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POLITICIZING PROCUREMENT: WILL PRESIDENT OBAMA'S PROPOSAL CURB FREE SPEECH AND HURT SMALL BUSINESS?

JOINT HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

AND THE

COMMITTEE ON SMALL BUSINESS

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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POLITICIZING PROCUREMENT: WILL PRESIDENT OBAMA'S PROPOSAL CURB FREE SPEECH AND HURT SMALL BUSINESS?

THURSDAY, MAY 12, 2011

HOUSE OF REPRESENTATIVES, COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, JOINT WITH THE COMMITTEE ON SMALL BUSINESS,

Washington, DC.

The committees met, pursuant to notice, at 2:40 p.m., in room 2154, Rayburn House Office Building, Hon. Darrell E. Issa (chairman of the Committee on Oversight and Government Reform) presiding.

Present from the Committee on Oversight and Government Reform: Representatives Issa, McHenry, Jordan, Walberg, Lankford, Amash, Buerkle, Gosar, Labrador, DesJarlais, Gowdy, Guinto, Farenthold, Kelly, Cummings, Kucinich, Connolly, Quigley, Braley, Welch, and Murphy.

Present from the Committee on Small Business: Representatives Graves, Chabot, Mulvaney, West, Ellmers, Hanna, and Velázquez.

Staff present from the Committee on Oversight and Government Reform: Richard A. Beutel, senior counsel; Robert Borden, general counsel; Will L. Boyington and Drew Colliatie, staff assistants; Molly Boyl, parliamentarian; Lawrence J. Brady, staff director; Benjamin Stroud Cole, policy advisor and investigative analyst; John Cuaderes, deputy staff director; Gwen D'Luzansky, assistant clerk; Adam P. Fromm, director of Member liaison and floor operations; Linda Good, chief clerk; Frederick Hill, director of communications and senior policy advisor; Christopher Hixon, deputy chief counsel, oversight; Justin LoFranco, press assistant; Mark D. Marin, senior professional staff member; Laura L. Rush, deputy chief clerk; Jeff Solsby, senior communications director; Becca Watkins, deputy press secretary; Daniel Epstein, professional staff member; Kevin Corbin, minority staff assistant; Ashley Etienne, minority director of communications; Jennifer Hoffman, minority press secretary; Carla Hultberg, minority chief clerk; Lucinda Lessley, minority policy director; Adam Miles and Any Miller, minority professional staff members; Dave Rapallo, minority staff director; and Mark Stephenson, minority senior policy advisor/legislative director.

Chairman ISSA. Since we have a quorum for a hearing, I am going to go forward. We won't go past the first opening statement until or unless the—one of the ranking members arrives. Today we

have a joint hearing on the politicizing procurement: Will President Obama's proposal curb free speech and hurt small business?

The Oversight Committee's mission statement is we exist to secure two fundamental principles. First, Americans have a right to know that the money Washington takes from them is well spent. And second, Americans deserve an efficient, effective government that works for them.

Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold government accountable to taxpayers, because taxpayers have a right to know what they get from their government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy.

Today's hearing is about the Federal Government and its honest contracting proposals. I am glad to see that the administration has agreed to testify before this joint hearing. There are many questions to be answered, and I have been concerned about the indifference, and perhaps disdain, of the administration as shown at times toward congressional oversight.

There is clear concern about a now well-circulated Executive order that may have a chilling effect on political participation, free speech, based on partisan issues. The American people have a right to know what the government is doing and to impact, through this Congress, proposed rules, regulations, and statutes in this country.

There is now bipartisan and bicameral alarm on Capitol Hill regarding the proposed Executive order and its potential effects on politics in procurement.

The concern about injecting politics into procurement is not new. It is not a Republican concern. It is not a Democratic concern. The acquisition and procurement laws and regulations are designed to preserve impartiality. We hold our very dedicated contractors to a high standard of seeking to get a level playing field, maintained fairness, and in fact obtain goods and services from the best sources on a decision made on price and quality.

To protect the interest of U.S. taxpayers, contracts must be awarded on the merits of the proposed bid and not on political affiliations or political donations of the prospective contractors. Yet, under the President's proposed Executive order, contractors would be required to disclose information about political contributions of some employees, and the information would be readily available to political appointees who are intimately involved in the decisions to award contracts. The risk that politics could play a role in the outcome of contracting and award decisions is too high.

I believe the United States has some of the finest public servants in the Federal contracting officers. Day after day, they do the hard work of examining proposed bids, crunching the numbers, always seeking to get the best for the U.S. taxpayer. Notwithstanding an attempt to always do an analytical assessment, we will always have some contracts that are awarded on a no-bid or cost-plus basis. Particularly in these contracts, there is a high risk that the whim of a political appointee could in fact be swayed one way or the other based on a public record of contributions.

During the Bush administration, when my friends on the other side of the aisle were in the majority, the committee spared no expense to hurl accusations of political bias in contracting process, and in the process the names and reputations of some very good people were smeared. This committee is not going to take that approach, precisely because we want to protect procurement officers and contractors alike from the charge of political bias when we have this and other hearings. Meanwhile, I believe it is telling that the President's proposal says nothing about requiring similar disclosures from labor unions and liberal advocacy groups.

Is the President not concerned about transparency on grantees, many of them trade unions, trade unions themselves or other groups that serve the country but do not fall under the general umbrella of Corporate America?

Nevertheless, we are here to examine what effects this proposed order will have on the contracting community. We must determine the cost both to contractors and the U.S. taxpayers if this proposal or one similar goes into effect.

We must consider the efficiency of such a requirement. Will the President's political disclosure rule serve to delay the delivery of goods and services to the Federal Government? We have to ask if it is appropriate for government to require businesses to ask for information from employees that may be deeply personal and potentially detrimental to their career. Imagine your employer demanding to know, have you made donations to an organization that supports or opposes abortion? Do you have or have you given money to a group that advocates gay rights—gay and lesbian rights, or those that may have a religious objection? Can you imagine the effect of having to disclose that and then questioning whether your career is in jeopardy.

Further, you could ask, are you supporting organizations that seek to expand union representatives of workers or seek to implement rights related to work laws.

And finally, we must consider the constitutionality of this proposal. In fact, it appears that the order currently is not narrowly tailored to a compelling government interest. Although we will not ask questions as to deliberative process here today, we do feel that, as drafted, it is legitimate to ask what the effects might be on Federal work force, on employees that would be covered under this, and ultimately whether or not, constitutionally, this is ground we should go into.

And with that, I recognize the distinguished ranking member for his opening statement, Mr. Cummings.

[The prepared statement of Hon. Darrell E. Issa follows:]

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Full Committee

"Politicizing Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business?"

May 12, 2011

Rep. Darrell Issa, Chairman

Hearing Preview Statement

Thursday's hearing of the House Committee on Oversight and Government Reform fulfills the committee's responsibility to safeguard the federal contracting and procurement processes from the exploitation and the undue influence of partisan political concerns. Recently, the Obama administration circulated a proposed Executive Order that would direct federal agencies to require contractors to disclose political expenditures and contributions made within two years of all proposal submissions in an official contracting certification. Moreover, the Executive Order would require contractors to certify their acknowledgment that full disclosure of this information has been made as a precondition for the contract award. Failure to make a full disclosure in the certification process could result in criminal prosecution.

There is now bipartisan alarm on Capitol Hill that the proposed Executive Order runs afoul of the government's responsibility to keep federal procurement and contracting fair and unbiased. Indeed, Congress must protect U.S. taxpayers from the kinds of corrupt spoils system that could develop if federal contract awards were seemingly tied to partisan political affiliations.

The acquisition and procurement laws are specifically designed to ensure impartiality in the selection of contractors. Competing offers are judged on the merits of their proposals and in the best interests of U.S. taxpayers. If the President's proposed Executive Order is authorized, political donation information would be readily available to political

appointees who are immediately involved in the contracting process. That risk is unacceptable.

Notably absent from the President's proposed disclosure requirements are any similar terms for unions that work on federal contracts or receive federal grant money. Yet unions are one of the largest political contributors in any American election cycle, and the data reveals that these interest groups overwhelmingly favor Democratic Party candidates.

The Committee will seek information from administration officials about the development of this proposal and hear testimony about its potential effects on the impartiality of federal contracting processes if enacted.

###

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

The Committee on Oversight and Government Reform is supposed to enhance transparency and shine light on waste, fraud, and abuse. I have been a member of this committee for 15 years and I never thought I would see the day when our committee would view transparency as the enemy.

The draft Executive order being developed by the administration would require Federal contractors to disclose more information about their political contributions than they currently provide, particularly those given to a third-party entity.

Chairman Issa said this week that he opposes this effort because additional information could be used nefariously to create, "a Nixonian-type enemy list." In other words, companies should not disclose more information, because people in power could misuse the information to retaliate against them.

I have a fundamental problem with this premise. Under this logic, all campaign disclosures would be bad, not just new ones. Government contractors already disclose contributions and expenditures by their PACs and those who contribute to them. Contributions by the officers and directors of government contractors are also required to be disclosed. Should we eliminate those provisions, too? Of course not.

A second argument made by the opponents is that contracting officers might review political contributions in order to reward allies or punish foes by awarding or withholding government contracts. Again, this can happen now under current law, under current disclosure rules, but Federal procurement laws prohibit it.

The draft Executive order also reiterates that, "every stage of the contracting process," must be free from the undue influence of factors extraneous to the underlying merits of contracting decision-making such as political activity or political favoritism.

A third argument that the draft Executive order violates the First Amendment is also misplaced. Even in the recent Citizens United case, eight of nine justices agreed that campaign disclosure rules are consistent with the First Amendment because they do not prohibit contributions and do not prevent anyone from speaking.

For all of these reasons, a broad coalition of dozens of open government groups and other organizations strongly supports the administration's draft Executive order. More than 30 groups, including nonpartisan, nonprofit organizations like Democracy 21, the Project on Government Oversight, Public Citizens, and many others have concluded that the draft Executive order would enhance transparency and decrease corruption.

Unfortunately, we will not be hearing from these groups today because Chairman Issa refused my request to invite Fred Wertheimer, the president of Democracy 21, to testify on behalf of this coalition.

Although I was encouraged when Chairman Graves agreed to to request from his ranking member, Ms. Velázquez, to invite a small business owner to today's joint hearing, Chairman Issa chose not to follow this example.

These are not the only groups that support the draft Executive order. On Tuesday, a coalition of institutional investors and investor coalitions, collectively managing more than $130 billion, also

wrote to express their support. In their letter they explained that corporate political activity presents significant risk to shareholder value, and transparency allows investors to put together a more complete picture of the various risks to our investments.

For these reasons, I ask unanimous consent to place the following documents into the official record of today's hearing.

First, I would like to submit the testimony that Mr. Wertheimer prepared for today's hearing but was not allowed to deliver.

Second, I would like to submit a letter written on May 4th by more than 30 open government organizations and others expressing their, "strong support," for the Executive order and its transparency goals.

And third, I would like to submit a letter written on May 10th from the Coalition of Institutional Investors who support the draft Executive order to protect the interest of corporate shareholders.

And I would ask that they be admitted into the record, Mr. Chairman.

Chairman ISSA. Without objection so ordered.

[The prepared statement of Hon. Elijah E. Cummings follows:]

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Opening Statement
Rep. Elijah E. Cummings, Ranking Member

Hearing on "Politicizing Procurement:
Will President Obama's Proposal Curb Free Speech and Hurt Small Business?"

May 13, 2011

The Committee on Oversight and Government Reform is supposed to enhance transparency and shine light on waste, fraud, and abuse. I have been a member of this Committee for 15 years, and I never thought I would see the day when our Committee would view transparency as the enemy.

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I have a fundamental problem with this premise. Under this logic, all campaign disclosures would be bad, not just new ones. Government contractors already disclose contributions and expenditures by their PACs and those who contribute to them. Contributions by the officers and directors of government contractors are also required to be disclosed. Should we eliminate those provisions too? Of course not.

A second argument made by opponents is that contracting officers might review political contributions in order to reward allies or punish foes by awarding or withholding government contracts. Again, this could happen now under current disclosure rules, but federal procurement law prohibits it. The draft executive order also reiterates that "every stage of the contracting process" must be "free from the undue influence of factors extraneous to the underlying merits of contracting decision making, such as political activity or political favoritism."

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For all of these reasons, a broad coalition of dozens of open government and other organizations strongly supports the Administration's draft executive order. More than 30 groups, including nonpartisan, nonprofit organizations like Democracy 21, the Project on Government Oversight, Public Citizen, and many others, have concluded that the draft executive order would enhance transparency and decrease corruption.

Unfortunately, we will not be hearing from these groups today because Chairman Issa refused my request to invite Fred Wertheimer, the President of Democracy 21, to testify on behalf of this coalition. Although I was encouraged when Chairman Graves agreed to the request from his ranking member, Representative Velazquez, to invite a small business owner to today's joint hearing, Chairman Issa chose not to follow his example.

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- Third, I would like to submit a letter written on May 10 from the coalition of institutional investors who support the draft executive order to protect the interests of corporate shareholders.

Thank you, Mr. Chairman.

Testimony by Democracy 21 President Fred Wertheimer On Draft Obama Administration Executive Order Submitted to Joint Hearing Held by House Oversight and Government Reform and House Small Business Committees

May 12. 2011

Thank you for the opportunity to submit testimony today.

My name is Fred Wertheimer and I am president of Democracy 21, a nonprofit, nonpartisan organization that supports effective campaign finance laws, including comprehensive disclosure laws.

We believe such laws are necessary to protect the integrity of our political system and serve as a safeguard against corruption and the appearance of corruption in government.

Democracy 21 strongly supports the draft proposed Executive Order of the Obama Administration to require government contractors to disclose *all* of the campaign contributions and expenditures they make to influence federal elections.

These disclosure provisions are an appropriate way for the Executive Branch to help protect the public against pay-to-play efforts by persons seeking to influence Executive Branch contracting decisions or seeking to obtain earmarks by Members of Congress for government contracts.

I would like to submit for the record a letter recently sent to President Obama by thirty-four organizations urging the President to sign the Executive Order.

In January 2010, the Supreme Court in the *Citizens United* case struck down the ban on corporate expenditures in federal elections. In doing so, the Court made clear that disclosure laws to cover the new campaign finance activities permitted by the decision were constitutional and necessary.

The Supreme Court by an 8 to 1 majority held that disclosure is "needed to hold corporations and elected officials accountable for their positions and supporters." The Court said that disclosure allows citizens to "make informed choices in the political marketplace," and "permits citizens and shareholders to react to the speech of corporate entities in a proper way."

The Court also stated, "A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today."

Unfortunately, however, as evidenced by the 2010 congressional races, such a system of "effective disclosure" did not exist on the day Justice Anthony Kennedy wrote the decision and still does not exist.

The new opportunities for independent spending in federal elections permitted by the *Citizens United* decision resulted in more than *$135 million in secret contributions* being spent by outside groups to influence the 2010 congressional races. This represented an unprecedented return to secret money in federal elections that has not been seen since before the Watergate scandals of the 1970s.

Secret money in American politics is a formula for scandal and corruption. As Albert Hunt, executive Washington editor and a columnist for *Bloomberg News* aptly noted in a column:

> A prediction: The U.S. is due for a huge scandal involving big money, bribery and politicians. Not the small fry that dominates the ethics fights in Washington; really big stuff; think Watergate.
>
> It is axiomatic in politics that without accountability there is abuse. This year, there is a massive infusion of special-interest money into U.S. politics that is secret, not reported.

The American people overwhelmingly support disclosure of the campaign finance activities being conducted by outside groups. According to a *New York Times/CBS* Poll last year (October 28, 2010):

> 92 percent of Americans said that it is important for the law to require campaigns and outside spending groups to disclose how much money they have raised, where the money came from and how it was used.

In the landmark case of *Buckley v. Valeo* (1976), the Supreme Court explained why campaign finance disclosure is constitutional and necessary. In upholding the comprehensive disclosure provisions of the Federal Election Campaign Act, the Court stated:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office.
>
> .....

> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.
>
> .....
>
> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

These basic principles are just as true today as they were thirty-four years ago. The constitutionality of campaign finance disclosure laws has repeatedly been reaffirmed by the Supreme Court, as recently as last year in the *Citizens United* decision.

Democracy 21 supports congressional enactment of new disclosure laws to cover the new campaign finance activities permitted by the *Citizens United* decision. The disclosure should be comprehensive and encompass campaign finance activities by corporations, tax-exempt advocacy groups, business associations and labor unions.

In the last Congress, we supported the DISCLOSE Act, which passed the House and received 59 votes in the Senate, one vote short of the 60 votes needed to break a filibuster and pass the legislation.

We continue to support in this Congress the enactment of new disclosure laws to require all persons – including corporations, tax-exempt advocacy groups, business associations, and labor unions – to disclose the independent campaign finance activities they are undertaking to influence federal elections as a result of the *Citizens United* decision.

Short of new legislation, we support alternative ways to provide to the American people the campaign finance disclosure information that the Supreme Court has made clear citizens have a basic right to know. This includes the draft Executive Order of the Obama Administration.

In considering a disclosure Executive Order applicable to government contractors, it is important to understand that government contractors are in a special category and have long had to abide by a special provision in the campaign finance law designed to protect the integrity of the government contracting process.

Section 441c of the Federal Election Campaign Act explicitly prohibits government contractors from making any contribution, directly or indirectly, to "any political party,

committee, or candidate for public office or to any other person for any political purpose or use." An exemption is provided in the section that allows the PACs of government contractors to make contributions, with such contributions subject to disclosure under existing disclosure laws.

Special rules for government contractors were considered necessary in order to help protect the integrity of the government contracting process and protect against pay-to-play efforts. This has been true both nationally and in a number of states which have enacted strong campaign finance restrictions and/or disclosure requirements on state and local government contractors.

The Draft Executive Order

The draft Executive Order is intended to ensure that the federal contracting process is "free from the undue influence of factors extraneous to the underlying merits of contracting decision-making, such as political activity or favoritism." Draft EO at 1. The draft Order notes that "additional measures are appropriate and effective in addressing the perception that political campaign spending provided enhanced access to or favoritism in the contracting process." *Id.* It states that the Order is intended "to increase transparency and accountability to ensure an efficient and economical procurement process." *Id.*

Contrary to statements made by opponents of the Executive Order, there is nothing new about government contractors making campaign finance disclosures. And, few, if any, concerns were raised in the past about such disclosures having a "chilling effect" or stifling speech"

Under existing campaign finance disclosure laws, government contractors are already required to make a number of campaign finance disclosures. They are required to disclose the campaign contributions and expenditures made by their PACs, as well as the individuals contributing to their PACs. They also are required to disclose the campaign expenditures they directly make on "independent expenditures" and "electioneering communications." The contributions made by officers and directors of government contractors also have to be disclosed by the recipients of the contributions.

What is missing today, however, and what the draft Executive Order would provide, is disclosure of contributions made by government contractors to third parties "with the intention or

reasonable expectation" that the third party groups will spend the contributions on independent expenditures or electioneering communications to influence federal elections.

This information would have been disclosed under existing campaign finance disclosure laws but for Federal Election Commission regulations that have eviscerated the disclosure requirements covering these contributions.

The draft Executive Order is intended to address for government contractors a gaping disclosure loophole that has arisen as a result of the *Citizens United* decision. Following that decision, corporations organized as "social welfare" organizations under section 501(c)(4) of the Internal Revenue Code or as business associations under section 501(c)(6) of the Code engaged in an unprecedented amount of campaign spending to influence the 2010 congressional elections.

This led *to more than $135 million in secret contributions* being spent by third party groups in the 2010 congressional races

. The draft Executive Order would require public disclosure of donations made by government contractors to third party groups where the donor knows or has reason to know that the money will be used by the third party group for expenditures to influence federal elections.

This would ensure that the public is fully informed about the campaign finance activities undertaken by government contractors and would help protect against government contractors using campaign funds to obtain influence with Executive Branch officials and members of Congress over government contractors.

The Executive Order is simply an effort by the Administration to do what the President appropriately can do under his own authority to obtain campaign finance information from government contractors that is being hidden from the American people.

The Executive Order would also provide the public with a more easily accessible database to use to obtain the campaign finance information being disclosed by government contractors. This would help to more effectively carry out the goals of disclosure laws to inform the American people and protect the integrity of government decisions.

The Constitutionality of the Disclosure Requirements

Opponents of the draft Executive Order argue that its disclosure requirements violate the constitutional rights of government contractors to engage in anonymous campaign spending and would "chill" and "stifle" free speech.

It is remarkable that these arguments are even being made, since the Supreme Court has clearly, consistently and repeatedly upheld the constitutionality of campaign finance disclosure requirements against such claims in cases spanning more than 35 years, beginning with *Buckley v. Valeo*, 424 U.S. 1, 43-55 (1976).

Indeed, these issues are completely laid to rest in *Citizens United* itself, where the Court by an 8 to 1 majority made clear in striking down the ban on corporate expenditures that it is constitutional to require corporations and labor unions to disclose the campaign expenditures and the donors behind these expenditures.

I would like to submit for the record a letter sent to House members last year by Democracy 21 on the constitutionality of campaign finance disclosure laws.

In *Citizens United*, the Supreme Court held that that disclosure requirements regarding campaign expenditures by outside groups "do not prevent anyone from speaking" and serve governmental interests in "providing the electorate with information" about the sources of money spent to influence elections so that voters can "make informed choices in the political marketplace."

The Supreme Court noted the importance of disclosure for the new corporate campaign finance activities being permitted, stating:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests."

The Supreme Court further stated:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages

Importantly, the Court in *Citizens United* also specifically noted the problems that result when groups run ads "while hiding behind dubious and misleading names," thus concealing the true source of the funds being used to make campaign expenditures. The Court said:

> In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending. 424 U. S., at 66. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§201 and 311. 540 U. S., at 196. <u>There was evidence in the record that independent groups were running election-related advertisements "'while hiding behind dubious and misleading names.</u>'" Id., at 197 (*quoting McConnell I,* 251 F. Supp. 2d, at 237). The Court therefore upheld BCRA §§201 and 311 on the ground that <u>they would help citizens "'make informed choices in the political marketplace</u>.'" 540 U. S., at 197 (quoting *McConnell I, supra*, at 237); see 540 U. S., at 231.

Id. (emphasis added).

In rejecting the challenge by Citizens United to the disclosure requirements applicable to its campaign activities, the Court said:

> The Court has explained that <u>disclosure is a less restrictive alternative to more comprehensive regulations of speech</u>. *See, e.g., MCFL*, 479 U. S., at 262. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. 424 U. S., at 75–76. In *McConnell*, three Justices who would have found §441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. 540 U. S., at 321 (opinion of KENNEDY, J., joined by Rehnquist, C. J., and SCALIA, J.). And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v. Harriss*, 347 U. S. 612, 625 (1954) (Congress "has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose"). <u>For these reasons, we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy</u>.

Id. at 916 (emphasis added).

While a bare majority of five Justices in the *Citizens United* case voted to strike the ban on corporate expenditures in campaigns, eight of the nine Justices in the same case voted to strongly endorse disclosure as a means to "provide shareholders and citizens with information needed to hold corporations and elected officials accountable for their positions and supporters."

The disclosure provisions for government contractors provided by the draft Executive Order will hold "elected officials accountable for their positions," on government contracts.

The "Chilling" Effect Argument

Opponents of the draft Executive Order claim that disclosure will have a "chilling" effect on government contractors. These opponents contend that disclosure of their campaign finance activities will subject them to harassment by customers or the public.

These arguments are not supported by law or by fact.

They also contend that government contracting officials may use the information to favor Administration supporters or punish Administration opponents by withholding contracts from them. This represents an attempt to take the arguments that have long been considered by Congress and the courts as the justification for disclosure and turn them upside down.

The chilling effect argument ignores the reality that government contractors as noted earlier already are subject to substantial campaign finance disclosure requirements.

What is missing and what the Executive Order would add, is disclosure of the funds given by government contractors to third party groups that are then spent by the third party groups to influence federal elections.

The Executive Order would facilitate disclosure and make it easier for citizens to know what government contractors are doing to influence federal elections by providing all of the relevant campaign finance information for a contractor in one centralized location.

This campaign finance information is necessary for public accountability and to guard against pay-to-play efforts involving decisions by the Executive Branch and actions by Members of Congress.

The idea that disclosure would facilitate the misuse of campaign finance support or opposition to make decisions is backwards. Disclosure to the public will protect against decisions being made on the basis of campaign finances and that is one of the cardinal principles used by the Supreme Court to uphold campaign finance disclosure laws.

Absent disclosure, public officials and elected officeholders are always able to know who provided them campaign finance support and who did not. The only people who will not know are the American people and the public absence of this information will make it easier, not harder, to make improper decisions based on campaign finance support or opposition.

Justice Antonin Scalia rejected the "chilling" effect argument in a forceful defense of disclosure in a concurring opinion in *Doe v. Reed* (2010). In this case, which upheld disclosure requirements for petition signers for ballot measures, Justice Scalia wrote:

> Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.

Furthermore, as a constitutional memo by the Campaign Legal Center (May 4, 2011) states regarding the harassment issue:

> Moreover, the Supreme Court has already formulated a remedy for any group who can in fact demonstrate a legitimate fear of harassment from campaign finance disclosure. In *Buckley*, it held that a specific group could request an "as-applied" exemption to a campaign disclosure law if it presented evidence showing "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." Indeed, several years after *Buckley*, the Supreme Court recognized that the Socialist Workers Party was entitled to such an exemption.[2] So if there is indeed evidence of harassment or reprisals, the Court has already fashioned a remedy.
>
> But the *Buckley* Court resoundingly rejected the proposition that general allegations of potential harassment like those offered by opponents here would render a campaign disclosure law facially unconstitutional. In the words of the Court, "*NAACP v. Alabama* is inapposite where, as here, any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative."
>
> [2] The inadequacy of opponents' arguments is also brought into relief by a review of the evidence of injury offered by the Ohio Socialist Workers Party ("SWP") in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), where an exemption to disclosure was granted. In *Socialist Workers*, the SWP brought an as-applied challenge to

> the constitutionality of Ohio's state political disclosure law. The SWP had introduced proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial, including threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office. *Id.* at 99. In the year before trial, four Ohio SWP members were fired because of their party membership. *Id.* The District Court also found a past history of government harassment, including FBI surveillance of both the national party and the Ohio SWP, and interference with their political activities. *Id.* at 99-100. The Supreme Court concluded that in light of the "substantial evidence of past and present hostility from private persons and government officials against the SWP," Ohio's disclosure law could not be constitutionally applied to the SWP.
>
> I would like to request the full Campaign Legal Center memo be included in the record.

The Argument that the Executive Order Frustrates Congressional Intent

Opponents of the draft Executive Order also claim that it is an attempt at an end-run around Congress. This argument has no merit and makes no sense.

The Obama Administration is proposing to take steps that it appropriately can under its own authority to provide citizens with campaign finance information that is currently being hidden from the public.

The Executive Order is just one of various ways to provide citizens with important campaign finance information they have a fundamental right to know. Democracy 21 supports and is pursuing legislative, litigation and administrative avenues to ensure that citizens are provided with this campaign finance information.

The United States Congress can and should enact comprehensive legislation to require disclosure for all groups of the new campaign finance activities permitted by the *Citizens United* decision. But Congress has no monopoly on whether voters are informed about the campaign money being used to influence their votes and government decisions.

The President also has a right to act within the appropriate sphere of his powers, which include protecting the integrity of the Executive Branch contracting process.

The courts have a right to determine whether existing campaign finance disclosure laws are being properly interpreted and enforced by the Federal Election Commission. The Democracy 21 legal team joined by the Campaign Legal Center has filed a lawsuit on behalf of Representative Chris Van Hollen on this question that challenges FEC contribution disclosure regulations as contrary to law and as having eviscerated contribution disclosure requirements.

The widespread opposition to new campaign finance disclosure requirements voiced by Republican Members of Congress last year and this year is puzzling, particularly in light of the past history of consensus support for disclosure laws and the overwhelming public support for disclosure.

In the past, there has always been strong and broad bipartisan support on Capitol Hill for full and timely disclosure of campaign finance activities. Even the most vocal congressional opponents of various other campaign finance reforms have argued that full and timely disclosure of campaign finance activities is the one reform that makes sense.

Ten years ago, for example, Congress enacted new disclosure legislation to apply to 527 political organizations that were at the time raising and spending undisclosed money to influence federal elections.

The House passed the disclosure legislation for 527 groups by a vote of 385 to 39. Of the 217 House Republicans who voted, 178 Republican Members voted for the disclosure legislation. The Senate passed the disclosure legislation 92 to 6. Of the 54 Republican Senators who voted, 48 Republican Senators voted for the legislation.

In contrast, last year, two House Republicans and no Republican Senator voted for the DISCLOSE Act.

An article in *TalkingPointsMemo* (May 6, 2011) included comments made last year in support of disclosure by House Majority Leader Eric Cantor and House Majority Whip Kevin McCarthy:

> "Anything that moves us back towards that notion of transparency and real-time reporting of donations and contributions I think would be a helpful move towards restoring confidence of voters," Cantor told *Newsweek* right after the *Citizens*

United ruling.

McCarthy is quoted in the same article as sharing a similar philosophy.

"I watched in California campaign-finance reform and what's happened is...people now move money through central committees at the last minute so you don't get the transparency," he said. "It doesn't get [at] what the public thought was going to happen. The best way, the fairest way, is greater transparency. Let people understand where it is going and what's happening."

There is strong editorial support for the draft Executive Order. For example, according to a *New York Times* editorial (May 1, 2011):

When the Supreme Court legalized a new era of unrestrained corporate campaign spending, the court made a point of upholding disclosure of donors as an alternative safeguard for voters and the democratic process.

.....

President Obama should take the court up on its transparency blessing forthwith and sign a proposed executive order that would require government contractors to disclose their donations to groups that support or oppose federal candidates.

According to a*Los Angeles Times* editorial (May 5, 2011):

Twenty-seven Senate Republicans sent a letter to the White House arguing that requiring disclosure of contractors would have a chilling effect "if prospective contractors have to fear that their livelihood could be threatened if the causes they support are disfavored by the administration." Worse still, the Republicans say, it might pressure companies to support the administration's party - a variation on the Washington practice of "pay to play."

But that's wrong. Transparency - and scrutiny from the political opposition - would provide a check on any abuses. Disclosure is the solution, not the problem.

Government contractors can argue that they are being singled out. The easy remedy for that is to require that all contributions to all groups that engage in political activities be made public. Requiring disclosure by contractors is a first step, but it doesn't have to be the last.

According to a *Baltimore Sun* editorial (May 9, 2011):

What's particularly galling about the criticism of the proposed executive order is that it's been cast as an example of "pay-to-play" politics. The Republicans claim Democrats could make sure those applying for federal contracts are not donating to GOP causes.

> In reality, transparency requirements like those proposed by the White House actually protect against pay-to-play by forcing contractors to reveal their donations. Without that requirement, a company - Halliburton, let's say - can direct millions of dollars to get a member of Congress or president elected without anyone but those involved knowing about it.
>
> ....
>
> If Republicans want to level the playing field, let them pass a campaign finance reform law in Congress that covers not just federal contractors but all who give to third-party groups, including unions and other traditional Democratic allies.
>
> Of course, that raises the most nonsensical of GOP objections to the proposal, that it would chill free speech. Again, the implication is that a contractor who reveals a third-party political donation to the wrong cause (by which they mean giving to Republicans while a Democrat is in the White House) would be made to suffer.
>
> Really? If Joe Bag-of-Doughnuts gives $50 directly to a candidate for federal office, that modest donation must be disclosed to the world. That's the law. Why should corporations be able to hide behind third-party groups when they give $50,000 or $50 million? Exactly whose free speech is being slighted? Wouldn't any favoritism shown to companies that make political donations and subsequently land government contracts only be revealed by disclosure? The converse is also true - if the Obama White House suddenly stopped giving contracts to firms that donated to Republicans, it, too, would become public knowledge.
>
> .....
>
> In the end, revealing the political activities of companies that do business with the government can only lead to one thing: better government."

The Supreme Court clearly and unequivocally found in *Citizens United* that campaign finance disclosure laws were constitutional and necessary for the new campaign finance activities permitted by the Court's decision. The draft Executive Order would provide such information to citizens and taxpayers whose funds are being spent on government contracts and who have a basic right to know this information.

President Obama should move promptly to sign the Executive Order.

Congress should enact comprehensive disclosure legislation to require corporations, tax-exempt advocacy groups, business associations and labor unions to disclose the campaign finance activities that were permitted by the *Citizens United* decision.

May 4, 2011

The Hon. President Barack Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

RE: Move ahead promptly with the proposed transparency in government contracting executive order

Dear President Obama:

The undersigned organizations, on behalf of our members and supporters, write today to express our strong support for the April 13th draft executive order that would require full disclosure of campaign spending and contributions by business entities that seek federal government contracts. We encourage you to move ahead promptly with the executive order.

While federal and state laws generally attempt to prevent any action to reward or penalize government contractors based on their political expenditures, there is a widespread public perception that companies and their executives who provide the most generous campaign financial support to winning candidates are rewarded with the most lucrative contracts. On far too many occasions that perception has been validated by scandal and the disgrace, resignation or even conviction of some governmental officials.

The proposed executive order attacks the perception and the reality of such "pay-to-play" arrangements by shining a light on political spending by contractors. It simply requires that a business entity, as a condition of bidding on a government contract, disclose the campaign contributions and expenditures of the company, its senior management and affiliated political action committees for all to see, so the public may judge whether contracts are being awarded based on merit rather than campaign money.

Transparency of campaign money in the government contracting process is nothing new at the state level. In response to numerous contracting scandals, more than a dozen states have imposed specific campaign finance disclosure requirements on government contractors.

At the federal level, many government contractors already are required to disclose some of their campaign finance activities as they are required to disclose their PAC contributions and expenditures. The executive order would also require government contractors to disclose their newly-permitted campaign finance activities that were authorized by the Supreme Court decision in the *Citizens United* case.

The Supreme Court in *Citizens United* strongly supported disclosure for these new campaign finance activities stating that disclosure requirements "do not prevent anyone from speaking."

The Supreme Court also said in supporting disclosure:

> "Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests."

The flip side of transparency is secrecy and the specter of hundreds of millions of dollars in secret campaign cash coming from companies that derive much of their wealth from government contracts.

In order to keep in check actual or perceived corruption in government contracting, it is imperative that there be full disclosure of campaign contributions and expenditures by federal government contractors.

Sincerely,

Campaign Legal Center
Center for Corporate Policy
Center for Media and Democracy
Central Conference of American Rabbis
Citizen Works
Citizens for Responsibility and Ethics in Washington (CREW)
Common Cause
Consumer Watchdog
Corporate Ethics International/Business Ethics Network
Democracy 21
Democracy for America
Democracy Matters
Democrats.com
Dēmos
Illinois Campaign for Political Reform
League of Women Voters of the United States
Michigan Campaign Finance Network
National Community Reinvestment Coalition (NCRC)
Ohio Citizen Action's Money in Politics Project
OMB Watch
OpentheGovernment.org

Oregon State Public Interest Research Group (OSPIRG)
People for the American Way
Project on Government Oversight (POGO)
Public Campaign
Public Citizen
Sanford Lewis, Counsel, Investor Environmental Health Network
SEIU
Social Equity Group
TakeAction Minnesota
Union of Concerned Scientists
U.S. PIRG
Wisconsin Democracy Campaign
Wisconsin Voices

Domini
SOCIAL INVESTMENTS®

The Way You Invest Matters®

May 10, 2011

The Hon. President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Mr. President:

We are writing to you as a group of institutional investors deeply concerned about the risks presented by corporate political spending, to support you in signing the proposed executive order that would require full disclosure of campaign spending and contributions by business entities that seek federal government contracts. We strongly support this effort to ensure that the government contracting process is free of "pay to play" relationships.

As fiduciaries, we have been working for more than five years to engage corporations in which we hold stock on their direct and indirect political spending. We have urged hundreds of companies to adopt board oversight and commit to full disclosure of all political contributions made from the corporate treasury, including payments to trade associations and other tax exempt entities that are used for political purposes. Shareholder proposals seeking this level of disclosure and accountability averaged 30% support in the 2010 proxy season, a very strong endorsement from the investor community. In 2011, shareholder resolutions seeking such disclosure and oversight are being voted at over 50 company stockholder meetings. We believe such transparency helps protect investor interests and also is the responsible path to take.

In the wake of the Supreme Court's *Citizens United* decision, investors have increasingly engaged companies on their policies and practices regarding independent expenditures. We have found that in light of the significant risks involved, a growing number of companies have stated they are not interested in engaging in such spending, and several, including IBM, Wells Fargo, Colgate-Palmolive, UNUM and Microsoft, have adopted formal policies to prohibit or restrict it.

These efforts seeking disclosure have been successful with many leading companies. Currently, 85 large public companies, including more than half in the S&P 100, have committed to disclosure of their political spending policies, the details of the spending, and oversight. These companies are, presumably, already in compliance with the major parts of the proposed executive order, demonstrating that this is feasible.

We note that the U.S. Chamber of Commerce has stated it will use a range of options to stop this executive order. Ironically, many major companies that are Chamber members or sit on the Chamber Board already implement political spending disclosure and oversight, and a number of these also disclose payments made to trade associations. At least a third of the S&P 100 publicly disclose such payments.

As investors, we work to address the social and environmental implications of our investment decisions, and of corporate behavior. Corporate political activity presents significant risks to shareholder value, in the form of legal, reputational and operational risks. We have also addressed the risk that companies are

532 Broadway, 9th Floor | New York, NY 10012-3939 | TEL: 212-217-1100 | FAX: 212-217-1101
www.domini.com | info@domini.com | Investor Services: 1-800-582-6757 | DSIL Investment Services LLC, Distributor

financing issues or candidates that are at odds with their formal policies and values, such as company policies favoring a strong legislative approach to climate change, or those providing equal opportunities or establishing a commitment to diversity for their workforce.

Corporate political transparency allows investors to put together a more complete picture of the various risks to our investments. As broadly diversified investors, we must also keep an eye on the risks to our economy, our electoral process, and our political system that are presented by undisclosed and unaccountable corporate political spending.

Louis Brandeis said it best: "Sunlight is the best of disinfectants." Time has proven Brandeis right, again and again.

We strongly support your proposed executive order and urge you to sign it as soon as possible.

Sincerely,

Adam M. Kanzer
Managing Director & General Counsel
Domini Social Investments LLC
akanzer@domini.com

Timothy Smith
Senior Vice President
Director of ESG Shareowner Engagement
Walden Asset Management, a division of Boston Trust & Investment Management
tsmith@bostontrust.com

On behalf of their organizations and the following institutional investors and investor coalitions collectively managing more than $130 billion:

Lauren Compere
Managing Director
Boston Common Asset Management

Bennett Freeman
Senior Vice President
Sustainability Research and Policy
Calvert Investment Management, Inc.

Rian Fried, President
Clean Yield Asset Management

Ruth Rosenbaum, PhD
Executive Director
CREA: Center for Reflection, Education and Action

Dr. Dominique Biedermann
Executive Director
Ethos Foundation
Switzerland

George R. Gay, CFP®, AIF®
Chief Executive Officer
First Affirmative Financial Network, LLC

Kristina Curtis
Senior Vice President
Green Century Capital Management

John Harrington
President and CEO
Forrest Hill, PhD
Senior Portfolio Manager
Harrington Investments, Inc

Laura Berry
Executive Director
Interfaith Center on Corporate Responsibility

Sanford Lewis
Counsel
Investor Environmental Health Network

Sean Morgan, President
Christine Jantz, CIO & Portfolio Manager
Jantz Morgan LLC

Marie J. Gaillac
Corporate Responsibility Corporation
JOLT, CRI

Joyce K. Moore, CHFC, LUTCF
President
Joyce Moore Financial Services

Jeffrey Scales, CFP®, AIF®
Managing Principal
JSA FINANCIAL GROUP

Peter W. Krull
President
Krull & Co.

Susan Smith Makos
Director of Social Responsibility
Mercy Investment Services, Inc.

Barbara Jennings, CSJ
Coordinator
Midwest Coalition for Responsible Investment

Luan Steinhilber
ESG Analyst/Director of Shareholder Advocacy
Miller/Howard Investments, Inc.

Lance Lindblom, President and CEO
Nathan Cummings Foundation

Michael Kramer, AIF®
Managing Partner & Director of Social Research
Natural Investments LLC

Julie N.W. Goodridge, CEO
NorthStar Asset Management, Inc.

Julie Fox Gorte, Ph.D
Senior Vice President for Sustainable Investing
PaxWorld Management LLC

Sr. Pamela Buganski, SND
Sisters of Notre Dame of Toledo, OH

Roberta Mulcahy, ssj
Socially Responsible Investment Coordinator
Sisters of St. Joseph of Springfield MA

Ron Freund
Duncan Meaney
Social Equity Group

Lars M. Lewander
President
Spring Water Asset Management, LLC

Thomas E. Ellington, II
Shareholder Advocacy
The Sustainability Group at Loring, Wolcott & Coolidge Trust LLC

Shelley Alpern
Vice President
Director, ESG Research & Shareholder Advocacy
Trillium Asset Management

Patricia Addeo
Senior Associate, Wealth Manager
Veris Wealth Partners

Mary Voorhes
W.G. Voorhes Trust

Robert Zevin
Chairman
Zevin Asset Management

Mr. CUMMINGS. Thank you very much and with that I yield back.

Chairman ISSA. I thank the gentleman. And we now recognize the chairman of the Committee on Small Business, Mr. Graves.

Chairman GRAVES. Good afternoon. I want to thank Chairman Issa for working with me on this joint hearing and look forward to hearing all of our witnesses today and their testimony.

All Americans should be concerned by a policy that directly and purposefully injects political giving into the contracting process, the integrity of which every single person here has worked so hard to maintain. Ensuring that contracts are awarded based on the merits to be offered, free of political and other inappropriate bias, is a fundamental responsibility of the procurement system of committees and Congress.

As chairman of the Small Business Committee, I would like to address the impact of this proposal to small businesses. Small businesses play a vital role in the U.S. economy in general and in the government contracting process in particular. There are over 360,000 small businesses seeking to do business with the Federal Government. Small businesses received over a $100 billion in Federal contracts in fiscal year 2010. That is over 20 percent of all Federal contracts. Previous statements from the President have recognized that small businesses have the capability, the flexibility, and innovation needed by Federal agencies, and that small business participation keeps Federal contracting costs down.

