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January 22, 2016

VIA HAND DELIVERY

The Honorable Charles W. Dent, Chairman
The Honorable Linda T. Sanchez, Ranking Member
Committee on Ethics
U.S. House of Representatives
1015 Longworth House Office Building
Washington, DC 20515

Re: The Honorable Alan M. Grayson's Response to the Office of Congressional Ethics Referral in Review Number 15-6530

Dear Chairman Dent and Ranking Member Sanchez:

This letter constitutes Rep. Alan M. Grayson's response to the referral by the Office of Congressional Ethics ("OCE") regarding further review in the above-referenced matter. Rep. Grayson's declaration is attached immediately following this letter, in accordance with the rules of the Committee on Ethics ("Committee"). The OCE referral is unsupported and unsupportable on the merits, but there is a preliminary matter that must be addressed: the close and sustained collaboration between OCE staff and Rep. Grayson's political opponent and the resulting numerous leaks of confidential information, in gross violation of both OCE Rules and any conceivable standard of objectivity and impartiality.

I. The OCE Report is Irreparably Tainted by the Gross Misconduct of the OCE Staff and the Committee Should Dismiss It Summarily

Throughout the OCE's review of this matter, one or more members of the OCE staff and Congressional staff disclosed confidential information to the staff of Rep. Grayson's primary opponent, in flagrant violation of the OCE's enabling resolution and the OCE's own Code of Conduct. This confidential information was leaked to the media, and Rep. Grayson's primary opponent then used it to intimidate Rep. Grayson's campaign staff and try to dissuade potential

donors from contributing to Rep. Grayson's Senate campaign. This outrageous misconduct by the OCE staff demonstrates that the OCE report now before the Committee is neither impartial nor unbiased. Accordingly, the Committee should dismiss the allegations against Rep. Grayson, initiate an investigation of the Office of Congressional Ethics, and take appropriate action against all those who have violated House Resolution 895, the OCE Code of Conduct and the Rules of the House.

Rep. Alan M. Grayson (D-FL) and Rep. Patrick Murphy (D-FL) are both candidates for the Democratic Party nomination to run for the U.S. Senate seat being vacated by Senator Marco Rubio (R-FL). Rep. Grayson announced his intention to seek the nomination on July 9, 2015. Shortly thereafter, Rep. Grayson's deputy campaign manager, David Keith, encountered Rep. Murphy's Chief of Staff, Eric Johnson, in Washington D.C. Mr. Johnson indicated to Mr. Keith that the Murphy campaign intended to use an OCE complaint against Rep. Grayson in the primary race. Specifically, Mr. Johnson told Mr. Keith that "Ethics was going after your boss." Mr. Keith told Rep. Grayson that Mr. Johnson made these statements to him with an intimidating tone.

The complaint that initiated this matter is dated July 7, 2015, but Rep. Grayson was not notified that the OCE had initiated a preliminary review of the matter until July 30, 2015, three weeks after Johnson's threat to Keith. The complaint was nominally filed by Celeste Bush, the Chair of the St. Lucie County Democrats, who is supporting Rep. Murphy in the Democratic Senate primary. In fact, the complaint was prepared by the law firm of Perkins Coie at the request and at the expense of Rep. Murphy's campaign committee, Friends of Patrick Murphy.[1] Mr. Johnson thus had prescient knowledge, two days after the complaint was filed but long before Rep. Grayson was informed of the preliminary review, that the OCE would be reviewing the complaint against Rep. Grayson. Unfortunately, this was only the first of many such instances in which Mr. Johnson obtained confidential information from the OCE staff during the course of the OCE review.

Before discussing the numerous further serious confidentiality violations that ensued, which demonstrate bias by the OCE staff, please note that House Resolution 895 prohibits members of the OCE staff from disclosing to anyone outside the OCE any information obtained during the course of an investigation.[2] Indeed, the resolution requires every individual who becomes a member of the OCE staff to take an oath stating: "I do solemnly swear (or affirm) that I will not disclose to any person or entity outside of the Office any information received in the course of my service with the Office, except as authorized by the board as necessary to conduct official

[1] Friends of Patrick Murphy, 2015 October 15 Quarterly Report at 617. The date of the Murphy campaign's payment to Perkins Coie was July 9, 2015 – two days after the complaint was filed with the OCE and the same day Rep. Grayson announced that he would be running against Rep. Murphy for the Democratic Senate nomination. (Response Exhibit 1).
[2] H. Res. 895, § (f)(1)(B).

business or pursuant to its rules."[3] House Resolution 895 requires that any violation of these confidentiality provisions be investigated by the OCE Board of Directors, and that appropriate action be taken.[4] Identical confidentiality provisions are embedded in the OCE's Code of Conduct.[5]

In addition, the OCE Rules for the Conduct of Investigations require that the:

> Office staff shall be impartial and unbiased in the conduct of an investigation.... In the event that a staff person has a personal or professional relationship with a subject, a subject's opponent in any election or a witness involved in an investigation, staff shall disclose that fact to the Staff Director who shall disclose it to the Board. Office staff shall notify the Staff Director and shall immediately discontinue working on an investigation in the event s/he feels s/he cannot be impartial and unbiased. If the Board believes that a staff person cannot be unbiased and impartial, the Board shall terminate that person's involvement in the matter.[6]

From numerous leaks, it quickly became clear that one or more members of the OCE staff had a personal relationship with Mr. Johnson, and had no compunction against violating the OCE Code of Conduct by disclosing confidential information provided to the OCE by Rep. Grayson to Johnson and others outside of the OCE.

On Wednesday, October 21, 2015, Rep. Grayson voluntarily appeared at the OCE office for confidential interview in this matter. The interview began at approximately 9:30 a.m. and concluded at approximately 2:15 p.m. Shortly afterward, that same day, a reporter asked Rep. Grayson about the confidential interview, just off the Floor of the House. On Thursday, October 22, 2015, Rep. Grayson's office was contacted by two different reporters who knew both that Rep. Grayson had been interviewed in the OCE office by the OCE staff the previous day, and that the interview lasted approximately five hours. Shortly thereafter, POLITICO published a news article (attached as Response Exhibit 2) which reported that information along with additional details that only the OCE staff could have known before improper disclosure. Specifically, absent improper disclosure, only Rep. Grayson, his counsel and the OCE staff knew: (1) the date of the interview, (2) that the interview lasted approximately five hours, (3) that Rep. Grayson was accompanied by an attorney from Akerman LLP, and (4) that the content of the interview concerned Rep. Grayson's investments.

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[3] H. Res. 895, § (f)(1)(A).
[4] H. Res. 895, § (f)(1)(C).
[5] Office of Congressional Ethics Code of Conduct, Section 8 – Prohibition on Public Disclosure.
[6] Office of Congressional Ethics, Rules for the Conduct of Investigations, Rule 5 – Investigator is Impartial (January 23, 2015)(emphasis added).

It would have been impossible for POLITICO to report that level of detail without a source from within the OCE, presumably with Johnson acting as a conduit. In the extremely unlikely event that there were reporters who were, without any notice from the OCE, willing to stake out the building for an entire day, they would merely have been able to observe Rep. Grayson entering and leaving the building, but they would have no way to know which office he visited unless they were told by the OCE staff.[7]

This information, including, but not limited to, the *date* of the interview, the *fact* that the interview took place, the *length* of the interview, the *persons attending* the interview, and the *content* of the interview, was confidential information the public disclosure of which requires an investigation by the OCE Board of Directors.[8] A disclosure of such information to *any third party*, much less to the media, is a violation of House Resolution 895.[9]

Accordingly, on October 26, 2015, Rep. Grayson filed a complaint with the OCE requesting an immediate investigation (attached as Response Exhibit 3). OCE Staff Director Omar Ashmawy replied by letter the same day indicating that he would inform the OCE Board of Directors of the complaint promptly (attached as Response Exhibit 4). As far as we know, however, no investigation of this egregious violation of the OCE confidentiality requirements has in fact been carried out, even though such investigation is required by House Resolution 895.[10]

Additional and very serious confidentiality violations by one or more members of the OCE staff came to light after Rep. Grayson submitted his October 26, 2015 complaint. After the POLITICO article appeared, Rep. Grayson's deputy campaign manager, David Keith, came forward and informed Rep. Grayson of a number of troubling encounters he had then had recently with Mr. Eric Johnson, Rep. Patrick Murphy's Chief of Staff. These facts raise grave questions regarding the integrity and impartiality of the OCE's investigation. (As noted above, Rep. Murphy and his staff qualify as an "opponent in any election" within the meaning of the OCE Rules.)

Mr. Keith told Rep. Grayson that, approximately a month before Grayson's interview with the OCE, Mr. Johnson talked to Mr. Keith and told him that "this Ethics stuff is going to really heat up." Even more importantly, on the day of Rep. Grayson's OCE interview, Mr. Johnson and Mr. Keith spoke by phone shortly after the interview ended, and the conversation indicated that Mr.

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[7] One of Rep. Grayson's constituents, the Walt Disney Company, has an office on the same floor of the same building that houses the OCE. Rep. Grayson has been in the Disney office before. Without inside information, anyone who happened to recognize Rep. Grayson and saw him entering the building could have just as easily concluded that he was going to the Disney office, rather than going to the OCE office.

[8] H. Res. 895, § (f)(1)(C).

[9] H. Res. 895, § (f)(1)(B) ("No testimony received or any other information obtained as a member of the board or staff of the Office shall be publicly disclosed by any such individual to *any person or entity* outside the Office.") (emphasis added).

[10] H. Res. 895, § (f)(1)(C).

Johnson had full knowledge of the confidential interview. Mr. Johnson asked Mr. Keith how the OCE interview (which Mr. Johnson was not supposed to know about) had gone. Mr. Johnson then called Mr. Keith back later that same day and warned Mr. Keith that his name had been raised during Rep. Grayson's OCE interview[11] – a startling statement that is absolutely inexplicable unless both Mr. Johnson and the OCE staff had violated confidentiality rules. The obvious purpose of Mr. Johnson's statement was to try to drive a wedge between Mr. Keith and the Grayson campaign. Mr. Keith's name was indeed raised by OCE staff during Rep. Grayson's OCE interview,[12] a fact that no one could have known before the improper disclosure except for those present – only Rep. Grayson, his attorneys, and the OCE staff. Mr. Johnson's communications with Mr. Keith demonstrate that throughout the OCE investigation in this matter, Rep. Murphy's staff was obtaining confidential information from the OCE staff and using it for partisan political purposes in direct conflict with the OCE's goal of complete impartiality. Based on Mr. Johnson's near-contemporaneous knowledge of the content of Rep. Grayson's OCE interview, it appears self-evident that Mr. Johnson was the source for the POLITICO article. Rep. Murphy and his campaign staff have used that and other articles generated by the leak of OCE information, as a part of Rep. Murphy's unscrupulous primary campaign against Rep. Grayson.[13] The House of Representatives imposed strict confidentiality requirements on the OCE in House Resolution 895 specifically to prevent information disclosed in an OCE investigation from being used for partisan political purposes.

