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The Honorable Susan W. Brooks, Chairwoman
The Honorable Theodore E. Deutch, Ranking Member
U.S. House of Representatives Committee on Ethics
1015 Longworth House Office Building
Washington, DC 20515

Re: Review No. 17-1147

Dear Chairwoman Brooks and Ranking Member Deutch:

We write on behalf of Delegate Madeleine Z. Bordallo, in response to the Report and Findings in this review, transmitted by the Office of Congressional Ethics (“OCE”) and provided by the Committee to Delegate Bordallo on June 12, 2017.

Because this review was defective from the beginning, and because the law and facts do not support the violations alleged by the Report, the Committee should dismiss this referral pursuant to Rule 17A(e) of the Rules of the Committee on Ethics.

I. INTRODUCTION

The record reveals that OCE erroneously pursued a review against Delegate Bordallo on the word of a former employee who resigned after facing criminal charges. The record demonstrates that OCE failed to consider exculpatory facts that should have thwarted the review: that the Delegate’s longstanding lease of her home to the Japanese Consulate preceded her service in Congress; that her family owned the Outrigger Resort, where she often stayed; and that her staff had longstanding, independent ties to the beauty pageant on which she purportedly “used” their services.

OCE confronted facts during the course of its review that undermined each of these allegations. It found that the lease arrangement not only preceded the Delegate’s federal service, but represented fair market value and was unrelated to the discharge of her official duties. It confirmed that the Delegate’s family entirely owned the Outrigger Resort, maintained family quarters there, controlled access, and let her stay there because of her relationship to them. It found that the Delegate did not force staff to perform personal work, that the staff had clear personal motivations for engaging in outside activities, and that they scrupulously avoided using official time or resources while doing so.

Unable to directly confront the charges made against her, Delegate Bordallo specifically asked OCE to disclose exculpatory information that would impeach the testimony of adverse witnesses,

to which she was entitled under OCE rules. Only upon receiving OCE's findings from the Committee did Delegate Bordallo learn that the testimony OCE took from her former chief of staff was contradicted by the weight of other evidence.

What happened to Delegate Bordallo in Review No. 17-1147 ought to alarm every Member, officer and employee of the House. On the word of a hostile third party, a subject can be presented with false allegations, the predicate for which is never disclosed to her. Investigators can make unreasonable demands on her family for documents and testimony, even while they face the untimely loss of a family member. OCE can offer witnesses the choice of producing thousands of pages of documents at great expense and burden, or facing noncooperation findings and subpoena threats. Finally, OCE can withhold exculpatory evidence in violation of its rules and deny the subject the most basic right of being able to confront the charges against her. Because this review was defective from the very beginning, and because the law and facts support none of the alleged violations, the Committee on Ethics should vote to dismiss all of the allegations against Delegate Bordallo and close Review No. 17-1147.

II. STATEMENT OF FACTS

A. OCE's February 7, 2017 Meeting with Delegate Bordallo

Review 17-1147 began on Saturday, February 4, 2017. Delegate Bordallo first learned of the review on Monday, February 6, 2017, when she received an "Initiation of Preliminary Review" letter from OCE. The letter stated that OCE was reviewing three allegations: (1) that she may have accepted rental payments from the Consulate of Japan during her service in Congress; (2) that she may have "solicited and accepted" free lodging at the Outrigger Resort during her service in Congress; and (3) that she may have "used" her congressional staff to perform maintenance on her rental property in Guam and to perform work for a Guam-based beauty competition.

On February 7, 2017, Delegate Bordallo's office immediately contacted OCE to set up a meeting. That same day, OCE staff met with Delegate Bordallo in her House office. When Delegate Bordallo told OCE's attorneys that her family owns the Outrigger Resort, she noticed that they appeared surprised. Her impression was confirmed by the expansive, multi-part request that OCE served on her. Among 15 requests spanning nine years, the requests sought communications "between March 11, 2008 and the present ... with ... Alfred C. Ysrael and Diana Z. Ysrael," her sister and late brother-in-law.

B. The Three Initial Allegations

1. The lease to the Japanese Consulate

OCE's first allegation centered on Delegate Bordallo's longstanding lease of her property to the Japanese Consulate. In 1990, Delegate Bordallo bought a house ("the Tamuning Property") in Tamuning, Guam.¹ In 1993, ten years before coming to Washington, she began renting the Tamuning property to the Japanese Consulate in Guam under a standard lease agreement, which was adjusted every two years to account for fluctuations in the monthly rental rate and to reflect the name of the current Japanese Consul General.² Delegate Bordallo's rental of the Tamuning Property has been no secret. Throughout the fourteen years that she has served Guam in Congress, she has filed publicly available financial disclosure statements showing the value of her ownership of the Tamuning Property—including its address—and the rental income that she has received from its lease.³

OCE's investigation confirmed that the Delegate rented the Tamuning Property to the Japanese Consulate at fair market value.⁴ Indeed, Delegate Bordallo's former district director told the OCE that the monthly rental amount required under the lease fluctuated over the years, and even *decreased* on some occasions at the tenant's behest, because of changing economic circumstances in Japan.⁵

Consistent with an arm's length agreement, not only did the Delegate not receive any special benefit from the Japanese Consulate through the lease, but the Government of Japan did not receive any benefits from the lease apart from the use of the property. Through interviews with

¹ Affidavit of Real Property, June 7, 1990 (Exhibit 2 at 17-1147_0012); Guam Department of Land Management Certificate of Title, June 18, 1990 (Exhibit 3 at 17-1147_0014).

² See Former District Director Transcript (Exhibit 5 at 17-1147_0031).

³ Del. Bordallo, 2015 Annual Financial Disclosure Report, filed May 11, 2016 at 2; Del. Bordallo, 2014 Annual Financial Disclosure Report, filed May 11, 2015 at 2; Del. Bordallo, 2013 Annual Financial Disclosure Report, filed May 8, 2014 at 2; Del. Bordallo, 2012 Annual Financial Disclosure Report, filed May 14, 2013 at 4; Del. Bordallo, 2011 Annual Financial Disclosure Report, filed May 1, 2012 at 4; Del. Bordallo, 2010 Annual Financial Disclosure Report, filed May 11, 2011 at 3; Del. Bordallo, 2009 Annual Financial Disclosure Report, filed 2010 (date unreadable) at 3; Del. Bordallo, 2008 Annual Financial Disclosure Report, filed May 12, 2009 at 3; Del. Bordallo, 2007 Annual Financial Disclosure Report, filed May 12, 2008 at 3; Del. Bordallo, 2006 Annual Financial Disclosure Report, filed May 15, 2007 at 3; Del. Bordallo, 2005 Annual Financial Disclosure Report, filed May 12, 2006 at 3; Del. Bordallo, 2004 Annual Financial Disclosure Report, filed May 16, 2005 at 3; Del. Bordallo, 2003 Annual Financial Disclosure Report, filed May 17, 2004 at 3; Del. Bordallo, 2002 Annual Financial Disclosure Report, filed May 15, 2003 at 3.

⁴ OCE Report at ¶ 32.

