

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[196] Transcript of Committee Meeting, March 6, 1991, pp. 48-49.

Our review determined that sometime during the Summer of 2010, Members of the Republican party concluded that the Chief Counsel stopped responding to them and, therefore, certain Republican Members began contacting the Director of Investigations directly.[197] Several Members of the Republican Party expressed concern that Chief Counsel had quit responding to the Ranking Member of an ASC that was occurring simultaneously with the Waters ASC.[198] The Chief Counsel testified that while there was a complicated period of time during which an issue of recusal was raised, he never intended to stop speaking to the Ranking Member of the ASC and, rather, recalled having several conversations with him.[199]

Suspicions also surfaced during this same time period regarding the relationship between the Chair and the Chief Counsel, as the Chief Counsel had previously worked with the Chair on the Judiciary Committee, and prior to his selection as the Chief Counsel, he had served as the designee to the Chair. Thus, the Chief Counsel had a partisan past, and a suspicion by certain Members and staff arose that the Chief Counsel was aligned with the Democratic party and the Chair and was acting in a partisan manner. These suspicions were fueled by the fact that the designee to the Ranking Member observed calls coming into the Chief Counsel's office from the former Speaker of the House's office.[200] Of course, there is no prohibition on calls being placed to the Chief Counsel by anyone, including the Speaker of the House. Further, while there was testimony that these calls were made, no one had any knowledge of what was discussed on any of these calls or who, in fact, was on the other end of the phone. These suspicions were further fueled by the fact that the two senior staff members on the Waters ASC team felt they were undermined by the Chief Counsel and that the Chair went directly to the Chief Counsel and did not consult with them on the Waters matter.[201] The Chair did, in fact, testify that she regularly communicated with the Chief Counsel about all matters pending before the Committee since, as the Chief Counsel he was the appropriate person in the organizational structure for her to communicate with on all matters before the Committee.[202]

Suspicions also arose because it was perceived that the Chief Counsel spent a lot of time in meetings with the designee to the Chair, and that together the Chief Counsel, the Chair's designee and the Chair made unilateral decisions regarding the matters pending before the Committee.[203] The Chair's designee, however, indicated that as the Chair of the

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[197] *See* RM Designee Dep. at 13-14.

[198] *See* RM Dep. at 33-34; Member #2 Dep. at 13; Member #3 Dep. at 13-14.

[199] *See* Chief Counsel Dep. at. 59.

[200] *See* RM Designee Dep. at 65-66.

[201] *See* DOI Dep. at 36.

[202] *See* Chair Dep. at 29

[203] *See* RM Designee Dep. 16-17.

ASC, it was the Chair's responsibility to make primary or initial rulings on objections and other matters before the ASC.[204]

In addition, several individuals indicated that both the Chair and the Chief Counsel acted in a partisan way in the investigations of both Representative Waters and in another matter pending before the Committee.[205] In fact, the Director of Investigations went so far as to allege that she believed that the Chair was trying to "sabotage" the case.[206] To the contrary, the Chair indicated that she was continually trying to move the matters forward and her designee stated that to the extent any tension existed, it was over the matter of scheduling, and had nothing to do with a political agenda.[207]

The suspicions were not entirely one-sided. As discussed previously in the factual background section, both the Chief Counsel and the Chair's designee believed that the Director of Investigations had notated binders that were provided to the Republican Members of the Waters ASC. This allegation was cited in Chief Counsel's memoranda supporting the decision to terminate the two senior attorneys on the Waters ASC team. As discussed, there was no basis for this allegation as the notations were made by the designee to the Ranking Member, and notating binders for the Republican members of the Committee is within her authority as the designee.

With respect to specific communications between staff and Members of only one party, a review of staff email uncovered emails between the two senior members of the Waters ASC team and the Ranking Member, and three other members of the Republican party. However, with respect to communications concerning the Waters matter, the majority of the communications do not discuss the substance of the allegations against Representative Waters and do not provide any information on the matter that was not available to all Members.

For example, on September 22, 2010, the Chair sent an email to the Ranking Member discussing the subpoena issue that had been raised at the previous ASC meeting as well as concerns the Chair had with the staff. The designee to the Ranking Member forwarded this email to the Director of Investigations so that she and the Waters team could be prepared for the meeting, and it was subsequently forwarded by the Director of Investigations to the entire Waters team. From there, one of the senior members of the Waters ASC team forwarded the email to her personal Gmail account, and then forwarded the email to two Republican committee members. One of the Members responded by

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204 *See* Chair Designee Dep. at 33. While the rules do state that the "Chair" shall make initial rulings, it has been the practice of this Committee that whenever possible the Chair and Ranking Member jointly make decisions affecting the Committee. As noted earlier, this practice changed following the joint press release by the Republican Members of the Committee.

205 *See* Member #3 Dep. at 17-18; RM Designee Dep. at 66.

206 *See* DOI Dep. at 70.

207 *See* Chair Designee Dep. at 63-68.

stating "Yep. Be prepared." To which the staff attorney responded, "Pls pick up my head for me when it is ripped off..."[208]

Similarly, on October 7, 2010, the Chair issued a public statement announcing the hearing dates for the hearings of Representative Waters and an additional hearing involving a separate Representative. One of the senior attorneys on the Waters ASC team received this statement by email, and subsequently forwarded it to three Republican representatives on the Committee, and also copied the Republican designee for the ASC on the other matter.[209] On that same day, the same senior attorney on the Waters ASC sent an email to the Ranking Member on the Waters ISC, indicating that she was enjoying reading the ISC's interview of one of the ISC's witnesses, to which the Member responded "Thanks. I now see the Chair has come to her senses, sort of."[210]

On November 8, 2010, the same senior attorney on the Water's ASC team forwarded an article about the Waters case that was published by thehill.com to three Republican members of the Committee, and again copied the Republican designee for the ASC in the other matter. One of the Members responded that "this is known as prepping the battle field." The staff attorney responded with a lengthy email about the newly discovered email and her opinion that the Chair would try to suppress it. Although this email may not constitute best practices, or comply with the spirit of the bar rules discussed above, because the Member with whom the staff attorney was communicating was on the ISC and not a member of the ASC, this communication is not an improper factual discussion with a member of the ASC in contravention of the "Bifurcation Rule."[211]

On November 18, 2010, the same staff attorney sent an email from her personal Gmail account to a Republican Committee Member stating "you guys are good...thx!" The Member responded stating "Happy thanksgiving." And the staff attorney again responded "...but there's always another 'ask': now you have to get them to let us start investigating the failure to turn over the document before the next congress starts." During the interview of the staff attorney, she testified that she believed this email referred to the recommital of the Waters matter and that she wanted the Committee to allow the staff to investigate why the newly discovered evidence had not been previously produced.[212]

The only email identified that passed along any information regarding the merits of the case was sent by a senior attorney on the Waters ASC on November 3, 2010. Initially, at 5:05 PM she forwarded an article that had been published on slate.com regarding the ethics case to the designee to the Ranking Member stating "in case the members are interested, a

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[208] *See* Email dated Sept. 23, 2010.

[209] *See* Email dated October 7, 2010.

[210] *See* Email dated Oct. 7, 2010.

[211] *See* Email dated Nov. 8, 2010.

[212] *See* Staffer #1 Dep. at 123-124; Email dated November 18, 2010.

long piece on Waters."[213] Because this was sent only to the designee for the Ranking Member and did not include the designee to the Chair, a rebuttable presumption arises that the senior attorney intended this to only be circulated to Republican Members. However, four minutes later, at 5:09PM, the senior attorney forwarded the same article to three Republican members of the Committee, with a message stating "FYI, Extensive piece on OneUnited and how one little bank got so much attention during the meltdown."[214] By forwarding this article with her spin on it, the senior attorney is actually passing along only select articles, and an argument can be made that the attorney is endorsing the facts and allegations contained in the article. When questioned about this, the senior attorney defended this action stating that this email merely provided a public article which the Members had access to, but recognized that in hindsight it probably should not have been sent.[215] It is the conclusion of Outside Counsel's review that the sending of this email was inappropriate. However, because the Members who received the communication have recused themselves from this matter, there is no harm to Representative Waters.

A review of the Director of Investigations' email evidenced communications between the Director of Investigations and the Ranking Member, and three Republican members of the Committee. Like the senior attorney, many of these emails are sent from a personal email account, as opposed to an official House account.[216] While the Director of Investigations does have substantive communication with the Ranking Member, the rules allow both the Chair and Ranking Member to receive all information available to the ISC, even if they will ultimately serve on the ASC.[217] For example, on August 18, 2010, the Director of Investigations responded to an email sent by the Ranking Member to the Chair, on which the Director of Investigations had been copied. The Ranking Member raised a number of issues in the email including scheduling and Representative Waters' press conference, and he specifically states that he would like the Director of Investigations' thoughts on the issues. The Director of Investigations responded directly to the Ranking Member and did not include the other recipients from the previous email. The Director of Investigation's response listed the facts that the Director of Investigations believed supported the receipt of an actual benefit by Representative Waters and argues that the evidence supports an actual violation, as opposed to an appearance of impropriety. The Director of Investigations followed-up with the Ranking Member and discussed an altercation she had had with the Chief Counsel and asked if the Ranking Member felt she should resign as she believed both the Chair and Chief Counsel wanted her to do. The

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[213] *See* Email dated Nov. 3 at 5:05PM.

[214] *See* Email dated Nov. 3, 2010 at 5:09PM.

[215] *See* Staffer #1 Dep. at 113.

[216] Beyond creating an appearance of impropriety through the use of a personal email account as opposed to staff's official House account, the use of personal email accounts for official Committee business is not best practices as personal accounts do not have the same level of security as the official accounts. Maintaining the confidentiality of Committee information is a priority of this Committee and use of personal email accounts to conduct official Committee business does not comport with that priority.

[217] *See* Committee Rule 8(a).

Ranking Member responded that she should not quit and promised to call her later.[218] This email was cited by the Chief Counsel in the memo he drafted after the termination of the two employees as evidence of an *ex parte* communication. However, as described above, there is no such Committee rule and, further, the Ranking Member is entitled to all information regarding a case whether he is on the ASC or not.

On September 15, 2010, the Ranking Member sent an email to the Director of Investigations stating simply "great job."[219]

With respect to communications between the Director of Investigations and other members of the Committee, the Director of Investigations emailed one Republican Member of the Committee on July 23, 2010, to provide him with a summary of a conversation she had with Representative Waters' attorney regarding settlement negotiations that was a "substantially different" conversation than the one the Chief Counsel had had on the subject.[220] The Member responded that he has enjoyed "about all of this 'dual universe' that I can. I am sure glad you are handling the negotiations."[221]

On July 25, 2010, the Director of Investigations forwarded a Republican Member of the Committee an email communication she received from Representative Waters' counsel indicating that she was not prepared to agree to any violations in the SAV, but would attend a settlement meeting. The Director of Investigations expressed her views on this matter to the Member who also responded to the Director of Investigations with his position.[222]

After transmittal of the SAV to the ASC, the Director of Investigations forwarded an article regarding the CEO and Chairman of OneUnited to a Republican Member of the Committee.[223]

Following the September 16, 2010, ASC meeting that was abruptly adjourned by the Chair, another member of the Waters ASC team sent a follow-up email to the Committee addressing the issues raised at the meeting. As previously indicated, one Republican Member of the Committee responded to the Director of Investigations and the other senior member of the Waters ASC team stating "nicely done." The Director of Investigations responded directly to this Representative indicating that "it was important to lay out exactly what was done so there is no confusion." Indicating the political nature of the Committee at that point in time, the Representative responded: "You have to. It's unfortunate how much they have politicized this Committee." The Director of Investigations ended the conversation

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[218] *See* Email dated August 18, 2010.

[219] *See* Email dated Sept. 15, 2010.

[220] *See* Email dated July 23, 2010.

[221] *See id.*

[222] *See* Email dated July 25, 2010.

[223] *See* Email dated August 11, 2010.

indicating that "[t]he non-partisan staff needs to protect themselves from the partisan staff director and the Chair that is seeking to protect her party members at whatever the cost."[224]

On September 22, 2010, the Director of Investigations sent an update to a Republican Member of the Committee from her personal email account letting him know that Representative Waters' attorneys had not agreed to any additional stipulations and that the Chair had not signed the requested subpoenas, which the Director of Investigations characterized as "another delay tactic."[225] She followed up with the same Member on Sept. 27, 2010, and emailed him copies of the most relevant excerpts from the Committee meeting held on September 23, which the Member had attended.[226] The Director of Investigations again communicated with the same Member in an email with the subject "high alert" on September 29, 2010. In that email, she informs him that she just learned that the Chair's designee was attempting to schedule a late night meeting for the Waters ASC.[227]

On November 8, 2010, the Director of Investigations emailed four Republican Members of the Committee from her personal email account regarding an article that had been forwarded to them. In the email she states that they are "still waiting to see what argument [the Chief Counsel and the Chair] are going to come up with to try and exclude the 2-page 'smoking gun' email on Rep. Waters and her grandson/COS."[228]

Finally, during the Committee meeting regarding the issue of recommital, the Director of Investigations emailed a Republican Member of the Committee on both a personal and professional email account to let him know that while the staff was "kept out of attendance by the Chair, the Waters staff is waiting outside in case any of the members have questions."[229]

During the course of our review, Outside Counsel observed several emails between the Director of Investigations and another senior attorney of the Waters ASC team with several Republican Members of the Committee. They appear to communicate almost exclusively with those Members. Likewise, we also observed that the Chief Counsel had significant, substantive exchanges with only the Chair.[230] It is questionable that any of the emails rise to the level of an ethics violation, pursuant to the D.C. Code of Professional Ethics as the staff members seemed to believe they were acting to protect the Committee from perceived misconduct of other Members. Rather, the emails discussed illustrate the level of

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[224] *See* Email dated Sept. 17, 2010.

[225] *See* Email dated Sept. 22, 2010.

[226] *See* Email dated Sept. 27, 2010.

[227] *See* Email dated Sept. 29, 2010.

[228] *See* Email dated Nov. 8, 2010.

[229] *See* Email dated Nov. 18, 2010.

[230] Outside Counsel notes that no other Democratic Members other than the Chair had substantive exchanges with the Chief Counsel or any other staff members.

distrust that existed on the Committee during this time period. The emails further demonstrate the risk that partisan suspicions among the Members can infect the staff and risk the important non-partisan nature of its work. But such emails do not create any alleged *ex parte* violation as there is no *ex parte* Committee Rule.

An *ex parte* rule would be unworkable in this Committee, since the non-partisan staff must serve all Members, as the Members are not allowed to have any personal staff assistance on Committee matters. It is, therefore, clear that Members are allowed to reach out to staff members when they have questions relating to the work of the Committee. However, while staff should always be responsive to Members, staff should show restraint in reaching out to Members on only one side. As the staff of this Committee is non-partisan, repeatedly reaching out to Members on only one side, as we observed occurring during this review, only leads to suspicions and mutual distrust arising within the Committee.

Finally, it must be noted that, even assuming that an *ex parte* or bifurcation violation existed in this case, such violation would be cured by the fact that the matter was recommitted prior to any vote by the ASC and all Members that previously served on the Committee have recused themselves from further involvement in the Waters matter.

c. ASC Authorized Subpoenas on Incomplete Representations

The Committee has also raised the issue of whether the ASC authorized subpoenas on incomplete representations. This issue was raised in the two memos authored by the former Chief Counsel following the termination of the two staff members. The Chief Counsel argued that staff sought Representative Waters' Chief of Staff's Yahoo! account on the basis of "newly discovered evidence." He indicates that they had the evidence regarding the Yahoo! account and failed to recognize the significance of this. In a September 23, 2010, email to the ASC, a senior attorney on the Waters ASC team recognized this point and admitted that they had not recognized the significance of the email account until the scheduling of the Waters' settlement discussion. The ASC did not vote on this subpoena request until after receipt of this email.

As discussed in detail in the background section above, all Members that voted to authorize the subpoenas felt that they had adequate information upon which to vote on the issue. Even the Chair stated that while she was not happy with the staff's performance with respect to the subpoena issue, she felt that the authorization was a ministerial act and one that she would not have performed had she not had sufficient information to do so. Again, this matter was not taken lightly and was the subject of at least two separate ASC meetings, as well as detailed email communication from the staff regarding the information sought and the manner in which it was brought to staff's attention. As such, no violation of any due process rights occurred. Further, even assuming her allegation is true, because of the procedural posture of this case, any violation would be cured by the recommital of the investigation to a new ISC and now a new committee.

5. Allegations of Inappropriate and/or Racially Insensitive Comments

In the memos drafted by the former Chief Counsel in support of the terminations of both staff members, he raised several examples of inappropriate and/or racially insensitive comments made by one of the attorneys. The allegation raised in his first memo[231] indicates that during deliberations regarding a count to include in the SAV in a different matter, a staff member, who is African-American, raised issues regarding the count's factual and legal efficacy. The staff attorney who was subsequently terminated was present in that meeting and sent an email referring to the African-American staff member to the Director of Investigations stating: "Wow, so glad we have a member of the CBC in our midst."[232]

In the personnel notes drafted by the Chief Counsel, he stated "[the staff attorney] often made inappropriate racial comments to other staff members. She often lamented her time as a prosecutor in the DC U.S. Attorney's office saying that how could she, a 'blond-haired, blue-eyed prosecutor' be expected to ever get a DC jury to convict a defendant."[233]

The notes continue to state that "[both of the terminated employees] were overheard complaining about the fact that the Chair likes to hire minorities."[234]

The notes further state that "[one of the staff attorneys] was talking about detailee prosecutors assigned to the DC USAO from Prince Georges County. She became quite animated saying 'they would bring these African-American prosecutors over from PG County. And, I'll just say it – they're just not as smart." *See id.*

Finally, with respect to staff interviews in another matter, the notes indicate that the Director of Investigations conveyed to the Chief Counsel that the staff attorney "often acted in an inappropriate way, flirting with witnesses and making inappropriate comments. For example, she stated about a homosexual man that finally there's one man I don't have to worry about [hitting on me or something to that effect]."[235]

During the course of Outside Counsel's review, we examined an email which was sent by the staff attorney to the Director of Investigations,[236] but found no additional emails indicating racially biased or insensitive comments. The Director of Investigations testified regarding this comment and indicated that she recognized it as

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[231] *See* the First Personnel Memo.

[232] *See* Email dated June 29, 2010.

[233] *See* the Personnel Notes.

[234] *See id.* Other than the Personnel Notes, there is nothing in the record to support that the Director of Investigations made inappropriate or racially insensitive comments.

[235] *See id.*

[236] *See id.*

insensitive or inappropriate, but never discussed it with the staff attorney who authored the email.[237]

During the course of Outside Counsel's interviews it was discovered that some Committee staff and Members had also heard racially insensitive or other inappropriate comments made by the staff attorney. For example, the designee to the Chair testified that another staff member[238] had told him that the staff attorney made the comment regarding being a blond-hair blue eyed prosecutor, as well as the comment regarding African-American prosecutors not being as smart, which comments were also included in the Chief Counsel's memos.[239] The African-American staff member who was the subject of the previously discussed email testified to hearing the same comments,[240] but also indicated that the staff attorney did not make comments that were insensitive on a regular basis.[241] Others also testified to hearing the same comments.[242] The most junior member of the Waters team testified to a conversation she had with the staff attorney wherein the staff attorney made a comment that certain judges nominated to the D.C. courts were only appointed because they were African-American.[243] In addition, the Chair a testified that at some point the staff member said something that the Chair found "concerning."[244] "It was kind of a racially tinged remark and it wasn't on the record, but it was a dismissive remark about – that as a white prosecutor she couldn't get a fair – you can imagine how she would be treated in a D.C. jury with all black jurors. And I thought that's really inappropriate."[245]

Several other staff members testified to never hearing any racially insensitive or inappropriate remarks being made by the staff attorney.[246] With the exception of the

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[237] *See* DOI Dep. at 182.

[238] It is clear that the particular staff member who relayed this information to the Chair's designee had a strained relationship with both of the attorneys that were terminated. In fact, this particular staff member testified to having an office "blow-up" with one of the attorneys. (Staffer #3 Dep. at 20-21.) In addition, this same staff member noted that she had several disagreements with the Director of Investigations and only spoke to her in meetings. (*See id. at* 41-42.) In fact, there was testimony that after one such disagreement with the Director of Investigations , this particular staff member remarked in her office that "that bitch is going down." (Staffer #4 Dep. at 39.)

[239] *See* Chair Designee Dep. at 27-28.

[240] *See* Staffer #5 Dep. at 47.

[241] *See id.*

[242] *See* Staffer #3 Dep. at 28-29; Chair Dep. at 47.

[243] *See* Staffer #2 Dep. at 163.

[244] *See* Chair Dep. at 47.

[245] *Id.*

[246] *See* Staffer #4 Dep. at 36-37; Staffer #6 Dep. at 38.

email received by the Director of Investigations, she never otherwise heard the staff attorney make any additional racially insensitive or inappropriate comments.[247] Committee Members also testified to never hearing any racially insensitive or inappropriate remarks made by the staff attorney, the Director of Investigations or anyone else on the staff.[248] In fact, the Ranking Member testified that the Chief Counsel never even brought these allegations to his attention prior to his termination of both employees.[249]

Even those individuals who testified to hearing insensitive remarks being made did not report those remarks to anyone in a supervisory position.[250]

Despite hearing remarks that were classified as either racially insensitive or inappropriate made by the staff attorney, no one accused her of racism or of allowing any insensitivity to invade her decision-making with respect to cases. Rather, the African-American attorney who was the subject of the previously discussed email made a point of stating that he did not want to paint her as a bigot, but rather indicated that the staff attorney was a nice, thoughtful person who was just lacking in cultural awareness of the fact that what she said could offend someone.[251] Likewise, the junior member of the Waters team indicated that she did not take particular offense to what the staff attorney said, but rather chalked it up to people having different views.[252]

During the course of Outside Counsel's review, the staff attorney was specifically questioned regarding these comments. She recognized that in a vacuum the email regarding the member of the CBC appeared "remarkably insensitive."[253] However, she explained that the Chief Counsel repeatedly talked about the pressure the CBC was putting on the Chair to make the charges against the Representative in a different matter go away or to make them resolve quickly. Thus, as the African-American staff attorney was advocating having a particular charge in a different matter dismissed, when she sent her email she was referring to the pressure the Chief Counsel referred to and not about the staff attorney himself.[254]

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[247] *See* DOI Dep. at 183.

[248] *See* Member #6 Dep. at 74; Member #7 Dep. at 54-55; Member #1 Dep. at 52; Member #3 Dep. at 44-45; Member #8 Dep. at 38-39; Member #2 Dep. at 55-56; Member #5 Dep. at 45-46; Member #4 Dep. at 37.

[249] *See* RM Dep. at 110-111.

[250] *See* Staffer #2 Dep. at 164; Staffer #5 Dep. at 54.

[251] *See* Staffer #5 Dep. at 46.

[252] *See* Staffer #2 Dep. at 164-165.

[253] *See* Staffer #1 Dep. at 135.

[254] *See id.* at 135-136.

With respect to the alleged comments regarding lawyers from Prince George's County, the staff attorney categorically denied making any such comment, and further stated that she never worked with lawyers from Prince George's County.[255] She indicated that most of the prosecutors she worked with were excellent attorneys, and to the extent they were not it had nothing to do with their race.[256] The staff attorney also denied making comments about it being difficult to get a conviction because she was blond-haired and blue-eyed, and stated that it was untrue as she did, in fact, get convictions.[257]

The Outside Counsel concludes that the staff member made racially insensitive and inappropriate comments. From a constitutional perspective, however, the comments' impact is less clear. Representative Waters could assert a violation of the Equal Protection Clause, either as a claim of deprivation of liberty or racial discrimination/selective prosecution, although the Outside Counsel does not believe the record would establish either claim.[258] With respect to an equal protection claim based on deprivation of liberty, courts have long held that, without proof of some additional constitutional injury, even the most offensive racial statements do not deprive a person of equal protection of the law.[259] Thus, even comments far worse than those allegedly made in this instance have been found not to cross any constitutional threshold even for criminal defendants who are the subject of racial epithets by their arresting officer.[260] In this case, Representative Waters cannot assert any additional constitutional injury

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[255] *See id.* at 139.