In addition, one of the outside investors in the Grayson Fund notified Rep. Grayson in early December 2015 that several weeks earlier, a large Democratic Senate Campaign Committee ("DSCC") donor told the investor that the donor knew that he was an investor in the Grayson Fund. The donor said that this information came to him from DSCC Chairman Senator Jon Tester (D-MT), who has endorsed Rep. Murphy. Rep. Grayson went to great lengths during the OCE investigation to keep the identity of the two outside investors in the Grayson Fund confidential, as he needed to do in accordance with his confidentiality agreement with the Grayson Fund. Rep. Grayson never disclosed the identity of this individual and his investment in the Grayson Fund except when he was questioned about it by an OCE interviewer who already knew the investor's identity (from confidential documents obtained by OCE).[14] The only persons who would have known that this individual was an investor in the Grayson Fund were Rep. Grayson, his attorneys, the Grayson Fund's employees and administrators, and the OCE staff. Needless to say, Rep. Grayson, his attorneys and the Grayson Fund's employees and administrators (all bound by confidentiality duties and agreements) have never disclosed the

[11] Incredibly, Mr. Johnson then asked Mr. Keith if he would confirm to a reporter that Mr. Keith was an employee of the Grayson Fund. Mr. Keith, of course, refused.
[12] Transcript of Interview of Representative Grayson, Oct. 21, 2015 (hereinafter "Transcript of Rep. Grayson") (Exhibit 2 at 15-6530_0109).
[13] If Rep. Murphy either knew or should have known of his own Chief of Staff's direct participation in these repeated and egregious violations, then those violations must be attributed directly to Rep. Murphy.
[14] Transcript of Rep. Grayson (Exhibit 2 at 15-6530_0109); Transcript of Rep. Grayson (Exhibit 2 at 15-6530_0114-115)

identity of this individual other than during the OCE investigation. The question, then, is how did DSCC Chairman Tester learn about it? Rep. Patrick Murphy's former Deputy Chief of Staff, Christopher L. Fisher, left Rep. Murphy's office early last fall to join the staff of the DSCC. It appears likely that one or more members of the OCE staff disclosed the identity of this outside investor to Mr. Johnson, who in turn disclosed it to Mr. Fisher after Fisher had joined the staff of the DSCC. There is no other plausible explanation.

Rep. Grayson made a personal statement to the OCE on December 18, 2015 at the conclusion of the OCE investigation. He informed the OCE Board of Directors personally about these incessant confidentiality violations, and simultaneously filed a second complaint with the OCE (attached as Response Exhibit 5). As far as we know, however, the OCE Board of Directors has not taken any action on either complaint.[15]

Remarkably, the leaks of confidential information from the OCE have continued even after Rep. Grayson filed complaints with the OCE, and even after the OCE proceedings were completed. The OCE made its referral in this matter to the Committee on January 6, 2016. That referral was confidential. Less than a week later, on January 13, 2016, however, Rep. Grayson received a telephone call from a reporter at *The New York Times*.[16] The reporter knew that the OCE had made a referral to the Committee and that Rep. Grayson's response was due on January 21, 2016. That date is significant. *The New York Times* reporter was apparently unaware that Rep. Grayson had received a one-day extension to file his response with the Committee – something that the Ethics Committee knew, but the OCE staff did not. The reporter's error demonstrates that the source of his information was someone on the OCE staff.

These repeated and continuing violations of the confidentiality requirements of House Resolution 895 and the OCE Code of Conduct, and the close and inexcusable collaboration between OCE staff and Rep. Murphy and his staff, are unethical and unconscionable. Following the leak of an earlier OCE report to *The Washington Post* last year, the Committee stated that

[15] The OCE, in its 74-page report with over 900 pages of exhibits, fails to even mention once – much less provide any explanation for – the breaches of confidentiality described herein and the related correspondence between Rep. Grayson and the OCE related to such confidentiality breaches. This is alarming given the OCE's dubious record related to such matters. *See* House Committee on Ethics, *In the Matter of Officially-Connected Travel by House Members to Azerbaijan in 2013*, H.R. Rept. No. 114-239 at 16-17, 114th Cong., 1st Sess. (July 31, 2015) ("Although the Committee is required to make public the materials transmitted to it by OCE in certain circumstances, the Committee is the only entity either required or authorized to make those materials public. . . . Anonymous leaks of ongoing ethics investigations are damaging to the Members involved, the ethics process, and the whole House.")

[16] Mr. Keith and Mr. Johnson exchanged a series of text messages the same day in which Mr. Johnson indicated that he had been in contact with *The New York Times* regarding the OCE referral. *See* Text Message Conversation Between Davis Keith and Eric Johnson (Response Exhibit 6). Clearly, Mr. Johnson learned that a referral had been made from one or more members of the OCE staff and disclosed that confidential information to the reporter at *The New York Times*.

> Although the Committee is required to make public the materials transmitted to it by OCE in certain circumstances, the Committee is the *only* entity either required or authorized to make those materials public. . . . The Committee did not authorize the release of those materials, and such an unauthorized release may have violated House Rules and other standards of conduct. . . . Anonymous leaks of ongoing ethics investigations are damaging to the Members involved, the ethics process and the whole House.[17]

In light of the OCE staff's and Mr. Johnson's repeated and flagrant violations of these confidentiality requirements, the Committee should dismiss the allegations against Rep. Grayson, initiate an investigation of the Office of Congressional Ethics and Congressional staff, and take appropriate action against all those employees who have violated House Resolution 895, the OCE Code of Conduct and the Rules of the House.

II. Rep. Grayson Did Not Violate the Prohibition on a Member Allowing the Use of His Name by an Entity "Providing Professional Services Involving a Fiduciary Relationship"

Regarding the specific terms of the OCE referral, for whatever reason, the OCE conducted its inquiry as a classic "fishing expedition," rendering a report largely untethered from the actual complaint filed by Rep. Murphy's political ally. The report completely ignores all of the overwhelming contrary evidence and legal authority that Rep. Grayson submitted to the OCE. It is a "tale of sound and fury, signifying nothing."[18]

The OCE alleges that Rep. Grayson may have violated House Rule 25 because his name was part of the name of an investment partnership formed while he was out of office. The OCE assumes, citing no legal authority whatsoever, that through the investment partnership, Rep. Grayson provided "professional services," and that such services "involved a fiduciary relationship," to two private investors in the investment partnership while he was a Member of Congress.[19] Rule 25 prohibits a Member of the House from permitting his name to be used by "a firm, partnership, association, corporation, or other entity that provides professional services involving a fiduciary relationship."[20] Accordingly, in order to make out a violation of Rule 25, the OCE would have to have established that Rep. Grayson, through one of the Grayson Fund entities, both provided professional services to the outside investors and that he had a fiduciary duty to them when he did so.

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[17] House Committee on Ethics, *In the Matter of Officially-Connected Travel by House Members to Azerbaijan in 2013*, H.R. Rept. No. 114-239 at 17-18, 114th Cong., 1st Sess. (July 31, 2015)(emphasis added).
[18] W. Shakespeare, *Macbeth, Act V, Scene 5.*
[19] OCE Report at ¶¶ 28-47.
[20] House Rule XXV, clause 2(a)&(b).

The OCE has failed utterly to establish either element of a Rule 25 violation. The OCE referral devotes five pages to describing the structure of the Grayson Fund entities, but there is not a single word explaining what "professional services" were provided and how Rep. Grayson had a fiduciary duty to these two investors. The OCE simply *assumes* that Rep. Grayson provided professional services to the two outside investors and that, in that capacity, he had a fiduciary duty to them. Neither the Ethics Committee nor any court or administrative body has *ever* ruled that a Member of Congress provide "professional services" when he invests in an investment partnership, much less that this creates a "fiduciary duty" to other investors. The OCE's assumptions are simply incorrect as a matter of law and, accordingly, must be dismissed.

Rep. Grayson established the Grayson Fund to manage investments for himself and his family members after he lost his bid for re-election to the House in 2010.[21] Prior to January 2015, there were, for a time, two outside investors in the Fund, both long-time personal friends of Rep. Grayson.[22] The two outside investors together never held more than a tiny fraction of the total amount invested in the Fund.[23]

The Grayson Fund actually consisted of five different related entities: (1) the Grayson Fund, LP; (2) the Grayson Fund Management Company, LLC; (3) the Grayson Fund General Partner, LLC; (4) the Grayson Fund (Caymans) LP, and (5) the Grayson Fund (Caymans) Ltd.[24] The Fund was structured this way, based on the advice of experienced securities lawyers in order to ensure (among other things) that Rep. Grayson would *not* fall within the statutory definition of an investment advisor.[25] All of the Grayson Fund entities are either limited partnerships or limited liability companies which simply accept funds from partners and invest those funds. Merely allowing outside investors to invest their funds through a limited partnership is not the "provision of professional services." Neither Rep. Grayson nor any of these entities is a registered investment advisor, and participating in an investment partnership is not in any sense a "profession." Tellingly, the OCE report never even endeavors to identify what "profession" that it claims the Grayson partnership may have been engaged in – because there is no such "profession." Indeed, blurring the well-recognized distinction between investment activities and "professional services" would create a great deal of mischief, if not outright turmoil, in areas such as securities law, professional licensing and taxation.

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[21] Transcript of Rep. Grayson (Exhibit 2 at 15-6530_0106-107); The Grayson Fund General Partner, LLC, Delaware Certificate of Formation, May 17, 2011 (Exhibit 7 at 15-6530_0319).

[22] Transcript of Rep. Grayson (Exhibit 2 at 15-6530_0113-115)

[23] *See* Transcript of Interview of Former Grayson Fund Vice President of Investor Relations, Oct. 2, 2015 (hereinafter "Transcript of Former Grayson Fund VP") (Ex. 1 at 15-6530_0044) ("Let's remember, this is all his money. He had a vested interest in all this ...because this was his money. A very very small percentage . . . was someone else's money.").

[24] The two Cayman entities were established to meet certain legal requirements; no fund assets ever were held in the Cayman Islands or anywhere else offshore, and all fund assets were subject in their entirety to U.S. taxation, with full IRS compliance.

[25] Transcript of Rep. Grayson (Exhibit 2 at 15-6530_0106-107).

Nor did Rep. Grayson owe any fiduciary duties to the two outside investors (much less to himself). The Grayson Fund, LP; the Grayson Fund Management Company, LLC and the Grayson Fund General Partner, LLC are all Delaware entities. Rep. Grayson is a limited partner of the Grayson Fund, L.P.[26] It is well-established under Delaware law that limited partners generally do not have any fiduciary duties to one another.[27] Moreover, in *AFB Capital Management v. Askin Capital Management,* 957 F. Supp. 1308, 1332-33 (S.D.N.Y. 1997), the court ruled that investors in Delaware and Cayman Islands hedge funds or investment partnerships could not bring an action for breach of fiduciary duty. All five relevant entities are incorporated in Delaware or the Cayman Islands; thus there was no fiduciary duty.

The Grayson Fund L.P. limited partnership agreement expressly designates the Grayson Fund General Partner, LLC as the general partner and Rep. Grayson as a limited partner.[28] The partnership agreement further provides that "[t]he management of the Partnership is vested *exclusively* in the General Partner" and that "the Limited Partners will have no part in the management of the Partnership, and will have no authority or right to act on behalf of, or to bind, the Partnership in connection with any matter."[29] The terms of the partnership expressly disclaim any fiduciary duty. *A fortiori,* Rep. Grayson therefore owes no fiduciary duties to the Grayson Fund, L.P. or its partners, and therefore the entity can bear his name without implicating House Rule 25 or any other applicable fiduciary duty law. The same principles apply under Cayman Islands law, and therefore also apply to any of the Grayson entities in the Cayman Islands that bore Rep. Grayson's name.

As for the Grayson Fund General Partner, LLC, Rep. Grayson was a managing member of that entity.[30] There are no statutes providing that Delaware LLC managing members owe fiduciary duties, and the Delaware Supreme Court has never ruled that managing members, by virtue of being managing members, have fiduciary duties.[31] Rep. Grayson only has a 50% interest[32] in the Grayson General Partner, LLC, and therefore is not a controlling member who owes a fiduciary duty, as he cannot exercise the control necessary to "freeze out" the other members.[33] Moreover, the remaining interests are held by his own children and his mother, rendering the notion of a

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[26] *See* 2013 Grayson Fund General Partner, LLC Schedule K-1 (Response Exhibit 7 at RepGrayson_00002787).
[27] *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 662 (Del. Ch. 2012).
[28] *See* The Sibylline Fund, LP, Limited Partnership Agreement, Sept. 1, 2015 (Ex. 26 at 15-6530_612.)
[29] *See* The Grayson Fund, LP, Confidential Private Placement Memorandum, Feb. 26, 2013 (Exhibit 3 at 15-6530_0182-0183) (emphasis added).
[30] *See* The Sibylline Fund General Partner, LLC, Written Resolution of the Sole Managing Member, De-Registration of the Partnership, 2015 (Exhibit 8 at 15-6530_0609).
[31] *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 660 (Del. Ch. 2012) ("the Delaware Supreme Court made clear that the comments about default fiduciary duties were 'dictum without any precedential value.'"); *accord Gatz Properties, LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1218 (Del. 2012).
[32] *Id.*; *see also* (Response Exhibit 7 at RepGrayson_00002787).
[33] *Imbert v. LCM Interest Holding LLC*, No. CIV.A. 7845-ML, 2013 WL 1934563 at *7 (Del. Ch. May 7, 2013)("Delaware law imposes no default fiduciary duties on non-managing, non-controlling members of limited liability companies.").

