

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT

Washington, DC 20515

March 11, 2008

Dear Colleague:

No one takes more seriously than I do the rules governing confidentiality of matters before the House Ethics Committee.

Each of us privileged to serve on the Committee signs an oath pledging not to disclose information related to the work of the Committee, except as authorized under Committee rules. Committee rule 7(g) provides "*Unless otherwise determined by a vote of the Committee, only the Chairman or Ranking Minority Member of the Committee, after consultation with each other, may make public statements regarding matters before the Committee or any subcommittee.*"

In accordance with that rule, earlier today I consulted with Ethics Committee Chairwoman Stephanie Tubbs Jones and advised her of my decision to share with all Members of the House the Committee memorandum reprinted below. The memo contains the expert analysis of the Committee's nonpartisan attorneys concerning the impact that the independent ethics entity proposed by Speaker Pelosi and Rep. Michael Capuano would have on the due process protections afforded Members – and on the ability of the Ethics Committee to carry out its responsibilities to enforce the rules of the House.

I have made this decision because I believe that before voting on the Pelosi / Capuano proposal it is essential that all Members have the benefit of the advice Congresswoman Tubbs Jones and I have received from our Committee's legal staff. I have the highest regard for these nonpartisan professionals and believe that the concerns they have raised warrant serious consideration by any Member of the House contemplating such a profound change in our ethics enforcement process.

By way of background, on November 5th, I received a letter from Rep. Lamar Smith, the Ranking Republican Member on the bipartisan Capuano-Smith ethics task force soliciting official comments from the Ethics Committee on a draft ethics enforcement proposal. Although Rep. Capuano declined to join him in making the request, Rep. Smith nevertheless reiterated his view that the task force should have the benefit of our Committee's perspective before proposing major changes to House rules affecting the work of our Committee. Upon receipt of his letter I shared Rep. Smith's request with Chairwoman Tubbs Jones and urged her to join me in submitting official comments to Rep. Capuano's task force on behalf of our Committee – a request to which she did not agree.

In light of my first-hand knowledge of the serious concerns raised about the Pelosi / Capuano plan by the House's own ethics attorneys, I have been hopeful that Members would not be forced to vote up or down on any ethics enforcement proposal until those concerns were addressed. However, with floor consideration now imminent, I cannot in good conscience withhold this analysis from Members, and have attached our attorneys' memorandum in its entirety below.

Sincerely,



Doc Hastings

Ranking Republican Member

From: O'Reilly, Bill
Sent: Tuesday, November 13, 2007 7:25 PM
To: Ungerecht, Todd; Kelly Mobley, Dawn
Subject: FW: Review of Task Force proposal

See ken's notes below – he has focused on those parts of the proposal which are most likely to negatively impact us. As you know, I think the proposal is a bad idea on a number of levels, but I don't have anything specific to add to ken's critique at this point.

Bill O'Reilly
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From: Kellner, Ken
Sent: Friday, November 09, 2007 6:14 PM
To: O'Reilly, Bill
Subject: Review of Task Force proposal

Bill:

I looked over the draft resolution forwarded by Rep. Smith. I suggest you review it closely as well. Review of the draft was not to critique the need for or merits of the proposal, but to identify areas in which the proposal would interfere with the operations of the Committee. We cannot anticipate all plausible areas of concern prior to actual implementation, but I did the best I could.

1. The new “Office” or “Board” is expressly authorized to take up matters on its own initiative and to conduct interviews and obtain testimony in its “review” of such matters. *See* Section 1(c)(1)(A). This raises several concerns, listed below:
 - ◆ As the Committee noted in its earlier feedback to the task force, the interview of witnesses by both the new entity and the Committee might result in conflicting statements that would undermine the value of testimony from that witness.
 - ◆ Statements from witnesses would also likely be obtained prematurely due to the time deadlines imposed on the new entity. Sometimes there are valid investigative reasons not to reveal the existence of an investigation to a witness until other witnesses are interviewed or other evidence obtained. In the course of its proceedings, the new entity might reveal critical evidence or information to key witnesses. The failure of those witnesses to keep this information confidential may be very harmful to the integrity of any future Committee inquiry.
 - ◆ The “self-initiation” discretion could undermine current rules that limit complaints to those filed by Members. An agent could provide information to

the new entity that would trigger review under its rules. There is no accountability as to the source of information, unlike with respect to “complainants,” who must certify that the “information is submitted in good faith and warrants the review and consideration of the Committee,” and who must provide a copy of the complaint and all attachments to the respondent. *See* Committee Rules (d) and (e).