⁵ Former District Director Transcript (Exhibit 5 at 17-1147_0032). OCE asked Delegate Bordallo for copies of the leases spanning nine years, back to 2008. She produced the most recent copies, which were the only ones she was able to locate, but which referenced the original lease in 1993. See Bordallo Production to OCE at 17-1147-000457 to 000478. Delegate Bordallo did not knowingly withhold any versions of the lease from OCE.

current and former staff members, OCE confirmed that the Japanese Consulate leased the property for reasons having nothing to do with the Delegate's official position. When asked why the Delegate rented the Tamuning Property to the Japanese Consulate, Delegate Bordallo's former district director told OCE that the Japanese Consul General was looking for a residential unit that was close to his office, and the Delegate's home was only a mile away from the Consul General's office.⁶ He said, "The house is situated very convenient[ly] for the type of work that the Consul General does."⁷ Even Delegate Bordallo's former chief of staff said that the house had unique features—for example, a stage—that suited the Consul General's needs.⁸ At least three of the witnesses that OCE interviewed, including the former chief of staff, confirmed that Delegate Bordallo did not take any action with respect to the Government of Japan that was in any way influenced by the rental arrangement.⁹ In fact, the former and current district directors made clear that Delegate Bordallo's office did not work on legislation or policy issues with the Japanese Consulate.¹⁰

2. The Delegate's use of her family's residence

OCE's second allegation involved Delegate Bordallo's stays at a hotel owned by her family—the Outrigger Resort—when she visits her district. The Outrigger Resort is owned by Tanota Partners, a family company founded and owned by Delegate Bordallo's sister and late brother-in-law, Diana and Alfred Ysrael ("the Ysraels"). Tanota Partners holds a portfolio of Guam commercial and residential properties, including hotels like the Outrigger. Under the umbrella of Tanota Partners are several business entities, which are all owned by the Ysraels, their five children, or some combination thereof. The Outrigger Resort is directly owned by corporations which are in turn owned in equal parts by five family trusts, of which Delegate Bordallo's family members are beneficiaries.¹¹ OCE's investigation confirmed that the Outrigger is "owned by a series of corporate entities and trusts that are ultimately controlled by Delegate Bordallo's nephew, nieces, brother-in-law, and sister."¹² The elaborate chart prepared by OCE to show the Outrigger's ownership does not identify a single person in the ownership chain besides the Delegate's family and the businesses they entirely own.¹³

As owners, the Ysraels had full discretion and control over the use of the Outrigger Resort, including who has access to the hotel's amenities, meeting facilities, the Voyager Club

⁶ Former District Director Transcript (Exhibit 5 at 17-1147_0037).

⁷ *Id.*

⁸ Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0055).

⁹ Former District Director Transcript (Exhibit 5 at 17-1147_0037); Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0069); Current District Director Transcript (Exhibit 8 at 17-1147_0117).

¹⁰ Former District Director (Exhibit 5 at 17-1147_0032); Current District Director (Exhibit 8 at 17-1147_0117).

¹¹ OCE Report at ¶ 56.

¹² OCE Report at ¶ 51.

¹³ OCE Report at ¶ 55.

hospitality suite, and the “family quarters”—apartment-style lodging, superior in quality to the other rooms, which are not made available to the public and are instead set aside for the Ysrael family to use at its own discretion. Delegate Bordallo has often stayed in the Outrigger family quarters and has used other hotel rooms and amenities available at the Outrigger through the grace of her sister and late brother-in-law. In its investigation, OCE learned from the Outrigger that the “family units” are not formally part of the Outrigger Resort nor are they included in the hotel management agreement between the family company that owns the Outrigger and Outrigger Guam Limited Partnership, the hotel management company that manages the resort.¹⁴

OCE’s investigation confirmed that Delegate Bordallo stayed at the Outrigger free of charge because it was owned by her family. Delegate Bordallo’s former chief of staff told OCE that the Delegate stayed at the Outrigger when she was in Guam “[b]ecause the Ysrael family is related to her. They own [the Outrigger].”¹⁵ The Delegate’s current district director said that she stayed at the Outrigger because the “[the Delegate’s] sister Diana Ysrael and her brother-in-law Alfred Ysrael own the property.”¹⁶ The Delegate’s office manager told OCE that the Delegate stayed at the Outrigger because “it’s owned by family.”¹⁷ Further, she said, “My understanding from the very first time I booked reservations for the Congresswoman is she stays at the Outrigger because it belongs to her sister and that she can stay with family.”¹⁸ The current district director told OCE that in 2016, when one of the Delegate’s political opponents attempted to use the Delegate’s stays at the Outrigger to make it seem as if the Delegate was out of touch with her constituency, the Delegate’s brother-in-law assured the Delegate that there was nothing wrong with the arrangement. According to the district director, Alfred Ysrael told the Delegate: “You’re staying with your sister. What’s wrong with that?”¹⁹

Delegate Bordallo’s niece, a part owner of the Outrigger, confirmed to OCE that the family quarters at the Outrigger were specifically created for use by the Ysraels’ family.²⁰ She described her family’s relationship to the Outrigger thusly: “We own it.”²¹ She explained that Delegate Bordallo was not the only family member who stayed in the family quarters free of charge; the Ysraels allowed other family members to stay in the family quarters as well.²² She told OCE that her mother, Delegate Bordallo’s sister, always knew that the Delegate was staying at the

¹⁴ OCE Report at ¶ 64.

¹⁵ Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0070).

¹⁶ Current District Director Transcript (Exhibit 8 at 17-1147_0124).

¹⁷ Office Manager Transcript (Exhibit 11 at 17-1147_0611).

¹⁸ *Id.* at 17-1147_0624.

¹⁹ Current District Director Transcript (Exhibit 8 at 17-1147_0133). OCE did not disclose this testimony to Delegate Bordallo as exculpatory evidence.

²⁰ Niece A Transcript (Exhibit 14 at 17-1147_0668).

²¹ *Id.* at 17-1147_0667.

²² *Id.* at 17-1147_0668-0669.

Outrigger free of charge, and that the Delegate did not pay to stay at the Outrigger or use its amenities “because she’s family.”²³

The record also indicates that Delegate Bordallo’s former chief of staff, whom Delegate Bordallo trusted to ensure that the office complied with the ethics rules, told other staff members that the Delegate could stay at the Outrigger for free because of the Delegate’s familial relationship with the Ysraels. The former district director told OCE that he never questioned why the Delegate stayed at the Outrigger because the former chief of staff told him that he had cleared the circumstances of Delegate Bordallo’s lodging at the Outrigger with the House Administration Committee.²⁴ Similarly, the office manager told OCE that from the very first time she booked reservations for the Delegate, it was conveyed to her by the former chief of staff that the Delegate stayed at the Outrigger because it is owned by the Delegate’s sister and that it was “allowed for her to stay with family.”²⁵

3. The outside activities of the Delegate’s staff

OCE’s third allegation involved a claim that Delegate Bordallo “used” her staff to work on a Guam-based beauty competition and maintain the Tamuning property. During the course of this review, and despite Delegate Bordallo’s requests, OCE did not present the Delegate with any factual predicate for these allegations. OCE’s own investigation later revealed that there was none. OCE ultimately and correctly recommended that the Committee dismiss this allegation because there was no substantial reason to believe that the Delegate “used” her staff to perform personal services.²⁶

OCE’s investigation affirmed that while certain members of Delegate Bordallo’s staff worked on the Miss World Guam pageant and helped maintain the Tamuning Property, they did so for their own personal reasons and avoided using official time or resources to do so.²⁷ Delegate Bordallo is the franchise owner and honorary president of the Miss World Guam beauty pageant. The pageant is a not-for-profit corporation and all proceeds raised are donated to local charities in Guam. Delegate Bordallo does not receive any profit in her role as the pageant’s franchise owner and honorary chair. The Delegate’s current district director has volunteered to work on the pageant, and the Delegate’s constituent services staffer has long been involved with the pageant. The constituent services staffer, Kaye Lea Custodio, has multiple connections to the Pageant apart from her association with Delegate Bordallo. Her mother-in-law, Zeny Custodio, was a

²³ *Id.* at 17-1147_0678.

