LANDLORD AND TENANT: THE TRUMP ADMINISTRATION'S OVERSIGHT OF THE TRUMP INTERNATIONAL HOTEL LEASE

(116–33)

HEARING

BEFORE THE

SUBCOMMITTEE ON
ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS, AND
EMERGENCY MANAGEMENT

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

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Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

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SEPTEMBER 20, 2019

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Economic Development, Public Buildings, and Emergency Management
FROM: Staff, Subcommittee on Economic Development, Public Buildings, and Emergency Management
RE: Subcommittee Hearing Title: "Landlord and Tenant: The Trump Administration's Oversight of the Trump International Hotel Lease"

PURPOSE

The Subcommittee on Economic Development, Public Buildings, and Emergency Management will meet on Wednesday, September 25, 2019, at 10:00 a.m. in 2167 Rayburn House Office Building, for a hearing titled "Landlord and Tenant: The Trump Administration's Oversight of the Trump International Hotel Lease." The purpose of the hearing is to examine the Old Post Office Building lease. Witnesses include representatives from the U.S. General Services Administration, the U.S. General Services Administration Office of the Inspector General, the Congressional Research Service, the Project on Government Oversight, Citizens for Ethics and Responsibility in Washington, and the Heritage Foundation.

BACKGROUND

FEDERAL OUTLEASING

The U.S. General Services Administration (GSA) is authorized to lease vacant or underutilized federally-owned space to private and non-federal entities.[1] GSA can also use its leasing authority to allow for retail or limited-scope use.[2] Depending on the facts and circumstances of the lease, GSA can use the following authorities for this "outleasing:" the National Historic Preservation Act (NHPA),[3] the Federal Property and Administrative Services Act,[4] the Cooperative Use Act,[5] and the Consolidated Appropriations Act, 2005.[6] The National Historic Preservation Act (NHPA) authorizes GSA to lease or exchange historic property provided that GSA can ensure its preservation.[7] GSA has used its authority under the NHPA to outlease two un-

[1] 40 U.S.C. § 581(d) (2017).
[2] 40 USC 581(h) (2017).
[3] 54 U.S.C. §§ 306121, 306122 (2017).
[4] 40 U.S.C. §§ 543, 581(d) (2017).
[5] 40 U.S.C. § 581(h) (2017).
[6] Pub. L. No. 108–447, Div. H, Title IV, § 412 (2005).
[7] 54 U.S.C. §§ 306121, 306122 (2017).

derutilized federal buildings for use as hotels—the Tariff Building and the Old Post Office Building, both of which are located in downtown Washington, D.C.[8]

OLD POST OFFICE BUILDING HISTORY

The Old Post Office Building is a unique, historic building located at 1100 Pennsylvania Avenue N.W., and owned by the GSA. The building was completed in 1899 and served as the main post office for the Nation's capital. It was placed on the Historic Register in 1973. After the main post office closed, the Old Post Office Building was used to house federal agency offices and limited retail space. The building was underutilized for decades. Attempts by GSA to introduce amenities failed and the federal government lost money year after year. For example, in 2007, the building's rental receipts of $5.4 million were far lower than the total expenses of the property of $11.9 million, resulting in a loss of $6.1 million to the federal government. The House Transportation and Infrastructure Committee held multiple hearings related to the Old Post Office Building and passed legislation to require GSA to find a private partner to redevelop the site.[9] Until 2016, the Old Post Office Building was one of the oldest buildings in Washington, D.C. that had yet to be rehabilitated and preserved.

OLD POST OFFICE BUILDING REDEVELOPMENT

In 2008, Congress enacted H.R. 5001, the "Old Post Office Redevelopment Act of 2008," sponsored by Congresswoman Eleanor Holmes Norton, which became P.L. 110–359 when signed into law.[10] The Act had bipartisan support and directed GSA to move forward with the redevelopment of the Old Post Office Building. In March 2011, GSA issued a Request for Proposals (RFP) for the redevelopment of the Old Post Office using authority under Section 111 of the NHPA. On February 7, 2012, GSA announced the selection of the Trump Organization as the preferred developer for the Old Post Office.[11] The Trump Organization's proposal called for redeveloping the Old Post Office building into a luxury hotel.[12]

OLD POST OFFICE LEASE AGREEMENT

Pursuant to the Old Post Office Redevelopment Act of 2008, GSA reported to the Committee on the proposed redevelopment for a 30-day congressional review period. The August 5, 2013, lease agreement was signed by Donald J. Trump, for Trump Old Post Office LLC (as tenant) with GSA (as landlord) for control over and the redevelopment of the Old Post Office Building.[13] Trump Old Post Office LLC is a subsidiary of the Trump Organization.[14] The Trump Organization invested $200 million to redevelop the Old Post Office Building into the 271-room Trump International Hotel.[15] The lease agreement extends for 60 years to the year 2076 from the date of the hotel's grand opening on October 26, 2016.[16] The federal government is entitled to a monthly rental payment as well as a percentage of profits each year if annual profits exceed the cost of the annual rental payments.[17]

The lease agreement contains section 37.19 which states:

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[8] "Federal Real Property: GSA Outleasing and Restrictions on Participation of Elected Officials," U.S. Government Accountability Office (GAO), GAO–18–603R, July 25, 2018, accessed here: https://www.gao.gov/assets/700/693396.pdfhttps://www.gao.gov/assets/700/693396.pdf.

[9] Old Post Office Redevelopment Act of 2008, P.L. 110–359 (2008).

[10] P.L. 110–359 (2008).

[11] Press Release, "GSA Selects the Trump Organization as Preferred Developer for DC's Old Post Office," General Services Administration, Feb. 7, 2012, accessed here: https://www.gsa.gov/about-us/newsroom/news-releases/gsa-selects-the-trump-organization-as-preferred-developer-for-dcs-old-post-office.

[12] The Trump Organization won the competition and submitted the original proposal. Trump Old Post Office LLC is the party to the lease and was created after the Trump Organization won the competition.

[13] Ground Leaser by & between the U.S. (as "Landlord") & Trump Old Post Office LLC (as "Tenant"), Lease No.: GS–LS–11–1307 (Aug. 5, 2013).

[14] Trump Old Post Office LLC is a Delaware-based corporation at the time of lease signing owned by Mr. Trump and his three adult children Ivanka Trump, Donald J. Trump, Jr., and Eric Trump.

[15] Press Release, "GSA and Trump Organization Reach Deal on Old Post Office Lease," General Services Administration, June 5, 2013, accessed here: https://www.gsa.gov/about-us/newsroom/news-releases/gsa-and-trump-organization-reach-deal-on-old-post-office-lease.

[16] *See* "Old Post Office Building," General Services Administration, accessed here: https://www.gsa.gov/real-estate/gsa-properties/visiting-public-buildings/old-post-office-building (last reviewed Sept. 20, 2019).

[17] Ground Leaser by & between the U.S. (as "Landlord") & Trump Old Post Office LLC (as "Tenant"), Lease No.: GS–LS–11–1307 (Aug. 5, 2013).

> No member or delegate to Congress, or elected official of the Government of the United States or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom, provided, however, that this provision shall not be construed as extended to any Person who may be a shareholder or other beneficial owner of any publicly held corporation or other entity, if this Lease is for the general benefit of such corporation or other entity.[18]

The federal government's outlease of the Tariff Building in Washington, D.C., now the Hotel Monaco, includes an identical provision.[19]

TRUMP INTERNATIONAL HOTEL CONSTRUCTION

Under the lease agreement, the Trump Old Post Office LLC gained access to the Old Post Office Building in May 2014 for construction activities. The ceremonial groundbreaking for the project took place on July 23, 2014.[20] GSA performed oversight of compliance with the lease and of construction activities. The Trump International Hotel partially opened on September 12, 2016,[21] and officially opened on October 26, 2016.[22]

ISSUES

TRUMP OLD POST OFFICE LLC BUSINESS STRUCTURE CHANGES

After President Donald J. Trump's presidential inauguration, Trump Old Post Office LLC sent a letter to GSA stating that President Trump transferred his interests in Trump Old Post Office LLC to DJT Holdings Managing Member LLC, a revocable trust.[23] On March 20, 2017, Trump Old Post Office LLC requested a certificate stating that Trump Old Post Office LLC was in full compliance with Section 37.19 of the lease and that the lease was valid.[24] On March 23, 2017, GSA's contracting officer for the lease issued an Estoppel Certificate and accompanying letter stating that Trump Old Post Office LLC was "in full compliance with Section 37.19 and, accordingly, the Lease is valid and in full force and effect."[25]

GSA OIG JANUARY 2019 REPORT

In January 2019, the GSA OIG issued a report titled: "Evaluation of GSA's Management and Administration of the Old Post Office Building Lease."[26] The OIG investigation focused on GSA's decision-making process in determining whether a breach of lease existed as a result of the election and inauguration of President Trump. The OIG interviewed over two dozen GSA personnel and reviewed GSA documents and emails related to the lease.[27]

The OIG report made three findings:

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[18] Ground Leaser by & between the U.S. (as "Landlord") & Trump Old Post Office LLC (as "Tenant"), Lease No.: GS–LS–11–1307 (Aug. 5, 2013).

[19] "Federal Real Property: GSA Outleasing and Restrictions on Participation of Elected Officials," U.S. Government Accountability Office (GAO), GAO–18–603R, July 25, 2018, accessed here: https://www.gao.gov/assets/700/693396.pdf.

[20] "Transformation of Washington's Old Post Office Underway," General Services Administration, July 23, 2014, accessed here: https://www.gsa.gov/blog/2014/07/23/transformation-of-washingtons-old-post-office-underway.

[21] Ian Simpson, "Trump luxury hotel opens just blocks from the White House," Reuters, Sept. 12, 2016, accessed here: https://www.reuters.com/article/us-usa-trump-hotel/trump-luxury-hotel-opens-just-blocks-from-the-white-house-idUSKCN11I25L.

[22] *See* Trump International Hotel Certificate of Occupancy [on file with Subcommittee].

[23] "Evaluation of GSA's Management and Administration of the Old Post Office Building Lease," Office of Inspector General (OIG), General Services Administration (GSA), JE19–002, January 16, 2019, accessed here: https://www.gsaig.gov/content/evaluation-gsas-management-and-administration-old-post-office-building-lease.

[24] Ibid.; *see* Letter from Kevin Terry to Trump Old Post Office LLC (Mar. 23, 2017), accessed here: https://www.gsa.gov/cdnstatic/Contracting__Officer__Letter__March__23__2017__Redacted__Version.pdf.

[25] Letter from Kevin Terry to Trump Old Post Office LLC (Mar. 23, 2017), at 1, accessed here: https://www.gsa.gov/cdnstatic/Contracting__Officer__Letter__March__23__2017__Redacted__Version.pdf.

[26] "Evaluation of GSA's Management and Administration of the Old Post Office Building Lease," Office of Inspector General (OIG), General Services Administration (GSA), JE19–002, January 16, 2019, accessed here: https://www.gsaig.gov/content/evaluation-gsas-management-and-administration-old-post-office-building-lease.

[27] Id. at 4.

- GSA did not address issues related to the Constitution's Emoluments[28] clauses "in connection with management of the lease;"[29]
- "the decision to exclude the emoluments decisions from GSA's consideration of the lease was improper because GSA, like all government agencies, has an obligation to uphold and enforce the Constitution; and because the lease, itself, requires that consideration;"[30] and
- "GSA's unwillingness to address the constitutional issues affected its analysis of Section 37.19 of the lease that led to GSA's conclusion that Tenant's business structure satisfied the terms and conditions of the lease. As a result, GSA foreclosed an early resolution of these issues, including a possible solution satisfactory to all parties, and the uncertainty over the lease remains unresolved."[31]

The OIG report made one recommendation to GSA: "before continuing to use the [Section 37.19] language, GSA determine the purpose of the Interested Parties provision, conduct a formal legal review by [GSA Office of General Counsel] OGC that includes consideration of the Foreign and Presidential Emoluments Clauses, and revise the language to avoid ambiguity."[32] The GSA in its formal response to the OIG concurred with the recommendation.[33] The IG's office has not yet closed out this recommendation.

WITNESS LIST

PANEL I:

- Mr. Daniel Mathews, Public Buildings Commissioner, U.S. General Services Administration
- The Honorable Carol F. Ochoa, Inspector General, U.S. General Services Administration

PANEL II:

- Mr. Michael A. Foster, Legislative Attorney, American Law Division, Congressional Research Service
- Mr. Hans A. von Spakovsky, Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies, The Heritage Foundation
- Ms. Liz Hempowicz, Director of Public Policy, Project on Government Oversight (POGO)
- Mr. Walter Shaub, Senior Advisor, Citizens for Responsibility and Ethics in Washington (CREW), and Former Director, U.S. Office of Government Ethics (OGE)

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[28] See Appendix A for a Congressional Research Service (CRS) report on the Constitutional Emoluments clauses.

[29] "Evaluation of GSA's Management and Administration of the Old Post Office Building Lease," Office of Inspector General (OIG), General Services Administration (GSA), JE19–002, January 16, 2019, at 1, accessed here: https://www.gsaig.gov/content/evaluation-gsas-management-and-administration-old-post-office-building-lease.

[30] Ibid.

[31] Ibid.

[32] Id. at 24.

[33] Id. at Appendix B.

APPENDIX A

IN FOCUS

UPDATED AUGUST 23, 2019.

The Emoluments Clauses of the U.S. Constitution

Recent litigation involving President Trump has raised a number of legal issues concerning formerly obscure constitutional provisions that prohibit the acceptance or receipt of "emoluments" in certain circumstances. This In Focus provides an overview of these constitutional provisions, highlighting several unsettled legal areas concerning their meaning and scope, and reviewing the status of ongoing litigation against President Trump based on alleged violations of the Emoluments Clauses.

THE CONSTITUTIONAL PROVISIONS

The Constitution mentions emoluments in three provisions, each sometimes referred to as the "Emoluments Clause":

- The Foreign Emoluments Clause (art. I, § 9, cl. 8): "[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."
- The Domestic Emoluments Clause (a.k.a. the Presidential Emoluments Clause) (art. II, § 1, cl. 7): "The President shall, at stated Times, receive for his Services, a Compensation which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them."
- The Ineligibility Clause (art. I, § 6, cl. 2): "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

PURPOSES OF THE EMOLUMENTS CLAUSES

Each of the Emoluments Clauses has a distinct, but related, purpose. The purpose of the Foreign Emoluments Clause is to prevent corruption and limit foreign influence on federal officers. The Clause grew out of the Framers' experience with the European custom of gift-giving to foreign diplomats, which the Articles of Confederation prohibited. Following that precedent, the Foreign Emoluments Clause prohibits federal officers from accepting foreign emoluments without congressional consent.

The purpose of the Domestic Emoluments Clause is to preserve the President's independence. Under the Clause, Congress may neither increase nor decrease the President's compensation during his term, preventing the legislature from using its control over the President's salary to exert influence over him. To further preserve presidential independence, the Clause prohibits a sitting President from receiving emoluments from federal or state governments, except for his fixed salary.

The purpose of the Ineligibility Clause is to preserve the separation of powers and prevent executive influence on the legislature (and vice versa). To that end, the Clause prohibits federal officers from simultaneously serving as Members of Congress. Moreover, a Member of Congress may not hold an office if it was established during his tenure or if the emoluments of that office were increased during his tenure.

OFFICERS SUBJECT TO THE EMOLUMENTS CLAUSES

In terms of the persons to whom they apply, the scope of the Domestic Emoluments Clause and the Ineligibility Clause is clear from the text of the Constitution: The Domestic Emoluments Clause applies to the President, and the Ineligibility Clause applies to Members of Congress.

The scope of the Foreign Emoluments Clause is less clear. By its terms, the Clause applies to any person holding an "Office of Profit or Trust under" the United

States. The prevailing view of the Clause is that this language reaches only federal, and not state, officeholders. According to the Department of Justice's Office of Legal Counsel (OLC), which has a developed body of opinions on the Foreign Emoluments Clause, offices "of profit" include those that receive a salary, while offices "of trust" are those that require discretion, experience, and skill.

There is disagreement, however, over whether elected federal officers, such as the President, are subject to the Foreign Emoluments Clause. Some legal scholars have argued that, as a matter of original public meaning, the Foreign Emoluments Clause reaches only appointed officers (and not elected officials). While there is some historical evidence in support of this view, other evidence may point in the opposite direction. Moreover, the OLC has generally presumed that the Foreign Emoluments Clause applies to the President, and a recent district court opinion came to the same conclusion.

THE MEANING OF THE TERM "EMOLUMENT"

Black's Law Dictionary defines an "emolument" as an "advantage, profit, or gain received as a result of one's employment or one's holding of office." There is significant debate as to precisely what constitutes an emolument within the meaning of the Foreign and Domestic Emoluments Clauses, particularly as to whether it includes private, arm's-length market transactions. The only two courts to decide this issue adopted a broad definition of "Emolument" as reaching any benefit, gain, or advantage, including profits from private market transactions not arising from an office or employ.

STANDING TO ENFORCE AN ALLEGED VIOLATION OF THE EMOLUMENTS CLAUSES

Whether the Emoluments Clauses may be enforced through civil litigation is an open question. The doctrine of standing presents a significant limitation on the ability of public officials or private parties to seek judicial enforcement of the Emoluments Clauses. Standing is a threshold constitutional and prudential issue that concerns whether the person bringing suit has a legal right to a judicial ruling on the issues he has raised. Standing is grounded in Article III of the U.S. Constitution, which limits the exercise of federal judicial power to "cases" and "controversies."

To establish the standing requirements of Article III, a plaintiff must identify a personal injury (referred to as an "injury-in-fact") that is actual or imminent, concrete, and particularized. The injury must additionally be "fairly traceable" to allegedly unlawful conduct of the defendant and "likely to be redressed by the requested relief."

Beyond these constitutional standing requirements, courts have at times recognized a set of prudential principles that are relevant to the standing inquiry. Because such limits are not constitutionally mandated, Congress may modify them if it does so expressly. In general, prudential principles require that (1) a plaintiff assert her own legal rights and interests (as opposed to those of a third party); (2) the plaintiff's complaint fall within the "zone of interests" covered by the legal provision at issue; and (3) the plaintiff may not assert what amounts to a "generalized grievance[]" that is more appropriately addressed by the representative branches of government.

Different plaintiffs in ongoing Emoluments Clause cases have relied on various theories to support standing, with mixed results. Private parties, including business competitors and government ethics watchdog groups, have asserted injuries in the form of increased competition in their industries and diversion of resources to combat the alleged constitutional violations. States have alleged injury to proprietary interests connected to ownership of competing businesses and harm to their "quasi-sovereign" interests in the federal system, among other things. Some Members of Congress have relied on the alleged deprivation of their opportunity to vote on the acceptance of emoluments under the Foreign Emoluments Clause.

SIGNIFICANT LITIGATION INVOLVING THE EMOLUMENTS CLAUSES

Until recently, there had been no substantial litigation concerning the Emoluments Clauses. However, since 2016, a number of private parties, state attorneys general, and Members of Congress have filed lawsuits against President Trump alleging that his retention of certain business and financial interests during his presidency—and his failure to seek congressional approval of interests relating to foreign governments—violate the Foreign and Domestic Emoluments Clauses. Three major federal lawsuits concerning the Emoluments Clauses have been filed.

In *Citizens for Responsibility and Ethics in Washington (CREW) v. Trump*, No. 17–CV–458 (S.D.N.Y.), a nonprofit government ethics watchdog, along with various organizations and individuals associated with the food services or hospitality industries in New York and Washington, DC, alleges violations of the Domestic and For-

eign Emoluments Clauses through President Trump's receipt of payments from the federal government and various foreign government officials at different Trump Organization properties. For example, plaintiffs allege that the Trump International Hotel's continuing lease with the General Services Administration violates the Domestic Emoluments Clause, and that payments for services made to the Trump International Hotel by agents of foreign governments violate the Foreign Emoluments Clause. President Trump moved to dismiss the suit, asserting that the plaintiffs lack standing and that the term "emoluments" does not extend to arm's-length commercial transactions. The district court dismissed the case for lack of standing on December 21, 2017. The plaintiffs' appeal on the standing issues is currently pending before the Second Circuit.

In *District of Columbia v. Trump*, No. 17–1596 (D. Md.), the District of Columbia and the State of Maryland sued President Trump, alleging violations of the Foreign and Domestic Emoluments Clauses similar to those in the *CREW* lawsuit. President Trump moved to dismiss based on standing and a failure to state a claim. On March 28, 2018, the district court ruled that the plaintiffs had standing, limited to injuries in the District of Columbia, based on alleged injuries related to the Trump International Hotel. On July 25, 2018, the court denied President Trump's motion to dismiss, holding that plaintiffs had stated a claim because the President was subject to the Foreign Emoluments Clause and the term "emolument" reached any "profit, gain, or advantage, of more than *de minimis* value, received by [the President], directly or indirectly, from foreign, the federal, or domestic governments." These rulings were appealed to the Fourth Circuit, which issued a decision on July 10, 2019, reversing the district court on the standing issue. The Fourth Circuit panel concluded that the plaintiffs lacked standing to pursue their claims and remanded the case with instructions to dismiss. However, the plaintiffs may still petition for rehearing by the full Fourth Circuit or seek review from the Supreme Court.

Finally, in *Blumenthal, et al. v. Trump*, No. 17–1154 (D.D.C.), 201 Members of Congress have alleged violations of the Foreign Emoluments Clause through the President's receipt of foreign-government payments at Trump properties, foreign licensing fees, and regulatory benefits, among other things. President Trump moved to dismiss on the grounds that the plaintiffs lack standing and that he has not received any prohibited "emoluments." On September 28, 2018, the district court ruled that the plaintiffs have standing, reasoning that these Members of Congress suffered an injury-in-fact through the deprivation of a voting opportunity under the Foreign Emoluments Clause. On April 30, 2019, the district court held that the plaintiffs had stated a claim against the President, adopting a broad definition of the term "Emolument" as reaching any gain, profit, or advantage. After the district court denied the President's request for an immediate appeal, the President petitioned the D.C. Circuit, requesting that it stay the district court's proceedings and review its rulings. On July 19, 2019, the D.C. Circuit denied the petition but suggested that the district court had abused its discretion by not permitting an immediate appeal. On August 21, 2019, the district court certified an immediate appeal and stayed the case pending appeal to the D.C. Circuit.

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Michael A. Foster, mfoster@crs.loc.gov, 7–7202

LANDLORD AND TENANT: THE TRUMP ADMINISTRATION'S OVERSIGHT OF THE TRUMP INTERNATIONAL HOTEL LEASE

WEDNESDAY, SEPTEMBER 25, 2019

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS, AND EMERGENCY MANAGEMENT,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:04 a.m., in room 2167, Rayburn House Office Building, Hon. Dina Titus (Chairwoman of the subcommittee) presiding.

Ms. TITUS. The subcommittee will come to order.

I ask unanimous consent that the chair be authorized to declare a recess at any point.

I also ask unanimous consent that members of the full committee be permitted to sit in the subcommittee.

Without objection, so ordered.

We will now proceed with opening statements.

I wish you all a good morning, and welcome to the fourth hearing of the Economic Development, Public Buildings, and Emergency Management Subcommittee.

One of the purposes of this committee is to protect taxpayer dollars by ensuring that they are spent effectively, efficiently, and with transparency. That brings us to today's hearing, which is entitled, "Landlord and Tenant: The Trump Administration's Oversight of the Trump International Hotel Lease."

You can tell from the title that today we are going to be investigating a fairly unprecedented situation. The Federal Government owns the building that houses President Trump's DC hotel. Since President Trump has declined to divest from his businesses, he is essentially acting as both the landlord and the tenant.

Before I was elected to Congress, I spent over three decades teaching college students about American Government and politics. In those classrooms, we had serious discussions about the role of the legislature holding the executive branch accountable to the highest legal and ethical standards, and that is exactly what we hope to do today.

So, first, let's start with some facts.

One, all Federal workers and federally elected officials take an oath to uphold the U.S. Constitution. And, of course, that includes the President, all members of the administration, and all of us in Congress.

Second, the Constitution contains two clauses that are pertinent to our topic today. One prevents an elected official from receiving, and I quote, "any present or emolument from any king, prince, or foreign state without the consent of Congress." To date, Congress has given this President no such consent.

A second and related clause prevents the President from accepting any Federal or State taxpayer dollars or emoluments beyond his Presidential salary. Now, a lot of people may not be familiar with the term "emolument," but the Founding Fathers thought of it broadly as any payment or benefit. They included it in the Constitution to prevent U.S. Government officials from accepting bribes from foreign governments or from parts of our own Government that might be trying to curry favor. I hope we can all at least agree that that is a practice that the public and the Members of this Congress don't abide.

Third, the Government lease for Trump's DC hotel explicitly states that the tenant may not use the premises to violate Federal law, quoting again, "for any purpose or in any way." And that, of course, includes the Constitution.

Moreover, section 37.19 of the lease states that no elected official of the Government of the United States shall be admitted to any share or part of this lease or to any benefit that may arise therefrom. Yet the President continues to have a personal stake in the hotel. When people stay at Trump's DC hotel, he directly benefits.

Yet, despite all the legal and ethical issues that arise from this unprecedented situation, the agency that oversees the lease, the General Services Administration, has not done a thing about it. In fact, the agency's independent inspector general, who is here with us today, conducted an exhaustive report that found that the GSA recognized that the President's business interest in the Old Post Office lease raised issues under the Constitution's Emoluments Clause that might cause a breach of lease.

Despite this observation, the inspector general found that the GSA decided not to address those obvious issues. The inspector general called that "improper." Well, I think that is kind of the least of it.

When you take an oath to uphold a Constitution, you are bound by that oath, yet GSA officials have turned a blind eye to these legal and ethical issues. When called on it, the GSA failed to implement basic recommendations made by the inspector general.

GSA was instructed to conduct a formal legal review that includes consideration of the Constitution's Emoluments Clauses and the terms of the lease. As far as I know, GSA hasn't even pretended to conduct that review.

GSA was also instructed to revise the language of their leases to make it even clearer that the Constitution is relevant. They haven't done so in any way that satisfies the inspector general, and they have haven't done so in any way that satisfies this committee.

Finally, in addition to the legal issues, GSA has refused to turn over documents to this subcommittee, which has the jurisdiction over GSA and that we have a legitimate purpose to examine. In 2008, Congress directed GSA to lease out the Old Post Office Building in order to make a profit, yet GSA, relying on the opinion not of their attorneys but of Trump's business lawyers, refused to turn

over any basic financial documents that could help us determine if they are upholding the terms of the lease.

How can we know that taxpayers' investments are being protected if we can't examine the financial records of the hotel? And how can we assure that national policy is not being swayed by those spending money at the hotel that benefits people at the highest levels of our Government?

GSA is also preventing us from looking at legal memos that were drafted when Government officials who were supposed to enforce the terms of this lease decided to look the other way. It is shameful, and yet it is what we have come to expect from an executive branch that continues to stonewall Congress and rejects transparency at every turn.

Few could have ever imagined the situation like we are in today, but the Founding Fathers were wise enough to put the Emoluments Clause right in the Constitution, and we should be wise enough to enforce it.

In our first panel today, we will hear from the agency that oversees the DC Trump International Hotel lease and from the inspector general, who found that the GSA did not fulfill its obligations under the Constitution. In the second panel, we will hear from legal scholars who can shed more light on some of these pertinent issues.

I want to thank the witnesses for being here today. I look forward to hearing your testimony and your answering our questions.

[Ms. Titus' prepared statement follows:]

Prepared Statement of Hon. Dina Titus, a Representative in Congress from the State of Nevada, and Chairwoman, Subcommittee on Economic Development, Public Buildings, and Emergency Management

Good morning and welcome to the fourth hearing of the Economic Development, Public Buildings, and Emergency Management Subcommittee. This morning's hearing is entitled, "Landlord and Tenant: The Trump Administration's Oversight of the Trump International Hotel Lease."

You can tell from the title that today we are investigating an unprecedented situation. The federal government owns the building that houses President Trump's D.C. hotel. Since President Trump has declined to divest from his business, he is essentially both the landlord and the tenant.

Before I was elected to Congress, I spent over three decades teaching college students about American government and politics. In those classrooms, we had serious discussions about the role of the legislature in holding the executive branch accountable to the highest legal and ethical standards. That's exactly what we hope to do today.

So let's start with some facts. First, all federal workers and federally elected officials take an oath to uphold the U.S. Constitution. Of course, that includes the President, the Administration, and all Members of Congress.

Second, the Constitution contains two clauses pertinent to our topic today: One prevents an elected official from receiving "any present [or Emolument] . . . from any King, Prince, or foreign state" . . . "without the Consent of Congress." To date, Congress has given this President no such consent. A second and related clause that prevents the President from accepting any federal or state taxpayer dollars or emoluments beyond his presidential salary.

A lot of people may not be familiar with the term "emolument," but the Founders thought of it broadly as any payment or benefit. They included it in the Constitution to prevent U.S. government officials from accepting bribes from foreign governments or from parts of our own government that could try to curry favor. I hope we can all at least agree that's a practice the American people will not abide.

Third, the government lease for Trump's D.C. hotel explicitly states that the tenant may not use the premises to violate federal law "for any purpose or in any way."

That of course includes the Constitution. Moreover, Section 37.19 of the lease states that "No . . . elected official of the Government of the United States . . . shall be admitted to any share or part of this lease, or to any benefit that may arise therefrom." Yet, the President continues to have a personal stake in this hotel.

When people stay at Trump's D.C. hotel, he directly benefits, yet despite all the legal and ethical issues that arise from this unprecedented arrangement, the agency that oversees the lease—the General Services Administration—has not done a thing about it. In fact, the agency's independent Inspector General who is here with us today conducted an exhaustive report that found that the GSA "recognized that the President's business interest in the Old Post Office lease raised issues under the Constitution's Emoluments Clause that might cause a breach of lease."

Despite this observation, the Inspector General found that GSA decided not to address those obvious issues. The Inspector General called that "improper"—and I think that description is, if anything, too kind.

When you take an oath to uphold the Constitution, you are bound by that oath. Yet, GSA officials have turned a blind eye to these legal and ethical issues. When called on it, the GSA failed to implement basic recommendations made by the Inspector General. GSA was instructed to conduct a formal legal review that includes consideration of the Constitution's Emoluments Clauses and the terms of the lease. As far as I know, GSA hasn't even pretended to do that. GSA was also instructed to revise the language of their leases to make it even clearer that the Constitution is relevant. They haven't done so in a way that satisfies the Inspector General and they certainly haven't done so in a way that satisfies this subcommittee.

Finally, in addition to the legal issues, GSA has refused to turn over documents to this subcommittee, which has jurisdiction over GSA, that we have a legitimate purpose to examine. In 2008, Congress directed GSA to lease out the Old Post Office building in order to make a profit. Yet, GSA, relying on the opinion of Trump's business lawyers, refuses to turn over basic financial documents that would help us determine if the tenant is upholding the terms of the lease.

How can we know that taxpayer investments are being protected if we can't examine the financial records of the hotel? And how can we ensure national policy is not being swayed by those spending money at a hotel that benefits people at the highest levels of our government? They're also preventing us from looking at the legal memos that were drafted while the government officials who were supposed to enforce the terms of this lease decided to look the other way. It's shameful, and yet it's what we've come to expect from an executive branch that stonewalls Congress and rejects transparency at every turn. Few could have ever imagined a situation like the one we have today, but the Founding Fathers were wise enough to put the Emoluments Clauses right in the Constitution. We should be wise enough to enforce them.

In our first panel, we will hear from the agency that oversees the D.C. Trump hotel lease and from the Inspector General who found that the GSA "did not fulfill" its obligations under the Constitution. In the second panel, we will hear from legal scholars who can shed more light on these serious issues.

I want to thank the witnesses for being here today. I look forward to hearing your testimony. I now recognize the Ranking Member, Mr. Meadows, for an opening statement.

Ms. TITUS. And I now recognize the ranking member, Mr. Meadows, for an opening statement.

Mr. MEADOWS. Thank you, Chairwoman Titus.

Once again, here we are in the drama of "everything related to President Trump is bad." You know, instead of focusing on critical issues like disaster recovery, our crumbling infrastructure, we are here today trying to answer a constitutional question that is currently before the courts and, I would offer, that no one on this dais is even able to answer.

We are looking at a constitutional question, but, no, this is all about the President and his business. And we have other business before this subcommittee that is critical to the American taxpayer. We have 79 bills that have been referred to this subcommittee, and we have only acted on 9 of them. We could be in a hearing today examining some of those proposals.

And it is National Preparedness Month. Here we are—the original plan for this hearing today was to focus on recovery areas, some that affect my very State. But, instead, we are here focusing on an issue because of the perception of wrongdoing.

Now, based on our markup last week, the remarks by Members at the markup, I am sure that there are Members on both sides of the aisle that would view it as a critical responsibility of this committee to address disaster relief. Right now, more than half the States and Territories are still impacted by 73 open major disasters and emergency declarations.

Additionally, GSA spends over $5 billion a year on leased space. The Federal Buildings Fund struggles to pay for the basic maintenance of those buildings. And yet here we are today, calling the GSA Buildings Commissioner here, not to talk about those important things, but, rather, to opine on a decision that has already been made, a conclusion that has already been made by my colleagues opposite.

Let us be very clear: We are here today because of a lease that was endorsed by, advocated by Democrats, signed off on by Democrats, negotiated and executed under President Barack Obama, and a lease where nearly all the decisions were made before and after the election, were made by the Obama administration. And yet somehow it is the President's fault.

And this one decision, made after the President was sworn in, was done by a career public servant. So, even with that, if you focus just on that, we have a long-term career public servant with leadership that is appointed by GSA making decisions. And here we are today; the inspector general still found that there was no undue influence in that decision.

Now, I am just at a loss for words, almost, when you look at this, because GSA has produced documents at the request of Members. Over 10,000 pages, nearly 3,800 documents that have been produced to the OPO, and more is expected. Yet our colleagues would argue that the GSA is not responding to their requests.

So let me be clear on this as well. I am a strong supporter of transparency and oversight and access to information. But when those demands start taking on an outside, beyond the mission, core mission of what is happening, we have the responsibility to make sure that those requests are not only reasonable and legitimate but they are not just a fishing expedition.

You know, Republican Members, myself included, sent a letter in February requesting documents on which the OIG based the analysis and conclusion in her report. That was actually requests not as a fishing expedition but because of the unusual nature of the OIG's report.

The report itself has been cited as authority in pending legal cases, yet contains assertions without citation. And at least one incident is factually incorrect. The factual assertion has been disputed by legal experts. You know, it contains its own legal analysis on unsettled constitutional questions currently before the courts.

Now, the chairwoman, she has talked about those constitutionally protected areas and our rights of oversight as a legislative body. Indeed it is. This question is one that has to be resolved by the courts, not by the legislative body. If we want to change the

law and make sure that we can change it, let's go ahead and introduce something. But to date, nothing has been introduced. No markups on that.

Given this issue and the facts, using the legal proceedings, it is critical for us to verify every bit of the OIG's report and its accuracy. And to understand the basis of that report, we have requested the casefile documents, similar to the request the committee made last year for the OIG's report on the FBI headquarters. However, so far on that, we have only received 177 documents. Those are largely publicly available legal research documents, like law review articles that they used for the constitutional analysis. To me, that is unresponsive.

I hope we can get back to the real work. I hope that we can make sure that, once again, this committee operates in a bipartisan fashion. Today's hearing is certainly not that.

[Mr. Meadows' prepared statement follows:]

Prepared Statement of Hon. Mark Meadows, a Representative in Congress from the State of North Carolina, and Ranking Member, Subcommittee on Economic Development, Public Buildings, and Emergency Management

Thank you, Chairwoman Titus.

Once again, instead of focusing on critical issues like disaster recovery and our crumbling infrastructure, we are here today focusing on answering a constitutional question that's currently before the courts.

We have other business before this subcommittee that is critical to the American taxpayer. We have 79 bills referred to this subcommittee and have only acted on about nine of them—we could have had a hearing today examining some of those proposals.

And, it is National Preparedness Month. The original plan for today's hearing was to focus on recovery efforts, but instead we are focusing on this issue because of a perception of wrongdoing by the President.

Based on our markup last week and the remarks by Members at that markup, I am sure there are Members on both sides who would have viewed a disaster hearing as critical. Right now, more than half the States and territories are still impacted by 73 open major disasters and emergency declarations.

Additionally, GSA spends over $5 billion a year on leased space. The Federal Buildings Fund struggles to pay for basic building maintenance, yet we call the GSA Public Buildings Commissioner here not to talk about that, but rather a decision made prior to his appointment or documents they are already producing.

Let's be very clear—we are here today because of a lease, endorsed by and advocated for by Democrats, signed off on by Democrats, and negotiated and executed under President Obama. A lease where nearly all of the decisions before and after the election were made under the Obama Administration.

And the one decision made after the President was sworn in was done by a career public servant, long before the current political leadership at GSA was appointed. Even the GSA Inspector General found there was no undue influence in that decision.

Since that time, GSA has produced documents at the request of Members—over 10,000 pages and nearly 3,800 documents have been produced related to the OPO and more is expected. Yet, our colleagues argue that GSA is not responding to their requests.

Let me be clear on this as well—I am a strong supporter of transparency, oversight, and access to information. But, when we are making demands of agencies, taking federal employees away from their core mission to comply with these requests, we have some responsibility to ensure the requests are reasonable—not for political purposes and not a fishing expedition.

Republican members, myself included, sent a letter in February requesting the documents on which the OIG based her analyses and conclusions in her report. We requested this not as a fishing expedition, but because of the unusual nature of the OIG report.

The report itself has been cited as authority in pending legal cases, yet contains assertions without citations and, in at least one instance, a factual assertion has been disputed by a legal expert.

And, it contains its own legal analysis on an unsettled constitutional question currently pending in the courts.

Given these issues and the fact that it has been used in legal proceedings, it is critical for us to verify its accuracy.

To understand the basis for the OIG's report, we requested the case file documents—similar to a request the Committee made last year for the OIG's report on the FBI Headquarters. However, so far we have only received 177 documents and those are largely publicly available legal research documents like law review articles they used for their constitutional analysis. To me that is unresponsive.

I hope we can get back to real work on what usually are bipartisan issues in this Committee. We have made headway in disaster reforms, reforming how we manage federal properties, and exploring ways to improve our economic development programs.

We could have focused today on a topic that would help inform our actions on those important issues and help our constituents who sent us here to work together on real solutions—not play games on their dime.

Mr. MEADOWS. And, with that, I yield back.

Ms. TITUS. I thank the ranking member.

And I now recognize the chairman of the T&I Committee, who has spent some time working on this issue and is quite familiar with the documents that have been released and some of the players and all of the issues. I recognize the chairman, Mr. DeFazio.

Mr. DEFAZIO. It is nearly 3 years since I first questioned GSA regarding the lease. It is pretty simple: No Member or Delegate to Congress or elected official of the Government of the United States or government of the District of Columbia shall be admitted to any share or part of this lease or to any benefit that may arise therefrom.

Now, the ranking member just went on at some length about why we are here. We are here because President Trump, ignoring all precedent, decided not to divest himself of his business interests and, in particular, of the hotel, the Trump Hotel, and, in particular, a hotel which has a lease that says no elected official shall benefit. And the President was elected. I mean, he didn't get a majority of the vote, but he was elected. So to say that this committee should not be pursuing this with GSA, in that instance, is bizarre.

Secondly, this building was leased because it was losing money. And the idea was, it is going to make money and we will get a share—now, you have to question the way GSA does this stuff; they do a lot of things that are incompetent—a share of the profits, as opposed to a share of the gross, because you can always hide and come up with, "Oh, we are hardly profitable." We don't even know today. The only statements we have were, either intentionally or unintentionally, put online [indicating a document].

Now, they would say—this is back in 2016. Now, they would say that this is proprietary. If you read through it, these are, like, simple, one-line disclosures. There is nothing proprietary in this document. But now GSA says: Congress is not entitled to those; those were released mistakenly.

Well, how do we know what the income is? How do we know how GSA is calculating the profits? Apparently, that is at the discretion of the contracting officer. I think that is the career official that he referred to.

This career official opined in November of 2016 that it was absurd that anybody would question this lease or the Emoluments Clause. This was a contracting officer. And I asked a series of questions of a former official from this agency: Is this how contracting officers work?

And then he went on in the email—this was to Ivanka Trump—to say: I want to get together with you and drink some coffee and tell you about my great trip to New York.

Now, this is a public servant who is looking out after the public interest. He is still the contracting officer. He has discretion in how they calculate the profits. And we don't know whether we are getting a damn penny out of this thing or not.

Here are the statements they give to us [indicating documents]. That is it. It is a cover page. A cover page. That is what Congress is entitled to.

Well, what is the income? We don't know. What is the profit? We don't know. What is the Government getting? We don't know.

And the gentleman doesn't want to know whether the taxpayers are getting ripped off or not? That is just extraordinary to me. Extraordinary.

Now, I——

Mr. MEADOWS. Will the gentleman yield? Will the gentleman yield?

Mr. DEFAZIO. No, I will not yield.

Mr. MEADOWS. Well, you asked a question——

Mr. DEFAZIO. I will not yield. The gentleman—I will not yield. Please be quiet. You went over time. I don't want to go too much over time. We have a lot to——

Mr. MEADOWS. Well, the chairman went over time too.

Mr. DEFAZIO. I haven't gone over yet. But you are going to make me.

So—and then I asked for the legal opinions. We can't see them. We can't have them.

OK. So we can't see the legal opinions that have been questioned by the IG, but the gentleman knows that they are fine, the legal opinions, whatever they are——

Mr. MEADOWS. Well, the gentleman knows that we get $3 million a year from the lease. The gentleman does know that.

Mr. DEFAZIO. We don't know on a monthly basis what the income of the hotel is and how they are calculating this and what percent we are getting. So we could be——

Mr. MEADOWS. But the gentleman knows we are getting more money under this lease than the previous lease.

Mr. DEFAZIO. The gentleman is out of order.

Thank you, Madam Chair.

So now——

Mr. MEADOWS. You are not the chairman. You are not the chairman.

Ms. TITUS. Will the ranking member please stop interrupting?

Mr. DEFAZIO. Are you going to be quiet now?

Thank you.

So here is the legal opinion that we have recently received from GSA [indicating document]. It didn't come from the counsel. We have never seen a document out of the General Counsel's Office.

There is a General Counsel's Office. And it is a document from Michael Best & Friedrich LLP, attorneys at law. And this is the only legal opinion we have, and that happens to be the Trump Hotel's attorneys.

This whole thing is so out of line, in terms of GSA's oversight of the public interest, of the lease of this hotel, from day one. Day one. And that is why we are here today.

And we are here principally because this President failed to divest himself of conflicts of interest and put himself and exposed himself, not only in violation of the lease but also to the Emoluments Clause of the Constitution of the United States, both foreign and domestic. That is why we are here today.

[Mr. DeFazio's prepared statement follows:]

Prepared Statement of Hon. Peter A. DeFazio, a Representative in Congress from the State of Oregon, and Chair, Committee on Transportation and Infrastructure

I have been pursuing issues related to the leasing of the federally owned Old Post Office building to the Trump International Hotel for years. Since October 2016, I have written seven letters to the General Services Administration (GSA) seeking records and asking questions about this lease and the agency's legal justification for not terminating this lease in order to comply with the terms of the lease and the U.S. Constitution's Emoluments Clauses.

Those clauses protect the country against efforts to corrupt the President. They also bar the President of the United States from profiting from any "King, Prince, or foreign State" without congressional consent or from being financially compensated from state governments or the federal government, with the exception of receiving his or her salary.

Because the President has refused to divest his interest in the Trump Old Post Office LLC, GSA needs to take action to prevent the U.S. Constitution from being violated.

As Ranking Member of this committee, GSA ignored my requests for information about the Old Post Office lease for years. They only began complying with my records requests once I became Chairman. And as Chairman of the Transportation and Infrastructure Committee, the first oversight letter I wrote with Ms. Titus on January 22, 2019, was to GSA requesting records on the Old Post Office Building lease.

Since then, we have received more than 3,000 documents amounting to more than 10,000 pages from GSA. However, eight months later GSA is still refusing to provide certain categories of documents to the committee including legal memos and opinions regarding this lease and monthly financial statements from the Trump International Hotel.

This is unacceptable. It is also deeply troubling to me that GSA on one hand has said they respect the committee's oversight authority and on the other hand they have relied on the Trump Old Post Office LLC's attorney—let me repeat that GSA has relied on the Trump Old Post Office LLC's attorney—to question the committee's legislative authority in seeking to obtain these records.

I would like to remind GSA that they are a federal agency and not an arm of the Trump Organization and that they have a fundamental obligation to provide the committee with the records it needs to conduct appropriate oversight of the leases the GSA manages, programs they create and policies they enact. And last time I checked, GSA has its own Office of General Counsel.

Congress' oversight authority is broad and this Committee's oversight of GSA leasing arrangements is clear. Our legislative jurisdiction over GSA and public buildings, including the Old Post Office Building, which is currently being leased to the Trump International Hotel, is well established. Our ability to conduct robust oversight ensuring the public is aware of how federal agencies are being managed and how their contracts with private entities are being enforced is paramount.

This oversight should not be a partisan issue. Previous Republican and Democratic Ranking Members and Chairs of the Transportation and Infrastructure Committee and its subcommittees have routinely investigated GSA's management of its leases.

Suggestions that the committee does not have oversight authority to look into the Old Post Office lease to the Trump International Hotel or that somehow business records of a company leasing a federally owned government building are sacrosanct and should not be reviewed as part of Congress' long-standing and legitimate investigative process is frankly ridiculous and appears to be a well-orchestrated distraction from the core issues surrounding GSA's apparent disregard of the Emoluments Clauses expressly laid out in the U.S. Constitution.

This hearing is focused on the Old Post Office Building lease and the GSA's failure to properly account for the Emoluments provisions in the U.S. Constitution, as a result of President Trump's refusal to divest from his financial stake in the Trump International Hotel. Unfortunately, this is only part of a pattern of government employees under this administration brazenly violating these provisions.

In the past few days it has been reported that a senior aide to the President of Ukraine met a State Department employee for breakfast at the Trump International Hotel in an alleged effort to seek help connecting with President Trump's lawyer, Rudolph Guiliani. Regardless of whether the foreign or federal U.S. official paid for this encounter, if they were there on government business it would implicate the Emoluments Clauses to the Constitution.

It has also been reported that Trump administration officials spent taxpayer funds to stay at Trump's golf club in Ireland and U.S. Air Force crews have used federal funds to stay at Trump's resort in Scotland. In addition, the Attorney General of the United States has apparently booked his private holiday party at the Trump International Hotel and the press has reported on patronage of the Trump Hotel in D.C. by foreign governments as well as at least one state government. Although not all of these acts may violate the law or the U.S. Constitution they all raise serious ethical concerns.

President Trump could have simply divested from his investments when he took office. He did not. He has not. It seems he will not. And GSA must now deal with the consequences and stop shirking its constitutional obligations.

Our Founding Fathers knew well the risk of unscrupulous individuals, both foreign and domestic, attempting to corrupt our presidents. And they knew this would have detrimental and wide-ranging negative consequences on our democracy and the public's perception of our government and its institutions.

Yet, in this instance regarding President Trump's financial stake in the Trump International Hotel, it seems clear that GSA has failed in its obligation to comply with the Constitution. Ignoring this problem won't make it disappear. But investigating it can help determine how GSA went so wrong, and how they can take corrective actions so that these mistakes and missteps are not repeated into the future.

Mr. DEFAZIO. Right on time.

Ms. TITUS. Thank you.

The Chair now recognizes the ranking member of the T&I Committee, Mr. Graves, for an opening statement.

Mr. GRAVES OF MISSOURI. Thank you, Madam Chair, Ranking Member Meadows.

We used to hear over and over and over again when Republicans were in the majority, why aren't we doing infrastructure? Why aren't we doing infrastructure? Where is an infrastructure bill? And that question is still valid today. And yet here we are, in a politically motivated hearing, talking about the Old Post Office.

In light of the disasters this year, I think we should be focusing on making sure our committee's disaster reform efforts are working. Instead, here we are, again in a politically motivated hearing. We need to make sure our communities have the tools to prepare and recover from the next disaster.

We saw just last week parts of Texas being hammered by Tropical Storm Imelda. My home district in Missouri is still recovering from historic flooding, with devastated homes and farms and people that still haven't been able to get back into their houses. We have many communities that have a long way to go when it comes to recovering from the last two hurricane seasons.

And, instead, today's hearing is going to be nothing more than a political spectacle and a chance for the President's opponents to try to undermine him and continue to do their search for anything to further their case on impeachment. And that is what this is about.

Instead of working on disaster preparedness or any other of the countless number of infrastructure items that are clearly more important than this, like fixing roads and bridges, we are instead going to be listening to politically motivated criticisms of the President.

I know we have worked together in a bipartisan manner on this committee, and I believe we can still do that if we put politics aside. But, instead, this is a political distraction. It takes us away from the important work that this committee should be doing.

[Mr. Graves of Missouri's prepared statement follows:]

Prepared Statement of Hon. Sam Graves, a Representative in Congress from the State of Missouri, and Ranking Member, Committee on Transportation and Infrastructure

Thank you, Chair Titus and Ranking Member Meadows.

First, I want to note that we still don't have an infrastructure bill—something our Nation desperately needs. And as Ranking Member Meadows noted, September is National Preparedness Month. Yet here we are in a politically motivated hearing talking about the Old Post Office.

In light of all the disasters this year we should be focusing today on making sure our Committee's disaster reform efforts are working as intended and that our communities have the tools to prepare for and recover from the next disaster.

We just saw last week parts of Texas being flooded from Tropical Storm Imelda. My home district in Missouri is still recovering from historic flooding that devastated homes and farms. And many communities have a long way to go to recover from the last two hurricane seasons.

Instead, today's hearing is going to be nothing more than a political spectacle—a chance for the President's opponents to try to undermine him and to continue their search for anything to further their case for impeachment.

Instead of working on disaster preparedness, or any of the other countless infrastructure items that are clearly more important than this, like fixing roads and bridges, we will instead listen to politically motivated criticisms of the President.

I know that we have worked together in a bipartisan manner on this Committee, and I believe we can continue to do so if we put politics aside. But instead, this partisan distraction takes us away from our important work on infrastructure.

Mr. GRAVES OF MISSOURI. And, with that, I yield back.

Ms. TITUS. Thank you, Mr. Graves.

At this time, we would like to welcome our witnesses. On the first panel, we have Mr. Daniel Mathews, the Public Buildings Commissioner for the U.S. GSA, and we have the Honorable Carol Ochoa.

Thank you for being here. We look forward to your testimony.

Without objection, our witnesses' full statements will be included in the record.

Since your written testimony has been made part of the record, the subcommittee requests that you limit your oral testimony to 5 minutes as well.

At this point, we will begin with Mr. Mathews.

TESTIMONY OF DAN MATHEWS, COMMISSIONER, PUBLIC BUILDINGS SERVICE, U.S. GENERAL SERVICES ADMINISTRATION; AND HON. CAROL FORTINE OCHOA, INSPECTOR GENERAL, U.S. GENERAL SERVICES ADMINISTRATION

Mr. MATHEWS. Good morning, Chairwoman Titus, Ranking Member Meadows, and members of the subcommittee. My name is Dan Mathews, and I was sworn in as Commissioner of the Public Buildings Service in August of 2017. Before that, I served as a majority and minority staff director of this subcommittee for almost 15 years.

Let me begin by thanking you for authorizing our prospectuses and for your help in securing Senate authorization as well, particularly for the Lloyd George U.S. Courthouse in Las Vegas.

I also would like to briefly discuss how PBS is attacking some of the most difficult challenges in Federal real estate which this committee and the GAO identified over the last decade. These problems include an over-reliance on costly leases, the need to renovate our aging inventory, and to reform the courthouse construction program.

Since September 2017, GSA has cut 3.5 million square feet from its expiring lease portfolio; negotiated rental rates 11 percent below market, as compared to the historic average of 3 to 5 percent below market; and avoided $1.9 billion in future lease costs.

By investing our scarce capital in GSA-owned facilities, such as the Suitland Federal Center in Maryland, GSA is reducing our reliance on leasing and improving the quality and utilization of our most important facilities.

And, finally, GSA is partnering with the judiciary to construct over $1 billion in courthouses on-budget and on-schedule.

Over the last 2 years, GSA has made significant progress in addressing the bipartisan priorities of this committee, and I look forward to working with you on these issues in the future.

Moving on to today's topic, I would like to share some context I believe is important.

