

United States Court of Appeals
For the District of Columbia Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT **FILED SEP 29 1997**

Division for the Purpose of
Appointing Independent Counsels **Special Division**

Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty Savings
& Loan Association

Division No. 94-1

UNDER SEAL

MOTION OF THE INDEPENDENT COUNSEL
FOR RECONSIDERATION OF THE COURT'S ORDER OF SEPTEMBER 26, 1997,
AND IN RESPONSE TO THE MOTION OF PATRICK KNOWLTON
FOR INCLUSION OF COMMENTS IN AN APPENDIX

In a separate motion filed today, the Office of Independent Counsel In re: Madison Guaranty Savings & Loan Association (Kenneth W. Starr) requested that this Court authorize public release of the OIC's report on the death of Vincent W. Foster, Jr. Under 28 U.S.C. § 594(h)(2), the Court may authorize inclusion of an appendix to the report with comments from persons named in it. The OIC submits that inclusion of Patrick Knowlton's letter of September 23, 1997, in an appendix would not be appropriate. For the reasons stated herein, the OIC therefore respectfully moves for reconsideration of the Court's order of September 26, 1997.¹

¹ The OIC received Knowlton's motion and letter from the Court at approximately 1:00 p.m. on Wednesday, September 24, 1997. The OIC indicated by message to the Clerk's Office the next evening (Thursday, September 25) that the OIC intended to file a response to Knowlton's motion by Monday, September 29. Consistent with the Court's order of August 7, 1997, in connection with an earlier motion filed by Knowlton, the OIC anticipated that the Court would rule on Knowlton's September 23 motion after the OIC's response was filed. In light of the

1. Section 594(h)(2) of title 28 states: "The division of the court may release to the Congress, the public, or any appropriate person, such portions of a report made under this subsection as the division of the court considers appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report." Pursuant to this subsection, the OIC has requested that the Court authorize public release of the OIC's report regarding the death of Vincent W. Foster, Jr.

2. Section 594(h)(2) of title 28 further provides: "The division of the court may make any portion of a final report filed under paragraph (1)(B) available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may, in the discretion of the division of the court, be included as an appendix to such final report" (emphasis added).

Patrick Knowlton has submitted an 11-page, single-spaced letter together with nine additional pages of exhibits and moved for their inclusion in an appendix. The OIC submits that Knowlton's letter and exhibits should not be included in an appendix.

To begin with, Knowlton is not named in the report. The OIC

Court's order of September 26, however, we have filed our response to Knowlton's motion as a motion for reconsideration.

is not aware of any precedent for including in an appendix comments from a person not named in a report. While one could conceive of scenarios in which such comments might be included in an appendix consistent with the statute, this is not such a case.

Knowlton is referenced in the report only by pseudonym (C2), and the references to C2 are exclusively factual. Those factual references, moreover, are minimal (pages 21-22, 69, and 89), neutral, and entirely fair.² (As recounted in the OIC's report at page 21, Knowlton's connection to the investigation is that he stopped to urinate in Fort Marcy Park at approximately 4:30 p.m. on the afternoon of July 20, 1993, where he observed another individual in the parking lot.) The report clearly does not accuse C2 of misconduct or criminal or inappropriate behavior of any kind. Cf. In re North, 16 F.3d 1234, 1237 (D.C. Cir. Spec. Div. 1994) (report accused persons of crimes); In re Sealed Motion, 880 F.2d 1367, 1374 (D.C. Cir. Spec. Div. 1989) (comment period provides some protection against "publicized allegations of unsubstantiated criminal conduct"); id. at 1378 (right to comment "stems from the hazard to the reputation of the high-level officials covered by the Act").

In short, because Knowlton's name never appears in the report, because Knowlton is not a subject of the investigation,

² In complying with the congressional intent of the Independent Counsel Reauthorization Act of 1994, see H.R. Conf. Rep. No. 103-511, at 19 (1994) -- that an independent counsel seek to avoid causing unnecessary reputational harm in a report -- the OIC's report uses pseudonyms where appropriate, particularly for private citizens such as Knowlton who were only minimally connected to the Foster death investigation.

and because the OIC's report refers to the pseudonym "C2" in a factual, minimal, fair, and non-disparaging manner, neither the text nor the purpose of the statute justifies inclusion of Knowlton's letter and exhibits in an appendix.

The nature and contents of Knowlton's letter and exhibits support and strengthen the conclusion that inclusion of the letter and exhibits in an appendix would not be appropriate.

Knowlton's letter consists primarily of scattershot complaints and accusations that have virtually no relevance to Knowlton's activities in Fort Marcy Park on July 20 or to the report's mention of C2. For example, Knowlton refers to an allegedly false FBI 302 report that was neither written during the OIC's investigation nor referenced in the OIC's report. Letter at 3. He discusses his involvement with a London newspaper, id., but that incident is not referenced in the OIC's report. He says he "was harassed by at least 25 men" in and around the District of Columbia around the time of his appearance before the federal grand jury. Id. at 3-4. He claims that this activity was connected to his grand jury appearance, but there is no evidence to support that allegation -- and in any event, the incident is not referenced in the OIC's report. He further claims -- without any supporting evidence -- that this technique is known to federal intelligence and investigative agencies, and that its "objects" in this case were to "intimidate and warn Patrick" and "to destabilize him and discredit his testimony before the grand jury." Id. at 4. Knowlton claims, furthermore,

that he has been "defamed by numerous individuals, most of whom are journalists," id. at 11 -- again, incidents that are not recounted in the OIC's report, related to Knowlton's activities in Fort Marcy Park, or otherwise caused by the OIC.

