JOINT HEARING OF THE HOUSE
OVERSIGHT AND GOVERNMENT ...

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JOINT HEARING OF THE HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE AND
THE COMMITTEE ON SMALL BUSINESS SUBJECT: "POLITICIZING PROCUREMENT: WILL
PRESIDENT OBAMA'S PROPOSAL CURB FREE SPEECH AND HURT SMALL BUSINESS?"
CHAIRIED BY: REPRESENTATIVE DARRELL ISSA (R-CA), REPRESENTATIVE SAM GRAVES
(R-MO) WITNESSES: DANIEL GORDON, ADMINISTRATOR, FEDERAL PROCUREMENT POLICY,
OFFICE OF MANAGEMENT AND BUDGET; ALAN CHVOTKIN, EXECUTIVE VICE PRESIDENT,
PROFESSIONAL SERVICES COUNCIL; D. MARK RENAUD, PARTNER, WILEY REIN, LLP;
BRADLEY SMITH, JOSIAH H. BLACKMORE II/SHIRLEY M. NAULT DESIGNATED PROFESSOR
OF LAW, CAPITAL UNIVERSITY LAW SCHOOL; M.L. MACKEY, CEO, BEACON INTERACTIVE
SYSTEMS; MARION BLAKEY, CEO, AEROSPACE INDUSTRIES ASSOCIATION; AND LAWRIE
HOLLINGSWORTH, PRESIDENT, ASSET RECOVERY TECHNOLOGIES, INC. LOCATION: 2154
RAYBURN HOUSE OFFICE BUILDING, WASHINGTON, D.C. TIME: 1:30 P.M. EST DATE:
THURSDAY, MAY 12, 2011

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

Today we have a joint hearing on the -- "Politicizing
Procurement: Would President Obama's Proposal Curb Free Speech and Hurt Small Business?"
The Oversight Committee's mission statement is we exist to secure two fundamental principles: First,
Americans have a right to know that the money Washington takes from them is well spent, and, second,
Americans deserve an efficient, effective government that works for them. Our duty on the
Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is
to hold government accountable to taxpayers because taxpayers have a right to know what they get
from their government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts
to the American people and bring genuine reform to the federal bureaucracy.

Today's hearing is about the federal government and its honest
contracting proposals. I'm glad to see that the administration has agreed to testify before this joint
hearing. There are many questions to be answered, and I have been concerned about the indifference and
perhaps disdain the administration has shown at times toward congressional oversight. There is clear concern about a now well-circulated executive order that may have a chilling effect on political participation, free speech, based on partisan issues. The American people have a right to know what the government is doing, and to impact, through its Congress, proposed rules, regulations, statutes in this country. There is now bipartisan and bicameral alarm on Capitol Hill regarding the proposed executive order and its potential effects on politics in procurement.

The concern about injecting politics into procurement is not new.
It is not a Republican concern. It is not a Democrat -- a Democratic concern. The acquisition and
procurement laws and regulations are designed to preserve impartiality. We hold our very dedicated
contractors to a high standard of seeking to get a level playing field, maintain fairness and, in fact,
obtain goods and services from the best sources on a decision made on price and quality. To protect the interest of U.S. taxpayers, contracts must be awarded on the merits of the proposed bid and not on political affiliations or political donations of the prospective contractors. Yet, under the president's proposed executive order, contractors would be required to disclose information about political contributions of some employees. And the information would be readily available to political appointees who are intimately involved in the decisions to award contracts. The risk that politics could play a role in the outcome of contracting and award decisions is too high.
I believe the United States has some of the finest public servants in the federal contracting officers. Day after day they do the hard work of examining proposed bids, crunching the numbers, always seeking to get the best for the U.S. taxpayer. Notwithstanding an attempt to always do an analytical assessment, we will always have some contracts that are awarded on a no-bid or cost-plus basis. Particularly in these contracts, there is a high risk that the whim of a political appointee could, in fact, be swayed one way or the other based on a public record of contributions.

During the Bush administration, when my friends on the other side of the aisle were in the majority, the committee spared no expense to hurl accusations of political bias in contracting process, and in the process, the names and reputations of some very good people were smeared. This committee is not going to take that approach, precisely because we want to protect procurement officers, contractors alike, from the charge of political bias when we have -- when we have this and other hearings. Meanwhile, I believe it is telling that the president's proposal says nothing about requiring similar disclosures from labor unions and liberal advocacy groups. Is the president not concerned about transparency on grantees, many of them trade unions, trade unions themselves, or other groups that serve the country but do not fall under the general umbrella of corporate America?

Nevertheless, we are here to examine what effects this proposed order will have on the contracting community. We must determine the cost both to contractors and the U.S. taxpayers if this proposal or one similar goes into effect. We must consider the efficiency of such a requirement. Will the president's political disclosure rule serve to delay the delivery of goods and services to the federal government? We have to ask if it is appropriate for government to require businesses to ask for information from employees that may be deeply personal and potentially detrimental to their career.

Imagine your employer demanding to know, have you made donations to an organization that supports or opposes abortion. Do you have -- or have you given money to a group that advocates gay rights -- gay and lesbian rights or the -- those that may have a religious objection? Can you imagine the effect of having to disclose that and then questioning whether your career is in jeopardy? Further, you could ask, are you supporting organizations that seek to expand union representatives of workers, or seek to implement rights related to work laws.

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

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

REPRESENTATIVE ELIJAH CUMMINGS (D-MD): Chairman, the Committee on Oversight and Government Reform is supposed to enhance transparency and shine a light on waste, fraud and abuse. I've been a member of this committee for 15 years, and I never thought I would see the day when our committee would view transparency as the enemy.

The draft executive order being developed by the administration
would require federal contractors to disclose more information about their political contributions than they currently provide, particularly those given to a third-party entity. Chairman Issa said that this week that he opposes this effort because additional information could be used nefariously to create -- and I quote -- "a Nixonian-type enemies list," end of quote. In other words, companies should not disclose more information, because people in power could misuse the information to retaliate against them.

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

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

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

For all of these reasons, a broad coalition of dozens of open-government groups and other organizations strongly supports the administration's draft executive order. More than 30 groups, including nonpartisan, nonprofit organizations like Democracy 21, the Project on Government Oversight, Public Citizen and many others, have concluded that the draft executive order would enhance transparency and decrease corruption. Unfortunately, we will not be hearing from these groups today because Chairman Issa refused my request to invite Fred Wertheimer, the president of Democracy 21, to testify on behalf of this coalition. Although I was encouraged when Chairman Graves agreed to the request from his ranking member, Ms. Velazquez, to invite a small-business owner to today's joint hearing, Chairman Issa chose not to follow this example.

There are not -- these are not the only groups that support the draft executive order. On Tuesday, a coalition of institutional investors and investor coalitions, collectively managing more than $130 billion, also wrote to express their support. In their letter they explained that corporate political activity presents significant risk to shareholder value, and transparency allows investors to put together a more complete picture of the various risks to our investments.

For these reasons, I ask unanimous consent to place the following documents into the official record of the day's hearing. First, I'd like to submit the testimony of Mr. Wertheimer, prepared for today's hearing but was not allowed to deliver. Second, I would like to submit a letter written on May 4th by more than 30 open-government organizations and others expressing their -- and I quote -- "strong support," unquote, for the executive order and its transparency goals. And third, I would like to submit a letter written on May 10th from the Coalition of Institutional Investors who support the draft executive order to protect the interests of corporate shareholders. And I would ask that they be admitted into the record, Mr. Chairman.

REP. ISSA: Without objection, so ordered.

REP. CUMMINGS: Thank you very much.
And with that, I yield back.

REP. ISSA: I thank the gentleman.

We now recognize the chairman of the Committee on Small Business for his opening statement. Mr. Graves.

REPRESENTATIVE SAM GRAVES (R-MO): Good afternoon. I want to thank Chairman Issa for working with me on this joint hearing, and I also look forward to hearing all of our witnesses today and their testimony.

You know, all Americans should be concerned by a policy that directly and purposefully injects political giving into the contracting process, the integrity of which every single person here has worked so hard to maintain. Ensuring that contracts are awarded based on the merits of the offer and free of political and other inappropriate bias is a fundamental responsibility of the procurement system of committees and Congress. As chairman of the Small Business Committee, I'd like to address the impact of this proposal to small businesses.

Small businesses play a vital role in the U.S. economy in general and in governing -- in the government contracting process in particular. There are over 360,000 small businesses seeking to do business with the federal government. Small businesses received over $100 billion in federal contracts in fiscal year 2010. It's over 20 percent of all federal contracts. Previous statements from the president have recognized that small businesses have the capability, the flexibility and innovation needed by federal agencies and that small business participation keeps federal contracting costs down. Why then has he not publicly rejected an executive order that will force small businesses out of this market where they are clearly needed?

Make no mistake. The compliance burden of this executive order will force small businesses out of the market and keep them from entering since small business -- some small businesses will be ill prepared to comply with the proposed executive order's record-keeping requirements, reporting regimes and potential criminal liability. Small businesses already bear a disproportionate share of the regulatory burdens. Businesses with fewer than 20 employees annually spend 45 percent more per employee than larger firms to comply with the federal regulations. Given that small businesses create 64 percent of net new jobs, I want these businesses growing, not stifled by unnecessarily duplicative and punitive regulations.

Any small business brave enough to face the compliance burden of the executive order will need to worry about their contributions being used against them by competitors alleging the -- or improper disclosure by politically motivated appointees, which will again deter small-business participation. Contracting officers under pressure from political appointees may choose not to award any contract to small businesses who may have been unable to donate to a political entity but who, nonetheless, may be a -- the appropriate winner. Even if this hypothetical never materialized, the fear of improper scheming will remain and have a chilling effect on small businesses and their willingness to compete in the federal marketplace.

The Obama administration is already failing to meet the congressionally mandated small-business goals. The president should be focused on bringing small businesses into the federal marketplace. Instead, this proposed executive order will drive small businesses away. While this would be harmful at any time, it is especially ill-conceived now when our economy needs vibrant small-business
participation at every level. And I hope this hearing is going to convince the president to disavow this proposal.

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

Again, I want to thank all of our witnesses for their participation and the Government and Oversight Reform Committee for hosting the hearing today.

Thank you, Mr. Chairman.

REP. ISSA: I thank the chairman.

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

REPRESENTATIVE NYDIA VELAZQUEZ (D-NY): Thank you, Chairman Graves and Chairman Issa.

Contracting with the federal government represents an unparalleled opportunity for small businesses. In fact, the federal government is the world's largest purchaser of goods and services. For many of these firms, government contracts provide reliable, sustainable growth. Last year alone, federal contracting accounted for $540 billion in taxpayers' dollar (sic), and small businesses received over $100 billion of those funds.

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

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

In 2010, there was nearly $300 million in spending on elections by organizations not directly affiliated with political campaigns.

Nearly 50 percent of that total was spent by organizations that did not disclose their donors. This type of spending is increasing rapidly, outpacing spending by political parties on congressional campaigns by nearly $100 million in 2010. As undisclosed spending increases, so does the potential for improper influence in federal procurement.

The Obama administration draft executive order increases taxpayer transparency regarding fair contracts and levels the playing field by publicly disclosing campaign contributions. Yet, while it is important to reform the system to prevent potential improper influence and to engender public trust, it is paramount that small-business concerns be put first. This is particularly important because small businesses are at the forefront of the economic recovery, generating nearly two out of every three new jobs. Historically, small businesses have faced many challenges in entering the federal marketplace.
Therefore, as we work to level the playing field for businesses, we must also work carefully to minimize the burden of disclosure requirements on small businesses. There are a number of sensible policy options to reduce the burden of disclosure on small businesses. To this end, as the administration’s rulemaking moves forward, this committee will be certain to carefully review and comment on this process so that commonsense disclosure requirements are adopted and burden is minimized.

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

I look forward to today’s testimony and thank the witnesses for their participation. I yield back.

REP. ISSA: I thank the gentlelady.

Without objection, I would -- I’d like to submit for the record a letter signed by Senator McCaskill and Lieberman expressing concern about this executive orders (sic), comments made to the Associated Press by minority Whip Steny Hoyer expressing his concerns, comments made by Mr. Connolly of this committee reported in The Washington Post.

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

Without objection, so ordered. All members may have seven legislative days in which to insert opening statements and extraneous material in the record.

The chair would now like to recognize our first panel witness. The Honorable Dan Gordon is the administrator of Federal Procurement Policy.

Mr. Gordon, pursuant to committee rules, all witnesses will be sworn. Would you please rise and take the oath -- raising your right hand without even being asked. Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth? Let the record indicate the witness answered in the affirmative. Please be seated.

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

Thank you, Mr. Gordon.

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

REP. ISSA: Well, actually, that was a Freudian slip, I'm sure.

MR. GORDON: Chairman Issa, Chairman Graves, Ranking Member
Cummings, Ranking Member Velazquez, I appreciate the opportunity to appear before you and all the members of the committee this afternoon.

As the administrator for federal procurement policy, I am responsible for overseeing the development of government-wide acquisition policies and regulations and ensuring that they promote economy, efficiency and effectiveness and the increased participation of small businesses in our federal marketplace. As you know, our president has made contracting reform a top priority, and he has called on agencies to expand opportunities for our small businesses.

I am pleased to say that we are making progress on both fronts, although, as we say in my former employer, GAO, much work remains to be done. I understand that the committee had requested testimony from OMB about a draft executive order regarding disclosure of political contributors by federal contractors. As you know, no such executive order has been issued, and it would be inappropriate for me or for any executive branch official to testify about matters that are still undergoing comment and review and do not yet reflect final administration policy.

As a result, I appreciate the committee's recognition that my testimony today will be limited to addressing our efforts to enhance integrity, efficiency, and transparency in federal procurement and will not address the draft executive order. That said, I can unequivocally state that this administration has always been and remains fully committed, 100 percent committed, to a merit-based contracting process that meets the highest standards of integrity and transparency. There simply is no place for politics in federal acquisition.

Accordingly, our process must ensure and the public must have confidence that it is ensures that no political considerations are allowed to bear on federal contracting decisions at any point during the acquisition process.

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

If a company that competes for a contract unsuccessfully believes that it lost because the agency has taken into account some factor that is not set out in the solicitation, it has available an established accountability mechanism, the bid protest process. I have the honor, as some of you know, of working at GAO for 17 years, most of that time in the bid protest process. It's a process I'm intimately familiar with, and I can tell you that it works well in providing disappointed bidders with an opportunity to get independent review if they believe that the award of a contract has been tainted by an improper factor or factor -- any other factor not set out in the solicitation.

