

No.

In The
Supreme Court of the United States

DAVID G. BOWSER,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

**PETITIONER'S APPENDIX TO PETITION FOR
WRIT OF CERTIORARI**

Leslie McAdoo Gordon
McAdoo Gordon & Associates, P.C.
1140 19th Street, NW
Washington, DC 20036
(202) 293-0534
Email: leslie.mcadoo@mcadoolaw.com
Counsel for Petitioner, David G. Bowser

January 4, 2021

APPENDIX TABLE OF CONTENTS

Opinion in the United States Court of Appeals for the District of Columbia Circuit.....	Pet.App. 1
Order on Rehearing En Banc in the United States Court of Appeals for the District of Columbia Circuit	Pet.App. 22
Opinion in the United States District Court for the District of Columbia	Pet.App. 24
Provisions Involved.....	Pet.App. 68
18 U.S. Code § 1001	Pet.App. 68
Federal Rule of Criminal Procedure 29	Pet.App. 70
Federal Rule of Criminal Procedure 48	Pet.App. 73
Day 8 - Morning Session Transcript of Jury Trial Proceedings Before the Honorable Emmet G. Sullivan, United States District Court Judge, and a Jury	Pet.App. 74

Day 11 - Afternoon Session Transcript of Jury Trial Proceedings Before the Honorable Emmet G. Sullivan, United States District Court Judge, and a Jury	Pet.App. 77
OCE Request for Information	Pet.App. 83

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

(Argued: March 9, 2020 Decided: June 30, 2020)

Docket No. 18-3055, 18-3062, 19-3037

DAVID G. BOWSER,)
)
Appellant,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)

Before:
HENDERSON, GRIFFITH, and WILKINS, *Circuit
Judges.*

Opinion for the Court filed by Circuit Judge
GRIFFITH.

A jury convicted David G. Bowser of charges that he
obstructed an investigation by the Office of

Congressional Ethics into his work as chief of staff to a Member of Congress. In this appeal, we affirm the jury's verdict and the post-trial rulings of the district court from all challenges by Bowser and the Government.

I

A

The evidence at trial established the following. Bowser began working as the chief of staff for Paul Broun, a Member of the House of Representatives from Georgia, in January 2009. Representative Broun first joined Congress after winning a special election in 2007, and he was easily re-elected in 2008 and 2010.

In January 2012, Bowser was confident that Representative Broun would again retain his seat after the primary and general elections later that year. But even winning politicians have flaws, and Representative Broun's was—according to Bowser—that he struggled with "messaging." Trial Tr. 32:16 (Mar. 15, 2018), J.A. 573. So in February 2012, just as Representative Broun's office was gearing up for another election, Bowser sought to hire a "messaging consultant" to help the Congressman "develop as a better communicator." J.A. 672. Brett O'Donnell was a seasoned consultant with experience preparing President George W. Bush and Senator John McCain for presidential debates. On June 14, Bowser announced to the Congressman's office that

O'Donnell would join "Team Broun as a communications and messaging consultant to our official office." J.A. 807.

Despite Bowser's explanation that the new hire would help only with official duties, O'Donnell soon found himself working on the Congressman's re-election campaign. In fact, on the same day that Bowser hired O'Donnell, he asked him to assist with the Congressman's debate preparation. Just a week later, O'Donnell prepared Representative Broun for yet another debate. This shift in duties surprised O'Donnell. He testified at trial that he felt like Bowser pulled a "bait and switch" by retaining him "to do work for the official side" and then asking him to perform campaign functions. Trial Tr. 52:13-20 (Mar. 1, 2018), J.A. 294.

O'Donnell's campaign duties soon decreased. In July 2012, the Congressman won the Republican primary, and he faced no serious opposition in the general election. But in early 2013, an incumbent Senator from Georgia announced his retirement, and Representative Broun decided to seek the vacant seat. O'Donnell once again found himself saddled with campaign duties. He helped prepare the Congressman for eight Republican primary debates and several campaign-related speeches and interviews. O'Donnell testified at trial that, in early 2013, he "was doing 60 percent official work, 40 percent campaign work"; by the end of 2013, he performed "easily 80 percent campaign work, 20

percent official work." Trial Tr. 101:19-22 (Mar. 5, 2018), J.A. 320.

Nothing prevented O'Donnell from assisting the campaign as a volunteer or campaign employee, but House Rules forbade the Congressman's office from paying O'Donnell out of the "Members' Representational Allowance" (MRA). The MRA provides funds "to support the conduct of the official and representational duties of a Member of the House of Representatives," *2 U.S.C. § 5341(a)*; *see also* Ida A. Brudnick, Cong. Research Serv., R40962, Members' Representational Allowance: History and Usage (2019), and the funds may not pay for campaign expenses. Between June 2012 and March 2014, O'Donnell was paid over \$ 40,000 from the Congressman's MRA funds. With one minor exception not relevant here, O'Donnell was paid only with MRA funds.

This possible misuse of congressional funds soon attracted media scrutiny. In March 2014, a reporter asked Representative Broun whether O'Donnell had been paid with taxpayer money to provide debate coaching. The Congressman allegedly slammed the door in the reporter's face, and a local news outlet published a story with the descriptive title, "Congressman Slams Door on Channel 2 Reporter When Asked About Campaign Coach." Because of this press report, O'Donnell was fired. He testified that Bowser informed him that "things [had] just gotten too hot with this story, that it would do damage to the campaign." Trial Tr. 55:24-25, 56:1

(Mar. 5, 2018), J.A. 333-34. O'Donnell also testified that, during the same conversation, Bowser told him for the first time that he had been only a "*volunteer* with the campaign." *Id.* at 56:16-24, J.A. 334 (emphasis added). On March 25, Bowser emailed the staff in the office to announce that Representative Broun "reluctantly accepted [O'Donnell's] resignation." J.A. 823.

This media attention also spurred an inquiry from the Office of Congressional Ethics (OCE or the "Office"). The OCE is "an independent office" within the House that reports to the House Committee on Ethics and investigates possible misconduct by Members of Congress or their employees. H.R. Res. 895, 110th Cong. § 1(a) (2008); *see* Jacob R. Straus, Cong. Research Serv., R40760, House Office of Congressional Ethics: History, Authority, and Procedures (2019). The Speaker of the House and the House Minority Leader each appoint three private citizens to serve on the Board, *see* H.R. Res. 895, 110th Cong. § 1(b) (2008), and the OCE hires additional staff to conduct its day-to-day business, *see id.* § 1(h). The Office may receive allegations of possible misconduct "from any source," including news reports and submissions from the public. Trial Tr. 60:9-19 (Mar. 8, 2018), J.A. 458. And when two Board members authorize a "preliminary review," the Office's staff must review the allegations and make a recommendation to the Board. If the Board concludes that misconduct occurred, it may "recommend[]" that the investigated matter "requires

further review" by the Ethics Committee itself. H.R. Res. 895, 110th Cong. § 1(c)(2)(B) (2008).

On April 1, 2014, OCE began such a preliminary review, informing Representative Broun that if he "misused funds from his [MRA]" to pay O'Donnell then "he may have violated House rules and federal law." J.A. 679. Bowser promptly emailed O'Donnell to reiterate his view that any assistance on the campaign was *voluntary*; he had been *paid* for only official work. "We hired you," Bowser wrote, "in an official capacity to help the Congressman improve his speaking abilities." J.A. 824. "Any debate advice you wanted to give him on your own time, outside the official compound, has no bearing on the fact that we hired you to work in an official capacity" *Id.*

In June, the Office issued a series of "Requests for Information" (RFIs) to the Congressman's staff, asking for "[a]ll files, records, notes, communications, and any other documents relating to Brett O'Donnell." J.A. 683. Bowser's interference continued. For instance, one staffer testified that he believed that Bowser instructed him to falsely certify that he "didn't have any information relevant" to the review. Trial Tr. 67:10 (Mar. 12, 2018), J.A. 501. Another testified that—on Bowser's instructions—she withheld campaign-related emails that she had exchanged with O'Donnell, Trial Tr. 83-85 (Mar. 7, 2018), J.A. 401-03, including some from her official account that "looked bad for the office," *id.* at 86:4, J.A. 404.

Bowser also received his own RFI, and although Bowser turned over emails from his official email account, he never disclosed any emails that he exchanged with O'Donnell on his personal account. Bowser also misled investigators about his reasons for hiring O'Donnell. During his OCE interview, for instance, he claimed that "at no point did we ever entertain the idea that this would be a political adventure. This was purely on the official side." J.A. 701.

The Office's review ended on June 25, 2014, and the Board recommended that the Ethics Committee investigate misconduct in Representative Broun's office. But the committee took no disciplinary action against the Congressman. Representative Broun lost the Senate primary and left office in January 2015, placing him beyond the committee's jurisdiction.

B

Though the Office's review never culminated in disciplinary action against the former Congressman, it spawned this criminal prosecution against his chief of staff. On April 6, 2016, a grand jury charged Bowser with obstruction of Congress (Count One), *see 18 U.S.C. § 1505*; theft of government funds (Count Two), *see id. § 641*; concealment of material facts from the OCE (Count Three), *see id. § 1001(a)(1)*; and five counts of making false statements to the OCE (Counts Four through Eight), *see id. § 1001(a)(2)*.

The case proceeded to trial. After the Government presented its case-in-chief, Bowser filed a motion for judgments of acquittal on Counts One through Seven. The district court reserved ruling on this motion, proceeded with the trial, then submitted the case to the jury. *See Fed. R. Crim. P. 29(b)*. The jury convicted Bowser of obstructing Congress, concealing material facts from OCE, and making three false statements. The jury acquitted Bowser of two of the false-statement charges. The jury also indicated that it was "hopelessly deadlocked" on the theft charge, and the district court declared a mistrial on that count. J.A. 105.

The district court then considered Bowser's motion for judgments of acquittal. At the Government's request, the district court dismissed the theft charge with prejudice. Next, the district court granted Bowser's motion for acquittal on the obstruction-of-Congress charge, reasoning that § 1505 does not "protect the OCE's investigatory power." J.A. 103. Finally, the district court denied the motion for judgments of acquittal on the concealment conviction and his false-statement convictions.

This appeal followed. The Government challenges the district court's decision to grant a judgment of acquittal on the obstruction-of-Congress charge. Bowser challenges his concealment conviction, two of the false-statement convictions, and the district court's decision to dismiss the theft charge with prejudice instead of granting a judgment of acquittal. Last, Bowser claims that, because he should have

been acquitted on some of these counts, "spillover prejudice" requires us to vacate his convictions on the false-statement charges. We reject both parties' arguments and affirm.

II

We begin with the Government's appeal of the district court's order granting a judgment of acquittal on Bowser's obstruction-of-Congress charge. *See 18 U.S.C. § 1505*. That statute criminalizes the obstruction of "any inquiry or investigation [that] is being had by either House, or any committee of either House or any joint committee of the Congress." *Id.* The Government concedes that the Office is neither a "House," nor a "committee," nor a "joint committee." Gov't Br. 49, 53 n.16. Instead, the Government emphasizes that the statute extends to any investigations "*being had by*" the House, which covers the Office's investigations because "the House itself initiated [them] through creating the OCE in the first place." *Id.* at 48.

We disagree. *Section 1505*'s specific reference to "either House," "any committee," and "any joint committee" implies that Congress meant to exclude other bodies within the Legislative Branch. *See Taylor v. FAA, 895 F.3d 56, 65, 437 U.S. App. D.C. 56 (D.C. Cir. 2018)* ("[T]he expression of one thing implies the exclusion of others."). Indeed, the statute's failure to include other congressional "offices" is especially strong evidence of meaning here because other statutes do. For instance, the False

Statements Act applies to "any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission *or office of the Congress.*" 18 U.S.C. § 1001(c)(2) (emphasis added); *see also* 18 U.S.C. § 202(e)(3) (defining the "legislative branch" to include both "the Congress" and "any other . . . office . . . established in the legislative branch" (emphasis added)). Congress knows how to refer to legislative offices when it chooses, and we must give effect to the statute's tailored language.