One of the longstanding bipartisan priorities of this committee was to address the serious disrepair and occupancy problems at the Old Post Office. This effort resulted in the bipartisan enactment of the Old Post Office Building Redevelopment Act, which directed GSA to redevelop the Old Post Office while maintaining Federal ownership and historic integrity of the facility.

Pursuant to the act, GSA conducted a full and open competition and, in 2013, signed a 60-year lease with the Trump Old Post Office LLC. The company pays rent, and the lease provides for the potential of revenue-sharing with the GSA and the American taxpayer.

This joint effort created a substantial financial benefit for the Government and taxpayers. Prior to the redevelopment of the Old Post Office, GSA operated the facility at a significant annual loss, including $6.5 million in 2007 alone. Today, as a direct result of the act, instead of a multimillion-dollar operating loss, GSA now receives approximately $3 million in annual rent for a historic property that has been fully renovated with private funds.

While the inspector general's review of the Old Post Office outlease did not seek to determine whether the President's interest

in the hotel violates either the Emoluments Clauses or section 37.19 of the lease, both of these issues continue to generate questions for Members of Congress.

With respect to the Emoluments Clauses, it would be inappropriate for GSA to weigh in on that issue while it is the subject of active litigations. The first of several lawsuits alleging violations of the Emoluments Clauses was filed on January 23, 2017. Accordingly, the meaning and application of the Emoluments Clauses has been the subject of active litigation for the entirety of the administration.

Beginning in June of 2017, the Department of Justice has taken the position in those cases that the President's interest in the Trump International Hotel does not violate the Constitution. The committee can rest assured that, if and when these issues are conclusively resolved as a matter of law, GSA would faithfully adhere to those legal determinations.

With respect to section 37.19 of the lease, GSA followed its standard process for determining compliance with the terms and conditions of a lease. The career contracting officer, who has the legal authority and responsibility for making contract decisions, worked in consultation with the career attorneys from GSA's Office of General Counsel to make this decision. As a result of that process, in a March 2017 determination by the career contracting officer, GSA found the tenant in compliance with section 37.19 of the lease.

As the committee is aware, following the contracting officer's determination, GSA's inspector general conducted a 16-month investigation into the management and administration of the Old Post Office Building lease.

Given the title of this hearing, I believe one key aspect of the review is absolutely vital to reiterate: The inspector general found no instances of undue influence or interference on the career civil servants charged with administering this lease.

Furthermore, as noted in our response to the review, GSA agreed with the report's single recommendation, as the agency understood it, and will take action consistent with that recommendation prior to continuing to use the language in future outleases.

Lastly, GSA has worked diligently to respond to congressional oversight requests concerning this project, including requests from this committee. As part of this effort, GSA has provided more than 3,000 documents and 10,000 pages of materials in response to this committee's requests, in addition to numerous briefings on this topic.

In conclusion, again, let me thank you for authorizing our prospectuses in a timely matter. We very much appreciate that. Thank you.

[Mr. Mathews' prepared statement follows:]

Prepared Statement of Dan Mathews, Commissioner, Public Buildings Service, U.S. General Services Administration

Good morning Chairwoman Titus, Ranking Member Meadows, and Members of the Subcommittee. My name is Dan Mathews, and I am the Commissioner of the Public Buildings Service (PBS) at the U.S. General Services Administration (GSA).

The purpose of my testimony today is to help explain the GSA history of the Old Post Office redevelopment project and detail how the agency has responded to the recommendation of the GSA Office of Inspector General (OIG) following its evaluation of the outlease.

Since this is my first time testifying before the Subcommittee—and many of my former Capitol Hill colleagues—I would also like to take the opportunity to discuss how PBS is building on its success to more efficiently and effectively support customer agencies achieve their mission, while saving taxpayer money.

Today, PBS is advancing this work through three strategic initiatives: lease cost avoidance, real estate footprint optimization, and our internal productivity initiative.

OLD POST OFFICE REDEVELOPMENT ACT

As many of you know, prior to joining GSA in August of 2017, I served as the Staff Director for both the majority and minority staff of this Subcommittee for almost 15 years. During my tenure, one of the issues that received strong bipartisan support was how to address the serious disrepair and occupancy problems at the Old Post Office building. This effort resulted in the bipartisan passage and enactment of the Old Post Office Building Redevelopment Act of 2008 (the Act). This legislation directed GSA to redevelop the property on Pennsylvania Avenue in between the White House and Capitol, while maintaining Federal ownership and the historic integrity of the facility.

Pursuant to the Act, GSA conducted a full and open competition, which resulted in the selection of the Trump Organization as the preferred private sector entity to redevelop the Old Post Office. In 2013, GSA signed a lease with the Trump Old Post Office, LLC. In accordance with the lease, the LLC pays rent for 60 years to use the Old Post Office facility as a hotel. Additionally, the lease provides for the potential of revenue sharing with GSA and the American taxpayer. Finally, the lease ensures the historic preservation and integrity of the building, as well as public access to the clock tower and observation deck.

The Act and subsequent repositioning of the Old Post Office created a substantial financial benefit for the government and taxpayers. Prior to the outlease and redevelopment of the property, GSA operated the facility at a significant annual loss. As this Committee noted in its Committee Report on the Act, in 2007, GSA collected $5.4 million in rent payments from tenants, while spending $11.9 million to operate and maintain the property. On top of this $6 million annual loss, it was estimated that it would take an investment of approximately $200 million to renovate the building to address maintenance backlogs and turn the facility into a modern office building. Understanding the challenges associated with such an investment, Congress directed GSA to follow through on its proposed plan to redevelop the building through a publicprivate partnership. Today, as a direct result of the Act, instead of a multi-million dollar annual operating loss, GSA now receives a monthly rent payment $267,653 and the historic property has been fully renovated with private funds and is maintained to a high standard.

OLD POST OFFICE LEASE ADMINISTRATION

While the Inspector General's review of the Old Post Office outlease "did not seek to determine whether the President's interest in the hotel violates either the Emoluments Clauses or Section 37.19 of the lease," both of these issues continue to generate questions from Members of Congress. With respect to the Emoluments Clauses, it would be inappropriate for GSA to weigh in on that issue while it is the subject of active litigations. The first lawsuit alleging violations of the Emoluments Clauses was filed in the Southern District of New York on January 23, 2017—the first full business day following the President's inauguration. Additional suits have been filed since that time. Accordingly, the meaning and application of the Emoluments Clauses has been the subject of active litigation for the entirety of this Administration. The Department of Justice has taken the position in those cases that the President's interest in the Trump International Hotel does not violate the Constitution. The Committee can rest assured that if and when these issues are conclusively resolved as a matter of law, GSA would faithfully adhere to those legal determinations.

With respect to Section 37.19 of the lease, GSA followed a fairly typical process for determining compliance with the terms and conditions of a lease. The career contracting officer, who has the legal authority and responsibility for making contract decisions, worked in consultation with career attorneys from GSA's Office of General Counsel to make this decision. As a result of that process, in a March 2017 deter-

mination by the career contracting officer, GSA found the tenant in compliance with Section 37.19 of the lease.

As the Committee is aware, following the Contracting Officer's determination, GSA's OIG conducted a very detailed and thorough 16-month investigation into the management and administration of the Old Post Office building lease. Given the title of this hearing, I believe one key aspect of the review is absolutely vital to reiterate: the OIG found no instances of undue influence or interference on the career civil servants charged with administering the lease.

Furthermore, as noted in our response to the review, GSA agreed with the report's single recommendation as the agency understood it and will take action consistent with that recommendation prior to continuing to use the language of Section 37.19 of the Old Post Office building lease in the future.

Lastly, GSA has also worked diligently to respond to Congressional oversight requests concerning this project, including requests from this Committee. As part of this effort, GSA has provided more than 3,000 documents and 10,000 pages of material in response to this Committee's requests, in addition to numerous briefings on this topic.

PBS STRATEGIC INITIATIVES

I would like to focus on PBS's strategic initiatives I mentioned at the beginning of my testimony. GSA's leased portfolio consists of more than 8,000 leases equating to more than 187 million rentable square feet of space. Leasing represents more than half of PBS's total expenditures and 66 percent of those leases are due to expire during the next five years. That's more than 100 million square feet of leased set to expire. The lifetime contract value of these leases is about $60 billion dollars. Over the next few years, GSA's goal is to trim billions from that figure by negotiating longer firm terms with lessors in order to secure lower rental rates, concessions, and other discounts.

GSA is also prioritizing the improved optimization of our owned inventory of more than 1,600 federal buildings. By investing in our owned portfolio, building conditions and utilization rates will improve. One example of this strategy at work is GSA's FY20 funding request to restack the Suitland Federal Center campus in Suitland, Maryland. This effort will allow Federal agencies to move out of expensive, leased space in the District of Columbia into a modern GSA-owned building, saving the taxpayer potentially $244 million over the next 10 years.

Finally, GSA is leveraging its human capital, technology, and business processes to improve agency productivity and efficiency. By ensuring we have the right people in the right places, with the right technology and resources, we will be strategically positioned to achieve our goals with regard to lease cost avoidance and real estate footprint optimization.

In closing, GSA is committed to carrying out its mission of delivering the best value in real estate for the Federal government and the American taxpayer.

I thank the Subcommittee for the opportunity to testify today and look forward to answering your questions.

Ms. TITUS. Thank you, Mr. Mathews. And we appreciate you getting your testimony to us ahead of time, which was late last night, despite the deadline being earlier.

Ms. Ochoa?

Ms. OCHOA. Good morning, Chairwoman Titus, Ranking Member Meadows, and members of the subcommittee. Thank you for the opportunity to testify here today regarding the Office of Inspector General's evaluation of GSA's management and administration of the Old Post Office.

As you know, GSA administers and manages the ground lease for the Old Post Office Building on Pennsylvania Avenue in Washington, DC. The Trump Old Post Office LLC, is the tenant on the lease.

On July 28, 2017, my office initiated an evaluation of GSA's management and administration of the lease based on numerous complaints from Members of Congress and the public. We focused our evaluation on GSA's decisionmaking process for determining whether the President's business interest in the lease caused the

tenant to be in breach of the lease upon the President's inauguration.

We did not seek to determine whether the President's interest in the hotel violates either the Emoluments Clauses of the U.S. Constitution or the "interested parties" provision in section 37.19 of the lease or whether any violation caused a breach of the terms and conditions of the lease. Rather, we sought to determine whether there were any improprieties in GSA's decisionmaking process regarding those issues.

Our evaluation found that GSA, through its Office of General Counsel and its Public Buildings Service, recognized that the President's interest in the lease raised issues under the Constitution's Emoluments Clauses that might cause a breach of the lease but decided not to address those issues.

We found that GSA attorneys made the decision not to address these issues by mid-December 2016 after having been put on notice in the summer of 2016 of the President's status as a nominee of a major political party for the Presidency. The attorneys did so without preparing a decision memorandum to document the rationale for the position they were taking. They did so without conducting any research of the two Emoluments Clauses. They did so without checking for any opinions about them from the Department of Justice Office of Legal Counsel or contacting or seeking guidance from that office.

Our report found that GSA was correct in recognizing that there was a potential issue regarding the Old Post Office lease raising constitutional issues. We addressed GSA's reasons for ignoring the constitutional issues and the effect this had on its analysis of section 37.19 of the lease.

GSA's lawyers gave us various reasons for their decisions to ignore the Emoluments Clauses. They told us, for example, that constitutional issues rarely arise in GSA's work, that the Emoluments Clauses are not within GSA's purview, and that GSA's role is only to opine on specific provisions of the lease.

For reasons that we set out in the report, we rejected these explanations. We rejected them largely because the decision not to include the emoluments issues from GSA's consideration of the lease was improper because GSA, like all Government agencies, has an obligation to uphold and enforce the Constitution and because the lease itself requires that consideration.

In addition, we found that GSA's unwillingness to address the constitutional issues affected its analysis of section 37.19 of the lease. That led to GSA's conclusion the tenant's business structure satisfied the terms and conditions of the lease, and, as a result, GSA foreclosed an early resolution of the issues, including a possible solution that would have been satisfactory to all parties. And the uncertainty over the lease remains unresolved.

At the conclusion of our report, we recommended that, before continuing to use the language, GSA determine the purpose of the "interested parties" provision, conduct a formal legal review by its Office of General Counsel that includes consideration of the foreign and Presidential Emoluments Clauses, and revise the language to avoid ambiguity.

I very much appreciate the interest of the committee in the work of our office, and I am happy to answer any questions you might have.

[Ms. Ochoa's prepared statement follows:]

Prepared Statement of Hon. Carol Fortine Ochoa, Inspector General, U.S. General Services Administration

Chairman Titus, Ranking Member Meadows, and Members of the Subcommittee: Thank you for the opportunity to testify here today regarding the Office of Inspector General's (OIG) Evaluation of the General Services Administration's (GSA) Management and Administration of the Old Post Office Lease.

INTRODUCTION

The General Services Administration (GSA) administers and manages the ground lease for the Old Post Office Building (OPO) on Pennsylvania Avenue in Washington, D.C. The Trump Old Post Office LLC is the Tenant on the lease.

On July 28, 2017, the GSA Office of Inspector General (OIG) initiated an evaluation of GSA's management and administration of the agency's ground lease of the OPO, based on numerous complaints from Members of Congress and the public. The complaints generally raised two issues regarding the lease: (1) does the Foreign Emoluments Clause or the Presidential Emoluments Clause of the U.S. Constitution bar President Donald J. Trump's business interest in the Trump Old Post Office LLC and (2) does the President's business interest in Tenant violate Section 37.19 of the lease, a provision addressing participation by elected officials.

We focused our evaluation on GSA's decision-making process for determining whether the President's business interest in the OPO lease caused Tenant to be in breach of the lease upon the President's inauguration. We did not seek to determine whether the President's interest in the hotel violates either the Emoluments Clauses or Section 37.19 of the lease, or whether any violation caused a breach of the terms and conditions of the lease. Rather, we sought to determine whether there were any improprieties in GSA's decision-making process regarding these issues. We issued our report on January 16, 2019.

Our evaluation found that GSA, through its Office of General Counsel (OGC) and Public Buildings Service, recognized that the President's business interest in the OPO lease raised issues under the Constitution's Emoluments Clauses that might cause a breach of the lease, but decided not to address those issues in connection with the management of the lease. We also found that the decision to exclude the emoluments issues from GSA's consideration of the lease was improper because GSA, like all government agencies, has an obligation to uphold and enforce the Constitution; and because the lease, itself, requires that consideration. In addition, we found that GSA's unwillingness to address the constitutional issues affected its analysis of Section 37.19 of the lease that led to GSA's conclusion that Tenant's business structure satisfied the terms and conditions of the lease. As a result, GSA foreclosed an early resolution of these issues, including a possible solution satisfactory to all parties; and the uncertainty over the lease remains unresolved.

Based on these findings, we recommended that, before continuing to use the language, GSA determine the purpose of the Interested Parties provision, conduct a formal legal review by OGC that includes consideration of the Foreign and Presidential Emoluments Clauses, and revise the language to avoid ambiguity.

Below is a more detailed discussion of the findings in our report.

BACKGROUND

The Old Post Office building, located on Pennsylvania Avenue in Washington, D.C., was erected in the 1890s. In 2008, Congress directed GSA to redevelop the property, which had become costly to maintain. GSA selected Trump Old Post Office LLC as the developer in 2012, and executed a lease of the building with that entity as Tenant in 2013. The Trump International Hotel officially opened there in October 2016. The next month, Donald J. Trump was elected President of the United States. At that time, President-elect Trump held a majority interest in Tenant.

Shortly after the November 2016 election, lawyers in GSA's OGC began discussing the issues the President-elect's business interest in Tenant raised under the Constitution's Emoluments Clauses and Section 37.19 of the lease.

The relevant provisions are as follows:

- *U.S. Constitution, Article I, Section 9, Clause 8—The Foreign Emoluments Clause*: [N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.
- *U.S. Constitution, Article II, Section 1, Clause 7—The Presidential Emoluments Clause*: The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.
- *Ground Lease, Old Post Office Building, Section 37.19*: Interested Parties: No member or delegate to Congress, or elected official of the Government of the United States or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom; provided, however, that this provision shall not be construed as extending to any Person who may be a shareholder or other beneficial owner of any publicly held corporation or other entity, if this Lease is for the general benefit of such corporation or other entity.

As described in further detail below, in December 2016, the OGC lawyers decided not to consider whether the President's business interest in the OPO lease might result in his receipt of emoluments under the Constitution's Emoluments Clauses. In March 2017, after receiving guidance from the lawyers, the GSA contracting officer responsible for the OPO lease decided that Tenant was in full compliance with Section 37.19 of the lease.

FACTS

Emoluments

GSA's legal work on the Emoluments Clauses and Interested Parties provision fell to a small group of OGC supervisory attorneys named in our report. Senior attorneys told us that they walled the Contracting Officer off to avoid any political influence over him and preserve his independence.

The selection in July 2016 of Tenant's primary owner, Donald J. Trump, as a major political party candidate for President raised the possibility for GSA that its lease of the OPO might generate questions under the Foreign Emoluments Clause and the Presidential Emoluments Clause. However, the attorneys responsible for providing guidance on the OPO lease told us that they did not discuss this possibility until November 2016.

The attorneys recalled participating in a few internal discussions about the emoluments issues after the election. In the end, they all agreed that there was a possible violation of the Constitution's Emoluments Clauses. Nonetheless, they decided to ignore the emoluments issues, for various reasons discussed below. As one senior attorney told us, OGC decided to "punt."

The OGC attorneys made the decision not to address the emoluments issues by mid-December 2016. The attorneys told us they did so without preparing a formal decision memorandum to document the rationale for the position they were taking, conducting any research of the two Emoluments Clauses, checking for any opinions about them from the Department of Justice Office of Legal Counsel (OLC), or contacting or seeking guidance from OLC.

Section 37.19

The language of Section 37.19 originated in an 1808 statute that provided that every federal government contract or agreement must include a prohibition that: "no member of Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon."

The version of the Interested Parties provision used in the OPO lease was taken from GSA's 1999 outlease of the historic Tariff Building in Washington, D.C., for the Hotel Monaco. The revised clause used in the Monaco Hotel lease stated in full:

> No member or delegate to Congress, or elected official of the Government or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom; provided, however, that this provision shall not be construed as extending to any Person who may be a shareholder or other beneficial owner of any publicly held corporation or other entity, if this Lease is for the general benefit of such corporation or other entity.

According to the GSA attorney on that project, the Interested Parties provision was intended to minimize an elected official's interference with the commercial operation of the government landlord.

GSA made no changes to the Monaco Hotel lease Interested Parties provision when pasting it into OPO lease Section 37.19. By the time GSA executed the OPO lease in 2012, Congress had revised the 1808 language used in Section 37.19 " . . . to conform to the understood policy, intent, and purpose of Congress to make it clear that the prohibition prohibited entry into a contract or benefiting from the contract."

The GSA team members assigned to the OPO redevelopment project recalled little discussion of, or familiarity with, Section 37.19 at the time the lease was signed. GSA did not consider the provision a material term of the OPO lease, and it was not discussed during lease negotiations. There also was no discussion on the OGC OPO team about Section 37.19's impact if Mr. Trump became President.

GSA Review of 37.19

As with the emoluments issue, GSA attorneys first began seriously discussing the meaning of Section 37.19 and whether President Trump's business interest in the OPO lease constituted a breach shortly after the election, following the publication of the first of several articles about Section 37.19 in November 2016. The Contracting Officer told us that he immediately formed an opinion, based on his "plain reading" of Section 37.19, that there was no breach of Section 37.19; however, he waited to formalize his opinion because he was willing to consider other points of view.

President Trump was sworn into office on January 20, 2017. After the inauguration, Tenant's counsel notified the Contracting Officer that the President had transferred his interest in the Old Post Office to a revocable trust and relinquished his management over that interest for the period of his presidency; however, he still retained his financial interest in the property.

OGC lawyers, the Contracting Officer, and the Project Manager met with Tenant representatives and counsel on January 31, 2017, to discuss Tenant's new organizational structure. The Contracting Officer told us that during the meeting, he strongly encouraged the President's divesture from Tenant. The Contracting Officer said he wanted to get the OPO out of controversy, but felt he did not have a solid position to force divestiture.

On February 10, 2017, the Contracting Officer solicited Tenant's position and analysis on whether Tenant was in "full and complete compliance" with the Lease, specifically Section 37.19. Counsel for Tenant responded February 17, 2017, concluding that, among other points, (1) Section 37.19 does not apply when an elected official is "admitted to" a lease before their election and (2) Tenant is an "other entity" under Section 37.19's exception for owners who have a beneficial interest in a "publicly held corporation or other entity." After receiving Tenant's response, the Contracting Officer requested a legal opinion from OGC.

OGC provided a memorandum to the Contracting Officer dated March 3, 2017, and further guidance in a memorandum dated March 20, 2017. GSA has asserted attorney-client and deliberative process privileges with respect to the contents of both memoranda.

Contracting Officer's Decision

The Contracting Officer sent an Estoppel Certificate and decision memorandum to Tenant dated March 23, 2017, stating that the Tenant was "in full compliance with Section 37.19 and, accordingly the Lease is valid and in full force and effect." The Contracting Officer told us he considered the four corners of the lease and the plain meaning of its language, Tenant's interpretation of the lease language, and the OGC opinions. He also stated that no one inside or outside GSA pressured him to render any specific decision about Section 37.19.

ANALYSIS

We evaluated whether GSA should have addressed the issue raised under the Foreign and Presidential Emoluments Clauses as part of its administration of the lease. To do so, we first considered whether, as GSA acknowledged, the Emoluments Clauses might apply to the benefits a government officer or employee receives from private business activities.

We surveyed sources that show the contemporaneous use and meaning of the term "emolument" during the Founding Era. We reviewed the Supreme Court opinions that might show general usages over long periods of time. Finally, we reviewed evidence of the first President's business activities that might be relevant to our inquiry. We found evidence that the term "emolument" as used historically and today

includes the gain from private business activities, confirming GSA's assumption that the Old Post Office lease raises at least potential constitutional issues.

We also addressed GSA's reasons for ignoring the constitutional issues, and the effect this had on its analysis of Section 37.19 of the lease. OGC lawyers told us they ignored the emoluments issues and that constitutional issues rarely arise within GSA's work. They also stated that the Foreign Emoluments Clause is not in GSA's purview, and not for GSA "to evaluate." OGC lawyers also justified their inaction by stating that Section 37.19 is a specific lease provision but the Foreign Emoluments Clause raised larger issues. We rejected these explanations. The notion that GSA can disregard selected parts of the Constitution fundamentally ignores Article VI of the Constitution. Clause 2 in Article VI establishes the whole Constitution as "the supreme Law of the Land" and, therefore, it governs every agency. Moreover, the lease, by its very terms, contemplates that laws will be considered even if they are not specifically included in the text.

The agency also disregarded existing precedent and instruction that provided important guidance for understanding the contours of the constitutional provisions GSA confronted. Significantly, we found that OGC had already addressed the threshold question that the lease presents: Does the Foreign Emoluments Clause restrict the income or other benefits that an officer or employee receives from their private business activities with foreign states?

At least as early as 2013, OGC recognized that a Foreign Emoluments Clause issue could arise when a GSA employee sought a waiver to participate in an outside real estate company in the Washington D.C. area. When the issue arose, the employee's supervisor, with the assistance of an OGC ethics advisor, issued a decision memorandum that partially granted the waiver but cautioned that the Foreign Emoluments Clause prohibited the employee from doing any business with any foreign country, such as any transaction regarding an embassy.

OGC also disregarded the opinions of the Department of Justice's OLC on the Foreign Emoluments Clause and the Presidential Emoluments Clause. OGC attorneys understood that OLC provides guidance on constitutional issues and were aware of applicable past OLC opinions. In fact, the office was aware of specific OLC opinions that interpreted the Presidential Emoluments Clause and the Foreign Emoluments Clause in circumstances that involved President Reagan and President Obama. Those and other OLC emoluments opinions provide guidance GSA attorneys could have used but ignored.

Finally, OGC also could have sought guidance from OLC directly, but did not. We found that OGC is familiar with seeking guidance from OLC, and had requested advice from OLC previously. OGC confronted a similar problem 20 years ago when OGC sought guidance on a complex business structure between six entities, in which two Members of Congress held beneficial interests through blind or excepted trusts, and a real estate investment trust that held government leases. The proposal raised a question whether the interests of the Members under the proposed transaction violated the criminal statutes, based on the 1808 Act that prohibited Members from entering in or holding federal government contracts. OGC sought guidance from OLC because of the statutory bar to Members of Congress contracting with the government. Within two months, OLC issued two opinions that rejected several alternatives suggested by the entities at issue, but also identified for GSA's General Counsel one alternate arrangement suggested by the entities that satisfied the law. OGC charted a different course here.

We recognize that under its OLC Best Practices, OLC addresses constitutional issues in the context of specific facts and circumstances, which changed in January 2017 as Tenant's business structure changed. However, much as OGC and the Members of Congress discovered in 1998, if asked, OLC might have worked with OGC in order to determine whether Tenant's current business structure or some other structure in OLC's view would satisfy the Constitution's restrictions, and those of Section 37.19. Instead, GSA chose to leave any Foreign Emoluments Clause and Presidential Emoluments Clause issues unresolved without seeking the type of OLC assistance that OGC sought previously.

Emoluments and Section 37.19

The primary clause of Section 37.19 states:

> No member or delegate to Congress, or elected official of the Government of the United States or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom . . . .

The first issue that arises is whether Section 37.19 bars an official from receiving a benefit if the official entered into the lease as a private person, before becoming a public official. This issue turns largely on what the term "admitted to" means.

Section 37.19 also creates an exception to the prohibition in a proviso clause that states:

> . . . provided, however, that this provision shall not be construed as extending to any Person who may be a shareholder or other beneficial owner of any publicly held corporation or other entity, if this Lease is for the general benefit of such corporation or other entity. Here the issue primarily turns on whether "publicly held" modifies both "corporation" and "other entity."

As previously noted, GSA has asserted privileges over the OGC's opinions on Section 37.19. This assertion limits discussion of OGC's views of the legal issues this provision presents, and its guidance to the Contracting Officer.

When OGC attorneys considered how Section 37.19 should be interpreted, they employed the standard tools attorneys use for interpreting language in contracts but they did not, however, analyze the Constitution's Foreign and Presidential Emoluments Clauses as they affected Section 37.19. This was a serious shortcoming that left a constitutional cloud over the lease.

Under the rule of constitutional avoidance, "where an otherwise acceptable construction . . . would raise serious constitutional problems . . . ," language should be interpreted to avoid the constitutional issues "unless such construction is plainly contrary to the intent of Congress." This prudential rule has special relevance to a contract or lease where constitutional restraints may limit the agency's own statutory authority, and by extension, that of its contracting officer. We found that at least some of the OGC OPO attorneys knew about the constitutional avoidance rule from researching OLC opinions, starting in December 2016, for an understanding of the Seven Member Rule. However, we found that OGC did not consider in connection with the OPO lease whether GSA has an obligation to interpret its lease provisions to avoid constitutional questions.

OGC should have recognized from OLC's authoritative Executive Branch precedents, as well as OGC's own experience with the Foreign Emoluments Clause, that the OPO lease presented serious constitutional questions. In this circumstance, the constitutional avoidance rule requires an inquiry to determine whether there are other plausible interpretations of Section 37.19 that do not present constitutional problems, as discussed above. Such an inquiry might have led, as we discussed earlier, to discussions with OLC. Much like the discussions that yielded the solution OLC found for OGC in 1998, when Members of Congress sought to participate in a business structure that included government leases, those discussions might have led OLC to identifying business structure options for GSA and Tenant that satisfied Section 37.19 without raising potential constitutional issues. However, OGC refused to consider any constitutional implications and failed to conduct this inquiry. As a consequence, the GSA contracting officer provided Tenant with an Estoppel Certificate that leaves a constitutional cloud over the lease.

CONCLUSION

We found that GSA, through its Office of General Counsel and Public Building Service, recognized that the President's business interest in the OPO lease raised issues under the Constitution's Emoluments Clauses that might cause a breach of the lease, but decided not to address those issues in connection with the management of the lease. We also found that OGC improperly ignored these Emoluments Clauses, even though the lease itself requires compliance with the laws of the United States, including the Constitution. In addition, we found that GSA's unwillingness to address the constitutional issues affected its analysis of Section 37.19 and the decision to grant Tenant an Estoppel Certificate. GSA's decision-making process related to Tenant's possible breach of the lease included serious shortcomings. GSA had an obligation to uphold and enforce the Constitution. However, GSA opted not to seek any guidance from the Department of Justice's Office of Legal Counsel and did not address the constitutional issues related to the management of the lease. As a result, GSA foreclosed an opportunity for an early resolution to these issues, including a possible solution satisfactory to all parties; and the constitutional issues surrounding the President's business interests in the lease remain unresolved.

GSA OGC has acknowledged that if a constitutional violation were later found, they would have to revisit the issue of potential breach of the OPO lease's Interested Parties provision; however, the fact remains that GSA continues to use the language of the provision in other outleases of historic properties.

RECOMMENDATION

At the conclusion of our report, we recommended that before continuing to use the language, GSA determine the purpose of the Interested Parties provision, con-

duct a formal legal review by OGC that includes consideration of the Foreign and Presidential Emoluments Clauses, and revise the language to avoid ambiguity.

In its response to our report, GSA agreed with our recommendation. The agency provided a written response to our evaluation report and we included that document as an appendix to our report's final version.

Subsequently, our office has been in ongoing dialogue with GSA management about its plan to implement the recommendation.

In my next semiannual report to Congress, which is scheduled to be delivered to you at the end of October, I will inform the Committee about the status of the recommendation and whether our office agrees with the final GSA management decision regarding its implementation.

Mr. MEADOWS. Madam Chairman, I have a unanimous consent request.

Ms. TITUS. The gentleman is recognized.

Mr. MEADOWS. I thank the gentlewoman.

In light of the testimony indicating that there was a $6 million annual loss that Mr. Mathews had, I would ask it be entered into the record both a briefing and a part of the lease that would indicate a base rent of $3 million, which would be income to the U.S. Government, not an expense.

I ask these documents be entered into the record.

Ms. TITUS. Without objection.

[The information is on pages 113–115.]

Mr. MEADOWS. Thank you.

Ms. TITUS. Thank you.

Thank you both for your testimony.

We will now move on to Member questions. Each Member will be recognized for 5 minutes. And I will start by recognizing myself.

Mr. Mathews, before you accepted your current job in the summer of 2017, did anyone affiliated with the Trump administration, Trump transition team, Trump campaign, or Trump Organization ask you for your opinion on whether the Trump Organization was in violation of the lease for the Old Post Office?

Mr. MATHEWS. I had no communication with anyone from the Trump companies while I was being considered for this position, no.

Ms. TITUS. Have you ever had any communication with any current or former GSA employees about how the White House or President Trump would respond if he were forced to divest from his business interests?

Mr. MATHEWS. Well, I worked for this subcommittee as the majority staff director, and we certainly received briefings from GSA on this very question.

Ms. TITUS. Thank you.

Ms. Ochoa, in January of this year, your office issued the report that has been described and outlined the failures of the GSA to address the issues with the lease, including those that pertain to the Emoluments Clause. Is that correct?

Ms. OCHOA. Yes.

Ms. TITUS. And on March 29 of 2019, GSA delivered a corrective action plan to you in response to the recommendations of how they should remedy the issues with the hotel lease. Is that correct?

Ms. OCHOA. Yes.

Ms. TITUS. And did you find that GSA's plan to remedy the situation was sufficient?

Ms. OCHOA. We have not agreed with the agency's corrective action plan to date.

Ms. TITUS. And, in your judgment, did GSA adequately clarify the section of the Old Post Office lease that prohibits elected officials from being a party or beneficiary of a Federal lease?

Ms. OCHOA. It is my understanding that GSA has not undertaken the analysis we requested or made——

Ms. TITUS. Did GSA bother to do the legal review of the Emoluments Clauses that they failed to do when Donald Trump took office and that you recommended?

Ms. OCHOA. I have no information that they have done that.

Ms. TITUS. So GSA went back and is it correct they submitted another plan to you on August 26 of 2019? Is that correct?

Ms. OCHOA. I think that is the right date.

Ms. TITUS. And did your office find that their plan to remedy the situation on that day was significantly different from the one that they had submitted back in March?

Ms. OCHOA. No, it is not.

Ms. TITUS. I have the two documents here. The first is the GSA's corrective action plan dated March 29, and the second is the inspector general's communication with the GSA on September 6, 2019. I would ask for unanimous consent that they be entered into the record.

Without objection, so ordered.

[The information is on pages 107–111.]

Ms. TITUS. Section 37.19 of the lease states that no Member or Delegate to Congress or elected official to the Government of the U.S. shall be admitted to any share or part of this lease or to any benefit that may arise therefrom.

Ms. Ochoa, your agency said that the GSA needed to clarify this language. Is it true that GSA attempted to clarify this language by claiming that it should only apply to Members of Congress and not the President of the United States?

Ms. OCHOA. The corrective action plan proposes to drop the language from section 37.19 that prohibits both State and local elected officials and the President and Vice President from benefiting from the lease.

Ms. TITUS. So their way of dealing with the problem of the President coming under the Emoluments Clause was to drop the President from the lease and just say that in the future this would apply only to Members of Congress but not the President and the Vice President. Is that correct?

Ms. OCHOA. Or State and local elected officials.

Ms. TITUS. For both clauses then. Yeah.

Ms. OCHOA. That is my understanding of the corrective action plan as to section 37.19.

Ms. TITUS. I found that astounding.

And on top of that, is it correct that, to date, GSA has still, in your judgment, failed to uphold its constitutional obligation about conducting the legal review of the Emoluments Clauses?

Ms. OCHOA. Yes, I am not aware of their effort to look into the Emoluments Clause in connection with how it affects interpretation of section 37.19.

Ms. TITUS. Mr. Mathews, I am sure we are in agreement that the President of the United States is an elected official of the Government. Given that the agency's independent IG has just said that you failed to uphold your duties under the U.S. Constitution, can you commit that the GSA will conduct a legal review of the Emoluments Clauses as they pertain to the Trump DC Hotel?

Mr. MATHEWS. First, I would like to just respond to our corrective action plan. So, with respect to the "interested parties" provision, GSA agreed to no longer use the language contained in section 37.19 in future outleases—not in the current lease—in future outleases. So I just wanted to correct——

Ms. TITUS. So in future leases only Congress is prohibited, but not the President and Vice President, in case there are future leases. We got that.

Mr. MATHEWS. Correct.

Ms. TITUS. Now, will you conduct that study of the legal implications or legal review of the Emoluments Clause?

Mr. MATHEWS. So, on that question, what we propose to do in future outleases is to remove the ambiguity from that "interested parties" clause by striking it and referencing the statutory basis for that clause so there is a direct reference to that statutory reference. That is what we are prepared to do——

Ms. TITUS. That statutory reference does not supersede the Constitution. So it seems to me that the IG's investigation revealed that you all just completely ignored the serious legal and ethical questions here. And your response to their recommendations was not to follow the recommendations but to strike the President and Vice President and say, oh, that just applies to Congress.

Thank you, and my time is up.

Mr. Meadows—oh. Mrs. Miller will be recognized.

Mrs. MILLER. Thank you, Chairwoman Titus.

And thank you, Ranking Member Meadows.

I spend most of my time on the Oversight Committee in hearings designed by my colleagues across the aisle with only one goal: to impugn and impeach our President. And now, instead of being productive in this committee, we are subjected to another display of political theater and listening to what the left thinks about what the President is doing with the hotel that he is not involved with.

Here I am in a Committee on Transportation and Infrastructure subcommittee meeting—it is one of the most bipartisan committees in Congress—and we are doing it again. This is disappointing. I find it disturbing and a waste of the American people's time and dollars.

I came to Congress to work on the issues that matter. Infrastructure is the future of America and the future of our States and my home State of West Virginia. When this hearing was first noticed, it was supposed to be a disaster recovery hearing—again, an issue that is very important to my home State and many of the other States that are suffering. It is an issue that I want to work on.

It is sad that the political environment is so toxic that it is preventing us from doing what we came here to do, which was to work together on the things that matter.

Mr. Mathews, isn't it true that before the lease that we were losing $6 million per year on the Old Post Office and that now the taxpayer is actually receiving income?

Mr. MATHEWS. Yes, that is correct. We have essentially a $10 million swing in the operating revenues of that facility. It has been a tremendously successful project, a bipartisan project, from a real estate perspective and a financial perspective from the taxpayer.

And we also have a building that had approximately $200 million in unfunded capital repair requirements. It has been fully renovated. All the mechanical, electrical, plumbing, you name it, it is all brandnew. The building is being maintained to a high standard.

It is a very successful real estate project for the taxpayer.

Mrs. MILLER. On what date did the GSA announce the selection of the Trump Organization as the preferred developer for the Old Post Office Building?

Mr. MATHEWS. The lease was executed on August 5, 2013.

Mrs. MILLER. And when was it signed?

Mr. MATHEWS. That is when it was signed, ma'am.

Mrs. MILLER. OK.

Mr. MATHEWS. August 5, 2013.

Mrs. MILLER. And on what date did the President alert the GSA that he intended to alter the business structure to assign his interest to another party in order to comply with the lease?

Mr. MATHEWS. I believe that took place—I would have to check to get that exact date. I am afraid it is not on my timeline. But I believe it was either early 2017 or late 2016.

Mrs. MILLER. I would like to know when it is finalized. Was that before or after his official inauguration?

Mr. MATHEWS. And that was January 23. So I would have to get that specific date, but it was right around that time.

Mrs. MILLER. OK.

At what date was it determined, following the review of the lease, that the tenant was in full compliance and it went in effect?

Mr. MATHEWS. That was March 23, 2017.

Mrs. MILLER. Thank you.

I yield back my time.

Ms. TITUS. The gentlelady yields back.

I would like to make a clarification. I don't know where this is coming from, that the hearing was noticed for disaster relief. This hearing has been noticed for this topic all along. And so that is something that needs to be cleared up.

Mr. MEADOWS. Madam Chairman, I think what it was was when we had the subcommittee looking at proposed hearings, you noticed it one way, but when we were doing the hold date, it was hold for disaster relief. I think that is where the ambiguity is.

Ms. TITUS. I think that is scheduled for later next week. We will be looking at FEMA again.

Mr. MEADOWS. I have a unanimous consent request——

Ms. TITUS. OK.

Mr. MEADOWS [continuing]. Madam Chairman.

I would ask unanimous consent that these three photos be entered into the record that show the Delegate from DC, the mayor of DC, along with President Trump, at the ground-breaking, along with the celebration at the ribbon-cutting with the Delegate from

DC, trying to demonstrate how everyone seemed to be happy about this until the President was elected.

Ms. TITUS. Without objection, we will enter these into the record.

[The information is on pages 116–117.]

Ms. TITUS [examining photos]. Ms. Norton, you are looking good here.

And I would point out, this is prior to the President being elected, which changes——

Mr. MEADOWS. Well, I would point out, one of the photos, for the record, is after——

Mr. DEFAZIO. Can we return to the topic at hand?

Mr. MEADOWS. Well, to my knowledge, just a point of clarification, to make clear on the unanimous consent request, is that one of the pictures is actually after the opening of the Trump Hotel.

Mr. DEFAZIO. Who cares?

Ms. NORTON. Would the gentleman yield?

Mr. DEFAZIO. Could I please ask——

Ms. TITUS. Could we have a little order in here, please? Could we please have a little order?

This is——

Mr. DEFAZIO. No objection.

Ms. TITUS. All right. There was no objection to entering these into the record. We just want to be clear that this is at the lease signing, which is prior to Mr. Trump being inaugurated as President. All right. Prior to him being President.

We will now recognize Mr. DeFazio for 5 minutes.

Mr. DEFAZIO. Thank you, Madam Chair.

You keep referring to the income, which is actually mandated by the lease, and all you are talking about is the mandated rent payment. And there is a provision of the proposed lease, percentage rent difference, where—and I would again question GSA's judgment in how they calculate this—but that we are supposed to receive an additional amount of money if the property is profitable.

And according to the only released monthly statements that were leaked or intentionally put out by a public-spirited employee at GSA, it began to be profitable in February 2017.

So, Mr. Mathews, last year—all you are quoting to us is the rent payment. What was the additional amount paid to the GSA under the terms of the lease out of the profits of the Trump Hotel?

Mr. MATHEWS. Thank you for the question.

Mr. DEFAZIO. It is a simple question. Just give me the number.

Mr. MATHEWS. So I actually need to correct something. The profit-sharing is not based on profits; it is based on gross revenues.

Mr. DEFAZIO. OK.

Mr. MATHEWS. And those gross revenues are reported——

Mr. DEFAZIO. OK. So what was the amount? I am asking you a simple question. We do not have that number. You have not provided us that number. What additional payments were made to the Government last year under this lease beyond the mandated rent? How much?

Mr. MATHEWS. We received—and the way it's structured is it is based on gross revenues with a minimum payment of approximately $3 million and a maximum payment—it is a percentage of the gross revenues.

Mr. DEFAZIO. Three percent more, up to 3 percent.

Mr. MATHEWS. It escalates——

Mr. DEFAZIO. OK. All right. So how much did we receive last year over and above the mandated rent?

Mr. MATHEWS. As I testified, we received the approximately $3 million base rent.

Mr. DEFAZIO. OK. So all we got was the base rent. So you are saying this hotel is losing money?

Mr. MATHEWS. I am not saying that.

Mr. DEFAZIO. No one is staying there? There are no gross revenues? There is no sharing? It is not beyond the lease?

OK. So you are telling us that. Do you believe it is legitimate for this committee—you worked for this committee for a long time.

Mr. MATHEWS. Yes, I did.

Mr. DEFAZIO. Do you believe we have oversight responsibility?

Mr. MATHEWS. Yes, I do.

Mr. DEFAZIO. Good. Now, then why can't we get anything except redacted monthly statements [indicating document]? How do we know—and you can't give me a number—that we are getting the additional payments that are required under the lease if you won't give us any financials? Will you give us the financial statements?

Mr. MATHEWS. So——

Mr. DEFAZIO. Will you give us, yes or no?

Mr. MATHEWS. So our goal——

Mr. DEFAZIO. Yes or no?

Mr. MATHEWS. Our goal is to——

Mr. DEFAZIO. Yes or no?

Mr. MATHEWS. Our goal is to——

Mr. DEFAZIO. Yes or no?

OK. You are not going to answer that question.

OK. You were asked earlier about—so you are not going to provide those. How about doing an audit? You do do audits of leases. Is that correct, yes or no?

Mr. MATHEWS. We receive an annual audited financial statement——

Mr. DEFAZIO. Who audits it?

Mr. MATHEWS. It is a third party, and we receive an annual——

Mr. DEFAZIO. OK. Did you choose the third party?

Mr. MATHEWS. Excuse me?

Mr. DEFAZIO. Who chose the third party?

Mr. MATHEWS. The tenant provides——

Mr. DEFAZIO. Sure. OK.

Mr. MATHEWS [continuing]. The audited financial statement.

Mr. DEFAZIO. OK. So you don't feel you have any responsibility to check into that, or the contracting officer doesn't?

Mr. MATHEWS. That actually——

Mr. DEFAZIO. To the IG, would you conduct an audit of this hotel to see whether or not the income, which is required, over and above the base rent is being properly paid to the taxpayers of the United States of America?

Ms. OCHOA. Actually, GSA has specific authority under the lease to conduct such an audit.

Mr. DEFAZIO. Well, he just said they won't do it.

Ms. OCHOA. The focus of that audit would be on determining whether the Government is getting the appropriate rent payments.

Mr. DEFAZIO. Yes.

Ms. OCHOA. We would have to think about that. We certainly have oversight authority over the payment issue. We would have to think carefully about the resources that it would take to do such an audit and any constraints on our ability to get the records independently of GSA. We would have to think about whether it made sense for GSA to ask us to do that audit or to have an outside auditor with expertise——

Mr. DEFAZIO. But GSA has the authority. GSA has done this for other leases, I would assume.

Have you? Have you ever audited a lease, GSA ever audited a lease? Or do we let all of our tenants just send us their own financials and send us their own legal, you know, after they have hired an accountant?

Mr. MATHEWS. I don't know offhand if we have audited other leases, but we do——

Mr. DEFAZIO. OK.

Mr. MATHEWS [continuing]. Receive certified financial statements.

Mr. DEFAZIO. Right. OK. So, since you receive them, how much additional money beyond the base rent did we get last year, did the taxpayers of the United States of America get last year, under the terms of this lease? What was that number?

Mr. MATHEWS. We just received the base rent.

Mr. DEFAZIO. OK. So somehow you have calculated that, you know, within this whole purview, that there is no one staying there, there is no revenues over and above?

Mr. MATHEWS. Well, again, we receive certified annual financial statements that tell us what the gross revenue is, and we know that we are receiving the proper amount of rent.

Mr. DEFAZIO. OK.

I thank the gentlelady.

Ms. TITUS. I will now recognize Mr. Pence.

Mr. PENCE. Thank you, Chairwoman Titus, Ranking Member Meadows, and the witnesses before us today.

Ranking Member Meadows, I know you want to save taxpayers billions of dollars in the public building space, like it seems like we have saved $9 million a year here at the Trump Hotel, and I would sincerely like to thank you for your leadership on this issue.

I would like to take this opportunity to discuss real issues that impact Hoosiers and all Americans, like transforming how we approach Federal real estate and saving taxpayer dollars, instead of putting on a partisan show.

You see, billions of taxpayer dollars can be saved if we continue to, one, consolidate and reduce our space footprint; two, negotiate good lease deals; three, sell or redevelop properties that are underutilized and high-value; and, four, put people in more efficient buildings.

Commissioner Mathews, when we met back in April, I told you that I had two priorities: public-private partnerships and updating OMB score rules to bring our approach to Federal real estate to the 21st century.

If we are serious about transforming how we approach Federal real estate, it is critical for us to do things differently and put more options on the table, like P3s. Today, Mr. Meadows and I introduce a Public-Private Partnerships for Prosperity Act of 2019, legislation to provide GSA with flexibility to pilot the use of public-private partnerships.

Hopefully, we get back to doing the work for the people we represent instead of grandstanding and self-promoting.

I yield back.

Ms. TITUS. Thank you, Mr. Pence.

We will now recognize Ms. Davids.

Ms. DAVIDS. Thank you, Chairwoman.

Mr. Mathews, in light of the inspector general's finding that as a result of GSA's failure to address the constitutional issues raised by the lease in question, has GSA taken any steps to address the emoluments and other constitutional issues at all?

Mr. MATHEWS. So a couple of points on that.

One, so we agreed with the single recommendation of the report, as we understood it. And we are applying a new—to future outleases, we have agreed to remove the "interested parties" provision and replace it with a reference to the underlying statute that governs that provision to remove any ambiguity——

Ms. DAVIDS. Sir, that is not the question I asked. I didn't ask what you were doing moving forward on other leases. I asked about the lease in question.

Mr. MATHEWS. So the lease in question. There are a number of lawsuits that are pending that are specifically designed to address this question of, is there or is there not an emoluments violation?

In that forum, the Department of Justice speaks for the executive branch of Government. And the Department of Justice has argued before the courts there is no emoluments violation, there is no violation of the Constitution. And it would not be appropriate for GSA to opine on that matter, given that the courts are addressing that issue and the Department of Justice has——

Ms. DAVIDS. OK. Thank you. That is enough on that one.

So, in response to a question that was just asked, you said you were uncertain whether you have conducted any audits on leases that the GSA has entered into. Is that true? You don't know whether you have——

Mr. MATHEWS. So——

Ms. DAVIDS. So you are currently running the GSA. Is that right?

Mr. MATHEWS. I am the Public Buildings Commissioner; that is correct.

Ms. DAVIDS. OK. And you don't know if your agency conducts audits on leases?

Mr. MATHEWS. We have thousands of leases. We conduct a variety of contractual lease administration activities every day. If——

Ms. DAVIDS. And you are unsure if an audit——

Mr. MATHEWS. If they involve third-party——

Ms. DAVIDS [continuing]. Is one of those activities?

Mr. MATHEWS [continuing]. Audits, I couldn't tell you, but we enforce contract actions every day——

Ms. DAVIDS. Sir, I would like you, after this concludes, to submit for the record whether or not the GSA conducts audits on any leases that it enters into.

Mr. MATHEWS. We would be happy to——

Ms. DAVIDS. Thank you.

Mr. MATHEWS [continuing]. Get back to you on that.

Ms. DAVIDS. What percentage of the activities that you are responsible for right now for the American people, what percentage of those activities is managing leases?

Mr. MATHEWS. So we have about $10.5 billion flowing through the Federal Buildings Fund, over 8,000 leases, approximately $5.6 billion in annual rent expenditures for private-sector leases. It is the majority of our portfolio. It is one of our top priorities.

Ms. DAVIDS. That is a lot of money to not know whether or not you audit the activities.

Are you concerned about the fact that you may or may not be auditing $10-plus-billion annual funds that go to the Federal Government?

Mr. MATHEWS. We have program management reviews on a regular basis. We have contracting reviews on a regular basis. We have a whole office within GSA; it is outside of PBS, but it is called the senior procurement executive. We do contract reviews of different business lines on a regular basis. This year alone, we have probably gone through six or seven regions of internal contract reviews of our leasing programs. So there is tremendous oversight over this.

The question was about a very specific type of audit. And I don't know if we do that same type of audit across all of our leases. I don't know if those lease terms, frankly, allowing, authorizing that type of a specific audit is even present. This is an outlease. Outleases are a very few minority of our lease portfolio. Most of our leases, we are the lessee and we are leasing a facility from a lessor. In this case, it is reversed.

Ms. DAVIDS. How often do you have a profit-sharing provision in a lease that you enter into as the GSA?

Mr. MATHEWS. Again, our outleases are relatively——

Ms. DAVIDS. Can you please—because it sounds like that will take you a long time to get to. Can you please find out how many and then report that to the committee? And then also find out how often you conduct audits on outleases specifically and report that to the committee as well?

From the answers that you have given so far, in addition to the lease that we are currently reviewing, I have major concerns about the oversight that you have over any of the leases that the GSA has entered into, because it sounds as if you are not exactly sure what kind of review you are doing. And that is very problematic for the person who is ultimately responsible for the properties that the Federal Government has.

I yield back.

Ms. TITUS. Thank you.

The lady yields back, and we will now recognize Mr. Palmer.

Mr. PALMER. Madam Chairman, I have a point of inquiry before I begin my questions, if I may? And it is a serious—I am asking for information.

In Chairman DeFazio's opening statement, I just need to clarify, did he say that he had a conversation with a former GSA employee who gave him a different perspective on the lease arrangement?

Mr. DEFAZIO. No, I said my staff did.

Mr. PALMER. Your staff did. Did that individual provide—Madam Chairman, did that individual provide documentation either in printed or electronic format, or was the content of the conversation recorded?

Mr. DEFAZIO. May I respond to the gentleman?

The former staff who has jurisdiction over this issue met with a person from GSA, and that person said there were substantial issues to be resolved.

That conversation was characterized and sent to GSA in a letter of inquiry in November. And GSA said that is not the conversation, and they denied the whole thing. So that is the end of that. And that gentleman has been transferred to New York, and he won't talk to anybody.

Mr. PALMER. OK. But it was a former——

Mr. DEFAZIO. He has been transferred——

Mr. PALMER [continuing]. A former staff——

Mr. DEFAZIO. He has been transferred to New York, the GSA employee.

Mr. PALMER. Madam Chairman, my inquiry is, was that a former member of this committee's staff that had that conversation? And if it was documented in any form, then it should have been provided to the entire committee, the staffer identified and the individual identified. That would be my point of inquiry.

Mr. DEFAZIO. I have no idea what he is talking about.

Ms. TITUS. We will just take a minute to take that under consideration.

Mr. PALMER. Thank you, Madam Chairman.

[Discussion off the record.]

Ms. TITUS. I have been advised that it was an informal meeting to a former staffer. I am sure those kind of meetings take place all the time. We can talk about that further offline.

Mr. PALMER. I thank you, Madam Chairman.

Ms. TITUS. Thank you.

Mr. PALMER. It would be my opinion that that information should have been provided to the entire committee, but I really appreciate your response to the inquiry.

Ms. TITUS. OK. Thank you.

Mr. MEADOWS. Yeah. Point of order.

Ms. TITUS. Mr. Meadows?

Mr. MEADOWS. If indeed it is entered into the record, it has to have something that is documented. You can't have a referral to a testimony that is not something of record, according to the committee rules.

Ms. TITUS. This was not a testimony. It was not referred to as a testimony. It was referred to as an informal conversation with a former staff person.

Mr. MEADOWS. So a point of inquiry, then. Was it subject to your investigation?

So you are saying this is not part of your normal investigation; this was just a casual conversation.