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

For example, earlier this spring the General Services Administration, GSA, unveiled a new web-based tool that now allows small businesses to access from one website all information about agency outreach, business development opportunities and training events across the entire federal government. With respect to transparency, a very high priority for this administration, we are shining a brighter light and a stronger light on our acquisition processes to help protect the public from wasteful spending practices and inspire public confidence in the integrity of the contracting process.
We have significantly improved the content and the functionality of usaspending.gov, which is a one-stop source for information on federal contract spending, so that the public will have unprecedented access to information about how their tax dollars are being spent. In addition, spending data on subcontracts is now posted on that site so that taxpayers can see how much work is subcontracted and to whom and for what purpose. In addition, the public now has access to salary information for the top executives of many of our federal prime contractors and subcontractors.

And finally, let me say a few words about the federal acquisition workforce mentioned by several of the opening speakers, a very important factor for me personally. The federal acquisition workforce is our most important resource, and it is the key to preserving the integrity of the acquisition process. This administration has taken unparalleled steps to increase the capability and the capacity of the acquisition workforce, as evidenced by the president's budget requests for both FY 2011 and 2012.

And it has been and it remains my top priority to make sure that the good women and men of our acquisition workforce have access to the training and to the development opportunities that they need to be the best possible stewards of our federal taxpayer dollars. Their professionalism is one of our greatest assets, and among my core responsibilities as administrator is to be their champion.

Finally, let me reiterate this administration's unwavering commitment to protecting the integrity of the federal contracting process and ensuring that our taxpayer dollars continue to be spent appropriately and that taxpayers see that they can have confidence in our procurement system. There is much left to be done, and we welcome the opportunity to work with both of these committees and with other members of Congress to make meaningful and sustained improvements to our procurement system to ensure that it remains merit-based and meets the highest standards of integrity, efficiency and transparency.

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

REP. ISSA: Thank you. Could we go ahead and run that quick video to set the theme for questioning?

PRESIDENT BARACK OBAMA: (From videotape.) It is time to require lobbyists to disclose each contact they make on behalf of a client with my administration or with Congress. It is time to put strict limits on the contributions that lobbyists give to candidates for federal office. With all due deference to separation of powers, last week the Supreme Court reversed a century of law that, I believe, will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.

REP. ISSA: The chair now recognizes himself for five minutes. You undoubtedly saw that clip when it was fresher, I suspect. It's clear that the president believes that the unlimited right of free speech is not appropriately decided, and he made that clear. Do you believe that free speech is, in fact, a right that relies to a certain extent on privacy of how money is spent?

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

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

MR. GORDON: I don't feel comfortable addressing the issue of campaign finance disclosure.

REP. ISSA: It's not campaign finance disclosure. It's political activity not currently covered by the disclosure, which ultimately we're not going to be endlessly asking you questions about the specifics of that. But the broad question is, do you believe that that is necessary information in order for a nonpartisan or a partisan appointee to participate fairly in the procurement. In your opening statement you made it very clear. You said it's supposed to be only in the structured requirement. Have you ever sent one out? Have you ever set out a bid request that asked how much you gave to United Gay and Lesbian Organizations (sic) or to the National Right to Life or any of these? Has that ever been part of the procurement process?

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

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

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

REP. ISSA: OK, so in looking at the draft executive order, we found that it would be a requirement in order to participate in the contracting process. Do you believe -- not talking to the executive order, but do you believe that we have a right to ask for information completely unrelated to the fitness of a vendor in order to give information to the public that would not otherwise be available, simply because somebody wants to be a vendor to the government?

MR. GORDON: There are many sorts of information that we require vendors to submit -- information about lobbying, for example. It is not taken into account in the selection of contractors, but it's required to be submitted and it is publicly available. There are other examples I could give you of information that we believe the public should have access to, even though they're not taken into account in the award of a contract.

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

Where is the authority, in your opinion, or the need? You've already said there isn't a need. Where is the authority, in your opinion?

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

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

MR. GORDON: I don't understand your reference to me. Let me be clear. What I was saying was in the selection of the contractor, the winning competitor for the contract, the information about political contributions is not needed. That's -- (inaudible) --

REP. ISSA: OK, so the executive order, as we read it, is asking for information that's not needed.

MR. GORDON: To decide which company should receive a contract, that's right. (Inaudible.)

REP. ISSA: OK, so you’re asking for unneeded information. Do you believe that people may choose not to make contributions if they're forced to make, for example, known that they gave to Planned Parenthood or National Right to Life?

MR. GORDON: Sir, you're outside the area where I feel comfortable expressing a view.

REP. ISSA: Well, I think it's very clear this executive order is outside the procurement process.

And with that, I recognize the ranking member for his questions.

REP. CUMMINGS: Thank you very much.

Mr. Gordon, I would thank you for being here. And I want to help answer the question that the chairman just asked. He asked about full disclosure and whether that's appropriate. And let me just read this quote, and listen carefully: "I think that we ought to do -- I think what we ought to do is we ought to have full disclosure, full disclosure of all of the money that we raise and how it is spent. And I think that sunlight is the best disinfectant." And that was said by Speaker Boehner, by the way, before he became speaker, on Meet the Press back -- 2/11/2007.

So I just wanted to help answer the question. The speaker clearly was of the opinion back then, and I think he's of the opinion of now -- I mean, let's not get confused about some things. The public knowing -- first of all, let's go back to what the chairman talked about a few moments ago. He was very complimentary of contracting officers. And I just -- I was just so impressed and so moved. And then he implies that -- you talk about how they must -- folks must -- in dealing with these contracts, they must deal with only the factors stated and set out in the -- I guess the bid documents or whatever. Is that correct?

MR. GORDON: Yes, sir.

REP. CUMMINGS: Now, so it's true that it's not about bid officers, these good people that the chairman just talked about, doing their job well, doing it with integrity. It's not about them looking at these documents trying to decide what a bid -- who should give or who should be awarded a bid. Is that right?

MR. GORDON: That's right.

REP. CUMMINGS: And this is more about the public having an opportunity to know -- the public having an opportunity to know just generally what's going on with these contributions or whatever. Is that right?
MR. GORDON: It is, sir.

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

And it just seems to me that, you know, we have disclosure now, and folks can always go to certain reports and see what folks are giving. Is that right?

MR. GORDON: It is -- it is correct, sir.

REP. CUMMINGS: Yeah, and so if they wanted to -- I guess so following this logic, no disclosure would be appropriate, you know? You got a situation where folks are already disclosing, and now they're giving money to organizations that don't disclose. So I guess the public -- and the public is getting very, very frustrated. All of our polling shows that they're frustrated. The public, not contracting officers, but the public, wants to know more about, you know, who's giving money where. They want to know. They want to have an idea. As a matter of fact, very shortly in a matter of three or four days, you know what's going to happen, Mr. Gordon? Everybody up here -- we've got to do some disclosing.

So I don't -- I -- and again, the organizations that have come forward, they have said look, we -- you know, they've looked at this. This is what they do. This is what they do. They are trying to make sure that the public has an opportunity to know as much information as possible. And you know why, Mr. Gordon? The reason why they want -- they want to know is because many of them feel powerless. Many of them feel that government goes off and does its thing, and they have no idea what's going on generally behind the scenes. And I think that that's what these organizations -- the letters that I asked be admitted into the record, that's what that's all about: 40 organizations basically begging the president to sign the executive order.

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

MR. GORDON: Thank you, Mr. Cummings.

REP. ISSA: The chair will now recognize the chairman of the full Committee on Small Business, Mr. Graves.

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

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

MR. GORDON: Chairman Graves, as you know, that would get me into a discussion of the draft executive order, and I don't think it's appropriate for me to do that. But I can make a couple of points that may be helpful. I used to teach for a good number of years at George Washington University's Law School. I taught international and comparative public procurement law. And one of the principles that we talked about when we look both at our state procurement systems and foreign procurement systems -- the fact is a huge amount of taxpayer funds flows through government contracting. That's true whether you're talking about in my home state, the city of Annapolis, or if it's talking -- the federal government or foreign governments.

And one of the things that we talked about in those classes is the importance of transparency, the enormous value of transparency.

I sometimes used to refer to it in class as vitamin T. It is enormously helpful to strengthen public confidence that their tax dollars are being used properly, that they feel that information is available to them.

REP. GRAVES: Well, let me ask you then, then how does this information do that. How does knowing ahead of time -- how does your agency know ahead of time who gave to what and how much they gave? How does that help in terms of transparency? Are we talking about your contract or how you're going to award the contract, or are we talking about -- you know, is the -- you know, I don't understand that. I don't understand the purpose when you can find out the transparencies there. If you award a contract to a company, they can go see what that company gave and who they gave it to. But it seems to me that it would serve no other purpose doing it ahead of the fact. You already said your agency doesn't need that information to make a determination on that contract. So I still fail to see what purpose it serves whatsoever in that determination.

MR. GORDON: The transparency serves an extremely important purpose for the public.

REP. GRAVES: Can't you get that information? Can the public get that information? Can they get that information? Can the public get that information? Once you've awarded a contract to a company, can they get that information and find out, all right, this company just got a contract for X number of dollars for the federal government; I want to see what it is that -- who they gave it to and what organization, how much, whatever? Can they get that information?

MR. GORDON: I understand. I'm not an expert on finance (campaign ?) disclosure.

REP. GRAVES: You just said -- you told -- you agreed with Mr. Cummings that they can get that information. They can get that information. And you agreed with Mr. Cummings when they said that, so --

MR. GORDON: My understanding is that some information about political contributions is currently available already. That -- (inaudible) --

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

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

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

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

REP. GRAVES: Are any of the people in that process politically appointed?

MR. GORDON: We are generally dealing with career people, although --

REP. GRAVES: Right.

MR. GORDON: -- there is an exception, and it's worth pointing out. By statute, chief acquisition officers of the agencies are, in fact, politically appointed. I remember hearing years ago when that was originally created some concern that having a political appointee could cause trouble. In fact, my -- at least to my knowledge, there have never been allegations of interference. I don't think that there is a problem. But if there were a problem, a company can file a bid protest.

REP. GRAVES: Well, I'm out of time now, but the fact remains that you don't -- and you said yourself you don't need that information for the contracting process, and that information is widely available after the fact, after the contract is awarded. And anybody in this country or worldwide can find out what that information is. So submitting it ahead of the fact is something that disturbs me a great deal, and what the motivation -- the true motivation is behind asking for this.

Thank you, Mr. Chairman.

REP. ISSA: Thank you.

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

REP. VELAZQUEZ: Thank you, Mr. Chairman.

Mr. Gordon, there are many concerns that providing donor
information to contract officers will politicize the procurement process. Is there an example of a federal program where there are safeguards to prevent such a conflict of interest?

MR. GORDON: Conflicts of interest -- if I could, Ranking Member Velazquez -- is a subject to which I'm particularly sensitive and my office is particularly sensitive. In my year and a half as the administrator for federal procurement policy I have led an effort to strengthen the rules about conflicts of interest, both personal conflicts of interest and organizational conflicts of interest. Those, again, go to the importance of protecting the integrity of our process. It's a very important area.

REP. VELAZQUEZ: So let me ask you, are there situations where an intermediary is placed between a participant submitting sensitive information and a federal agency who might be biased by such information.

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

REP. VELAZQUEZ: We hear from many people that says that transparency can help engender public trust and increase taxpayers' confidence in government. My question to you is, can transparency efforts also generate cost savings by creating more competitive and efficient federal programs.

MR. GORDON: Absolutely. I should tell you that the Organization for Economic Cooperation Development, the OECD, just did an international peer review of the U.S. federal procurement system. And I'm happy to report that one of the things they're focused on was integrity and competition. And, frankly, we came through with flying colors. The fact is that increasing transparency and increasing trust in the system brings more businesses in. It's a special concern for us in the area of small businesses. When I go around the country talking with small businesses, they so often say, Dan, the system is so difficult. How are we ever going to break in? We'll never get a contract.

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

REP. VELAZQUEZ: Whenever we are debating legislation here, there are some that says that localities and municipalities -- that we should not be dictating, the federal government, to localities of the state government. The fact of the matter is that many states have enacted pay-to-play laws. Even today there is a Wall Street Journal -- an article about Andrew Cuomo putting pressure on the legislature to pass pay-to-play laws to prevent favoritism in contracting.

So given the many recent scandals in -- contracting scandal, are there similar issues in federal procurement that need to be addressed immediately?

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

REP. VELAZQUEZ: Thank you.

REP. ISSA: The chair recognizes the gentleman, Mr. Walberg.
REPRESENTATIVE TIM WALBERG (R-MI): Thank you, Mr. Chairman.

And thank you, Mr. Gordon, for being here.

Mr. Chairman, I would like to submit for the record an article that was published in today’s Washington Examiner. I think it accurately points out that if this draft executive order goes through and gets finalized, it will effectively restore the partisan spoil system in federal contracting that Civil Service reformers struggled for decades to eradicate. I believe that the acquisition awards should be based on merits. Despite what the administration may say, there is no way one can claim that politics won’t be taken into consideration in the source-selection process that the CEO has finalized. And so I’d like to submit this for the record.

REP. ISSA: Without objection -- (off mic) --

REP. WALBERG: Mr. Gordon, the White House has stated clearly that disclosure is one of their overall goals. But under this draft executive order, isn’t it true that the contributions to unions that sign collective bargaining contracts with the federal government, yet are engaged in independent political activities, are exempt from the EO?

MR. GORDON: Sir, as you know, I can’t speak to the draft executive order at this point, but if the question is, are unions federal contractors, I’m not aware of situations where they actually hold a federal contract, although it may be wrong.

REP. WALBERG: But they’re exempted in this draft executive order from this provision. So there must be some expectation of that at the very least. And if transparency is the goal, wouldn’t this have the opposite effect?

MR. GORDON: I’m not in a position to speak to that, sir. Sorry.

REP. ISSA: Would the gentleman yield?

REP. WALBERG: Yes, I’ll yield.

REP. ISSA: Mr. Gordon, if you would presume that the draft executive order that you have read is a draft piece of legislation from here forward and answer it as though it was draft legislation of Congress, which you are able to respond to -- I yield back.

MR. GORDON: Thank you. It feels, though, like I’m being asked indirectly to talk about the draft executive order. I’m simply not comfortable doing that, although I must say I don’t understand the question about an exemption for unions. I’m simply not familiar with that.

REP. ISSA: If the gentleman would further yield --

REP. WALBERG: To the chairman, yes.

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

And I yield back and thank the gentleman.

