Allegations of Misconduct at the General Services Administration: A Closer Look

Preliminary Staff Report
U.S. House of Representatives
110th Congress
Committee on Oversight and Government Reform

Tom Davis, Ranking Member
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On March 28, 2007 at 10:00 a.m., the Committee will hold a hearing entitled "Allegations of Misconduct at the General Services Administration." This hearing is part of an investigation Chairman Waxman initiated in response to a January 19, 2007 front page story in the *Washington Post*.[1] The newspaper published allegations concerning an internal investigation by the General Services Administration (GSA) Inspector General into a contemplated arrangement between GSA and a well-recognized firm specializing in diversity and small business issues. In addition Doan is said to have intervened in the negotiation process for the exercise of an option under a Federal Supply Schedule contract held by Sun Microsystems, intervened in an on-going suspension and debarment process, as well as engaging in partisan campaign activities on federal property. Our staff has carefully analyzed the facts and circumstances surrounding these charges. This staff report provides a closer look at the allegations raised and evidence submitted to date against the Administrator of General Services.[2]

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[1] Scott Higham and Robert O'Harrow, Jr., "GSA Chief Scrutinized For Deal With Friend," WASH. POST, Jan. 19, 2007, at A1 [hereinafter Higham and O'Harrow, Jan. 19, 2007].

[2] The Minority has raised concerns with the Majority about being excluded from discussions with the GSA Office of Inspector General (IG). Questions posed to witnesses reflect information supplied by the Office of Inspector General that never was supplied to the Minority. As auditors from the IG participated in the Sun Microsystems contract renegotiation among other matters under investigation by the Committee, their testimony is necessary. The prepared statement of Inspector General Miller dated March 28, 2007, delivered to the Committee on March 26, contains information not previously produced to the Minority. The Inspector General's statement also reveals that an official referral to the Office of Special Counsel was made by its office regarding the Hatch Act allegations. The IG states that a copy of this referral was provided to the Committee. Such referral was not produced to the Minority staff.

The Inspector General's statement reveals what might be an unofficial partnership between his office and the Majority staff. One example, at page 13 of his statement is telling: "In describing what happened, GSA's General Counsel at the time, Alan Swendiman, told this Committee he repeatedly advised that the contract be terminated, but was unable to convince Administrator Doan to do so." What does Miller know about what Swendiman told the Committee?

In any event, Swendiman did not say this. Swendiman met with Committee staff, on February 2, 2007, and stated he prepared a memorandum to John Phelps, Doan's Chief of Staff, advising that a termination for convenience be transmitted to Diversity Best Practices to avoid any misperceptions this arrangement was to be carried out. Swendiman had no discussions with the Administrator about terminating the contemplated arrangement with Diversity Best Practices. The only communication between Swendiman and the Administrator on this topic was in the form of Swendiman's memorandum (GSA 01-07-0014). In an interview with Minority staff on March 14,

I. Executive Summary

The massive expenditure of Committee resources throughout this inquiry -- 14,086 pages of documents from the General Services Administration (GSA) and 14 so-called voluntary transcribed "interviews" of government employees from as far away as Boston and Denver -- has failed to establish that the Administrator of General Services engaged in any form of misconduct. When she was told that GSA could not enter a sole source contract for a report on improving diversity practices at GSA, she agreed. GSA never entered a contract for the report.

Similarly, there is no evidence to support the allegation that the Administrator intervened in the suspension and debarment process. The Administrator merely contacted her Chief of Staff and asked that the matter, which could have resulted in a government-wide prohibition against awarding any contracts to most of the major accounting firms be suspended until she could be a briefed. Such an inquiry was ordinary and appropriate. The agency's suspension and debarment official stated, "At no time did I receive any direct or indirect instruction or comment from the Office of the Administrator." Further, he stated, ". . . I processed and concluded the matter as directed by the factual record in accordance with the prescribed process."

There is simply no evidence to support the allegation that the Administrator acted improperly with respect to the Sun Microsystems contract option negotiations. At no time during the negotiation process did the Administrator speak to any of the contracting officers nor did she pressure any of the contracting officers to exercise the Sun option.

2007, the Administrator said, as a matter of practice, she takes all telephone calls from three people at the agency, her Chief of Staff, the Inspector General, and the General Counsel. Accordingly, had Swendiman called Doan, she would have spoken with him. Both Doan and Swendiman have said there were no conversations, just the memo.

On the morning of March 27, 2007, less than a day before the scheduled hearing, the Majority released a memorandum entitled "Supplemental Information Regarding Full Committee Hearing on the General Services Administration." In this document, two interviews are cited, that with Robert Overbey on March 14, 2007 (footnote 5) and Carolyn Alston on March 22, 2007 (footnote 32). Instances like these demonstrate that the Minority has not had an opportunity to participate meaningfully in all phases of this investigation.

Further evidence that the Majority and Inspector General are working in concert appears at page 22 of his testimony where he notes that one of the contracting officers in "has gone on the record that he was not stressed by the considerations of the audit findings or litigation potential during the Sun negotiations." The Inspector General quotes from the Committee's confidential interview transcripts. These are not public.

As far as the alleged "partisan campaign activities" are concerned, some witnesses recalled that on January 26, 2007 at the conclusion of a staff luncheon attended by GSA political appointees, the Administrator made an offhand comment about "helping our candidates." It is important to note the date of this meeting; January 26 -- a bit late for a campaign push. **And when concerns were raised that the conversation may have been straying into inappropriate territory, that discussion stopped.**

There is absolutely no evidence to support the additional allegations that follow-up discussion centered on efforts to exclude Speaker Pelosi from the ceremonial opening of a federal building in her congressional district. Nor did we find any evidence that any GSA officials improperly considered the prospect of inviting Senator Martinez to the opening of a federal courthouse in Miami, Florida.

The Administrator and GSA Inspector General Brian D. Miller have a well-chronicled contentious relationship. They have tangled over the performance of contract auditing, budgetary matters, and have had various unpleasant public exchanges. Miller's background as a Justice Department official raises an important consideration – should Inspectors General be drawn from the auditing discipline? Shouldn't they be specialists in the areas of accounting and financial analysis? Chairman Waxman thinks so. In a January 2005 staff report, the then Ranking Member's staff called for Inspector Generals with prior audit experience. Prior to assuming the post of GSA Inspector General, Miller predominantly worked as a government lawyer. Miller possesses no accounting or auditing experience.