Attempting to side-step this textual argument, the Government urges that the Office's reviews are investigations "being had by" the House or the Ethics Committee *itself* because the Office functions as their "agent." Gov't Br. 51-53 (citing *United States v. Senffner*, 280 F.3d 755, 760 (7th Cir. 2002) ("[W]henver an entity acting for or at the direct request of an agency has been obstructed, the agency itself has also been obstructed.")). The argument fails. First, the Government's agency theory creates surplusage; if § 1505 were interpreted to criminalize obstruction of Congress's "agents," then the statute's inclusion of "committees" and "joint committees" would do little or no work. Moreover, the House Rules themselves establish that the Office's review process is not yet an investigation by the House or the Ethics Committee. The Office possesses only the limited power to recommend that the allegations "require[] further review" by the Ethics Committee, H.R. Res. 895, 110th Cong. § 1(c)(2)(B) (2008), and the committee may "undertake an investigation"

"upon receipt of a report" from the OCE. Rules of the House of Representatives, 116th Cong., Rule XI.3(b)(2) (2019) (emphasis added). If the Ethics Committee "undertake[s] an investigation" only after it receives the Office's report, then the process of creating that report cannot be an investigation "being had by" the House or its committee.

We need not decide whether or in precisely what circumstances a legislative office might work so closely with the House or a committee that the investigation is "being had by" an institution listed within § 1505. *See Senffner*, 280 F.3d at 760. We hold only that—in these circumstances—the House has structured its internal procedures such that the Office's reviews precede any investigation by the House or the Ethics Committee. If Congress wishes to extend liability to those who obstruct the work of the Office, it may do so, and it has model language for such an amendment in the *False Statements Act*. *See 18 U.S.C. § 1001(c)(2)*. We thus affirm the judgment of acquittal on the obstruction-of-Congress charge.

III

We next consider Bowser's challenges to his convictions.

A

First, Bowser argues that the district court should have granted his motion for a judgment of acquittal on the concealment charge. *See 18 U.S.C. §*

1001(a)(1), (c)(2). Of relevance here, that statute makes it unlawful to "conceal[] . . . a material fact" during "any investigation or review" by an "office of the Congress." *Id.* To secure a conviction, the Government must establish a "duty to disclose material facts on the basis of specific requirements for disclosure of specific information." *United States v. Safavian*, 528 F.3d 957, 964, 381 U.S. App. D.C. 339 (D.C. Cir. 2008). Bowser asserts that he had no such duty to disclose because "OCE's review was an entirely voluntary process," and "there [was] no statute, regulation, or form that imposed on [him] a specific requirement to disclose particular information." Bowser Br. 47.

We disagree. Bowser does not dispute that he failed to produce emails from his personal account between himself and O'Donnell. He also conceded at oral argument that a government "form" can impose a duty to disclose. Oral Arg. Tr. 32:24-25; *see also Safavian*, 528 F.3d at 965 n. 7, *United States v. Calhoon*, 97 F.3d 518, 526 (11th Cir. 1996). Here, the form that Bowser received—the Request for Information—identified the "specific information" that the Office sought, all communications with O'Donnell. That form also advised Bowser that he would need to "certify" that he "provided all [responsive documents]," and that this certification would be "subject to the provisions of the Federal False Statements Act, 18 U.S.C. § 1001." J.A. 835. Later, he signed two documents certifying that he had fully complied with the RFI and acknowledging that 18 U.S.C. § 1001 applied to his disclosure of

information. J.A. 837, 839. Altogether, Bowser affirmed that he fully complied with a request for specific information that was issued during a duly authorized ethics inquiry. These facts establish a duty to disclose.

Bowser's efforts to compare his case to *Safavian* fail. In that case, the defendant—David Safavian—was an employee of the General Services Administration (GSA). *Safavian*, 528 F.3d at 959. One of Safavian's friends conducted some business before GSA, and that friend invited Safavian to travel to Scotland on a chartered plane for a five-day golfing trip. *Id.* Safavian sought "an ethics opinion from GSA's general counsel about whether he could accept the air transportation as a gift," but he never disclosed that the friend conducted business before the GSA. *Id.* at 960, 962. Later, GSA's Inspector General opened an investigation into the trip; Safavian agreed to be interviewed, but he again failed to disclose that his friend conducted business before GSA. *Id.* at 961. A jury convicted Safavian of two counts of concealment—one for withholding information when he requested the ethics opinion, the other for his incomplete answers to the Inspector General. *Id.* at 962-63.

We reversed, reasoning that § 1001(a)(1) requires the Government to establish "a duty to disclose material facts on the basis of *specific* requirements for disclosure of *specific* information." *Id.* at 964 (emphasis added). In *Safavian*, the Government asserted two insufficient bases for this duty. First, it

pointed to what we characterized as "vague standards of conduct for government employees," such as an instruction to refrain from "us[ing] public office for private gain." *Id. at 964* (internal quotation marks omitted). Second, the Government argued that "once one begins speaking when seeking government action or in response to questioning, one must disclose all relevant facts." *Id. at 965*. But neither of these sources triggered a duty to disclose because neither gave "fair notice of what conduct [was] forbidden." *Id. at 964* (internal quotation marks omitted).

Unlike the defendant in *Safavian*, Bowser did have "fair notice" that he could be criminally prosecuted. The RFI identified the specific information sought and informed him of possible criminal liability under § 1001 if he withheld it. Bowser seems to think that a voluntary process like an ethics inquiry can never create a duty to disclose, but that stretches *Safavian* too far. *Section 1001* extends to "any investigation or review" by an "office of the Congress," 18 U.S.C. § 1001(c)(2) (emphasis added), and that language easily encompasses the OCE's voluntary ethics investigations—so long as the investigator gives "fair notice." Because the form distributed to and signed by Bowser satisfies this requirement, we affirm the concealment conviction.

B

Bowser next argues that the district court should have granted judgments of acquittal on two of the

false-statement charges, Counts Four and Seven. *See 18 U.S.C. § 1001(a)(1)*. Count Four charged Bowser with making a false statement when he told the OCE investigators, "At no point did we ever entertain the idea that this [O'Donnell's services] would be a political adventure. *This was purely on the official side.*" Indictment ¶ 86, J.A. 67 (emphasis added). And likewise in Count Seven: "I mean, bottom line is this was done because [Representative Broun] significantly needed help in his communicating ability and that's the only reason why it was done and, you know, *we had no intention at all of doing anything on the political side with this.*" *Id.* ¶ 92, J.A. 70 (emphasis added). Bowser raises three challenges to these convictions, but none is persuasive.

1

Bowser claims that his false-statement convictions are nonjusticiable under *United States v. Rostenkowski*, 59 F.3d 1291, 313 U.S. App. D.C. 303 (D.C. Cir. 1995). There, we noted that the Constitution's Rulemaking Clause authorizes each House of Congress to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, and we reasoned that "judicial interpretation of an ambiguous House Rule runs the risk of the court intruding into the sphere of influence reserved to the legislative branch under the Constitution." *Rostenkowski*, 59 F.3d at 1306. Under *Rostenkowski*, then, a charge may be nonjusticiable if it compels the jury to interpret an "ambiguous" House Rule.

Bowser says that his false-statement convictions must be dismissed under *Rostenkowski*. He notes that the House Rules authorize Congressmen to use MRA funds for "primarily official duties that are not campaign related." J.A. 199-201. Bowser suggests that the false-statement charges invited the jury to interpret the House Rules by determining Bowser's "primary purpose" in hiring O'Donnell. Bowser Br. 50-51.

Bowser's *Rostenkowski* argument fails. As discussed, the Government alleged that Bowser falsely stated that he expected O'Donnell to perform *only* official work—not campaign work. *E.g.*, Indictment ¶ 86, J.A. 67 ("This was purely on the official side."). That allegation does not implicate the House Rules at all. The Rules concern whether O'Donnell could be *compensated* with congressional funds; the allegations supporting the false-statement charges concern only *what kind of work* Bowser anticipated that O'Donnell would perform. Accordingly, the jury could convict Bowser of making these false statements without interpreting the House Rules, and so the charges were justiciable.

2

Bowser argues that the jury lacked sufficient evidence to conclude that his statements to the OCE investigators were false. We owe "tremendous deference" to the jury's verdict, *United States v. Long*, 905 F.2d 1572, 1576, 284 U.S. App. D.C. 405

(*D.C. Cir. 1990*), and Bowser's conviction must be upheld if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Wahl*, 290 F.3d 370, 375, 351 U.S. App. D.C. 284 (*D.C. Cir. 2002*) (internal quotation marks omitted).

The standard of review presents an insurmountable hurdle for Bowser. As the district court noted, a "voluminous record" supports the jury's verdict that Bowser always intended for O'Donnell to perform campaign work. J.A. 122. For instance, Bowser conducted O'Donnell's interview in the offices of the National Republican Campaign Committee, a venue where Republican Congressmen perform campaign activities that would be impermissible in congressional office buildings. Perhaps most tellingly, just *two hours* after Bowser officially hired O'Donnell, Bowser asked O'Donnell to assist with debate preparation. And O'Donnell testified that—just a month after he had been hired—he felt like Bowser had pulled a "bait and switch" by "retaining [him] to do work for the official side" and then asking him to perform campaign functions. Trial Tr. 52:13-20 (Mar. 1, 2018), J.A. 294.

Bowser offers an alternative interpretation. He suggests that Representative Broun "had no need for campaign assistance" when Bowser first hired O'Donnell because the Congressman faced only "token opposition" in the 2012 election. Bowser Br. 55-56. But the jury is entitled to "draw a vast range of reasonable inferences," *Long*, 905 F.2d at 1576,

and a rational factfinder could infer that Bowser always expected to enlist O'Donnell on the campaign, regardless of its competitiveness. We decline to overturn the jury's verdict.

3

Finally, Bowser challenges the jury instructions. The district court instructed the jury that the statement must have been "false, fictitious, or fraudulent"—an instruction that precisely tracks the statute's language. J.A. 627; *18 U.S.C. § 1001(a)(2)*. Bowser claims that the jury should've been instructed that Bowser's statements "were false under any reasonable interpretation of them." Bowser Br. 58. Bowser relies exclusively on the out-of-circuit decision in *United States v. Migliaccio*, *34 F.3d 1517 (10th Cir. 1994)*, but he fails to explain—and we fail to see—that decision's relevance here. We thus decline to adopt Bowser's proposed jury instruction.

C

After the jury deadlocked on the theft charge, the district court dismissed the charge with prejudice. *See FED. R. CRIM. P. 48(a)*. Unsatisfied with that result, Bowser argues that he "should have been *acquitted* at the close of the Government's case." Bowser Br. 34 (emphasis added). Bowser again relies on *Rostenkowski*, arguing that the theft charge "asked the jury to invade the legislative province" by "interpret[ing] internal rules adopted by the House to govern its own Members." *Id.* at 38-39.

The Government responds that this claim is moot, *see* Gov't Br. 23-25, and we must first address this threshold jurisdictional issue. Bowser's claim becomes moot only if "it is impossible for a court to grant any effectual relief whatever." *Chafin v. Chafin*, 568 U.S. 165, 172, 133 S. Ct. 1017, 185 L. Ed. 2d 1 (2013) (internal quotation marks omitted); *see also Almagrami v. Pompeo*, 933 F.3d 774, 779 (D.C. Cir. 2019).