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

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

MR. GORDON: Sir, there is no executive order that has been signed by the president. There is a draft.

REP. WALBERG: Is the draft executive order narrowly tailored to serve an important governmental interest?

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

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

MR. GORDON: You bring me back, sir, to vitamin T. Transparency is one of the best ways of fighting corruption. Sunlight is the best disinfectant -- (inaudible) --

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

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

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

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

Thank you.

REP. ISSA: The gentleman from Virginia, Mr. Connolly.

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

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

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

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

REP. CONNOLLY: And to that end, I would strongly urge you, at least as one member of this side of the aisle, to consider that or to take that back to those colleagues you have who may be participating in cogitating about theoretically such a draft, because I am very concerned that all kinds of people are going to make a conclusion that in fact is false, even though the dots are both there. I made a contribution. I got an award of a contract. You have testified we don't take that into account at all, and you're -- you've never been aware of that being taken into account. Yet nonetheless once we change this procedure, that is the risk, that both the media and the public could draw that conclusion, albeit a false one, and now somebody's good name is damaged. So I think that's not a trivial issue.

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

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

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

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

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

REP. GRAVES: The chair now recognizes the gentleman from Florida, Mr. West.

REPRESENTATIVE ALLEN WEST (R-FL): Thank you, Mr. Chairman.

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

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

REP. WEST: But why are you here, sir?

MR. GORDON: I think I can address the point. As soon as I heard the acronym RFP, I realized that you do have experience in this area, (and that's helpful?).

REP. WEST: Yeah, absolutely.

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

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

MR. GORDON: As a general matter, as I said earlier, every procurement system -- ours, the states', the local governments' and foreign ones -- are constantly facing a risk that the public will view their system as tainted because the fact is enormous numbers of dollars of taxpayer funds are at risk in the procurement system, and in order to instill confidence in the public, you want to have as much transparency as you can.
REP. WEST: But you don't think that the American people would have confidence in a retired three-star, four-star general to be able to -- with his team be able to write an RFP to compete for a contract. What purpose does it have with this draft executive order to bring forth this requirement to disclose your political contributions? What is the purpose of that -- with that RFP? What is the purpose of that in the awarding of this contract? As we have said, I can understand after a contract is awarded, that's public knowledge, but why is that part of the criteria that we have upfront?

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

REP. WEST: But correct me if I'm wrong. That's what this draft executive order brings forth.

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

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

MR. GORDON: There is concern in every system, including ours, that award decisions may have been affected by inappropriate considerations.

Having more of -- information to the -- available to the public, having more transparency can help strengthen confidence in (the government ?).

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

MR. GORDON: I don't feel comfortable responding to the question, sir. I'm not -- I'm not in a --

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

MR. GORDON: I'm not in a position to talk about the draft executive order, sir.

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

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

REP. WEST: I yield back.

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

REPRESENTATIVE PATRICK MCHENRY (R-NC): I thank the gentleman.
Thank you, Chairman.

Mr. Gordon, I want to thank you for your service to your government. We know that this is probably not the highlight of your career to come before Congress with this draft executive order that Mr. West was asking about.

But, you know, I want to start by saying, you know, for the average American business, small businesses especially, they're dealing with high government regulations. They're dealing with the burden of government regulations every day. I was just talking to a group of constituents up here, small-business folks, heating and plumbing contractors, and they're talking about regulations, the burden on their ability to hire folks.

And what we're talking about with this is in essence employers going to their employees and saying we need you to give us every donation you've made to the causes most dear to you. That's an additional burden, and, you know, Americans are private folks. You know, even if you have to disclose a political contribution, for instance, on the Internet, it's a little different when your boss comes in and says, hey, tell me who you've been voting for.

I mean, that's basically what we're saying with this.

So, you know, but I've got a larger question. In a time when the cost of government is going up -- I mean, government is spending more this year as a percentage of the economy than it has since World War II. So my question is would this disclosure requirement -- will this in any way reduce the costs to the taxpayers of these government contracts?

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

REP. MCHENRY: No, no, let me ask -- let me ask this question. Mr. Gordon, I appreciate that, and that's not the question I'm asking, with all due respect. Someone is offering -- someone -- you put out a bid for paper products. Would this disclosure requirement, this additional certification that you're -- you would require, does that reduce the cost of those paper products to the government?

MR. GORDON: Yes, it's an area we focus on a lot. The fact is transparency requirements impose burdens. As we implement them --

REP. MCHENRY: Or costs -- burdens and costs?

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

REP. MCHENRY: So more competition by having a greater requirement on a contractor to do business with government, that seems a little interesting to me and sort of defies logic. But let me ask another question. And, you know, you talk about the bid protest process, which you have a great level of expertise in. Would you anticipate that this additional disclosure would increase the bid protests?

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

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

MR. GORDON: The way -- you're several steps ahead of me, sir, but one -- I understand that one method that's been used in some states is to say that, yes, companies have to say they've made all required disclosures, just like today we require companies to -- (inaudible) --

REP. MCHENRY: OK, would you --

MR. GORDON: -- you don't have a tax liability above $3,000 (or whatever?).

REP. MCHENRY: OK. OK. And would you verify that that certification is indeed correct nor was made?

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

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

REP. GRAVES: The chair now recognizes Mr. Lankford of Oklahoma.

REPRESENTATIVE JAMES LANKFORD (R-OK): Thank you, Mr. Chairman.

Mr. Gordan, thank you for being here as well. Let me -- let me try to clarify something. You were just talking about -- that the hope of this in adding more transparency and such is to increase competition. So it is your belief if we ask companies to disclose who they're giving to and ask their employees who they're giving to, more companies are going to say, yes, I want to get in that. This will increase competition, therefore, decrease price.

Is that what you're saying with that?
MR. GORDON: We always hope that increasing trust in the system will cause more companies to participate in the system.

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

MR. GORDON: Not because they're looking forward to making the disclosure but because the disclosure can increase trust in the system. That's right.

REP. LANKFORD: Where would this data be distributed? We talked a little about this morning who will make the decision on what -- how this data gets out to the public.

MR. GORDON: You're really then getting into the specifics. And I should say a word about the specifics of a draft. The fact is a draft executive order is a confidential document. We're discussing it internally.

REP. LANKFORD: Right, I understand that. Let me -- I've got several questions. I understand that. I've heard that loud and clear. But my concern is, obviously, once this data comes in and the political appointees begin to look at it, there is a chance that they're going to look at it and suddenly 57 percent of the contracts gave predominantly to Democrats and that this administration would go, oh, that's a -- not a good idea to release because then it looks like we're giving preferential treatment to more people.

And then suddenly, is there a statement -- this executive order suddenly goes away. Is this not a mining to go out and look and say, we're either going to expose one thing or another, and, if it's politically not expedient, there's the opportunity to say, I don't think we're going to release it this time?

It just allows -- obviously, I understand we're two or three steps down the path on that, but it becomes this circle on this.

And your comments about transparency -- I understand the transparency concept, but having gone through job interviews and interviewed multiple people myself, I know when I'm looking at an application, that's not about transparency. That's about who I'm hiring and who I'm not. Transparency is after the fact, to expose everybody -- what's happened. Before the fact, information is an application. That's information I'm gathering to make a decision. So to say ahead of time I'm going to gather this information but I'm not going to really use it to make a decision begs the question why it's on the initial information. That seems to be something that would be exposed later, not before. As I've gone through interviews, there's not been a time I've looked at it and said I'm not going to look at that section of the application. I'm pretty much looking at all of it.

Do you anticipate with this that there will be a time as we get down the road -- again, it's a hypothetical to say we need to balance this out better. We have too many people who are in companies that give -- from Republicans or Democrats. Let's establish a quota system that will only do procurement based on -- we need to have a balanced number of companies that give to Republicans, Democrats or don't give at all. Do you -- do you anticipate this is where that would head, just try to balance things out and make it more fair if we determined -- there are a lot of Republicans, let's say, that give to these companies. So we need to make sure we have more companies that are Democrat-owned that actually get engaged in this in the procurement process and set that quota aside?
MR. GORDON: Absolutely not. We need to protect -- we need to keep politics out of the contracting process.

REP. LANKFORD: I would completely agree, and there's -- a good way to do that is to keep it exposed as we are right now.

Well, one last thought on this. OMB currently has the authority to put out a circular to require, you know, information about grant writing in particular. Is there any conversation that you're aware of in OMB on the grant writing to put out a circular saying well, let's do for all those that get grants, let's say, from unions that they would have to give who they give to and their union members that are leadership -- to note political contributions? Now, that wouldn't take an executive order. That's just -- OMB could do that now. They already have the authority to do that. Do you know if there's been any conversation related to that?

MR. GORDON: You won't be surprised to hear, sir, that I'm not in a position to disclose internal discussions.

REP. LANKFORD: OK, well, that would be -- interested to note just on that. The president has been very good to just say we don't want to do an end-around Congress. But this certainly feels like -- the previous Congress said this wasn't a good idea. And so they're going to do an end-around Congress just to be able to find a way to legislate in an area that is not -- does not have legislative authority. I understand that you have a responsibility, but this was a clear decision made by a previous Congress not to do this, and now we're going to currently try to do it, anyway. And I find that fascinating and an interesting conversation for another day on constitutional issues and authority. So thank you for your time.

REP. GRAVES: The chair now recognizes Mr. Mulvaney of South Carolina.

REPRESENTATIVE MICK MULVANEY (D-SC): Thank you, Mr. Chairman.

Mr. Gordon, thank you for coming before us today. I want to go back to something that I thought I heard you say earlier on in the testimony, which is -- I believe you said that the contractor's action, that their conduct in participating in the political process doesn't really -- it's not really related to what they're doing for the government. Is that correct?

MR. GORDON: What I said, sir, was that a contracting officer in deciding who should win a contract will look only at the selection factors in the solicitation, not at political activities or political contributions.

REP. MULVANEY: So political activities, not a selection factor.

MR. GORDON: That's right, sir.

REP. MULVANEY: So it's fair to say that political activity has nothing to do with whether or not they'll be fully able to perform their duties to the government.

MR. GORDON: Certainly nothing to do with whether they're going to get the contract.

REP. MULVANEY: Thank you. Well, would it -- if it did have an impact on whether or not they could perform the contract, would you consider it?

MR. GORDON: Well, it feels very hypothetical. If you told me
factor X would make a company incapable of performing, should that be taken into account? Then the answer to that would be yes. Certainly. And why would political activity have any impact on their ability to perform?

REP. MULVANEY: And actually, Mr. Gordon, I know this will come as a surprise to you, but I'm trying to agree with you on that point. So --

MR. GORDON: I had a suspicion of that.

REP. MULVANEY: Which is -- which is -- I asked the question because I'm trying to figure out where this directive is coming from.

If it has -- if political activity has nothing to do with a firm's ability to perform its contract for the government, is it coming from your office? Is this directive coming from the Office of Federal Procurement?

MR. GORDON: The question -- the direct answer is that's an internal matter within the Executive Office of the President that I'm not in a position to discuss. But I think the broader question is, would it help the procurement system to have more disclosure. And that takes us back to the earlier conversation. The hope is that transparency increases public trust, which brings more companies into the competitive process, which improves economy and efficiency.

That's the hope.

REP. MULVANEY: Well, again, then it goes back to my original question, which I understand you're not going to answer, which is, did this directive come from your office. And I understand that you're invoking a privilege that I'm not familiar with. Is that correct, that you're invoking a type of executive privilege here today?

MR. GORDON: No, I'm simply explaining that this is a matter of internal deliberation that I don't think it's appropriate for me to be disclosing here.

REP. MULVANEY: What department does the OFPP operate under?

MR. GORDON: OFPP is an office within the Office of Management and Budget, which is within the Executive Office of the President.

REP. MULVANEY: Are you the head of that department?

MR. GORDON: I am the administrator and the head of the Office of Federal Procurement Policy.

REP. MULVANEY: Are you head of the department under which OFPP functions?

MR. GORDON: As I said, sir, there's not actually a department. It's the Executive Office of the President, and no, I'm not the head of the Executive Office of the President.

REP. MULVANEY: Do you have -- when we've been asking you these questions today regarding where this directive began, do you actually know the answers to those questions?

MR. GORDON: I'm not comfortable answering the question, sir. I don't think it's appropriate for me to be disclosing our internal deliberations.
REP. MULVANEY: All right. And I think you've explained for us at some length why you're not comfortable giving that. Let me ask you some general questions then, which is, would a disclosure requirement in general, not dealing with this specific draft -- would a disclosure requirement put an obligation on members of the public in order to do business with the United States of America?

MR. GORDON: Yes. We have many disclosure requirements. I mentioned one earlier. You have to disclose lobbying activities if you want to get a federal contract. You've got to disclose the compensation of your five highest paid executives. We have a whole series of things which, frankly, can be quite burdensome for private companies. And we're always looking at the balance. These are often driven, I might add, by statute.

REP. MULVANEY: And that was my point. In fact, they're always driven by statute, that the requirement that you disclose your lobbying activities, such as the other requirements, are driven by statute, not by executive order. That's correct, isn't it?

MR. GORDON: On those two specific ones, yes, but there are others that are not driven by statute. For example, organizational conflicts of interest, the requirement for disclosure is driven by regulation.

REP. MULVANEY: By regulation?

MR. GORDON: That's right -- that my office is responsible for issuing.

REP. MULVANEY: Mr. Gordon, finally, I'll ask you this: Is the violation of an executive order a punishable offense?

MR. GORDON: That's a question to ask counsel, sir.

REP. MULVANEY: Do you believe that it should be?

MR. GORDON: Not in a position to express a view -- I would turn -- I would turn to the lawyers and ask them that question.

REP. MULVANEY: I'm not asking you -- but I think you actually have to answer that question unless you're invoking a privilege. Do you think a violation of an executive order should be a punishable offense?

MR. GORDON: I'm not sure I understand the question. Should executive agencies be following executive orders? Absolutely.

REP. MULVANEY: No, should the -- should a member of the public be able to be punished for violation of an executive order?

MR. GORDON: I'm not sure that it -- you've got me over my depths, but I don't think an executive order would actually apply to a member of the public. An executive order typically is implemented through regulations, and obviously, the regulations might apply to the public.

REP. MULVANEY: Yeah, thank you, Mr. Gordon.
REP. ISSA: Thank the gentleman.

The gentleman from Connecticut, Mr. Murphy.

REPRESENTATIVE CHRISTOPHER MURPHY (D-CT): Thank you very much, Mr. Chairman.