²⁴ Former District Director Transcript (Exhibit 5 at 17-1147_0040).

²⁵ Office Manager Transcript (Exhibit 11 at 17-1147_0611). OCE does not appear to have examined the former chief of staff about these statements. *See* Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0070-89).

²⁶ OCE Report at ¶ 185.

²⁷ *See* Former District Director Transcript (Exhibit 5 at 17-1147_0036); Current District Director Transcript (Exhibit 8 at 17-1147_0115-0117, 0121-0122); Office Manager Transcript (Exhibit 11 at 17-1147_0651, 0654).

member and leader of the Miss World Guam pageant before her death in 2000.²⁸ Ms. Custodio herself was once a contestant in the Pageant.²⁹ Ms. Custodio has accordingly volunteered her services to the pageant on her own time for several years, including by serving as Pageant Director in 2012 to the present.³⁰ She has also appeared in multiple news articles about the Pageant and has tweeted about her involvement with evident enthusiasm.³¹ Similarly, the Delegate's current and former district directors helped with maintaining the Tamuning property, but on their own time and of their own volition, because of their longstanding relationships with the Delegate and her family.³²

OCE's investigation confirmed these facts. The evidence it obtained did not support the former chief of staff's claim that Delegate Bordallo's staff raised concerns about volunteering for Miss World Guam or helping the Delegate maintain the Tamuning property. Delegate Bordallo's former district director explained to OCE that he never told Delegate Bordallo's former chief of staff that he felt he was doing too much work on the Tamuning property.³³ The current district director explained to OCE that he helped take care of the Tamuning property because of his longstanding relationship with Delegate Bordallo and her husband, and his desire to look after Delegate Bordallo as she grew older.³⁴ He said that he used his personal email address and personal phone to address any requests related to the property.³⁵ He confirmed that he never expressed any concern or dissatisfaction regarding taking care of the property or working on the pageant with Delegate Bordallo's former chief of staff, and that just as he knew that time spent working on these outside activities had to be in a staffer's personal time, so too did Kaye Custodio.³⁶ He also testified that the Delegate had never assigned him a pageant-related task.³⁷ Delegate Bordallo's office manager confirmed the district directors' accounts, saying she had no knowledge that any of Delegate Bordallo staff members had ever expressed any concern about volunteering for the pageant or maintaining the Tamuning property.³⁸

²⁸ See Bordallo Production to OCE, 17-1147-000498.

²⁹ See OCE Report ¶ 163.

³⁰ See *id.*

³¹ See, e.g., <http://www.angelopedia.com/news/Aria-Perez-Theisen-Workshop-for-Miss-World-Guam-2016-Finalists/3372>; https://twitter.com/kaye_lea/status/202879786446626818.

³² See Former District Director Transcript (Exhibit 5 at 17-1147_0036); Current District Director Transcript (Exhibit 8 at 17-1147_0115-0117, 0121-0122); Office Manager Transcript (Exhibit 11 at 17-1147_0651, 0654).

³³ Former District Director Transcript (Exhibit 5 at 17-1147_0036).

³⁴ Current District Director Transcript (Exhibit 8 at 17-1147_0115).

³⁵ *Id.* at 17-1147_0116.

³⁶ *Id.* at 17-1147_0117.

³⁷ *Id.* at 17-1147_0121.

³⁸ Office Manager Transcript (Exhibit 11 at 17-1147_0651, 0654). The specific, consistent testimony of the former district director, the current district director, and the office manager all stand in contrast with the former chief of staff's vague and evasive insinuations. See Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0059-65). Here, again, OCE does not appear to have examined the former chief of staff about his colleagues' contrary statements.

C. OCE's Continued Pursuit of This Matter

1. OCE's overbroad requests for information

OCE launched its review by serving Delegate Bordallo with an overbroad 15-part Request for Information (“RFI”) that sought highly personal information spanning a period of nine years. Among other things, the RFI asked the Delegate to produce all of her calendars of every time she traveled to her district; a list of each trip she took to her district, along with a narrative of where she stayed and who accompanied or staffed her; and all of her communications with her sister and brother-in-law regarding each time she stayed at her family’s hotel during visits to her district.³⁹ Read literally, one of the original requests—which OCE narrowed, after being told that Diana Ysrael was the Delegate’s sister and the Ysrael family owned the Outrigger—sought all of the Delegate’s correspondence with her sister, brother-in-law, nephews and nieces, regardless of topic.⁴⁰ The RFI also sought a vast array of information about the Tamuning Property over nine years, including a list of everyone who has ever lived in the Japanese Consulate.⁴¹ Finally, the RFI asked Delegate Bordallo to search nine years of records for documents about the Miss World Guam pageant and work done by her staff on her rental property.⁴²

Through counsel, the Delegate objected to the broad scope and time period of OCE’s requests. OCE agreed to slightly narrow the scope of two of them: it said it was seeking calendars only for the Delegate’s time on Guam; it defined “lodging” for purposes of RFI 3 to include “any materials reflecting where Delegate Bordallo stayed on Guam”; and disclaimed any intention to seek communications with the Delegate’s sister and brother-in-law that were unrelated to the Outrigger.⁴³ Still, the narrowed requests remained substantially overbroad and impossible practically to comply with. Delegate Bordallo worked in good faith to gather and produce responsive materials. On April 11, 2017, she produced more than 500 pages of documents to OCE, which comprise the bulk of OCE’s exhibits to its Report and Findings. The production included a significant amount of material, including information related to the Miss World Guam pageant, leases of the Tamuning Property between the Delegate and the Japanese Consulate, and the Delegate’s official, campaign, and personal calendars documenting travel to her district over the past nine years. Because OCE’s request was overbroad, many of the calendar entries provided details about official meetings, staff illnesses, personal activities, religious observances, and other matters unrelated to the allegations. Given the personal nature of this information, Delegate Bordallo sought assurance from OCE that the calendars would not be made public.⁴⁴

³⁹ RFI ¶¶ 1, 2. Despite the overbreadth of this request even as modified, the Delegate produced these documents to OCE at Bordallo Production to OCE at 17-1147-000001 to 000456.

⁴⁰ RFI ¶ 3.

⁴¹ RFI ¶ 4.

⁴² RFI ¶¶ 10, 13, 14.

⁴³ Email from H. Eisner to B. Svoboda and A. Branch (Feb. 16, 2017).

⁴⁴ Email from B. Svoboda to P. Solis and H. Eisner (April 10, 2017).

OCE provided no such assurance. While OCE redacted portions of the calendars from the exhibits, it included them among the findings.⁴⁵

Hours after Delegate Bordallo produced the documents to OCE, OCE informed her that the production was “incomplete.”⁴⁶ Subsequently, on April 27, 2017, OCE informed Delegate Bordallo that it had determined that she failed to cooperate with the review both because she would not agree to an interview with OCE—her counsel asked for detail about the questions to be asked and OCE refused to provide it—and because she failed to produce a complete set of documents in response to OCE’s Requests for Information.⁴⁷ OCE consistently refused to provide Delegate Bordallo with any factual predicate or source for the allegations, making the Delegate’s further cooperation impossible.