[256] *See id.*

[257] *See id.* at 140-141.

[258] Representative Waters has not, and could not, assert a claim under Title VII of the 1964 Civil Rights Act or 42 U.S.C. § 1981. However, courts apply the same standard or proof for discriminatory intent or purpose as in the equal protection context. Accordingly, judicial authority from those areas of law is relevant to any equal protection analysis. *See Redding v. Tuggle*, 2007 U.S. Dist. LEXIS 67853, at *32 (N.D. Ga. July 11, 2007) ("Claims brought under Title VII, § 1981, and the Equal Protection Clause are analyzed under the same framework, and all require proof of intentional discrimination."); *Johnson v. City of Fort Wayne*, 91 F.3d 922, 940 (7th Cir. Ind. 1996) ("Although section 1981 and Title VII differ in the types of discrimination they proscribe, the methods of proof and elements of the case are essentially identical.").

[259] *See Williams v. Bramer*, 180 F.3d 699, 706 (5th Cir.1999) ("[A]n officer's use of a racial epithet, without harassment or some other conduct that deprives the victim of established rights, does not amount to an equal protection violation ."); *Brims v. Barlow*, 441 Fed. Appx. 674, 678 (11th Cir. 2011) ("Here, even if one were to accept Brims's contention that Barlow used a racial epithet, Brims has not established that Barlow engaged in any other misconduct. Therefore, to the extent that Brims was attempting to bring a separate equal protection claim, that claim is meritless."); *Carter v. Morris*, 164 F.3d 215, 219 (4th Cir. 1999) ("although Carter alleges that individual officers insulted her with racial epithets, such undeniably deplorable and unprofessional behavior does not by itself rise to the level of a constitutional violation.").

[260] *See Williams*, 180 F.3d at 702 (no equal protection violation where officer allegedly called African American arrestee "boy" and [the 'N' word]). Given that congressional disciplinary matters carry far less due process weight than criminal matters in general, it would seem odd were Members of Congress to award themselves greater constitutional protections than those afforded to criminal defendants.

because the Committee never recommended, and the House never adopted, any sanction of her. Moreover, even if Representative Waters had suffered some constitutionally cognizable injury, it was cured by the process of recommitting her matter to the ISC and, ultimately, by the formation of a new Committee to decide her matter.

If Representative Water instead alleges that she was unfairly targeted, or the investigation against her was otherwise tainted, based on her race, she would be required to show that the Committee's actions against her "had a discriminatory effect and [were] motivated by a discriminatory purpose."[261] With respect to discriminatory purpose, "[o]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [race] . . . constitute direct evidence of discrimination."[262] Thus, courts have found equal protection violations only where a decisionmaker expressed a clear intent to discriminate *with respect to the decision at issue.*[263] Further, "[r]emarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination."[264] Thus, even where courts have acknowledged the existence of "deplorable and reprehensible" racial comments, they have dismissed equal protection claims where there was no connection between the comments and the action or decision complained of.[265]

As a threshold matter, none of the racial comments alleged here were connected in any way to the Waters matter. Rather, the comments were more akin to the type of "stray remarks" in an office setting that, when "unrelated to the decisional process, are insufficient to demonstrate that [the defendant] relied on illegitimate criteria, even when such statements are made by the decisionmaker in issue."[266]

It is also important to note that neither the staff member who made the inappropriate comments was not involved at the ISC stage, although she was involved in the preparations for the ASC hearing (which never occurred). The Outside Counsel

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[261] *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quotation omitted).

[262] *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999).

[263] *See id.* at 1359 (example of a statement indicating discriminatory purpose would be "Fire Earley—he is too old.").

[264] *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir.1998); *cf. Gonzalez-Droz v. Gonzalez-Colon*, 660 F3d 1, 15 (4th Cir. 2011) (where a medical board investigator was alleged to have exhibited bias against a doctor whom he was investigating, court held that "[c]ertainly, 'a biased decisionmaker [is] constitutionally unacceptable.' But [respondent's] duties as the Board's investigative officer do not involve decisionmaking. A person who investigates and presents an agency's case, unlike a decisionmaker, does not have to be neutral.").

[265] *See Club Retro v. Hilton*, 568 F.3d 181, 213 (5th Cir. 2009) ("As deplorable and reprehensible as the use of racial profanity is, particularly in the context of intrusive displays of official police authority, plaintiffs have not alleged that any defendant made a statement that he targeted Club Retro because it was minority-owned and attracted a mixed-race and mixed-ethnicity crowd."); *Black Spotted Horse v. Else*, 767 F.2d 516, 517 (8th Cir. 1985) (dismissing a Fifth Amendment equal protection claim based on racial statements because "the connection between the physical injury and the claimed racial prejudice is not close enough").

[266] *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989).

found no evidence that e the staff member at issue made any decisions that determined the outcome of the matter.

Indeed, the Chief Counsel, despite his awareness of all of the alleged comments, concluded that "the [ISC] acted honorably in making their decision and reporting the case out."[267] He also testified that he did not have any basis to believe that any racial bias or insensitivity by any staff members affected the Committee's investigation of Representative Waters.[268] Further, he believed that the recommital was the best option for the ASC as well.[269] Accordingly, although the Outside Counsel finds the statements by the former staff member, if accurate, entirely inappropriate. There is no reason to believe that the ultimate decisions in this matter—the adoption of an SAV by the ISC, and the decision to recommit by the ASC—were motivated by the comments or any bias they allegedly reflected. Outside Counsel thus recommends that the Waters Committee ultimately find that the alleged racial remarks made by a staff member do not rise to the level of a Constitutional violation.[270]

IV. CONCLUSIONS AND RECOMMENDATIONS REGARDING DUE PROCESS ANALYSIS

For the foregoing reasons, it is our opinion that Representative Waters and the Committee failed to raise any viable due process violations, nor did Outside Counsel identify any additional due process violations not raised by either Representative Waters or the Committee. As such, the Outside Counsel recommended, and the Waters Committee unanimously voted to consider the matter through the normal course.

V. FACTUAL FINDINGS REGARDING SUBSTANTIVE ALLEGATIONS

A. Background and Summary of Factual Findings

On September 7, 2008, the United States Department of Treasury ("Treasury") and the Federal Housing Finance Agency ("FHFA") placed two government-sponsored entities (the "GSEs"), the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), into conservatorship. At that time, OneUnited Bank, a minority depository institution ("MDI") headquartered in Boston, Massachusetts, held substantial investments in the GSEs preferred stock. Due to the effect of the Conservatorship on the value of the GSEs' preferred stock, OneUnited incurred unrealized losses on its investments that effectively wiped out all of OneUnited's Tier 1 capital, and, according to the bank executives, threatened the existence of the bank.

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[267] Chief Counsel Dep. at 85.

[268] Chief Counsel Dep. at 88.

[269] *Id.*

[270] *See Stewart v. Harrah's Illinois Corp.*, 2000 U.S. Dist. LEXIS 10413, at *60-61 (N.D. Ill., July 18, 2000) ("Although [the officer's statement . . . is undoubtedly offensive, it is insufficient to show that race motivated Stewart's arrest or the charges brought against him. The record clearly reflects the existence of probable cause to arrest and charge Stewart—the single remark, unrelated to those actions, does not establish that racial animus was the motivating factor for [the officer's] actions.").

Representative Waters' husband was a former member of the OneUnited Board and, as a condition of his service, was required by Massachusetts law to purchase stock in OneUnited. On December 31, 2007, Representative Waters' husband owned stock in OneUnited that accounted for less than 0.5% of the outstanding stock in the bank. The stock was valued at approximately $350,000 and accounted for somewhere between 4.6% and 15.2% of Representative Waters' and her husband's combined net worth. By the end of September 2008, the stock was valued at approximately half that amount.

On September 9, 2008, in the midst of the 2008 financial crisis and the day after the GSEs were placed into the Conservatorship, OneUnited executives contacted several Members of Congress, including Representative Waters and the Chairman of the Financial Services Committee, seeking assistance with arranging a meeting with Treasury to discuss the Conservatorship. The evidence shows that OneUnited's Chairman and Chief Executive Officer ("CEO") expressed to Representative Waters that he was speaking on behalf of MDIs generally. Further, the bank's senior counsel, who was also the Chair-Elect of the Board of Directors of the National Bankers Association[271] (the "NBA") and Chair of the NBA's Legislative Affairs Committee, indicated that he was meeting with her in his capacity as Chair-Elect of the NBA.

After the conversations with OneUnited's CEO and Senior Counsel, Representative Waters agreed to assist with arranging a meeting with Treasury, and placed a telephone call to the then-Secretary of the Treasury to arrange a meeting with several senior Treasury officials and with what she believed were representatives from the NBA. The evidence supports the conclusion that at the time Representative Waters placed her call to the then-Treasury Secretary she believed she was acting on behalf of the NBA.

The meeting with Treasury took place on September 9, 2008. OneUnited was the only NBA bank personally represented at the meeting that was attended by high ranking Treasury officials and bank regulators, as well as staffers working for Representative Waters, the Chairman of the Financial Services Committee and a staffer for a Massachusetts Senator. While recollections of the meeting attendees varied, no witness believed the meeting was called specifically on behalf of OneUnited, but rather it appeared to be a meeting to discuss the conservatorship on minority banks in general.[272] During this time period in 2008, the impact of the conservatorship on minority banks was not widely known. The NBA had begun a survey that had not yet been completed. However, one FDIC official shared with regulators following the meeting that FDIC research indicated that only two minority banks were going to be impacted. OneUnited was one of those two banks. During the meeting, following a general discussion of the conservatorship, OneUnited's CEO used OneUnited as an example of the conservatorship on minority banks and explicitly requested that Treasury pay $50 million to OneUnited for the purchase, or "buy back", of its shares of Freddie Mac

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[271] The NBA is a trade association founded in 1927 that represents minority and women owned banks. *See http://nationalbankers.org/profile.asp* (last visited August 15, 2012).

[272] This is consistent with internal Treasury emails, which referred to the meeting as the "Minority Bankers Association Meeting" and did not include any reference to OneUnited. (*See* Bates Nos. COE.WAT.OC.012646-02662.)

and Fannie Mae. The Treasury officials and bank regulators told the attendees at the meeting that they did not have the legal authority to grant OneUnited's request.

Soon after the September 9, 2008, meeting, the then-Treasury Secretary placed a telephone call to Representative Waters in which he expressed his concern to Representative Waters that he had made the meeting available to all MDIs, but OneUnited was the only MDI represented at that meeting.

Sometime in September 2008, Representative Waters learned that OneUnited requested $50 million from Treasury and determined that she should not assist OneUnited with that request because her husband's investment in and former association with the bank created a conflict of interest.[273] Sometime after Representative Waters made this determination, she spoke with the Chairman of the Financial Services Committee about her husband's past relationship with the bank, and expressed concern that this relationship created a conflict of interest. The Chairman, who told the Committee that he was unaware of Representative Waters' husband's financial interest in the bank, counseled Representative Waters to not assist OneUnited, and said that he would take care of it. While the exact date of this conversation is not clear in the record, it likely occurred sometime between September 9 and September 20, 2008.

Following the Treasury meeting, OneUnited executives continued to ask for help from both Representative Waters' office and from the Chairman of the Financial Services Committee. Despite Representative Waters' discussion with the Chairman of the Financial Services Committee, her Chief of Staff ("COS") continued to have contact with OneUnited related to the bank's request for assistance from Treasury. Outside Counsel did not discover any evidence that Representative Waters was aware of her COS's continued contact with OneUnited, but determined that her COS was acting within the scope and course of his employment.

On October 3, 2008, The Emergency Economic Stabilization Act of 2008 ("EESA") was enacted. EESA established the Troubled Asset Relief Program ("TARP"). The Chairman of the Financial Services Committee advocated for the inclusion of a provision within EESA that specifically granted Treasury the authority to assist small minority and community banks, such as OneUnited, in restoring their capitalization. OneUnited ultimately received approximately $12 million in TARP funds and a tax credit waiver from the FDIC that was worth approximately $20 million. OneUnited also raised approximately $17 million in private capital. Without the private capital, TARP funds and tax waiver, OneUnited would not have been able to remain adequately capitalized and believed it would have faced imminent threat of failure.

B. Representative Waters' Background

Representative Waters was elected to the House of Representative in 1990, and has represented the 35th district of California since that time. She is currently the most senior African-American Member of the Financial Services Committee and is the Ranking Member

[273] As discussed, *infra*, n.481, following the Treasury meeting, Representative Waters' COS did not convey to Representative Waters that OneUnited had specifically requested $50 million from Treasury.

of the Subcommittee on Capital Markets and Government Sponsored Enterprises. Representative Waters also serves on the House Committee on the Judiciary. In addition, she is involved with Congressional Democratic Leadership, and serves as a Chief Deputy Whip and as a member of the Steering & Policy Committee. She is also an influential member of the Congressional Black Caucus, where she served as the former Chairwoman. Representative Waters is married to a former U.S. Ambassador to the Commonwealth of the Bahamas, and, among other of her legislative and policy concerns, has a long history of advocating for diversity and inclusion of women and minority and specifically for assisting small and minority owned banks generally.[274] She also has a history of working with minority associations including the NBA, the National Association of Women and Minority Law Firms, the National Association of Securities Professionals, and the Minority Auto Dealers.[275]

C. OneUnited Bank

OneUnited is a privately-held, minority-owned bank incorporated in Massachusetts. OneUnited's headquarters are located in Boston, and the bank has offices in Miami and Los Angeles. OneUnited is a designated Community Development Financial Institution ("CDFI"). According to its website, OneUnited is the "first Black internet bank and the largest Black owned bank in the country."[276] The bank's stated mission is "to be the premier banking institution for urban communities across America."[277]

1. Senior Management

OneUnited has three members of senior management that are relevant to this review. The first is the CEO and Chairman of the Board. He began serving as Chairman of the Board between 1995 and 1996, and became the CEO between 2006 and 2007.[278] The CEO and Chairman of the Board has contributed $1,000 to Representative Waters via the Citizens for Waters campaign fund in 2002, 2003 and 2005, for a total of $3,000, although he testified that he did not recall making the contributions and believed his wife likely made them on his behalf.[279]

The second relevant individual in management at OneUnited is the President and Chief Operating Officer ("COO") of OneUnited. She is married to the CEO and Chairman, and has been with OneUnited since 1994. She has served as the President and COO for approximately six years.[280] Like her husband, she has also contributed to

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[274] *See* Rep. Waters Dep. at 15.

[275] *See* NBA President Dep. at 15-16; 7/5/12 Rep. Waters COS Dep. at 74.

[276] https://www.oneunited.com/about-us/ (last visited August 14, 2012).

[277] *Id.*

[278] *See* OU CEO Dep. at 7.

[279] *See id.* at 21-22.

[280] *See* OU COO Dep. at 6.

Representative Waters' campaign fund. In addition, Representative Waters testified before the ISC that the couple hosted a fundraiser for her at their home in Malibu, California.[281]

Finally, the third relevant individual is the Senior Counsel at OneUnited, who, during the relevant time period, also served as the Chair-Elect of the NBA and Chair of the NBA's Legislative Affairs Committee. He has been serving as OneUnited's Senior Counsel since 1997.[282]

2. Board of Directors

The Board of Directors of OneUnited currently consists of ten members, including the CEO and the COO, as well as a lobbyist and expert in the banking field, who was also a witness in this matter.[283] The minimum and maximum number of board members is set by OneUnited's bylaws and may increase or decrease as needed.[284] Board members serve for one-year terms and are elected on an annual basis.[285] The Board meets once per month and board members are compensated on a per diem basis for each meeting attended.[286]

3. Representative Waters' Husband's Service on the OneUnited Board

Representative Waters' husband served on the Board of Directors of OneUnited beginning in 2004, and he resigned from the Board on April 21, 2008.[287] The Chairman and CEO asked Representative Waters' husband to serve on the board after he was recommended by another Board member.[288] Representative Waters' husband told the ISC that he became acquainted with the Chairman and CEO through their attendance at periodic fundraisers in the Los Angeles area.[289] As a board member, Representative Waters' husband participated in Board meetings held on a monthly basis. During his

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[281] *See* Rep. Waters Dep. at 8-9.

[282] *See* OU Counsel Dep. at 5-6.

[283] *See https://www.oneunited.com/about-us/company-profile/board-of-directors/* (last visited August 15, 2012).

[284] *See* OU CEO Dep. at 16.

[285] *See* OU Counsel Dep. at 106.

[286] *See id.* at 105-106.

[287] *See* Amb. Dep. at 6; COE.WAT.OC.014496.

[288] *See* Amb. Dep. at 6; OU COO Dep. at 12.

[289] *See* Amb. Dep. at 13-14.

time as a board member, he declined to receive the ordinary compensation for service on the Board.[290]

Prior to his service on the Board, Representative Waters' husband did not own shares of OneUnited stock.[291] Massachusetts law required him to purchase qualifying common stock of not less than one thousand dollars prior to his service on the Board. *See* Mass. Gen. Laws, ch. 172 § 13 (2009). Due to this requirement, Representative Waters' husband purchased 476 shares of OneUnited Common stock and purchased an additional 3,500 shares of OneUnited Preferred A stock as an investment in the bank itself.[292] As of December 31, 2007, Representative Waters' husband's OneUnited stock accounted for somewhere between 4.6% and 15.2% of his and Representative Waters' combined net worth.[293] Representative Waters' husband's OneUnited holdings equaled less than one-half of one percent of the total of OneUnited shares.[294] In June 2008, Representative Waters' husband's OneUnited stock was valued at approximately $350,000.[295]

D. National Bankers Association

The NBA is a trade association for minority and women-owned banks. Founded in 1927, the NBA advocates on behalf of minority and women-owned banks on legislative and regulatory matters concerning and affecting NBA members and the communities they serve.[296] The NBA currently has a membership of 103 banks in 29 states, two territories and the District of Columbia.[297]

1. NBA Staff

The NBA maintains its offices in Washington, DC. The current president of the NBA also served in that capacity during the relevant time period. The NBA President's primary responsibility is to advocate on behalf of the NBA to Members of Congress, the Executive Branch, and regulatory agencies.[298] The President also functions as the chief

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[290] *See* OU COO p. 41.

[291] *See* Representative Waters 2003 Financial Disclosure Statements.

[292] *See* Amb. Dep. at 19.

[293] These numbers are based on the various ranges for investment values found in Representative Waters' Financial Disclosure Statement for the 2007 calendar year.

[294] *See* COE.WAT.OC.015065.

[295] *See* COE.WAT.OC.015173.

[296] *See* http://nationalbankers.org/profile.asp (last visited August 15, 2012).

[297] *See id.*

[298] *See* NBA President Dep. at 5.

executive officer handling the day-today activities of the NBA. The NBA also employs a full-time special assistant to the President, and one other part-time staff member.

In the early part of 2008, the NBA's former president resigned.[299] The previous president had served in that capacity for over 10 years. After the resignation of the prior president, the NBA was without a president for approximately five months. The current president began working on September 1, 2008.[300] The current president spent his first week on the job at Citizens Bank in Nashville, Tennessee, undergoing training.[301]

2. NBA Board

The NBA is governed by a board of executives consisting of thirteen to fourteen members.[302] The board usually meets four to six times per year and is considered the policy-making body of the NBA. The board determines a plan of action for the NBA. The NBA's governing structure also consists of a Legislative Affairs Committee and an Executive Committee.[303] According to the NBA's bylaws, the purpose of the Legislative Affairs Committee is to further "the interests of minority financial institutions through effective coordination with Congress, Banking regulatory agencies including the Federal Reserve Board, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and the Comptroller of the Currency."[304] The Legislative Affairs Committee is also tasked with "planning and setting up meetings between NBA members and key Members of congress and the administration."[305]

3. OneUnited Officer's Service with NBA

During the relevant time period of this matter, OneUnited's Senior Counsel also chaired the NBA's Legislative Affairs Committee. During his interview before the ISC, he testified that as Chairman of the Legislative Affairs Committee, he set the legislative agenda for the association, and planned and scheduled meetings with NBA member banks and with key Members of Congress and the Administration regarding matters that might be averse to the minority banking industry.[306]

In 2007, OneUnited's Senior Counsel was elected to the Board of Directors of the NBA as Chairman-Elect and served in that capacity from 2007 to 2008. In 2009, he

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[299] *See* OU Counsel Dep. at 14-15.

[300] *See id.* at 15.

[301] *See* NBA President Dep. at 25.

[302] *See id.*

[303] *See id. at* 8.

[304] COE.WAT.OC.014975.

[305] *Id.*

[306] *See* OU Counsel Dep. at 12.

began his term as the Chairman of the Board of Directors.[307] He is currently the NBA's Immediate Past Chairman.[308]

4. Representative Waters' Relationship with NBA

The evidence gathered during the ISC in this matter, as well as by Outside Counsel, demonstrates that Representative Waters has consistently supported the NBA since she has been a member of Congress. In fact, Representative Waters testified that she has worked with the NBA:

> almost since I came to Congress. It's one of the minority organizations that I've always supported. I speak at their national conventions. Various members contact me from time to time. And I'm always interested in the public policy surrounding minority bankers and small bankers and community bankers. So I'm very familiar with the NBA.[309]

Likewise, in his interview with the Outside Counsel, Representative Waters' COS testified that:

> the Congresswoman is the go-to person for many trade associations, specifically trade associations that operate in the minority business space. So whether we're talking about the minority auto dealers, National Bankers Association, national securities professionals, accountants, lawyers, et cetera, she's someone that folks seek out to help gain access to the Federal Government and impact the legislative process.[310]

The current President of the NBA, who is not associated with OneUnited, testified before the ISC that Representative Waters often advocated on behalf of the NBA. He stated that "[w]henever I was trying to get a meeting with Treasury, it was Congresswoman Maxine Waters who I called. Why? Because that was the role she always played."[311] The NBA President explained, "if we call her to say we've got this particular problem, she steps in to do what she can do...going to her is what we always did, you know, and she always responded. She's highly regarded by our bankers for the advocacy role that she's played."[312]

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[307] *See id.* at 9.

[308] *See* http://nationalbankers.org/boardmembers.asp (last visited August 15, 2012).

[309] *See* Rep. Waters Dep. at 15.

[310] 7/5/12 Rep. Waters' COS Dep. at 6.

[311] *See* NBA President Dep. at 16.

[312] *See id.*

OneUnited's Senior Counsel, who was also the NBA Chair-elect and Chair of the Legislative Affairs Subcommittee, stated that the NBA would contact Representative Waters on issues that impacted minority banks.[313] He also testified that in his role as Senior Counsel of OneUnited, he would contact Representative Waters on issues impacting OneUnited because the bank operated a branch in her district.[314] He explained that "we have a sort of long had a close relationship sort of with her. So there are a number of matters that affect her community, of which the bank is an integral part of that community, and it would be logical to sort of go to her on matters that would affect her district."[315]

In the fall of 2008, the NBA lobbied in support of passing the EESA legislation. Due to her role as an advocate for issues impacting the NBA, Representative Waters was contacted by, among other groups, executives of the NBA.[316]

E. Fannie Mae, Freddie Mac and OneUnited

1. OneUnited's Investments in Fannie Mae and Freddie Mac

The evidence demonstrates that as of September 2008, OneUnited had a substantial investment in the preferred stock of the GSEs. As of September 5, 2008, OneUnited held 600,000 shares of Fannie Mae preferred stock, series S; 200,000 shares of Fannie Mae preferred stock, series Q; and 100,000 shares of Fannie Mae preferred stock, series N.[317] As of September 5, 2008, OneUnited held 800,000 shares of Freddie Mac preferred stock, series Z and 125,000 shares of Freddie Mac preferred stock, series T.[318] The Chairman and CEO of OneUnited testified that in June 2008, OneUnited "had a larger investment in Freddie and Fannie preferred stock...than we had Tier 1 capital."[319]

The Director of the Division of Supervision and Consumer Protection at the FDIC testified before the ISC that OneUnited increased its holdings of the GSEs' preferred shares in 2008, leading to its overexposure to these shares.[320] In fact, the Director of Division of Supervision and Consumer Protection FDIC also testified that the Area

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313 *See* OU Counsel Dep. at 18-19.

