

PROVIDING FOR A DELIBERATIVE REVIEW BY THE COMMITTEE ON THE JUDICIARY OF A COMMUNICATION FROM AN INDEPENDENT COUNSEL, AND FOR THE RELEASE THEREOF, AND FOR OTHER PURPOSES

SEPTEMBER 10, 1998.—Referred to the House Calendar and ordered to be printed

Mr. SOLOMON, from the Committee on Rules,
submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H. Res. 525]

The Committee on Rules, to whom was referred the resolution (H. Res. 525) providing for a deliberative review by the Committee on the Judiciary of a communication from an independent counsel, and for the release thereof, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the resolution be agreed to.

PURPOSE OF THE RESOLUTION

The purpose of H. Res. 525 is to provide for a deliberative review by the Committee on the Judiciary of a communication from an independent counsel, and for the release thereof, and for other purposes.

SUMMARY OF THE RESOLUTION

H. Res. 525 establishes procedures for House consideration of the communication received on September 9, 1998 from an independent counsel pursuant to section 595(c) of title 28, United States Code. Under the resolution, the communication from the independent counsel will be referred to the Judiciary Committee, which will review the report to determine whether sufficient grounds exist to recommend to the House that an impeachment inquiry be com-

menced. The resolution provides that the approximately 445 pages comprising an introduction, a narrative, and a statement of grounds, will be printed as a House document and made public. The balance of the material will remain in executive session of the Judiciary Committee until September 28, 1998 unless the Committee votes to not release the material for printing as a House document. Access to the executive session material will be restricted to members of the Judiciary Committee and such employees that have been designated by the chairman for that purpose, after consultation with ranking minority member. Finally, each meeting, hearing, or deposition of the Committee will be in executive session unless otherwise determined by the Committee.

COMMITTEE CONSIDERATION

H. Res. 525 has introduced by Rules Chairman Solomon on September 10, 1998, and referred to the Committee on Rules.

On Thursday, September 10, the Committee held a hearing on H. Res. 525 and received testimony from: the Honorable Henry Hyde, Chairman of the Committee on the Judiciary; the Honorable John Conyers, Ranking Minority Member of the Committee on the Judiciary; the Honorable Sheila Jackson-Lee; the Honorable Maxine Waters; the Honorable Zoe Lofgren; and the Honorable Peter Deutsch.

On Thursday, September 10, the Committee on Rules held a markup of the resolution. The Committee favorably reported H. Res. 525 by a voice vote. During the markup, no amendments to H. Res. 525 were agreed to.

BACKGROUND AND NEED FOR THE RESOLUTION

The Constitution provides that the President “* * * shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors” (Article II, section 4), and that the “House of Representatives * * * shall have the sole Power of Impeachment” (Article I, section 2). To that end, an independent counsel, under 28 U.S.C. sec. 595(c), must advise the House of Representatives of any “substantial and credible information which * * * may constitute grounds for an impeachment.”

The Independent Counsel statute was first enacted in 1978 as Title IV of the Ethics in Government Act of 1978, and has been reauthorized three times since.

On September 9, 1998, Independent Counsel Kenneth Starr wrote to Speaker Gingrich and Minority Leader Gephardt notifying them of his transmission to the House of a report prepared under Section 595(c) of Title 28, United States Code.

Independent Counsel Starr further noted in his letter that his communication contains confidential material, disclosure of which to the House was authorized by the United States Court of Appeals for the District of Columbia Circuit. The Independent Counsel, in his letter, asserts that “The contents of the Referral may not be publicly disclosed unless and until authorized by the House of Representatives. Many of the supporting materials contain information of a personal nature that I respectfully urge the House to treat as confidential.”

A resolution of the House is necessary to refer this communication to the House Judiciary Committee; to authorize the Committee to conduct an initial review of the material; and provide the parameters for release of the communication from the independent counsel and potential restrictions on the access to certain materials. Certain exceptions are necessary from the standing rules of the House in order to achieve these objectives.

The Rules Committee recognizes the grave nature of the communication from Independent Counsel Starr and the constitutional process it could initiate in the House of Representatives. The Committee recommends H. Res. 525 to the House as a prudent means for the House to assess the nature and contents of the communication and make a determination about whether to initiate an impeachment inquiry of the President of the United States.

The Rules Committee understands that further procedures may be necessary to assist the Judiciary Committee with their review to determine whether sufficient grounds exist to recommend to the House that an impeachment inquiry be commenced.