Why then has he not publicly rejected an Executive order that will force small businesses out of this market where they are clearly needed?

Make no mistake, the compliance burden of this Executive order will force small businesses out of the market and keep them from entering, since small business—some small businesses will be ill-prepared to comply with the proposed Executive orders, record-keeping requirements, reporting regimes, potential criminal liability.

Small businesses already bear a disproportionate share of the regulatory burdens. Businesses with fewer than 20 employees annually spend 45 percent more per employee in larger firms to comply with the Federal regulations. Given that small businesses create 64 percent of net new jobs, I want these businesses growing, not stifled by unnecessarily duplicative and punitive regulations.

Any small business brave enough to face the compliance burden of the Executive order will need to worry about their contributions being used against them by competitors alleging the improper disclosure by politically motivated appointees, which will again deter small business participation.

Contracting officers under pressure from political appointees may choose not to award any contract to small businesses who may have been unable to donate to a political entity, but who nonetheless may have the appropriate winner.

Even if this hypothetical never materializes, the fear of improper scheming will remain and will have a chilling effect on small businesses and their willingness to compete in the Federal marketplace.

The Obama administration is already failing to meet the congressionally mandated small business goals, and the President should

be focused on bringing small businesses into the Federal marketplace. Instead, this proposed Executive order will drive small businesses away. While this would be harmful at any time, it is especially ill-conceived now when our economy needs vibrant, small business participation at every level. And I hope this hearing is going to convince the President to disavow this proposal.

You know, the way I see it, this is a very simple argument and has already been pointed out. After the fact, after the contract has been awarded, anybody can find out which small businesses gave to whom, and that process is completely open. But doing this ahead of the fact, doing this ahead of the contract award and having that information out there, can serve no other purpose than to be politically motivated or politically charged or preventing somebody from getting a contract just based on who they are giving to and why they are giving it.

I think it is a very simple argument. Again, I want to thank all of our witnesses for their participation and the Government and Oversight Committee for hosting the hearing today. I thank the chairman.

Chairman ISSA. I thank the chairman.

We now recognize the ranking member of the Small Business Committee, the gentlelady from New York, Ms. Velázquez, for her opening statement.

Ms. VELÁZQUEZ. Thank you, Chairman Graves and Chairman Issa.

Contracting with the Federal Government represents an unparalleled opportunity for small businesses. In fact, the Federal Government is the world's largest purchaser of goods and services. For many of this, government contracts provides reliable, sustainable growth. Last year alone, Federal contracting accounted for $540 billion in taxpayers' dollars and small businesses received over $100 billion of those funds.

Given the importance and enormity of the fairer procurement process, the American taxpayer deserves to know that when contracts are awarded, it is on the merits, not because of political contributions. While contracts should be awarded without such interference, recent court rulings on political spending and current campaign finance laws making their validity of the procurement process to remain insulated from improper political influence.

Under the current campaign finance system, much of the contractors' political spending may be undisclosed and unknown to the public. And because of the Supreme Court's recent ruling, big corporations can now contribute unlimited sums to influence Federal campaigns. These undisclosed sums have great potential to improperly influence Federal procurement and disadvantage persons that play by the rules.

In 2010, there was nearly $300 million in spending on elections by organizations not directly affiliated with political campaigns. Nearly 50 percent of that total was spent by organizations that did not disclose their donors. This type of spending is increasing rapidly, outpacing spending by political parties on congressional campaigns by nearly $100 million in 2010.

As undisclosed spending increases, so does the potential for improper influence in fair procurements. The Obama administration

draft Executive order increases taxpayer transparency regarding fairer contracts and levels the playing field by publicly disclosing campaign contributions. Yet while it is important to reform the system to prevent potential improper influence and to engender public trust, it is paramount that small business concerns be put first. This is particularly important because small businesses are at the forefront of the economic recovery, generating nearly two out of every three new jobs.

Historically, small businesses have faced many challenges in entering the Federal marketplace. Therefore, as we look to work to level the playing field for businesses, we must also work carefully to minimize the burden of disclosure requirements on small businesses. There are a number of sensible policy options to reduce the burden of disclosure on small businesses. To this end, as the administration's rulemaking moves forward, this committee will be certain to carefully review and comment on this process so that commonsense disclosure requirements are adopted and burden is minimized.

In closing, companies that do business with the government, and thus with taxpayers, should be transparent in their political giving. However, as we seek to increase accountability in the Federal marketplace, the needs of small businesses must be a priority and we must take great care not to discourage their participation in small businesses.

I look forward to today's testimony and thank the witnesses for their participation.

I yield back.

Chairman ISSA. I thank the gentlelady.

Without objection, I would like to submit for the record a letter signed by Senators McCaskill and Lieberman, expressing concern about this Executive order; comments made to the Associated Press by Minority Whip Steny Hoyer expressing his concerns; comments made by Mr. Connolly of this committee reported in the Washington Post.

Additionally, I would like to submit the following statements for the record: a statement from the chair of the Federal Election Commission; a statement from the vice chair of the Federal Election Commission; a statement from the president of the Business Coalition for Fair Competition; a statement of Paul Miller on behalf of the Virginia Small Business Partnership; and a statement by Joel Gora, professor at Brooklyn Law School.

Without objection, so ordered.

[The information referred to follows:]

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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510–6250

May 12, 2011

President Barack Obama
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

We are writing regarding a recent draft Executive Order that would require businesses seeking contracts with the federal government to disclose a broad range of political contributions and expenditures. As Chairman and Ranking Member of the Senate Homeland Security and Governmental Affairs Committee and Chairman and Ranking Member of the Committee's Subcommittee on Contracting Oversight, we have concerns specifically related to the draft Executive Order's potential impact on the contracting process.

The draft Executive Order requires that businesses disclose political contributions and expenditures when making offers for federal contracts. According to Section One, this requirement is intended to help ensure that "every stage of the contracting process … be free from the undue influence" of politics and to ensure that taxpayers "have the utmost confidence" that the contracting process is fair. We share your commitment to ensuring that the federal contracting process is not influenced by political activity or favoritism.

However, we are concerned that requiring businesses to disclose their political activity when making an offer risks injecting politics into the contracting process. Federal contracting law already precludes the consideration of political activity in evaluating contract offers. Under the Federal Acquisition Regulation, the award of a contract must be based on the evaluation of quality, price, past performance, compliance with solicitation requirements, technical excellence and other considerations related to the merits of an offer. The requirement that businesses disclose political expenditures as part of the offer process creates the appearance that this type of information could become a factor in the award of federal contracts.

We are also concerned about the impact that this draft Executive Order may have on the federal government's acquisition workforce. Considering that the acquisition workforce is already straining to adequately manage and oversee federal contracts, the draft Executive Order may create new, unnecessary burdens for these officials.

In addition, we have questions regarding the draft Executive Order's requirement that the disclosure information be included on data.gov. We have tracked closely the Administration's ongoing efforts to create one integrated system for federal contracting information, including

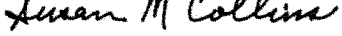
President Barack Obama
May 12, 2011
Page 2

contractor certifications and disclosures. The draft Executive Order's requirement to create a new repository for this type of contractor information on data.gov may complicate these efforts.

We respectfully request that you consider these concerns. We look forward to continuing to work with your Administration.

Sincerely,

Joseph I. Lieberman
Chairman



Susan M. Collins
Ranking Member

Claire McCaskill
Chairman
Subcommittee on Contracting Oversight

Rob Portman
Ranking Member
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May 10, 4:17 PM EDT

No. 2 House Democrat against contractor disclosure

By LARRY MARGASAK
Associated Press

WASHINGTON (AP) -- The second-ranking House Democrat said Tuesday he opposes a White House proposal to require anyone seeking government contracts to disclose political contributions.

Rep. Steny Hoyer of Maryland, the party whip, placed himself on the same side as Republicans and the business community - and against liberal groups demanding more disclosure.

Hoyer told reporters that contractors should be chosen on the merits of their applications, their bids and their capabilities, not on their political donations.

President Barack Obama's disclosure order, drafted in April, has not yet been issued.

One of Obama's sharpest critics, Chairman Darrell Issa of the House Oversight and Government Reform Committee, has scheduled a hearing Thursday to hear from witnesses who believe the order would curb free speech and harm small businesses.

Hoyer told reporters, "It's not a requirement now. I don't think it ought to be a requirement. So I'm not in agreement with the administration on that issue."

Drafted April 13, Obama's proposal would require anyone submitting bids for government work to disclose two years' worth of political contributions and expenditures. The order would apply if the total exceeded $5,000 to a given recipient during a given year.

The total would include donations that officers, directors, affiliates and subsidiaries made to federal candidates and parties. But most important,

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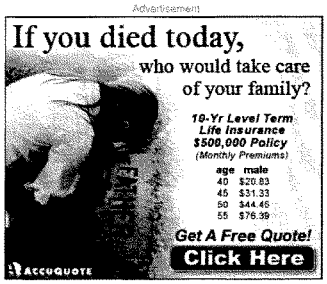

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it would cover donations to third-party entities that make independent political expenditures. Those donations are not disclosed currently.

Liberal groups that track campaign finance urge Obama to approve the order, so the public can identify at least some of the contributors to third- party groups such as the U.S. Chamber of Commerce. Collectively, these third-party groups spend millions of dollars to influence presidential and congressional elections, but their donors are not disclosed.

The director of the White House Office of Management and Budget, Jacob Lew, has declined Issa's invitation to testify at Thursday's hearing. Issa, in a letter to Lew on Monday, asked him to reconsider and threatened to issue a subpoena to force his future appearance.

Lew wrote Issa last week that he was unable to testify because the draft order "is still moving through the standard review and feedback process."

Hoyer, in his weekly session with reporters, said, "I think there are some serious questions as to what implications there are if somehow we consider political contributions in the context of awarding contracts."

He said the plan would raise questions if a Democratic contributor failed to win a contract with a Republican administration - or vice versa.

Hoyer represents a Maryland district in Washington's suburbs, an area rich in government contractors. His web page even provides advice on "Learning how to sell successfully to the U.S. government, the world's largest buyer of goods and services."

The draft order said it addresses "the perception that political campaign spending provides enhanced access to or favoritism in the contracting business."

Issa, in his letter to Lew, complained that the plan did not order disclosure of union contributions, "because unions and political advocacy groups receive millions of taxpayer dollars through federal grants."

Republicans appeared jubilant after learning of Hoyer's comments.

"I'm glad to see that somebody on the other side is standing up to this blatant attempt to intimidate people into either not contributing to causes the administration opposes or to the contrary," said Senate Republican leader Mitch McConnell of Kentucky. He said Obama was seeking to inject politics into government contracting, which he called "a truly outrageous suggestion."

The White House proposal would temper a portion of the Supreme Court's 5-4 campaign finance ruling in January 2010. The decision vastly increased the power of big business and unions to influence government decisions by freeing them to spend their millions directly to sway elections for president and Congress.

The ruling allows unions and corporations to make contributions to third party groups that spend money on politics. Those groups operate under a provision of the tax code that allows them to accept money for political activities without disclosing the donors. The executive order would undermine that secrecy if the donors bid for government contracts.

Fred Wertheimer, president of Democracy21, said of Hoyer's comments, "I just think he's wrong." The non-profit group is among the liberal organizations that have rallied in favor of the proposal.

"The reality is that government contractors have been making campaign finance disclosures for years," Wertheimer said, referring to donations to parties, political action committees and federal candidates. "This (the proposed order) picks up on additional disclosure that is necessary because of loopholes created" by the Supreme Court ruling.

Blair Latoff, spokeswoman for the U.S. Chamber, said, "Ensuring that no

administration has the capability of politically intimidating contractors is not a partisan issue." She said Hoyer's "belief that the government should award contracts based on merit for the job rather than political calculations is a belief the business community shares wholeheartedly."

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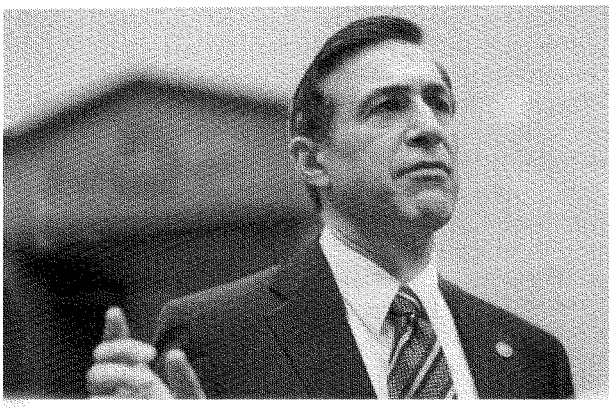
Posted at 12:35 PM ET, 05/11/2011

Washington Post

After subpoena threat, White House budget official to testify on contractor contribution disclosure

By Felicia Sonmez



A White House budget official will testify at a hearing Thursday following a subpoena threat from House Oversight Committee Chairman Darrell Issa (R-Calif.). (Joshua Roberts/Bloomberg)A White House budget official will testify Thursday at a joint congressional hearing on the Obama administration's proposal to require companies seeking federal contracts to disclose their political contributions.

The House Oversight and Government Reform Committee, which is holding Thursday's joint hearing together with the House Small Business Committee, announced Wednesday that Daniel Gordon, the Administrator for Federal Procurement Policy at the Office of Management and Budget, will testify on the draft executive order, which has yet to be issued.

The move follows a subpoena threat from Oversight Committee Chairman Darrell Issa (R-Ga.) and Small Business Committee Chairman Sam Graves (R-Ga.) as well as criticism from House Minority Whip Steny Hoyer (D-Md.), who told reporters Tuesday that he disagreed with the administration on the matter.

Both committees had originally invited OMB Director Jack Lew and Chief Performance Officer Jeffrey Zients to testify at the hearing, titled "Politicizing Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business?"

According to an Oversight Committee aide, Issa and Graves sent a letter to the White House on April 27 inviting both officials to testify. They did not hear back until Monday, when Lew sent a letter declining the invitation since the executive order was still in the process of being drafted.

Issa and Graves responded the same day in a letter to Lew stating that they were prepared to resort to the "compulsory process" of utilizing subpoena power if necessary. The White House then offered to make Gordon available, and Issa and Graves agreed, the aide said.

While Gordon likely won't be able to go into the details of the order since it's still being drafted, he is certain to get an earful from members who have expressed concerns.

The White House and Democrats have defended the order -- which echoes previous legislative efforts to counter the Supreme Court's ruling in the Citizens United case -- as a means of promoting transparency and accountability from federal contractors. Republicans have charged that it is an attempt to politicize the bidding process.

In the Citizens United case, the court ruled that companies can spend as much as they want to support or oppose individual candidates.

In addition to Hoyer, Rep. Gerry Connolly (D-Va.), a member of the Oversight Committee whose northern Virginia district is home to thousands of contractors, said Tuesday that while he believes the administration's intent is not to bring politics into the contracting process, the order could wind up having that effect.

"I understand and I support legislation to refine the Citizens United decision, which I think ranks as one of the most wretched Supreme Court decisions in American history," Connolly said.

"Having said that, I am concerned that, surely unintentionally, the administration's desire to get at transparency and accountability may also look like it's having – or will have – a chilling effect on the ability of people freely to participate in the political process and donate as they see fit," he continued. "So I think we've got to look at that before we embrace one approach or another."

Connolly added that he believed Thursday's hearing would provide an opportunity for members to have their questions on the executive order addressed by administration.

"I think we'll have more clarity after that testimony," Connolly said.

By Felicia Sonmez | 12:35 PM ET, 05/11/2011

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Reporting Requirements and

the Treatment of Federal Contractors

Under the Federal Election Campaign Act and FEC Regulations

Statement of Cynthia L. Bauerly, Chair

Federal Election Commission

Submitted on May 10, 2011 to the

House Committee on Oversight and Government Reform and the

House Committee on Small Business

Chairmen Issa and Graves, Ranking Members Cummings and Velázquez, and Members of the Committees, thank you for the opportunity to submit written testimony to the House Committee on Oversight and Government Reform and the House Committee on Small Business in advance of the Committees' joint hearing on May 12, 2011. As requested, this statement is intended to provide the Committees with background on the existing framework for disclosure of campaign contributions, particularly with respect to government contractors, under the Federal Election Campaign Act (the "Act") and Federal Election Commission regulations. The Committees have also asked about the interplay between the Draft Executive Order (the "Draft EO") and the existing regime.

I would like to emphasize the scope of the Commission's expertise on some of the topics addressed by the upcoming hearing. The Commission is an independent regulatory agency created to administer and enforce the Act. It does not regularly deal with either issues particular to Federal contractors, because, as explained in more detail below, they are prohibited from making contributions under the Act, or issues particular to small businesses because the Act makes no distinction based upon that status. Instead, this statement focuses on providing the Committees with the requested overview of the existing framework of Federal campaign finance laws.

I. Treatment of Federal Contractors Under the Federal Election Campaign Act and Commission Regulations

The Act and Commission regulations currently limit political activity by any person who, under certain conditions, enters into any contract with the United States or any department or agency. *See* 2 U.S.C. 441c; 11 CFR Part 115. The Act prohibits Federal contractors from, for a certain time period, "directly or indirectly" making "any contribution of money or other things of value, or promising expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use." 2 U.S.C. 441c(a)(1). The Act also prohibits knowingly soliciting any such contribution from a Federal contractor for political activity. 2 U.S.C. 441c(a)(2).

Correspondingly, Commission regulations prohibit Federal contractors from making, either directly or indirectly, any contribution or expenditure of money or other thing of value, or promising expressly or impliedly to make any such contribution or expenditure to any political party, committee, or candidate for Federal office or to any person for any political purpose or use. This prohibition does not apply to contributions or expenditures in connection with State or local elections. 11 CFR 115.2(a). The prohibition is in force between the earlier date of the commencement of negotiations or the sending out of requests for proposals and the later date of the completion of performance of the contract or termination of negotiations for the contract. 11 CFR 115.1(b). Commission regulations also prohibit any person from knowingly soliciting such contributions from a Federal contractor. 11 CFR 115.2(c).

Despite the general prohibition, the Act allows Federal contractors to establish and administer separate segregated funds ("SSFs") for the purpose of influencing Federal elections, unless otherwise prohibited. *See* 2 U.S.C. 441c(b). Under the Act, corporations, labor organizations and incorporated membership organizations may sponsor SSFs, popularly called PACs, which solicit contributions from a limited class of individuals and use these funds to make contributions and expenditures to influence Federal elections. 2 U.S.C. 431(4)(B); 441b(b). As the sponsor (i.e., the "connected organization") of the SSF, the corporation, labor organization or incorporated membership organization may absorb all the costs of establishing and operating the SSF and soliciting contributions to it. These administrative expenses are fully exempted from the Act's definitions of "contribution" and "expenditure." 2 U.S.C. 441b(b); 11 CFR 114.1(a)(2)(iii).

The Commission has further interpreted and implemented these regulations in Advisory Opinions and enforcement actions, particularly in defining who meets the definition of a Federal contractor. For example, the Commission has concluded that an individual who has entered into a personal services contract in his individual capacity with a Federal government agency is considered a Federal contractor and may not make contributions. Advisory Opinion ("AO") 2008-11 (Lawrence Brown). The Commission has also concluded that a law firm organized as a partnership representing the Federal Deposit Insurance Corporation and the Resolution Trust Corporation would be considered a Federal government contractor if the agencies compensate the firm from funds containing Congressional appropriations. AO 1990-20 (Bradbury, Bliss & Riordan). On the other hand, the Commission has concluded that a law firm partner and

associate who received appointments to the Federal panel of trustees for bankruptcy cases are not considered Federal contractors. AO 1988-49 (Lawyers for Better Government Fund – Federal).

There have been few recent occasions to address matters implicating these rules, in part because prior to the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), corporations and labor organizations were generally prohibited from making contributions or expenditures in connection with a Federal election. *See* 2 U.S.C. 441b. Since most Federal contractors are incorporated entities, the Commission has not had many opportunities to consider the independent provisions that specifically address contractors. *See, e.g.*, *FEC v. Weinsten*, 462 F. Supp. 243, 249 (S.D.N.Y. 1978) (concluding that considerations regarding treatment as corporation were the same as treatment as contractor). In the past, these rules were primarily implicated by sole proprietorships, partnerships, and membership organizations that are Federal contractors. Now that the Supreme Court has struck down the statutory prohibition on expenditures by corporations and labor organizations, the rules regarding contractors may require more frequent consideration.

II. Reporting Requirements for Political Committees, Independent Expenditures and Electioneering Communications

Even though government contractors are currently prohibited from making, either directly or indirectly, any contribution or expenditure in connection with a Federal election, certain individuals and entities associated with government contractors may engage in permissible political activity. *See* 11 CFR 115.4; 115.5; 115.6. When they do, they must adhere to existing disclosure laws. When a contractor establishes an SSF, the SSF must disclose its campaign contributions and expenditures. Any campaign contributions from a contractor's SSF or its stockholders, officers, or employees would have to be reported by the recipient political committee. While such reporting will indicate the source of these contributions, it will not necessarily indicate connections between a given individual contributor and any government contractor with which that contributor is associated.[1] The Act also requires persons who make Independent Expenditures or Electioneering Communications to report certain information to the Commission.

A. Political Committees

The Act requires political committees to file periodic reports disclosing the funds they raise and spend. 2 U.S.C. 434(a). Candidates must identify, for example, all committees that give them contributions, and they must identify individuals who give them more than $200 in an election cycle. Additionally, they must disclose expenditures exceeding $200 per election cycle to any individual or vendor. If a government contractor that is permitted to establish an SSF

[1] The Act and Commission regulations require the reporting of the name, mailing address, occupation and name of employer of individuals whose contributions exceed $200 in an election cycle. 2 U.S.C. 431(13); 11 CFR 100.12. If the treasurer of a political committee can show that best efforts have been used to obtain, maintain and submit such information, the Committee's report will be considered to be in compliance with the Act. 2 U.S.C. 432(i); 11 CFR 104.7. Even when a report includes complete and accurate identifying information, it cannot ensure that all relationships between a given contributor and government contractor will be set forth.

does so, that SSF, like all SSFs, is a "political committee" within the meaning of the Act. 2 U.S.C. 431(4)(B). Accordingly, the SSF must report to the FEC all of its receipts (including contributions it receives) and all of its disbursements (including contributions and expenditures that it makes). 2 U.S.C. 434(b).

B. Independent Expenditures

An Independent Expenditure is an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents." 11 CFR 100.16(a); *see* 2 U.S.C. 431(17). Every person that is not a political committee and that makes Independent Expenditures aggregating in excess of $250 with respect to a given election in a calendar year must file a report with the Commission containing certain information. 11 CFR 109.10(b); *see* 2 U.S.C. 434(c)(1).

A government contractor may not make Independent Expenditures or contributions for the making of an independent expenditure, because it is prohibited from making contributions or expenditures pursuant to 11 C.F.R. 115.2(a). Persons or entities, such as SSFs, associated with a government contractor may make Independent Expenditures from their own funds, or contribute funds to another for the purpose of making Independent Expenditures.

Under Commission regulations the person reporting the Independent Expenditure must include: (1) the person's name, mailing address, occupation and the name of his or her employer, if any; (2) the identification (name and mailing address) of the person to whom the expenditure was made; (3) the amount, date and purpose of each expenditure; (4) a statement that indicates whether such expenditure was in support of, or in opposition to, a candidate, together with the candidate's name and office sought; and (5) a verified certification as to whether such expenditure was coordinated with a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. 11 CFR 109.10(e).

The Act states that persons who make Independent Expenditures exceeding $250 per calendar year must report contributors that make contributions in excess of $200 in a calendar year. 2 U.S.C. 434(b)(3)(A); 434(c)(1). The Act goes on to state that such persons must also report the identification of any person who makes a contribution in excess of $200 "for the purpose of furthering an independent expenditure." 2 U.S.C. 434(c)(2)(C).

In *Citizens United*, the Court invalidated the statutory prohibition on the making of Independent Expenditures by corporations and labor organizations. However, the Court upheld the relevant disclosure requirements, stating that "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." 130 S. Ct. at 916. In light of the Supreme Court's decision in *Citizens United*, it may be appropriate for the Commission to revisit its regulations regarding the reporting of Independent Expenditures.

Additionally, U.S. Representative Chris Van Hollen has filed a Petition for Rulemaking requesting that the Commission "conduct a rulemaking to revise and amend 11 C.F.R. § 109.10(e)(1)(vi), the regulation relating to disclosure of donations made to persons, including corporations and labor organizations, which make Independent Expenditures, in order to conform the regulation with the law." Petition at 1. The essence of Representative Van Hollen's petition is that, while the statute requires disclosure of each person who makes a contribution or donation of more than $200 to the person making the Independent Expenditures, the regulation requires disclosure only of those who make a contribution or donation "for the purpose of furthering the reported independent expenditure." *See* Petition at 3. According to the petition, the regulation is inconsistent with the statute. *Id.*

C. Electioneering Communications

An Electioneering Communication is, with certain exceptions, any broadcast, cable or satellite communication that (1) refers to a clearly identified candidate for Federal office; (2) is made within 60 days before a general, special, or runoff election for the office sought by the candidate or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (3) in the case of a communication that refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate. 2 U.S.C. 434(f)(3). All government contractors may now make Electioneering Communications because they are not, by definition, expenditures under the Act, 2 U.S.C. 434(f)(3)(B)(ii), and, after *Citizens United*, the specific ban on corporations making Electioneering Communications is no longer valid.

Every person who makes a disbursement for the cost of Electioneering Communications aggregating in excess of $10,000 in a calendar year must file a reporting statement. 2 U.S.C. 434(f)(1). These statements must include, among other things: (1) the identification of the person making the disbursement for the Electioneering Communication, as well as the identification of any person sharing or exercising direction or control over the activities of such person, (2) if the person is not an individual, the principal place of business of the person, (3) the amount of each disbursement over $200 for the Electioneering Communication, and (4) all identified candidates referred to in the Electioneering Communication as well as the election in which those candidates are running for office. 2 U.S.C. 434(f)(2)(A)-(D). If the Electioneering Communication was financed from funds in a segregated bank account, the person sponsoring the ad is required to disclose the names and addresses of contributors of $1,000 or more to that segregated bank account 2 U.S.C. 434(f)(2)(E). By contrast, if the Electioneering Communication was financed by general treasury funds of the entity making the ad, the entity is required to report all contributors of $1,000 or more to that entity. 2 U.S.C. 434(f)(2)(F).

In *Citizens United*, the Court also invalidated the statutory prohibition on the making of Electioneering Communications by corporations and labor organizations. Accordingly, corporations and labor organizations making Electioneering Communications are no longer subject to the restrictions in 11 CFR 114.15.[2] Because the Commission's regulations regarding

[2] The regulation at 11 CFR 114.15 was promulgated in 2007 in response to the Supreme Court's decision in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), which held that Electioneering Communications by corporations and labor organizations could not be prohibited unless they contain the functional equivalent of express advocacy.

the reporting of Electioneering Communications were promulgated to reflect the framework of the Supreme Court's decision in *FEC v. Wisconsin Right to Life*, these rules are in need of clarification in light of the *Citizens United* decision.

Current Commission regulations specify the contents of reports filed by all persons when they make Electioneering Communications.[3] The information that must be reported depends on who is making disbursements for Electioneering Communications and how that person pays for them. *See* 11 CFR 104.20 (c)(1)-(9).

Current paragraph (c)(7)(i) states that if a person pays for Electioneering Communications exclusively from a segregated bank account that accepts funds only from individuals who are United States citizens, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20), then the Electioneering Communications may contain the functional equivalent of express advocacy, and the person paying for the electioneering communication must report the contributors of $1,000 or more to that segregated bank account since the first day of the preceding calendar year.

Similarly, current paragraph (c)(7)(ii) states that if a person paying for Electioneering Communications does so solely from a segregated bank account established to pay for Electioneering Communications that do not contain the functional equivalent of express advocacy, then the person paying for the electioneering communication must report contributors whose donations aggregated $1,000 or more since the first day of the preceding calendar year. Current paragraph (c)(7)(ii) differs from current paragraph (c)(7)(i) in that the segregated bank account is not limited to donations solely from individuals.

Current paragraph (c)(8) requires the reporting of the name and address of each person who donated an amount aggregating $1,000 or more within a certain time frame to the person making the electioneering communication if (1) the electioneering communication was not funded exclusively by one of these segregated bank accounts described in paragraph (c)(7), and (2) was not made by a corporation or labor organization pursuant to 11 CFR 114.15.

For Electioneering Communications made by corporations and labor organizations pursuant to 11 CFR 114.15, the rule at 11 CFR 104.20(c)(9) currently states that information about donors must be reported only if the donations aggregating to $1,000 or more were "made for the purpose of furthering Electioneering Communications." 11 CFR 104.20(c)(9).

The adequacy of the Commission's regulations regarding the disclosure of Electioneering Communications have been challenged and are likely to remain in dispute for the near future.

Following the Supreme Court's decision in *Citizens United*, this exception is superfluous. The Commission has received a petition for rulemaking from the James Madison Center proposing the elimination of several provisions implementing the statutory prohibition on Independent Expenditures and Electioneering Communications by corporations and labor organizations, including 11 CFR 114.15.

[3] Political committees do not file these reports because such spending by political committees is reported as an expenditure. 2 U.S.C. 434(f)(3); *see also* 11 CFR 104.20(b).

The Commission has recently been sued by Representative Chris Van Hollen regarding paragraph (c)(9) of the regulation. Representative Van Hollen's lawsuit alleges that "[t]he challenged regulation, 11 C.F.R. § 104.20(c)(9), is arbitrary, capricious, and contrary to law because it is inconsistent with a provision of the Bipartisan Campaign Reform Act ('BCRA') – BCRA § 201, codified at 2 U.S.C. § 434(f) -- that the regulation purports to implement. As a consequence, the regulation has frustrated the intent of Congress by creating a major loophole in the BCRA's disclosure regime by allowing corporations, including non-profit corporations, and labor organizations to keep secret the sources of donations they receive and use to make 'electioneering communications.'" Complaint at 1.

III. The Draft Executive Order

As requested, the relationship between the requirements of the Act and those that appear to be required by the Draft EO will be addressed. At the outset, the Draft EO provided by the Committees is not final, not signed by the President, and is subject to change at any point. Accordingly, any comments on the Draft EO are necessarily limited to the existing draft and may be inapplicable to any revised version.

Moreover, the ability to determine the scope of any regulatory overlap is limited by the fact that the Draft EO, if adopted, requires the Federal Acquisition Regulatory Council to provide further guidance on its implementation. *See* Draft Sections 2, 4. Those regulations would presumably include detail about the specifics of the certification required and the necessary disclosure, including to what entity, frequency and form. Without the implementing regulations, the manner by which persons seeking Federal contracts would disclose and certify their political activity cannot be known with certainty. For example, it is not clear whether the Draft EO requires those seeking Federal contracts to make the disclosure to the entity with contracting authority or to data.gov, or whether disclosures that have been made via existing requirements(e.g., to the FEC by the recipient committees in the case of contributions, or by the entity making Electioneering Communications or Independent Expenditures) would suffice. In addition, because the Draft EO is not specific as to who is to make the certification, it is possible that an agency's contracting officer would be required to make the certification that the disclosures had been made prior to making an award. Again, any regulations implementing the Draft EO would presumably set out the disclosure and certification procedure.

Certainly some of the information that the Draft EO requires to be disclosed is already publicly available. However, as mentioned previously, existing reporting will not necessarily reveal the connections between those engaging in political activity and the government contractors with which they are associated. Additionally, one potential effect of the Draft EO is that it could provide for a consolidated location for this information, simplifying public access to the data.

A. Time Frame

As noted above, under the Act and Commission regulations, Federal contractors are prohibited from making contributions from the earlier date of the commencement of negotiations or the sending out of requests for proposals and later date of the completion of performance of

the contract or termination of negotiations for the contract. The Draft EO does not prohibit any political activity and narrowly focuses on reporting and thus does not directly intersect with the statutory prohibition. However, the timeframe for disclosure of contributions in the Draft EO is not coterminous with the prohibition contained the Act. The Draft EO requires disclosure of contributions beginning two years from the submission of an offer. Of course, at some point, all successful bidders who may have been required to report under the Draft EO will become subject to the Act's prohibition, because it looks back to the beginning of the contracting process. Nonetheless, in many cases there may be a period where entities covered by the EO will be subject to its reporting requirements prior to the point that the prohibitions in the Act become applicable to it. Finally, it bears mentioning that while the reporting provisions of the Draft EO and the prohibition in the Act are in place for specified periods of time, the general reporting requirements of the Act are ongoing.

B. Contributions and Expenditures

The Draft EO Section 2(a) states that the disclosure shall include all contributions or expenditures to, or on behalf of, Federal candidates, parties or party committees made by the biding entity, its directors or officers, or any affiliates or subsidiaries within its control. Under current law, any contribution to a candidate committee, party committee or political committee over $200 would be reported to the FEC by the recipient committee. Expenditures on behalf of Federal candidates or committees that are made in coordination with them may, under some circumstances, be considered in-kind contributions under the Act and, if so, would be reported by the recipient as a contribution. The Act currently focuses reporting obligations in these instances on the recipient of the contributions rather than the contributors. As explained above, those making Independent Expenditures and Electioneering Communications are required to report them to the FEC.

C. Contributions to Third Party Entities

The Draft EO also addresses some political spending that is presently not reportable to the Commission. Section 2(b) of the Draft EO states that disclosure shall include: Any contribution made to third party entities with the intention or reasonable expectation that parties would use those contributions to make Independent Expenditures or Electioneering Communications. The Act requires political committees to report all contributions and expenditures. To the extent the third party entities identified in Section 2(b) are political committees under the Act, contributions to them would be reported to the FEC by the committee. To the extent that the third party entities are not political committees, as defined by the Act, contributions to such entities may not be reported to the FEC, outside the circumstances described above with respect to Electioneering Communications and Independent Expenditures. Disclosure of contributions to third party entities that are not political committees would represent more comprehensive and thorough disclosure of political spending than currently required by the Act or Commission regulations.

IV. Conclusion

Thank you for the opportunity to provide a statement regarding the existing framework for government contractor contributions and disclosure of contributions. The Commission stands ready to assist the Committees with any additional information it may be able to provide.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

The Honorable Chairman Darrell E. Issa, Ranking Member Elijah Cummings, and
Members of the House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Chairman Sam Graves, Ranking Member Nydia Velázquez, and
Members of the House Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515

May 10, 2011

Dear Chairmen Issa and Graves, Ranking Members Cummings and Velázquez, and Committee Members,

Thank you for the invitation to provide this statement on the White House's proposed Executive Order on "Disclosure of Political Spending by Government Contractors." I am pleased to submit my comments along with those of my colleague, Chair Cynthia Bauerly, with whom I have served on the Federal Election Commission since we both joined the agency in July 2008. The following comments may, in certain respects, supplement those of my colleague; at other points my remarks may present an alternative view. The complexities of campaign finance law and the First Amendment invariably result in differing viewpoints.

From my perspective as an FEC commissioner, the draft Executive Order may introduce additional complexity to an area of the law that some would argue already places undue burdens on core First Amendment rights. As things stand, civic-minded citizens and groups have to contend with at least 171 pages of statute, 366 pages of regulations, and thousands of pages of advisory opinions.

Addressing the reporting provisions in the order in which they are presented in the draft Executive Order, the proposal would add to this complex body of law and:

- Create duplicative reporting that may confuse not only firms competing to do business with the federal government, but also for government agency contracting officials;
- Set forth an additional, vague, and potentially unconstitutional reporting requirement; and
- Encroach upon the exclusive domain of the Federal Election Campaign Act of 1971, as amended (the "Act," or the "FECA").

The Draft Executive Order May Impose Burdensome and Redundant Reporting Requirements

To the extent the following contributions aggregate in excess of $5,000 during any calendar year, Section 2 of the draft Executive Order would require prospective contractors to report:

(a) All contributions or expenditures to or on behalf of federal candidates, parties or party committees made by the bidding entity, its directors or officers, or any affiliates or subsidiaries within its control; and

(b) Any contributions made to third party entities with the intention or reasonable expectation that parties would use those contributions to make independent expenditures or electioneering communications.

The requirements in Section 2(a) of the Executive Order may, to a large extent, impose additional and redundant reporting burdens on prospective contractors for information on certain contributions that is already readily available on various FEC disclosure reports.

Under the FECA and the FEC's implementing regulations, all political committees (including candidate committees, political party committees, "separate segregated funds" of unions and corporations, and "non-connected" committees that are formed separately from any union or corporation) already must report and itemize all contributions they receive from individuals aggregating in excess of $200 per calendar year, as well as all contributions they receive from any other political committees.[1] This itemized reporting includes, among other information, the names of individual contributors' employers. Moreover, in two advisory opinions issued last year, the FEC has extended these reporting requirements to the unlimited contributions, whether by individuals, unions, or corporations, made to independent-expenditure-only political committees that arose after the Supreme Court's *Citizens United* decision (so-called "Super PACs").[2]

Additionally, to the extent the draft Executive Order's requirement to report contributions made by a bidding entity's "affiliates or subsidiaries" may include whatever separate segregated fund ("SSF," or "PAC") it has formed, SSFs are already required under existing law to report all

[1] 2 U.S.C. § 434(b)(3); 11 C.F.R. § 104.8.

[2] FEC Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten). It has been suggested that, after *Citizens United*, although corporations are no longer prohibited from making expenditures, Section 441c(a) of the Act nevertheless continues to prohibit government contractors from making any contributions "for any political purpose," which may include contributions to independent-expenditure-only committees. Additionally, 11 C.F.R. § 115.2. which the FEC has not yet revisited, continues to prohibit government contractors from also making any "expenditures . . . for any political purpose." However, if government contractors continue to be prohibited from making either contributions or expenditures for any political purpose, then much of the proposed Executive Order would be moot, as the spending it purports to require to be reported would be illegal in the first instance. For the purposes of this memorandum, we assume, as the proposed Executive Order apparently does, that government contractors are no longer prohibited from making political expenditures. And if government contractors may fund independent expenditures directly, then it stands to reason that they also may make independent expenditures indirectly by funding other entities that sponsor such communications.

of their disbursements that aggregate in excess of $200 per calendar year to any recipient.[3] Furthermore, all sponsors of electioneering communications aggregating in excess of $10,000 per calendar year already must report detailed information about all contributors who gave an aggregate of $1,000 or more in the preceding calendar year "for the purpose of furthering electioneering communications."[4] Similarly, individuals or entities that are not political committees[5] making independent expenditures exceeding $250 per calendar year already must report each "contribution in excess of $200" given to the sponsor "for the purpose of furthering the reported independent expenditure."[6]

Thus, with respect to direct contributions to candidate- , party- , and other political committees, and with respect to disbursements for independent expenditures and electioneering communications, much of the draft Executive Order appears to require bidding entities to gather independently information that is already reported under existing law on various FEC reports, thereby introducing additional complexity to the bidding process. Not only that, it also would require firms to canvass all of their officers and directors for information on political contributions that those individuals make with their personal funds, and would essentially put firms in the uncomfortable position of monitoring their directors' and officers' personal political activities. Moreover, to the extent this requirement apparently is intended to ascribe to the firms the personal political activities of their directors and officers,[7] it blurs the distinction heretofore maintained in the Act and FEC regulations (and, in fact, strengthened by the ban on so-called "soft money" under the Bipartisan Campaign Reform Act of 2002) that direct contributions to candidate and party committees by individuals are to be made strictly in their personal capacities, and not on behalf of their employers.[8]

The following chart summarizes the existing FECA and FEC reporting requirements, and how Section 2(a) of the draft Executive Order may impose additional and redundant reporting burdens on prospective contractors:

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[3] 2 U.S.C. § 434(b)(6)(B). Of course, the recipients of SSF contributions also are required to report such contributions. *See supra* note 1.

[4] 2 U.S.C. § 434(f)(2); 11 C.F.R. § 104.20(b). It has been alleged that the Commission's regulation does not properly implement the statute in that the former introduces a "state of mind" qualification not contained in the latter. *Van Hollen v. Federal Election Commission*, No. 1:11-cv-00766-ABJ (D.D.C. filed Apr. 21, 2011), Complaint at ¶ 4. However, Section 434(f)(2) of the Act requires the reporting of "funds contributed" and "all contributors," and Section 431(20)(8)(A) of the Act in turn defines a "contribution" generally as anything "made by any person *for the purpose of* influencing any election for Federal office." (Emphasis added.) Accordingly, the Commission's regulation faithfully follows the statute.

[5] As discussed above, political committees must itemize all contributions aggregating in excess of $200 per calendar year from any contributor, regardless of their purpose.

[6] 2 U.S.C. § 434(c); 11 C.F.R. § 109.10(e)(1)(vi).

[7] As the draft Executive Order states, it is intended to address the purported "perception that political campaign spending provides enhanced access to or favoritism in the contracting process." In other words, the proposal is premised on the idea that the personal contributions of a firm's directors and officers are ascribed to the firm.

[8] Section 441f of the Act strictly prohibits anyone, including employees, from acting as "straw contributors" for anyone else.

Figure 1 – Draft Executive Order's potential reporting burdens for bidding entities

Spending type	Existing reporting	Draft Executive Order reporting	Analysis
Direct contributions to candidate-, party-, and other political committees	These contributions are prohibited[9]		
Direct contributions to independent-expenditure-only committees	All contributions aggregating in excess of $200 per calendar year to a recipient (reported by recipients)	All contributions aggregating in excess of $5,000 per calendar year to a recipient by bidding entity (reported by bidding entity)	Executive Order may create additional reporting burden for bidding entities concerning mostly duplicative information
Direct contributions to candidate-, party-, and other political committees by bidding entity's directors and officers	All contributions aggregating in excess of $200 per calendar year to a recipient (reported by recipients)	All contributions aggregating in excess of $5,000 per calendar year to a recipient by bidding entity's directors and officers (reported by bidding entity)	Executive Order may create additional reporting burden for bidding entities concerning mostly duplicative information
Direct contributions to candidate-, party-, and other political committees by bidding entity's PAC	(1) All contributions aggregating in excess of $200 per calendar year to a recipient (reported by recipients) (2) All disbursements aggregating in excess of $200 per calendar year made to a recipient (reported by PAC)	All contributions aggregating in excess of $5,000 per calendar year to a recipient by bidding entity's PAC (assuming reference to "affiliates or subsidiaries" in EO includes PACs) (reported by bidding entity)	Executive Order may create additional reporting burden for bidding entities concerning mostly duplicative information
Independent expenditures ("IEs") made by bidding entity	All IEs exceeding $250 per calendar year (reported by bidding entity)	All "expenditures... on behalf of federal candidates… or party committees" aggregating in excess of $5,000 per calendar year with respect to a beneficiary (reported by bidding entity)	Executive Order may create additional reporting burden for bidding entities concerning mostly duplicative information
Electioneering communications ("ECs") made by bidding entity	All ECs exceeding $10,000 per calendar year (reported by bidding entity)	All "expenditures... on behalf of federal candidates… or party committees" aggregating in excess of $5,000 per calendar year with respect to a beneficiary (reported by bidding entity)	Executive Order may create additional reporting burden for bidding entities concerning mostly duplicative information
Contributions to non-political committee entities that make IEs or ECs	All contributions aggregating in excess of $1,000 in the preceding calendar year for the purpose of furthering ECs; in excess of $200 for the purpose of furthering the reported IEs (reported by recipients)	All contributions "with the intention or reasonable expectation" that recipient would use those contributions to make IEs or ECs (reported by bidding entity)	See Figure 2(b) below

[9] 2 U.S.C. §§ 441b; 441c(a).