You know, campaign finance laws have existed for more than a century. I mean, going back to 1907 the Tillman Act prohibited contributions by corporations to political parties for the first time. And most recently in 2002 Congress passed a bipartisan campaign Finance Reform Act.

Mr. Gordon, I know you're a procurement expert. You're not an expert on campaign finance laws. But I think it's useful to explain what's on the books already today. Today, all individual contributors, or aggregate contributors in excess of $200, have to be disclosed. All contributors from PACs and party committees have to be disclosed. All contributors and expenditures made by PACs have to be disclosed. All independent expenditures and electioneering communications have to be disclosed. I lay this out because one of the arguments used by the opponents of increasing disclosure requirements is that by doing so you're going to chill free speech, that by requiring individuals or entities to disclose the contributions that they make that all of a sudden they're going to stop making them.

But here's what we know: that political contributions from people who do business with the federal government have increased from $5 million in 1998 to almost $10 million today. That's what we know about. That's the people that are contributing through existing disclosure laws, mainly through individual contributions. And so I guess I say all of this by means of asking you this simple question. We have a lot of disclosure requirements on the books today. In fact, what we're talking about is just really one loophole within our existing laws that prevent donations to 527 and like organizations from the light of day.

And I'm interested to know, Mr. Gordon, if you think that the disclosure requirements that we have already have had a chilling effect on either contributions to political candidates from existing government contractors or on firms or companies willing to do government work.

MR. GORDON: I can only tell you what I know, sir. Number one, I've never heard a complaint that the existing disclosure requirements have deterred any company for competing for a federal contract, and number two, I'm not aware of any complaint that the fact that we know which companies give money to which political candidates, that's publicly available. I've never heard of a bid protest being filed because of an allegation that that information somehow was improperly used.

REP. MURPHY: It seems as if -- that we're litigating this issue for the first time on this committee as if this is a contest of first impression. It's not. Individuals and companies for 100 years have been required in some way, shape, or form to disclose the political contributions that they make. And we have pretty irrefutable data to show that over the last 10 years at least that government contractors have not been making less contributions. They've been making more.

And I go straight to Justice Scalia when I think about this argument regarding a chilling effect. In Doe v. Reed Justice Scalia, one of the most conservative justices on the court, said that "requiring people" -- quote, "Requiring people to stand up in public for their political acts fosters civil courage, without which democracy is doomed."
"And with that, I yield back.

REP. ISSA: Thank the gentleman -- the gentleman from Tennessee, Mr. DesJarlais.

REPRESENTATIVE SCOTT DESJARLAIS (R-TN): Thank you, Honorable Gordon, for attending today.

How does the draft EO improve transparency above and beyond the status quo? I know we've talked about it, but can you explain that again?

MR. GORDON: Sir, I'm -- hesitate to point out again that I'm not comfortable talking about the details of the draft, but I will just say from the earlier conversation and, in fact, from Congressman Murphy's remarks that there are some aspects of political contributions which have long been required to be disclosed, and there are some aspects of political contributions which are not today required to be disclosed.

REP. DESJARLAIS: OK, but you talked about how public perception would improve this process.

MR. GORDON: Absolutely, sir. Disclosure and transparency can strengthen the public trust in the procurement system.

REP. DESJARLAIS: Does the -- is the public involved any way in advance of the awarding of these contracts by your agency?

MR. GORDON: In many ways, actually. When there is public trust -- and this is an issue that's come up when I've worked with developing countries in improving their procurement system. When there is public trust in the integrity of this system, you get more companies willing to participate in competitions. It's extremely important, absolutely.

REP. DESJARLAIS: OK. So you're saying then that by this draft EO essentially what we're going to see is that people will have a better idea of who these contractors are, and that would influence your decision whether or not to award a contract?

MR. GORDON: Without talking about the draft, as a general matter, when people have more trust in the system, you can hope to have greater competition, absolutely.

REP. DESJARLAIS: So I guess what I'm trying to get at -- are you expecting the general public to influence your decision on a specific contract award?

MR. GORDON: I'm sorry. I'm not sure I understand the question. The award decision has to be based on the selection criteria and the solicitation, not public perception.

REP. DESJARLAIS: OK. So there's no political involvement in the decision.

MR. GORDON: Absolutely not. It is prohibited, and we have a very strong core of acquisition professionals that know that the Competition in Contracting Act would prohibit them from considering any factor except what's set out in the solicitation.
REP. DESJARLAIS: OK. So you believe contracting officials are able to award contracts without regard to political consideration or how it is achieved.

MR. GORDON: Absolutely.

REP. DESJARLAIS: OK. Are political appointees removed from the selection process, for example?

MR. GORDON: It depends on the situation. There are -- there are very large procurements where the selecting official, I think, could be a political appointee, but they are bound just like anybody else by the evaluation criteria. No one can deviate from what's in the solicitation. And if someone deviates, they're going to face an independent review by GAO or the Court of Federal Claims.

REP. DESJARLAIS: And you feel that we do need more disclosure than we currently have? The current system that we have in place is not good enough?

MR. GORDON: I would say as a general matter I am an advocate of transparency.

REP. DESJARLAIS: OK, so you think we need more than we currently have. You agree with this draft EO.

MR. GORDON: I was asked earlier, sir. I want to say that respecting the sensitivity and the confidentiality of deliberations on drafts is very important. That's true whether it's a discussion in the Situation Room or whether we're talking about a draft executive order. Until the president decides, I don't think either I or any executive branch official should be discussing the content.

REP. DESJARLAIS: OK. Do you think this is an important hearing for this process?

MR. GORDON: I always respect congressional committees. I worked at GAO for 17 years here. I know the enormous value that congressional oversight committees bring.

REP. DESJARLAIS: OK. I just -- earlier when Ranking Member Cummings seemed shocked that we were doing this and that we needed more disclosure, it just kind of took me back to the last time before I was an elected official when we heard that we need to pass the bill before we know what's in it. And, yeah, that was, of course, the Affordable Health Care Act that was referred to by both the president and the former speaker. And I think that the example of the 1099 provision, which was repealed and the president subsequently signed into law, would be an example of why we have these hearings. So I was a little shocked at Ranking Member Cummings' displeasure for this hearing today.

But I appreciate your attendance, and I yield back.

REP. ISSA: I thank the gentleman -- the gentleman from Ohio, Mr. Chabot.

REPRESENTATIVE STEVE CHABOT (R-OH): Thank you, Mr. -- thank you, Mr. Chairman.

Just a number of questions, Mr. Gordon -- I'd like to read to you
a few descriptions of what others have called this executive order and see if you agree with them or not. One example was that "this order amounts to the White House brazenly directing the power of government against its political opponents, and it's an unabashedly partisan move." Would you agree with that representation?

MR. GORDON: Sir, I'm not going to be feel comfortable coming up with a view on the various opinions that have been expressed, but I guess on that particular one I would tell you that, no, I don't agree with it.

REP. CHABOT: All right, let me get -- let me ask you about this one. The minority leader of the United States Senate said that this was the crassest political move he's ever seen. "This is almost gangster politics to shut down people who oppose them," referring to the administration. I would assume that you probably don't agree with that statement?

MR. GORDON: You assume correctly, sir.

REP. CHABOT: I thought so. Let me -- let me ask you this one. As designed to muzzle corporations and businesses, it would at the same time allow unions to continue spending at will. Isn't that accurate? Even though you may not agree with it, wouldn't that be accurate?

MR. GORDON: No, sir, I don't believe it's accurate.

REP. CHABOT: All right, well, let me try another one then. This particular individual is also in the Senate, and this person is a moderate and, in fact, actually voted for the McCain-Feingold campaign finance reform, which, you know, a lot of Republicans did not vote for. This person did. This person called this executive order Orwelian and also said that the order undermines decades of work by this person and others to ensure federal business is free of corruption of political influence, called it the equivalent of repealing the Hatch Act, and further said that it's "taken decades to create a federal contracting system based on 'best prices, best value, best quality,'" and that the effect of this order is to again have "politics play a role in determining who gets contracts." Companies may choose not to bid, which will reduce competition and raise government costs."

Now, I know you believe that this is going to help us relative to costs and make there be more transparency and more competition, but this person disagrees with that. I assume you would disagree with the statement that I just read there as well?

MR. GORDON: Yes, sir.

REP. CHABOT: OK. And let me conclude with this one. Supporters of the president, President Obama, are predicting that he's going to raise a billion dollars this year for his campaign -- talk about campaign finance reform and the corruption of money in politics and all that -- a billion dollars this year for the first time, if he attains that, and simultaneously that he'd be positioned even more strongly if he could in effect by this executive order dry up some at least and maybe a substantial amount of Republican donations. I would assume that you would disagree with that point of view?

MR. GORDON: I have -- I've spent many years, sir, working to improve the -- and protect the integrity of the procurement system. I intend to continue doing that.

REP. CHABOT: OK. Let me just conclude because I've only got a minute left. Now I'll tell you what I think. I think that this is nothing more than blatant, raw politics. And I think in the 15 years that I've been here, I've not seen anything as outrageous and as much
of an exercise of naked political power than this executive order. I think it's shameful. I think it's disgusting. I think it's despicable. I think it's outrageous. And this administration is talking about doing this by fiat essentially. That's what an executive order is.

However, if you're going to do something this dramatic, it ought to be done by the will of the people by their elected representatives. That's the United States Congress. It's not by an executive order coming out of the White House. And I think the administration ought to be ashamed of what it's trying to do here. And as I say, I've been here awhile -- 15 years now, although I had a two-year involuntary sabbatical. But I hope you --

REP. ISSA: Would the gentleman yield?

REP. CHABOT: I'd be happy to yield.

REP. ISSA: On that, I agree. Thank you for your comments.

REP. CHABOT: (Laughs.) Thank you. I yield back.

REP. ISSA: The gentleman from Iowa, Mr. Braley.

REPRESENTATIVE BRUCE BRALEY (D-IA): I thank the chairman, and I want to start by going back to the clip the chairman played at the beginning of this hearing, because if you go back and listen closely to what President Obama said, he is a prophet, because that's exactly what happened after Citizens United. We've seen a massive flow of secret money, which is something that's a much greater threat to democracy in this country than this executive order is.

And you indicated, Mr. Gordon, that you had taught at a law school dealing with procurement issues, so you know that the federal procurement slice, a merely -- $500 billion, is an enormous part of the federal budget. And yet four years ago in this very committee, we had a hearing where the head of the General Services Administration, Lurita Doan, came and testified about illegal activity taking place in a federal agency in violation of the Hatch Act when a gentleman named Scott Jennings, who worked in the White House as Karl Rove's chief deputy, was doing political briefings on government time in violation of the Hatch Act. And President Bush fired her because of that. That was the only recourse he had. And it's ironic that Scott Jennings was the deputy of Karl Rove, who heads Crossroads and many of the secret donor groups that are engaged in pumping millions of dollars of secret money to try to influence the outcome of political elections.

And one of the things that nobody talked about in this hearing is the very different levels of scrutiny applied to different types of speech. Because as a fundamental part of constitutional First Amendment Law, there's the regulation of content, which is a high level of scrutiny, and the government is supposed to have very little impact on what you say, and then there's the regulation of time, manner, and place of speech, where the government where the government is given much more leeway, and that's exactly what this executive order is all about.

So I'm confused by the people who come to this hearing and claim about the threat to the right of free speech and the threat to our democracy when, in fact, it's the unlimited amount of secret money coming into elections that's the biggest threat to democracy we face today. And I'll say that whether it's money coming into support a Republican candidate or a Democratic candidate. One of the things we know is that in their opinion the Supreme Court rejected the arguments being offered today because Justice Kennedy wrote for the majority and made it clear that disclosure doesn't prevent speech. He said, "The First Amendment protects political speech, and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and different messages."
The executive order, Mr. Gordon, does nothing to regulate the content of what anyone wants to say. Isn't that true?

MR. GORDON: Transparency is what is at issue here, and transparency is something that I very much agree with as an extremely important value, including in the federal procurement system.

REP. BRALEY: And one of the reasons why that's so important is something we've talked about, and that's because American taxpayers are the ones whose money is being used to fund these projects with these contractors. Isn't that true?

MR. GORDON: Absolutely, more than half a trillion dollars a year.

REP. BRALEY: Absolutely. And that's a big chunk of money. So taxpayers across the political spectrum have a strong interest in making sure those contracts, regardless of who is in the White House, are not being unduly influenced by political contributions. Isn't that true?

MR. GORDON: Absolutely.

REP. BRALEY: And if you look what goes on in this country in states where they elect judges, and the massive amount of money that's being spent to elect judges, and then you come into court in some of these states and you may be facing a judge that your opponent has given millions (of dollars) or hundreds of thousands of dollars to, and I think everyone should have a right to know what those donations are so that they can judge for themselves whether that's a fair and impartial decision maker. Isn't that the same way we're talking about here with this level of transparency?

MR. GORDON: I think that is the goal of the advocates, absolutely.

REP. BRALEY: And one of the reasons why this is so important is because the Supreme Court made clear in Citizens United that you can have opportunities to engage in greater forms of political speech but that transparency is a legitimate and noble purpose that everyone should embrace and apparently the speaker of the House himself has embraced. Isn't that true?

MR. GORDON: Indeed.

REP. BRALEY: And so --

REP. ISSA: The gentleman's time is expired.

REP. BRALEY: I yield back, and I appreciate the chairman's -- (inaudible) --

REP. ISSA: Thank you. In support of the gentleman's statements, I'd ask unanimous consent that the copy of the The Hill from May 10th of 2011 entitles -- entitled, unions spent $100 million in 2010 campaign to save Democratic majorities, and the Wall Street Journal -- entitled, public employee union is now campaign's biggest spender.” Without objection, so ordered.
We now recognize the gentlelady from North Carolina.

REPRESENTATIVE RENEE ELLMERS (R-NC): Thank you, Mr. Chairman.

Thank you for being here today, Mr. Gordon. I don't usually -- I usually maybe jot down a few things, but I have pages here. I keep running into conflict after conflict in your statement. So I'm going to start off with number one, one being you said that you believe that this will increase competition amongst businesses wanting to participate because of this up-front disclosure. Is that correct?

MR. GORDON: I wasn't actually speaking about the draft executive order. I said that in general, the hope of transparency is that transparency engenders more trust in the system, and therefore, increases competition. That's correct.

REP. ELLMERS: OK, but the Office of Advocacy in the Small Business Administration found that regulations cost small businesses 45 percent more than large businesses with -- in regard to this situation. Doesn't that show that we will have a decrease in the number of small businesses that will participate in this?