2. OCE’s contacts with the Ysrael family

During this review, OCE repeatedly contacted the Delegate’s elderly sister, her now late brother-in-law, her niece, and her nephew, seeking information about the Outrigger Resort, which they and their family wholly owned. On multiple occasions, the Ysraels explained the ownership structure of the Outrigger, that the Ysraels owned the Outrigger, and that the Delegate has stayed there as a member of their family. Still, OCE’s requests of the Ysraels persisted even after Alfred Ysrael died approximately a month into this review.⁴⁸ At the very end of OCE’s interview with Delegate Bordallo’s niece, she indicated that she had previously told OCE to direct any questions to the family’s attorney, Michael Ysrael, and that she had agreed to interview with OCE only for the sake of cooperating with the review: “Well, I already told you that he said direct all questions to him, so when I told him you called me he said direct all questions to him *and then you didn’t* and so I’m trying to be kind and speak to you about it right now. But basically he is, he acts as our representative and our lawyer.”⁴⁹ The transcript of OCE’s belligerent interview with Delegate Bordallo’s niece—weeks after the death of her father—shows clearly what the Delegate herself might have expected, had she consented to an interview.⁵⁰

⁴⁵ See generally Exhibit 9.

⁴⁶ Letter from O. Ashmawy to B. Svoboda and A. Branch (Apr. 11, 2017).

⁴⁷ *Id.*

⁴⁸ Delegate Bordallo’s brother-in-law, Alfred Ysrael, passed away in Guam on March 10, 2017 at the age of 86. See J. Borja, “Local Business Icon Alfred Ysrael Dies at 86,” Pacific Daily News (Mar. 10, 2017), available at <http://www.guampdn.com/story/news/2017/03/10/local-business-icon-alfred-ysrael-dies-86/98995094/>.

⁴⁹ Niece A Interview (Exhibit 14 at 17-1147_0684). After the Delegate’s niece made this statement, OCE correctly sought and obtained confirmation that she did not regard herself as personally represented by counsel in the review before continuing—and ultimately concluding—the interview.

⁵⁰ See Niece A Interview Transcript (Exhibit 14 at 17-1147_0678) (“Wouldn’t it make more sense to ask her that question instead of, since I’m not the one doing it? You’re making me, you’re telling me to make an assumption -- ... “No I’m not Niece A. Part of an investigatory process is that we ask people the same question, different people the same question.”)

III. ARGUMENT

A. OCE's Referral of the Consulate Allegation Was Plainly Erroneous

1. A non-voting Delegate's longstanding, arm's length rental of her house to a foreign consulate violates no federal law

This review presents a non-voting Delegate who, ten years before coming to Washington, began to rent her house to a foreign consulate—at fair market value, at arm's length, and under circumstances having nothing to do with her federal service. The record shows that her office took no action on behalf of the Consulate and that she consistently disclosed the lease on her personal financial disclosure report. The Framers did not write the Foreign Emoluments Clause to reach such singular facts, and neither has the House nor anyone else interpreted or enforced the Clause to reach them. By failing properly to apply the law to the facts, OCE erred in recommending investigation over the lease of the Tamuning property.

a. The Foreign Emoluments Clause of the U.S. Constitution does not clearly reach a non-voting territorial Delegate

At Article 1, Section 9, Clause 8 of the Constitution, the Foreign Emoluments Clause provides:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.⁵¹

A threshold question—unacknowledged and unanswered by OCE—is whether a nonvoting Delegate holds an “Office of Profit or Trust” under the Foreign Emoluments Clause. The Clause’s text, history and interpretation indicates that she does not. One only holds “an Office of Profit or Trust” and is covered by the Clause when having significant sovereign authority to execute a government function or bind the rights of others.⁵² Because non-voting Delegates lack this authority, even while performing a significant role under House rules, they are not covered by the Foreign Emoluments Clause.

The Constitution makes no express provision for territorial representation.⁵³ When the nation’s first territory sent its first Delegate, James White, to the House, then-Representative James

⁵¹ U.S. Const. art. I, § 9, cl. 8.

⁵² See *Application of the Emoluments Clause to a Member of the President's Council on Bioethics*, 29 Op. O.L.C. 55 (2005) (hereinafter “Council on Bioethics”), <https://www.justice.gov/olc/file/478996/download>.

⁵³ See Christopher M. Davis, Congressional Research Service, *Delegates to the U.S. Congress: History and Current Status* (Aug. 25, 2015).

Madison averred that because Mr. White was not a Member of Congress, he could not be directed to take the oath, except voluntarily.⁵⁴ One of Madison's colleagues described White as "an Envoy to Congress," and another as "an Officer deputed by the people of the Western Territory."⁵⁵ Still, another emphasized White's lack of voting power: "He is not a member. He cannot vote, which is the essential part."⁵⁶

These inherent limitations on a territorial representative's authority—understood by Framers like Madison—are at odds with the sovereign authority inherent in an "Office of Profit or Trust" as that term is used in the Constitution. According to *A Treatise on the Law of Public Offices and Officers*—a late-nineteenth century treatise on which the U.S. Supreme Court, the Office of Legal Counsel of the U.S. Department of Justice ("OLC"), and other authorities have relied for over a century⁵⁷— "the *sine qua non* of a public 'office' is the exercise of some portion of delegated sovereign authority."⁵⁸ Similarly, according to *Hinds' Precedents of the House of Representatives*, 'offices under the United States' "involve[] necessarily the power to [] legislate, or [] execute law, or [] hear and determine judicially questions submitted . . . [and] [t]herefore, mere power to . . . report without power to make binding on the Government[] does not constitute a person an officer."⁵⁹

There are other factors that help to identify such an "Office" for constitutional purposes: a continuing and permanent body; an oath requirement; salaries or fees for work; and formal methods of appointment. Yet it is ultimately a person's delegated sovereign authority that determines whether she holds such an office.⁶⁰ Examples of such sovereign authority include "the public authority to arrest criminals, impose penalties, enter judgments, and seize persons or property"; the power "to issue regulations and authoritative legal opinions on behalf of the government"; and "other domestic matters authorized by law that could bind or otherwise affect the government or third parties for the public benefit."⁶¹

The Justice Department has frequently advised that positions lacking sovereign authority do not constitute an "Office of Profit or Trust" for purposes of the Foreign Emoluments Clause, or an "Office under the United States" under related constitutional provisions:

⁵⁴ *Id.* at 3 (citing *Annals of Congress*, vol. 4, 3rd Cong., 2nd sess., Nov. 18, 1794, at 884-89).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See, e.g., *Bogan v. Scott-Harris*, 523 U.S. 44, 50 n.4 (1998); *Robinson v. Freeze*, 15 F.3d 107, 109 (8th Cir. 1994); Council on Bioethics, 29 Op. O.L.C. at 60; *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 84 (2007), <https://www.justice.gov/olc/file/477046/download>.

⁵⁸ 29 Op. O.L.C. at 67 (citing Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* §§ 1, 4 (1890)).

⁵⁹ *Id.* at 66 (quoting 1 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* 604 (1907)).

⁶⁰ See *id.*

⁶¹ *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 88-90 (2007), <https://www.justice.gov/olc/file/477046/download>.