The Draft Executive Order May Require Additional Disclosure Under Unprecedented and Confusing Standards

While Section 2(a) of the proposed Executive Order may impose additional and redundant reporting burdens, Section 2(b) appears to create unprecedented standards for reporting in two respects, both of which may introduce confusion for bidding entities.

First, the FECA defines an "expenditure" generally as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."[10] Neither the Act nor FEC regulations currently requires entities that are not political committees to report their general political "expenditures."

Moreover, it is not clear there is constitutional authority to apply such a requirement to entities that are not political committees. In the landmark case *Buckley v. Valeo*, the Supreme Court held that:

> [W]hen the maker of the expenditure is not within these categories - when it is an individual other than a candidate or a group other than a "political committee" - the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of 434 (e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of 608 (e) - to reach only funds used for communications that expressly advocate 108 the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.[11]

In other words, the Court limited the reporting requirement applicable to individuals and groups that are not candidates and political committees only to the communications the FECA calls "independent expenditures."[12] Similarly, in *McConnell v. FEC*, the Supreme Court upheld the constitutionality of the Bipartisan Campaign Reform Act's electioneering communications reporting requirements for outside groups because, unlike the definition of "expenditure," the statute's definition electioneering communication "applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable."[13]

If Section 2(b) of the draft Executive Order – which applies to entities that are neither candidates nor political committees – were to be read constitutionally consistent with *Buckley* and *McConnell* by narrowing the reporting requirement only to "independent expenditures," then that would simply add a layer of redundancy to existing law, as all independent expenditures

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[10] 2 U.S.C. § 431(9)(A)(i).
[11] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).
[12] 2 U.S.C. § 431(17).
[13] 540 U.S. 93, 194 (2003).

exceeding $250 per calendar year are already required to be reported, regardless of the type of entity that sponsors them.[14] If, on the other hand, the draft Executive Order purports to require the reporting of "expenditures" in some sense other than that defined by the FECA and *Buckley*, then bidding entities would have to familiarize themselves with a new category of political spending that heretofore has not existed under campaign finance law.

Secondly, Section 2(b) of the draft Executive Order introduces a new standard for bidding entities to report their contributions to third-party entities if they have the "intention or reasonable expectation" that those contributions would be used to make independent expenditures or electioneering communications. As noted above, current law requires all sponsors of electioneering communications and independent expenditures exceeding certain monetary thresholds to report the sources of all contributions "for the purpose of furthering electioneering communications" or "for the purpose of furthering the reported independent expenditure."[15] Thus, the draft Executive Order creates a new subjective intent standard that has never been applied before, and would require not only bidding entities, but also whatever governmental entity or entities are charged with enforcing the new reporting requirements, to determine the circumstances under which this new subjective intent standard is triggered.[16]

The following charts illustrate how Section 2(b) of the draft Executive Order may create additional, unprecedented, confusing, and potentially unconstitutional standards for reporting by bidding entities:

Figure 2(a) – Draft Executive Order's potentially unprecedented new reporting burdens for "expenditures"

Existing reporting requirements	Executive Order reporting requirement	Analysis
Independent expenditures, electioneering communications and direct contributions	All "expenditures... on behalf of federal candidates… or party committees" aggregating in excess of $5,000 per calendar year with respect to a beneficiary	(1) To the extent "expenditures" is inconsistent with the statutory definition, as limited by *Buckley*, the draft Executive Order introduces an unprecedented and undefined new concept in campaign finance law;
(reported by bidders making such disbursements; see also Figure 1 above)	(reported by bidders making such "expenditures")	(2) To the extent "expenditures" is understood to be constitutionally consistent with *Buckley*, this is merely duplicative with existing IE reporting requirements.

[14] *See supra* note 6. Even when narrowed to independent expenditures containing express advocacy, the FEC and numerous state governments have had considerable trouble properly construing express advocacy. *See, e.g.*, *Virginia Society for Human Life. Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8 (D. Maine), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996). *cert. denied.* 522 U.S. 810 (1997); *Right to Life of Dutchess Co., Inc. v. FEC*, 6 F. Supp.2d 248 (S.D.N.Y. 1998). *See also Ctr. for Individual Freedom, Inc. v. Ireland*, 2008 WL 4642268 (S.D.W.Va.), *amended by* 2009 WL 2009 WL 749868 (S.D.W.Va): *North Carolina Right to Life. Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008): *Iowa Right to Life Comm., Inc. v. Williams*, 87 F.3d 963 (8th Cir. 1999).

[15] *See supra* notes 4 and 6.

[16] The proposed Executive Order would task the Federal Acquisition Regulatory Council, which is organized under the Office of Management and Budget, with adopting rules and regulations and to issue orders to carry out the Executive Order, and would require each contracting department or agency to "cooperate with the FAR Council and provide such information and assistance as the FAR Council may require in the performance of its functions under this order."

Figure 2(b) – Executive Order's potentially unprecedented new reporting burdens for independent expenditures and electioneering communications

Existing reporting requirements	Executive Order reporting requirement	Analysis
All contributions aggregating in excess of $1,000 in the preceding calendar year "for the purpose of furthering electioneering communications," and in excess of $200 "for the purpose of furthering the reported independent expenditure" (reported by the recipients of such contributions; see also Figure 1 above)	All contributions "with the intention or reasonable expectation" that recipient would use those contributions to make IEs or ECs (reported by bidders making such contributions)	Draft Executive Order may create a new subjective standard that has never been applied before.

<u>The Draft Executive Order May Encroach on the Exclusive Domain of the FECA</u>

Congress evidently intended the FECA to serve as a comprehensive statutory scheme to occupy the field of federal election law. As the text of the statute itself states, the FECA and FEC regulations "supersede and preempt any provision of State law with respect to election to Federal office."[17] While this language could be construed to be limited to a statement about preemption of state law, other provisions of the FECA and relevant court decisions suggest Congress also intended the FECA and the FEC specifically to serve as the sole legal authority in this area.

As the Act also states: "The [FEC] shall administer, seek to obtain compliance with, and formulate policy with respect to this Act . . . The [FEC] shall have exclusive jurisdiction with respect to the civil enforcement of such provisions."[18] As Justice Byron White noted, "The reference to 'exclusive' was designed to centralize all *governmental* enforcement authority in the FEC."[19] Thus, in *Galliano v. United States Postal Service*, where the Postal Service sought to regulate the names and disclaimers used by organizations soliciting political contributions by mail, the D.C. Circuit held the FEC was the "exclusive arbiter" of such questions.[20] "To permit the Postal Service to base findings of false representation on a political committee's name and disclaimers that are consistent with FECA requirements would defeat the substantive objective of that Act's first-amendment-sensitive provisions," the court stated.[21]

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[17] 2 U.S.C. § 453. *See also* H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974) ("[T]he Federal law is construed to occupy the field with respect to elections to federal office and . . . the Federal law will be the sole authority under which such election will be regulated."; H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974) ("Federal law occupies the field with respect to . . . the source of campaign funds in federal races [and to] the conduct of Federal campaigns.").
[18] 2 U.S.C. § 437c(b)(1).
[19] *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 505 (J. White, dissenting) (emphasis in original).
[20] 836 F.2d 1362 (D.C. Cir. 1988).
[21] *Id.* at 1370.

The draft Executive Order cites the Federal Property and Administrative Services Act ("Procurement Act"), 40 U.S.C. § 101 *et seq.* as the legal authority pursuant to which it purports to impose these additional reporting requirements for political spending by bidding entities. However, the Procurement Act does not address political spending – including by government contractors – or the reporting thereof.[22] In fact, not surprisingly, it is the FECA which regulates political spending by government contractors.[23] Moreover, the FECA and implementing FEC regulations have provisions which are quite specific about the reporting of political contributions, electioneering communications, and independent expenditures made by all individuals and entities, including government contractors.[24] Applying the reasoning in *Galliano*, the Procurement Act, in contrast to the FECA, also was not promulgated with First Amendment sensitivities in mind.

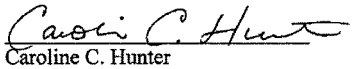
In light of these considerations, the Executive Order's reliance on the Procurement Act to require additional reporting of political activities may conflict with the FECA's exclusive jurisdiction in this area.

Conclusion

The draft Executive Order appears to have a substantial nexus with existing campaign finance law administered by the FEC and, as discussed above, may encroach on the exclusive domain of the FECA. On a practical level, the draft Executive Order appears to impose additional burdens on bidding entities. In some respects, these burdens may be redundant with existing FEC reporting requirements while, in other respects, they may apply existing campaign finance law concepts in an unprecedented manner. Either way, the proposal introduces additional complexity and uncertainty to an already confusing area of the law governing the exercise of core First Amendment rights.

Thank you once again for the invitation to provide my input regarding this matter. Please do not hesitate to contact me or any members of my staff at (202) 694-1045 if you have any questions.

Sincerely,



Caroline C. Hunter
Vice Chair, Federal Election Commission

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[22] Section 31.205-22(a) of the Federal Acquisitions Regulation prohibits government contractors from counting as part of their reimbursable costs any expenses for any "attempts to influence the outcomes of any Federal, State, or local election," as well as "[e]stablishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections." However, the purpose of the FAR provision is to protect government funds from being used for political activities, and is distinguishable from the proposed Executive Order, which addresses political spending by government contractors' own funds, as well as the personal funds of their directors and officers.

[23] 2 U.S.C. §§ 441c(a) and 441i(a).

[24] *See supra* notes 2, 4, 5, and 7.

May 10, 2011

The Honorable Darrell Issa, Chairman
House Committee on Oversight and Government Reform
Washington, DC 20515

The Honorable Sam Graves, Chairman
House Committee on Small Business
Washington, DC 20515

Dear Mr. Chairmen:

The Business Coalition for Fair Competition (BCFC) is a national coalition of businesses, associations, taxpayer organizations and think tanks that are committed to reducing all forms of unfair government created, sponsored and provided competition with the private sector. BCFC believes the free enterprise system is the most productive and efficient provider of goods and services and strongly supports the Federal government utilizing the private sector for commercially available products and services to the maximum extent possible.

BCFC appreciates the opportunity to comment on President Obama's April 13, 2011 draft Executive Order, "Disclosure of Political Spending by Government Contractors."

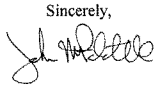
BCFC objects to this draft document based on the way government contractors and government employee unions are treated differently. The numerous restrictions and new reporting as laid out in the draft policy only applies to private sector government contractors. The draft Executive Order fails to create any or equal requirements on political contributions by government employee unions.

This regulatory inequity will exacerbate an unlevel playing field for performance of commercial activities. The Federal government should rely on the private sector for commercially available products and services. There are over 850,000 Federal government employees engaged in commercial activities. Not only are these activities performed by government employees, but many of these activities duplicate and compete with private sector firms, including small business. In fact, unfair government competition has been a top issue of every White House Conference on Small Business (1980, 1986, and 1995). Therefore, additional regulatory restrictions on government contractors without equal restrictions on government employee unions compound unfair government competition with the private sector.

Moreover, the draft Executive Order requires all firms competing for a government contract to include in its bids or proposals a listing of contributions to political organizations. There is no reason a Federal government contracting officer needs this information. To do so will only result in undesirable and inappropriate political pressure on contracting officers to use such information in making contract award decisions. Rather than resulting in a fairer and unbiased procurement system, this will result in favoritism to bidders and offerers who contribute to the party in power. Such a "pay to play" system would overturn 90 years of reform efforts and return the Federal government to the days of Teapot Dome.

BCFC urges the Executive Branch to cancel this draft Executive Order or include similar restrictions on government employee unions, or for Congress to legislatively make such changes.

Sincerely,



John M. Palatiello, President
Business Coalition for Fair Competition (BCFC)

1856 Old Reston Avenue, Suite 205, Reston, Virginia 20190
P (703) 787-6665 F (703) 787-7550

VIRGINIA SMALL BUSINESS PARTNERSHIP

Testimony

Before the Joint House Small Business and Oversight & Government Reform Committee's

Examining Problems with Forcing Companies to Disclose Political Records before Competing for Government Contracts

May 12, 2011

Chairman Issa, Chairman Graves, Ranking Members Cummings and Velazquez, members of the Committee, I want to thank you for holding this hearing today and for allowing the Virginia Small Business Partnership to submit this testimony for the record. My name is Paul Miller and I serve as the Chairman of the Virginia Small Business Partnership, which is a small business advocacy group designed to work with state leaders on policies and issues that support small businesses.

I applaud the President's efforts to bring about change to our political and legislative processes. I agree with the President that in order to create change government activity should be more transparent. Where I strongly disagree with the President is how you get there. I would urge caution before we issue any more regulation that may look good on paper, but in practicality, has the opposite effect. The draft Executive Order issued by the White House will do just that.

I'd like to focus my remarks on four areas:

1) Duplication;
2) Contracting shouldn't be a political tool;
3) Pay-to-play; and
4) Intimidation.

Duplication

At a time when Congress and the Administration are trying to eliminate red tape and duplication within the Federal government this Executive Order creates more red tape and duplication. The fact is a database already exists for those who have given campaign contributions to candidates and/or political parties. The Federal Election Commission (FEC) already requires candidates and parties to disclose this information. Creating another similar database would be duplicative and a waste of tax-payer dollars.

The draft Executive Order requires a contractor go back two years and disclose their contributions. What happens if a small business forgets to list a contribution? Will they be fined or penalized for doing so? How is this information going to be checked and verified? Will the contracting officer now have to go to the FEC database and confirm the contractor's information is accurate? It seems like we're adding a lot of extra work on an agency workforce that is already overworked due to a shortage of contracting officers to meet current demands.

Is this new database going to be used by the media or interest groups to create stories based on innuendo or what they perceive to be fact? The last thing a small business can afford is to find their name and company embroiled in a scandal that may not be fact based or true. Small businesses don't typically have deep pockets to fight these types of allegations.

As I stated earlier, the information currently being sought by the President through this Executive Order is already available through the FEC.

Contracting shouldn't be a political tool

As a small business owner myself and someone who works closely with small businesses throughout the contracting process, I can tell you this Executive Order will create a true pay-to-play system. When our small businesses currently bid on contracts they don't go through a member of Congress, they respond to a Request For Proposal put out by an agency. To add a new requirement that a contractor disclose their campaign donations is going to set in motion a system that will dictate who gets contracts and who doesn't based in part, on which candidates or parties they contribute too.

The Executive Order states and I quote "It is incumbent that every stage of the contracting process – from appropriation to contract award to performance to post-performance review – be free from undue influence..." This Executive Order will have the direct opposite effect. This Executive Order will now open the door for undue influence to be a major element of how contracts are awarded. We can say contracting officers aren't political, but we'd be kidding ourselves. This is Washington and you would be hard pressed to find someone who doesn't have political views and where having access to this new information wouldn't play a role in their decision-making. The fact is, there will be those contracting officers who will use this information in determining who gets a contract and who doesn't. It would be naïve to think otherwise. Even if it happens just once; its one too many times.

Our system of government isn't perfect, but it is the best in the world. Our procurement system isn't perfect either and there are a lot of changes that could and should be made to make it more effective and efficient, but implementing this Executive Order would do more harm to a system already in desperate need of change. Change is good, but this Executive Order would take us in the wrong direction.

We should do everything we can to keep politics out of our procurement system. This Executive Order is dangerously close to changing the procurement landscape and not for the better.

Pay-to-play

I'm not naïve to think pay-to-play situations haven't occurred in our procurement process, but this is not like an Earmark where a small business requests the contract from a member of Congress. The procurement process allows for protests and other avenues to weed out this type of activity. The last thing we can or should do is turn our procurement process into an extension of our political system.

I have thought long and hard about this and I cannot find one single reason why a contracting officer would need to know who a small business owner made campaign donations too on a competitive bid. I can find lots of reasons why this information would be helpful if you're trying to identify those who support your policies or politics. Having this information could take your bid from the bottom of the pack straight to the top.

I know we might hear that this would never happen. I could say the same about Earmarks, yet these are now banned because of the perception of pay-to-play occurring. Why would it be unreasonable to think the same wouldn't happen under this Executive order?

Intimidation

Finally, this Executive Order could be construed to be a political tool used to keep businesses from exercising their Constitutional right of free speech by keeping them from donating and participating in our political system. This Executive Order will make company's think twice about getting involved in our political process for fear that them giving to the "wrong" party or candidate will cost them from winning a contract. Small businesses have enough challenges in the procurement process that this Executive Order would cause an even bigger challenge. I could see a situation where a company who hasn't been successful starts giving to the "right" party or candidate and thus starts winning more contracts. What then? Are we going to say they automatically did something wrong? Are we going to investigate them? Are we going to drag them through the mud and destroy their name? This can and will happen if this Executive Order is implemented. A lot of what if's in the above statement, but these are real possibilities that need to be resolved before any Executive Order is issued and implemented.

As I mentioned earlier, if the President's goal is to ensure our procurement system is free from influence, then don't implement this Executive Order. The minute this goes into effect is the moment we have created a political pay-to-play procurement system. I don't believe the President wants this.

What I continue to be troubled by is the unwillingness of the President to sit down with the right people and talk about these issues. If the President would just reach out to us and work with us we could come up with a better way to keep undue influences out of the procurement process. If the President would only work with the lobbying community on Earmark reforms and lobbying reforms we could create a system that eliminates the loopholes and makes these processes cleaner and more transparent. You can't simply rely on academics and people who have no real world experience with these issues. You need to hear from small businesses who feel the challenges everyday of competing in the federal market. We would welcome the opportunity to work with the President on transparency issues that make sense and achieve everyone's goals.

Conclusion

Transparency is a good thing, but this Executive Order takes it to a whole new level. There is no reason why a contracting officer would ever need to review the political contributions of any contractor. This should have no bearing on which company can best serve the needs of the federal agency. The only reason to collect this information is to punish those who an Administration doesn't agree with or to reward those businesses who have been "loyal" to an Administration.

There comes a time when we can go as far as we can with transparency before we overreach and create a system with costly unintended consequences. We are at that moment with this Executive Order and I would urge the President to reconsider such action. Let's not turn our procurement process into a pay-to-play system. Let's not turn our procurement system into a system that rewards or punishes based on your political leanings. Let's not force anyone out of the federal market through the possible intimidation this Executive Order will create. And, let's not duplicate a process that is already in place at the expense of tax-payers.

If this Executive Order is implemented as currently written, I assure you we will be back here in very short order because someone will be accused of pay-to-play. It may not be true, but the accusations will be made and the investigations will begin. This risk is way too high for any small business and could force many to get out of the federal market all together. Let's focus our attention on helping small business succeed in the federal market instead of adding more hurdles to that success. This Executive Order will only send a strong signal that only those who support an Administration need apply for federal contracts.

I want to thank you for the opportunity to submit this statement for the record. I would welcome the opportunity to answer any questions you ro your staff may have on this very important topic. I can be reached directly at (703) 383-1330 or via e-mail at pmiller@mwcapitol.com.

STATEMENT SUBMITTED TO THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM AND THE COMMITTEE ON SMALL BUSINESS OF THE UNITED STATES HOUSE OF REPRESENTATIVES CONCERNING THE PROPOSED EXECUTIVE ORDER ON "DISCLOSURE OF POLITICAL SPENDING BY GOVERNMENT CONTRACTORS."

Professor Joel M. Gora

May 12, 2011

My name is Joel M. Gora, and I am a full-time Professor of Law at Brooklyn Law School, where I teach Constitutional Law, First Amendment Law and Election Law. Prior to my joining the Brooklyn faculty in 1978, I was a full-time attorney with the American Civil Liberties Union, handling cases in a number of areas, most particularly, the First Amendment. Because of that specialty, I became involved in numerous cases dealing with the clash between First Amendment rights and campaign finance restrictions and requirements, such as disclosure.

I worked on a number of cases dealing with those issues even before the Supreme Court landmark decision in Buckley v.Valeo, 424 U.S. 1 (1976). I was one of the lawyers who argued before the Supreme Court in that case, challenging the Federal Election Campaign Acts disclosure requirements in particular. Since Buckley, I have participated, on behalf of the ACLU in most of the major Supreme Court cases on campaign finance controls, including most recently, the Courts landmark decision in Citizens United, v. Federal Election Commission, 130 S. Ct. 876 (2010).

In addition to working on these cases, I have written extensively about these issues in scholarly journals, and I recently co-authored a book with Peter J. Wallison entitled BETTER PARTIES, BETTER GOVERNMENT: A Realistic Proposal for Campaign Finance Reform (AEI Press, 2009). Notwithstanding these various affiliations, the views set forth here are solely my own.

I am submitting this written statement to give my assessment of the Proposed Executive Order entitled "Disclosure of Political Spending By Government Contractors". This Order would compel unprecedented disclosure of political activity of the thousands of companies seeking federal government contracts and, even worse, of the personal political donations of the tens of thousands of officers of such companies. In my opinion, and based on my experience, the proposed Order would skirt settled constitutional principles in a number of questionable ways. I think that no case has been made for the unprecedented expansion of disclosure requirements, and that the potential abuse of political association and deterrence of political speech outweigh whatever valid governmental benefits the Executive Order might accomplish.

First, the Order is an end-run around the principles of separation of powers. Having lost this issue in the Congress with the defeat of the so-called DISCLOSE Act, President Obama is

now trying to push key portions of the failed bill through as an executive order. But it is axiomatic, going back at least to the 1952 Steel Seizure case, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (192), that significant actions affecting individual rights should require joint action by Congress and the President, not unilateral action by the President alone.

Second, the Executive Order is also an end run around the Supreme Court's ruling in Citizens United v. Federal Election Commission, by undercutting the decision's strong political speech protection for corporations, unions and non-profit groups by imposing unprecedented and burdensome disclosure requirements. The proposed Executive Order goes well beyond any disclosure authorized by the Supreme Court in the Citizens United case.

Third, the Order tries to skirt First Amendment protections for freedom of association and political privacy. Those protections go all the way back to the landmark decision of NAACP v. Alabama, 357 U.S. 449 (1958) which recognized and established the right of individuals to contribute to political organizations and causes without fear of government or private harassment or retaliation made possible by compelled disclosure of their support for those organizations.

The Executive Order would compel disclosure of perfectly lawful contributions to candidates, parties, independent groups and even non-profit organizations, well beyond anything that has been upheld before. Here's how the scheme would work.

In order to seek a federal contract, a company would have to publicly disclose whether it or any of its subsidiaries or officers had given or spent as little as $5,000 in a year for any one candidate, campaign, party organization or independent group that might engage in regulated campaign speech. Right now, only partisan individual contributions of more than $200 must be publicly reported to the government. Under the Executive Order, lawful individual contributions below that $200 amount-- which is still a ridiculously low figure -- can be swept up in public, online reporting if the aggregate of contributions from one company to a particular candidate or campaign exceeds $5,000 in an entire year, a relatively paltry sum. So, an officer of a company who gives as little as $100 to a candidate or political organization runs the very real risk of having that personal act of political participation subject to unlimited public disclosure.

What is even more unusual and troubling is that officials at companies who give any amount to a non-profit 501 (c) (4) organization, such as the ACLU, NAACP or NRA, will have that contribution disclosed, if, once again, a mere $5000 is contributed from anywhere in the entire company to the organization, and the organization might engage in any regulated campaign speech. There has never been such potentially sweeping disclosure of the identity of such small individual contributions to non-partisan organizations in the history of federal campaign finance regulation. The closest we came was a rogue statutory provision passed as part of the major 1974 amendments to the FECA, requiring all issue organizations to disclose the names of anyone who gave the group more than $100 to support commentary on the voting records of political candidates. That provision was unanimously struck down as almost a *per se* First Amendment violation by the courts as part of the Buckley case. See Buckley v. Valeo, 519 F. 2d 821, 869-78

(D.C. Cir. 1975, en banc), aff'd in part, rev'd in part, 424 U.S. 1 (1976). Indeed, the consensus of its unconstitutionality was so deep that the government did not even appeal the invalidation of the disclosure provision and it was allowed to lapse.

Worse still, the Order is also an end run around the principle that your political beliefs and affiliations are none of your boss's business. Instead the Order requires that any prospective government contractor must investigate all political contributions by their officers, not just to candidates and parties, but to third party organizations as well, far removed from partisan politics. We have had an unfortunate experience with employers snooping on their employee's political affiliations during the anti-communist era of the 1950's. Why would we want to mandate similar snooping by employers today?

Fourth, the President's Order circumvents two 1996 Supreme Court cases holding that a business cannot be denied a government contract because they make or refuse to make political campaign contributions, or because of their political activity generally. See O'Hare Truck Services Inc., v. Northlake, Ill., 518 U.S. 712 (1996); Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996). Since government contractors cannot constitutionally be penalized for giving or refusing to give campaign contributions, what purpose is served by requiring them to list in their application all of the political contributions that their officers have made? If anything, that requirement would seem, ironically, to facilitate the very political discrimination and bias and favoritism that the Court has said rejected on First Amendment grounds.

These Supreme Court decisions are examples of the large principle embedded in the unconstitutional conditions doctrine, which the Executive Order flaunts and violates. A company (or anyone) may not have a right to a government contract, but it cannot be required to sacrifice the First Amendment rights of its officials in order to seek such a contract. How would we feel about asking any applicant for a government contract to list the political party affiliation and non-profit organization membership and contributions of all of its key officials as the price to pay for seeking a government contract? This Order is tantamount to that.

Fifth, there is little record of serious or widespread "pay-to-play" or other claimed episodes of corruption in federal contracting. First Amendment protections cannot yield unless, at the very least, there is a manifest showing of the need to overcome them. No such showing has been made here.

Finally, perhaps the most telling end-run is around the core principle that in regulating speech, government cannot pick and choose which speakers or ideas shall be favored and which shall be burdened. Yet, the Executive Order does just that. It enables groups that tend to favor Democrats and disables those which tend to favor Republicans. It applies only to government contractors, which tend to be business corporations, largely Republican in outlook. Totally exempt are the entities that get huge amounts of government grants through the OMB procedures, namely, non-profits, largely Democratic in orientation. Not surprisingly, public

employee unions with a huge stake in government spending are totally exempt as well.

If there is any core lesson that the Citizens United case taught us it is that the First Amendment is allergic to a situation where there are restrictive rules and burdensome requirements for some speakers but not for others.

While I think that the basic thrust and premise of the proposed Executive Order are fatally flawed, if there were to be new regulation in this area, I think it must follow the long-standing requirement that where First Amendment rights are being burdened in a serious way, as here, the government must chose those alternative methods of regulation which are least restrictive of or burdensome to those rights. There are a number of ways that the Executive Order could be narrowed. While none of them singly or in the aggregate can cure the unconstitutionality of this Order, they would make the order less objectionable, though still unacceptable. Here are some possible more limited alternatives.

1. The definition of electioneering communications that trigger the reporting obligation should be narrowed to just those communications that contain express advocacy of election or defeat of a federal candidate.

2. Exempt from the disclosure obligations of the contract bidder those officers and directors whose contributions do not exceed $200 for any particular candidate or political entity.

3. Permit contractors to submit an aggregate amount of contributions to any candidate or organization from the entity or its officers, rather than requiring public listing of each of those individuals. If there is any relevant information there it is that the contractor was the source of a contribution or supported a candidate, not which individuals affiliated with it did so.

4. Replace the reference to intention or reasonable expectation set forth in Section 2(b) in favor of more certain language that triggers reporting only if the recipient entity has actually made independent expenditures or electioneering communications (as narrowly defined) in the previous election cycle.

But, as I said at the outset, while these improvements would make the proposed Executive Order less intolerable, the basic thrust of the Order is still fatally flawed.

For these reasons, I respectfully submit that steps should be taken to prevent this Executive Order from becoming law and being implemented.

Chairman ISSA. All Members may have 7 legislative days within which to insert opening statements and insert extraneous material in the record.

[The prepared statement of Hon. Paul A. Gosar follows:]

"Politicizing Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business?"

OGR Hearing May 12, 2011

OPENING STATEMENT FROM PAUL GOSAR

Mr. Chair: Thank you for giving me the opportunity to address this important matter. The procurement process to provide goods and services paid for by taxpayer money must be 100% honest and incorruptible. Reforms have been instituted over the years to ensure that there are fair bids and fair bid letting.

The proposed executive order is troubling on several grounds. First, it injects an element of partisanship into an otherwise apolitical and merit based bid process. For what lawful reason would the Administration need to know what causes, parties or people a bidder supports? None. This is not about transparency. This is more about rewarding political supporters with lucrative government contractors.

Second, beyond being highly questionable on policy grounds and risking the fairness and neutrality of our procurement process, I question whether the President has the Constitutional authority to make a law like this. Where in the Constitution does it grant to the President the power to make law and impose this requirement? Nowhere. And we know that the Constitution reserved all federal legislative authority to Congress. Our Supreme Court, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579 (1952), invalidated President Truman's Executive Order 10340 that tried to control the nation's steel mills. The Court rejected the Executive Order because it tried to make law—an act only Congress can do. Here too, the President's proposed executive order makes a new law, and imposes a disclosure requirement. It does not clarify any law or seek to enforce a law passed by Congress.

Finally, the proposed order would chill the First Amendment rights of prospective bidders. Such bidders may choose not to engage in the political process if they thought their contributions would be used as a factor in

determining whether they get a bid or not. For this reason, this proposed order is constitutionally suspect.

Thank you for the opportunity to speak and for holding this hearing.

The Voice of the Government Services Industry

May 31, 2011

Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa:

Thank you for your May 18 letter providing follow-up questions to my testimony at the May 12, 2011 joint hearing with the House Small Business Committee titled "Politicizing Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business." I am pleased to provide my response as an attachment to this letter.

Thank you for the opportunity to provide the Professional Services Council's views on this important matter. If I can provide you with any additional information, please do not hesitate to let me know. I can be reached at (703) 875-8059 or at chvotkin@pscouncil.org.

Sincerely,

Alan Chvotkin, Esq.
Executive Vice President and Counsel

Attachment

CC: Hon. Elijah Cummings, Ranking Member, Committee on Oversight and Government Reform
Hon. Sam Graves, Chairman, Committee on Small Business
Hon. Nydia Velazquez, Ranking Member, Committee on Small Business

4401 Wilson Boulevard, Suite 1110, Arlington, Virginia 22203 P: 703-875-8059 F: 703-875-8922 www.pscouncil.org

RESPONSE OF ALAN CHVOTKIN, PROFESSIONAL SERVICES COUNCIL, TO QUESTIONS FOR THE RECORD FROM CHAIRMAN ISSA, MAY 12, 2011 JOINT HEARING ON "POLITICIZING PROCUREMENT: WOULD PRESIDENT OBAMA'S PROPOSAL CURB FREE SPEECH AND HURT SMALL BUSINESS"

Q1: Is it realistic to expect the FAR Council to be able to complete its implementation of the Executive Order by the end of the calendar year as required by the Executive Order? What are the biggest challenges it will face?

A: The FAR Council's ability to complete implementation by the end of the calendar year, as provided for in the April 13 draft version of the Executive Order, will depend in large part on the date that the President signs the Executive Order and "starts the clock."

The FAR Council has a checkered record of meeting deadlines, whether imposed by statute or Executive Order. For example, on March 16, 2011, the FAR Council published an interim rule relating to requirements for the acquisition of multiple-award contracts. The rule amends the FAR to implement section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), that was enacted on October 14, 2008.[1] Section 863 mandates the development and publication of regulations in the FAR to enhance competition for the award of orders placed under multiple award contracts. The law required FAR regulations to be issued within one year after enactment—that is by October 14, 2009. Besides being published 17 months past the due date, the rule was still issued as an interim rule because "urgent and compelling circumstances exist" to promulgate the rule without first obtaining public comment.

In addition, on January 30, 2009, President Obama issued Executive Order 13495, "Nondisplacement of Qualified Workers Under Service Contracts." The Executive Order establishes a general policy of the federal government that service contracts and solicitations for such contracts shall include a clause that requires the contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer those employees employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. PSC strongly opposed, and continues to oppose, the Executive Order because it ignores extensive existing rules regarding the treatment of employees under the Service Contract Act and because it unnecessarily and inappropriately interferes with company hiring and personnel decisions. But the Executive Order did direct the Department of Labor (DOL), in consultation with the Federal Acquisition Regulatory Council (FARC), to issue regulations within 180 days of the date of the Order to the extent permitted by law to implement the requirements of this Order. DOL published a proposed rule on March 19, 2010. While PSC has significant concerns with the proposed rule and submitted extensive comments to the DOL on their proposed rule on May 16, 2010,[2] and we are in no hurry to see further

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[1] Available at http://edocket.access.gpo.gov/2011/pdf/2011-5553.pdf

[2] Available at http://www.pscouncil.org/AM/Template.cfm?Section=Policy_Issues&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=5463

regulations, as of May 30, 2011 no final DOL rule has been issued and no FAR rule in any form has been published for comment.

However, the Administrator of the Office of Federal Procurement Policy (OFPP) does have influence over the work priorities of the FAR Council. Should the Administrator prioritize the implementation of this Order among the FAR Council's other pending cases, and expedite the internal OMB reviews by OFPP and the Office of Information and Regulatory Affairs (OIRA), there is a greater likelihood that the FAR Council could meet the deadline the President established.

In addition to the timing for issuing rules, however, there are appropriate questions about the expertise of the FAR Council to write these rules. Under the draft Executive Order, a significant portion of the regulations would cover the procurement process but a portion also deals with election law provisions. The FAR Council signatories may have procurement expertise but they certainly lack familiarity with the election laws. Thus, the FAR Council will be dependent on input from other executive branch agencies, most likely the Department of Justice, for assistance in developing those portions of the rule.

Finally, given the importance of these rules to the procurement community, PSC would strongly desire that any procurement rules issued to implement an Executive Order be published as a proposed rule for public comment with a reasonable (45 to 60 day) period of time to analyze the rule and prepare our comments. However, the FAR Council's recent approach for rules that are required by statute is to publish them as interim rules while simultaneously requesting comments, notwithstanding the amount of time Congress made available for the development of the rule. We can well imagine that, if the rule is issued as an interim rule, the President's OFPP Administrator would not have the same urgency to evaluate the public comments and finalize an interim rule that is already achieving the President's stated objectives.

Q2: What kind of compliance systems will be required for businesses to determine if disclosure is necessary? Is there a less intrusive or burdensome way to balance free speech with transparency?

A: Until the final Executive Order is signed and the implementing procurement rules are issued, it will be difficult to know with precision the compliance systems that a company would have to develop and implement to comply with any disclosure requirement. Based on the draft Order, a government contractor would likely need to:

- Maintain a list of all officers, directors and affiliates (their "covered reporting individuals");
- Prepare a reporting form that will be issued to each covered reporting individual periodically (depending on how often the report is required and what the certification mandated under the Order requires);
- Develop a mechanism to collect the reported forms, ensure that all forms have been returned, and aggregate by donor recipient any identified contributions to determine whether the $5,000 threshold provided for in the Order has been exceeded;
- Develop a mechanism to upload contribution data to the government-identified website and monitor that site regularly to ensure that the information reported matches the company's reports; and

- Develop a mechanism to ensure that the required certification can be submitted in a timely manner with each offer submitted to a federal agency.

While we are not experts in First Amendment free speech rights, if political contributions as addressed in the draft Order are required to be disclosed, we believe there are far less intrusive methods that can be developed and that are far removed from the federal procurement process. For example, under the current procedures for campaign contributions, it is the recipient of the contribution that is required to file the necessary disclosure reports periodically, based on certain published criterion. This approach appears to work well for these contributions. While we take no position on whether independent expenditures should be reported, we believe this same approach would work for this additional category of contributions that are not already required to be reported.

Q 3: Is the Executive Order likely to result in more bid protest filings?

A: Companies take many factors into account in making a decision on whether to file a protest. Based on the elements of a final Order, the only opportunity for a company to file a protest would be after an award decision is made by a procuring agency. In addition, without the final version of the regulations implementing the Order, it is speculation about the grounds that might exist for a protest to be filed. However, under the draft Order, the certification is a predicate requirement for an award and a company may have grounds to file a protest if the agency were to make an award decision without having the required certification from the apparent successful offeror(s). Similarly, grounds for a post-award protest may exist if an unsuccessful offeror is aware that all disclosures from covered reporting individuals have not been made or that the certification is based on information that is not current, complete and accurate.

Q 4: What kinds of safeguards or firewalls would you expect agencies to put into place to ensure that information disclosed under the Executive Order or political considerations do not taint the source selection process?

A: We strongly object to the linkage between source selection decisions and disclosure of certain campaign contributions. In our view, the best way to ensure that political contributions do not "taint" the source-selection process is to keep the information about political contributions—including the potential that no contributions have been made—out of the source selection process since any certification that is required to be submitted as a requirement for award must be reviewed in a timely manner by government officials to be sure it is current, complete and accurate. While agencies will try to establish safeguards or firewalls to minimize the number of government officials who would have access to the reported information, the draft Order interjects this matter directly into the source-selection process. Thus, for each procurement, the contracting officer, the source-selection official (if different) and likely others in the source-selection process will have to be aware of and address this matter. In our view, as long as the political information is intentionally interjected into the contracting source-selection process, we do not believe that agencies can develop sufficient safeguards or firewalls to ensure that political considerations are not taken into account in that process.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
WASHINGTON, D.C. 20503

June 1, 2011

The Honorable Darrell Issa
Chairman
House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa:

Please find enclosed responses to your follow-up questions for the record of the May 3, 2011 hearing entitled, "Presidential Records in the New Millennium: Updating the Presidential Records Act and Other Federal Recordkeeping Statutes to Improve Electronic Records Preservation." Please note that, while your letter of May 11 requested a response date of May 25, in discussions with your staff it was agreed that June 1 would be acceptable. I hope you find the enclosed information helpful.

Sincerely,

Brook Colangelo
Chief Information Officer
Office of Administration
Executive Office of the President

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

Questions for Mr. Colangelo
Chief Information Officer
Office of Administration, Executive Office of the President

Rep. Darrell Issa, Chairman
Committee on Oversight and Government Reform

Hearing: "Presidential Records in the New Millennium:
Updating the Presidential Records Act and Other Federal
Recordkeeping Statutes to Improve Electronic Records Preservation"

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1. **Please provide the Committee with the total number of EMC EmailXtender system-based searches and/or the dates and times of such searches since the EOP began using EmailXtender.**

   The EMC EmailXtender system offers search capability through a search utility that employs a user-friendly interface. The search utility can perform keyword searches, along with searches by the sender or recipient of the email. The search utility can also utilize Boolean logic. A limited number of users are authorized to use the search utility. The EOP has used the search utility periodically since it has been operational.

2. **Have any of EmailXtender's weekly audit reports ever revealed any unauthorized attempts by White House or EOP staff to remove e-mail from the EOP network?**

   No, the weekly audit reports have not revealed any unauthorized attempts by White House or EOP staff to remove e-mail from the EOP network.

3. **How many EOP employees have access to EmailXtender's e-mail search capabilities? Of these, how many are political appointees?**

   Five EOP employees have access to the EMC EmailXtender search utility. Three of these employees were appointed under Title 3 of the United States Code and two were appointed under Title 5. All were employed by the EOP prior to the beginning of the current Administration.

4. **You indicated in your written testimony that the EOP's Office of Administration (OA) has only been capturing PIN-to-PIN messaging among EOP employees since November 2010 – in other words, for only about the last six months (*see p. 11*). What was the precise date in November 2010 when this PIN-to-PIN archiving policy went into effect within the EOP, and what accounted for the delay in archiving PIN-to-PIN messages?**

At the beginning of the Administration there was no system in place for archiving PIN-to-PIN messages and the attention and resources of the Office of the Chief Information Officer were focused on keeping core EOP systems up and operational. Over 82 percent of our IT assets were considered "end-of-life" and this outdated and unstable technology caused multiple outages in the beginning of the Administration. It took significant time to reach the operational state that would enable us to pursue capturing PIN-to-PIN messages—both in terms of stabilizing the architecture of the EOP network to the point that it could handle the configuration and having personnel available to work the issue (rather than concentrating mainly on the emergency work needed to stabilize and modernize EOP systems).

Configuring the EOP system to capture PIN-to-PIN messages was a significant project that required researching potential technical solutions, consulting with the National Archives and Records Administration, developing configuration changes, modifying Blackberry device settings on every EOP Blackberry, restarting the system, and creating storage space. To ensure that our system would not crash when PIN-to-PIN logging was initiated, we first conducted a test pilot program (from October 7, 2010 to October 21, 2010) for eleven users. Once we verified the results of the pilot (that our system was not negatively affected by the capturing of the messages and that the messages were being captured properly), we were able to extend the program EOP-wide on October 28, 2010.

5. **Did the EOP have the technical capability to capture PIN-to-PIN messages before November 2010?**

   See answer to Question #4.

6. **Was there any plan for capturing the PIN-to-PIN messages that were transmitted among Blackberry-equipped EOP employees before this archiving policy went into effect in November 2010?**

   As described in the answer to Question #4, EOP systems could not capture PIN-to-PIN messages. However, PIN-to-PIN messaging is intended for emergency communications—absent an emergency, EOP policy requires EOP staff to conduct work-related electronic communications on their EOP email account.

7. **Have any of these pre-November 2010 PIN-to-PIN messages been stored or kept in any way that permits review by the National Archives and Records Administration (NARA) or the public, now or in the future?**

Any PIN-to-PIN messages that were stored on EOP BlackBerry devices on October 28, 2010 were captured when the EOP BlackBerry Enterprise Server was reconfigured to log PIN-to-PIN messages, even if they were generated prior to October 28, 2010. Those messages associated with EOP components subject to the Presidential Records Act will be transferred to NARA at the end of the current Administration in accordance with that statute.