"fiduciary duty" irrelevant. Rep. Grayson has never served as an investment broker, investment advisor, or in any other fiduciary role as defined by and traditionally understood by federal law.[34] The House Ethics Manual concedes that the Ethics Reform Act does not define the term "fiduciary" and suggests that the term should "not be applied in a narrow technical sense."[35] The Committee obviously should not construe the term to apply to a situation in which federal, Delaware and Cayman Islands law all say a fiduciary relationship does not exist. Further, the Committee should not construe the term to apply to a situation in which the Member, Rep. Grayson, had every reason to believe that it did not apply, including legal advice.

[34] *See* 29 C.F.R. § 2510.3-21:

> §2510.3-21 Definition of "Fiduciary."
> (a)-(b) [Reserved]
> (c) Investment advice. (1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (the Act) and this paragraph, only if:
> (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
> (ii) Such person either directly or indirectly (e.g., through or together with any affiliate)—
> (A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or
> (B) Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.
> (2) A person who is a fiduciary with respect to a plan by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan with respect to which such person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:
> (i) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or
> (ii) Exclude such person from the definition of the term "party in interest" (as set forth in section 3(14)(B) of the Act) with respect to any assets of the plan.

[35] Committee on Standards of Official Conduct, 110th Cong., 2d Sess., House Ethics Manual 214-15 (2008)(emphasis added)("House Ethics Manual").

Accordingly, there is no basis for the OCE's allegation that Rep. Grayson may have violated Rule 25. Neither he nor any of the Grayson Fund entities provided professional services involving a fiduciary duty to the two former investors in the Grayson Fund.

Finally, as even the OCE admits, Rep. Grayson has removed his name from the names of the three Delaware entities, and terminated the registrations of the two Cayman Islands entities that formerly bore his name.[36] Accordingly, going forward, the continued existence of these entities for the purpose of managing the investments of Rep. Grayson and his family cannot in any way implicate Rule 25.

III. Rep. Grayson Never Received Any Compensation from Any of the Grayson Entities, and Therefore Certainly Did Not Violate the Prohibition on a Member Receiving Compensation from any "Entity Providing Professional Services Involving a Fiduciary Relationship"

The OCE also alleges that Rep. Grayson may have violated Rule 25 by receiving compensation from an entity that provided professional services involving a fiduciary duty while a Member of Congress.[37] Rule 25 prohibits a Member of the House from receiving "compensation for affiliating with or being employed by a firm, partnership, association, corporation or other entity that provides professional services involving a fiduciary relationship."[38]

This allegation is fatally flawed for the reasons already discussed – neither Rep. Grayson nor any of the Grayson Fund entities provided professional services involving a fiduciary duty to the outside investors. Indeed, it would set a very dangerous precedent even to consider equating an investment partnership with an entity "providing professional services involving a fiduciary duty." Even if they had, this allegation would still fail because the overwhelming weight of the evidence produced to the OCE shows that Rep. Grayson never personally received any compensation whatsoever in exchange for the services he provided to the Grayson Fund entities.

Rep. Grayson cooperated extensively with OCE investigation of this matter. In response to the OCE's expansive request for financial records, Rep. Grayson produced all the monthly statements of the Grayson Fund, as well as tax records for eighteen individuals and entities, including the three Delaware Grayson Fund entities, Rep. Grayson and Rep. Grayson's five children.[39] Out of that virtual mountain of financial information the OCE has extracted a single

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[36] OCE Report at ¶ 70 & nn. 87-91. Rep. Grayson notes that he terminated the Cayman Island entities not because of any impropriety, but rather because those entities held no invested assets and subjected the fund to rising and excessive administrative expenses. He has stated publicly that he changed the name of the Delaware entities because "it never was important that they had the name Grayson, and it isn't important that they don't."

[37] OCE Report at ¶¶ 54-67.

[38] House Rule XXV, cl. 2(a).

[39] *See generally* OCE Report at ¶¶ 143,146,159,164.

wire transfer, and misinterpreted it to argue that Rep. Grayson may have received one single $4,000 payment for management services supposedly provided to the Grayson Fund.[40]

The OCE's allegation is simply incorrect. Both Rep. Grayson[41] and the former Grayson Fund VP[42] testified repeatedly that Rep. Grayson never received *any* management fees from the Grayson Fund. The transaction upon which the OCE's allegation to the contrary hinges took place when the Grayson Fund was in the process of refunding the investments of the two outside investors. As part of refunding all of the funds the investors had originally invested, Rep. Grayson chose to refund to them all of the management fees that had been incurred, but not paid, to the Grayson Fund Management Company.[43] During the process of refunding these management fees, a wire transfer including $4,079.22 in management fees was made between the SunTrust bank account of the Grayson Fund LP and a different SunTrust bank account of the Grayson Fund Management Company (not Rep. Grayson). The former Grayson Fund VP testified that the Grayson Fund Management Company SunTrust bank account also was used to pay the day-to-day operational expenses of the Grayson Fund entities.[44] This bank account was used to make the refunds to the outside investors. Because $4,079.22 in management fees simply *passed through* this account, the OCE claims that Rep. Grayson "received" the management fees in violation of Rule 25.

Because the outside investors were refunded all of their money, and because only the outside investors were subject to "fees," the OCE's allegation does not hold water.

Moreover, there is no evidence whatsoever in the OCE referral that this minor payment somehow represented "compensation" to Rep. Grayson. If the OCE had bothered to ask, it would have discovered that the investment partnership owed money to Rep. Grayson, and all Grayson Fund payments of any kind to Rep. Grayson actually constituted repayment of that money, not compensation for "professional services." Needless to say, repayment of a loan, or a contribution of assets to a partnership, is not "compensation."

It is difficult to imagine a more tortured interpretation of the facts in this case than that presented by the OCE. Fortunately, there is no need for the Committee to engage in such mental gymnastics. The OCE's allegation that Rep. Grayson violated Rule 25 can be dismissed simply

[40] Based on his detailed annual financial disclosures to the Ethics Committee, dating from 2006, Rep. Grayson routinely is described in the media as one of the ten wealthiest Members of the House. Some reported estimates of his assets exceed $100 million. The OCE never deigns to explain why Rep. Grayson even would *need* to be paid $4000 from his own investment partnership for what the OCE wrongly calls "management services."
[41] Transcript of Rep. Grayson (Exhibit 2 at 15-6530_0119-121).
[42] Transcript of Interview of Former Grayson Fund Vice President of Investor Relations, Oct. 2, 2015 ("Transcript of Former Grayson Fund VP") (Exhibit 1 at 15-6530_0024-25).
[43] Transcript of Rep. Grayson (Exhibit 2 at 15-6530_0118-119); Transcript of Former Grayson Fund VP (Exhibit 1 at 15-6530_0024-25) Transcript of Rep. Grayson Congressional Office Manager and Business Director (Exhibit 13 at 15-6530_0396-397).
[44] Transcript of Former Grayson Fund VP (Exhibit 1 at 15-6530_0043).

on the basis that the neither Rep. Grayson nor any of the Grayson Fund entities ever provided professional services involving a fiduciary duty to the two outside investors, as noted above.

IV. Rep. Grayson Did Not Violate the Prohibition on a Member Allowing the Use of His Name by an Entity Providing Professional Services Involving a Fiduciary Relationship When He Received Legal Advice From an Employee of His Own Consulting Firm

For more than a decade, starting long before he was elected to Congress, Rep. Grayson has been the part-owner of a corporation called "Grayson Consulting, Inc." Grayson Consulting never held itself out as a law firm, and never represented any third parties in court. From time to time, it required representation in court, as corporations often do, and in such circumstance, it employed both outside counsel and in-house counsel. In some of those matters, Grayson Consulting and Rep. Grayson both were parties to the litigation. Incredibly, the OCE has suggested that Rep. Grayson may have violated House Rule 25 merely because this corporation had Rep. Grayson's name, and engaged in the "professional service" of representing itself in court. Needless to say, this is ridiculous.

By way of background, when he was not serving in Congress, Rep. Grayson represented clients through two law firms (Grayson & Associates and Grayson Law Center), *not* Grayson Consulting. The OCE staff devoted a great deal of time and effort trying (and failing) to establish that Rep. Grayson violated Rule 25 by either allowing his two former law firms to continue to use his name after he was elected to Congress or by receiving inappropriate compensation from this former law firms while he was a Member of Congress. The OCE staff interrogated two former colleagues of Rep. Grayson and attempted to intimidate them into disclosing confidential and privileged client information.[45] Most egregiously, the OCE staff attempted to bully one of Rep. Grayson's former colleagues into surrendering an inoperative law firm computer, so that it could be repaired and searched by the OCE staff, who would then have improper access to that confidential and privileged information.[46] When Rep. Grayson's colleague refused to provide the OCE staff with unfettered access to a law firm computer containing confidential client files, the OCE irresponsibly labeled him as a non-cooperating witness.[47]

Ultimately, the OCE staff was forced to concede that Rep. Grayson did not violate Rule 25 because neither of his former law firms continued to use his name after he was elected to Congress.[48] In addition, despite their best efforts to find evidence that Rep. Grayson violated

[45] *See generally* Transcript of Interview of Grayson Law Firms Attorney, Sept. 2, 2015 ("Transcript of Grayson Law Firms Attorney") (Exhibit 32).
[46] OCE Report at ¶ 104; Email from Victor Kubli to Helen Eisner, Investigative Counsel, Sept. 21, 2015 (Exhibit 74 at 15-6530_0912).
[47] OCE Report at ¶¶ 104, 245-247 and 263.
[48] OCE Report at ¶¶ 77, 99.

Rule 25 by receiving inappropriate compensation from his former law firms after he became a Member of the House, the OCE staff reluctantly concedes that that never happened either.[49]

Seemingly frustrated by its inability to establish that Rep. Grayson's relationship with his former law firms in any way violated Rule 25, the OCE staff now alleges that Representative Grayson violated Rule 25 by receiving legal advice from his own personal attorney on Grayson Consulting's staff, because she was an employee of his consulting firm for a six-month period in 2014.[50] (Rep. Grayson provided the money that paid her salary.) The OCE staff's theory is premised on a bizarre misinterpretation of Rule 25. Because the name of the consulting firm was Grayson Consulting Inc., and an employee provided legal advice to Rep. Grayson – professional services involving a fiduciary relationship – the OCE staff claims that Rule 25 was violated.

This is simply Kafkaesque. The purpose of Rule 25's prohibition on a Member allowing his or her name to continue to be used by an entity that provides professional services involving a fiduciary duty after they have been elected to Congress is to prevent the entity from misleading the general public into believing that they may receive special consideration if they employ an entity linked to a sitting Member of Congress. The goal is to prevent the entity from capitalizing on the individual's status as a Member.[51] Here the "Grayson Law Firms Attorney" (the label for this individual used by the OCE) testified unequivocally that Grayson Consulting Inc. was not a law firm, and provided no services to the general public.[52] Grayson Consulting was merely an entity that paid the "Grayson Law Firms Attorney" for the legal services that she provided solely to Grayson Consulting and Rep. Grayson, in litigation where both were involved.