The Administrator has raised concerns that the details of private intra-agency meetings and investigations are being leaked by someone in Mr. Miller's office to the newspapers as part of a plan to publicly harm her, and to disrupt her efforts in leading GSA. The Administrator and Mr. Miller have also quarreled publicly over budget considerations.

Finally, the Majority has repeatedly exercised its subpoena authority to coerce witnesses into transcribed interviews. Witnesses repeatedly told of being offered a subpoena to induce them to the "voluntary" interview. With an interview instead of a deposition (under subpoena or not), the witnesses (and the Minority) are not entitled to notice of the deposition and are not entitled to review and request corrections to the transcripts, which also, unlike a deposition transcript, could be released at any time.

The Minority was not consulted about this use of the subpoena authority -- we found out about it at the interviews. This is not the kind of consultation about the use of that authority that was promised at the Committee organizational meeting. Minority staff was also not consulted about scheduling of interviews -- the Majority simply announced when they had scheduled them. In at least one case, the interview was scheduled late in the afternoon for the next day.

Finally, it was clear from the interviews that the Majority had documents it had not shared with the Minority. Again, this is not cooperation.

Given the evidence, it is important that the Committee on Oversight and Government Reform hold a hearing -- to clear the air and set the record straight.

II. Findings

- **Re Diversity Best Practices Contract:** The Majority has failed to establish that the Administrator engaged in any kind of elaborate scheme to enrich an acquaintance in her efforts to acquire a study regarding GSA's use of small businesses, particularly those owned by minorities and women. The evidence supports the conclusion that the Administrator was embarrassed and concerned that GSA received an "F" from the Small Business Administration regarding its use of disadvantaged small businesses, and the Administrator sought to engage the services of the well-known diversity consultant, Diversity Best Practices. The Administrator erroneously believed she had the authority to acquire these services on an expedited sole-source basis. When she discovered she did not have that authority, the arrangement was called off. No contract was awarded. No work was ever performed. No money changed hands.

- **Re Sun Microsystems Contract:** There is no evidence the Administrator acted improperly with respect to the Sun Microsystems contract option negotiations. At no time during the negotiation process did the Administrator speak to any of the contracting officers, nor did she pressure any of the contracting officers to exercise the Sun option.

- **Re Suspension and Debarment Process Interference:** There is no evidence that the Administrator intervened in the suspension and debarment process. The GSA debarment official had initiated preliminary proceedings against the major accounting firms (KPMG, PriceWaterhouseCooper, BearingPoint, Ernst & Young, and Booz Allen Hamilton). The Administrator merely contacted her Chief of Staff and asked that the matter be suspended until she could be briefed. In a written statement prepared by the debarment official and produced to the Committee, he stated, "At no time did I receive any direct or indirect instruction or comment from the Office of the Administrator." Further, he stated, "I processed and concluded the matter as directed by the factual record in accordance with the prescribed process."

- **Re Hatch Act Allegation:** On January 26, 2007 at the conclusion of a staff luncheon attended by GSA political appointees, several

witnesses reported that the Administrator made an offhand comment about "helping our candidates," an alleged violation of the Hatch Act. **Any concerns that this was inappropriate were addressed immediately, and the discussion was terminated.** There is no evidence to support the additional allegations that follow-up discussions centered on efforts to exclude Speaker Pelosi from the ceremonial opening of a federal building in her congressional district. No evidence was found that any GSA officials improperly considered the prospect of inviting Senator Martinez to the opening of a federal courthouse in Miami, Florida.

III. Background

A. The Investigation

In the January 19, 2007 *Post* story, the newspaper presented allegations that Administrator Lurita A. Doan sidestepped federal laws and regulations to give a so-called "no-bid" contract to a longtime friend.[3] *On the same day*, Chairman Waxman wrote to Doan asking for more information on matters contained in the newspaper article.[4] In addition to initiating an examination into the diversity consulting arrangement, Chairman Waxman asked for information and documents concerning the Administrator's interactions with the Office of Inspector General, and the Administrator's involvement in the debarment process.

On March 6, 2007, Chairman Waxman again wrote to the Administrator.[5] In this letter, the Chairman outlined some of the evidence the Committee had received, and raised new concerns. The Chairman advised Doan that the Committee was looking into alleged Hatch Act violations, as well as allegations that the Administrator improperly interfered with the contract option process with a technology provider, Sun Microsystems.

[3] Higham and O'Harrow, Jan. 19, 2007.

[4] Letter from Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight and Gov't Reform [hereinafter Gov't Reform Comm.] to Lurita A. Doan, Administrator, U.S. General Services Administration [hereinafter GSA], (Jan. 19, 2007) [hereinafter Waxman Letter, Jan. 19, 2007].

[5] Letter from Rep. Henry A. Waxman, Chairman, Gov't Reform Comm. to Lurita A. Doan, Administrator of GSA, (Mar. 6, 2007) [hereinafter Waxman Letter, Mar. 6, 2007].

In the course of investigating these matters, the Committee received and reviewed 14,086 pages of documents from GSA. Without consultation[6] from the Minority staff or the Ranking Member, Chairman Waxman's staff, largely through the threat of subpoena, conducted 14 transcribed "interviews,"[7] securing the "voluntary" attendance of current

[6] Minority staff was invited to attend the transcribed interviews, but was, in some instances, restricted from examining the witnesses. Brief inquiries were sometimes permitted, but it was not uncommon for the Majority staff to protest and attempt to terminate the Minority counsel's questioning. Although Rule 22 of the Rules of the Gov't Reform Comm. [hereinafter Comm. Rules] provides that "the chairman and ranking member shall be provided with a copy of the transcripts of the deposition at the same time," this did not occur. Minority staff was required to obtain all interview and deposition transcripts through the Majority clerk. Minority staff was not provided electronic copies of the transcripts until several days after the delivery of the hard copy transcripts.