314 *See id.* at 20.

315 *Id.*

316 *See* Rep. Waters Dep. at 7.

317 *See* COE.WAT.OC.015014.

318 *See id.*

319 OU CEO Dep. at 31.

320 *See* FDIC Director Dep. at 29.

Director for the FDIC's Boston Area Office told OneUnited Executives that its investment in the shares was high, "because I think it was 100-some odd percent of their capital, over 100 percent of their capital, and that was not good."[321]

While the Chair and CEO of OneUnited believed there may have been discussions between the bank and the FDIC regarding the bank's high concentration of Freddie and Fannie stock, he also indicated that the bank felt the government encouraged banks to invest in Freddie and Fannie by stating they were "safe and sound investments."[322] He also monitored news reports where policymakers extolled the "virtues of Fannie Mae and what they represented, bringing low and moderate income folks into the mainstream and supporting the mission of Fannie Mae."[323] He also testified that the Office of the Comptroller of the Currency ("OCC") provided a low risk weighting for Fannie Mae, which was another way the government encouraged the investment as a safe investment.[324] Similarly, the President of the NBA testified that "our banks were told this was a good investment to purchase this GSE stock, Fannie Mae."[325]

2. Government Conservatorship of the GSEs

In July 2008, Congress granted the Treasury, the Federal Reserve and the FHFA new authorities with respect to Fannie Mae and Freddie Mac.[326] Treasury, the Federal Reserve and FHFA eventually determined that it was necessary to take action, and on September 7, 2008, FHFA placed the GSEs into conservatorship.[327]

3. Effect of Conservatorship on OneUnited and other Minority and Community Banks

Following the conservatorship, the FDIC "ran reports to try to identify those institutions that would have been impacted by that decision."[328] The Director of the Division of Supervision and Consumer Protection at the FDIC believed that "all of the bank regulators had that information because we wanted to understand the impact of

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[321] *Id.*

[322] *See* OU CEO Dep. at 46.

[323] *Id.*

[324] OU Counsel Dep. at 48.

[325] NBA President Dep. at 13.

[326] *See* Statement by Secretary Henry M. Paulson, Jr. on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers, September 7, 2008 (hereinafter September 2008 Paulson Statement).

[327] *See* September 2008 Paulson Statement.

[328] FDIC Director Dep. at 12-13.

the decision on the banks' capital, so we ran it for a broad universe, all institutions, and we also ran it for the MDIs as well."[329]

After running its reports, the FDIC determined that with respect to MDIs, there were less than five institutions "whose capital was significantly impacted by the placement of Fannie and Freddie into conservatorship."[330] Following the conservatorship, the FDIC "ran reports to try to identify those institutions that would have been impacted by that decision."[331] The Director of the Division of Supervision and Consumer Protection at the FDIC explained that by "significantly impacted" she meant that:

> There are different capital levels that have different percentages. Like 10 percent is well-capitalized, and 2 percent is critically undercapitalized; and when a bank has a 2 percent capital level, then PCA, the prompt corrective action, kicks in, and they've got 90 days to come up with a capital plan...[P]rior to Fannie and Freddie being placed into a – into conservatorship, they were counted as capital; and when we ran our numbers, we noted that there were – I can't remember in terms of the total universe of institutions that were impacted, but I don't think there were a whole, whole lot, but I know for the MDIs there were two that were impacted where the capital levels would have taken them to critically undercapitalized, under the 2 percent level or lower.[332]

One of the two MDIs who would have become critically undercapitalized due to the Conservatorship was OneUnited.[333] The Senior Counsel of OneUnited believed that after the Conservatorship "the bank was in danger of failing because it was operating without capital."[334] Likewise, the President of OneUnited testified before the ISC that OneUnited "had about $50 million invested in Fannie and Freddie preferred, and I think our unrealized loss was about close to $50 million. So...the stock went down to close to zero."[335]

Nonetheless, the two MDIs that were affected by the conservatorship, which includes OneUnited, were not the only small banks affected by the conservatorship. The evidence demonstrates that community banks were also affected, thus the overall community of small and minority banks affected by the conservatorship was greater

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[329] *Id.* at 13.

[330] *Id.*

[331] *Id.* at 12-13.

[332] *Id.* at 13-14.

[333] *Id.* at 14.

[334] OU Counsel Dep. at 72.

[335] OU COO Dep. at 20.

than only the two MDIs. A staff attorney for the Financial Services Committee testified before the Outside Counsel that "there were a few dozen banks that were in a similar situation that OneUnited was in."[336] The staff attorney clarified that these banks were "small community banks."[337] Another Financial Services staffer also testified that around this same time, the Financial Services Committee was made aware that there were "other smaller-sized institutions that were similarly situated" to OneUnited.[338] Representative Waters' COS similarly testified that "the Independent Community Bankers Association sent in a survey that they had that identified, out of a small portion of their banks, 40-plus that had had significant impact by Fannie and Freddie."[339]

F. OneUnited's Reaction to the Conservatorship

In the time leading up to, and immediately after the GSEs were placed into the conservatorship, OneUnited's Senior Counsel and OneUnited's Chairman and CEO contacted several Members of Congress, including Representative Waters, the Chairman of the Financial Services Committee and a Massachusetts Senator, seeking assistance with setting up a meeting with Treasury to discuss the conservatorship. During his meeting with Representative Waters, the Senior Counsel of OneUnited indicated that he was meeting with her in his capacity as Chair-Elect of the NBA. Similarly, the Chairman and CEO of OneUnited expressed that he was approaching her on behalf of MDIs generally.[340] While it is true that the Senior Counsel of OneUnited testified that during the same time period he was also the chairman-elect of the NBA and chairman of the NBA's Legislative Affairs Committee and that he didn't have an "exact recollection of when and how I distinguished the roles," there is no evidence in the record to suggest that Representative Waters had any reason to believe that the two individuals had not approached her on behalf of the NBA and MDIs generally.[341]

1. Initial Outreach Efforts

On August 22, 2008, the Senior Counsel of OneUnited/Chair-Elect of the NBA sent a letter to Representative Waters on OneUnited letterhead attaching a memorandum discussing the issues facing minority banks, Community Development Financial Institutions ("CDFIs") and not-for profits in connection with the recent decline of the stock prices of Fannie Mae and Freddie Mac securities.[342] Even though the letter was written on OneUnited letterhead, in the letter, the Senior Counsel of

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[336] 7/23/12 FSC Staffer #1 Dep. at 12.

[337] *Id.* at 13.

[338] 7/25/12 FSC Staffer #2 Dep. at 17.

[339] 7/5/12 Rep. Waters' COS Dep. at 46.

[340] *See* Rep. Waters Dep. at 18-19.

[341] OU Counsel Dep. at 79.

[342] CSOC.WAT.000707-712, attached hereto as Ex. 22.

OneUnited/Chair-Elect of the NBA indicates that he is the Chairman-Elect of the NBA and in that capacity is asking for a contact to follow-up with the Treasury Department.[343]

A memorandum attached to the August 22, 2008, letter, states that "[t]he recent decline in the value of the preferred stock of Government-Sponsored Entities ("GSEs") creates significant and possibly fatal losses for minority banks, Community Development Financial Institutions ("CDFIs") and not-for-profit organizations."[344] Prior to drafting this letter, the Senior Counsel of OneUnited/Chair-Elect of the NBA testified that he had conversations with a number of NBA member banks, although he could not recall which banks he spoke with, other than Unity Bank and Trust.[345] In addition, the NBA President, who began serving in that capacity in September 2008, stated that many member banks were "concerned" about the conservatorship and would call him.[346] The President also stated that the NBA would usually contact Representative Waters for assistance with such matters, "[b]ecause that was the role she always played."[347] He continued by stating that it "was not uncommon for her to step in and advocate for these banks. And the record is replete with examples of it."[348]

On September 6, 2008, the Senior Counsel of OneUnited/Chair-Elect of the NBA sent a letter directly to the then-Treasury Secretary and copied both Representative Waters and the Chairman of the Financial Services Committee.[349] This letter was written on NBA letterhead and sought to ensure that the interests of minority banks were properly protected in any resolutions reached regarding the Freddie Mac and Fannie Mae conservatorship.[350] The signature block of the letter indicated that it was sent by the "Chair-Elect" of the NBA.[351]

The Chair-Elect testified that he wrote the letter because he believed MDIs as a whole would be affected by the conservatorship.[352] He testified that the basis of the concern arose out of the very strong relationship between the GSEs and minority banks.[353] He stated that the NBA had an agreement with Fannie Mae wherein Fannie

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343 *See id.*

344 *Id.*

345 *See* OU Counsel Dep. at 45-46.

346 NBA President Dep. at 12-13.

347 *Id.* at 14-16.

348 *Id.* at 17.

349 *See* CSOC.WAT.00714-00715, attached hereto as Ex. 23.

350 *See id.*

351 *See id.*

352 *See* OU Counsel Dep. at 43.

353 *See id.*

Mae would "provide funds to the association and Fannie Mae would encourage certain member banks to use their products and services."[354] He continued to state that it was a "partnership, a way for the banks and Fannie and Freddie to really promote the government's agenda of affordable housing. Many minority banks, again, operate in low-to-moderate income areas. In fact, the government sort of encouraged all banks, including minority banks, to invest in Fannie and Freddie."[355] He ultimately testified that, while he only specifically recalled the name of one NBA member bank that he had spoken to that had significant exposure due to the conservatorship, he believed he had spoken with other NBA members banks regarding their Fannie and Freddie exposure prior to sending this letter.[356]

Ultimately the letter requested a resolution that would assist all minority banks, and did not specifically mention OneUnited. Rather, it stated that "we are not asking for minority banks to receive a windfall from this resolution. Rather we are simply seeking a return of the money we invested in the GSEs. In other words, each minority bank would demonstrate the amount of funds it invested into the preferred stock of the GSEs, and be assured of receiving that amount in return as part of any resolution you develop."[357] When Representative Waters received this letter, she had no reason to assume that it was written to assist any particular bank, but rather that it was written on behalf of the NBA and its member banks.

The ISC in the prior Congress focused on the fact that when this letter was sent, the NBA's board had not approved the letter and the President of the NBA was unaware that the letter was sent until several months after it was sent. However, the Chair-Elect testified that prior to sending the letter he discussed the substance of the letter with a fellow member of the Legislative Affairs Subcommittee.[358] Further, after a news article was published by the Boston Globe in March 2009, in which this letter was discussed, the NBA Board met to discuss the matter and concluded that the Chair-Elect had acted within his authority as both the Chair-Elect and the Chair of the Legislative Affairs Committee. The Board concluded that the actions taken by the Chair-Elect were "consistent with practices and authorities granted him by the association."[359]

2. Discussions with Representative Waters and Other Members

The NBA and OneUnited reached out to several members of Congress at the time of the conservatorship. For instance, the Chairman of the Financial Services Committee

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354 *Id.* at 44.

355 *Id.* at 45.

356 *See id.* at 26.

357 CSOC.WAT.00714-715, attached as Ex. 23.

358 *See* OU Counsel Dep. at 57.

359 COE.WAT.OC.013565, attached hereto as Ex. 24.

received the September 6, 2008, letter from the NBA and also received a separate letter on the same date from a Massachusetts State Senator.[360] Prior to receipt of the letter by the Massachusetts State Senator, he also received a call from her in which she stated that "there was a terrible problem with OneUnited," and that they were "about to lose the only black bank we had."[361] Even though the call from the Massachusetts State Senator was about OneUnited, the Chairman of the Financial Services Committee told her that "it is not just our problem here; it is a National issue."[362]

After speaking with the State Senator, the Chairman of the Financial Services Committee contacted his special counsel, who was a former legislator and colleague from Boston and said "hey, let's work on this and see what we can do."[363] In addition, the Chairman of the Financial Services Committee also spoke to two Representatives who represented districts in Massachusetts and served on the Financial Services Committee as well.[364] The Chairman of the Financial Services Committee testified that initially he thought "the only thing we could do was for them to get the same kind of tax relief that everybody else got. It wasn't until the TARP thing came up that it became possible to think of some other source of help."[365] He also noted that a number of banks, in addition to OneUnited, brought the issue of GSE preferred shares to his attention. Specifically he stated that "it wasn't just the African American banks. I talked to the Massachusetts Bankers Association and others, as chairman of the committee, and Members came to me. So it was one of the most common topics of conversation. Because again, remember, with the banks, when they lose the value of their preferred

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360 The Massachusetts State Senator sent a letter on September 6, 2008, to the then-Treasury Secretary, and copied Representative Waters and the Chairman of the Financial Services Committee. The Chair-Elect of the NBA testified that he had spoken with the State Senator regarding the critical deficiency in OneUnited's capital following the conservatorship. (OU Counsel Dep. at 53.) However, he testified that he did not know if she wrote a letter to anybody and did not recall seeing one. (OU Counsel Dep. at 54.) Unlike the September 6, 2008, letter from the NBA Chair-Elect, the September 6, 2008, letter from the Massachusetts State Senator specifically referred to OneUnited Bank. The prior staff determined that the two letters were textually similar as both letters noted the "substantial" interests held "in the preferred stock of GSES" and both state that they are not seeking "a windfall from the carve out. Rather, we seek a return of their investment." Both letters were sent to the former Treasury Secretary on the same day, and both copied Representative Waters and the Chairman of the Financial Services Committee. As such, the prior Committee staff concluded that the letters were drafted or influenced by the same person or persons. *Compare* COS.MW.FRANK.48 and COS.MW.FRANK.86. Outside Counsel notes the similarities in the letters, but has reached no conclusion regarding the drafter or drafters of the letters, as the issue of importance in this matter is whether Representative Waters or her staff had any reason to believe at this time that the Chair-Elect of the NBA was acting solely on behalf of OneUnited, or whether he was acting, as he stated to be, on behalf of the NBA and its member banks as a whole.

361 FSC Chair Dep. at 12, 14.

362 *Id.* at 17.

363 *Id.* at 18.

364 *See id.* at 17.

365 *Id.* at 18.

shares, that becomes a community issue because then their capital is depleted and then they can't lend as much."[366]

The Chairman of the Financial Services Committee had no prior connection to OneUnited, but stated his reason for wanting to assist them was "[t]his was an African American bank, which I think is very important; and I am proud of my record as an advocate of trying to deal with racial inequality. And it was a bank in the State I represented."[367]

The then-Chief of Staff for the Chairman of the Financial Services Committee sent the Massachusetts State Senator's letter to a staffer with the Financial Services Committee who testified that one of the issues in her portfolio is to "look at diversity issues, including ways to promote and to strengthen minority-owned financial institutions."[368] This same staffer testified before Outside Counsel that she has a history of working with Representative Waters' COS on "workforce diversity issues," and they typically communicate about minority-owned financial institutions.[369] The same day the Financial Services Staffer received the letter from the Massachusetts State Senator, she also received the September 8, 2008, letter from the NBA addressing the effect of the conservatorship on MDIs.[370]

Upon receipt of these letters, the Staffer reached out to the State Senator from Massachusetts to try and get a better understanding of the issue. The Staffer testified that the State Senator "did not have details as to the scope of the problem, and she, I believe, suggested that I call and reach out to OneUnited in particular, which I did."[371] The Staffer contacted the Special Counsel of OneUnited/Chair-Elect of the NBA who informed her "that the majority of [OneUnited's] capital was in the form of preferred stock [of the] GSEs."[372]

In terms of determining whether other minority banks were impacted by the GSE preferred stocks, the Staffer testified that:

> We didn't know the scope of the problem, we were, given the financial crisis that was looming and the concerns that if financial institutions were deemed to be vulnerable to capital issues that depositors could have a run on the bank, you know, we didn't have any concrete

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366 *Id.* at 11.

367 *Id.* at 15.

368 FSC Staffer #2 Dep. at 5.

369 7/25/12 FSC Staffer #2 Dep. at 22.

370 *See* FSC Staffer #2 Dep. at 9.

371 *See id.* at 10.

372 *Id.* at 10, 23.

> information about other minority-owned financial institutions that were similarly situated, as OneUnited.
>
> But we did understand that some of the issues raised by OneUnited and by the National Bankers Association of the possibility of vulnerability because of a likelihood that minority-owned financial institutions may have more of this preferred, type of preferred stock, led me to believe that it was possible that there were other minority-owned financial institutions that could be similarly situated.[373]

The Staffer also indicated that she made several outreaches to get a better sense of the problem and that the "regulators seemed to think there was a small number of institutions that could be vulnerable because of their ownership of preferred stock, but no one had any concrete information to dispute the National Bankers Association or OneUnited's claims or to confirm them."[374]

In addition to the NBA, the Staffer also indicated that the Independent Community Bankers Association ("ICBA") made the Financial Services Committee aware that there were "other community banks, small-sized institutions, which had similar vulnerability."[375]

At the same time that OneUnited's Special Counsel/Chair-Elect of the NBA contacted Representative Waters' office, the Chairman of the Financial Services office, and the Massachusetts State Senator's office, the Chair and CEO of OneUnited contacted a United States' Senator from Massachusetts about the problems OneUnited was having, and the Senator contacted the Treasury Secretary.[376]

Following their outreach efforts on September 6 and 7, 2008, the Chairman and CEO of OneUnited, along with OneUnited's Special Counsel/Chair-Elect of the NBA, traveled to Washington, D.C. on September 8, 2008, and each separately met with Representative Waters. Representative Waters told the ISC that she "remember[ed] coming to my office and being met I think in the hallway by [OneUnited's Special Counsel/Chair-Elect of the NBA]."[377] Representative Waters said that he "was in a panic saying that all the minority banks were in deep trouble" due to the conservatorship "and that they needed to talk with the Secretary about it."[378] Representative Waters further

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373 *Id.* at 10-11.

374 *Id.* at 11-12. There is no evidence in the record that at this time the FDIC had shared the results of its inquiry finding that less than five MDIs were affected with anyone other than regulators. Further, as will be discussed below, the NBA did not determine that only a small number of its member banks were affected until a few days after the Staffer made her outreach attempts.

375 FSC Staffer #2 Dep at 13.

376 *See* MA Senator's Leg. Dir. Dep. at 7.

377 Rep. Waters Dep. at 11.

378 *Id.*

testified that he asked her to "please help get them to the Secretary of the Treasury," and that she told him "sure, let me see what I can do."[379] During this conversation OneUnited's Special Counsel/Chair-Elect of the NBA indicated to Representative Waters that he was meeting with her in his capacity as Chair-Elect of the NBA.[380]

Likewise, Representative Waters' COS also recalled OneUnited's Special Counsel/Chair-Elect of the NBA coming to Representative Waters' office on September 8, 2008, to discuss a meeting with Treasury regarding the conservatorship.[381] Representative Waters' COS testified before the ISC that Representative Waters and OneUnited's Special Counsel/Chair-Elect of the NBA discussed "the fact that they had reached out to the Treasury Department, and that the conservatorship had happened to Fannie and Freddie, and that they hadn't got a response."[382] Representative Waters' COS further stated that OneUnited's Special Counsel/Chair-Elect of the NBA told Representative Waters "that there was a potential for, you know, several minority banks to be negatively impacted by the conservatorship, and they wanted help setting up the meeting."[383] While there is nothing in the record to demonstrate that at the time of this meeting OneUnited's Special Counsel/Chair-Elect of the NBA knew the extent of the impact of the conservatorship on MDIs, there is no evidence in the record to establish that Representative Waters had any reason to doubt what OneUnited's Special Counsel/Chair-Elect of the NBA conveyed to her.

On the same day that OneUnited's Special Counsel/Chair-Elect of the NBA met with Representative Waters, the Chair and CEO of OneUnited also met with her. When meeting with Representative Waters, he indicated that he was speaking on behalf of MDIs generally.[384] In fact, he specifically stated that the conservatorship "was an issue for minority banks, that a lot of minority banks were at risk."[385]

Following her conversations with both OneUnited's Special Counsel/Chair-Elect of the NBA and OneUnited's Chairman and CEO, Representative Waters believed that

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379 *Id.*

380 *See id.* at 18-19. The previous Committee raised concerns that OneUnited's officers were not completely honest with Representative Waters, and believed that the officers were acting solely on behalf of OneUnited and not on behalf of either the NBA or minority banks, as they claimed in their meetings with Representative Waters. The Outside Counsel was not given the mandate to investigate the actions of OneUnited, nor does the Outside Counsel believe that it is necessary to take the time to consider the issue as it is not central to the determination of this Matter. However, Outside Counsel notes that even if the two individuals misrepresented themselves during their meetings with Representative Waters, such evidence is exculpatory for Representative Waters.

381 *See* Rep. Waters' COS Dep. at 21.

382 *Id.* at 21.

383 *Id.* at 66.

384 *See* Rep. Waters Dep. at 18-19.

385 *Id.*

"all of the minority banks represented by [the NBA] were at risk."[386] She also indicated that neither gentleman ever mentioned OneUnited specifically and that she was unaware of any "particular institutions" affected by the conservatorship; although, she had "heard tales about institutions, something in Texas and something in Louisiana."[387] She also stated that after speaking to these two individuals, she did not "know what their preferred solution was."[388] In fact, she stated that they "didn't ask for anything. They asked to meet with Treasury. They didn't have a solution."[389] At this point in time, the NBA was the only institution that specifically approached her regarding the conservatorship.[390]

During these conversations with both OneUnited's Special Counsel/Chair-Elect of the NBA and OneUnited's Chairman and CEO, Representative Waters stated that her husband's stock holdings were never discussed, nor did she even think about his stock holdings when she agreed to contact the former Treasury Secretary. Moreover, Representative Waters explained her interest in assisting the NBA as follows:

> Let me just tell you this, the way things work around here. Little people, small business people, minorities, don't have access to Treasury, to the Secretaries of any of the agencies. Someone was laughing at one point and told me that the President of the BofA or Wells Fargo, they pick up the phone and they call the Secretary of the Treasury and say, hey, how are you doing? We need to talk about this. Or they walk in the door.
>
> But for small people and minorities, these community bankers, what have you, you don't get to do that. And so, they don't have access. And oftentimes, you will find, whether it's in the Latino Caucus or the Black Caucus or sometimes just rural folks who are trying to get representation for their bankers, they have to step up to the plate for them and they have to open the door and they have to get them access. But it doesn't happen easily. And I do that. I see that it's part of my job.[391]

Following her meetings with OneUnited's Special Counsel/Chair-Elect of the NBA and the Chairman and CEO of OneUnited, Representative Waters called the then-

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[386] *Id.* at 30-31.

[387] *Id.* at 31.

[388] *Id.* at 52.

[389] *Id.*

[390] *See id.* at 55.

[391] *See id.* at 15-16.

Treasury Secretary and requested a meeting on behalf of the NBA. Specifically, Representative Waters stated that she told the then-Secretary:

> That the minority banks that I think we had discussed before appeared to be in trouble and there were representative of the minority banks that were in town and they desperately wanted to come over there and see him and find out what was going on and would he see them, and he said yes.[392]

The former Treasury Secretary testified before the ISC that he was "consumed with" other matters related to the financial crisis during the week of September 8, 2008, but he remembered speaking with Representative Waters and delegating the meeting she requested, although this was not a major matter to him at the time:

> I got to tell you, these calls were so relatively unimportant relative to other things I was doing then. Given what was going on, if I ever explained it to you, on a Richter Scale of sort of a 1 to 10, they would not have even got up to near 1 in terms of everything else that was going on. And so I had hundreds of calls
> ...
> So what hit me, and I can't tell you whether it was on the first call when I called Maxine or whether she called back, so I just can't tell you. But I would say the other thing that hit me was how quickly she was on to that issue. And she really was quite aggressive with me – and I think in a very appropriate way – saying, the first thing, saying that, you know, there are banks and minority banks that have bought preferred stocks of government-sponsored enterprises thinking they were going to be money good; now...you've taken this step and wiped them out, and so she was concerned about that.
> ...
> My best recollection was she didn't mention the name of a bank. My best recollection is she didn't mention a name of, you know, the NBA. But what she wanted was me personally to meet with a group of minority bankers that were in town and to meet that week.
> And I told her I couldn't but that I would delegate that to someone else. And – and then I had our staff do it, and I can see from the correspondence that [the under-secretary] had the meeting. I had no recollection as to who I delegated that to. In the overall scheme of things, that was just not the big thing to me.[393]

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[392] *See id.* at 11.