- In 2007, OLC determined that the Foreign Emoluments Clause did not apply to members of the Federal Bureau of Investigation (“FBI”) Director’s Advisory Board, because they did not hold an “Office of Profit or Trust.” While the members held top secret security clearances and received access to classified information, they did not possess any authority over the government’s handling of that information.⁶²
- In 2005, OLC determined that the Foreign Emoluments Clause did not apply to the President’s Council on Bioethics, again because membership was not an “Office of Profit or Trust” under the Clause.⁶³ OLC was unable to find “a single case in which an individual was deemed to hold an ‘office,’ including one ‘of profit or trust,’ where he [or she] was invested with no delegated sovereign authority, significant or otherwise.”⁶⁴
- In 1989, OLC determined that an advisory commission was not an “Office under the United States” for purposes of Article I, Section 6, Clause 2’s Incompatibility Clause “because members of such commissions do not ‘exercis[e] significant authority pursuant to the laws of the United States.’”⁶⁵
- In 1969, then-Assistant Attorney General William H. Rehnquist determined that a staff assistant to the President likewise did not hold an “Office under the United States” under Article I, Section 5, Clause 2.⁶⁶ The term ‘office,’ Rehnquist opined, referred to “an individual [] invested with some portion of the sovereign functions of the [g]overnment to be exercised by him for the benefit of the public.”⁶⁷

The Office of the Delegate from Guam presents the same lack of sovereign authority. While the office was created by statute, and is paid and staffed from the U.S. Treasury, its powers are entirely at the sufferance of the House of Representatives.⁶⁸ As such, the office enjoys no inherent sovereign authority to execute government functions and bind the rights of others. Under current House rules, Delegates can “speak and introduce bills and resolutions on the floor of the House” and “speak and vote in House committees.”⁶⁹ But Delegates are not Members of

⁶² *Application of the Emoluments Clause to a Member of the FBI Director’s Advisory Board*, 31 Op. O.L.C. 154-55 (2007), <https://www.justice.gov/file/451556/download>.

⁶³ 29 Op. O.L.C. at 55.

⁶⁴ *Id.* at 69.

⁶⁵ *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 249, 249 n.2 (1989), <https://www.justice.gov/file/24286/download>.

⁶⁶ Council on Bioethics, 29 Op. O.L.C. at 64-65 (quoting Memorandum for Lamar Alexander, Staff Assistant to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 2 (1969)).

⁶⁷ *Id.* (emphasis omitted).

⁶⁸ See Pub. L. 92-271, 86 Stat. 119 (1972) (codified at 48 U.S.C. § 1715). See also *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994).

⁶⁹ Christopher M. Davis, Cong. Research Serv., R40555, Delegates to the U.S. Congress: History and Current Status 6 (2015), <https://fas.org/sgp/crs/misc/R40555.pdf>.

Congress and accordingly cannot vote by right, do not count towards a quorum, and cannot make motions to reconsider during floor debates.⁷⁰ The House has ultimate power to determine their “compensation, allowances, and benefits.”⁷¹

Even the House’s ability to grant certain prerogatives to Delegates hinges on the absence of sovereign authority. In *Michel v. Anderson*, the U.S. District Court for the District of Columbia upheld rule changes that allowed Delegates to vote in Committee of the Whole. Because Delegates’ votes could never be decisive—an immediate second ballot was required whenever Delegate votes were decisive to the outcome, in which the Delegates could not then participate—the rule changes avoided improperly giving the Delegates “legislative power—a power which under Article I [] is reserved to *Members* of Congress elected by the people of the several *States*.”⁷² Without the automatic revote provision, the D.C. district court concluded that the rule change “would have improperly diluted the voting power of legislative representatives of the States as well of the citizens who elected them.”⁷³ *Michel* demonstrates clearly the absence of sovereign authority that resides in a nonvoting Delegate.

Nothing would prevent the House from applying the Foreign Emoluments Clause to a non-voting Delegate through House rules. Likewise, nothing would prevent the House from enforcing restrictions on payments from foreign governments that meet or even surpass the most aggressive interpretations of the Clause now propounded. Delegate Bordallo seeks in no way to shirk compliance with the spirit of House rules. That she consistently and publicly disclosed the lease for so long shows the absence of any intent to evade. Delegate Bordallo is prepared to comply with any future rule the House might adopt.

However, current law does not support any violation of the Foreign Emoluments Clause by Delegate Bordallo. Even before one reaches the serious question of whether the Clause applies to the arm’s length rental of a house—under an arrangement preceding federal service, and having nothing to do with official business—her status as a non-voting Delegate provides an independent reason to dismiss the allegation regarding the longstanding lease of her home.

⁷⁰ See, e.g., Christopher M. Davis, Cong. Research Serv., R40170, Parliamentary Rights of the Delegates and Resident Commissioner from Puerto Rico (2017), <https://fas.org/sgp/crs/row/R40170.pdf>.

⁷¹ Pub. L. 92-271, 86 Stat. 119 (1972) (codified at 48 U.S.C. § 1715).

⁷² *Michel v. Anderson*, 823 F. Supp. 126, 147 (D.D.C. 1993), *aff’d*, 14 F.3d 623 (D.C. Cir. 1994) (emphasis in original).

⁷³ *Id.*

b. Even if the Foreign Emoluments Clause covers a non-voting Delegate, this particular lease would not present a violation

Even if the Foreign Emoluments Clause clearly applied to Delegate Bordallo, it still would not prohibit the transaction under review here—an arm’s length lease of a house⁷⁴ to a foreign state under an arrangement that preceded her election, does not involve her personal services, and is entirely unrelated to her federal position.⁷⁵ No House precedent or other legal authority has ever applied the Foreign Emoluments Clause to a transaction on these singular facts. Moreover, this question affects not simply Delegate Bordallo, but millions of retired military personnel and federal employees, who are covered by the Clause, and yet who might foreseeably engage in just this sort of commonplace household transaction.⁷⁶

Every Office of Legal Counsel (“OLC”) or Comptroller General opinion in the modern era indicates that the definition of “emolument” is limited to compensation for services performed personally by the federal officeholder and related to the scope of her duties.⁷⁷ For example, in a 1954 opinion, the OLC addressed whether a U.S. officer who had worked as a judge in Germany but was forced to retire because of his race could receive the following two types of remedial payments from the German government: (1) a monthly annuity that reflected the retirement benefit he would have received had he been permitted to continue to serve, and (2) a fixed payment to compensate him for earnings lost on account of his premature retirement.⁷⁸ The OLC noted that “the term ‘emolument’ . . . was intended to cover compensation of any sort *arising out of an employment relationship* with a foreign state,” and concluded that while the officer could accept the fixed payment which was equivalent to damages received as a result of a wrongful act of a foreign state (and were not tied to employment), he could not receive the monthly retirement

⁷⁴ OCE Report at ¶ 32.

⁷⁵ Former District Director Transcript (Exhibit 5 at 17-1147_0037); Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0069); Current District Director Transcript (Exhibit 8 at 17-1147_0117).

⁷⁶ See, e.g., Chuck Blanchard, “A Primer on Emoluments And Its Possible Application to President Trump,” <http://aguyintheworld.blogspot.com/2017/02/a-primer-on-emoluments-and-its-possible.html> (Feb. 17, 2017).

⁷⁷ See, e.g., 44 Comp. Gen. 130, 130-31 (1964) (“[T]he term ‘emoluments’ is defined . . . as ‘the profit arising from office of employment’ and ‘that which is received as compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites’”); Comptroller General, *To the Secretary of the Air Force*, 49 Comp. Gen. 819 (1970) (“‘Emolument’ is broadly defined as profit, gain, or compensation received for services rendered . . . Reward monies received for the service . . . to [foreign] public authorities would, in our opinion, fall within” the Foreign Emoluments Clause. Memorandum for S.A. Andretta, Administrative Assistant Attorney General, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, *Re: Payment of Compensation to Individual in Receipt of Compensation from a Foreign Government* at 8 (Oct. 4, 1954) (“[T]he term ‘emolument’ . . . was intended to cover compensation of any sort arising out of an employment relationship with a foreign state.”); Comptroller General, see also *Emolument*, Black’s Law Dictionary (10th Ed. 2014) (“Any advantage, profit, or gain received as a result of one’s employment or one’s holding of office”).