MATTERS OCCURRING BEFORE A GRAND JURY

The Rules Committee understands questions have been raised about the House Judiciary Committee's ability to obtain and use grand jury related material during its review of the communication received from the independent counsel. The Committee notes the following precedents granting House committees access to grand jury materials in the context of impeachment actions.

- In 1811, a grand jury in Baldwin County in the Mississippi territory forwarded to the House a presentment specifying charges against Washington District Superior Court Judge Harry Toulmin for possible impeachment action. *3 Hind's Precedents of the House of Representatives* § 2488 at 985, 986 (1907).

- In 1944, the House Committee on the Judiciary received grand jury material pertinent to its investigation into allegations of impeachable offenses committed by Judges Albert W. Johnson and Albert L. Watson. *Conduct of Albert W. Johnson and Albert L. Watson, United States District Judges, Middle District of Pennsylvania: Hearings before the Subcommittee of the Committee on the Judiciary to Investigate the Official Conduct of United States District Court Judges Albert W. Johnson and Albert L. Watson*, 79th Cong., 1st Sess. (1945).

- In 1974, the House Committee on the Judiciary received grand jury material pertinent to its investigation into allegations of impeachable offenses committed by President Richard Nixon. *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219 (D.D.C.), *mandamus denied sub nom. Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974).

- The House Judiciary Committee received grand jury material regarding allegations of impeachable offenses committed by Judge Alcee L. Hastings. *In re request for Access to Grand Jury Materials Grand Jury No. 81-1 (Miami)*, 833 F.2d 1438 (1987).

- The House Judiciary Committee also received grand jury material during its impeachment investigation of Judge Walter L. Nixon, Jr. *Impeachment of Walter L. Nixon, Jr.*, H. Rept. 101-36,

101st Cong., 1st Sess. (1989); *Judge Walter L. Nixon, Jr. Impeachment Inquiry: Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 100th Cong., 2nd Sess. (1988).

SECTION-BY-SECTION ANALYSIS OF THE RESOLUTION

The Resolved clause states that the Committee on the Judiciary (the Committee) shall review the subject matter of the communication received on September 9, 1998 from an independent counsel and related matters to determine whether sufficient grounds exist to recommend to the House that an impeachment inquiry be commenced.

Section 2 states that the material transmitted by the independent counsel to the House shall be considered as referred to the Committee. The portion of such material consisting of approximately 445 pages comprising an introduction, a narrative, and a statement of grounds shall be printed as a House document. The balance of such material shall be deemed to have been received in executive session but shall be released from that status on September 28, 1998, except as otherwise determined by the Committee. Material so released shall be immediately submitted for printing as a House document.

Section 3 deems additional material received by the Committee during the review to be received in executive session unless it is received in an open session of the Committee.

Section 4 restricts the access to the executive session material of the Committee to members of the Committee and also to such employees of the Committee as may be designated by the chairman, after consultation with the ranking minority member, notwithstanding clause 2(e) of rule XI.

Clause 2(e)(2) of House rule XI states that “All committee hearings, records, data, charts, and files shall be kept separate and distinct from the congressional office records of the Member serving as chairman of the committee; *and such records shall be the property of the House and all members of the House shall have access thereto * * **”

The Rules Committee also notes that clause 2(k)(7) of House rule XI states that “No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee.”

Section 5 states that notwithstanding clause 2(g) of rule XI, each meeting, hearing, or deposition of the Committee relating to the review shall be conducted in executive session unless otherwise determined by an affirmative vote of the committee, a majority being present. Such an executive session may be attended only by members of the Committee, and by such employees of the Committee as designated by the chairman after consultation with the ranking minority member.

Clause 2(g) of House rule XI requires committee meetings and hearings to be open to the public, including media, unless the committee in open session with a majority present votes to close the meeting or hearing.

MATTERS REQUIRED UNDER THE RULES OF THE HOUSE

Congressional Budget Office estimates

Clause 2(1)(3)(C) of rule XI requires each committee to include a cost estimate prepared by the Director of the Congressional Budget Office, pursuant to section 402 of the Congressional Budget Act of 1974, if the cost estimate is timely submitted. No cost estimate was received from the Congressional Budget Office.

Oversight findings

Clause 2(1)(3)(A) of rule XI requires each committee report to contain oversight findings and recommendations required pursuant to clause 2(b)(1) of rule X. The oversight findings of the Committee are reflected in the body of this report.