Bowser contends that the case remains live "because he has a right to clear his good name." Bowser Reply 8. The "dismissal did not exonerate him," Bowser says, so he is entitled to seek the judgment of acquittal, which would amount to a ruling that he "was in fact innocent." *Id.* We disagree. Bowser's *Rostenkowski* argument entitles him—at most—to a dismissal of the allegations against him because they lie beyond a federal court's authority to adjudicate. A favorable ruling under *Rostenkowski* would not announce his innocence; instead, it would announce that trying the theft charge risks judicial intrusion "into the sphere of influence reserved to the legislative branch." *Rostenkowski*, 59 F.3d at 1306. Because Bowser's argument under *Rostenkowski* would not entitle him to the declaration of innocence that he seeks, we cannot redress this alleged reputational harm.

Bowser next claims that "he was prejudiced with respect to the other charges by [the theft charge's] existence." Bowser Reply 9. When addressing

mootness, we must assume the success of his argument on the merits. *Almagrami*, 933 F.3d at 779. And if Bowser were correct, we could redress *that* harm by vacating for another trial on the *other* charges. See *United States v. Rooney*, 37 F.3d 847, 855 (2d Cir. 1994). This potential remedy keeps Bowser's claim alive—but barely. We do not think that Bowser really did suffer prejudice from the district court's refusal to acquit him before submitting the theft charge to the jury. Again, the Government presented overwhelming evidence that Bowser withheld information from and lied to the Office—the factual bases for his remaining convictions. We thus cannot see the theft charge's "substantial and injurious effect or influence in determining the jury's verdict." *United States v. Baugham*, 449 F.3d 167, 174, 371 U.S. App. D.C. 213 (D.C. Cir. 2006) (internal quotation marks omitted). Because any error was harmless, we need not address the merits of Bowser's *Rostenkowski* argument.

D

Finally, Bowser claims that we must reverse three of his false-statement convictions because of a "prejudicial spillover of evidence" from allowing the jury to consider the theft, obstruction, and concealment charges. Bowser Br. 59 (citing *Rooney*, 37 F.3d at 855); cf. *United States v. Mathis*, 216 F.3d 18, 25, 342 U.S. App. D.C. 127 (D.C. Cir. 2000) (discussing the possibility of prejudicial error "when multiple defendants are charged with a large and

complex conspiracy and spillover prejudice confuses the jurors"). He faults the district court because the jury "should have been instructed to disregard the evidence" relating to these counts. Bowser Br. 61. But as we've explained, overwhelming evidence supports the jury's verdict on the false-statement charges. *Rooney*, 37 *F.3d* at 855-56 (considering the "strength of the government's case on the counts in question" when assessing spillover prejudice). Thus, any failure to instruct the jury to ignore evidence presented for other counts was harmless, and we decline to vacate Bowser's convictions. *See Baugham*, 449 *F.3d* at 174.

IV

We affirm the judgment of the district court.

So ordered.

Pet.App. 22

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

(Argued: March 9, 2020 Decided: June 30, 2020
Petition for Rehearing Denied: August 6, 2020)

Docket No. 18-3055, 18-3062, 19-3037

DAVID G. BOWSER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Before:

HENDERSON, GRIFFITH, and WILKINS, *Circuit*
Judges.

ORDER

Pet.App. 23

Upon consideration of appellant/cross-appellee's
petition for panel rehearing filed on July 14, 2020, it
is

ORDERED that the petition be denied.

Per Curiam

Pet.App. 24

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

(Decided: July 17, 2018)

Docket No. 16-59 (EGS)

UNITED STATES OF AMERICA,

v.

DAVID G. BOWSER,

Defendant.

Opinion by:

Emmet G. Sullivan, United States District Judge.

MEMORANDUM OPINION

This case stems from the government's allegations that David Bowser, who was then Chief of Staff for former Representative Paul Broun in the United States House of Representatives, unlawfully used congressional funds to pay a consultant for campaign

services. Following a four-week trial, the jury returned guilty verdicts on five counts. Pending before the Court are the following motions: (1) Mr. Bowser's motion for a judgment of acquittal following the close of the government's evidence; (2) Mr. Bowser's motion for a judgment of acquittal at the close of all evidence; Mr. Bowser's motion for a judgment of acquittal notwithstanding the verdict; and (4) the government's motion to dismiss Count Two of the Indictment. Based on the evidence in the record, the applicable law, and the parties' arguments, and for the reasons explained below, the Court **GRANTS IN PART AND DENIES IN PART** Mr. Bowser's motions and **GRANTS** the government's motion.

I. BACKGROUND

On April 6, 2016, David Bowser was charged with one count of obstruction of proceedings in violation of *18 U.S.C. §§ 1505* (Count One); one count of theft of government property in violation of *18 U.S.C. § 641* (Count Two); one count of concealment of material facts in violation of *18 U.S.C. §§ 1001(a)(1)* and *(c)(2)* (Count Three); and five counts of making false statements in violation of *18 U.S.C. §§ 1001(a)(2)* and *(c)(2)* (Counts Four through Eight). *See generally* Indict., ECF No. 1.¹ These charges were based on allegations that Mr. Bowser, who was the Chief of Staff to Representative Paul Broun from 2008 until

¹ For the eight counts charged in the indictment, the government also alleges that Mr. Bowser is liable as an aider or abettor under [*18 U.S.C. § 2*](#).

2015, used his position to misappropriate federal funds to pay a campaign consultant, Brett O'Donnell, and then obstructed the Office of Congressional Ethics' investigation of that misappropriation.

Jury selection commenced on February 23, 2018. The government completed its case-in-chief on March 13, 2018. Pursuant to *Federal Rule of Criminal Procedure* 29, Mr. Bowser orally moved for a judgment of acquittal as to Counts One through Seven at the close of the government's case. Mr. Bowser subsequently filed a written motion, *see* ECF No. 72, which was fully briefed by March 18, 2018, *see* ECF Nos. 82 and 85. The Court reserved judgment on the motion, and Mr. Bowser presented his defense. The defense completed its case-in-chief on March 19, 2018. The government did not present rebuttal evidence. Mr. Bowser orally renewed his motion for a judgment of acquittal and filed a second written motion. *See* ECF No. 86. The Court reserved judgment on that motion until after the jury's verdict.

On March 23, 2018, the jury returned guilty verdicts on Counts One, Three, Four, Seven, and Eight. *See* Jury Verdict, ECF No. 100. The jury acquitted Mr. Bowser on Counts Five and Six, and it was unable to reach a unanimous verdict on Count Two. *Id.*; *see also* Jury Note, ECF No. 94. The Court received the jury's verdict as to the unanimous counts and instructed the jury to continue deliberations as to Count Two. After continued deliberations, the jury informed the Court that it was unable to reach a verdict with respect to Count Two. *See* Jury Note, ECF No. 96. The Court again instructed the jury to continue deliberating. *See*

3/23/18 Trial Tr., ECF No. 116 at 8-12 (providing anti-deadlock instruction pursuant to *United States v. Thomas*, 449 F.2d 1171, 146 U.S. App. D.C. 95 (D.C. Cir. 1971)). After further deliberations, the jury informed the Court that it was still "hopelessly deadlocked" as to Count Two. *See* Jury Note, ECF No. 98. At that point, the government stated that "it would be appropriate to declare a mistrial." *Id.* at 12. The Court agreed and, over Mr. Bowser's objection, determined that it was "manifestly necessary" to declare a mistrial as to Count Two. *Id.* at 12-13; *see also* Minute Order of March 25, 2018 (explaining that it was necessary to declare a mistrial given the "jury's continued inability to reach a verdict" and the "significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors").

On April 13, 2018, Mr. Bowser filed a motion for a judgment of acquittal notwithstanding the verdict as to Counts One, Two, Three, Four, and Seven. *See* ECF No. 117. On that same day, the government filed a notice of its intention not to seek retrial on Count Two and asked that Count Two be dismissed without prejudice pursuant to *Federal Rule of Civil Procedure 48(a)*. *See* ECF Nos. 118 and 119. Mr. Bowser requested the Court to reserve its ruling on the government's request to dismiss Count Two until after it had ruled on his motions for acquittal. *See* ECF No. 120. The Court subsequently ordered the government to show cause why Count Two should not be dismissed with prejudice in view of the government's decision not to seek retrial on that count. *See* Minute Order of June 15, 2018 (citing *United States v. Karake*, No. 2-

256, 2007 U.S. Dist. LEXIS 98981, 2007 WL 8045732, at *3 (D.D.C. Feb. 7, 2007)). On June 20, 2018, in response to the Court's order to show cause, the government stated that it had no objection to dismissing Count Two with prejudice. *See* ECF No. 124. Mr. Bowser nonetheless maintains that a judgment of acquittal is appropriate. *See* ECF No. 125.

In his motions, Mr. Bowser argues that Counts One, Two, Three, Four and Seven fail for the following reasons:

- Count One, obstruction of proceedings, fails because the Office of Congressional Ethics does not fall within the scope of *18 U.S.C. § 1505*, which only applies to the "House" or a "committee" of the House.
- Count Two, theft of government funds, is nonjusticiable pursuant to *United States v. Rostenkowski*, 59 F.3d 1291, 313 U.S. App. D.C. 303 (D.C. Cir. 1995).
- Count Three, concealment of a material fact, fails because there was no legal duty for Mr. Bowser to disclose any information to the Office of Congressional Ethics, as cooperation with that office's investigations is voluntary.
- Counts Four and Seven, making a false statement, fail because they are non-justiciable like Count Two and for the additional reason that the evidence was insufficient to establish that Mr. Bowser had the requisite *mens rea*.

II. LEGAL STANDARD

A. Motion for a Judgment of Acquittal at the Close of Evidence

Federal Rule of Criminal Procedure 29(a) provides that, "[a]fter the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." In considering a *Rule 29* motion, "the trial court must view the evidence in the light most favorable to the Government giving full play to the right of the jury to determine credibility, weigh evidence and draw justifiable inferences of fact." *United States v. Treadwell*, 760 F.2d 327, 333, 245 U.S. App. D.C. 257 (D.C. Cir. 1985) (quoting *United States v. Davis*, 562 F.2d 681, 683, 183 U.S. App. D.C. 162 (D.C. Cir. 1977)). In other words, "the Court must decide whether a reasonable jury could conclude that the government met its burden of proving each element of the offense beyond a reasonable doubt." *United States v. Quinn*, 403 F. Supp. 2d 57, 60 (D.D.C. 2005). "The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was

reserved." *Fed. R. Crim. P. 29(b)*.

B. Motion for a Judgement of Acquittal After the Verdict

Under *Rule 29(c)*, a defendant may renew a motion for a judgment of acquittal within fourteen days after a guilty verdict. Because a court owes "tremendous deference to a jury verdict," *United States v. Long*, 905 F.2d 1572, 1576, 284 U.S. App. D.C. 405 (D.C. Cir. 1990), the court "must view the evidence in the light most favorable to the verdict, and must presume that the jury has properly carried out its functions of evaluating the credibility of witnesses, finding the facts, and drawing justifiable inferences," *United States v. Campbell*, 702 F.2d 262, 264, 226 U.S. App. D.C. 283 (D.C. Cir. 1983). A conviction in a criminal trial should be upheld if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Wahl*, 290 F.3d 370, 375, 351 U.S. App. D.C. 284 (D.C. Cir. 2002) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The standard for "clear[ing] the bar for [a] sufficiency of evidence challenge" is "very high," and the evidence to support a conviction does "not need to be overwhelming." *United States v. Pasha*, 797 F.3d 1122, 1135 n.9, 418 U.S. App. D.C. 258 (D.C. Cir. 2015). "Thus a judgment of acquittal is appropriate only when there is **no** evidence upon which a reasonable juror might fairly conclude guilt beyond a reasonable doubt." *United States v. Weisz*, 718 F.2d 413, 438, 231 U.S. App. D.C. 1 (D.C. Cir. 1983) (emphasis added).