[7] Transcribed Interview by Gov't Reform Comm. Staff with Matthew R. Sisk, GSA, Region 1 (Boston), in Wash., D.C. (Mar. 12, 2007) [hereinafter Sisk Interview]; Transcribed Interview by Gov't Reform Comm. Staff with Dennis R. Smith, GSA, Region 1 (Boston), in Wash. D.C. (Mar. 12, 2007) [hereinafter Smith Interview]; Transcribed Interview by Gov't Reform Comm. Staff with Michael Berkholtz, GSA, in Wash. D.C. (Mar. 12, 2007) [hereinafter Berkholtz Interview]; Transcribed Interview by Gov't Reform Comm. Staff with Christiane Monica, GSA, in Wash. D.C. (Mar. 13, 2007) [hereinafter Monica Interview]; Transcribed Interview by Gov't Reform Comm. Staff with Justin Busch, GSA, in Wash. D.C. (Mar. 13, 2007) [hereinafter Busch Interview]; Transcribed Interview by Gov't Reform Comm. Staff with Jennifer Millikin, GSA, in Wash. D.C. (Mar. 13, 2007) [hereinafter Millikin Interview]; Transcribed Interview by Gov't Reform Comm. Staff with Edie Fraser, The Public Affairs Group, Inc., in Wash. D.C. (Mar. 14, 2007) [hereinafter Fraser Interview]; Deposition Pursuant to Subpoena by Gov't Reform Comm. Staff with Emily Murphy, former Chief Acquisition Officer, GSA, in Wash. D.C. (Mar. 15, 2007) [hereinafter Murphy Deposition]; Transcribed Interview by Gov't Reform Comm. Staff with George Barclay, GSA, in Wash. D.C. (Mar. 15, 2007) [hereinafter Barclay Interview]; Transcribed Interview by Gov't Reform Comm. Staff with Herman Caldwell, Jr., GSA, in Wash. D.C. (Mar. 15, 2007) [hereinafter Caldwell Interview]; Transcribed Interview by Gov't Reform Comm. Staff with Michael Butterfield, GSA, in Wash. D.C. (Mar. 16, 2007) [hereinafter Butterfield Interview]; Transcribed Interview by Gov't Reform Comm. Staff with Shana Budd, GSA, Region 8 (Denver), in Wash. D.C. (Mar. 16, 2007) [hereinafter Budd Interview]; Transcribed Interview by Gov't Reform Comm. Staff with Donna Hughes, GSA, in Wash. D.C. (Mar. 19, 2007) [hereinafter Hughes Interview]; and Transcribed Interview by Gov't Reform Comm. Staff with James Williams, Commissioner, Federal Acquisition Service, GSA, in Wash. D.C. (Mar. 26, 2007) [hereinafter Williams Interview, Mar. 26, 2007].

and former GSA officials from as far away as Boston and Denver.[8] Two GSA officials flew from Boston to Washington, D.C., for "interviews" regarding the Hatch Act allegations. The Boston officials were questioned for as little as 30 minutes in one instance[9] and 40 minutes in another.[10] No reason was supplied why these "interviews" could not take place telephonically. Those "interviewed" were not permitted to be joined by agency counsel at the interview. Although the Majority claimed to have informed witnesses that personal counsel could be present, four witnesses stated for the record they were not made aware they were permitted to retain personal counsel for these transcribed interviews.[11] One "interviewee" attended with personal counsel.[12]

There is no meaningful distinction between the transcribed "interviews" and formal depositions. Although the "interviewees" were not administered an oath and consequently not exposed to a potential perjury prosecution, they were subject to the false statements statute, 18 U.S.C. section 1001, which makes it a crime to provide false statements to legislative branch officials.

B. The Agency

Congress enacted the Federal Property and Administrative Services Act in 1949 to provide for an "economical and efficient system" for the federal government's management of real property, procurement, administrative services, and records.[13] This act, which established GSA, authorized the Administrator of General Services to procure and distribute supplies and services needed by federal agencies "in the proper discharge of their responsibilities."[14] In order to obtain these goods and services, the act transferred to the Administrator authority to oversee and control the General Supply Fund, a special U.S. Treasury account.[15]

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[8] One of the 13 GSA officials questioned – former GSA Chief Acquisition Officer Emily Murphy – appeared pursuant to Subpoena and was questioned under the Comm.'s Deposition Authority, Rule 22, Rules of the Comm.

[9] Sisk Interview.

[10] Smith Interview.

[11] Millikin Interview at 6-7; Butterfield Interview at 5-6; Busch Interview at 5; Barclay Interview at 5-6.

[12] Emily Murphy was represented by personal counsel at her Deposition.

[13] 41 U.S.C. § 251 et seq.; Stephanie Smith, Congressional Research Service, Acquisition Services Reorganization at the General Services Administration, CRS no. RL33068, Jan. 24, 2007 [hereinafter CRS GSA Reorganization Report].

[14] CRS GSA Reorganization Report.

[15] *Id.*.

GSA provides support to federal agencies in meeting their acquisition requirements in such areas as supplies, equipment, telecommunications, and integrated information technology.[16] GSA has responsibility for nearly $66 billion in federal spending and for managing assets valued at nearly $500 billion.[17] These assets include more than 8,300 government-owned or leased buildings, an interagency fleet of 170,000 vehicles, and technology programs and products ranging from laptop computers to systems that cost over $100 million.[18] As GSA provides for the office and space requirements of the federal workforce, it is sometimes referred to as the government's "landlord."[19]

The Administrator of General Services, who heads GSA, may establish contracting activities and delegate broad authority to manage the agency's contracting functions to heads of such contracting activities. Contracts may be entered into and signed on behalf of the Government only by contracting officers, who get their authority through the head of the agency.[20] Contracting officers have the authority to enter into, administer, or terminate contracts and make related determinations and findings.[21]

IV. Public Disagreements with Inspector General

The GSA Administrator and Inspector General Brian D. Miller have a well-chronicled contentious relationship.[22] They have tangled over the performance of contract auditing and budgetary matters, and have had various disagreements exposed in public exchanges. The Inspector General (IG) has claimed, for example, that Doan has

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[16] GSA, Organization Overview, http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelId=-13261 (last visited Mar. 22, 2007).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] FAR § 1.601(a).

[21] FAR § 1.602-1.

[22] *See generally*, Elise Castelli, *GSA Administrator Reduces IG's Role in Contract Audits*, *FEDERAL TIMES*, Oct. 23, 2006, at 4 [hereinafter FEDERAL TIMES, Oct. 23, 2006; Editorial, *Reining In the Watchdog*, *N.Y. TIMES*, Dec. 13, 2006, at 32; Matthew Weigelt, *GSA's Doan, IG Struggle Over Money*, *FEDERAL COMPUTER WEEK*, Dec. 4, 2006 [hereinafter FCW, Dec. 4, 2006].

characterized IG officials as "terrorists."[23] *The Washington Post* has reported, "Doan said [the Inspector General's] effort to examine contracts had 'gone too far and is eroding the health of the organization.'"[24]

A. Sensitive Information Leaked About Administrator

Has the IG's prosecutorial background – Miller was most recently an Assistant United States Attorney for the Eastern District of Virginia and Counsel to Deputy Attorney General Paul J. McNulty – led him to overemphasize criminal-like investigations to the detriment of the IG's programmatic oversight responsibilities? Miller's prepared statement for the March 28 hearing reads like a legal brief in opposition to the Administrator.