The OCE staff is essentially asking the Committee to initiate an investigation into whether Rep. Grayson was unduly influenced to hire Grayson Consulting Inc. for legal advice because the name of the company included his own name! The Committee should decline this invitation to further waste congressional resources, based on a bizarre legal theory propounded by the OCE

[49] OCE Report at ¶ 80. The OCE staff seems oddly surprised and uncomfortable with the fact that the terms of Rep. Grayson's buy-out agreement with his former law firm required the firm to continue to provide personal legal services to him as part of his compensation for selling his interest in the firm to his former associate. OCE Report at ¶¶ 85-96. Of course, such a buy-out agreement is essentially required for any lawyer in private practice who is elected to Congress. Failing to have such an agreement could have resulted in an actual Rule 25 violation. Having failed to find evidence of a Rule 25 violation, the OCE staff postulates that the terms of the buy-out agreement may, in some heretofore unknown way, constitute a violation of the gift rule (House Rule XXV, cl. 5). OCE Report at ¶ 111. The OCE staff cites no authority for this bizarre interpretation of the gift rule – because, of course, there is none. A contract is not a "gift." That the OCE staff would offhandedly include such an unfounded and legally unsupportable allegation in their report merely illustrates the bias and lack of impartiality that have scarred the OCE's entire investigation.

[50] OCE Report at ¶¶ 105-112.

[51] House Ethics Manual at 219-220.

[52] Transcript of Interview of Grayson Law Firms Attorney (Exhibit 32 at 15-6530_0664-665).

staff in their vain and biased quest to try to find some possible violation of Rule 25 by Rep. Grayson.[53]

V. The OCE's Allegation that Rep. Grayson May Have Violated 18 U.S.C. § 203 Because He Represented Plaintiffs in *Qui tam* Proceedings Before He Was Elected to Congress Ignores Both Well-Established Law and the Facts of this Case

Rep. Grayson is an attorney, and some of Rep. Grayson's legal work when he was not a Member of Congress consisted of representing whistleblowers in *"qui tam"* cases brought against government contractors who defrauded the government. Rep. Grayson also did other work which his firms billed by the hour. On both occasions when Rep. Grayson was elected to Congress, he: (a) discontinued all legal work and withdrew from all pending cases, (b) had the law firm within which he practiced do the same; (c) turned over all pending cases (including the *qui tam* cases) to another law firm, (d) removed the Grayson name from the legal entity that had performed such work, and (e) continued the existence of those law firm entities only to maintain his malpractice insurance for his prior work and collect any fees for work that had been completed before he took office. All of this was done with the advice of counsel, and in full accordance with all applicable ethical rules.[54]

Nevertheless, the OCE alleges that Rep. Grayson may have violated 18 U.S.C. § 203 because it claims there is substantial reason to believe that he "agreed to receive compensation for representational services, rendered by another, in at least seven False Claims Act cases in which the United States had a direct and substantial interest, during a time when he was a Member of Congress, in violation of federal law."[55] But as the OCE well knows, Rep. Grayson "agreed to receive" such compensation *before* he was elected to office, and before Rep. Grayson took office, he turned over each and every such case to a different law firm, which makes the OCE's claim disingenuous at best. Nor does OCE even identify any such "compensation" Rep. Grayson has received that even would qualify under that law. OCE is questioning whether Rep. Grayson *could* have received such compensation, without ever showing that he *did.*

The OCE bases its strained and tenuous claim solely on three Department of Justice, Office of Legal Counsel ("OLC") advisory opinions – only one of which relates to *qui tam* cases[56] – for the proposition that a federal employee's pending contingency interest in a *qui tam* case violates

[53] This Grayson Consulting name issue, like many issues in the OCE report, never surfaced until the report itself. The OCE fishing expedition extended far and wide, and the OCE never presented Rep. Grayson with any bill of particulars. The OCE obviously was more interested in generating hypothetical issues than in addressing real ones. Rep. Grayson has voluntarily removed his name from five other legal entities, and if there were a reason to do it, he would do so with regard to Grayson Consulting. But on the facts of this case, obviously, there is no reason to do so.
[54] Much of the compensation for *qui tam* cases often consists of regular hourly fees under the "lodestar" formula, and of course, regular hourly fees are a liquidated amount that is ascertainable at any time.
[55] OCE Report at ¶ 115.
[56] *See* Application of 18 U.S.C. § 203 to Former Employee's Receipt of Attorney's Fees in *Qui Tam* Action, 26 Op. O.L.C. 10, 11 (2002).

18 U.S.C. § 203's prohibition against a federal employee's compensation from private parties for providing services in connection with any matter in which the United States has an interest.[57] The lone advisory opinion cited by the OCE dealing with *qui tam* cases (as well as the other advisory opinions) expressly rebuts the OCE's conclusion, because that advisory opinion unambiguously leads to the conclusion that a fixed right to payment for legal work in a *qui tam* case performed prior to one's government employment does *not* violate 18 U.S.C. § 203.[58]

> A lawyer who receives only fees generated during the time he was not with the government thus does not receive 'any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another . . . at a time when such person is an officer or employee' of the United States. 18 U.S.C. § 203(a).[59]

The OCE offers no binding authority or case law supporting its misinterpretation of 18 U.S.C. § 203 related to *qui tam* cases, and it glosses over the fact that it relies solely on advisory opinions issued by the executive branch for that misinterpretation.[60] All advisory opinions, however, including the very OLC opinions cited by the OCE, submit that there is no violation of federal law when a contingent interest in a *qui tam* case is reduced to a fixed interest prior to a person's government employment.[61]

The OCE argues that contingency fees could create ethical problems because the "entire body of representational work in the proceeding is not fixed to any particular period in time," yet not much more than a sentence before this vague remark, the OCE concedes that a Buy-Out Agreement, through which Victor Kubli bought Rep. Grayson's law firm practice, "fixed that date on which contingent fees were earned to before Representative Grayson's congressional service".[62] This concession is fatal and dispositive of the OCE's allegations. As noted above and in the authority relied upon heavily by the OCE, a fixed amount established prior to a Member's employment by the federal government does not give rise to any violation of federal law.[63] The

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[57] OCE Report at ¶ 115, n. 157.

[58] Application of 18 U.S.C. § 203 to Former Employee's Receipt of Attorney's Fees in *Qui Tam* Action, 26 Op. O.L.C. 10, 11 (2002) ("A lawyer who receives only fees generated during the time he was not with the government thus does not receive "any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another . . . at a time when such person is an officer or employee" of the United States. 18 U.S.C. § 203(a)."); *see also* Attorney's Fees for Legal Service Performed Prior to Federal Employment, 23 Op. O.L.C. 42, 44 (1999).

[59] Application of 18 U.S.C. § 203 to Former Employee's Receipt of Attorney's Fees in *Qui tam* Action, 26 Op. O.L.C. 10, 11 (2002); *see also* Attorney's Fees for Legal Service Performed Prior to Federal Employment, 23 Op. O.L.C. 42, 44 (1999).

[60] OCE Report at ¶¶ 113-114.

[61] *See* Attorney's Fees for Legal Service Performed Prior to Federal Employment, 23 Op. O.L.C. 42, 44 (1999).

[62] OCE Report at ¶ 120.

[63] Attorney's Fees for Legal Service Performed Prior to Federal Employment, 23 Op. O.L.C. 42, 44 (1999) (citing Memorandum for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Mary Braden, Director, Departmental Ethics Office, Justice Management Division, *Re: Request for Legal Opinion Regarding the*

Buy-Out Agreement accomplished just that, reducing any contingent interest held by Rep. Grayson in a *qui tam* case to a fixed amount for work earned prior to his tenure in Congress.[64]

What goes beyond merely a claim that is not viable and ventures into an irresponsible lack of due diligence or, worse, an attempt by the OCE to completely ignore exculpatory evidence, is the OCE's request to investigate further Rep. Grayson's role in *United States ex. rel. Ritchie v. Lockheed Martin Corp.* and *United States ex. rel. Ubl v. IIF Data Solutions*. A summary review of the publicly available docket for those cases reveals that those case were dismissed without any recovery to the relator *before Rep. Grayson ran for office*.[65] The OCE has wasted months investigating these cases, interviewed multiple witnesses, reviewed thousands of pages of documents, and now asks this Committee to investigate these cases further when a few minutes perusing public dockets shows no recovery from those cases and that they were terminated prior to Rep. Grayson's tenure as a Member.[66] All other cases were pending before the execution of the Buy-Out agreement, which subsequently reduced Rep. Grayson's interest in all of these cases to a fixed interest prior to his time in Congress.[67] Accordingly, Rep. Grayson had no unlawful interest in a *qui tam* case while he was a member of Congress, and that fact is conclusively established by the Buy-Out agreement and the *qui tam* cases' dockets.

VI. Rep. Grayson Did Not Violate the Ethics in Government Act When Reporting His Holdings in The Grayson Fund and He Has Already Filed Amendments to Rectify Inadvertent Omissions From His Financial Disclosure Statements

Application of 18 U.S.C. § 203 to Acceptance of Attorney's Fees for Work Performed Prior to Service as Department of Justice Employee (Jan. 12, 1999).

[64] Buy-Out Agreement (Exhibit 34 at 15-6530_0673-684)

[65] *United States ex. rel. Ritchie v. Lockheed Martin Corp.*, No. 04-1937, District Court Docket Doc. Nos. 13, 211; *United States ex. rel. Ubl v. IIF Data Solutions*, No. 1:06-cv-00641-LO-TRJ, District Court Docket Doc. No. 277, 337.

[66] *United States ex rel. Rycroft v. Zeroline, Ltd.*, No. 1:07-cv-10777-WGY, Docket Doc. Nos. 1, 43, 117; *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, No. 1:04-cv-00199-TSE-TRJ, Docket Doc. Nos. 244, 562, 566, 570, 598; *United States ex rel. Godfrey v. KBR, Inc.*, No. 08-1423, Docket Doc. Nos. 18, 32, 35; *United States ex. rel. Ritchie v. Lockheed Martin Corp.*, No. 04-1937, District Court Docket Doc. Nos. 13, 211 *United States ex. rel. Ritchie v. Lockheed Martin Corp.*, No. 08-1112, Appellate Docket Doc. Nos. 0101413183, 01015120880, 01017583062; *United States ex. rel. El-Amin v. The George Washington University*, No. 1:95-cv-02000-CKKK-JMF, Docket Doc. Nos. 10, 743, 771, 781, 800; *United States ex. rel. McBride v. Halliburton Co.*, No. 1:05-cv-00828-FJS, Docket Doc. Nos. 1, 7, 79, 80, 198, 213; *United States ex. rel. Ubl v. IIF Data Solutions*, No. 1:06-cv-00641-LO-TRJ, District Court Docket Doc. No. 277, 337; *United States ex. rel. Ubl v. IIF Data Solutions*, No. 09-2280, Appellate Docket Doc. No. 8.

[67] *Rycroft* was filed on April 23, 2007 and no judgment was recovered in that case; *DRC, Inc.* was filed on February 24, 2004 and a judgment was entered in that case in November of 2009; *El Amin* was filed in 1995 and no judgment was recovered in that case; *Godfrey* was filed in December of 2005 and a judgment was entered in that case in favor of the relator on April 16, 2008, which was before Rep. Grayson was elected as a Member for the first time; and *McBride* was filed on April 26, 2005 with no judgment entered in favor of the relator. Any of these contingency fees would have been reduced by the terms of the Buy-Out into a fixed fee.