MR. GORDON: You're actually talking about one of our very highest priorities. We are working hard to meet the statutory goal of 23 percent of our federal contracting dollars going to small businesses, and the president has made clear meeting that goal is not enough. We need to exceed that goal, including for the subcategories, such as the small businesses owned by our service disabled vets.

REP. ELLMERS: On the point of the idea of the trust in the system by the American people, which is -- which is what you're saying that this process will provide, did you or did you not say that there is -- that these things will be handled internally so that the information will not come out as to which candidates or contributions are made? Is it -- is that information disclosed off right off the bat as soon as that contract is bid on, or is that held internally, as you stated?

MR. GORDON: Actually, I don't believe I spoke to that issue before, but it's been said earlier that the information about political contributions would be publicly available.

REP. ELLMERS: Publicly available immediately?

MR. GORDON: You're getting into a level of detail that I -- we're in a situation where we're talking about, or rather not talking about, a draft executive order. And I don't feel comfortable getting into the details --

REP. ELLMERS: OK.

MR. GORDON: -- the advantage of having our Executive Branch review of a draft so executive orders are improved.

REP. ELLMERS: So what is -- what is the difference then? What is the difference? Because we know that these things have to be disclosed after the contracts are obtained. This is information. The transparency is already there, so the difference I am seeing is the time they would have to disclose this information up front with their application, the contract process, rather than afterwards. So what is the change?

MR. GORDON: I am not an expert in campaign finance disclosures,
but my understanding is there is -- and it was said earlier in one of the colloquies -- more information being disclosed than is in fact disclosed today. I am not sure that the timing is actually any different at all. The timing, the information is -- some information is already available today.

REP. ELLMERS: Well, in closing I'd just like to say this. You know, the American people -- I know you have basically stated that this is about transparency for the American people and instilling trust in the system. I don't see how that happens with this. And I think that the American people are so wonderfully filled with common sense that they are going to come up with the same conclusion that I have right now, which is this is nothing more than a political move. I agree with my colleague, Mr. Chabot, that this is politics at its worst and this is nothing more than retaliation against the Supreme Court decision for Citizens United.

Thank you.

REP. ISSA: Would the gentlelady yield?

REP. ELLMERS: Yes, sir.

REP. ISSA: I thank the gentlelady.

Mr. Gordon, you've basically said you're not comfortable, you don't know, you're not an expert, repeatedly. Isn't that the best reason that your part of government should not be reviewing or doing this, that in fact the Federal Election Commission, which is charged with campaign disclosure and which is charged by Congress, should be the appropriate way to handle this?

Your choice is say yes, or suddenly become an expert and start answering our questions. You may pick.

MR. GORDON: There is one other possibility, Mr. Chairman, and that's that there are other people in the Executive Office of the President and across the executive branch who have knowledge and expertise that I do not.

REP. ISSA: Well, we asked for the person most knowledgeable in an agreement. When the OMB director wasn't available, they sent you.

We'll undoubtedly have to ask for some additional people who are more knowledgeable because it does appear as though -- the questions of the procurement, the only thing we've decided today is this is not necessary to do your job, your people will not look at it, but in fact we can see that the draft order circumvents current IRS laws that protect disclosure for nonprofits and other groups that would fall under this.

With that, I recognize the gentleman from Vermont, Mr. Welch.

REPRESENTATIVE PETER WELCH (D-VT): Thank you, Mr. Chairman.

You know, part of the issue for me, sitting here listening to this, is if it were -- if the things that are feared by opponents of this were in fact to be allowed, then I would share their concerns, so I just want to pin down, what is the effect of this.

Number one, any individuals or corporations that make contributions have to disclose them under current law. Isn't that right?

MR. GORDON: I do believe that there is extensive disclosure
already.

REP. WELCH: And the effect of this would be to put in one place, for easier review by the public, the contributions that were made, correct?

MR. GORDON: I think that is one of the ideas.

REP. WELCH: Right. So to the extent there is a reporting requirement, that burden is already part of what a contributor must deal with, right?

MR. GORDON: Yes.

REP. WELCH: And have you had input from some of -- also, if a union were to get a contract, a federal contract, they would be subject to this law just like a private corporation.

Is that correct?

MR. GORDON: You heard my colloquy earlier. I was rather surprised at reference to an exemption for unions.

REP. WELCH: Right. So, I mean, everybody is in the same boat here, basically.

MR. GORDON: This applies -- the draft -- if it were ever finalized, the draft would apply, as I understand it, to contractors whoever they are.

REP. WELCH: OK. And have you had reactions from corporations that are saying one thing or another about this requirement or this draft order?

MR. GORDON: I think the committees are going to have an opportunity the next panel to hear from many of those responses. I've seen several articles in the press.

REP. WELCH: In the drafting of this, let me ask you this: Do you anticipate any difficulties that contractors would have in complying with this?

MR. GORDON: I don't feel comfortable talking about a draft. The fact is that a draft executive order, as it goes through the process, may be changed substantially, may never be finalized. I can't predict that. What I can tell you is that disclosure requirements -- and there are many of them today -- can be challenging for companies, especially for small companies. We look for ways to minimize the burden on companies because we don't want disclosure requirements to deter them from participating in the procurement process.

REP. WELCH: The disclosure requirement here would be that if I were a small company, that I just simply have to list the contributions that I made in the individual's -- and where I made them, correct?

MR. GORDON: I understand your point, sir.

REP. WELCH: All right. I yield back.
Carolina, Mr. Gowdy.

REPRESENTATIVE TREY GOWDY (R-SC): Thank you, Mr. Chairman.

Mr. Gordon, I want to thank you for being here and also thank you for your service to our country.

Can you please describe for me what involvement you personally had in the drafting of this draft executive order?

MR. GORDON: Sir, I don't think it's appropriate for me or any executive branch official to disclose our internal deliberations.

REP. GOWDY: Are you relying on any specific testimonial privilege in reaching that conclusion?

MR. GORDON: I'm telling you, sir, that in my experience it is extremely important to protect the confidentiality of advice shared within the Executive Office of the President and across the executive branches.

REP. GOWDY: Well, rather than disclose for me the contents of any communication, can you answer whether or not there was communication -- not the content of it, but whether or not there was any between you and the president?

MR. GORDON: I understand, sir. My concern and our shared concern across the government -- and I should say this is true across administrations. There is nothing unique in this administration about this. We need to be able to have frank discussions internally and not share even the fact of who participated, outside.

REP. GOWDY: Do you believe the privilege belongs to you as the witness or to the president if we were to seek a waiver of that privilege?

MR. GORDON: Actually, sir, I didn't mention the word "privilege." I was talking about the need to protect the confidentiality of our process.

REP. GOWDY: Well, that's -- but that would be -- but that would be the only legal basis for not answering the question would be the executive privilege, correct?

MR. GORDON: Sir, I am not talking about privilege. I am talking about my belief about the importance of protecting the confidentiality of our internal deliberations.

REP. GOWDY: Well, let me ask you this. Would you agree with me -- let's assume arguendo that there were a privilege. Well, let's assume arguendo about the need for confidentiality in all regards. Would you agree with me that that confidentiality is waived by the presence of third parties who are not members of the executive branch? So let me ask you this: Were there any third parties who were not members of the executive branch present for any communications, thereby waiving any confidentiality?

MR. GORDON: Sir, you're talking in the area of privileges, and that's not where I am. But you're also asking me questions where, frankly, if you, or other members of the committee want to pursue that, it's something that I think we should pursue with the assistance of counsel.

REP. GOWDY: Can you tell me where the executive order originated?
MR. GORDON: No, sir. I don't think that it's appropriate for me to be disclosing that.

REP. GOWDY: And by your answer I take it that you do know the answer to it but you choose not to disclose the answer.

MR. GORDON: I don't think it's appropriate for me to be talking about any of the -- either the content or the process in the development of a draft document.

REP. GOWDY: How did you become aware of the executive order or the draft executive order?

MR. GORDON: Sir, it's another way of asking me to disclose either the content or the process. I am not comfortable disclosing that. Protecting the confidentiality of deliberations within the Executive Office of the President is nothing unique to this president. It is, in my opinion, extremely important, extremely important for us to be able to deliberate without having to disclose outside who we met with and what we discussed, and who participated.

REP. GOWDY: Does it strike you at all as being ironic to invoke confidentiality and not answering questions when we're having a hearing about transparency?

MR. GORDON: It does not, sir. I think that there are discussions, even about transparency and developing rules about transparency that we need to be able to have quietly and behind closed doors. That's true when we were working recently on a rule about conflicts of interest. You could say, well, surely if you're talking about conflicts of interest, you should be open.

In fact we needed to have quiet discussions internally.

REP. GOWDY: You would agree with me though -- let's assume for the sake of argument that your analysis is correct, and I in some regards do agree with you about the need for confidentiality. If there were third parties who were not part of the executive branch who were present for those conversations, then your need for confidentiality or your desire for it has already been breached. Correct?

MR. GORDON: Sir, I feel like the conversation -- the question feels too hypothetical. I would need to think about that afterwards and get back to you if you'd like.

REP. GOWDY: Well, let me ask you this. Are you aware of one scintilla of evidence, or study supporting the notion that contracting officials are swayed by undue influence of factors extraneous to the underlying merits of contracting decision-making, such as political activity, or political favoritism?

MR. GORDON: Am I aware of such allegations? Absolutely.

REP. GOWDY: Have any hearings been conducted in that regard?

MR. GORDON: I am not aware of a hearing by a congressional committee, but there have certainly been allegations. In fact, in GAO, in bid protests, we would -- you would get occasionally allegations that an award decision was swayed by an improper and in some cases a political consideration. Absolutely.

REP. GOWDY: Were there studies that were relied upon in the drafting of this draft executive order?
MR. GORDON: You’re asking a question about our internal deliberations. I am not comfortable disclosing our internal deliberations.

REP. GOWDY: All right, one final question -- I apologize, Mr. Chairman. The draft says that “failure to make a full disclosure in the certification” “could result in criminal prosecution.” That’s an interesting word to me, because if it could, then it could not. And my question is, who are you going to prosecute and who is going to make the decision.

MR. GORDON: I can answer the question in general terms. When we have requirements for disclosure, to give you an example, contractors today have to disclose whether they have a tax delinquency above $3,000 and over a certain period of time. If they fail to accurately disclose, they could be making themselves liable for prosecution. Absolutely.

REP. GOWDY: You would prosecute every case?

MR. GORDON: No.

REP. GOWDY: So an executive order can provide criminal liability for average citizens?

MR. GORDON: That, I don't know, sir, to be the case. But an executive order is frequently and in fact, in the area of procurement, is generally implemented full regulation. And if in fact a contractor takes action inconsistent, or that violates a regulation, that's a very serious matter. Absolutely.

REP. GOWDY: Thank you, Mr. Chairman.

REP. ISSA: The gentleman's time has expired.

I'd ask unanimous consent that the article, the daily briefing from March 31, 2011 be inserted into the record. It's entitled, "Former OSC Scott Bloch sentenced to one month in prison." Of course, he was the one who found Lorita Doan to have committed the Hatch Act.

Without objection, so ordered.

We now recognize the gentleman from Idaho, Mr. Labrador.

REPRESENTATIVE RAUL LABRADOR (R-ID): Thank you, Mr. Chairman, and it seems to me and I think the comment was already made by the good gentleman from South Carolina that in a transparency hearing this has been one of the most opaque hearings that I've ever been a participant in. And I am not really sure why you're here. Can you tell me why you are here?

Why exactly did the administration send you, because I have no idea what exactly you have aided this committee in doing today?

MR. GORDON: I was asked -- I was asked to appear in order to talk about the general issues of integrity, and in fact I think the issues of integrity are directly relevant to the subject matter of the hearing, and I think you've seen that -- although I can't talk about a draft presidential document before the president makes a decision -- I can certainly and I have talked at some length about the principles that are at issue.

REP. LABRADOR: OK, let's talk about those principles real quick.

You told us today that no award decision will be based on this
information that's being given, that you are going to base it on the selection criteria. Is that correct?

MR. GORDON: Award decisions can only be based according to the Competition Contracting Act upon the selection criteria in the solicitation.

REP. LABRADOR: All right. So, you're a law school professor. You were a law school professor, I was a law school student at one point so this is kind of fun for me. When you gave law school exams, there was -- at least in my law school I was not able to -- I never wrote down my name. Did your law school have that same requirement?

MR. GORDON: At GW, where I taught, yes. You used a number rather than a name.

REP. LABRADOR: And why is that?

MR. GORDON: Because you want to be sure that your judgment about the quality of the exam is not based on your knowledge of the individual but rather on the content of their answer.

REP. LABRADOR: And that's because there are certain students, right, that you don't like in your class, or that you have --

MR. GORDON: (Inaudible), sir.

REP. LABRADOR: OK. But some professors, hypothetically, there are some professors who don't like some of their students.

MR. GORDON: They also may like -- (inaudible) --

REP. LABRADOR: Or they may like somebody too much. Is that correct?

MR. GORDON: Yes.

REP. LABRADOR: OK. So in order for us to make -- for the professor to make an unbiased decision, isn't that correct?

MR. GORDON: Absolutely.

REP. LABRADOR: OK. So when under this proposed rule -- and let's just speak hypothetically about any requirement to do this -- would the contracting agent have the document in front of him or her that shows what those donations were?

MR. GORDON: It depends, sir. My understanding is that in some of the states that have pay-to-play laws, in fact the contracting officials do not have the information. All they know is that the company affirms that it made the disclosure. So if you had that on the federal level, all you would know is the company says, yes, we made all required disclosures.

The contracting officer would see nothing, nothing about who received the money, or how much.

REP. LABRADOR: OK, but somebody would in the administration see that document, correct?
MR. GORDON: Just as today, today there is already public information about contractors' disclosures. Absolutely.

REP. LABRADOR: Absolutely. And then let's follow up on that comment.

There's already public information, and you're telling us that you're an advocate of transparency. Correct?

MR. GORDON: I am an advocate of transparency in procurement.

REP. LABRADOR: And it increases public trust?

MR. GORDON: That is always our hope.

REP. LABRADOR: So what is unavailable at this time that you think we need to have more information of that is not currently found in the public documents out there?

MR. GORDON: As actually several members of the committee has pointed out, there is information about third-party donations, which is not publicly disclosed today.

REP. LABRADOR: OK. Now does that have anything to do with -- were you an advocate or did you have a problem with Citizens United?

MR. GORDON: Sir, I am a procurement person, not a campaign finance person.

REP. LABRADOR: No, but you must have an opinion. You're a law school professor.