Ms. TITUS. This was back in 2016.

So we will move on with the questions from Mr. Palmer.

Mr. MEADOWS. You mean under the previous Congress?

Ms. TITUS. Yes.

Mr. MEADOWS. So, then, it is not relevant to this hearing.

Ms. TITUS. Well, it is as relevant as the pictures from the ribbon-cutting are.

So I think we will now move on with Mr. Palmer's questions.

Mr. PALMER. Thank you, Madam Chairman.

IG Ochoa—is that correct?

Ms. OCHOA. "Ochoa."

Mr. PALMER. "Ochoa." Thank you. In your written testimony, you make a point in your conclusion that appears to say that the procedures that the GSA followed in these outleases of historic properties is consistent with the other outleases.

I will read it to you. It says, "GSA OGC has acknowledged that if a constitutional violation were later found, they would have to revisit the issue of potential breach of the OPO lease's Interested Parties provision; however, the fact remains that GSA continues to use the language of the provision in other outleases of historic properties."

So it appears to me that they are basically doing what they always do. It is almost like a cut-and-paste and a lease arrangement that occurred, apparently, in 2013? Is that accurate?

Ms. OCHOA. Are you asking me about the origin of that language?

Mr. PALMER. No, ma'am, I am asking you if this is consistent with what, as you point out, and it appears that you think is problematic, GSA has kind of a standard operating procedure for these outleases of historic properties.

Ms. OCHOA. The point of the sentence that you are reading to me was that GSA has told us that if there is a constitutional violation found, it would have to go back and revisit whether there was a breach——

Mr. PALMER. But the point I am making——

Ms. OCHOA [continuing]. Of the Post Office lease. They still have the same language in two existing leases.

Mr. PALMER. It is consistent with the other leases. It is the same language in these other outleases of historic properties.

Ms. OCHOA. Yeah, it is substantially similar. The only difference is which State and local officials it applies to.

Mr. PALMER. That is my point. This is a standard lease.

Madam Chairman, I yield the balance of my time to the ranking member, Mr. Meadows.

Mr. MEADOWS. I thank the gentleman from Alabama.

Mr. Mathews, let me come to you. Is the Trump Organization in breach of their contract?

Mr. MATHEWS. No. In March 2017, the contracting officer found them in compliance.

Mr. MEADOWS. All right. And so, with regards to the lease payments, are they in breach of their lease agreement up until today? Are they paying the accurate amount of lease payments as agreed upon in the lease that we all have?

Mr. MATHEWS. Correct. They are current on their rent.

Mr. MEADOWS. In your long history with this committee and with GSA and dealing with public buildings, would it be foolish for them to underpay on their lease because that would, in essence, terminate the lease after all of the improvements they have made?

Mr. MATHEWS. It certainly wouldn't be wise.

Mr. MEADOWS. OK. Well, let me put it this way: If you had invested millions of dollars to upgrade the Old Post Office, would you make sure that you are making your monthly payments in accordance to the lease so that you do not default on a lease?

Mr. MATHEWS. One would think it would be important to remain in compliance with the lease, absolutely.

Mr. MEADOWS. All right.

So, fundamentally, the question that we have before us today is not whether the Trump Organization is making the payments that have been negotiated under the previous administration, as I said in my opening statements. It is not that they are—so this all boils down to an emoluments question and whether the President of the United States should get some kind of benefit tangentially from the operating of a hotel that he leased prior to him becoming President. Is that correct?

Mr. MATHEWS. Yes, it is. We know we receive—we have a certified, annual, audited financial statement. We know that the right amount is being paid. And you are right; at the end of the day, this comes down to that core question, which is pending before the courts. And GSA is not in a position to opine on that answer. The Department of Justice has already.

Mr. MEADOWS. Does GSA have a number of buildings in the Washington, DC, area that they are actually paying money, taxpayer money, out on an annual basis to maintain those buildings that is a net cost to the taxpayer?

Mr. MATHEWS. There are some, and most of them are historic buildings.

Mr. MEADOWS. Are there more than a dozen of those?

Mr. MATHEWS. I don't know about in the National Capital region, but——

Mr. MEADOWS. It is a softball question.

Mr. MATHEWS [continuing]. Certainly nationally, absolutely.

Mr. MEADOWS. OK. All right.

And so, in doing this, what you took was a nonperforming asset, where we lost, according to your testimony, $6 million a year—is that correct?

Mr. MATHEWS. Yes.

Mr. MEADOWS. And you are now making it a net plus at $3 million a year to the Federal Treasury. Is that correct?

Mr. MATHEWS. That is correct. It has been a very successful financial real estate transaction for the taxpayer.

Mr. MEADOWS. I yield back.

Ms. TITUS. Thank you.

The Chair now recognizes Ms. Norton.

Ms. NORTON. Well, hooray for us. We don't even know if we are getting the share of the profits that the Government is entitled to.

The Old Post Office Building Redevelopment Act was my bill. This building is located not only in my district, in the Nation's Capital. It was an embarrassment to anyone who came. It is catty-cor-

ner from the White House. It was a dump. The first floor was used for street vendors, essentially.

And so we finally were able to get those taxes—and, by the way, that bill, they do pay property taxes to the District and DC hotel tax. You bet your life I was quite pleased to cut the ribbon on this dump and make it into a real asset for the Federal Government. It was underperforming. And, in plain sight, the Government was losing millions of dollars every day.

Let me ask you, Commissioner Mathews, you said that the GSA now receives a monthly rent payment. And here I am quoting the amount you indicated—$267,653 a month. I appreciate that figure. As with any testimony, could you tell us how the Congress can verify your answer? Obviously, we don't take at face value figures like that without having some way to verify them and, therefore, give credit to such an answer.

Mr. MATHEWS. Well, so we receive the rent, we receive payments; those go into the U.S. Treasury. We certainly could provide you the financial transaction records that show that those deposits were made. I am sure that is possible.

Ms. NORTON. Mr. Mathews, what GSA continues to provide Congress with are monthly and annual financial statements. I made this same request 2 years ago, but we have still not received the monthly financial statements.

I am asking you now at this hearing, will you commit to providing this committee with these financial documents so we can verify that the Old Post Office is a performing asset, as you have indicated today?

Mr. MATHEWS. So, with respect to the financial documents request, I would say our goal is to accommodate the committee's oversight request to the greatest extent possible while ensuring compliance with our contractual obligations to the tenant. And our staffs, I know, are discussing these issues, and we are trying to accommodate that request so we can provide information while also respecting our contractual obligations under the lease.

Ms. NORTON. You will engage with the committee on this question of providing the documents I have just asked for?

Mr. MATHEWS. Our staffs are. Correct.

Ms. NORTON. What?

Mr. MATHEWS. Our staffs are. Correct. Yes.

Ms. NORTON. As we speak. All right.

Thank you very much, Madam Chair.

Ms. TITUS. The gentlelady yields back.

Mr. LaMalfa is recognized.

Mr. LAMALFA. Well, thank you, Madam Chair, for letting me sit on the committee today and ask a couple questions.

As we get into the fall season here, you know, the pumpkins are ripening and people are just going crazy for pumpkin spice coffee and early birds are putting the witches and ghosts out in their yards, so we are going to chase a few more witches and ghosts, I guess, right?

Because I am in disbelief that we are here, at a time with the fires in the West that we have had and the hurricanes and the flooding in the South, the infrastructure we should be working on, boosting up our levees and water infrastructure and everything

around this country, that we are dealing with a hotel here once again that has been established as making money after it was losing money for years.

And it is getting down to, do we have to ask our accountants, is it, in fact, making money? I mean, that is pretty simple stuff. Do we want to see the, you know—Mr. Mathews, has the President signed the checks himself? I mean, I have a hat with his signature on it. You can compare signatures to make sure that it is actually happening. Do you need that information?

Mr. MATHEWS. I know the lease is with the Trump Old Post Office LLC, not with the President himself.

Mr. LAMALFA. OK. Well, that is about what we are down to here.

Now, if we wanted to actually talk about what this committee works on, you know, the Subcommittee on Economic Development, Public Buildings, and Emergency Management, I had hoped we would do more emergency management, with what we have going on, but we do have a situation of a public building in California.

There is a request for a new Federal building, one for the Citizenship and Immigration Services Center which processes immigration applications. Kind of a big deal right now, right? Their existing building has an extremely high-risk seismic classification and other health issues in the building which have impacted Federal workers and has caused delays in processing immigration applications. Again, kind of a big topic these days.

So this committee hasn't acted on that. You know, it has done some other business here, but a very high-priority issue is our border and the people that—you know, we hear a lot of dramatics about how they are doing along the border.

With the committee not having addressed this, can you talk about the importance of expediting this and the committee doing this work?

Mr. MATHEWS. I guess I would say a couple things.

Seismic interests are obviously very important. We have an older inventory, so oftentimes our buildings are not to current seismic codes. And so we are in the process of upgrading a number of buildings across the country in high-risk seismic areas, some in northern California, some in Oregon, some in Seattle, Washington, as well, and then in the New Madrid Fault area.

And one of our biggest challenges is our Federal Buildings Fund. We receive about $10.5 billion in rent from our tenant agencies every year, but we only receive appropriation out of that fund, about $9 billion to $9.5 billion a year. So every year we are being shorted about $1 billion, $1½ billion of funds that can only be spent on public building purposes under title 40.

But the money is sitting there, and we are not able to access it. And properties like you are describing, we are really challenged to repair them, get them in good working order, and to make them safe. And we have thousands of employees sitting in Federal buildings that need——

Mr. LAMALFA. Exactly.

Mr. MATHEWS [continuing]. Real significant improvements, and if we had full access to the funds in the Federal Buildings Fund, we would be able to do that.

It is absolutely critical to approve prospectuses in a timely manner. And, again, that is why I thanked the chairwoman for her help, particularly with a prospectus we had for a building in her district. We have a courthouse; it is about 20 years old, and the fire and life safety system—we proposed that project. And for a good year and a half, that prospectus was sort of blocked up in the Senate. And thank you for your help. We were able to get it loose, and we are now——

Mr. LAMALFA. Well, it would be nice——

Mr. MATHEWS [continuing]. Replacing the fire alarm system.

Mr. LAMALFA. It would be nice, Mr. Mathews, if we could get that prospectus going here. Because we have a backlog at the border; we have, obviously, many seismic issues in my home State of California and nearby in Oregon as well and in the West. So would you say this is a priority this committee should take up?

Mr. MATHEWS. Yes. We would very much appreciate that. The——

Mr. LAMALFA. OK. Thank you. I should end it there. I would like to yield the rest of my time to Mr. Meadows. So thank you for that answer, Mr. Mathews.

Mr. MEADOWS. I thank the gentleman from California.

Ms. Ochoa, let me come to you. After your report was released, I think Seth Tillman, a lecturer for the Maynooth University Department of Law, wrote you, detailing a factual error in your constitutional analysis of the Emoluments Clause. Are you aware of that?

Ms. OCHOA. I am aware that Professor Tillman wrote, asking that we adopt his particular argument.

Mr. MEADOWS. But pointing out that he felt like you had a factual error.

Ms. OCHOA. He expressed a different view.

Mr. MEADOWS. Well, did he say you were correct?

Ms. OCHOA. He expressed a different view——

Mr. MEADOWS. It is an easy—well, you have counsel behind you, if you want to turn around and ask them. I mean, did he agree with your analysis?

Ms. OCHOA. No, he did not.

Mr. MEADOWS. OK.

So I would ask unanimous consent that we enter into the record the statement from Professor Josh Blackman and Lecturer Seth Tillman detailing the exchange with Ms. Ochoa's office.

Ms. TITUS. Without objection.

[The information is on pages 117–120.]

Mr. MEADOWS. Thank you. I yield back.

Ms. TITUS. We will now recognize Mr. Garamendi.

Mr. GARAMENDI. Thank you, Madam Chair.

The question has been raised on why we are here——

[Audio malfunction in hearing room.]

Mr. MEADOWS. It wasn't me, John.

Mr. GARAMENDI. No, it certainly wasn't Mr. Meadows. Thank you.

The question has been raised as to why we are here today dealing with this issue. All of us have taken the oath of office, and it basically says, "I do solemnly swear that I will support and defend

the Constitution of the United States against all enemies, foreign and domestic, and I will bear true faith and allegiance to the same."

We are really here about the Constitution of the United States. We know that Article I, Section 9, Clause 8, is the Foreign Emoluments Clause, which is very much a question before this committee at this moment, and Article II, Section 1, Clause 7, the Presidential Emoluments Clause, is also before the committee at this moment.

I think we would all agree that that is the issue at hand, and the reason we are here is to carry out our solemn oath of office.

And both of you before us also took the same oath of office.

So let us proceed, then, with some questions in an understanding of why we are here.

Mr. Mathews, you stated just a moment ago that the tenant is in full compliance with the lease.

My question goes to Ms. Ochoa.

On page 23, paragraph 5, lines 6 through 9 of your report, you say, according to it, can—my question to you is, can the GSA state definitively that the Trump Organization, LLC, is not in breach of the Old Post Office lease terms without—without—an evaluation of these constitutional questions?

In other words, can you tell us definitively that they are not in breach until such time as the constitutional Emoluments Clause issues are dealt with?

Let me put that in the positive. Are they in breach of their lease because of the Emoluments Clause and the lease language itself?

Ms. OCHOA. It is hard to have a full discussion of that issue without being able to discuss GSA's legal opinions. Certain portions of our report have been redacted based on claims of privilege.

What I can say and what we said in the report is that, without employing the doctrine of constitutional avoidance, in their interpretation of section 37.19, they foreclosed a way of taking the emoluments issues off the table.

Mr. GARAMENDI. They pushed aside the fundamental constitutional issue of emoluments and simply said, that is not relevant. Is that correct?

Ms. OCHOA. They said they were not going to decide the issues. I don't think they said they were not relevant. They recognized it was an issue; it was an issue relevant to the lease. But they decided that they were not going to attempt to resolve the issue.

Mr. GARAMENDI. On page 8 of your report, you say that he—I suspect you mean the President here—still retains his financial interest in the property. Is that your view? Is that correct, that he does maintain a financial interest in the property?

Ms. OCHOA. I believe that is a fact.

Mr. GARAMENDI. OK.

Mr. Mathews, does the President maintain a financial interest in the property?

Mr. MATHEWS. I believe that is correct, yes.

Mr. GARAMENDI. So your answer is, yes, he does maintain a financial interest in the property.

Mr. MATHEWS. I am not familiar with all the details of the financial structures of the company, but I believe that is correct.

Mr. GARAMENDI. You believe that is correct.

Mr. MATHEWS. I do, yes.

Mr. GARAMENDI. Thank you.

Now, are you aware of any payments made to the hotel from foreign governments?

For both of you, Mr. Mathews first.

Mr. MATHEWS. So GSA, we are not involved in the daily management of the hotel. That is why we did an outlease.

Mr. GARAMENDI. So you are unaware of any payments from any foreign governments?

Mr. MATHEWS. I have certainly seen press reports.

Mr. GARAMENDI. But you have not asked for or received specific information on that issue, even though it would be a question of the emoluments and the lease itself?

Mr. MATHEWS. Well, with respect to the question of emoluments, that question is pending before the courts, and——

Mr. GARAMENDI. We understand that, but my question to you is, have you attempted to collect any information on payments from foreign governments, even though the lease itself raises that issue?

Mr. MATHEWS. We don't receive that level of information——

Mr. GARAMENDI. So the answer is that you have not.

Mr. MATHEWS [continuing]. In the financial documents.

Mr. GARAMENDI. Ms. Ochoa, do you have any information about payments from foreign governments?

Ms. TITUS. The gentleman's time has expired.

Ms. OCHOA. Would you like me to answer the question?

Ms. TITUS. You may answer the question.

Ms. OCHOA. We don't have direct access to the books and records of the hotel.

Mr. GARAMENDI. Thank you.

Thank you, and I yield back.

Ms. TITUS. Thank you.

Just for clarification—Mr. LaMalfa will be glad to hear this, I think, if you all can tell him. He was talking about a request for funding for a new building in Laguna Niguel. GSA sent us that prospectus 3 weeks ago, and minority and majority staff are already meeting with GSA on that subject. So we would like to share that information with him.

Now, Mr. Weber is recognized.

Mr. WEBER. Thank you, ma'am.

It is appalling to me, too, that we are kind of here, because Congressional District 14 in Texas is a gulf coast district, and we have had Hurricane Harvey 2 years ago that we are still trying to recover from and now Tropical Storm Imelda. And those are the things we should be focused on, in my opinion, but we are here.

Mr. Mathews, you were sworn in in August 2017. You stated that the lease was signed August the 5th, 2013.

Mr. MATHEWS. Correct.

Mr. WEBER. Do you know when those negotiations for that lease began?

Mr. MATHEWS. I believe they began in 2012.

Mr. WEBER. 2012. OK. So it was well before Donald Trump's announcement, June 16 of 2015, that he was going to run for President?

Mr. MATHEWS. Yes, absolutely.

Mr. WEBER. OK.

Are you aware of the lawsuits that have been filed against Trump over this hotel, the three lawsuits we call the CREW suits, for example?

Mr. MATHEWS. Yes, that is correct.

Mr. WEBER. And how about you, Ms. Ochoa? Are you aware of those.

Ms. OCHOA. I am, yes.

Mr. WEBER. Are you aware that at least two members of this committee are associated with those lawsuits?

Ms. OCHOA. Am I personally aware?

Mr. WEBER. Yes, ma'am.

Ms. OCHOA. I haven't reviewed the——

Mr. WEBER. How about you, Mr. Mathews? Did you know that?

Mr. MATHEWS. Yes.

Mr. WEBER. OK. You did know that.

Once the GSA contracting office made the decision about the Emoluments Clause and decided to move on, was that sufficient for the two of you?

Mr. Mathews, we will go with you first.

Mr. MATHEWS. Well, obviously, that decision was made, you know, by the inspector general's own report and testimony, in December of 2016.

Mr. WEBER. Right.

Mr. MATHEWS. And subsequent——

Mr. WEBER. So was it sufficient for you? Did you say, OK, we will move on, we will do the American people's work?

Mr. MATHEWS. Well, I didn't arrive until 2017, so that ship had pretty much sailed.

Mr. WEBER. But when you got there, it was sufficient.

Was it sufficient for you, Ms. Ochoa?

Ms. OCHOA. No, for the reasons stated in the report.

Mr. WEBER. No, I gotcha. OK.

Well, we would love for this committee to be able to do the same thing, move on, do the American people's work as well.

I am going to yield back to the ranking member the rest of my time.

Mr. MEADOWS. I thank the gentleman from Texas.

Ms. Ochoa, I am going to come back and follow up on my good friend from California, Mr. Garamendi's question. Because he was talking about a memo that I guess is privileged from December of 2016. Is that correct?

Ms. OCHOA. No, there is not a memo from December of 2016. It is——

Mr. MEADOWS. All right. So the privileged memo that you were talking about, what privileged memo were you talking about there?

Ms. OCHOA. I am talking about the legal opinions that GSA's lawyers wrote in connection with advising the contracting officer about his interpretation——

Mr. MEADOWS. And when did those legal opinions get written? When were they written?

Ms. OCHOA. Those were in March of 2017.

Mr. MEADOWS. And they were written by whom?

Ms. OCHOA. They were written by GSA lawyers who were part of the team advising the contracting——

Mr. MEADOWS. And that team—and it was—at that particular point, had that legal team, were they part of the Trump administration? Were they political appointees, I guess is what I am getting at, or were they people who had actually worked at GSA during the procurement process?

Ms. OCHOA. It was the same team of lawyers spanning both administrations. These were career attorneys, yes.

Mr. MEADOWS. I am sorry, I didn't hear you. Could you repeat that?

Ms. OCHOA. The same team of lawyers looked at the issues spanning both administrations. They began looking——

Mr. MEADOWS. Yeah, but I think according to your testimony, it says, the Office of General Counsel, OGC, made the decision not to address the emoluments issue by mid-December of 2016. Do you stand by that?

Ms. OCHOA. I do, yes.

Mr. MEADOWS. OK. Was President Trump in charge of that decision at that particular point? Had he been inaugurated at that point?

Ms. OCHOA. No.

Mr. MEADOWS. All right. So any nefarious purpose of the emoluments issue being addressed, how would that have anything to do with the current President if the decision was made in December of 2016 during the last months of the Obama administration?

Ms. OCHOA. Our report didn't ascribe, or describe, any nefarious——

Mr. MEADOWS. No, but I guess what I am saying is there seems to be an implication that this administration was the one that actually said that there is not an emoluments issue. And I guess you and I both know what the real story is, and those decisions were made under the previous administration. Isn't that correct, according to your testimony?

Ms. OCHOA. Congressman Meadows, I would love to be able to talk with you about the legal opinions. I cannot because the——

Mr. MEADOWS. Well, did they happen in December—do you stand by your testimony that they happened in the mid part of December of 2016?

Ms. OCHOA. They made the decision to ignore the issue in December of 2016.

Mr. MEADOWS. All right. And do you think that President-elect Trump was putting pressure on them to make that decision at that point?

Ms. OCHOA. I have made no such——

Mr. MEADOWS. Do you have any evidence that would suggest that?

Ms. OCHOA. If we had found any such evidence, we would have reported it.

Mr. MEADOWS. I thought so.

I yield back.

Ms. TITUS. Mr. Johnson is now recognized.

Mr. JOHNSON OF GEORGIA. Thank you.

Mr. Mathews, prior to becoming Public Buildings Commissioner at GSA, you worked for several Republican congressmen out of California, and then you went to work for the House Rules Committee on the Republican side. And, thereafter, you came to the Transportation and Infrastructure Committee, where you ended up as staff director of the Transportation and Infrastructure Committee's Subcommittee on Economic Development, Public Buildings, and Emergency Management. And after that, you then went to the administration as Commissioner of Public Buildings. Is that correct?

Mr. MATHEWS. Yes, that is correct.

Mr. JOHNSON OF GEORGIA. And you are what we call a political appointee. Isn't that correct?

Mr. MATHEWS. Yes, I am.

Mr. JOHNSON OF GEORGIA. And you have had absolutely no experience in running a large organization. Isn't that correct?

Mr. MATHEWS. No, that is not correct.

Mr. JOHNSON OF GEORGIA. What large organization have you managed?

Mr. MATHEWS. I was the assistant deputy commissioner of the Texas Department of Health, and I——

Mr. JOHNSON OF GEORGIA. Assistant deputy director——

Mr. MATHEWS [continuing]. Deputy commissioner of the Texas Department of Health. And——

Mr. JOHNSON OF GEORGIA. OK.

Mr. MATHEWS [continuing]. Under our responsibility were several thousand people and a couple billion dollars.

Mr. JOHNSON OF GEORGIA. Well, I don't want your range of responsibilities, but I will say, welcome back to the——

Mr. MATHEWS. Thank you.

Mr. JOHNSON OF GEORGIA [continuing]. Subcommittee, that you now are Public Buildings Commissioner, answering to your prior subcommittee as a political appointee.

Now, let me ask you this question, sir. On March 20, 2017, the Trump Post Office LLC requested an estoppel certificate stating that the company was in full compliance with section 37.19 of its lease agreement. And GSA, your organization, the public buildings department, issued the letter. Isn't that correct?

Mr. MATHEWS. Yes. I worked for this committee at the time, but, yes, that is right.

Mr. JOHNSON OF GEORGIA. Well, but you—so my point is that, in issuing that estoppel letter, it was done 3 days after it was requested. The estoppel letter was issued 3 days after the Trump team requested it, correct?

Mr. MATHEWS. I don't know how many days went by, but we can find out for you.

Mr. JOHNSON OF GEORGIA. You don't know how many days? Well, you wouldn't disagree, then. It was 3 days.

And what kind of assessment would take place prior to granting an estoppel certificate by your department?

Mr. MATHEWS. Well——

Mr. JOHNSON OF GEORGIA. What would normally happen?

Mr. MATHEWS. So there is——

Mr. JOHNSON OF GEORGIA. And how long does it normally take? That is the question I want to ask.

Mr. MATHEWS. So there is a structure in place for making contract administration——

Mr. JOHNSON OF GEORGIA. Does it take longer than 3 days?

Mr. MATHEWS. Again, I don't know if it took 3 days or how long that was under consideration.

Mr. JOHNSON OF GEORGIA. Let me ask you this question. How many employees in your public buildings department?

Mr. MATHEWS. A little under 6,000.

Mr. JOHNSON OF GEORGIA. 6,000 employees. And how many public buildings?

Mr. MATHEWS. Well, when you include our lease portfolio, we have well over 10,000 facilities.

Mr. JOHNSON OF GEORGIA. And so you have not had a chance, with all that responsibility, to review what actually happened on this Trump Post Office lease? Is that correct? Even though you were the staff attorney for this subcommittee?

Mr. MATHEWS. I am not an attorney, but I was the staff director of the subcommittee.

Mr. JOHNSON OF GEORGIA. In fact, you have a degree in Government and philosophy.

Mr. MATHEWS. From Georgetown University, that is right.

Mr. JOHNSON OF GEORGIA. So now you are managing this big organization here. Have you received any phone calls from Donald Trump, Jr., Donald Trump, Eric Trump, or anybody concerned with the Trump Organization during your tenure as Public Buildings Commissioner?

Mr. MATHEWS. No.

Mr. JOHNSON OF GEORGIA. You have not?

Mr. MATHEWS. No.

Mr. JOHNSON OF GEORGIA. Are you certain about that?

Mr. MATHEWS. Yes, I am.

Mr. JOHNSON OF GEORGIA. Why was it that GSA did not embark upon a study to determine whether the Post Office lease to the Trump Organization was compliant insofar as the Emoluments Clause of the Constitution is concerned?

Mr. MATHEWS. Well, again, that decision was made in December of 2016 by the previous administration——

Mr. JOHNSON OF GEORGIA. And you could have had it reviewed, yourself, could you not, to determine constitutionality? Isn't that your responsibility as Public Buildings Commissioner?

Mr. MATHEWS. Well, I would say that conditions have changed since 2016. There have been a number of lawsuits filed, and this very question which you are asking is pending before the courts. And in that forum, the Department of Justice, who speaks for the executive branch, in that forum, has argued there is no violation of the Constitution. And so it wouldn't be appropriate——

Mr. JOHNSON OF GEORGIA. But your department never undertook such a review. Is that your testimony today?

Mr. MATHEWS. I am sorry, is that for me or——

Mr. JOHNSON OF GEORGIA. No, that is for you. You should know. You are the director of—you are the Commissioner.

Ms. TITUS. The gentleman's time has expired. Can you answer that "yes" or "no"?

Mr. MATHEWS. No, and it wouldn't be appropriate for us to do that.

Ms. TITUS. OK. Thank you.

We will now recognize Mr. Perry.

Mr. PERRY. Thank you, Madam Chair.

Inspector General Ochoa, according to the report, the OIG began the evaluation of GSA's management and administration of GSA's ground lease of the Old Post Office Building in July of 2017 in response to numerous complaints from Members of Congress and the public at large about the management of the lease.

The complaints generally raised two issues regarding the lease: One, does the Foreign Emoluments Clause or the Presidential Emoluments Clause of the U.S. Constitution bar President Trump's business interest in the Trump Old Post Office LLC (Tenant)? And, number two, does the President's business interest in Tenant violate section 37.19 of the lease?

The next paragraph of the report explains that the OIG did not seek to determine the accuracy of either complaint; rather, sought to determine whether there were any improprieties in GSA's decisionmaking process regarding these issues.

My question at this time is, why was the evaluation aimed at the decisionmaking process regarding the complaints rather than addressing the complaints themselves? In other words, did something preclude you or GSA from evaluating the emoluments question itself?

Ms. OCHOA. In the first instance, the responsibility for evaluating those issues was with GSA management. They had made their decision by the time we opened our review, and that is why we scoped our review to look at whether there was anything improper in the way they went about making those decisions.

Mr. PERRY. And the second case?

Ms. OCHOA. In both cases.

Mr. PERRY. You said in the first case it was management's——

Ms. OCHOA. In the first instance of addressing those issues, that was GSA management's responsibility. Our oversight extended to how GSA fulfilled its responsibilities.

Mr. PERRY. Why didn't you just address the questions themselves? Do you know why? I mean, you are the OIG, so you would know why they made that decision to look at the process as opposed to the questions themselves.

Ms. OCHOA. Yes. Yes, I do know why. It was a matter of exercising judgment as to the scope of the review. It wasn't necessary for us to resolve the merits of the issues in order to determine whether GSA was correct in recognizing there was a constitutional issue and whether their reasons for avoiding it were valid.

Mr. PERRY. So it wasn't necessary to answer the question of the complaints by Members of Congress or the—that is what you are saying right now. You——

Ms. OCHOA. No, I am——

Mr. PERRY [continuing]. Answered the administration of it but not the questions themselves, and you made that judgment.

Ms. OCHOA. I made the judgment that the review was appropriately scoped to address the concerns of the complaints.

Mr. PERRY. And the concerns of the complaints were regarding the Emoluments Clauses themselves, not the process by which you would evaluate them, and you decided not to do that.

Ms. OCHOA. It is one and the same. It is, how did GSA come to its conclusion.

Mr. PERRY. Well, no, because we don't get the answer, right? I mean, the answer is that it is settled constitutional law, but obviously it is not settled constitutional law.

Let me ask you this. When did you start your role as the IG for the agency?

Ms. OCHOA. In July of 2015.

Mr. PERRY. 2015.

Ms. OCHOA. Yeah.

Mr. PERRY. So you have been there for a little while. You are not a puppet of the administration. You are doing the job that you think that you are supposed to do regardless of who is the President or not and what interest they may have.

Mr. Mathews, regarding other similar leases that might be close to the Old Post Office, do you receive monthly statements from other leases in accordance to what has been asked of you in this hearing?

Mr. MATHEWS. Yes.

Mr. PERRY. And you receive them from the Trump Hotel as well.

Mr. MATHEWS. We do.

Mr. PERRY. And do you receive a breakdown of how much the profit or loss is based on the lease on a weekly, monthly, whatever basis?

Mr. MATHEWS. So we receive a monthly financial statement and an annual audited financial statement.

Mr. PERRY. And it is the same for all of them?

Mr. MATHEWS. I believe it is for all of them, yes. I can confirm that for you, but I believe that is the case.

Mr. PERRY. Generally speaking, right?

Mr. MATHEWS. Yes.

Mr. PERRY. There might be an outlier, but it is the same for all of them, and it is the same for the Trump Hotel/the Old Post Office? No difference, right?

Mr. MATHEWS. That is correct.

Mr. PERRY. So what you are being asked today, even though, according to my good friend from California, the reason for this—the focus of this hearing is on the Emoluments Clause, but we keep on being concerned about how much money we are getting. You are reporting the same as you do for the Trump Hotel as everyone else, and what you are being asked here today is to provide something wholly separate, unique, and different than every other lease that you manage.

Mr. MATHEWS. That is correct.

Mr. PERRY. And how many leases do you manage?

Mr. MATHEWS. Over 8,000.

Mr. PERRY. Thank you, Madam Chair. I yield my time.

Ms. TITUS. We want to clarify that there are only six of these outleases. So when you talk about the thousands of leases you

have, those would not be the same type as the type you have with the Trump Hotel. Is that correct?

Mr. MATHEWS. Outleases are——

Ms. TITUS. Yes, thank you.

All right. We will now recognize Mr. Brown.

Mr. BROWN. Thank you, Madam Chair.

I want to thank my colleagues on the committee for their attention and diligence on this issue. And I realize that a number of the questions, lines of inquiry that I had have already been covered.

So let me just start by saying, I am really troubled. I mean, I am, like, disturbingly frustrated to know that a Federal Government agency, the GSA, its officers, its attorneys, its supervisors, do not fulfill their responsibility to consider, uphold, and enforce all of the laws of this country, whether it is rules, Executive orders, statutes, and, yes, the Constitution. And to learn from the IG's report that that responsibility was shirked, it is disturbing, to say the least.

I don't think that any public servant, Members of Congress, the President, are above the law, but I don't think that that sentiment is shared at 1600 Pennsylvania Avenue. The bottom line is that, if the President had fully divested from his company, this hearing would not be necessary.

Instead, we have to discern whether the President is putting his business and personal interests above our Nation's. We have to question why foreign leaders, lobbyists, and even the Attorney General is choosing to spend tens of thousands of dollars at the Trump International Hotel and whether the President is trying to enrich himself in direct violation of the Constitution.

Commissioner Mathews, I want to direct this question to you. According to the Office of Inspector General's January 2019 report and contrary to both your written and oral testimony here today, GSA failed to appropriately consider the Emoluments Clauses—"clauses," both—to the U.S. Constitution in regard to the Old Post Office lease, as well as section 37.19 of the lease.

Mr. Commissioner, has anyone in the GSA Office of General Counsel provided you or any of your colleagues any guidance on the emoluments issue since the January 2019 report was issued?

Mr. MATHEWS. The answer is "no," but this emoluments question is pending before the courts, and that is——

Mr. BROWN. Yeah, I understand that, but—so, in anticipation, you have not made any inquiry of your general counsel on this issue?

Mr. MATHEWS. It wouldn't be appropriate for GSA to opine on——

Mr. BROWN. I was just asking "yes" or "no." I am just asking if you or any of your colleagues have made inquiry of your general counsel on the emoluments issue since the IG's report in January of this year. It is a "yes" or "no." It sounds like the answer is, no, you have not. Is that correct?

Mr. MATHEWS. That is correct.

Mr. BROWN. The committee has been requesting records relating to the Trump Hotel financial statements to the GSA. And I know a number of Members have asked about it.

Has the GSA Office of General Counsel provided you with guidance on how to track expenditures at the Trump International Hotel or any other similarly situated hotel relating to rental or lease fees derived from foreign, Federal, or State governments?

Mr. MATHEWS. Well, under the lease, the tenant is obligated to provide monthly and annual audited financial statements——

Mr. BROWN. And do they report revenues by revenue source, whether it is a foreign, Federal, or State government? Yes or no?

Mr. MATHEWS. The financial documents, again, we are working with——

Mr. BROWN. Well, I am just asking a question. I mean, it really is a "yes" or "no." I mean, I appreciate your desire to provide a lengthy explanation, but is there a process where the revenues are reported by source, specifically Federal, State, or foreign governments?

Mr. MATHEWS. We don't receive that sort of breakdown.

Mr. BROWN. So if the courts were to rule that there is a potential Emoluments Clause problem, are you saying that you don't have the systems in place to identify whether a foreign government paid for rent or lease or for services at the hotel?

Mr. MATHEWS. I am not going to speculate on what the courts may or may not do——

Mr. BROWN. So you are just going to wait until the court actions show——

Mr. MATHEWS [continuing]. Or what the implications of that may or may not be for GSA.

Mr. BROWN. Have you asked your general counsel about guidance on this issue?

Mr. MATHEWS. I am not going to speculate on what the courts are going to do.

Mr. BROWN. No, I am just asking you, have you asked your general counsel about the issue of whether or not you should or shouldn't track the sources of revenues or fees that are paid at the Trump Hotel?

Mr. MATHEWS. The tenant complies with the lease, and the lease has provisions——

Mr. BROWN. So have you asked your general counsel?

Mr. MATHEWS. I am not going to discuss the——

Mr. BROWN. Oh, so you are not going to answer that question "yes" or "no"?

Mr. MATHEWS. No.

Mr. BROWN. Let me just be clear. Are you going to answer "yes" or "no" to the question I just previously asked?

Mr. MATHEWS. Look, the—well, I am trying to answer your question——

Mr. BROWN. OK. Then let me restate the question. Let me be a little simpler in the question.

Mr. MATHEWS [continuing]. Financial statements.

Mr. BROWN. Let me be a little simpler. I am reclaiming my time. I am reclaiming my time.

Ms. TITUS. The gentleman's time has expired.

Mr. BROWN. OK. Boy, 5 minutes flies.

Ms. TITUS. I now recognize Mr. Westerman.

Mr. WESTERMAN. Thank you, Madam Chair.

Thank you to the witnesses for being here today.

Madam Chair, I was excited to see that we were going to be talking about the billions of dollars of Federal assets that are sitting out there unused, but, unfortunately, that is not really what this discussion is about. You know, I thought this horse had been ridden hard and put up wet, but apparently it died in the stable, and somebody wants to bring it out and beat on a dead horse a little bit more.

But there are serious issues this committee should be addressing. Just in my hometown of Hot Springs, Arkansas, we have a 200,000-square-foot hospital. It was the original Army and Navy hospital used from the 1800s up through World War II. It is a historic building. It currently needs a tenant. We have a national park there, where we have leased out historic bathhouses to private businesses.

We need to be doing more of that to take care of these old historic buildings, instead of having hearings to beat up on one of these buildings that actually is a success story, how we have reused Federal assets. And it is just a rhetorical question, but when are we going to start focusing on the real issues?

And I would like to yield the remainder of my time to Ranking Member Meadows.

Mr. MEADOWS. I thank the gentleman from Arkansas.

Ms. Ochoa, I am going to come back to you. So when you were preparing your review of this lease and drafting the report, did you reach out to outside legal counsel?

Ms. OCHOA. No.

Mr. MEADOWS. All right. So all your legal experts were from within the IG's office. Is that correct?

Ms. OCHOA. The team that did the review was inside the——

Mr. MEADOWS. And the drafting.

Ms. OCHOA. Yes.

Mr. MEADOWS. So they are on your IG staff. Is that correct?

Ms. OCHOA. Yes.

Mr. MEADOWS. All right. So who on your staff is a constitutional expert?

Ms. OCHOA. Actually, the three senior members of the team have over 70 years of combined experience handling constitutional litigation at the Department of Justice.

Mr. MEADOWS. All right. So, with the Department of Justice, obviously you were very critical with the GSA. You were very critical of the GSA in not consulting—I mean, with GSA of not consulting DOJ. Is that correct?

Ms. OCHOA. Yes, and not reaching out to try to find a solution to the issue that was presented.

Mr. MEADOWS. All right. So when you were drafting the report, did you take into account the DOJ's position on this issue?

Ms. OCHOA. We looked at GSA's decisionmaking at the time that the decision was made, and we looked at what was available to them in that context.

Mr. MEADOWS. So did you take into account their position, their published position, as it relates to this particular question?

Ms. OCHOA. The position that the Department developed in litigation doesn't affect the conclusions in our report.

Mr. MEADOWS. Well, but, by the IG's statute, you are bound to look at all of those legal experts. And you are saying that the three people that you relied on were from DOJ, but did you rely on any current DOJ opinion in drafting it?

Ms. OCHOA. Look, we were aware of the DOJ litigating position. We were not——

Mr. MEADOWS. So you just disagreed with it.

Ms. OCHOA. No. We didn't weigh in on the merits of the question that the DOJ litigating position is addressing. That is the merits of whether there is a violation of the constitutional Emoluments Clauses here.

All we engaged in was really an issue-spotting exercise. Because before we were about to criticize career attorneys for failing to address an issue, we wanted to make darn sure they were right when they realized that it was a potential constitutional issue. That is what our report was about.

Mr. MEADOWS. And so you used the key word there, "potential." Is that correct? So you are not making a definitive statement. You are not suggesting that the Supreme Court is going to come down on your side or GSA's side. You are not making an opinion there. You are just saying it could be a potential issue.

Ms. OCHOA. That is right. We are not trying to weigh in one way or the other. We don't know how the lawsuits will——

Mr. MEADOWS. So, when you did your report, did you look at and analyze the potential legal and financial exposure to the taxpayer that the contracting officer may have had in making this decision? Was that part of your analysis?

Ms. OCHOA. Excuse me, could you repeat that?

Mr. MEADOWS. Well, the contracting officer obviously made a decision based on unsettled constitutional law. Did you look at the potential financial implications that might arise from that particular decision?

Ms. OCHOA. We looked at the reasons that the contracting officer gave us and the lawyers gave us, and the financial situation didn't come into play at all——

Mr. MEADOWS. All right.

Ms. OCHOA [continuing]. What they told us.

Mr. MEADOWS. So can you—I see my time has expired.

Ms. TITUS. I will now recognize Mrs. Fletcher.

Mrs. FLETCHER. Thank you, Chairwoman Titus. And thanks to you and Ranking Member Meadows for holding this hearing today and to the witnesses for taking time to testify.

I want to clarify a few of the things that we have just heard and make clear that, in response to one of the questions about the volume of leases that are similar to the one that we are talking about, that there are only six outleases of the type with the Trump Hotel in Washington, DC. That is correct?

Mr. MATHEWS. We have far more than six outleases.

Mrs. FLETCHER. OK. But of the—actually, in a July 2018 GAO report, prior to the 2019 report that we have been discussing, it analyzed the GSA's outleasing program and reviewed, quote, "the extent to which GSA has included lease provisions in its outlease agreements related to the participation of elected officials in these outleases."

And, according to the GAO report, there are six, only six, Federal buildings with at least 20 percent outleased by GSA. Do you disagree with that report?

Mr. MATHEWS. I would have to have it in front of me, but we outlease space in Federal buildings all across the country. In our building, for example, we have three outleases that I can think of. One is for a coffee shop, one is for a Mexican restaurant, and another is for a sandwich shop.

Mrs. FLETCHER. Does that total more than 20 percent of the building?

Mr. MATHEWS. No, those do not.

Mrs. FLETCHER. OK. So, of the buildings with at least 20 percent outleased by GSA, the report concludes that there are only six of these buildings, and all but one of those leases contains a provision restricting participation by elected officials. And that is the Silvio O. Conte Federal Building in Pittsfield, Massachusetts.

Are you familiar with that?

Mr. MATHEWS. Not with that particular building, no.

Mrs. FLETCHER. Inspector General Ochoa, did your team raise this issue with the GSA? In connection with the recommendation, did your team raise this issue with the GSA?

Ms. OCHOA. We have had some discussion about the fact that the language of 37.19 is still in two of those outleases and that it has not been modified to resolve the ambiguity. And we have also pointed out that, with respect to one of those outleases, just a year ago, GSA told GAO that using that language was a best practice for GSA and they intended to modify a lease that didn't contain it.

Mrs. FLETCHER. OK. And so their response was that they intended to modify it.

Commissioner Mathews, has the GSA indeed modified that provision or added the language to the Conte Building lease that would restrict participation by elected officials?

Mr. MATHEWS. So what we agreed to do was, in future outleases, to remove that "interested parties" provision, replace it with language referencing the underlying statute which those provisions were based upon.

Mrs. FLETCHER. So the answer to my question is, no, it has not been revised for the Conte Building lease. Is that correct?

Mr. MATHEWS. I don't know. We would be happy to get that answer for you. But what we said we would do——

Mrs. FLETCHER. If you could please provide that answer for the record, that would be helpful.

And with respect to the future leases, as a practicing lawyer before I got here, litigating leases and contracts and disputes, I am curious as to how you determined that a reference to the underlying statute was superior to an express provision in the contract, an explicit provision in the lease, requiring compliance. Can you explain the rationale for that decision?

Mr. MATHEWS. Well, the rationale was to remove the ambiguity in the contract provision, and referencing the statute explicitly would eliminate that ambiguity.

Mrs. FLETCHER. Do you think that referencing the statute explicitly in addition to the explicit contractual provision is an appropriate correction to the ambiguity?

Mr. MATHEWS. Well, I think the concern is that the "interested parties" provision itself in the contract has some ambiguity to it. And so our proposed corrective action plan would eliminate the use of that provision in future contracts and instead replace it with a reference to the underlying statute.

Mrs. FLETCHER. With simply a reference to the statute as amended——

Mr. MATHEWS. Yes, correct.

Mrs. FLETCHER [continuing]. From time to time?

I have one other quick question. I want to follow up on a question that my colleague Ms. Davids asked you about the auditing. It was my understanding from your testimony that the lessee selects the auditor for the audited financial statements that you receive. Is that correct?

Mr. MATHEWS. Yes.

Mrs. FLETCHER. OK. And do you have a list of approved auditors?

Mr. MATHEWS. If we do, I would be happy to get it for you.

Mrs. FLETCHER. And do you require any specific standards of the auditors—for example, GAAP accounting—even if it is a nonpublic company?

Mr. MATHEWS. They have to comply with those standards, is my understanding.

Mrs. FLETCHER. And do you have any employees who review the audited financial statements for these six specific outlease buildings?

Mr. MATHEWS. I am sorry, I couldn't hear you.

Ms. TITUS. I am sorry. The lady's time is up.

Mrs. FLETCHER. Oh, I believe my time has expired.

Thank you very much, Madam Chairwoman. I yield back.

Ms. TITUS. Thank you.

Mr. Meadows?

Mr. MEADOWS. Thank you, Madam Chair.

So, Mr. Mathews, let me come back on this lease to make sure we are crystal-clear. It is a lease that allows for a base amount of money to be paid to the American taxpayer of approximately $250,000 a month or $3 million a year. Is that correct?

Mr. MATHEWS. That is correct.

Mr. MEADOWS. And then there are thresholds that are above that that would basically be based off of gross revenue. Is that correct?

Mr. MATHEWS. Correct.

Mr. MEADOWS. So the operational expense, wherever it is, we are just looking at gross revenues and a percentage of that that would adjust a lease payment. Is that correct?

Mr. MATHEWS. That is correct.

Mr. MEADOWS. Is that not the most transparent way to do a lease where you have a plus-up from a base amount, where you don't get into how much it costs that you paid your waiters or how much you paid the staff or anything else? If you do a gross revenue, is that not the most fair way to the American taxpayer to find an adjusted base lease? Is that correct?

Mr. MATHEWS. Yes, that is correct.

Mr. MEADOWS. All right.

Ms. Ochoa, would you agree with that?

Ms. OCHOA. I haven't considered those issues.

Mr. MEADOWS. You haven't considered those issues?

Ms. OCHOA. No.

Mr. MEADOWS. All right. So let me ask you this, Ms. Ochoa. Do you believe the American taxpayer is receiving more money under the Trump Hotel lease or less money than they did prior to it being leased to the Trump Organization?

Ms. OCHOA. I accept what I am hearing about the loss prior to the hotel beginning operation and the $3 million a year since.

Mr. MEADOWS. All right.

And the Delegate from DC has been very active on trying—would you agree with this, Mr. Mathews? The Delegate has been very active on making sure that we use underutilized buildings in the District of Columbia and make them producing assets. Is that something that the Delegate and I have been pestering you about for some time?

Mr. MATHEWS. Yes. And I would say it has been a bipartisan priority of this committee for well over 20 years.

Mr. MEADOWS. And would you say, other than the fact that the President of the United States is associated with the Trump Hotel, would you say that that is a good model for all of the underutilized properties, in terms of taking it from what it once was to what it currently is?

Mr. MATHEWS. Absolutely.

Mr. MEADOWS. All right.

Mr. MATHEWS. It is a tremendous financial project.

Mr. MEADOWS. So, Ms. Ochoa, let me come back to you, because you make a number of assertions throughout your report that are without citations in your report. And——

Ms. OCHOA. I would have to disagree with that.

Mr. MEADOWS. OK. Well, you can disagree. So I am going to give you a chance to clarify. Because it doesn't give us any way to verify the accuracy or context of that. And so, in fact, just in the last few weeks, I believe that Chairman Johnson, the Senator from Wisconsin, provided your office with some details highlighting specifically where in your report supporting documentation would be useful in his oversight. Do you plan to respond to that?

Ms. OCHOA. Of course. We have been working with the committees for several months, trying to respond to your requests.

Mr. MEADOWS. All right. So Chairman Johnson's response, you are planning to respond to that. Will you give that to this committee as well?

Ms. OCHOA. We can do that. Are you making a request for that same——

Mr. MEADOWS. I am making a request for that.

Now, when can we expect those responses? I don't want to speak for the chairwoman, but I am assuming that she would want clarification for any report that the IG does.

Ms. OCHOA. Look, all along, we have been providing equivalent information to the majority and minority of the committees who have——

Ms. TITUS. And that is true. The staff has been working with them, so we——

Mr. MEADOWS. So when can we expect a clarification of that report with what Chairman Johnson is requesting and what I believe the chairwoman is alluding to?

Ms. OCHOA. I haven't had a chance to look at what is being requested. I understand it is a request for more documents. We will look at it, and we will do what we can.

We have been prioritizing documents for GSA for months now. Most of the documents that we relied on in the report that aren't public in nature, that we already turned over, are the agency's legal memoranda, the email exchanges among the attorneys working on the matter and with the contracting officer and between the contracting officer and the attorneys and the Trump Organization. We have produced and reproduced those and winnowed them down for GSA to look at to provide to these committees.

Mr. MEADOWS. So are you aware, Ms. Ochoa, of any reason, other than perhaps a court decision, why the Trump Organization would be in default of the current lease? Are you aware of anything other than perhaps this emoluments question that is out there?

Ms. OCHOA. Section 37.19. The two of them are not independent of each other.

Mr. MEADOWS. So those together—and so do you believe that they are in breach?

Ms. OCHOA. I am going to stand on my report, Ranking Member Meadows. We did not make that ultimate determination. I would love to discuss with you the agency's legal opinions, but I cannot.

Ms. TITUS. The gentleman's time is up.

I just want to clarify too for the committee, the problem has not been getting information from the IG; the problem has been getting information from the GSA.

We will now recognize Mr. Cohen.

Mr. COHEN. Thank you, Madam Chair.

Ms.—is it Ochoa?

How do you pronounce her name?

Inspector General, how do you pronounce your last name?

Ms. OCHOA. It is Ochoa. Thank you.

Mr. COHEN. Ochoa. I had it right. Thank you.

You were talking about section 37 and 37.19?

Ms. OCHOA. Correct.

Mr. COHEN. And that seems, to me, to be pretty clearly obvious that the exemption that is put in here to say the public officials could engage in a lease is if they are for the general benefit of a corporation or other entity that—and the corporation or other entity is publicly held, and the idea being that if an individual owns some stock in Hilton or another hotel company or a REIT, that was—they weren't the significant owner, significant beneficiary, or involved major management, that it would be OK, because it was like a de minimis involvement. And that is clear, but as previously noted, the GSA has asserted privileges over there at the OGC's opinion on that section when they looked to interpret it.

Why were they having to exert a privilege rather than just release their opinion? To me, as a lawyer, it is pretty clear that the other entities is connected to the public ownership and it is exemption for people who own stock that it is a de minimis amount of

influence, and it is distinguished from somebody who is a primary partner. Is that not accurate?

Ms. OCHOA. Look, I would love to talk with you about the agency's legal opinions. I can't. I think our report does point out that there is an interpretation along the lines that you are——

Mr. COHEN. You can't talk to me about it because it is privileged or they assert privilege?

Ms. OCHOA. Yes.

Mr. COHEN. Which is hooey, in my opinion.

Let me ask you this question. Let me ask Mr. Mathews this question. In 2017, August 2, the United States went to court at the request of GSA's Acting Commissioner of Public Buildings to condemn a leasehold interest in a property in Myrtle Beach, South Carolina. GSA had leased office space for the FBI at a building owned by Rice REI, Limited Liability Corporation, wholly owned by Congressman Tom Rice. Tom Rice is a friend. I like Tom a lot and I am not questioning him whatsoever. He entered into this lease way before he was elected to Congress.

But GSA went to court. And in the complaint, the United States argued contracts between Members of Congress and the Federal Government are prohibited, and the lease in question was voided upon Congressman Rice's election and assumption of office. And I have a copy of the complaint here, and I would like to enter this into the record, without objection.

Ms. TITUS. Without objection.

[The information is on pages 111–112.]

Mr. COHEN. So when GSA contracted with Congressman Rice's LLC and disregarded his corporate shell and regarded Congressman Rice as the beneficiary of the lease with GSA. Is that not accurate?

Mr. MATHEWS. Yes, that is correct.

Mr. COHEN. Well, when it comes to President Trump, why did you not try to go beyond the corporate shell and try to see if President Trump was affected?

Mr. MATHEWS. Well, compliance with the lease is determined by the contracting officer, and the contracting officer, in consultation with the Office of General Counsel, made the determination that the tenant was in full compliance with the lease. The situations are not comparable. There is a statutory——

Mr. COHEN. I understand all that, but basically, you are looking for some reason to treat Mr. Rice differently than President Trump, and there really isn't a reason, in my opinion.

Inspector General Ochoa, does this inconsistency concern you, that they look at the President differently than they look at Congressman Rice?

Ms. OCHOA. We have been discussing that issue of dropping section 37.19 from the contracts in light of the fact that up until recently GSA thought that was the best practice and in light of the fact that during the course of the review, we were told that they specifically inserted the additional language about State and local officials and the President and Vice President to prevent interference with contracts.

Mr. COHEN. Is it not good policy to say that public elected officials can't benefit from a Government lease? That is good public

policy. Why should we be concerned about that? We are concerned about it because we have got a new person involved.