III. ANALYSIS

A. Count One: Obstruction of Proceedings

Count One charges Mr. Bowser with obstruction of proceedings in violation of *18 U.S.C. § 1505*, which prohibits an individual from corruptly obstructing or endeavoring to obstruct "the due and proper exercise of the power of inquiry . . . by either House, or any committee of either House or any joint committee of the Congress." Indict., ECF No. 1 PP 64-80. Specifically, the government charged Mr. Bowser with obstructing an official investigation that was conducted by the Office of Congressional Ethics ("OCE") regarding the use of federal funds by Congressman Broun's office to pay for consultant Brett O'Donnell's services to Congressman Broun's House reelection and Senate campaigns. *Id.* P 65. For Mr. Bowser to have been found guilty of violating *section 1505*, the government was required to prove the following elements beyond a reasonable doubt:

- (1) that, from in or about March 2014 through in or about June 2014, there was an inquiry or investigation being had by the U.S. House of Representatives or any committee of the House;
- (2) that Mr. Bowser knew that the inquiry or investigation was being had by the U.S. House of Representatives or any committee of the House; and
- (3) that Mr. Bowser did corruptly endeavor to influence, obstruct or impede the due and proper

exercise of the power of inquiry under which the investigation or inquiry was being had by the U.S. House of Representatives or any committee of the House.

See Jury Instructions, ECF No. 87 at 11; *see also* 18 *U.S.C. § 1505* (explaining that an individual may be found guilty of violating the section if he "corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress"). Mr. Bowser argues that he could not have obstructed a proceeding within the meaning of *section 1505* because the OCE is not the "House" or "any committee" the House. Def.'s Mot. for J. of Acquittal ("Def.'s MJOA"), ECF No. 72 at 1.

The issue here is one of pure statutory interpretation: does the phrase "House, or any committee of either House or any joint committee of the Congress" as used in *section 1505* include the OCE? The first step "in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *United States v. Wilson*, 290 *F.3d* 347, 352, 351 *U.S. App. D.C.* 261 (*D.C. Cir.* 2002) (quoting *Robinson v. Shell Oil Co.*, 519 *U.S.* 337, 340, 117 *S. Ct.* 843, 136 *L. Ed. 2d* 808 (1997)). In determining whether a statutory term is plain or ambiguous, the court examines "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* In so doing, "the court

must avoid an interpretation that undermines congressional purpose considered as a whole when alternative interpretations consistent with the legislative purpose are available." *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352, 349 U.S. App. D.C. 399 (D.C. Cir. 2002).

If, after considering "everything from which aid can be derived," a court "can make no more than a guess as to what Congress intended," then a court should apply the rule of lenity. *United States v. Muscarello*, 524 U.S. 125, 138-39, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998); see also *United States v. Moore*, 613 F.2d 1029, 198 U.S. App. D.C. 296 (D.C. Cir. 1979) (explaining that criminal statutes "are to be strictly construed" and "uncertainty regarding their ambit is to be resolved in favor of lenity"). The rule of lenity counsels in favor of reading ambiguous criminal statutes "to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990); see also *United States v. Poindexter*, 951 F.2d 369, 378, 292 U.S. App. D.C. 389 (D.C. Cir. 1991) ("a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct it prohibits, and do so in a manner that does not invite arbitrary and discriminatory enforcement by which policemen, prosecutors, and juries . . . pursue their personal predilections"). Notably, "[t]he simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." *Muscarello*,

524 U.S. at 138. Rather, to invoke the rule of lenity, the court "must conclude that there is a grievous ambiguity or uncertainty in the statute." *Id. at 138-39* (citation and internal quotation marks omitted).

Whether an OCE investigation falls within the scope of *18 U.S.C. § 1505* appears to be a matter of first impression. The Court finds that a plain-text reading of the statute compels the conclusion that the OCE does not fall within the scope of the statute. *Section 1505* prohibits an individual from corruptly obstructing or endeavoring to obstruct "the due and proper exercise of the power of inquiry . . . ***by either House, or any committee of either House or any joint committee of the Congress.***" The government relies on House Resolution 895 to argue that the OCE is "in the House" and therefore subject to *section 1505*. Gov't Opp'n to Def.'s Mot. for J. of Acquittal ("Gov't MJOA Opp'n"), ECF No. 82 at 6. The relevant provision of House Resolution 895 reads as follows:

For the purpose of assisting the House in carrying out its responsibilities under *article I, section 5, clause 2 of the Constitution* (commonly referred to as the "Discipline Clause"), there is established ***in the House*** an independent office to be known as the Office of Congressional Ethics.

H. Res. 895 § 1(a) (emphasis added). The report published by the Special Task Force on Ethics Enforcement in the House of Representatives — which was created in January 2007 by House Speaker Nancy Pelosi and then Minority Leader John Boehner to determine whether the House should create an

"outside" ethics enforcement entity — uses similar language in describing the OCE, noting that the OCE was designed to be "an independent office *of the House* of Representatives." *See* Rep. of the Democratic Members of the Special Task Force on Ethics Enforcement ("Task Force Rep."), 110th Cong., 1st sess., H. Prt. 110-1 at 6 (emphasis added); *see also id.* (recommending that the OCE be "established as an independent office *within the House* of Representatives") (emphasis added). Indeed, the Task Force considered and expressly rejected the idea of creating the OCE as an "outside" entity that would be "separate from the House." *Id.* at 7. Instead, the Task Force concluded that establishing the OCE as "an office within the Legislative Branch," much like independent offices such as "the Office of the Inspector General or the Office of the Chief Administrative Officer," made the most sense from both a constitutional and practical perspective. *Id.*

The government also argues that the evidence at trial established that the OCE is "part of the House in all meaningful ways." Gov't MJOA Opp'n, ECF No. 82 at 7. For example, at trial, the government introduced the testimony of Bryson Morgan, a lawyer who served as investigative counsel for the OCE between September 2013 and July 2015. *See* 3/8/18 p.m. Trial Tr., ECF No. 110 at 47-49. Mr. Morgan testified that the OCE is designed to assist the House in carrying out its constitutional obligation to punish its own members, *id.* at 50; the OCE's governing board is composed of individuals appointed by the Speaker of the House and the House Minority Leader, *id.*; the OCE board reports to the House Committee on Ethics,

id. at 53, 55, 65-68; the OCE staff are House employees, *id.* at 56-57; the OCE's investigative authority "is quite broad" and includes investigations into alleged violations "by a member of the House, employee of the House, officer of the House in the conduct of their official duties, *id.* at 57; and the OCE's authority to promulgate its own rules comes from the House, 3/13/18 a.m. Trial Tr. at 93.²

The government's arguments on this point are not persuasive. Although the government is correct that the OCE was created to operate *within* the House, it is not the "House" itself. Article 1, section 2 of the Constitution makes clear that the House "shall be composed of Members chosen every second Year by the People of the several States." The OCE is indisputably not composed of "members elected by the people," and therefore it cannot be "the House" as defined by the Constitution. To the contrary, a member of Congress is expressly ineligible to be on the board of the OCE. *See* H. Res. 895 § 1(b)(4)(B)(i)(V). Moreover, a member of the OCE board is not "considered to be an officer or employee of the House." *Id.* § 1(b)(7).

Nor is the OCE a "committee of either House or any joint committee of the Congress" within the meaning of *section 1505*. Rule X of the Rules of the House of Representatives establishes a number of standing committees and sets forth their jurisdiction. *See* Rules

²To the extent transcripts of the proceedings are not on the docket, the Court relies on copies of rough transcripts it has received.

of the House of Representatives, available at <http://clerk.house.gov/legislative/house-rules.pdf> (last visited July 5, 2018). Although the House Committee on Ethics is established through those Rules as having jurisdiction over matters covered by the Code of Official Conduct, *see* Rule X § 1(g), the OCE is not established as a separate committee. Indeed, the OCE was designed to "advise" the Committee on Ethics regarding purported ethical violations, but it was never intended to supplant the work of that committee. Task Force Rep. at 10 (further explaining that the OCE would "enhance and supplement the House ethics process"). Moreover, at trial, Mr. Morgan squarely testified that the OCE is not a "committee" or a "joint committee":

Q: [T]he OCE is not a committee of the House?

A. That is correct.

Q. Okay. And it is not a joint committee of the Congress?

A. Correct.

3/12/18 p.m. Trial Tr., ECF No. 111 at 126. Thus, there is no evidence in the record to support the conclusion that the OCE is a committee or a joint committee of Congress.

The government strains to analogize the OCE to a congressional subcommittee that has been established by a House committee to conduct a specific investigation. Gov't MJOA Opp'n, ECF No. 82 at 8 n.6. The government posits that the OCE serves "as an extension of the House Ethics Committee" by conducting "preliminary investigations" of matters that are then referred to the Ethics Committee. *Id.*

To be sure, if the OCE were, in fact, a subcommittee, it would likely fall into the scope of *section 1505*. The Fifth Circuit's decision in *United States v. Rainey*, 757 F.3d 234 (5th Cir. 2014), is instructive on this point. In that case, the defendant moved to dismiss a *section 1505* charge arguing, *inter alia*, that the section did not apply to investigations being conducted by subcommittees. *Id.* at 238. In support of his contention that the term "committee" in *section 1505* excludes "subcommittees," the defendant argued that the court should look to the "technical" reading of the statute because it operates in the "congressional context." *Id.* at 241-42. Because the term "committee" in the congressional context meant "a group of legislators, formally created by and reporting to the House on particular matters, in accordance with the Rules of the House," the defendant argued that a subcommittee could not fall within that definition because it only "reports to the committee of which it is a part and not the entire House." *Id.* at 242.

The district court granted the defendant's motion to dismiss the *section 1505* count. *United States v. Rainey*, 946 F. Supp. 2d 518, 537-42 (E.D. La. 2013). According to the district court, the "crux of the issue" presented by the defendant's motion was "whether the word 'committee' in *section 1505* should be read in its generic sense or should be understood in its more technical sense, as the term is used in the United States Congress." *Id.* at 541. As the district court explained, the "generic connotation" of the word committee would encompass subcommittees, but committees and subcommittees "have distinct meanings" if defined in the "narrow congressional

sense." *Id. at 541-42.* Given these competing interpretations, the district court found that *section 1505* was "ambiguous" and therefore invoked the rule of lenity to dismiss the count. *Id. at 542.*

On appeal, the Fifth Circuit reversed, holding that under the plain meaning of *section 1505*, a congressional subcommittee is "any committee of either House." 757 F.3d 234, 236. In so doing, the Fifth Circuit rejected the defendant's narrow reading of *section 1505*, explaining that nothing in the statute "reflect[ed] congressional intention to import a technical meaning to the phrase 'any committee.'" *Id. at 242.* For example, the Court noted that "[s]ection 1505 does not prohibit obstructing any committee that 'reports to either House,' . . . but instead protects 'any committee of either House.'" *Id.* Moreover, although the defendant relied on internal House rules to support his proposed definition of "committee," the defendant nowhere explained "why the phrase 'of either House' crossreferences Congress' internal regulations into *section 1505*." *Id.* Rather, according to the Fifth Circuit, the plain text of *section 1505* suggested that Congress intended a broader definition:

If Congress intended "committee" as a term of art, which under [the defendant]'s proposed interpretation excludes other committee types, "a committee of either House" would perfectly define the class intended. The modifier "any," by contrast, suggests inclusion rather than exclusion.

Id.