[393] Former Treasury Sec. Dep. at 11-13. Many of the significant events of the 2008 financial crisis occurred approximately one week after Representative Waters called the former Treasury Secretary. On September 15, 2008, Lehman Brothers Holdings Inc. filed for Chapter 11 bankruptcy protection. *See http://timeline.stlouisfed.org/index.cfm?p=timeline#* (last visited August 20, 2012). That same day, Bank of America announced its intent to purchase Merrill Lynch & co. for $50 billion. (*Id.*) The next day, on September 16, 2008, the Federal Reserve Board authorized the Federal Reserve Bank of New York to

Representative Waters' COS testified that the meeting had been granted to OneUnited's Special Counsel/Chair-Elect of the NBA, in his capacity as Chair-Elect of the NBA.[394] OneUnited's Special Counsel/Chair-Elect of the NBA was in charge of sending meeting invitations, and then sent the list of attendees to Representative Waters' COS.[395] The Chief of Staff then forwarded the names of the attendees to Treasury for security clearances.[396] According to the COS's testimony before Outside Counsel, Treasury was in receipt of the names of the attendees the evening before the meeting was to occur.[397] Representative Waters told the ISC that she did not discuss her COS's actions related to setting up the meeting, but rather asked him to be responsible for the details.[398]

3. Preparations for the Meeting at Treasury

On September 8, 2008, at 6:31 PM, a Treasury employee sent an email to Representative Waters' COS confirming that the meeting would occur the next day at 11:00 AM.[399] That email confirmed that the Treasury had invited the following attendees to the meeting: then Acting Under Secretary of the Treasury, the Deputy Assistant Secretary for Financial Institutions Policy, a Senior Advisor to the Acting Under Secretary, the Director of the Office of Financial Institutions Policy, the Director of the Division of Supervision and Consumer Protection at the FDIC, the Associate Director, Division of Supervision and Consumer Protection at the FDIC, and the Deputy Comptroller from the Office of the Comptroller of the Currency ("OCC").[400] These individuals testified that the meeting was called to discuss the effect of the conservatorship on minority banks in general.

The Acting Under Secretary told the ISC that the request for the September 9, 2008, meeting "came into my office, but it probably came in that day or the – even the day before. I don't know."[401] The Acting Under Secretary did not remember who asked him to attend the meeting, but stated that the meeting "was a request to meet with

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lend up to $85 billion to the American International Group (AIG) under Section 13(3) of the Federal Reserve Act to prevent its failure. (*Id.*)

394 *See* Rep. Waters' COS Dep. at 23.

395 *See id.*

396 *See id.*

397 *See* 7/5/12 Rep. Waters' COS Dep. at 18.

398 *See* Rep. Waters Dep. at 12.

399 *See* COS.MW.FRANK.50.

400 *See id.*

401 Under Sec. Dep. at 14.

members of the broader community in terms of addressing kind of what we were doing, why we did what we did and the potential impacts on financial institutions."[402]

Further, the Director of the Division of Supervision and Consumer Protection at FDIC, who also attended the meeting, stated that she "got a phone call...the night before to come over to Treasury because there was a concern that several institutions, minority institutions, were impacted by the government's decision to place Fannie and Freddie into conservatorship."[403]

According to Representative Waters' COS, OneUnited's Special Counsel/Chair-Elect of the NBA had the primary responsibility for selecting the meeting attendees other than the representatives from Treasury and the bank regulators.[404] In fact, Representative Waters' COS testified that "in general, when we work with associations, we allow them to decide who the best person or people are to represent their association and represent the issue that they are dealing with at the time. So, I just said, the meeting is tomorrow; let me know who's coming."[405]

There is evidence in the record that the Chairman and CEO of OneUnited, who did not have a role with the NBA, invited a staffer from the Massachusetts Senator's office. "A day or two after" the Chairman and CEO of OneUnited had initially contacted the staffer, he called back and "said that there was a meeting scheduled at the Treasury Department about this issue."[406] In addition to the staffer from the Massachusetts' Senator's office, Representative Waters' COS and a staffer from the Financial Services Committee also attended the meeting. The Financial Services staffer was asked to attend the meeting by the Chairman of the Financial Services Committee.[407]

The additional individuals present at the meeting included the Chairman and CEO of OneUnited,[408] OneUnited's Special Counsel/Chair-Elect of the NBA, and the President of OneUnited. A partner with the law firm of Goodwin Procter LLP, who was Outside Counsel to both OneUnited and the NBA, also attended the meeting. He testified that he believed he "was representing the National Bankers Association" at the Treasury meeting.[409] The NBA had been a pro bono client of his for approximately a

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[402] *Id.*

[403] FDIC Director Dep. at 12.

[404] *See* Rep. Waters' COS Dep. at 67.

[405] *Id.* at 67-68.

[406] MA Senator Leg. Dir. Dep. at 7.

[407] *See* Waters_071912_31, attached hereto as Ex. 25.

[408] Although the Chairman and CEO of OneUnited informed a staffer from the Massachusetts Senator's office that the meeting had been set up, during his testimony before the ISC he stated that he did not recall inviting anyone to the meeting. (OU CEO Dep. at 39.)

[409] NBA Counsel Dep. at 9.

year and a half at the time of the Treasury meeting, and had been Outside Counsel for OneUnited for approximately 10 years.[410]

The only NBA member bank represented at the meeting was OneUnited. While OneUnited's Special Counsel/Chair-Elect of the NBA stated that he considered inviting other NBA members, he "didn't know, again, who was impacted at that time."[411] And while he considered doing a survey of other NBA member banks before sending the September 6, 2008, letter, the "meeting again was done on a moment's notice."[412]

Neither the then Chairman of the NBA nor the President of NBA attended the meeting.[413] The President told the ISC that he did not find out about the meeting until after it occurred, and ultimately asked OneUnited's Special Counsel/Chair-Elect of the NBA why he would "have a meeting at Treasury or anywhere else without consulting me?"[414] Despite the President's displeasure with the actions of OneUnited's Special Counsel/Chair-Elect of the NBA, in March 2009, the NBA Board of Directors determined that all actions taken on behalf of the NBA by OneUnited's Special Counsel/Chair-Elect of the NBA during this time frame were "consistent with practices and authority granted him by the Association."[415] Furthermore, there is no evidence in the record to demonstrate that Representative Waters knew that the President of the NBA was unaware of the request for the Treasury meeting.

4. Meeting at Treasury

Outside Counsel's review determined that the meeting at Treasury was essentially comprised of three parts: 1) a general discussion of the effects of the conservatorship by government officials; 2) a discussion of the impact on OneUnited specifically as an exemplar of the effect the conservatorship could have on minority banks; and 3) a specific request for $50 million by OneUnited as a buyback for its investment in Fannie and Freddie. As will be discussed below, this is the general recollection of the meeting attendees and no one testified that they believed the meeting was called solely for OneUnited.

a. OneUnited's Special Counsel/Chair-Elect of the NBA

OneUnited's Special Counsel/Chair-Elect of the NBA recalled that the Treasury Under-Secretary convened the meeting and "essentially recit[ed] what [the Treasury Secretary] said maybe a day and a half earlier."[416] After the Under-Secretary completed

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[410] *See id.* at 7, 9.

[411] OU Counsel Dep. at 65-66.

[412] *Id.* at 67.

[413] *See* NBA President Dep. at 22.

[414] *Id.* at 23.

[415] COE.WAT.OC.013565, attached as Ex. 24.

[416] OU Counsel Dep. at 68.

his presentation, OneUnited's Special Counsel/Chair-Elect of the NBA, who had brought a copy of the NBA's September 6, 2008, letter to Treasury to the meeting "read through the letter[.]"[417] During his testimony before the ISC, OneUnited's Special Counsel/Chair-Elect of the NBA explained that at the meeting he stated that he "was explicitly representing the NBA."[418] In fact, he stated that he did that "on several occasions at the meeting."[419] He testified that the purpose of the meeting was to "ensure that the interests of minority banks are properly protected in any resolution with respect to the disposition of the GSEs."[420] In his capacity as Chair-Elect of the NBA, he also explained that OneUnited was represented at the meeting "as a demonstrative example of the potential – not the potential impact, but the real impact that this could have on three communities, that there may be some other banks that were impacted."[421] Ultimately, he testified that as a result of the meeting he "hope[d] that in case sort of there were any minority banks that were adversely impacted, that, in fact, they would be protected."[422] It was his hope that banks could be protected by demonstrating "the amount of funds it invested in the preferred stock of the GSEs and be assured of receiving that amount in return as any part of any resolution that developed."[423] OneUnited's Special Counsel/Chair-Elect of the NBA said, "[a]t a bare minimum, we urged that the GSE resolution include a provision that any minority bank that would fail due to the investment in the BSE preferred stock would simply have its investment returned."[424]

b. OneUnited's Chairman and CEO

OneUnited's Chairman and CEO testified that he "thought the topic [of the Treasury meeting] was going to be the – that the economic chaos that was going to ensue."[425] He continued by stating that "we just broke the whole economic system, so like we're probably going to be talking about it and trying to discuss what's going to happen."[426] He was specifically asked whether he thought OneUnited would be the sole topic of the meeting, and he responded "No, absolutely not. No, absolutely not.

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[417] *Id.*

[418] *Id.*

[419] *Id.*

[420] *Id.* at 60.

[421] *Id.* at 68.

[422] *Id.* at 61.

[423] *Id.*

[424] *Id.* at 61-62.

[425] OU CEO Dep. at 40.

[426] *Id.*

OneUnited Bank was not going to be the sole topic. The notion was we were going to discuss, you know, the economic issues that had – that were cascading upon us at that point in time."[427] In fact, he explained that OneUnited came up as an example of what was happening in the larger banking community.[428] Although he did state that he believed that "the actions that were taken by the Treasury related vis-à-vis Freddie and Fannie were – you know, were inappropriate, and I feel like we were damaged as a result of those inappropriate actions, and so, therefore, I feel like – that we were owed money, and I asked them for the money that we were owed."[429] He believed that he requested around $40 million and agreed that the specific request would have benefited every shareholder at OneUnited.[430]

c. OneUnited's President

OneUnited's President testified before the ISC that OneUnited's Special Counsel/Chair-Elect of the NBA told her that the purpose of the meeting "was to share with Treasury the impact of the conservatorship by minority banks."[431] She testified that OneUnited's Special Counsel/Chair-Elect of the NBA was there on behalf of the NBA, and that the attorney was present representing the NBA.[432] She confirmed that at the Treasury Meeting OneUnited "asked for our money back."[433] She explained that "I would say for myself what we wanted and what we felt like we were misled in terms of this being an okay security to own by a bank, and we wanted our money back."[434] OneUnited's President acknowledged that she got a "sense from the meeting that there wasn't a sense in the room that banks were significantly impacted by the conservatorship."[435]

d. NBA's Outside Counsel

The attorney who serves as Outside Counsel for both OneUnited and the NBA testified that he was present at the meeting representing the NBA.[436] NBA's Outside Counsel testified that OneUnited's Special Counsel/Chair-Elect of the NBA "spoke on

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427 *Id.* at 41.

428 *See id.* at 41-42.

429 *Id.* at 45.

430 *See id.* at 43-44.

431 OU COO Dep. at 26.

432 *See id.* at 26.

433 *See id.* at 31.

434 *Id.*

435 *Id.* at 38.

436 *See* NBA Counsel Dep. at 10.

behalf of NBA principally and talked about the concern that – the effect it would have on the NBA on some of their members if they weren't reimbursed for stock."[437] NBA's Outside Counsel then addressed the group regarding "FIRREAS, the 1989 legislation that talks about promoting minority banks."[438] Finally, the Chairman and CEO of OneUnited, and OneUnited's President "focused primarily on OneUnited and OneUnited's own losses with Fannie and Freddie stock."[439] He believed that a little less than half the time of the meeting was spent specifically discussing OneUnited.[440] He further testified that, at the meeting, the representatives from Treasury and the regulators "largely just ask[ed] questions, asking what the scope of the problem was. And I seem to remember them saying something along the lines of they are not sure of the authority under which they would act to provide any such compensation."[441] OneUnited was the only bank he recalled specifically being mentioned.[442]

Following the Treasury meeting, Outside Counsel testified that he walked to Representative Waters' office with the Chairman and CEO of OneUnited, the President of OneUnited, and that OneUnited's Special Counsel/Chair-Elect of the NBA.[443] He testified that he stayed for approximately 15-20 minutes in her office, but Representative Waters was not there and he then left to catch a plane back to Boston.[444]

e. Director of Division of Supervision and Consumer Protection for the FDIC

The Director of Division of Supervision and Consumer Protection for the FDIC told the ISC that OneUnited's Special Counsel/Chair-Elect of the NBA "pretty much led the meeting; and the essence of the meeting was to talk about the impact of placing the GSEs into conservatorship."[445] Since the meeting was called by the NBA she did not think it was odd to have only one member bank present, as she recalled situations where the ICBA, which has thousands of members, call a meeting and only have one person present at the meeting.[446] The Director of Division of Supervision and Consumer Protection for the FDIC explained that OneUnited's Special Counsel/Chair-Elect of the

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437 *Id.* at 12.

438 *Id.* at 13.

439 *Id.*

440 *See id.* at 25.

441 *Id.* at 13.

442 *See id.* at 14.

443 *See id.* at 19-20.

444 *See id.* at 27-29.

445 FDIC Director Dep. at 16.

446 *See id.* at 41-42.

NBA said that "minority institutions were devastated."[447] She actually asked him how many MDIs were devastated "because I knew, and I didn't want – I wanted to make sure we were working with the same data."[448] He did not know the exact number, and the Director of Division of Supervision and Consumer Protection for the FDIC did not share that information with him, even though she knew the number to be limited.[449]

The Director of Division of Supervision and Consumer Protection for the FDIC testified before the ISC that, after she asked about the scope of the problem, "the meeting kind of shifted, and it turned out to be, you know, here is an instance of one institution that was impacted, and then [the Chairman and CEO of OneUnited] started talking."[450] According to the Director of Division of Supervision and Consumer Protection for the FDIC, he essentially "said that his institution was devastated by this move, and he asked the Treasury for $50 million, which was the impact of the placement on his capital."[451] He did not explain where the money would come from, and the Director of Division of Supervision and Consumer Protection for the FDIC said that the "people in the room just looked at him; it was a really different request."[452] She felt that the request was "almost like open bank assistance, and there's a law that prohibits that."[453]

The Director of Division of Supervision and Consumer Protection for the FDIC did not recall any discussion at the end of the meeting as to follow-up steps, instead, she recalled "everyone was listening politely, and I just remember Treasury people saying, We'll get back to you. Thank you very much. It was more of a polite, listening conversation."[454] Once the meeting concluded, the Director of Division of Supervision and Consumer Protection for the FDIC asked the regulators to stay behind and she informed them that she believed the "number of institutions impacted [was] less than five," and, according to her, the regulators seemed "surprised to be called over there for that."[455]

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447 *Id.*

448 *Id.* at 16-17.

449 *See id.* at 17.

450 *Id.* at 16.

451 *Id.* at 17.

452 *Id.* at 19.

453 *Id.* at 23.

454 *Id.* at 19.

455 *Id.* at 18.

f. Representative Waters' COS

Representative Waters' COS testified before the ISC that the Treasury meeting was "Based on the letter that was sent to [the then-Treasury Secretary] requesting the original meeting, which the Congresswoman followed up on, [and that] the purpose of the meeting was to discuss the impact on minority banks that the conservatorship would have."[456] In describing the meeting, Representative Waters' COS stated that:

> A large chunk of the first 20 minutes was kind of like the introductions, the niceties and everybody introducing themselves. [OneUnited's Special Counsel/Chair-Elect of the NBA] gave the opening statement, basically saying, I'm here as the Chairman-elect, but I want to acknowledge that I'm an executive of OneUnited. And then there was just kind of like a free-flowing conversation. I know there was a significant amount of time that was dedicated, a conversation between the FDIC and [the Chairman and CEO of OneUnited].[457]

He believed that approximately 25-30% of the meeting revolved around OneUnited.[458] He also stated that the FDIC, OneUnited's primary regulator, "seemed fairly familiar about, you know, the content of the conversation, and so there was a discussion about basically how widespread the problem was, and nobody – nobody that was at the table could – could answer that question."[459] Representative Waters' told the ISC that shortly after the meeting, she discussed what took place with her COS. She stated that her COS "tried to identify who all was in the meeting, including FDIC and others who were in the meeting, and that he told me that [the Chairman and CEO of OneUnited] was a little bit heated."[460] Representative Waters said that her COS relayed that the Chairman and CEO of OneUnited "Was saying that they thought that Fannie and Freddie were safe places for the banks to invest, and it turns out that the government misled them in some way, and he was mad that the banks were losing money, that he was losing money."[461]

g. Legislative Director for Massachusetts Senator

The Legislative Director for the Massachusetts Senator who had been contacted on this issue also attended the Treasury meeting. It was his recollection that "the Treasury Department welcomed everybody and gave a brief overview of what they felt

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[456] Rep. Waters' COS Dep. at 24-25.

[457] *Id.* at 70.

[458] *See id.*

[459] *Id.* at 27.

[460] Rep. Waters Dep. at 13.

[461] *Id.* at 47.

the situation was."[462] The Legislative Director said that, after the introduction, "representatives of OneUnited Bank and National Bankers Association made a presentation...about what they felt the situation was...and made their request for Federal assistance and...they then...talked about it briefly, and then that was generally the meeting."[463] He stated that the "topic of the meeting" was that due to the conservatorship, the "investments that OneUnited Bank had made into [the GSE]bonds were essentially worthless; and, as part of that, they were looking for some assistance to make up for that loss."[464]

The Legislative Director also told the ISC that he believed that during the meeting, "there was a reference to other banks having similar problems."[465] He stated that he believed "the Treasury Department's interest in this was the fact that there were many other community banks that had also invested in these bonds and had lost money and that the Federal Government needed to find a response to this in some way."[466] It was his belief that Treasury officials and regulators "were collecting information in order to make the determination of how to proceed."[467] Following the meeting, the Legislative Director "spoke with [OneUnited] briefly."[468] Other than that brief discussion, he did not recall if anyone from the Massachusetts' Senator's office had any other substantive discussion of the issues addressed at the meeting with anyone from OneUnited or the NBA.[469]

h. Financial Services Committee Staffer

A Financial Services Committee staffer who attended the Treasury meeting at the request of the Financial Services Committee Chairman prepared a memorandum for the Chairman entitled "Update on Treasury Meeting with National Bankers Association" following the meeting.[470] The memorandum stated:

> OneUnited Bank had about $25 million in Fannie and $25 million in Freddie and they maintain that the bank is now functioning with effectively no capital. [OneUnited's Special Counsel/Chair-Elect of the NBA] asked Treasury to buy back the preferred GSE stock of MOIs

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462 MA Senator's Leg. Dir. Dep. at 10.

463 *Id.*

464 *Id.*

465 *Id.*

466 *Id.*

467 *Id.*

468 *Id.*

469 *Id.* at 11-12.

470 COS.MW.FRANK.27, attached hereto as 26.

> [Minority Owned Institutions] that may otherwise fail due to overexposure from preferred GSE stock. They estimate that this buy-back could amount to about $74-$100 million to address MOIs' vulnerability from overexposure of GSE preferred stock. FDIC, the primary regulator for OneUnited Bank, indicates that they have already been in contact with the bank to try to devise a plan to address the capital problem and that prompt corrective action, if triggered, would still give the bank about 90 days to address any capital issues. Given the difficulties of raising capital for [MDIs], however, OneUnited Bank argued that it was in serious danger of failing if Treasury decided not to offer some sort of protection of buy-back to it.
>
> Although [OneUnited's Special Counsel/Chair-Elect of the NBA] has framed the problem of having significant exposure of preferred GSE stock as one that is, or could be, affecting the solvency of other MOIs, it is unclear to me whether they [sic] are any other MOIs that are facing the same capital situation as OneUnited right now. During the Treasury meeting, FDIC staff asked [OneUnited's Special Counsel/Chair-Elect of the NBA] directly what information he had on the scope of the problem facing other MOIs and his answer was vague. He responded that he has heard some anecdotal information from other MOIs but that those banks are unlikely to step forward to confirm this information due to the potential public relations problem that it could cause. FDIC staff seemed skeptical that the scope of this problem with MOIs was widespread. Although initially [OneUnited's Special Counsel/Chair-Elect of the NBA and OneUnited's Chairman and CEO] indicated that the problem facing MOIs could likely be solved with $100 million buy-back from the affected institutions, at the close of the meeting, they mentioned a lower amount of $74 million.[471]

In her testimony before the ISC, the Financial Services staffer clarified the "vague" answer provided regarding the other MOIs affected by explaining that at the Treasury meeting OneUnited's Special Counsel/Chair-Elect of the NBA referenced an informal phone survey that had been conducted, but was hesitant to identify the number of institutions that may have been impacted.[472]

i. Meeting Follow-up by the NBA

The day after the Treasury meeting, a follow-up letter was sent from OneUnited's Special Counsel/Chair-Elect of the NBA to the Under Secretary on NBA letterhead. Representative Waters was copied on the letter and it was also emailed to her COS, who subsequently forwarded it to the Financial Services staffer in attendance at the Treasury

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[471] *Id.*

[472] FSC Staffer #2 Dep. at 36.

meeting.[473] This letter memorialized the request made at the meeting whereby the Treasury Department would redeem the Government Sponsored Entities ("GSE") preferred stock held by Minority Depository Institutions ("MDIs") in order to "avert possible failure of one if not several" of NBA's banks.[474] On September 11, 2008, the NBA sent another letter to the Under Secretary disclosing that it had determined that the conservatorship affected only two of its member banks.[475]

5. Conversation with the Former Treasury Secretary Following the Meeting

The day after the Treasury meeting, the former Treasury Secretary contacted Representative Waters and expressed disappointment that more NBA members did not attend the meeting. According to Representative Waters' COS, the former Secretary "said to the Congresswoman...that he thought that it would be larger – a quote, larger meeting, more banks, more minority banks represented."[476] Representative Waters told the ISC that the former Secretary "said something like he expected more bankers to be there."[477]

Representative Waters told the ISC that she "had no expectations" as to how many minority bankers would attend the meeting because she "didn't know who was going to be there."[478] She also stated that she could not recall her exact response to the former Secretary, but she "probably just said I didn't know who was going to be there-who all was going to be there."[479]

Representative Waters' COS testified that following the telephone call with the former Secretary, Representative Waters asked him "who was at the meeting, why is he calling me, and I mean, what's the concern?"[480] The COS replied "these are the people that they asked me to invite, these are the people that I sent over there and that's who was at the meeting."[481]

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473 *See* COS.WATERS.24, attached hereto as Ex. 27.

474 *Id.*

475 COS.MW.FRANK.53, attached hereto as Ex. 28.

476 Rep. Waters' COS Dep. at 75-76.

477 Rep. Waters Dep. at 19.

478 *Id.* at 20.