Miller's background as a Justice Department official raises an important consideration – shouldn't Inspectors General be drawn from the auditing discipline? Shouldn't they be specialists in the areas of accounting and financial analysis?

Chairman Waxman thinks so. In a January 2005 staff report, the then Ranking Member's staff called for Inspectors General with prior audit experience.[25] Prior to assuming the post of GSA Inspector General, Miller predominantly worked as a government lawyer.[26] Miller possesses no accounting or auditing experience.[27]

The Administrator has raised concerns that the details of private intra-agency meetings and investigations are being leaked to newspapers as part of a plan to publicly harm her, and to disrupt her efforts in leading GSA.[28] Through counsel, the Administrator, has written to the President's Council on Integrity and Efficiency, the Executive Branch entity with oversight responsibility of inspectors general, to raise

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[23] Scott Higham and Robert O'Harrow, Jr., *GSA Chief Seeks to Cut Budget For Audits*, WASH. POST, Dec. 2, 2006, at A1 [hereinafter Higham and O'Harrow, Dec. 2, 2006].

[24] Higham and O'Harrow, Dec. 2, 2006.

[25] Minority Staff, H. COMM. ON GOV'T REFORM, 109TH CONG., "THE POLITICIZATION OF INSPECTORS GENERAL" (Jan. 7, 2005).

[26] Nominations of Richard L. Skinner and Brian D. Miller Before the S. Comm. on Homeland Security and Gov't Affairs, 109th Cong. (July 18, 2005).

[27] Nominations of Richard L. Skinner and Brian D. Miller Before the S. Comm. on Homeland Security and Gov't Affairs, S. Hrg. 109-199, 109th Cong. (Comm. Print July 18, 2005), at 73-74.

[28] Letter from Michael J. Nardotti, Patton Boggs LLP, Counsel to Doan, to James Burress, Chair, Integrity Committee, President's Counsel on Integrity and Efficiency (Jan. 31, 2007) [Nardotti Letter, Jan. 31, 2007].

serious charges regarding possible leaks to the news media by the Inspector General.[29] During the course of the Administrator's interview with *The Washington Post* on January 17, it became apparent the reporters had been provided confidential and protected documents and information from the IG's investigative file on the Administrator.[30] According to Doan, her Chief of Staff John Phelps observed materials with the Patton Boggs LLP – the law firm Doan hired to assist her with the IG investigation – letterhead among the documents in the possession of the reporters.[31] It appeared the reporters had obtained correspondence between the Administrator's counsel and the Inspector General's office. Having observed this, Doan and Phelps began to question whether a calculated effort was afoot by the GSA Inspector General to harm the reputation and the ability of the Administrator to lead the agency.[32]

B. Public Dispute Over Role of IG Personnel as Contract Auditors

Miller and Doan's first public disagreement occurred in October 2006, when Doan announced her intention to reduce the agency's Office of Inspector General's role in contract audits.[33] The Administrator believed that shifting the auditing responsibility, both pre- and post-award, outside of the agency would allow GSA to increase the speed of the contract award process.[34]

It is common, but by no means universal, for the government's contracting officers to use the support of auditors in the negotiation of contracts. The contracting officer (CO) is the decision-making official. The auditors act only as advisors to assist the contracting officer in making the decision. The CO may or may not follow their advice. There is no requirement that they be used at all. Generally speaking, contracting officers are the only officials who may enter into contracts on behalf of the government.[35]

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[29] Nardotti Letter, Jan. 31, 2007.

[30] *Id.*

[31] Telephonic Interview by Gov't Reform Minority Comm. Staff with Lurita Doan, Administrator, GSA, in Wash., D.C. (Mar. 14, 2006) [hereinafter Doan Telephonic Interview].

[32] Doan Telephonic Interview.

[33] *FEDERAL TIMES*, Oct. 23, 2006.

[34] *Id.*

[35] FAR § 1.601.

The Administrator's consideration of moving the auditing function from the IG is not at all surprising or unusual. In fact, it is somewhat unusual for contract support audit work to be performed by auditors from an Inspector General's office. Virtually all of the government agencies (DOD, DHS, and NASA among others) that expend large amounts of funds through contracts use the highly acclaimed Defense Contract Audit Agency (DCAA).[36] Most other agencies use other in-house auditors. It is our understanding that the only other large agency regularly using IG resources for contract audit support is the Veterans Administration. So it is perfectly reasonable for the Administrator to question the practice of using IG auditors for this purpose. Shifting the contract auditing function from the IG's office to another entity such as DCAA would have been routine. However, the Administrator's idea to migrate the contract auditing function to private auditing firms caused some alarm.[37] That concept, however, has not been finalized or even initiated.

C. Public Dispute Over the IG's Budget

The Administrator and the IG have also quarreled publicly over budget considerations.[38] Following this dispute, the IG called the Office of Special Counsel in response to some off-hand remarks, according to "information received" by Chairman Waxman,[39] made by the Administrator at an office luncheon. The Office of Special Counsel is charged with investigating and enforcing the Hatch Act, the laws that prohibit public officials from engaging in partisan politics. Chairman Waxman's letter states that the Administrator "asked the GSA officials participating in a [luncheon event for politically appointed agency personnel] how the agency could help 'our candidates' in the next elections."[40]

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[36] DCAA provides standardized contract audit services including accounting and financial advisory services regarding contracts and subcontracts to its client agencies responsible for acquisition and contract administration. These services are provided in connection with negotiation, administration, and settlement of contracts and subcontracts. DCAA, History, http://www.dcaa.mil/ (last visited Mar. 22, 2007).

[37] Letter from Reps. Henry A. Waxman, James L. Oberstar, and Del. Eleanor Holmes Norton to Lurita A. Doan, Administrator, GSA (Dec. 5, 2006).

[38] FCW, Dec. 4, 2006.

[39] Waxman Letter, Mar. 6, 2007.

[40] *Id.* at 7.