⁷⁸ Memorandum of S.A. Andretta, Administrative Assistant Attorney General, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, *Re: Payment of Compensation to Individual in Receipt of Compensation from a Foreign Government* (Oct. 4, 1954).

annuities because they were “part of the emoluments of office.”⁷⁹ Likewise, the OLC and the Comptroller General have concluded that an officer may not receive compensation from a foreign government for employment or services associated with his office.⁸⁰

However, the OLC has concluded that a prohibited “emolument” is *not* provided when the compensation in question is unrelated to the recipient’s office.⁸¹ That was the case when the OLC was asked to interpret the term “emolument” as used in the Domestic Emoluments Clause, which fixes the President’s compensation and prohibits the President from receiving emoluments from the United States and from individual states.⁸² The OLC concluded that President Reagan could accept retirement payments from the State of California because the payments were not “emoluments” — they were not compensation provided to President Reagan for the services he provided while he was Governor of California.⁸³ Instead, President Reagan was entitled to the retirement benefits as a matter of California law, and he was not required to perform any further services to obtain them.⁸⁴

Furthermore, the Supreme Court has specifically defined “emoluments” in accordance with this principal, office-related definition. For example, in *Hoyt v. United States*, the Court defined “emolument” as “embracing every species of compensation or pecuniary profit derived *from a discharge of the duties of the office.*”⁸⁵ Similarly, in *McLean v. United States*, the Court again made clear that an emolument is tied to an office, noting that “emoluments are but expressions of value used to give recompense to a deserving officer.”⁸⁶ Finally, in *United States v. Hill*, the Court followed its precedent of cabining the term “emolument” to an office-related definition

⁷⁹ *Id.* (emphasis added).

⁸⁰ See, e.g., Memorandum for Assistant General Counsel, United States Nuclear Regulatory Commission from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act* (Feb. 24, 1982); Memorandum for John G. Gaine, General Counsel, Commodity Futures Trading Commission, Office of Legal Counsel, Re: Expense Reimbursement in Connection with Chairman Stone’s Trip to Indonesia (Aug. 11, 1980) (reimbursement from a foreign government of a public official’s travel expenses would be considered a present or emolument); Opinion of the Comptroller General, In the Matter of Retired Uniformed Services Members Receiving Compensation from Foreign Governments, 58 Comp. Gen. 487, B-193562, 1979 WL 14960 (prohibition against “emoluments” includes salary and forms of compensation other than salary such as free transportation, household good shipments, and housing allowances”).

⁸¹ See Office of Legal Counsel, *President Reagan’s Ability to Receive Retirement Benefits from the State of California*, 5 U.S. Op. Off. Legal Counsel 187 (1981) (noting that an “emolument” is defined as “profit or gain arising from station, office, or employment: reward, remuneration, salary,” and the prior, more expansive definition of the term had become “obsolete”).

⁸² U.S. Const. art. II § 1, cl. 6.

⁸³ See Office of Legal Counsel, *President Reagan’s Ability to Receive Retirement Benefits from the State of California*, 5 U.S. Op. Off. Legal Counsel 187 (1981).

⁸⁴ *Id.*

⁸⁵ *Hoyt v. United States*, 51 U.S. 109, 135 (1850) (emphasis added).

⁸⁶ *McLean v. United States*, 226 U.S. 374, 382 (1912).

when it concluded that “a sum collected by a clerk for a service not pertaining to his office . . . was not a fee or emolument.”⁸⁷

Under these consistent, longstanding interpretations, Delegate Bordallo can certainly contend that her rental payments from the Japanese Consulate do not involve personal services, are unrelated to her office, and hence are not covered by the Foreign Emoluments Clause. But the singular facts of her situation make her case even stronger. Her lease arrangement long preceded her federal service, and it never would have occurred to her that she would need to terminate it. Moreover, she has approached the lease with complete transparency, disclosing the fact of the lease, the property’s address and the category of rental income received on her personal financial disclosure reports. Finally, the transaction occurred at arm’s length and was evidently unconnected to her federal service. The house’s location and amenities were convenient to the Consul General;⁸⁸ as a matter of course, the Delegate’s office has not worked on legislation or policy issues with the Japanese Consulate;⁸⁹ and even if the Consulate were to seek such assistance, a non-voting Delegate would be curtailed in the exercise of sovereign authority. On these facts, OCE erred in finding substantial reason to believe that Delegate Bordallo violated the Foreign Emoluments Clause.

B. OCE’s Referral of the Outrigger Allegations Was Plainly Erroneous

1. House rules allowed Delegate Bordallo to receive lodging and amenities from her family

House Rule 25, clause 5(a)(3)(C) expressly permits Members of Congress to receive gifts from relatives, including sisters, brothers-in-law, nieces and nephews.⁹⁰ The exception does not apply when a relative of a Member, officer, or employee is “merely passing along a gift from some other person.”⁹¹ Thus, for purposes of the exception for gifts from relatives, it is legally irrelevant whether these relatives provide the gifts directly, or indirectly through a third party they control. The only relevant questions under the House gift rules are: (1) whether the gift is being provided by a relative; and (2) whether the relative is using the gift exception applicable to family members in order to pass along a gift from another person. The record in this review

⁸⁷ *United States v. MacMillan*, 253 U.S. 195, 205 (1920) (summarizing the holding of *United States v. Hill*, 120 U.S. 169 (1887)).

⁸⁸ Former District Director Transcript (Exhibit 5 at 17-1147_0037); Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0055).

⁸⁹ Former District Director (Exhibit 5 at 17-1147_0032); Current District Director (Exhibit 8 at 17-1147_0117).

⁹⁰ House Rule 25, cl. 5(a)(3)(C). *See also* 5 U.S.C. app. 4 § 109(16) (defining “relative” to include, *inter alia*, a sister, brother-in-law, niece and nephew).

⁹¹ House Ethics Manual at 69.

establishes beyond cavil that Delegate Bordallo stayed at the Outrigger Resort at the pleasure of her family, who owns and controls it.⁹²

The Committee does not take a formalistic approach either to permit or prohibit a gift. It consistently looks to the substance of the transaction—not its form—to evaluate it, asking who is really providing the benefit involved. Thus, the rules expressly permit a Member to fly on a relative’s non-commercial plane, even when a nonpublic corporation technically owns the plane.⁹³ The plane is deemed “owned or leased” by the relative when he or she has fractional ownership or equity in the nonpublic corporation that actually owns it, so long as the Member’s use of the plane does not exceed the relative’s proportionate ownership or equity share.⁹⁴ Likewise, while an invitation to a widely attended event must come from the sponsor in order to fall within the gift exception, Members may accept invitations from those who have “a substantial role in organizing the event.”⁹⁵ The Executive Branch takes a similar approach with gifts provided on the basis of personal friendship; it explicitly extends the personal friendship exemption to gifts originally purchased by a corporation but given to the corporation’s employees to use at their discretion.⁹⁶ In each case, the regulator looks to “the real facts” and asks who is *really* providing the gift: the relative who controls the use of the plane; the company who is putting together the widely-attended event; or the corporate employee who is really controlling the end recipient of their gifts.⁹⁷

Even if the Committee were to follow OCE’s lead, depart from this approach, and determine that the “family gift” exception does not apply when a family company serves as the intermediary, Delegate Bordallo’s use of the Outrigger still would have been permitted under the separate exception for outside activities.⁹⁸ This is a “common-sense provision that allows Members and staff to accept things of value that essentially have nothing to do with their position with the

⁹² Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0070); Current District Director Transcript (Exhibit 8 at 17-1147_0124); Office Manager Transcript (Exhibit 11 at 17-1147_0611).