The Rep. Murphy-instigated complaint that initiated this matter falsely charged that the OCE investigate whether Rep. Grayson may not have properly reported all of his income, assets and positions on his 2013 Personal Financial Disclosure (PFD) statement, based upon the incorrect assumption that Grayson Fund assets were not disclosed. Ignoring this specific request, the OCE expanded its inquiry to include a tedious and persnickety review of every PFD Rep. Grayson has filed since he first ran for Congress in 2007 – a year before the OCE even existed.[68] This includes literally thousands of individual entries. Not surprisingly, given Rep. Grayson's complex financial holdings and the fact that Rep. Grayson served nonconsecutive terms in the House since first being elected in 2008, the OCE staff found a number of so-called "issues" while fly-specking his PFDs, including the fact that Rep. Grayson, in the opinion of the OCE staff, has bad handwriting.[69]

As noted, the Murphy complaint alleged that Rep. Grayson violated the Ethics in Government Act and House Rule 26 by supposedly failing to disclose the underlying assets of the Grayson Fund, LP on his 2013 Personal Financial Disclosure form. The OCE staff determined that this allegation was not true and that Rep. Grayson had, in fact, disclosed all the underlying assets of the Grayson Fund on all his PFDs.[70] The OCE staff, however, nevertheless seeks to take issue with *the method* that Rep. Grayson used to disclose the assets of the Grayson Fund, despite the fact that the law does not prescribe (nor proscribe) any specific method of disclosure.[71]

The allegation that Rep. Grayson may have violated the Ethics in Government Act in how he disclosed the assets of the Grayson Fund is simply incorrect because Rep. Grayson's interest in Grayson Fund, LP assets was, in fact, both disclosed and particularized. The Committee conducted a thorough, line-by-line review of Rep. Grayson's Personal Financial Disclosure forms for both 2012 and 2013 and never questioned the way in which Rep. Grayson reported the assets of the Grayson Fund, LP.[72] In both 2012 and 2013, Rep. Grayson reported an interest in the Grayson Fund, LP of between five and twenty-five million dollars and also listed his interest in fund assets individually. The House Ethics Committee never asked Rep. Grayson to disclose the underlying assets of the Grayson Fund in a separate list as the Murphy complaint insists on. Nor would such an omission necessarily constitute unethical conduct; as this Committee has recognized, "errors and omissions are an ordinary part of the process . . . ."[73]

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[68] The OCE's jurisdiction is limited to events that occurred while it existed. Office of Congressional Ethics, Rules for the Conduct of Investigations, Rule 1 - Jurisdiction (January 23, 2015).
[69] OCE Report at ¶ 172 and n. 269.
[70] OCE Report at ¶ 162.
[71] OCE Report at ¶¶ 162-171.
[72] Letter from Representative Grayson to Committee on Ethics Chair Conaway and Ranking Member Sanchez, October 6, 2014 (Response Exhibit 8 at RepGrayson_00000128-131); Letter from Committee on Ethics Chair Conaway and Ranking Member Sanchez to Representative Grayson, September 17, 2013 (Response Exhibit 9 at RepGrayson_00000139-141).
[73] Following its review of Rep. Grayson's 2012 and 2013 Personal Financial Disclosure Forms, the House Ethics Committee did request additional information regarding specific assets and transactions. Rep. Grayson October 6, 2014 Letter to Ethics Committee (Response Exhibit 8 at RepGrayson_00000128-131); Rep. Grayson September 17,

The Ethics Committee's guidance regarding the reporting of private investment funds has been in a constant state of evolution over the past seven years. In 2009, Members who invested in private investment funds were merely instructed to disclose their ownership interest in each fund that met the reporting threshold. Specifically, Members were instructed to disclose only the name of the fund and its year-end value.[74] By 2012, the Committee realized that there was a fundamental conflict between the reporting requirements of the Ethics in Government Act and the contractual requirements imposed on private investment fund investors. All private investment funds, including the Grayson Fund, LP, require their investors to keep confidential any information provided by the fund, including, especially, the fund's holdings.[75] Accordingly, the Committee changed the guidance it gave to Members to create different reporting requirements for different funds depending upon whether the fund qualified as an Excepted Investment Fund ("EIF"). If the fund did not qualify as an EIF, Members were told that they had to disclose the individual holdings of the fund. Members who were unable to comply with this requirement because they were subject to a fund's confidentiality requirement were told merely to contact the Committee.[76] Tellingly, in such a complex and conflicting circumstance, there was no statement or implication that the failure to comply would constitute an ethical violation (although, in any case, Rep. Grayson did comply.)

The Committee's 2012 effort to reconcile the conflict between private investment fund confidentiality requirements and the Ethics in Government Act's reporting requirements did not resolve the issue satisfactorily, so the Committee created a bipartisan working group "to study matters related to the disclosure of and handling of personal financial interests in the House of Representatives."[77] The working group was empowered to "study and make recommendations with respect to the Committee's financial disclosure guidance regarding modern complex

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2013 Letter to Ethics Committee (Response Exhibit 9 at RepGrayson_00000139-141). Rep. Grayson responded to both of these requests by providing the information requested. Rep. Grayson January 13, 2014 Letter to Ethics Committee (Response Exhibit 10 at RepGrayson_00000122, 135-138). No more is required. "[E]rrors and omissions in Financial Disclosure Statements are an ordinary part of the process for many filers, and in the normal course of review and amendment of Financial Disclosure Statements, the fact of errors and omissions are typically not the subject of an investigation or Report by the Committee, but rather are disclosed publicly by the filing of the amendment itself." Committee on Ethics, U.S. House of Representatives, *In the Matter of Allegations Relating to Representative Vernon G. Buchanan,* H.R. Rep. No. 112-588 at 5, 112th Cong., 2nd Sess. (July 10, 2012), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt588/html/CRPT-112hrpt588.htm.

[74] Committee on Standards of Official Conduct, U.S. House of Representatives, *Instruction Guide for Completing Calendar Year 2009 Financial Disclosure Statement Form A For Use By Members, Officers, and Certain Employees of the Legislative Branch* at 16.

[75] Selected Page from The Grayson Fund – Confidential Private Placement Memorandum, November 1, 2011 (Response Exhibit 11 at RepGrayson_00000337).

[76] Committee on Standards of Official Conduct, U.S. House of Representatives, *Instruction Guide for Completing Calendar Year 2012 Financial Disclosure Statement Form A For Use By Members, Officers, and Certain Employees of the Legislative Branch* at 17.

[77] Committee on Ethics, U.S. House of Representatives, *Statement Of The Chairman And Ranking Member Of The Committee on Ethics Regarding The Establishment of a Working Group* (May 23, 2013).

investment vehicles" due to the challenges such vehicles pose "for financial disclosure under the Ethics in Government Act."[78]

The recommendations of the bipartisan working group were never made public, but the guidance to Members for completing their annual Personal Financial Disclosure forms was changed yet again. Members are now told that if they are invested in a private investment fund that does not qualify as an ETF they must either list each asset in the fund or submit to the Committee letters from both the Member and the manager of the investment fund attesting that (1) the Member is not able to control or direct the investments made by the fund, (2) that the Member is not entitled to receive investment information and that the fund manager considers the information regarding investments made by the fund to be proprietary and confidential, or (3) that the Member is entitled to receive investment information, but is subject to a confidentiality agreement that prohibits him from disclosing the information.[79]

This latest iteration of the House Ethics Committee's guidance does not address Rep. Grayson's specific situation where he is both a Member and a partner in the investment partnership. Given that there is no guidance applicable to his specific situation, Rep. Grayson has chosen to comply with the reporting requirements of the Ethics in Government Act and disclose *all* of his assets without regard to whether they are held individually or though his interest in the Grayson Fund, LP. By disclosing all of his assets without separately identifying those that are held through the Grayson Fund, LP, Rep. Grayson provides the public with complete financial disclosure while allowing him to continue to comply with the confidentiality requirements of the Fund.[80] This approach vindicates the Ethics in Government Act's goal of complete financial transparency for the purpose of identifying potential financial conflicts of interest and, significantly, it has never been questioned by the Committee, despite the fact that Rep. Grayson has consistently adhered to this practice in every PFD.

Accordingly, the OCE staff has failed to demonstrate that there is a substantial reason to believe that Rep. Grayson violated the Ethics in Government Act and Rule 26 by choosing this method to disclose the underlying assets of the Grayson Fund.

The OCE also alleges that Rep. Grayson may have violated the Ethics in Government Act and Rule 26 by omitting certain specific assets, income and positions from his PFDs.[81] There were a small number of inadvertent omissions from Rep. Grayson's PFDs within the thousands of entries disclosed. When these were discovered during the course of the OCE investigation, Rep.

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[78] *Id.*

[79] Committee on Ethics, U.S. House of Representatives, *Instruction Guide - Financial Disclosure Statements and Periodic Transaction Reports Calendar Year 2014 For Use By Members, Candidates, Officers, and Certain Employees of the Legislative Branch* at 17.

[80] Specifically identifying and segregating partnership assets as partnership assets obviously would mean that they would no longer be confidential.

[81] OCE Report at ¶¶ 143-150, 177-78.

Grayson filed amendments to the applicable PFDs with the Clerk of the House and the Committee to remedy the omissions– a fact that the OCE staff reluctantly concedes in its report.[82]

The Committee has repeatedly rejected recommendations by the OCE, like this one, that the Committee investigate a Member's inadvertent PFD omissions. Most recently, the Committee has stated that "a full and complete amendment correcting these errors is the appropriate resolution of the matter, as it is in most other instances requiring an amendment."[83] In that case, the Committee stated that:

> [B]etween 30% and 50% of all Financial Disclosure Statements reviewed by the Committee each year contain errors or require a corrected statement. For over 95% of these inaccurate Financial Disclosure Statements, the filer appears to be unaware of the errors until they are notified by the Committee. . . . Generally, unless there is some evidence that errors or omissions are knowing or willful, or appear to be significantly related to other potential violations, the Committee notifies the filer of the error and requires that he or she submit an amendment, which is then publicly filed. Once the amendment is properly submitted, the Committee takes no further action. Accordingly, errors and omissions in Financial Disclosure Statements are an ordinary part of the process for many filers, and in the normal course of review and amendment of Financial Disclosure Statements, the fact of errors and omissions are typically not the subject of an investigation or Report by the Committee, but rather are disclosed publicly by the filing of the amendment itself.[84]

The OCE staff stubbornly argues that, despite the fact that these omissions have been corrected, Rep. Grayson could still be found to have violated the Ethics in Government Act and House Rule 26 because these omissions appear to be "significantly related" to other potential violations, an opaque and ambiguous term.[85] This smokescreen argument appears to be an attempt to salvage the OCE's recommendation that the Committee further investigate these alleged reporting violations by bootstrapping them to the OCE's Rule 25 allegations involving the Grayson Fund and Rep. Grayson's former law firms.[86] Given that those allegations have already been debunked, this argument is entirely unavailing.

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[82] OCE Report at ¶¶ 145, 150 and 178.
[83] Committee on Ethics, U.S. House of Representatives, *In the Matter of Allegations Relating to Representative Vernon G. Buchanan,* H.R.. Rep. No. 112-588 at 5, 112th Cong., 2nd Sess. (July 10, 2012), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt588/html/CRPT-112hrpt588.htm.
[84] *Id.* (emphasis added).
[85] OCE Report at ¶ 138.
[86] *Id.*

In addition, the OCE staff irresponsibly claims that Representative Grayson may have violated the Ethics in Government Act and House Rule 26 by failing to disclose the existence of the Lolita Carson Grayson Irrevocable Family Trust.[87] As Rep. Grayson specifically informed the OCE staff, however, the only assets in that trust were the personal residences of members of the Grayson family, without mortgages, producing no income.[88] The House Ethics Manual expressly states that "[p]ersonal residences not producing rental income . . . need not be reported."[89] If such personal assets need not be reported when owned outright, it makes little sense to maintain that they somehow should be reported when held by a trust, nor does the OCE even attempt to explain why this should be the case. In either case the asset is not producing income, and is an irrelevant holding for purposes of conflict of interest analysis.