Oversight findings and recommendations of the Committee on Government Reform and Oversight

Clause 2(1)(3)(D) of rule XI requires each committee report to contain a summary of the oversight findings and recommendations made by the Government Reform and Oversight Committee pursuant to clause 4(c)(2) of rule X, whenever such findings have been timely submitted. The Committee on Rules has received no such findings or recommendations from the Committee on Government Reform and Oversight.

Committee votes

Pursuant to clause 2(1)(2)(B) of House rule XI the results of each rollcall vote on an amendment or motion to report, together with the names of those voting for and against, are printed below:

Rules Committee Rollcall No. 101

Date: September 10, 1998.

Measure: H. Res. 525, to provide for a deliberative review by the Committee on the Judiciary of a communication from an independent counsel, and for the release thereof, and for other purposes.

Motion by: Mr. Moakley.

Summary of motion: An amendment in the nature of a substitute that would restrict access to material held in executive session to only the chairman and ranking minority member of the Judiciary Committee until September 20, 1998.

Results: Defeated 4–8.

Vote by Members: Dreier—Nay; Goss—Nay; Linder—Nay; Diaz-Balart—Nay; McInnis—Nay; Hastings—Nay; Myrick—Nay; Moakley—Yea; Frost—Yea; Hall—Yea; Slaughter—Yea; Solomon—Nay.

Rules Committee Rollcall No. 102

Date: September 10, 1998.

Measure: H. Res. 525, to provide for a deliberative review by the Committee on the Judiciary of a communication from an independent counsel, and for the release thereof, and for other purposes.

Motion by: Mr. Hall.

Summary of motion: An amendment in the nature of a substitute offered by Representative Conyers that provides that the “referral” portion of the materials transmitted to the House by the Independ-

ent Counsel be provided to the counsel for the President upon passage of the resolution at least 48 hours before it was submitted for publication as a House document, and that until September 25, 1998, review of the remaining materials shall be limited to the chairman, ranking minority member and designated staff.

Results: Defeated 4–8.

Vote by Members: Dreier—Nay; Goss—Nay; Linder—Nay; Diaz-Balart—Nay; McInnis—Nay; Hastings—Nay; Myrick—Nay; Moakley—Yea; Frost—Yea; Hall—Yea; Slaughter—Yea; Solomon—Nay.

Views of committee members

Clause 2(1)(5) of rule XI requires each committee to afford a two day opportunity for members of the committee to file additional, minority, or dissenting views and to include the views in its report. Although this requirement does not apply to the Committee, the Committee always makes the maximum effort to provide its members with such an opportunity. The following views were submitted:

DISSENTING VIEWS

We are very disappointed with the resolution adopted by the committee. This process began with the hope and promise of a fair, bipartisan agreement on the ground rules by which the fate of our nation's leader will be determined. It is regrettable that, on such a solemn occasion, the agreement struck just yesterday by the Speaker and the Judiciary Committee Chairman, Mr. Hyde, with our minority leaders has been ignored. We find instead that we cannot even rely on the commitment made by the Speaker or by the Chairman of the Judiciary Committee.

That agreement—reached in a lengthy meeting on Wednesday of this week—was to proceed on a two-step track. The first resolution would establish a process for reviewing and making public the documents presented to the House by the independent counsel. The second resolution would establish certain special authorities for the Committee on Judiciary to assess whether to commence an impeachment inquiry. With regard to the first resolution, the agreement was to release immediately the 445 pages, which consist of an introduction, a narrative and a statement of grounds. The remaining materials would be treated as if received in executive session. Access to this material would be restricted to the Chairman and Ranking Minority Member of the Judiciary Committee for the purpose of identifying those portions which might unnecessarily harm the reputations of innocent individuals. All remaining material would be released to the public within ten days.

And what do we have? First, the resolution is not limited to how the material should be released. The resolution includes a directive to the Judiciary Committee to examine matters beyond the scope of the Independent Counsel's report. It assumes that the Committee will compile additional information through a new inquiry and discusses how that material will be handled. It contemplates additional depositions, meetings, hearings on matters that may or may not be included in the Independent Counsel's report. Fortunately, one of the most egregious sections of this resolution was removed at our request. The Rules Committee attempted to include a provision which would have changed the vote requirement for granting use immunity to witnesses from a two-third's vote in Committee to a majority of the House.