V. Allegation Relating to GSA's Contemplated Engagement with Diversity Consulting Firm

FINDING: ***The Majority has failed to establish that the Administrator engaged in any kind of elaborate scheme to enrich an acquaintance in her efforts to acquire a study regarding GSA's use of small businesses, particularly those owned by minorities and women. The evidence supports the conclusion that the Administrator was embarrassed and concerned that GSA received an "F" from the Small Business Administration regarding its use of disadvantaged small businesses, and the Administrator sought to engage the services of the well-known diversity consultant, Diversity Best Practices. The Administrator erroneously believed she had the authority to acquire these services on an expedited sole-source basis. When she discovered she did not have that authority, the arrangement was called off. No contract was awarded. No work was ever performed. No money changed hands.***

The claim that the Administrator awarded a "no-bid" $20,000 contract to a company operated by a personal friend has been greatly overblown. According to newspaper accounts, the Administrator gave her friend $20,000 to compile a 24-page report promoting GSA's use of minority- and woman-owned businesses.[41] This did not happen.

Early in the Administrator's tenure, she was made aware of GSA's poor performance contracting with minority and women-owned small businesses. As an African-American woman, and former small business owner, the Administrator was particularly disappointed in GSA's performance in this critical area. To this end, she contemplated an arrangement with a prominent diversity consulting firm headed by a professional acquaintance to study GSA's performance in the area of contracting with minority and women-owned small businesses. As the Administrator soon realized, she did not have authority to enter into such an arrangement on a non-competitive basis. Accordingly, the arrangement was called off. No enforceable contract was awarded. No work was ever performed. No money ever changed hands. The Administrator summed up her misjudgment in a front page story in *The Washington Post*.[42] "I made a mistake. They canceled it, life went on, no money exchanged hands, no contract exchanged hands." The Administrator's statements are correct. To the extent she agreed to any arrangement, she was merely approving the decision to move forward with the initiative.

[41] Waxman Letter, Mar. 6, 2007 at 3.

[42] Higham and O'Harrow, Jan. 19, 2007.

The Committee's investigation into this matter confirms the Administrator's public comments.

On June 9, 2006, Doan's sixth day at GSA, she met with Associate Administrator for the Office of Small and Disadvantaged Business Utilization Felipe Mendoza, to discuss GSA's performance in the area of Small Business activities. The Administrator's prior experience as an owner of a woman-owned small business motivated her to improve GSA's dismal "F" grade in the area of Small Business activities.[43] During the meeting with Mendoza, Doan made a note to "get a study" of GSA's utilization of small businesses.[44] The Administrator had a limited window to address this poor SBA score before the next report to Congress.[45]

On June 14, Doan spoke with a professional associate, Edie Fraser, of the consulting firm Diversity Best Practices (DBP), a component of The Public Affairs Group, Inc. (PAG), concerning the creation of a report to profile successful practices in GSA contracting for minority and women owned business. The idea was to publish a data report with case studies.[46] Fraser and Doan had a successful business relationship in the private sector, owing to their common interest in promoting women and minority owned businesses.[47] Doan had used Fraser's services when Doan was the CEO of New Management Technology Inc.[48] Based on their previous relationship, Doan knew that Fraser was a "recognized leader in this field" and had the expertise needed to develop a report to promote GSA's use of small businesses.[49]

Doan immediately put Mendoza and Fraser in touch, and Mendoza met with Fraser on June 20 to develop an outline of the study.[50] The only subsequent correspondence between Fraser and Doan before July 25 was a June 28 e-mail in which Doan said she would "take a look at the contract" and check with the Chief Financial Officer about how to handle payment.[51]

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[43] U.S. Small Business Administration, 2005 National Ombudsman Report to Congress.

[44] Felipe Mendoza, GSA, Meeting Notes (June 20, 2006) (GSA 01-02-0007).

[45] *See e.g.*, Letter from Nicholas N. Owens, National Ombudsman and Assistant Administrator for Regulatory Enforcement Fairness, U.S. Small Business Administration, to Lurita A. Doan, GSA, Feb. 8, 2007.

[46] E-mail from Edie Fraser, Diversity Best Practices (June 14, 2006) (PAG 000156).

[47] GSA Letter, Feb. 2, 2007 at 3.

[48] *Id.*

[49] *Id.*

[50] Felipe Mendoza, Calendar Entry Meeting (June 20, 2006) (GSA 01-06-0002.).

[51] LD 000031.

The Administrator was not involved in any of these meetings. On July 21, Tauna Delmonico, assistant to the Chief of Staff, delivered a copy of the "Confirmation of Service Order" that had been faxed to GSA by DBP to Contracting Officer Donna Hughes.[52] The $20,000 order requested services to profile the best practices in GSA for promoting the use of small businesses, particularly those owned by members of disadvantaged groups, and publish a data report with case studies.[53] The project was to be completed by September 30, 2006, and delivered to the Office of Small Business Utilization.[54]

This "service order" was finally shown to Doan on July 25, and she signed it.[55] Her assistant, Delmonico, faxed the signed order back to DBP and sent the order to the Contracting Officer Hughes, to be processed.[56]

Hughes indicated that since the "service order" was valued at over $2,500, the requirement encompassed in the "service order" should either be competed or awarded pursuant to a sole source justification under the simplified acquisition procedures.[57]

Simplified acquisition procedures are utilized for procurements of aggregate value of more than the $2,500 micro-purchase threshold[58] and less than $100,000, the simplified acquisition threshold.[59] The simplified procedures are intended to reduce administrative costs, improve opportunities for small business, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors.[60]

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[52] Donna Hughes, GSA, Memo for the File (Aug. 4, 2006) (GSA 01-08-0013) [hereinafter Hughes Statement].

[53] *Id.*

[54] *Id.*

[55] Diversity Best Practices, Service Order (July 25, 2006) (GSA 01-08-0015 to 01-08-0017).

[56] *Id.*

[57] Hughes Statement.

[58] FAR § 2.101.

[59] FAR § 2.101; 41 U.S.C. § 403; and FAR § 13.

[60] FAR § 13.003.