Since he first ran for Congress in 2007, Rep. Grayson has expended considerable time and gone to considerable expense to comply with all of the reporting requirements of the Ethics in Government Act when preparing his PFDs – a significant challenge given the evolving guidance regarding the reporting of complex financial instruments. The tiny number of inadvertent errors already has been corrected as soon as identified, voluntarily and promptly. To the extent that the Committee determines that there are any additional inaccuracies or omissions in Rep. Grayson's PFDs, he will promptly file amendments to correct the public record.

VII. The OCE's Allegation that Rep. Grayson May Have Used Official Resources to Support Outside Businesses is Flatly Contradicted by Overwhelming Evidence

Rep. Grayson has a staffer who works four days a week for Congress, and one day a week for his investment partnership. She is paid accordingly. Seeking to make a mountain out of this molehill, the OCE alleges that Rep. Grayson may have violated 31 U.S.C. § 1301 and acted contrary to guidance in the House Ethics Manual because it wrongly claims:

- "Rep. Grayson Congressional Office Manager and Business Director [a single person, notwithstanding the two titles that the OCE bestows on her] has held and, in some cases, currently holds a number of positions for Representative Grayson's congressional office, campaign committee, the Grayson Hedge Fund, multiple law firms, and nonprofits"[90]

- "Rep. Grayson Congressional Office Manager and Business Director also plays a central role in managing Representative Grayson's personal and business finances."[91]

- Rep. Grayson's Congressional Office Manager's congressional duties were "comingled" with her duties outside of congressional duties;[92] and

[87] OCE Report at ¶¶ 154-56.
[88] Transcript of Rep. Grayson (Exhibit 2 at 15-6530_0135).
[89] House Ethics Manual at 256.
[90] *See* OCE Report at ¶ 184.
[91] *Id.*

- "Rep. Grayson Congressional Office Manager and Business Director performed services for Representative Grayson that do not relate to official duties or outside employment."[93]

Section 1301 prohibits Members from using government-appropriated funds for purposes other than those for which the appropriations were made.[94] The House Ethics Manual provides that once "House employees have completed their official duties, they are free to engage in campaign activities on their own time, as volunteers or for pay, as long as they do not do so in congressional offices or facilities, or otherwise use official resources."[95] The Manual further provides that a staff member's "own time" are determined by personnel policies instituted by the employing office.[96] Highly instructive to the OCE's allegations, the Ethics Manual also provides:

> The Standards Committee has recognized that the hours that constitute a staff member's own time will not always correspond to evenings and weekends: Due to the irregular time frames in which the Congress operates, it is unrealistic to impose conventional work hours and rules on congressional employees. At some times, these employees may work more than double the usual work week — at others, some less. Thus employees are expected to fulfill the clerical work the Member requires during the hours he requires and generally are free at other periods. If, during the periods he is free, he voluntarily engages in campaign activity, there is no bar to this.[97]

The House Ethics Manual further notes that a "provision of the rules issued by the House Administration Committee allows minor, incidental personal use of House equipment and supplies."[98]

Precisely where the Congress drew the line between official work and personal services "is not so clear."[99] Courts have further noted that a Member or his or her staff cannot be tried by the judiciary for using official resources to conduct personal business where a certain activity is not clearly defined by the House as "personal" rather than "official" business.[100] The House of

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[92] *Id.*
[93] *Id.*
[94] *See* 31 U.S.C. § 1301.
[95] House Ethics Manual at 136.
[96] *Id.*
[97] *Id.* (internal quotations omitted) (emphasis added).
[98] *Id.* at 197 (emphasis added).
[99] *United States v. Rostenkowski*, 59 F.3d 1291, 1309 (D.C. Cir.) *opinion supplemented on denial of reh'g*, 68 F.3d 489 (D.C. Cir. 1995).
[100] *Id.* For example allegations that a staff member did "little or no official work" and to have performed "personal services for a Member, "such as picking up his laundry, driving his family members around Washington, and

Representatives also "has not attempted to define a Member's official and representative duties, and has in large measure vested Members with discretion to fix the terms and conditions of employment of staff members."[101] "[T]he life of a congressman" – and, arguably, his staff as well –"as incumbent legislator and perpetual candidate for office, whose official day ends only after a round of nominally social events at which he is obliged to appear, and whose weekends and holidays are only an opportunity to reconnect with his constituents—makes the line between 'official work' and 'personal services' particularly difficult to draw."[102] The distinction between work and life is relatively unclear for a Member and, arguably, his staff, as "service in the United States Congress is not a job like any other, it is a constitutional role to be played upon a constitutional stage."[103]

Nowhere does federal law or the House Ethics Manual prohibit a staff member from securing part-time employment outside his or her congressional work, and in fact expressly contemplates that staff members may and often will secure such employment apart from their congressional work. Thus, the allegations that Rep. Grayson's Congressional Office Manager may have held positions outside of her Congressional duties does nothing more than state conduct that is expressly contemplated and permitted by the House Ethics Manual. The same applies for the allegations that:

- "Rep. Grayson Congressional Office Manager and Business Director performed services for Representative Grayson that do not relate to official duties or outside employment" (for which she was paid separately);

- Rep. Grayson's Congressional Office Manager held the title of "treasurer" for the Committee to Elect Alan Grayson for a period of three months in 2015 (a title that required no work on her part); and

- she held the title of registered agent and secretary for two Florida nonprofits that conducted no business and were later dissolved (which, again, required no work on her part).

The allegations that "Rep. Grayson Congressional Office Manager and Business Director also plays a central role in managing Representative Grayson's personal and business finances" is unsupported by the evidence and (if it were true) would be justified by her separate pay, but (more fundamentally) also would ask the Ethics Committee to investigate any staffer that prepares or in any way remotely helps a Member prepare his or her Personal Financial Disclosure forms. To complete these forms and comply with reporting requirements, it is

working at campaign events" could not be tried "because the performance of those activities might, in some circumstances, directly—even vitally—aid a Congressman in the performance of his official duties." *Id.* at 1310.

[101] *Id.* at 1309.

[102] *Id.* at 1312.

[103] *Id.*

necessary for Rep. Grayson's Congressional Office Manager to maintain records and perform certain "bookkeeping" services for Rep. Grayson and his investment partnership interest – *for which the investment partnership pays her* – so that all of the information concerning Rep. Grayson's personal finances are adequately maintained and readily available to report pursuant to federal reporting requirements. Rep. Grayson's Congressional Office Manager's bookkeeping work in furtherance of Rep. Grayson's reporting obligations – *for which the investment partnership pays her* – gives rise to no ethics violation as such work "directly—even vitally—aid[s] a Congressman in the performance of his official duties."[104] With such allegations, the OCE potentially demands that the Ethics Committee investigate at least one staffer of all 435 Members, since virtually all Members have their staff in some way or another review or maintain documents related to personal financial disclosure forms, all of which the OCE would characterize as "bookkeeping" services related to a Member's personal finances and businesses.

According to her testimony, the Congressional Office Manager's other bookkeeping services and administrative duties related to the Grayson Fund (for which the Fund pays her one day each week) included, among other things, the transfer of money as needed by the fund, communications with brokers or other parties related to the fund, paying the fund's expenses, performing 45 seconds – literally – of daily research for the fund on a personal computer, and preparing and filing taxes for the fund, which implicates several other entities such as trusts benefitting Rep. Grayson's family members, as they are investors in the fund. These services clearly were a genuine part-time job, which is permitted under the House Ethics Manual as described above.

Indeed, the OCE either concedes (or otherwise utterly fails to refute) the following facts that Rep. Grayson and his Congressional Office Manager instituted significant safeguards, such as the following so that his Congressional Office Manager could perform part-time work as permitted by House rules:

- Rep. Grayson's Congressional Office Manager used a personal computer and other personal equipment for work outside of Congressional duties;[105]

- Rep. Grayson's Congressional Office Manager was paid a separate salary for work outside of Congressional duties;[106] and

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[104] *Id.* at 1310.

[105] *See, e.g.*, Transcript of Rep. Grayson (Exhibit 2 at 15-6530_405); Transcript of Rep. Grayson Congressional Office Manager and Business Director (Exhibit 13 at 15-6530_405).

[106] *See, e.g.*, OCE Report at ¶ 95; Transcript of Rep. Grayson Congressional Office Manager and Business Director (Exhibit 13 at 15-6530_0383). Nowhere does the OCE allege that Rep. Grayson used government-appropriated funds to compensate his Congressional Office Manager for investment partnership-related activities, because it cannot. *See United States v. Diggs, 613* F.2d 988, 994 (D.C. Cir. 1979); *U. S. ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1375 (D.C. Cir. 1981).

- Rep. Grayson's Congressional Office Manager was given a day off each week for work outside of Congressional duties, and she performs those duties outside the office.[107]

Thus, the OCE's months-long investigation on this issue that consumed (and wasted) a significant amount of congressional resources was limited to a finding that Rep. Grayson's Congressional Office Manager may have sometimes "comingled" her duties by performing, during her lunch hour, *45 seconds* of research a day related to the investment partnership on her own personal computer,[108] receiving one or another extremely rare e-mail inadvertently misdirected to her House email account,[109] and, perhaps once or twice a year,[110] asking Rep. Grayson to sign documents[111] related to the investment partnership in the congressional office because of an imminent deadline, and because that was her only opportunity to see Rep. Grayson when he was not in Florida. As noted above, however, the House Ethics Manual permits "minor, incidental personal use of House equipment and supplies," so these instances fall well within the intent of that exception. All of these are extremely "incidental," by anyone's definition of that term.[112]

The fact is that Rep. Grayson's Office Manager has been paid for outside work one day a week during the entire time that she has worked four days a week for the Congressional office. Sadly but tellingly, however, the OCE's allegations related to the Congressional Office Manager's supposed potential use of official resources to support outside business are riddled with distortions of fact and purposeful omissions of exculpatory evidence.[113] For example, the OCE alleges that Rep. Grayson's Congressional Office Manager transferred money from Grayson Consulting, Inc. to pay for fund expenses despite having no role with the fund at that time, and that she was paid no compensation for her roles with GL CTR, P.C. or AMG T.R. P.C.[114] Here, the OCE has omitted that, at that time, she was working part-time for GL CTR, P.C. and was paid for her part-time work for GL CTR, P.C., which included but was not limited to Rep.

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[107] *See, e.g.*, Transcript of Rep. Grayson (Exhibit 2 at 15-6530_0151); Transcript of Rep. Grayson Congressional Office Manager and Business Director (Exhibit 13 at 15-6530_407).
[108] *See* OCE Report at ¶ 191; Transcript of Rep. Grayson Congressional Office Manager and Business Director (Exhibit 13 at 15-6530_0392).
[109] *See* OCE Report at ¶¶ 193-94; Transcript of Rep. Grayson Congressional Office Manager and Business Director (Exhibit 13 at 15-6530_0405).
[110] *See* OCE Report at ¶ 195; Transcript of Rep. Grayson Congressional Office Manager and Business Director (Exhibit 13 at 15-6530_0407).
[111] *See* OCE Report at ¶ 197.
[112] If one were to take the OCE report seriously, it might be illegal for a Member of Congress to carry his checkbook into his office, or a phone that has personal contacts in it, or to glance at an e-mail from his spouse.
[113] It should be noted further that the OCE recorded witness interviews and had a very junior OCE staff member -- untrained in and unaware of proper practices for interview transcription that court reporters and other similar professionals are familiar with – listen to each interview and transcribe each interview. The interview transcripts were riddled with typographical errors, misquoted persons that spoke in the interviews, and in at least one instance, an interview transcript attributed a statement to the wrong person.
[114] *See* OCE Report at ¶ 197.