Second, the resolution rewrites the bipartisan agreement of the House leaders on how to review and determine the release of the appendices and the 17 boxes of support documents which were not immediately made public. One of the keystones of the agreement is that this additional material was to be reviewed solely by the Chairman and the Ranking Minority Member to limit the possibility of information leaking to the press which could be harmful to innocent people. This protection was requested by the Independent Counsel in his letter of transmittal. It was a protection that Chair-

man Hyde, Speaker Gingrich, Minority Leader Gephardt and Ranking Minority Member Conyers all felt was important in their bipartisan discussions. However, it has been summarily overthrown by the Rules Committee. The resolution hands this raw material to all 34 members of the Judiciary Committee to determine what sensitive material should be kept confidential. This process will unduly harm people who are incidental to the investigation. It is unacceptable.

On the matter of fairness, we want to express our regret that the request of the Ranking Minority Member, Mr. Conyers, to offer a substitute amendment was rejected by the Rules Committee. The Conyers substitute would have allowed the President the opportunity to review the charges against him for two days before they are made public. This does not seem unreasonable since the rules of the House offer Members of Congress facing ethics charges ten days to review all evidence the investigative subcommittee intends to use to prove its charges including "documentary evidence, witness testimony, memoranda of witness interviews and physical evidence" before a scheduled vote on a statement of alleged violations.

We had hoped for a fair process in order to be able to carry out our responsibilities in the Constitution. Unfortunately, the majority on the Rule Committee did not see fit to give us one.

JOE MOAKLEY.
TONY P. HALL.
MARTIN FROST.
LOUISE SLAUGHTER.

APPENDIX A

Letter to the House and Court Order Provided by Independent Counsel Starr:



Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
 Suite 490-North
 Washington, D.C. 20004
 (202) 514-8688
 Fax (202) 514-8802

September 9, 1998

By Hand Delivery

Honorable Newt Gingrich, Speaker
 United States House of Representatives
 Room H232, Capitol
 Washington, D.C. 20515

Honorable Richard A. Gephardt, Democratic Leader
 United States House of Representatives
 Room H204, Capitol
 Washington, D.C. 20515

Dear Mr. Speaker and Representative Gephardt:

Today this Office has delivered to the Sergeant at Arms, the Honorable Wilson Livingood, 36 sealed boxes containing two complete copies of a Referral to the House of Representatives. This Referral is filed in conformity with the requirements of Title 28, United States Code, Section 595(c), which provides that "[a]n independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives . . . that may constitute grounds for an impeachment."

This Referral contains confidential material and material protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure. Disclosure of this material to the House of Representatives has been authorized by the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels. A copy of that order is attached. The contents of the Referral may not be publicly disclosed unless and until authorized by the House of Representatives. Many of the supporting materials contain information of a personal nature that I respectfully urge the House to treat as confidential.

I respectfully request that the Sergeant at Arms maintain this Referral in a sealed and secure condition and deliver this sealed Referral to the House of Representatives at a time and place to be determined by the House consistent with its own Rules. Until such time as the Sergeant at Arms is directed to deliver this Referral, I consider it a record of the Office of the Independent Counsel, an executive department of the Executive Branch. I respectfully request that the Referral remain sealed until its formal receipt by the House. *Jefferson's Manual*, § 706(c) (citing Speaker O'Neill's ruling of July 31, 1980, CONG. REC. at 20765).

Respectfully yours,

A handwritten signature in cursive script that reads "Kenneth W. Starr".

Kenneth W. Starr
 Independent Counsel

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

UNITED STATES COURT OF APPEALS **FILED** JUL 7 1998
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Special Division

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In Re: Madison Guaranty Savings
& Loan Association

Division No. 94-1

FILED UNDER SEAL

Before: SENTELLE, *Presiding Judge*, and BUTZNER and FAY, *Senior Circuit Judges*.

ORDER

Upon consideration of the "Ex Parte Motion for Approval of Disclosure of Matters Occurring Before a Grand Jury" filed by Independent Counsel Kenneth W. Starr on July 2, 1998, the Court finds that it is appropriate for the Independent Counsel to convey the materials described in that motion to the House of Representatives. Accordingly, it is

ORDERED that the motion be granted. The Court hereby authorizes the Independent Counsel to deliver to the House of Representatives materials that the Independent Counsel determines constitute information of the type described in 28 U.S.C. § 595(c). This authorization constitutes an order for purposes of Federal Rule of Criminal Procedure 6(e)(3)(C)(i) permitting disclosure of all grand jury material that the independent counsel deems necessary to comply with the requirements of § 595(c). This order may be disclosed as required in connection with the Independent Counsel's compliance with his statutory mandate.

Per Curiam

For the Court:
Mark J. Langer, Clerk

by


Marilyn R. Sargent
Chief Deputy Clerk