8. **You indicated in your written testimony that OA has only been tracking SMS (Short Message Service) texts, or "text messages," among EOP employees since "early March" of this year – in other words, for only about the last two months (*see p. 11*). What was the precise date in March 2011 when this SMS archiving policy went into effect within the EOP, and what accounted for the delay in archiving SMS messages?**

EOP employees do not have the ability to send SMS messages on EOP BlackBerry devices. EOP employees do have the ability to receive SMS messages on EOP BlackBerry devices, for the purpose of receiving emergency communications, especially emergency notifications to all EOP employees from the EOP's Joint Secure Operations Center. These emergency notifications are also sent through the EOP email system. Consequently, emergency notifications sent as SMS messages are duplicate copies of messages sent and archived through the EOP email system.

At the beginning of the Administration there was no system in place for archiving SMS messages and the attention and resources of the Office of the Chief Information Officer were focused on keeping core EOP systems up and operational. Over 82 percent of our IT assets were considered "end-of-life" and this outdated and unstable technology caused multiple outages in the first two months of the Administration. It took significant time to reach the operational state that would enable us to pursue capturing SMS messages—both in terms of stabilizing the architecture of the EOP network and having personnel available to work the issue (rather than concentrating mainly on the emergency work needed to stabilize and modernize EOP systems).

Enterprise-wide logging of SMS messages was implemented on March 3, 2011. The reconfiguration work conducted for PIN-to-PIN capturing laid the groundwork for SMS capturing, but additional work, such as researching potential technical solutions, activating capture functionality, and rebooting all EOP Blackberry devices, was still required.

9. **Did the EOP have the technical capability to capture SMS messages before March 2011?**

See answer to Question #8. Prior to March 3, 2011, it was technically possible for the EOP to request from our mobile carrier a manual capture of SMS messages sent or received on EOP BlackBerry devices within a limited window of time. This process was resource intensive for the carrier and not a service normally provided, however, so it could not be used on a regular basis to archive SMS messages. The EOP did utilize this option for one brief period. After the catastrophic earthquake in Haiti in January 2010, a group of EOP staff were among the federal government personnel who traveled to Haiti to assist in relief efforts. On the island, email access was severely limited and SMS was the most reliable means of communication. OCIO temporarily configured the BlackBerry devices of staff traveling to the island and those with whom they were communicating to be able to both send and receive SMS messages. SMS messages from this period were collected manually by our carrier and archived.

10. Was there any plan for capturing the SMS messages that were transmitted among EOP employees before this archiving policy went into effect in March 2011?

As described in the answer to Question #8, EOP employees do not have the ability to send SMS messages on EOP BlackBerry devices. EOP employees do have the ability to receive SMS messages on EOP BlackBerry devices, for the purpose of receiving emergency communications, especially emergency notifications to all EOP employees from the EOP's Joint Secure Operations Center. These emergency notifications are also sent through the EOP email system. Consequently, the emergency notifications sent as SMS messages were duplicate copies of messages sent and archived through the EOP email system.

As described in the answer to Question #9, the EOP did have a plan for capturing SMS messages sent or received on EOP Blackberry devices when that communication was enabled for the purpose of responding to the earthquake in Haiti.

11. Have any of these pre-March 2011 SMS messages been stored or kept in any way that permits review by NARA or the public, now or in the future?

Email copies of SMS security alerts transmitted by the Joint Secure Operations Center were archived in the EOP email system. The messages that were captured during Haiti relief efforts have been preserved and will be transferred to NARA at the end of the current Administration in accordance with the Presidential Records Act. Any SMS messages that were stored on EOP BlackBerry devices on March 3, 2011 were captured when the EOP BlackBerry Enterprise Server was reconfigured to log SMS messages, even if they were generated prior to March 3, 2011. Those messages associated with EOP components subject to the Presidential Records Act will be transferred to NARA at the end of the current Administration in accordance with

that statute.

12. **Does the EOP currently have any directives or policies prohibiting, or the technical ability to block, EOP employees from utilizing their Blackberries' PIN-to-PIN or SMS messaging except under emergency circumstances?**

The EOP does not have the ability to disable SMS and PIN-to-PIN messaging and activate it in an emergency without creating a substantial risk that either the emergency communication functions would not be successfully activated or that activation could be delayed in the crucial immediate period following a sudden emergency. For that reason, and because the White House Complex and the personnel that work within it could face a wide variety of serious security threats without warning, these emergency communications capabilities are always activated on EOP BlackBerry devices.

EOP policy requires EOP staff to conduct work-related electronic communications on their EOP email account, except in emergency circumstances when staff cannot access the EOP email system and must accomplish time-sensitive work.

13. **Do EOP employees who work on the White House grounds (which include the White House itself and the Eisenhower Executive Office Building) have access, via the use of either EOP computer equipment or their own personal electronic devices, to any Wi-Fi (wireless Internet) networks from the White House grounds, and, if so, what procedures or protocols are in place to ensure EOP network security?**

OCIO does not provide Wi-Fi services for EOP employees on White House grounds at this time. EOP secure mobile workstations, the standard computer used by EOP staff, cannot be configured to connect to a Wi-Fi network. OCIO is exploring ways to enable Wi-Fi capability on these workstations in a secure, records-managed environment. Some EOP users are issued Apple computers for official business, which allow users to connect to Wi-Fi networks but are configured to require them to connect to the EOP Virtual Private Network, which incorporates EOP network filters, before going out to the internet. Users could access external wireless networks from their personal devices or personal cell phones, but these devices cannot connect to the EOP network. EOP users have been instructed to use EOP computers and resources for all official work.

14. **Does the President use a secure Blackberry (or similar personal electronic device) that is not connected to EOP's servers, but rather is connected to its own server(s), and, if so, is there some arrangement, in keeping with the Presidential Records Act, that**

archives these communications?

Emails sent and received from the President's mobile device are secured and archived in accordance with the Presidential Records Act.

15. **In the wake of former White House Deputy CTO Andrew McLaughlin's use of personal e-mail to conduct official business and his subsequent reprimand by White House officials, has the White House or the EOP developed any new directives, policies, procedures, or information campaigns for dealing with employees who violate the rules in the way Mr. McLaughlin did?**

Mr. McLaughlin was employed by the Office of Science and Technology Policy (OSTP) within the Executive Office of the President, rather than the White House Office. My understanding is that OSTP leadership sent a memorandum to all OSTP employees that discussed Mr. McLaughlin's use of personal email, reiterated relevant recordkeeping policies, and stressed the importance of properly archiving government records, and that OSTP also held an office-wide training on records management and updated their records training practices. Additionally, each EOP component has practices and policies for training and reminding employees of their record-keeping obligations.

16. **Besides mere requests to EOP employees, what additional methods does the Administration use to ensure compliance with the Presidential Records Act?**

Like every prior administration subject to the Presidential Records Act (PRA) (Reagan, Bush 41, Clinton, and Bush 43) and every agency subject to the Federal Records Act, this Administration's compliance with the PRA rests in part on educated individual EOP employees responsibly managing their own records in accordance with the PRA. From a technological perspective, OCIO has devoted significant time and resources to modernizing EOP IT systems in order to enhance stability, ensure security and provide for robust electronic records management. While operating within financial and staffing constraints, we have been able to take major steps to modernize an EOP IT infrastructure that was struggling to maintain stable and secure operations. These modernization efforts enhanced electronic records management. Additionally, OCIO has worked proactively to improve electronic records management. In this Administration, we have:

- Maintained the EmailXtender archiving system procured by the Bush Administration;
- Taken steps to upgrade or replace that system before it becomes outdated;

- Upgraded our Miscrosoft Exchange and BlackBerry Enterprise servers to improve their reliability;
- Implemented a system for capturing PIN-to-PIN messages for the first time;
- Implemented a system for capturing SMS messages for the first time;
- Installed a new content management system for the White House website that archives every change to the site;
- Made it easier for staff to work on records-managed EOP systems by deploying secure mobile workstations and creating a secure, web-based portal for remote access to EOP desktop and applications; and
- Restricted EOP network access to websites that could pose records management risks, such as nongovernmental email, social networks, and instant messaging services using web gateway filtering that is regularly updated.

The Voice of the Government Services Industry

June 15, 2011

Honorable Paul Gosar
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Gosar:

Thank you for your June 3 letter providing follow-up questions to my testimony at the May 12, 2011 joint hearing with the House Small Business Committee titled "Politicizing Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business?". I am pleased to provide my response as an attachment to this letter.

Thank you for the opportunity to provide the Professional Services Council's views on this important matter. If I can provide you with any additional information, please do not hesitate to let me know. I can be reached at (703) 875-8059 or at chvotkin@pscouncil.org.

Sincerely,

Alan Chvotkin, Esq.
Executive Vice President and Counsel

Attachment

CC: Hon. Darrell Issa, Chairman, Committee on Oversight and Government Reform
Hon. Elijah Cummings, Ranking Member, Committee on Oversight and Government Reform
Hon. Sam Graves, Chairman, Committee on Small Business
Hon. Nydia Velazquez, Ranking Member, Committee on Small Business

4401 Wilson Boulevard, Suite 1110, Arlington, Virginia 22203 P: 703-875-8059 F: 703-875-8922 www.pscouncil.org

RESPONSE OF ALAN CHVOTKIN, PROFESSIONAL SERVICES COUNCIL, TO QUESTIONS FOR THE RECORD FROM REP. GOSAR, MAY 12, 2011 JOINT HEARING ON "POLITICIZING PROCUREMENT: WOULD PRESIDENT OBAMA'S PROPOSAL CURB FREE SPEECH AND HURT SMALL BUSINESS?"

Q1: I have concerns about the proposed executive order and how that may infringe upon a contractor's free speech rights. Our Supreme Court ruled in *Citizens United* that companies have a constitutional right to participate in our democratic process. The court explained, and I quote:

> **"If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, *or associations of citizens*, for simply engaging in political speech."**
>
> **• If the Administration forces applicants to disclose their political speech, doesn't that raise the possibility of chilling or inhibiting companies from engaging in political dialogue?**
>
> **A:** We certainly see the argument that disclosure could "chill or inhibit" companies from engaging in political dialogue. However, under the current law, companies are already precluded from using corporate funds for political contributions to candidates. *Citizens United* appears to sanction the use of company funds for independent expenditures. There is no indication that the current disclosure rules relating to candidate contributions have restricted the public's engagement in the political dialogue.
>
> **• And really, isn't that the intent here? To force a company to choose political speech or submitting a government bid?**
>
> **A:** We don't know the "intent" behind the draft Executive Order but we oppose the order because it requires the disclosure of information only from those companies who are competing for government contracts and requires disclosure only in the context of the source selection process for government contracts. Standing alone, the draft order does not force a company to "choose" between political speech and competing for government contracts. Rather, it forces a choice between making the required disclosure of any specifically described political contributions made (or not made) by the company and by specifically identified covered individuals and the company's competition for government contracts. We oppose forcing companies to make that choice. We take no position on the merits of disclosure requirements that are completely divorced from the merit-based selection process or any other phase of federal procurements.

Q2: Federal Government Contractors are already prohibited under FEC rules from contributing money to influence federal elections. How would this proposed executive order impact that rule?

A: The draft order would not alter the current statutes and Federal Election Commission (FEC) regulations prohibiting federal government contractors from using corporate funds for political contributions to candidates. Nor would the draft order alter the current statutes and FEC regulations permitting companies, including government contractors, to create properly structured Political Action Committees. However, in light of the *Citizens United* decision, the current statutes and FEC regulations

do not and could not constrain companies (including government contractors) from making independent expenditures.

- **Does it undermine the FEC?**

A: In our view, this draft order does not undermine the FEC.

- **Doesn't this Executive Order imply that federal contractor applicants could be donating money to influence federal elections?**

The draft order does not encourage or discourage businesses competing for federal contracts to make independent expenditures. However, the draft order does require any company competing for government contracts—and only companies competing for government contracts — to disclose independent expenditures as a condition of being awarded a federal contract. We take no position on the merits of any disclosure requirement that is completely divorced from the merit-based selection or any other phase of the federal procurement process. However, the draft order inaccurately implies that political contributions made to federal candidates influence the source selection process for government contracts.

Q3: Is this proposed Executive Order simply a way to telegraph to the bid processors how the contractor views politics?

A: There is no subtlety in the approach used in the draft order. As a condition of award of a federal government contract, every bidder must submit to the contracting officer a certification (in a form yet to be determined) that the contractor has disclosed on a publicly available website (which does not yet exist) information about the independent expenditures made by the company and all contributions made by the company's officers, directors and affiliates. The order puts the information relating to the contributions from covered individuals of government contractors competing for work—and only government contractors—squarely in the hands of the government's source selection decision-makers.

- **How is that relevant in determining the most qualified bidder?**

A: In our view, this information has no relevance to determining a bidder's qualifications for award of a government contract and should have no relevance at any stage in the government's federal procurement process.

- **Why should any bureaucrat be taking this information into consideration?**

A: We do not believe there is any reason any government official involved in the federal procurement process needs, or should have any use for, the information required to be disclosed under the draft order.

• Our contracting system is supposed to be merit based. Why would the President want to inject politics into the process?

A: We don't have any information about the President's intent. In our view, the draft order injects information that is not necessary, and that should not be necessary, at any stage of the federal procurement process.

• Isn't this a way for the administration to identify cronies and reward them with a contract?

A: The draft order injects information into the competitive process that is not necessary, and that should not be necessary, at any stage of the federal procurement process. While the draft order does not require this information to be specifically evaluated as a source selection factor in making an award, it does make the contractor's certification that disclosures to a public website have been made a condition of award of a federal contract. Thus, we believe the draft order creates the potential for abuse or favoritism in the source selection process; to prevent such potential, any disclosure requirements must be removed from the contracting process and not focus solely on federal contractors.

Q4: This proposed order appears to make a new law, a new legal requirement. I do not see a constitutional provision that allows the President to write laws. This is a power vested with Congress only. Do you agree?

A: While I am not a constitutional lawyer, and I agree that only the Congress is vested with the authority to "make laws," the President does have broad authority and responsibility to faithfully execute the laws. As a justification for this draft order, the preamble included in the draft order cites the President's general authority under the Constitution and the laws of the United States of America, and specifically including the Federal Property and Administrative Services Act (40 U.S.C. 101, et.seq.). But the President's authority under that law is not unlimited. Whether this order and the implementation through subsequent regulations and specific contract clauses are within and consistent with those authorities is a decision that will ultimately be adjudicated by the federal courts.

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

D. Mark Renaud
202.719.7405
mrenaud@wileyrein.com

June 17, 2011

Via Hand Delivery and Via Email

Rep. Darrell Issa, Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

RE: Responses from D. Mark Renaud to Questions from Rep. Paul Gosar of the Committee on Oversight and Government Reform – "Politicizing Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business?"

Dear Chairman Issa:

This letter is to transmit my responses to the questions from Rep. Gosar transmitted in your June 3, 2011, letter following up on the May 12, 2011, hearing "Politicizing Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business?"

I appreciate the opportunity to supplement the record with these responses.

Sincerely,

D. Mark Renaud

Responses from D. Mark Renaud

to Questions from

Rep. Paul Gosar
Committee on Oversight and Government Reform

Hearing on "Politicizing Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business?"

Question 1. I have concerns about the proposed executive order and how that may infringe upon a contractor's free speech rights. Our Supreme Court ruled in *Citizen's United* that companies have a constitutional right to participate in our democratic process. The court explained, and I quote:

> "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, *or associations of citizens*, for simply engaging in political speech."

1a. If the Administration forces applicants to disclose their political speech, doesn't that raise the possibility of chilling or inhibiting companies from engaging in political dialogue?

RESPONSE: As stated in my archived testimony, *available at* http://oversight.house.gov/images/stories/Testimony/5-12-11_Renaud_Procurement_Testimony.pdf, I agree that the draft executive order's ("draft EO") proposed disclosure requirements will curtail the political activities of bidders and their affiliates, which is particularly vexing given the lack of a connection between contributions and any procurement awards. The draft EO would essentially dissuade companies and their affiliates from engaging in any activities that, per the logic of the draft EO, give the appearance of impropriety in the procurement process or make the company less competitive vis-á-vis one or more contracts. To mitigate the risk of losing contracts, companies rationally will feel compelled to reduce reportable, political activities as the only protection against the artificial appearance of impropriety created by the draft EO. The draft EO also would disincentivize federal contractors and their affiliates from contributing to third parties that make independent expenditures or engage in electioneering

communications—core First Amendment rights. Accordingly, companies will likely avoid political speech that must be disclosed in order to protect their business reputation from this manufactured smear.

Additionally, the vagueness of the draft EO would increases the likelihood that the proposed disclosure requirements would chill an even greater expanse of political dialogue. Depending on how the FAR Council implements the draft EO, it could have far-reaching implications for the types of speech that must be disclosed. This lack of clarity about the reporting requirements will likely reduce political activities for companies that want to avoid a possible rules violation.

1b. And really, isn't that the intent here? To force a company to choose political speech or submitting a government bid?

RESPONSE: I am unable to comment on the intent of the Administration.

Question 2. Federal Government Contractors are already prohibited under FEC rules from contributing money to influence federal elections. How would this proposed executive order impact that rule?

RESPONSE: As discussed further below, the FEC already has broad authority to regulate campaign finance. The Federal Election Campaign Act ("FECA") currently prevents federal contractors from making campaign contributions, and the proposed executive order unnecessarily complicates the existing campaign finance regulatory scheme. The draft EO also advances the deceptive notion that political contributions impact the procurement process.

2a. Does it undermine the FEC?

RESPONSE: The draft EO would create new disclosure rules that are largely duplicative of, concurrent with, yet distinct from the FEC's authority. The FEC is already vested with jurisdiction to administer the nation's campaign finance laws. *See* 2 U.S.C. § 437c(b) ("The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, [FECA] . . . . The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions."). The FECA already prohibits contributions by federal contractors to candidates for federal office, federal political party committees, and federal PACs. *See* 2 U.S.C. § 441c(a)(1).

Additionally, the FEC already oversees corporate PAC contributions to federal political committees and candidates. *See* 2 U.S.C. § 441a(1). In addition to creating disclosure requirements already encapsulated by FECA (such as the disclosure of PAC contributions and contributions by individuals), the draft EO creates new campaign rules beyond the authority of the FEC and the tax code. The

draft EO establishes a new campaign finance mechanism vested in the FAR Council, a government body where campaign finance regulation is not a core competency.

Currently, based on the proposal of a Democratic Commissioner, the FEC does not oversee disclosure of donations to third party entities that are not political committees unless the donations are for the purpose of making electioneering communications or independent expenditures. *See* 11 C.F.R. § 104.20(c)(9) (establishing disclosure requirements for contributions that total $1,000 or more, made to corporations or labor organizations, "for the purpose of furthering electioneering communications."); 11 C.F.R. § 109.10(e)(1)(vi) (establishing disclosure requirements for contributions that total more than $200 made to entities "for the purpose of furthering the reported independent expenditures."). The draft EO, however, would create a new set of rules regulating the third party donations of federal contractors. Thus, the new rules would single out federal contractors for disparate treatment and create a campaign finance regulatory system outside of the FEC. The creation of competing disclosure rules would, among other things, make campaign finance law more complicated and may consequently undermine the efforts of the FEC.

2b. Doesn't this Executive Order imply that federal contractor applicants could be donating money to influence federal elections?

RESPONSE: The draft EO relies on the misconception that federal contractors may donate money to influence federal elections. As previously discussed, federal contractors already are banned from making contributions to federal candidates, federal political party committees, and federal PACs. The notion that disclosure is necessary to prevent corruption also breeds the false public perception that corporate political activities (or the activities of directors or officers, or any affiliates or subsidiaries within a bidding entity's control) impact the procurement process. In fact, the personnel who generally make federal contracting decisions are neither elected officials nor appointees of elected officials. Thus, the individuals involved in federal contracting decisions are insulated from politics and there is no threat of *quid pro quo* procurement or even the appearance of impropriety if the public were educated about the procurement process. Further, the draft EO inappropriately proclaims to the public that federal contractors require unique disclosure rules because of their potential to improperly influence the procurement process. This unjustifiable assumption perpetuated by the draft EO may have an impact on the public's electoral decision-making.

Question 3. Is this proposed Executive Order simply a way to telegraph to the bid processors how the contractor views politics?

RESPONSE: As discussed further below, political contributions do not and should not impact procurement decisions. The draft EO's emphasis on disclosure of independent expenditures and electioneering communications during the government procurement process likely reflects opposition to the recent *Citizens United* decision.

3a. How is that relevant in determining the most qualified bidder?

RESPONSE: The political views of federal contractors are not, and should not be, relevant to determining the most qualified bidder.

3b. Why should any bureaucrat be taking this information into consideration?

RESPONSE: Procurement officials should not take the political views of federal contractors into account when determining the most qualified bidder.

3c. Our contracting system is supposed to be merit based. Why would the President want to inject politics into the process?

RESPONSE: I am unable to comment on the intent of the President in proposing the EO. It clear, however, that President Obama opposes the Supreme Court's decision in *Citizens United v. FEC*, in which the Court refused to place limits on a corporation's ability to fund independent expenditures. *See* President Barack Obama, State of the Union Address (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address (expressing opposition to the *Citizens United* decision by stating that "last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests...to spend without limit in our elections.").

Corporate political activities do not affect the current procurement process because the civil servants who generally determine contract awards are neither appointed nor elected. Further, in *Citizens United* the Court emphasized that independent expenditures and independent electioneering communications do not raise corruption concerns. *See* 558 U.S. ___ , 130 S. Ct. 876, 883 (2010). Yet, the requirements of the draft EO incorporate the President's opposition to unlimited, corporate independent expenditures by creating disclosure requirements that could hinder a company's acquisition of government contracts for engaging in constitutionally protected political speech. The new requirements link a company's political contributions to independent expenditures and electioneering communications with the perception of corruption. As a result, there is a fear that the draft EO's disclosure requirements will force political considerations to be a part of the bidding process and introduce politics into an area that was and should be apolitical.

3d. Isn't this a way for the administration to identify cronies and reward them with a contract?

RESPONSE: I hope that the Administration would not use the disclosure requirements to identify and reward cronies. Federal contract rules generally place contract selection decisions in the hands of civil servants who are neither elected nor appointed. Thus, procurement officials are insulated from political activities and not subject to partisan pressures. The protections in place as a part of the current government procurement process for identifying qualified bidders remove the threat of corruption.

Question 4. This proposed order appears to make a new law, a new legal requirement. I do not see a constitutional provision that allows the President to write laws. This is a power vested with Congress only. Do you agree?

RESPONSE: The Administration's attempt to enact a new legal framework for procurement and campaign finance laws through the draft EO has no basis in the Constitution or delegated statutory authority. The President's authority to issue executive orders does not allow him to use this power to circumvent the will of Congress. The President can issue executive orders that are consistent with a specific statutory delegation or with constitutional authority. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952) ("The President's power, if any, to issue the order must stem from an act of Congress or from the Constitution itself."). Congress considered and rejected legislation with nearly identical content to the draft EO. *See* Democracy is Strengthened by Casting Light on Spending in Elections Act, S.3628, 111th Cong. (2010). In this case, the draft EO would promulgate legal requirements that Congress would not enact legislatively. In addition, no constitutional provision supports this exercise of executive power.

Finally, the draft EO would have a significant impact on the nation's campaign finance law. The draft EO would create a novel legal framework independent from other mechanisms that currently regulate campaign finance. The use of questionable authority to create an entirely new legal requirement represents a serious overextension of executive power into a realm reserved exclusively for Congress.

June 17, 2011

Honorable Darrell Issa, Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Re: Response to supplemental questions for Hearing of May 12, 2011, "Politicizing Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business."

Dear Chairman Issa:

Enclosed are my responses to supplemental questions from the Committee hearing on May 12, 2011, titled "Politicizing Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business." As I informed the Committee at the Hearing on May 12, I was departing the country immediately after for an extended vacation and would be unable to respond to supplemental questions until my return in late June. I appreciate the Committee's allowing this late response to these supplemental questions.

Please let me know if the Committee has questions or additional follow-up requests.

Very Truly,

Bradley A. Smith
Chairman

124 West Street South, Ste 201 Alexandria, VA 22314 www.campaignfreedom.org P: 703.894.6800 F: 703.894.6811

Before the United States House of Representatives
Committee on Oversight and Government Reform

Hearing of May 12, 2011
"Politicizing Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business."

Responses of Bradley A. Smith, Chairman
Center for Competitive Politics
124 S. West St., Suite 201
Alexandria, VA 22314
and
Josiah H. Blackmore II/Shirley M. Nault Professor of Law
Capital University Law School
303 E. Broad Street
Columbus, OH 43215
to Supplemental Questions from Chairman Issa
June 17, 2011

Question 1) Is the FAR Council, as opposed to the Federal Election Commission, the appropriate entity to implement disclosure requirements for campaign finance activities? Does the Executive Order intrude on the prerogatives of Congress?

Answer) I believe that asking the FAR Council to interpret – or create – a disclosure regime for federal campaign finance activities would seriously complicate the obligations of citizens, confuse the public, and hinder the FEC in its enforcement duties.

2 U.S.C. 437c (b) (1) specifically grants to the Federal Election Commission "exclusive jurisdiction with respect to the civil enforcement" of the Federal Election Campaign Act. The Act itself, as published by the FEC, is over 160 pages, and the regulations over 400 pages. Over the years, the FEC has also issued hundreds of advisory opinions interpreting the Act and regulations. Additionally, numerous court cases involving constitutional challenges determine how specific provisions of the law must be interpreted. Thus, to give just one example, the Act and or various FEC Advisory Opinions and court rulings now

124 West Street South, Ste 201 Alexandria, VA 22314 www.campaignfreedom.org P: 703.894.6800 F: 703.894.6811

contain the following terms, all of which are terms of art that do not necessarily match their use in ordinary English: "expenditures;" "contributions;" "independent expenditures;" "electioneering communications;" "Federal election activity;" "generic campaign activity;" "public communications;" "coordinated expenditure;" "express advocacy;" "issue advocacy;" "get-out-the-vote activity;" "general public political advertising;" and "voter registration activity." FAR personnel are not experts in federal campaign finance law and should not and cannot be expected to become experts in the constitutional law that limits and defines many of these terms.

Already, for tax status purposes the Internal Revenue Service has limited responsibilities for recording some information on political spenders. This has created confusion because the IRS and the FEC do not use the same terms or always interpret those terms in the same manner. Oddly enough, not only does dividing the enforcement and reporting regime among agencies sow confusion in the public, but it allows those with the best lawyers and sharpest consultants to exploit joints in the law, in ways that leave the small business community, with fewer resources, at a disadvantage. In my experience as a Commissioner at the FEC, efforts to use the tax code to force campaign finance disclosures not covered by FECA or exempt under constitutional precedent seriously complicated and hindered public understanding of the campaign finance laws and enforcement efforts at the FEC.

Congress granted the FEC "exclusive jurisdiction" over civil enforcement of federal campaign finance laws for good reason.

While it is a legitimate exercise of Presidential authority to oversee the procurement process, to the extent that the proposed Executive Order seeks to address campaign finance regulation, it indeed oversteps the executive's authority. To my knowledge, the Administration has identified no need for this information in the contracting process – indeed, at this hearing its representative emphatically stated that FAR personnel would never consider the information this order would disclose in the course of performing their duties. Executive power only extends to the extent necessary to carry out the duties that Congress has legislated or that are mandated by the Constitution. Thus, I would say that attempting to use the procurement process to regulate campaign finance is a usurpation of the prerogatives of Congress. This is particularly true given that this is a high profile issue that has been considered and voted on by Congress in the last year.

Question 2) Do you imagine certain entities will, instead of giving up their federal contracts, withdraw from engaging in political speech?

Answer) Yes.

It is often suggested that need to know "who is paying for" certain political communications. In fact, the sponsors of all print and broadcast political communications are identified already. For example, if the U.S. Chamber of Commerce pays for a TV commercial supporting a candidate, that appears on the ad and is reported to the FEC. So the idea that we don't know "who is paying" for ads is misleading. What seems to be motivating this proposed order is a desire to go further up the chain – in other words, to know who is paying the party paying for the ads, and if necessary to know who is paying the party who is paying the party paying for the ads, and so on. From the standpoint of a voter, however, knowing that the Chamber, for example, paid for an ad should provide all the information needed to judge the veracity of the ad and possible motivations of the sponsor.

One of the main reasons that individuals and businesses often choose to participate in politics indirectly, however, is to avoid the possibility of public harassment or official retaliation. One of the key things that trade groups such as the Chamber do is provide a way for the public to participate without those

threats. Note that this is also true when we talk about lobbying – businesses and other members of the public frequently prefer to comment on federal regulations, or before Congress, through trade associations. This removes the possibility of retaliation from those in power who would abuse their authority. If one reason for engaging in political activity through trade associations is to avoid the possibility of retaliation, then of course we should presume that some speakers will choose not to participate if that avenue is closed to them.

Both as a Commissioner at the FEC and in private legal practice, I have heard countless individuals declare that the complexity of campaign finance law, and the difficulties and hassles it presents, has convinced them not to be involved in political campaigns. Even if the compliance with the proposed EO were simple – and if you have tried to complete FEC filing forms, I suggest you know it probably will not be – I would expect some to drop out of politics. After all, as important as politics are, few small business owners are going to jeopardize their livelihood to contribute a few hundred dollars to a political campaign. The simple knowledge that a political contribution – including those made independently by employees - must be reported as part of the contracting process will cause some to shy away from all political spending, and to discourage or even attempt to prohibit their employees from doing so as well. Why take a risk on messing with your business. And as the former Executive Director of the Small Business Association of Michigan, I can say that even if compliance is easy, even if assured that their action is legal, small business owners have enough worries on their plate without this one, and many will decide it is better to forego political activity. Making contributions is, after voting, probably the single most common way in which a person directly associates with a political campaign. It cannot be healthy for our democracy to discourage this form of political activity.

Question 3) Could the Executive Order subject bidding entities and their officers or directors to harassment or reprisal? Does this have constitutional implications?

Answer) Yes, clearly so. For just a few examples of harassment and reprisal facilitated by campaign finance disclosure rules, see Bradley A. Smith, *In Defense of Political Anonymity,* City Journal, Vol. 20 (Winter 2010), also available at http://www.city-journal.org/2010/20_1_political-anonymity.html.; Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process,* 47 Harvard Journal of Legislation 75, 98-99 (2010).

Of course, much of the information that the proposed EO would seek is already disclosed. But as noted, the EO appears to demand information that goes beyond the current law, and in doing so ignores the fact that donors often want to engage in political activity through groups precisely to avoid personal harassment. And, in fact, one purpose of the added disclosure appears to be to facilitate such harassment. As Candace Nichols of the Las Vegas Gay and Lesbian Community Center and an organizer of boycotts against supporters of California's Proposition 8 vote on marriage noted, campaign finance disclosure was vital to their campaign of harassment and boycotts: "Years ago we would never have been able to get a blacklist that fast and quickly." Common Cause, which supports this order, has recently organized boycotts and picketing of donors to causes and politicians with which it disagrees.

From a constitutional standpoint, this added disclosure raises questions for this very reason. It is true that the Supreme Court has frequently upheld the constitutionally of campaign finance disclosure rules. However, there are numerous exceptions. First, the disclosure must be necessary to serve an important government interest, *see Buckley v. Valeo,* 424 U.S. 1 (1976) – one which has not been identified in the context of federal procurement. *Buckley* also limited disclosure to ads containing "express advocacy" (and, now, presumably, it's equivalent, *see McConnell v. FEC,* 540 U.S. 93 (2003) and *Wisconsin Right to Life v. Federal Election Commission,* 551 U.S. 449 (2007))or made by a "political committee." Second,

individuals spending small amounts have a right to remain anonymous, *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995), which may be directly offended if the order requires contractors to disclose expenditures by individual employees. Additionally, individuals and entities who can demonstrate realistic concerns about retaliation have a right to anonymous speech. *Brown v. Socialist Workers '74 Campaign Committee,* 459 U.S. 87 (1982); *see also Doe v. Reed,* 561 U.S. ___ (2010).

Some in the so-called "reform" community have argued that the Supreme Court's decisions in *Doe v. Reed* and *Citizens United v. Federal Election Commission,* 558 U.S. 50 (2010) clearly hold that the types of rules in the proposed EO are constitutional. This is a serious overstatement, at best. The Court has never ruled on these types of disclosure rules, and as the above cases indicate, it has frequently limited the reach of disclosure regimes. Just as the Supreme Court has frequently upheld campaign finance disclosure rules, it has also frequently upheld anonymous speech in political and other contexts. So for example, a door-to-door solicitors –such as those in Organizing for America – have a right to work anonymously, *Watchtower Bible & Tract Society of New York v. Village of Stratton,* 536 U.S. 150 (2002); as do union organizers, *Thomas v. Collins,* 323 U.S. 516 (1945); as do those engaging in commercial boycotts, such as those organized by Proposition 8 opponents, *Talley v. California,* 362 U.S. 60 (1960).

Thus, while I would not go so far as to predict the results of a Supreme Court decision – and such a decision could turn on the final form of any EO – I feel quite confident in predicting that any such EO (or similar proposals if passed through legislation or by the FEC) would be challenged in the courts, and those challenges would be serious and well supported by various lines of Supreme Court precedent. I also, of course, believe that the members of this body have an obligation of their own to consider the constitutionality of proposals, and to reject those that they deem unconstitutional, rather than cede all constitutional questions to the courts.

In other words, does it have "constitutional implications?" Obviously so.

Conclusion) Thank you for allowing me to respond to these supplemental questions.

Respectfully submitted,

Bradley A. Smith

Chairman ISSA. The chair would now like to recognize our first panel witness. The Honorable Dan Gordon is the Administrator for Federal procurement policy.

Mr. Gordon, pursuant to committee rules all witnesses will be sworn. Would you please rise and take the oath?

[Witness sworn.]

Chairman ISSA. Let the record indicate the witness answered in the affirmative. Please be seated.

It is customary, as you know, to have a 5-minute opening statement. Your entire opening statement will be placed in the record. If you go past the 5 minutes, we're not going to cut you off, but please feel free to go off message at the greatest amount—or on message, but off of your opening statement, and then we will round of questions. Thank you.

Mr. Gordon.

STATEMENT OF DANIEL GORDON, ADMINISTRATOR FOR OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET

Mr. GORDON. Thank you Mr. Chairman. I'll try not to go off message.

Chairman ISSA. Actually, that was a Freudian slip, I am sure.

Mr. GORDON. Chairman Issa, Chairman Graves, Ranking Member Cummings, Ranking Member Velázquez, I appreciate the opportunity to appear before you and all of the members of the committee this afternoon. As the administrator for Federal procurement policy, I am responsible for overseeing the development of governmentwide acquisition policies and regulations and ensuring that they promote economy, efficiency, and effectiveness and the increased participation of small businesses in our Federal marketplace.

As you know, our President has made contracting reform a top priority, and he has called on agencies to expand opportunities for our small businesses. I am pleased to say that we are making progress on both fronts although, as we say in my former employer, GAO, much work remains to be done.

I understand that the committee had requested testimony from OMB about a draft Executive order regarding disclosure of political contributions by Federal contractors. As you know, no such Executive order has been issued and it would be inappropriate for me or for any executive branch official to testify about matters that are still undergoing comment and review and do not yet reflect final administration policy.

As a result, I appreciate the committees' recognition that my testimony today will be limited to addressing our efforts to enhance integrity, efficiency, and transparency in Federal procurement and will not address the draft Executive order.

That said, I can unequivocally state that this administration has always been and remains fully committed, 100 percent committed, to a merit-based contracting process that meets the highest standards of integrity and transparency. There simply is no place for politics in Federal acquisition. Accordingly, our process must ensure, and the public must have confidence that it ensures, that no polit-

ical considerations are allowed to bear on Federal contracting decisions at any point during the acquisition process.

In that regard, one of the bedrock principles in the evaluation of proposals and the award of contracts in our Federal procurement system is that agencies may consider only the factors that are set out in the solicitation. Nothing more, nothing less.

If a company that competes for a contract unsuccessfully believes that it lost because the agency has taken into account some factor that is not set out in the solicitation, it has available an established accountability mechanism, the bid protest process.

I had the honor, as some of you know, of working at GAO for 17 years, most of that time in the bid protest process. It is a process I am intimately familiar with, and I can tell you that it works well in providing disappointed bidders with an opportunity to get independent review if they believe that the award of a contract has been tainted by an improper factor or any other factor not set out in a solicitation.

With respect to improving efficiency in our system, we are strengthening tools to increase competition, to decrease the use of sole-source or no-bid contracts. And I am pleased to tell you that many of the successes we have had in that regard in increasing competition have rebounded to the benefit of small businesses. We are working to help small businesses more easily navigate the Federal market space to find business opportunities.

For example, earlier this spring, the General Services Administration [GSA], unveiled a new Web-based tool that now allows small businesses to access from one Web site all information about agency outreach, business development opportunities, and training events across the entire Federal Government.

With respect to transparency, a very high priority for this administration, we are shining a brighter light and a stronger light on our acquisition processes to help protect the public from wasteful spending practices and inspire public confidence in the integrity of the contracting process. We have significantly improved the content and the functionality of USA Spending dot-gov, which is a one-stop source for information on Federal contract spending, so that the public will have unprecedented access to information about how their tax dollars are being spent.

In addition, spending data on subcontracts is now posted on that site so that taxpayers can see how much work is subcontracted, and to whom, and for what purpose. In addition, the public now has access to salary information for the top executives of many of our Federal prime contractors and subcontractors.

And finally, let me say a few words about the Federal acquisition work force mentioned by several of the opening speakers, a very important factor for me personally. The Federal acquisition work force is our most important resource, and it is the key to preserving the integrity of the acquisition process. This administration has taken unparalleled steps to increase the capability and the capacity of the acquisition work force, as evidenced by the President's budget request for both fiscal year 2011 and 2012, and it has been and it remains my top priority to make sure that the good women and men of our acquisition work force have access to the training and to the development opportunities that they need, to be the best pos-

sible stewards of our Federal taxpayer dollars. Their professionalism is one of our greatest assets, and among my core responsibilities as Administrator is to be their champion.

Finally, let me reiterate this administration's unwavering commitment to protecting the integrity of the Federal contracting process and ensuring that our taxpayer dollars continue to be spent appropriately and that taxpayers see that they can have confidence in our procurement system.

There is much left to be done. And we welcome the opportunity to work with both of these committees and with other Members of Congress to make meaningful and sustained improvements to our procurement system, to ensure that it remains merit-based and meets the highest standards of integrity, efficiency, and transparency.

This concludes my prepared remarks, and I am happy to answer questions from either of the committees.

Chairman ISSA. Thank you.

[The prepared statement of Mr. Gordon follows:]

STATEMENT OF
THE HONORABLE DANIEL I. GORDON
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
AND THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES

May 12, 2011

Chairman Issa, Chairman Graves, Ranking Member Cummings, Ranking Member Velazquez, and members of the Committees, I appreciate the opportunity to appear before you today. As the Administrator of the Office of Federal Procurement Policy (OFPP), I am statutorily responsible for overseeing the development of government-wide acquisition policies and regulations and ensuring they promote economy, efficiency, and effectiveness in agencies' procurement activities and the increased participation of small businesses in the federal marketplace. As you know, the President has made contracting reform a top priority and he has also called on agencies to expand opportunities for our nation's small businesses, including small disadvantaged businesses, service-disabled veteran owned small businesses, women-owned small businesses, and small businesses in Historically Underutilized Business Zones. I am pleased to say we are making good progress on both fronts. After more than a decade of uncontrolled contracting growth, we are reducing contract spending, with spending in Fiscal Year 2010 about 15 billion dollars lower than in 2009. We have also increased competition and created new opportunities for the small business community.

I understand that the Committee had requested testimony from OMB about a draft Executive Order regarding disclosure of political contributions by federal contractors. As you know, and as Director Lew has written to you, because no such Executive Order has been issued, it would be inappropriate for any OMB or Executive Branch official to testify about matters that are still undergoing comment and review and do not yet reflect final Administration Policy. As a result, we appreciate the Committee's recognition that my testimony today will be limited to addressing our efforts to enhance integrity, efficiency and transparency in federal procurement and will not address the draft Executive Order.

I can state unequivocally that this Administration has always been, and remains, fully committed to a merit-based contracting process rooted in the highest levels of integrity and transparency. There is no place for politics in federal acquisition. Accordingly, the process must ensure, and the public must have confidence, that no political considerations are allowed to bear on federal contracting decisions at any point during the acquisition process.

Since my confirmation as Administrator in November 2009, OFPP has worked with Executive Branch agencies to make important strides to strengthen the integrity, transparency, and efficiency in our procurement process. These efforts, along with those to strengthen the

acquisition workforce, are helping us to reinforce fundamental principles of fairness and make our acquisition system the envy of the world.

Integrity. One of the most, if not the most, important tenets of our acquisition system is that only factors set out in the contract solicitation may be considered in making awards – nothing more and nothing less. There are well established accountability mechanisms to ensure the integrity of the process, both administrative and judicial, that are available to bidders to challenge agency decisions if they believe the agency has not followed the factors stated in the solicitation. I am particularly familiar with the bid protest process at the Government Accountability Office, where I worked for 17 years, and can tell you based on this extensive experience, that the protest process, ultimately culminating in possible recourse in the Court of Federal Claims and the Federal Circuit, works very well in providing the type of independent review that is required to protect the integrity of the process.

These mechanisms are just some among many others that help preserve the integrity of our procurement system. A year ago, we unveiled the "Federal Awardee Performance and Integrity Information System" (FAPIIS) – a new one-stop source for a comprehensive range of data, such as information on suspensions and debarments, contract terminations, and contractor disclosure of adverse criminal, civil, and administrative actions. Broadened and easier access to this information is giving our contracting officers the information they need to more easily determine whether a company is playing by the rules and has the requisite integrity to do business with the government. Beginning last month, information inputted in FAPIIS is also being made available to the public, so our citizens also can have greater insight into the contractors who are bidding for work. FAPIIS is thus another example of efforts to share information about contractors with the public, in order to reinforce the public's confidence in the integrity of the procurement process.

We are also modernizing rules addressing conflicts of interest to help our contracting officers more effectively deal with present-day challenges associated with the government's increased use of service contractors. The new rules, when finalized, will better ensure that no contractor benefits from an unfair competitive advantage in a source selection and that the taxpayers' interests are protected from contractors that are unable to render impartial assistance or advice to the government.