Grayson's transfer of his business proceeds or other funds to his investment partnership.[115] Other factual distortions or omissions include, among other things, the following:

- *distortion* - that Rep. Grayson's Congressional Office Manager supposedly did not receive a salary from the Sibylline Fund LP (formerly known as the Grayson Fund LP) – the Sibylline Fund Management Co., LLC (formerly known as the Grayson Management Fund Co., LLC) is the company that manages the entire fund, and that entity paid Rep. Grayson's Congressional Office Manager for her work on behalf of all the fund entities that comprised the investment partnership as a whole;[116]

- *omission* - that Rep. Grayson's Congressional Office Manager "very rarely" made a telephone call related to investment partnership work during her four weekly work days as a Congressional staff member, and if she had to, she did it on her lunch hour;[117]

- *omission* - that Rep. Grayson's Congressional Office Manager maintained a separate email account for her work outside of her congressional-related duties;[118]

- *omission* - that Rep. Grayson's Congressional Office Manager – as acknowledged by courts of law and the House Ethics Manual – sometimes incidentally comingled time not to do investment partnership work, but rather due to the 24-hour, seven-days a week, and 365-days a year nature of her job as scheduler and office manager for a Member: "I always do Congressional work. My email goes off 24/7, 365.";[119]

- *omission* - that Rep. Grayson's Congressional Office Manger checked her investment partnership-related emails not during Congressional working hours but rather at night, and that when the rare email was sent inadvertently by persons associated with the investment partnership to her House email address, she asked them not to send emails to her House email address;[120] and

- *omission* - that "99.9 %" of her work in the Congressional office was congressional work.[121]

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[115] Transcript of Rep. Grayson Congressional Office Manager and Business Director (Exhibit 13 at 15-6530_358) ("Helen Eisner: You mean Former Grayson Fund Vice President of Investor Relations left the hedge fund . . .; Witness: Yes because that's when I stopped working ... That's when I stopped getting paid by Grayson Law Center.")
[116] *See, e.g.,* OCE Report at ¶ 190.
[117] *See id.* (Exhibit 13 at 15-6530_404).
[118] *See id.* (Exhibit 13 at 15-6530_405).
[119] *See id.*
[120] *See Id.* (Exhibit 13 at 15-6530_404).
[121] *See Id.* (Exhibit 13 at 15-6530_407).

There are further factual distortions and omissions, yet in the interest of not wasting the Committee's valuable time by requiring it to parse through the OCE's laundry list of misstatements and omissions, we strongly recommend that the Ethics Committee undertake efforts to review the record itself and not through the OCE's warped perspective. The record, taken as a whole and in its real context, clearly absolves Rep. Grayson and his Congressional Office Manager of any wrongdoing whatsoever related to use of official resources, as well as the other allegations in the OCE's report. The only question that matters here is whether it was permissible for Rep. Grayson to pay his Congressional Office Manager for one day a week of outside work and the answer, of course, is "yes."

The OCE's indefensible decision – following an ethics complaint instigated by Rep. Grayson's political opponent and OCE leaks to Rep. Grayson's political opponent that were then used by his political opponent to influence the Senate race and intimidate Rep. Grayson's campaign staff – to expend significant government resources to investigate and then have the Ethics Committee further investigate *45 seconds of investment research each day on a personal computer*, one or other of the extremely rare investment partnership emails received on a House email account, and the even more rare signature of documents in Rep. Grayson's Congressional office that relate to the investment partnership, is yet further confirmation that the OCE has failed its duty as contemplated by the Ethics Committee. The unique role of the Ethics Committee reflects a desire to "to protect the rights of individuals accused of misconduct, preserve the integrity of the investigative process, and cultivate collegiality among Committee members."[122] The OCE's Rules and establishing statute further note that the OCE is independent and nonpartisan, and that it must consider exculpatory evidence as much as it considers evidence that tends to show any conduct contrary to ethics rules.[123] The distortion of facts and purposeful omission of exculpatory evidence in the OCE report related to the above allegations, along with the OCE's utterly unconscionable actions assisting Patrick Murphy in order to influence the Florida Senate race,[124] irreparably discredits the allegations related to Rep. Grayson's Congressional Staff Member as well as the entire OCE report, and further mandates dismissal of the OCE's report in order to preserve the integrity of the entire ethics process.

VIII. The OCE's Allegation that Rep. Grayson May Have Violated 18 U.S.C. § 431 is Laughable and Totally Unsupported by Any Law

In a display of, at best, gross overreaching and, at worst, a transparent desire to throw a lot of "stuff" against the wall in the desperate hope that something might stick, the OCE alleges that there may be a substantial reason to believe that Rep. Grayson may have held or enjoyed a

[122] *Boehner v. McDermott*, 484 F.3d 573, 579 (D.C. Cir. 2007).
[123] OCE Rules, Introduction; H. Res. 895, §1(c)(F).
[124] *See also* Transcript of Former Grayson Fund VP (Exhibit 1 at 15-6530_053) ("I don't even believe there was anything unethical. I believe this is politically motivated. That might come as a shock or not, but I am very interested in hearing the results of this when it comes out, because I think it's a witch hunt.")

contract with the federal government in supposed possible violation[125] of 18 U.S.C. § 431, due to Rep. Grayson's investment as a normal shareholder in three energy-sector investment partnerships publicly traded on the New York Stock Exchange ("NYSE") that have tens of thousands of shareholders.[126] Amazingly, the OCE reaches this conclusion after conceding that the partnerships' subsidiaries - not the partnerships themselves – are the entities that may have held agreements with the federal government *more than 30 years ago.*[127] In essence, the OCE is claiming that any Member who is a shareholder in any company that sells anything to the federal government is violating the law – which is completely ridiculous.

The plain language of 18 U.S.C. § 431 provides that:

> Whoever, being a Member of or Delegate to Congress, . . . directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertakes, executes, holds, or enjoys, in whole or in part, any contract or agreement, made or entered into in behalf of the United States or any agency thereof, by any officer or person authorized to make contracts on its behalf, shall be fined under this title.[128]

A statute like this must be be strictly construed. "This means that no offense may be created except by the words of Congress used in their usual and ordinary sense."[129] Pursuant to a long-respected OLC opinion, this particular statute "is a highly penal law; and, besides, is in derogation of common right; on both accounts, therefore, if not to be interpreted strictly, it is at least not to be extended by any latitude of inference and construction."[130]

Nowhere in the plain language of the statute does it prohibit a Member from investing in a publicly traded limited partnership with tens of thousands of shareholders whose subsidiaries happen to have a contract with the federal government.[131] The OCE cites to no controlling

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[125] *See* OCE Report at ¶¶ 202-15.

[126] Those three investment partnerships are CVR Refining, LP, Natural Resource Partners L.P., and Northern Tier Energy, LP. As of September 30, 2015, the CVR Refining had a total of 147,600,000 common units issued, each of which represents a limited partnership interest in CVR Refining. *See* CVR Form 10-Q, October 29, 2015 (Response Exhibit 12 at 16). As of February 2015, Natural Resource Partners had approximately 43,400 beneficial and registered holders of common units representing limited partnership interest in Natural Resource Partners. Letter from Kathryn Wilson, President & General Counsel, Natural Resource Partners, L.P. to Omar Ashmawy, Staff Director and Chief Counsel, Office of Congressional Ethics, Oct. 12, 2015. (Exhibit 62 at 15-6530_0828).. The number of limited partners in Northern Tier, LP has been approximately 70,000 through 2014 and 2015. Scott Childs, Procurement Counsel, Northern Tier Energy LP to Deputy Chief Counsel, Paul Solis, Oct. 15, 2015 (Exhibit 61 at 15-6530_0823).

[127] OCE Report at ¶ 202.

[128] 18 U.S.C. § 431.

[129] *United States v. Alpers*, 338 U.S. 680, 681 (1950).

[130] Contract with a Member of Congress, 4 Op.Atty.Gen. 47 (1842) (emphasis added) (referencing and applying the prior version of 18 U.S.C. § 431).

[131] A fact that actually was unknown to Rep. Grayson.

authority or any case law whatsoever that would lead to the conclusion that Rep. Grayson even conceivably violated 18 U.S.C. § 431. Rather, the OCE hinges its entire specious argument on a single, nonbinding and wholly inapposite OLC advisory opinion.[132]

That opinion involved a proposed transaction in which Members' blind trusts would acquire, through preferred distribution rights, a direct ownership interest in a closely-held partnership that held a lease with the federal government.[133] The opinion reasoned that "Attorneys General and our Office consistently have recognized that [18 U.S.C. § 431] applies not only to Government contracts that are directly with a Member, but also to such contracts with a partnership in which a Member of Congress is a partner."[134] Thus, the OLC opined that the proposed transaction would be unlawful for two reasons. First, because the Members' "preferred distribution rights in the OP Units represent ownership interests in the Operating Partnership, which would directly hold the Government leases." Such interests, therefore, were not too remote or contingent, but "actual ownership interests covered by the plain language of § 431."[135]

Second, the OLC submitted that the proposed arrangement violated Section 431 because funds acquired from the government lease would flow directly into the partnership's general funds in which the Members had a direct ownership interest.[136] The OLC differentiated this situation from one "in which the interest in the underlying Government contract depended entirely on contingencies" as opposed to one where the partners "would immediately enjoy the value coming from the unfettered ability to effect a conversion that would give them an interest in Government contracts."[137]

Here, unlike the OLC Opinion, Rep. Grayson is a passive, shareholder in the publicly traded energy-sector investment partnerships, and has no direct ownership interest whatsoever in the partnerships' subsidiaries that hold government contracts and the funds arising from such contracts. Nor does Rep. Grayson have preferred distribution rights in an entity that holds a government contract. Nor does Rep. Grayson have any authority[138] whatsoever to decide how

[132] *See* OCE Report at ¶ 202 60 n. 326.
[133] 22 Op. O.L.C. 33, 34 (Feb. 17, 1998) ("Because leases with the Government would be held by the Operating Partnership under the transaction, and because the Members of Congress, through their trusts, would acquire ownership interests in the OP Units, the question arises whether the Members would hold interests in contracts with the Government in violation of 18 U.S.C. §§431-433.")
[134] *Id.* at 35 (emphasis added).
[135] *Id.* at 35-36.
[136] *Id.* at 36.
[137] *Id.*
[138] Natural Resource Partners specially grants no management power to its limited partners and stated in response to OCE inquiries that the limited partners "shall not participate in the management or control of the Partnership.... NRP does not and is not required to hold annual meeting of its limited partners and limited partners have limited voting rights. As of the date of this letter, NRP has never held a unitholder vote." *See* Letter from Kathryn Wilson, President & General Counsel, Natural Resource Partners, L.P. to Omar Ashmawy, Staff Director and Chief Counsel, Office of Congressional Ethics, Oct. 12, 2015 (Exhibit 62 at 15-6530_0828). CVR Refining's quarterly report filed with the SEC states " [t]he Partnership's general partner manages the Partnership's activities subject to the terms and

the general partners of these investment partnerships use funds their subsidiaries have obtained from the federal government. Whether, and if, the general partner decides to transfer funds from its subsidiaries obtained from a government contract and then distribute such funds to tens of thousands of limited partner shareholders, including Rep. Grayson, involves several layers of contingency – a situation that the OLC opinion expressly acknowledged would not result in a violation of 18 U.S.C. § 431. Regrettably, months of investigative activities, a production and review of thousands of pages of documents, and interviews of multiple witnesses have led to a referral based entirely on one, selectively-cited and inapposite advisory opinion that explicitly contradicts the OCE's conclusion.[139] (The OCE not only wasted its own time, but also the time of the management of these three companies, by contacting them and requiring them to provide a list of any government contracts.)

Not to be outdone by this bizarre and groundless allegation, the OCE further alleges that Rep. Grayson may have violated Section 431 because a subsidiary of Northern Tier LP ("Northern Tier"), another NYSE listed partnership with 70,000 limited partners (of whom Rep. Grayson is precisely one), had "non-competitive licenses, permits, and certifications" with the federal government. That a "license, permit or certification" somehow is interchangeable with a statutory "contract or agreement" with the government under 18 U.S.C. § 431 is utterly frivolous. The OCE cites no authority to make this broad leap, because there is none. As noted above, a statute like this must be strictly construed.[140] The OCE is not permitted to refer such silly nonsense to the House Ethics Committee, and therefore, the Committee should dismiss all of the OCE's referrals based on 18 U.S.C. § 431.