Delmonico informed the Office of General Counsel (OGC) of the order. OGC staff worked with Hughes to gather facts and prepare briefing materials to determine whether the circumstances justified the use of sole source procedures.[61]

After a week of discussions among the OGC employees and Hughes, the General Counsel Alan Swendiman sent a memo to Chief of Staff John Phelps stating that Diversity Best Practices should be notified in writing of the termination of the "service order."[62] At the same time, the contact person at Diversity Best Practices, Kevin Briscoe, requested clarification on the data and funding needed for the project.[63]

On August 4, Phelps notified the Administrator that Hughes would terminate the order.[64] The Administrator's initial effort to award a contract for the project was appropriately ended. No money changed hands, no work was performed, and the government incurred no liability. On that same day, the Administrator, eager to ensure the underlying project not die because of the procedural missteps, sent an e-mail to Phelps asking whether Felipe Mendoza or Edie Fraser was drafting the Statement of Work for the project and requested that Felipe Mendoza, Tauna Delmonico, or David Bethel be the "point person to move this forward."[65]

On August 14, Phelps spoke with Fraser and told her this project could not be performed by Diversity Best Practices as it was involved in the preparation of the statement of work, but GSA planned to follow through on the concept. GSA continued to develop a Statement of Work for this report after the termination for convenience on August 4. On September 14, Hughes contacted the new point person for this project, Cari Dominguez, with a draft statement of work, which was based on input from Dominguez.[66] Despite these efforts, on September 25 Dominguez concluded the project could not be competed by the end of the current fiscal year and the matter was dropped.[67]

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[61] Hughes Statement (GSA 01-07-0013).

[62] Hughes Statement (GSA 01-07-0014).

[63] Phone Message for John Phelps, GSA (Aug. 4, 2006) (GSA 01-07-0016).

[64] E-mail from John Phelps, GSA to Lurita Doan, GSA, "Termination of Diversity Contract" (Aug. 4, 2006) (GSA 01-07-0004).

[65] E-mail from John Phelps, GSA to Lurita Doan, GSA, "Termination of Diversity Contract" (GSA 01-07-0003).

[66] E-mail from Donna Hughes, GSA to Cari Dominguez, GSA, "Draft Statement of Work" with attachment, (Sept. 14, 2006) (GSA 01-08-0057 to 01-08-0066).

[67] E-mail from Cari Dominguez, GSA to Donna Hughes, GSA, "Follow-Up" (Sept. 25, 2006) (GSA 01-08-0056).

It is simply not reasonable to conclude from these events that the Administrator's effort to acquire a study of GSA's use of small businesses was really an elaborate scheme to enrich an acquaintance. First, as GSA has said to the Committee, the Public Affairs Group, Inc. and Diversity Best Practices "is a respected and successful company that conducts studies and produces reports on practices to encourage the use of minority and women-owned small businesses. The firm produced similar reports and studies for many Fortune 500 companies."[68] Doan's concept for a study of GSA's practices for encouraging the use of small and minority-owned businesses was a logical match for Diversity Best Practices, whose products and advice in this area enjoyed wide-spread acclaim in the commercial marketplace. Second, the proposed "service order" was for $20,000. This is not a significant sum for a firm like Public Affairs Group, whose annual revenues are approximately $3 million.[69] The value of the "service order" would have been roughly 0.7% of that firm's total revenue. This hardly seems to have been a *gold mine*.

Moreover, GSA manages tens of billions worth of contracts a year. A $20,000 "service order" is miniscule in view of GSA's overall portfolio. It is odd that a Committee with jurisdiction over government-wide operations would choose to focus on such a minor incident, even though Doan has repeatedly admitted it was wrong procedurally and a mistake on her part.

Our review of thousands of documents related to this matter lead to the conclusion that Doan's motivations were clear: she was embarrassed and dismayed that GSA had received an "F" from the Small Business Administration for its small business utilization and she was determined to improve GSA's image and score. Fraser in her interview repeatedly spoke about the need for major federal agencies such as GSA to analyze their small businesses practices. Both Doan and Fraser are passionate about this issue. It is also worth noting that despite the termination of the "service order," Doan continued to seek a report and analysis of this matter that was so important to her.[70]

The Majority and the IG have also mischaracterized the relationship between Swendiman and Doan.[71] Swendiman met with Committee staff to discuss his role in the termination of the "service order." At no time did Swendiman state he had spoken

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[68] Letter from Kevin Messner, Associate Administrator, Office of Congressional and Intergovernmental Affairs, GSA, to Rep. Henry A. Waxman, Chairman, Comm. on Gov't Reform (Feb. 2, 2007), at 3 [hereinafter GSA Letter, Feb. 2, 2007].

[69] iVillage Inc., Quarterly Report (Form 10Q) at 29 (May 10, 2006); *See also* Dun & Bradstreet, Inc., Comprehensive Report on Public Affairs Group, Inc. (subsidiary of iVillage, Inc., New York, NY), DUNS: 78-592-3871, (Mar. 22, 2007).

[70] E-mail from Donna Hughes, GSA to Cari Dominguez, GSA, "Draft Statement of Work" with attachment, (Sept. 14, 2006) (GSA 01-08-0057 to 01-08-0066).

[71] Waxman Letter, March 6, 2007.

directly or had any other direct communication with Doan.[72] Swendiman's communications about this matter were exclusively with John Phelps, Doan's Chief of Staff.

VI. Allegation Relating to the Sun Microsystems Contract

FINDING: ***There is no evidence the Administrator acted improperly with respect to the Sun Microsystems contract option negotiations. At no time during the negotiation process did the Administrator speak to any of the contracting officers, nor did she pressure any of the contracting officers to exercise the Sun option.***

In the March 6 letter to the Administrator, Chairman Waxman advised that he had received information relating to the Sun Microsystems contract. The Chairman raised the following in his letter.[73]

- "I have also received information that you intervened on behalf of Sun Microsystems in August 2006 in the midst of a lengthy contract renewal dispute with GSA."

- "I have been told that as a result of your intervention, federal taxpayers could pay millions more for Sun's products and services than necessary."

- "According to the information I received, the first contracting officer assigned to the case refused to extend the contract on the terms Sun proposed because the officer concluded that Sun was not offering sufficient discounts to government purchasers."

- "Subsequently, the Office of the Inspector General conducted a pre-award audit in January 2006. I understand that this audit supported the contracting officer's decision, finding that the discounts Sun offered to government purchasers were not as favorable as some that Sun granted to commercial purchasers, as required by federal procurement regulations."

- "Before you started at GSA, the contracting official responsible for the Sun contract was replaced with a second official who, I am told, also reached the same findings as his predecessor and the Inspector General."

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[72] Interview by Gov't Reform Comm. Staff with Alan Swendiman, former General Counsel, GSA, in Wash. D.C. (Feb. 2, 2007).