Is President Trump's corporate shell the only shell the GSA has refused to look through in order to determine the beneficial interest in a lease with GSA? Mr. Mathews, is his corporate shell the only one?

Mr. MATHEWS. Again, with respect to whether or not the tenant is in compliance with the lease——

Mr. COHEN. I am asking have you gone beyond—is his the only corporate shell you have tried not to go into?

Mr. MATHEWS. I wouldn't know the answer to that question.

Mr. COHEN. Well, you should.

Are you aware of any other leases that you have where Donald J. Trump may be the beneficiary?

Mr. MATHEWS. I would have to get back to you. Not that I know of.

Mr. COHEN. Is the Monaco Hotel lease the same basically as Trump's that is a percentage of the gross or a minimum?

Mr. MATHEWS. I would have to review it specifically, but I believe it is an identical lease.

Mr. COHEN. Have you audited the Monaco Hotel to see if they pay more?

Mr. MATHEWS. I believe we receive the same type of——

Mr. COHEN. Do you know if the Monaco Hotel pays over the minimum——

Ms. TITUS. The gentleman's time is——

Mr. COHEN [continuing]. And pays based on the gross proceeds? Can he answer my last question?

Mr. MATHEWS. I would be happy to get back to you with that information.

Mr. COHEN. You would be happy to get back with me. You need some work.

I yield back the balance of my time.

Ms. TITUS. Thank you. The gentleman's time is expired.

There seems to be a lot of questions for these two witnesses, so we will now start a second round of questioning. We will begin with Mr. DeFazio.

Mr. DEFAZIO. Thanks, Madam Chair.

I just want to get back to this issue about the base rent. As of now, adjusted by CPI, according to your testimony, the base rent is $267,653 a month. Is that correct?

Mr. MATHEWS. I don't know the exact number offhand.

Mr. DEFAZIO. Well, that is in your testimony.

Mr. MATHEWS. OK.

Mr. DEFAZIO. OK. Good. And if the proceeds of the hotel on an annual basis exceed 12 times that amount, OK, which would be $3,211,836, the tenant is obligated to pay 3 percent of any overage, $1 or $1,000 or $1 million. Is that correct?

Mr. MATHEWS. That is correct.

Mr. DEFAZIO. OK. So in the last released monthly that we have, from April 2017, the gross was $1,965,000. So if you multiply that times 12, that comes out to $23,580,000 a year. But you are telling me that somehow we are back to the point where the Trump Hotel is only grossing $267,653 a month and doesn't owe us a penny

more. Because I have asked you how much more are we getting and you have stonewalled that and you just keep going back to the $267,653.

Let me try it one more time. On an annual basis, has the Trump Hotel revenues exceeded 12 times that amount, which is $3,211,836? Yes or no?

Mr. MATHEWS. I think the confusion——

Mr. DEFAZIO. Yes or no. There is no confusion.

Mr. MATHEWS. I am afraid there is.

Mr. DEFAZIO. We are due additional funds if they exceed $3,211,836. I am asking you a simple question. Have their revenues exceeded that in the last year, because you have not given us a statement on that?

Mr. MATHEWS. I am afraid you are conflating the gross revenues with the rent.

Mr. DEFAZIO. The rent is obligated. Gross revenue that exceeds the rent is to be—we are to get 3 percent of it. You understand that. You just agreed to that.

Mr. MATHEWS. Three percent of the gross revenues.

Mr. DEFAZIO. Over and above the rent.

Mr. MATHEWS. The way this is structured, which——

Mr. DEFAZIO. Look, if you don't—if that is—I think you are misinterpreting the contract. Because our understanding of staff, and I asked you this question before, is that he pays the base rent, and if his revenues exceed the base rent, we are due 3 percent of the gross over that amount.

Mr. MATHEWS. That is not correct. That is not the way it works.

Mr. DEFAZIO. Well, that is the way the staff has explained it to me. So you tell us how it works. So very quickly.

Mr. MATHEWS. So the way it works is, the rent is based upon the gross revenues, and the gross——

Mr. DEFAZIO. No, no. The rent was set in the original lease and it was $250,000 and it is now up to $267,000, correct, by CPI?

Mr. MATHEWS. There is a floor.

Mr. DEFAZIO. Right.

Mr. MATHEWS. So there is a minimum rent payment——

Mr. DEFAZIO. That is what we are asking.

Mr. MATHEWS [continuing]. Of approximately $3 million.

Mr. DEFAZIO. Right. You keep coming back to that. So you are saying we are not getting a penny over that because there is no revenue over and above that. That is what you are telling us? The Trump Hotel is losing money?

Mr. MATHEWS. I am afraid I am not doing a good job of explaining this. The gross revenues, with the rent that we receive, is based upon the gross revenues. We receive 3 percent of the gross revenues in rent, and there is a floor, a minimum of $3 million in rent.

Mr. DEFAZIO. Of $3,211,836. But you are saying we are not getting a penny more than that, that they don't owe us anything else, the 3-percent provision hasn't been triggered?

Mr. MATHEWS. We are getting the minimum rent amount, that is correct.

Mr. DEFAZIO. OK. So you are saying, then, that this hotel is essentially a failure because in 1 month——

Mr. MATHEWS. No, I am not saying that.

Mr. DEFAZIO [continuing]. They have revenues of $2 million, and you are saying now their revenues are somewhere around $267,000 a month?

Mr. MATHEWS. No, I am not saying what the revenues are at all.

Mr. DEFAZIO. I know. You certainly aren't because you won't provide us the documents. So we don't know what the revenues are or aren't.

Will you provide us the—don't have to give us what was released here [indicating document], which is nothing proprietary, but OK. Will you give us the gross number for last year?

Mr. MATHEWS. Again, we are working with the committee to accommodate——

Mr. DEFAZIO. No, you are not working with the committee. I have been asking for this data for a very long time, and we are going to only have one recourse if you keep stonewalling us here. You are stonewalling us. You are not—you are telling us that all we are getting is the base rent and nothing else is due, but you won't substantiate that. You are accepting their audited statements, you won't show us those, and you have, you know—and then we have the legal opinions, of course, which we can't see either. So we are kind of looking into a black hole here.

I mean, there is the document we gave to Congress [indicating document]. You even blacked out who signs for the tenant. What the hell is that about?

Ms. TITUS. The chairman's time is expired.

Mr. Meadows.

Mr. MEADOWS. So let me see if I can add some clarification since I have worked on leases for a long time. You have a floor in a lease and the lease amount is 3 percent of gross revenues with a floor. Is that correct?

Mr. MATHEWS. That is correct.

Mr. MEADOWS. All right. So in order to hit the floor amount, the gross revenues would have to be closer to $100 million in order to hit that floor amount. Is that correct?

Mr. MATHEWS. That is correct.

Mr. MEADOWS. All right. So what we are essentially saying is the way the lease is structured is that in order to get above that figure, you are actually having to have gross receipts above $100 million. So $200 million actually would have changed the amount that is paid to the Federal Treasury if the gross receipts are $200 million. Is that correct, Mr. Mathews?

Mr. MATHEWS. Yes, that is correct.

Mr. MEADOWS. So I have tried to explain that what happened is this is a good deal for the American taxpayer. We can take the other emoluments question separately, but indeed, when you look at a hotel and we are getting a base amount of lease, the way this is structured is to protect the American taxpayer, not to penalize them. Is that correct, Mr. Mathews?

Mr. MATHEWS. That is absolutely correct.

Mr. MEADOWS. So I don't know what is so complicated about this, because when we look at the lease, it is very clear, if you are looking at a lease, how you would apply this.

Did you actually—have you actually worked on leases before, Mr. Mathews, when you were a staffer?

Mr. MATHEWS. We reviewed them sometimes.

Mr. MEADOWS. You reviewed them. Did you work on legislation that applied to public buildings when you were a staffer here?

Mr. MATHEWS. Yes, for a very long time.

Mr. MEADOWS. Did Chairman Mica have a real issue with public buildings where—that is a softball question. Did he have an issue with public buildings and the accountability and what we need to be doing with public buildings?

Mr. MATHEWS. He did. He made it a very high priority to protect the taxpayer through Federal real estate.

Mr. MEADOWS. All right. And will you commit, will you commit to this committee that you are willing to go and look at other ways to verify that the Trump Organization is paying the proper amount to the American people? Are you willing to look—so if I give you other ways to verify this number that is beyond just an audited return, are you willing to do that?

Mr. MATHEWS. We would absolutely take it into—we would certainly look at that, absolutely.

Mr. MEADOWS. All right. So is there any malicious part on the part of you or the GSA to try to cheat the American taxpayer out of revenue on behalf of the President of the United States?

Mr. MATHEWS. No, of course not.

Mr. MEADOWS. You know, I just—I am at a loss because we continue to come back, we have taken a nonperforming asset, we make it a performing asset; we have taken a $6 million liability and we have turned it into a surplus of $3 million. We have done that all without spending American taxpayers' dollars. We have allowed a President of the United States when in his personal capacity to invest in Washington, DC, it was applauded by Democrats, it was certainly championed by all of us as a good thing for Washington, DC, and then, voila, all of a sudden, it is a bad thing because the President of the United States happened to win an election in 2016.

You know, we are looking for an enemy here. There are important things for us to look at, but there is no doubt in my mind that this particular deal was a good deal for the American taxpayer. Would you agree with that, Mr. Mathews?

Mr. MATHEWS. It has been a fabulous economic performer for the taxpayer.

Mr. MEADOWS. So, Ms. Ochoa, I am going to come back to you. Here is what I need, and you know that you have come before my other committee a number of times. This is not the first time that we go back. I love my IGs, and here is what I am asking you to do. There are internal documents that you keep talking about with GSA. There are also internal documents that you have from an IG standpoint where it comes to the constitutional analysis that you have actually put forth in this report.

Are you aware of any other time where you actually have been asked to come in and make substantial constitutional analysis as it relates to the IG's work?

Ms. OCHOA. Actually, first, I have to say that there are no internal documents that we have not——

Mr. MEADOWS. Emails back and forth between your counsel as they were going back and forth whether this applied or not, you don't have those?

Ms. OCHOA. What we relied upon for the analysis of whether there was a constitutional issue is all public source material, and we have provided that to your staff.

Mr. MEADOWS. So the three people that you have, that internal deliberation, do we understand how they came to that decision?

Ms. OCHOA. Absolutely. It is laid out in the——

Mr. MEADOWS. No, no, no. In terms of their internal back and forth. Can you get that to us? Do you have a problem with us having that?

Ms. OCHOA. With having source material——

Mr. MEADOWS. The internal deliberations of how you arrived at your constitutional analysis.

Ms. OCHOA. That is laid out in the report.

Ms. TITUS. The gentleman's time is expired.

Mr. Garamendi.

Mr. GARAMENDI. Thank you.

There are two issues here, one of which is the financial situation with regard to the hotel, and that could be discussed back and forth. The issue that I want to focus on is the emoluments issue. And in the emoluments issue, both of you opined a while ago that the President continues to have a financial interest in the hotel. That was your earlier testimony.

Without going back at that, the question then of emoluments becomes pertinent. The Constitution is very, very clear that the President cannot receive an emolument from a foreign power, prince or State, or from the United States beyond his salary, or from a State. That is very clear language. We are not—there is not much—there is no debate about that. The question then with regard to the hotel situation is, does the President receive money from a foreign government?

In that earlier question, neither of you had that specific information. And the question for Mr. Mathews is, why do you not have that information? You have been asked that question.

Mr. MATHEWS. Again, so we receive financial information based on the terms and conditions of the contract, and we receive the information we are required under the terms——

Mr. GARAMENDI. Excuse me. Excuse me. It is a yes or no, sir. You are going to blow through my time here.

Have you requested information about money from foreign governments and from State governments?

Mr. MATHEWS. So the question of whether or not there is an emoluments violation is pending before the courts. It is not GSA's—it wouldn't be appropriate——

Mr. GARAMENDI. That is not my question. My question is, have you asked for that information? I think the answer is, no, you have not. Is that correct?

Mr. MATHEWS. That is correct.

Mr. GARAMENDI. OK. So you have not.

And, Ms. Ochoa, have you requested that information?

Ms. OCHOA. We don't have direct access to the hotel's books and records. We have access to GSA's materials.

Mr. GARAMENDI. Have you requested that information?

Ms. OCHOA. We have not requested it from GSA at this point.

Mr. GARAMENDI. Thank you.

Madam Chair, I would ask that the committee request that specific information.

Ms. TITUS. Without objection.

Mr. GARAMENDI. Now, I believe we have a slide. It is called, "Tracking Profits from Foreign Governments to the Trump Hotel." This is a slide that actually was given to the committee, and it came from the Trump Organization. And presumably, The Trump Organization gives back to the Treasury whatever profits there may be. We have not determined that there are or are not profits, but my question really goes to how in the world we are going to determine the accuracy of any profit contributed to the Treasury when we have absolutely no information about any foreign government or any State government paying anything at the hotel.

So is this useful or is this just a sham? Open question. Mr. Mathews, have you ever attempted to track any profit that has been returned to the Treasury?

Mr. MATHEWS. That is not our role at GSA.

Mr. GARAMENDI. So the answer is no, you have not.

And, Ms. Ochoa?

Ms. OCHOA. My question remains with any obstacles to our access, the OIG's access to that information.

Mr. GARAMENDI. So once again, the rationale that the Trump administration used to get past the emoluments issue was that they would deliver to the Treasury any profit that was received, and yet we have absolutely no way to determine if there was any participation at the hotel by a foreign government or State government. We do have press reports and we do have the testimony of the former Governor of Maine that apparently the State of Maine spent $22,000 at the hotel.

Now, the underlying question here goes back to the initial lease and the question of the estoppel. We have been denied the legal questions that were asked of the counsel, but we do know that there was a legal analysis done by the counsel. Is that correct?

Ms. OCHOA. That is correct.

Mr. GARAMENDI. OK. We also know that Mr. Terry, the contracting officer, knew that the Office of the General Counsel recognized a violation of the Foreign Emoluments Clause might be relevant to a breach and that this important issue remained open. This is your testimony, Ms. Ochoa. Do you stand by that?

Ms. OCHOA. Yes. That is what we found in the report.

Mr. GARAMENDI. OK. So apparently, the Office of the General Counsel raised a question about the emoluments and that remains open today, and I would just simply say, this is our task.

Thank you.

Ms. TITUS. The gentleman's time is expired.

Mr. Johnson.

Mr. JOHNSON OF GEORGIA. Thank you.

You know, we could talk about how much would be calculated under the lease, whether or not the lease was in violation of the Emoluments Clause and other such issues that may escape the scrutiny of the American people, but one thing the American people

do understand is that the American people don't get a good deal when the President of the United States is the tenant and also the landlord. That is pretty much like the fox being in charge of security at the hen house. Everybody knows that that is a setup that is doomed to benefit the lessor/lessee who is the same person at the same time. How could that work out to the benefit of the American people?

And that is something that this subcommittee is well poised to address, don't you agree with that, Mr. Mathews, since you formerly worked on this subcommittee? Isn't it our legitimate interest to oversee the operations of the General Services Administration, particularly in a situation where the fox is over the hen house?

Mr. MATHEWS. The committee and subcommittee, absolutely, have oversight jurisdiction over GSA, yes.

Mr. JOHNSON OF GEORGIA. So all of the things that my friends on the other side of the aisle have been saying all morning to somehow besmirch this hearing or to take away from its legitimacy, you don't agree with, do you?

Mr. MATHEWS. I am not going to opine on the minority's——

Mr. JOHNSON OF GEORGIA. Well, I understand your loyalty, but you also have a loyalty to the Constitution, do you not?

Mr. MATHEWS. Yes, I do.

Mr. JOHNSON OF GEORGIA. And thank you.

With that, I am going to yield the balance of my time to the gentleman from Tennessee.

Mr. COHEN. Thank you, Mr. Johnson.

Let me go back to Mr. Mathews. Would you give us the agreement, the lease agreement with the Monaco Hotel and GSA, and let us know, when you give it to us, if they have paid more than the base rent and paid their rent based on the percentage of gross proceeds provision?

Mr. MATHEWS. I would be happy to take that request back and we will respond to your request.

Mr. COHEN. That is good that you will do that. But you don't know for a fact if they have paid more than their minimum rent?

Mr. MATHEWS. I don't know. And, again, if there are provisions in the lease that restrict the financial information, we will certainly have to work through that as well.

Mr. COHEN. Well, it would be interesting to know if it was similar or different. The percentage of—the Trump family has decided at some point on their own that to not violate the Emoluments Clause, they would pay the hotel's profits that Mr. Trump would otherwise get to the United States Treasury at the end of the year to avoid violating the Constitution's Emoluments Clause. Are you familiar with that arrangement and decision?

Mr. MATHEWS. Just by press reports.

Mr. COHEN. OK. Well, don't you think, Ms. Ochoa, that if the President has decided to donate his profits so not to violate the Emoluments Clause, that is basically an admission that the Emoluments Clause is effective, as you have said, and it should have been considered in determining the lease?

Ms. OCHOA. I am not going to provide an opinion on those types of statements. We did find in the report that there is an issue, a constitutional issue with respect to the lease.

Mr. COHEN. Thank you. And apparently, the Trump family agrees.

Now, let me ask you this. Mr. Mathews, they give a percentage to the Treasury. Do you know what amount of money they give to the Treasury?

Mr. MATHEWS. Are you referring to the lease contract or this other arrangement?

Mr. COHEN. The other arrangement where the Trump family donates—Donald Trump donates his profits.

Mr. MATHEWS. I am not familiar with that.

Mr. COHEN. Well, I would submit to you you ought to be familiar with it. If the President of the United States, who is your boss, decides he is violating the Constitution if he doesn't give this money to the Treasury, and you don't know what—if he is actually giving the percentage of profits that he gets from foreign governments, which you could know by auditing his books, and you don't know, you are being derelict in your responsibility. The President has said this is a constitutional issue and he is going to give his profits to the United States Treasury, and yet you don't know what he is deciding to give and whether it is enough or not.

This is within your purview, and Mr. Trump has basically said he is violating the Constitution, but so as not to be seen as violating, he is going to donate a certain percentage. But there is not going to be anybody looking over his shoulder to see that he donates the right amount of money to not violate the Constitution?

I guess that is an answer. You don't care.

You want to answer?

Mr. MATHEWS. What I would say is the question of an emoluments violation that is pending several litigations before the courts right now, and in those—in that forum, the Department of Justice has argued before the courts there is no constitutional violation right now.

Mr. COHEN. But Mr. Trump has admitted it. Mr. Trump doesn't give away money for no reason at all. He doesn't even pay taxes.

I yield back.

Ms. TITUS. Mr. Meadows.

Mr. MEADOWS. Madam Chairman, I have just a few unanimous consent requests. One would be, for the record, the Seth Tillman "Business Transactions and President Trump's 'Emoluments' Problem" document. I ask unanimous consent that that be included.

Ms. TITUS. Without objection.

[The information is on page 120.]

Mr. MEADOWS. And then the amicus brief that was filed on the same subject. Without going into a long dissertation, I ask unanimous consent that that be included in the record as well.

Ms. TITUS. Without objection.

[The information is on page 121.]

Mr. MEADOWS. I thank the gentlewoman, and I yield back.

Ms. TITUS. I think—we will thank our witnesses and appreciate them staying with us so long, and they will be dismissed and we will welcome our second panel. We will take about a 5-minute break.

I am sorry. It is not a break; it is a recess, a 5-minute recess.

[Recess.]

Ms. TITUS. The hearing will come back to order.

Now I want to welcome our second panel of witnesses. Mr. Michael Foster, who is the legislative attorney for CRS' American Law Division; Liz Hempowicz, who is director of public policy for the Project on Government Oversight, known as POGO; Mr. Walter Shaub, senior advisor for Citizens for Responsibility and Ethics in Washington, CREW, and the former Director of the U.S. Office on Government Ethics; and Mr. Hans von Spakovsky, who is a senior legal fellow for the Edwin Meese Center for Legal and Judicial Studies at the Heritage Foundation.

Thank you very much for being here. We are looking forward to your testimony.

Without objection, our witnesses' full statements will be included in the record. And as with the previous panel, since your written testimony is included, we would ask you to please limit your comments to 5 minutes.

We will now proceed with the witnesses and starting with Mr. Foster.

TESTIMONY OF MICHAEL A. FOSTER, LEGISLATIVE ATTORNEY, CONGRESSIONAL RESEARCH SERVICE; HANS A. VON SPAKOVSKY, SENIOR LEGAL FELLOW, EDWIN MEESE III CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION; LIZ HEMPOWICZ, DIRECTOR OF PUBLIC POLICY, PROJECT ON GOVERNMENT OVERSIGHT; AND WALTER M. SHAUB, JR., SENIOR ADVISOR, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, AND FORMER DIRECTOR, U.S. OFFICE ON GOVERNMENT ETHICS

Mr. FOSTER. Chair Titus, Ranking Member Meadows, and members of the subcommittee, my name is Michael Foster. I am a legislative attorney in the American Law Division of the Congressional Research Service. Thank you for inviting me to testify today on behalf of CRS to provide background information on the Emoluments Clauses of the U.S. Constitution and recent litigation concerning those provisions.

In brief, under what I will refer to as the Foreign Emoluments Clauses of the Constitution, any person holding any office of profit or trust under the United States is prohibited from accepting of any present, emolument, office, or title of any kind whatever from a foreign government unless Congress consents. Additionally, a separate constitutional provision, the Domestic Emoluments Clause, provides that the President of the United States shall receive during his term a compensation for his services, but shall not receive within that period any other emolument from the United States or any of them.

For most of their history, these clauses were little discussed and largely unexamined by the courts. However, recent litigation involving the President has resulted in multiple Federal courts more fully addressing the scope and application of the clauses. Though these clauses and the litigation raise a host of legal issues, some of which I address in more detail in my written testimony, my testimony today will focus on the primary interpretive issue that has arisen in the recent litigation; namely, the issue of what the term "emolument" as used in the clauses means.

What constitutes an emolument within the meaning of the constitutional provisions is a key question that has divided legal scholars and has only recently been addressed by any Federal courts. Several potential definitions of the term have been offered. The narrowest definition would limit an emolument to compensation for the personal performance of services as an officer or employee of a foreign or domestic government, but would not extend to ordinary business transactions between a covered official and such a government. By contrast, a broad definition that some have proposed would cover any profit, gain, advantage, or benefit, including even ordinary fair market value transactions between covered officers and a foreign or domestic government.

The Department of Justice's Office of Legal Counsel, or OLC, has also sometimes appeared to employ a functional fact-specific definition in rendering legal advice to the executive branch on whether the acceptance of particular payments or benefits by executive branch officials would implicate the clauses. Some OLC opinions, in assessing whether a particular benefit would constitute a prohibited emolument, have looked to the clauses' goals of limiting influence on the President and Federal officers, and have accordingly inquired into whether a benefit at issue is intended to or could influence the recipient as an officer under the totality of the circumstances.

Debate over the definition of an emolument has largely centered on the text of the clauses, their history and purpose, and historical practice. For instance, proponents of the broad definition assert that the general anticorruptive and anti-influence purposes of the clauses support reading it expansively and rely on contemporaneous dictionary definitions and practices of past Presidents. In support of the office or employment limited definition, however, some scholars rely on competing contemporaneous dictionary definitions and usage by some founders, as well as the possible business practices of early Presidents like George Washington.

In 2018 and 2019, two Federal district courts substantively addressed the scope of the Emoluments Clauses for the first time, with the courts concluding that the term "emolument" is defined as any profit, gain, or advantage of more than de minimis value. Regarding the clause's text, the courts found significant the use of modifiers like "any other" and "any kind whatever," and rejected the proposition that the term's office-related use in another part of the Constitution should control under the clauses.

With respect to the clauses' history and purpose, the courts, while acknowledging the broader and narrower definitions of emolument both existed at the time of ratification, found the weight of the historical evidence in the clauses anticorruption purpose to support the more expansive definition. Finally, the courts viewed executive branch precedent and practice as consistent with an expansive view of the meaning of the term "emolument."

These recent court decisions construing the Emoluments Clauses are not final, however. In fact, one of the decisions has since been reversed by the U.S. Court of Appeals for the Fourth Circuit on a separate issue regarding the standing of the plaintiffs to sue, and the other decision has been certified for an immediate appeal to the U.S. Court of Appeals for the District of Columbia Circuit. Thus,

the import of these decisions as it relates to the meaning of the Emoluments Clauses remains unclear.

Thank you, and I will be happy to answer any questions at the appropriate time.

[Mr. Foster's prepared statement follows:]

Prepared Statement of Michael A. Foster, Legislative Attorney, Congressional Research Service

Chair Titus, Ranking Member Meadows, and Members of the Subcommittee:

My name is Michael Foster. I am a Legislative Attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for inviting me to testify on behalf of CRS to provide background information on the Emoluments Clauses of the U.S. Constitution and recent litigation concerning those provisions.[1]

The Constitution contains three provisions that mention the term "emolument":

1. *The Foreign Emoluments Clause*: Article I, Section 9, Clause 8 provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State";[2]
2. *The Domestic Emoluments Clause*: Article II, Section 1, Clause 7 provides that "[t]he President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them";[3] and
3. *The Ineligibility Clause*: Article I, Section 6, Clause 2 provides (among other things) that no Member of Congress shall "be appointed" during his or her term "to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time[.]"[4]

The first two Clauses are the focus of this testimony.[5] For most of their history, the Foreign and Domestic Emoluments Clauses (collectively, the "Emoluments Clauses" or the "Clauses") were little discussed and largely unexamined by the courts.[6] But recent litigation involving President Trump has led to multiple federal court decisions more fully addressing the Clauses' scope and application.[7] This testimony will accordingly provide an overview of the Emoluments Clauses as they relate to the President, focusing on the legal issues that have been central to the recent litigation. More specifically, this testimony will discuss (1) the history and purpose of the Clauses; (2) whether the President is a person holding an "Office of Profit or Trust under [the United States]" for purposes of the Foreign Emoluments Clause; (3) the scope of the Emoluments Clauses, focusing specifically on disputes over the breadth of the term "emolument"; and (4) whether the Clauses may be enforced in court and by whom.

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[1] Legislative Attorney Kevin Hickey assisted in preparing this written testimony.

[2] U.S. CONST. art. I, §9, cl. 8.

[3] *Id*. art. II, § 1, cl. 7.

[4] *Id*. art. I, § 6, cl. 2. This provision is sometimes referred to by other names, such as the "Legislative Emoluments Clause." *E.g.*, Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 658 (2017).

[5] The Ineligibility Clause is not at issue in the litigation and is not further discussed in this testimony except as it relates to interpretation of the other Clauses.

[6] *See* Julie Bykowicz & Mark Sherman, *Why Conflict of Interest Rules Apply Differently to the President*, PBS NEWS HOUR (Jan. 9, 2016), https://www.pbs.org/newshour/politics/conflict-interest-rules-apply-differently-president ("Arthur Hellman, an ethicist at the University of Pittsburgh, said he does not believe any U.S. court, much less the Supreme Court, has ever interpreted the emoluments clause."). Prior to the court cases discussed in this testimony, a few judicial decisions briefly discussed the Foreign Emoluments Clause without extensively analyzing its scope. *E.g.*, U.S. *ex rel*. New v. Rumsfeld, 350 F. Supp. 2d 80, 101–02 (D.D.C. 2004) (rejecting argument that order to wear U.N. insignia on uniform amounted to Foreign Emoluments Clause violation and noting apparent lack of "Supreme Court precedent defining the scope and application of the clause"), *aff'd*, 448 F.3d 403, 410 (D.C. Cir. 2006) (summarily affirming).

[7] *See generally In re* Trump, 928 F.3d 360 (4th Cir. 2019); Blumenthal v. Trump, 382 F. Supp. 3d 77 (D.D.C. 2019); Citizens for Responsibility & Ethics in Wash. v. Trump, No. 18–474, slip op. (2d Cir. Sept. 13, 2019).

HISTORY AND PURPOSE OF THE EMOLUMENTS CLAUSES

Founding Era

Foreign Emoluments Clause. The basic purpose of the Foreign Emoluments Clause is to prevent corruption and limit foreign influence on federal officers. At the Constitutional Convention, Charles Pinckney of South Carolina introduced the language that became the Foreign Emoluments Clause based on "the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence."[8] The Convention approved the Clause unanimously without noted debate.[9] During the ratification debates, Edmund Randolph of Virginia—a key figure at the Convention—explained that the Foreign Emoluments Clause was intended to "prevent corruption" by "prohibit[ing] any one in office from receiving or holding any emoluments from foreign states."[10]

The Clause reflected the Framers' experience with the then-customary European practice of giving gifts to foreign diplomats.[11] Following the example of the Dutch Republic, which prohibited its ministers from receiving foreign gifts in 1651,[12] the Articles of Confederation provided that "any person holding any office of profit or trust under the United States, or any of them" shall not "accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state."[13] The Foreign Emoluments Clause largely tracks this language from the Articles, although there are some differences.[14]

During the Articles period, American diplomats struggled with how to balance their legal obligations and desire to avoid the appearance of corruption, against prevailing European norms and the diplomats' wish to not offend their host country.[15] A well-known example from this period, which appears to have influenced the Framers of the Emoluments Clause,[16] involved the King of France's gift of an opulent snuff box to Benjamin Franklin.[17] Concerned that receipt of this gift would be perceived as corrupting and violate the Articles of Confederation, Franklin sought (and received) congressional approval to keep the gift.[18] Following this precedent, the Foreign Emoluments Clause prohibits federal officers from accepting foreign presents, offices, titles, or emoluments, unless Congress consents.[19]

Domestic Emoluments Clause. The Domestic Emoluments Clause's purpose is to preserve the President's independence from Congress and state governments.[20] To

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[8] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 389 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (Madison's notes).

[9] *Id*.

[10] *See* 3 FARRAND'S RECORDS 327; *accord* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 215–16 (1st ed. 1833) ("[The Foreign Emoluments Clause] is founded in a just jealousy of foreign influence of every sort.")

[11] *See generally* Deborah Samuel Sills, *The Foreign Emoluments Clause: Protecting Our National Security Interests*, 26 J.L. & POL'Y 63, 69–72 (2018); Robert G. Natelson, *The Original Meaning of "Emoluments" in the Constitution*, 52 GA. L. REV. 1, 37, 43–45 (2017); Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U.L. REV. COLLOQUY 30, 33–35 (2012).

[12] *See* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 20–21 (2014) (citing 4 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 579 (1906)).

[13] ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

[14] Two differences are notable. First, unlike the corresponding provision in the Articles, the Foreign Emoluments Clause expressly provides that Congress may consent to a federal official's receipt of emoluments. *See* U.S. CONST. art. I, § 9, cl. 8. Second, the Articles expressly reached *state* officeholders as well as federal ones, while the Foreign Emoluments Clause does not. *See* ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1. *See also* Natelson, *supra* note 11, at 37–38 (discussing these differences); Seth Barrett Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 399, 405 (2015) (same).

[15] *See generally* TEACHOUT, *supra* note 12, 20–26; Natelson, *supra* note 11, at 43–45.

[16] *See* 3 FARRAND'S RECORDS 327 (statement of Edmund Randolph) ("An accident which actually happened, operated in producing the [Foreign Emoluments Clause]. A box was presented to our ambassador by the king of [France]. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states. . . . [I]f at that moment, when we were in harmony with the king of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence . . . ."). It is unclear whether Randolph was referring to the snuff box gifted to Franklin, or a similar gift made to Arthur Lee, an American envoy to France during this same period. *See* Teachout, *supra* note 11, at 35.

[17] *See* TEACHOUT, *supra* note 12, at 25–26.

[18] *See id*.; Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 16 n.4 (1994).

[19] U.S. CONST. art. I, § 9, cl. 8.

[20] *See generally* THE FEDERALIST NO. 73 (Alexander Hamilton).

accomplish this end, the Clause contains two key provisions. First, it provides that the President shall receive a compensation for his services, which cannot be increased or decreased during his term,[21] thus preventing the legislature from using its control over the President's salary to exert influence over him. To preserve presidential independence further, the Clause provides that, apart from this fixed salary, the President shall not receive "any other Emolument" from the United States or any state government.[22]

The Domestic Emoluments Clause, which drew upon similar provisions in state constitutions,[23] received little noted debate at the Constitutional Convention.[24] Its meaning, however, was elucidated by Alexander Hamilton in *The Federalist No. 73*. Hamilton wrote that the Domestic Emoluments Clause was designed to isolate the President from potentially corrupting congressional influence: because the President's salary is fixed "once for all" each term, the legislature "can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice."[25] Similarly, Hamilton explained that because "[n]either the Union, nor any of its members, will be at liberty to give ... any other emolument," the President will "have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution."[26] Other Framers echoed this sentiment during the ratification debates.[27]

Nineteenth and Twentieth Century Practice

The Foreign Emolument Clause provides a role for Congress in determining the propriety of foreign emoluments, in that receipt of an emolument otherwise prohibited by the Clause is permitted with the consent of Congress.[28] Under this authority, Congress has in the past provided consent to the receipt of particular presents, emoluments, and decorations through public or private bills,[29] or by enacting general rules governing the receipt of gifts by federal officers from foreign governments.[30] For example, in 1966, Congress enacted the Foreign Gifts and Decorations Act, which provided general congressional consent for foreign gifts of minimal value,

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[21] U.S. CONST. art. II, § 1, cl. 7.

[22] *Id*.

[23] *See., e.g*. MASS. CONST. of 1780, pt. II, ch. II, § 1, art. XIII ("As the public good requires that the governor should not be under the undue influence ... it is necessary that he should have an honorable stated salary, of a fixed and permanent value ... ."); MD. CONST. of 1776, art. XXXII ("That no person ought to hold, at the same time, more shall one office of profit, nor ought any person in public trust, to receive any present from any foreign prince or state, or from the United States, or any of them, without the approbation of this State."); *see generally* Brianne J. Gorod et al., *The Domestic Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, CONST. ACCOUNTABILITY CTR. (2017), at 6–7, https://www.theusconstitution.org/wp-content/uploads/2017/07/20170726__White__Paper__Domestic__Emoluments__Clause.pdf (discussing state constitutional precedents for the Domestic Emoluments Clause); Natelson, *supra* 11, at 24–27 (same).

[24] *See* Robert J. Delahunty, Compensation, THE HERITAGE GUIDE TO THE CONSTITUTION (last accessed Sept. 13, 2019), https://www.heritage.org/constitution/#!/articles/2/essays/84/compensation ("The Constitutional Convention hardly debated [the Domestic Emoluments Clause]."). Early in the Constitutional Convention, Benjamin Franklin proposed that the President should receive no compensation at all; this motion was politely postponed "with great respect, but rather for the author of it than from any apparent conviction of its expediency or practicability." 1 FARRAND'S RECORDS 81–85 (Madison's notes). The Convention unanimously agreed to the fixed salary provision for the President on July 20, 1787. 2 FARRAND'S RECORDS 69 (Madison's notes). On September 15, 1787, Franklin and John Rutledge moved to add the prohibition that the President should not receive "any other emolument" from the federal or state governments, which was approved by a 7–4 vote without noted debate. 2 FARRAND'S RECORDS 626 (Madison's notes); *see also* Natelson, *supra* note 11, at 36 ("Although the [emoluments] ban was added to the [presidential] compensation feature without debate, the divided vote (7–4) suggests competing values were at stake.").

[25] THE FEDERALIST NO. 73 (Alexander Hamilton).

[26] *Id*.

[27] *See* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES] (statement of James Wilson) ("[The Domestic Emoluments Clause was designed] to secure the President from any dependence upon the legislature as to his salary.").

[28] U.S. CONST. art. I, § 9, cl. 8.

[29] *See generally* S. REP. NO. 89–1160, at 1–2 (1966) ("In the past, the approval of Congress, as required by [the Foreign Emoluments Clause], has taken the form of public or private bills, authorizing an individual or group of individuals to accept decorations or gifts.").

[30] *See, e.g*., Act of Jan. 31, 1881, ch. 32 § 3, 21 Stat. 603, 603–04 (1881) (authorizing certain named persons to accept presents from foreign governments, and requiring that "hereafter, any presents, decoration, or other thing, which shall be conferred or presented by any foreign government to any officer of the United States ... shall be tendered through the Department of State").

as well as conditional authorization for acceptance of gifts on behalf of the United States under certain circumstances.[31]

Several Presidents in the 19th century—such as Andrew Jackson,[32] Martin Van Buren,[33] John Tyler,[34] and Benjamin Harrison[35]—notified Congress of foreign presents that they had received, and either placed the gifts at its disposal or obtained consent to their receipt. Other 19th century Presidents treated presents that they received as "gifts to the United States, rather than as personal gifts."[36] Thus, in one instance, President Lincoln accepted a foreign gift on behalf of the United States and then deposited it with the Department of State.[37]

In the 20th century, some Presidents have sought the advice of the Department of Justice's Office of Legal Counsel (OLC) on whether acceptance of particular honors or benefits would violate the Emoluments Clauses. Three such OLC opinions addressed whether: (1) President Kennedy's acceptance of honorary Irish citizenship would violate the Foreign Emoluments Clause;[38] (2) President Reagan's receipt of retirement benefits from the State of California would violate the Domestic Emoluments Clause;[39] and (3) President Obama's acceptance of the Nobel Peace Prize would violate the Foreign Emoluments Clause.[40]

PERSONS SUBJECT TO THE EMOLUMENTS CLAUSES

An important threshold issue in examining the Emoluments Clauses is determining who is subject to their terms. The scope of the Domestic Emoluments Clause is clear: it applies to "[t]he President."[41] The Clause prohibits the President from receiving emoluments from state or federal governments, aside from his fixed federal salary. The Foreign Emoluments Clause applies to any person holding an "Office of Profit or Trust under [the United States]."[42] The OLC, which has developed a body of opinions on the Emoluments Clauses,[43] has opined that the President "surely" holds an "Office of Profit or Trust" under the Constitution.[44] OLC opinions are generally considered binding within the executive branch.[45]

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[31] *See* Pub. L. No. 89–673, 80 Stat. 592 (1966) (codified as amended at 5 U.S.C. § 7342).

[32] A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1902, at 466–67 (James Richardson, ed., 1907) (January 19, 1830 letter from President Jackson to the Senate and House of Representatives, stating that the Constitution prohibited his acceptance of a medal from Simon Bolivar and therefore placing the medal "at disposal of Congress").

[33] S.J. Res. 4, 26th Cong., 5 Stat. 409 (1840) (joint resolution of Congress authorizing President Van Buren to dispose of presents given to him by the Imam of Muscat and deposit the proceeds in the Treasury);

[34] S. JOURNAL, 28th Cong., 2d Session 254 (1844) (authorizing sale of two horses presented to the United States by the Imam of Muscat); *see also* Teachout, *supra* note 11, at 42 (discussing the Van Buren and Tyler precedents); Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. L. REV. COLLOQUY 180, 190 (2013) (same).

[35] Pub. Res. 54–39, 29 Stat. 759 (1896) (congressional resolution authorizing delivery of Brazilian and Spanish medals to Benjamin Harrison).

[36] *See* Proposal that the President Accept Honorary Irish Citizenship, 1 Op. O.L.C. Supp. 278, 281 (1963).

[37] *Id*.

[38] *Id*. at 278 (concluding that acceptance of even "honorary" Irish citizenship would violate "the spirit, if not the letter" of the Foreign Emoluments Clause).

[39] President Reagan's Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187, 189–92 (1981) (concluding that retirement benefits are not "emoluments" under the Domestic Emolument Clause because they "are neither gifts nor compensation for services" and would not subject the President to improper influence).

[40] Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1, 4, 7–9 (2009) (concluding that the Nobel Peace Prize is not given on behalf of a foreign government, but a private organization).

[41] U.S. CONST. art. II, § 1, cl. 7.

[42] *Id*. art. I, § 9, cl. 8.

[43] *See generally* Gary J. Edles, *Service on Federal Advisory Committees: A Case Study of OLC's Little-Known Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1 (2006); Sills, *supra* note 11, at 75–87 (reviewing OLC's interpretation of the Foreign Emoluments Clause).

[44] *See Nobel Peace Prize*, 33 Op. O.L.C. at 4; *see also Honorary Irish Citizenship*, 1 Op. O.L.C. Supp. at 278 (assuming, without definitively stating, that the Foreign Emoluments Clause applies to the President).

[45] *See* Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1711 (2011) (reviewing BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2011)) {"OLC's legal opinions are treated as authoritative and binding within the executive branch unless 'overruled' by the Attorney General or the President."); Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, *Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010), http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf {"OLC's core

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There has been significant academic debate about whether OLC's conclusion comports with the original public meaning of the Foreign Emoluments Clause.[46] Some legal scholars have argued that the Foreign Emoluments Clause does not apply to *elected* officials such as the President, but only to certain appointed federal officers.[47] Other scholars support the OLC's view that the President holds an office of profit under the United States under the original meaning of the Foreign Emoluments Clause.[48]

In addition to textual and structural arguments, these scholars debate the significance of Founding-era historical evidence. To support the view that the Foreign Emoluments Clause does not apply to the President, academics have observed that, among other things: (1) a 1792 list produced by Alexander Hamilton of "every person holding any civil office or employment under the United States" did not include elected officials such as the President and Vice President;[49] (2) George Washington accepted gifts from the Marquis de Lafayette and the French Ambassador while President without seeking congressional approval;[50] and (3) Thomas Jefferson similarly received and accepted diplomatic gifts from Indian tribes and foreign nations, such as a bust of Czar Alexander I from the Russian government, without seeking congressional approval.[51] On the other side of the debate, scholars have observed that, among other things: (1) during Virginia's ratification debates, Edmund Randolph directly stated that the Foreign Emoluments Clause applies to the President;[52] (2) George Mason, another Framer, articulated a similar view in those same debates;[53] and (3) Alexander Hamilton, discussing the dangers of foreign influence on republics in *The Federalist No. 22*, stated that this concern extends to a republic's elected officials.[54]

Beyond examining contemporaneous historical evidence of the Foreign Emolument Clause's original public meaning, other evidence (such as text, precedent, and settled practice) is often used—at least by some jurists—to inform constitutional meaning and interpretation.[55] As a textual matter, both the Constitution itself[56] and con-

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function, pursuant to the Attorney General's delegation, is to provide controlling advice to Executive Branch officials on questions of law.").

[46] *See, e.g.*, Natelson, *supra* note 11, at 12 (describing this issue as one of "sharp disagreement"); *compare* Tillman, *supra* note 34, at 185–95 (arguing that the Foreign Emoluments Clause does not apply to elected federal officials), *with* Teachout, *supra* note 11, at 39–48 (disputing Tillman's view).

[47] *See, e.g.*, Tillman, *supra* note 34, at 185; Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 1: The Constitution's Taxonomy of Officers and Offices*, WASH. POST: THE VOLOKH CONSPIRACY (Sept. 25, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/25/the-emoluments-clauses-litigation-part-1-the-constitutions-taxonomy-of-officers-and-offices/ {"[T]he text and history of the Constitution, and post-ratification practice during the early republic, strongly support the counterintuitive view: The president does not hold an 'Office . . . under the United States.'").

[48] *See, e.g.*, Teachout, *supra* note 11, at 48; Erik M. Jensen, *The Foreign Emoluments Clause*, 10 ELON L. REV. 73, 86–93 (2018).

[49] *See* Tillman, *supra* note 34, at 186–88.

[50] *See id.* at 188–90.

[51] *See* Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 2: The Practices of the Early Presidents, the First Congress and Alexander Hamilton*, WASH. POST: THE VOLOKH CONSPIRACY (Sept. 26, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/26/the-emoluments-clauses-litigation-part-2-the-practices-of-the-early-presidents-the-first-congress-and-alexander-hamilton/.

[52] *See* DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 345 (2d ed. 1805) (1788) (statement of Edmund Randolph), https://archive.org/details/debatesotherproc00virg/page/345 {"There is another provision against the danger mentioned by the honorable member, of the president receiving emoluments from foreign powers. [citing the Emoluments Clauses]. I consider, therefore, that he is restrained from receiving any present or emoluments whatever. It is impossible to guard better against corruption.").

[53] 3 ELLIOT'S DEBATES 484–85 (statement of George Mason) {"[The President] may, by consent of Congress, receive a stated pension from European potentates. . . . It will, moreover, be difficult to know whether he receives emoluments from foreign powers or not.").

[54] *See* THE FEDERALIST NO. 22 (Alexander Hamilton) (describing the danger of foreign influence on "persons elevated from the mass of the community, by *the suffrages of their fellow-citizens*, to stations of great pre-eminence and power") (emphasis added); *accord* Sills, *supra* note 11, at 77 (interpreting Hamilton's statement as supporting the applicability of the Foreign Emoluments Clause to elected officials).

[55] *See generally* CRS Report R45129, *Modes of Constitutional Interpretation*, by Brandon J. Murrill, at 1–4, 5–7, 10–15, 22–25.

[56] U.S. CONST. art. II, § 1, cl. 1 {"[The President] shall hold his Office during the Term of four Years . . . ."); id. cl. 5 {"No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . ."); id. cl. 6 {"In Case of the Removal of the President from Office . . . .").

temporaneous sources[57] refer to the Presidency as an "Office."[58] The President receives compensation for his service in office (that is, "Profit") and is tasked with many important constitutional duties (that is, "Trust").[59] Furthermore, as discussed earlier, historical practice from the 19th and 20th centuries could support the view that the President is subject to the Foreign Emoluments Clause.[60] Unlike Washington's and Jefferson's actions, several 19th century Presidents notified Congress or sought congressional approval upon receipt of gifts by foreign governments.[61] Finally, the common practice among recent Presidents of placing their financial interests in a blind trust or its equivalent[62] could reflect a concern that presidential financial holdings may implicate the Foreign Emoluments Clause.[63]

The parties in recent litigation involving the Emoluments Clauses have not disputed that the Foreign Emoluments Clause applies to the President.[64] A single district court decision has reached the merits of this issue. Weighing the evidence discussed above, that court held that "the text, history, and purpose of the Foreign Emoluments Clause, as well as executive branch precedent interpreting it, overwhelmingly support the conclusion" that the Foreign Emoluments Clause applies to the President.[65] However, this decision was recently overturned on appeal on other grounds.[66]

THE MEANING OF "EMOLUMENT"

A key disputed issue regarding the scope of the Emoluments Clauses is what constitutes an "emolument."[67] This question has divided legal scholars and has only recently been addressed by any federal courts.

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[57] *See, e.g.*, THE FEDERALIST NO. 39 (James Madison) ("The President is to continue in office for the period of four years . . . ."); *id*. NO. 69 (Alexander Hamilton) ("The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office . . . .").

[58] It should be noted that commentators who dispute that the Foreign Emoluments Clause applies to the President do not deny that the Presidency is an "office," but argue more narrowly that the President does not hold an office under the United States. *See supra* note 47.

[59] *See* Sills, *supra* note 11, at 81 ("The term 'Office of *Profit*' refers to an office in which a person in office receives a salary, fee, or compensation. The term 'Office of *Trust*,' refers to offices involving "duties of which are particularly important" and requiring 'the exercise of discretion, judgment, experience and skill.'" (quoting Application of the Emoluments Clause to a Member of the President's Council on Bioethics, 29 Op. O.L.C. 55, 61–62 (2005))).

[60] *See, e.g.*, Teachout, *supra* note 11, at 42; *see generally* NLRB v. Noel Canning, 573 U.S. 513, 524 (2014) ("[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions . . . .") (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)).

[61] *See supra* notes 32–37 and accompanying text.

[62] Several recent Presidents have voluntarily placed their financial interests in a blind trust or limited their investments to assets like diversified mutual funds. *See* Michael D. Shear & Eric Lipton, *Ethics Office Praises Donald Trump for a Move He Hasn't Committed To*, N.Y. TIMES, Nov. 30, 2016, https://www.nytimes.com/2016/11/30/us/politics/donald-trump-business-president-elect.html (citing "four decades" of presidential practice); Timothy L. O'Brien, *Conflicts of Interest? President Trump's Would Be Amazing*, BLOOMBERG, June 2, 2016, https://www.bloomberg.com/opinion/articles/2016-06-02/donald-trump-might-make-the-white-house-a-walmart (citing presidential "tradition" of using blind trusts between the Lyndon B. Johnson Administration and President Trump).

[63] *See* Norman L. Eisen, et al., *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, BROOKINGS INSTITUTION 10 (Dec. 16, 2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf ("[Some recent Presidents'] recognized purpose for [putting financial holdings in a blind trust] has been to avoid an array of conflicts, including with the Emoluments Clause.").

[64] Blumenthal v. Trump, 373 F. Supp. 3d 191, 196 n.3 (D.D.C. 2019) ("The parties do not dispute that the [Foreign Emoluments] Clause applies to the President."), *motion to certify appeal granted*, No. CV 17–1154 (EGS), 2019 WL 3948478 (D.D.C. Aug. 21, 2019); District of Columbia v. Trump, 315 F. Supp. 3d 875, 880 (D. Md. 2018) ("Although the President himself does not make the argument, as a preliminary matter one of the *Amici Curiae* suggests that the President is not covered by the Foreign Emoluments Clause."), *rev'd and remanded sub nom*. *In re* Trump, 928 F.3d 360 (4th Cir. 2019).

[65] *District of Columbia*, 315 F. Supp. 3d at 883–85.

[66] *See In re Trump*, 928 F.3d at 374–79 (holding that the plaintiffs, the District of Columbia and the State of Maryland, lacked standing under Article III to pursue their Emoluments Clauses claims against the President).

[67] The Foreign Emoluments Clause may additionally be violated by accepting without the consent of Congress a "present, . . . Office, or Title." U.S. CONST. art. I, § 9, cl. 8. Scholarship generally has not focused as much on these aspects of the provision, however. *See, e.g.*, Sills, *supra* note 11, at 82–83 ("There is general agreement to the meaning of the terms, 'present,' 'office,' and 'title.' As such, these terms will not be further discussed."). As noted above, Congress has also consented by statute to the acceptance of certain foreign gifts (i.e., "present[s]"), including

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Scholars, courts, and executive branch agencies have offered several potential definitions of "emolument":

1. *Office-related definitions*: *Black's Law Dictionary* defines an "emolument" as an "advantage, profit, or gain received as a result of one's employment or one's holding of office."[68] Some scholars argue that this employment- or office-centric definition of the term is the definition encompassed by the Emoluments Clauses, meaning that the Clauses prohibit covered officials from receiving compensation "for the personal performance of services" as an officer or employee but do not bar "ordinary business transactions" between a covered official and government.[69]
2. *Any "profit, gain, advantage, or benefit"*: Others argue that the term "emolument" is broader in scope, applying to any profit, gain, advantage, or benefit.[70] Under this broader conception, even "ordinary, fair market value transactions" with foreign or domestic governments would be prohibited.[71]
3. *Functional or Purpose-based Definitions*: Both the Department of Justice's OLC and the Comptroller General of the United States, on behalf of the Government Accountability Office (GAO), in issuing opinions on whether the acceptance of particular payments, benefits, or positions would implicate the Clauses, have at times appeared to adopt a fact-specific, functional view of the Clauses. These opinions have sometimes focused on the purpose and potential effect of the specific payments or benefits at issue as they relate to the Clauses' goals of limiting influence on the President and federal officers, assessing whether they are intended to or could "influence . . . the recipient as an officer of the United States" under the totality of the circumstances.[72] At least one commentator has asserted that the OLC and GAO opinions support a middle view that Presidents or other federal officers may receive "certain fixed benefits" without those benefits being considered emoluments so long as they are not "subject to foreign or domestic government manipulation or adjustment in connection with" the office.[73]

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by the President, in limited circumstances. *See* 5 U.S.C. § 7342. The two recent court decisions addressing the substance of the Foreign Emoluments Clause in relation to the President have considered the relationship between "present" and "emolument," as described in more detail below.

[68] *Emolument*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[69] Grewal, *supra* note 4, at 642; *see also* Natelson, *supra* note 11, at 55 {"[T]he word 'emolument(s)' in the Constitution meant compensation with financial value, received by reason of public office. . . . Proceeds from unrelated market transactions were outside the scope of the term."). Much of the scholarship has focused specifically on the meaning of "emolument" in the Foreign Emoluments Clause. However, as discussed *infra*, similar arguments have been raised regarding both the Foreign and Domestic Emoluments Clauses in the recent litigation involving the President.

[70] *See* John Mikhail, *The 2018 Seegers Lecture: Emoluments and President Trump*, 53 VAL. U. L. REV. 631, 666 (2019) ("When the Constitution was written, 'emolument' was a flexible term that generally meant 'profit,' 'gain,' 'advantage,' or 'benefit.' It was commonly used in ordinary English to refer to advantages or benefits of different types. Not only government salaries, but also payments on contracts, interest on loans, and profits from ordinary commercial transactions were all referred to as 'emoluments.'"); Eisen, et al., *supra* note 63, at 11 ("[T]he [Foreign Emoluments] Clause unquestionably reaches any situation in which a federal officeholder receives money, items of value, or services from a foreign state.").