MR. GORDON: I was a law school professor before I came into this job, before Citizens United was decided, and I was a professor of procurement law, sir.

REP. LABRADOR: And did you read the opinion of Citizens United?

MR. GORDON: I did not.

REP. LABRADOR: And you are aware that the administration has some problems with that opinion?

MR. GORDON: Yes, sir, I am aware of that.

REP. LABRADOR: OK. So let me just give you another hypothetical.

If I am the procurement officer -- you know, one of the concepts that I was taught in law school is to make sure that in drafting legislation you have to be really careful not to encourage future lawsuits when you're drafting legislation. Let's say you have a Republican, conservative, socially conservative administration, and we have one contractor who shows that he or she has donated thousands and thousands of dollars to the pro-life community. And you have another contractor who shows that he or she has donated thousands and thousands of dollars to a pro-choice or a pro-abortion community, and this Republican administration gives the contract to the person who
did the pro-life -- gave the money to a pro-life community. Don't you think there might be a cause for a lawsuit? Because you are an expert in procurement law. Would there be a cause for a lawsuit here?

MR. GORDON: You do have allegations. As I said, in my years -- in the 17 years I was at GAO, we had a small number, I am happy to say, but there were a few cases where there are allegations that political interference had caused the contract to go one way or the other. In my recollection, GAO found -- when it did an independent investigation, it never found a base for it to be true. But could a company have concern about that today, already? Absolutely.

REP. LABRADOR: OK, and let me ask you another hypothetical.

My time is up. Thank you very much.

MR. GORDON: Thank you, sir.

REP. GRAVES: Thank you. And this concludes the first part of our panel.

Mr. Gordon, we appreciate you being here for the first part of our hearing.

MR. GORDON: Thank you, sir.

REP. GRAVES: We appreciate you being here and appreciate your testimony, and we'll now seat the second panel.

MR. GORDON: Thank you.

REP. GRAVES: We'll now recognize our second panel of witnesses.

We have with us today Mr. Alan Chvotkin, senior vice president of Professional Services Council. We have Mr. Mark Renaud, who is a partner at the national law firm of Wiley and Rein. We have Ms. M.L. Mackey, who is the CEO of Beacon Interactive Systems and the vice chair of the small business division of the National Defense Industrial Association. Of all the businesses that raise this issue with our committee, Ms. Mackey was the only one that wanted to testify today. All the others cited fears of reprisal, so we thank you very much for coming, Ms. Mackey.

We also have Lawrie Hollingsworth who is the president of Asset Recovery Technologies, Inc., and is testifying on behalf of the U.S. Women’s Chamber of Commerce. We have Ms. Marion Blakey, who is the president and chief executive officer of the Aerospace Industries Association, and Mr. Brad Smith, who is a former Federal Election Commission Chairman and is professor of law at Capital University Law School.

Pursuant to the committee rules, we have to swear in all of the witnesses, all of you today, so if you will please stand and raise your right hand.

(Witnesses given oath.)

REP. GRAVES: Let the record reflect that our witnesses answered in the affirmative. Thank you very much. Please be seated.

In order for -- to allow time for discussion, I'd ask that you
Mr. Chvotkin.

MR. CHVOTKIN: Chairman Graves and Mr. Issa, members of the two committees, thank you for your invitation and the opportunity to testify at this joint hearing.

So there is no mistake about it, the Professional Services Council is opposed to the draft executive order in its current form, and we hope that it will not be issued.

Political contributions currently are not and should not be disclosed as part of the bidding and source selection process for federal contract awards. The draft executive order takes the ill-conceived approach of injecting that very information into the contracting process, forcing all bidders for federal contracts to disclose -- to collect and disclose that information as part of their bid.

Furthermore, only those competing for federal contracts are covered by this draft order. We are not aware of any action that has been taken elsewhere to cover other entities, or even the federal employees who are source decision makers for those federal procurements. Singing out federal contractors adds its own political tinge to the draft order.

The first paragraph of section one of the draft order spells out the policy foundation. We fully endorse those statements. They spell out a necessary and appropriate requirement that is, in our view, must be at the very heart of the federal contracting process. Today, no information about campaign contributions or other political activity is ever asked to be presented to a contracting officer or other source-selection official.

I doubt that any procurement official has done her own research into publicly available campaign contributions to aid them in their source selection. But if there is that concern, rather than insulating contracting officers from this tainted information, this draft order requires every bidder for a federal contract to affirmatively disclose that information and further provides that making the required disclosure is a condition of award.

For us, this is not a question of disclosure of political contributions, it is a question of the linkage to the federal procurement process.

The first paragraph of section two of the draft order requires a certification that disclosure of this information has been made and the FAR Council is given authority to establish the manner in which that certification is made. It's not clear whether the draft order also gives the FAR Council the flexibility to determine the nature of the certification required.

Certification has special importance in the federal procurement system.

Typically and ideally where they are required, they should be made subject to the certifier's best knowledge and belief, where the contractor is dependent on obtaining information from others in order to make the necessary certification.

Second, there should be some method for the bidder to be able to identify areas outside the contractor's control where the certification cannot be made, such as when a contributor refuses to provide the relevant information to a bidding entity.
Section two of the order also requires the disclosure of two types of contributions. The first is contributions to federal candidates. Like the discussion, while that is publicly available, today companies are not now required to collect this information. Once the contributions are made, it is the recipient of the contribution that makes the disclosure, not those companies. Now we also have concerns about the threshold that has been established because the bidder still has to collect the information in order to know whether the aggregate exceeds the $5,000 threshold in the executive order.

The second type of contribution of third -- is the third-party entities with the intent or reasonable expectation that those parties would use the contribution to make independent expenditures. None of these contributions have been discussed today and are now subject to reporting. Yet the draft order uses an undefined standard of reasonable expectation, whose interpretation may vary, thus undercutting the value of the information.

Further, by adding a requirement that the bidder ascertain from the contributor whether she was aware of the intent of the third party or had reasonable expectation of the likely use of the contribution, the bidding entity would have to further pry into the contributor's knowledge of the actions of the third-party recipient. While the reporting requirements are not duplicative of existing reporting requirements, they would still impose a heavy information-collection and compliance burden on contractors that does not exist today.

PSC is opposed to this draft order and recommends that it not be issued. This type of political information has been intentionally kept out of source selection to ensure a merit-based evaluation and award process, but the order would make its disclosure a condition of award. While the purpose of this order is to prevent pay-to-play contracting seen in some state procurement environments, the result will be to create the very pay-to-play environment on the federal level where none exists today.

Thank you for the opportunity to present these comments. I look forward to any questions you may have.

REP. ISSA: Thank you, Mr. Chvotkin.

Mr. Renaud?

MR. RENAUD: Thank you, Mr. Chairman and Mr. Ranking Member and the members of these two committees for inviting me to testify (sic). This is an important issue facing Congress, and I hope my comments prove useful. These views are solely my own and do not reflect the views of my firm or any of its clients.

In short, there is simply no connection between the political information sought by the president's draft executive order and the contracting process, no corruption to be remedied and no need to burden on core First Amendment rights of speech and association. Among other things, under current campaign finance law, employees and PACs of government contractors are subject to the same contribution limits as other contributors and their contributions are fully reported. As just mentioned, businesses currently are not required to collect or report their employees’ contributions and are advised against it. All contributions are voluntary.

The president's draft EO is styled as a pay-to-play law, laws that stop the giving of contributions for the receipt of contracts. But terminology along is insufficient. I have extensive experience working on compliance issues related to federal, state and local pay-to-play laws. Many of these laws suffer from the same infirmities as this draft EO.

Here there is no evidence of corruption from campaign activity in
the federal contracting process -- maybe in New Jersey and Connecticut in the past, but not here. The nexus then, between the contracting process and the contributions is created solely by this draft EO and its supporters because federal acquisition officers, as we've just heard today, are insulated from the campaign system, as they ought to be. The connection put forward pollutes the marketplace of ideas with this idea of corruption.

Because there is no nexus, the draft EO is unlike pay-to-play regimes that target elected officials and their political cronies who are thoroughly and unavoidably involved in the procurement process. The draft EO also reaches beyond contributions to independent expenditures, which no other pay-to-play regime does directly, save the rules of the Nebraska Lottery Commission.

The Supreme Court has reminded us frequently that independent expenditures do not cause corruption or the appearance of corruption. The Securities and Exchange Commission in its recent rigorous pay-to-play rulemaking fully disclaimed affecting independent expenditures. The draft EO, unlike any other pay-to-play system, also targets grassroots lobby in the form of electioneering communications.

Because of its inclusion in the contracting process -- that's the key: inclusion in the process -- the disclosures under the draft EO will have a negative effect on corporate and personal political activities of those covered. Because of uncertainty about how the information will be used, the contractors will rationally move to eliminate any activity that might make them less competitive. The disclosures also will politicize the employer-employee relationship with officers, especially for small businesses who may not be able to afford parallel compliance systems that many large corporations use, forcing subordinate officers to report political activity to their superiors and fear for the consequences.

The vagueness of the draft EO exacerbates this chilling effect. The FAR Council is tasked with providing guidance, but campaign finance is not its core competency, and it will be undertaking its task on an accelerated basis during the presidential election cycle. With vagueness, an ever larger group of persons will curtail an even wider set of activities.

In closing, I leave you with a sample of the burdens imposed. Contractors must report contributions made to third parties with the intention or reasonable expectation that the parties will use the contributions for independent expenditures or electioneering communications. This is a precursor to an unending number of disputes over contribution certifications. With hindsight, competing and losing bidders will be able to protest awards based upon donations, perhaps even trade association dues paid by the bidder but not reported, given the attention or reasonable expectation of the bidder at the time. And some think that there will be no chilling here.

Thank you. I am happy to answer any questions you might have.

REP. GRAVES: Thank you. Ms. Mackey?

MS. MACKEY: Good afternoon. I am speaking to you today as vice chair of the National Defense Industrial Association, Small Business Division Legislative Affairs Committee and as the CEO and co-founder of Beacon Interactive Systems.

NDIA membership is composed of over 90,000 individual members and 1,700 corporate members, over half of which are small businesses. Beacon Interactive Systems is a 17-year-old small business that for the past nine years has been a federal contractor, actively developing and delivering innovative technology and cost savings to the Department of Defense.
In terms of today’s discussion, the contribution that I can make is to describe the potential impact of this proposed executive order on small businesses that actively engage in the federal procurement process. The intent of ensuring that campaign contributions do not unduly influence the award of federal contracts is laudable. Unfortunately, the approach taken by this proposed order could have serious negative consequences on business, especially small business. The order presents five areas of significant concern.

First, it politicizes the federal procurement process, which by all accounts should be completely independent and transparent.

Secondly, it puts company management in the distasteful position of invading the privacy of their senior management by requiring disclosure of their personal political contribution.

Thirdly, this proposed executive order could have the effect of silencing the voice of small businesses who might, in an effort to mitigate potential contracting risks, no longer be comfortable making the grassroots contributions to advocate for the issues that are important to them.

Fourth, small business may decide that operating under the proposed order is not worth the effort of doing business with the federal government.

And fifth, this order will increase the reporting burden on small business and contracting officers, which in turn increases cost and further prolongs an already lengthy procurement process.

None of these consequences are acceptable. Let me expand on some of these challenges.

It is imperative in the realm of government contracting that small businesses be able to operate on a level playing field. In order for small businesses to compete effectively, proposals must be evaluated in an open and consistent manner with a laser focus on three main factors: technical merit, cost competitiveness and past performance history.

The proposed disclosures will now shine a spotlight on a company’s political contribution and of a lengthy, rigorous and often convoluted evaluation process. Small-business owners will be required to provide contracting officers with a detailed record of a company’s political expenditures. It is not hard to imagine that this information could, whether intentionally or not, be used to influence a procurement decision, precisely the outcome the proposed executive order seeks to prevent.

Even if there were no impropriety, a competing vendor who lost a procurement opportunity might argue and protest that political affiliations were a contributing factor in the decision-making.

Secondly, the proposed executive order requires me, as an example, to report individual contributions made by my company officers. As a small-business owner, I do not want to force my employees to disclose their political leaning. How employees allocate their campaign contributions should have no bearing on my hiring, compensation or promotion policies.

My employees should be concentrating on how to best execute their
job responsibilities, not worrying about whether their political choices are consistent with mine. This is a personal matter that does not need to be thrust into the workplace. In the same manner, personal political choices should not be unnecessarily thrust into contracting.

The third area of concern is that this proposed executive order could have a chilling effect on the political activities of small business and their management. It is difficult enough for small businesses to compete effectively and navigate the often complex waters of federal contracting. Politicizing the process will add one more possible obstacle to small-business participation.

From my personal experience as a small-business owner, I can tell you that I do not have the resources or the inclination to manage this unquantifiable risk. If my political contributions can negatively affect my ability to win a federal contract, I will not make them.

As you know, true small-business advocacy is funded at the grassroots level. If small businesses fear that their operations will be harmed by their political choices, they may remove themselves from the public discourse and halt future donations. This effectively limits free speech and may leave the small-business constituency without adequate representation.

Alternatively, some small businesses may feel coerced into supporting a party in power in order to bolster their chances of winning contracts. Either way, the political process is compromised.

And finally, there is likelihood that the proposed executive order could discourage small businesses from pursuing federal contracts. The intrusive disclosures of personal political contributions combined with the additional reporting requirements would add unproductive time and costs to the procurement process. If this pushes small businesses to adopt a "why bother" stance, our nation and particularly our men and women in uniform would be deprived of the innovations, agility and cost efficiencies that small business brings to the table.

Mr. Chairman, on behalf of the National Defense Industrial Association, I would like to thank you and the committee for your leadership on this important issue. We appreciate your efforts to keep the federal procurement process fair and independent as this is a critical component of successful small-business participation. I would be pleased to respond to any of your questions. Thank you.

REP. ISSA: Ms. Hollingsworth?

MS. HOLLINGSWORTH: Good afternoon, Chairman Graves, Ranking Member Cummings, Chairman Issa and members of the committee. I am here today as a member of the U.S. Women's Chamber of Commerce, representing our half a million members, three quarters of whom are American small-business owners and federal contractors.

I am Lawrie Hollingsworth, the president of Asset Recovery Technologies. Our engineering business, founded in 1994 and headquartered in Chicago with multiple offices nationwide, provides technical services for disaster recovery and disaster response to business and government offices impacted by fire, flood and catastrophe, and the recovery of technology assets to return the businesses and offices to operation. We were, by the way, proud responders to 9/11 and Hurricane Katrina.