2. The new entity must “transmit to the individual who is the subject of the second-phase review the written report and findings of the board[.]” *See* Section 1(c)(2)(C)(ii). In addition, the report will include “findings of fact,” “a description of any relevant information that it was unable to obtain or witnesses whom it was unable to interview [] and the reasons therefore,” and a recommendation for the issuance of subpoena’s where appropriate.”
 - ◆ It is a bad idea for the Committee’s purposes that the “written report and findings of the board” be transmitted both to the Committee and to the individual under review. This will provide information to a potential respondent at an inappropriate stage, including alerting the respondent as to witnesses who have been identified as potential recipients of subpoenas. At a minimum, this would provide opportunities for the coordination (or appearance of coordination) of testimony. Potential respondents would also be alerted as to difficulties encountered in obtaining information from certain witnesses. This could discourage negotiated outcomes if a respondent knows that certain individuals are not cooperating witnesses.
 - ◆ This process is not sensitive to the need for confidentiality of witness information at the early stages of an investigation. Members, staff, and private individuals should be able to provide information in confidence, at least at the initial stages. The new rules may have an anti-whistleblower effect and possibly employment ramifications for individuals as well. For example, what if it is revealed that a current employee is providing or refusing to provide information about his or her employing Member? A previous ethics task force was “mindful” of the need to “protect the confidentiality of a witness prior to publicly disclosing” a statement of alleged violation. Report of the Ethics Reform Task Force on H. Res. 168, 105th Cong., 1st Sess. at 25 (June 17, 1997).
 - ◆ The proposal is also inconsistent with Committee rules and practices that keep investigative information confidential. Under Committee Rule 26(f), evidence gathered by an Investigative Subcommittee that would potentially be used to prove a violation “shall be made available to the respondent and his or her counsel **only after each agrees, in writing**, that no document, information, or other materials . . . shall be made public until” a Statement of Alleged Violation is made public by the Committee or an adjudicatory hearing is commenced.
 - ◆ There is no rule or precedent in effect for the new entity for dealing with concerns of the Department of Justice in cases of concurrent jurisdiction. As noted, under the proposed process, there is considerable potential for the making

of inconsistent statements by witnesses and for the release of confidential information. It this occurs, it could easily undermine active criminal investigations.

- ◆ The Board may make “findings of fact” as part of their submission. This is generally a function for a trier of fact after an opportunity for a defendant/respondent to cross-examine witnesses or challenge the evidence. What if the findings differ from those reached by the Committee?
3. There appears to be a requirement that the Committee publicly disclose Board submissions to the Committee. *See* Section 3(2). This would occur if the Committee declines to empanel an Investigative Subcommittee or if one year has passed from the date of the referral from the new entity.
- ◆ This means that the Committee must release the Board’s findings, even if the Committee has already determined to handle the matter non-publicly. This is inconsistent with the discretion now with the Committee (and investigative bodies generally) to exercise judgment as to what matters to address in a non-public fashion. With the possibility of review by the new entity and public disclosure of conduct, there will be greatly reduced incentive for witnesses and investigated parties to cooperate with the Committee or to do so with complete cooperation and candor.
 - ◆ This procedure also may place artificial pressure on an Investigative Subcommittee to complete its work in well less than a year, regardless of the impact on the investigation. While such a time period may be sufficient, neither the Department of Justice nor other law enforcement entities and regulatory bodies, are subject to such limitations as they would generally impact adversely on the completeness of an inquiry.
4. A provision in the proposal provides that the Office will cease its review of a matter on the request of the Committee “because of the ongoing investigation of such matter by the Committee.” *See* Section 1(d).
- ◆ This rule should be clarified to make clear that it includes informal fact-finding efforts by the Chair and Ranking Member of the Committee. Otherwise, this important rule may only have effect in the unusual case of empanelled subcommittees. New language could be “because of the ongoing review of this matter by the Committee in accordance with the Committee’s rules.” Section 1(d) and Section 3(3) should be revised.
5. If the new entity ceases such review at the request of the Committee it will “so notify any individual who is the subject of the review.” *See* Section 1(d).

- ◆ There are valid circumstances under which the Committee would not want to notify an individual that it is undertaking review of a matter until it is ready to do so for valid investigative and privacy reasons. In general, it is not the routine practice of law enforcement entities to notify individuals. Such disclosures could trigger protective behaviors that might undermine an investigation, as well as lead individuals to hire attorneys (perhaps unnecessarily and at considerable expense). [By analogy, would it be appropriate in all cases to notify a respondent that the Committee has referred evidence of criminal conduct to the Department of Justice? In many cases, it is in the interests of criminal law enforcement that such referrals be made in confidence.]
6. The new entity must adopt a “rule requiring that there be no ex parte communications between any member of the board and any individual who is the subject of any review by the board.” *See* Section 1(c)(2)(E)(iv).
- ◆ This provision should be revised to prohibit communications from any interested persons and any member of the board, as well as make explicit that ex parte contacts include those made by counsel. A useful provision to examine in considering ex parte prohibitions is the provision contained in Federal Election Commission regulations pertaining to contacts with any Commissioner. *See* 11 C.F.R. § 201.2.

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