The D.C. Circuit's decision in *Barenblatt v. United States*, 240 F.2d 875, 100 U.S. App. D.C. 13 (D.C. Cir. 1957), vacated, 354 U.S. 930, 77 S. Ct. 1394, 1 L. Ed. 2d 1533, lends some support to the Fifth Circuit's broad reading of the phrase "committee." *Barenblatt* involved a prosecution under the congressional contempt statute, 2 U.S.C. § 192, which uses nearly identical language in criminalizing a witness's refusal to answer questions pertinent to "any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress." *Id.* at 877, n.1. The defendant in that case argued that "Congress did not intend to make it a crime to refuse to answer questions of a subcommittee." *Id.* at 878. The D.C. Circuit disagreed:

Nothing has been shown which reflects that Congress has indicated such belief. We can only construe the statute in the light of the obvious purpose for its enactment. That purpose was to discourage the impairment of the vital investigative function of Congress. The function Congress sought to protect is as often committed to subcommittees as it is to full committees of Congress, as indeed it must be. Construing the statute in a manner consistent with its obvious purpose, we hold that Congress intended the word 'committee' in its generic sense, which would include subcommittees.

Id. Here, too, the government stresses that its broad interpretation of *section 1505* to include the OCE is supported by the statute's purpose, which is to "deter[] and punish[] obstructions of all congressional

inquiries," and that "the statute is construed broadly by the courts so as to properly encompass the types of obstruction envisioned by Congress." Gov't MJOA Opp, ECF No. 82. at 5-6 (citing, *inter alia*, *United States v. Cisneros*, 26 F. Supp. 2d 24, 38-39 (D.D.C. 1998)).

The Court concludes that the interpretation advanced by Mr. Bowser hews closer to the statutory text. Unlike the subcommittees at issue in *Rainey* and *Barenblatt*, the OCE is not composed of members of Congress; in fact, members of Congress are expressly precluded from serving on the OCE's board. Moreover, the OCE's investigations are not directly undertaken on behalf of the Committee on Ethics, and indeed, the connection between the OCE and the Ethics Committee is more tenuous than that between a subcommittee and a committee. For example, as Mr. Morgan explained:

So one of the things that distinguishes the OCE from the House Ethics Committee is that the OCE can receive allegations from any source, and that was — it was intended, when the OCE was created, that there would be more avenues for allegations to be reviewed. And so it could come from a complaint. Someone could come to the OCE with evidence that misconduct occurred. It could be — it could be news reports of misconduct that come forward. It could be any source. It could be something that the board or staff discover upon reviewing information on their own.

3/8/18 p.m. Trial Tr., ECF No. 110 at 60. Thus, the OCE is permitted to undertake investigations not requested or authorized by the House Committee on Ethics.

Even assuming that the House Ethics Committee had authority to delegate its functions to the OCE and intended to do so — the scenario presented in both *Rainey* and *Barenblatt* — some showing that the Ethics Committee did, in fact, authorize the investigation into the particular subject matter is critical for a criminal sanction to attach. As the Supreme Court has cautioned, "[t]he jurisdiction of the courts cannot be invoked to impose criminal sanctions in aid of a roving commission." *Gojack v. United States*, 384 U.S. 702, 715, 86 S. Ct. 1689, 16 L. Ed. 2d 870 (1966). Instead, it is "necessary to link the inquiry conducted by the subcommittee to the grant of authority dispensed to its parent committee." *Id.* As the *Gojack* court noted, this requirement stems from the fact that it is "the investigatory power of the House that is vindicated" by the congressional contempt statute. *Id.* at 716.

Here, *section 1505* aims to protect investigations undertaken by "by either House, or any committee of either House or any joint committee of the Congress" from obstruction. There is no evidence, however, that the OCE's investigation was undertaken at the behest of the House, the House Committee on Ethics, or any other congressional committee of the House or joint committee of the Congress. This conclusion is further buttressed by the fact that the Committee on Ethics did not take any final action in response to the OCE's investigation of Congressman Broun. On July 25, 2014, the OCE board issued its report recommending that the Committee on Ethics "further review" the allegations because there was a "substantial reason" to believe that House rules and federal laws were

violated. *See* OCE Report, Review No. 14-2533, available at <https://ethics.house.gov/sites/ethics.house.gov/files/Rep.%20Broun%20OCE%20Report%20%26%20Findings.pdf> (last visited July 5, 2018). Although the Committee on Ethics released the OCE's report and noted that the Committee was continuing to review the allegations, it did not take any action before January 3, 2015. At that point Representative Broun was no longer a member of the House and therefore was not subject to the Committee's jurisdiction. *See* Press Release, Committee on Ethics, Statement of the Chairman and Ranking Member of the Committee on Ethics Regarding Representative Paul Broun (Oct. 29, 2014), <https://ethics.house.gov/press-release/statement-chairman-and-ranking-member-committee-ethics-regarding-representative-paul-0> (last accessed July 5, 2018). As such, there is no evidence to suggest that Mr. Bowser's obstructive actions somehow directly impeded the Committee on Ethics' investigation into a matter within its jurisdiction. *Cf. United States v. Aguilar*, 515 U.S. 593, 600-02, 115 S. Ct. 2357, 132 L. Ed. 2d 520 (1995) ("We do not believe that uttering false statements to an investigating agent . . . who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503.").

In short, because the OCE is not the "House, or any committee of either House or any joint committee of the Congress," the Court finds that *section 1505* should not be read to protect the OCE's investigatory power. Alternatively, the Court concludes that it cannot say with certainty that Congress intended to

criminalize obstruction of proceedings being conducted by the OCE. Accordingly, the Court will apply the rule of lenity in favor of Mr. Bowser and grant his motion for a judgement of acquittal on Count One. *See United States v. Granderson*, 511 U.S. 39, 54, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994) (where the "text, structure, and history fail to establish that the Government's [reading of a statute] is unambiguously correct . . . we apply the rule of lenity and resolve the ambiguity in [defendant's] favor").

B. Count Two: Theft of Government Funds

Count Two charges Mr. Bowser with theft of government funds in violation of *18 U.S.C. § 641*. Indict., ECF No. 1 PP 81-82. For Mr. Bowser to have been found guilty of violating *section 641*, the government was required to prove the following elements beyond a reasonable doubt:

- (1) the money described in the Indictment belonged to the United States;
- (2) Mr. Bowser stole or knowingly converted the money to someone else's use;
- (3) Mr. Bowser knowingly and willfully intended to deprive the United States of the use or benefit of the money; and
- (4) the money had a value greater than \$1,000.

See Jury Instructions, ECF No. 87 at 12; *see also 18 U.S.C. § 641* (explaining that an individual may be found guilty of violating the section if he embezzles, steals, purloins, or knowingly converts to his use or

the use of another . . . any record, voucher, money, or thing of value of the United States").

The jury could not reach a unanimous verdict on Count Two, and the Court declared a mistrial at the government's request after the jury indicated that it was "hopelessly deadlocked." *See* Minute Order of March 25, 2018. The government subsequently notified the Court that it does not intend to seek retrial on Count Two and consents to dismissal of that count with prejudice. *See* Gov't Notice, ECF 118; Gov't Resp., ECF No. 124. Mr. Bowser nonetheless requested that the Court reserve ruling on the government's motion to dismiss Count Two "until after it has ruled on the Defendant's motions for Judgment of Acquittal." *See* Def.'s Resp. to Gov't Mot., ECF No. 120 at 1. Mr. Bowser makes this request because he believes that the government's evidence was "insufficient to sustain a conviction" and therefore, an "acquittal is warranted." *Id.*

Federal Rule of Criminal Procedure 48(a) provides that "[t]he government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent." Mr. Bowser argues that "the trial in this case is still pending until the Court rules on his timely Motions for Judgment of Acquittal," and therefore the Court may not dismiss Count Two without his consent. Def.'s Reply to Gov't Resp., ECF No. 125. *Rule 48*, however, only requires the government to obtain the defendant's consent "during trial," and Mr. Bowser has not cited any authority requiring the government to seek the

defendant's consent after trial. *See United States v. Williams*, 720 F.3d 674, 703 (8th Cir. 2013) (holding that the government only needed leave of the court and not the defendant's consent to obtain dismissal after trial). The "principal object of the 'leave of court' requirement is apparently to protect a defendant against prosecutorial harassment, e. g., charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection." *Rinaldi v. United States*, 434 U.S. 22, 29 n.15, 98 S. Ct. 81, 54 L. Ed. 2d 207 (1977). Here, given that the government consents to dismissal *with* prejudice, any concern regarding prosecutorial harassment is not present. Accordingly, the Court grants the government's motion and dismisses Count Two with prejudice.

C. Count Three: Concealment of Material Facts

Count Three charges Mr. Bowser with falsifying, concealing, or covering up a material fact in a matter within the jurisdiction of the legislative branch of the United States government in violation of *18 U.S.C. § 1001(a)(1)* and *(c)(2)*. Indict., ECF No. 1 ¶¶ 83-84. For Mr. Bowser to have been found guilty of concealing a material fact, the government was required to prove the following elements beyond a reasonable doubt:

- (1) Mr. Bowser falsified, concealed, or covered up a fact for which there was a legal duty to disclose imposed by statute, regulation, or government form;
- (2) the fact was material;
- (3) Mr. Bowser falsified, concealed, or covered up the fact by using a trick, scheme or device;

- (4) Mr. Bowser acted knowingly and willfully; and
- (5) Mr. Bowser falsified, concealed, or covered up the material fact in a matter within the jurisdiction of the legislative branch of the government of the United States.

See Jury Instructions, ECF No. 87 at 13. The government charged Mr. Bowser with concealing information in four ways: (1) lying to the OCE, (2) withholding documents from OCE investigators, (3) attempting to influence the testimony of other witnesses before the OCE, and (4) attempting to prevent other witnesses from providing their documents to OCE investigators. Indict., ECF No. 1 ¶¶ 84(a)-(d).

Relying on *United States v. Safavian*, 528 F.3d 957, 381 U.S. App. D.C. 339 (D.C. Cir. 2008), Mr. Bowser argues that he cannot be guilty of Count Three because he had no specific duty to disclose any information to the OCE. *See* Def.'s MJOA, ECF No. 72 at 8-11. He points out that compliance with the OCE's investigative demands is entirely voluntary, and that there was no requirement that Mr. Bowser or other members of Congressman Broun's staff submit to OCE interviews or provide documents to the OCE in the first instance. *Id.* at 9. Mr. Bowser further argues that his decision to participate in the OCE's investigation did not impose upon him any new duty to disclose because *section 1001* does not demand "that individuals choose between saying everything and saying nothing." *Id.* at 10 (citing *Safavian*, 528 F.3d at 965).

A *section 1001* violation predicated on concealment, as opposed to a false representation, requires the government to prove that the defendant had a legal duty to disclose the concealed information. *See United States v. Safavian*, 528 F.3d 957, 964, 381 U.S. App. D.C. 339 (D.C. Cir. 2008) ("Concealment cases in this circuit and others have found a duty to disclose material facts on the basis of specific requirements for disclosure of specific information."); *United States v. Calhoon*, 97 F.3d 518, 526 (11th Cir. 1996) ("Falsity through concealment exists where disclosure of the concealed information is required by a statute, government regulation, or form.").