[71] Eisen, et al., *supra* note 63, at 11.

[72] President Reagan's Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187, 188 (1981) (citing Assistant Comptroller General Weitzel to the Attorney General, 34 Comp. Gen. 331, 335 (1955)); *see also* Emoluments Clause Questions Raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales, 1986 WL 1239553 (O.L.C.) at *2 (1986) (considering whether specific factual scenario "would raise the kind of concern (viz., the potential for 'corruption and foreign influence') that motivated the Framers in enacting the constitutional prohibition").

Other OLC and GAO opinions contain statements that could support either a broad or a narrower reading of the Clauses' scope. Compare Authority of Foreign Law Enforcement Agents to Carry Weapons in the United States, 12 Op. O.L.C. 67, 68 (1988) {"The Emoluments Clause must be read broadly in order to fulfill [its underlying] purpose.") and To the Secretary of the Air Force, 49 Comp. Gen. 819, 821 (1970) {"It seems clear from the wording of the constitutional provision that the drafters intended the prohibition to have the broadest possible scope and applicability."), with Letter Opinion of the Comptroller General, B–180472 (May 9, 1974) ("'Emolument' has been defined as profit, gain, or compensation received for services rendered.") and Authority of Foreign Law Enforcement Agents, *supra*, at 69 ("At a minimum, it is well established that compensation for services performed for a foreign government constitutes an 'emolument' for purposes of the Emoluments Clause.").

[73] Jane Chong, *Reading the Office of Legal Counsel on Emoluments: Do Super-Rich Presidents Get a Pass?*, LAWFARE (July 1, 2017), https://www.lawfareblog.com/reading-office-legal-counsel-emoluments-do-super-rich-presidents-get-pass.

Debates over the scope of the Clauses have largely centered on their text, their history and purpose, and historical practice.[74] With respect to text, for instance, proponents of a broad definition emphasize the use of the word "any" in both Clauses and the phrase "any kind whatever" in the Foreign Emoluments Clause.[75] They also contrast those provisions with the limiting term "whereof" that links emoluments to "civil Office" in the Ineligibility Clause (the provision that limits the ability of Members of Congress to hold dual positions).[76] But proponents of a narrower, office- or employment-limited definition note that the word "any" in the Clauses may simply be read as extending coverage to multiple *forms* of emoluments (beyond just monetary remuneration).[77] They further assert that the use of "emolument" in the Ineligibility Clause is clearly tied to an office-based definition and supports applying the same definition to the other provisions.[78] As for the Clauses' history and purpose, both sides point to dictionary definitions and other uses of the word (including by Framers) contemporaneous with the Constitution's drafting to support their preferred definition.[79] Proponents of a broad definition also argue that statements about the general anti-corruptive purpose of the Clauses support reading it expansively,[80] while proponents of an office- or employment-limited definition assert that the Clauses were the product of a "balancing of values" that included attracting candidates for federal service who may have had conflicting commercial interests.[81] As for the corpus of OLC and GAO opinions interpreting the Clauses, proponents of the broader and narrower definitions both cite opinions that they argue support their favored definitions.[82]

In 2018 and 2019, two federal district courts substantively addressed the Emoluments Clauses' scope for the first time. Both courts concluded that the term "emolument" as used in the Clauses "is broadly defined as any profit, gain, or advantage."[83] As to the Clauses' text, the courts found significant the use of "expansive

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[74] *See generally* CRS Report R45129, *Modes of Constitutional Interpretation*, by Brandon J. Murrill, at 1–4, 5–7, 10–15, 22–25.

[75] Eisen, et al., *supra* note 63, at 11 {"[T]he clause, by referring to 'any kind whatever,' instructs that it be given a broad construction.").

[76] *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 35, Blumenthal v. Trump, 373 F. Supp. 3d 191 (D.D.C. 2019) (No. 17–1154).

[77] *See* Grewal, *supra* note 4, at 660–61 (maintaining that "a phrase like 'of any kind whatever' should not affect the threshold definition of a word that precedes it").

[78] *See id*. (arguing that reading the three constitutional provisions referencing emoluments "together supports" the narrower interpretation); Memorandum of Law in Support of Defendant's Motion to Dismiss at 28–30, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17–458) (arguing that under Domestic Emoluments Clause, allowance of presidential compensation "for his Services" and prohibition on "any other Emolument" supports narrower reading).

[79] One study examined English language dictionaries published from 1604 to 1806 and English legal dictionaries published from 1523 to 1792 and concluded that over 92% of the dictionaries defined "emolument" exclusively using one or more terms favored by proponents of the broad definition (i.e., "profit," "advantage," "gain," or "benefit"), while only 8% of dictionaries contained a definition tied to "office or employ." Mikhail, *supra* note 70, at 655. By contrast, another scholar focused specifically on references to emoluments in constitutional-convention and ratification-debate records and concluded that usage was mainly limited in those contexts "to emoluments by reason of public office." Natelson, *supra* note 11, at 29, 39.

[80] Brief of *Amici Curiae* by Certain Legal Historians on Behalf of Plaintiffs at 14, Blumenthal v. Trump, 373 F. Supp. 3d 191 (D.D.C. 2019) (No. 17–1154) (arguing that a "narrow definition of 'emolument' limited to official services is inconsistent with the [Foreign Emoluments Clause's] basic purposes," which include "seek[ing] to prevent activities that have the potential to influence or corrupt the person who profits from them").

[81] *E.g.*, Natelson, *supra* note 11, at 54 {"That the founders sought to encourage active members of the private sector to public service provides further support for the Constitution's emoluments provisions applying only to those emoluments received by reason of office.").

[82] *Compare* Marty Lederman, *How the DOJ Brief in* CREW v. Trump *Reveals that Donald Trump is Violating the Foreign Emoluments Clause*, TAKE CARE (June 12, 2017), https://takecareblog.com/blog/how-the-doj-brief-in-crew-v-trump-reveals-that-donald-trump-is-violating-the-foreign-emoluments-clause (asserting that OLC opinion concluding partner at a private law firm could not accept partnership profits derived from foreign-government clients he did not personally represent is "difficult to reconcile" with office- or employment-limited definition), *with* Grewal, *supra* note 4, at 641 n.10, 655 (citing, among other opinions, Emoluments Clause and World Bank, 25 Op. O.L.C. 113, 114 (2001), which itself cited other OLC opinions for the proposition that the term "emolument" covers "compensation of any sort arising out of an employment relationship with a foreign state").

[83] Blumenthal v. Trump, 373 F. Supp. 3d 191, 207 (D.D.C. 2019); District of Columbia v. Trump, 315 F. Supp. 3d 875, 904 (D. Md. 2018) {"[T]he term 'emolument' in both Clauses extends to any profit, gain, or advantage, of more than *de minimis* value, received by [the President], directly or indirectly, from foreign, the federal, or domestic governments."). As discussed *infra*, a third court considering a lawsuit involving the Clauses did not reach the interpretive

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modifiers" like "any other" and "any kind whatever,"[84] and rejected the proposition that the term's office-related use in the Ineligibility Clause should control its use in the other Clauses.[85] With respect to the Clauses' history and purpose, the courts, while acknowledging that broader and narrower definitions of "emolument" both existed at the time of ratification,[86] found the weight of the historical evidence and the Clauses' "broad anti-corruption" purpose supported the more expansive definition.[87] Finally, the courts viewed executive branch precedent and practice as "overwhelmingly consistent with . . . [an] expansive view of the meaning of the term 'emolument,'"[88] observing that "OLC pronouncements repeatedly cite the broad purpose of the Clauses and the expansive reach of the term 'emolument.'"[89]

The recent court decisions construing the Emoluments Clauses are not final, however. In fact, as discussed below, one of the decisions has since been reversed by the U.S. Court of Appeals for the Fourth Circuit on a separate issue regarding the standing of the plaintiffs to sue,[90] and the other decision has been certified for an immediate appeal to the U.S. Court of Appeals for the District of Columbia Circuit.[91] Thus, the import of these decisions is unclear.

Enforcement of the Clauses

Separate from issues regarding the scope of the Emoluments Clauses is how the provisions' mandates are enforced and, more specifically, whether the federal courts have a role in adjudicating violations of the Clauses.[92] A principal hurdle in recent

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question because it concluded the claims should be dismissed on threshold grounds. Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174, 186 (S.D.N.Y. 2017). However, now that an appellate court has reversed that judgment, CREW v. Trump, No. 18–474, slip op. at 26 (2d Cir. Sept. 13, 2019), the lower court may need to interpret the term "emolument." *See infra* § Enforcement of the Clauses.

[84] *District of Columbia*, 315 F. Supp. 3d at 887–88; *see also Blumenthal*, 373 F. Supp. 3d at 201.

[85] *Blumenthal*, 373 F. Supp. 3d at 201; *District of Columbia*, 315 F. Supp. 3d at 888. The courts instead viewed the context to support the broader view, as "when the Founders intended for an Emolument to refer to an official's salary or payment associated with their office, they said so explicitly." *Blumenthal*, 373 F. Supp. 3d at 201; *see also District of Columbia*, 315 F. Supp. 3d at 888. Additionally, the courts rejected the proposition that adopting a broad definition of "emolument" would make the prohibition on "present[s]" in the Foreign Emoluments Clause unnecessary, reasoning that including "present[s]" simply makes clear that gratuitous benefits are also covered. *Blumenthal*, 373 F. Supp. 3d at 201; *District of Columbia*, 315 F. Supp. 3d at 889.

[86] *Blumenthal*, 373 F. Supp. 3d at 201; *District of Columbia*, 315 F. Supp. 3d at 889.

[87] *Blumenthal*, 373 F. Supp. 3d at 202–04; *District of Columbia*, 315 F. Supp. 3d at 889–900. In support of the narrower definition, the defendant had pointed to the possible business dealings of George Washington, among other presidents, with foreign and domestic governments and to a failed constitutional amendment that would have extended the Foreign Emoluments Clause to all U.S. citizens. *See, e.g., Blumenthal*, 373 F. Supp. 3d at 202–04. The courts did not accord significant weight to this historical evidence, however, essentially viewing it as speculative. *Id.* at 204; *District of Columbia*, 315 F. Supp. 3d at 894, 899. The courts also rejected the contention that adopting the broad definition would lead to "absurd consequences" such as mutual fund holdings being prohibited, e.g., *District of Columbia*, 315 F. Supp. 3d at 899, noting that the broad definition could still account for "context" and *de minimis* exceptions. *Id.; Blumenthal*, 373 F. Supp. 3d at 204.

[88] *District of Columbia*, 315 F. Supp. 3d at 901; *see Blumenthal*, 373 F. Supp. 3d at 206 ("[A]dopting the President's narrow definition of 'Emolument' would be entirely inconsistent with Executive Branch practice defining 'Emolument' and determining whether the Clause applies.").

[89] *District of Columbia*, 315 F. Supp. 3d at 902; *see also Blumenthal*, 373 F. Supp. 3d at 206 ("OLC opinions have consistently cited the broad purpose of the Clause and broad understanding of 'Emolument' advocated by plaintiffs to guard against even the *potential* for improper foreign government influence."). The court in *District of Columbia* also cited a 2017 opinion from the House of Representatives' Office of Congressional Ethics, which applied the Foreign Emoluments Clause to a Delegate's receipt of profits from a rental home, noting that the House Ethics Manual defines "emolument" broadly with "no exception or limitation . . . for when the Member generates the profit from a fair market value commercial transaction." OCE Report, Review No. 17–1147, at 12 (June 2, 2017), https://ethics.house.gov/sites/ethics.house.gov/files/OCE%20Report%20and%20Findings_6.pdf.

[90] *In re* Trump, 928 F.3d 360, 380 (4th Cir. 2019). Pending before the appellate court is the plaintiffs' request that the court reconsider its ruling or have the entire circuit court hear the case. Petition for Rehearing or Rehearing En Banc, *In re* Trump, 928 F.3d 360 (4th Cir. 2019) (No. 18–2486).

[91] Blumenthal v. Trump, No. 17–1154, 2019 WL 3948478, at *3 (D.D.C. Aug. 21, 2019).

[92] There is no criminal prohibition on receiving or accepting emoluments from foreign or domestic governments that would apply to the President, though accepting something of value in return for "being influenced in the performance of [an] official act" could, theoretically, be prosecuted as bribery under federal law. *See* 18 U.S.C. § 201(b)(2) (prohibiting bribery of public offi-

litigation involving the President has been the doctrine of standing. Standing is a threshold limitation concerning whether the person or entity suing in federal court has a "right to make a legal claim or seek judicial enforcement of a duty or right."[93] The limitation includes a constitutional component stemming from Article III of the U.S. Constitution, which limits the exercise of federal judicial power to "Cases" or "Controversies."[94] The Supreme Court has interpreted this "case-or-controversy limitation"[95] to require, among other things, that a litigant have "a personal stake in the outcome of the controversy" before the court.[96] At a minimum, a plaintiff must establish that he or she has suffered a personal injury (often called an "injury-in-fact") that is actual or imminent and concrete and particularized.[97] In other words, the injury cannot be "abstract,"[98] must affect the plaintiff in a "personal and individual way,"[99] and must actually exist or at least be "certainly impending" rather than merely possible in the future.[100] The plaintiff must also show "a sufficient causal connection between the injury and the conduct complained of" (causation) and "a likelihood that the injury will be redressed by a favorable decision" (redressability).[101]

Recent lawsuits over the Emoluments Clauses have been filed in three federal courts by (1) private parties who argue they compete for business with properties related to the alleged violations of the Clauses, as well as a public interest organization (the "SDNY litigation"); (2) the State of Maryland and the District of Columbia (the "Maryland litigation"); and (3) over 200 Members of Congress (the "Congressional litigation"). Each set of plaintiffs implicate distinct legal issues and precedent related to standing. Private-party competitor plaintiffs rely on the notion of "competitor standing,"[102] which holds that an economic actor may have standing to challenge unlawful action that benefits a direct competitor in a way that increases competition in the relevant market.[103] State plaintiffs also rely on a competitor standing theory and additionally assert harms to certain sovereign and "quasi-sovereign" interests of the state related to tax revenue, diminution of their sovereign author-

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cials and defining "public official" in a way that would appear to include the President); Andy Grewal, *Trump's Obstruction of Justice Defense and the Bribery Counterargument*, NOTICE & COMMENT: YALE J. REG. (Dec. 14, 2017), http://yalejreg.com/nc/trumps-obstruction-of-justice-defense-and-the-bribery-counterargument/ (treating 18 U.S.C. § 201 as applying to the president).

[93] *Standing*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[94] U.S. CONST. art. III, § 2, cl. 1. Constitutional standing is a matter of a federal court's subject-matter jurisdiction that it may raise and decide before reaching a lawsuit's merits, whether or not the parties contest standing. *See* United States v. Windsor, 570 U.S. 744, 756 (2013) (referring to "the jurisdictional requirements of Article III"); Gonzalez v. Thaler, 565 U.S. 134, 141 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.").

[95] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341–42 (2006).

[96] Warth v. Seldin, 422 U.S. 490, 498 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

[97] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[98] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548–49 (2016).

[99] *Lujan*, 504 U.S. at 560 n.1.

[100] Clapper v. Amnesty Int'l, 568 U.S. 398, 410 (2013) (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

[101] Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (quoting *Lujan*, 504 U.S. at 560–61) (alteration and quotation marks omitted). Beyond constitutional requirements, courts have also sometimes looked to certain "prudential" considerations in assessing standing. These considerations have traditionally included (1) whether a plaintiff is asserting his or her own legal rights and interests (rather than those of a third party); (2) whether the plaintiff's complaint falls within the "zone of interests" covered by the legal provision at issue; and (3) whether the plaintiff is merely asserting a "generalized grievance[]" that is more appropriate for the representative branches of government to resolve. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 474–75 (1982) (citations omitted). However, in recent years, the Supreme Court has appeared to move away from the concept of prudential standing, indicating that whether a case asserts a "generalized grievance" is part of the constitutional analysis and the "zone of interests" test (at least in the statutory context) is actually a question of whether a plaintiff "has a cause of action" because he or she "falls within the class of plaintiffs . . . authorized to sue." Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 n.3, 128 (2014).

[102] *See* Citizens for Responsibility & Ethics in Wash. (CREW) v. Trump, 276 F. Supp. 3d 174, 184 (S.D.N.Y. 2017) ("The Hospitality Plaintiffs attempt to rely on the competitor standing doctrine to establish injury in fact.").

[103] *E.g.*, Adams v. Watson, 10 F.3d 915, 922 (1st Cir. 1993) (surveying Supreme Court cases finding standing "premised on a plaintiff's status as a direct competitor whose position in the relevant marketplace would be affected adversely by the challenged governmental action" (emphasis omitted)). The public interest organization involved in the SDNY litigation also claimed harm in the form of diversion of its resources to combat alleged violations of the Clauses, *CREW*, 276 F. Supp. 3d at 189, but it has since dropped out of the lawsuit. CREW v. Trump, No. 18–474, slip op. at 3 n.1 (2d Cir. Sept. 13, 2019).

ity,[104] and the economic well-being of state residents in general.[105] Finally, Members of Congress assert standing stemming from the alleged deprivation of their constitutionally prescribed opportunity to vote on the permissibility of particular emoluments under the Foreign Emoluments Clause, which implicates a unique set of standing principles that apply specifically to legislative-entity plaintiffs.[106] More broadly, regardless of the status or classification of the plaintiffs, the fact that a lawsuit involving the Emoluments Clauses seeks a court ruling on the constitutionality of the conduct of an official within another branch of the federal government means that courts must conduct an "especially rigorous" standing inquiry given underlying separation-of-powers concerns.[107]

Attempts by these various plaintiffs to sue for alleged violations of the Emoluments Clauses have met with mixed results. With respect to private-party competitor plaintiffs, the district court in the SDNY litigation concluded that several such plaintiffs lacked standing because it was "wholly speculative" that any loss of business or increase in competition could be traced to alleged violations of the Emoluments Clauses rather than "government officials' independent desire to patronize [the] businesses" allegedly involved in those violations based on factors such as service and location.[108] But the U.S. Court of Appeals for the Second Circuit recently reversed the district court's ruling regarding the competitor plaintiffs,[109] concluding that "a plaintiff-competitor who alleges a competitive injury caused by a defendant's unlawful conduct that skewed the market in another competitor's favor [has standing] notwithstanding other possible, or even likely, causes for the benefit going to the plaintiff's competition."[110]

As for state plaintiffs, a different district court concluded in the Maryland litigation that the State of Maryland and the District of Columbia (D.C.) had standing to sue as competitors based on their interests, along with the interests of their citizens, in hotels and event spaces that competed with a hotel in D.C. related to the alleged unconstitutional conduct.[111] The court reasoned that, based on specific fac-

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[104] *See* District of Columbia v. Trump, 291 F. Supp. 3d 725, 738–42 (D. Md. 2018).

[105] *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel*. Barez, 458 U.S. 592, 607 (1982) (recognizing that a state may sue in certain circumstances to protect its interests in "the health and well-being—both physical and economic—of its residents in general").

[106] For a fulsome discussion of those principles, see CRS Report R45636, *Congressional Participation in Litigation: Article III and Legislative Standing*, by Wilson C. Freeman and Kevin M. Lewis.

[107] Raines v. Byrd, 521 U.S. 811, 819–20 (1997) {"[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.").

[108] *CREW*, 276 F. Supp. 3d at 186. The district court in that case also concluded the asserted injuries were unlikely to be redressed by the requested relief—an injunction preventing further Emoluments Clause violations, among other things—because it was speculative whether such relief would "lessen the competition inherent in any patron's choice of hotel or restaurant." *Id*. Moreover, the court applied another doctrine governing judicial review, "ripeness," which is "designed to prevent courts from prematurely adjudicating cases," to conclude that the plaintiffs' Foreign Emoluments Clause claims were not ripe for review. *Id*. at 194 (citing Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1976)). In the court's view, the "conflict between two co-equal branches of government" had "yet to mature" because Congress had not "asserted its authority and taken some sort of action with respect to" the "alleged constitutional violations of its consent power." *Id*. at 194–95.

[109] The lower court had also determined that a public interest organization involved in the suit did not suffer a cognizable injury for standing purposes by having to expend its resources to combat the alleged violations of the Emoluments Clauses, reasoning that the organization's decisions about how to expend finite resources were "entirely self-inflicted and not borne out of [the organization's] need to remedy any particular adverse consequence or harmful effect of" the challenged conduct. *Id*. at 191 n.6. The public interest organization opted not to appeal the district court's judgment that it lacked standing. CREW v. Trump, No. 18–474, slip op. at 3 n.1 (2d Cir. Sept. 13, 2019).

[110] *Id*. at 26. The appellate court also rejected the lower court's conclusions that the asserted injuries were unlikely to be redressed by the requested relief and that the ripeness doctrine posed a barrier to maintaining suit, reasoning that (1) standing is not defeated by the "mere possibility that customers might continue to favor" one product or service over another after a court enjoins violations of law contributing to that favoritism, and (2) deferring adjudication would not necessarily lead to further ripening but would likely simply allow the challenged conduct to continue "because of the absence of an adjudicator to tell the President whether his conduct is, or is not, permitted by the Constitution he serves." *Id*. at 42, 63–64. One judge dissented, arguing that the majority applied an unbounded theory of competitor standing based on speculative assertions of harm, causation, and redressability. *Id*. at 15 (Walker, J., dissenting).

[111] District of Columbia v. Trump, 291 F. Supp. 3d 725, 757 (D. Md. 2018). Regarding the interests of citizens, the court concluded that Maryland and the District of Columbia could sue as *parens patriae*, based on their own "quasi-sovereign" interests in the economic well-being of the citizens. *Id*. at 748; *see* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel*. Barez, 458 U.S. 592, 600–02 (1982) (describing quasi-sovereign interests and contrasting them with sovereign

tual allegations regarding diversion of business to that hotel, the plaintiffs were "placed at a competitive disadvantage" because of violations of the Clauses that "unfairly skew[ed] the hospitality market" against them.[112] The U.S. Court of Appeals for the Fourth Circuit subsequently reversed this decision, however, concluding that the theory of standing hinged on the proposition that government customers were patronizing the relevant hotel "because the [h]otel distributes profits or dividends" in violation of the Clauses "rather than due to any of the [h]otel's other characteristics[,]" and such a proposition required "speculation into the subjective motives of independent actors . . . not before the court, undermining a finding of causation."[113]

Finally, with respect to Members of Congress, the district court in the Congressional litigation determined in 2018 that over 200 Members had standing to sue under the Foreign Emoluments Clause based on the deprivation of their "opportunity to exercise their constitutional right to vote on whether to consent prior to . . . acceptance of prohibited emoluments."[114] Faced with Supreme Court precedent indicating that individual legislators generally lack standing to sue for institutional injuries that amount to "abstract dilution of institutional legislative power," but may have standing when their votes on specific items "have been completely nullified,"[115] the district court concluded that the Members alleging violations of the Foreign Emoluments Clause fell into the latter category.[116] Central to the district court's decision in the Congressional litigation was its view that the Member-plaintiffs lacked an adequate legislative remedy for the alleged violations without court intervention.[117] According to the court, although Congress as a whole could pass "legislation on the emoluments issue" to consent to or reject perceived emoluments, the political process would do nothing to address the deprivation of the Members' opportunity to give advance approval or disapproval of particular emoluments in the first instance.[118]

As with the court rulings on the definition of the term "emolument," the judicial decisions on standing to enforce the Emoluments Clauses all present avenues for further review: (1) in the SDNY litigation, the case could be reheard by the panel of, or the entire, U.S. Court of Appeals for the Second Circuit if requested;[119] (2) in the Maryland litigation, the plaintiffs have asked the U.S. Court of Appeals for the Fourth Circuit to reconsider its ruling;[120] and (3) in the Congressional litigation, the district court recently stayed the case and granted an immediate appeal in response to an order from the U.S. Court of Appeals for the D.C. Circuit indicating such an appeal would be appropriate.[121] It is thus possible that the outcomes in some or all of the opinions just described could change. Given that the U.S. Courts of Appeals for the Second and Fourth Circuits have now effectively split on

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and "other kinds of interests that a State may pursue"). In so doing, the court distinguished cases casting "doubt on a State's standing to assert a quasi-sovereign interest . . . against the Federal Government," Massachusetts v. EPA, 549 U.S. 497, 539 (2007) (Roberts, C.J., dissenting), as involving challenges to "the operation of federal statutes" rather than asserting a state's "rights under federal law (which it has standing to do)." *District of Columbia*, 291 F. Supp. 3d at 747 (quoting *Massachusetts*, 549 U.S. at 520 n.17).

[112] *Id*. at 745. The court also determined that Maryland and the District of Columbia had standing stemming from injuries to a distinct "quasi-sovereign" interest, *see Snapp & Son*, 458 U.S. at 600–02, in equal status and participation in the federal system, based on allegations that they felt "effectively 'coerced'" to stay at or grant special concessions to the hotel allegedly involved in violations of the Clauses to "help them obtain federal favors." *District of Columbia*, 291 F. Supp. 3d at 742.

[113] *In re* Trump, 928 F.3d 360, 376, 377 (4th Cir. 2019). The appellate court further determined that the alleged injuries were not redressable because there was a likelihood that an injunction "would not cause government officials to cease patronizing" the hotel allegedly involved in violations of the Clauses, *id*. at 377, and the court dismissed alleged injuries to the plaintiffs' other quasi-sovereign interests as "amount[ing] to little more than a general interest in having the law followed." *Id*. at 378.

[114] Blumenthal v. Trump, 335 F. Supp. 3d 45, 63 (D.D.C. 2018).

[115] Raines v. Byrd, 521 U.S. 811, 823, 826 (1997); *see also* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1953–54 (2019) (observing that "individual members lack standing to assert the institutional interests of a legislature" and concluding that one house of a bicameral state legislature lacked standing where the case "[did] not concern the results of a legislative chamber's poll or the validity of any counted or uncounted vote").

[116] *Blumenthal*, 335 F. Supp. 3d at 62–64.

[117] *Id*. at 66.

[118] *Id*. at 66–68.

[119] CREW v. Trump, No. 18–474 (2d Cir. Feb. 16, 2018); FED. R. APP. P. 35, 40 (permitting petitions for rehearing *en banc* and setting time limits for filing petitions for panel rehearing).

[120] Petition for Rehearing or Rehearing En Banc, *In re* Trump, 928 F.3d 360 (4th Cir. 2019) (No. 18–2486).

[121] *See* Blumenthal v. Trump, No. , 2019 WL 3948478, at *3 (D.D.C. Aug. 21, 2019).

the viability of competitor standing theories as they relate to alleged violations of the Emoluments Clauses, Supreme Court review is also possible.[122]

Beyond standing, other doctrines may present potential roadblocks to judicial enforcement of the Clauses. For instance, though its continued vitality is questionable,[123] the Supreme Court has traditionally applied as a prudential aspect of the standing inquiry a "zone of interests" test, which "denies a right of review if the plaintiff's interests are marginally related to or inconsistent with the purposes implicit in the constitutional provision" at issue.[124] Applying this test in the context of the Emoluments Clauses, the district court in the SDNY litigation involving private competitors concluded that such competitors fell outside the zone of interests of the Clauses, as the Emoluments Clauses stemmed from "concern with protecting the . . . government from corruption and undue influence" and were not "intended . . . to protect anyone from competition."[125] Another potential barrier is the "political question doctrine," a separation-of-powers-based limitation on the ability of courts to hear disputes where there is, among other things, a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it."[126] In the SDNY litigation, the district court concluded that the fact that the Foreign Emoluments Clause provides authority to Congress to "consent to violations" meant that Congress, rather than the judiciary, would be "the appropriate body to determine whether" the alleged conduct "infringes on that power."[127]

Reversing both rulings, however, the U.S. Court of Appeals for the Second Circuit recently concluded that (1) "a plaintiff who sues to enforce a law that limits the activity of a competitor satisfies the zone of interests test even though the limiting law was not motivated by an intention to protect entities such as plaintiffs from competition,"[128] and (2) the judiciary's responsibility to adjudicate alleged violations of the Constitution was not lessened by the "mere possibility that Congress might grant consent" to particular emoluments.[129] The district courts in the Maryland litigation and the Congressional litigation likewise agreed that the zone of interests test and political question doctrine did not bar those suits.[130] Nevertheless, like the other issues raised in recent litigation involving the Emoluments Clauses, further review of the application of these doctrines is possible.[131] Ultimate resolution of the issues is thus uncertain and will likely depend on the nature of the plaintiff involved.

Ms. TITUS. Thank you very much.

I will now go to Mr. von Spakovsky.

Mr. VON SPAKOVSKY. Thank you, Madam Chairwoman.

It is important to note that the lease between the Government and Trump Old Post Office LLC, a corporate entity, not the President, became operative more than 3 years before Donald Trump was elected.

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[122] *See* SUP. CT. R. 10 (indicating that, in deciding whether to grant certiorari, the Supreme Court may consider the fact that one federal "court of appeals has entered a decision in conflict with the decision of another [federal] court of appeals on the same important matter").

[123] *See supra* note 101.

[124] Wyoming v. Oklahoma, 502 U.S. 437, 469 (1992) (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 394, 399 (1987)) (alterations omitted).

[125] CREW v. Trump, 276 F. Supp. 3d 174, 187 (S.D.N.Y. 2017).

[126] Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012).

[127] *CREW*, 276 F. Supp. 3d at 193.

[128] CREW v. Trump, No. 18–474, slip op. at 47 (2d Cir. Sept. 13, 2019).

[129] *Id.* at 59.

[130] Among other things, the district court in the Congressional litigation reasoned that Congress's interests are explicitly contemplated in the text of the Foreign Emoluments Clauses. *Blumenthal*, 373 F. Supp. 3d at 209–10. The district court in the Maryland litigation viewed the Clauses as "protect[ing] all Americans" and determined that without congressional approval of emoluments, sufficient standards existed for the judiciary to review the legality of the actions at issue. *District of Columbia*, 291 F. Supp. 3d at 755, 757.

[131] The President has also raised other arguments in the litigation involving the Emoluments Clauses, including that the requested relief of an injunction would impermissibly interfere with his constitutional duties and is unavailable in the Emoluments Clause context. *E.g., Blumenthal*, 373 F. Supp. 3d at 208–12. Thus far, none of the courts considering the Clauses have accepted these arguments, *e.g., id.*, though one appellate court has indicated that the arguments are "substantial" and another has noted that whether the Foreign Emoluments Clause supports a cause of action against the President is "unsettled." *In re* Trump, 928 F.3d 360, 374 (4th Cir. 2019); *In re* Trump, No. 19–5196, 2019 WL 3285234, at *1 (D.C. Cir. July 19, 2019).

The IG comes to a number of erroneous conclusions. The IG claims the GSA should have considered whether the lease is a violation of the Emoluments Clause, and it failed to consider that issue in determining whether the leaseholder was in violation of section 37.19 of the lease. But the emoluments question is a constitutional issue under the authority of the Department of Justice, not GSA.

DOJ has made it clear, from the beginning of the administration and throughout the litigation filed against the President, that the executive branch does not believe the lease violates the Emoluments Clause. That position is controlling for the entire executive branch, and the IG's criticism of GSA is, therefore, unwarranted.

Furthermore, GSA's position as the tenant is not in violation of section 37.19 of the lease is also correct. That provision states an elected official cannot be admitted to any share or part of the lease. But that section was not violated when the lease was entered into in 2013, since Donald Trump was not an elected official at the time. Also, the lease was not with him personally but with a corporate entity in which he held a majority interest, along with other shareholders. The section does not apply to Donald Trump since it clearly states that it, quote: "Shall not be construed as extending to any person who may be a shareholder or other beneficial owner of any publicly held corporation or other entity." Trump Old Post Office LLC clearly falls within the definition of other entity.

Trump's interests in this LLC, as you know, were transferred to a trust after he was sworn in. He relinquished his management control and announced that all profits from foreign government payments would be donated to the U.S. Treasury. Therefore, GSA was correct when it issued an estoppel certificate saying the tenant was in full compliance with the lease.

It is also important to note that after interviewing two dozen employees and reviewing over 10,000 documents, the IG found that there was no undue influence, pressure, or unwarranted involvement of any kind by anyone, including the Executive Office of the President.

The IG's conclusion that GSA's unwillingness to address the constitutional emoluments issue affected its analysis of section 37.19 makes no sense. Since it was and is the Justice Department's position that there has been no violation of the Emoluments Clause, there was and is no reason for GSA to independently consider the issue.

The plain text of the Emoluments Clause, as well as historical practice, makes it clear that it was intended to prevent gifts, presents from foreign and State governments, as well as payments for services rendered in the President's official capacity. They were not meant to bar a President from having private business interests or owning businesses in which customers, including foreigners, pay the fair market value of products or services they receive in an open exchange. As DOJ has pointed out in its briefs, neither the text nor the history of the clauses show they were intended to reach benefits arising from a President's private business pursuits having nothing to do with his office or personal service to a foreign power.

The argument advocated by those who say that the Emoluments Clause prevents anything of value being received by a President is far outside the intentions of the Framers. Under that theory, the Governor's pension that Ronald Reagan received as President would violate the Domestic Emoluments Clause. A DOJ opinion concluded that did not fit within the Emoluments Clause. Under this dubious theory, a President could not even hold U.S. Treasury bonds because the interest that he would receive in payments on those bonds would be considered a violation of the Emoluments Clause.

The concerns raised by the IG have no basis in fact or law. There was no violation of the Emoluments Clause when the Trump Organization was selected to be the developer of the Trump Hotel in 2012. There was no violation after the President was elected based on the specious claim that any Government official staying in the hotel is paying an emolument to the President. The President is not providing any services in his official capacity as President.

Given that DOJ has maintained since the beginning of the administration that the lease is not in violation of the Emoluments Clause, there was no reason for GSA to consider that issue contrary to the criticisms of the IG. And the GSA was correct in its assessment of the lease by its own terms, it does not apply to this situation. This is all much ado about nothing.

[Mr. von Spakovsky's prepared statement follows:]

Prepared Statement of Hans A. von Spakovsky, Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies, The Heritage Foundation

INTRODUCTION

My name is Hans A. von Spakovsky.[1] I appreciate the invitation to be here today. The views I express in this testimony are my own, and should not be construed as representing any official position of the Heritage Foundation or any other organization.

I am a Senior Legal Fellow in the Meese Center for Legal and Judicial Studies at The Heritage Foundation. Prior to joining The Heritage Foundation, I was a Commissioner on the U.S. Federal Election Commission for two years (2006–2007). Before that, I spent four years at the U.S. Department of Justice as a career civil service lawyer in the Civil Rights Division, where I received three Meritorious Service Awards (2003, 2004, and 2005). I began my tenure at the Justice Department as a trial attorney in 2001 and was promoted to be Counsel to the Assistant Attorney General for Civil Rights (2002–2005).[2]

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[1] The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work.

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Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

[2] I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981.

Summary of Testimony

This hearing concerns the lease of the Trump International Hotel ("Trump Hotel") with the General Services Administration ("GSA"). Congress passed the "Old Post Office Building Redevelopment Act of 2008," which directed GSA to redevelop the Old Post Office Building located on Pennsylvania Avenue in Washington, D.C., and originally built between 1892 and 1899. According to a report issued by the IG on January 16, 2019 (the IG Report), GSA solicited bid proposals in 2011. lt selected the Trump Old Post Office LLC in 2012 as the developer. GSA entered into a 60-year lease in 2013.[3]

lt is important to note at the outset that the lease between the government and Trump Old Post Office LLC became operative more than three years before Donald Trump was elected President of the United States.

The IG comes to a number of erroneous conclusions with regard to the lease of the Old Post Office Building to the Trump Old Post Office LLC (Tenant).[4] The IG claims that GSA failed to consider whether the lease amounts to a violation of the two Emoluments Clauses of the Constitution, and that it failed to consider the emoluments issue when determining whether the leaseholder was in violation of Section 37.19 of the lease.

But as the deputy counsel of GSA, Lennard Loewentritt, properly concluded, the emoluments question was a constitutional issue subject to evaluation by the Department of Justice's Office of Legal Counsel, not GSA.[5] lt is the Office of Legal Counsel that determines the position of the executive branch on constitutional issues and agencies like GSA are bound by its legal opinions.[6]

The Justice Department has made clear throughout the litigation filed against the president under the Emoluments Clauses that the legal position of the executive branch is that the lease of the Old Post Office Building by the Trump Hotel does not violate the Constitution. That position is controlling and the IG's criticism of GSA is unwarranted.

Furthermore, GSA's position that the Tenant is not in violation of Section 37.19 of the lease is also correct. That provision states that an elected official cannot be "admitted to any share or part" of the lease.[7] But Section 37.19 was not violated when the lease was entered into in 2013, since Donald Trump was not an elected official at that time. Also, the lease was not with him personally but a corporate entity in which he held a majority interest. This provision does not apply to the Tenant under its plain text since it clearly states that it "shall not be construed as extending to any Person who may be a shareholder or other beneficial owner of any publicly held corporation or other entity" if the lease is for "the general benefit of such corporation or other entity."[8]

As the IG herself admits, that is the situation with regard to this Tenant. The Tenant is an entity in which Trump was one of the shareholders and "in which several other business entities also held a small interest each."[9] All of Trump's interests in that entity were transferred to a trust after he was sworn into office; he relinquished his management authority; and his counsel announced that all profits from the hotel from foreign government payments would be donated to the U.S. Treasury.[10] Therefore, GSA was correct when it issued an estoppel certificate on March 23, 2017, stating that the Tenant was in full compliance with the lease.[11]

Even the IG noted that the GSA lease-contracting officer, Kevin Terry, was "walled" off to "avoid any political influence over him and preserve his independence."[12] GSA's general counsel, Jack St. John, notes that after interviewing two dozen employees and reviewing over 10,000 documents, the IG "found not a single instance in which a political appointee or career federal employee at GSA attempted to improperly interfere with or exert pressure on the contracting officer's decision-making process." In fact, the IG "found no undue influence, pressure, or unwarranted involvement of any kind by anyone, including the Executive Office of the

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[3] *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, Office of Inspector General, U.S. GENERAL SERVICES ADMINISTRATION, JE19–002 (Jan. 16, 2019).
[4] *Id*.
[5] *Id*. at 5.
[6] See https://www.justice.gov/olc.
[7] IG Report at 3.
[8] IG Report at 3.
[9] IG Report at 8.
[10] IG Report at 8.
[11] IG Report at 1O.
[12] IG Report at 4.

President and the Office of Management and Budget." [13] Thus, there is no evidence of any undue influence over GSA's determination that the Tenant was in full compliance with the lease.

The IG's conclusion that GSA's "unwillingness to address the constitutional [emoluments] issues affected its analysis of Section 37.19" makes no sense. Since it was and is the Justice Department's position that there has been no violation of the Emoluments Clauses, there was and is no reason for GSA to independently consider the emoluments issue. Furthermore, the Tenant has satisfied the plain language of the exception in this provision of the lease.

The Emoluments Clauses

The Foreign Emoluments Clause of the Constitution states that no person "holding any Office of Profit or Trust under [the United States] shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign state." [14] As the Heritage Guide to the Constitution explains, the Framers adopted this clause to prevent the corruption of U.S. officeholders, particularly foreign ministers, through the receipt of bribes and improper benefits—presents, gifts, and emoluments—from foreign officials.

As Heritage outlines, this clause was meant as an "antidote" to what the Framers had "observed during the period of the [Articles of] Confederation." [15] Louis XVI had a habit of giving expensive gifts to foreign diplomats, including Americans, who had signed treaties with France. For example, he gave Arthur Lee and Benjamin Franklin portraits of himself set in diamonds. The King of Spain gave John Jay a horse while he was negotiating with Spain.

As the Justice Department pointed out in its "Writ of Mandamus" in the Fourth Circuit, "interpreting the term 'Emolument' to reach essentially anything of value renders entirely superfluous the Foreign Emolument Clause's prohibition on receipt of any 'present'." [16] According to the Justice Department, such a reading of the Emoluments Clause "is belied by Founding-era history and context." In fact:

> [S]everal early Presidents owned plantations and continued to export cash crops overseas while in office, including [George] Washington, who exported flour and cornmeal to 'England, Portugal, and the island of Jamaica,' and Thomas Jefferson, who exported tobacco to Great Britain. Yet there is no evidence that they took steps to ensure that foreign governments were not among their customers.[17]

Such normal, customary business transactions were not considered emoluments because they were not gifts or presents, and they were not compensation tied to the president's services in his official position. In contrast to President Trump, no one has raised any claim that former President Barack Obama violated the emoluments clause for earning over $10 million in foreign book sales during his presidency.[18]

Entering into a lease with the federal government on a property that will generate profits over and above what is paid to the government for the lease is also not a prohibited emolument. This is especially true when the lease was entered into with a private company, whose major shareholder held no public office whatsoever at the time the lease was ratified.

George Washington *directly* transacted business with the federal government, purchasing public land up for public sale in the then Territory of Columbia. As the Justice Departments relates:

> [N]o concern was raised that such transactions conferred a benefit, and thus a prohibited emolument, on Washington. The absence of any such concern is especially telling because one of the three Commissioners [of the district who were appointed by Washington] had, like Washington, attended the Constitutional Convention, and the other two had voted in the state ratification conventions.[19]

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[13] *Memorandum from Jack St. John, General Counsel, to Carol F. Ochoa, Inspector General*, GENERAL SERVICES ADMINISTRATION (Jan. 9, 2019); Appendix B, IG Report.

[14] U.S. Constitution, Art. I, Sec. 9, Cl. 8.

[15] The Heritage Guide to the Constitution; https://www.heritage.org/constitution/#!/articles/l/essays/68/emoluments-clause.

[16] In re Donald J. Trump, No. 18–2486 (4th Cir.), *Petition for a Writ of Mandamus to the United States District Court for the District of Maryland and Motion for Stay of District Court Proceedings Pending Mandamus* (Dec. 17, 2018), p.21–22.

[17] *Id*. at 23 (citations omitted).

[18] John-Michael Seibler, *Democrats' Suit Claims Constitution Means One Thing for Obama, but Another for Trump,* DAILY SIGNAL (June 13, 2017); https://www.dailysignal.com/2017/06/13/democrats-suit-claims-constitution-means-one-thing-for-obama-but-another-for-trump/.

[19] CREW v. Trump, Case No. 17–458 (So. D. N.Y.), *Memorandum of Law in Support of Defendant's Motion to Dismiss* (June 9, 2017), p. 38.

Additionally, in the early days of our Republic, the term "emolument" was comprehensively defined as "compensation or pecuniary profit derived from a *discharge of the duties of the office*." [20] Thus, the Justice Department argues persuasively that the Foreign Emoluments Clause "prohibits benefits arising from services the President provides to the foreign state either as President (e.g., making executive decisions favorable to the paying foreign power) or in a capacity akin to an employee of a foreign state (e.g., serving as a consultant to a foreign power)." [21]

This provision was intended to prevent gifts and presents from foreign leaders, as well as payments for services rendered in the president's official capacity. lt was not meant to bar a president from having private business interests or owning businesses in which customers and consumers—including foreigners—pay the fair market value of products or services they receive in an open exchange. This would include paying for a hotel room and hotel services in a luxury hotel in Washington, D.C. In fact, at the time of our founding, government officials were not paid very well "and many federal officials were employed with the understanding that they would continue to have income from private pursuits." [22]

But here, Donald Trump, upon becoming President, put his interests in the private company that owns the hotel into a trust, which he has zero ability to control or manage.

The terms of the Domestic Emoluments Clause directly support this interpretation as well. This clause provides that the president shall "receive for his Services, a Compensation . . . during the Period for which he shall have been elected, and he shall not receive within the Period any other Emolument from the United States, or any of them." [23] In other words, he cannot receive any other compensation for his service, tying the term "emolument" directly into the president's service as president. Thus, none of the fifty states may provide him with presents, gifts, or additional compensation for his services as president, just like foreign governments.

The very same reasoning applies to this provision as to the Foreign Emoluments Clause. As the Justice Department points out, "[n]either the text nor the history of the Clauses shows that they were intended to reach benefits arising from a President's private business pursuits having nothing to do with his office or personal service to a foreign power." [24] Similarly, this provision does not "preclude a President from acting on the same terms as any other citizen in transacting business with a federal or state instrumentality, such as entering into a lease or applying for a tax credit." [25]

The arguments advocated by Donald Trump's opponents are far beyond what the Framers ever intended for the Emoluments Clauses. Under the claim that the receipt by a president of *anything* of value outside of his salary as president is a violation of either of the two Emoluments Clauses, Pres. Ronald Reagan's receipt of a pension from the State of California based on his service as governor would have been a violation of the Domestic Emoluments Clause. As the Office of Legal Counsel concluded, however, those benefits were not "emoluments in the constitutional sense" and their receipt by the president did not "violate the spirit of the Constitution" either.[26]

Under this theory, a president could not even hold U.S. Treasury bonds while in office since the interest paid on those bonds could be considered an "emolument" from the U.S. government over and above his salary and compensation. Such a broad interpretation makes no sense and is not in according with the historical understanding of the clause. In truth, the Emoluments Clauses are not the sweeping anti-corruption laws that Trump's opponents would like them to be.

The Inspector General misinterprets and misapplies the past opinions of the Office of Legal Counsel on the Emoluments Clauses on pages 18 and 19 of the IG Report. All of the opinions the IG cites concern federal employees receiving stipends, consulting fees, employment compensation, gifts, awards, and partnerships fees from foreign governments.

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[20] Hoyt v. U.S., 51 U.S. 109, 135 (1850) (emphasis added).

[21] CREW v. Trump, Case No. 17–458 (So. D. N.Y.), *Memorandum of Law in Support of Defendant's Motion to Dismiss* (June 9, 2017), p. 29.

[22] CREW v. Trump, Case No. 17–458 (So. D. N.Y.), *Memorandum of Law in Support of Defendant's Motion to Dismiss* (June 9, 2017), p. 36 (citing Leonard D. White, *The Federalists: A Study in Administrative History* (1st ed. 1948), pages 291–92, 296).

[23] U.S. Constitution, Art. Il, Sec. 1, Cl. 7.

[24] CREW v. Trump, Case No. 17–458 (So. D. N.Y.), *Memorandum of Law in Support of Defendant's Motion to Dismiss* (June 9, 2017), p. 26.

[25] *Id*. at 29.

[26] *President Reagan's Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.LC. 187, 192 (1981).

None of these opinions apply to the lease agreement for the Trump Hotel.[27]

When state government officials choose to stay in the Trump Hotel and pay the fair market value of their hotel room and room services, that is not a gift, a present, or an emolument tied to the president's official duties. They are engaging in a normal, standard business transaction, no different from staying in any other hotel in the nation's capital. Neither of the Emoluments Clauses was intended to prohibit a company or a business in which a president has an ownership or financial interest from doing business with any foreign, federal or state government.

As of the date of this hearing, there have been no federal court of appeals decisions on the substantive interpretation of the Foreign and Domestic Emoluments Clauses and their applicability to the Trump Hotel and the lease that is the subject of the IG Report.

A three-judge panel of the Fourth Circuit Court of Appeals has thrown out claims made by the State of Maryland and the District of Columbia, concluding that neither the state nor the federal district has Article III standing to even assert a claim against the president.[28] The court said that their interest in enforcing the emoluments clauses, based on a theory that the Trump Hotel supposedly keeps customers from choosing their own hotels and facilities, "is so attenuated and abstract that their prosecution of this case readily provokes the question of whether this action against the President is an appropriate use of the courts."[29]

On the other hand, a divided panel of the Second Circuit recently reinstated a similar claim that had been dismissed by a federal district court for lack of standing.[30] In his dissent, Judge John M. Walker explained that "nothing in the plain text of either Emoluments Clause addresses competition in the marketplace or the conduct of business competitors generally."[31] The plain text "concerns only the receipt of 'emoluments' from foreign governments or their officials by those 'holding any Office of Profit or Trust' on behalf of the United States and the Domestic Emoluments Clause only prohibits the President from receiving 'emoluments' beyond the salary of the office from 'the United States, or any of them.'" According to Walker, "the text and historical meaning plainly do not evidence concern for protecting fair competition in the marketplace."[32]

Conclusion

The concerns that have been raised by the Inspector General of GSA have no basis in fact or law. There was no violation of the Emoluments Clauses of the Constitution when the Trump organization was selected to be the developer of the Trump Hotel in 2012 and entered into a lease in 2013. Further, there was no violation after the president was elected based on the specious claim that any state, federal, or foreign government official staying at the hotel and paying for the standard services provided by the hotel is paying an "emolument" to the president. The president is not providing any services to such officials in his official capacity as president.

Given that the Justice Department has maintained since the beginning of the administration that the lease is not a violation of the Emoluments Clauses, there was no reason for GSA to consider that issue when evaluating the lease, contrary to the criticisms of the IG. The IG's disapproval of GSA is unjustified and the IG is incorrect when she claims that "the uncertainty over the lease remains unresolved." The Justice Department has the last word on constitutional issues, not GSA and not the IG.

GSA was also correct in its assessment that there was no violation of Section 37.19 of the lease. Under the plain terms of that provision, the Tenant—Trump Old Post Office LLC—was not an "elected official" of the government and Donald Trump was not president when the lease was entered into. By its own terms, the lease also does not apply to the president who was merely a shareholder in the Tenant, especially given the fact that the president transferred his shareholder interest to a trust after his inauguration.

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[27] In his Jan. 9, 2019, response to the IG Report, GSA's general counsel, Jack St. John, points out "despite its lengthy historical analysis of the Emoluments Clauses," the IG Report "does not find that any constitutional violation occurred."

[28] In re Donald J. Trump, 928 F.3d 360 (4th Cir. 2019). In addition to the claim involving hotel services provided to guests by the Trump Hotel, the court also dismissed claims contending that granting a $32 million historic-preservation tax credit for the hotel and government officials using the facilities of the Mar-a-Largo Club would violate the emoluments clauses.

[29] 928 F.3d at 379.

[30] CREW v. Trump, ____ F.3d ____, 2019 WL 4383205 (2nd Cir. 2019).

[31] 2019 WL43832205 at *19.

[32] Id.

Ms. TITUS. Thank you.

Ms. Hempowicz.

Ms. HEMPOWICZ. Chair Titus, Ranking Member Meadows, and Chair DeFazio, and members of the subcommittee, thank you for the opportunity to testify today on behalf of the Project on Government Oversight.

At the root of it, we are here today because President Donald Trump has not fully divested from his private businesses, and his continued financial relationship with the Trump Organization creates a specific conflict of interest regarding the organization's lease with the GSA. This arrangement possibly implicates the Constitution's Foreign and Domestic Emoluments Clauses. It also presents a possible violation of the clause in the lease meant to ensure that Government officials do not benefit from a lease of this sort.

As we heard this morning, earlier this year, the GSA's Office of Inspector General found serious shortcomings in the agency's process of determining whether the Trump Organization was in compliance with the lease. Early on in the GSA's review, the agency's Office of General Counsel acknowledged that the President-elect's business interest in the Trump Organization might constitute a violation of the Emoluments Clauses. Such a violation could constitute a breach of the lease.

Despite this knowledge, GSA officials did not consider this issue when determining compliance. Instead, GSA's review focused solely on whether Donald Trump's having been elected President constituted a violation of section 37.19 in the lease. Based on a flawed legal analysis by the Trump Organization and a legal analysis by the agency's general counsel that has not been released to the public, the contracting officer determined there was no violation of this section.

For example, in an effort to limit the scope of the section, the Trump Organization attorneys narrowly interpreted the word "admitted"; however, the definition they put forth plainly states that it could also mean give access to. Under this meaning, the assertion that the President was admitted to the lease before he was elected is unconvincing as it doesn't address the fact that he can still access benefits from the lease.

I know that Members of the minority have expressed frustrations that the GSA IG in its review of the Emoluments Clauses didn't definitively answer whether the President's interest in his private businesses constitute a violation of those clauses, but it appears that no one at GSA wants to be responsible for making that decision.

When GSA's contracting officer determined that the Trump Organization was in full compliance with the lease, he knew of the existence of this possible violation and ignored it. This decision was made before litigation on the Emoluments Clauses began. This calls into question the prudence of his decision to issue an unqualified estoppel certificate to the Trump Organization.

Even absent undo interference, serious questions remain about GSA's handling of this matter. Given the serious nature of the inspector general's findings, the agency's response was grossly inadequate. Written by the agency's general counsel, the response ignored all but the inspector general's one recommendation, and

placed the blame for the report's primary findings on former agency officials. The tone of the letter was, at times, jarringly contemptuous, appearing more concerned with protecting the President's reputation than ensuring the agency is operating in full accordance with the law.