[73] Waxman Letter, Mar. 6, 2007, at 8.

- "I also understand that during this period, the second contracting official learned about discussions between the Inspector General and the Department of Justice regarding a possible False Claims Act referral concerning Sun overcharges."

- "I have been told that on August 29, 2006, you requested a meeting on short notice with senior auditing staff from the Inspector General's office."

- "According to the account I have received, you expressed the view that it was essential for GSA to complete the contract extension with Sun."

- "I have been informed that when the officials from the Inspector General's office explained their concerns about Sun's inflated prices, you responded by criticizing the audit of Sun's pricing and the subsequent referral of overcharges to the Department of Justice."

- "You apparently said that the contracting official was too "stressed" by these issues to continue with the contract negotiations, and you suggested that he might be removed."

- "Within two days of the meeting, on August 31, 2006, the second contracting official had been relieved, and a third contracting officer was assigned to resume contract negotiations with Sun despite having no background in the prior discussions."

- "This third contracting official completed the negotiations with Sun in only nine days, but the terms were not favorable."

- "I have been told that the contracting officer accepted an offer that was inferior to a previous Sun proposal, with contract terms from Sun that the official's predecessors had rejected."

The contract option negotiations with Sun Microsystems were examined by Committee staff. In lieu of subpoenas, "voluntary" transcribed interviews were conducted with four GSA officials, three of whom were Contracting Officers for GSA in talks with Sun.[74] Having the benefit of a careful examination, the facts of the Sun Microsystems contract negotiation do not raise any indicia of wrongdoing on the part of the Administrator. Rather, the facts tell a different story.

On August 23, 1999, GSA awarded Sun Microsystems a Federal Supply Schedule contract for items of equipment and support services for a five-year base period with

[74] Caldwell Interview; Butterfield Interview; Budd Interview; Williams Interview.

three option periods of five years each.[75] The initial performance period ran through late August 2004. In August 2004, Sun submitted a request to exercise the first option period of the contract. Around that time, the Office of the Inspector General initiated a post-award audit concerning allegations of improper pricing by Sun under the initial contract. The Inspector General also commenced a pre-award audit concerning allegations of improper pricing by Sun under the related contract as well as a pre-award audit to support negotiation for the exercise of the option. The support audit was not completed until late January 2006.[76] Since neither the audit work nor the negotiations were completed by the expiration date of the initial performance, the contract underwent a series of extensions until finalized on September 9, 2006.

Between August 2004 and September 2006, several contract extensions were issued by three contracting officers. The fourth contracting officer, Shana Budd, finally exercised the option based on her conclusion that the offer made by Sun was fair and reasonable.[77] Budd was able to successfully conclude the protracted negotiations by building on the work completed by the two preceding contracting officers and her exhaustive analysis of the facts and materials relating to the unresolved issues.

At no time during this process did Doan speak to any of the contracting officers nor did she pressure any of the contracting officers to exercise the Sun option.[78] GSA management was understandably concerned the negotiations had dragged on for so long. Jim Williams, Commissioner of the Federal Acquisition Service (FAS) indicated to the contracting officer that it was time to conclude a satisfactory deal with Sun or let the contract lapse.[79] Budd clearly stated she felt no pressure "to resolve this one way or the other."

As negotiations started with Sun, the first and second contract extensions were executed by Robert Overbey over the period of seven months.[80] As the second contract extension was set to expire in February 2005, Overbey was reassigned to Herman Caldwell's division as part of the Information Technology Acquisition Center

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[75] Herman Caldwell, Chronology of Events in the Sun Renewal Process, (undated 10 page document produced to the Minority Staff on Mar. 15, 2007) at 1 [hereinafter Caldwell Timeline]; Budd Interview at 20.

[76] Pre-award audit, GSA Office of Inspector General.

[77] Budd Interview at 15.

[78] Interview by Gov't Reform Minority Comm. Staff with James Williams, Commissioner, Federal Acquisition Service, GSA, in Wash., D.C. (Mar. 22, 2006) [hereinafter Williams Interview, Mar. 22, 2007]; Caldwell Interview at 9.

[79] Williams Interview, Mar. 22, 2007.

[80] Caldwell Interview at 2.

Reorganization.[81] At that time, Caldwell assumed responsibility for the Sun contract and issued an extension until August 31, 2005.[82] Caldwell entered into negotiations with Sun in February 2005 and issued an additional extension on August 14, 2005, which would continue the contract until February 15, 2006.[83] After intensive discussions and negotiations, Caldwell was not able to reach an agreement with Sun. The negotiations during Caldwell's period as contracting officer seemed to have been contentious and difficult. Caldwell advised his supervisor in May 2005 he believed the Sun contract ought to be allowed to lapse.[84] In fact, Caldwell, without knowledge of GSA management, actually sent an e-mail to the Chairman of Sun announcing that an agreement had not been reached and the Sun contract was about to lapse.[85] Soon after this extraordinary communication by Caldwell, the matter came to the attention of GSA management. At that point, the decision was made to further extend the contract in an attempt to work out the outstanding issues and reach an agreement if possible. Caldwell never was able to reach an agreement with Sun.[86] Eventually Caldwell was reassigned to work on Networx, GSA's government-wide telecommunications acquisition that is currently on-going.[87] As Caldwell acknowledged, Networx is GSA's most visible program.[88]

Michael Butterfield assumed responsibility for the Sun contract on February 9, 2006.[89] Yet another contract extension was issued in February 2006, set to expire on September 11, 2006. It was now Butterfield's turn to negotiate with Sun.

Around this time, the Office of the Inspector General finally issued the long-awaited audit report on the Sun contract. As a part of that report, the auditors proposed a Corrective Action Plan (CAP), because Sun had not provided appropriate discounts under the initial contract's price reduction clause.[90] The CAP sets forth the method Sun is to use to track commercial sales, sales to the government, discounts, and orders, among

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[81] *Id.* at 2.

[82] *Id.* at 3.

[83] *Id.* at 5.

[84] *Id.* at 25.

[85] *Id.* at 24.

[86] *Id.* at 36.

[87] *Id.* at 34.

[88] *Id.* at 38.

[89] Butterfield Interview at 14.

[90] *Id.* at 24.

other things. On May 15, Sun agreed to take corrective action and submitted a completed corrective plan that was accepted by Butterfield and the Office of Inspector General.