In *Safavian*, a jury found the defendant guilty of concealing relevant information from (1) an ethics officer in the course of seeking an ethics opinion and (2) the General Services Administration in the course of that agency's investigation. 528 F.3d at 963. Specifically, the defendant had requested advice from the ethics officer but purportedly failed to provide all the information that would have been relevant to the officer in rendering his opinion. *Id.* at 964. Likewise, the defendant purportedly failed to provide complete information to the agency's investigator with whom he voluntarily met. *Id.* On appeal, the D.C. Circuit reversed the defendant's convictions on these concealment counts, holding that the government had failed to identify a duty to disclose. With respect to the defendant's failure to provide complete information to the ethics officer, the D.C. Circuit noted that it was not clear "how th[e] voluntary system" of seeking ethical advice — which the defendant was ultimately free to follow or disregard — "impose[d] a duty on those

seeking ethical advise to disclose . . . 'all relevant information' upon pain of prosecution for violating § 1001(a)(1)." *Id.* Instead, any duty to disclose must arise from "specific requirements for disclosure of specific information" so that the a defendant has "fair notice . . . of what conduct is forbidden." *Id.* The Circuit also rejected the government's argument that "once one begins speaking when seeking government action or in response to questioning, one must disclose all relevant facts." *Id. at 965.* Noting that there was no "regulation or form or statute" that contained such a requirement, the court found that nothing in *section 1001* "demands that individuals choose between saying everything and saying nothing." *Id.*

This case is inapposite. The government argued in *Safavian* that the defendant's duty to disclose information was imposed upon him not by statute, regulation, or government form, but by "standards of conduct for government employees," which provided fourteen "general principles" of behavior. *Id. at 964.* The D.C. Circuit concluded that these standards were "vague" and that the "ethical principles" embodied in them did not impose a clear duty on an executive employee to disclose information. *Id. at 964-65.* Here, Mr. Bowser's duty to disclose information to the OCE is not the result of vague "general principles." Rather, Mr. Bowser's legal duties were far clearer. On June 3, 2014, Mr. Bowser received a letter from the OCE requesting all documents relating to Brett O'Donnell. *See Gov't Trial Ex. 503.* The letter stated as follows: "If you are not providing a requested document or piece of information, then please identify the document or information withheld and the reason why

it is being withheld." *Id.* Even more, the certification form accompanying the letter read as follows:

I certify that I have not knowingly and willfully withheld, redacted or otherwise altered any information requested in the Office of Congressional Ethics' ("OCE") Request for Information, dated 6/9/14, or if I have withheld, redacted or otherwise altered any requested information, then I have identified the information and why it was withheld, redacted, or otherwise altered. ***This certification is given subject to 18 U.S.C. § 1001 (commonly known as the False Statements Act)*** and OCE Rule 4(A)(2).

Gov't Trial Ex. 507 (emphasis added). Mr. Bowser signed and dated this certification form and submitted it to the OCE along with his document production. 3/12/18 a.m. Trial Tr. 8:4-12:6. Likewise, prior to his interview with OCE investigators on June 24, 2014, Mr. Bowser received and executed an *18 U.S.C. § 1001* Acknowledgment Form. The form stated: "I have been provided with a copy of the text of *section 1001 of title 18, United States Code* (popularly known as the False Statements Act) and hereby acknowledge that it applies to any testimony or documents I provide to the Office of Congressional Ethics." Gov't Trial Ex. 516. Mr. Bowser signed this certification before the beginning of his interview with the OCE. 3/12/18 a.m. Trial Tr. 41:1-42:8.

Mr. Bowser contends that he cannot be found guilty of concealment "based on [his] alleged false statements to OCE" because "[a] false statement alone cannot constitute a 'trick, scheme, or device' proscribed by the

concealment offense." Def.'s Reply, ECF No. 85 at 6-7. Thus, he argues, his false certifications "simply exposed" him to criminal prosecution pursuant to the false statement portion of the statute. *Id.* at 7.

Although Mr. Bowser is correct that an affirmative act by which a material fact is concealed is necessary to prove a violation of the concealment prong of *18 U.S.C. § 1001*, see *United States v. London*, 550 F.2d 206, 213 (5th Cir. 1977), the government has alleged, and a reasonable jury could have found, an affirmative act here. Specifically, based on the evidence adduced in the government's case-in-chief, a reasonable jury could conclude that Mr. Bowser's decision not to produce his personal emails discussing Mr. O'Donnell's work on Congressman Broun's campaign and his false statements to the OCE investigators in the course of his interview in the face of his express duty to provide full disclosure, were "affirmative" acts constituting a "trick, scheme or device" by which facts were concealed. See, e.g., *United States v. Dale*, 782 F. Supp. 615, 626 (D.D.C. 1991) ("The case law is clear that the deliberate failure to disclose material facts in the face of a specific duty to disclose such information constitutes a violation of the concealment provision of § 1001."). As another court explained, "[w]hile the concealment of a fact that no one has a legal duty to disclose may not be a violation of [section 1001], such is not the case where a regulation or form requires disclosure." *United States v. Perlmutter*, 656 F. Supp. 782, 789 (S.D.N.Y. 1987), *aff'd*, 835 F.2d 1430 (2d Cir. 1987). A defendant's nondisclosure in such a circumstance is "distinguishable from a 'passive failure to disclose' or 'mere silence in the face of an

unasked question." *Dale*, 782 F. Supp. at 627.

Here, although Mr. Bowser may not have had any preexisting duty to disclose documents or information to the OCE, a duty was imposed upon him after he signed forms agreeing that he would not "falsif[y], conceal[], or cover[] up by any trick, scheme, or device" a "material fact" within the purview of the OCE's investigation. *See* Gov't Trial Exs. 507 and 516. The purpose of these certifications is to provide the OCE a "tool" by which it can "protect the veracity of the information" that it receives. 3/12/18 a.m. Trial Tr. 11:2-7. As Mr. Morgan explained during the trial, the OCE "require[s] people to submit this certification and represent to our office that they have provided us with the complete production of documents, and they do that under penalty of the False Statements Act as a method of protecting or providing some credibility to that assertion." *Id.* 11:8-12. Because these forms advised Mr. Bowser that he was required to fully disclose material facts relevant to the OCE's inquiries, Mr. Bowser's failure to disclose in these circumstances constituted an affirmative act sufficient to form the basis of a concealment charge. Accordingly, the evidence adduced in the government's case-in-chief is sufficient to support Mr. Bowser's concealment conviction.

D. Counts Four and Seven: False Statements

Counts Four and Seven charge Mr. Bowser with making a false statement in a matter within the jurisdiction of the legislative branch of the United

States government in violation of *18 U.S.C. § 1001*. Indict., ECF No. 1 ¶¶ 85-86, 91-92. For Mr. Bowser to have been found guilty of making a false statement, the government was required to prove the following elements beyond a reasonable doubt:

- (1) Mr. Bowser made the statement, as charged in Counts Four through Eight;³
- (2) the statement was false, fictitious, or fraudulent;
- (3) the statement was material;
- (4) Mr. Bowser acted knowingly and willfully; and
- (5) the false statement pertained to a matter within the jurisdiction of the legislative branch of the government of the United States.

See Jury Instructions, ECF No. 87 at 14. Count Four charged Mr. Bowser of making the following false statement:

. . . at no point did we ever entertain the idea this [O'Donnell's services] would be a political adventure. This was purely on the official side.

Indict., ECF No. 1 ¶ 86. Count Seven charged Mr. Bowser of making the following false statement:

³ Counts Five, Six and Eight also charged Mr. Bowser with making false statements. *See* Indict., ECF No. 1 ¶¶ 87-90, 93-94. The jury returned a verdict of not guilty on Counts Five and Six, so the Court need not consider Mr. Bowser's arguments with respect to those counts. In addition, Mr. Bowser does not challenge the government's case or his conviction on Count Eight, which charged him with making a false statement when he signed the Request for Information Certification verifying he had not withheld any information during the course of the OCE investigation.

I mean, bottom line is this was done because Congressman Broun significantly needed help in his communicating ability and that's the only reason why it was done and, you know, we had no intention at all of doing anything on the political side with this.

Id. ¶ 92.

Mr. Bowser argues in his motions that Counts Four and Seven are non-justiciable under *United States v. Rostenkowski*, 59 F.3d 1291, 313 U.S. App. D.C. 303 (D.C. Cir. 1995). He also argues that the evidence presented at trial was insufficient to establish that he had the requisite mens rea. The Court addresses each argument in turn.

1. Counts Four and Seven are Justiciable

Mr. Bowser argues that Counts Four and Seven must be dismissed as non-justiciable because there is no "judicially discoverable or manageable standard" to apply to determine whether Mr. Bowser's statements are true or false. Def.'s MJOA, ECF No. 72 at 11. Specifically, he points to House rules that provide that certain expenditures may be paid from congressional funds so long as the "primary purpose" of the expenditure is "representational" and not "campaign-related." *Id.* at 12.⁴ He argues that a jury would be

⁴The parties stipulated to the following at trial: "The House rules do not permit [Members' Representational Allowance] funds to be used to pay for campaign expenses or campaign-related political party expenses. In other words, these rules require that official resources of the House must be used for the performance

required to interpret these House rules and determine the "primary purpose" of Mr. O'Donnell's work for Congressman Broun in order to resolve these counts. *Id.* Because the Constitution reserves to each House the authority to make its own rules, Mr. Bowser asserts that judicial or juror interpretation of the meaning of the "primary purpose" rule would intrude on the sphere of the legislative branch because "the court would effectively be making the Rules." *Id.* at 13; *see also id.* ("The jury cannot be permitted to second guess whether this was the 'primary purpose' for hiring O'Donnell because 'there is too great a chance that it will interpret the Rule differently than would the Congress itself[.]").

To support his arguments, Mr. Bowser relies on *United States v. Rostenkowski*, 59 F.3d 1291, 313 U.S. App. D.C. 303 (D.C. Cir. 1995). In that case, a congressman was charged with, among other things, using his congressional allowance to purchase "a variety of valuable consumer goods and gift merchandise . . . including armchairs, luggage, sets of china, and crystal sculptures of the U.S. Capitol . . . to be paid for as supplies necessary for the official use,

of official business of the House, and those resources may not be used for campaign or political purposes. . . . MRA funds may be spent to perform what are primarily official duties that are not campaign related but that have a side effect that has political or campaign-related benefits. For example, a congressional employee, whose salary is paid for with MRA funds, can write a bill that the Member introduces and then the Member can later talk about that bill at a campaign event as a reason why he or she should be elected." Tr. Stip. No. 6, 2/27/18 Trial Tr. p.m., ECF No. 103 at 116-117.

when in fact the goods he obtained were for the personal use of himself, his family, or his friends." *Id. at 1311*. The congressman argued that, to resolve the charge, the court would be required to draw a line between "official use" and "personal use" by reference to ambiguous House rules. *Id.* The "question" before the court was whether those terms were "sufficiently clear, either inherently or as interpreted by the House itself," such that they could be applied to the facts alleged in the indictment. *Id. at 1309*. The D.C. Circuit found that, "while the House Rules certainly contemplate a line between the 'official' and the 'personal,' they do little to indicate where that boundary lies." *Id. at 1311*. The Circuit explained that its justiciability analysis turned on whether it could determine "that the facts set out in a particular allegation could not be authorized under *any* reasonable interpretation of the House Rules." *Id. at 1310* (emphasis added). Thus, for example, because purchase of gifts with official funds was clearly prohibited by the relevant House rule, allegations that the congressman purchased items for the use of "family, or his friends" were justiciable. *Id. at 1311*. To the extent the government's case depended on a showing that the congressman had purchased the items for "personal use," however, the case was non-justiciable because "without explanation in the Rules," the term "personal use" was "too ambiguous to support the prosecution of a Member of Congress." *Id.*

Mr. Bowser's arguments are a red herring, and his case can be distinguished from *Rostenkowski*. With respect to Counts Four and Seven, the government was required to show beyond a reasonable doubt that

the following statements made by Mr. Bowser were false:

- "... at no point did we ever entertain the idea this [O'Donnell's services] would be a political adventure. This was purely on the official side."
- "I mean, bottom line is this was done because Congressman Broun significantly needed help in his communicating ability and that's the only reason why it was done and, you know, we had no intention at all of doing anything on the political side with this."