Ignoring the inspector general's statement that it would not examine whether the President's interests in the hotel violates the Emoluments Clauses, the general counsel misstated that the inspector general does not find any constitutional violation occurred. He further asserted that the inspector general found an emoluments violation is merely possible, but disputes that claim pointing to ongoing litigation in which the Justice Department is arguing that the President's business interests do not pose a violation of the Emoluments Clauses.

The general counsel ignored the fact that in those lawsuits, Justice Department attorneys are exercising their role as the President's civil defense attorneys. The Federal program's branch of the civil division, as described on the Department's website, defend civil actions against the Executive Office of the President, such as the Emoluments Clause lawsuits the general counsel cited in his response.

As the Justice Department is zealously arguing for an interpretation of the law most favorable to its client, it is hardly an impartial arbiter of fact or law in this situation. To present the Department's assertions as impartial like the GSA's general counsel did in his response is misleading.

The conflicts of interest apparent in the lease for the Old Post Office Building may well be being managed appropriately, but it is inadequate and unfair to ask the public to blindly trust that an agency under the President's authority will manage those conflicts properly. Instead, the Trump Organization and the GSA should cooperate fully with oversight efforts of Members of Congress. That oversight extends to examining the IG's review of the agency decisionmaking process.

I am, therefore, additionally concerned by a lack of productive response to a request for records from the GSA inspector general submitted in part by Ranking Member Meadows.

In closing, it is important for us to take a step back and consider the broader policy implications of our conversation today. The fundamental issue is whether we as a country are OK with the system that allows elected officials to privately profit off their official actions. If the answer to that question is no, as is suggested by the Emoluments Clauses in the Constitution, then we need to take a serious accounting of the laws and policies governing the conduct of those elected officials to ensure that they are sufficient. In this committee, that starts with GSA contracts.

Thank you very much. I look forward to your questions.

[Ms. Hempowicz's prepared statement follows:]

Prepared Statement of Liz Hempowicz, Director of Public Policy, Project on Government Oversight

Chair Titus, Ranking Member Meadows, and members of the Subcommittee, thank you for the opportunity to testify about how the General Services Administra-

tion (GSA) oversees the federal government's lease with the Trump Organization for the Old Post Office Building. I am Liz Hempowicz, director of public policy at the Project On Government Oversight (POGO).

POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. Throughout our nearly 40-year history, we have consistently worked with lawmakers from all points on the political spectrum to advance policy solutions to systemic issues in the federal government. Regardless of their party affiliation, we hold those to account who need to be held accountable and give credit where credit is due.

At the root of it, we're here today because President Donald Trump has not fully divested from his private businesses. In addition to the conflicts of interest posed by President Trump's serving as both landlord and primary tenant of a federally owned building, this arrangement implicates the Constitution's foreign and domestic emoluments clauses. It also presents a possible violation of a clause in the lease meant to ensure that government officials do not benefit from a lease of this sort.

Earlier this year, the GSA's Office of Inspector General released a report on how the agency had handled the lease. The watchdog found "serious shortcomings" in the agency's process of determining whether the president was in compliance with the lease.[1] Perhaps more disturbing was the GSA general counsel's inadequate response to the report's conclusions. That response prompted POGO to urge the head of the agency to supplement the general counsel's response, to more completely address the report's findings and detail how the GSA would correct the deficiencies the inspector general identified.[2] I also understand that members of this subcommittee have concerns about GSA's actions in response to congressional oversight requests.[3]

My testimony will address the possible conflicts presented by the relationship between the Trump Organization and the GSA, the inspector general's findings, the GSA general counsel's response, and this committee's oversight efforts.

POTENTIAL CONFLICTS OF INTEREST

The Trump Organization's lease with the GSA for the Old Post Office Building is perhaps the clearest instance in which President Trump's personal financial interests may be at odds with what is best for taxpayers.

The Trump International Hotel in the Old Post Office Building opened in 2016, a few weeks before Donald Trump was elected president. After the election, POGO and other ethics and legal experts from across the political spectrum urged the president-elect to divest his business enterprises into a true blind trust managed by an independent trustee with no family relationship with him, in accordance with the guidelines of the Ethics in Government Act.[4] Given the nature of President Trump's personal businesses, this trustee would have then had to liquidate all business enterprises and invest the new assets without providing the president any information about the new holdings.

This course of action would likely constitute a considerable financial sacrifice for the president. However, I believe that such a personal sacrifice is necessary to erase any doubt as to whether President Trump—or any other executive branch official—is making decisions to further his own financial interests or the interests of the American taxpayer.

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[1] General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, January 16, 2019, 23. https://www.gsaig.gov/sites/default/files/ipa-reports/JE19-002%20OIG%20EVALUATION%20REPORT-GSA%27s%20Management%20%26%20Administration%20of%20OPO%20Building%20Lease__January%2016%202019__Redacted.pdf

[2] Letter from POGO Executive Director Danielle Brian to GSA Administrator Emily W. Murphy about the agency's response to the Inspector General's review of the Trump International Hotel lease for the Old Post Office building, January 24, 2019. https://www.pogo.org/letter/2019/01/watchdog-report-on-trump-hotel-review-raises-serious-questions/

[3] Letter from Chair of the House Transportation and Infrastructure Committee Peter DeFazio and Chair of the Subcommittee on Economic Development, Public Buildings, and Emergency Management Dina Titus to Administrator of the General Services Administration Emily Murphy, following up on earlier requests for documents from the agency, September 10, 2019. https://transportation.house.gov/imo/media/doc/2019-09-10%20DeFazio-Titus%20Letter%20Response%20to%20GSA.pdf

[4] Letter from POGO et al. to President-elect Donald Trump, urging the president-elect to fully divest from his private business interests, December 9, 2016. https://www.pogo.org/letter/2016/12/pogo-and-bipartisan-ethics-experts-in-new-letter-to-trump-divest-now-to-prevent-ongoing-conflicts/

Because the president instead stepped away from management of his businesses and put his interests in those businesses into a revocable trust, he still stands to benefit financially from them. The contention that this arrangement is sufficient because he won't benefit while in office is disingenuous, ignoring the simple fact that a benefit doesn't need to be immediate to cause a conflict of interest.

The president has considerable influence over the GSA, the agency from which his private business leases the Old Post Office Building. Any enhancements the government makes to the building will provide a clear benefit to President Trump, and the current legal arrangement does not deny him this financial benefit—it just delays the receipt of any benefit until he leaves office.

More concretely, the president's own political appointee who leads the agency is in the position to influence negotiations with the president's private business to determine future changes to the lease agreement that could have significant financial consequences. For example, it appears that, under the lease, in addition to the fixed rent the Trump Organization will pay for the space it is also subject to a "percentage rent difference," to be calculated annually.[5] The terms for determining this possible increase are redacted from the publicly released version of the lease. But it appears that the lease provides the GSA, as landlord, a range of numbers to choose from to calculate the percentage rent difference.

The Trump Organization can authorize the GSA to release the redacted information in the lease. I recommend that the company do so, to allow for independent oversight of this contract. As it stands, the public is essentially being asked to trust that the GSA, an agency under the president's authority, will do what is right for taxpayers even if that comes at the expense of the financial interests of its boss.

The fact that President Trump has not completely divested from his businesses has created an untenable situation. His responsibilities as president of the United States and head of the executive branch unavoidably conflict with his personal financial interests as the individual who may still benefit from the trust with a controlling interest in the Trump International Hotel at the Old Post Office Building. This conflict is starkly demonstrated by the GSA's repeated deference to the Trump Organization's arguments in favor of withholding documents in response to congressional inquiries.[6]

Significant conflicts of interest like these cast an unnecessary shadow over the decisions made by federal agencies under President Trump, and will continue to cast that shadow as long as he maintains a financial interest in his private businesses.

THE GSA INSPECTOR GENERAL'S REPORT

After the 2016 election, the GSA's Office of Inspector General received "numerous complaints" from Members of Congress and the public about the potential conflicts of interest posed by the president-elect's lease for the Old Post Office Building.[7] The inspector general undertook an examination of the agency's decision-making process for determining whether the president's inauguration breached the lease. Because the report covers a period that includes a presidential transition, some of the events examined occurred under President Barack Obama while others occurred under President Trump.

The inspector general report, released in January of this year, highlights deficiencies in the agency's post-2016 election review of whether the president-elect's business interests in the tenancy of the Old Post Office Building breached the government's contract with those business interests. The post-election review was conducted by members of the GSA's office of general counsel between November 2016 and March 2017. According to the inspector general, the GSA's central error was its decision to decline to consider whether the Constitution's foreign or domestic emoluments clauses "barred the President's business interest" in the building.[8] As the inspector general concluded, "GSA's unwillingness to address the constitutional issues affected its analysis of . . . the lease."[9]

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[5] Ground Lease by and between the United Stated of America and Trump Old Post Office LLC, Lease No: GS–LS–11–1307, Section 5.1(b), August 5, 2013, 35. https://www.gsa.gov/cdnstatic/Part__One__of__Segment__001__of__OPO__Ground__Lease__%282013%29__RA.pdf

[6] Letter from Chairs DeFazio and Titus to Administrator Murphy, September 10, 2019 [see note 3].

[7] General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, 1 [see note 1].

[8] General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, 23 [see note 1].

[9] General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, 1 [see note 1].

The foreign emoluments clause of the Constitution was intended "to prevent corruption and limit foreign influence on federal officers" by prohibiting "federal officers from accepting foreign emoluments without congressional consent," as the Congressional Research Service explains.[10] Courts have adopted a broad definition of emolument as any benefit, gain, or advantage, including profits from private market transactions. However, the meaning of the word as used in the Constitution is the subject of ongoing and significant debate.[11] Whether the foreign emoluments clause is implicated by President Trump's continued financial interests in his private businesses remains an open legal question.

The domestic emoluments clause was intended "to preserve the President's independence" by preventing the president from receiving any emoluments from federal or state governments, other than his fixed salary.[12] Whether the domestic emoluments clause is implicated by the president's continued financial interests in his private businesses is an open question as well.

Errors in the GSA's Review of the Trump Organization's Compliance with the Old Post Office Lease

President Trump's continued financial interests in his private businesses also present a possible violation of Section 37.19 of the lease between the Trump Organization and the GSA. The section reads as follows:

> No member or delegate to Congress, or elected official of the Government of the United States or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom; provided, however, that this provision shall not be construed as extending to any Person who may be a shareholder or other beneficial owner of any publicly held corporation or other entity, if this Lease is for the general benefit of such corporation or other entity.[13]

During the 2016 presidential campaign, the media and the public began scrutinizing a number of potential conflicts of interest presented by then-candidate Trump's involvement with the Trump International Hotel at the Old Post Office Building.[14] The potential conflicts implicated both emoluments clauses and the aforementioned provision in the lease; a violation of any of the three could constitute a breach of the lease.

Despite these concerns, GSA did not begin discussing these issues until after Donald Trump was elected president, according to the inspector general report.[15] This was GSA's first error in this matter. The agency and the public would have been better served had GSA begun a rigorous review of these legal implications when Donald Trump became the Republican nominee in July 2016.

"Early on" in the GSA's post-election review, according to the inspector general, the agency's office of general counsel acknowledged that the president-elect's business interests in the Trump Organization might constitute a violation of the emoluments clauses and could cause a breach of the lease for the Old Post Office Building.[16] But the office of general counsel did not consider that issue, and did not document the rationale for this decision. This was the GSA's second error in this matter.

The agency's review instead focused solely on whether Donald Trump's having been elected president constituted a violation of Section 37.19.

As detailed in the inspector general's report, in December 2016, the Trump Organization notified the GSA contracting official handling the Old Post Office Building lease that the company would be restructuring the president-elect's financial interest in the company as it pertained to the lease. Over the next few months, the contracting officer communicated with Trump Organization attorneys and the GSA gen-

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[10] Kevin J. Hickey and Michael A. Foster, "The Emoluments Clauses of the U.S. Constitution," Congressional Research Service, August 23, 2019, 1. https://fas.org/sgp/crs/misc/IF11086.pdf

[11] Hickey and Foster, "The Emoluments Clauses of the U.S. Constitution," 1 [see note 10].

[12] Hickey and Foster, "The Emoluments Clauses of the U.S. Constitution," 1 [see note 10].

[13] Ground Lease by and between the United Stated of America and Trump Old Post Office LLC, Lease No: GS–LS–11–1307, Section 37.19, August 5, 2013, 103. https://www.gsa.gov/cdnstatic/Part_Two_of_Segment_001_of_OPO_Ground_Lease_%282013%29_RA.pdf

[14] Russ Choma, "Donald Trump Has a Huge Conflict of Interest That No One's Talking About," *Mother Jones*, August 15, 2016. https://www.motherjones.com/politics/2016/08/trump-conflict-of-interest-old-post-office-hotel/; Bloomberg News, "Trump's Pricey Washington Hotel Is a Showcase and Test for Ivanka," *Investor's Business Daily*, September 16, 2016. https://www.investors.com/news/trumps-pricey-washington-hotel-is-a-showcase-and-test-for-ivanka/

[15] General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, 8 [see note 1].

[16] General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, 5 [see note 1].

eral counsel's office to determine whether there was a violation of Section 37.19. The Trump Organization communicated to the contracting officer that after his inauguration the president had transferred his interest in the Old Post Office Building to a revocable trust and relinquished management over that interest, though he retained his financial interest in the property.[17]

The contracting officer then requested a "written submission" from President Trump laying out his position on whether the Trump Organization was in compliance with the lease, "specifically Section 37.19."[18] Attorneys for the company responded with a written legal analysis concluding that the organization was in full compliance with the lease.[19]

The contracting officer then asked the GSA general counsel's office to provide a legal opinion on the matter. After deliberations with the general counsel's office, the contracting officer issued a document known as an estoppel certificate, stating unequivocally that GSA believed the Trump Organization was in full compliance with the terms of the lease.[20]

The inspector general's report noted that when the contracting officer issued the certificate, he knew that the GSA general counsel "recognized a violation of the Foreign Emoluments Clause might be relevant to a breach and that this important issue remained open."[21] It is therefore disconcerting that the certificate does not include a qualifier acknowledging that potential breach.

Due to redactions in the inspector general's report, it isn't possible to fully examine the GSA general counsel's legal analysis. But the report plainly states that the decision to ignore the implications of the emoluments clauses was "improper" and left a cloud of legal uncertainty over the lease. The GSA's third and most serious error in this matter was ignoring the emoluments clauses in its legal analysis.

The three errors I've described raise significant concerns about the internal GSA review process that led to the issuance of an unqualified legal certificate confirming that the Trump Organization was in compliance with its lease.

The GSA General Counsel's Response to the Inspector General Report

Given the serious nature of the inspector general's findings, the agency's response was grossly inadequate. Written by the agency's general counsel, the response ignored all but the inspector general's one recommendation and placed blame for the report's primary findings on former agency officials.[22] The tone of the letter was at times jarringly contemptuous, appearing more concerned with protecting the presi-

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[17] General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, 8–10 [see note 1].

[18] Letter from GSA contracting officer Kevin Terry to Donald J. Trump, requesting a written submission of Tenant's (Donald J. Trump's) position regarding its compliance with the lease, February 10, 2017, 16 [page in PDF]. https://www.gsa.gov/cdnstatic/Contracting_Officer_Letter_March_23_2017_Redacted_Version.pdf

[19] The Trump Organization's analysis rested on three principal assertions. The first was that the phrase "shall be admitted to any share or part of this Lease" cannot apply to the president because he was admitted to the lease before he entered an elected official. The second was that the president fits under the exclusionary clause in Section 37.19, which states that "this provision shall not be construed as extending to any Person who may be a shareholder or other beneficial owner of any publicly held corporation or other entity, if this Lease is for the general benefit of such corporation or other entity." The lawyers argue "other Person" is the President and the Trump Organization is an "other entity" of which he is an "indirect beneficial owner." Finally, even if Section 37.19 does apply to the president's interest in the Old Post Office building lease, the lease does not provide a remedy for the violation of the provision presented and therefore would not affect the validity of the lease. Letter from partner at Morgan, Lewis & Brockius LLP Sheri A. Dillon to GSA contracting officer Kevin Terry in response to request for Tenant's position on its compliance with the GSA lease, February 17, 2017, 23–32 [pages in PDF]. https://www.gsa.gov/cdnstatic/Contracting_Officer_Letter_March_23_2017_Redacted_Version.pdf

[20] After this conclusion was reported, in March 2017, POGO and a coalition of partner organizations asked the inspector general to review the decision-making process. Without a transparent legal analysis, the letter conveying the decision raised significant questions; we requested an independent review to ensure propriety. Letter from POGO et al. to General Services Administration Inspector General Carol F. Ochoa requesting an independent review of the GSA's contracting officer's determination that the Trump Organization is in compliance with the Old Post Office building lease, March 29, 2017. https://www.pogo.org/letter/2017/03/pogo-requests-review-of-conclusion-that-president-trump-isnt-violating-his-dc-hotel-lease/

[21] General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, 10 [see note 1].

[22] General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, Appendix B, 45 [page in PDF] [see note 1].

dent's reputation than ensuring the agency is operating in the best interests of American taxpayers.

The response began by saying the GSA was "gratified" by the fact that the inspector general found no instances of improper interference in the contracting officer's decision-making process when he determined that the Trump Organization was in compliance with the terms of the lease. While this is certainly notable, it does not mitigate the inspector general's findings that the review was subject to "serious shortcomings" and was "improper."[23] The general counsel's response mentioned neither of those findings; nor did it detail any course of action for the agency to remedy those shortcomings.

Perhaps the most significant part of the agency's response comes in its second-to-last paragraph. Ignoring the statement at the beginning of the inspector general's report establishing that it would not examine whether the president's interest in the hotel violates the emoluments clauses, the general counsel stated that the inspector general "does not find that any constitutional violation occurred," and asserted that the inspector general found "an Emoluments violation is merely possible."[24] The GSA general counsel goes on to dispute the assertion that an emoluments violation is even possible under the current circumstances, pointing to ongoing litigation in which the Justice Department is arguing that the president's business interests do not pose a violation of the emoluments clauses.

The general counsel appeared to discount the fact that in those lawsuits, Justice Department attorneys are exercising their role as the president's civil defense attorneys. The Federal Programs Branch of the Civil Division, as described on the department's website, "defends civil actions against the Executive Office of the President,"[25] such as the emoluments clause lawsuits the general counsel cited in his response. As the Justice Department is zealously arguing for an interpretation of the law most favorable to its client, it is hardly an impartial arbiter of fact or law in this situation. To present the department's assertions as impartial, like the GSA's general counsel did in his response, is misleading.

Rather than substantively addressing any of the deficiencies in the agency's legal analysis caused by ignoring the emoluments clause issues, the general counsel attempted to deflect criticism by implying that such a review wouldn't have made a difference to the agency's final determination.

THE COMMITTEE'S OVERSIGHT EFFORTS

Chairs DeFazio and Titus have been engaged in efforts to oversee the GSA's handling of the Trump Organization's lease for the Old Post Office building.[26] It is my understanding that Chairs DeFazio and Titus have taken issue with the GSA's refusal to comply fully with document requests from this committee. POGO has worked for many years to strengthen Congress's oversight capacity, and I am particularly sympathetic to the frustrations the chairs expressed in their latest letter to the GSA administrator.

That letter, sent earlier this month, explained that the GSA has passed along claims from Trump Organization attorneys to withhold documents from the committee, in which the organization argued that the records constitute confidential business information and that the requests lack a legislative purpose.[27] POGO has long objected to federal agency general counsels' reflexive acceptance of third-party denials by private leaseholders or contractors as sufficient justification to withhold documents from Congress.

The GSA's refusal to release documents to Members of Congress in this case may also be a result of the conflict presented by the president's continued interests in

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[23] General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, 23, 16 [see note 1].

[24] General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, Appendix B, 46 [page in PDF] [see note 1].

[25] "About the Civil Division—Federal Programs Branch," Department of Justice, last modified October 12, 2018. https://www.justice.gov/civil/federal-programs-branch

[26] Letter from Chair of the House Transportation and Infrastructure Committee Peter DeFazio and Chair of the Subcommittee on Economic Development, Public Buildings, and Emergency Management Dina Titus to Administrator of the General Services Administration Emily Murphy, following up on earlier questions asked about the leasing of the Old Post Office building, January 22, 2019. https://transportation.house.gov/news/press-releases/chairman-defazio-rep-titus-press-gsa-on-the-repeated-refusal-to-respond-to-questions-surrounding-trumps-conflicts-of-interest; Letter from Chairs DeFazio and Titus to Administrator Murphy, September 10, 2019 [see note 3].

[27] Letter from Chairs DeFazio and Titus to Administrator Murphy, September 10, 2019, 1 [see note 3].

the GSA lease. GSA officials have found themselves caught in the crossfire in a fight between their boss's personal business interests and Congress's responsibility to oversee the executive branch.

Fortunately, past Supreme Court rulings offer guidance for the GSA to ensure that its officials are acting in accordance with the law. As the committee notes, the court has repeatedly ruled that it is not the obligation of a congressional committee to provide a valid legislative purpose for an inquiry to a federal agency or to a presidential administration.[28] As the Supreme Court has previously ruled, "valid legislative" inquiries do not need to be publicly declared to make them valid.[29]

Clearly, the GSA should give the Supreme Court's rulings greater weight than the president's personal attorney's legal argument as to why the agency should withhold information the committee has requested.

The GSA must respond to your legitimate oversight requests regardless of whether your committee identifies any potential legislative actions that may result from the information. We similarly believe that the GSA's Office of Inspector General must fully comply with the request for information and documents it received from Ranking Members Graves and Meadows in February of this year.[30]

The administration of public buildings and the work of the GSA inspector general are squarely within the jurisdiction of this committee. This level of agency obfuscation is not new. But it should worry Members on both sides of the aisle, as it will do lasting damage to Congress' oversight authorities if allowed to go unchecked.

WHAT'S AT STAKE

The inspector general review provided two notable conclusions. First, that the GSA contracting officer's decision to certify that the Trump Organization was in compliance with its lease was not tainted by improper interference. Second, that despite the absence of overt political pressure, there were "serious shortcomings" in that decision-making process. The shortcomings mean that the legality of the lease between the Trump Organization and the GSA is still in question.

I urge the GSA to comply with all document requests from members of this committee so that the Congress has what it needs to establish whether current laws have been violated as well as to determine whether it is necessary to update those laws. The American public deserves to be able to trust that our public officials, whether in the federal agencies or in the White House, are acting in our best interest.

Ms. TITUS. Thank you.

Mr. Shaub.

Mr. SHAUB. Chair Titus, Ranking Member Meadows, and members of the subcommittee, thank you for inviting me to discuss GSA's management of the Old Post Office, which the President's business leases from the Government he leads.

Nearly 3 years ago, Donald Trump declared that, quote, "the President can't have a conflict of interest." But that is not right. A conflict of interest arises when any official's personal interests are at odds with the duty to the American people. True, Presidents and Vice Presidents aren't covered by a law that prescribes criminal penalties for conflicts of interest, but this exemption isn't a perk of high office.

Conflicts of interest endanger the fabric of our Republic. The Justice Department and the Office of Government Ethics have advised Presidents to act as though the law applied, and for the better part

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[28] Letter from Chairs DeFazio and Titus to Administrator Murphy, September 10, 2019, 2 [see note 3].

[29] Todd Garvey, "Legislative Purpose and Adviser Immunity in Congressional Investigations," Congressional Research Service, May 24, 2019, 3. https://fas.org/sgp/crs/misc/LSB10301.pdf

[30] Letter from Ranking Member of the House Transportation and Infrastructure Committee Sam Graves and Ranking Member of the Subcommittee on Economic Development, Public Buildings, and Emergency Management Mark Meadows to Inspector General of the General Services Administration Carol Ochoa, requesting information and documents related to the GSA inspector general's investigation, February 4, 2019. https://republicans-oversight.house.gov/wp-content/uploads/2019/02/2019-02-04-JJ-MM-RJ-SG-to-Ochoa-GSA-IG-re-Old-Post-Office-Building-due-2-18.pdf

of four decades they did. They took the kinds of measures their appointees took to prevent conflicts of interest.

Now, a federally owned landmark houses the Trump Hotel, which is patronized by individuals and groups with interests affected by the Federal Government. For example, T-Mobile infamously sent executives to stay at the hotel while it sought Federal approval of a merger. Lobbyists, advocacy groups, businesses, nonprofits, and political candidates frequent the hotel. And why wouldn't they? White House staff and other appointees mingle there with influence seekers. The hotel is even frequented by Members of Congress who are responsible for oversight of the executive branch.

CREW has also tallied nearly 60 foreign governments visiting Trump properties. One diplomat suggested it would be, quote, "rude to come to his city and say I am staying at your competitor." In fact, today a transcript was released that shows that the Ukrainian President was highlighting that he once stayed at a Trump Hotel. Apparently, he seemed to think that that would ingratiate himself to the President.

Bahrain, Kuwait, and the Philippines hosted major events at the hotel. The Romanian Prime Minister personally stayed there. The Saudi Government has been one of the Trump Organization's bigger customers, raising concerns about the kingdom's relationship with the administration.

The consequence of these circumstances has been an unprecedented ethics crisis. This scandal-plagued administration has seen one appointee after another resign amid inquiries into their conduct, while others remain in Government under the cloud of ethics concerns.

For their part, GSA officials emphasized that aspects of their work occurred before the inauguration. They claimed this meant that they weren't under any pressure. That defense ignores the very real risks they faced if they challenged the Trump Organization's lease compliance. The election was over. They were about to get a whole new set of bosses, and every career official knew this. In fact, GSA was the lead agency for the Presidential transition.

Now, there are two main problems with GSA's March 2017 lease determination. First, GSA refused to even consider the Constitution's Emoluments Clauses. In failing to even consider them, GSA fell below the standard for agency action. Failing to consider an important aspect of a problem renders an agency action arbitrary and capricious. More importantly, GSA officials failed to fulfill their oath to support and defend the Constitution.

Second, the lease makes clear that an elected official cannot be admitted to any part or share of the lease and cannot benefit from it. Rather than interpreting this contract language, GSA sidestepped the issue. The determination only recites steps taken by the Trump Organization that create the illusion of separation from the President.

The Trump Organization said the President's share of hotel profits will sit in a capital account while he is in Government, but this doesn't solve the problem. The money stays in a property he owns and he will benefit from any improvements they make with it.

There is also nothing to stop it from coming back to him when he leaves Government.

GSA also noted that President Trump's assets are now in a revocable trust, but the trust is meaningless. OGE has explained that putting assets in a revocable trust does nothing to resolve a conflict of interest. I discuss these issues in more detail in my written testimony.

In closing, I will just emphasize that GSA needs to conduct a new evaluation of the lease, one that properly takes into account the Emoluments Clauses and the relevant contract language. And, of course, the most effective way to avoid issues would be divestiture.

Thank you again for inviting me, and I am happy to answer questions today.

[Mr. Shaub's prepared statement follows:]

Prepared Statement of Walter M. Shaub, Jr., Senior Advisor, Citizens for Responsibility and Ethics in Washington, and Former Director, U.S. Office on Government Ethics

Chair Titus, Ranking Member Meadows and members of the Subcommittee, thank you for the invitation to discuss the General Services Administration's failures in appropriately managing the lease for the Trump International Hotel located on the site of the Old Post Office building in Washington, D.C. Before turning to legal problems with the lease's management, I would like to draw the Subcommittee's attention to the impact of these failures on government ethics in the executive branch and on the public's confidence that government officials are upholding the most basic ethical principle, that public service is a public trust.

I. GSA'S ROLE IN THE EXECUTIVE BRANCH ETHICS CRISIS

It has been nearly three years since President Trump declared that "the president can't have a conflict of interest."[1] This statement was quite obviously wrong. In fact, a conflict arises any time personal interests create incentives that are at odds with an official's duty to the American people. Abuse of entrusted power for private gain is the very definition of corruption.[2]

It is true that the President is exempt from a law that prescribes criminal penalties for conflicts of interest.[3] But this exemption was never intended as a perk of high office. Both the Office of Government Ethics and the Department of Justice have emphasized the importance of presidents acting as though they were covered by the law.[4] As the Supreme Court cautioned, a conflict of interest is "an evil which endangers the very fabric of a democratic society."[5] This is no less true for the President than for his cabinet secretaries. The public's faith in those who govern is shattered when they engage in activities that arouse "suspicions of malfeasance and corruption."[6]

That is why government employees are told to avoid even the appearance of a conflict of interest.[7] This admonition should apply equally to the President. We entrust him with great power, and we expect him to use that power solely for our benefit—not his own. The American people should never have to wonder whether government action is motivated by the President's stated policy objectives or his personal inter-

[1] Isaac Arnsdorf, Trump: 'The president can't have a conflict of interest', *Politico*, Nov. 22, 2016, https://politi.co/2kPDw5L.

[2] *See* Transparency International (website), How do you define corruption?, https://bit.ly/2IMPCX9 (last viewed Sept. 18, 2019).

[3] 18 U.S.C. §§ 202, 208; *but see* 18 U.S.C. § 201 (subjecting presidents to the criminal prohibition against bribery).

[4] U.S. Office of Gov't Ethics, OGE Inf. Adv. Op. 83 x 16 (1983), https://bit.ly/2fRpIG0; Letter from Antonin Scalia, Assistant Attorney Gen., Office of Legal Counsel, to Kenneth A. Lazarus, Associate Counsel to the President, Dec. 16, 1974, https://bit.ly/2Zv0xgb.

[5] *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961).

[6] *Id.*

[7] 5 C.F.R. § 2635.101(b)(14).

ests. We should also never have to wonder whether he is using his high office for profit.

But today we are talking about precisely those questions. President Trump's decision to retain his interests in the Old Post Office building lease ("OPO Lease") was and continues to be part of a broad pattern that has called into question the government's integrity in countless ways. The first agency subjected to the influence of those conflicts of interest was the General Services Administration ("GSA"). Even before President Trump was sworn into office, there were signs GSA officials were feeling hard pressed to enforce the Constitution they swore to support and the terms of the lease they had negotiated with his company. For instance, they initially tried to dodge questions about the OPO Lease by referring media inquiries to the agency I was then leading, the Office of Government Ethics ("OGE").[8] I had to ask GSA to either stop suggesting OGE was involved or start involving us.

GSA failed to make a determination before the inauguration as to whether it would continue the OPO Lease. That delay raised the stakes for GSA officials because they were no longer in the position of potentially having to cancel a major deal with a President-elect—which alone may have been overwhelming for many executive branch officials—but now faced the even more daunting prospect of canceling a deal with a sitting President after declaring him in violation of the Constitution. By then, GSA and the public had already witnessed the then-Chairman of the House Oversight Committee issue a menacing letter to me the day after I sounded the alarm about the President's refusal to divest his conflicting financial interests, and the President's Chief of Staff issue what seemed like a threat that I "ought to be careful."[9] It was, by then, also public knowledge that the White House had breached the norms of government by leaning on the Federal Bureau of Investigation ("FBI") to refute allegations about the Trump campaign.[10] Closer to home for GSA officials, President Trump had removed the acting GSA Administrator and installed a hand-picked replacement shortly after the inauguration, and it would be months before he nominated a replacement.[11]

Indeed, President Trump had created what must have been an unnerving environment for GSA officials confronting the challenge of evaluating his compliance with constitutional and contractual requirements applicable to him. They were not up to the challenge. As GSA's Office of Inspector General ("OIG") reported this past January, they balked entirely at evaluating the constitutional issues the situation presented.[12] As I discuss later, their failure to consider these issues rendered GSA's determination "arbitrary and capricious." Their conclusory determination that President Trump remained in compliance with the OPO Lease was inconsistent with its

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[8] Jordyn Phelps, Inside the Potential Conflict Posed by Trump's DC Hotel, *ABC News*, Dec. 15, 2016 ("[W]hile the terms of the lease do allow for the GSA to pull out under certain conditions, the agency at this point is continuing to hold up the terms of the lease and is deferring ethics questions to the Office of Government Ethics . . . 'It is the Office of Government Ethics that provides guidance to the executive branch on questions of ethics and conflicts of interest. GSA plans to coordinate with the president-elect's team to address any issues that may be related to the Old Post Office building,' a GSA spokesperson told ABC News."), https://abc7ne.ws/2mcKHZw; Steven Schooner and Daniel Gordon, GSA's Trump Hotel Lease Debacle, *GovExec Magazine*, Nov. 28, 2016 ("We are sympathetic to GSA's quandary. Yet, despite media suggestions to the contrary, GSA cannot foist this challenging situation on the Office of Government Ethics."), https://bit.ly/2mgjntnxx; Charles Clark, GSA Will Examine Ethics Issues Around Trump's D.C. Hotel Lease, *GovExec Magazine*, Nov. 17, 2016, https://bit.ly/2kPoJLM.

[9] Rob Garver, Team Trump Steps Up Intimidation of Government Ethics Officer, *Fiscal Times*, Jan. 16, 2017, https://bit.ly/2kO7XNd; Richard Painter and Norman Eisen, Just when you thought the Trump ethics disaster couldn't get worse, it did, *Washington Post*, Jan. 16, 2017, https://wapo.st/2jhInex; Dana Liebelson, Chaffetz Skipped Meeting With Ethics Chief He Threatened To Subpoena, Emails Show, *Huffington Post*, Jan. 18, 2017, https://bit.ly/2mejzcC.

[10] Jim Sciutto, Evan Perez, Shimon Prokupecz, Manu Raju, and Pamela Brown, FBI refused White House request to knock down recent Trump-Russia stories, *CNN*, Feb. 24, 2017 ("The direct communications between the White House and the FBI were unusual because of decade-old restrictions on such contacts. Such a request from the White House is a violation of procedures that limit communications with the FBI on pending investigations."), https://cnn.it/2mlu7qC.

[11] Isaac Arnsdorf, Trump picks leader for federal agency overseeing his D.C. hotel, *Politico*, Jan. 26, 2017 ("The reason for the whiplash isn't clear. It appears the GSA's outgoing leadership wanted Dong to take over temporarily but Trump preferred Horne."), https://politi.co/2lZajJc; Mark Rockwell, Pick to lead GSA is popular, but faces political challenges, *Federal Computer Week*, Sept. 5, 2017, https://bit.ly/2kRe1Ez.

[12] GSA OIG, Evaluation of GSA's Management and Administration of the Old Post Office Building Lease, JE19–002 (Redacted), Jan. 16, 2019, at 1, https://bit.ly/2RAV9ct ("GSA OIG Report").

terms. To be fair, though, they should never have been put in this position—caught between their duty to the people and the President's conflicts of interest.

There is simply no getting around the fact that our President has chosen to undertake a dual role as both landlord and tenant of a historic property belonging not to him but to us. There is no getting around the fact that he has now spent close to a third of his days in office visiting his private properties, including his D.C. hotel at the Old Post Office.[13] With the media in tow, every one of these visits amounts to an advertisement for those properties—only we are the ones paying for that advertising. This past May, the cost to taxpayers of trips to his golf courses alone was conservatively estimated to have exceeded $100 million—an amount that excluded the costs of trips to his other properties.[14] After a little more than two years, that cost was closing in on costs attributed by Judicial Watch to all presidential family travel during the entire eight years of the Obama administration.[15]

This circumstance flows from the original sin of this administration: the President's refusal to divest his conflicting financial interests. That breach of ethical norms has had a profoundly deleterious effect on the executive branch ethics program. The litany of the Trump administration's ethics scandals is far too expansive to recount today, and the unprecedented pace of ethics scandals in this administration shows no sign of slowing.[16] Such are the wages of a bad tone at the top.

Earlier this month, President Trump announced a desire to host the G7 Summit at his own Miami resort.[17] He then gave an internationally televised sales pitch for the property as he stood beside another world leader.[18] As CREW explained in a complaint to an Inspector General, his words suggested a degree of personal involvement in the site selection process, potentially putting him in position to influence a federal procurement for a meeting he will lead.[19] That would be a crime for any other executive branch official, besides the Vice President.[20] This spectacle undermines our government's reputation for integrity on the world stage, which could hurt our anti-corruption agenda in developing countries.[21] Though it marks a possible escalation of his behavior, this aggressive bid to mix personal and official business was typical of his messaging about the overlap of official and personal business from the start.

It is no wonder lobbyists, companies, industry associations, nonprofits, and others with interests affected by the government are flocking to the Trump International Hotel in Washington., D.C., as well as his other properties.[22] Among other incentives, top administration officials congregate at the hotel.[23] Numerous members of Congress similarly frequent his hotel, though they are responsible for oversight of presidential conflicts of interest.[24] Even Attorney General Barr, who is responsible

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[13] Liz Johnston, Tracking President Trump's visits to Trump properties, *NBC News*, https://nbcnews.to/2h7kRjo (last visited Sept. 17, 2019).

[14] Daniel Moritz-Rabson, Trump's golfing has cost taxpayers $102 million, just $12.7 million behind Obama's travel during entire presidency: report, *Newsweek*, May 22, 2019, https://bit.ly/2EHK9kX.

[15] *Id*.

[16] *See, e.g.*, Presidential Profiteering: Trump's Conflicts Got Worse in Year Two, *Citizens for Responsibility and Ethics in Washington*, Jan. 16, 2019, https://bit.ly/2FBC2IK; The Most Unethical Presidency, Year One, *Citizens for Responsibility and Ethics in Washington*, Jan. 4, 2018, https://bit.ly/2DrM9y1.

[17] Remarks by President Trump and President Macron of France in Joint Press Conference, *White House*, Aug. 26, 2019, https://bit.ly/328d7Uc.

[18] Jennifer Jacobs, Josh Wingrove, and Jonathan Levin, Trump Pitches Luxury Miami Property for Next G–7: His Own, *Bloomberg*, Aug. 26, 2019, https://bloom.bg/2PkyIHK.

[19] CREW requests investigation of Trump Doral G–7 announcement, *Citizens for Responsibility and Ethics in Washington*, Sept. 9, 2019, https://bit.ly/2kmlU4J.

[20] 18 U.S.C. § 208(a).

[21] The State Department works internationally to strengthen "the ability of governments and their citizens to promote better public transparency, accountability, and integrity." U.S. Department of State, Combating Corruption and Promoting Good Governance, https://bit.ly/2lVBXqM (last viewed Sept. 18, 2019).

[22] Bernard Condon, Vaping group plotted lobbying efforts at Trump's DC hotel, *Associated Press*, Sept. 11, 2019, https://abcn.ws/2kCpZC9; Jonathan O'Connell and David Fahrenthold, T-Mobile announced a merger needing Trump administration approval. The next day, 9 executives had reservations at Trump's hotel, *Washington Post*, Jan. 16, 2019, https://wapo.st/2mep7Uu; Ben LeFebvre, Oil group to lobby president after stay at Trump hotel, *Politico*, Mar. 14, 2018, https://politi.co/2Hzm2nj.

[23] Trump's 2,000 Conflicts of Interest (and Counting), *Citizens for Responsibility and Ethics in Washington*, updated Aug. 15, 2019, https://bit.ly/31FxDeP ("CREW Conflicts Report"); Eric Lipton and Annie Karni, Checking In at Trump Hotels, for Kinship (and Maybe Some Sway), *New York Times*, Sept. 7, 2019, https://nyti.ms/2m8VmVh.

[24] CREW Conflicts Report, https://bit.ly/31FxDeP; David A. Fahrenthold, Jonathan O'Connell, and Anu Narayanswamy, Trump's properties made $4.2 million from Republican campaigns, even as GOP suffered defeats, *Washington Post*, Nov. 8, 2018, https://wapo.st/2mfe7Gr.

for ongoing investigations affecting the President, has drawn criticism based on his booking a $30,000 holiday party at the President's hotel.[25] The line between official and personal activities in the Trump administration is a blurry one. Just this month Secretary Pompeo spoke at the Old Post Office hotel to the President's paying customers, and his remarks may have implicated the misuse of position rule when he praised the venue they chose.[26] Displaying a disdain for government ethics endemic to this administration, Secretary Pompeo joked that his effective endorsement of the hotel was "for the Washington Post."[27]

CREW has also tallied sightings of officials from nearly 60 foreign governments at Trump properties.[28] Not long after the election, Bahrain and Kuwait moved their annual galas to the Old Post Office hotel.[29] The Philippine embassy similarly celebrated the country's 120th anniversary at the hotel.[30] The Romanian Prime Minister personally stayed at the hotel this year.[31] Then there's Saudi Arabia, which is reportedly a big customer of the President's business.[32] Lobbyists for the Saudi government ran up a tab of $270,000 at his D.C. hotel at a time when it was lobbying against legislation that would allow victims of terrorist attacks to sue foreign governments.[33] In this context, it is easy to understand how even the appearance of a conflict of interest can be as damaging as an actual conflict of interest.

In that vein, it bears emphasizing that questions linger as to the President's role in the decision to scrap the long-planned FBI headquarters relocation project.[34] The move was abruptly canceled after the government had spent $20 million and more than a decade on planning.[35] The public did not fail to notice to how this cancellation could benefit President Trump, whose Old Post Office hotel lies just up Pennsylvania Avenue from prime real estate that might attract a competitor if the FBI were to relocate its headquarters.[36] But GSA Administrator Emily Murphy, who personally met with President Trump before cancelling the move, seems disinclined to supply the transparency needed to assess the decision, and her agency is resisting CREW's requests for more information.[37]

It is in the context of this entirely foreseeable ethics crisis that Congress turns its attention to the fateful decision GSA made regarding the OPO Lease on March 23, 2017. That decision, with its profound consequences, was the wrong one.

II. Legal Problems with GSA's Management of the OPO Lease

In March 2017, GSA issued a letter determining that the Trump Old Post Office LLC ("Trump-OPO") was in compliance with its lease for the Trump International Hotel, located in the federally-owned Old Post Office building in Washington, D.C. There are two major legal problems with GSA's decision and its overall management of the OPO Lease warranting congressional scrutiny.

First, as the GSA OIG found in its January 2019 report, GSA's lease-compliance determination ignored critical questions regarding the Constitution's Emoluments

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[25] Aaron Rupar, William Barr's $30k Trump hotel party illustrates how corruption is becoming more brazen and blatant, Vox, Aug. 28, 2019, https://bit.ly/2kpy7Ws; Madeleine Carlisle and Olivia Paschal, After Mueller: The Ongoing Investigations Surrounding Trump, *Atlantic*, Mar. 22, 2019, https://bit.ly/2OlF71d.

[26] John Bowden, Pompeo jokes about speaking at Trump hotel: 'The guy who owns it' is 'going to be successful,' *The Hill*, Sept. 13, 2019 ("I look around. This is such a beautiful hotel."), https://bit.ly/2kGcj9h.

[27] *Id*.; 5 C.F.R. § 2635.702(c).

[28] Eric Lipton and Annie Karni, Checking In at Trump Hotels, for Kinship (and Maybe Some Sway), *New York Times*, Sept. 7, 2019, https://nyti.ms/2m8VmVh.

[29] Alex Altman, Donald Trump's Suite of Power: How the President's D.C. outpost became a dealmaker's paradise for diplomats, lobbyists and insiders, *Time*, Mar. 14, 2018, https://bit.ly/2kmmxLD.

[30] Ali Dukakis, Watchdog group finds more spending at Trump properties by foreign governments, political groups, *ABC News*, June 27, 2018, https://abcn.ws/2GVc9VH.

[31] Ilya Marritz, Justin Elliott, and Zach Everson, Romanian Prime Minister Is Staying at Trump's D.C. Hotel, *Pro Publica*, Mar. 25, 2019, https://bit.ly/2kplQkT.

[32] David A. Fahrenthold and Jonathan O'Connell, Saudi-funded lobbyist paid for 500 rooms at Trump's hotel after 2016 election, *Washington Post*, https://bit.ly/2kF4lNG.

[33] Altman, *Time*, Mar. 14, 2018.

[34] Jonathan O'Connell, Federal government cancels costly, decade-long search for a new FBI headquarters, *Washington Post*, July 10, 2017, https://wapo.st/2ubVdmz.

[35] Was the FBI headquarters relocation scrapped to protect Trump's hotel from competition?, *Citizens for Responsibility and Ethics in Washington*, Oct. 13, 2018, https://bit.ly/2krLLZe.

[36] Editorial Board, The FBI needs new digs. For some reason, Trump doesn't seem inclined to help, *Washington Post*, Aug. 8, 2018, https://bit.ly/2lVIK3L.

[37] General Servs. Admin., Office of Inspector, Review of GSA's Revised Plan for the Federal Bureau of Investigation Headquarters Consolidation Project, Aug. 28, 2018, https://bit.ly/2kkl20s; CREW sues GSA for FBI HQ renovation records, *Citizens for Responsibility and Ethics in Washington*, updated July 29, 2019, https://bit.ly/2kPgC1W.

Clauses. There is also no indication that, in response to the OIG report, GSA has undertaken any evaluation of emoluments issues relating to the OPO Lease.

Second, GSA's determination was analytically flawed because it failed altogether to construe section 37.19 of the lease, which forbids any "elected official of the Government of the United States" to "be admitted to any share or part of this Lease, or to any benefit that may arise therefrom." Rather than interpreting this lease language, GSA merely recited steps Trump-OPO took ostensibly to insulate President Trump from active management of the hotel and summarily concluded that those steps were sufficient to avoid a violation of section 37.19. GSA reached this conclusion even though the President, an elected official of the United States government, still holds a 77.5% interest in the hotel through a revocable trust, and therefore is plainly "admitted to" a share or part of the OPO Lease from which he derives a "benefit."

GSA should, at a minimum, undertake a new assessment of Trump-OPO's compliance with the lease that properly evaluates both the emoluments issues agency officials previously ignored and the application of section 37.19 to the facts. Given that all federal officials have a duty to support and defend the Constitution, it is incumbent on GSA to take all steps within its power to ensure compliance with the Emoluments Clauses and the terms of the OPO Lease.

A. Factual Background

In August 2013, Trump-OPO executed a 60-year ground lease with GSA under which the Old Post Office building would be redeveloped as a luxury hotel.[38] At that time, Donald J. Trump had a majority interest in Trump-OPO.[39] The Trump International Hotel opened on the site in October 2016.[40] Just before taking office in January 2017, President Trump resigned from his position with Trump-OPO but retained a 77.5% interest in it through DJT Holdings LLC and DJT Holdings Managing Member LLC, both of which he placed in the Donald J. Trump Revocable Trust ("DJT Revocable Trust").[41]

Upon taking office, Mr. Trump became an elected official of the Government of the United States, a change in status that implicated section 37.19 of the OPO Lease. Section 37.19 of the lease provides:

> No ... elected official of the Government of the United States ... shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom; provided, however, that this provision shall not be construed as extending to any Person who may be a shareholder or other beneficial owner of any publicly held corporation or other entity, if this Lease is for the general benefit of such corporation or other entity.[42]

As GSA's OIG explained, "[f]ollowing the publication of the first of several articles about section 37.19 on November 15, 2016, the OGC attorneys working on the OPO project began discussing whether President Trump's business interest in the OPO Lease constituted a breach of the section."[43] Ultimately, GSA issued a determination in March 2017 finding that Trump-OPO was in full compliance with section 37.19 and that the lease remained in full force and effect.[44] That determination failed to provide any legal analysis of the meaning of section 37.19. In addition, it failed to address the Constitution's Emoluments Clauses, which were implicated by the benefits accruing to President Trump. It also failed to consider related sections of the OPO Lease, sections 6.2 and 37.2, barring Trump-OPO from "us[ing]" the property, or "permit[ting]" it "to be used," for "any unlawful or illegal business, use or purpose" or "in any way in violation ... of any ... Applicable Laws," including the Constitution.[45] Instead, it concluded that certain measures Trump-OPO took ostensibly to insulate President Trump from the hotel's management and profits were sufficient to avoid a violation of section 37.19.[46]

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[38] GSA OIG Report, at 2.
[39] *Id.*
[40] *Id.* at 3.
[41] GSA Determination, Exhibit B to Exhibit 7 (Exhibit 7 is a Dec. 29, 2016 letter from Adam L. Rosen of Trump-OPO to GSA, and Exhibit B to that letter includes an ownership chart for Trump-OPO). Donald J. Trump Resignation Letter, Jan. 19, 2017, https://bit.ly/2kolESM; Letter from GSA Contracting Officer Kevin M. Terry to Trump Old Post Office LLC, March 23, 2017, at 6, https://bit.ly/2nhKfaB ("GSA Determination").
[42] Ground Lease By and Between the United States of America and Trump Old Post Office LLC, Lease No. GS–LS–11–1307, Aug. 5, 2013, https://bit.ly/2kHtmaT ("OPO Lease").
[43] GSA OIG Report, at 8.
[44] GSA Determination, at 1.
[45] *Id.*; OPO Lease, §§ 6.2, 37.2.
[46] *See* GSA Determination, at 2–8.

The Domestic and Foreign Emoluments Clauses are two constitutional provisions designed to prevent self-dealing and corruption by federal officials, including the President. The Domestic Emoluments Clause provides: "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them."[47] Similarly, the Foreign Emoluments Clause bars any person "holding any Office of Profit or Trust"—including the President—from, "without the Consent of the Congress, accept[ing] ... any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[48] In establishing these prohibitions, the Framers sought to prevent foreign governments, the federal government and the states from improperly influencing the President through financial rewards,[49] and to address their "concern that the President should not have the ability to convert his or her office for profit."[50]

In January 2019, the GSA OIG released a report finding that GSA's "decision to exclude the emoluments issues from GSA's consideration of the lease was improper because GSA, like all government agencies, has an obligation to uphold and enforce the Constitution; and because the lease, itself, requires that consideration."[51] GSA's Office of General Counsel deliberately chose not to consider the Constitution's Emoluments Clauses because they mistakenly believed the issue was outside GSA's purview.[52] The report further found that "GSA's unwillingness to address the constitutional issues affected its analysis of section 37.19 of the lease that led to GSA's conclusion that Tenant's business structure satisfied the terms and conditions of the lease."[53] The GSA OIG did not, however, recommend that GSA take any action to remedy this deficiency in the agency's evaluation of the lease.

In its response to the OIG's report, GSA did not dispute that it failed to consider the impact of the Constitution's Domestic and Foreign Emoluments Clause in approving the OPO Lease, nor did it commit to undertake an analysis of those issues.[54] GSA instead referenced the Department of Justice's ("DOJ") litigation filings from the various pending emoluments suits against the President to support the proposition that the lease "does not violate the Emoluments Clauses."[55] Unlike the decision of a court, however, DOJ's litigation briefs are not binding on GSA and do not relieve the agency of its obligation to evaluate known constitutional questions.

B. Legal Issues

There are at least two major problems with GSA's management of the OPO Lease that deserve congressional scrutiny: its wholesale failure to consider the impact of the Constitution's Emoluments Clauses and its failure to properly analyze section 37.19 of the lease.

1. The Domestic and Foreign Emoluments Clauses

GSA has never properly evaluated the impact of the Constitution's Emoluments Clauses on the OPO Lease. The OIG report confirms that GSA consciously chose to ignore this issue as part of its March 2017 lease-compliance determination, and the agency has given no indication that it plans to consider them in the future. The closest GSA has come to addressing the topic publicly was its response to the OIG's report, where it summarily adopted DOJ's litigation position that the lease itself "does not violate the Emoluments Clauses." But this lackluster effort falls far short of satisfying GSA officials' constitutional duties.[56] As the D.C. Circuit has observed, "[f]ederal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it," and thus an agency's failure to properly evaluate known constitutional issues is "the very paradigm of arbitrary and capricious

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[47] U.S. Const., art. II, § 1, cl. 7.
[48] U.S. Const. art. I, § 9, cl. 8.
[49] 5 Op. O.L.C. 187, 189 (1981).
[50] *Griffin v. United States*, 935 F. Supp. 1, 4 (D.D.C. 1995); *see also* Brianne J. Gorod, Brian R. Frazelle, and Samuel Houshower, The Domestic Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump, *Constitutional Accountability Center*, July 2017, https://bit.ly/2kuOXmE.
[51] GSA OIG Report, at 1.
[52] *Id*. at 4, 16–17.
[53] *Id*. at 1.
[54] *Id*., App. B.
[55] *Id*. at 2.
[56] *Id*. at 17.

administrative action."[57] GSA's determination was also arbitrary and capricious because GSA "entirely failed to consider an important aspect of the problem."[58]

In addition, GSA misstates the scope of the problem: the question is not merely whether the lease itself "violate[s] the Emoluments Clauses," but whether Trump-OPO is using the property, or permitting it to be used, in an "unlawful or illegal" manner, in violation sections 6.2 and 37.2 of the OPO Lease and the Emoluments Clauses.[59] CREW and others have documented numerous instances of the apparent receipt of prohibited emoluments via payments to the Trump International Hotel.[60]

2. Section 37.19 of the OPO Lease

GSA also has never properly assessed whether Trump-OPO is in compliance with section 37.19 of the OPO Lease, which provides that "[n]o ... elected official of the Government of the United States ... shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom." Critically, the President has not divested his 77.5% interest in Trump-OPO; he merely placed it in his revocable trust, the DJT Revocable Trust. GSA's March 2017 lease-compliance determination concluded that Trump-OPO had avoided a violation of section 37.19 based on: (1) President Trump's establishment of the DJT Revocable Trust; (2) the fact that the President no longer held a position with any member entity of Trump-OPO; and (3) amendments to the Trump-OPO internal operating agreement requiring that money that otherwise would have been distributed to President Trump during his term in office be credited to an unrecovered capital contribution account that may only be used for Trump-OPO's business activities.[61]

But in reaching this conclusion, GSA failed to conduct any substantive analysis of the meaning of section 37.19. GSA failed entirely to consider what qualifies as a "benefit" arising from the OPO Lease or what it means to be "admitted to any share or part of th[e] lease." This failure falls below the basic standard required for administrative decision making, for not only must the result of agency action be within the scope of its lawful authority "but the process by which it reaches that result must be logical and rational."[62] Were the agency to properly analyze the issue, it would see that, in fact, the trust does not sever the President's interest in the trust property, nor does Trump-OPO's use of an unrecovered capital contribution account deprive him of the benefits of the OPO Lease.

a. President Trump's revocable trust does not sever his financial interests in the trust property and, as a result, he derives a benefit and is admitted to a share or part of the OPO Lease.