479 *Id.*

480 Rep. Waters' COS Dep. at 76.

481 *Id.* This answer by Representative Waters' COS did not address the question regarding the concern raised by the former Treasury Secretary. A more accurate response to Representative Waters would have been that OneUnited was the only NBA member bank present at the meeting and that OneUnited specifically asked Treasury for $50 million as a buy-back for its investment in Fannie and

G. Representative Waters' Decision that she should not Assist OneUnited in its Efforts to Directly Obtain Money

Representative Waters testified that at some point following the Treasury meeting, once the TARP legislation began to be drafted, she recognized that OneUnited was specifically seeking money and, because of her husband's former tenure on the Board of OneUnited and his current stock holdings with the bank, she determined that she should not be involved in OneUnited's specific attempt to get money and spoke to the Chairman of the Financial Services Committee about the issue. She testified before the ISC that:

> Q: At any point did you consider your husband's ownership of stock in the bank as a reason to not be involved in OneUnited's--
>
> A: Well, I think at the point that we started to talk about TARP and them actually asking for money, I think that might have been one of my motivations in talking to [the Chairman of the Financial Services Committee] too, that I shouldn't be involved with that.
>
> Q: Why not?
>
> A: Well, as you said, several reasons. TARP was new, they were asking for money. I didn't know or understand the implications of that. And it was at that point that I realized that if they were asking for money that I perhaps should take a distance from that. I would not be involved in that.[482]

This issue was addressed later in her testimony under questioning by one of the Members on the ISC. Representative Waters clarified that she believed the conflict existed if she were to assist OneUnited specifically obtain money pursuant to TARP:

> ISC Member: Okay. You seem to have had a pretty keen understanding that if they were asking for TARP money specifically, that that would create a conflict of interest for you; is that correct?
>
> Ms. Waters: That's right, because you had a singular bank who was now raising that question. That's different then an association asking to meet with the Treasurer under FIRREA.[483]

While the date of his conversation with Representative Waters is not clear,[484] the Chairman of the Financial Services Committee expressed that he was also concerned

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Freddie preferred stock. Had her COS advised her of this request at that time, Representative Waters would have been aware of the potential conflict sooner and any appearances of impropriety could possibly have been avoided.

[482] Rep. Waters Dep. at 26-27.

[483] Rep. Waters Dep. at 53.

about OneUnited and since they were a Massachusetts bank, Representative Waters should stay out of it and he would handle the situation:

> Q: Turning back to your conversation with Representative Waters, was there any reason why you counseled her not to get involved?
>
> A: Yes, because she said [her husband] had been involved with that bank. Well, I take it back because I don't remember when the OneUnited thing because [inaudible] but I did think that because [her husband] had been involved it was better for her not to be involved. She got a little stressed because it is a black bank and she is the senior African-American member on the Committee. I know what it is like to have people come to you and ask you for help in many ways. And so I said in this case, look, I have every interest in helping this bank so why don't you just stay out of it.[485]

Representative Waters' COS also testified that he was aware of this conversation, as he testified before the OCE:

> He became aware of the conversation between Rep. Waters and [the Chairman of the Financial Services Committee] when, as he went through his tasks with Rep. Waters one day following the September meeting, she indicated that he need not work on the minority-bank matters because, as she said, "I spoke to [the Chairman of the Financial Services Committee.] Don't worry about it." He took this to mean that he need not work on the NBA matters that day. He does not remember Rep. Waters making any reference to [the Chairman of the Financial Services Committee] instructing her not to get involved in NBA matters.[486]

Representative Waters' COS's testimony before the ISC differs from the MOI of his interview before the OCE.

> Q: Can you tell us a little bit about the circumstances surrounding how you became aware of that conversation?
>
> A: Yeah. I believe the Congresswoman – they have several kind of fly-by conversations. They talk to each other often about issues that are going on. I think that what happened after the meeting, based on communications, et cetera, and by the fact that we hadn't gotten results from the survey bank, et cetera, that at that time no other banks had basically stepped up and said, look, you know, there's a – we have an issue with this Fannie and Freddie piece. And so I think the conversation that the Congresswoman had was

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[484] The Chairman of the Financial Services Committee testified that he believed the conversation took place during the 10-day period following the Treasury meeting, but prior to the first version of the TARP legislation being circulated on September 20, 2008. (9/11/12 FSC Chair Dep. at 14-15.)

[485] FSC Chair Dep. at 23-24.

[486] Rep. Waters' COS OCE MOI.

> basically, look, you know, we were approached by the NBA about this, but at this point it seems like OneUnited has a problem. I don't want to get involved with this on this level. Can you do it? And [the Chairman of the Financial Services Committee] kind of said, stay out of it, I'll take over, or something like that.[487]

In his interview with Outside Counsel, Representative Waters' COS confirmed his OCE testimony that following his conversation with Representative Waters he believed he was not to work on the issue that day.[488] It is critical to Outside Counsel's analysis of this matter that Representative Waters took steps to inform her staff of the conflict that existed. Representative Waters' COS's testimony demonstrates that she informed him of her conversation with the Chairman of the Financial Services Committee. Further, in Representative Waters' press conference on August 2010 she stated:

> There has also been a question about whether or not I instructed my staff not to get involved with OneUnited Bank, and their interest in assessing (sic) TARP funds.
>
> My staff had only been involved in understanding the impact of the financial crisis on small and minority banks broadly and assisting in setting up the meeting with the Treasury Department for, again – again – the National Bankers Association.
>
> I told my chief of staff that I had informed [the Chairman of the Financial Services Committee] about OneUnited Bank's interest, that

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[487] Rep. Waters' COS Dep. at 80. Representative Waters' COS contradicts himself in other ways as well. His ISC testimony suggests that he understood that he could not have involvement with OneUnited because they were the only bank affected by the conservatorship and, therefore, any actions would solely assist OneUnited as opposed to the NBA as a whole. This is contradicted by later testimony where Representative Waters' COS testified that community banks also contacted Representative Waters' office as they too were affected by the conservatorship. However, there is sufficient evidence in the record to support the testimony that while only a small number of minority banks were affected, small community banks were also affected by the conservatorship. Thus, Representative Waters and her staff were permitted to assist the larger community, of which OneUnited is a part. *See, e.g., 2008 Ethics Manual,* at 234 ("It is a principle of 'immemorial observance' that a Member should withdraw when a question concerning himself arises; but it has been held that the disqualifying interest must be such as affects the Member directly, and not as one of a class.")(*citing* John V. Sullivan, Parliamentarian, *Constitution, Jefferson's Manual, and Rules of the House of Representatives, One Hundred Tenth Congress,* H. Doc. 109-157, 109th Cong., 2d Sess. (2007), § 673).

[488] 7/5/12 Rep. Waters' COS Dep. at 53. There is additional evidence in the record, beyond his testimony before the OCE and Outside Counsel, to contradict that Representative Waters' COS believed he was only to abstain from working on the matter that day. The Chief Counsel and Staff Director of the Financial Services Committee testified to having a brief conversation with Representative Waters' COS "in which he mentioned the concern about the conflict." (FSC Chief Counsel Dep. at 17.) She continued to state that "I do remember having a conversation with [Representative Waters' COS] where he proactively indicated that his boss was concerned and taking a step back." *Id.* While the Financial Services Committee's Chief Counsel believed this conversation occurred once they began working on the EESA legislation, she could not be certain of the exact timing of the conversation. (*Id.* at 17-18.)

> we were only concerned about small and minority banks broadly, that [the Chairman of the Financial Services Committee] would evaluate OneUnited's issue and make a decision about how to proceed.[489]

Also during Outside Counsel's interview of Representative Waters' COS, he was asked how Representative Waters was able to continue working on the TARP legislation in light of the concerns she had discussed with the Chairman of the Financial Services Committee. Her COS responded as follows:

> Okay. So two things. One, the TARP – I guess the initial thing that I will say is that the TARP bill was not about OneUnited, right? So the TARP bill was an $800 billion bill that was aimed at shoring up the entire United States financial services system, right, and potentially the world financial system. So, as a general matter, OneUnited or any other individual bank, including large banks like Goldman, Bank of America, J.P. Morgan, were not, I don't think a consideration for any member. The question was, what are we going to do broadly to ensure the stabilization of the financial services community, period.
>
> And so from a "how" perspective or a "why" perspective would the Congresswoman continue to work on the TARP bill is that it's part of her duty and responsibility. She had leadership on the Financial Services Committee. And what she did would have been any meetings, drafts of legislation, proposed amendments, changes to the bill, briefings by the Treasury Department or other entities in the financial services community. She would have participated in those.[490]

During the course of his interview, several emails between Representative Waters' COS with either OneUnited's Special Counsel/Chair-Elect of the NBA and OneUnited's Chairman and CEO regarding specific legislative language were identified,[491] and he was asked whether he believed those were on behalf of OneUnited specifically or coming from the NBA. He stated that "given that there had been multiple people from the NBA all engaged in this issue, I was very comfortable and clear that this was a broad concern of the NBA."[492]

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[489] *See* Tr. of Rep. Waters August 2010 Press Conference.

[490] 7/5/12 Rep. Waters' COS Dep at 40-41.

[491] Those communications will be discussed in detail later in this Report, *infra* section H.1.

[492] 7/5/12 Rep. Waters' COS Dep. at 45-46. This testimony is in conflict with the NBA's letter dated September 11, 2008, on which Representative Waters was copied. COS.MW.FRANK.53. In that letter, the NBA disclosed that only two of its member banks were seriously affected by the conservatorship, so Representative Waters' COS' statement that he was comfortable that this was a "broad concern of the NBA" is belied by the facts in the record, of which he had notice.

Finally, Representative Waters' COS indicated that Representative Waters was not only approached by the NBA, but by community banks as well:

> Also around that time, the Independent Community Bankers Association sent in a survey that they had that identified, out of a small portion of their banks, 40-plus that had had significant impact by Fannie and Freddie, and they needed special consideration within the EESA for their banks as well. And the ABA had significant, and still have significant, letters and correspondence on their web site that they sent to the Financial Services Committee talking about the impact that Fannie and Freddie have on their members, which are from small to large.[493]

Ultimately, Representative Waters' COS was asked what type of involvement with OneUnited and TARP he could work on following Representative Waters' conversation with the Chairman of the Financial Services Committee. He answered as follows:

> Well, I think the matters – as I understood it, the Congresswoman's working knowledge was around this idea that they had been asked for $50 million as a repayment, a buyback. And so, for me, the conversation was that that is a dead issue. If there's to be a response to that ask, that type of ask, that's not something that you're to work on.[494]

> The context within which I was working was a broader context around NBA's ask, the ICBA and the ABA. So I see them as separate things.[495]

H. Continued Communications with OneUnited and Representative Waters' Office

Outside Counsel's review of the evidence determined that following the meeting at Treasury, OneUnited's Special Counsel/Chair-Elect of the NBA and OneUnited's

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[493] *Id.* at 46.

[494] In this testimony, Representative Waters' COS recognizes that Representative Waters was aware of the $50 million request by OneUnited. As discussed earlier, *supra* n. 481, he did not inform her of this request following her phone call with the former Treasury Secretary. Further, he testified that he could not recall any specifics of his conversation with her regarding the Treasury meeting nor could he recall ever informing her of OneUnited's $50 million request. (9/13/12 Rep. Waters' COS Dep. at 22-25.) Representative Waters' testimony on this topic does not assist in clarifying when she actually learned of this request. "I don't know what their preferred solution was. I was not in the meeting where they talked to the Treasury. I'm reading newspaper accounts, and I'm hearing little gossip here and there about what they might have been suggesting. I don't know if that was a legitimate suggestion, if that was something that somebody just made up because they thought that's what happens when a government sponsored agency is under conservatorship. I don't know what would have inspired or driven that kind of conversation." (Rep. Waters Dep. at 51-52.) Thus, the exact date when Representative Waters first learned of this $50 million request by OneUnited is unclear.

[495] 7/5/12 Rep. Waters' COS Dep. at 54-55.

Chairman and CEO continued to contact both Representative Waters' office and the office of the Chairman of the Financial Services Committee. Despite Representative Waters' conversation with the Chairman of the Financial Services Committee, which she conveyed to her COS, unknown to Representative Waters, her COS continued to communicate with executives of OneUnited.

1. OneUnited's Communications with Representative Waters' COS and the Financial Services Committee

On September 11, 2008, at 10:16 pm, OneUnited's Special Counsel/Chair-Elect of the NBA sent an email to Representative Waters' COS and the Massachusetts State Senator who had been involved in this issue, the Chairman and CEO was also copied on this email. The email stated:

> [p]lease see attached American Banker article re: [the Chairman of the Financial Services Committee] and GSE Takeover by Treasury. See asterix [sic] at top of third column: "House Financial Services Committee Chairman...said he does not think any bank will be allowed to fail as a result of the takeover.[496]

Representative Waters' COS forwarded this email to the Financial Services staffer who had been present at the Treasury meeting.

On September 12, 2008, the day after OneUnited's Special Counsel/Chair-Elect of the NBA sent his letter to the Treasury Under Secretary, and copied Representative Waters, informing the Under Secretary that only two NBA member banks were significantly impacted by the conservatorship, OneUnited sent a facsimile to the Chairman of the Financial Services Committee.[497] This document outlined why OneUnited's investment was unique and needed to be protected.[498]

On September 15, 2008, a Financial Services Committee staffer drafted a memo to the Chairman of the Financial Services Committee with the subject "Draft Letter to Treasury about OneUnited Bank."[499] The memo attached a draft letter to Treasury expressing support for the NBA's proposal to redeem the preferred GSE stock of minority owned institutions, and also notes that OneUnited had discussed their problems with two other Representatives from Massachusetts.[500]

In addition to the draft letter, the staffer also attached a chart to the memorandum entitled "A Request for Protection from U.S. Treasury to Avert the Failure

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[496] COS.MW.FRANK.102, attached hereto as Ex. 29.

[497] *See* COS.MW.FRANK.57, attached hereto as Ex. 30.

[498] *See id.*

[499] COS.MW.FRANK.25, attached hereto as Ex. 31.

[500] *See id.*

of OneUnited Bank due to its Investment in GSE Preferred Stock."[501] The chart contained the following three boxes: 1) OneUnited Bank Investment In GSE Preferred Stock; 2) Call Report Data; and 3) A Request for Protection from U.S. Treasury to Avert Failure.[502] OneUnited's Special Counsel/Chair-Elect of the NBA confirmed that OneUnited created the chart, and said "[o]ne of the purposes [of creating the chart] was to detail, at least according to the document, the – sort of capital shortfall that OneUnited faced...due to the loss of capital as a result of the GSE seizure."[503] He testified that the chart was "a request to Treasury for repayment."[504]

The next communication from Representative Waters' COS involving OneUnited did not occur until September 19, 2008, at 12:20 pm when he sent the Financial Services staffer an email with the subject "OU is in trouble." She responded at 12:21 pm stating "depends on scope," and he replied at 12:22 pm "I think it will become a timetable issue."[505] The Financial Services staffer testified before the ISC that she believed Representative Waters' COS was referring to "an issue with trying to act quickly, and I think that they had not heard back from Treasury in terms of whether Treasury was going to implement the National Bankers Association proposal, so it's probably a reference to that."[506] However, when the same staffer was interviewed by Outside Counsel, she testified that she did not recall what she was referring to in this email.[507] Based on the record in this case, Outside Counsel believes it is a reasonable interpretation that this email is a specific reference to OneUnited's call report, which was due at the end of September, and OneUnited's potential failure. During that same interview, the Financial Services Staffer testified that she did not recall if she took any action related to that email.[508]

Staffers are prohibited from taking official acts to aid the personal business or interest of their employing Member. This email can be construed as an official act to assist OneUnited, however, there is insufficient evidence in the record to prove by clear and convincing standards that Representative Waters' COS was aware of Representative Waters' husband's investment at the time this email was sent. To the contrary, during questioning regarding an email sent on September 22, 2008, her COS responded that "I knew that the ambassador had been on the board that he had come off the board. I knew that the Congresswoman had an investment and had gotten rid of that investment.

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501 COS.MW.FRANK.54, attached hereto as Ex. 32.

502 *See id.*

503 OU Counsel Dep. at 86.

504 *Id.*

505 COS.MW.FRANK.44, attached hereto as Ex. 33.

506 FSC Staffer #2 Dep. at 58-59.

507 7/25/12 FSC Staffer #2 Dep. at 11.

508 *See id.* at 12.

I was not conscious at the time that the ambassador still had an investment. So that would not have been a red flag."[509] There is, moreover, no evidence that Representative Waters was aware that her COS sent this email. As such, while there is some evidence in the record to suggest that Representative Waters' COS should have known of the conflict at the time he sent this email, Outside Counsel recommends that the Waters Committee determine that there is insufficient evidence in the record to support by a clear and convincing margin that the sending of this email constitutes a knowing violation of the ethics rules.[510] It is important to note that while the Outside Counsel has raised concerns regarding credibility of certain witnesses, the ultimate findings, recommendations and conclusions of the Outside Counsel are not based on credibility determinations. Rather, the credibility concerns are raised so that credibility determinations can properly be made by the Members of the Waters Committee themselves.

Approximately one hour later, the Financial Services staffer sent an email to the staff director for the Financial Services Committee. In that email she wrote:

> [an individual] with FDIC indicated that FDIC does not have authority to implement NBA proposal. From what he knows, Treasury was "looking underneath sofa cushions" to see if they had authority through one of their programs, which may be one of the reasons that they haven't closed the loop with us on how they can be supportive to date.

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[509] 7/5/12 Rep. Waters' COS Dep. at 63. Outside Counsel questions the credibility of this testimony. While there is no evidence in the record that Representative Waters' COS was involved in any way with Representative Waters' financial disclosures, Representative Waters' COS is also her grandson and, in addition, a year prior to this email being sent Representative Waters publicly disclosed at a Financial Services Subcommittee Hearing that her husband had an investment in the bank. Representative Waters' COS testified that he was aware of the statement from the Subcommittee Hearing, but could not recall if he was aware of it at the time it was made or only became aware of the statement when gathering documents in connection with the Committee's investigation. (9/14/12 Rep. Waters' COS Dep. at 5-6.) In addition, Representative Waters testified that her COS "would have known" about the investment because "everybody knows." (Rep. Waters Dep. at 48.) But there is no evidence in the record that Representative Waters directly disclosed her husband's investment to her COS.

[510] There is Committee precedent in which, after a referral from the OCE, actual violations are found, but determined to not be "knowing" violations and, while the matters are not dismissed, no disciplinary action is recommended, and no additional sanctions are ordered. *See, e.g.*, House Comm. On Ethics, *In the Matter of Allegations Relating to Representative Jean Schmidt*, H. Rep. 112-195, 112th Cong., 1st Sess. (Aug. 5, 2011) (deciding not to dismiss a matter because, despite the Member's "apparent lack of knowledge of this arrangement, it was in fact improper and constituted an impermissible gift." The Committee further found that, because of the Member's lack of knowledge of the improper gift, while she was required to "disclose and repay the improper gift," in accordance with House rules, laws and other standards of conduct, no sanction was necessary); *See* House Comm. On Ethics, *In the Matter of Allegations Relating to Gregory Hill*, H. Rep. 112-194, 112th Cong., 1st Sess. (Aug. 5, 2011) (deciding not to dismiss a matter because, despite the employee's reasonable reliance on W-2s provided to him by the campaign, he was, in fact, paid in excess of the outside earned income limit. The Committee further found that, because of the employee's lack of knowledge of the violation of the earned income limit, while he was required to repay the excess money received, no further action was necessary.)

> As of yesterday, [the FDIC employee] said Treasury had not been in contact with...the FDIC with a conclusion on it. FDIC is willing to work with [the] institution on capital restoration plan but that does not go to implementation of proposal.[511]

The Financial Services staffer recalled a conversation with the Director of FDIC's Office of Legislative Affairs, in which "Treasury and possibly FDIC indicated they wanted to be supportive to minority-owned financial institutions, but it was not clear to us, nor was it clear to them whether they had sufficient authority to implement the National Bankers Association proposal."[512]

2. The EESA Legislative Process Begins

As it became increasingly clear that neither Treasury nor the FDIC had the authority to implement the NBA's proposal to assist minority banks, minority and community banks began to lobby for a legislative solution to the problem.

The Chairman of the Financial Services Committee said that he did not remember specific follow-up activity after the Treasury meeting. Rather, he explained that "there was a constant set of meetings going on about all aspects of this, so I didn't want to stress from all small banks that we had to do something."[513] The Chairman further explained to the ISC that the concerns raised by OneUnited and the NBA were "a small part of a concern expressed by the American Bankers Association, the Independent Community Bank Association, the Mass Bankers who talked to me, a component of ABA. There was just a lot of conversation."[514] The Chairman also stated that "[t]he minority bank concern with GSEs was a subset of a general concern. And we would not have gotten legislation passed and signed that quickly if it had only been minority banks, I guarantee you that."[515] The Chairman said that the issue related to the conservatorship did lead to legislation, but explained that the legislation was necessary because "this is, again, pre-TARP, so there is no money around."[516]

OneUnited's Special Counsel/Chair-Elect of the NBA sought to address the need for a legislative solution when he sent an email on September 19, 2008, at 12:38 pm to Representative Waters' COS, copying the senior legislative assistant for the Representative in whose district in Massachusetts OneUnited is headquartered, and the

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[511] COS.MW.FRANK.43.

[512] FSC Staffer #2 Dep. at 49.

[513] FSC Chair Dep. at 29.

[514] *Id.* at 34.

[515] *Id.* at 35.

[516] *Id.* at 30.

Chairman and CEO of OneUnited.[517] The email proposed a provision in the Continuing Resolution, a temporary appropriations bill, as an alternative back-up strategy in case Treasury did not grant the specific relief OneUnited had requested.[518] The language proposed by OneUnited's Special Counsel/Chair-Elect of the NBA was:

> Provided further, [sic] That, notwithstanding any other provision of law, the Director of Federal Housing Finance Agency, acting as conservator, shall, or shall cause the regulated entities in conservatorship to, immediately redeem at the purchase price paid the preferred stock of such regulated entities in conservatorship which is held by a [U.S. Department of Treasury certified Community Development Financial Institution.][519]

Upon receipt of this email, Representative Waters' COS testified that he would typically have reviewed the email, but would not take any other action.[520] Representative Waters said she was not aware that OneUnited's Special Counsel/Chair-Elect of the NBA was sending emails such as this to her COS, but she was not surprised.[521] She explained:

> Staff, when they are working, when they are considered to be, you know, a key person in the an office, whether it is the chief of staff or someone handling particular issues, they get emails from everywhere. They get emails from people who think they can help them. They get emails from people who are trying to persuade them to help them. They get emails that are informational. This stuff goes on all day long. So I am not surprised that as a chief of staff that someone would not – and even [OneUnited's Special Counsel/Chair-Elect of the NBA] would not email them either informing them about what they are doing and asking advice. It just happens all day every day.[522]

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[517] OneUnited's Special Counsel/Chair-Elect of the NBA testified that "at the time, I was chairman-elect [of the NBA] and chairman of the Legislative Affairs Committee. I was also senior counsel for OneUnited...I don't have [an] exact recollection of when and how I distinguished the roles." (OU Counsel Dep. at 79.) Moreover, several individuals testified before both the ISC and Outside Counsel that OneUnited's Special Counsel/Chair-Elect of the NBA was their point of contact with the NBA. (7/5/12 Waters' COS Dep. at 49-50; NBA Counsel Dep. at 9; FSC Staffer #2 Dep. at 8.) Based on the testimony in the record, Outside Counsel is unable to conclude whether OneUnited's Special Counsel/Chair-Elect of the NBA was acting in his capacity at OneUnited or with the NBA when he sent communications to Representative Waters' COS.

[518] COS.WATERS.31,attached hereto as Ex. 34. This strategy was never adopted, nor is there any evidence that Representative Waters' COS forwarded this email to anyone or otherwise took any action related to the receipt of this email.

[519] COS.WATERS.31.

[520] Rep. Waters' COS Dep. at 40-41.

[521] Rep. Waters Dep. at 34.

[522] *Id.* at 34-35.