⁹³ House Rule 25, cl. 15.

⁹⁴ *Id.*

⁹⁵ House Ethics Manual at 46.

⁹⁶ See 5 C.F.R. § 2635.204(b) (providing an example of a permissible gift given on the basis of personal friendship where “an employee of the Federal Deposit Insurance Corporation (FDIC) has been dating an accountant employed by a member bank [and] [a]s part of its “Work-Life Balance” program, the bank has given each employee in the accountant’s division two tickets to a professional basketball game and has urged each to invite a family member or friend to share the evening of entertainment. Under the circumstances, the FDIC employee may accept the invitation to attend the game. Even though the tickets were initially purchased by the member bank, they were given without reservation to the accountant to use as she wished, and her invitation to the employee was motivated by their personal friendship.”).

⁹⁷ House Ethics Manual at 231.

⁹⁸ House Rule 25, cl. 5(a)(3)(G)(i); see also House Ethics Manual at 59-60. The rule provides that a member may accept benefits resulting from the member’s outside business or other activities so long as the member (1) is satisfied that the benefit was neither offered nor enhanced because of the member’s official position, and (2) the benefit is customarily provided to others in similar circumstances.

House, but instead are the result of outside business or other activities.”⁹⁹ The House Ethics Manual provides several examples, like one where a staff member’s spouse is a law firm partner that leases a skybox in a professional football stadium and permits each partner to attend games with his or her spouse or other guest.¹⁰⁰ Under those circumstances, the Committee says that the staff member may attend the football game with his or her spouse.¹⁰¹ The same reasoning applies here. Even if it were the Outrigger—not the Ysraels—who provided the lodging and amenities, it would have been because the Delegate is a member of the owners’ family, not because of her official position, and the gift of lodging would have been permitted.¹⁰²

Nonetheless, the record shows that it was the Ysraels themselves—Delegate Bordallo’s family—who were the true source of the lodging and amenities she received.¹⁰³ While OCE intended the elaborate chart on page 17 of the Report and Findings to demonstrate that it was “a limited liability company” that provided gifts to Delegate Bordallo, it unwittingly proved that those same benefits came entirely from her family, who completely owned that same LLC.¹⁰⁴ The testimony confirmed that it was the Ysraels who let her stay at the Outrigger. Asked what her ownership interest was in the Outrigger, the Delegate’s niece said flatly: “We own it.”¹⁰⁵ She confirmed that “my Auntie” stayed in quarters specifically created for family use, was not the only family member who stayed there, and did not need to pay to stay at the Outrigger or use its amenities “cause she’s family.”¹⁰⁶ As the late Alfred Ysrael told his sister-in-law, when political opponents tried to make the same charge that OCE so credulously accepted: “You’re staying with your sister. What’s wrong with that?”¹⁰⁷

⁹⁹ See House Committee on Ethics, “Benefits Resulting from Outside Business and Other Activities,” available at <http://ethics.house.gov/gifts/gift-exceptions-0/benefits-resulting-outside-business-and-other-activities>.

¹⁰⁰ House Ethics Manual at 60. The rule on benefits resulting from other activities applies to House members and House staff alike.

¹⁰¹ *Id.*

¹⁰² In a classic case of “attacking a straw man,” OCE’s Report and Findings assert that the gift rule’s “personal hospitality” exception does not apply to the Delegate’s use of the Outrigger, because that exception does not extend to business-owned premises. See OCE Report and Findings at 14 (citing House Ethics Manual at 62). But Delegate Bordallo has not asserted and need not claim that the “personal hospitality” exception applies. And OCE fails to observe that the text of the “family” and “outside activity” exceptions contain no similar, limiting language. Rather, the Committee conditions the availability of the “family” and “outside activity” exceptions on a simple, practical question—why is the Member *really* receiving the benefit?

¹⁰³ RFI ¶ 5; see also Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0070); Current District Director Transcript (Exhibit 8 at 17-1147_0124); Office Manager Transcript (Exhibit 11 at 17-1147_0611).

¹⁰⁴ OCE Report at ¶¶ 55-56.

¹⁰⁵ Niece A Transcript (Exhibit 14 at 17-1147_0667).

¹⁰⁶ *Id.* at 17-1147_0666, 0668-0669, 0679.

¹⁰⁷ Current District Director Transcript (Exhibit 8 at 17-1147_0133).

2. The referral fails to support the claim that Delegate Bordallo misused official funds to stay at the Outrigger

Apparently eager to demonstrate—with the help of the former chief of staff—that Delegate Bordallo somehow still must have violated House rules while staying at her family’s hotel, OCE fashioned a fourth allegation that was never disclosed to her, which was that some of her meals and lodging at the Outrigger were paid for using the Members Representational Allowance (“MRA”).

The referral presents no substantial basis for this “late hit.”¹⁰⁸ To the contrary, it shows that the Delegate relied on the advice of the former chief of staff when it came to the details of her travel. The office manager told OCE that Delegate Bordallo paid for some of her meals while in Guam using her official travel card because “[s]he was advised by her former chief of staff that when she travels she can use the travel card to pay for her meals.”¹⁰⁹ The former chief of staff said himself only that the Delegate told him to “figure out” how to pay for her lodging and to “take care of” the matter.¹¹⁰ And the Delegate’s former district director testified that the former chief of staff was charged with ensuring that the affairs of the office complied with ethics rules, and any time staff members had a question about the rules, they would consult with him.¹¹¹ The referral presents no evidence that the Delegate countenanced any violation of the restrictions on the use of the MRA. Testifying to OCE under penalty of false statement, not even the former chief of staff went so far as to make this claim. Rather, the record shows that the Delegate relied appropriately on him to handle these matters properly.

This last-minute allegation regarding the Outrigger is simply another example of how OCE repeatedly deprived Delegate Bordallo of the most basic right of confronting the charges against her. Members and Delegates are entitled to respond to allegations that OCE has properly reviewed and disclosed at preliminary review.¹¹² OCE may only authorize a second-phase review if it finds probable cause to believe that the alleged violation occurred, and it may only refer the matter to the Ethics Committee if there is substantial reason to believe *that same allegation*.¹¹³ While OCE claims the authority to address other violations it discovers in a review, the Resolution gives it none. In the past, the Committee has chosen to overlook this repeated breach of fundamental fairness by OCE. But OCE’s Star Chamber treatment of Delegate Bordallo throughout the entire review counsels toward reconsideration.

¹⁰⁸ See OCE Report at ¶ 110.

¹⁰⁹ Office Manager Transcript (Exhibit 11 at 17-1147_0636).

¹¹⁰ Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0086).

¹¹¹ Former District Director Transcript (Exhibit 5 at 17-1147_0041-0042).

¹¹² H. Res. 895, 110th Cong. § 1(c)(1)(A); Office of Cong. Ethics R. 7(A).

¹¹³ H. Res. 895, 110th Cong. § 1(c)(1)(C); Office of Cong. Ethics R. 8(A), 9(A).