As a small-business owner I appreciate the opportunity to provide this testimony and appreciate being here. Hopefully, I can impart some insights and perspectives from the small-business viewpoint on the issues of political spending, campaign finance, transparency and prevention of the politicization of the procurement process through unscrupulous pay-to-play tactics.
Our political system which is already too full of cash influence now faces a threat of undisclosed corporate political spending. With the landmark Citizens United case, we are already seeing a flood of corporate campaign spending, much of it which would not be publicly disclosed. At stake are millions of dollars in undisclosed donations that would be provided by large corporations, to trade associations and other not-for-profit organizations and entities that will use the money for independent campaign expenditures.

To get a grasp of the amount of money known to be used by the biggest firms to influence government, consider this: The top 10 federal contractors spent over 65 million (dollars) in 2010 for lobbying alone, and I believe I heard a figure of 100 million (dollars) tossed around today. That was an amount that is considerably more than the gross annual sales of probably most small businesses as the SBA defines them.

Small-business owners do not possess the resources, financial and otherwise, to compete with the enormous amount of capital, influence and lobbyist activity that large businesses employ to gain access to and win government contracts. And I’d like to especially note single-source government contracts.

In enacting a policy as is detailed in the draft of the president’s executive order, it is my hope that by being aware of the influence that government -- the awarding of government contracts will level the playing field for the small-business owner. Currently small-business owners have only limited resources to compete with large corporations in the awarding of government contracts. While many factors are at play, certainly campaign contributions and other politically-related acts of large corporations place the small business owner at a substantial disadvantage in the awarding of government contracts.

While I feel that the stated purpose of this policy, which is to cast light upon hidden interests and influences in the awarding of government contracts, is admirable and desirable, it is also desirable to impact small business with additional burdens as little as possible in the process. The small-business owners already face substantial obstacles and impediments to the point of entry for government contracting, so much so that many small businesses literally give up on the process.

Clearly, regulations and paperwork that do not result in increased opportunity for small business is undesirable. However, if a policy is enacted that brings greater transparency and integrity to our federal contracting and political fundraising processes in such a manner that small-business owners can respond without undue burden, I feel this is a worthy proposal deserving the support of small business.

The draft EO would allow the public to see the flow of money that is now hidden through third-party groups, cut out phony mechanisms and other political strategies that allow donors to hide their contributions. Rather than hurting small business by politicizing the process, it is very likely this much-needed transparency will depoliticize the process, help to pay-to-play schemes, and assure small businesses compete fairly. Public scrutiny will prevent contractors from using their taxpayer-funded deep pockets to secure an unwarranted advantage in a government procurement process.

I believe certain steps can be taken to improve the draft executive order, including raising the disclosure threshold and establishing a contract site. I assure you that the rules and regulations developed to support the proposal provide easy, clear steps for compliance.

In short, the -- (inaudible) -- rules will allow small business in many cases to be exempt from those allegedly onerous burden to comply with this act.
I appreciate your time here today, and I would be happy to answer any questions. Thank you.

REP. ISSA: Thank you.

Ms. Blakey?

MS. BLAKEY: Thank you, Chairman Issa, Congressman Cummings, Congresswoman Ellmers.

I am delighted to be here testifying today. My name is Marion Blakey, and I am the president and CEO of the Aerospace Industries Association. I am here representing the 345 member companies of the aerospace and defense industry and their 800,000 U.S. workers. We want to express our grave concerns about the provisions contained in the draft executive order regarding political contributions. Through our member companies, we represent thousands of small businesses across the nation and are particularly offering their voice today.

As written, the draft EO would, for the first time, introduce political contributions into the government contracting process. It's unclear how that information would be used by a contracting officer in the source-selection process. This creates a possibility that donations to a particular political party or candidate would be a consideration in evaluating contract proposals, whether specifically intended or not.

This also might have the unfortunate consequence of contributing to the belief among some that particular political contributions are a requirement for winning contracts. Political contributions should never be considered by any procurement officer when making a decision to either award or deny a contract to an entity.

In order to comply with this executive order, any company bidding on the federal contract would have to develop, implement and maintain a system to track and record all personal political contributions, to include retroactive contributions upon implementation. This will also result in an additional cost burden and, in most cases, will be reflected in higher contractor overhead rates. This is particularly challenging for small companies, such as those in the extensive aerospace supplier base, who don't have a large corporate infrastructure to meet the federal mandates.

Furthermore, the certification requirement places an undue risk on small companies in the event that any of their directors, officers, affiliates, subsidiaries would perhaps provide inaccurate or even incomplete information. If a company's submission for the contract contains a list of donors that's incomplete, even if the company tried fully to comply, they may find themselves in an expensive legal proceeding for violation of both Title 18 and Title 31 of the U.S. Code, for making false claims or statements.

Smaller companies that can't afford to defend themselves in these situations may instead opt to avoid government contracting altogether. The resulting impact is not necessarily restricted to small companies. Imposition of disclosure and certification requirement would also result in large and medium-sized commercial businesses opting out of selling to the federal government, potentially leaving the government without access to technologies and services necessary for its mission. This is a real liability in the aerospace and defense arena, where our defense industrial base has shrunk and there may be only one or two suppliers for a particular technology critical to protecting our fighting men and women.
Requirements already exist, as has been pointed out, to ensure transparency in political contributions. Those requirements apply evenly across the board for all individuals and organizations that make political contributions. AIA and its member companies support efforts to assure there is greater transparency and accountability in the federal contracting arena. However, we do not support actions which would introduce politics into that arena, increase the regulatory burden and risk for companies, or infringe upon the constitutional rights of a particular segment of corporate citizenry.

As I stated earlier, political contributions should never be considered by any procurement officer when making a decision to either award or deny a contract to any entity. Not levying this requirement on companies to report such contributions to the procurement officer is one important way to safeguard against the risk that any such consideration would ever be given.

Thank you very much.

REP. ISSA: And now for the only person who has the expertise our previous panel did not show, Mr. Smith.

MR. SMITH: Thank you, Mr. Chairman.

First, I will note that you -- and thank the ranking member as well, I'm sorry. I want to first -- I know you took some flak for having an unbalanced panel. Fred Wertheimer, who has left, and is undoubtedly out issuing a press release now has said that he's never seen such an unbalanced panel, and I just thought I'd mention that I've been on many of those in the last four years, usually as the minority witness. (Laughter.)

So, anyway, I appreciate you having this hearing today.

When we get to regulation speech, we find that we talk immediately about constitutional issues and in interpreting the Constitution, the Supreme Court, it's very clear, has granted quite a bit of leeway to regulating disclosure laws relating to campaigns. It has given the government quite a bit of leeway to regulate in the area of disclosure.

Mr. Gordon eventually conceded in the last panel transparency is not an unequivocal good in all circumstances at all times. And in fact, the Supreme Court has never blessed everything that's labeled as campaign finance disclosure, and the Supreme Court has never blessed this particular kind of disclosure that is proposed in this draft order.

Just to give a quick rundown for example, in Thomas v. Collins, the Supreme Court held that labor organizers don't have to identify themselves. They can do that anonymously.

In Tally v. California, the Supreme Court held that picketers and boycotters, such as people who might want to boycott, say, the Koch Brothers or Target don't have to identify themselves. They can do that anonymously.

In Watchtower Bible and Tract Society v. Village of Stratton, the Supreme Court said that people going door-to-door don't have to identify themselves, such as for example people working for -- what is it -- Organizing for America, they could do that anonymously.
In McIntyre v. Ohio Elections Commission, the Supreme Court held directly that individuals cannot be required to report small levels of political activity to the government, which is what this draft order would require to be done through an indirect process.

And of course, in NAACP versus Alabama, a series of other decisions, the Supreme Court held that membership organizations, at least those at a minimum that feared -- had legitimate fears of harassment and retaliation, could not be required to disclose their members to the government. So the government -- the Court has not, as a constitutional matter, generally approved disclosure.

Where it has approved disclosure, it has done so for political committees, or where there is no vagueness. That is, it has required a bright-line test. It goes without saying that we're not dealing with political committees here, so we're dealing with the question, is there a bright line.

I don't think this meets this test as set forth in Buckley v. Valeo and other cases. I won't go into the details other than to say that terms such as "intention" or "reasonable expectation" that funds you gave to somebody two years ago were going to be used for some type of political activity are, I think, very vague terms. Other terms that could be vague -- "officers." How far down does it go -- subsidiaries that are under control of a company, or other organizations under control of the company. And to even terms such as "independent expenditure" and "electioneering communications" are malleable. That is, they have meanings for election law specialists, but it's not at all clear that they have meanings for federal compliance officers, and I doubt that most officers working there would have expertise in that area or know the relevant judicial precedents.

Further, the government has to have a compelling government interest. What is that government interest here? We've heard repeatedly that, A, this information won't actually be used by the government in contracting; B, there is no problem of contracting corruption, and if there were, you should probably be showing some subpoenas and having some investigations of the current process.

We are told that it has been pointed out that most of this activity is already disclosed. What's not disclosed are contributions by contractors that would go to a third party that might spend them for political activity, but they are not designated for political activity. We've never seen something like that required and approved by the Court before.

This is what we call at the Center for Competitive Politics -- which I should note I also run -- we call this "junk disclosure." It basically just duplicates. It requires extra forms, extra reporting. It may create different standards for different people. And indeed, there is quite a bit of growing evidence that this does not increase public confidence in government. Studies by Nate Persily of Columbia; Kelli Lammie of the University of Pennsylvania; Jeffrey Milo of the University of Missouri have shown that excessive disclosure often in fact decrease public confidence in government.

Here you will have the presumption out there that, ah, here's disclosure and here -- you know, here's the contract, and people are going to draw the connection, ah, you have to give to get the contract. What is a contractor going to think six years from now? Somebody is not in business today, and he sits down to bid on his first government contract, and there he sees, who have you given your major political contributions to.

So I don't see this reducing or -- I mean, increasing public confidence in government, and I think we should recognize that the possibilities for retaliation that have made the Supreme Court hesitant are very real. We know the Nixon enemy's list. We know the K Street Project. We know that during the Clinton administration there was concern that trips on international business trips were being sold to key donors. And the answer to that was not to require
more disclosure, tell us all this stuff. It was to say you cannot consider that, you cannot put that in your application, and I think that's the way this should be dealt with here.

Thank you.

REP. ISSA: Thank you.

I recognize myself for five minutes.

Ms. Hollingsworth, are you concerned that the disclosure, nowhere in the draft executive order, would cause the unions of companies who are contractors to be disclosed, meaning that -- let's just assume for a moment that all contractors gave all their money to Republicans and all unions gave all their money to Democrats, are you concerned you'd be seeing only half of the contributions?

MS. HOLLINGSWORTH: Well, I just assume that's actually the case today.

REP. ISSA: Now of course both sides have some crossover, but I said assume for a moment, just because you obviously -- the truth is there is a leaning about 90 percent of union money goes to the president's party, but that's not disclosed. Does it concern you that that 90-10 ratio, historically, would not be disclosed? And more importantly, a specific independent activity of millions of dollars of union money in some independent way would not be disclosed, even if it's to further the contract of one of your large competitors, Boeing, or somebody of that sort? You know, because you talked about small business being impacted, isn't small business disproportionately not union? Large business is comparatively highly union and wouldn't that nondisclosure be of concern to you?

MS. HOLLINGSWORTH: Well, I think to answer the question somewhat similar to the gentleman before me from the OMB --

REP. ISSA: Evasively?

MS. HOLLINGSWORTH: Excuse me, sir?

REP. ISSA: Evasive, that's how the gentleman from OMB was. He could answer yes to the minority, and he could answer I am not qualified to answer pretty consistently to the majority. Are you going to be more specific? Do you believe there is a concern, because the draft executive order completely exempts unions using their collected dues, involuntarily collected, where that money goes. Do you have a concern? Please yes, or no.

MS. HOLLINGSWORTH: That sounds kind of like, have I quit beating my dog, yes or no. But to answer that, the answer is no, I don't.

REP. ISSA: OK, you're not concerned.

Mr. Smith, because you came out of -- among other things the time at the FEC, does the FEC operate, to the best of your knowledge, under any executive orders?

MR. SMITH: As an independent agency, generally the FEC is not bound by executive orders.

REP. ISSA: Right. So, if I understand correctly the Federal Election Commission was created by Congress under a law, and periodically new laws have been passed that set guidance and then empower the Federal Election Commission to set rulemaking after
those are passed, including even rules by the House and the Senate that you then act on. Isn't that true?

MR. SMITH: Yes, and a crucial point of that is that the FEC has a bipartisan makeup. That is, no one party can control that rulemaking process or the prosecutions under it. You always have to have --

REP. ISSA: So doesn't this executive order essentially circumvent that and create a new entity that is not bipartisan, that in fact is inherently partisan; it goes to one party's control, or another depending upon who wins the presidential election?

MR. SMITH: That could certainly be an appearance that many people would draw.

REP. ISSA: Well, I am not trying to be argumentative, but --

MR. SMITH: That's a yes.

REP. ISSA: Thank you.

Ms. Blakey, you heard my earlier question to Ms. Hollingsworth.

Are you concerned that in fact there would be a disparity between union and nonunion companies' ability to make undisclosed contributions because of their union activities, which are not covered in this?

MS. BLAKEY: I think our feeling is that you have to have real parity and real equity across all entities involved in the political process. Our big concern is there simply should be no link between the political contributions and the federal contracting process. That's making a false link, and it is something that really introduce politicization where it should never be.

REP. ISSA: Ms. Mackey, you've been very courageous. You are the only person that our side could find --

MS. MACKEY: Courageous, or ignorant? I am not sure which one it is. (Laughs)

REP. ISSA: Well, we'll take courageous --

MS. MACKEY: All right.

REP. ISSA: -- willing to come forward both on behalf of an association and in a personal capacity.

Do you feel -- and this is a little bit of a stretch -- that if something like this were going to be instituted, that it should be done by Congress, require full disclosure of all parties and be handled by the Federal Election Commission? In other words, would you -- would you be more comfortable if this process was done in a way in which it was deliberative, it was done nonpartisan, and, more importantly, you were not asked to ask your employees questions, but if there was a requirement to disclose, that requirement would be between the FEC and not your insisting on various people telling you and then having a penalty if you are unable to get the facts right?

MS. MACKEY: I don't think I have the civics expertise to know
who should be making those calls. What I can tell you is that it's very important that this discussion, this private discussion gets taken out of two places for me: one, my business; and, two, my business development with the contracting officer. I am happy with transparency. I am happy with everyone knowing where people are contributing. I just don't want it brought into the private conversations in my company or the business development relationship with my contracting officer.