Further complicating matters during this time period is the fact that Representative Waters' COS testified before Outside Counsel that the staffer in Representative Waters' office who was assigned to work with the Financial Services Committee was on maternity leave during this time period, so Representative Waters' COS became the point person with the Financial Services Committee until the staffer's return.[523]

The following day, on September 20, 2008, Treasury circulated its first draft of the legislation that would ultimately become the TARP bill. That same day, Mr. Moore forwarded that draft legislation to the Chairman and CEO of OneUnited.[524] The email did not contain any text, and the Chairman and CEO of OneUnited testified that he did not recall receiving the email, but that it was likely sent to him because "probably in these issues in and around, you know, minority banking and inner-city finance and those sorts of issues. I probably know more about those issues than anybody else. Period."[525]

Two days later, on September 22, 2008, Representative Waters' COS received an email from the Chairman and CEO of OneUnited, which forwarded an email from a OneUnited Board member who has been described as a lobbyist and expert in the banking field.[526] In the email, the Chairman and CEO of OneUnited asked Representative Waters' COS to "print this for our meeting."[527] During the course of

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[523] 7/5/12 Rep. Waters' COS Dep. at 30-31.

[524] *See* COS.WATERS.34, attached hereto as Ex. 35.

[525] OU CEO at 64.

[526] *See* CSOC.WAT.000744, attached hereto as Ex. 36. Representative Waters' COS testified that he was "not sure" if he was aware that the individual who was both a OneUnited Board member and a lobbyist, was, in fact, associated with OneUnited. (7/5/12 Rep. Waters' COS Dep. at 51-52.) This testimony is questionable in light of the facts in the record. The record demonstrates that this same individual sent Representative Waters' COS an email on July 16, 2008, requesting a meeting with Representative Waters. In that email, he specifically states that he serves on the board of OneUnited. (*See* Waters_071912_11, attached hereto as Ex. 37.) Representative Waters' COS testified that he received this email, but otherwise could not recall reading it. (9/13/12 Rep. Waters' COS Dep. at 10-11.) Further, the board member testified that he had been in a meeting with Representative Waters' COS where he mentioned that he served on OneUnited's board, and did not think that Representative Waters' COS seemed surprised by that news. (OU Board Member Dep. at 13.) Further, the board member testified to having a long-standing working relationship with Representative Waters and her staff. (*See id.* at 11-12.) Notwithstanding the credibility of Representative Waters' COS, it is important to note that the board member testified that he was never retained to lobby on behalf of OneUnited, and any legislative language he sent to either Representative Waters' COS or staffers of the Financial Services Committee during this time period were pro bono efforts on behalf of either the NBA or other associations, but were not on behalf of OneUnited. (*See id.* at 14, 22-23, 25-26.) Nor did OneUnited ever direct him to draft such legislation or any other proposals on their behalf. (*See id.* at 33-34.)

[527] *See* CSOC.WAT.000744, attached as Ex. 36.

Outside Counsel's review, Outside Counsel was unable to determine that any meeting actually occurred between Representative Waters' COS and the Chairman and CEO of OneUnited. Representative Waters' COS testified before Outside Counsel that he did not recall any such meeting, and also testified that he did not realize that the individual who had drafted the proposed language was affiliated with OneUnited as he only knew him as an expert in the banking field.[528] Likewise, the Chairman and CEO of OneUnited testified that he did not recall sending the email nor did he recall meeting with Representative Waters' COS.[529] Further, Representative Waters testified that she was unaware of any meeting between her COS and the Chairman and CEO of OneUnited around this time, nor had she ever seen this email.[530] The only evidence the Outside Counsel uncovered of a meeting with anyone related to OneUnited at this time period, was a meeting between a staffer from the Financial Services Committee and OneUnited's Special Counsel/Chair-Elect of the NBA.[531] That staffer also could not recall if the meeting was specifically about OneUnited or if other banks were discussed as well.[532] In addition, he could not recall who requested that he meet with OneUnited's Special Counsel/Chair-Elect of the NBA.[533]

The language that was proposed in the email is as follows:

> Provided that, notwithstanding any other provision of law, the Director of the Federal Housing Finance Agency, acting as conservator, shall, or shall cause the regulated entities in conservatorship, to immediately redeem at the purchase price paid the preferred stock of such regulated entities in conservatorship which is held by any Department of Treasury certified community development financial institutions which, as of September 5, 2007, had more than five percent of its total assets invested in the preferred stock of the regulated entities in conservatorship.[534]

Outside Counsel has examined the proposed language and determined that it is not language that is included in the final TARP bill.

Also on September 22, 2008, a Financial Services staffer sent a memorandum to the Chairman of the Financial Services Committee.[535] The subject of the memorandum

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[528] *See* 7/5/12 Waters' COS Dep. at 50-51; 60-61.

[529] *See* OU CEO Dep. at 65.

[530] Waters Dep. at 38.

[531] *See* 7/23/12 FSC Staffer #1 Dep. at 8.

[532] *See id.* at 9.

[533] *See id.* at 8.

[534] CSOC.WAT.000744, at Ex. 36.

[535] *See* COS.MW.FRANK.28, attached hereto as Ex. 38.

was "Update on National Bankers Association's Proposal re: Preferred GSE Stock Buy-back."[536] The memorandum demonstrates that the Chairman of the Financial Services Committee was making good on his promise to Representative Waters that he would assist OneUnited, as minority banks were an important issue to him as well. Specifically, the memorandum stated that Financial Services Committee staff had reached out to:

> Treasury, congressional staff...and...[the former Treasury Secretary's] COS, but we [were]not able to get a firm commitment from them about whether they will pursue National Bankers Association's (NBA) proposal to redeem the GSE preferred stock held by minority depository institutions.[537]

The memorandum further stated that, "while [the former Treasury Secretary] wants to be supportive, [his COS] is not completely sure if Treasury has the administrative authority to implement the exact NBA proposal."[538] The memorandum also notes that "Banks' call report data is due on September 30."[539] It also notes that "without a firm commitment from Treasury to redeem the GSE preferred stock, OneUnited believes the bank will be shut down at the end of the month."[540] Of note is the fact that the memorandum also stated that the Independent Community Bankers of America ("ICBA") "has now raised similar concerts to NBA that some community banks may be considered undercapitalized because of their significant write-downs of GSE preferred stock."[541] The Chairman of the Financial Services Committee testified before the ISC that the:

> Relevance of the [call report data] is, they wanted to see if they could get something done before that, because that would be the day in which, if their capital had been devalued, they would have had to write down the value of loans, and that would have been kind of a drop dead day when negative consequences would have flowed.[542]

Further demonstrating the Chairman of the Financial Services Committee's commitment to this issue is an email from the staff director for the Financial Services

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536 *Id.*

537 *Id.*

538 *Id.*

539 *Id.*

540 *Id.*

541 *Id.*

542 FSC Chair Dep. at 42.

Committee to Treasury's Office of Legislative Affairs on September 22, 2008, at 11:49 am.[543] The email stated:

> I know you folks are going under for third time but I really need some guidance on what can be done about the National Association proposal. It is [a] huge priority for our minority caucuses who have had other major concerns not to [sic] date accommodated in pending bill. We are talking here about the potential failure of minority institutions that Treasury has a statutory responsibility to promote. [The Chairman of the Financial Services Committee] and [the former Treasury Secretary] spoke personally and the Secretary indicated he was committed to being helpful. I just need to know what that means. If the issue can be dealt with administratively – and will be – that would be very helpful to know. Otherwise there will be recommendations for provisions for this bill.[544]

On September 23, 2008, OneUnited's Special Counsel/Chair-Elect of the NBA sent Representative Waters' COS an email with an attachment entitled "Treasury Request Appendix Final.xls," which was a chart breaking down OneUnited's investment in GSE preferred stock.[545] Representative Waters' COS testified before the ISC that he reviewed the email when he received it, but he did not know why it had been sent to him.[546] OneUnited's Special Counsel/Chair-Elect of the NBA , testified that he did not have a "recollection of the reason why" he sent the chart to Representative Waters' COS and was "not sure I was sending it in or even thinking of it in either" his capacity as chairman-elect of the NBA or senior counsel to the NBA.[547]

Documents produced by Representative Waters' COS demonstrate that after he received the email, he forwarded it to a staffer on the Financial Services Committee.[548] He immediately followed up with the staffer by emailing and asking her "how did the meeting go?"[549] The staffer responded that they "will continue to pursue T acting

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543 *See* COS.MW.FRANK.39.

544 *Id.*

545 CSOC.WAT.001806-1807, attached hereto as Ex. 39.

546 *See* Rep. Waters' COS Dep. at 42-43.

547 OU Counsel Dep. at 80.

548 Waters_071912_75, attached hereto as Ex. 40. The Financial Services Committee already had this information as the same chart had been sent to the Chairman of the Financial Services Committee on September 15, 2008. The document received by Representative Waters' office was identical to the copy sent to the Chairman of the Financial Services Committee, except it was missing the header that stated, "A request for Protection from U.S. Treasury to Avert the Failure of OneUnited Bank due to Its Investment in GSE Preferred Stock." *Compare* Ex. 39 to Ex. 32.

549 *Id.*

without legislation but [another staffer] and I are also working on drafting CDFI-related language to help them that we could try to possibly add to the bailout bill."[550] In her testimony before Outside Counsel the staffer could not definitely answer who she was referring to in this email when she stated they were trying to "help them" but she did state that at this time they "were trying to help the National Bankers Association, but we were also around this time, I believe, made aware that there were other smaller-size institutions which were similarly situated, so "them" could be referring to the entities that were adversely impacted."[551]

At 4:01 pm on September 23, 2008, OneUnited's Special Counsel/Chair-Elect of the NBA forwarded an email to Representative Waters' COS that contained warrants language options for inclusion in the pending legislation.[552] There is no evidence in the record to demonstrate that her COS forwarded this email to anyone or otherwise acted on this email. Further, Outside Counsel has reviewed the legislative language included in this email and determined that the language is not included in the TARP legislation.

At 4:17 pm on that same day, a staffer on the Financial Services Committee, sent an email about the legislative solution to a member of the Chairman of the Financial Services Committee's personal staff and copied two other staff members from the Financial Services Committee.[553] The email states that the Chairman of the Financial Services Committee "confirmed this afternoon that he wants to address this in the rescue bill. Here's our draft language for your review and comment."[554] The following is the language that was proposed, which formed the basis for what ultimately became EESA section 103(6):

> The Secretary may establish a procedure to purchase the preferred stock of the entities under conservatorship under the manner set forth in the Housing and Economic Recovery Act of 2008 from individual institutions that are certified as community development financial institutions as defined under section 103(5) of the Riegle Community Development and Regulatory Improvement Act of 1994 with total assets of less than $750 million as of the date of the enactment of the Act in which the institutions capitalization rating has been materially impacted by the conservatorship at a sum that shall be determined by the Secretary. In establishing such a procedure, the Secretary shall include a requirement that the financial institution provide nonvoting stock as equity in exchange for the redemption.[555]

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[550] *Id.*

[551] 7/25/12 FSC Staffer #2 Dep. at 17.

[552] *See* CSOC.WAT.01804-001805, attached at Ex. 41.

[553] *See* CSOC.WAT.000456, attached hereto as Ex. 42.

[554] *Id.*

[555] *Id.*

Two days later, on September 25, 2008, OneUnited's Special Counsel/Chair-Elect of the NBA sent an email to Representative Waters' COS with the subject "any update?" The COS responded by asking OneUnited's Special Counsel/Chair-Elect of the NBA to call him in the office.[556] During his testimony before the ISC, Representative Waters' COS stated that he did not recall this email, but it was typical for him to have phone conversations as well as email communication.[557] Similarly, Mr. Cooper testified that he did not know to what he was referring, but speculated that it was "[m]aybe an update on a legislative approach."[558]

On September 28, 2008, Representative Waters' COS sent an email to the staff director and chief counsel for the Financial Services Committee, the deputy chief counsel for the Financial Services Committee, as well as two Committee staffers.[559] This email has been described as the "newly discovered" email that prompted the matter to be recommitted to the ISC during the 111th Congress. In the email, Representative Waters' COS thanks the staff for their work but expresses concern that he has not seen a draft for a couple of days and wants to know the status of provisions they have been working on. He specifically states that "Rep. Waters is under the explicit impression that the contracting language, the small bank language and systemic loan modification approach language is included in the bill. If there is any material or technical changes to the language as last agreed upon, please alert me as soon as possible so that Rep. Waters has an opportunity to weight in. It would not be acceptable to receive a copy after it is final."[560] In addition, he flags two drafting errors. The first involves inserting the word "financial" in section 103(6) of the EESA bill. This change was incorporated into the final bill. He also suggests substituting the word "practicable" for "possible" in Section 107(b), which is a section addressing minority contractors.[561] The staff director and

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556 CSOC.WAT.001178, attached hereto as Ex. 43.

557 *See* Rep. Waters' COS Dep. at 43.

558 OU Counsel Dep. at 82.

559 *See* COE.WAT.OC.265121, attached hereto as Ex. 44.

560 *Id.*

561 *Id.* Both Representative Waters and her COS testified that Representative Waters worked on provisions of the EESA legislation affecting minority institutions and didn't focus on OneUnited. Specifically, her COS stated that "[f]or me a litmus legislatively is not whether or not something will impact one individual or not. The litmus is whether or not it's a good policy and it's broad policy, and whether or not it has a broad impact. And so, even where we ended up with section 103(6), it was never a question for me whether or not OneUnited or any other bank fell into that. The question was whether or not this was a broad category that had a specific need, and the answer to me is yes." (7/2/12 Rep. Waters' COS Dep. at 61.) This testimony is supported by a Treasury Department email from early October 2008 indicating that certain individuals had heard from others that Representative Waters was concerned about opportunities for qualified minority and women-owned businesses to participate in the execution of the TARP program. *See* COE.WAT.OC.013009, attached hereto as Ex. 45.

chief counsel for the Financial Services Committee responds that "Leg Counsel is still working on the most recent draft and that RM or JH will report on the progress."[562]

These efforts by Representative Waters appear to be consistent with her overall efforts in this area. In fact, during his July 5, 2012, interview with Outside Counsel, Representative Waters COS was questioned specifically about this email, and he stated that the language he suggested he believed was a "composite of conversations that I had with NBA, documents I read from ABA and ICBA."[563] One of the Financial Services Committee staffers who received this email testified before Outside Counsel that he had previously worked on legislation with Representative Waters' COS and that it was not unusual for Representative Waters' COS to work on this type of legislation. In this particular instance, he did not recall her COS ever stating that he wanted the changes included in the legislation specifically for OneUnited, nor was there any other indication that he was specifically assisting OneUnited.[564]

Also on September 28, 2008, at 8:15 pm, OneUnited's Special Counsel/Chair-Elect of the NBA sent Representative Waters' COS an email with the subject line "Thank you for all your hard work!"[565] The email did not include any text. In his testimony before the ISC, OneUnited's Special Counsel/Chair-Elect of the NBA testified that he believed that this email was "referring to, again, my understanding of him ...setting up...a meeting with Treasury. I have been in contact with [Representative Waters' COS and the Congresswoman's office over a long period of time, and, you know, the office has always been receptive...taking my calls."[566]

On September 29, 2008, OneUnited's Special Counsel/Chair-Elect of the NBA sent an email to Representative Waters' COS with the subject "Checking in."[567] This was the day before OneUnited's September call report was due to the FDIC, which was a critical date for OneUnited. In the email, OneUnited's Special Counsel/Chair-Elect of the NBA states that "in thinking about next steps, we are prepared to rally our supporters by phone or through direct personal contacts. What is your sense, given that the inevitable 'mental fatigue' will begin to set in around a process that even as we speak

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[562] *Id.*

[563] 7/5/12 Rep. Waters' COS Dep. at 66-67.

[564] 7/23/12 FSC Staffer Dep. at 32-33.

[565] COS.WATERS.52, attached hereto as Ex. 46.

[566] OU Counsel Dep. at 82. Outside Counsel is not able to credit this answer. This email was sent three weeks after the Treasury meeting was held. In the time period since that meeting, OneUnited's Special Counsel/Chair-Elect of the NBA had forwarded several communications to Representative Waters' COS, who allowed himself to appear as a liaison for OneUnited by forwarded many of those communications. Further, the COS had notified a staffer on the Financial Services Committee that "OU is in trouble." Thus, it is questionable that this email was thanking Representative Waters' COS for assisting with the meeting at Treasury.

[567] CSOC.WAT.000771, attached hereto as Ex. 47.

has not been settled."[568] Despite receipt of this email, there is no evidence that Representative Waters' COS took any action on this email, that he forwarded this email to anyone, nor is there any evidence that he communicated directly with Treasury during this time period.[569] Rather, consistent with the earlier conversation between the Chairman of the Financial Services Committee and Representative Waters, there is substantial evidence that the Chairman's office did communicate with Treasury regarding OneUnited.[570]

3. The Legislative Solution

On October 3, 2008, EESA, which established TARP, was signed into law. Section 103(6) of EESA stated:

> In exercising the authorities granted in this Act, the Secretary shall take into consideration –
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> ...
>
> (6) providing financial assistance to financial institutions, including those serving low and moderate income populations and other underserved communities, and that have assets less than $1,000,000,000 that were well or adequately capitalized as of June 30, 2008, and that as a result of the devaluation of the preferred government-sponsored enterprises stock will drop one or more capital levels, in a manner sufficient to restore the financial institutions to at least an adequately capitalized level.[571]

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[568] *Id.*

[569] The only evidence of direct communication between Representative Waters' COS and Treasury is a series of emails in November 2008, where her COS forwards an outline of the NBA's proposed capital purchase program and attempts to assist the NBA set up a meeting with Treasury. The NBA correspondence is from the NBA Chairman and the NBA President. No individuals from OneUnited appear to be involved. A meeting was granted to the NBA after the Thanksgiving holiday.

[570] *See, e.g.,* COE.WAT.OC.012698; COE.WAT.OC.012666, attached hereto as Ex. 48.

[571] At the time the Wall Street Journal began investigating this matter, an email was circulated at the Treasury department about OneUnited. Initially, the Treasury Deputy Assistant Secretary of Public Affairs, states "Apparently this bank is the only one that has gotten money through section 103(6) of the EESA law. And Maxine Waters' husband is on the board of the bank." Later in the chain, the TARP program's deputy director, states that "OneUnited is a CDFI, which permits them to participate in CPP without issuing warrants to Treasury. They are by no means an exception in this regard – there are two other CDFIs that have already been funded under this arrangement." The Treasury Deputy Assistant Secretary Public Affairs further asked whether other banks were approved pursuant to section 103(6), to which the TARP program's deputy director responds "would we say that the CDFIs are approved under 103(6)?" (COE.WAT.OC.012679-012680, attached hereto as Ex. 49.) Whether any banks were specifically approved for TARP funds pursuant to section 103(6) may not be a question that can ultimately be answered because the Interim Assistant Secretary for Treasury for Financial Stability who made the ultimate decisions on the TARP applications testified that the investment committee evaluated all banks on one set of standards, and did not try to determine if a particular bank fit into one section of TARP or another. (Ass. Int. Treasury Sec. Dep. at 16, 21.)

One of the Financial Services Staffers testified that the Financial Services Committee "worked to include a provision in the TARP legislation that would allow Treasury to provide assistance to small-sized institutions, including under-served communities." She further testified that "[a]t the time that we were drafting the provision...we thought that there were up to 40 institutions that were of that size that may have been exposed because of the conservatorship that could have been impacted by that provision."[572]

The Chairman of the Financial Services Committee has publicly taken credit for this provision of the EESA legislation. In fact, he testified that he "urged the regulators to give to OneUnited and to some others because [he] believed that – as I said, economic disparity is a large part of our race problem."[573] He specifically stated that because of this language, he "intervened to urge" OneUnited to apply for TARP funds because "we made them eligible."[574]

OneUnited's Special Counsel/Chair-Elect of the NBA testified that he had worked on the language with many Members of Congress, including the Chairman of the Financial Services Committee and Representative Waters.[575]

I. Recapitalization of OneUnited

Following the government's conservatorship of Freddie and Fannie, OneUnited executives believed that the bank would fail unless it was able to find a way to recapitalize. The evidence in the record demonstrates that less than a month after the creation of TARP, OneUnited was able to raise enough capital to again be restored to an "adequately capitalized" status.

There were three elements to OneUnited's recapitalization efforts: 1) OneUnited needed to raise capital to be adequately capitalized and thus qualified to apply for TARP funds; 2) OneUnited needed to receive a waiver by the FDIC to allow certain tax credits to be counted towards Tier 1 capital; and 3) OneUnited needed to apply for and receive TARP funds.

1. Private Investment

OneUnited raised $17 million in private equity from State Street capital bank. After receiving these funds, the Chairman and CEO of OneUnited sent an email to Representative Waters and her COS, Special Counsel to the Chairman of the Financial Services Committee, a staffer on the Financial Services Committee and the Legislative Director for the Massachusetts' Senator that had been involved in this issue stating: "Thank you for your kindness and consideration in helping us to consummate this

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[572] FSC Staffer #2 Dep. at 107.

[573] FSC Chair Dep. at 53.

[574] *Id.* at 52-53.

[575] OU Counsel Dep. at 94.

transaction....the Bank is now adequately capitalized and we will be applying to the TARP program next week."[576]

Despite this email, the Chairman and CEO of OneUnited testified that he did not receive any help from anyone in Congress with raising private investment funds for OneUnited. Representative Waters testified that she had never seen the email and that she would be very surprised if anyone in her office had assisted since "office staff is not connected with monied sources. They don't raise money."[577] Her COS also stated that he provided no assistance to OneUnited in the raising of private equity.[578] Lending support to this testimony is the testimony of the Financial Services staffer who received this email and testified that the email was "a little confusing to me."[579] She continued by stating "we did insert a provision in the TARP legislation that addresses the situation that OneUnited and other smaller-sized institutions were in because of the conservatorship, so he may be referring to that. He may be referring to something else. I don't know."[580]

2. Tax Relief

The FDIC, as OneUnited's primary regulator, granted OneUnited a waiver to allow certain tax credits to count as capital. There is no evidence that Representative Waters, nor anyone on her staff, ever contacted the FDIC on this issue. In fact, in his deposition with Outside Counsel, Representative Waters' COS specifically denied any involvement with OneUnited's tax waiver request.[581] Further, the Director of Division of Supervision and Consumer Protection for the FDIC's testimony indicates that she recommended to the FDIC Board that the tax waiver be granted to OneUnited.[582]

3. TARP Funds

The FDIC also recommended that OneUnited receive TARP funds. In total 213 minority institutions received TARP funding.[583] There is no evidence that Representative Waters, nor anyone on her staff, ever contacted the FDIC on this issue.

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576 CSOC.WAT.000791, attached hereto as Ex. 50.

577 Rep. Waters Dep. at 45.

578 *See* 7/5/12 Rep. Waters' COS Dep. at 74.

579 FSC Staffer #2 Dep. at 94-95.

580 *Id.* at 95. The TARP language likely assisted OneUnited secure its private investment as the TARP funds protected the private investment, however, that alone does not support a finding that anyone on Representative Waters' staff inappropriately assisted OneUnited to obtain its private funding through staff's general work on TARP or even section 103(6).

581 *See* 7/5/12 Rep. Waters' COS Dep. at 75.

582 *See* FDIC Director Dep. at 21-22.

583 *See id.* at 40.

In fact, in his deposition with Outside Counsel, Representative Waters' COS specifically denied any involvement with OneUnited's TARP application.[584] OneUnited's Special Counsel/Chair-Elect of the NBA testified that he discussed OneUnited's TARP application with many members of Congress, including, he believed, Representative Waters' office, but he did not receive assistance from any members.[585] OneUnited ultimately received $12 million in TARP funds on December 19, 2008.