Efficiency. We are strengthening tools to help us take more efficient and effective advantage of competition, our most powerful tool for saving money, improving contractor performance, curbing fraud, and promoting accountability for results. Every agency is working to reduce the share of dollars obligated through new contracts that are awarded noncompetitively or after a competition that received only one bid – situations that put our government at heightened risk of waste and abuse. We are also improving rules and practices governing the use of interagency and agency-wide contracts. These vehicles give us the ability to leverage the government's purchasing scale and increase administrative efficiency. These vehicles also reduce costly duplication in contracting activities, lessen the amount of paperwork contractors must prepare to receive work and lower their costs of doing business with the government. I am proud to say that many of our most promising examples of success to date involve awards to small businesses, and we are working every day to enlarge the base of small businesses who do

business with our agencies. This includes taking better advantage of technology to help small businesses more easily navigate the federal market space to find business opportunities. Earlier this spring, for example, the General Services Administration unveiled a new web-based tool that now allows small businesses to access from one website all agency outreach, business development, and training events across the government.

Transparency. We are shining a stronger light on our acquisition processes to help protect the public from wasteful spending practices and inspire public confidence in the integrity of the contracting process. We have significantly improved the content and functionality of USASpending.gov, the one-stop source for information on federal contract spending, to give the public unprecedented access to information about how their tax dollars are being spent. Spending data on subcontracts is now posted on this site, so taxpayers can understand how much work is subcontracted, to which vendors, and for what purpose. The public also has access to salary information of the top executives of many of our federal prime contractors and subcontractors.

Acquisition workforce. The acquisition workforce is our most important resource and key to preserving the integrity of the acquisition process. This Administration has taken unparalleled steps to increase the capability and capacity of the acquisition workforce, as evidenced in the President's Budget requests for FY 2011 and FY 2012, and it has been, and remains, my first priority to make sure the good women and men of our acquisition workforce have access to the training and development opportunities they need to be the best possible stewards of our taxpayer dollars. Their professionalism is one of our greatest assets, and among my core responsibilities as Administrator is to be their champion.

Let me reiterate the Administration's unwavering commitment to protecting the integrity of the federal contracting process and ensuring our taxpayers continue to have confidence in our procurement system. There is much left to be done and we welcome the opportunity to work with both of these Committees and other members of Congress to make meaningful and sustained improvements to our procurement system to ensure that it remains merit-based and meets the highest standards of integrity, efficiency, and transparency.

This concludes my prepared remarks. I am happy to answer any questions that you may have.

Chairman ISSA. Could we go ahead and run that quick video to set the theme for questioning?

[Video shown.]

Chairman ISSA. The chair now recognizes himself for 5 minutes.

You undoubtedly saw that clip when it was fresher, I suspect. It is clear that the President believes that the unlimited right of free speech is not appropriately decided. He made that clear.

Do you believe that free speech is in fact a right that relies to a certain extent on privacy of how money is spent?

Mr. GORDON. Mr. Chairman, I am going to get a bit out of my depth when I go beyond the procurement system.

Chairman ISSA. Let's put it another way. Do you believe the government has a legitimate right to know whether I gave to the pro-life movement, whether I gave to United Gays and Lesbians, or whether I gave to the Democratic Party, if I am a vendor of the government submitting a bid?

Mr. GORDON. I don't feel comfortable addressing the issue of campaign—of campaign finance disclosure.

Chairman ISSA. It is not campaign finance disclosure. It is political activity, not currently covered by the disclosure, which ultimately we are not going to be endlessly asking you questions about the specifics of that. But the broad question is, do you believe that is necessary information in order for a nonpartisan or a partisan appointee to participate fairly in the procurement?

In your opening statement you made it very clear. You said it is supposed to be only in the structured requirement. Have you ever sent one out? Have you ever sent out a bid request that asked how much you gave to United Gay and Lesbian organizations or to the National Right to Life or any of these? Has that ever been part of the procurement process?

Mr. GORDON. No, sir. I would not expect that to be an evaluation criterion at any point in the future, just as it has not been in the past.

Chairman ISSA. So if I read you correctly—and I want to be very careful—you don't see that as necessary information in the procurement process?

Mr. GORDON. In the selection of a contractor, a contractor can only be selected based on the factors that are set out in the solicitation. If the question is would the public like to know what contributions are made, that is separate from the procurement process itself.

Chairman ISSA. OK. So in looking at the draft Executive order, we found that it would be a requirement in order to participate in the contracting process.

Do you believe—not talking to the Executive order—but do you believe that we have a right to ask for information completely unrelated to the fitness of a vendor in order to give information to the public that would not otherwise be available, simply because somebody wants to be a vendor to the government?

Mr. GORDON. There are many sorts of information that we require vendors to submit; information about lobbying, for example. It is not taken into account in the selection of contractors. But it is required to be submitted and it is publicly available. There are other examples I could give you of information that we believe the

public should have access to, even though they are not taken into account in the award of a contract.

Chairman ISSA. So where is the constitutional charge of the President, without an act of Congress, to in fact require private citizens to turn over information in order to enter into the flow of commerce? I don't want to know about historic things that nobody argued about. We're now talking about Chicago hardball politics that clearly could lead to a chilling effect on contributions by those required to participate. Clearly, unions are exempt from this draft order, while corporations generally are not and their key employees. Where is the authority, in your opinion, or the need? You've already said there isn't a need. Where is the authority, in your opinion?

Mr. GORDON. Mr. Chairman, you won't be surprised to hear that I am not a constitutional lawyer, and I won't be citing to the Constitution.

Chairman ISSA. So you head up the procurement. You are the responsible party at OMB. You see no need. So therefore if this Executive order, or one substantially similar, were to happen, it would not be based on need. It would probably be based on the President's statement at the State of the Union and his opinion that follows that, obviously?

Mr. GORDON. I don't understand your reference to "need." Let me be clear. What I was saying was in the selection of the contractor, the winning competitor for the contract, the information about political contributions is not needed.

Chairman ISSA. OK. So the Executive order, as we read it, is asking for information that is not needed.

Mr. GORDON. To decide which company should receive a contract; that is correct.

Chairman ISSA. That's OK. So you're asking for unneeded information.

Do you believe that people may choose not to make contributions if they are forced to make, for example, known that they gave to Planned Parenthood or National Right to Life?

Mr. GORDON. Sir, you're outside the area where I feel comfortable expressing an opinion.

Chairman ISSA. I think it is very clear this Executive order is outside the procurement process.

With that, I recognize the ranking member for his questions.

Mr. CUMMINGS. Thank you very much. Mr. Gordon, I would thank you for being here. And I want to help answer the question that the chairman just asked.

He asked about full disclosure and whether that is appropriate. And let me just read this quote—and listen carefully. "I think what we ought to do is we ought to have full disclosure, full disclosure of all of the money that we raise and how it is spent. And I think that sunlight is the best disinfectant." And that was said by Speaker Boehner.

By the way, before he became Speaker, on Meet the Press back on February 11, 2007. So I just wanted to help answer the question. The Speaker clearly was of the opinion back then and I think he's of the opinion now—and let's not get confused about some things.

The public knowing—first of all, let's get back to what the chairman talked about a few moments ago. He was very complimentary of contracting officers. And I was just so impressed and so moved. And then he implies that you talk about how they must—folks must, in dealing with these contracts, they must deal with only the factors stated and set out in, I guess, the bid documents or whatever; is that correct?

Mr. GORDON. Yes, sir.

Mr. CUMMINGS. Now, so it is true that it is not about bid officers, these good people that the chairman just talked about doing their job well, doing it with integrity. It is not about them looking at these documents, trying to decide what a bid—who should be awarded a bid; is that right?

Mr. GORDON. That is right.

Mr. CUMMINGS. This is more about the public having an opportunity to know, the public having an opportunity to know generally what's going on with these contributions or whatever; is that right?

Mr. GORDON. It is, sir.

Mr. CUMMINGS. Now, Mr. Gordon, last week a coalition of 34 good government and other organizations sent a letter to the President supporting this draft, you know, Executive order. And the letter said this, and this is very interesting. It says, "The undersigned organizations, on behalf of our members and supporters, write today to express our strong support for the April 13th draft Executive order. It simply requires that a business entity, as a condition of bidding on a government contract, disclose campaign contributions and expenditures of the company. It seems management and afflicted political action committees for all"—for all—"to see."

And it just seems to me that we have disclosure now and folks can always go to certain reports and see what people have been giving; is that right.

Mr. GORDON. It is correct, sir.

Mr. CUMMINGS. Yeah. So if they wanted to, I guess—so following this logic, no disclosure would be appropriate. You know, you've got a situation where folks already are disclosing, and now they're giving money to organizations that don't disclose. So I guess the public—and the public is getting very, very frustrated.

All of our polling shows that the frustrated—the public, not contracting officers, but the public wants to know more about, you know, who's giving money where. They want to know. They want to have an idea.

As a matter of fact, very shortly, in a matter of 3 or 4 days, you know what's going to happen, Mr. Gordon? Everybody up here, we've got to do some disclosing.

And again, the organizations that have come forward, they have said, Look, they have looked at this. This is what they do. This is what they do. They are trying to make sure that the public has an opportunity to know as much information as possible. And you know why, Mr. Gordon? The reason why they want to know is because many of them feel powerless. Many of them feel that government goes off and does its thing, and they have no idea what's going on generally behind the scenes.

And I think that is what these organizations, in the letters that I asked to be admitted into the record, that is what that is all

about; 30 organizations basically begging the President to sign the Executive order.

Now, there's another thing that is very interesting. I know you're not commenting on all of this, but this is a draft. So we're here talking about a draft. We don't know what—first of all, we don't know that there will be a final Executive order. We don't know what will be in the final Executive order. And so with that, I just—it is kind of frustrating and I'm glad you're here to testify.

Mr. GORDON. Thank you.

Chairman ISSA. The chair now recognizes the chairman of the full Committee on Small Business, Mr. Graves.

Chairman GRAVES. Thank you, Mr. Chairman. Just to kind of dovetail on what the ranking member said—and he's correct. You can find out this information, you know, if somebody gets a contract for the Federal Government, you can go look at what their contributions were. So in terms of the public feeling powerless, I don't understand where that comes from because they can find out. He stated himself.

So my question to you, Mr. Gordon, is, ahead of the fact, submitting this information ahead of the fact—and you said yourself it is information we don't need to make determination on a contract—so submitting this information ahead of the fact, what purpose does it serve?

Mr. GORDON. Chairman Graves, as you know, that would get me into a discussion of the draft Executive order, and I don't think it is appropriate for me to do that. But I can make a couple of points that may be helpful.

I used to teach for a good number of years at George Washington University's law school. I taught international and comparative public procurement law. And one of the principles that we talked about when we look both at our State procurement systems and foreign procurement systems, the fact is a huge amount of taxpayer funds flows through government contracting. That is true whether you're talking about, in my home State, the city of Annapolis, or the Federal Government or foreign governments.

And one of the things that we talked about in those classes is the importance of transparency, the enormous value of transparency. I sometimes used to refer to it in class as Vitamin T. It is enormously helpful to strengthen public confidence that their tax dollars are being used properly, that they feel that information is available to them.

Chairman GRAVES. Let me ask you, then, how does this information do that? How does your agency know ahead of time who gave to what and how much they gave? How does that help in terms of transparency? Are we talking about your contract or how you're going to award the contract, or are we talking about—you know, I don't understand that. I don't understand the purpose when you can find out the transparency is there, if you award a contract to a company and they can go see what that company gave and who they gave to.

But it seems to me that it would serve no other purpose doing it ahead of the fact. You already said your agency doesn't need that information to make a determination on that contract. So I still fail to see what purpose it serves, whatsoever, in that determination.

Mr. GORDON. The transparency, transparency serves an extremely important purpose to the information.

Chairman GRAVES. Can you get that information? Can the public get that information? Once you've awarded a contract to a company, can they get that information and find out, all right, this company just got a contract for X number of dollars from the Federal Government. I want to see who they gave to and what organization, how much, whatever. Can they get that information?

Mr. GORDON. I understand that. I am not an expert——

Chairman GRAVES. You agreed with Mr. Cummings they can get that information. They can get that information. And you agreed with Mr. Cummings when he said that.

Mr. GORDON. My understanding is that some information about political contributions is currently available already.

Chairman GRAVES. The fact of the matter is it is available. It is fully available. And so if a company gets a contract from the Federal Government, you can go look and see total transparency. But the simple idea that you want that information ahead of time disturbs me in a big way. And why the administration would want that information ahead of time, ahead of awarding the contract, it disturbs me in a big way.

And the fact of the matter is, we asked a lot of small businesses to come in and testify today, and they didn't want to testify today because they are afraid of retribution from this administration. Well, the simple fact that they are afraid of retribution from this administration and they're in the contracting process means that there is at least that paradigm or that idea that is out there.

So my question to you is, how are you going to assure that at least the appearance of awarding these contracts based on, or the appearance of—let's look at it the other way. How are you going to assure small businesses that the appearance is on the up-and-up and that you don't need that information to make that award? How are you going to assure that to these small businesses who are already scared to even come in here and testify?

Mr. GORDON. We have, as Chairman Issa said, we have a terrific corps of contracting officers. They know what the rules are. They are set out in the Competition in Contracting Act and in the Federal Acquisition Regulation. No factors, no factors can be considered except those set out in the solicitation. If the company feels those rules weren't followed, they can file a bid protest. They will get independent review.

Chairman GRAVES. Are any of those people in that process politically appointed?

Mr. GORDON. We are generally dealing with career people, although there is an exemption and it is worth pointing out, by statute chief acquisition officers of the agencies are in fact politically appointed. I remember hearing years ago when that was originally created some concern that having a political appointee could cause trouble. In fact, at least to my knowledge, there have never been allegations of interference. I don't think that there is a problem, but if there were a problem a company can file a bid protest.

Chairman GRAVES. I am out of time now, but the fact remains you said you don't need that information for the contracting process and that information is widely available after the fact, after the

contract is awarded, and anybody in this country or worldwide can find out what that information is.

So submitting it ahead of the fact is something that disturbs me a great deal, and what the motivation, the true motivation, is behind asking for this.

Thank you, Mr. Chairman.

Chairman ISSA. Thank you.

The chair now recognizes the ranking member, Ms. Velázquez.

Ms. VELÁZQUEZ. Mr. Gordon, there are many concerns that providing donor information to contract officers willfully decides the procurement process. Is there an example of another program where there are safeguards to prevent such a conflict of interest?

Mr. GORDON. Conflicts of interest, if I could, Ranking Member Velázquez, is a subject to which I'm particularly sensitive and my office is particularly sensitive. In my year and a half as the Administrator for Federal Procurement Policy, I have led an effort to strengthen the rules about conflicts of interest, both personal conflicts of interest and organizational conflicts of interest. Those, again, go to the importance of protecting the integrity of our process. It is a very important area.

Ms. VELÁZQUEZ. So let me ask you, are there situations where an intermediary is placed between participants needing sensitive information and a Federal agency who might be biased by such information?

Mr. GORDON. I would want to hear more specifics, but we would certainly be sensitive to ensuring that there is insulation and there could—you can imagine an arrangement where there would be a firewall so that contracting officials could be separated from any sensitive information that could create an appearance of a problem.

Ms. VELÁZQUEZ. We hear from many people that say that transparency can help engender public trust and increase taxpayers' confidence in government. My question to you is, can transparency efforts also generate cost savings by creating more competitive and efficient Federal programs?

Mr. GORDON. Absolutely. I should tell you that the Organization for Economic Cooperation Development, the OECD, just did an international peer review of the U.S. Federal procurement system. And I am happy to report that one of the things they focused on was integrity and competition, and frankly we came through with flying colors.

The fact is that increasing transparency and increasing trust in the system brings more businesses in. It is a special concern for us in the area of small businesses. When I go around the country talking with small businesses, they so often say, Dan, the system is so difficult; how are we ever going to break in? We will never get a contract.

We work with our friends at the Small Business Association and other agencies to get them to try to get a contract with the Federal Government. The more trust we have in the system, the more competition we have. The more competition we have, the lower the prices, the more innovation we can get.

Ms. VELÁZQUEZ. Whenever we are debating legislation here, there are some that says that localities and municipalities, that we should not be dictating the Federal Government to localities of the

State government. The fact of the matter is that many States have enacted pay-to-play laws.

Even today there is in Wall Street Journal an article about Andrew Cuomo putting pressure on the legislature to pass pay-to-play laws to prevent favoritism in contracting. So given the many recent scandals, contracting scandals, are there similar issues in Federal procurement that need to be addressed immediately?

Mr. GORDON. I am not an expert on State laws. But I will tell you that because so many taxpayer dollars are at issue, there is always concern about improper decisions. And the little bit I know about the State pay-to-play statutes suggests that you can have disclosure of those contributions there without, in fact, ever taking them into account, in contracting award decisions.

Ms. VELÁZQUEZ. Thank you.

Chairman ISSA. The chair recognizes the gentleman, Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman. And thank you, Mr. Gordon, for being here.

Mr. Chairman, I would like to submit for the record an article that was published in today's Washington Examiner. I think it accurately points out that if this draft Executive order goes through and gets finalized, it will effectively restore the partisan spoil system in Federal contracting that civil service reformers struggled for decades to eradicate.

I believe that acquisition award should be based on merits. Despite what the administration may say, there is no way one can claim that politics won't be taken into consideration in the source selection process if this is EO finalized. So I would like to submit this for the record.

Chairman ISSA. Without objection so ordered.

Mr. WALBERG. Mr. Gordon, the White House has stated clearly that disclosure is one of their overall goals, but under this draft Executive order, isn't it true that contributions to unions that sign collective bargaining contracts with the Federal Government, yet are engaged in independent political activities, are exempt from the EO?

Mr. GORDON. Sir, as you know, I can't speak to the draft Executive order at this point. But if the question is are unions Federal contractors, I'm not aware of situations where they actually hold a Federal contract, although I may be wrong on that.

Mr. WALBERG. But they're exempted in this draft Executive order from this provision, so there must be some expectation about that at the very least. And if transparency is the goal, wouldn't this have the opposite effect?

Mr. GORDON. I'm not in a position to speak to that, sir, sorry.

Chairman ISSA. Would the gentleman yield?

Mr. WALBERG. Yes, I'll yield.

Chairman ISSA. Mr. Gordon, if you would presume that the draft Executive order that you have read is a draft piece of legislation from here forward and answer it as though it was draft legislation of Congress which you are able to respond to.

I yield back.

Mr. GORDON. It feels, sir, like I'm being asked indirectly to talk about the draft Executive order. I'm simply not comfortable doing

it. Although I must say I don't understand the question about an exemption for unions. I'm simply not familiar with that.

Chairman ISSA. If the gentleman would further yield.

Mr. WALBERG. To the chairman, yes.

Chairman ISSA. We can only deal with what fortuitously became available to us. It exempts unions which do have a limited amount of contracts and a great many grants to the Federal Government. We clearly saw that as a deliberate effort. And if it is draft legislation, how would you feel about exempting anybody who is a contractor to the government?

And I yield back and thank the gentleman.

Mr. WALBERG. Well, thank you, Mr. Chairman. Good points. And I have information in front of me that clearly indicates that union support in elections goes on and there are grants and contracts that are made effectively to these unions as well.

But let me move on here. Is the Executive order, as you understand it, I know you say you can't respond to it, but—I mean, that's the purpose we're here today. Is the Executive order narrowly tailored to serve an important government interest, in your opinion?

Mr. GORDON. Sir, there is no Executive order that has been signed by the President. There is a draft.

Mr. WALBERG. Is the draft Executive order narrowly tailored to serve an important governmental interest?

Mr. GORDON. I remember from my days working at the Office of General Counsel at GAO that "narrowly tailored" is a phrase not chosen at random, and I don't feel comfortable using constitutional language. I can tell you that disclosure serves an extremely important public purpose of transparency and therefore increasing public trust in the procurement system.

Mr. WALBERG. Now, let me ask you this, following up on that. Does, in your opinion, disclosure per se eliminate corruption in government contracting?

Mr. GORDON. You bring me back, sir, to Vitamin T. Transparency is one of the best ways of fighting corruption. Sunlight is the best disinfectant.

Mr. WALBERG. One of the best ways of fighting corruption within governmental system itself, within Congress, and I certainly agree with Speaker Boehner on that statement as it relates to us, our body, in being clear and with sunlight on us, but to put sunlight on, as someone once said, inappropriately on the private sector in ways like this is an excessive amount of sunlight that can bring cancer. And that's my concern with what's going on here, that it's a cancerous approach, and within government contracting it can shut down all sorts of good things.

Let me ask one more final question because of time. Do you imagine certain entities will instead of giving up their Federal contracts withdraw from engaging in political speech as a result of this draft Executive order?

Mr. GORDON. I don't feel comfortable speculating on that question, sir. I understand that many—much political speech already has to be disclosed. I'm not aware of that chilling that speech, but I'm really not in a position to speak.

Mr. WALBERG. Well, I thank you for appearing, but I'm concerned that the light of day from this administration was not afforded to us today. Thank you.

Chairman ISSA. The gentleman from Virginia, Mr. Connolly.

Mr. CONNOLLY. Thank you, Mr. Chairman. And welcome, Mr. Gordon. It's interesting to have sparring matches between committee members and a witness when he really is not at liberty to comment on the subject matter. And I must say I find it a little ironic that many of the people who now are so concerned about the rights of Federal contractors had no such concern just a few weeks ago when this committee very peremptorily decided that if you were a Federal contractor and you were charged with delinquent taxes, by God, we were going to judge you guilty and we were going to short circuit due process and make sure that you were suspended from doing business with the Federal Government.

Having said that, and having been a major critic of the Supreme Court in what I consider one of the top 10 worst Supreme Court decisions in American history with respect to Citizens United which is going to upend the politics of America and is going to profoundly affect how campaigns are funded and what the public gets to see or not see, I am concerned about unintended consequences. So if you and I can engage in a hypothetical conversation, Mr. Gordon.

Hypothetically I might want—you and I might both agree that disclosure is a good thing, it's the best disinfectant, as Speaker Boehner said. However, I am concerned theoretically if somebody were to come up with the idea of requiring contractors before they—before an award of a contract were made, or even after, immediately after the award of a contract being made, to disclose any and all campaign contributions that their political action committee may have made and their top officers may have made, the unintended consequence of that is that it suggests to the public that there's a relationship between the two when in fact there may—as you have testified, there is not. Would you share my concern that could be an unintended consequence hypothetically of such activity?

Mr. GORDON. Thank you for setting out that hypothetical. Let me say, sir, that I want to reflect both on those possible unintended consequences, and in all fairness to all the Members here, I want to reflect on the other comments that the Members have shared. I do think it is—you could have a situation of an unintended consequence and it is certainly worth reflecting on that, because you don't want a situation where transparency ends up rebounding against the intended goal.

Mr. CONNOLLY. And to that end I would strongly urge you, at least as one Member on this side of the aisle, to consider that or to take that back to those colleagues you have who may be participating in cogitating about theoretically such a draft, because I am very concerned that all kinds of people are going to make a conclusion that in fact it's false even though the dots are both there. I made a contribution, I got an award of a contract. You have testified we don't take that into account at all, and you've never been aware of that being taken into account. Yet nonetheless, once we change this procedure that is the risk that both the media and the

public could draw that conclusion, albeit a false one, and now somebody's good name is damaged. So I think that's not a trivial issue.

The other issue that concerns me, again, with the best of intentions, the intention being disclosure is the best disinfectant, I agree with that principle. But I am also concerned that by changing the policy at this time it could have a chilling effect on the ability or willingness of people in fact to participate in the political process, to exercise the First Amendment rights, whether we agree with it or not, to make a contribution, to show up at an event, whatever it may be.

Might that be, again hypothetically, a concern you and I might have if we were contemplating such a change of policy?

Mr. GORDON. Your first hypothetical, sir, involved a possible allegation against the procurement system, so I'm more comfortable ruminating, if you will, and reflecting on that. The second hypothetical takes me outside the procurement system, and I'm not sure that my ruminations would lead to any useful product on that score.

Mr. CONNOLLY. Yes. I just thought you could put your professorial hat back on, Mr. Gordon, and share with me just a genuine concern—a general concern as a citizen that we not have the unintended effect here of chilling, of having a chilling effect on people's participation, including Federal contractors.

Mr. GORDON. I understand, sir. The fact is, again, my understanding is that many political contributions, although not as—perhaps not all of them, but many political contributions are already publicly available, including by Federal contractors and their leaders. I'm not sure that there's evidence that the political—excuse me, that the transparency that already exists about those political contributions has in fact had any chilling effect on government contractors.

Mr. CONNOLLY. My time is up. Thank you, Mr. Chairman.

Chairman GRAVES [presiding]. The chair now recognizes the gentleman from Florida, Mr. West.

Mr. WEST. Thank you, Mr. Chairman. Honorable Gordon, pleasure to have you here today. I would like to speak from experience on this, because after serving 22 years in the U.S. Army I was a DOD contractor. So I want to ask you this very simple question. The Department of Defense sends out an RFP to have, you know, recently retired individuals that can go and help to augment the military in Afghanistan or Iraq. Why before a contract is awarded would you then have the head of an organization, a retired three-star or four-star general, disclose his political affiliations or contributions? What impact does that have on that request for proposal?

Mr. GORDON. I want to make very clear, Congressman West, two points. One, to the extent that you're taking me into a discussion of the details of the draft Executive order I don't feel comfortable speaking, but I think I can still address the point.

Mr. WEST. But why are you here, sir?

Mr. GORDON. I think I can address the point. As soon as I heard the acronym RFP I realized that you do have experience in this area and that's helpful.

Mr. WEST. Absolutely.

Mr. GORDON. The contracting officer who is awarding that contract will never take into account political contributions, but, but, the public may want to know, she the contracting officer, he the contracting officer, will not take that information into account. The only thing that they will take into account are the factors in the RFP. The question isn't is it going to be a factor in the selection, the question is does the public have the right to know what contributions were made by contractors.

Mr. WEST. But what bearing does that have on the request for proposal for someone to come in and provide services for the Department of Defense, you know, their political contributions? I guess my question is, what has been broken in the procurement process up to this point which leads to that draft Executive order being proposed?

Mr. GORDON. As a general matter, as I said earlier, every procurement system, ours, the States, the local governments and foreign ones, are constantly facing a risk that the public will view their system as tainted. Because the fact is enormous numbers of dollars of taxpayer funds are at risk in the procurement system, and in order to instill confidence in the public you want to have as much transparency as you can.

Mr. WEST. But you don't think that the American people will have confidence in a retired three-star or four-star general to be able to, with his team, be able to write an RFP to compete for a contract? What purpose does it have with this draft Executive order to bring forth this requirement to disclose your political contributions? What is the purpose of that with that RFP? What is the purpose of that in the awarding of this contract? As we have said, I can understand after a contract is awarded that's public knowledge, but why is that part of the criteria that we have up front?

Mr. GORDON. It would absolutely not be part of the evaluation criteria, absolutely not part of the criteria, sir.

Mr. WEST. But correct me if I'm wrong, that's what this draft Executive order brings forth?

Mr. GORDON. The only question is whether companies that want to get contracts should be required to have made disclosure of their contributions. Contributions would never be, would never be a criterion for selecting a company.

Mr. WEST. And then I come back to my original premise. What has been broken with the process up to this point that was the impetus for this draft Executive order to be created?

Mr. GORDON. There is concern in every system, including ours, that award decisions may have been affected by inappropriate considerations. Having more information available to the public, having more transparency, can help strengthen confidence in the system.

Mr. WEST. Would subsequent subcontractors or subsequent employees also be under the jurisdiction of this draft Executive order, such as myself when I was hired on to go to Afghanistan in June 2005?

Mr. GORDON. I don't feel comfortable responding to the question, sir. I'm not in a position to.

Mr. WEST. Well, then I'm going ask this one last question. As you sit here today do you support that draft Executive order or not?

Mr. GORDON. I'm not in a position to talk about the draft Executive order, sir.

Mr. WEST. Well, I don't understand why you're here. It's a simple question. Do you support the draft Executive order that is placed before you right now or not? Yes or no question.

Mr. GORDON. I am not in a position to express an opinion about the draft.

Mr. WEST. I yield back.

Chairman GRAVES. The chair recognizes the gentleman from North Carolina, Mr. McHenry.

Mr. MCHENRY. I thank the gentleman. Thank you, Chairman. Mr. Gordon, I want to thank you for your service to your government. We know that this is probably not the highlight of your career to come before Congress with this draft Executive order that Mr. West was asking about. But I want to start by saying, you know, for the average American business, small businesses especially, they're dealing with high government regulations, they're dealing with the burden of government regulations every day.

I was just talking to a group of constituents up here, small business folks, heating and plumbing contractors, and they're talking about regulations, the burden on their ability to hire folks. And what we're talking about with this is in essence employers going to their employees and saying, we need you to give us every donation you've made to the causes most dear to you. That's an additional burden. And, you know, Americans are private folks. You know, even if you have to disclose a political contribution, for instance, on the Internet, it's a little different when your boss comes in and says, hey, tell me who you've been voting for. I mean, that's basically what we're saying with this. So, you know, but I've got a larger question.

In a time when the cost of government has gone up and government is spending more this year as a percentage of the economy than it has since World War II, so my question is, with this disclosure requirement will this in any way reduce the costs to the taxpayers of these government contracts?

Mr. GORDON. The issue of the cost that we spend on contracts that you raise, sir, is an extremely important one for us. I have to tell you, and I tell you this with pride, that over the prior 12 years we saw the amount of money being spent on government contracts year after year increasing. In fact, over the 8 years before this administration came in we were increasing on average year after year 12 percent. People said to us you'll never be able to stop that. We stopped it. In fiscal 2010 we spent something on the order of $15 billion less on Federal contracts for services than the year before.

Mr. MCHENRY. Mr. Gordon, I appreciate that, and that's not the question I'm asking, with all due respect. Someone is offering—someone—you put out a bid for paper products. With this disclosure requirement, this additional certification that you would require, does that reduce the cost of those paper products to the government?

Mr. GORDON. I understand the question, I think, sir.

Mr. MCHENRY. Does it reduce the cost of providing that good or service to their government? And if you don't want to answer, just say that.

Mr. GORDON. No, no. It's an area we focus on a lot. The fact is transparency requirements impose burdens as we implement them.

Mr. MCHENRY. Or costs, burdens or costs?

Mr. GORDON. Absolutely, sir. Those burdens turn into costs and we the taxpayers pay for them. Transparency is not free. One of the benefits we hope to get through transparency, though, that was alluded to earlier, is more competition, and more competition can lower cost, absolutely.

Mr. MCHENRY. So more competition by having a greater requirement on a contractor to do business with government. That seems a little interesting to me and sort of defies logic. But let me ask another question. And, you know, you talk about the bid protest process which you have a great level of expertise in.

Would you anticipate that this additional disclosure would increase the bid protests?

Mr. GORDON. Actually, sir, I don't think it is likely to do that. I think it's good to have bid protests available as a check. But if you have a system in place where there is information available to the public but not taken into account in award decisions, you shouldn't have an increase in protests.

Mr. MCHENRY. Well, thank you. And additionally, as this would operate, in the bid process you would ask those that are bidding, the government, if they—you would ask them to certify that they've made these disclosures on their political contributions, right, you would ask for a certification; is that likely how it would work operationally?

Mr. GORDON. Boy, you're several steps ahead of me, sir. But I understand that one method that's been used in some States is to say that, yes, companies have to say they've made all required disclosures, just like today we require companies to say we don't have a tax liability above $3,000.

Mr. MCHENRY. OK. And would you verify that certification is indeed correct or was made?

Mr. GORDON. Normally—we try to minimize the burden on our contracting staff, so normally unless they have reason to doubt a certification we don't require them to check. For example, if a company certifies that they're small, normally the contracting officer can simply accept that certification unless she or he has a reason to believe that it's inaccurate.

Mr. MCHENRY. Thank you, Mr. Chairman. I appreciate the opportunity to comment. And it is certainly interesting with that certification, you know, we would just simply hope that procurement officer wouldn't look at those contributions that are publicly made to certify that they were indeed made public. And if they did view those contributions, it would have to necessarily influence the outcome of the bid.

Chairman GRAVES. The chair now recognizes Mr. Lankford from Oklahoma.

Mr. LANKFORD. Thank you, Mr. Chairman. Mr. Gordon, thank you for being here as well. Let me try to clarify something. You were just talking about the hope of this and adding more trans-

parency and such as to increase competition. So it is your belief if we ask companies to disclose who they're giving to and ask their employees who they're giving to more companies are going to say, yes, I want to get in that, this will increase competition, therefore decrease price. Is that what you're saying with that?

Mr. GORDON. We always hope that increasing trust in the system will cause more companies to participate in the system, yes.

Mr. LANKFORD. So you anticipate when we ask people who they give to they're going to say, yes, I haven't done bidding before, but I want to jump in, I want to participate in that, now that I'm going to be required to say who I give to before I bid I'm now going to engage in a process that's new so to increase competition on that?

Mr. GORDON. Not because they're looking forward to making the disclosure, but because the disclosure can increase trust in the system, that's right.

Mr. LANKFORD. Where would this data be distributed? We talked about a little bit about this before. Who will make the decision on how this data gets out to the public?

Mr. GORDON. You're really then getting into the specifics. And I should say a word about the specifics of a draft. The fact is a draft Executive order is a confidential document, we're discussing it internally.

Mr. LANKFORD. Right. I understand that. I've got several questions. I understand that. I've heard that loud and clear. My concern is, obviously, once this data comes in and the political appointees begin to look at it there is a chance that they're going to look at it and suddenly 57 percent of the contracts gave predominantly to Democrats and this administration will go, oh, that's not a good idea to release because then it looks like we're giving preferential treatment to more people, and then suddenly there is a statement if this Executive order suddenly goes away, is this not a mining to go out and look and say, we are either going to expose one thing or another, and if it is politically not expedient there's the opportunity to say, I don't think we're going to release it at this time. Obviously, I understand we're two or three steps down the path on that, but it becomes this circle on this.

And your comments about transparency, I understand the transparency concept. But having gone through job interviews and interviewed multiple people myself, I know when I'm looking at an application that's not about transparency, that's about who I'm hiring and who I'm not. Transparency is after the fact, it's exposed to everybody what's happened. Before the fact the information is an application. That's information I'm gathering to make a decision. So to say ahead of time I'm going to gather this information but I'm not going to really use it to make a decision begs the question why it's on the initial information. That seems to be something that would be exposed later, not before. As I've gone through interviews there's not been a time I've looked at it and said I'm not going to look at that section of the application, I'm pretty much looking at all of it.

Do you anticipate with this that there will be a time as we get down the road, again it's a hypothetical, to say, we need to balance this out better, we have too many people that are in companies that give from Republicans or Democrats, let's establish a quota

system that will only do procurement based on we need to have a balanced number of companies that give to Democrats, Republicans or don't give at all? Do you anticipate this is the way that would head to just try to balance things out and make it more fair if we determine there are a lot of Republicans, let's say, that give to these companies so we need to make sure we have more companies that are Democrat owned that actually get engaged in this in the procurement process and set that quota aside?

Mr. GORDON. Absolutely not. We need to protect. We need to keep politics out of the contracting process.

Mr. LANKFORD. I would completely agree, and there is a good way to do that, is to keep it exposed as we are right now.

One last thought on this. OMB currently has the authority to put out a circular to require, you know, information about grant writing, in particular. Is there any conversation that you're aware of in OMB on the grant writing to put out a circular saying, well, let's do for all of those that get grants, let's say, from unions, that they would have to give who they give to and the union members that are leadership to note political contributions. Now, that wouldn't take an Executive order. OMB could do that now. They already have the authority to do that.

Do you know if there's been any conversation related to that.

Mr. GORDON. You won't be surprised to hear, sir, that I'm not in a position to disclose internal discussions.

Mr. LANKFORD. OK. Well, that would be interesting to note just on that.

The President has been very good to just say, we don't want to do an end around Congress. But this certainly feels like the previous Congress said this wasn't a good idea, and so they're going to do an end around Congress just to be able to find a way to legislate in an area that is not, does not have legislative authority. I understand you have a responsibility, but this was a clear decision made by a previous Congress not to do this and now we're going to currently try to do it anyway. And I find that fascinating and an interesting conversation for another day on constitutional issues and authority.

So thank you for your time.

Chairman GRAVES. The chair now recognizes Mr. Mulvaney of South Carolina.

Mr. MULVANEY. Thank you, Mr. Chairman. Mr. Gordon, thank you for coming before us today. I want to go back to something that I thought I heard you say earlier on in the testimony, which is I believe you said that the contractor's action, that their conduct in participating in the political process doesn't really, it's not really related to what they're doing for the government, is that correct?

Mr. GORDON. What I said, sir, was that a contracting officer in deciding who should win a contract will look only at the selection factors in the solicitation, not at political activities or political contributions.

Mr. MULVANEY. So political activity is not a selection factor?

Mr. GORDON. That's right, sir.

Mr. MULVANEY. So it's fair to say that political activity has nothing to do with whether or not they'll be fully able to perform their duties to the government?

Mr. GORDON. Certainly nothing to do with whether they're going to get the contract.

Mr. MULVANEY. Thank you. Well, if it did have an impact on whether or not they could perform the contract, would you consider it?

Mr. GORDON. Boy, it feels very hypothetical. If you told me factor X would make a company incapable of performing should that be taken into account, then the answer to that would be yes.

Mr. MULVANEY. Certainly.

Mr. GORDON. But why would political activity have any ability on their ability to perform.

Mr. MULVANEY. Actually, Mr. Gordon, I know will come as a surprise to you, but I'm trying to agree with you on that point.

Mr. GORDON. I had a suspicion of that.

Mr. MULVANEY. Which is why I asked the question, because I'm trying to figure out where this directive is coming from. If political activity has nothing to do with a firm's ability to perform its contract for the government, is it coming from your office, is this directive coming from the Office of Federal Procurement?

Mr. GORDON. The direct answer is that's an internal matter within the Executive Office of the President that I'm not in a position to discuss. But I think the broader question is, would it help the procurement system to have more disclosure, and that takes us back to the earlier conversation. The hope is that transparency increases public trust, which brings more companies into the competitive process, which improves economy and efficiency. That's the hope.

Mr. MULVANEY. Well, again, then it goes back to my original question, which I understand you're not going to answer, which is, did this directive come from your office? And I understand that you're invoking a privilege that I'm not familiar with, is that correct, that you're invoking a type of executive privilege here today?

Mr. GORDON. No. I'm simply explaining that this is a matter of internal deliberation that I don't think it's appropriate for me to be disclosing here.

Mr. MULVANEY. What department does the OFPP operate under?

Mr. GORDON. OFPP is an office within the Office of Management and Budget, which is within the Executive Office of the President.

Mr. MULVANEY. Are you the head of that department?

Mr. GORDON. I am the Administrator and the head of the Office of Federal Procurement Policy.

Mr. MULVANEY. Are you head of the department under which OFPP functions?

Mr. GORDON. As I said, sir, there is not actually a department, it's the Executive Office of the President, and no, I'm not the head of the Executive Office of the President.

Mr. MULVANEY. Do you have—when we've been asking these questions today about where this directive began, do you actually know the answers to those questions?

Mr. GORDON. I'm not comfortable answering questions, sir. I don't think it's appropriate for me to be disclosing our internal deliberations.

Mr. MULVANEY. And I think you've explained for us at some length why you're not comfortable giving that.

Let me ask you some general questions then, which is would a disclosure requirement in general, not dealing with this specific draft, would a disclosure requirement put an obligation on members of the public in order to do business with the United States of America?

Mr. GORDON. Yes. We have many disclosure requirements. I mentioned one earlier. You have to disclose lobbying activities if you want to get a Federal contract, you've got to disclose the compensation of your five highest paid executives. We have a whole series of things which frankly can be quite burdensome for private companies. And we're always looking at the balance. These are often driven, I might add, by statute.

Mr. MULVANEY. And that was my point. In fact they're always driven by statute. That the requirement that you disclose your lobbying activities and the other requirements are driven by statute, not by Executive order, that's correct, isn't it?

Mr. GORDON. On those two specific ones, yes, but there are others that are not driven by statute. For example, organizational conflicts of interest, the requirement for disclosure is driven by regulation.

Mr. MULVANEY. By regulation?

Mr. GORDON. That's right. That my office is responsible for issuing.

Mr. MULVANEY. Mr. Gordon, finally, I'll ask you this. Is the violation of an Executive order a punishable offense?

Mr. GORDON. That's a question to ask counsel, sir.

Mr. MULVANEY. Do you believe that it should be?

Mr. GORDON. I'm not in a position to express a view. I would turn to the lawyers and ask them that question.

Mr. MULVANEY. I'm not asking you—I think you actually have to answer that question unless you are invoking a privilege. Do you think a violation of an Executive order should be a punishable offense?

Mr. GORDON. I'm not sure I understand the question. Should executive agencies be following Executive orders? Absolutely.

Mr. MULVANEY. No. Should a member of the public be able to be punished for a violation of an Executive order?

Mr. GORDON. I'm not sure that it—you've got me over my depth, but I don't think an Executive order would actually apply to a member of the public. An Executive order typically is implemented through regulations, and obviously the regulations might apply to the public.

Mr. MULVANEY. Thank you, Mr. Gordon.

Chairman ISSA [presiding]. I thank the gentleman. The gentleman from Connecticut, Mr. Murphy.

Mr. MURPHY. Thank you very much, Mr. Chairman. You know, campaign finance laws have existed for more than a century. I mean, going back to 1907, the Tillman Act prohibited contributions by corporations to political parties for the first time. And most recently in 2002 Congress passed the bipartisan Campaign Finance Reform Act. Mr. Gordon, I know you're a procurement expert, you're not an expert on campaign finance laws, but I think it's useful to explain what's on the books already today. Today, all individual contributors or aggregate contributors in excess of $200

have to be disclosed. All contributors from PACs and party committees have to be disclosed. All contributors and expenditures made by PACs have to be disclosed. All independent expenditures in electioneering communications have to be disclosed.

I lay this out because one of the arguments that's used by the opponents of increasing disclosure requirements is that by doing so you're going to chill free speech, that by requiring individuals or entities to disclose the contributions that they make that all of a sudden they're going to stop making them.