A reasoned analysis reveals that President Trump does, indeed, derive "benefit" from the OPO Lease and has been "admitted to a share or part" of it in violation of section 37.19. The discussion of the President's trust in GSA's determination letter ignored the nature of that trust, which is merely a revocable trust for which he is both grantor and beneficiary.[63] It does nothing to sever his financial interest in the trust property.

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[57] *Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987); *accord Graceba Total Commc'ns, Inc. v. FCC*, 115 F.3d 1038, 1041–42 (D.C. Cir. 1997); *McBryde v. Comm. to Review Circuit Council Conduct*, 264 F.3d 52, 62 (D.C. Cir. 2001).

[58] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[59] GSA OIG Report, App. B at 2 (agency's Jan. 9, 2019, response to the OIG); OPO Lease. §§ 6.2, 37.2.

[60] Trump's 2,000 Conflicts of Interest (and Counting), *Citizens for Responsibility and Ethics in Washington*, updated Aug. 15, 2019, https://bit.ly/31FxDeP; Jonathan O'Connell, Joshua Partlow, and David A. Fahrenthold, Trump pledged not to use his office to help his business. Then he pitched his Florida club for the next G–7, *Washington Post*, Aug. 31, 2019, https://wapo.st/2ZKTIXL (noting that "[t]he Post has identified at least nine examples of foreign governments spending money at Trump Properties since Trump took office" and noting a Trump Organization official's estimate that "about 90%" of the money foreign governments paid to the Trump Organization was spent at the Trump International Hotel in Washington, D.C.).

[61] GSA Determination, at 4–8.

[62] *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).

[63] Establishing that President Trump is the grantor of the DJT Revocable Trust, his attorney explained that, "[a]mong other steps taken, Mr. Trump conveyed all of his business and investment assets to The Donald J. Trump Revocable Trust ... ." GSA Determination, Exhibit 1.B at 5 (Letter from Sheri Dillon to Kevin Terry). President Trump's financial disclosure report likewise establishes he is the trust's beneficiary, disclosing his financial interest in Trump-OPO through the DJT Revocable Trust. *See* Donald J. Trump, Public Financial Disclosure Report, May 15, 2019 (Part 2, Line 95 (Trump-OPO), App., Item 408 (Trump-OPO), and App., at A1 ("All of the Interests listed below in this exhibit, which were formerly held by Donald J. Trump, directly or indirectly, are now held by The Donald J. Trump Revocable Trust.")), https://bit.ly/2WhTs0Q ("Trump 2019 Financial Disclosure").

A revocable trust can remain subject to modification and dissolution at the whim of the grantors after its establishment.[64] This feature of a revocable trust leaves its property within reach of the grantor's creditors, for the establishment of a revocable trust does not truly alienate the grantor from trust property.[65] In the analogous context of conflict of interest laws—which, like section 37.19, guard government integrity against the conflicting financial interest of high officials—OGE has explained: "[T]he grantor of a revocable living trust retains such rights of control and enjoyment with respect to the trust property that OGE must view the grantor as the true owner of the property."[66] OGE has also emphasized that, "OGE believes this to be the case whether or not the grantor actually receives any distribution of trust income and whether or not the grantor actually serves as trustee."[67]

This explanation by OGE demonstrates the ineffectiveness of a revocable trust to separate a grantor from the trust property. In fact, Congress gave similar treatment to the property of revocable trusts when it designed a qualified blind trust mechanism for executive branch officials.[68] The mechanism Congress designed, which is predicated on the establishment of revocable trusts,[69] treats all known trust property as the financial interest of the grantor for purposes of the conflict of interest law:

> An asset placed in a trust by an interested party shall be considered a financial interest of the reporting individual, for the purposes of any applicable conflict of interest statutes, regulations, or rules of the Federal Government (including section 208 of title 18, United States Code), until such time as the reporting individual is notified by the trustee that such asset has been disposed of, or has a value of less than $1,000.[70]

Thus, this mechanism frees grantors from coverage of the primary conflict of interest law only after they lack the requisite knowledge of their financial interests to violate that law—a clear recognition by Congress that placing property in a revocable trust does nothing to eliminate a financial interest in the property.[71]

Consistent with these well-settled principles of revocable trusts, the terms of the DJT Revocable Trust make clear that President Trump has a continuing financial interest in the trust property. Its stated purpose is to "hold assets for the exclusive benefit of Donald J. Trump, and President Trump retains the power to revoke the trust or appoint new trustees.[72] President Trump's attorney has also publicly acknowledged that President Trump has the right to withdraw money or assets from the trust any time he wishes.[73] A tax expert who reviewed this arrangement, summed it up by explaining that "[f]or tax purposes, it's as if the trust doesn't exist at all. . . . It's just an entity on paper, nothing more."[74]

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[64] *See, e.g., In re: Marriage of Githens*, 227 Or. App. 73, 88 (Or. Ct. App. 2009) ("Only nomenclature distinguishes the remainder interest created by [a revocable] trust from the mere expectancy arising under a will. Under either the trust or the will, the interest of the beneficiaries is both revocable and ambulatory.") (quoting John Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108, 1113 (1984)); *see also* Restatement (Third) of Trusts § 25 (2003) comment a ("[T]he revocable trust is widely used as a legally accepted substitute for the will as the central document of an estate plan."); 67 Fed. Reg. 37965 (May 31, 2002) (grantor of a revocable trust has the power "to revoke the trust entirely and to make lessor changes, such as substitutions of beneficiaries or trustees"), https://bit.ly/2lXz7RS.

[65] *See, e.g., In re Estate of King*, 196 Misc. 2d 250, 256, 764 N.Y.S.2d 519, 524 (Surr. Ct. Broome. Co. 2003) ("A revocable trust is subject to the claims of the grantor's creditors."); *Ackerman v. Abbott*, 978 A.2d 1250, 1256 (D.C. 2009) ("[Trust] had an enforceable right to require the personal representative to convey the property to it under the terms of the will (subject, to be sure, to any outstanding creditor claims and expenses of administration . . .)").

[66] Office of Gov't Ethics, DO–02–15, at 7 (2002), https://bit.ly/2lyKYWB.

[67] 67 Fed. Reg. 37965, 37966 (May 31, 2002), https://bit.ly/2lXz7RS.

[68] 5 U.S.C. app. § 102(f)(3).

[69] 5 U.S.C. app. § 102(f)(5)(C) (establishing procedures attendant to dissolution of the qualified blind trust); 5 C.F.R. 2634.410 (Dissolution); Office of Gov't Ethics, Model Qualified Blind Trust Provisions, OMB No. 3209–0007, at 2 (2016) (lines 18–19 provide for dissolution by revocation), https://bit.ly/2kkMv25.

[70] 5 U.S.C. app. § 102(f)(4).

[71] 18 U.S.C. § 208(a) (conflict of interest prohibition applicable only to known assets of an employee).

[72] Certification of Trustee, Jan. 26, 2017, https://bit.ly/2lWUsew; GSA Determination, at 6–7 & Exhibit 14.

[73] Derek Kravitz and Al Shaw, Trump Lawyer Confirms President Can Pull Money From His Businesses Whenever He Wants, *Pro Publica*, Apr. 17, 2017, https://bit.ly/2o1OM1C.

[74] *Id*. President Trump recently acknowledged his continuing financial interest in an asset he placed in the revocable trust: "Turnberry Resort (which I do own) in Scotland." Donald J. Trump

Continued

b. President Trump continues to derive benefits from the lease notwithstanding Trump-OPO's distributions to the unrecovered capital contribution account.

Trump-OPO's use of an unrecovered capital contribution account is likewise insufficient to bring it into compliance with section 37.19 of the OPO Lease. GSA's determination regarding the OPO Lease cited assurances by Trump-OPO that "amounts that would have been distributed to DJT Holdings LLC," through which President Trump holds an interest in Trump-OPO, "will instead be credited to the unrecovered capital contribution account of DJT Holdings LLC" and "treated as capital contributions" to Trump-OPO.[75] GSA offered the following summary of this arrangement: "In plain terms, what this means is that the funds will remain in [Trump-OPO] instead of being distributed to DJT Holdings LLC."[76] Nevertheless, President Trump still benefits from the OPO Lease in several ways, both tangible and intangible.[77] I will summarize highlights of CREW's discussion in a prior submission to Congress regarding ways he benefits.[78]

GSA's explanation that "the funds will remain in [Trump-OPO]" ignored the fact that the President retained his financial interest in Trump-OPO. Stated even more plainly, the money remains invested in an asset that President Trump owns. In addition, any money remaining in the capital contribution account can be distributed directly to President Trump or his businesses after he leaves office.[79] If no money is drawn from the capital contribution account while he is in office, all of it may flow to him in the future.

The capital contribution account is broadly available for "business activities and purposes, such as repayment of debt, capital improvements, maintenance and repairs, operating expenses, etc."[80] With this broad language, the opportunities for benefitting President Trump are nearly boundless. The company could use the capital contribution account to make enhancements to the hotel, which would benefit President Trump both by increasing the value of his investment and attract additional revenue. The success of the hotel, in turn, would strengthen the Trump brand, which further inures to the President's benefit by increasing the value of, and revenue from, the vast web of business entities he refused to divest.[81] In addition, the value of his investment in Trump-OPO would increase if the capital contribution account made payments toward the company's loans or other liabilities. Further, the capital contribution account could be used to subsidize his other businesses—for example, by purchasing wine for the hotel from his Trump Vineyards Estates LLC.[82]

For these reasons, President Trump has not deprived himself of the benefits of the OPO Lease by arranging for Trump-OPO to credit money to an unrecovered capital contribution account that would otherwise be distributed to him. It was inappropriate for GSA to rely on this arrangement to justify a conclusion that Trump-OPO remained in compliance with the OPO Lease. At a minimum, GSA should conduce a new review of the lease that takes into account the fact that President Trump continues to be admitted to the benefits of the OPO Lease.

c. Arguments made by President Trump's attorney, on which GSA may have relied, run contrary to the natural meaning of the lease language.

Although GSA's lease-compliance determination does not grapple with the meaning of section 37.19, President Trump's attorney offered arguments on that issue in urging the agency to deem Trump-OPO in compliance with the OPO Lease. She argued that Trump-OPO qualified for an exception to section 37.19 and, alternately, that section 37.19 was inapplicable because President Trump was a private citizen when the lease was executed. The extent to which GSA relied on either of these arguments is unclear, but the OIG report (which is redacted in key places) seems to

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(@realDonaldTrump), Twitter, https://bit.ly/2mrywsd; Trump 2019 Financial Disclosure (Part 2, Line 38 and App., Item 157).

[75] GSA Determination, at 7.

[76] *Id.*

[77] *Id.*

[78] Letter from CREW to Sens. John Barrasso and Tom Carper, April 25, 2017, https://bit.ly/2lT1hh8.

[79] GSA Determination, Exhibit 1.C (the relevant document is the "First Amendment to Second Amended and Restated Limited Liability Company Agreement of Old Post Office LLC," which is attached to the Mar. 20, 2017 letter from Sheri Dillon to Kevin Terry).

[80] GSA Determination, Exhibit 1.C., at 4 (letter from President Trump's attorney, Sheri Dillon).

[81] Trump 2019 Financial Disclosure (Part 2).

[82] Trump 2019 Financial Disclosure (Part 2, Line 110).

suggest GSA accepted the former and rejected the latter. As the OIG report explains, however, both arguments were without merit.[83]

As to the first argument, the President's attorney urged GSA to conclude that, as a privately-held limited liability company ("LLC"), Trump-OPO qualified for an exception to section 37.19. I encourage the Subcommittee to review the discussion of the issue in the OIG report, which ably refutes this argument.[84] The exception provides that section 37.19 is inapplicable to "a shareholder or other beneficial owner of any *publicly held* corporation or other entity."[85] President Trump's attorney argued that the phrase "publicly held" modified only "corporation" and was, therefore, available to Trump-OPO.[86] But this nonsensical reading would make the exception unavailable to a privately held corporation while leaving it available to any privately held LLC, limited liability partnership, statutory trust, business trust, common-law trust, real estate investment trust, unincorporated association, and any other conceivable type of legal entity that is privately held. Such an outcome would fail to achieve the section's goal of reducing conflicts of interest. No one could reasonably argue that a large financial interest in a privately held LLC—owned primarily by a few family members and bearing an elected official's name—poses less risk than a few shares of a privately held corporation with thousands of shareholders, officers, and employees.

As to the second argument, the President's attorney argued that section 39.17 was inapplicable because the lease was executed when he was a private citizen, but the OIG Report seems to suggest GSA rejected this argument.[87] The attorney essentially urged GSA to read the phrase "admitted to" out of context to support a conclusion that the term referred to a "singular transaction or act" occurring when the lease was executed.[88] The language, however, does not bar an elected official's admittance to the lease. Rather, it bars admittance to any "share or part" of the lease or any benefit "arising therefrom." The benefits of the lease will arise across the life of the lease. In fact, the public statements of GSA and Trump-OPO show they were focused on ensuring that benefits arise after the President entered government.[89]

III. Conclusion

For all of these reasons, GSA should undertake a new assessment of Trump-OPO's compliance with the lease to properly evaluate both the emoluments issues and the application of section 37.19 to the facts. I will close by noting an important point: while we strongly disagree with GSA's actions in this case, ultimate responsibility for the harms we have identified lies with President Trump. His decision to break from ethical norms by retaining his vast portfolio of conflicting financial interests is the true source of these problems.

Thank you for the opportunity to address the Subcommittee today. I respectfully request that this written testimony be entered into the record of this hearing. I am also happy to answer questions members of the Subcommittee may have.

Ms. Titus. Thank you, Mr. Shaub.

We will now go to Chairman DeFazio for the first questions.

Mr. DeFazio. Thanks, Madam Chair.

Ms. Hempowicz, the gentleman sitting next to you said that because the Justice Department is defending the President in civil litigation, that this becomes a controlling opinion over employees of the Government of the United States. Is that correct?

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[83] GSA OIG Report, at 20–23.
[84] GSA Determination, Exhibit 1.B, at 7; GSA OIG Report, at 20–23.
[85] OPO Lease at § 39.17 (emphasis added).
[86] GSA OIG Report, at 21–22.
[87] *Id*.
[88] GSA Determination, Exhibit 1.C at 6.
[89] GSA Lease-Compliance Determination, at 2 ("[T]he Lease turned a building that had been costing taxpayers millions of dollars per year into a revenue-generating asset."); Betsy Woodruff, Trump Inc. Had a Rough Year, but His D.C. Hotel Is Killing It, *Daily Beast*, Dec. 29, 2017 ("Patricia Tang, the hotel's director of sales and marketing, said the team there is happy with its success this year. 'We are very pleased with the performance of the hotel in its first full year of operation, not just financially but also with regards to the recognition of the high service standards achieved by our associates as indicated in the reviews and rankings on TripAdvisor, Expedia, Booking.com,' she told The Daily Beast. 'We are looking forward to an even more successful 2018.'"), https://bit.ly/2lUPS08.

Ms. HEMPOWICZ. I believe he may have been talking about the Office of Legal Counsel as its opinions involve this issue ongoing. I am unaware of any OLC opinion directly on this situation, although they are notoriously private.

Mr. DEFAZIO. And for it to be binding, it would have to be an official opinion, not involved in pleadings in a civil lawsuit?

Ms. HEMPOWICZ. I think so. But I also think, you know, the problem is, is that when the GSA initially decided not to look into this issue, the Department of Justice wasn't involved in any ongoing litigation on it.

Mr. DEFAZIO. That is a very good point. I mean, GSA has its own counsel. They say, well, they certainly couldn't handle that, why wouldn't they ask the Office of Legal Counsel for an opinion?

Ms. HEMPOWICZ. I think that is a great question, and I think the inspector general report highlights an instance 20 years ago where they did exactly that when the question involved Members of Congress rather than the President.

Mr. DEFAZIO. Yeah. Mr. Shaub, did you—because you also talked about GSA and dereliction of duty and not asking that question. You want to expand on that a little bit?

I don't think your mic's on, or get closer or something.

Mr. SHAUB. Sorry. Can you hear me now?

Mr. DEFAZIO. Yeah.

Mr. SHAUB. They had a duty to consider the issue. First of all, they swore an oath to uphold and support the Constitution. Second of all, courts have ruled that an agency's failure to even consider an important issue renders its action arbitrary and capricious. So that means that they haven't done the basic thing that agencies do to evaluate a problem. They just simply punted. They decided not to address it.

Mr. DEFAZIO. Well, of course, we don't know what was in the general counsel's legal opinion which led to the estoppel by the career employee who, shortly after the election, was corresponding with Ivanka Trump and saying this is all nonsense, there is nothing wrong with this lease, and by the way, I want to tell you about my trip to New York and let's have coffee. Is that normal behavior by a contracting officer of the Government in the United States dealing with the daughter of and/or ultimate beneficiary of this?

Mr. SHAUB. Yeah, that is not normal for any Government official. I spent years of my career working with Presidential nominees, and I never once asked any of them out to coffee.

Mr. DEFAZIO. I think there was a different attraction there for this employee.

Mr. Foster, I don't know if you can answer this or not, but, again, the gentleman sitting next to you alleged that because the Department of Justice has made pleadings in a civil litigation case, that that becomes a binding legal opinion upon employees of the United States Government?

Mr. FOSTER. Thank you for your question. I can't speak to the legal impact of the Department of Justice's pleadings. I do agree that, generally, formal opinions of the Office of Legal Counsel within the Department of Justice are binding within the executive branch, unless or until they are overruled by the Attorney General or the President.

Mr. DEFAZIO. OK. Thank you.

All right. Thank you, Madam Chair.

Ms. TITUS. Mr. Meadows.

Mr. MEADOWS. Thank you, Madam Chairman.

Mr. Spakovsky, in your prior work, I think you served as an attorney at DOJ. Is that correct?

Mr. VON SPAKOVSKY. That is correct.

Mr. MEADOWS. And so given that history, can you maybe elaborate on the role of the DOJ lawsuits and particularly, I guess, the one involving the constitutional interpretation?

Mr. VON SPAKOVSKY. The Justice Department is the lawyer for the executive branch, including independent agencies and executive branch agencies and agencies such as GSA.

Mr. MEADOWS. And they put forth an opinion. Is that correct?

Mr. VON SPAKOVSKY. They put forth all kinds of opinions. They certainly have a whole long string of opinions on the Emoluments Clauses. But the point here is that when they take a position in litigation that a particular Federal issue is constitutional or unconstitutional, that is binding on the executive branch, including other agencies.

I not only worked at the Justice Department, but I was a Commissioner for 2 years at the Federal Election Commission. And when we had a case, for example, before the U.S. Supreme Court, even if I as a Commissioner personally believed, or in my official capacity, that a particular statute was unconstitutional, it was the Solicitor General of the Justice Department that argued before the court and argued about its constitutionality. I had no power to change that.

So this idea that GSA can come up with its own view on the constitutionality of the Emoluments Clause, it just doesn't—it is just not in accord with the way the law has been practiced and the way the Justice Department operates. Just look back to former Attorney General Eric Holder, who refused to defend certain Federal statutes, including those affecting gay marriage, because he said they were unconstitutional. The Federal agencies involved with those particular statutes could not have appeared in court and said, oh, well, we disagree with the Attorney General.

Mr. MEADOWS. So what you are saying is it would break historical precedence in terms of the executive branch to allow the GSA Administrator here, I guess the ranking official that has been here on the panel before you, who is not an attorney, to opine on the constitutionality of the Emoluments Clause. Is that correct?

Mr. VON SPAKOVSKY. He can opine all he wants, but his opinion is irrelevant, as is the opinion of the IG. The controlling authority is the U.S. Department of Justice.

Mr. MEADOWS. All right. And so, Ms. Hempowicz—is that correct—let me come to you. I want to clarify one thing, and I see they have called votes so I will try to be very brief here. In your written testimony, on page 4, you say, the "courts have adopted a broad definition of emolument as any benefit, gain, or advantage, including profits from private market transactions."

I am not aware of any case that would identify private market transactions. Can you help me with the case that was decided

where that definition was included? Was that in a majority opinion?

Ms. HEMPOWICZ. Unfortunately, I can't off the top of my head, but I will tell you that I——

Mr. MEADOWS. I don't think there is one. And so here I would ask you to clarify that, because I don't think there is one. We have looked, and when you look at it, it seems like, you know—and you made a definitive statement, so perhaps you can go back and verify that, either get us the citation or remove it, and that would be very helpful.

Ms. HEMPOWICZ. I would be happy to.

Mr. MEADOWS. All right. Thank you.

Mr. Foster, let me come back to you in the 1 minute and 12 seconds I have remaining. CRS, I am a big fan, and in fact, I applaud the Democrats for continuing to have CRS come as witnesses. I think it is good in a bipartisan spirit of transparency.

Has the opinion on the Emoluments Clause, has it changed over time? Has what CRS interpreted as the emoluments, has it changed over time? And I know you are new, and so if you don't know, don't answer.

Mr. FOSTER. Thank you for your question. I think what I would say is that CRS' determinations are based in the law and are based in kind of existing legal precedent. And there is very little legal precedent on the question of what an emolument is. It has only recently been addressed by the Federal courts.

Mr. MEADOWS. So what you are saying is, is that basically we need for CRS to have a definitive opinion, we probably need the courts to rule on this with the pending litigation that is out there?

Mr. FOSTER. There are ways that CRS can look at legal provisions that haven't been definitively interpreted and apply existing——

Mr. MEADOWS. But you have, and that has changed over time. From 2012 to 2016, it has changed in terms of your interpretation from CRS. Are you aware of that?

Mr. FOSTER. I am not aware.

Mr. MEADOWS. I will let you—I see your staff over there. I will let you get with them, and you can get back with us.

And I yield back.

Ms. TITUS. Thank you, Mr. Meadows.

Mr. Foster, we keep hearing from the—or we heard from the GSA that they were trying to make the new practice consistent with underlying law, and they quote 8 U.S.C. section 431, 41 U.S.C. section 603(a). That is a criminal provision and a civil provision that has to do with Members of Congress and contracts. I would argue that that is not really relevant here, and I am just asking you, do you think that supersedes the Constitution that prohibits a President or any elected official from taking emoluments?

Mr. FOSTER. Thank you for your question. I have not reviewed those provisions in preparation for this testimony. I can say, as a general matter, that statutory law does not supersede the Constitution.

Ms. TITUS. Would you agree with that, Ms. Hempowicz?

Ms. HEMPOWICZ. Yes.

Ms. TITUS. Thank you.

Also, we have been hearing all from our friends down here how much money the post office is making now as a hotel. It is making all this money. It has been great for the taxpayers, it is making all this money. Well, if it is making money, then it is making money for the President, because it is a revocable trust which he can revoke any time, or he can defer the money till he leaves office, or he can reinvest the money in the property, so he is making money. The hotel's making money, the President's making money.

Mr. Shaub, isn't that a violation of the Emoluments Clause?

Mr. SHAUB. It certainly is. The revocable trust does absolutely nothing to separate him from his assets or his income. We dealt with revocable trusts all the time with Presidential appointees coming in the Government, and we helped them work through their conflicts of interest and consider these nonentities.

Ms. TITUS. We also heard from the GSA and the IG that it used to be a best practice—that is their word—a best practice of the GSA to put something in the lease like section 37.19 that prohibits Members of Congress or elected officials or members of the administration. If it was a best practice before President Trump came in, why isn't it a best practice now? Does that make any sense to you, Mr. Shaub?

Mr. SHAUB. Well, that is the most confounding thing about GSA's response. Their solution to this hard problem is to never address it again and eliminate this prophylactic, conflicts-of-interest provision from future contracts. So they are compounding a dereliction of duty with an even bigger dereliction of duty.

Ms. TITUS. And weren't you, Mr. Shaub, the Director of the OGE when Donald Trump was elected, and didn't you give him some advice about how to avoid these conflicts of interest? Could you share with us that advice?

Mr. SHAUB. Well, I think I have been very public about the fact that all Presidents should divest their conflicting financial interests, and the same is true for the current President.

Ms. TITUS. Did he follow your advice?

Mr. SHAUB. He did not.

Ms. TITUS. No, he didn't.

Well, thank you all very much. We are going to have to go and—oh, where did she come from? All right. Sorry.

We now have a new Member with us. We will hear from Mrs. Miller.

Mrs. MILLER. Thank you, Madam Chairwoman.

I want to thank you all for being here.

And once again, I want to emphasize that the very first hearing that we had on this committee was called, "The Cost of Doing Nothing: Why Investing in Our Nation's Infrastructure Cannot Wait." It is more important to my constituents that we act swiftly to improve our Nation's infrastructure.

Mr. Spakovsky, how appropriate is it for a contractor to make a determination based on an unsettled law in the courts?

Mr. VON SPAKOVSKY. Well, I think that is very problematic for a Federal agency, and I can say that as a former Commissioner of a Federal agency, and in particular, when the Justice Department is taking a position, again, because they are the controlling authority particularly on constitutional issues, GSA can't go against that.

And the position of the Justice Department throughout all of the litigation over the Trump Hotel and the lease is that this is not a violation of the Emoluments Clause.

Mrs. MILLER. Thank you very much.

I yield back my time to Mr. Meadows.

Mr. MEADOWS. I just want to thank all of you. I want to thank the gentlewoman from West Virginia, and I want to thank the chairman. And I will yield back.

Ms. TITUS. Thank you, Mr. Meadows.

Any further questions from the subcommittee?

Seeing none, I would like to thank each of the witnesses for your testimony today. Your contribution to our discussion has been very informative, very helpful.

I would ask unanimous consent that the record of today's hearing remain open until such time as our witnesses have provided answers to any questions that may be submitted to them in writing, and unanimous consent that the record remain open for 15 days for any additional comments and information submitted by Members or witnesses to be included in the record of today's hearing.

Without objection, so ordered.

If no other Members have anything to add, the subcommittee stands adjourned. Thank you.

[Whereupon, at 1:17 p.m., the subcommittee was adjourned.]

SUBMISSIONS FOR THE RECORD

GSA Public Buildings Service Memo of March 29, 2019, to Inspector General, Submitted for the Record by Hon. Dina Titus

March 29, 2019

TO: Carol F. Ochoa, Inspector General (J)
THROUGH: Daniel W. Mathews, Commissioner, Public Buildings Service (PBS)
FROM: Stuart Burns, Assistant Commissioner, Portfolio Management and Customer Engagement (PT)
SUBJECT: Final Report—*Evaluation of GSA's Management and Administration of the Old Post Office Building Lease* (JE19–002)

This transmittal memo and the attached Management Decision Record and Corrective Action Plan (CAP) are in response to the sole recommendation contained in the Office of Inspector General's final report entitled *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, dated January 16, 2019 (Evaluation Report). GSA's agency response to the Evaluation Report, dated January 9, 2019, was submitted by the Office of General Counsel since the analysis and findings contained in the report primarily involved actions taken by OGC. However, since the recommendation in the Evaluation Report involves program activity residing within the Public Buildings Service (PBS), the Management Decision Record and CAP are being provided by PBS.

The Evaluation Report recommended:

> . . . that before continuing to use the language [in Section 37.19 of the Old Post Office (OPO) outlease], GSA determine the purpose of the Interested Parties provision, conduct a formal legal review by OGC that includes consideration of the Foreign and Presidential Emoluments Clauses, and revise the language to avoid ambiguity.
>
> Evaluation Report at 24.

Your office found that, "Section 37.19 [of the OPO outlease] is based on an 1808 Act of Congress that prohibited Members of Congress from participating in contracts or agreements with the United States, and subjected Members and government officers who made such contracts to criminal prosecution." Evaluation Report at p. 7 (citation omitted). After tracing the development of the 1808 Act, the Evaluation Report summarized the current status of the law as follows: "'A Member of Congress may not enter into or benefit from a contract or agreement or any part of a contract or agreement with the Federal Government.'" *Id*. at p. 8, *citing* Pub. L. No. 111–350, 124 Stat. 3805–06 (Jan. 4., 2011); 41 U.S.C. § 6306(a). *See also* Evaluation Report at p. 7, note 29 ("Versions of these provisions remain in force today in the criminal and public contract laws of the United States Code. *See* 18 U.S.C. §§ 431–432; 41 U.S.C. § 6306(a).").

Based on the findings and recommendations in the Evaluation Report, GSA will no longer use the language contained in Section 37.19 of the OPO outlease in future outleases. Instead, GSA will insert into all outleases a clause putting outlessees on notice of the requirements of 18 U.S.C. § 431 and 41 U.S.C. § 6306(a). As noted in the Evaluation Report, such language reflects "the understood policy, intent, and purpose of Congress in the original enactments. . . . " Evaluation Report at p. 8, *citing* Pub. L. No. 111–350, § 2(b) ("CONFORMITY WITH ORIGINAL INTENT"), 124 Stat. 3677, 3677 (Jan. 4, 2011).

GSA understands the U.S. House of Representatives passed a bill on March 8, 2019, that would change many current laws regarding conflicts and contracts by the President, Vice President, and Members of Congress. *See* For The People Act of 2019, H.R. 1, 116th Cong. § 8014 (2019). Should the provisions of this bill, or any other similar provisions, become enacted into law, PBS will further adjust its model forms and templates accordingly to reflect the current state of the law.

As noted on the attached CAP, PBS is in the process of conducting a review of its current outleasing forms and templates in order to make the necessary changes, if any, as noted above. Please feel free to contact Stuart Burns with any questions.

Attachments (2):

Corrective Action Plan
Management Decision Record

Management Decision Record for Evaluations)
(For additional information see GSA Order ADM P 2030.2D)

A. ***Report Data:***
Report Number: JE19-002 Report Date: Jan. 16, 2019 Region: JE

Report Title: Evaluation of GSA's Management and Administration of the Old Post Office Building Lease

Total Number of Recommendations: 1 Number of Non-Monetary Recommendations: 1 Number of Monetary Recommendations (Fill in Below): _____

Dollars Reviewed:$ n/a

Questioned Costs:[1] Total Amount: $ _____ Unsupported Amount: $ _____

Funds Put to Better Use:[2] Total Amount: $ _____ Unsupported Amount: $ _____

B. ***Management Decision:*** Due By: ***March 29, 2019 (extended due to funding lapse)***

Non-Monetary Recommendations: A management decision is needed as follows:

If you *agree* with the non-monetary recommendations, initial here x JM, attach a management determination action plan.

If you *disagree*, in full or in part, with the non-monetary recommendations, initial here _____, attach the basis for your disagreement and provide supporting materials.

Monetary Recommendations:

If you *fully agree* with the monetary recommendations, initial here[3] _____, attach a management determination and action plan.

If you *fully disagree* with the monetary recommendations, initial here[4] _____, attach the basis for your disagreement and provide supporting materials.

If you *partially disagree* with the monetary recommendations, initial below[5] to indicate whether you disagree with the Questioned Costs and/or Funds Put to Better Use, attach the basis for your disagreement and provide supporting materials.

Questioned Costs _____ Funds Put to Better Use _____

Regional Management Decision: _____ Date: 3/29/19

HSSO Management Decision: _____ Date: 3.29.19

(Send the management determination along with the signed Management Decision Record and action plan to the GAO/IG Audit Response Division (H1C) and the evaluation manager. If applicable, attach the basis for your disagreement and provide supporting materials.)

C. ***OIG Response to Management Decision:***

If you *fully agree*, initial here[6] _____, sign below, and send to JE and H1C.

If you *fully disagree*, initial here[7] _____ or *partially disagree*, initial here[7] _____, sign below, and send to JE and H1C along with an explanation of your disagreement. If applicable, provide a revised management decision amount.

OIG Signature: _____ Date: _____

EVALUATION OF GSA'S MANAGEMENT AND ADMINISTRATION OF THE OLD POST OFFICE—BUILDING LEASE (JE19–002)

OFFICE OF PORTFOLIO MANAGEMENT AND CUSTOMER ENGAGEMENT
Corrective Action Plan
Designated Responding Official: Stuart Burns, Assistant Commissioner, PBS Office of Portfolio Management and Customer Engagement (PT)
Contact Person: Maria Torres
Telephone Number: XXX–XXX–XXXX
Date: March 29, 2019
Recommendation (Only one recommendation per page)

1. We recommend that before continuing to use the language [in Section 37.19 of the Old Post Office (OPO) outlease], GSA determine the purpose of the Interested Parties provision, conduct a formal legal review by OGC that includes consideration of the Foreign and Presidential Emoluments Clauses, and revise the language to avoid ambiguity.

Action to be Taken Step by Step	Supporting Documentation to be sent to the GAO/IG Audit Management Division	Documentation will be Sent Last Day
001 Review existing outlease forms to determine what, if any, revisions need to occur. Update outleasing forms as necessary.	Copy of revised outleasing forms, if applicable.	December 31, 2019.
002 Update the Outleasing Program Guide	Copy of revised Outleasing Program Guide ..	March 31, 2020.
003 Update forms section on outleasing website with updated outleasing forms (if applicable)	Screenshot of updated outleasing site, specifics on section with most current forms, and replace existing Outlease Program Guide with newest version.	March 31, 2020.
004 Update Outleasing Contract Training to address recommendation findings	Copy of updated Outleasing Contract Training slide deck.	June 30, 2020.

GSA Office of Inspector General Memo of September 6, 2019, to GSA Deputy Administrator, Submitted for the Record by Hon. Dina Titus

September 6, 2019

TO: ALLISON FAHRENKOPF BRIGATI, DEPUTY ADMINISTRATOR
CC: DANIEL MATTHEWS, COMMISSIONER, PUBLIC BUILDINGS SERVICE
JACK ST. JOHN, GENERAL COUNSEL
THERESA OTTERY, DIRECTOR, OFFICE OF EXECUTIVE SECRETARIAT AND AUDIT MANAGEMENT
PATRICIA SHEEHAN, ASSISTANT INSPECTOR GENERAL FOR INSPECTIONS
FROM: CAROL OCHOA, INSPECTOR GENERAL
SUBJECT: Response to Management Decision: Evaluation of GSA's Management and Administration of the Old Post Office Building Lease

I am responding to your August 26, 2019 Management Decision letter with respect to the OIG's recommendation in the January 16, 2019 *Evaluation of GSA's Management and Administration of the Old Post Office Lease* (Report).

After finding the agency's proposed corrective action plan (CAP) non-responsive, Assistant Inspector General Sheehan sought your assistance as provided in Chapter 3, § 2(f) of GSA Order ADM P 2030.2D. Your Management Decision, issued pursuant to § 2(g), finds that "the agency's interpretation of the Report's recommendation as only applying prospectively was reasonable." Your Management Decision also accepts that the OIG "intended for the Report's recommendation to be broader than it was understood by the agency," applying both to current and prospective leases.

I appreciate your attention to this matter, but must note my disagreement with the conclusion that the agency's interpretation of the recommendation was reasonable. While I accept that PBS officials interpreted the recommendation to apply solely to prospective leases, the language and context of the recommendation do not support that reading.

In their June 14, 2019 memorandum to Assistant Inspector General Sheehan, Commissioner Matthews and Assistant Commissioner Burns quoted the Report in explaining how they reached their understanding:

> [W]e interpreted the Report, and its recommendation that we revise the language of the Interested Parties provision to avoid ambiguity, as applying to "other" (namely, future) leases.

The meaning Commissioner Matthews and Assistant Commissioner Burns attribute to the Report's use of "other" overlooks the context in which the quoted word appears. The quoted word comes from the sentence immediately preceding the recommendation:

> In interviews with the OIG, OGC has acknowledged that if a constitutional violation were later found, they would have to revisit the issue of potential breach of the OPO lease's Interested Parties provision; however, the fact remains that GSA continues to use the language of the provision in other leases.[1]

These "other leases" are the Tariff Building and David W. Dyer Building leases, as discussed in the paragraph immediately preceding the Conclusion and Recommendation and elsewhere in the Report.[2] These and the OPO lease are *existing* leases, not leases GSA may enter into in the *future*, a word not used in our Report.

In a similar vein, the agency has misconstrued the OIG's statement in the Report that "GSA agreed with our recommendation."[3] This acknowledgement that the agency stated its agreement with our recommendation in its January 9, 2019 response to the Report should not be interpreted as our concurrence with the agency's later stated position that the recommendation was prospective only.

The Report recommended "that *before continuing to use the language*, GSA determine the purpose of the Interested Parties provision, conduct a formal legal review by OGC that includes consideration of the Foreign and Presidential Emoluments Clauses, and revise the language to avoid ambiguity" (emphasis added). The agency's response to the Report stated, "the agency agrees with the report's single recommendation and will take action consistent with that recommendation prior to continuing to use the language of Section 37.19 of the Old Post Office lease in the future." This statement does not in any way suggest that the agency believed our recommendation was inapplicable to the agency's continued use of the language in existing leases and instead pertained solely to potential use of the language in future leases. Moreover, none of the agency attorneys who presented the agency's comments on the draft and final Report expressed such an interpretation in meetings with the OIG about the Report. It was only after the OIG rejected the agency's proposed corrective action plan that PBS officials first articulated their belief to us that our recommendation that GSA take certain steps "before continuing to use the language" meant instead that GSA should take those steps only if it contemplated using the language in new leases.

I also considered your suggestion in the Management Decision that the OIG amend the Report's recommendation so that PBS will be in a position to better respond. While amending a recommendation is within an OIG's authority, I see no need for that here. The Report specifically addresses each matter covered by the Report's recommendation. The Report discusses the history and original purpose for the language that GSA used for Section 37.19; the ambiguities GSA attorneys found with the Section's primary clause and the proviso; and the relevance of the constitutional avoidance doctrine for interpreting Section 37.19 in view of the potential emoluments issues that GSA recognized and our Report supports. As noted, the recommendation itself is also quite specific as to the steps GSA should take to correct shortcomings in its decision-making process for interpreting Section 37.19, without being prescriptive as to the end result:

> We recommend that before continuing to use the language, GSA determine the purpose of the Interested Parties provision, conduct a formal legal review by OGC that includes consideration of the Foreign and Presidential Emoluments Clauses, and revise the language to avoid ambiguity.

Finally, to the extent PBS misunderstood the recommendation, our exchange of memoranda on this issue should resolve that misunderstanding.

In summary, for the reasons stated in Ms. Sheehan's July 26, 2019 memorandum to you, the OIG believes the agency's proposed corrective action plan is not responsive to our recommendation. Your memorandum does not address the substantive issues outlined in Ms. Sheehan's memorandum. Pursuant to the Inspector General Act, the OIG will report this as an outstanding recommendation in the upcoming

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[1] Report, p. 24.
[2] *Id.* at pp. 7, 23.
[3] *Id.* at p. 24.

and future Semiannual Reports until the recommendation is resolved, 5 U.S.C. App. 3, § 5.

***United States of America* v. *3,726 Rentable Square Feet of Office Space, et al.*, 4:17-cv-02034-RBH (D.S.C. Florence Div.), Submitted for the Record by Hon. Steve Cohen**

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVSION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
3,726 RENTABLE SQUARE FEET OF OFFICE SPACE (3,240 ANSI BOMA OFFICE AREA (ABOA USABLE SQUARE FEET OF SPACE), more or less, and FIVE PARKING SPACES, situated in the City of Myrtle Beach, Horry County, South Carolina; Rice REI, LLC, *et. al.*,
Defendants.

Civil No._____

COMPLAINT IN CONDEMNATION

1. This is a civil action brought by the United States of America at the request of the Acting Commissioner, Public Buildings Service, General Services Administration ("GSA"), for the taking of an interest in property in Myrtle Beach, South Carolina, under the power of eminent domain through a Declaration of Taking, and for the determination and award of just compensation to the owner and parties in interest.
2. On April 2, 2007, GSA entered into a ten-year lease with Rice REI, LLC, for office space in Myrtle Beach, South Carolina, for use by the Federal Bureau of Investigation ("FBI"). The lease term was to run from September 1, 2007 to August 31, 2018. Recently, GSA became aware that Rice REI, LLC is wholly owned by Congressman Tom Rice, who became a member of Congress in January 2013 and remains so to date. Pursuant to 18 U.S.C. § 431, contracts between members of Congress and the federal government are prohibited, and the lease in question was voided upon Congressman Rice's election and assumption of office. Accordingly, the United States is condemning a leasehold interest in the Myrtle Beach property for fourteen months to allow adequate time for suitable accommodation for the FBI to be identified elsewhere and outfitted for use.
3. The Court has jurisdiction over all relevant matters in the case as provided by 28 U.S.C. § 1358.
4. The authority for the acquisition of the estate in property is set forth in Schedule A, attached hereto and made a part hereof. As stated in Schedule A, the interest in the property is taken pursuant to the authority of the Act of Congress approved August 1, 1888 (40 U.S.C. § 3113), as amended; the Act of Congress approved February 26, 1931 (40 U.S.C. § 3114); 40 U.S.C. § 581(c)(1), which authorizes the Administrator of GSA to acquire by condemnation real estate and interests in real estate; and the Consolidated Appropriations Act of 2017, Pub. L. No. 115–31, which appropriates funds for this acquisition. The authority granted to the Administrator of GSA in 40 U.S.C. § 581(c)(1), to acquire by condemnation real estate or interests in real estate, was delegated to the Office of the Commissioner by Chapter 5 Part I, paragraph 2.d of the GSA Delegations of Authority Manual ADM P 5450.39D, Nov. 16, 2011, as revised by PBS Order 5450.1, March 4, 2015.
5. The public purpose for which said land is taken is for the continued use and occupancy of office space by the Federal Bureau of Investigation, in furtherance of mission needs, as set forth in Schedule B, attached hereto and made a part hereof.
6. A legal description of the property being taken is set forth in Schedule C, attached hereto and made a part hereof.

7. An aerial photograph and surveys showing the property in which the interest is being taken is set forth in Schedule D, attached hereto and made a part hereof.
8. The estate taken is described in Schedule E, attached hereto and made a part hereof.
9. The estimate of just compensation is stated in Schedule F, attached hereto and made a part hereof.
10. The names and addresses of known parties having or claiming an interest in said property are set forth in Schedule G, attached hereto and made a part hereof.

WHEREFORE, plaintiff requests judgment that the property and interests be condemned, and that just compensation for the taking be ascertained and awarded, and for such other relief as may be lawful and proper.

Dated: August 2, 2017.

Respectfully submitted,

BETH DRAKE
United States Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, and mailed by United States Postal Service the filed documents to the following non-CM/ECF participants:

Rice REI, LLC, a Limited Liability Company
950 48th Avenue, N, Suite 200
Myrtle Beach, SC 29577

South State Bank
2440 Mall Drive
Charleston, SC 29406

s/*Daniel W. Kastner*
DANIEL W. KASTNER
Attorney for Plaintiff United States

Policy Excerpt, "Trump—Donation of Profits from Foreign Government Patronage," Trump Organization, Submitted for the Record by Hon. John Garamendi

TRUMP

Donation of Profits from Foreign Government Patronage

IDENTIFICATION OF FOREIGN GOVERNMENT PATRONAGE

In the normal course of operating hotels, revenue is generated from the sale of overnight guestroom stays, food and beverage, conference and banquet services, spa services, retail sales, recreation activities and other ancillary services. Consistent with the hotel industry, we may accept patronage from not only registered guests and contracted groups staying at our Properties, but also transient, walk-in customers (for example, restaurant patrons).

To fully and completely identify all patronage at our Properties by customer type is impractical in the service industry and putting forth a policy that requires all guests to identify themselves would impede upon personal privacy and diminish the guest experience of our brand. It is not the intention nor design of this policy for our Properties to attempt to identify individual travelers who have not specifically identified themselves as being a representative of a foreign government entity on foreign government business.

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"To fully and completely identify all patronage at our Properties by customer type is impractical in the service industry and putting forth a policy that requires all guests to identify themselves would impede upon personal privacy and diminish the guest experience of our brand."

"Report of Material Provisions of the Old Post Office Development Agreement," GSA, June 2013, Submitted for the Record by Hon. Mark Meadows

GSA—REPORT OF MATERIAL PROVISIONS OF THE OLD POST OFFICE DEVELOPMENT AGREEMENT, JUNE 2013

V. MATERIAL PROVISIONS OF THE PROPOSED LEASE

- *Term*: Ground Lease with a term of 60 years from the opening date of the hotel.
- *Annual Rent:* Trump will pay a minimum annual base rent of $3 million, escalated on an annual basis at the Consumer Price Index (CPI). The rent will not decrease during the term of the lease. Rent will start the earlier of eight months from start of construction or one year and eight months after lease execution.

- *Percentage Rent Difference*: Trump will also pay a percentage rent difference if the Percentage of Gross Revenues exceeds the minimum base rent payment in accordance with the following structure: Lease Years 1–10, three (3%) percent; during Lease Years 11–20, three and one half (3.5%) percent; during Lease Years 21–30, four (4%) percent; during Lease Years 31–40, four and one half (4.5%) percent; during Lease Years 41–50, five (5%) percent; and during Lease Years 51–60, five and one half (5.5%) percent.
- *Proceeds from Sale or Refinance*: If there are proceeds from a sale or refinancing by Trump, Trump first receives a 20% Internal Rate of Return on their equity. GSA would then receive 15% of any remaining proceeds beyond the initial Trump return. The deferred participation continues at every such event throughout the term of the lease for all such transactions, even if Trump (or a subsequent purchaser) were to sell its interest. lf Trump sells the entire leasehold interest, the new lessee would only be entitled to a 12% return, in lieu of the Trump preferred return of 20%, with GSA receiving the same 15% of any remaining proceeds beyond the initial 12% return.
- *Taxes*: Trump shall be responsible for and pay directly *all taxes* arising out of or in connection with the Lease now in effect or in the future.
- *Lease of Land and Improvements*: GSA's fee interest in the land and its interests under the Lease shall remain superior to the interests of any other person and shall not be subordinated.
- *Public Access*: Trump shall permit access to the clock tower, which will continue to be operated by the National Park Service (NPS), by the public and by the Washington Ringing Society. In addition, Trump will provide public access to tour the historically and architecturally significant portions of the cortile as well as the newly designed Congress Bells Gallery and Exhibition Gallery. To the maximum extent possible, Trump will permit public access to the clock tower during construction, but, due to safety concerns, access will most likely be curtailed for some extended duration.
- *Security Deposit*: Upon execution of the Lease, Trump must deliver an unconditional, irrevocable letter of credit in the amount of $4 million. The letter of credit steps down to $2,096,308 in May 2014 (to coincide with granting Trump exclusive possession) if Permit Termination (described below) is not exercised and to $0 at hotel opening. The only circumstances under which the letter of credit is returned to Trump is if Trump

* * * * * * *

"*Management Agreement*" shall mean an agreement between Tenant and Operator for the management or operation of the Hotel, a true copy of which shall be provided to Landlord, within ten (10) days following its execution, together with any amendments, if and when executed.

"*Market Rent*" shall have the meaning ascribed thereto in *Section 33.2(a)*.

"*Memorandum of Understanding (Jurisdiction)*" shall be in the form attached hereto as *Exhibit L*.

"*Mezzanine Lender*" shall mean the secured lender (any Lead Lender of which shall be an Institutional Lender) which is the holder of a pledge of all of the direct or indirect ownership interest in Tenant.

"*Mezzanine Loan*" shall mean any debt financing by a Mezzanine Lender where the collateral for such loan is all of the direct or indirect ownership interest in Tenant.

"*Minimum Hold Period*" shall have the meaning ascribed thereto in *Section 6.5*.

"*Minimum Operating Standard*" shall have the meaning ascribed thereto in *Section 32.1(c)*.

"*Minor Sublease*" shall mean a Sublease (x) or combination of Subleases to a Space Tenant and its Affiliates totaling less than a (b) (4) usable square feet at the Premises and (b) (4)

"*Minor Subtenant*" shall mean any Space Tenant that is a party to a Minor Sublease.

"*Monetary Breach*" shall have the meaning ascribed thereto in *Section 27.1*.

"*Monthly Base Rent*" shall mean the following amounts paid in advance on or before the 1st day of each calendar month during the following periods:

> Beginning on the Rent Commencement Date, Monthly Base Rent shall be payable in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) per month, as adjusted on the Adjustment Date pursuant to the next paragraph.
>
> Subject to the last sentence of this paragraph, on each Adjustment Rent, Monthly Base Rent shall be adjusted upward, if any, to reflect the percent-

age (b) (4) (b) (4) during the immediately preceding Adjustment Period, calculated as follows: the Monthly Base Rent in effect as of such Adjustment Date shall be multiplied by a fraction, the numerator of which is the CPI published most recently prior to the Adjustment Date, and the denominator of which is the CPI published for the month and year of the immediately preceding Adjustment Date. (On the first Adjustment Date, the "*immediately preceding Adjustment Date*" shall mean the Commencement Date.) In computing any upward adjustment, the percentage adjustment to Monthly Base Rent on any Adjustment Date shall not exceed (b) (4) of the Monthly Base Rent in effect during the immediately preceding Adjustment Period.

(b) (4)
(b) (4)

"*Monthly Base Rent Floor*" shall have the meaning ascribed thereto in the definition of Monthly Base Rent.

"*Mortgaged Premises*" shall have the meaning ascribed thereto in Section *18.1(d)*.

"*Mortgagee Excused Defaults*" shall have the meaning ascribed thereto in *Section 18.4*.

"*Mortgagee Trigger Event*" shall have the meaning ascribed thereto in *Section 18.4*.

"*Net Worth*" shall mean, as of a given date, (x) the total assets of such Person as of such date less (y) such Person's total liabilities as of such date, as determined in accordance with GAAP.

"*NHPA*" shall mean the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470 *et seq.* and all regulations promulgated thereunder as such statute and regulations may be amended, and any successor act or regulations.

"*Non-Compliance Cure Period*" shall have the meaning ascribed thereto in *Section 32.1(f)*.

"*Non-Compliance Notice*" shall have the meaning ascribed thereto in *Section 32.1(e)*.

"*Non-Hotel Tenant Affiliate Products*" shall have the meaning ascribed thereto in the definition of Excluded Tenant Affiliate Revenues.

"*Non-Lead Lender*" shall mean any lender who is not a Lead Lender. Any Non-Lead Lender shall be a Person that (i) is not listed on any Government Lists and is not an Excluded Contractor, (ii) is not a Person who has been determined by competent authority to be subject to the prohibitions contained in Presidential Executive Order No. 13224 (Sept. 23, 2001) or any other similar prohibitions contained in the rules and regulations of OFAC or in any enabling legislation or other Presidential Executive Orders in respect thereof, and (iii) has not been previously indicted for or convicted of any Patriot Act Offense.

"*Non-Monetary Breach*" shall have the meaning ascribed thereto in *Section 27.1*.

"*Notice to Mortgagee*" shall have the meaning ascribed thereto in *Section 18.5(a)*.

"*NPS*" shall mean the U.S. Department of the Interior, National Park Service.

Photos Submitted for the Record by Hon. Mark Meadows

Old Post Office, 2013

Hotel groundbreaking, 2014

Hotel groundbreaking, 2014

Joint Statement of Professor Josh Blackman and Lecturer Seth Barrett Tillman, Submitted for the Record by Hon. Mark Meadows

Chairman Titus and Ranking Member Meadows:

We thank you for the opportunity to submit a written statement, as we were not able to attend the hearing in person. Our biographical information appears at the end of our written statement.