VI. LEGAL ANALYSIS OF SUBSTANTIVE ALLEGATIONS

A. Summary of Legal Analysis

Outside Counsel reviewed Representative Waters' conduct pursuant to the rules and standards of conduct applicable to using a Member's office for personal benefit and pursuant to the rules and standards of conduct generally applicable to contacting administrative agencies of the federal government. The Outside Counsel also reviewed Representative Waters' conduct pursuant to longstanding House precedent holding Members responsible for the oversight and administration of the Member's congressional office. Despite the fact that two and half years ago, the ISC in the Matter of Representative Waters for the 111th Congress determined that there were enough facts in the record to warrant an SAV in this matter, after a review of the facts by Outside Counsel and additional investigation, it is Outside Counsel's conclusion and recommendation to the Waters Committee that it cannot be proved by clear and convincing evidence that a knowing violation of the ethics rules or standards of conduct for Members of the United States House of Representatives occurred.

B. Relevant Rules and Standards of Conduct

1. Use of a Member's Office for Personal Benefit

As a general matter, Members are not barred "from holding assets that might conflict with or influence the performance of official duties."[586] Instead, the House recognizes that "some actual conflicts of interest are inevitable...and are not in themselves necessarily improper or unethical."[587] Under the House rules, Members are

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584 *See* 7/5/12 Rep. Waters' COS Dep. at 75.

585 *See* OU Counsel Dep. at 96.

586 House Bipartisan Task Force on Ethics, *Report on H.R. 3360*, 101st Cong., 1st Sess. 22 (Comm. Print, Comm. On Rules 1989), *reprinted in* 135 *Cong. Rec.* H9253, H9259 (Daily ed. Nov. 21, 1989). Although the term "conflict of interest" may be subject to various interpretations in general usage, under federal law and regulation, this term "is limited in meaning; it denotes a situation in which an official's conduct of his office conflicts with his private economic affair." Robert S. Getz, *Congressional Ethics* 3 (1967); *see also* Bayless Manning, *Federal Conflict of Interest Laws* 2-5 (1964). The ultimate concern "is risk of impairment of impartial judgment, a risk which arises whenever there is a temptation to serve personal interest." Association of the Bar of the City of New York Special Comm. On Congressional Ethics, *Congress and the Public Trust* 39 (1970).

587 *See* House Comm. On Standards of Official Conduct, *In the Matter of Representative Sam Graves,* H. Rep. 111-320, 111th Cong., 1st Sess. 15 (2009) (internal quotations and citations omitted).

permitted to take official action that results in a personal benefit to the Member, if the potential personal benefit is incidental to the Member's purpose in taking the action.[588] In contrast, a Member is barred from acting if a personal benefit is, or appears to be, one of the Member's reasons for taking the action.[589]

a. Official Action Resulting in Incidental Personal Benefit

There are several House and ethics rules that govern personal interest issues, which will be discussed in turn below.

First, under House Rule III, Members "shall vote on each question put, unless having a direct personal or pecuniary interest in the event of such question."[590] Just as Members may vote on legislation that affects them as members of a class rather than as individuals, they may also generally contact federal agencies on issues in which they, along with their constituents, have an interest.[591] "A constituent need not be denied congressional intercession merely because a Member...may stand to derive some incidental benefit along with others in the same class."[592] However, the 2008 *House Ethics Manual* counsels Members that official actions "such as sponsoring legislation, advocating or participating in an action by a House committee, or contacting an executive branch agency...entail a degree of advocacy above and beyond that involved in voting."[593] For this reason, "a Member's decision on whether to take any such action on a matter that may affect his or her personal financial interest requires added circumspection."[594]

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588 *House Ethics Manual,* at 314 ("A constituent need not be denied congressional intercession merely because a Member or the staff assistant assigned to a particular issue may stand to derive some incidental benefit along with others in the same class. Thus, Members who happen to be farmers may nonetheless represent their constituents in communicating views on farm policy to the Department of Agriculture. Only when Members' actions would serve their own narrow, financial interests as distinct from those of their constituents should the Members refrain.").

589 *House Ethics Manual,* at 187. In addition to restrictions against the use of a Member's office for direct personal benefit, there are also a few specific circumstances when a Member must refrain from acting because of a conflict of interest. For example, federal law prohibits Members, officers, and employees from privately representing others before the federal government. 18 U.S.C. § 203. Additionally, the Code of Ethics states that government employees should "engage in no business with the Government, either directly or indirectly which is inconsistent with the conscientious performance of his governmental duties." Code of Ethics for Government Service, section 7.

590 House Rule III.

591 (*House Ethics Manual,* House Comm. On Standards of Official Conduct, 110th Congress, 2nd Sess. (2008 ed.) (hereinafter 2008 *House Ethics Manual*) at 314).

592 *Id.*

593 *Id.* at 237.

594 *Id.*

A conflict of interest becomes problematic when a Member uses his position for the purpose of enhancing his personal financial interests or his personal financial interest impairs his judgment in conducting his public duties.[595] Thus, only when a Member's actions would serve his own narrow financial interests, as distinct from those of his constituents, should a Member refrain from acting.[596] "Historically, there is no authority to force a House Member to abstain from voting, and the decision on whether abstention from voting was necessary has been left to individual Members to determine for themselves under the circumstances."[597] While the House has never barred a Member from voting on a matter due to a possible personal benefit, the House has reprimanded Members for taking other action for personal benefit.[598]

Members may take official action that incidentally results in a personal benefit because they are required to make public disclosure of assets, financial interests, and investments.[599] "The House has required public financial disclosure by rule since 1968, and by statute since 1978." (*2008 Ethics Manual* at 251.) The House has determined that incidental conflicts of interest "are best resolved by the political process."[600] Public disclosure of assets, financial interest, and investments is intended to regulate possible conflicts of interest to "provide the information necessary to allow Members' constituencies to judge their official conduct in light of possible financial conflicts with private holdings."[601] Thus, the timely filing of complete and accurate Financial Disclosure Statements is essential to the political process and is fundamental to the House ethics system.[602]

b. Use of Office for Personal Benefit

The House Rules and other standards governing Members' conduct prohibit a Member from using, or appearing to use, his official position for personal benefit.[603]

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595 House Bipartisan Task Force on Ethics, *Report on H.R. 3360*, 101st Cong. 1st Sess. 22 (Comm. Print, Comm. On Rules 1989), *reprinted in* 135 *Cong. Rec.* H9253, H9259 (daily ed. Nov. 21, 1989).

596 *2008 House Ethics Manual*, at 314.

597 *Id.* at 238, *citing 5 Hinds' Precedents of the House of Representatives* §§ 5950, 5952 at 502, 503-04 (1907).

598 *See, e.g.*, Comm. On Standards of Official Conduct, *In the Matter of a Complaint Against Representative Robert L.F. Sikes*, (hereinafter *Sikes*) H. Rep. 94-1364, 94th Cong., 2d Sess. 3 (1976).

599 (House Rule XXVI; Title I of the Ethics in Government Act of 1978 (5 U.S.C. App. §§ 101-111.)

600 House Comm. On Standards of Official Conduct, *In the Matter of Representative Sam Graves,* (hereinafter *Graves Report*) H. Rep. 111-320, 111th Cong., 1st Sess. 15 (2009).

601 *Id.*

602 *Id.* at 15-16.

603 House Rule XXIII, clause 3; Code of Ethics for Government Service, section 5; *see also Sikes*, at 3; *2008 House* Ethics *Manual*, at 187 ("One of the purposes of the rules and standards [of conduct relevant to use of a Member's office for personal benefit] is to preclude conflict of interest issues.")

Under the Code of Ethics for Government Service ("Code of Ethics")[604], a federal official, including a Member, shall:

> Never discriminate unfairly by dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.[605]

Because the Code of Ethics measures a Member's conduct by "what might be construed by reasonable persons," a Member may violate this provision even if the Member's actions merely raise the appearance of impropriety.[606]

The House Rules also prohibit Members from "receiv[ing] compensation and...permit[ing] compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress.[607] A Member would violate this provision if the Member used the Member's "political influence, the influence of his position...to make pecuniary gains."[608]

Moreover, "when considering the applicability of this provision to any activity they are considering undertaking," Members "must also bear in mind that under a separate provision of the code of Official Conduct (House rule 23, cl.2), they are required to adhere to the spirit as well as the letter of the Rule of the House."[609] House Rule XXIII, clause 2, was drafted to "provide the House the means to deal with infractions that rise to trouble it without burdening it with defining specific charges that would be difficult to state with precision."[610] The practical effect of House Rule XXIII,

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[604] 72 Stat., Part 2, B12, H. Res. 175, 85th Cong. (adopted Jul 11, 1958).

[605] Code of Ethics, ¶ 5.

[606] Comm. on Standards of Official Conduct, *In the Matter of Representative Mario Biaggi*, (hereinafter *Biaggi*) H. Rep. 100-56, 100th Cong. 2d Sess. 9 (Feb. 18, 1988) ("While the Committee does not argue, nor can it be determined, that Representative Biaggi would not have interceded on behalf of Coastal in the absence or because of Esposito's gratuities to the congressman, it is nevertheless clear that at a minimum, an appearance is raised that such was the case. Accordingly, the Committee concluded that such improper appearance supports a determination that Representative Biaggi violated clause 5 of the Code of Ethics.").

[607] House Rule XXIII, clause 3.

[608] 114 *Cong. Rec.* 8807 (Apr. 3, 1968) (statement of Representative Price).

[609] *2008 House Ethics Manual*, at 186. In addition to House rule XXIII, clause 3, and Code of Ethics, section 5, Members should also be mindful that official resources, including congressional staff, must be used for official business and should not be used to do the work of private entities.

[610] 114 *Cong. Rec.* 8778 (Apr. 3, 1968); *see also* 114 *Cong. Rec.* 8799 (statement of Representative Teague, member of the House Comm. on Standards of Official Conduct, 90th Cong.).

clause 2, has been to provide a device for construing other provisions of the Code of Official Conduct and House Rules.[611] This rule has been interpreted to mean that a Member or employee may not do indirectly what the Member or employee would be barred from doing directly.[612] In other words, the House Rules should be read broadly, and a narrow technical reading of the House Rules should not overcome its "spirit" and the intent of the House in adopting the rules.[613]

When assessing whether a Member has taken official action for personal benefit, the Committee will take into consideration the nature of the benefit,[614] the people or entities that could benefit from the official action,[615] and the Member's motive in taking the action.[616] A Member may not take official action if the Member is motivated, or appears to be motivated, to take the action by the personal benefit that may accrue to the Member.[617] When determining a Member's motive in taking official action, the Committee asks whether there is "direct evidence that the congressman had any such improper motive."[618]

The House has applied the prohibition on taking official action for personal benefit in situations where the potential personal benefit would accrue to an investment held by the Member.[619] For example, in the Committee's report *In the Matter of a Complaint against Representative Robert L.F. Sikes*, the Standards Committee found

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[611] 2008 *House Ethics* Manual, at 17.

[612] House Select Comm. on Ethics, *Advisory Opinion 4*, Rep. 95-1837, 61-62, 95th Cong., 2d Sess. (1979).

[613] *Id.* House rule XXIII, clause 2, has not only been used as an aid to interpreting other House rules. For example, the Committee has cited the violation of House Rule XXIII, clause 2, several times in recommending expulsion of Members for various reasons. *See, e.g.,* House Comm. on Standards of Official Conduct, *In the Matter of Representative Michael J. Myers*, H. Rep. 96-1387 96th Cong., 2d Sess. 5 (1980) (member convicted of bribery); House Comm. on Standards of Official Conduct, *In the Matter of Representative Raymond F. Lederer*, H. Rep. 97-110 97th Cong., 1st Sess. 16 n.8 (1981) (Member convicted of bribery); *Biaggi*, at 7 (Member convicted of accepting illegal gratuities); House Comm. on Standards of Official Conduct, *In the Matter of Representative James A. Traficant Jr.*, H. Rep. 107-594, 107th Cong., 2d Sess. Vols. 1-VI (July 19, 2002) (Member convicted of conspiring to violate the bribery statute, accepting gratuities, obstructing justice, conspiring to defraud the United States, filing false income tax returns and racketeering).

[614] *See, e.g.,* House Comm. on Standards of Official Conduct, *Investigation of Financial Transactions Participated in and Gifts Accepted by Representative Fernand J. St. Germain*, (hereinafter *St. German*) H. Rep. 100-46, 100th Cong., 1st Sess. 43 (1987).

[615] *Graves*, at 19; *Sikes*, at 28.

[616] *St. Germain*, at 43.

[617] *Id.*

[618] *Id.*

[619] 3 *Deschler's Precedents of the United States House of Representatives*, ch. 12 § 8.4, 1714 (1994).

that when Representative Sikes sought to purchase shares of a privately held bank "which he had been active in his official position in establishing" he failed to observe:

> The standard of ethical conduct...as is expressed in principle in Section 5 of the Code of Ethics for Government Service, and which prohibits any person in Government service from accepting for "himself...benefits under circumstances which might be construed be reasonable persons as influencing the performance of his governmental duties."[620]

The Committee further found that Representative Sikes failed to observe "[t]he standard of ethical conduct that should be observed by Members of the House, as is expressed in principle in the Code of Ethics for Government Service, and which prohibits conflicts of interest and the use of an official position for any personal benefit," when he sponsored legislation to remove a reversionary interest and restrictions on land in which he had a personal financial interest.[621]

2. Contacts with Administrative Agencies of the Federal Government

In most circumstances, arranging for a meeting with an administrative agency is an appropriate use of a Member's official position.[622] The Committee has long recognized that acting as a "go-between" or conduit between a Member's constituents and administrative agencies of the federal government is an important aspect of a Member's representative function.[623] The Constitution guarantees all citizens the right to petition the government for redress of grievances, and a logical point of contact is one's elected representative.[624] Of course, when acting as a conduit between a Member's constituents and administrative agencies of the federal government, a Member's conduct is bound by certain statutory and judicial restrictions.[625] Moreover, when taking any such action, a Member "must also observe certain ethical principles."[626]

Federal law specifically prohibits *ex parte* communications directed to executive or independent agency officials on the merits of matters under their formal

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[620] *Sikes*, at 3.

[621] *Id.* at 4.

[622] *Advisory Opinion No. 1.*

[623] *2008 House Ethics Manual*, at 299.

[624] U.S. Const., amend. I; *see also McCormick v. United States*, 500 U.S. 257, 272 (1991) ("Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator.").

[625] *See, e.g.*, 5 U.S.C. § 557(d); *Pillsbury Co. v. FTC*, 354 F.2d 952, 963 (5th Cir. 1966).

[626] *2008 House Ethics Manual*, at 300; *see also, e.g., Advisory Opinion No. 1.*

consideration.[627] The proscription against *ex parte* communications does not extend to "general background discussions about an entire industry which do not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole."[628] The statute also specifically exempts congressional status requests.[629] "While the prohibitions on *ex parte* communications relative to the merits apply to communications from Members of Congress, they are not intended to prohibit routine inquiries or referrals of constituent correspondence."[630]

In addition to statutory and judicial restrictions on acting as a conduit between a Member's constituents and administrative agencies of the federal government, Congress has also adopted standards that recognize the legitimate role of a Member in assisting constituents, while protecting both the due process rights of parties potentially affected by government action and the ability of agency officials to exercise their responsibilities.[631]

The Committee expressed its longstanding guidance on communicating with executive and independent agencies of the federal government in its Advisory Opinion No. 1. In this opinion, the Committee stated that it is appropriate for a Member to act as a conduit between a Member's constituents and federal government agencies by arranging for interviews or appointments with federal government agencies.[632] The Committee noted that the "overall public interest...is primary to any individual matter and should be so considered."[633] Advisory Opinion No. 1 further set forth the following "self-evident" standards of conduct:

1. A Member's responsibility in this area is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations.

2. Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role.

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[627] 5 U.S.C. § 557(d). Such communications are defined as oral or written communications made without proper notice to all parties and not on the public record, from an interested person outside the agency to a member of the agency, an administrative law judge, or an employee involved in the decision-making process. 5 U.S.C. § 551(14).

[628] House Comm. on Gov't Operations, *Government in the Sunshine Act*, H. Rep. 94-880, 94th Cong., 2d Sess., pt. I, at 20 (1976).

[629] *See* 5 U.S.C. §551(14); *see also* Government in Sunshine Act, S. Conf. Rep. 94-1178, 94th Cong., 2d Sess. 29 (1976).

[630] H. Rep. 94-880, at 21-22.

[631] *See generally 2008 House Ethics Manual*, at 305.

[632] *See Advisory Opinion No. 1.*

[633] *Id.*

3. A Member should make every effort to assure that representation made in his name or by any staff employee conform to his instruction.[634]

The Committee has further stated that a "legislator's expressions of interest" are not sufficient to show that a Member used undue influence" in contacting an administrative agency of the federal government."[635] A finding of influence should not be based on "pure inference or circumstance or, for that matter, on the technique and personality of the legislator."[636] Instead, a finding of undue influence "must be based on probative evidence that a reprisal or threat to agency officials was made."[637]

In the *2008 House Ethics Manual*, the committee further advised: "[w]hen communicating with an agency, Members and staff should only assert as fact that which they know to be true."[638] The *2008 House Ethics Manual* warns Members that "[i]n seeking relief, a constituent will naturally state his or her case in the most favorable terms...Thus, a Member should exercise care before adopting a constituent's factual assertions."[639] For this reason, the *House Ethics Manual* suggests that "[a] prudent approach in any communication would be to attribute factual assertions to the constituent."[640]

A Member should "[n]ever discriminate unfairly by the dispensing of special favors or privileges to anyone."[641] A Member's obligations are to all constituents equally. Considerations such as political support, party affiliation, or campaign contributions should not affect either the Member's decision to provide assistance or the quality of help that is given.[642] While a Member should not discriminate in favor of political supporters, neither should the Member discriminate against them.[643] "The fact that a constituent is a campaign donor does not mean that a Member is precluded from

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634 *Id.*

635 House Comm. on Standards of Official Conduct, *Statement in the Matter of James C. Wright, Jr.*, 101st Cong., 1st Sess. 84 (1989).

636 *Id.*

637 *Id.*

638 *2008 House Ethics Manual*, at 307.

639 *Id.*

640 *Id.*

641 Code of Ethics for Government Service, ¶ 1.

642 *Advisory Opinion No. 1.*

643 House Comm. on Standards of Official Conduct, *Statement Regarding Complaints Against Representative Newt Gingrich*, 101st Cong., 2d Sess. 66 (1990).

providing any official assistance. As long as there is no *quid pro quo*, a Member is free to assist all persons equally."[644] The Committee has warned that providing official assistance in some instances, such as acting as a conduit between an administrative agency and a donor to the Member's campaign, may "raise an appearance of impropriety."[645] In such instances, the Committee has warned Members to "be aware of the appearance of impropriety that could arise from championing the causes of contributors and take care not to show favoritism to them over other constituents."[646]

In addition to acting as a conduit between a Member's constituents and administrative agencies of the federal government, Members may also assist individuals from outside of the Member's district.[647] However, a Member's ability to provide assistance to individuals from outside of the Member's district is more limited. In particular, the statute establishing the Member's Representational Allowance provides that the purpose of the allowance is "to support the conduct of the official and representational duties of a Member of the House of Representatives with respect to the district from which the Member is elected."[648] This statute does not absolutely prohibit a Member from ever responding to a non-constituent. As the Committee has stated:

> In some instances, working for non-constituents on matters that are similar to those facing constituents may enable the Member to better serve the Member's district. Other times, the Member may serve on a House committee that has the expertise and ability to provide the requested help. Of course, if a Member has personal knowledge regarding a matter or an individual, he or she may always communicate that knowledge to agency officials. As a general matter, however, a Member should not devote official resources to casework for individuals who live outside the district. When a Member is unable to assist such a person, the Member may refer the person to his or her own Representative or Senator.[649]

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[644] *Id.*

[645] *2008 Ethics Manual*, at 309 (*citing* Senate Select Comm. on Ethics, *Investigation of Senator Alan Cranston*, S. Rep. 102-223, 102d Cong., 1st Sess. 11-12 (1991)).

[646] *2008 House Ethics Manual*, at 309.

[647] *Id.*

[648] 2 U.S.C. ¶ 57b; *see also* Comm. on House Admin., U.S. House of Representatives, *Members' Congressional Handbook*, Regulations Governing the Members' Representational Allowance (2001).

[649] *2008 House Ethics Manual*, at 310.

3. Member's Responsibility for Oversight and Administration of Congressional Staff

Members are responsible for the oversight and administration of the Member's congressional office.[650] Under longstanding House precedent, "Members are responsible for the knowledge and acts acquired or committed by their staff within the course and scope of their employment."[651] "Many times Members act through the actions of their staff and, therefore, should be held liable for those actions in certain circumstances."[652] This is because "it would not well serve the House as an institution to allow its Members to escape responsibility by delegating authority to their staff to take actions and hide behind their lack of knowledge of the facts surrounding these actions.[653]

There are several instances where this Committee has held a Member liable and recommended disciplinary findings and sanctions for the actions of the Member's staff.[654] In this instance, such a finding would be appropriate if Representative Waters' COS *knowingly* violated the conflict rules, or if Representative Waters had taken no steps to prevent such conflicts. However, as discussed above, Representative Waters took the affirmative step to inform her Chief of Staff of her conversation with the Chairman of the Financial Services Committee, during which time she determined that neither she, nor her staff, should specifically assist only OneUnited.

4. Clear and Convincing Standard Applicable to Committee Hearings

In conducting our review and formulating our conclusions and recommendations, Outside Counsel was mindful of the clear and convincing evidentiary

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650 *Gingrich*, at 60.

651 *See* House Comm. on Standards of Official Conduct, *In the Matter of the Investigation into Officially Connected Travel of House Members to Attend the Carib News Foundation Multinational Business Conferences in 2007 and 2008* (hereinafter *Carib News*), H. Rep. 111-422, 111th Cong., 2d Sess. 122 (2010).

652 *Id.* at 126.

653 *Id.* at 125-126.

654 *See, e.g.*, Comm. on Ethics, *In the Matter of Allegations Relating to Representative Laura Richardson*, H. Rept. 112-642, 112th Cong. 2d Sess. at 93 (August 1, 2012) ("Longstanding precedent of the Committee holds that each Member is responsible for assuring that the Member's employees do not violate this rule, and Members may be held responsible for any violations occurring in his or her office"); Comm. On Standards of Official Conduct, *In the Matter of Representative E.G. "Bud" Shuster,* H. Rep. 106-979, 106th Cong. 2d Sess. 31 (2000) (Member held liable for violations of prohibition on campaign work by official staff arising from lack of uniform leave policy); *Statement Regarding Complaints Against Representative Newt Gingrich,* 101st Cong. 2s Sess. 60, 165-66 (1990) (Member held responsible for violations arising out of presence of political consultant in his office); *In the Matter of Representative Austin J. Murphy,* H. Rep. 100-485, 100th Cong. 1st Sess. 4 (1987) ("a Member must be held responsible to the House for assuring that resources provided in support of his official duties are applied to the proper purposes").

standard that is applicable to Committee Hearings. Specifically, Committee Rule 23(c), which governs Adjudicatory Hearings, states the following:

> The adjudicatory subcommittee shall hold a hearing to determine whether any counts in the Statement of Alleged Violation have been proved by clear and convincing evidence and shall make findings of fact, except where such violations have been admitted by respondent.[655]

While there is no Committee precedent describing this standard, federal case law, while not binding on the Committee, can be used to illustrate what this standard requires. In the Judicial branch, a clear and convincing standard requires that the finder of fact determine that the evidence demonstrates a high probability that the violation occurred.[656]

Upon review of the House and Committee Rules, as well as the evidentiary standard governing this Matter, as will be discussed below, it is the recommendation of Outside Counsel that the record does not contain clear and convincing evidence to prove an ethical violation by Representative Waters.

C. Discussion

1. Representative Waters did not Violate Any Rules or Other Standards of Conduct by Arranging the Meeting with Treasury

Upon the completion of its review, Outside Counsel has concluded and is recommending to the Waters Committee that Representative Waters did not violate any rule or other standards of conduct when she arranged for the September 9, 2008, meeting with Treasury because Representative Waters believed she was arranging the meeting due to the impact of the Conservatorship on a large group of MDIs, and thus any potential personal benefit she may have received from the meeting was only incidental to her purpose in arranging the meeting.