But here's what we know: That political contributions from people who do business with the Federal Government have increased from $5 million in 1998 to almost $10 million today. That's what we know about. That's the people that are contributing through existing disclosure laws, mainly through individual contributions. And so I guess I say all of this by a means of asking you this simple question. We have a lot of disclosure requirements on the books today. In fact, what we're talking about is just really one loophole within our existing laws that prevent donations to 527 and like organizations from the light of day. And I'm interested to know, Mr. Gordon, if you think that the disclosure requirements that we have already have had a chilling effect on either contributions to political candidates from existing government contractors or on firms or companies willing to do government work.

Mr. GORDON. I can only tell you what I know, sir. No. 1, I've never heard a complaint that the existing disclosure requirements have deterred any company from competing for a Federal contract. And No. 2, I'm not aware of any complaint that the fact that we know which companies give money to which political candidates that's publicly available, I've never heard of a bid protest being filed because of an allegation that information somehow was improperly used.

Mr. MURPHY. It seems as if that we're litigating this issue for the first time on this committee, as if this is a contest of first impression. It's not. Individuals and companies for 100 years have been required in some way, shape or form to disclose the political contributions that they make. And we have pretty irrefutable data to show that over the last 10 years at least that government contractors have not been making less contributions, they've been making more.

And I go straight to Justice Scalia when I think about this argument regarding a chilling effect. In *Doe* v. *Reed Justice Scalia,* one of the most conservative justices in the Court, said that, "requiring people to stand up in public for their political acts fosters civic courage without which democracy is doomed."

And with that, I yield back.

Chairman ISSA. I thank the gentleman. The gentleman from Tennessee, Mr. DesJarlais.

Mr. DESJARLAIS. Thank you, Honorable Gordon, for attending today. How does the draft EO improve transparency above and beyond the status quo? I know we've talked about it, but can you explain it again?

Mr. GORDON. Sir, I hesitate to point out again that I'm not comfortable talking about the details of the draft. But I will just say from the earlier conversation, and in fact from Congressman Mur-

phy's remarks, that there are some aspects of political contributions which have long been required to be disclosed and there are some aspects of political contributions which are not today required to be disclosed.

Mr. DESJARLAIS. But you talked about how public perception would improve this process.

Mr. GORDON. Absolutely, sir. Disclosure and transparency can strengthen the public trust in the procurement system.

Mr. DESJARLAIS. Is the public involved in any way in advance of the awarding of these contracts by your agency?

Mr. GORDON. In many ways actually. When there is public trust—this is an issue that's come up when I've worked with developing companies in improving their procurement system. When there is public trust in the integrity of the system, you get more companies willing to participate in competitions. It's extremely important, absolutely.

Mr. DESJARLAIS. So you're saying then that by this draft EO, essentially what we're going to see is that people will have a better idea of who these contractors are and that would influence your decision whether or not to award a contract.

Mr. GORDON. Without talking about the draft, as a general matter when people have more trust in the system you can hope to have greater competition, absolutely.

Mr. DESJARLAIS. So I guess what I'm trying to get at, are you expecting the general public to influence your decision on a specific contract award?

Mr. GORDON. I'm sorry, I'm not sure I understand the question. The award decision has to be based on the selection criteria and the solicitation, not public perception.

Mr. DESJARLAIS. OK. So there's no political involvement in the decision?

Mr. GORDON. Absolutely not. It is prohibited. And we have a very strong core of acquisition professionals that know that the Competition in Contracting Act would prohibit them from considering any factor, except what's set out on the solicitation.

Mr. DESJARLAIS. OK. And so you believe contracting officials are able to award contracts without regard to political consideration or how it is achieved?

Mr. GORDON. Absolutely.

Mr. DESJARLAIS. Are political appointees removed from the selection process, for example?

Mr. GORDON. It depends on the situation. There are very large procurements where the selecting official, I think, could be a political appointee, but they are bound just like anybody else by the evaluation criteria. No one can deviate from what's in the solicitation. And if someone deviates they're going to face an independent review by GAO or the Court of Federal Claims.

Mr. DESJARLAIS. And you feel that we do need more disclosure than we currently have; the current system that we have in place is not good enough?

Mr. GORDON. I will say as a general matter I am an advocate of transparency.

Mr. DESJARLAIS. OK. So you think we need more than we currently have, you agree with this draft EO?

Mr. GORDON. I was asked earlier, sir. I want to say that respecting the sensitivity and the confidentiality of deliberations on drafts is very important. That's true whether it's a discussion in the Situation Room or whether we're talking about a draft Executive order. Until the President decides I don't think either I or any executive branch official should be discussing the content.

Mr. DESJARLAIS. Do you think this is an important hearing for this process?

Mr. GORDON. I always respect congressional committees. I worked at GAO for 17 years, sir. I know the enormous value that congressional oversight committees bring.

Mr. DESJARLAIS. Just earlier when Ranking Member Cummings seemed shocked that we were doing this and that we needed more disclosure, it just kind of took me back to the last time before I was an elected official when we heard that we need to pass the bill before we know what's in it, and that was of course the Affordable Health Care Act that was referred to by both the President and the former Speaker. And I think that the example of the 1099 provision which was repealed and the President subsequently signed into law would be an example of why we have these hearings. So I was a little shocked at Ranking Member Cummings' displeasure for this hearing today.

But I appreciate your attendance and I yield back.

Chairman ISSA. I thank the gentleman. The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman. Just a number of questions for Mr. Gordon. I would like to read to you a few descriptions of what others have called this Executive order and see if you agree with them or not. One example was that this order amounts to the White House brazenly directing the power of government against its political opponents. And it's an unabashedly partisan move. Would you agree with that representation?

Mr. GORDON. Sir, I'm not going to feel comfortable coming up with a view on the various opinions that have been expressed, but I guess on that particular one I will tell you that, no, I don't agree with it.

Mr. CHABOT. All right. Let me ask you about this one. The minority leader of the U.S. Senate said that this was the crassest political move he's ever seen, this is almost gangster politics to shut down people who oppose them, referring to the administration. I would assume that you probably don't agree with that statement.

Mr. GORDON. You assume correctly, sir.

Mr. CHABOT. I thought so. Let me ask you this one. As designed to muzzle corporations and businesses, it would at the same time allow unions to continue spending at will, isn't that accurate? Even though you may not agree with it, wouldn't that be accurate?

Mr. GORDON. No, sir, I don't believe it's accurate.

Mr. CHABOT. All right. Well, let me try another one then. This particular individual is also in the Senate, and this person is a moderate, and in fact actually voted for the McCain-Feingold campaign finance reform, which a lot of Republicans did not vote for. This person did. This person called this Executive order Orwellian, and also said that the order undermines decades of work by this person and others to ensure Federal business is free of corruption

of political influence, called it the equivalent of repealing the Hatch Act, and further said that it's taken decades to create a Federal contracting system based on best prices, best value, best quality, and that the effect of this order is to again have politics play a role in determining who gets contracts. Companies may choose not to bid, which will reduce competition and raise government cost.

Now, I know you believe that this is going to help us relative to cost and make there be more transparency and more competition, but this person disagrees with that. I assume you would disagree with the statement that I just read there as well.

Mr. GORDON. Yes, sir.

Mr. CHABOT. And let me conclude with this one. Supporters of the President, President Obama, are predicting that he's going to raise $1 billion this year for his campaign. Talk about campaign finance reform and the corruption of money and politics and all of that, $1 billion this year for the first time if he attains that. And that simultaneously that he'd be positioned even more strongly if he could in effect by this Executive order dry up some at least, and maybe a substantial amount, of Republican donations.

I would assume that you would disagree with that point of view.

Mr. GORDON. I've spent many years, sir, working to improve and protect the integrity of the procurement system. I intend to continue doing that.

Mr. CHABOT. Let me just conclude, because I've only got a minute left.

Now I will tell you what I think. I think that this is nothing more than blatant raw politics, and I think in the 15 years that I've been here I've not seen anything as outrageous and as much of an exercise of naked political power than this Executive order. I think it's shameful, I think it's disgusting, I think it's despicable, I think it's outrageous. And this administration is talking about doing this by fiat essentially. That is what an Executive order is. Rather, if you're going to do something this dramatic it ought to be done by the will of the people, by their elected representatives. That's the U.S. Congress, it's not by an Executive order coming out of a White House. And I think the administration ought to be ashamed of what it's trying to do here. And as I say, I've been here a while, 15 years now, although I had a 2-year involuntary sabbatical.

Chairman ISSA. Would the gentleman yield?

Mr. CHABOT. I would be happy to yield.

Chairman ISSA. On that I agree. Thank you for your comments.

Mr. CHABOT. Thank you. I yield back.

Chairman ISSA. The gentleman from Iowa, Mr. Braley.

Mr. BRALEY. I thank the chairman. And I want to start by going back to the clip the chairman played at the beginning of this hearing. Because if you go back and listen closely to what President Obama said, he is a prophet, because that is exactly what happened after Citizens United. We've seen a massive flow of secret money, which is something that's a much greater threat to democracy in this country than this Executive order is. And you indicated, Mr. Gordon, that you had taught at a law school dealing with procurement issues, so you know that the Federal procurement slice of nearly $500 billion is an enormous part of the Federal

budget. And yet 4 years ago in this very committee we had a hearing where the head of the General Services Administration, Lurita Doan, came and testified about illegal activity taking place in a Federal agency in violation of the Hatch Act when a gentleman named Scott Jennings, who worked in the White House as Karl Rove's chief deputy, was doing political briefings on government time in violation of the Hatch Act. And President Bush fired her because of that. That was the only recourse he had. And it's ironic that Scott Jennings was the deputy of Karl Rove, who heads Crossroads and many of the secret donor groups that are engaged in pumping millions of dollars of secret money to try to influence the outcome of political elections. And one of the things that nobody talked about in this hearing is the very different levels of scrutiny applied to different types of speech. Because as a fundamental part of constitutional First Amendment law there's the regulation of content, which is a high level of scrutiny, and the government is supposed to have very little impact on what you say, and then there's the regulation of time, manner and place of speech, where the government is given much more leeway. And that's exactly what this Executive order is all about.

So I am confused by the people who come to this hearing and claim about the threat to the right of free speech and the threat to our democracy when in fact it's the unlimited amount of secret money coming into elections that's the biggest threat to democracy we face today. And I'll say that whether it's money coming in to support a Republican candidate or a Democratic candidate.

One of the things we know is that in their opinion the Supreme Court rejected the arguments being offered today, because Justice Kennedy wrote for the majority and made it clear that disclosure doesn't prevent speech. He said, the First Amendment protects political speech and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and different messages.

The Executive order, Mr. Gordon, does nothing to regulate the content of what anyone wants to say, isn't that true?

Mr. GORDON. Transparency is what is at issue here, and transparency is something that I very much agree with as an extremely important value, including in the Federal procurement system.

Mr. BRALEY. And one of the reasons why that's so important is something we've talked about, and that's because American taxpayers are the ones whose money is being used to fund these projects with these contractors, isn't that true?

Mr. GORDON. Absolutely. More than half a trillion dollars a year.

Mr. BRALEY. Absolutely. And that's a big chunk of money. So taxpayers across the political spectrum have a strong interest in making sure those contracts, regardless of who is in the White House, are not being unduly influenced by political contributions, isn't that true?

Mr. GORDON. Absolutely.

Mr. BRALEY. And you look at what goes on in this country, in States where they elect judges, and the massive amount of money that's being spent to elect judges, and then you come into court in

some of these States and you may be facing a judge that your opponent has given millions or hundreds of thousands of dollars to, and I think everyone should have a right to know what those donations are so that they can judge for themselves whether that's a fair and impartial decisionmaker.

Isn't that the same way we're talking about here with this level of transparency.

Mr. GORDON. I think that is the goal of the advocates, absolutely.

Mr. BRALEY. And one of the reasons why this is so important is because the Supreme Court made clear in Citizens United that you can have opportunities to engage in greater forms of political speech, but that transparency is a legitimate and noble purpose that everyone should embrace, and apparently the Speaker of the House himself has embraced, isn't that true?

Mr. GORDON. Indeed.

Chairman ISSA. The gentleman's time has expired.

Mr. BRALEY. I yield back.

Chairman ISSA. Thank you. In support of the gentleman's statements, I would ask unanimous consent that the copy of The Hill from May 10, 2011 entitled, Unions Spent $100 Million in 2010 Campaigns to Save Democratic Majorities, and the Wall Street Journal entitled, Public Employee Union is Now Campaign's Biggest Spender. Without objection so ordered.

And I now recognize the gentlelady from North Carolina.

Mrs. ELLMERS. Thank you, Mr. Chairman. Thank you for being here today, Mr. Gordon. I don't usually—I usually maybe jot down a few things, but I have pages here. I keep running into conflict after conflict after conflict in your statements, so I'm going to start off with No. 1, one being you said that you believe that this will increase competition amongst businesses wanting to participate because of this up front disclosure, is that correct?

Mr. GORDON. I wasn't actually speaking about the draft Executive order. I said that in general the hope with transparency is that transparency engenders more trust in the system and therefore increases competition, that's correct.

Mrs. ELLMERS. OK. But the Office of Advocacy in the Small Business Administration found that regulations cost small businesses 45 percent more than large businesses in regard to this situation. Doesn't that show that we will have a decrease in the number of small businesses that will participate in this?

Mr. GORDON. You're actually talking about one of our very highest priorities. We are working hard to meet the statutory goal of 23 percent of our Federal contracting dollars going to small businesses. And the President has made clear meeting that goal is not enough. We need to exceed that goal, including for the subcategories, such as the small businesses owned by our service disabled vets.

Mrs. ELLMERS. On the point of the idea of the trust in the system by the American people, which is what you are saying that this process will provide, did you or did you not say that there is, that these things will be handled internally so that the information will not come out as to which candidates or contributions are made? Is that information disclosed right off the bat as soon as that contract is bid on or is that held internally, as you stated?

Mr. GORDON. Actually, I don't believe I spoke to that issue before. But it's been said earlier that the information about political contributions would be publicly available.

Mrs. ELLMERS. Publicly available immediately.

Mr. GORDON. You're getting into a level of detail that—we're in a situation where we're talking about or rather not talking about a draft Executive order, and I don't feel comfortable getting into the details. The advantage of having our executive branch review of a draft is Executive orders are improved.

Mrs. ELLMERS. So what is the difference then? What is the difference, because we know that these things have to be disclosed after the contracts are obtained? This is information, the transparency is already there. So the difference I'm seeing is the time that they would have to disclose this information up front with their application, the contract process rather than afterwards. So what is the change?

Mr. GORDON. I'm not an expert in campaign finance disclosures, but my understanding is there is, and it was said earlier in one of the colloquies, more information being disclosed than is in fact disclosed today. I'm not sure that the timing is actually any different at all. The timing, the information is, some information is already available today.

Mrs. ELLMERS. Well, in closing I just would like to say this. You know, the American people, I know you have basically stated that this is about transparency for the American people and instilling trust in the system. I don't see how that happens with this. And I think that the American people are so wonderfully filled with common sense that they're going to come up with the same conclusion that I have right now, which is this is nothing more than a political move, I agree with my colleague Mr. Chabot, that this is politics at its worst, and this is nothing more than retaliation against the Supreme Court decision for Citizens United.

Thank you, and I yield back.

Chairman ISSA. Will the gentlelady yield?

Mrs. ELLMERS. Yes, sir.

Chairman ISSA. I thank the gentlelady.

Mr. Gordon, you've basically said you're not comfortable, you don't know, you're not an expert repeatedly. Isn't that the best reason that your part of government should not be reviewing or doing this, that in fact the Federal Election Commission, which is charged with campaign disclosure and which is charged by Congress, should be the appropriate way to handle this?

Your choice is to say yes or suddenly become an expert and start answering our questions. You may pick.

Mr. GORDON. There is one other possibility, Mr. Chairman, and that's that there are other people in the Executive Office of the President and across the executive branch who have knowledge and expertise that I do not.

Chairman ISSA. Well, we asked for the person most knowledgeable in an agreement when the OMB Director wasn't available. They sent you. We'll undoubtedly have to ask for some additional people who are more knowledgeable, because it does appear as though the questions of the procurement—the only thing we've decided today is this is not necessary to do your job, your people will

not look at it, but in fact we can see that the draft order circumvents current IRS laws that protect disclosure for nonprofits and other groups that would fall under this.

With that, I recognize the gentleman from Vermont Mr. Welch.

Mr. WELCH. Thank you, Mr. Chairman. You know, part of the issue for me, sitting here listening to this, is if it were, if the things that are feared by opponents of this were in fact to be allowed, then I would share their concerns. So I just want to pin down what is the effect of this. No. 1, any individuals or corporations that make contributions have to disclose them under current law, isn't that right?

Mr. GORDON. I do believe that there is extensive disclosure already.

Mr. WELCH. And the effect of this would be to put in one place for easier review by the public the contributions that were made, correct?

Mr. GORDON. I think that is one of the ideas.

Mr. WELCH. And so to the extent there's a reporting requirement, that burden is already part of what a contributor must deal with, right?

Mr. GORDON. Yes.

Mr. WELCH. And have you had input from some of the—also, if a union were to get a contract, a Federal contract, they would be subject to this law just like a private corporation, is that correct?

Mr. GORDON. You heard my colloquy earlier. I was rather surprised at reference to an exemption for unions.

Mr. WELCH. Right. I mean, everybody is in the same boat here basically?

Mr. GORDON. This applies—the draft, if it were ever finalized, the draft would apply, as I understand it, to contractors, whoever they are.

Mr. WELCH. And have you had reactions from corporations that are saying one thing or another about this requirement or this draft order?

Mr. GORDON. I think the committees are going to have an opportunity in the next panel to hear from many of those responses. I've seen several articles in the press.

Mr. WELCH. In the drafting of this—let me ask you this. Do you anticipate any difficulties that contractors would have in complying with this?

Mr. GORDON. I don't feel comfortable talking about a draft. The fact is that a draft Executive order as it goes through the process may be changed substantially, may never be finalized. I can't predict that. What I can tell you is that disclosure requirements, and there are many of them today, can be challenging for the companies, especially for small companies. We look for ways to minimize the burden on companies because we don't want disclosure requirements to deter them from participating in the procurement process.

Mr. WELCH. The disclosure requirement here would be that, if I were a small company, that I would just simply have to list the contributions that I made and the individuals and where I made them, correct?

Mr. GORDON. I understand your point, sir.

Mr. WELCH. All right. I yield back.

Chairman ISSA. I thank the gentleman. The gentleman from South Carolina, Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman. Mr. Gordon, I want to thank you for being here and also thank you for your service to our country.

Can you please describe for me what involvement you personally had in the drafting of this draft Executive order?

Mr. GORDON. Sir, I don't think it's appropriate for me or any executive branch official to disclose our internal deliberations.

Mr. GOWDY. Are you relying on any specific testimonial privilege in reaching that conclusion?

Mr. GORDON. I'm telling you, sir, that in my experience it is extremely important to protect the confidentiality of advice shared within the Executive Office of the President and across the executive branches.

Mr. GOWDY. Well, rather than disclose for me the contents of any communication, can you answer whether or not there was communication? Not the content of it, but whether or not there was any between you and the President.

Mr. GORDON. I understand, sir. My concern, and our shared concern across the government, and I should say this is true across administrations, there is nothing unique in this administration about this. We need to be able to have frank discussions internally and not share even the fact of who participated outside.

Mr. GOWDY. Do you believe the privilege belongs to you as the witness or to the President if we were to seek a waiver of that privilege?

Mr. GORDON. Actually, sir, I didn't mention the word "privilege." I was talking about the need to protect the confidentiality of our process.

Mr. GOWDY. But that would be the only legal basis for not answering the question, would be the executive privilege, correct.

Mr. GORDON. Sir, I'm not talking about privilege, I'm talking about my belief about the importance of protecting the confidentiality of our internal deliberations.

Mr. GOWDY. Well, let me ask you this. Would you agree with me, let's assume arguendo that there were a privilege, well, let's assume arguendo about the need for confidentiality in all regards, would you agree with me that confidentiality is waived by the presence of third parties who are not members of the executive branch? So let me ask you this. Were there any third parties who were not members of the executive branch present for any communications, thereby waiving any confidentiality?

Mr. GORDON. Sir, you're talking in the area of privileges, and that's not where I am. But you're also asking me questions where frankly if you or other members of the committee want to pursue that it's something that I think we should pursue with the assistance of counsel.

Mr. GOWDY. Can you tell me where the Executive order originated?

Mr. GORDON. No, sir, I don't think that it's appropriate for me to be disclosing that.

Mr. GOWDY. And by your answer I take it that you do know the answer to it but you choose not to disclose the answer?

Mr. GORDON. I don't think it's appropriate for me to be talking about any of the—either the content or the process in the development of a draft document.

Mr. GOWDY. How did you become aware of the Executive order, or the draft Executive order?

Mr. GORDON. Sir, it's another way of asking me to disclose either the content or the process. I'm not comfortable disclosing that. Protecting the confidentiality of deliberations within the Executive Office of the President is nothing unique to this President. It is, in my opinion, extremely important, extremely important, for us to be able to deliberate without having to disclose outside who we met with and what we discussed and who participated.

Mr. GOWDY. Does it strike you at all as being ironic to invoke confidentiality and not answering questions when we're having a hearing about transparency?

Mr. GORDON. It does not, sir. I think that there are discussions even about transparency and developing rules about transparency that we need to be able to have quietly and behind closed doors. That's true when we were working recently on a rule about conflicts of interest. You could say, well, surely if you're talking about conflicts of interest you should be open. In fact, we needed to have quiet discussions internally.

Mr. GOWDY. You would agree with me, though, let's assume for the sake of argument that your analysis is correct, and I in some regards do agree with you about the need for confidentiality, if there were third parties who are not part of the executive branch who were present for those conversations then your need for confidentiality or your desire for it has already been breached, correct?

Mr. GORDON. Sir, I feel like the conversation—the question feels too hypothetical. I would need to think about that afterwards and get back to you if you would like.

Mr. GOWDY. Well, let me ask you this. Are you aware of one scintilla of evidence or study supporting the notion that contracting officials are swayed by undue influence or factors extraneous to the underlying merits of contracting decisionmaking such as political activity or political favoritism?

Mr. GORDON. Am I aware of such allegations? Absolutely.

Mr. GOWDY. Have any hearings been conducted in that regard?

Mr. GORDON. I'm not aware of a hearing by a congressional committee, but there have certainly been allegations. In fact, in GAO, in bid protests we would—you would get occasionally allegations that an award decision was swayed by an improper and in some cases a political consideration, absolutely.

Mr. GOWDY. Were there studies that were relied upon in the drafting of this draft Executive order?

Mr. GORDON. You're asking me a question about our internal deliberations. I'm not comfortable disclosing our internal deliberations.

Mr. GOWDY. All right. One final question. And I apologize, Mr. Chairman. The draft says, the failure to make a full disclosure in the certification could result in criminal prosecution. That's an interesting word to me, because if it could then it could not. And my question is who are you going to prosecute and who is going to make the decision?

Mr. GORDON. I can answer the question in general terms. When we have requirements for disclosure, to give you an example, contractors today have to disclose whether they have a tax delinquency above $3,000 and over a certain period of time. If they fail to accurately disclose, they could be making themselves liable for prosecution, absolutely. Do we prosecute every case? No.

Mr. GOWDY. So an Executive order can provide criminal liability for average citizens?

Mr. GORDON. That I don't know, sir, to be the case. But an Executive order is frequently, and in fact in the area of procurement is generally implemented through a regulation, and if in fact a contractor takes action inconsistent or that violates a regulation that's a very serious matter, absolutely.

Mr. GOWDY. Thank you, Mr. Chairman.

Chairman ISSA. The gentleman's time has expired. I would ask unanimous consent that the article, The Daily Briefing, from March 31, 2011 be inserted into the record. It's entitled, Former OSC Scott Bloch Sentenced to One Month in Prison. Of course he was the one who found Lurita Doan to have committed the Hatch Act. Without objection, so ordered.

We now recognize the gentleman from Idaho, Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman. And it seems to me, and I think the comment was already made by the good gentleman from South Carolina, that in a transparency hearing this has been one of the most opaque hearings that I've ever been a participant in. And I'm not really sure why you're here.

Can you tell me why you're here? Why exactly did the administration send you, because I have no idea what exactly you have aided this committee in doing today?

Mr. GORDON. I was asked—I was asked to appear in order to talk about the general issues of integrity. And in fact I think the issues of integrity are directly relevant to the subject matter of the hearing. And I think you've seen, although I can't talk about a draft Presidential document before the President makes a decision, I can certainly, and I have talked at some length, about the principles that are at issue.

Mr. LABRADOR. Let's talk about those principles real quick. You told us toward that the no award decision will be based on this information that's being given, that you're going to base it on the selection criteria; is that correct.

Mr. GORDON. Award decisions can only be based, according to the Competition in Contracting Act, on the selection criteria in the solicitation.

Mr. LABRADOR. So you're a law school professor. You were a law school professor. I was a law school student at one point, so this is kind of fun for me. Let's—when you gave law school exams, there was—at least in my law school I was not able to—I never wrote down my name. Did your law school have that same—that same requirement?

Mr. GORDON. At GW where I taught, yes. You used the number rather than a name.

Mr. LABRADOR. Why is that?

Mr. GORDON. Because you want to be sure that your judgment about the quality of the exam is not based on your knowledge of the individual, but rather on the content of their answer.

Mr. LABRADOR. And that's because there are certain students, right, that you don't like in your class or that you have a problem with.

Mr. GORDON. Never in my class, sir.

Mr. LABRADOR. OK. But some professors—hypothetically there are some professors who don't like some of their students.

Mr. GORDON. They also may like somebody———

Mr. LABRADOR. Or they may like somebody too much; is that correct?

Mr. GORDON. Yes.

Mr. LABRADOR. OK. So it's in order for us to make—for the professor to make an unbiased decision; isn't that correct?

Mr. GORDON. Absolutely.

Mr. LABRADOR. So under this proposed rule, and let's just speak hypothetically about it, any requirement to do this, would the contracting agent have the document in front of him or her that shows what those donations were?

Mr. GORDON. It depends, sir. My understanding is that in some of the States that have pay-to-play laws, in fact, the contracting officials do not have the information. All they know is that the company affirms that it made the disclosure. So if you had that on the Federal level, all you would know is the company says, yes, we made all required disclosures. The contracting officer would see nothing, nothing about who received the money or how much.

Mr. LABRADOR. But somebody would in the administration see that document, correct?

Mr. GORDON. Oh, just as today. Today there is already public information about contractors' disclosures. Absolutely.

Mr. LABRADOR. Absolutely.

Then let's followup on that comment. There's already public information, and you're telling us that you're an advocate of transparency, correct?

Mr. GORDON. I am an advocate of transparency in procurement.

Mr. LABRADOR. And it increases public trust.

Mr. GORDON. That is always our hope.

Mr. LABRADOR. So what is unavailable at this time that you think we need to have more information of that is not currently found in the public documents out there?

Mr. GORDON. As actually several members of the committee has pointed out, there is information about third-party donations which is not publicly disclosed today.

Mr. LABRADOR. OK. Now, does that have anything to do—were you an advocate or did you have a problem with Citizens United?

Mr. GORDON. Sir, I'm a procurement person, Not a campaign finance person.

Mr. LABRADOR. No, but you must have an opinion. You're a law school professor.

Mr. GORDON. I was a law school professor before I came into this job, before Citizens United was decided, and I was professor of procurement law, sir.

Mr. LABRADOR. And did you read the opinion of Citizens United?

Mr. GORDON. I did not.

Mr. LABRADOR. You are aware that the administration has some problems with that opinion?

Mr. GORDON. Yes, sir. I am aware of that.

Mr. LABRADOR. So let me just give you another hypothetical. If I am the procurement officer—you know, one of the concepts that I was taught in law school is to make sure in drafting legislation you have to be really careful not to encourage future lawsuits when you're drafting legislation. So let's say we have a Republican conservative—socially conservative administration, and we have one contractor who shows that he or she has donated thousands and thousands of dollars to the prolife community, and you have another contractor who shows that he or she has donated thousands and thousands of dollars to a prochoice or a proabortion community, and this Republican administration gives the contract to the person who did the prolife—gave the money to the prolife community. Don't you think there might be a cause for a lawsuit? Because you are an expert in procurement law. Would there be a cause for a lawsuit here?

Mr. GORDON. There are? You do have allegations. As I said, in my years—in the 17 years I was at GAO, we had a small number, I am happy to say, but there were a few cases where there were allegations that political interference had caused the contract to go one way or the other. In my recollection, GAO found when it did an independent investigation, it never found a basis for it to be true. But could a company have concern about that today already? Absolutely.

Mr. LABRADOR. Let me ask you another hypothetical. OK. My time is up.

Chairman GRAVES. Thank you.

This concludes the first part of our panel. Mr. Gordon, we appreciate you being here during the first part of our hearing. Appreciate you being here, and appreciate your testimony. We will now seat the second panel.

Chairman GRAVES. We will now recognize our second panel of witnesses. We have with us today Mr. Alan Chvotkin, senior vice president of Professional Services Counsel.

We have Mr. Mark Renaud. He's a partner at the law firm of Wiley and Rein.

We have Ms. M.L. Mackey, who is the CEO of Beacon Interactive Systems and the vice chair of the small business division of the National Defense Industrial Association. And of all of the businesses that raised this issue with our committee, Ms. Mackey was the only one that wanted to testify today. All of the other cited feared some reprisals. So we thank you very much for coming Ms, Mackey.

We also have Lawrie Hollingsworth, who is president of Asset Recovery Technologies, Inc., and is testifying on behalf of the U.S. Women's Chamber of Commerce.

We have Ms. Marion Blakey, who is the president, chief executive officer of the Aerospace Industries Association.

And Mr. Brad Smith, who is the former Federal Election Commission chairman and is professor of law at Capital University Law School.

Pursuant to the committee rules, we have to swear in all of the witnesses, all of you today. So you if you will please stand and raise your right hands.

[Witnesses sworn.]

Chairman GRAVES. Let the record reflect that all witnesses answered in the affirmative.

Please be seated.

In order to allow time for discussion, I would ask that you please limit your testimony to 5 minutes. But your entire written testimony will be made a part of the record. And we will start with you, Mr. Chvotkin. And, again, I want to thank all of the witnesses for coming today. I appreciate it very much. I am looking forward to your testimony.

STATEMENTS OF ALAN CHVOTKIN, SENIOR VICE PRESIDENT, PROFESSIONAL SERVICES COUNCIL; MARK RENAUD, PARTNER, WILEY REIN LLP; M.L. MACKEY, CEO, BEACON INTERACTIVE SYSTEMS; LAWRIE HOLLINGSWORTH, PRESIDENT, ASSET RECOVERY TECHNOLOGIES, INC.; MARION BLAKEY, PRESIDENT AND CEO, AEROSPACE INDUSTRIES ASSOCIATION; AND BRAD SMITH, PROFESSOR, CAPITAL UNIVERSITY LAW SCHOOL

STATEMENT OF ALAN CHVOTKIN

Mr. CHVOTKIN. Chairman Graves, Mr. Issa, members of the two committees, thank you for your invitation and the opportunity to testify at this joint hearing. So there's no mistake about it, the Professional Services Council is opposed to the draft Executive order in its current form, and we hope that it will not be issued.

Political contributions currently are not and should not be disclosed as part of the bidding and source selection process for Federal contract awards. Yet the draft Executive order takes the ill-conceived approach of injecting that very information into the contracting process, forcing all bidders for Federal contracts to disclose—collect and disclose that information as part of their bid.

Furthermore, only those competing for Federal contracts are covered by this draft order. We are not aware of any action that has been taken elsewhere to cover other entities or even the Federal employees who are source decisionmakers for those Federal procurements. Singling out Federal contractors adds its own political tinge to the draft order.

The first paragraph of section 1 of the draft order spells out the policy foundation. We fully endorse those statements. They spell out a necessary and appropriate requirement that is and, in our view, must be at the very heart of the Federal contracting process. Today no information about campaign contributions or other political activity is ever asked to be presented to a contracting officer or other source selection official.

I doubt that any procurement official has done her own research in the publicly available campaign contributions to aid them in their source selection, but if there is that concern, rather than insulating contracting officers from this tainted information, this draft order requires every bidder for a Federal contract to affirmatively disclose that information, and further provides that making

the required disclosure is a condition of award. For us, this is not a question of disclosure of political contributions; it is a question of the linkage to the Federal procurement process.

The first paragraph of section 2 of the draft order requires a certification that disclosure of this information has been made and the FAR Council is given authority to establish the manner in which the certification is made. It is not clear whether the draft order also gives the FAR Council the flexibility to determine the nature of the certification required.

Certifications have special importance in the Federal procurement system. Typically and ideally where they are required, they should be made subject to the certifier's best knowledge and belief where the contractor's dependent on obtaining information from others in order to make the necessary certification.

Second, there should be some method for the bidder to be able to identify areas outside the contractor's control where the certification cannot be made, such as when a contributor refuses to provide the relevant information to a bidding entity.

Section 2 of the order also requires the disclosure of two types of contributions. The first is contributions to Federal candidates, like the discussion, while that is publicly available. Today companies are not now required to collect this information. Once the contributions are made, it is the recipient of the contribution that makes the disclosure, not these companies.

We also have concerns about the threshold that has been established, because the bidder still has to collect the information in order to know whether the aggregate exceeds the $5,000 threshold in the Executive order.

The second type of contribution is to third-party entities with the intent or reasonable expectation that those parties would use the contribution to make independent expenditures. None of these contributions as have been discussed today are now subject to reporting, yet the draft order used as an undefined standard of reasonable expectation whose interpretation may vary, thus undercutting the value of the information.

Further, by adding a requirement that the bidder ascertain from the contributor whether she was aware of the intent of the third party or had reasonable expectation of the likely use of the contribution, the bidding entity would have to further pry into the contributor's knowledge of the actions of the third-party recipient. While the reporting requirements are not duplicative of existing reporting requirements, it would still impose a heavy information collection and compliance burden on contractors that does not exist today.

PSC is opposed to this draft order and recommends that it not be issued. This type of political information has been intentionally kept out of source collection to ensure a merit-based evaluation and award process. But the order would make its disclosure a condition of award. While the purpose of this order is to prevent pay-to-play contracting seen in some State procurement environments, the result will be to create the very pay-to-play environment on the Federal level where none exists today.

Thank you for the opportunity to present these comments. I look forward to any questions you may have.

Chairman GRAVES. Thank you, Mr. Chvotkin.

[The prepared statement of Mr. Chvotkin follows:]

STATEMENT OF

ALAN CHVOTKIN

EXECUTIVE VICE PRESIDENT AND COUNSEL

PROFESSIONAL SERVICES COUNCIL

BEFORE THE JOINT HEARING OF THE

COMMITTEE ON SMALL BUSINESS AND COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

"POLITICIZING PROCUREMENT: WOULD PRESIDENT OBAMA'S PROPOSAL CURB FREE SPEECH AND HURT SMALL BUSINESS"

MAY 12, 2011

4401 Wilson Boulevard, Suite 1110, Arlington, Virginia 22203 P: 703-875-8059 F: 703-875-8922 www.pscouncil.org

Chairmen Issa and Graves, members of the two committees, thank you for your invitation and the opportunity to testify at this joint hearing to address a draft Executive Order requiring the disclosure of political spending by government contractors. We are opposed to the draft Executive Order in its current form and hope that it will not be issued.

I am Alan Chvotkin, Executive Vice President and Counsel of the Professional Services Council (PSC). PSC is the leading national trade association representing more than 340 companies providing professional and technical services to the federal government. PSC's member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Approximately 20 percent of our members are small businesses and another approximately 30 percent would be considered small mid-tier firms. Together, the association's members employ hundreds of thousands of Americans in all 50 states. Our membership list is public and is posted on our website.

PSC is a non-profit concern organized under Section 501(c)(6) of the Internal Revenue Code. In addition, we have an affiliated, Federal Election Commission-registered, political action committee, the PSC PAC. I am also the PAC Treasurer. Neither PSC, nor the PSC PAC, have ever made any independent expenditure ourselves nor made any contribution to others for the purpose of making independent expenditures.

Draft Executive Order

On April 20, we became aware of the April 13 draft Executive Order titled "Disclosure of Political Spending by Government Contractors."

Contrary to the laudable goal of keeping political contributions out of the federal procurement process, the draft Executive Order is based on a number of misconceptions, including: 1) that political contributions are currently impacting federal contract awards 2) that contracting officers would find useful the information required by the draft executive order and, 3) that much of the information required is currently hidden from public view.

The truth is that political contributions currently are not, and should not, be disclosed as part of the bidding and source selection process for federal contract awards. Despite the repeated efforts by some to show a link between campaign contributions and contract awards, I am pleased that there is no evidence that campaign contributions—for either president or Congress—have had any impact on any agency's procurement evaluation or award decisions. Yet the draft executive order takes the ill-conceived approach of injecting that very information into the contracting process, forcing all bidders for federal contracts to collect and disclose that information as part of their bid.

Furthermore, only those competing for federal contracts are covered by this draft Order. We are not aware of any action that is being taken elsewhere to cover other "entities," such as entities that win federal work without having to competitively "bid" for it (such as federally funded research and development centers) or federal employees who are source selection decision-makers for those federal procurements, or grantees, or those receiving other types of federal assistance. Singling out federal contractors adds its own political tinge to the draft Order.

In addition, the draft Order imposes a significant administrative and compliance burden on companies seeking to provide their goods or services to the federal government and would force contractors to unnecessarily track the political giving of their directors, officers or any affiliate or subsidiary within the bidding entity's control. Since the largest number of federal contractors are small businesses, we would expect that this Order and any subsequent acquisition regulations would have a disproportionate impact on that sector of the federal marketplace.

Of course we were well aware of the Supreme Court's January 2010 *Citizens United* decision. In an article I wrote in February 2010 for a newsletter "Government Services Insider,"[1] I noted that, for most government contractors, the existing panoply of regulations governing campaign contributions were unaffected by the decision and have remained effective, thus outweighing any immediate advantage of the Court's decision.

But beyond carefully watching the legislative response to the Supreme Court's decision, primarily through the consideration of the DISCLOSE Act,[2] and being vigilant about any particular effort to focus on the government contractor community, PSC did not then and has not now taken a position on the Supreme Court's decision or on the appropriateness of a legislative response that would require all entities making covered contributions to report that information publicly.

So we were surprised when a draft Executive Order focused only on government contractors was circulated. We had no prior discussions with officials in the Executive Branch about this draft Order or any other Executive Branch initiative relating to the disclosure of campaign contributions. On April 20, we issued a public statement strongly objecting to the approach in the draft Order[3] and over the next several days responded to numerous questions from Congress, the Executive Branch and the media.

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[1] See Government Services Insider, "Contractor Political Campaign Activism Unleashed?," Feb. 20, 2010, available at: http://gsinsider.com/wordpress/archives/47

[2] See the Democracy Is Strengthened by Casting Light On Spending in Elections (Disclose) Act, 111th Congress, introduced in the House (H.R. 5175) and the Senate (S. 3295).

[3] See "PSC: Draft Executive Order Counterintuitive, Counterproductive" issued April 20, 2011, and available at:http://www.pscouncil.org/AM/Template.cfm?Section=Home1&CONTENTID=7164&TEMPLATE=/CM/ContentDisplay.cfm

Draft Order Preamble

The authority statement for the draft Order cites the president's authority under the Federal Property and Administrative Services Act (40 U.S.C. 101, et.seq.) as well as the president's authority to ensure the integrity of the federal contracting system in order to produce the most economical and efficient results for the American people. While others may be better suited to explain in detail the scope of the president's authority, we know that it is not unlimited or unconstrained.

Draft Order Section 1

The first paragraph of Section 1 of the draft Order spells out the policy foundation for the Order. It starts with the affirmative statement that the "Federal Government's policy (is) that its contracting decisions are merit-based in order to deliver the best value for the taxpayer." It then adds that "every stage of the contracting process... be free from the undue influence of factors extraneous to the underlying merits of contract decision-making, such as political activity or political favoritism. It is important that the contracting process not only adhere to these principles, but also that the public have the utmost confidence that the principles are followed." We fully endorse these statements and those that follow in the paragraph. They spell out a necessary and appropriate requirement that is, and in our view must be, at the very heart of the federal contracting process. If that were all there was to the Administration's statement, I am confident we would all support it and I doubt this hearing would be necessary except maybe to explore the question of why the president thought it necessary to restate it.

However, the second paragraph of Section 1 of the draft Order then raises interesting but at times unrelated matters. For example, the first sentence asserts that the "Federal Government prohibits federal contractors from making certain contributions during the course of negotiation and performance of a contract." The federal election laws do generally prohibit federal contractors from making contributions and the Federal Acquisition Regulation already specifically provides that certain "lobbying" and political advocacy costs are unallowable for charging against government contracts.

However, no information about campaign contributions or other political activity is ever asked to be presented to a contracting officer or other source selection official. I doubt that any procurement official has done her own market research of publicly available campaign contributions to aid them in their source selection determination. But if there is that concern, rather than insulating contracting officials from this "tainted" information, this draft Order requires every bidder for a federal contract to affirmatively disclose that information to them and further provides that making the required disclosure of the covered information specified in the draft Executive Order is a condition of the award of the federal contract.

But the order then asserts that "additional measures are appropriate and effective (sic) in addressing the perception that political campaign spending provides enhanced access to or

favoritism in the contracting process." Contrary to limited, unproven and vigorously denied allegations of political favoritism, we are not aware of any evidence that campaign contributions or other related actions have created enhanced access to or favoritism in federal contracts. Nor are we aware of any bid protest filed at the Government Accountability Office, or any case filed in the federal courts, where this type of favoritism has been alleged, let alone proven.[4] Much of the credit for this can be attributed to the fact that contracting officers are far removed from the political process and have no reason to look into a contractor's political inclinations. Those trying to demonstrate favoritism in the contracting process in exchange for political contributions have historically pointed to the congressional earmark process as the most vulnerable to favoritism, even though only a limited number of cases have been proven and the current system of detecting potential cases seems to be working. Furthermore, even the potential for future instances have been further minimized by the recent reforms that Congress has adopted regarding earmarks. Lastly, I can assure you that the competitors in the federal market are attuned to any government action or inaction that would bias the source selection process and would not hesitate to challenge an agency's decision if there was information that an award decision was based on it.