Indict., ECF No. 1 ¶¶ 86, 92. Mr. Bowser attempts to analogize this case to *Rostenkowski* by pointing to the "primary purpose" rule, which requires a member of Congress to determine whether the primary purpose of a particular expense is "official and representational" or "campaign-related," and only allows reimbursement for "expenses the primary purpose of which are official and representational." Def.'s MJOA, ECF No. 72 at 12. Mr. Bowser asserts that the jury cannot decide whether he lied as alleged in Counts Four and Seven without first determining whether the "primary purpose" of Mr. O'Donnell's employment was "official" or "campaign-related." Def.'s Mot. for J. Notwithstanding the Verdict, ECF No. 117 at 9-10. Because the line between "official work" and "campaign work" is ambiguous, he concludes that these counts are non-justiciable. *Id.* at 10.

As Mr. Bowser acknowledges, however, the "primary purpose" rule relates to whether certain *expenditures* are *reimbursable* from congressional funds. Def.'s MJOA, ECF No. 72 at 12 (emphasis added).

Conviction for the false statement counts, however, turns on Mr. Bowser's intent in employing Brett O'Donnell between 2012 and 2014. For the government to succeed on these counts, it needed to prove, among other things, that the statements made by Mr. Bowser to the OCE were materially false. In particular, the government needed to show that Mr. Bowser's statement that he never entertained the idea that Mr. O'Donnell's services would be "political" was false. Likewise, the government needed to show that Mr. Bowser's statement that he and Congressman Broun never intended for Mr. O'Donnell to provide services "on the political side" was false. Such a showing in no way depends on whether Mr. O'Donnell's salary was reimbursable from congressional funds or any other interpretation of the "primary purpose" rule. To the contrary, even if the government conceded that the primary purpose of Mr. O'Donnell's work was official, Mr. Bowser could still be found to have lied to the OCE if a jury concluded that Mr. Bowser intended for some portion of Mr. O'Donnell's work to be "political" or "on the political side." Accordingly, the Court declines to dismiss Counts Four and Seven as non-justiciable.

2. There Is Sufficient Evidence Of Mens Rea To Sustain A Conviction On Counts Four And Seven

Mr. Bowser also argues that his convictions on Counts Four and Seven fail because there is insufficient evidence of mens rea to sustain his conviction. Specifically, he argues that if he believed in good faith that Mr. O'Donnell was employed to provide official,

rather than campaign, services to Congressman Broun, he lacked the necessary mens rea to make a false statement within the scope of *section 1001*. Def.'s Mot. for J. of Acquittal Notwithstanding the Verdict, ECF No. 117 at 10-16. In support of these arguments, Mr. Bowser reiterates the same arguments he advanced at trial, namely:

- Congressman Broun did not need campaign assistance when he hired Mr. O'Donnell in 2012 because Congressman Broun was the overwhelming favorite to win the primary and faced no opposition in the general election.
- Mr. O'Donnell was hired "as a communications and messaging consultant" for the "official side" of Congressman Broun's office, and Mr. O'Donnell's contract reflected this fact.
- Mr. O'Donnell volunteered his services to Congressman Broun's campaigns, as was "commonplace" among staff in the House.
- Mr. O'Donnell complained about not being paid for his services to Congressman Broun's Senate campaign and requested to be reimbursed from the campaign, which suggests that Mr. O'Donnell was not, in fact, being paid for his campaign work.

Id. Mr. Bowser argues that, based on the facts adduced at trial, no reasonable jury could conclude that "Mr. Bowser knew from the outset that the employment arrangement with O'Donnell was impermissible and that he deliberately lied to OCE about that arrangement." *Id.* at 16.

In considering a defendant's motion for a judgment of

acquittal at the close of evidence, the Court "must view the evidence in the light **most favorable** to the Government, giving full play to the right of the jury to determine credibility, weigh evidence and draw justifiable inferences of fact." *United States v. Treadwell*, 760 F.2d 327, 333, 245 U.S. App. D.C. 257 (D.C. Cir. 1985) (citation and internal quotation marks omitted, emphasis added). Once a jury returns a verdict, the Court's standard of review is even more deferential: a court owes "tremendous deference" to the verdict, *United States v. Long*, 905 F.2d 1572, 1576, 284 U.S. App. D.C. 405 (D.C. Cir. 1990), and his convictions must be upheld if "**any rational trier of fact** could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Wahl*, 290 F.3d 370, 375, 351 U.S. App. D.C. 284 (D.C. Cir. 2002) (emphasis added).

The evidence at trial, viewed in the light most favorable to the government, was sufficient to establish that Mr. Bowser "knowingly and willfully" made false statements to the OCE when he stated that "at no point did we ever entertain the idea this [O'Donnell's services] would be a political adventure" and that "we had no intention at all of doing anything on the political side with this." Although the Court will not summarize the entire, voluminous record adduced in the government's case-in-chief on this issue, the Court outlines some of the evidence that supports the mens rea element of the government's false statement counts.

On the first day of trial, the government elicited testimony from Stephen Allen, a messaging

consultant who had also interviewed for the role for which Mr. O'Donnell was eventually hired. Mr. Allen testified that, based on his meeting with Mr. Bowser and Congressman Broun, it was initially his understanding that they were seeking a consultant who would be able to provide "campaign services." 2/27/18 Trial Tr. p.m., ECF No. 103 at 32-33. Mr. Allen further testified that, after a subsequent meeting with Congressman Broun, it was his understanding that the Congressman "was on a crusade and wanted to go around the country talking about conservative causes." *Id.* at 113. Mr. Allen agreed with the government that the crusade was a "political venture" to the extent Congressman Broun intended to "advocate[e] conservative principles and causes." *Id.* at 114.

Brett O'Donnell also testified at trial and explained the nature of his work for Congressman Broun. He stated that, although it was his understanding that he would primarily be providing official services to the congressman, he was also asked to assist the congressman in preparing for campaign activities within days of being hired. Trial Tr. 3/1/18 a.m. 132-139. As he continued to work for Congressman Broun, Mr. O'Donnell testified that he routinely consulted with the congressman on campaign messaging and strategy. *See, e.g.*, 3/5/18 Trial Tr. a.m. 34, 36-37, 39-40. For example, in the course of discussing an email regarding Mr. O'Donnell's availability to prepare Congressman Broun for a campaign interview, Mr. O'Donnell confirmed that he prepared the congressman for a number of campaign events:

Q. Other than this particular example, were there

other occasions where you would meet or speak with the Congressman to prepare him for upcoming campaign events?

A. There are.

Q. Okay. And we're going to talk about debates in a moment, but what other — what are campaign

A. Speeches, media interviews that might be focused on the campaign, those kinds of events.

3/5/18 Trial Tr. a.m. 81-82. Mr. O'Donnell even spoke with Congressman Broun's wife on a number of occasions about "direction on messaging for the campaign" and "how to stay on message." 3/5/18 Trial Tr. a.m. 31. Furthermore, Mr. O'Donnell testified that he spent an increasing proportion of his time providing services to Congressman Broun's campaign over the course of 2013 and into 2014.

A. In early 2013, I would say I was doing 60 percent official work, 40 percent campaign work. By the end of 2013, that was easily 80 percent campaign work, 20 percent official work.

Q. During the same period — and, again, we're referring to December of '13 to March of '14 — were you in communication with the defendant?

A. I was.

Q. Approximately how often?

A. Maybe even daily via e-mail, at least a couple of times by phone, and then in and out of the office a time or two a week.

...

Q. And how is it that you would describe the substance of your conversations with the defendant during this period?

A. Most of them centered around campaign

messaging, strategy, debates, things that were happening on the campaign side.

Q. Could you give the jury some examples or a sampling of what kind of discussions you were having with the defendant during that time?

A. Yes. We might have been discussing an upcoming debate and what needed to be done to prepare the candidate for that debate, what our overall message in the debate would be, logistics for the debate, the format of the debate, so we might talk about a range of things relative to that one particular event or we could be talking about how the campaign was going, generally. Particularly on the messaging side we might talk about specific media interviews that he had done or was going to do. So there were a variety of discussions that could have occurred.

Q. How about your communications with Congressman Broun during this period?

A. Mostly centered on the campaign. There would be some time for official work, if there was a press release going out from the office or things that were happening on the official side that we would message to, but mainly relative to the campaign; meetings in and out of the office, whether they were in the official office or down at Jamestown Associates when we were preparing for debates, would center around the campaign and what was happening relative to him or his competitors in the race.

Q. I asked you earlier about who it was that set the agenda for the work that you were doing, whether it be official or campaign. You had mentioned Mr. Bowser; is that right?

A. Correct.

Q. Same true during this period, or someone else?

A. Absolutely, Mr. Bowser, with input from Christine in terms of some of the tactical considerations that we needed to review. But primarily David Bowser would set the agenda for what I should be working with on Dr. Broun.

3/5/18 Trial Tr. a.m. 101-103. Based on this testimony, the Court concludes that a reasonable jury could conclude that the government met its burden of proving mens rea sufficient to support a conviction under *18 U.S.C. § 1001*. Furthermore, to the extent that Mr. Bowser offered contrary testimony, it was the jury's role to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Moreover, the Court specifically and clearly instructed the jury on Mr. Bowser's theory of the case:

Mr. Bowser asserts that the four statements he made to the OCE which are charged as alleged false statements in Counts IV, V, VI and VII were, in fact, truthful statements and also were based on opinions or beliefs he honestly held in good faith at the time he made them. . . . Good faith is a complete defense to all of the charges in this case. A statement made with good faith belief in its accuracy does not amount to a false statement and is not a crime. The burden of establishing lack of good faith and criminal intent rests on the government. A defendant is under no burden to prove his good faith; rather, the government must prove bad faith or knowledge of falsity beyond a

reasonable doubt.

Jury Instructions, ECF No. 87 at 16. After receiving the evidence and hearing this instructions, a reasonable jury could find that, both at the time of the hiring decision and continuing through 2014, Mr. Bowser contemplated that Mr. O'Donnell would provide some services on the "political side" in his work for Congressman Broun. Accordingly, the Court denies Mr. Bowser's motions as to Counts Four and Seven.

IV. CONCLUSION

For the reasons set forth above, the Court **GRANTS** Mr. Bowser's motion for a judgment of acquittal as to Count One. The Court also **GRANTS** the government's motion to dismiss Count Two and dismisses that count with prejudice. Finally, the Court **DENIES** Mr. Bowser's motions with respect to Counts Two, Three, Four, Five, Six, and Seven. An Order accompanies this Memorandum Opinion.

SO ORDERED.

SIGNED: /s/ Emmet G. Sullivan

United States District Court Judge

July 17, 2018

ORDER

For the reasons set forth in the accompanying

Memorandum Opinion, it is hereby **ORDERED** that the government's motion to dismiss Count Two [ECF No. 119] is **GRANTED** and Count Two is **DISMISSED WITH PREJUDICE**.

It is **FURTHER ORDERED** that defendant David G. Bowser's motion for a judgment of acquittal at the close of the government's case [ECF No. 72] is **GRANTED IN PART AND DENIED IN PART** as follows:

(1) Mr. Bowser's motion is **GRANTED** as to Count One, obstruction of proceedings in violation of *18 U.S.C. § 1505*, and Count One is **DISMISSED WITH PREJUDICE**; and

(2) Mr. Bowser's motion is **DENIED AS MOOT** as to Counts Two, Five, and Six; and

(3) Mr. Bowser's motion is **DENIED** as to Counts Three, Four and Seven.

It is **FURTHER ORDERED** that Mr. Bowser's motion for a judgment of acquittal at the close of all evidence [ECF No. 86] is **DENIED AS MOOT** as to Counts One, Two, Five, and Six and **DENIED** as to counts Three, Four, and Seven.