REP. ISSA: Thank you. We may have a second round, but I recognize the gentleman form Maryland, Mr. Cummings.

REP. CUMMINGS: Let me -- I have sat here and I've listened to all of this, and one of the things that I say to my children is that I want to leave a better world than the one that I found. I want to leave a world with more opportunity. I want to leave a world where the rivers are not polluted. I want to leave a world that's safer and better. And as I listen to all of this, there is another thing I want to leave: a stronger democracy, a stronger democracy.

And, you know, it's easy to -- you know the public is in a position now, the general public is saying they want more disclosure. They want to know what's going on. You know why? Because they don't feel like they have a chance, period.

Ms. Hollingsworth, I heard what you said, and there are a lot of small business folk like you.

Mr. Smith, you talked about Mr. Wertheimer. It would have been nice to have him here. I'm sure you would agree with that. But his organization that stands up for all of those little people was shut out and unable to voice what they had to say in person.

And I think that if we are going to leave a better world, we've got to be very careful, because, I mean, I think about the elections and where we -- we've got situations where you can drop millions of dollars in a congressional district, millions (of dollars), and literally wipe out a representative, period -- period. And, you know, a lot of people will talk and say, well, the Supreme Court said in Citizens United we can do certain things. I think we've got to guard this democracy that we've got, because I think that at the rate we're going, there will come a time where we won't even know it. You will have a district that's owned by this corporation or that.

And it's interesting as I listen to all that has been said, on the one hand, I hear business saying, trust us, which is great. But on the other hand they say we don't trust the president. We don't trust our elected officials.

You know, I think that when it comes to disclosure, if it were up to me, I'd want every single thing, everything disclosed, everything, unions, everybody, because I want the public -- I want the public to know. I want them to have a clue of what's going on. And if they look at that information and they determine that you know, that -- if they believe that something is unfair, fine.

And I go back to what Mr. Gordon talked about. You know, there is a thing about trust and I think he makes a point, and people tried to, you know, make fun of him and ridicule him for saying it, but there is something called the speed of trust. Covey writes about it in his book, "The Speed of Trust." It's one of the greatest books ever written.

And what he says is that when you can establish the mechanisms
for trust and if there is trust, then people are more likely -- the relationships are better. And it does make sense that there would be more competition if people trust the process. If they feel like everything is stacked against them before they even get in the game, I mean that just -- that goes against everything, and so why bother?

But the interesting thing is that, you know, we're talking about an executive order, and I can understand the chairman's position. We're talking about a draft document, and, you know, I think that some kind of way, we've got to move more towards disclosure than moving away from it, because the playing field that we're playing on now is a playing field that says less and less disclosure, and I don't think that's what America is all about. I really don't. I don't think that our Founding Fathers would, about that.

And so, with that, Mr. Chairman, my time is up and I yield back.

REP. ISSA: Thank you.

Mrs. Ellmers.

REP. ELLMERS: Thank you, Mr. Chairman.

My first question is for Ms. Mackey.

Ms. Mackey, I understand that you are an SBIR success story, and SBIR is near and dear to my heart and I have legislation pending right now for us to reenact it and get it in place for another three years.

So I would just like you to elaborate on that -- on that process, and then I know in your opening statement you did speak to the dangers that you feel exist with this draft EO. And I would just like for you to reiterate that as well.

MS. MACKEY: OK. So, first, I am very pleased to tell you that we are a SBIR success story with some level of effort. We started planning with the SBIR program and participating in 2002. It has taken us nine years. I can tell you that the technology that we were delivering to the private sector was expanded on the innovation and is now rolling out to every ship in U.S. Fleet Forces Command. So every maintainer will look at our application to understand what they should be maintaining to keep our ships ready for mission readiness. So it's a very good thing. It's a very proud experience for me. It's a great thing for my company that's growing and expanding. It's good for my company, the jobs in my company and my employees.

And when I think about the risk that this kind of -- the approach taken by this executive order could impact on stories like mine, it's that -- as intimately aware with the SBIR program that you are, it takes some time. There are spits and starts when you're developing technology and innovation, and it doesn't transition directly into a product.

There's some places and there are times that maybe when we were a little -- ah, is this going to happen, is this going to work, that if I had seen this kind of an onerous reporting and if I had seen myself exposed legally for the kind of HR challenges that I get by asking my employees -- you should see the checklist I have when I recruit people of what I can ask, what I can't ask and how I tell my employees to interview people. I could also tell you that in the small -- well, in the business community in general but certainly for small businesses, it's more painful as we don't have a lot of corporate resources.

When you have to let someone go for poor performance, no one
wants to hear they are being let go for poor performance, and they often want to find another reason. And if they don’t find another job, they often want to be punitive on who let them go. I really don’t want to introduce politics into that equation.

So as far as your question about SBIR successes and will we, as a country be getting back the investment in R, D, T and E that we need, have to go to our federal government, I think you risk of encouraging people to back away and step out, because it’s too much to overcome.

I hope I have answered your question.

MS. ELLMERS: No, actually you have, and I appreciate that. My thought also is that that would deter businesses from moving forward when we -- when we know that it’s a lengthy process. You’re going to have your ups and downs. And when faced with something like this, that would, you know, deters someone, and that is my feeling on it.

Thank you very much. Yes, please.

MS. MACKEY: I don’t know that it would deter people to participate, but in that place where you choose now the investment that’s been made, do I want to further look to giving that to the federal government, or should I step out to private sector, and that’s a juncture that I don’t want our tax dollars -- I mean, I think it should go back to the war fighters, especially in the DOD SBIR program. Thank you.

REP. ELLMERS: Thank you. Thank you.

Ms. Hollingsworth, I just wanted to clarify. My understanding from your opening statement is that you are in favor of this draft executive order. Is that correct?

MS. HOLLINGSWORTH: That’s correct, Congresswoman.

REP. ELLMERS: But that you feel that small businesses should be exempt from it?

MS. HOLLINGSWORTH: Well, it seems to me this afternoon I have heard small business being used as a sympathy card, being played quite a bit. And as a matter of fact I think certain size small businesses -- and the definition of small business is a very wide definition, depending on industry and so forth, I think the very straightforward remedy is to raise the threshold of the contribution, whether it’s 5,000 dollars for contribution, or the size of the contractor.

So many of the concerns that Ms. Mackey and other people are speaking to you today, I simply answered by exempting small business up to a certain point from falling under this act.

REP. ELLMERS: So at what point would you consider a business that this should be adhered to? Where would you draw the line? So you obviously do not see this as a deterrent for government contracts, or working with the federal government. You just feel that it may be a little more costly for a small business. Is that -- I mean at what point would you consider a business -- this executive order would apply to them?

MS. HOLLINGSWORTH: To answer the first part of your question, Congresswoman, I do agree with this potential draft EO. In terms of threshold, at what point should it apply to a small business, I would defer that to wiser and, you know, older heads than my own.
Certainly, people familiar with the government contract process know the size of businesses that might fall under certain categories, so I don't have a concrete opinion for you, but I do believe that we can kind of take out the tears aspect of this for small business by some simple thresholds similar to the thresholds that are in place for small business in other arenas.

REP. ELLMERS: OK, one last question on that -- so along that line, do you agree that there is already transparency; it's just an issue of when these things are divulged beforehand in the contract process rather than afterwards as a business reporting contributions, federal contributions?

MS. HOLLINGSWORTH: Well, again, I am an engineer, not a constitutional lawyer. We've heard that excuse many times today, so I can't pretend to be a complete expert. From what I understand so far is the disclosure and transparency is incomplete and lacking. I don't feel it's complete yet, and I do feel the parameters that have been discussed in this draft EU -- I'm sorry, EO, would shed additional sunlight, and I do think that is needed.

REP. ELLMERS: Because it would be beforehand rather than after an award of a contract?

MS. HOLLINGSWORTH: I think in general that the public could look at what influences are coming to bear, particularly in single-source contracting, which is something that has been jumped over constantly here today. That's contractors that receive a -- you know, they are the single source, there is no competition, and I think the public and small business has the right to know just why these single-source contracts are being let the way they are. And obviously current disclosure rules are not giving us enough sunshine on that.

REP. ELLMERS: Mr. Chairman, will you indulge me for just --

REP. ISSA: One minute.

REP. ELLMERS: OK, wonderful.

Mr. Smith, I have a question for you. My understanding is that the order requires information to be retroactive for the past two years. Would you -- could this be -- I mean, could this information not be used politically in a campaign? For instance, we have the 2012 election coming up. Could this not -- information not be used against those running for office as to who is contributing to their campaigns and possible affiliations?

MR. SMITH: I think of course it could. And to some extent, that's what I meant when I said earlier that we call this "junk disclosure." That is, in some ways it's more misleading to the public than leading. They are going to say, you know, here is the contract, here is the donation. They are going to assume a connection there. And that leads us to what seems to be the purpose here, and we can't have this discussion today without -- I mean, the question to answer -- is this going to politicize the process, right?

It already has politicized the process. Look at this hearing. Look at what's being said. Look at what people are doing.

And why would the American people think that the purpose of this is to maybe chill speech, or to get people to give to the right side? They might think that because rightly or wrongly, correctly or incorrectly, the president of the United States has been out repeatedly saying we need to do something about all this secret hidden money that's going to come out after Citizens United. And he has specifically identified groups that he wants to silence: big oil, banks, he calls them.
We might think that because last Congress on a straight party-line vote with two exceptions in this chamber. This chamber passed and the other chamber did not pass the DISCLOSE bill. We might think that because then when the FEC attempted to issue new regulations complying with Citizens United, the three Democratic commissioners insisted that the regulations go further and include the kind of disclosure that's being asked for here. People might think that because on a straight party-line vote the SEC recently put new restrictions on reporting.

And so is it true or not? I won't try to answer that. I'll leave that for others to say that this is politically motivated. But people certainly might think it's politically motivated, and I think there is a pretty good trail that would lead them to that conclusion.

REP. ISSA: Ms. Velazquez?

REP. VELAZQUEZ: I'm sorry that I wasn't here for your testimony, but I was in a full committee markup on financial services and I had an amendment.

REP. ISSA: It was brilliant.

REP. VELAZQUEZ: Thank you. Yeah, I can imagine.

But I would like to ask some questions if I may.

Ms. Hollingsworth, as a small-business owner do you have concerns that undisclosed political spending could disadvantage your firm in the contracting marketplace?

MS. HOLLINGSWORTH: I am very concerned about that, Congresswoman.

REP. VELAZQUEZ: The executive order will require your business to report the political spending of yourself as the owner and also that of your officers. Do you have any concerns that asking colleagues about their political spending could complicate your business relationships?

MS. HOLLINGSWORTH: Congresswoman, I think one remedy to that would be to use either a third party or, in the case of a very small business, the bookkeeper, accountant, who is already privy to such things as compensation, you know, perhaps special medical issues, et cetera, insurance. I will designate a person with confidence to as a third-party entity, if you will, to take that information, pass it along without it ever coming to my eye. I would think that small even much larger but still small-businesses like mine could easily implement something like that.

REP. VELAZQUEZ: Ms. Blakey, if a contractor spends millions of dollars to influence their elections in a congressional district where it also conducts a billion-dollar defense contract with taxpayer funds, doesn't the public have a right to know?

MS. BLAKEY: The contract, of course, does disclose all contributions, so that information is out there in front of the public. At any point people can access it. Our concern is we are making a link between the procurement process and political contributions. There is an inference there that really, we believe, is fundamentally wrong. And we also look at the fact that we are very supportive of the administration in terms of strengthening the acquisition workforce, trying to improve the acquisition process. But at the same time, you put this information in front of
contracting officers over and over and over again in the procurement process, and it's looking to make a connection that should never be there.

REP. VELAZQUEZ: But my question is, taxpayers, do they have a right to know if taxpayers money that is given -- is awarded through federal contracting?

MS. BLAKEY: Taxpayers can go any time they choose to and go to the information that is publicly available, and they can choose to look up anything they want.

REP. VELAZQUEZ: Is that a yes, or no answer? That the public should know and should have a right to know --

MS. BLAKEY: The public can know and does know.

REP. VELAZQUEZ: -- taxpayers?

MS. BLAKEY: Yes, the public can know and should know.

REP. VELAZQUEZ: Thank you.

Mr. Smith, you have noted that this executive order will chill free speech. Could you explain how this order will legally limit the amount of contributions that federal contractors could give to any political campaign or organization of any kind?

MR. SMITH: Sure. This illustrates one of the problems here, one of the issues of vagueness and chilling. For example, right now, federal contractors do not make any contributions to political campaigns. It is illegal for them to do that. If they are doing it, they are violating the law and they can be prosecuted.

What we're talking about here is federal contractors who might give money to a trade association, which then might spend money on independent expenditures down the road. And we're going to say that that should be held responsible, and the company has to report that kind of information.

Now, how will that chill companies? Well --

REP. VELAZQUEZ: But there is nothing that legally will prohibit them from writing contributions to --

MR. SMITH: That's right, but the question you asked then was, how will it chill them from doing that. And it will chill them because if people feel they are likely to be retaliated against -- that is, government has tremendous power -- somebody who is bidding on a contract --

REP. VELAZQUEZ: You're changing my question. My question is, if legally they cannot.

MR. SMITH: My answer is legally they already cannot make contributions, which was your question. And legally they will still be able to do independent spending through others, but your question was, how will it chill them, which is different from what they can legally do.

REP. VELAZQUEZ: Mr. Smith, I don't think you understand my
question. How would it limit the freedom of an organization to give how much it wants to whom it wants when it wants? It wouldn't, would it, legally?

MR. SMITH: Legally the answer is no.

REP. ISSA: I thank the gentlelady. I thank the gentleman.

You've all been very generous with your time. I realize the hour is late.

What I would ask, since we had so many members who had questions and had other obligations, would each of you be willing to answer additional questions put by both sides?

OK.

MR. : If I may say so, I will be leaving the country in two days for a month. I would be delighted to answer questions--

REP. ISSA: So you're fleeing the country to get away from our questions?

(Laughter.)

MR. : I am fleeing the country and I would be delighted to answer questions if I can have an extension.

REP. ISSA: You know, this committee has a long history working on people fleeing the country not to answer our questions. (Laughter.) But we will try to get the questions to you immediately, but I appreciate that. We're going to leave the record open for seven days. If we see a need for an extension, the ranking member and I can extend, but I think it's important.

Your testimony was very good and the questions were good, but I don't think we got enough of them. So with your indulgence we'll do that. And with that, we stand adjourned.

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END

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