Draft Order Section 2

The first paragraph of Section 2 of the draft Order requires a "certification" that disclosure of this information has been made and the FAR Council is given authority to establish the manner in which that certification is made. It is not clear whether the draft Order also gives the FAR Council the flexibility to determine the nature of the certification required to be made. Certifications have special importance in the federal procurement system. Typically (and ideally) where they are required, they should be made subject to the certifier's "best knowledge and belief" where the contractor is dependent on obtaining information from others in order to make the necessary certification. Second, there should be some method for the bidder to be able to identify areas outside the contractor's control where the certification cannot be made, such as when a contributor refuses to provide the relevant information to the bidding entity. Finally, if there is to be any disclosure requirement on federal contractors, we strongly recommend that bids for commercial items be exempt from the certification and reporting requirement.

Section 2 also requires the disclosure of two types of contributions. The first type is of contributions to or on behalf of federal candidates, parties or party committees, information that is already generally required to be publicly disclosed by recipients based on long-standing federal election laws and Federal Election Commission requirements. However, reporting entities are required by the election law only to make a good faith effort to collect personal

[4] The Federal Acquisition Regulation recognizes that an incumbent contractor may have an advantage in the follow- on competition for the same work because it may have access to information that competitors do not. This "incumbent advantage" is often challenged in bid protests and GAO has spelled out the standards to differentiate between the advantage of incumbency and the conflict of interest that might arise because of "unequal access to information." See FAR 9.5.

information from contributors where the contribution exceeds $200. This draft Order does not acknowledge that threshold applicable to individuals, even if, in the aggregate, total contributions exceed the $5,000 threshold specified in the draft Order. We also have concerns about the threshold that has been established because the "bidder" still has to collect the information in order to know whether the aggregate exceeds the $5,000 threshold. While significantly raising the threshold would have some benefit on the certification and disclosure side, the entity would still have to collect the information from the covered individuals to know whether the threshold has been met.

The second type is of contributions to third party entities "with the intent or reasonable expectation that parties would use those contributions to make independent expenditures or electioneering communications." None of these contributions are now subject to reporting by anyone. The draft Order uses an undefined standard of "reasonable expectation" whose interpretation may vary by individual, by third party entity and by bidding entities, thus undercutting the value of the information and potentially creating conflicting reporting between bidding entities based on the extent of their due diligence and the timing of collecting this information from covered individuals. Further, by adding a requirement that the bidder ascertain from the contributor whether she was aware of the intent of the third party or had a reasonable expectation of the likely use of the contributor, the bidding entity would have to further pry into the contributor's knowledge of the actions of the third party recipient.

In addition, the draft Order puts the responsibility on the bidding entity to collect information about these contributions from officers and directors who are not now obligated to disclose to the company whether or to whom any such contributions have been made and the entity has no means to require that this personal information be disclosed to it merely to meet a government-imposed reporting requirement. As with the first type of contributions, and notwithstanding the $5,000 threshold for disclosure included in the last paragraph of this section, bidding entities would have to collect all of the information required so as to know whether the contributions exceed the minimum threshold and thus trigger the disclosure requirement.

Where the reporting requirements are not duplicative of existing reporting requirements, they would impose a heavy information collection and compliance burden on contractors, despite the Order's language stating that rules or regulations stemming from the Order "shall minimize the costs of compliance for contractors and shall not interfere with the ability of contractors or their officers or employees to engage in political activities to the extent otherwise permitted by law."

Draft Order Section 7

In one of the few positive elements of the draft Executive Order, Section 7 makes the Order effective upon enactment but applicable only to contracts that result from solicitations first issued on or after the effective date of the FAR regulations. This formulation at least allows the governing rules to be put into effect and then gives both the government and the contractor community an opportunity to understand how to comply. It is at that point that companies will be in the best position to determine whether they want to compete for new federal contracting opportunities knowing that they will have to make the required disclosures or not compete for new business.

Conclusion

PSC is opposed to this draft Order and recommends that it not be issued. PSC is deeply concerned about the potential impact this draft Order, if finalized in its current form, would have on federal procurement awards. This type of political information has been intentionally kept out of source selection to ensure a merit-based evaluation and award process, but the Order would make its disclosure a condition of award! While the putative purpose of the Order is to prevent "pay-to-play" contracting seen in some state procurement environments, the result will be to create the very "pay-to-play" environment on the federal level where none currently exits.

Thank you for the opportunity to present these comments. I look forward to any questions you may have.

Chairman GRAVES. Mr. Renaud.

STATEMENT OF MARK RENAUD

Mr. RENAUD. Thank you, Mr. Chairman, and Mr. Ranking Member, and the members of these two committees, for inviting me to testimony. This is an important issue facing Congress, and I hope my comments prove useful. These views are solely my own and do not reflect the views of my firm or any of its clients.

In short, there is simply no connection between the political information sought by the President's draft Executive order and the contracting process, no corruption to be remedied, and no need to burden on core First Amendment rights of speech and association.

Among other things, under current campaign finance law, employees and PACs of government contractors are subject to the same contribution limits as other contributors, and their contributions are fully reported. As just mentioned, businesses are currently not required to collect or report their employees' contributions and are advised against it. All contributions are voluntary.

The President's draft EO is styled as a pay-to-play law, the laws that stops the giving of contributions for the receipt of contracts. But terminology alone is insufficient. I have extensive experience working on compliance issues related to Federal, State and local pay-to-play laws. Many of these laws suffer from the same infirmities as this draft EO. Here there is no evidence of corruption from campaign activity in the Federal contracting process; maybe in New Jersey and Connecticut in the past, but not here.

The nexus, then, between the contracting process and the contributions is created solely by this draft EO and its supporters, because Federal acquisition officers, as we just heard today, are insulated from the campaign system, as they ought to be. The connection put forward pollutes the marketplace of ideas with this idea of corruption.

Because there is no nexus, the draft EO is unlike pay-to-play regimes that target elected officials and their political cronies who are thoroughly and unavoidably involved in the procurement process.

The draft EO also reaches beyond contributions to independent expenditures, which no other pay-to-play regime does directly, save the rules of the Nebraska Lottery Commission. The Supreme Court has reminded us frequently that independent expenditures do not cause corruption or the appearance of corruption. The Securities and Exchange Commission, in its recent rigorous pay-to-play rulemaking, fully disclaimed affecting independent expenditures.

The draft EO, unlike any other pay-to-play system, also targets grassroots lobbying in the form of electioneering communications. Because of its inclusion in the contracting process—that's the key, inclusion in the process—the disclosures under the draft EO will have a negative effect on corporate and personal political activities of those covered.

Because of uncertainty about how the information will be used, the contractors will rationally move to eliminate any activity that might make them less competitive. The disclosures also will politicize the employer and employee relationship with officers, especially for small businesses who may not be able to afford parallel

compliance systems that many large corporations use, forcing subordinate officers to report political activity to their superiors and fear for the consequences.

The vagueness of the draft EO exacerbates this chilling effect. The FAR Council is tasked with providing guidance, but campaign finance is not its core competency, and it will be undertaking this task on an accelerated basis during the Presidential election cycle. With vagueness, an ever larger group of persons will curtail an even wider set of activities.

In closing, I leave you with a sample of the burdens imposed. Contractors must report contributions made to third parties with the intention or reasonable expectation that the parties will use the contributions for independent expenditures or electioneering communications. This is a precursor to an unending number of disputes over contribution certifications.

With hindsight, competing and losing bidders will be able to protest awards based upon donations, perhaps even trade association dues paid by the bidder but not reported, given the attention or reasonable expectation of the bidder at the time. And some think there will be no chilling here.

Thank you. I am happy to answer any questions you might have.

Chairman ISSA. Thank you.

[The prepared statement of Mr. Renaud follows:]

Prepared Written Testimony of

D. Mark Renaud

Partner

Wiley Rein LLP

"Politicizing Procurement: Will President Obama's Proposal Curb Free Speech and Hurt Small Business?"

Hearing Before the House Committee on Small Business and the House Committee on Oversight and Government Reform

Thursday, May 12, 2011 at 1:30 pm

Rayburn House Office Building, Room 2154

Chairmen and Ranking Members:

I appreciate the opportunity to submit comments in this hearing on the President's Draft Executive Order ("draft EO"), dated April 13, 2011 (and attached hereto at Appendix A), requiring government contractors and certain of their affiliates to disclose political and lobbying activity. My name is D. Mark Renaud, and I am a partner in the Election Law and Government Ethics group at Wiley Rein LLP. Our group is one of the oldest and largest such practices in the nation, and I personally have devoted over ten years to counseling private citizens, business entities, trade associations, and others on the nation's political laws, with a particular focus on federal, state, and local "pay-to-play" laws. At the outset, it is important to note that the views expressed herein are solely my own and do not reflect the views of my Firm or any of its clients.

As the President considers whether to issue the draft EO, I believe it is important for Congress, and especially these two committees, to understand the implications of the President's proposal and to appreciate the significant burdens that it would place on core First Amendment activity. As drafted, the President's proposal does little to further the draft EO's stated goals of transparency, efficiency, and integrity. If anything, the President's proposal actually creates several new problems where none existed before, and it does so without any empirical justification for the additional burdens it imposes. In many cases, these burdens will fall particularly hard on small businesses, who must use their limited resources to collect, sort, and then disclose information unrelated to the contracting process. In short, there simply is no nexus between the political information sought and the nation's contracts, no corruption to be remedied, and no need for the draft EO.

My testimony below explains these conclusions in greater detail.

A. Overview of the Draft EO and the Pay-to-Play and Campaign Finance Context in Which It Would Be Issued

1. How Does the President's Proposal Work?

In its current form, the draft EO essentially requires all persons, regardless of size, that submit offers in connection with federal contracts to disclose two types of information for the two years immediately preceding the submission of the bid:

- All contributions or expenditures to or on behalf of federal candidates, parties or party committees made by the bidding entity, its directors or officers, or any affiliates or subsidiaries within its control; and
- Any contributions made to third party entities with the intention or reasonable expectation that parties would use those contributions to make independent expenditures or electioneering communications.

The draft EO carves out an exception to this disclosure requirement when the aggregate "contributions and expenditures [do not exceed] $5,000 to a given recipient during a given year."

The plain language of the draft EO does not appear to require the disclosure of the political activities of directors and officers beyond those of the bidding entity. Nevertheless, since, the terms "affiliates," "officers," "control," and "third party entities" (among other terms) are vague and not defined, the scope of the draft EO is potentially very far-reaching. Similarly, the phrase "reasonable expectation that parties would use those contributions . . ." is a concept incorporated into the draft EO without any definition or interpretation. As a result, it is not clear whose political contributions the bidding entity must disclose or under what circumstances they must be disclosed.

To take but one example of the practical difficulties this vagueness creates, consider the parent-subsidiary relationship. Clearly, activity by certain subsidiaries would have to be disclosed, but it is unclear how far "within its control" reaches with respect to subsidiaries, joint ventures, etc.

Moreover, because of the undefined language in the draft EO, including the "reasonable expectation" phrase mentioned above, donations to 501(c)(4) and 501(c)(6) organizations could be subject to disclosure under the President's proposal if such entities are politically active with respect to federal elections or engage in radio and television grassroots advertisements near a federal election where the ads mention or feature federal candidates (known as "electioneering communications"). Donations to 501(c)(3) charities would be less likely to be disclosed since such charities may not, per federal tax law, make contributions or expenditures in connection with elections, although such entities might, given a rare confluence of facts and circumstances, permissibly engage in issue ads that fall within the definition of electioneering communications.

2. Current Federal Campaign Finance Law

The draft EO would be issued in the context of current campaign finance law, which already affects many of the contributions targeted by the draft EO.

Federal campaign finance law currently prohibits all federal contractors from making contributions to candidates for federal office, federal political party committees, and federal PACs. *See* 2 U.S.C. § 441c(a)(1). This ban does not, however, extend to a separate segregated fund or political action committee ("PAC") connected to a federal contractor, *id.* § 441c(b), or to a contractor's directors, officers, or employees, assuming such individuals are not foreign nationals. The PACs, directors, officers, and employees are, like all PACs and individuals, limited in how much they may contribute to federal political committees and candidates, *id.* § 441a(1), and such contributions in excess of $200 per election or calendar year, as appropriate, are publicly disclosed on the recipients' campaign finance reports filed with the Federal Election Commission ("FEC") (and available at www.fec.gov), *id.* § 434(b)(3)(A). Moreover, all federal PACs must disclose all of their disbursements to the FEC, *id.* § 434(b)(4), and the contributions

of the PACs of employers of federal lobbyists are also reported publicly on semiannual Lobbying Disclosure Act reports (Form LD-203), *id.* § 1604(d).

Under federal campaign finance laws, corporations may not require their directors and officers to make contributions, for political contributions are a voluntary and personal decision. *See id.* § 441b(b)(3). Moreover, there is no requirement that a company track the individual contributions of its officers or directors. In fact, such tracking could be problematic under the Federal Election Campaign Act ("FECA") and employment law (with respect to the officers). Although the personal federal political contributions and expenditures of officers and directors are publicly available on the FEC's website, for the same FECA and employment-law reasons, attorneys often caution corporations against researching such information with respect to their directors, officers, and employees.

3. Pay-to-Play Laws Around the Nation

In the past several years, one of the major trends in campaign finance law throughout the country has been the adoption of so-called "pay-to-play laws." By pay-to-play laws, I mean laws, ordinances, and rules designed to prevent "paying" (*i.e.*, providing political contributions) in order to "play" (*i.e.*, receiving a grant, contract, etc. from the government). Scandals triggered most of these laws, although, in an ironic twist, it was the imminent application of Illinois' pay-to-play laws that led to the downfall of Illinois Governor Blagojevich.

By my count, 21 states and 13 major local jurisdictions now have pay-to-play laws of some sort. In addition, many smaller localities in California and New Jersey, among other states, also have such rules. Some of these rules, such as the rules of the State Investment Council of New Jersey and the Teacher Retirement System of Texas, are targeted specifically to persons involved in the financial services industry, although most are of general application to persons who hold or seek contracts with the given government entity.

There is an almost infinite variety among the pay-to-play laws around the country. Some are at the state level, others at the municipal level, and still others at the agency level. Some state laws apply at both the state and local levels. Several of the pay-to-play laws employ contribution bans, while several others limit contributions, and still others employ only a disclosure mechanism. Moreover, some of the pay-to-play laws are limited to the contracting entity whereas others encompass related business entities, PACs, owners, directors, officers, and other employees. The application of the laws range from the duration of the procurement process itself to a look-back period of four plus years. Finally, some of the laws focus exclusively on no-bid contracts, whereas others also cover competitively bid contracts.

Importantly, the real difference among the many pay-to-play laws is their ability to address the issues of corruption and the appearance of corruption. The most targeted pay-to-play laws are those adopted in the context of a procurement process where elected officials or their political appointees make the ultimate contracting decisions. Examples include the Municipal Securities Rulemaking Board's ("MSRB") Rule G-37, New Mexico's general state pay-to-play law, and San Francisco's pay-to-play ordinance. In these jurisdictions, the ban, limit, or disclosure requirement has a direct connection to the contracting process.

By contrast, in jurisdictions where the contracting officers are more insulated from the influence of elected officials and their political appointees, any "pay-to-play" laws merely employ pay-to-play terminology in order to ease passage under the banner of "reform." The rules in these jurisdictions impose burdens on core First Amendment activities that have real effects, but, given the context of the applicable procurement laws, can provide no positive benefit to the contracting process or the political process.

B. The Draft EO Is Not A Targeted Pay-to-Play Law

In its opening paragraphs, the draft EO styles itself as a pay-to-play provision, modeled after efforts in the states. Although it may resemble one or more of the non-targeted pay-to-play rules, the draft EO differs greatly from what is the focus of the targeted pay-to-play rules in the states and localities. The result is that any disclosures are marginally related to the integrity of the procurement process.

1. The Draft EO Would Not Prevent Corruption

If adopted, the draft EO would operate in the context of the federal contracting rules under which source selection decisions are most often made by contracting officers and other civil servants insulated from the pressures of the electoral marketplace. These personnel are neither elected officials nor appointees of elected officials and heretofore have not been privy to the political activities of those seeking federal contracts.

The draft EO would puncture these safeguards, then, by introducing the political into an area where politics and political contributions are not currently part of the calculus. This contrasts sharply with the state and local experiences where elected officials often make or approve the contracting decisions or appoint the commissioners or others who make or approve such decisions. In such states and localities, politics already is a part of the contracting process. Thus, rather than introduce politics into the system, the state and local pay-to-play laws seek to remove or limit the influence of politics.

The federal contracting process is different. Since elected officials and their political appointees are typically not directly involved in federal contracting decisions, even an absolute ban of political activities by the bidders, their affiliates, and their officers and directors would not have any meaningful effect on the contracting process. With respect to the draft EO, the disclosure of the bidders' political activities would do even less. In fact, although one can

readily read an inference of corruption in the language of the draft EO, neither the draft EO, the manufactured findings that were part of the DISCLOSE Act when it was introduced in the House, the findings of the House committee on the DISCLOSE Act, nor any recent commentary on the draft EO provides empirical evidence that political contributions have led to a corruption of the federal contracting process.

If acquisition professionals are fully insulated from the reportable political activity, then the draft EO is woefully misplaced. If, on the other hand, the insulation is insufficient or incomplete under some circumstances, then the draft EO is a distraction from the real and immediate task at hand – fixing the problematic areas of the federal procurement process.

2. The Draft EO Would Not Prevent the Appearance of Corruption, But Would Instead Inject Partisanship into the Process

Combating the appearance of corruption can serve as a legitimate basis for a pay-to-play law. Nonetheless, the draft EO cannot provide such a basis when it does not, as stated above, combat actual corruption.

As supporters of the draft EO have indicated, one of the aims of the draft EO is to show taxpayers where contractors spend their profits.[1] These supporters themselves, however, have exacerbated the cynicism of the public (the "appearance of corruption"), for with every reform pronouncement on the draft EO, they have tied contributions with federal contracts even though they have not and cannot produce any evidence of actual corruption.

Moreover, the process of making this political activity public through the draft EO will likely make the public more cynical unless, as discussed in detail below, the bidders and their affiliates and officers and directors cease all political activity to protect themselves. Despite the

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[1] It must be profits since political activity and lobbying activity are both unallowable under FAR cost principles.

lack of a connection between political activity and the federal contracting process, the mandatory reports of the bidders will explicitly tie political activity to particular procurements, and periodic news reports will remind the public regularly of the nexus created solely by the draft EO. The bootstrapping of a "reform" mechanism on the government contract process thus will breed public cynicism rather than foster additional confidence in government decisionmakers.

Finally, contrary to common assumptions, the disclosures mandated by the draft EO would not support any informational interest if, in fact, one exists in this context at all. Disclosure would be required without any "sufficiently important" government interest that bears a "substantial relation" to the disclosure requirement, *Citizens United v. FEC*, 130 S.Ct. 876, 914 (2010), since the premise of the requirement for disclosure, *i.e.*, that the disclosed contributions entail corruption in the contracting process, is a faulty one. Moreover, in the marketplace of ideas, the federal government would effectively be putting its thumb on the scale through the operation of the draft EO. In the draft EO and the databases that would be created as a result, the government would be proclaiming to the public the idea that these contractor contributions were different in that they do or may corrupt the government contracting process. Since this is false, the context of this forced disclosure would "officially" skew the public's perception of these contributions and may subtly and unjustifiably alter the electoral decisions the public may make as a result. This contrasts with the requirement of general disclosure currently found on the FEC's website, where all contributions and expenditures are disclosed without distinction.

3. The Draft EO Attacks Independent Expenditure Activity That Does Not Cause Corruption or the Appearance of Corruption

The inadequacies of the draft EO discussed above are reflected in two particular elements of the mandated disclosure regime. This is the targeting of activities that go beyond

contributions – independent expenditures and electioneering communications. By contrast, state and local pay-to-play laws, even the non-targeted ones, remain focused on contributions.

Although the U.S. Supreme Court has repeatedly stated that independent expenditures do not corrupt or cause the appearance of corruption, *see, e.g., Citizens United*, 130 S.Ct. at 908-11; *Buckley v. Valeo*, 424 U.S. 19, 47 (1976), the draft EO tramples further into the realm of core speech by requiring disclosure of such expenditures by bidders and their affiliates, officers, and directors. In this respect, it is telling that I have found only one state or local jurisdiction that extends its pay-to-play reach directly to independent expenditures – Nebraska – and then only with respect to its lottery division. No other jurisdiction appears to include contractor independent expenditures as part of its pay-to-play laws –even as part of a disclosure mechanism.

A good example of why the pay-to-play laws focus on contributions and not independent expenditures can be found in recent activity at the U.S. Securities and Exchange Commission ("SEC"). In implementing its recent and very stringent pay-to-play contribution ban and limits for investment advisers, the SEC was very concerned about preventing actual corruption and the appearance of corruption. After reviewing the relevant case law, the SEC concluded that its anti-corruption goal was achieved by restricting only direct contributions. *See Political Contributions by Certain Advisors*, 75 Fed. Reg. 41,018, 41,023-24 (July 14, 2010). In fact, the SEC specifically disclaimed any interest in regulating independent expenditures. *See id.* at 41,024 ("[T]he rule does not in any way impinge on a wide range of expressive conduct in connection with elections. For example, the rule imposes no restrictions on activities such as making independent expenditures to express support for candidates . . . ."); *see also id.* at 41,030

("We also note that 'contributions' are not intended to include independent 'expenditures,' as that term is defined in 2 U.S.C. 431 & 441b.") (internal citations omitted).

4. The Draft EO Attacks Electioneering Communications That Do Not Cause Corruption or the Appearance of Corruption

Even further afield from contributions and the possible sources of corruption and the appearance of corruption is the draft EO's targeting of contributions to third parties for electioneering communications. As a reminder, electioneering communications are, at least under federal campaign finance law, television and radio ads aired in a relevant congressional district or state 30 days before a primary or 60 days before a general election that mention or feature a federal candidate in that jurisdiction. Electioneering communications do not involve express advocacy, as such communications are defined as independent expenditures or, if coordinated, in-kind contributions. The inclusion of electioneering communications in the draft EO thus implicates grassroots lobbying advertisements, which are even further removed from the pay-to-play sphere than independent expenditures.

No state or locality, not even Nebraska's lottery division, purports to apply its pay-to-play ban, limit, or disclosure requirements to payments made for such grassroots lobbying activities. Like independent expenditures, electioneering communications are independent and unable to cause the corruption or appearance of corruption that pay-to-play laws attempt to address. The draft EO, on the other hand, improperly targets such lobbying activities without any anti-corruption rationale for doing so.

C. Bidders and Their Affiliates and Officers and Directors Will Rationally Curtail Political Activities as a Result of the Draft EO

Compliance by corporations with any pay-to-play law has two dimensions: corporate and personal. In both cases, compliance with the draft EO is likely to have negative ramifications on

core First Amendment activity by introducing uncertainty as to the use of political information in the contracting process. Uncertainty means risk.

1. The Draft EO Will Reduce Corporate Political Involvement

In my experience, there is no doubt that many contractors will refrain from any activity, including political activity, that gives even the appearance of making them less competitive vis-à-vis one or more contracts. With the draft EO, the risk for the contractor is that its political activity could reduce its competitive profile with respect to the contracts on which it will be bidding – whether the risk comes from the fact that the contractor engaged in any reportable political contributions at all, the magnitude of such contributions, or the identity of the recipients of the reportable contributions. Thus, the contractor will likely follow rational risk mitigation strategies and reduce or eliminate the reportable activity. (In the worst case scenario, the contractor may increase reportable activity that benefits the incumbent administration on the theory that it may decrease its risk of reporting little or no support – the opposite, I think all would agree, of the stated goal of the draft EO.)

As stated above, federal contractors are prohibited from making contributions, so the corporate activity that will be reduced will be the contributions to third parties that might possibly make independent expenditures or electioneering communications. In fact, this appears to be the goal of the draft EO even though there is no reported link between independent expenditures or electioneering communications and the contractor activity at the federal level. Since we do not know how the FAR Council is going to implement the draft EO, it is difficult to measure the activities that the contractor will curtail. If, in the worst case scenario, reportable contributions extend to dues payments to trade associations and similar groups, then the draft EO will not only undermine permissible political activities, which is problematic enough, but also

will work to defund trade associations and other groups so that they cannot engage in their representational activities in all spheres of modern life – legislative, social, media, political, etc.

2. The Draft EO Will Reduce Personal Political Activity

The draft EO also will negatively affect the personal political activities of covered officers and directors. First, officers and directors, even in large contractors, may internalize the corporate reaction discussed above, although, in the context of officers and directors, this reaction would affect candidate and party contributions as well. Second, although large corporations can offer parallel compliance processes and management structures that provide some comfort to the provision by employees of personal political information to the corporation, small businesses may not have the luxury of these duplicative processes. In such cases, the employee-employer relationship is particularly politicized given that officers, for example, may need to report contributions to persons with whom they may have a direct report relationship. If the subordinate officer feels his or her personal contributions may either cause problems for upcoming contract bids or be adverse to the political leanings of a superior, then the officer will rationally choose to curtail such contributions.

Although contributions of more than $200 are already itemized and reported to the FEC, the draft EO would be the particular source of this chilling effect given that (1) the reported contributions would be officially tied to the contractor participating in a bid; (2) the contributions would be reported as part of the bidding process; and (3) the company would have to collect the information in order to report it. Currently, corporations are not required to report the political activities of their employees, and, in fact, attorneys advise companies not to investigate the publicly-available campaign finance information about their employees – for employment law as well as campaign finance reasons. The draft EO would, then, change the employee/corporate balance under the campaign finance laws for contractors.

3. The Vague Language Found in the Draft EO Exacerbates the Risks

The risks presented by the draft EO are exacerbated by the vague language used in the draft EO and the lack of clear guidance. Although the FAR Council will have a chance to weigh in on the final rules, campaign finance is not one of the Council's core competencies, and it will be tasked with providing guidance on an expedited basis (by the end of the year) amid a Presidential election cycle. In any event, such vagueness often is not clarified in the rulemakings or guidance that subsequently emanates from the responsible agencies (just look at the MSRB's guidance on Rule G-37 for examples of a lack of clarity). Vagueness causes an even broader swath of political activity to be chilled.

Vagueness is present because the draft EO is filled with undefined terms. One of the most dangerous vague ideas in the draft EO is the phrase "with the intention or reasonable expectation" used with respect to contributions made to third parties. It is not clear what this might mean, and I fear that the FAR Council may not provide any additional clarity. To the extent that reportable contributions turn on the intent of the contributor, then this phrase just serves as the precursor to an unending number of disputes over any unreported third-party contributions. If the bidder made a payment to a third party, there must be some objective criteria by which it can determine whether the payment is reportable. The "reasonable expectation" language does not help much, given that reasonableness will be based on the time and place of the decision to contribute and/or the actual contribution, often a fact-specific determination. With hindsight, however, others, including competing bidders, losing bidders, political opponents, and the government acquisition officials themselves, may see some other, after-the-contribution development with respect to the third party and challenge the bidder's certification, protest the contract award, and generally embark on a fishing expedition with respect to any contributions not reported. Besides these needless and intrusive investigations,

such risks may lead to pre-clearance by the company of all covered directors' and officers' activities in order that the company may analyze all the risks before any reportable contributions are made.

APPENDIX A

Draft 4/13/11; 4:00 pm

EXECUTIVE ORDER

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DISCLOSURE OF POLITICAL SPENDING BY GOVERNMENT CONTRACTORS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and to ensure the integrity of the federal contracting system in order to produce the most economical and efficient results for the American people, it is hereby ordered that:

Section 1. The Federal Government must ensure that its contracting decisions are merit-based in order to deliver the best value for the taxpayer. It is incumbent that every stage of the contracting process - from appropriation to contract award to performance to post-performance review - be free from the undue influence of factors extraneous to the underlying merits of contracting decision making, such as political activity or political favoritism. It is important that the contracting process not only adhere to these principles, but also that the public have the utmost confidence that the principles are followed. When the public lacks confidence that the contracting system works fairly, it may deter participation and deprive the government of the most robust competition and the best providers. And without the full complement of tools to hold the system accountable, the possibility of actual misconduct or the appearance thereof is increased.

In order to begin to address these problems, the Federal Government prohibits federal contractors from making certain contributions during the course of negotiation and performance of a contract. Notwithstanding these measures and the diligent work of the government's contracting officers and other acquisition professionals, additional measures are appropriate and effective in addressing the perception that political campaign spending provides enhanced access to or favoritism in the contracting process. Several states have adopted "pay-to-play" laws that go further by limiting not only contributions by the contracting entity itself, but also by certain officers and affiliates to prevent circumvention and in other cases by requiring disclosure. This state innovation towards better government should be encouraged and the Federal government should draw from the best practices developed by the states.

Sec. 2. Therefore, in order to increase transparency and accountability to ensure an efficient and economical procurement process, every contracting department and agency shall require all entities submitting offers for federal contracts to disclose certain political contributions and expenditures that they have made within the two years prior to submission of their offer. Certification that disclosure of this information has been made in the manner established by the Federal Acquisition Regulatory Council (FAR Council) pursuant to Sec. 4 shall be required as a condition of award.

This disclosure shall include:

(a) All contributions or expenditures to or on behalf of federal candidates, parties or party committees made by the bidding entity, its directors or officers, or any affiliates or subsidiaries within its control; and

(b) Any contributions made to third party entities with the intention or reasonable expectation that parties would use those contributions to make independent expenditures or electioneering communications.

This disclosure shall be required whenever the aggregate amount of such contributions and expenditures made by the bidding entity, its officers and directors, and its affiliates and subsidiaries exceeds $5,000 to a given recipient during a given year.

Sec. 3. All disclosed data shall be made publicly available in a centralized, searchable, sortable, downloadable and machine readable format on data.gov as soon as practicable upon submission.

Sec. 4. On or before the end of this calendar year, the FAR Council shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out this order. Such rules, regulations, and orders shall minimize the costs of compliance for contractors and shall not interfere with the ability of contractors or their officers or employees to engage in political activities to the extent otherwise permitted by law.

Sec. 5. Each contracting department or agency shall cooperate with the FAR Council and provide such information and assistance as the FAR Council may require in the performance of its functions under this order.

Sec. 6. (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 7. This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the action taken by the FAR Council under section 4 of this order.

THE WHITE HOUSE,

Chairman ISSA. Ms. Mackey.

STATEMENT OF M.L. MACKEY

Ms. MACKEY. Good afternoon. I'm speaking to you today in my capacity as vice chair of National Defense Industrial Association small business division, legislative affairs committee, and as CEO and cofounder of Beacon Interactive Systems. NDIA membership is composed of over 90,000 individual members and 17,000 corporate members, over half of which are small businesses. Beacon Interactive Systems is a 17-year-old small business that for the past 9 years has been a Federal contractor actively developing and delivering innovative technology and cost savings to the Department of Defense.

In terms of today's discussion, the contribution that I can make is to describe the potential impact of this proposed Executive order on small businesses that actively engage in the Federal procurement process.

The intent of ensuring that campaign contributions do not unduly influence the award of Federal contracts is laudable. Unfortunately, the approach taken by this proposed order could have serious negative consequences on business, especially small business.

The order presents five areas of significant concern. First, it politicizes the Federal procurement process, which by all accounts should be completely independent and transparent.

Second, it puts company management in the distasteful position of invading the privacy of their senior management by requiring disclosure of their personal political contributions.

Third, this proposed Executive order could have the effect of silencing the voice of small businesses, who might, in an effort to mitigate potential contracting risks, no longer be comfortable making the grassroots contributions to advocate for the issues that are important to them.

Fourth, the small business may decide that operating under the proposed order is not worth the effort of doing business with the Federal Government.

And fifth, this order will increase the reporting burden on small business and contracting officers, which in turn increases costs and further prolongs an already lengthy procurement process.

None of these consequences are acceptable.

Let me expand on some of these challenges.

It is imperative in the realm of government contracting that small businesses be able to operate on a level playing field. In order for small businesses to compete effectively, proposals must be evaluated in an open and consistent manner with a laser focus on three main factors: technical merit, cost competitiveness, and past performance history.

The proposed disclosures will now shine a spotlight on a company's political contributions. At the end of a lengthy, rigorous, and often convoluted evaluation process, small business owners will be required to provide contracting officers with a detailed record of a company's political expenditures. It is not hard to imagine that this information could, whether intentionally or not, be used to influence the procurement decision, precisely the outcome the proposed Executive order seeks to prevent. Even if there were no impro-

priety, a competing vendor who lost a procurement opportunity might argue and protest that political affiliations were a contributing factor in the decisionmaking.

Second, the proposed Executive order requires me, as an example, to report individual contributions made by my company officers. As a small business owner, I do not want to force my employees to disclose their political leanings. How employees allocate their campaign contributions should have no bearing on my hiring, compensation or promotion policies. My employees should be concentrating on how to best execute their job responsibilities, not worrying about whether their political choices are consistent with mine. This is a personal matter that does not need to be thrust into the workplace. In the same manner, personal political choices should not be unnecessarily thrust into contracting.

The third area of concern is that this proposed Executive order could have a chilling effect on the political activities of small business and their management. It is difficult enough for small businesses to compete effectively and navigate the often complex waters of Federal contracting. Politicizing the process will add one more possible obstacle to small business participation. From my personal experience as a small business owner, I can tell you that I do not have the resources or the inclination to manage this unquantifiable risk. If my political contributions can negatively affect my ability to win Federal contracts, I will not make them.

As you know, true small business advocacy is funded at the grassroots level. If small businesses fear that their operations will be harmed by their political choices, they may remove themselves from the public discourse and halt future donations. This effectively limits free speech and may leave the small business constituency without adequate representation. Alternatively, some small businesses might feel coerced into supporting the party in power in order to bolster their chances of winning contracts. Either way, the political process is compromised.

And finally, there is likelihood that the proposed Executive order could discourage small businesses from pursuing Federal contracts. The intrusive disclosures of personal political contributions combined with the additional reporting requirements would add unproductive time and costs to the procurement process. If this pushed small businesses to adopt the "why bother" stance, our Nation and particularly our men and women in uniform would be deprived of the innovations, agility and cost efficiencies that small business brings to the table.

Mr. Chairman, on behalf of the National Defense Industrial Association, I would like to thank you and the committee for your leadership on this important issue. We appreciate your efforts to keep the Federal procurement process fair and independent, as this is a critical component of successful small business participation.

I'd be pleased to respond to any of your questions. Thank you.

Chairman ISSA. Thank you.

[The prepared statement of Ms. Mackey follows:]

TESTIMONY FOR THE HOUSE SMALL BUSINESS COMMITTEE AND THE HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE

"PROPOSED EXECUTIVE ORDER: DISCLOSURE OF POLITICAL SPENDING BY GOVERNMENT CONTRACTORS"

THURSDAY, MAY 12, 2011

ML Mackey
Vice Chair, NDIA Small Business Division Legislative Affairs Committee
CEO & Co-Founder, Beacon Interactive Systems

Good Afternoon. I am speaking today in my capacity as Vice Chair, National Defense Industrial Association (NDIA) Small Business Legislative Affairs Committee and as the CEO and Co-Founder of Beacon Interactive Systems. NDIA membership is composed of over 90,000 individual members and 1,700 corporate members, over half of which are small businesses. Beacon Interactive Systems is a 17 year-old small business that for the past 9 years has been a federal contractor, actively developing and delivering innovative and cost-saving software products to the Department of Defense. In terms of today's discussion, the contribution that I can make is to describe the potential impact of this proposed Executive Order on small businesses that actively engage in the federal procurement process.

The intent of insuring that campaign contributions do not unduly influence the award of federal contracts is laudable. Unfortunately, the approach taken by this proposed order could have serious negative consequences on business, especially small business. The Order presents five areas of significant concern. First, it politicizes the Federal Procurement Process, which, by all accounts, should be completely independent and transparent. Secondly, it puts company management in the distasteful position of invading the privacy of their senior management by requiring disclosure of their personal political contributions. Thirdly, this proposed Executive Order could have the effect of silencing the voice of small businesses who might, in an effort to mitigate potential contracting risk, no longer be comfortable making the grassroots contributions to advocate for the issues that are important to them. Fourth, small business may decide that operating under the proposed order is not worth the effort of doing business with the federal government. And fifth, this order will increase the reporting burden on small business and contracting officers which, in turn, increases costs and further prolongs an already lengthy procurement process. None of these consequences are acceptable.

Let me expand on some of these challenges. It is imperative that, in the realm of government contracting, small businesses be able to operate on a level playing field. In order for small businesses to compete effectively, proposals must be evaluated in an open and consistent manner with a laser focus on three main factors: technical merit, cost competitiveness and past performance history. The proposed disclosures will now shine a spotlight on a company's political contributions. At the end of a lengthy, rigorous and often convoluted evaluation process, small business owners will be required to provide contracting officers with a detailed record of a company's political expenditures. It is not hard to imagine that this information could, whether intentionally or not, be used to influence the procurement decision—precisely the outcome the proposed Executive Order seeks to prevent. If all other factors are equal, what is to prevent a contracting officer from awarding a contract to the company whose political affiliations are most closely aligned with his or hers? Even if there were no impropriety, a competing vendor who lost a

procurement opportunity might argue, and protest that political affiliations were a contributing factor in the decision-making.

Secondly, the proposed Executive Order requires me, as an example, to report individual contributions made by my company officers. As a small business owner, I do not want to force my employees to disclose their political leanings. How employees allocate their campaign contributions should have no bearing on my hiring, compensation or promotion policies. Employees should be concentrating on how to best execute their job responsibilities—not worrying about whether their political choices are consistent with mine. This is a personal matter that does not need to be thrust into the workplace. In the same manner, personal political choices should not be unnecessarily thrust into the federal acquisition process.

The third area of concern is that this proposed Executive Order could have a chilling effect on the political activities of small businesses and their management. It is difficult enough for small businesses to compete effectively and navigate the often complex waters of federal contracting. Politicizing the process will add one more possible obstacle to small business participation. From my personal experience as a small business owner, I can tell you that I do not have the resources or inclination to manage this unquantifiable risk. If my political contributions can negatively affect my ability to win federal contracts, I will not make them. As you know, small business advocacy is funded at the grass-roots level. If small businesses fear that their operations will be harmed by their political choices, they may remove themselves from the public discourse and halt future donations. This effectively limits free speech and may leave the small business constituency without adequate representation. Alternatively, some small businesses might feel coerced into supporting the party in power in order to bolster their chances of winning contracts. Either way, the political process is compromised.

And, finally, there is likelihood that the proposed Executive Order could discourage small businesses from pursuing federal contracts. The intrusive disclosures of personal political contributions combined with the additional reporting requirements would add unproductive time and cost to the government procurement process. If this pushed small businesses to adopt a "why bother" stance, our nation—and particularly our men and women in uniform—would be deprived of the innovations, agility and cost efficiencies that small business brings to the table.

Mr. Chairman, on behalf of the National Defense Industrial Association, I would like to thank you and the Committee for your leadership on this important issue. We appreciate your efforts to keep the federal procurement process fair and independent as this is a critical component of successful small business participation.

I would be pleased to respond to any of your questions. Thank you.

Chairman ISSA. Ms. Hollingsworth.

STATEMENT OF LAWRIE HOLLINGSWORTH

Ms. HOLLINGSWORTH. Good afternoon, Chairman Graves, Ranking Member Cummings, Chairman Issa and members of the committee. I am here today as a member of the U.S. Women's Chamber of Commerce representing our half a million members, three-quarters of whom are American small business owners and Federal contractors.

I am Lawrie Hollingsworth, president of Asset Recovery Technologies. My engineering business, founded in 1994 and headquartered in Chicago with multiple offices nationwide, provides technical services for disaster recovery and disaster response to business and government offices impacted by fire, flood, and catastrophe; and the recovery of technology assets to return these businesses and offices to operation. We were, by the way, proud responders to 9/11 and Hurricane Katrina.

As a small business owner, I appreciate the opportunity to provide this testimony and appreciate being here. Hopefully I can impart some insights and perspectives from the small business viewpoint on the issues of political spending, campaign finance, transparency, and prevention of the politicization of the procurement process through unscrupulous pay-to-play tactics.

Our political system, which is already too full of cash for influence, now faces a threat of undisclosed corporate political spending. With the landmark Citizens United case, we are already seeing a flood of corporate campaign spending, much of which will not be publicly disclosed. At stake are millions of dollars in undisclosed donations that will be provided by large corporations to trade associations and other not-for-profit organizations and entities that will use the money for independent campaign expenditures.

To get a grasp of the amount of money known to be used by the biggest firms to influence government, consider this. The top 10 Federal contractors spent over $65 million in 2010 for lobbying alone, and I believe I heard a figure of $100 million tossed around today. That is an amount that is considerably more than the gross annual sales of probably most small businesses as the SBA defines them.

Small business owners do not possess the resources, financial and otherwise, to compete with the enormous amount of capital, influence and lobbyist activity the large businesses employ to gain access to and win government contracts, and I'd like to especially note single-source government contracts.

Through enacting a policy as is detailed in the draft of the President's Executive order, it is my hope that by being aware of the influences that govern the awarding of government contracts, we will level the playing field for the small business owner.

Currently small business owners have only limited resources to compete with large corporations in the awarding of government contracts. While many factors are at play, certainly campaign contributions and other politically related acts of large corporations place the small business owner at a substantial disadvantage in the awarding of government contracts.

While I feel that the stated purpose of this policy, which is to cast light upon hidden interests and influences in letting of government contracts, is admirable and desirable, it is also desirable to impact small business with additional burdens as little as possible in the process. Small business owners already face substantial obstacles and impediments to the point of entry to government contracting, so much so that many small businesses literally give up on the process.

Clearly, regulations and paperwork that do not result in increased opportunity for small business is undesirable. However, if a policy is enacted that brings greater transparency and integrity to our Federal contracting and our political fundraising processes in such a manner that our small business owners can respond without undue burden, then I feel this is a worthy proposal deserving the support of small business.

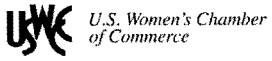
The draft EO would allow the public to see the flow of money that is now hidden through third-party groups, cut-out funding mechanisms and other political strategies that allow donors to hide their contribution. Rather than hurting small business by politicizing the process, it is very likely this much-needed transparency will depoliticize the process, help to prevent pay-to-play schemes, and assure small businesses compete fairly. Public scrutiny will prevent contractors from using their taxpayer-funded deep pockets to secure an unwarranted advantage in the government procurement process.

I believe certain steps can be taken to approve the draft Executive order, including raising the disclosure threshold and establishing a contract site, assuring that the rules and regulations developed to support the proposal provide easy, clear steps for compliance. In short, the right sort of rules will allow small business in many cases to be exempt from what is allegedly an onerous burden to comply with this act.