It is **FURTHER ORDERED** that Mr. Bower's motion for a judgment of acquittal notwithstanding the verdict [ECF No. 117] is **DENIED AS MOOT** as to Counts One and Two, and **DENIED** as to Counts Three, Four, and Seven.

It is **FURTHER ORDERED** that the motions' hearing set for July 18, 2018 is **VACATED**.

It is **FURTHER ORDERED** that the parties shall submit a proposed schedule for obtaining a presentence report and submitting memoranda in aid of sentencing, along with three proposed dates and times for sentencing, by no later than **July 31, 2018**.

It is **FURTHER ORDERED** that the parties shall contact the courtroom deputy, Mark Coates, to make arrangements to retrieve copies of exhibits and other trial materials from the Courtroom.

SO ORDERED.

SIGNED: /s/ Emmet G. Sullivan

United States District Court Judge

July 17, 2018

PROVISIONS INVOLVED

18 U.S. Code § 1001 - Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

- (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
- (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

Federal Rule of Criminal Procedure 29- Motion for a Judgment of Acquittal

(a) **BEFORE SUBMISSION TO THE JURY.** After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) **RESERVING DECISION.** The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) **AFTER JURY VERDICT OR DISCHARGE.**

(1) *Time for a Motion.* A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) *Ruling on the Motion.* If the jury has returned a guilty verdict, the court may set aside the verdict

and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) *No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) CONDITIONAL RULING ON A MOTION FOR A NEW TRIAL.

(1) *Motion for a New Trial.* If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) *Finality.* The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) *Appeal.*

(A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of

Pet.App. 72

acquittal, the trial court must proceed as the appellate court directs.

Federal Rule of Criminal Procedure 48- Dismissal

(a) BY THE GOVERNMENT. The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent.

(b) BY THE COURT. The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in:

- (1) presenting a charge to a grand jury;
- (2) filing an information against a defendant; or
- (3) bringing a defendant to trial.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Docket No. 16-59 (EGS)

(Dated March 12, 2018
9:10 a.m.)

UNITED STATES OF AMERICA,

v.

DAVID G. BOWSER,

Defendant.

**DAY 8 - MORNING SESSION TRANSCRIPT OF
JURY TRIAL PROCEEDINGS BEFORE THE
HONORABLE EMMET G. SULLIVAN, UNITED
STATES DISTRICT COURT JUDGE, and a JURY**

APPEARANCES:

For the Government:

Todd William Gee, Assistant U.S. Attorney
U.S. DEPARTMENT OF JUSTICE

Pet.App. 75

Criminal Division, Public Integrity Section
1400 New York Avenue, NW
12th Floor
Washington, DC 20005
(202) 514-9751
Email: todd.gee2@usdoj.gov

Sean F. Mulryne, Assistant U.S. Attorney
U.S. DEPARTMENT OF JUSTICE
Public Integrity Section
1400 New York Avenue, NW
Washington, DC 20005
(202) 598-2816
Fax: (202) 514-3003
Email: sean.mulryne@usdoj.gov

For the Defendant:
Leslie McAdoo Gordon
McADOO GORDON & ASSOCIATES
1140 19th Street, NW
Washington, D.C. 20036
(202) 293-0534
leslie.mcadoo@mcadoolaw.com

Court Reporter:
Scott L. Wallace, RDR, CRR
Official Court Reporter
(202)354-3196
scottlyn01@aol.com

**EXAMINATIONS - DIRECT EXAMINATION OF
BRYSON MORGAN BY MR. MULRYNE**

[p. 14]

A. Well, I think I explained last Thursday, it was very important to the investigation for us to have all the communications between Congressman Broun's office and individuals who worked on his campaigns and Brett O'Donnell. I would expect those communications to take place not only in using official e-mail accounts, but also using personal e-mail accounts to the extent -- or personal or campaign e-mail accounts to the extent that Brett O'Donnell was providing services to the campaigns.

Q. Why would you expect this?

A. The House rules require that campaign activity be conducted using -- not using official resources, that includes an e-mail account. So I would have expected that folks, even if they worked for the congressional office, that when they were doing campaign activity they would be using personal or campaign e-mail accounts.

Pet.App. 77

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Docket No. 16-59 (EGS)

(Dated March 15, 2018
1:37 p.m.)

UNITED STATES OF AMERICA,)
)
)
)
v.)
)
DAVID G. BOWSER,)
)
Defendant.)

DAY 11 – AFTERNOON SESSION

**TRANSCRIPT OF JURY TRIAL
HELD BEFORE THE HONORABLE EMMET G.
SULLIVAN
UNITED STATES DISTRICT JUDGE**

APPEARANCES:

For the United States:
TODD WILLIAM GEE, ESQ.
SEAN F. MULRYNE, ESQ.

U.S. DEPARTMENT OF JUSTICE
PUBLIC INTEGRITY SECTION
1400 New York Avenue, NW
Washington, D.C. 20005
(202) 514-9751
todd.gee2@usdoj.gov

For the Defendant:
LESLIE S. McADOO GORDON, ESQ.
McADOO GORDON & ASSOCIATES
1140 19th Street, NW
Washington, D.C. 20036
(202) 293-0534
leslie.mcadoo@mcadoolaw.com

Court Reporter:
Lisa A. Moreira, RDR, CRR
Official Court Reporter
U.S. Courthouse, Room 6718
333 Constitution Avenue, NW
Washington, DC 20001
202-354-3187

Proceedings recorded by mechanical stenography;
transcript produced by computer-aided transcription

**EXAMINATIONS - CROSS EXAMINATION OF
DAVID BOWSER BY MR. GEE**

[p. 152]

Q. And you knew it got sent to Mr. Findlay before
Bryson

Morgan told you they'd take a supplemental production from you, right?

A. Yes.

Q. And you knew Josh Findlay had the title of campaign

manager in that Senate race, right?

A. Yes.

Q. Josh Findlay never worked for the congressional office

except for as an intern before you even were there, right?

A. Right.

Q. But you didn't think the OCE cared about Brett O'Donnell's campaign work even though Josh Findlay got a letter?

A. I didn't think about that, no. I --

Q. You knew that Paul Kilgore got this letter also, right?

A. Yes.

Q. Paul Kilgore was the campaign treasurer, right?

A. Yes.

Q. He didn't do any work for the official office, right?

A. No.

Q. And even though you knew Paul Kilgore got this letter,

you thought OCE only cared about Brett O'Donnell's official work?

A. From me, yes.

Q. And after receiving this letter, you didn't provide the

OCE any of your personal emails, did you?

A. I don't believe so.

Q. You don't believe so, or you didn't?

A. I didn't.

Q. And you'd agree with me that the vast majority of your campaign-related emails with Brett O'Donnell are on the official side?

A. I'm sorry, the vast majority of my emails with Brett

O'Donnell are official? Sure.

Q. I'm sorry. Let me rephrase. Thank you.

You'd agree with me that the vast majority of your emails with Brett O'Donnell about campaign activity were

sent and received on your Yahoo personal email account, correct, sir?

A. About campaign activity, yes.

Q. And there was some testimony here today about when

Ms. Hardman came to see you about her own production, right?

A. Yes.

Q. Now, I understand that you say that she came to you and

asked if she should provide her personal, and you said, "Use your own discretion." You remember it differently than her, right?

A. That's how I recall it, yes.

Q. You heard her testimony. She actually remembers

gathering all her personal emails and gathering all her

[p. 154]

official and starting to sort them and then asking you, and you saying you only have to provide official for now. You

heard all that testimony?

A. I heard that testimony, yes.

Q. She actually remembers sorting and everything, right?

A. That's what she testified to, yes.

Q. Yes. And she remembers that you told her just the official for now, right?

A. That's what she said, yes.

Q. But what you remember regardless is you remember

saying -- and you remember also that -- we'll go to this.

Ms. Hardman also remembers a second conversation where she asked you whether she should provide the campaign

emails on her official account, and you said, "Use your

discretion." You heard that testimony, right?

A. I believe so, yes.

Q. And now you don't remember it that same way, right?

A. No. I remember we had three conversations.

Q. Okay. Now, the part you do remember, the way you

remember it is that she asked you if she should
provide her
personal, and you said, "Use your discretion." That's
the
way you remember it, right?

A. Yes.

Q. All right. Let's take it the way you remember it.

Board
Porter Goss, Chair *David Skaggs, Co-Chair*
Jay Byrnes *Karan English*
Allison Hayward *Belinda Pinckney, BG (R)*
Judy Biggart *Michael Barnes*
Omar S. Ashmawy, Staff Director & Chief Counsel
oce.house.gov
oce@mail.house.gov

Congress of the United States
House of Representatives
OFFICE OF CONGRESSIONAL ETHICS
Washington, DC 20515

Mailing Address:
P.O. Box 895
Washington, DC 20515-0895

Office Address:
425 3rd Street, SW
Suite 1110
Washington, DC 20024
(202) 225-9739
(202) 226-0997 (fax)

CONFIDENTIAL

June 3, 2014

Tim Reitz
2437 Rayburn House Office Building
Washington, D.C. 20515

REQUEST FOR INFORMATION

Re: Review No. 14-2533

Dear Mr. Reitz:

This Request for Information is pursuant to a second-phase review authorized by the Board of the Office of Congressional Ethics ("OCE") that commenced on April 28, 2014.

In accordance with Rule 8(C) of the Office of Congressional Ethics' Rules for the Conduct of Investigations ("OCE Rules"), the Review shall end on June 25, 2014. Your timely cooperation is appreciated and will assist the Board in reaching an informed and accurate decision.

For purposes of this request, "communications" includes, but is not limited to, written letters, memoranda, emails, instant messages, records and memoranda to file, or any document memorializing or reflecting a meeting, conversation, or telephone call.

Please provide the following information:

- (1) All files, records, notes, communications, and any other documents relating to Brett O'Donnell, O'Donnell & Associates, LTD, or anyone employed by or associated with O'Donnell & Associates, LTD, from January 1, 2012 to the present.
- (2) All communications between you and the Committee on House Administration, from January 1, 2012 to the present, relating to Brett O'Donnell or O'Donnell & Associates, LTD.



Pet.App. 84

Tim Reitz
June 3, 2014
Page 2 of 2

- (3) The OCE requests the opportunity to interview you at a mutually convenient time. Please contact Bryson Morgan, Investigative Counsel, at (202) 226-8006 no later than June 11, 2014 to arrange an interview.

The OCE may make additional information requests, as warranted by the facts and circumstances of this review. In addition, we will review any additional information you feel is relevant that we have not requested.

If you are not providing a requested document or piece of information, then please identify the document or information withheld and the reason why it is being withheld.

Please note that under House Resolution 895 of the 110th Congress, as amended, and OCE Rule 6, the Board may draw a negative inference from any refusal to cooperate and may include a statement to that effect in any referral to the Committee on Ethics.

Pursuant to OCE Rule 4(A)(2), each witness who provides documents or other evidence in response to a Request for Information must sign a statement certifying that (1) the witness has provided all documents in his or her possession that are responsive to the Request, and (2) if the witness has not provided a requested document or other evidence, he or she has identified that document or evidence and explained why it was not produced. The certification is made subject to the provisions of the Federal False Statements Act, 18 U.S.C. § 1001. A certification form is enclosed with this Request. Refusal to sign the certification form may be deemed by the OCE Board as a refusal to cooperate under OCE Rule 6.

If you have any questions regarding this request or require any assistance in the production of the information requested, please do not hesitate to contact Bryson Morgan, Investigative Counsel, at (202) 226-8006. The OCE can provide assistance with the document production, including performing electronic document collection and copying original paper documents. In the event you retain counsel, the OCE requests that your counsel follow the enclosed OCE data delivery standards for any document and e-mail production you provide to the OCE.

Respectfully yours,


Omar S. Ashmawy
Staff Director and Chief Counsel

Encl.