On December 31, 2007, Representative Waters' husband held approximately $350,000 in OneUnited stock.[657] His stock was less than a 0.5% interest in the bank and

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[655] Comm. Rule 23(c).

[656] *See, e.g., Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d. 1348, 1349 n.5 ("The 'clear and convincing' standard is an intermediate standard which lies somewhere in between the 'beyond a reasonable doubt' and the 'preponderance of the evidence' standards of proof. Although an exact definition is elusive, 'clear and convincing evidence' has been described as evidence that 'place[s] in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable'") (citing *Colorado v. New Mexico*, 467, U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 425 (1979)); *see also In re Genetically Modified Rice Litig.*, 666 F.Supp.2d 1004, 1030 (E.D. No. 2009) ("Clear and convincing evidence is evidence that 'instantly tilts the scales in the affirmative when weighed against evidence in opposition; evidence which clearly convinces the fact finder of the truth of the proposition to be proved") (applying Missouri law).

[657] COE.WAT.OC.015272.

accounted for somewhere between 4.6% and 15.2% of his and Representative Waters' combined net worth.[658] On June 30, 2008, Representative Waters' husband's OneUnited stock was still valued at approximately $350,000. However, in September 2008, when the GSEs were placed into conservatorship, OneUnited incurred unrealized losses on their investments in Fannie Mae and Freddie Mac preferred stock that effectively wiped out all of OneUnited's Tier 1 capital and threatened the existence of the bank.[659] Because of this event, Representative Water's husband's investment in OneUnited immediately lost more than half its value,[660] and if the bank failed, he would have lost all of the stock's value.

Immediately after the GSEs were placed into conservatorship, OneUnited executives, one of whom played a dual role and also represented the NBA as the Chair-Elect, asked Representative Waters to arrange a meeting with Treasury, and asked her COS, to coordinate the meeting.[661] In both written and verbal conversations with Representative Waters, the OneUnited executives told her that they were contacting her on behalf of the NBA and that the conservatorship threatened the existence of a large group of MDIs.[662] They further told her that the purpose of the meeting with Treasury would be to discuss the impact of the conservatorship on this large group.[663]

Based upon those representations, Representative Waters called the former Treasury Secretary to request a meeting on behalf of the minority bankers and, once the meeting was granted, asked her COS to coordinate the meeting.[664] The next day, several OneUnited executives, one of whom was also the Chair-Elect and Chair of the Legislative Committee of the NBA, an attorney who served as counsel for both NBA and

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658 COE.WAT.OC.015207.

659 *See* OU Counsel Dep. at 32, 72; OU COO Dep. at 20; FDIC Director Dep. at 14.

660 *See* CSOC.WAT.ONEUN.00000679.

661 *See* Rep. Waters Dep. at 19, 30-31; Rep. Waters' COS Dep. at 66.

662 *See* COS.MW.FRANK.48-COS.MW.FRANK.49; Rep. Waters' COS Dep. at 66; Rep. Waters Dep. at 19, 30-31.

663 *See* Rep. Waters Dep. at 19, 30-31; Rep. Waters' COS Dep. at 66. As discussed *supra*, a Member must "exercise care before adopting a constituents' factual assertions" when communicating with an agency. 2008 House Ethics Manual, at 307. In this case, the record indicates that Representative Waters' told the former Treasury Secretary that the minority banks "appeared" to be in trouble. (Rep. Waters Dep. at 11.) While the former Treasury Secretary stated that "there are banks and minority banks that have bought preferred stocks of government-sponsored enterprises thinking they were going to be good money; now... you've taken this step and wiped them out, and so she was concerned about that." (Former Treasury Sec. Dep. at 12.) Thus the record is not clear that she adopted her constituents statements, or if she attempted to limit her conversation to conveying the information given to her and properly attributing the information to the minority banks. Thus, it is Outside Counsel's recommendation that the Waters Committee determine that the record does not contain clear and convincing evidence to demonstrate a violation by Representative Waters with respect to her call to the Former Treasury Secretary.

664 *Id.*

OneUnited, Representative Waters' COS, and staffers for the Financial Services Committee and a Massachusetts Senator's staffer met with high ranking representatives from Treasury and various bank regulators.[665]

At the meeting, the Treasury officials had a general discussion of the conservatorship. Special Counsel for OneUnited/Chair-Elect of the NBA and others discussed the overall effect of the conservatorship on minority banking institutions in general. Ultimately, the Chairman and CEO of OneUnited discussed the impact the conservatorship had on OneUnited as an example of the effect on minority banks, but then specifically requested $50 million for OneUnited as a buy-back of its Freddie and Fannie shares of preferred stock.[666]

Based on this evidence, the Outside Counsel is advising the Committee that the rules and standards of conduct related to use of a Member's official position for personal benefit did not bar Representative Waters from arranging the September 9, 2008, meeting. Representative Waters serves on the Financial Services Committee, and in that capacity has a long history of assisting MDIs and working with the NBA.[667] Additionally, the evidence demonstrates that MDIs, including OneUnited, serve Representative Waters' district.[668] Thus, her constituents have an interest in MDIs.[669] Moreover, overwhelming evidence supports the conclusion that, at the time she requested the meeting with Treasury, Representative Waters believed that she was arranging the meeting on behalf of all NBA member banks and not just OneUnited.[670]

Outside Counsel also concluded that when Representative Waters arranged for the September 9, 2008, meeting with Treasury, she did not violate any House Rule or other standard of conduct generally applicable to contacting administrative agencies of the federal government on behalf of constituents. Instead, Representative Waters' conduct to the extent it was limited to requesting a meeting, appeared to conform to the Committee's longstanding guidance on communicating with executive and independent agencies of the federal government on behalf of constituents.

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665 COS.MW.FRANK.50.

666 *See, e.g.,* FDIC Director Dep. at 17-23; OU CEO Dep. at 45.

667 *See* Rep. Waters Dep. at 6, 15; NBA President Dep. at 16; OU Counsel Dep. at 18-20.

668 *See* OU Counsel Dep. at 20.

669 *See* Rep. Waters Dep. at 49.

670 *See* Rep. Waters' COS Dep. at 66; Rep. Waters Dep. at 11, 30-31; Former Treasury Sec. Dep. at 9-10; CSOC.WAT.ONEUN.00000373; COS.MW.FRANK.48; COS.Mw.FRANK.99; COS.MW.FRANK.53.

2. Representative Waters Recognized that she should not take any Official Action to Assist OneUnited to Directly Receive Money

As noted above, Representative Waters, through her husband, had a financial interest in OneUnited.[671] At some point in September 2008, Representative Waters had a conversation with the Chairman of the Financial Services Committee regarding the effect of the Conservatorship on OneUnited.[672] While Outside Counsel is unable to conclusively determine the exact date this conversation took place, based on the testimony in the record, it is Outside Counsel's conclusion that the conversation likely took place sometime in the time period between September 9 and September 20, 2008. During the course of the conversations, the Chairman of the Financial Services Committee was not aware of Representative Waters' financial interest in the bank, but still told Representative Waters that she did not "have to worry about them being abandoned because this is an issue that I care about and it is in my region. So I plan to be very helpful to them, and I recommend that you stay out of it."[673] Representative Waters agreed with the Chairman of the Financial Services Committee's suggestion, and decided that because of her interest in the bank, she "shouldn't be involved with that."[674]

Outside Counsel has determined that Representative Waters' decision that she could arrange for a meeting between representatives of the NBA and Treasury, but should not later advocate to Treasury solely on behalf of a bank in which she had a financial interest was an appropriate interpretation of the rules and standards of conduct relevant to use of a Member's office for personal benefit.

As discussed above, simply having a personal financial interest in the subject matter of the September 9, 2008, Treasury meeting was not sufficient to bar Representative Waters from contacting Treasury to arrange the meeting if that interest was incidental to Representative Waters' purpose in arranging the meeting.[675] However,

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[671] Representative Waters fully and accurately disclosed her interest in OneUnited on her Financial Disclosure Statements. *See* Representative Waters' 2008 Financial Disclosure Statement; *see also* Representative Waters' 2007 Financial Disclosure Statement; Representative Waters' 2006 Financial Disclosure Statement; Representative Waters' 2005 Financial Disclosure Statement. Further demonstrating her attempts to be transparent about her husband's investment in OneUnited, during an October 2007 Financial Services subcommittee hearing, Representative Waters disclosed that her husband was a current board member and a shareholder of OneUnited. She did so both on the record and in a statement she submitted for the record. Representative Waters stated on the record that the she was making the disclosures, regardless of whether she was required to do so, because "I think we should always put it in the record."

[672] *See* FSC Chair Dep. at 19-20; Waters Dep. at 26-27.

[673] FSC Chair Dep. at 19-20.

[674] Rep. Waters Dep. at 53.

[675] *2008 House Ethics Manual,* at 314.Outside Counsel notes that the record does not support by clear and convincing evidence that Representative Waters violated any of the express prohibitions on Members acting due to a conflict of interest. (Rep. Waters Dep. at 11; Former Treasury Sec. Dep. at 9-10.)

once Representative Waters learned that executives of OneUnited were seeking money specifically for only OneUnited bank, she properly recognized that she should not advocate solely on behalf of that bank due to her financial interest.[676]

Representative Waters' husband had previously served on the board of OneUnited, and Representative Waters, through her husband, had a financial interest in OneUnited of approximately $350,000.[677] While his service on the board and ownership of stock, standing alone, do not create a violation, these facts coupled with any actions perceived to be taken solely on behalf of OneUnited create an appearance of impropriety. Representative Waters properly appears to have considered these factors when determining whether her assistance to the bank had the potential to create an appearance of impropriety.[678] Based on the facts of this case, the Outside Counsel concluded that, if Representative Waters assisted the bank in a direct request for financial assistance from Treasury, it would create an appearance of impropriety because reasonable persons might construe these factors as influencing Representative Waters' decision to assist the bank.[679] For these reasons, any such assistance would be contrary to at least the spirit, if not the letter, of the House rules and other standards of conduct relevant to use of a Member's office for personal benefit. However, after careful review of the record in this matter, Outside Counsel concludes and recommends to the Waters Committee that Representative Waters properly recognized that she should not take any official action to assist OneUnited to directly receive money. As such, there is not clear and convincing evidence in the record that Representative Waters violated any House rule or other standard of conduct.

3. Representative Waters' Chief of Staff Communicated Solely on Behalf of OneUnited in Two Circumstances

If Representative Waters was unable to advocate solely on behalf of OneUnited's financial interest, her staff was also barred from advocating solely on behalf of the bank as well.[680] After Representative Waters concluded that she should not advocate on

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[676] *See* FSC Chair Dep. at 19-24; Rep. Waters Dep. at 53.

[677] *See* COS.WATERS.90; CSOC.WAT.ONEUN.0000002; CSOC.WAT.ONEUN.00000001; CSOC.WAT.ONEUN. 571; CSOC.WAT.ONEUN.00000679. Outside Counsel notes that the Chairman and CEO of OneUnited, as well as the President of OneUnited donated money to Representative Waters' campaign and hosted a fundraiser for her as well. (OU COO Dep. at 10-11; OU CEO Dep. at 12; Rep. Waters Dep. at 8-9.) A Member assisting a donor is not, on its own, improper. *See, e.g., McCormick v. United States*, 500 U.S. 257, 272 (1991). However, Members "should be aware of the appearance of impropriety that could arise from championing the causes of contributors and take care not to show favoritism to them over other constituents." *2008 House Ethics Manual* at 309. Outside Counsel has concluded that Representative Waters acted appropriately in connection with any actions she took on behalf of the NBA.

[678] *See* Code of Ethics, section 5; *2008 House Ethics Manual*, at 237.

[679] *See* Code of Ethics, section 5.

[680] *See generally St. Germain*, at 43 (assessing whether a Member, who was the chairman of the Committee on Banking, Finance and Urban Affairs, improperly attempted to influence the Federal Home Loan Bank Board when a staffer for the Banking Committee made telephone calls to the

behalf of OneUnited, her COS continued to have contact with OneUnited executives regarding the legislative solution being sought by minority and community banks. Her COS characterized his communications with the Chairman and CEO of OneUnited and OneUnited's Special Counsel/Chair-Elect of the NBA as "FYI's that I was sent."[681]

While Outside Counsel believes that Representative Waters' COS's level of involvement went beyond that of a passive recipient, it is Outside Counsel's opinion that, with two exceptions discussed below, the evidence does not establish by a clear and convincing standard that he was knowingly acting only on behalf of OneUnited, and not also on behalf of the larger community of minority and community banks.[682] Further, the evidence in the record is unclear as to when the two specific actions that have been identified that were taken solely on behalf of OneUnited[683] occurred with relation to the conversation between Representative Waters and her Chief of Staff. Outside Counsel could not determine from the record whether the two emails sent on behalf of OneUnited by Representative Waters' COS occurred prior to or following the conversation between Representative Waters and her COS. Outside Counsel believes this is an important determination as it represents the clearest instance when Representative Waters' COS should have learned that a conflict existed between Representative Waters and OneUnited. However, as discussed previously, there is evidence in the record to indicate that Representative Waters' COS should have known of the conflict with OneUnited prior to his conversation with Representative Waters.[684] Once her COS became aware of the conflict, he should have refrained from taking any further action solely on behalf of OneUnited.

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chairman of the Bank Board); *see also Carib News* at 125-126 ("it would not well serve the House as an institution to allows its Members to escape responsibility by delegating authority to their staff to take actions and hide behind their lack of knowledge of the facts surrounding these actions.").

[681] Rep. Waters' COS Dep. at. 30.

[682] *See* 7/5/12 Rep. Waters' COS Dep. at 66-67; FSC Chair Dep. at 34-35; FSC Staffer #2 Dep. at 17; *see also* FSC Sr. Policy Dir. at 21 (testified to receiving complaints from many outside groups that TARP would not do enough to help small institutions); FSC Chair's Counsel Dep. at 40 (testified to having conversations with ICBA and Massachusetts Bankers regarding the conservatorship because it was a larger issue than simply a OneUnited issue).

[683] These two actions include the September 19, 2008, email sent by Representative Waters' COS to a staffer on the Financial Services Committee with the subject line "OU is in trouble," and the forwarding of the chart regarding OneUnited's investment in GSEs to a Financial Services Committee staffer on September 23, 2008. *See* COS.MW.FRANK.44; CSOC.WAT.001806-1807. As discussed previously, because OneUnited was part of a larger class of banks affected by the financial crisis, there is no violation of any House Rules or other standards of conduct with respect to assisting the entire class. However, there is nothing in these two email communications to demonstrate, nor is there any other evidence in the record to support, that these emails were sent on behalf of the larger class as opposed to solely being sent on behalf of OneUnited.

[684] Ultimately, the Waters Committee will need to make a credibility determination regarding Representative Waters' COS' testimony regarding his knowledge, or lack thereof, of the conflict between Representative Waters and OneUnited.

At the time the two emails were sent on behalf of OneUnited by Representative Waters' COS, he testified that he could not recall if he was aware of Representative Waters' husband's financial interest in OneUnited at that time.[685] There is evidence in the record to demonstrate that Representative Waters made her COS aware that she should not take any action to specifically assist OneUnited, although the timing of that conversation is not clear from the record. Finally, there is no evidence in the record to indicate that Representative Waters was aware of the communications between her COS and anyone associated with OneUnited. As such, Outside Counsel recommends that the evidence in the record does not support by clear and convincing evidence that Representative Waters failed to exercise proper oversight of her COS.

Outside Counsel's review demonstrates that Representative Waters' COS had the following communications with executives of OneUnited or otherwise took the following actions on behalf of OneUnited:

- September 19, 2008, email to a Financial Services staffer stating that "OU is in trouble."[686]

- September 20, 2008, Representative Waters' COS forwarded the first draft of the legislation that ultimately became the EESA legislation to the Chairman and CEO of OneUnited.[687]

- On September 23, 2008, Representative Waters' COS forwarded an email he received from OneUnited's Special Counsel/Chair-Elect of the NBA with an attached chart that broke down OneUnited's investment in GSE preferred stock to a Financial Services Staffer.[688] He immediately followed

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[685] Rep. Waters' COS Dep. at 14-15. Outside Counsel is troubled by this testimony in light of the fact that, as discussed above, at a subcommittee hearing in 2007 Representative Waters' disclosed her husband's investment in OneUnited. In addition, Representative Waters' COS is also her grandson, Representative Waters testified that he would have known of the investments, and the investments are disclosed in Representative Waters' financial disclosure statements.

[686] This email can be construed as an official act to assist OneUnited. During questioning regarding an email sent on September 22, 2008, her COS responded that "I knew that the ambassador had been on the board, that he had come off the board. I knew that the Congresswoman had an investment and had gotten rid of that investment. I was not conscious at the time that the ambassador still had an investment. So that would not have been a red flag." (7/5/12 Rep. Waters' COS Dep. at 63.) However, as discussed, *supra* n.685, Outside Counsel is troubled by this testimony in light of other evidence in the record regarding the disclosure of Representative Waters' husband's investment. Nonetheless, there is no evidence that Representative Waters was aware that her COS sent this email.

[687] While the Chairman and CEO of OneUnited was not also an officer of the NBA, because OneUnited is both a member bank of the NBA and the largest African-American bank in the country, it is Outside Counsel's conclusion and recommendation to the Committee that the evidence can support an interpretation that the forwarding of this legislation to a OneUnited executive was done as part of his actions to assist all minority and community banks at this time.

[688] Waters_071912_75, attached as Ex. 40.

up with the staffer by emailing and asking her "how did the meeting go?"[689] The staffer responded that they "will continue to pursue T acting without legislation but [another staffer] and I are also working on drafting CDFI-related language to help them that we could try to possibly add to the bailout bill."[690]

- On September 25, 2008, Representative Waters' COS instructed OneUnited's Special Counsel/Chair-Elect of the NBA to call him so that he could provide an update to OneUnited's Special Counsel/Chair-Elect of the NBA.[691]

- On September 28, 2008, Representative Waters' COS sent an email to the Staff Director and Chief Counsel for the Financial Services Committee in which he sought an update on the draft legislation on behalf of Representative Waters. He also requested that certain changes be made to the sections affecting minority banks and minority contractors.[692]

- On September 28 and 29, 2008, Representative Waters' COS received unsolicited emails from OneUnited's Special Counsel/Chair-Elect of the NBA thanking him for all his "hard work" and "checking in" respectively. There is no evidence that Representative Waters' COS forwarded these emails or otherwise took any action in response to their receipt.

Outside Counsel has determined, and recommends to the Waters Committee, that it is not possible to determine by a clear and convincing standard when the conversation between Representative Waters and her COS regarding her conflict with OneUnited occurred. Nonetheless, there is evidence in the record to allow the Waters Committee to determine that Representative Waters' COS should have known of the conflict prior to that conversation. Regardless, following that conversation, Representative Waters' COS was clearly on notice of the conflict that existed and knew that he could not assist OneUnited in its own narrow attempt to secure funding. However, because credibility determinations are left to the Waters Committee and the

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689 *Id.*

690 *Id.* The Financial Services Staffer testified before Outside Counsel that at the time of this email the Financial Services Committee was trying to help both the NBA and also smaller-size institutions that were similarly situated. (7/25/12 FSC Staffer #2 Dep. at 17.) As discussed supra nn. 685-686, Outside Counsel questions the credibility of Representative Waters' COS with respect to his testimony regarding whether he was aware of Representative Waters' husband's investment in OneUnited.

691 The testimony in the record supports the conclusion that this conversation may have been about the "legislative approach," which was drafted to assist minority and community banks in general and necessarily OneUnited. (OU Counsel Dep. at 82.)

692 Outside Counsel has concluded, and recommends to the Committee, that the testimony in the record supports the fact that Representative Waters' COS determined that he was acting in this email for "a broad category that had a specific need," and not solely on behalf of OneUnited. (7/5/12 Rep. Waters' COS Dep. at 61.)

timing of that conversation is unclear, the Outside Counsel recommends that the two actions taken by her COS solely on behalf of OneUnited cannot be proven by a clear and convincing standard to rise to the level of a knowing violation of House rules or other standards of conduct relevant to using a Member's office for personal benefit.

Representative Waters' COS is the most senior person on her staff. Once Representative Waters arranged for the meeting with Treasury, she instructed her COS to coordinate with OneUnited's Special Counsel/Chair-Elect of the NBA regarding the meeting, and the COS "was the main point of contact [with Treasury] after the Congresswoman spoke to the former Treasury Secretary."[693] As previously discussed, there was nothing inappropriate about Representative Waters arranging this meeting. However, sometime after the meeting, around the time the TARP legislation was being discussed, Representative Waters had a conversation with the Chairman of the Financial Services Committee regarding the fact that she should not assist OneUnited's attempt to receive money. The first draft of the legislation that ultimately became the EESA bill was not circulated until September 20, 2008, and it is Outside Counsel's determination that the evidence in the record supports that the conversation likely occurred prior to that date.

While Outside Counsel's review has not determined when or how Representative Waters learned of OneUnited's specific request for money, once Representative Waters learned of this request and determined she had a conflict in assisting OneUnited in its attempt to receive money from Treasury for its shares of Freddie and Fannie, she should have ensured that her office, including her COS, did not provide continued assistance specifically to OneUnited. Based on the testimony of Representative Waters' COS, she had a conversation with him regarding the fact that she was stepping back from directly assisting OneUnited. However, Representative Waters' COS's testimony that he was only to refrain from working on OneUnited matters for that day strains credibility. As the most senior staffer in Representative Waters' office he owed Representative Waters a duty to clarify that direction before he continued communicating with OneUnited executives. Further, the Chief Counsel of the Financial Services Committee also testified that Representative Waters COS had conveyed to her that he was stepping back from working on OneUnited matters.[694]

If, however, Representative Waters' COS's claim to have misunderstood her directions to avoid assisting OneUnited is to be believed, that fact would only support the conclusion that Representative Waters should have done more to ensure that her entire staff was fully aware of the potential conflict and refrained from any official action to assist OneUnited in its attempt to directly obtain money.[695] There is no evidence in

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[693] Rep. Waters' COS Dep. at 21.

[694] *Compare* 7/5/12 Rep. Waters' COS Dep. at 53 *with* FSC Chief Counsel Dep. at 17.

[695] Outside Counsel does not believe that Representative Waters was required to refrain from any involvement in the EESA legislation as the record supports the conclusion that the EESA legislation, and particularly provision 103(6), was drafted to assist a larger community of banks, of which OneUnited was a member.

the record to support a finding that Representative Waters was aware of her COS' communications with OneUnited executives. However, it is clear that such communications were normally within the scope of his position, unless, of course, they constituted an impermissible conflict.[696]

4. CONCLUSIONS REGARDING SPECIFIC SUBSTANTIVE ALLEGATIONS AND RECOMMENDATIONS OF OUTSIDE COUNSEL

For the foregoing reasons, it is Outside Counsel's opinion that Representative Waters did not violate any House Rules or other standards of conduct. As such, the Outside Counsel recommends that the Waters Committee find that Representative Waters committed no violations in this Matter.

Furthermore, the Outside Counsel recommends the Waters Committee find that, while Representative Waters' COS's actions in sending the two emails on behalf of OneUnited's private efforts to obtain assistance do violate conflict of interest rules and standards, for which Representative Waters could bear responsibility, there is not sufficient evidence in the record to prove by a clear and convincing standard that Representative Waters' COS was aware of the conflict at the time, although as noted throughout this Report, there is evidence in the record to demonstrate that Representative Waters' COS should have known of the conflict prior to sending the two emails. In addition, Outside Counsel recommends finding that Representative Waters did make an effort to prevent her COS from creating the conflict in the first place, though she was either too late, too unclear, or simply not abided (there is insufficient evidence to prove which it was by clear and convincing evidence). Therefore Outside Counsel recommends that that Waters Committee find that no formal sanction or referral to the floor of the House of Representatives is warranted by the record in this Matter.

[696] *See* Rep. Waters Dep. at 34-35; Rep. Waters' COS Dep. at 73.