Since January 2017, litigants have alleged that President Trump is violating the Foreign and Domestic Emoluments Clauses. We have filed several amicus briefs in these cases. We contend that the phrase "emolument" used in the Constitution does not extend to business transactions for value. Rather, "emoluments" are the lawful compensation or profits that are derived from the discharge of the duties of an office. *See Hoyt v. U.S.*, 51 U.S. (10 How.) 109, 135 (1850). President Trump's business activities may raise ethical conflicts under modern good governance standards, but they raise no constitutional conflicts under the Foreign or Domestic Emoluments Clauses.

Our briefs have discussed an important historical incident in the early years of our Republic. In 1793, President George Washington purchased four lots of land at a public auction in the new federal capital. If an "emolument" includes anything of value, then President Washington received something of value from the Federal Government, beyond his regular salary—that is, he received the land. Therefore, he would have violated the Domestic Emoluments Clause. The better reading, we contend, is that "emolument" is limited to the lawful compensation or profits that arise from the discharge of the duties of an office. Under this position, Washington was not a lawbreaker.

However, a January 2019 report from the Office of Inspector General, General Services Administration, reached a different conclusion. The report asserted that Washington purchased *private*, rather than *public* property at the auctions.[1] Specifically, the report stated that the sales "did not provide [President Washington with] a benefit from the United States." Therefore, the Inspector General reasoned, these transactions did not implicate the Domestic Emoluments Clause. This conclusion is not correct.

Bob Arnebeck, a historian with particular expertise concerning President Washington and land transactions in the early federal capital, responded to the Inspector General's Report. He explained that our first President purchased *public*, not *pri-*

[1] Evaluation of GSA's Management and Administration of the Old Post Office Building Lease, at 15–16 & App'x A (Jan. 16, 2019), http://bit.ly/2FWQbQl.

vate land.[2] And, if there were any doubts about this record, the President's own correspondences repeatedly referred to the land and the sale as "public."[3] We discussed the Inspector General's error at some length in an amicus brief submitted to the U.S. Court of Appeals for the Fourth Circuit.[4]

The Inspector General's error was understandable, She was reviewing intricate financial and historical records from two centuries ago in an area where her office and staff may lack the requisite expertise. We object, however, to her continued unwillingness to acknowledge this serious error. Specifically, Tillman wrote, emailed, and called the Inspector General's Office many times over the past nine months, flagging the plain errors in the report. The Inspector General has taken no actions to correct its error. Here is a brief summary of the communications:

- *February 4, 2019:* Tillman mailed a letter to the Office of Inspector General noting that the "report errs."[5] Tillman urged the Inspector General to "consider modifying your findings," as the report "has been cited" in litigation in two federal courts. Tillman did not receive any response.
- *April 8, 2019*: Tillman wrote a second, more extensive, letter to Inspector General Ochoa.[6] Neither General Ochoa nor anyone else at the Office of Inspector General responded to Tillman's April 8, 2019 letter. The letter explained, in part:

  > Anyone can make a mistake—but it would be far worse than stubbornness not to correct this report. The OIG Report is being actively used in litigation against the President of the United States in regard to a point where the report plainly errs. It is now long past time for your office to address that error. There is no inspector general to look into wrongdoing by the inspectors general's offices.

- *April 29, 2019*: Tillman called the Office of Inspector General's public affairs office. A representative from that office asked Tillman to retransmit his prior two letters (from February 4 and April 8, 2019) to them by email. He did so on April 29, 2019.[7] That message included several attachments, including extracts from books by leading historians supporting his position. Once again, Tillman received no response from the public affairs office or from anyone else at the Office of the Inspector General.
- *April 30, 2019*: Tillman and Martin spoke by telephone. Martin asked Tillman to share his materials. Tillman did so on April 30, 2019.[8] Tillman received only a *pro forma* response from Martin, also on April 30, stating: "I have received your email."[9] Tillman replied, and offered "to answer[] any questions [Martin] or [his] staff/colleagues might have."[10]
- *May 3, 2019*: Tillman emailed Martin, and asked "if you or your colleagues are giving my letter (and its attachments) active consideration, and when I might expect either: [1] a response to my letter; or, [2] a revision to JE19–002 (or both)."[11] Martin responded: "I have reviewed the documents you sent me on April 30, 2019. The GSA OIG's Evaluation of GSA's Management and Adminis-

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[2] Bob Arnebeck, *Not Gogol's IG, but close*, Washington Examined (Jan. 19, 2019), https://perma.cc/H3MR-2G3M.

[3] *See* Letter from George Washington to the District of Columbia Commissioners (Sept. 28, 1798), https://founders.archives.gov/documents/Washington/06-03-02-0023 (stating that "*all* the lots I have purchased" as having been purchased "from the *Public*" (emphases in the original)); *id.* (describing the auction as a "public sale," not a private sale); Letter from George Washington to Thomas Jefferson (Mar. 31, 1791), https://founders.archives.gov/documents/Washington/05-08-02-0019 (explaining the agreement between the proprietors and federal government as follows: "The Landholders [Proprietors] to have the use and profits of all their ground until the city is laid off into lots, and sale is made of those lots *which, by this agreement, become public property*." (emphasis added)).

[4] Brief of *Amici Curiae* Scholar Seth Barrett Tillman and the Judicial Education Project in Support of Defendant-Appellant at 5–10, District of Columbia and State of Maryland v. Donald J. Trump, in his individual capacity, App. No. 18–2488 (4th Cir. Jan. 31, 2019), ECF No. 31–1, 2019 WL 411728, http://bit.ly/CA4Brief.

[5] Letter from Seth Barrett Tillman to Office of Inspector General (Feb. 4, 2019), http://bit.ly/2m91UTS.

[6] Letter from Seth Barrett Tillman to the Honorable Carol Fortine Ochoa, Inspector General, U.S. General Services Administration (Apr. 8, 2019), http://bit.ly/2mATqF7.

[7] Email from Seth Barrett Tillman to IG/GSA Office of Public Affairs (Apr. 29, 2019), http://bit.ly/2kBCFcf.

[8] Email from Seth Barrett Tillman to Edward Martin, Counsel to the Inspector General (Apr. 30, 2019), http://bit.ly/2kCgK4R.

[9] Letter from Edward Martin to Seth Barrett Tillman (Apr. 30, 2019), http://bit.ly/2161xJm.

[10] Letter from Seth Barrett Tillman to Edward Martin (Apr. 30, 2019), http://bit.ly/2161xJm.

[11] Email from Seth Barrett Tillman to Edward Martin (May 3, 2019), http://bit.ly/2kX0onE.

tration of the Old Post Office Lease, dated January 16, 2019, is a final report and speaks for itself."[12]

The report does not speak for itself. It is in error. And the Inspector General has taken no steps to correct a plain historical error.

Because we are unable to participate in the hearing, we provide the subcommittee with the following questions that should be asked of the Inspector General.

1. The report states "The evidence that we found suggests that Washington purchased privately owned property during his presidency." What evidence did you rely on to reach this conclusion? In addition to the sources you. identify, specify the particular passages and pages supporting your conclusion.
2. The report states "The evidence similarly suggests that the Commissioners' participation in the sales did not provide a benefit from the United States." What evidence did you rely on to reach this conclusion? In addition to the sources you identify, specify the particular passages and pages supporting your conclusion.
3. Can OIG/GSA identify any financial records proving that, after the public auctions were held by the commissioners, private landowners were paid for the land which was sold at the auction?
4. Can OIG/GSA identify any nonfinancial records, such as personal correspondence, where a private landowner stated that, following the public auctions held by the commissioners, the private landowner was paid the monies connected to the successful bids?
5. Can you confirm that the report was generated entirely internally by OIG/GSA employees? Were the report's authors in contact with or did they consult any non-GSA-employees (*eg*, outside historians and/or others with purported expertise)? If "yes," identify those non-GSA employees and reproduce for the subcommittee all such communications sent to or received from those non-GSA employees.
6. Did any OIG employees discuss or share any drafts or prepublication versions of the report prior to January 16, 2019 with *any* persons outside the OIG/GSA? If "yes," identify those persons and reproduce for the subcommittee all communications sent to or received from those persons.
7. Did any OIG employees hold any discussions with anyone inside or outside the OIG/GSA about how the report could be used in the 3 Emoluments Clauses cases? If "yes," identify those OIG/GSA employees and reproduce for the subcommittee all such communications.
8. Professor Tillman's letters and emails demonstrate that the Inspector General's office was in error. Why did your office fail to put forward any substantive response?
9. Since the publication of the report, and the receipt of Professor Tillman's communications, has the Inspector General reviewed the historical sources Professor Tillman has submitted? If not, why not?
10. Does the Inspector General have any plans to correct or modify the report? If not, why not? Keep in mind that this report has been cited in litigation in federal court as an authoritative government document.

We thank you for the opportunity to submit this statement.

Biographical Information for Josh Blackman

Josh is an Associate Professor of Law at the South Texas College of Law in Houston who specializes in constitutional law, the United States Supreme Court, and the intersection of law and technology. Josh is the author of three books: Unprecedented: The Constitutional Challenge to Obamacare (2013), Unraveled: Obamacare, Religious Liberty, and Executive Power (Cambridge University Press, 2016), and An Introduction to Constitutional Law: 100 Supreme Court Cases Everyone Should Know.

Josh was selected by Forbes Magazine for the "30 Under 30" in Law and Policy. Josh has twice testified before the House Judiciary Committee on the constitutionality of executive action on immigration and health care. He is an adjunct scholar at the Cato Institute. Josh is the founder and President of the Harlan Institute, the founder of FantasySCOTUS, the Internet's Premier Supreme Court Fantasy League, and blogs at JoshBlackman.com. Josh is the author of over four dozen law review articles, and his commentary has appeared in The New York Times, Wall Street Journal, Washington Post, USA Today, L.A. Times, and other national publications.

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[12] Email from Edward Martin to Seth Barrett Tillman (May 3, 2019), http://bit.ly/2kX0onE.

Biographical Information for Seth Barrett Tillman

I am an American and a legal academic. Before becoming an academic, I graduated from the College of the University of Chicago and Harvard Law School. After graduating from law school, I practiced law in the District of Columbia and in Delaware. I was also a law clerk for three federal trial court judges, in the Middle District of Alabama, in the Middle District of Pennsylvania, in the District of New Jersey, and for one federal appellate judge, on the United States Court of Appeals for the Third Circuit.

Now, I teach law in the Republic of Ireland, at the Maynooth University Department of Law. Maynooth University has been my academic home since 2011. I am part of the permanent faculty there—in. other words, I have tenure. My title—following European conventions—is lecturer. Since 2008, that is, long before Trump's running for president appeared on anyone's radar, the primary focus of my research has related to the Constitution's *office under the United States* language, which is a drafting convention or term of art appearing in several clauses of the Constitution, including the Foreign Emoluments Clause. I have also written on the Constitution's use of the term "emoluments." My publications on these issues have appeared in a variety of fora—including peer reviewed academic journals, both domestic and foreign, *eg, Election Law Journal* and the *British Journal of American Legal Studies*, and traditional American student-edited journals, such as *Harvard Journal of Law & Public Policy, Northwestern University Law Review*, and *South Texas Law Review*. All these articles, along with many of my amicus briefs filed in the three Emoluments Clauses cases (which remain ongoing during appellate review), have been actively cited in the scholarly literature.

"Business Transactions and President Trump's 'Emoluents' Problem," by Seth Barrett Tillman, Harvard Journal of Law and Public Policy, Vol. 40, No. 3, 2017, Submitted for the Record by Hon. Mark Meadows

[The 13-page article is retained in committee files and is available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract__id=2957162.]

Brief of *Amici Curiae* Scholar Seth Barrett Tillman in *District of Columbia and State of Maryland* v. *Donald J. Trump, in his individual capacity*, No. 18–2488 (U.S. 4th Cir.), Submitted for the Record by Hon. Mark Meadows

No. 18–2488

United States Court of Appeals for the Fourth Circuit

DISTRICT OF COLUMBIA AND STATE OF MARYLAND, PLAINTIFFS-APPELLEES,

v.

DONALD J. TRUMP, IN HIS INDIVIDUAL CAPACITY, DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT GREENBELT IN CASE NO. 8:17–CV–01596–PJM PETER J. MESSITTE, SENIOR U.S. DISTRICT JUDGE

BRIEF OF AMICI CURIAE SCHOLAR SETH BARRETT TILLMAN AND THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF DEFENDANT-APPELLANT

[The 32-page brief is retained in committee files and is available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract__id=3314702.]

APPENDIX

QUESTIONS FROM HON. PETER A. DEFAZIO AND HON. DINA TITUS TO DAN MATHEWS, COMMISSIONER, PUBLIC BUILDINGS SERVICE, U.S. GENERAL SERVICES ADMINISTRATION

Implementation of GSA IG Recommendation

Question 1. In preparing its response to the January 2019 GSA IG report on the Old Post Office Building lease, did you or anyone else you are aware of at GSA communicate with or receive guidance from:

a. The Office of Management and Budget?
ANSWER. See below.

b. The U.S. Department of Justice?
ANSWER. See below.

c. The White House?
ANSWER. See below.

GSA's goal is to accommodate the Committee's oversight requests to the greatest extent possible while, at the same time, preserving the legitimate, long-standing confidentiality interests of the Executive Branch. I respectfully decline to discuss internal communications that I, or others within GSA, may have had with the Office of Management and Budget, the U.S. Department of Justice, or the White House about the preparation of draft documents. Notwithstanding the above, I am unaware of anyone at GSA receiving guidance from the listed entities regarding GSA's written response to the recommendations in the OIG report referenced above.

Question 2. If so, please provide all records regarding these communications or guidance to the Committee.
ANSWER.

Revision of Interested Parties Provision in the Old Post Office Lease

Question 1. Even before the GSA Office of Inspector General issued its January 2019 report, our Committee had already added language to the resolutions accompanying GSA prospectuses that pass our Committee. Following our Subcommittee's July 2017 hearing on GSA, our Committee added the following language to resolutions accompanying GSA lease prospectuses:

> "Provided further, the Administrator of General Services may not enter into this lease if it does not contain a provision barring any individual holding a Federally-elected office, regardless of whether such individual took office before or after execution of this lease, to directly participate in, or benefit from or under this lease or any part thereof and that such provision provide that if this lease is found to have been made in violation of the foregoing prohibition or it is found that this prohibition has been violated during the term of the lease, the lease shall be void, except that the foregoing limitation shall not apply if the lease is entered into with a publicly-held corporation or publicly-held entity for the general benefit of such corporation or entity."

Please provide the committee with the specific number of leases GSA has signed since this resolution language was added to prospectus resolutions passed out of our committee. Please also identify which of these leases included the language referenced above.

ANSWER. Since April 2018, the Committee has adopted 39 resolutions approving prospectuses that have included the above-referenced language. Of those 39 resolutions, GSA has awarded five leases that contain a new clause GSA drafted to implement the resolution:

- PDC–07–WA17 for the State Department in Washington, DC;

- PVA–04–WA17 for the Patent and Trademark Office in Arlington, VA;
- PFL–04–WE18 for the Drug Enforcement Agency in Weston, FL;
- PCO–01–DE18 for the Internal Revenue Service & the Treasury Inspector General for Tax Administration in Denver, CO; and
- PMD–01–WA18 for the Department of Defense in Landover, MD.

a. If a lease did not include this language please provide the Committee with a written response explaining why the lease did not include this language.

ANSWER. GSA did award one new lease for the Federal Bureau of Investigation in Seattle, WA (Lease Prospectus PWA–01–SE18) that did not contain the new clause. While the language was included as part of the Request for Lease Proposals and placed the market on notice of the prohibition, the new clause was inadvertently omitted from the awarded lease. GSA is working with this lessor to amend the lease to insert the clause.

Tracking Domestic/Foreign Government Transactions

Question 1. Is GSA aware of any effort by the Trump International Hotel to attempt to identify customers who may be patronizing the hotel while on state or federal business?

ANSWER. No. GSA is not involved in the day-to-day operations of the Trump International Hotel.

a. If so, please describe the efforts they have informed you that they have taken.

Question 2. Does GSA know if, for example, a guest registers with an email addresses ending in ".gov" or "maine.gov"—does the Trump International Hotel look into whether that is a state or federal government transaction?

ANSWER. No. GSA is not involved in the day-to-day operations of the Trump International Hotel.

a. If so, please describe the efforts they have informed you that they have taken.

Question 3. Likewise, does GSA know if, for example, a guest registers with a state or federal government credit card, does the Trump International Hotel look into whether this may be a state or federal government transaction?

ANSWER. No. GSA is not involved in the day-to-day operations of the Trump International Hotel.

Question 4. Has GSA asked the Trump Organization to take any steps to identify Trump International Hotel transactions with states or the federal government?

ANSWER. No. GSA is not involved in the day-to-day operations of the Trump International Hotel.

a. If so, please provide the Committee with all relevant records, including e-mails, letters or other correspondence regarding GSA's efforts in this regard.

Question 5. Is GSA aware of any effort by the Trump International Hotel to attempt to identify customers to its hotel who are there representing foreign governments or their agencies?

ANSWER. GSA is aware of public statements by the Trump Organization regarding the donation of its profits from foreign governments to the U.S. Treasury. For instance, as reported by the Wall Street Journal:

> The company has declined to specify how it calculates its foreign profits. Last year, it said it arrived at the $150,000 figure "in accordance with our policy and the Uniform System of Accounts for the Lodging Industry," but declined to provide further details on what its policy entails and how the company was tracking which guests' stays were being paid for by foreign governments.

Trump Organization Details Level of Profits from Foreign Governments, available at https://www.wsj.com/articles/trump-organization-details-level-of-profits-from-foreign-governments-11551116974.

a. If so, please describe the efforts they have informed you that they have taken.

ANSWER. I am unaware of any efforts the Trump Organization has made to inform GSA of the efforts they have taken.

Old Post Office Clocktower During Government Shutdown

Question 1. During the most recent government shutdown in late 2018 and early 2019, National Park Service sites around the country and the National Capital Region were shuttered and non-essential National Park Service staff were furloughed—yet the Old Post Office Tower reopened on January 6, 2019—weeks before the rest of the government.

According to the National Park Service Website, "The National Park Service provides interpretive programming within the Old Post Office Tower under an agreement with the building's owner, the General Services Administration." Under the Old Post Office Building lease, the tenant, the Trump Old Post Office LLC, is required to grant the public access to the tower. The tenant covers the cost of maintaining the spaces and it is our understanding that the Trump Old Post Office LLC is reimbursed for these costs.

Who made the decision to reopen the Tower when the rest of the government was still closed?

ANSWER. Career GSA officials contacted the National Park Service (NPS) to address the closure of the clock tower. I would add that, in 1983, Congress directed GSA to enter into an agreement with NPS for operating the observation tower (see Public Law 98–1). As a result, and as outlined in section 4 of Public Law 98–1, GSA and NPS have executed a series of agreements under which GSA provides funds from the building operations account in the Federal Buildings Fund (FBF) and NPS provides staff at the observation tower. Copies of the more recent agreements between GSA and NPA may be found on GSA's Electronic FOIA Reading Room:

https://www.gsa.gov/reference/freedom-of-information-act-foia/electronic-reading-room.

Services to operate the clock tower, along with thousands of other GSA properties, are paid through the building operations account within the FBF. The building operations account had available budget authority during the recent partial government shutdown, and GSA continued to pay all invoices from contractors due under that account for building-related services such as janitorial, grounds keeping, snow removal, and operations and maintenance.

Question 2. To your knowledge, was GSA Administrator Murphy involved in that decision?

ANSWER. No.

Question 3. To your knowledge, was the GSA Contracting Officer involved in that decision?

ANSWER. No.

Question 4. To your knowledge, was the GSA Office of General Counsel involved in that decision?

ANSWER. It is my understanding that career attorneys in the Office of General Counsel reviewed the agreement between GSA and NPS.

Question 5. Did you or any other GSA officials that you are aware of receive any requests from the White House to open the Tower?

ANSWER. No.

a. If so, please describe that request and provide the Committee with all supporting records, including e-mails, letters or other correspondence with GSA on this matter.

Question 6. Did anyone at the Trump Old Post Office LLC, Trump Organization or Trump International Hotel ask to open the Tower?

ANSWER. No.

a. If so, please describe that request and provide the Committee with all supporting records, including e-mails, letters or other correspondence with GSA on this matter.

Contracting Officer

Question 1. Commissioner Mathews, in your written testimony you mention that the career contracting officer overseeing the Trump Hotel lease "has legal authority and responsibility for making contract decisions" and, after consulting with career attorneys at GSA, the contracting officer "found the tenant in compliance with Section 37.19 of the lease."

Is the contracting officer who made that decision the same contracting who helped negotiate the deal between GSA and the Trump Organization? Yes or No

ANSWER. Yes.

Question 2. Is he the same contracting officer who (based on emails we've obtained) appears to have tried to develop a social relationship with Ivanka Trump? Yes or No

ANSWER. I respectfully decline to respond to this question because it does not specify the emails to which it refers, and I am therefore unable to review or characterize them.

Question 3. Do you believe this contracting officer made an unbiased and objective decision? Yes or No

ANSWER. Yes. I would add that the Inspector General's report, which followed a 16-month investigation, did not identify a single instance in which a political appointee or career federal employee at GSA attempted to improperly interfere with or exert pressure on the contracting officer's decision-making process.

Question 4. Now that the GSA IG has found that the contracting officer failed to take into account the Emoluments Clauses to the U.S. Constitution, do you intend to ask him to reconsider his decision? Yes or No

ANSWER. It would be inappropriate for GSA to comment on a question that implicates the t Emolument Clause issues that are the subject of a number of active lawsuits. The Department of Justice has taken the position in those cases that the President's interest in the Trump International Hotel does not violate the Emoluments Clauses. When these issues are conclusively resolved in the courts, GSA will respond accordingly, to the extent necessary.

Legal Guidance from GSA Office of General Counsel

Question 1. The failure of GSA to appropriately consider the Emoluments Clauses to the U.S. Constitution in regard to the Old Post Office lease was a central finding of the Office of Inspector General's January 2019 report.

Mr. Mathews, has anyone in the GSA Office of General Counsel (OGC) provided you or any other staff in the office of the Public Buildings Service (PBS) with any guidance at all on these issues since the report was published?

ANSWER. GSA's goal is to accommodate the Committee's oversight requests to the greatest extent possible while, at the same time, preserving the long-standing confidentiality interests of the Executive Branch. In light of the interest in the confidentiality of attorney-client communications, I respectfully decline to discuss communications that I, or others within GSA, may have had with the Office of General Counsel.

a. If so, please describe the guidance you were provided and provide the Committee with all relevant records, including e-mail correspondence, letters, memoranda or other records.

ANSWER.

Question 2. Has the GSA Office of General Counsel provided you with any guidance on whether or not GSA should attempt to track expenditures at the Trump International Hotel that GSA receives in the form of rental or lease fees that are derived from either foreign, federal or state governments?

ANSWER. GSA's goal is to accommodate the Committee's oversight requests to the greatest extent possible while, at the same time, preserving the long-standing confidentiality interests of the Executive Branch. I respectfully decline to discuss communications that I, or others within GSA, may have had with the Office of General Counsel.

a. If so, please describe the guidance you were provided and provide the Committee with all relevant records, including e-mail correspondence, letters, memoranda or other records.

ANSWER.

Question 3. Have you or the Public Buildings Service (PBS) asked the GSA Office of General Counsel to provide you with any guidance on these issues?

ANSWER. GSA's goal is to accommodate the Committee's oversight requests to the greatest extent possible while, at the same time, preserving the long-standing confidentiality interests of the Executive Branch. I respectfully decline to discuss communications that I, or others within GSA, may have had with the Office of General Counsel.

Question 4. Please provide copies of the legal guidance you have received from GSA to the committee.

ANSWER.

Corporate Shells as Signatories to GSA Leases

Question 1. Has GSA ever looked past a corporate shell to determine a beneficial interest in any of its leases—other than GSA's lease with Rice REI in Myrtle Beach, South Carolina?

ANSWER. The lease referenced in your question was between GSA and Rice REI, LLC, an entity in which a Member of Congress owned an interest. As referenced in the Inspector General's report, GSA sought guidance from the Office of Legal Counsel 20 years ago as to whether a proposed lease transaction involving Members

of Congress would violate 18 U.S.C. § 431–433. Since August of 2017 (when I became the Commissioner of the Public Buildings Service), GSA's lease with Rice REI, LLC in Myrtle Beach, South Carolina is the only one I am aware of which raised issues concerning 18 U.S.C. § 431.

Question 2. Is Trump Old Post Office LLC the only shell that GSA has refused to look through in order to determine the beneficial interest in a lease with GSA and whether such beneficiary is legally allowed to accept such benefits?

ANSWER. I disagree that GSA failed to inquire as to Trump Old Post Office LLC's organizational structure. In his letter dated March 23, 2017, the contracting officer detailed the meetings and discussions that occurred between GSA and Trump Old Post Office LLC regarding the tenant's organizational structure. For instance, the contracting officer listed the individuals and entities with an ownership interest in Trump Old Post Office LLC and included organizational charts as exhibits to his letter. Almost immediately following issuance of his March 23 letter, GSA made the contracting officer's letter publicly available in an electronic reading room. Accordingly, GSA was, and has been, forthcoming and transparent regarding its understanding of the ownership structure of the Old Post Office LLC.

Question 3. Is GSA aware of any other GSA lease or outlease to which Donald J. Trump may be a beneficiary?

ANSWER. No.

a. If so, please identify the specific leases and the dates they were signed.

Communications as Public Buildings Service Commissioner

Question 1. Before you accepted your current job in the summer of 2017, did anyone affiliated with the Trump Administration, Trump transition team, Trump campaign, or Trump Organization ask you for your opinion on whether the Trump Organization was in violation of the terms of its lease at the Old Post Office?

ANSWER. No.

a. If so, who asked you for your opinion? When? What did you say?

Question 2. Have you ever had any communication with any current or former GSA employees about how the White House or President Trump would respond if he was forced to divest from his business interests in the Trump hotel?

ANSWER. To the best of my knowledge, no.

a. If so, who have you discussed this with? When? What was said?

QUESTIONS FROM HON. MARK MEADOWS TO DAN MATHEWS, COMMISSIONER, PUBLIC BUILDINGS SERVICE, U.S. GENERAL SERVICES ADMINISTRATION

Question 1. Mr. Mathews, could you please explain GSA's standard process in auditing out-lease contracts such as the OPO? Specifically, as it relates to the OPO, what audits have occurred and when would GSA perform an audit? Who has the legal authority under GSA's outlease contracts to initiate an audit?

ANSWER. The terms and conditions of GSA's outleasing contracts as they specifically relate to audit rights differ depending upon the particular transaction. Regarding the Old Post Office outlease, the contract allows GSA to audit the tenant's books and records. Much like other GSA contracts, the contracting officer would make the decision whether to conduct an audit. The tenant at the Old Post Office Building has provided annual financial statements audited by an independent certified public accountant setting forth (among others), gross revenues, percentage rent, and percentage rent difference. To date, the tenant has paid GSA all of the rent that is due under the outlease.

Question 2. Mr. Mathews, when GSA receives audited financial statements, what controls are in place to ensure the audits meet industry standards? Does the auditing firm need to meet certain accreditation requirements? If so, which?

ANSWER. Regarding the qualifications of government contractors, such requirements are set forth in the contract. For example, Section 5.4 of the Old Post Office lease states, in part, as follows:

> Tenant shall furnish Landlord annually, within one hundred twenty (120) days following the end of each Lease Year, a complete copy of *Tenant's annual audited financial statements audited by an independent certified public accountant* reasonably acceptable to Landlord or a nationally recognized accounting firm prepared in accordance with the Uniform System and reconciled in accordance with GAAP and the requirements of this Lease covering the Hotel for such Lease Year, including statements of members' eq-

uity, income and expense and cash flow for Tenant and a balance sheet for Tenant (the "Annual Statement").

As set forth above, the annual financial statements must be audited by an independent certified public accountant.

Question 3. Mr. Mathews, please explain how the rent is calculated on the OPO under the contract.

ANSWER. During my recent testimony before the Committee, there seemed to be some confusion on this very point. As noted in a prior letter to Chairman DeFazio dated February 12, 2019, GSA explained the rent calculation as follows:

> Trump Old Post Office LLC pays a minimum annual base rent of $3 million ($250,000 per month), escalated on an annual basis at the Consumer Price Index. Trump Old Post Office LLC also pays a percentage rent difference if the percentage of gross revenues exceeds the minimum base rent payment in accordance with the following structure: Lease Years 1–10, three (3%) percent; during Lease Years 11–20, three and one half (3.5%) percent; during Lease Years 21–30, four (4%) percent; during Lease Years 31–40, four and one half (4.5%) percent; during Lease Years 41–50, five (5%) percent; and during Lease Years 51–60, five and one half (5.5%) percent.

Gross revenues are just that; *all* of the revenue generated by the hotel (subject to any exclusions set forth in the lease). Thus, for instance, if gross revenues were $50 million and the base rent was $3 million, there would be no additional rent payment due to GSA (i.e., a percentage rent difference) because 3% of $50 million is $1.5 million, which is below the base rent. Conversely, if gross revenues were $200 million and the base rent was $3 million, there would be an additional rent payment due to GSA in the amount of $3 million because 3% of $200 million is $6 million, which is $3 million in excess of the base rent.

QUESTIONS FROM HON. JOHN GARAMENDI TO DAN MATHEWS, COMMISSIONER, PUBLIC BUILDINGS SERVICE, U.S. GENERAL SERVICES ADMINISTRATION

Foreign and State Government Payments

Question 1. Does GSA currently have any information regarding payments that Trump Old Post Office LLC or the Trump Organization receives from foreign governments or State governments through Trump International Hotel at the Old Post Office Building? If so, please provide any such information.

ANSWER. Please refer to the Answer provided in response to Question 5 above on page [124].

Question 2. Furthermore, has GSA discussed seeking or plan to request information from Trump Old Post Office LLC or the Trump Organization regarding payments from foreign governments or State governments through Trump International Hotel at the Old Post Office Building?

ANSWER. To the best of my knowledge, no.

QUESTIONS FROM HON. SHARICE DAVIDS AND HON. STEVE COHEN TO DAN MATHEWS, COMMISSIONER, PUBLIC BUILDINGS SERVICE, U.S. GENERAL SERVICES ADMINISTRATION

GSA Outleases

Question 1. Has GSA conducted any audits on outleases the agency has with non-federal entities?

ANSWER. Outleases that provide for potential additional rent above a base amount (e.g., revenue sharing) are very infrequent transactions under the Outleasing Program, which, as an entire program, consists of 603 outleases. Of these outleases, only five, including OPO, provide the potential for an additional rent payment above a base amount. A majority of the outleases are considered low risk, as defined by the total contract value. Approximately 85% of outleases have a total contract value of less than $250,000; approximately 15% of outleases have a total contract value of less than $10 million; and, only six outleases, or 0.5% of the outleasing inventory, have a total contract value exceeding $10 million. Accordingly, program wide audits are not conducted on a regular basis.

a. If so, please identify the lease and the year it was signed.

ANSWER.

Question 2. How many GSA outleases include "profit-sharing" provisions in which rent is at least partially based on revenues, profits, etc.?

ANSWER.

a. If so, please identify the lease and the year it was signed.

ANSWER. Below is a list of outleases that provide for the potential for an additional rent payment above a base amount.

Building Name	Tenant	Effective Date of Lease
William O. Lipinski Fed. Bldg.	Rush Development	11/1/1998
General Post Office	Tariff Bldg. Assoc., LP/Jay	12/1/1999
Ariel Rios Federal Building	NOMA Retail	9/1/2009
Tacoma Union Station Parking	Republic Parking Northwest	9/1/2012
Old Post Office Bldg.	Trump Old Post Office, LLC	8/5/2013

Question 3. How is monthly rent owed by the Tariff Building/Hotel Monaco outlease tenant to GSA calculated? Has the tenant paid more than the base rent over the course of the lease?

ANSWER. The rental consideration at the Tariff Building consists of three components: (1) the base rent; (2) percentage rent; and (3) participation rent. The base rent is a fixed annual rent paid monthly. This amount escalates annually in accordance with the Consumer Price Index. Percentage rent is calculated as a sum of a percentage of annual food and beverage revenues and a percentage of annual room rents. The outlease has two schedules of percentages that increase throughout the life of the contract. Participation rent is calculated as a percentage of net cash flows generated. The tenant has paid more than the base rent over the course of the lease.

Question 4. Please provide the Committee with an unredacted copy of the Tariff Building/Hotel Monaco lease and all accompanying amendments to the lease.

ANSWER. The requested information is confidential information under the terms and conditions of the lease. The GSA contracting officer has requested the tenant's consent to releasing the information to the Committee. Subject to such consent, GSA will forward the lease to the Committee under separate cover.

QUESTIONS FROM HON. LIZZIE FLETCHER TO DAN MATHEWS, COMMISSIONER, PUBLIC BUILDINGS SERVICE, U.S. GENERAL SERVICES ADMINISTRATION

Elected Officials Clauses in GSA Outleases

Question 1. A July 2018 GAO report analyzed GSA's outleasing program and reviewed "the extent to which GSA has included lease provisions in its outlease agreements related to the participation of elected officials in these outleases." According to the GAO report, there are six federal buildings at least 20 percent outleased by GSA, and all but one has a lease provision restricting certain participation by elected officials—the Silvio O. Conte Federal Building in Pittsfield, Massachusetts. GSA indicated to GAO that it would add this provision to the Conte Building lease.

Has GSA added language to the Conte building lease that would restrict certain participation by elected officials in the lease?

ANSWER. No.

a. If so, please provide the Committee with copies of this lease language.

b. If not, please explain why GSA has not added this language to the lease.

ANSWER. Since the July 2018 GAO report, the Inspector General issued her report on the management and administration of the Old Post Office Building. In response to the IG's recommendation, and as noted in the agency's Management Decision Record (MDR) and Corrective Plan (CAP), GSA indicated that it would no longer use the language contained in the Old Post Office lease (i.e., Section 37.19) in future outleases. Rather, GSA noted its intention to insert into all outleases a clause placing outlessees on notice of the requirements of 18 U.S.C. § 431 and 41 U.S.C. § 6303(a), which already apply to the Conte outlease. Moving forward, GSA plans to implement its MDR and CAP on future outleases.

Question 2. Does GSA maintain an approved list of auditors from which tenants can choose for the completion and submission of an annual audit?

ANSWER. No.

QUESTIONS FROM HON. MARK MEADOWS TO HON. CAROL FORTINE OCHOA, INSPECTOR GENERAL, U.S. GENERAL SERVICES ADMINISTRATION

General Services Administration (GSA) Office of Inspector General (OIG) Response to Congressional Request on OIG Emoluments Report:

Question 1. Ms. Ochoa, on February 4, 2019, you received a letter from the Republican leadership on this Committee, the Oversight Reform Committee, as well as Senate Committee on Homeland Security and Governmental Affairs (Senate HSGAC), requesting the case file information supporting your OIG report on the Old Post Office (OPO). The information requested was similar to that requested of your Federal Bureau of Investigations (FBI) Headquarters report. Yet, unlike the FBI Headquarters request, your office refused to comply. Specifically, after staff negotiations, all the Committee has received so far are publicly available legal research documents you used for the constitutional analysis. Can you explain why you have not responded?

ANSWER. The Inspector General responded by letter dated February 19, 2019, to the February 4 request for all documents "gathered, reviewed, or used" in our evaluation. Our February 19 letter explained that most of the documents requested are GSA documents and that GSA had asserted attorney-client and deliberative process privilege in connection with our evaluation report. On March 12, 2019, we provided to GSA the more than 2 million agency documents that we had "gathered, reviewed, or used" in our evaluation so that GSA could review the materials for privilege and produce them to the requestors. On the same date, we also produced to the requestors all of the publicly available documents we used in the evaluation.

Since then, the OIG has engaged in extensive discussions with members of the congressional requestors' staffs and has made concerted efforts to facilitate the staffers' subsequent, narrower requests for agency documents. For example, at the staffers' request, we identified the GSA documents in the subset of "over 10,000 documents" referenced on page 4 of our *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease* (Report), and provided those documents again to GSA in May and June 2019. Thereafter, on July 23, again at the request of staff members, we prioritized an even smaller batch of those documents for GSA's review and production, starting with 32 pages of legal memoranda and followed by approximately 2,000 emails and attachments.

We understand from the agency's General Counsel that members of the requestors' staffs have asked the agency to hold off on review or production of those documents.

a. Ms. Ochoa, this Committee has received similar documentation from your office in previous investigations and Inspector General (IG) reviews and there has never been an issue. Why are there concerns with this report and review now?

ANSWER. The OIG treated this request for agency documents the same way the office has treated previous requests for such documents during Inspector General Ochoa's tenure: by providing them to GSA for review and production. In past cases, the agency promptly cleared the documents for production to the congressional requestors. In this case, the agency has asserted attorney-client and deliberative process privileges. In addition, we understand that members of the requestors' staffs asked the agency to hold off on review and production of the documents to the requestors.

With respect to OIG records of interviews, as we stated in our February 19 response, we believe that any release outside the OIG has a chilling effect on the willingness of witnesses generally to provide us with candid and complete information. In this matter, release of the records outside the OIG would be especially problematic given GSA's assertion of attorney-client and deliberative process privilege. The attendant redaction process would mandate wholesale disclosure to the agency of everything witnesses told the OIG in the course of an OIG evaluation. That would open the door to witness retaliation or fears of retaliation, and could seriously deter individuals not just in GSA but throughout the government from cooperating with OIG investigations, audits, reviews, and evaluations.

b. Did you put together a justification memo for this report? If so, please provide to the Committee.

ANSWER. No. As stated on page 4 of our report, we conducted our evaluation in accordance with the Council of the Inspectors General on Integrity and Efficiency *Quality Standards for Inspection and Evaluation*.

c. Please provide all requested information from the February 4, 2019 letter.

ANSWER. As detailed in our answers above, most of the over 2 million documents the February 4 letter requested are agency documents. We have provided all of

those documents to the agency for review and production to the requestors on multiple occasions and in various subsets, in coordination with requests from members of the requestors' staff. Please direct your request for those documents to the agency. The OIG cannot assert or waive privilege on the agency's behalf.

Question 2. Ms. Ochoa, you make a number of assertions throughout your report without citations or any way for the Committee to verify accuracy and context. In fact, last month Chairman Johnson of Senate HSGAC provided your office details highlighting specifically where in your report supporting documentation would be useful in the Committee's oversight. When do you plan to respond? Please provide this Committee with a copy of your response.

ANSWER. The 24-page report and its 6-page appendix together contain 154 endnotes citing the source material. In addition, the report contains abundant additional textual citations to documents and information we received from witnesses. For example, pp. 17–18 of the report contain textual citations such as "OGC's [GSA's Office of General Counsel] March 3, 2017 memorandum," "the emoluments guidance OGC provided in 2013," and "Deputy General Counsel Loewentritt, OGC's senior career attorney, acknowledged." The report's citation format comports with the Council of the Inspectors General on Integrity and Efficiency *Quality Standards for Inspection and Evaluation*.

In addition, as we noted in our February 19 letter, we provided the agency with a final draft of the report, received their proposed redactions and informal comments on the report, and met with GSA's General Counsel and his staff to discuss them. After those discussions, we received the agency's final comments and included them in their entirety in our report. The agency's response to the report does not dispute the accuracy of any facts asserted in the report. See Report, Appendix B.

We will continue to work to facilitate Committee requests for information. To that end, we are reviewing the September 20 request from Senator Johnson's staff. We will contact the relevant staffers when our review is complete.

a. Ms. Ochoa, while we appreciate your willingness to protect privilege, it is hard to believe that e-mails even within the OIG office about this report could not be provided to the Committee. Further, for all documents, we know that in prior items occasionally there are taint teams created to expediate this process. Has your staff has met with GSA attorneys to determine a way to expediate the Committee's request for documents aside from merely provided over 300 GBs on a hard drive? If not, why and when do you plan to do so?

ANSWER. OIG staff have had numerous meetings and conversations with agency attorneys in attempts to expedite this process. While we cannot assert or waive privilege on the agency's behalf, as noted above, we have made extensive efforts in coordination with the requestors' staff to facilitate the agency's production of the documents. On March 12, we provided a hard drive to GSA containing 342 GB of agency documents, in direct response to your February 4 request for all documents "gathered, reviewed, or used" in our evaluation. Since then, in response to staffers' subsequent, narrowed request, we identified the GSA documents in the subset of "over 10,000 documents" referenced on page 4 of our report and provided those to GSA for review and production. After further dialogue with requestors' staff, we asked GSA's General Counsel to prioritize review and production of 32 pages of legal memoranda and approximately 2,000 emails and attachments. We understand that members of the requestors' staffs have asked the agency to hold off on review and production of these documents to the requestors.

Question 3. Ms. Ochoa, in your report you mention that your office conducted over two dozen interviews with personnel. Please provide the Committee with the exact number of interviews and the specific dates of each interview.

ANSWER. Please see our previous answers regarding the production of witness interview records.

OIG Response to Legal Historians on OIG Emoluments Report:

Question 1. Ms. Ochoa, after your report was released, Seth Tillman, Lecturer at Maynooth University Department of Law, wrote your office detailing a factual error in your constitutional analysis of the Emoluments Clause. Prof. Tillman expressed his concerns that some of your historical assertions informing your analysis on the Emoluments Clause were wrong and did not rely on historians, legal historians, or similar experts. He was concerned given that the report's conclusions were used to criticize GSA's actions and used as an authority in pending court actions. Given that the report was being used as authority in legal cases, did your office ever review his comments or look to correct your report? If not, why?

ANSWER. We reviewed Mr. Tillman's letter carefully and found no need to revise our report. The suggestion that Mr. Tillman's argument identified a factual error ignores our report's clear statement that we do not purport to resolve definitively the issue of private versus government ownership of land lots President Washington bought in the late 1700s. Moreover, Mr. Tillman has filed *amicus curiae* briefs on this subject in pending litigation. We concluded that he was seeking our endorsement of his legal theory that the Foreign Emoluments Clause does not apply to U.S. Presidents. Because Mr. Tillman appeared to seek our agreement with his legal theory in a matter in pending litigation, we rejected his request.

a. Can you point the Committee to the specific authorities you used to assert that the example of transactions conducted by George Washington do not apply to the Emoluments Clause because they were private land deals?

ANSWER. Our report does not make this assertion. As we stated in the report, if the United States owned certain lots of land that Washington bought during his presidency, Washington's purchase might provide a historical precedent that private business dealings did not offend the Presidential Emoluments Clause. We reported that we found evidence suggesting that the lots in question were held privately. See Report at pp. 15–16, and Appendix A. However, we did not purport to resolve the issue of private versus government ownership one way or the other. Instead, we stated that we "are mindful that disputes over the lot sales bred litigation for over 170 years" and that "our report does not reach a definitive judgment on whether Washington's lot purchases show a historic practice of the first President conducting private business with the United States." *Id*. at Appendix A, p. 6. We also stated that, "whether any business Washington had with the United States or any foreign government violated the Foreign or Presidential Emoluments Clauses also requires an examination of broader issues of constitutional interpretation, such as a structural analysis of the clause and an inquiry into its purpose," *id*. at Appendix A, Endnotes p. 7, n. 2, an analysis we did not undertake.

In Appendix A of our report, we cite all the historical sources and authorities we used for this discussion. All of these materials are public source documents that we provided to congressional staff in March 2019.

Question 2. Ms. Ochoa, Professors Blackman and Tillman have written analyses detailing why there is no violation of the Emoluments Clauses. With legal experts on both sides of this issue, why would you think it would have been appropriate for a GSA contracting officer to base a contractual decision on a constitutional question that still had not been sorted out by the courts?

ANSWER. We agree that there are legal experts on both side of the Emoluments Clauses issue. The robust legal debate confirms our finding that GSA lawyers were correct in recognizing that the President's business interest in the Old Post Office Building lease raised issues under the Emoluments Clauses. We found it was improper for the agency lawyers to ignore the issue for the reasons stated in the report. Ignoring the issue foreclosed the opportunity for GSA to work with the Department of Justice (DOJ) Office of Legal Counsel (OLC) before the litigation arose to determine a possible solution satisfactory to all parties.

Question to Ms. Ochoa on OIG Emoluments Report and Legal Analyses:

Question 1. Ms. Ochoa, can you provide the Committee with examples of other OIG reports that included legal analyses and conclusions on constitutional questions pending before a court?

ANSWER. Our report does not make conclusions on constitutional questions pending in litigation.

Question 2. Ms. Ochoa, did it factor into your analysis the potential legal and financial exposure to the taxpayer had the contracting officer made a decision based on unsettled constitutional law?

ANSWER. We considered the reasons the agency offered in support of its decision to ignore the constitutional issues. The agency lawyers and the contracting officer did not cite potential liabilities as a factor in their decision to ignore the issue. We found that because of their decision, they missed the opportunity to find a possible solution satisfactory to all parties.

Question 3. Ms. Ochoa, your report criticizes GSA for not consulting DOJ on the constitutional question yet you seem to ignore in your report that the DOJ asserted a position in the pending legal cases. Did you take into account the DOJ's position? If not, please justify your reasoning for not doing so.

ANSWER. Our report does not address DOJ positions in pending litigation because DOJ articulated those positions after GSA made the decisions we reviewed in this evaluation. Our evaluation focused on GSA's December 2016 decision to ignore the

constitutional issues and its March 2017 determination that the OPO tenant met the terms and conditions of the lease. DOJ did not advocate an interpretation of the Foreign Emoluments Clause in civil litigation until June 2017. We considered the decisions GSA made in the context of the guidance that was available at the time GSA acted. Our findings do not depend or opine on the merits of positions taken in subsequent litigation.

Question 4. Ms. Ochoa, at the hearing, Mr. von Spakovsky noted that once the Department of Justice has rendered a position on a Constitutional question, which it has done in this case concluding there has been no violation of the Emoluments Clause, there is no reason for GSA to independently consider the issue. The DOJ is the lawyer for the Executive Branch. In other words, once the DOJ established its position, that position is controlling. Why did you not take this into consideration or the DOJ's position in your report? Can you provide the Committee with examples of OIG reports suggesting an agency, outside of DOJ, should have taken a legal position contrary to an established legal opinion of the DOJ in a pending case?

ANSWER. Our report does not find or suggest that GSA "should have taken a legal position contrary to an established legal opinion of the DOJ in a pending case." As noted in our previous answers, we considered the decisions GSA made in the context of the guidance that was available at the time GSA acted. The DOJ positions relevant at that time are the OLC opinions cited in our report that provided controlling legal advice to GSA and other Executive agencies on the Constitution's Emoluments Clauses during the period covered by our review. As our report finds, when GSA lawyers made their decision in December 2016, they did not research the emoluments issues or refer them to OLC. OLC had previously helped GSA by identifying permissible business structures when GSA sought its guidance for Members of Congress interested in investing in government land. Had GSA timely reached out to OLC for guidance, rather than ignore the issue in this case, OLC may have been able to do the same here.

Question 5. Ms. Ochoa, did you consult with any outside legal experts during the course of your review of this lease and the drafting of the report? If so, who? If not, please explain why.

ANSWER. No, because the matters we addressed in the report were within the expertise of the OIG team assigned to the matter.

Question 6. Ms. Ochoa, did you or anyone in your office have any communication about the review or report before, during, or after your review and issuance of the report with any legal counsel or parties to any of the legal cases regarding the Trump Hotel pending now or at the time, excluding any communications your office may have had with congressional offices in their official capacities? If so, please provide with whom the communications occurred, the dates, and the nature of the communications.

ANSWER. Neither the Inspector General nor anyone in her office, to her knowledge, has had any communications with legal counsel or parties to any of the legal cases.

Question 7. Ms. Ochoa, have you or anyone in your office, met with any individuals who are plaintiffs in any of the ongoing emoluments lawsuits, excluding any meetings your office may have had with congressional offices in their official capacities, or any of their counsels? If so, please provide names and dates of such meetings.

ANSWER. Neither the Inspector General nor anyone in her office, to her knowledge, has had any such meetings.

Question to IG Ms. Ochoa on GSA Corrective Action Plan and Recommendation:

Question 1. Ms. Ochoa, my understanding is that GSA and the GSA IG went back and forth on the corrective action plan. Could you enlighten us as to why this occurred and what the dispute was over your acceptance of the plan?

ANSWER. The OIG provided memoranda documenting our position on this issue to the Committee. The agency has its own correspondence on this issue that you may wish to seek from them.

Question 2. Ms. Ochoa, the Committee received your response to GSA's Management Decision on your recommendation regarding reviewing the contract clause in question (37.19). You describe GSA's response as "non-responsive" based on the argument that you intended GSA to determine the purpose of the clause and conduct a formal legal review of the clause "before continuing to use the language." GSA interpreted that to mean before using it in future contracts. However, your office seems to suggest GSA should change the clauses in the existing contracts. Can you

provide examples where GSA unilaterally changed provisions in a legal contract? Please explain the legal justification for why such action would not result in subsequent legal challenges?

ANSWER. We did not propose that GSA unilaterally change any lease provisions. As we noted in our September 6, 2019, response to the Deputy Administrator, our recommendation described the steps GSA should take to correct shortcomings in its decision-making process for interpreting Section 37.19, without being prescriptive as to the end result:

> We recommend that before continuing to use the language, GSA determine the purpose of the Interested Parties provision, conduct a formal legal review by OGC that includes consideration of the Foreign and Presidential Emoluments Clauses, and revise the language to avoid ambiguity.

The agency itself has previously suggested to the Government Accountability Office (GAO) that it was in the process of adding an amendment to insert an Interested Parties provision in an outlease (see *Federal Real Property: GSA Outleasing and Restrictions on Participation of Elected Officials*, GAO–18–603R (July 25, 2018), page 5). You may wish to consult with the agency about how they sought such an amendment, whether through bilateral modification or some other process.

Question 3. Ms. Ochoa, in recommending changes to existing contracts, can you detail the role of the contracting officer and the legal parameters surrounding actions and decisions of the contracting officer? Is it accurate to say that others at an agency, including its leadership, are not supposed to influence or direct the contracting officer to take specific actions on a specific contract? Would GSA leadership or others directing or suggesting specific actions to the contracting officer absent his request for guidance be considered undue influence?

ANSWER. As noted above, we did not propose that GSA unilaterally change any lease provisions. The agency itself has previously suggested to the GAO that it was in the process of adding an amendment to insert an Interested Parties provision in an outlease (see *Federal Real Property: GSA Outleasing and Restrictions on Participation of Elected Officials*, GAO–18–603R (July 25, 2018), page 5). You may wish to consult with the agency about the roles of the contracting officer and agency management in that process.

Question to IG Ms. Ochoa on OIG Emoluments Report Internal Deliberations:

Question 1. Ms. Ochoa what is the standard operating procedure or GSA OIG guidance as it relates to internal document review prior to publicly submitting a report? Please provide a copy of that process to the Committee.

ANSWER. We follow the Council of the Inspectors General on Integrity and Efficiency *Quality Standards for Inspection and Evaluation*, which is publicly available at https://www.ignet.gov/sites/default/files/files/iestds12.pdf.

Question 2. Ms. Ochoa, did the report your office issued on the Emoluments Clause go through internal deliberations or standard edits both as it went through the OIG review process or in response to GSA agency comments on the original report? If so, please provide all drafts of the report including the dates of each draft report and who reviewed each draft.

ANSWER. Before issuing the report publicly, we provided the agency with a draft of the report, received their proposed redactions and informal comments on the report, and met with GSA's General Counsel and his staff to discuss them. After those discussions, we made redactions to the public version of our report requested by agency management based on their assertions of attorney client and deliberative process privileges, and included their final comments in their entirety in our report. As the agency's final comments reflect, the agency did not contest any of the facts stated in the report.

Question 3. Ms. Ochoa, on February 4, 2019, you received a letter from the Republican leadership on this Committee, the Oversight Reform Committee, as well as Senate Committee on Homeland and Governmental Affairs (Senate HSGAC), requesting the case file information supporting your OIG report on the Old Post Office (OPO). To date the production has been limited and during the hearing you were asked further about internal emails between your staff discussing this report and the internal deliberations that lead to various conclusions. Please provide for the record all copies of staff emails and meeting invites about this report; including scheduling of interviews, legal research and analyses performed, discussions on conclusions reached in the report, discussions on feedback from GSA, and responses to requests from individuals questioning the report's conclusions.

ANSWER. Please see our answers above regarding our extensive efforts to facilitate the production of documents in response to the February 4 request. We will continue

to work with the Committee to facilitate production of materials the Committee needs for its oversight mission, while seeking to protect the integrity of the Inspector General's function.

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