IX. The Committee Should Reject the OCE's Allegation That Rep. Grayson May Have Used Official Resources for Campaign Purposes

conditions specified in the Partnership's partnership agreement." CVR Form 10-Q, October 29, 2015 (Response Exhibit 12 at 10). It further notes that Coffeyville Resources, LLC owns 100% of the limited partnership's general partner. *Id.* Finally, Northern Tier's latest quarterly report notes that Western Refining, Inc. indirectly owns 100% of Northern Tier Energy GP LLC ("NTE GP"), the general partner of NTE LP. Northern Tier Form 10-Q, November 3, 2015 (Response Exhibit 13 at 8). The general partner of Northern Tier makes all management and operating decisions. *See, e.g. id.* at 43 ("The board of directors of our general partner has approved setting aside cash reserves to fund certain of our organic growth projects in determining cash available for distributions.")

[139] Rep. Grayson actually doesn't even enjoy a shareholder vote in these companies, meaning that he has even fewer rights than he does when he own shares in a corporation. In a more egregious example of the OCE's overreaching, it urges the Committee to waste its time to investigate Rep. Grayson's interest in Natural Resource Partners based on the fact that *one of its subsidiaries leased a portion of its land to the U.S. Postal Service for a post office more than 30 years ago. See* OCE Report at ¶ 212.

[140] *See United States v. Alpers*, 338 U.S. 680, 681 (1950); Contract with a Member of Congress, 4 Op.Atty.Gen. 47 (1842).

The OCE alleges that Rep. Grayson may have violated federal law and House rules merely by being in his office when he participated in two media interviews which, the OCE contends, were primarily focused on his Senate campaign.[141]

Federal law provides that official funds may be used only for the purposes for which they were appropriated.[142] Accordingly, the Committee has stated that "official resources of the House must, *as a general rule*, be used for the performance of official business of the House, and hence those resources may not be used for campaign or political purposes."[143] The Committee has identified five specific campaign activities that may not be undertaken in a congressional office or using House resources: (1) soliciting contributions, (2) drafting campaign speeches, statements, press releases or literature, (3) completing FEC reports, (4) creating or issuing a campaign mailing, and (5) holding meetings on campaign business.[144]

Conspicuously missing from this list of *per se* violations of the rule against using official resources for campaign purposes is any mention of interviews with the press that may include a discussion of a Member's election campaign. On the contrary, the Committee has "recognized that there are certain limited activities that, while related to a Member's campaign, may properly take place in a congressional office. The Committee's view has been that it would be impracticable and unnecessary to attempt to prohibit these specific activities."[145] Accordingly, the Committee has long advised that the press secretary in a congressional office "may answer occasional questions on political matters, and may also respond to such questions that are merely incidental to an interview focused on the Member's official activities."[146]

Given this specific exemption for congressional press secretaries, it is clear that the Committee should and would regard it as both impracticable and unnecessary to enforce a complete ban on Members answering questions regarding their campaigns during the course of an interview that happens to take place while they are in their congressional offices in their congressional office. Such questions are an inevitable consequence of the fact that Members of the House (unlike press secretaries) are simultaneously federal officeholders and candidates for federal office. Accordingly, the prohibition on the use of official resources for campaign purposes should be applied to Members at least as broadly (if not more broadly) as it is applied to their press secretaries – as allowing "occasional questions on political matters." The HuffPost Live interview meets this test.

The allegation that Rep. Grayson violated the rule against the use of official resources rests merely on the fact that he was in his congressional office at the time the interview occurred.

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[141] OCE Report at ¶¶ 219-44.
[142] 31 U.S.C. § 1301.
[143] House Ethics Manual at 123.
[144] *Id.* at 124.
[145] *Id.* at 132.
[146] *Id.* at 133.

When Rep. Grayson and his congressional and campaign staff realized that congressional business would prevent him from returning to Florida to respond to press inquiries regarding his Senate announcement, they went to substantial lengths to comply with both the letter and the spirit of the prohibition on the use of official resources when responding to HuffPost Live's request for an interview. In order to avoid using the House's telecommunications system for the interview, Rep. Grayson and his staff decided to have the interview conducted by Skype using a laptop computer purchased by the Committee to Elect Alan Grayson.[147] On January 12, 2015, Rep. Grayson, using a Committee to Elect Alan Grayson credit card, purchased a Lenovo laptop through Amazon.[148] The Committee's purchase of the laptop was reflected on the Committee to Elect Alan Grayson's April 15th Quarterly Report to the Federal Election Commission.[149] The connection was made through the wifi service on Rep. Grayson's personal phone.

Accordingly, no House facilities were used to conduct the HuffPost Live interview.

No one watching the entire interview, moreover, would conclude that it was substantially devoted to his Senate campaign announcement. While the interview begins with the question of why he chose to run for the Senate, the interview then rapidly moved to cover a wide variety of current legislative and social issues, including income inequality, "fast track" legislation, same-sex marriage, paid sick leave, taxation of Social Security benefits, and legislation introduced by Senator Elizabeth Warren to reduce student loan interest rates, as well as Senator Rand Paul's positions on foreign military entanglements and personal privacy. Less than one-third of the entire fifteen-minute HuffPost Live interview was devoted to Rep. Grayson's Senate announcement and his decision to run for the Senate.[150]

It should also be noted that any HuffPost Live viewer who missed the first minute of the fifteen-minute interview would have been totally unaware that Rep. Grayson was in his congressional office at the time of the interview. The initial Skype video shows the American and Florida flags behind Rep. Grayson in what appears to be an office setting, but the Skype connection soon failed and the video was replaced with a still shot of Rep. Grayson for the balance of the interview. The congressional office background appeared on screen for less than forty-five seconds of the entire fifteen-minute interview.[151]

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[147] E-mail from Franck to Scudder re HuffPost Live Interview dated July 9, 2015 (Response Exhibit 14 at RepGrayson_0000084-56).
[148] Committee to Elect Alan Grayson American Express January 2015 Invoice (Response Exhibit 15 at Committee_00000053-56).
[149] Committee to Elect Alan Grayson April 15, 2015 Quarterly Report to Federal Election Commission (Response Exhibit 16 at Committee_00000001-4).
[150] *See generally* http://live.huffingtonpost.com/r/segment/alan-grayson-running-for-senate/559bdab12b8c2ae808000041.
[151] *Id.*

Given the lengths they had taken to comply with the House rules, Rep. Grayson and his staff were surprised the following day when a reporter for Fox News questioned the propriety of doing the interview in the congressional office.[152] Concerned that they may have misunderstood the rules, they agreed to admit that a mistake may have been made and that in the future no interviews that were likely to be campaign-related would be done in the congressional office.[153]

Following the Fox News report on the HuffPost Live, both Rep. Grayson[154] and his communications director[155] testified to the OCE that the congressional staff understood that going forward they were to screen media requests for interviews to the congressional office more carefully to ensure that the interview would be about official topics. No such screening process, however, can prevent a reporter from straying off topic and questioning a Member about campaign issues. That is precisely what happened during the subsequent Nicole Sandler interview, which the OCE alleges may have violated federal law and House rules.[156]

Nicole Sandler is the host of a talk radio program. In September 2015, Ms. Sandler contacted Rep. Grayson's Orlando office and spoke to the press secretary, David Damron, requesting an interview with Rep. Grayson regarding legislation Rep. Grayson had introduced, the Shut Down the Shutdowns Act (H.R. 1776).[157] Mr. Damron told Rep. Grayson about the subject of the interview on the day it occurred, September 25, 2015.[158] Ms. Sandler began the interview by asking Rep. Grayson about House leadership issues, but after that she elected to veer off into a series of questions regarding the Florida Senate campaign.[159] It would have been utterly implausible to expect Rep. Grayson to terminate the radio interview for that reason alone; we have never seen any Member of Congress do that.

The HuffPost Live and Nicole Sandler interviews illustrate the futility of utilizing a bright-line rule prohibiting Members from discussing campaign issues during media interviews while on congressional property. With regard to the HuffPost Live interview, Rep. Grayson and his congressional staff went well beyond making a good faith effort to comply with the House rules

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[152] E-mail from Christina Jensen to Franck re Grayson Announcement dated July 10, 2015 (Response Exhibit 17 at Committee_000000015); E-mail Chain Fwd: Grayson Announcement dated July 10, 2015 (Response Exhibit 18 at Scudder_00000006).
[153] E-mail Chain Fwd: Grayson Announcement dated July 10, 2015 (Response Exhibit 19 at Committee_00000013-14); E-mail Chain Fwd: Grayson Announcement and Response (Response Exhibit 20 at Scudder_00000007-8).
[154] *See* Transcript of Rep. Grayson (Exhibit 2 at 15-6530_0146).
[155] Transcript of Interview of Representative Grayson's Communications Director, Oct. 15, 2015 ("Transcript of Representative Grayson's Communications Director") (Exhibit 66 at 15-6530_870-871).
[156] OCE Report at ¶¶ 238-44.
[157] Transcript of Rep. Grayson (Exhibit 2 at 15-6530_0148-149).
[158] *See* Transcript of Rep. Grayson (Exhibit 2 at 15-6530_0148). During his OCE interview, Rep. Grayson mistakenly testified that the Sandler interview had been arranged by his Communications Director rather than by Mr. Damron. The OCE concedes that counsel for Rep. Grayson corrected the record on this point in a letter to the OCE on October 28, 2105. OCE Report at ¶ 243 n. 418.
[159] OCE Report at ¶ 239.

governing the use of official resources for campaign purposes when confronted with a conflict between Rep. Grayson's official duties and his campaign schedule. Rather than miss important votes, Rep. Grayson chose to stay in Washington and try to accommodate the press by doing an interview using a campaign computer. The Nicole Sandler interview presented a different but equally vexing problem. Ms. Sandler requested an interview to discuss Rep. Grayson's legislation, but then unexpectedly asked a series of campaign-related questions.

The House Ethics Manual does not bar a Member from participating in an interview that includes some campaign-related information while in a congressional office. The Manual specifically allows a Member's press secretary to do such an interview in congressional office space as long as the interview is not substantially devoted to the campaign.[160] At least the same broad interpretation should apply to Members, who are far more likely to be confronted with questions regarding both their official duties and their campaigns during the course of an interview. A more stringent interpretation of the rule when applied to Members would raise serious First Amendment issues as well as being impractical, unnecessary and impossible to enforce.[161]

As noted above, this OCE referral was born in sin – an utterly irresponsible collaboration between OCE staff and a Grayson political opponent, featuring incessant disclosure of confidential information that Rep. Murphy's staff attempted to use to smear Rep. Grayson in the media and to Grayson's own campaign staff. The referral itself verges on the demented, in all of its Captain Ahab attempts to spear the white whale by coming up with something – anything – with which to try to argue that some unethical conduct has occurred. Acting upon detailed legal advice at every turn, Rep. Grayson has gone all out, at great expense, to adhere to all of the rules. Not only were the rules never broken; they were never even bent. And this is precisely the kind of witch-hunt that the OCE should not be engaged in. For all the foregoing reasons, Rep. Grayson respectfully requests that the Committee reject all the OCE's recommendations and dismiss the referral in Review Number 15-6530.

Sincerely,

Brett G. Kappel
Counsel for the Honorable Alan M. Grayson

[160] House Ethics Manual at 133.
[161] *Id.* at 132.

Declaration

I, Representative Alan Grayson, declare (certify, verify, or state) under penalty of perjury that the response and factual assertions contained in the attached letter dated 1/22, 2016, relating to my response to the January 6, 2016, Committee on Ethics letter, are true and correct.

Signature: Alan Grayson

Name: Representative Alan Grayson

Date: 1/21, 2016