C. While OCE Correctly Recommended Dismissal of the Allegation Regarding the Delegate’s Use of Her Staff, It Never Warranted Review To Begin With

OCE correctly voted to dismiss the allegation that Delegate Bordallo “used” her staff to perform work on the Miss World Guam pageant and the Tamuning property. Just as with the other two allegations, OCE should not have initiated a review into this allegation in the first place. OCE’s investigation only confirmed what was clear from the very beginning: Delegate Bordallo’s staff engaged in outside activities regarding the Tamuning property and the Miss World Guam pageant on their own time and volition without using official resources.¹¹⁴

OCE’s treatment of the Delegate’s Constituent Services Representative, Kaye Lee Custodio, is a telling example of investigatory excess. One must wonder whether, at the beginning of the review, OCE knew that Ms. Custodio was a former contestant in the Miss World Guam beauty pageant, and that her mother-in-law had been a former pageant director—just as OCE appeared not to know that the Ysrael family wholly owned the Outrigger.¹¹⁵ Still, when Ms. Custodio declined to meet fully OCE’s sweeping investigatory requests, OCE labeled her a non-cooperating witness, referenced her by name in its findings, and recommended that she be subpoenaed, even while finding that the alleged violation in which she was supposedly involved failed to meet the threshold for investigation and should be dismissed.

D. OCE Withheld Exculpatory Information From Delegate Bordallo in Violation of Its Rules

It appeared evident from the very beginning of this review that OCE received claims about Delegate Bordallo from a third party that prompted it to begin an effective audit of her public life. The disconnected nature of the allegations, the specificity of OCE’s sweeping information requests, and the paucity of media reports about these same matters all pointed in this direction. So, too, did the apparent omission of relevant exculpatory facts from each allegation: the origin of the consulate lease, the family ownership of the Outrigger, and the independent connection between Ms. Custodio and the pageant.

Delegate Bordallo was entitled to information related to the credibility of adverse witnesses. OCE Rule 4(F) required the disclosure of any information that OCE has received that may impeach the source of the allegations against Delegate Bordallo. Justifying its asserted refusal to provide exculpatory evidence to another Member in another review, the OCE Board “adopted the standard set out in *Brady v. Maryland*, 373 U. S. 83 (1963) and subsequent cases ...”¹¹⁶ That

¹¹⁴ See Former District Director Transcript (Exhibit 5 at 17-1147_0036); Current District Director Transcript (Exhibit 8 at 17-1147_0115-0117, 0121-0122); Office Manager Transcript (Exhibit 11 at 17-1147_0651, 0654).

¹¹⁵ OCE Report ¶ 163.

¹¹⁶ Response to Criticism by Committee on Standards of Official Conduct Regarding the Investigation Conducted by the Office of Congressional Ethics in the Matter of Representative Sam Graves (Nov. 20, 2009), available at

standard unambiguously covers information relevant to the credibility of an adverse witness.¹¹⁷ Through counsel, Delegate Bordallo expressly requested this information. Unable to know the source or scope of the charges against her, not understanding why OCE was pursuing these matters given the exculpatory facts she knew, and seeing her staff members and bereaved family harassed by OCE, Delegate Bordallo was entitled to this information so she could defend herself.

Yet, until the Committee sent Delegate Bordallo the Report and Findings in this review, she was not able to see that claims were made against her by her former chief of staff, who resigned from her office because of criminal charges that had been brought against him.¹¹⁸ She did not know that OCE obtained evidence of bias: that the former chief of staff felt he had been treated unfairly by the Delegate because of his resignation.¹¹⁹

Nor was Delegate Bordallo able to know that other witnesses interviewed by OCE—in some cases, *every* other witness—had contradicted her former chief of staff’s testimony. For example, regarding the Outrigger allegation, the former chief of staff testified that Diana and Alfred Ysrael did not know that Delegate Bordallo was staying in the family quarters at the Outrigger for free.¹²⁰ Yet every other witness who was asked to corroborate the former chief of staff’s testimony told OCE that the Delegate stayed at the Outrigger because it was owned by her family, and Delegate Bordallo’s own niece told OCE that her mother always knew that the Delegate was staying at the Outrigger and using its amenities free of charge “because she’s family.”¹²¹ In fact, the record reflects that the apparent source of this allegation believed (and informed other members of Delegate Bordallo’s staff) that Delegate Bordallo was permitted to stay at the Outrigger because it was owned by her family.¹²²

<http://clients.dotgov.com/oce2/wp-content/uploads/2015/11/OCE-Board-Response-to-Criticism-Regarding-the-Investigation-of-Rep-Sam-Graves.pdf>.

¹¹⁷ See *Giglio v. United States*, 405 U.S. 150 (1972); see also *Banks v. Dretke*, 540 U.S. 668 (2004).

¹¹⁸ See Cameron Miculka, *John Whitt resigns as Guam Del. Madeleine Bordallo's chief of staff*, Pacific Daily News, Sep. 18, 2015, <http://www.guampdn.com/story/news/2015/09/17/john-whitt-resigns-guam-del-madeleine-bordallos-chief-staff/72361474/>.

¹¹⁹ See Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0094) (“I took an action with House of Employment, forget, it was under the Congressional Accountability Act. I took an action based on the fact of sexual discrimination that I’m a gay man and my incident involved another person, another male. The District Director, who I had referred to earlier had a sexual harassment incident that involved women. And when that was investigated and reviewed, the advice was to terminate him, but the Congresswoman wouldn’t terminate him. So, based on two different outcomes for pretty much, you know, similar issues and of course his was on duty with staffers; mine was off duty with nobody related to our office.”); (Exhibit 6 at 17-1147_0095) (“I do feel that I was not treated fairly...I still feel that, you know, I could have been treated better because I was vindicated. And I feel that understanding my relationship with Ricky Bordallo [Delegate Bordallo’s late husband] and what happened to Ricky and my testifying at the trial of Ricky; I felt that all of that should have weighed in to how they treat me.”).

¹²⁰ Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0083).

¹²¹ Niece A Transcript (Exhibit 14 at 17-1147_0679).

¹²² See Former District Director Transcript (Exhibit 5 at 17-1147_0040).

Finally, while the former chief of staff claimed that several staff members had raised concerns with him about the time they were spending working on the pageant, the transcript revealed that he had significant difficulty recalling any specific instance in which staff members raised such concerns.¹²³ OCE repeatedly asked the former chief of staff to provide specific examples of concerns that the staff raised, and he never did so, only providing vague examples after conferring with his counsel.

OCE's failure to disclose exculpatory information was the capstone of a process that left Delegate Bordallo transpierced by investigation through factual and legal error. Served with document requests seeking her communications with her sister over nine years, seeing her family harassed even after her brother-in-law had died, and carrying the practical and visceral burdens of investigation, she was entitled at least to fidelity to the rules—if not the opportunity to confront her accuser. Delegate Bordallo can only hope that the Committee on Ethics—faithful to its own rules, and carefully applying the law to the uncontroverted facts—can appropriately resolve and dismiss this matter.

IV. CONCLUSION

We respectfully request that the Committee on Ethics dismiss the referral against Delegate Bordallo and close Review No. 17-1147.

Very truly yours,



Brian G. Svoboda
Aria C. Branch
Counsel to Delegate Bordallo

¹²³ See Former Chief of Staff Transcript (Exhibit 6 at 17-1147_0060-0062).

Declaration

I, Delegate Madeleine Z. Bordallo, declare under penalty of perjury that the response and factual assertions contained in the attached letter dated July 3, 2017 relating to my response to the June 12, 2017 Committee on Ethics letter, are true and correct.

Signature: Madeleine Z. Bordallo
Name: Delegate Madeleine Z. Bordallo
Date: 6/30/17