I appreciate your time here today, and I would be happy to answer any questions. Thank you.

Chairman ISSA. Thank you.

[The prepared statement of Ms. Hollingsworth follows:]



Testimony of
Lawrie N. Hollingsworth, President
Asset Recovery Technologies, Inc.
on behalf of the
U.S. Women's Chamber of Commerce

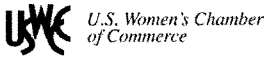
Before the House Small Business Committee
and the
House Committee on Oversight and Government Reform
for the Hearing
"Politicizing Procurement: Would President Obama's
Proposal Curb Free Speech and Hurt Small Business?
Thursday, May 26, 2011 at 1:30 pm
Rayburn House Office Building, Room 2154

Ranking Member Velázquez, Chairman Graves, Ranking Member Cummings, Chairman Issa Members of the Committees. I am here today as a member of the U.S. Women's Chamber of Commerce representing our 500,000 members, three-quarters of whom are American small business owners and federal contractors.

I am Lawrie N. Hollingsworth, President of Asset Recovery Technologies, Inc. (ART) and the Price-Hollingsworth Company, Inc. My engineering business, Asset Recovery Technologies – founded in 1994, and headquartered in the Chicago area with multiple offices nationwide – provides technical services for disaster recovery and disaster response to businesses impacted by fire, flood and catastrophe, and recovery of technology assets to return businesses and state, local, and government offices to operation.

As a small business owner, I appreciate the opportunity to provide this testimony and hopefully impart some insights and perspectives from the small business viewpoint on the issues of political spending, campaign finance, transparency, and the prevention of the politicization of the procurement process through unscrupulous "pay to play" tactics.

Our political system, which is already too full of cash for influence, now faces a new threat of undisclosed corporate political spending. With the landmark Supreme Court ruling in Citizens United v. Federal Election Commission, we will see a flood of corporate campaign spending -- much of which will not be publicly disclosed. At stake are millions of dollars in undisclosed donations that will be provided by corporations to trade associations and other not-for-profit organizations that will use the money for independent campaign expenditures.



To get a grasp of the amount of money invested by our biggest firms to influence government, consider this -- the top ten federal contractors spent well over $65M in 2010 for lobbying alone, an amount that is more than the gross annual sales of many small businesses. Small business owners do not possess the resources, financial and otherwise, to compete with the enormous amount of capital, influence, and lobbyist activity that large businesses employ to gain access to and win government contracts.

Through enacting a policy, as is detailed in the President's Executive Order, it is my hope that by being aware of the influences that govern the awarding of government contracts we will "level the playing field" for the small business owner. Currently, small business owners have only limited resources to compete with large corporations and the awarding of government contracts as successfully as they should be. While many factors are at play, certainly campaign contributions and other politically-related acts of large corporations place the small business owner at a substantial disadvantage in the awarding of government contracts.

While I feel that the stated purpose of this policy, which is to cast light upon hidden interests and influences in the letting of government contracts, is admirable and desirable, it is also desirable to impact small business with additional burdens as little as possible in the process. Small business owners already face substantial obstacles and impediments to the point of entry for government contracting, so much so that many small businesses literally give up on the process.

Clearly, regulations and paperwork that do not result in increased opportunity for small business is undesirable. However if a policy is enacted that brings greater transparency and integrity to our federal contracting and political fundraising processes in such a manner that small business owners can respond without undue burden, then I feel this is a worthy proposal deserving of the support of Small Business.

The draft Executive Order would allow the public to see the flow of money that now is hidden through third-party groups, cutout funding mechanisms, and other political strategies that allow donors to hide their contributions. Rather than hurting small businesses by politicizing the process, it is very likely this much needed transparency will de-politicize the process, help to prevent "pay-to-play" schemes, and assure small businesses can compete fairly. Public scrutiny will help prevent contractors from using their tax payer funded deep pockets to secure an unwarranted advantage in the government procurement process.

I believe certain steps can be taken to improve the draft Executive Order including raising the discloser threshold and/or establishing a contract size threshold, and assuring that the rules and regulations developed to support the proposal provide clear, easy to follow guidelines for compliance.

In conclusion, as a small business owner, I caution that care be taken to assure the implementation of this policy does not create undue burdens and barriers to opportunities for small business contractors, but support the very necessary efforts of the President to assure transparency in our contracting and political systems so as to make certain our federal procurement process is based on fair competition and not unscrupulous, undisclosed "pay to play" campaign donations.

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Chairman ISSA. Ms. Blakey.

STATEMENT OF MARION BLAKEY

Ms. BLAKEY. Thank you, Chairman Issa, Congressman Cummings, Congresswoman Ellmers. I am delighted to be here testifying today. My name is Marion Blakey, and I am the president and CEO of the Aerospace Industries Association. I am here representing the 345 member companies of aerospace and defense industry and their 800,000 U.S. workers.

We want to express our grave concerns about the provisions contained in the draft Executive order regarding political contributions. Through our member companies, we represent thousands of small businesses across the Nation, and I am particularly offering their voice today.

As written, the draft EO would for the first time introduce political contributions into the government contracting process. It's unclear how that information will be used by a contracting officer in the source selection process. This creates the possibility that donations to a particular political party or candidate would be a consideration when evaluating contract proposals, whether specifically intended or not.

This also might have the unfortunate consequence of contributing to the belief among some that particular political contributions are a requirement for winning contracts. Political contributions should never be considered by any procurement officer when making a decision to either award or deny a contract to an entity.

In order to comply with this Executive order, any company bidding on the Federal contract would have to develop, implement and maintain a system to track and record all personal political contributions, to include retroactive contributions upon implementation. This will also result in an additional cost burden that in most cases will be reflected in higher contractor overhead rates. This is particularly challenging for small companies such as those in the extensive aerospace supplier base who don't have a large corporate infrastructure to meet the Federal mandates.

Furthermore, the certification requirement places an undue risk on small companies in the event that any of their directors, officers, affiliates, subsidiaries would perhaps provide inaccurate or even incomplete information. If the company submission for the contract contains a list of donors that's incomplete, even though the company tried to fully comply, they may find themselves in an expensive legal proceeding for a violation of both Title 18 and Title 31 of the U.S. Code for making false claims or statements. Smaller companies that can't afford to defend themselves in these situations may instead opt to avoid government contracting altogether.

The resulting impact is not necessarily restricted to small companies. The imposition of disclosure and certification requirements would also result in large and medium-sized commercial businesses opting out of selling to the Federal Government, potentially leaving the government without access to technologies and services necessary for its mission. This is a real liability in the aerospace and defense arena, where our defense and industrial base has shrunk, and there may be only one or two suppliers for a particular technology critical to protecting our fighting men and women.

Requirements already exist, as has been reported out, to ensure transparency of political contributions. Those requirements apply evenly across the board for all individuals and organizations that make political contributions.

AIA and its member companies support efforts to ensure there is greater transparency and accountability in the Federal contracting arena; however, we do not support actions which would introduce politics into that arena, increase the regulatory burden at risk for companies, or infringe upon the constitutional rights of a particular segment of corporate citizenry.

As I stated earlier, political contributions should never be considered by any procurement officer when making a decision to either award or deny a contract to any entity. Not levying this requirement on companies to report such contributions to the procurement officer is one important way to safeguard against the risk that any such consideration would ever be given.

Thank you very much.

Chairman ISSA. Thank you.

[The prepared statement of Ms. Blakey follows:]

Joint Hearing of the House Small Business and Oversight and Government Reform Committees

Impact of Political Donation Disclosures

Statement of Marion C. Blakey

President and CEO of Aerospace Industries Association

May 12, 2011

Chairman Graves, Chairman Issa, Congresswoman Velazquez, Congressman Cummings, members of the Small Business and Oversight and Government Reform Committees; my name is Marion Blakey and I am the President and CEO of the Aerospace Industries Association (AIA).

I am here today representing 393 member companies of the aerospace industry and their 800,000 U.S. workers to express our grave concerns about the provisions contained in the draft Executive Order (EO), "Disclosure of Political Spending by Government Contractors." The draft Executive Order (EO) would impose the requirement upon those bidding for government work that they disclose contributions and expenditures that they, their directors, officers, affiliates, subsidiaries—and presumably the directors and officers of those affiliates and subsidiaries--have made within the two years prior to submission of their offer to any federal candidate, party, or party committee and any third party entity that would use those contributions for communications during an election. The company representative submitting the proposed bid would be required to certify that the submission was accurate.

As written, the draft EO would for the first time introduce political contributions into the government contracting process. It is unclear how the information would be used by a contracting officer in the source selection process. This creates the possibility that donations to a particular party or candidate would be a consideration when evaluating contract proposals, whether specifically intended or not. This might also have the unfortunate consequence of contributing to the belief among some that particular political contributions are a requirement for winning contracts. **Political contributions should never be considered by any procurement officer when making a decision to either award or deny a contract to any entity.**

The draft EO appears to ignore current law barring government contractors from making "any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office" from corporate funds[1]. In fact, it goes

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[1] 2 U.S.C. 441c, "Contributions by government contractors"

well beyond established law, requiring companies to report political contributions their officers and directors have legally made with their own personal funds, thus infringing on contractor employees' First Amendment rights. As drafted, the EO would extend this intrusive reporting requirement to include any employee who has made a political contribution via his or her corporate Political Action Committee (PAC).

Furthermore, under current election law campaigns are required to collect and report data on their donors--including their donors' employers. Today, if you want to know what political contributions have been made by the employees of any federal contractor, you can access a public database and simply begin a search by the employer name and up come the results. **Does providing this information to a procurement official make them any better informed on the merits of a proposal, or simply make them better informed on who has made political contributions to the administration or any other federal candidate?**

In order to comply with this draft executive order, each federal contractor will have to develop, implement and maintain a system to track and record all personal political contributions, to include retroactive contributions upon implementation. This will result in an additional cost burden that will in most cases be reflected in a contractor's overhead rates. This is particularly challenging for small companies, such as those in the extensive aerospace supplier base, which do not have a large corporate infrastructure to meet this new federal mandate.

Furthermore, the certification requirement places an undue risk on small companies in the event that any of their directors, officers, affiliates, subsidiaries or the directors and officers of those affiliates and subsidiaries provide the prime contractor with inaccurate or incomplete information If the company submission for the contract contains a list of donors that is incomplete, even though the company tried to fully comply, they may find themselves in an expensive legal proceeding for violations of Title 18 and Title 31 of the U.S. Code for making false claims or statements. Smaller companies that cannot afford to defend themselves in these situations may instead opt to avoid government contracting altogether.

This resulting impact is not necessarily restricted to small companies. The imposition of a disclosure and certification requirement could also result in large- and medium-sized commercial businesses opting out of selling to the federal government, potentially leaving the government without access to technologies and services necessary for its mission. Businesses that primarily operate in the commercial marketplace may decide to avoid federal contracting not because of concerns about transparency of political contributions but because of concerns about the burden of complying with the disclosure and certification requirement, as well as the consequences of inadvertent errors in reporting.

Requiring disclosure of political contributions by officers, directors, and other employees of the business may also have a chilling effect on an individual's right to engage in political speech in the form of contributions. Current reporting requirements for political contributions do not require reporting of such contributions to your employer. The draft EO will require that officers and directors report political contributions to their employer as part of their obligation to comply with the disclosure and certification requirement. Individuals may feel uncomfortable making their political views known to their employer through reporting of political contributions, yet the draft EO would require such disclosure, thus connecting employment with political affiliation in a way that would not exist if the individual worked for a business that does not sell to the federal government.

Requirements already exist to ensure transparency of political contributions. Those requirements apply evenly across the board for all individuals and organizations which make political contributions. The EO would impose an undue, additional burden for duplicative reporting by federal contractors that would not apply to individuals and organizations whose conduct is also affected by the actions of the federal government, such as regulatory oversight, but who are not necessarily in the business of selling goods and services to the federal government.

AIA and its member companies support efforts to ensure that there is greater transparency and accountability in the federal contracting arena. However, we do not support actions which would introduce politics into that arena, increase the regulatory burden and risk for companies, or infringe upon the Constitutional rights of a particular segment of the corporate citizenry.

As I stated earlier, **political contributions should never be considered by any procurement officer when making a decision to either award or deny a contract to any entity.** Not levying the requirement on companies to report such contributions to the procurement officer is one important way to safeguard against the risk that any such consideration will be given.

Chairman ISSA. And now for the only person who has the expertise our previous panel did not show, Mr. Smith.

STATEMENT OF BRAD SMITH

Mr. SMITH. Thank you, Mr. Chairman.

First I will note that you—and thank the ranking member as well. I'm sorry. I want to note first that I know you took some flack for having an unbalanced panel. Fred Wertheimer, who has left and is undoubtedly out issuing a press release now, has said he's never seen such an unbalanced panel. And I just thought I'd mention that I have been on many of those in the last 4 years, usually as the minority witness. So in any case, I appreciate you having this hearing today.

Whenever we get to a regulation speech, we find we talk immediately about constitutional issues. And in interpreting the Constitution, the Supreme Court, it's very clear, has granted quite a bit of leeway to regulating disclosure laws relating to campaigns, has given the government quite a bit of leeway to regulate in the area of disclosure. However, as Mr. Gordon eventually conceded in the last panel, transparency is not an unequivocal good in all circumstances at all times. And, in fact, the Supreme Court has never blessed everything that's tabled as campaign finance disclosure, and the Supreme Court has never blessed this particular kind of disclosure that is proposed in this draft order.

Just to give a quick rundown, for example, in *Thomas* v. *Collins,* the Supreme Court held that labor organizers don't have to identify themselves; they can do that anonymously. In *Tally* v. *California,* the Supreme Court held that picketers and boycotters, such as people who might want to boycott the Koch brothers or Target, don't have to identify themselves; they can do that anonymously. In *Watchtower Bible and Tract Society* v. *Village of Stratton,* the Supreme Court said that people going door to door don't have to identify themselves, such as, for example, maybe people working for, what is it, Organizing for America; they could do that anonymously. In *McIntyre* v. *Ohio Elections Commission,* the Supreme Court held directly that individuals cannot be required to report small levels of political activity to the government, which is what this draft order would require to be done through an indirect process. And, of course, in *NAACP* v. *Alabama* and a series of other decisions, the Supreme Court held that membership organizations, at least those at a minimum that feared—had legitimate fears of harassment and retaliation, could not be required to disclose their members to the government.

So the government—or the Court has not as a constitutional matter generally approved all disclosure. When it has approved disclosure, it has done so for political committees or where there is no vagueness. That is, it has required a bright line test.

It goes without saying that we're not being mean with political committees here. So we're dealing with the question, is there a bright line? I don't think this meets this test as set forth in *Buckley* v. *Vallejo* and other cases. I won't go into the details other than to say that terms such as "intention" or reasonable expectation that funds you gave to somebody 2 years ago were going to be used for some type of political activity are, I think, very vague terms.

Other terms that could be vague, "officers," how far down does it go, subsidiaries that are under control of a company or other organizations under control of a company, and to even terms such as "independent expenditure" and "electioneer in communications" are malleable; that is, they have meanings for election law specialists, but it is not at all clear that they have meanings for Federal compliance officers. And I doubt that most officers working there would have expertise in that area or know the relevant judicial precedence.

Further, the government has to have a compelling government interest. What is that government interest here? We've heard repeatedly that A, this information won't actually be used by the government in contracting; B, there is no problem with contracting corruption, and if there were you should probably be issuing some subpoenas and having some investigations of the current process. We're told that it has been pointed out that most of these activities are already disclosed.

What's not disclosed are contributions by contractors that would go to a third party that might spend them for political activity, but they're not designated for political activity. We've never seen something like that required and approved by the Court before.

This is what we call at the Center for Competitive Politics—which, I should note, I also run—we call this "junk disclosure." It basically just duplicates. It requires extra forms, extra reporting. It may create different standards for different people. And indeed there is quite a bit of growing evidence that this does not increase public confidence in government. Studies by Nate Persily of Columbia, Kelly Lanny of the University of Pennsylvania, Jeffrey Milo of the University of Missouri, have shown that excessive disclosure often in fact decreases public confidence in government.

Here you would have the presumption out there that, Ah, here's disclosure and here is the contract and people are going to draw the connection; ah, you have to give to get the contract. What is a contractor going to think 6 years from now, someone who is not in business today and he sits down to bid on his first government contract and he sees who have you given your major political contributions to?

So I don't see this reducing or, I mean, increasing public confidence in government, and I think we should recognize that the possibilities for retaliation that made the Supreme Court hesitant are very real. We know the Nixon enemy list. We know the K Street Project. We know that during the Clinton administration there was concern that trips on—international business trips were being sold to donors, and the answer to that was not to require more disclosure, not to say tell us all this stuff; it was to say, you cannot consider that, you cannot put that in your application. And I think that's the way that this should be dealt with here.

Thank you.

Chairman ISSA. Thank you.

[The prepared statement of Mr. Smith follows:]

Testimony of Bradley A. Smith before the Committee on Oversight & Government Reform

Politicizing Procurement:

Will President Obama's Proposal

Curb Free Speech & Hurt Small Business?

Thursday, May 12, 2011

1:30 p.m.

Center for Competitive Politics

124 S. West St., Suite 201

Alexandria, VA 22314

http://www.campaignfreedom.org

Introduction

Mr. Chairman, Ranking Member, and members of the committee.

My name is Bradley Smith. I am the Josiah H. Blackmore II/Shirley M. Nault Professor of Law at Capital University in Columbus, Ohio, founder and Chairman of the Center for Competitive Politics, a non-profit education organization based in Alexandria, and a former Commissioner and Chairman at the Federal Election Commission.

Thank you for inviting me here today to address a proposed executive order requiring bidders on government contracts to disclose their political spending, and that of certain employees, to the government prior to bidding on contracts. Such an order is, in my mind, ill-advised and represents an attempted power grab by the Obama administration on campaign finance issues. In short, it has three major flaws:

- It imposes junk disclosure requirements that serve no good purpose
- It chills protected political activity
- It seems motivated by simple partisan politics

The main purpose of the order is to force disclosure of donations made to independent groups that engage in any electioneering communications—ads mentioning candidates that air near elections—or independent expenditures—ads advocating for the election or defeat of candidates but made independently of candidates. Historically, this information has not been subject to disclosure under federal campaign finance laws, and in the last congress an effort to require disclosure of this information was defeated. This proposed Executive Order will interject into the contracting process political information that is illegitimate to the award of government contracts. Today, we enjoy an acquisition system that is, with rare exception, free of political pressure. Should the draft Executive Order be implemented, those days will be gone. This type of disclosure will dramatically reduce the transaction costs for those few procurement officials who may find it attractive to engage in pay-to-play activity. The Order will create one-stop shopping for everything the rare dishonest federal acquisition official might want to know.

The draft order would also duplicate existing disclosure laws by requiring contractors to submit records of the political donations made by the company, top employees, subsidiaries and affiliates. Recall

that existing law already requires that all contributions to candidates, party committees and other political committees be reported. Once any donor contributes $200 to such an effort, that person's name, address, occupation and employer become part of the public record. The spending of all these entities is also itemized at the $200 level. Contributions to so-called "527" groups are disclosed in similar reports filed with the IRS. Moreover, direct contributions by federal contractors, both incorporated and unincorporated, are flatly prohibited. These contractors, like businesses generally, may establish political action committees, but all contributions and expenditures in excess of $200 by political action committees are publicly disclosed under the Federal Election Campaign Act. Similarly, all independent expenditures and electioneering communications, by any group, are already disclosed under the Federal Election Campaign Act and the Bipartisan Campaign Reform Act of 2002, as are all donations to any group that is specifically for the purpose of airing such ads. Thus, what we are talking about here, really, is requiring the disclosure of spending by individuals and businesses that goes to groups that then spend the money, often without the knowledge and almost always without the specific approval of the donors, to further their agenda.

Limits to Disclosure

We hear in some quarters that such disclosure requirements are benign. "It's just disclosure – what do you have to hide?" is a theme repeated when more intrusive disclosure requirements are being advocated. Make no mistake, there are limits to the government's power to mandate disclosure. The government cannot require individuals to divulge information without good reason. In the political law arena, disclosure requirements must be justified by some government interest in fighting corruption, and calibrated to reveal activity germane to that interest.

There is good reason for this. Over the years, the Supreme Court has struck down as unconstitutional laws requiring civil rights organizations to disclose their membership lists to the government; laws requiring socialist groups to disclose their donors, and laws requiring union organizers, organizers of boycotts and picketing, leafletters and pamphleteers, and citizens passing door to door, to disclose their identities where no anti-corruption or other compelling government interest was served. Moreover, the Supreme Court has required that even campaign finance disclosure requirements must not be vague, so that speakers may know what they may say without having the government infringe on their privacy.

What does the Executive Order require that has not already been covered by existing law? It take a bold step away from this vision of tailored and calibrated disclosure, by demanding disclosure of fees, contributions, donations or other transfers to independent non-profit entities that, among other activities, make electioneering communications or independent expenditures. It requires such information looking back two years before the entity submits a contracting offer.

Not to put too fine a point on it, but this is junk disclosure. It captures all payments, not just those ultimately used for political speech. No connection need be shown between the payment and the use of the funds. The two-year look back period will capture transactions that lack any connection to political activity, and are far removed from any subsequent use of the money. As a result, individuals and entities will be associated with issues and political speech they do not share. This will give the public (and contracting officials) inaccurate and confusing information. A rule ostensibly designed to inform will create disinformation. Only in an Orwellian vision of participatory democracy could this result be tolerated.

Vague Requirements Lead to Chilled Speech

The Executive Order furthermore imposes its dictates using vague and amorphous terms. It is not evident what donors might be included in the group of "affiliates or subsidiaries" whose activity is brought into this disclosure regime. What constitutes a "reasonable expectation" that money will be "used" for "independent expenditures or electioneering communications?" Vague requirement chill protected speech, by causing individuals and groups to steer wide of the mark so as not to trigger a violation. Vague rules also present a trap for the unwary, which in this case might not know they will be considered an "affiliate" or "subsidiary."

Another Example of "Reform's" Dark Side

Considering the timing of this executive order, as President Obama prepares for re-election, the motive seems to be about politics, rather than good government or rooting out corruption. White House-allied organizations that support the executive order openly admit that the intent of the order is to target business groups, singling out the U.S. Chamber of Commerce. As *The Hill* newspaper reported,

> Fred Wertheimer, president of Democracy 21, said that if the order had been in place during the last election, government contractors who contributed to the $33 million that the Chamber spent on

electioneering communications would have been disclosed. "That, in a nutshell, is the reason," Wertheimer said.[1]

There is no present justification for this Order. Since late 2007, companies have been able to spend money on electioneering communications. That year, the Supreme Court ruled in *Federal Election Commission v. Wisconsin Right to Life* that the government, via McCain-Feingold, could not prohibit a nonprofit group from airing an ad that happened to mention a candidate in a window before Election Day. *Citizens United v. FEC*, in early 2010, expanded on that decision and held that the government could not prohibit companies, unions and advocacy groups from airing independent expenditures.

Yet, the Obama administration waited until April 2011 to draft this executive order. If a grave problem of corruption within the federal contracting process and political donations exists, why hasn't President Obama addressed this problem since he took office? Indeed, this action comes only after the administration and its allies have failed in Congress and at the FEC, and now must try to impose this provision by fiat.

First, the Obama administration urged congressional action. Democrats proposed the DISCLOSE Act, which would have banned the political speech of many government contractors. The bill also contained myriad new disclosure and disclaimer regulations. It failed to pass Congress.

Next, the administration turned to the FEC. Rather than allowing the agency to simply remove the unconstitutional regulations invalidated by *Citizens United*, three commissioners allied with the president's party refused, insisting on including broad new disclosure regulations not authorized by Congress. That process has stalled as the otherthree commissioners objected.

In closing skepticism is called for when government begins to regulate political speech. This is because of how incumbent governments, politics, and the enforcement process work. The history of "reform" is in part a history of efforts to silence or cripple political opponents. This current initiative seems no different.

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[1] *The Hill*, "Watchdogs urge action on White House's contractor donation disclosure order," May 4, 2011 http://thehill.com/business-a-lobbying/159353-watchdogs-urge-action-on-donation-disclosure-order

Chairman ISSA. I'd recognize myself for 5 minutes.

Ms. Hollingsworth, are you concerned that the disclosure nowhere in the draft Executive order would cause the unions of companies who are contractors to be disclosed, meaning that—let's just assume for a moment that all contractors gave all of their money to Republicans and all unions gave all of their money to Democrats. Are you concerned you'd be seeing only half of the contributions?

Ms. HOLLINGSWORTH. Well, I just assume that's actually the case today.

Chairman ISSA. Of course, both sides have some crossover. But I said assume for a moment just because, obviously, the truth is there is a leaning, about 90 percent of union money goes to the President's party. But that's not disclosed. Does it concern you that 90/10 ratio historically would not be disclosed and, more importantly, a specific independent activity of millions of dollars of union money in some independent way would not be disclosed, even if it's to further the contract of one of your large competitors, Boeing or somebody of that sort? You know, because you talked about small business being impacted. Isn't small business disproportionately not union, large business comparatively highly union and wouldn't that nondisclosure be of concern to you?

Ms. HOLLINGSWORTH. Well, I think to answer the question somewhat similar to the gentleman before me, from the OMB.

Chairman ISSA. You mean evasively? Evasive? That's how the gentleman from OMB was. He could answer "yes" to the minority and he could answer "I am not qualified to answer" pretty consistently to the majority.

Are you going to be more specific? Do you believe there is a concern because the draft Executive order completely exempts unions using their collective dues, involuntarily collected, where that money goes? Do you have a concern, please? Yes or no?

Ms. HOLLINGSWORTH. That sounds like have I quit beating my dog, yes or no? But to answer that, the answer is no, I don't.

Chairman ISSA. OK. You're not concerned.

Mr. Smith, because you came out of, among other things, the time at the FEC, does the FEC operate, to the best of your knowledge, under any Executive orders?

Mr. SMITH. As an independent agency, generally the FEC is not bound by Executive orders——

Chairman ISSA. Right. So if I understand correctly, the Federal Elections Commission was created by Congress under a law; and, periodically, new laws have been passed that set guidance and then empower the Federal Election Commission to set rulemaking after those are passed, including even rules by the House and Senate that you then act on; isn't that true?

Mr. SMITH. Yes. And a crucial point of that is that the FEC has a bipartisan makeup; that is, no one party can control that rulemaking process, or the prosecution is under it and you always have to have——

Chairman ISSA. So wouldn't this Executive order essentially circumvent that and create a new entity that is not bipartisan, that in fact is inherently partisan? It goes to one party's control or another, depending on who wins the Presidential election?

Mr. SMITH. That could certainly be an appearance that many people would draw.

Chairman ISSA. I am not trying to be argumentative.

Mr. SMITH. That's a yes.

Chairman ISSA. Thank you.

Ms. Blakey, you heard my earlier question to Ms. Hollingsworth. Are you concerned that in fact there would be a disparity between union and non-union companies' ability to make undisclosed contributions because of their union activities that are not covered in this?

Ms. BLAKEY. I think our feeling is that you have to have real parity and real equity across all entities involved in the political process. Our big concern is there simply should be no link between the political contributions and the Federal contracting process. That's making a false link and it is something that really introduced politicization where it should never be.

Chairman ISSA. Ms. Mackey, you've been very courageous. You're the only person that our side could find.

Ms. MACKEY. Courageous or ignorant. I'm not sure which one it is.

Chairman ISSA. Well, we'll take courageous. Willing to come forward both on behalf of an association and in a personal capacity.

Do you feel—and this is a little bit of a stretch—that if something like this were going to be instituted, that it should be done by Congress, require full disclosure of all parties, and be handled by the Federal Election Commission? In other words, would you be more comfortable if this process was done in a way in which it was deliberative, it was done nonpartisan and, more importantly, you were not asked to ask your employees questions, but if there was a requirement to disclose, that requirement would be between the FEC and not your insisting on various people telling you and having a penalty if you're unable to get the facts right.

Ms. MACKEY. I don't think I have the civics expertise to know who should be making those calls. What I can tell you, it's very important that this discussion this private discussion gets taken out of two places for me: one, my business; and, two, my business development with the contracting officer. I am happy with transparency. I am happy with everyone knowing where people are contributing. I just don't want it brought into the private conversations in my company or the business development relationship with my contracting officer.

Chairman ISSA. I thank you. We may have a second round, but I recognize the gentleman from Maryland, Mr. Cummings.

Mr. CUMMINGS. I stand here and I listened to all of this. And one of the things that I say to my children is that I want to leave a better world than the one that I found. I want to leave a world with more opportunity. I want to leave a world where the rivers are not polluted. I want to leave a world that's safer and better.

And as I listened to all of this, there's another thing I want to leave. A stronger democracy. A stronger democracy. You know it's easy to—you know, the public is in a position now, the general public is saying they want more disclosure. They want to know what's going on. You know why? Because they don't feel like they got—they have a chance, period.

Ms. Hollingsworth, I heard what you said, and there are a lot of small business folks like you. Mr. Smith, you talked about Mr. Wertheimer. It would have been nice to have him here, I am sure you would agree with that. But his organization that stands up for all of those little people were shut out and unable to voice what they had to say in person.

And I think that if we're going to leave a better world, we've got to be very careful, because, I mean, I think about the elections and where we've got situations where you can drop millions of dollars in a congressional district, millions, and literally wipe out a Representative, period. Period. And you know, a lot of people will talk and say Well, the Supreme Court said in Citizens United we can do certain things.

I think we've got to guard this democracy that we've got, because I think that at the rate we're going, there will come a time when we won't even know it, you will have a district that's owned by this corporation or that. And it's interesting as I listen to all that has been said, on the one hand I hear business saying, "Trust us," which is great. But on the other hand they say, "We don't trust the President. We don't trust our elected officials."

You know, I think that when it comes to disclosure, if it were up to me, I'd want every single thing. Everything disclosed. Everything. Unions, everybody. Because I want the public, I want the public to know. I want them to have a clue of what's going on. And if they look at that information and they determine that, you know, that they believe that something is unfair, fine.

And I go back to what Mr. Gordon talked about. You know, there is a thing about trust that I think he makes a point, and people tried to make fun of him and ridicule him for saying it. But there is something called the speed of trust. Covey writes about it in his book, The Speed of Trust, one of the greatest books ever written.

What he says is, when you can establish the mechanisms for trust and if there is trust, that people are more likely—the relationships are better. And it does make sense that there would be more competition if people trust the process. If they feel like everything is stacked against them before they even get in the game, I mean that goes against everything. So why bother?

But the interesting thing is that, you know, we're talking about an Executive order, and I can understand the chairman's position. We're talking about a draft document and, you know, I think that some kind of way we've got to move more toward disclosure than moving away from it, because the playing field that we're playing on now is a playing field that says no—less and less disclosure. And I don't think that's what America is all about. I really don't. I don't think that our Founding Fathers would about that.

So with that, Mr. Chairman, my time is up. I yield back.

Chairman ISSA. Thank you. Mrs. Ellmers.

Mrs. ELLMERS. Thank you, Mr. Chairman. My first question is for Ms. Mackey.

Ms. Mackey, I understand that you are an SBIR success story. And SBIR is near and dear to my heart, and I have legislation pending right now for us to reenact it and get it in place for another 3 years. So I would just like you to elaborate on that, on that process. And then I know in your opening statement, you did speak

to the dangers that you feel exist with this draft EO. And I would just like for you to reiterate that as well.

Ms. MACKEY. So first I am very pleased to tell you we're a SBIR success story, on some level of effort. We started playing with the SBIR program and participating in 2002. It's taken us 9 years. I can tell you that the technology that we were delivering to the private sector was expanded on the innovation and is now rolling out to every ship in U.S. Fleet Forces Command. So every maintainer will look at our application to understand what they should be maintaining to keep our ships ready for mission readiness. So it is a very good thing. It's a very proud experience for me. It's a great thing for my company that's growing and expanding. It's a good thing for my company, the jobs in my company, and my employees.

And when I think about the risk that this kind of—that the approach taken by this Executive order could impact on stories like mine is that, as intimately aware with the SBIR program that you are, it takes some time—there are fits and starts when you are developing technologies and innovation, and it doesn't transition directly into a product. There are some places—and there are times that, maybe when we were little, is this going to happen, is this going to work; that if I had seen this kind of an onerous reporting and if I had seen myself exposed legally for the kind of HR challenges that I get by asking my employees—you should see the checklist I have when I recruit people of what I can ask, what I can't ask, and how I tell my employees to interview people.

I could also tell you that in the business community in general, but certainly for small businesses, it's more painful as we don't have a lot of corporate resources. When you have to let someone go for poor performance, no one wants to hear they're being let go for poor performance, and they often want to find another reason. And if they don't find another job, they often want to be punitive on who let them go. I really don't want to introduce politics into that equation.

So as far as your question about SBIR successes and will we as a country be getting back the investment in RDT&E that we need to go to our Federal Government, I think you run the risk of encouraging people to back away and step out because it's too much to overcome. I hope I answered your question.

Mrs. ELLMERS. Actually, you have. I appreciate that. My thought also is that would deter businesses from moving forward when we know that it is a lengthy process. You're going to have your ups and downs, and when faced with something like this, that would deter someone. And that is my feeling on it. Thank you very much.

Yes, please.

Ms. MACKEY. I don't know that it would deter people to participate, but in that place where you choose now the investment that's been made, do I want to further look to giving that to the Federal Government or should I step out to the private sector, and that's the junction that I don't want our tax dollars—I mean, I think it should go back to our warfighters, especially in the DSDF division. Thank you.

Mrs. ELLMERS. Thank you. Thank you.

Ms. Hollingsworth, I just wanted to clarify. My understanding from your opening statement is that you are in favor of this draft Executive order; is that correct?

Ms. HOLLINGSWORTH. That's correct, Congresswoman.

Mrs. ELLMERS. But you feel that small businesses should be exempt from it?

Ms. HOLLINGSWORTH. It seems to me this afternoon, I've heard small business being used as a sympathy card being played quite a bit. As a matter of fact, certain sized small businesses and the definition of small businesses is a very wide definition, depending on industry and so forth. I think a very straightforward remedy is to raise the threshold for contribution, whether it's 5,000 for a contribution or the size of contractors.

So there are many of the concerns that Ms. Mackey and other people are speaking here today that are simply answered by exempting small business up to a certain point from falling under this act.

Mrs. ELLMERS. So at what point would you consider a business that this should be adhered into? Where would you draw the line? I mean, so you obviously do not see this as a deterrent for government contracts or working with the Federal Government. You just feel that it may be a little more costly for a small business.

At what point would you consider a business, this Executive order would apply to them?

Ms. HOLLINGSWORTH. Well, to answer the first part of your question, Congresswoman, no. I mean, I do agree with this potential draft EO. And in terms of thresholds or at what point should it apply to a small business, I would defer that to wiser if not older heads than my own. Certainly people familiar with the government contract process know the size of businesses that might fall under certain categories.

So I don't have a concrete opinion for you, but I do believe that we can kind of take out the tiers aspect of this for small business by some simple thresholds similar to the thresholds that are in place for small business in other arenas.

Mrs. ELLMERS. OK. One last question on that. So along that line do you agree that there's already transparency, it's just an issue of when these things are divulged beforehand in the contract process rather than afterwards as a business reporting contribution, Federal contribution?

Ms. HOLLINGSWORTH. Well, again, I'm an engineer, not a constitutional lawyer, as we've heard the excuse many times today, so I can't pretend to be a complete expert about that. From what I understand so far is the disclosure and the transparency is incomplete and lacking. I don't feel it's complete yet, and I do feel the parameters that have been discussed in this draft EO would shed additional sunlight, and I do think that is needed.

Mrs. ELLMERS. Because it would be beforehand rather than after an award of a contract?

Ms. HOLLINGSWORTH. I think in general that the public could look at what influences are coming to bear, particularly on the single source contracting, which is something that has been jumped over constantly here today. That's contractors that receive—you know, they are a single source, there's no competition. And I think

the public and small business has a right to know just why these single source contracts are being let the way they are. And obviously current disclosure rules are not giving us enough sunshine on that.

Mrs. ELLMERS. Mr. Chairman, will you indulge me for just——

Chairman ISSA. One minute.

Mrs. ELLMERS. OK. Wonderful. Mr. Smith, I have a question for you. My understanding is that the order requires information to be retroactive for the past 2 years. Would you—could this be—I mean could this information not be used politically in a campaign? For instance, we have the 2012 election coming up. Could this information not be used against those running for office as to who is contributing to their campaigns and possible affiliations?

Mr. SMITH. I think of course it could. And to some extent that's what I meant when I said earlier that we call this junk disclosure. That is in some ways it's more misleading to the public than leading. They're going to say, you know, here's the contract, here's the donation, they're going to assume a connection there. And that leads us to what seems to be the purpose here. We can't have this discussion today without ignoring it.

I mean, the question has been answered already. Is this going to politicize the process, right? It already has politicized the process. I mean, look at this hearing, look at what's being said, look at what people are doing. And why would the American people think that the purpose of this is to maybe chill speech or to get people to give to the right side? They might think that, because rightly or wrongly, correctly or incorrectly, the President of the United States has been out repeatedly saying, we need to do something about all this secret hidden money that is going to come out after Citizens United. And he has specifically identified groups that he wants to silence; big oil, banks he calls them. We might think that because last Congress on a straight party line vote with two exceptions in this Chamber, this Chamber passed and the other Chamber did not pass the DISCLOSE bill. We might think that because then when the FEC attempted to issue new regulations complying with Citizens United the three Democratic commissioners insisted that the regulations go further and include the kind of disclosure that's being asked for here. People might think that because on a straight party line vote the SEC recently put new restrictions on reporting.

And so is it true or not? I won't try to answer that. I'll leave that for others to say whether this is politically motivated. But people certainly might think it's politically motivated, and I think there's a pretty good trail that might lead them to that conclusion.

Chairman ISSA. Ms. Velázquez.

Mr. VELÁZQUEZ. I'm sorry that I wasn't here for your testimony, but I was in a full committee markup on Financial Services and I had an amendment.

Mr. CUMMINGS. It was brilliant.

Mr. VELÁZQUEZ. Thank you. Yeah. I can imagine. But I would like to ask some questions if I may.

Ms. Hollingsworth, as a small business owner, do you have concerns that undisclosed political spending could disadvantage your firm in the contracting marketplace.

Ms. HOLLINGSWORTH. I am very concerned about that, Congresswoman.

Mr. VELÁZQUEZ. The Executive order will require your business to report the political spending of yourself as the owner and also that of your officers. Do you have any concerns that asking colleagues about their political spending could complicate your business relationships?

Ms. HOLLINGSWORTH. Congresswoman, I think one remedy to that would be to use either third-party or in the case of a very small business the bookkeeper-accountant who is already privy to such things as compensation, you know perhaps special medical issues, etc., insurance. I would designate a person with the competence to as a third-party or entity, if you will, to take that information and pass it along without it ever coming to my eyes. And I would think that small, even much larger, but still small business in mind, could easily implement something like that.

Mr. VELÁZQUEZ. Ms. Blakey, if a contractor spent millions of dollars to influence fair elections in a congressional district where it also conducts $1 billion defense contract with taxpayer funds, doesn't the public have a right to know?

Ms. BLAKEY. The contractor of course does disclose all contributions, so that information is out there in front of the public. At any point people can access it. Our concern is we are making a link between the procurement process and political contributions. There is an inference there that really we believe is fundamentally wrong. And we also look at the fact that we're very supportive of the administration in terms of strengthening the acquisition work force, trying to improve the acquisition process. But at the same time you put this information in front of contracting officers over and over and over again in the procurement process, and it's looking to make a connection that should never be there.

Mr. VELÁZQUEZ. But my question is, taxpayers, do they have a right to know since it's taxpayers' money that is given, is awarded through Federal contracting?

Ms. BLAKEY. Taxpayers can go any time they choose to and go to the information that is publicly available, and they can choose to look up anything they want.

Mr. VELÁZQUEZ. Is that a yes or no answer?

Ms. BLAKEY. The information is there.

Mr. VELÁZQUEZ. That the public should know.

Ms. BLAKEY. Yes, the public can no and should know.

Mr. VELÁZQUEZ. Thank you.

Mr. Smith, you have noted that this Executive order will chill free speech. Could you explain how this order will legally limit the amount of contributions that Federal contractors could give to any political campaign or organization at any time.

Mr. SMITH. Sure. This illustrates one of the problems here and one of the issues of vagueness and chilling. For example, right now Federal contractors do not make any contributions to political campaigns. It is illegal for them to do that. If they're doing that, they're violating the law and they can be prosecuted. What we're talking about here is Federal contractors who might give money to a trade association which then might spend money on independent expenditures down the road. And we're going to say that should be held

responsible and the company has to report that kind of information. Now, how would that chill companies?

Mr. VELÁZQUEZ. But there is nothing that legally will prohibit them from writing contributions to——

Mr. SMITH. That's right. But the question you asked then was how it would chill them from doing that. And it will chill them because if people feel they are likely to be retaliated against, that is government has tremendous power, somebody who is bidding on contracts——

Mr. VELÁZQUEZ. Mr. Smith, you're changing my question. My question is, if legally they cannot.

Mr. SMITH. My answer is legally they already cannot make contributions, which was your question. And legally they will still be able to do independent spending through others. But your question was how will it chill them, which is different from what they can legally do.

Mr. VELÁZQUEZ. Mr. Smith, I don't think you understand my question. How would it limit the freedom of an organization to give how much it wants, to whom it wants, when it wants. It wouldn't, would it, legally?

Mr. SMITH. Legally the answer is no.

Chairman ISSA. I thank the gentleman, thank the gentlelady. You've all been very generous with your time. I realize the hour is late. What I would ask, since we had so many members who had questions and had other obligations, would each of you be willing to answer additional questions put by both sides? OK. We're going to leave——

Mr. SMITH. Mr. Chairman, if I may say so, I will be leaving the country in 2 days for a month. I would be delighted to answer questions if I could have——

Chairman ISSA. Are you fleeing the country to get away from our questions?

Mr. SMITH. I would be delighted to answer questions if I could have an extension.

Chairman ISSA. This committee has a long history working on people fleeing the country not to answer our questions. But we will try to get the questions to you immediately. But I appreciate that. We're going to leave the record open for 7 days. If we see a need for an extension, the ranking member and I can extend. But I think it's important. Your testimony was very good and the questions were good, but I don't think we got enough of them. So with your indulgence we'll do that.

And with that, we stand adjourned.

[Whereupon, at 5:53 p.m., the committees were adjourned.]

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