Knowlton makes numerous allegations about other law enforcement investigations -- in particular, the Park Police and Fiske investigations. He contends that the record upon which the Fiske Report is based is "replete with evidence that the FBI concealed the true facts surrounding Mr. Foster's death." Id. at 6. He contends also, with no supporting evidence, that "the FBI concealed the gunshot wound in Mr. Foster's neck." Id. at 6 n.9. Again, these comments have nothing to do with Knowlton's activities in Fort Marcy Park on July 20 or with any references to C2 in the OIC's report.

Notwithstanding specific statutory authorization that an independent counsel rely on Department of Justice resources, see 28 U.S.C. § 594(d), Knowlton complains that the OIC's investigation is contrary to law because DOJ personnel and FBI agents have been used. Letter at 7. He also contends, erroneously, that the FBI had primary jurisdiction over the investigation. Id.; cf. In re Visser, 968 F.2d 1319, 1321 (D.C. Cir. Spec. Div. 1992) (dismissing allegations relating to independent counsel that indicate the complainant's "absence of any knowledge of the federal system of government of the United States").

Knowlton accuses specific FBI agents by name of serious

misconduct, see Letter at 3, although those agents are not mentioned in the OIC's report. The OIC finds it extremely troubling that these career federal agents would have no opportunity to respond to these allegations in this forum. The statutory right of review under Section 594 is intended to allow named individuals to correct factual inaccuracies, not to besmirch the reputations of others.

The exhibits attached by Knowlton are largely not germane to the references to C2 in the report or to Knowlton's activities in Fort Marcy Park. In addition, they contain pernicious allegations and insinuations about the conduct of third parties unable to defend themselves in this forum. These exhibits relate to, for example, allegations relating to Mr. Foster's wife that have no connection to Knowlton's activities or to the references to C2 in the report; allegations relating to supposed other gunshot wounds that were on Mr. Foster's body; accusations concerning allegedly missing photographs of the death scene; and allegations relating to the conduct of the Medical Examiner's Office. Yet the persons affected and named have no opportunity to respond to these many claims and insinuations. Perhaps most egregious, Knowlton's exhibits include pictures of the gun, including one of the gun in Mr. Foster's hand, the inclusion of which would be highly offensive to the Foster family, and which are unconnected to Knowlton's activities in the park or to the references to C2 in the report.

Knowlton contends both that Mr. Foster did not commit

suicide, see Letter at 8 (information "refutes the FBI's repeated official conclusion of suicide in the park"), and that "the FBI obstructed justice," id., but the statutory reporting mechanism set out in Section 594(h)(2) is clearly not the appropriate forum for Knowlton to spin out his theories. Knowlton speculates, in addition, about the time Mr. Foster must have died, id. at 8 n.12, and that "Mr. Foster could not have driven to the park," id., but such speculation is not only unsupported, it is obviously unrelated to Knowlton's activities in Fort Marcy Park or to the references to C2 in the report.

Knowlton complains, finally, that he has been "attacked as a delusional conspiracy theorist, a homosexual, and as an outright liar." Id. at 11. But the OIC's report clearly does not -- explicitly or implicitly -- advance such claims, nor have OIC officials made such accusations.

Knowlton has availed himself of many outlets for his extraordinary complaints. Indeed, as Knowlton notes, id. at 6 n.9, many of his complaints are currently the subject of a civil lawsuit he has filed in federal district court against two FBI agents. He also has communicated to the media about his grievances. For example, a commentator informed the OIC of a sensational accusation made by Knowlton regarding his grand jury appearance. The OIC informed Knowlton by letter dated November 22, 1995, that careful review of the transcript of the grand jury appearance conclusively demonstrated the falsity of his accusation. Knowlton also has appeared on a widely advertised

and distributed video repeating complaints and allegations about the Foster investigations.

In sum, Knowlton's letter consists primarily of complaints and allegations that are totally unrelated to his activities in Fort Marcy Park on July 20 or to the report's references to C2. Moreover, most important in terms of the text and purposes of the statute, Knowlton is not referenced by name in the report, and the minimal pseudonym references are completely factual, fair, and neutral.

This Court possesses discretion under the statute to determine whether to include comments, in whole or in part, in an appendix.³ For the many foregoing reasons, the OIC requests that the Court exercise its discretion so as not to include Knowlton's comments in an appendix.

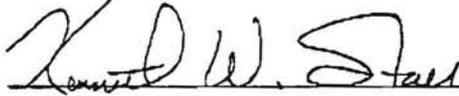
If the Court rejects our primary suggestion that Knowlton's letter should not be included in an appendix, we submit in the alternative that only certain portions of Knowlton's letter warrant inclusion. See 28 U.S.C. § 594(h)(2) (Court may order inclusion of a named person's comments "in part"). In particular, page 1, page 2, the first sentence of page 3, page 8 (excluding footnote 12), and page 9 are the only parts of

³ The phrasing of the statute -- comments "in whole or in part, may, in the discretion of the division of the court, be included" -- clearly evinces the congressional expectation that not all comments would be appropriate for inclusion in an appendix.

Knowlton's letter related to the OIC's report or to Knowlton's activities on July 20, 1993.

Respectfully submitted,

KENNETH W. STARR
Independent Counsel

A handwritten signature in black ink, appearing to read "Kenneth W. Starr". The signature is written in a cursive style and is positioned below the typed name and title.

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September 29, 1997