Face-to-face negotiations between Butterfield and Sun began in June 2006 and reached an impasse in August 2006.[91] Throughout this period Butterfield was accompanied by IG auditors in his negotiation sessions with Sun. According to Butterfield, the auditors were "very passionate" about their position that Sun was not offering competitive discounts and not offering the appropriate product mix for the price reduction clause.[92] Butterfield felt at the time that he was caught in the middle between the Sun people and the auditors, both of whom were quite "passionate" that they had the correct position during the negotiations.[93] It appears the auditors contributed to the strained relations between the government and Sun by laughing during a negotiation session and making a derisive reference to possible false claim actions against Sun.[94]

In August 2006, the on-going Sun negotiations came to the attention of FAS Commissioner, Jim Williams. Williams met with Bill Vass, President and Chief Operating Officer for Sun Microsystems Federal to discuss the on-going negotiations.[95] Williams determined through his conversation with Vass that he needed to look into the Sun matter since negotiations had dragged on for two years and seemed to be at an impasse.

While a number of issues had been resolved during the preceding time period, three major issues remained.[96] The first concerned the wording and operation of the so-called price reductions clauses.[97] These provisions ensure the discounts provided by the contractor continue to track those given to comparable firms throughout the life of the contract. The second concerned the base discount Sun would provide for its support services.[98] The third concerned an arrangement whereby the government would be able to recover some of the past discounts it had not received under the initial contract.[99]

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[91] *Id.* at 49.

[92] *Id.* at 70

[93] *Id.* at 70-72.

[94] Butterfield Interview at 35-38.

[95] Williams Interview, Mar. 22, 2007.

[96] Budd Interview at 32.

[97] *Id.*

[98] *Id.*

[99] *Id.*.

Williams subsequently asked Butterfield if he wished to continue with the Sun negotiations.[100] Butterfield recognized the negotiations were not moving forward, so he decided to let someone else take over.[101] Williams believed the Sun matter had dragged on too long and must be resolved either with a satisfactory new contract period or with the final lapse of the Sun contract.

On August 31, 2006, Shana Budd was assigned as the new contracting officer for the Sun contract.[102] With the extension deadline looming, Budd entered into intensive negotiations with the understanding she should award the five-year option or let it expire. On September 9, 2006, the negotiations were completed and the option was exercised.[103]

After prolonged negotiations spanning over two years, the contract option was awarded. The Committee has interviewed all three of the most current contracting officers. While it is alleged this contract option was exercised precipitously under unfavorable terms due to the improper influence of upper management,[104] there is no evidence in support of these allegations.

To the contrary, interviews with the contracting officers revealed the Administrator had little if anything to do with the Sun negotiations. Butterfield states in his interview that he never had contact of any kind with the Administrator while working on this project.[105] Budd explains in her interview that she never felt any influence from her superiors to award the contract. In fact, she was advised "that upper management did not want to put into place another temporary extension. They either wanted this thing killed…or resolve it."[106]

Budd's decision to exercise the option was not made under duress, nor was it a bad deal for the taxpayer, as has been alleged.[107] Budd states she worked day and night between her assignment to the contract and the award date. She understood all of the issues and was comfortable with her negotiations to obtain fair and reasonable prices for GSA.[108] These negotiations occurred over two years. Many of the issues had been

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[100] Butterfield Interview at 61- 63.

[101] *Id.*.

[102] Budd Interview at 10.

[103] *Id.* at 14.

[104] Waxman Letter, Mar. 6, 2007 at 8-9.

[105] Butterfield Interview at 58

[106] Budd Interview at 23.

[107] Waxman Letter, Mar. 6, 2007 at 8-9.

[108] Budd Interview at 81.

resolved under the previous contracting officers. To imply that the contract option could be awarded in the nine days that Budd had to work on it is ludicrous. The resolution of this matter was not accomplished in a mere nine days. It was a cumulative effort over the course of two years. The terms of the negotiated option were a bit less than the pre-negotiation goals established by Butterfield. Nevertheless, those ambitious goals do not appear to have been achievable.[109] Moreover the discounts ultimately received were a part of the entire agreement with Sun, which included a number of other elements as well.

Federal Supply Schedule contracts, like the one with Sun, are not awarded based upon a competition among various firms, but to commercial firms that are willing to offer the government the same discounts they offer to comparable classes of commercial customers. There is no obligation on the government's part to order anything off the Schedule contract. A government agency orders items off the Schedule after it reviews the prices of at least three schedule holders and determines that the chosen contractor represents the best value to the government. Throughout the process, ordering agencies are encouraged, and very often receive, significant price reductions above and apart from the discounts are encompassed in the schedule contract prices. The bottom line here is that, while important, the initial discounts that are offered to get on the schedule are often just the first step in determining the final price paid by an ordering agency.

Finally, the insinuation that the last Contracting Officer, Shana Budd, awarded this contract option in order to receive "a requested transfer from Washington, DC, to Denver, despite having been previously refused such a transfer" is unfounded.[110] It is well documented that Budd petitioned for the transfer after the contract had been awarded and was initially denied the transfer. She was subsequently granted the transfer following the departure of an employee from the Denver office.[111] It is sad that we have been reduced to accusing an honest, hard-working civil servant of nefarious motives simply because of her superior accomplishment.

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[109] Butterfield Interview at 85.

[110] Waxman Letter, Mar. 7, 2007 at 9.

[111] GSA Vacancy Announcement #0780011 (Sept. 2006) (GSA G-06-0076 – 0087); Notification of Personnel Action, GSA Form S50 (Nov. 26, 2006) (GSA G-14-10565).

VII. Allegation Relating to Suspension and Debarment

FINDING: ***There is no evidence that the Administrator intervened in the suspension and debarment process. The GSA debarment official had initiated preliminary proceedings against the major accounting firms (KPMG, PriceWaterhouseCooper, BearingPoint, Ernst & Young, and Booz Allen Hamilton). The Administrator merely contacted her Chief of Staff and asked that the matter be suspended until she could be briefed. In a written statement prepared by the debarment official and produced to the Committee, he stated, "At no time did I receive any direct or indirect instruction or comment from the Office of the Administrator." Further, he stated, "I processed and concluded the matter as directed by the factual record in accordance with the prescribed process."***

The Administrator is alleged to have acted improperly by intervening in suspension and debarment proceedings.[112] Testimony by the Suspension and Debarment Official at GSA tells a vastly different story.

George Barclay, as Acting Suspension and Debarment Official for the General Services Administration (GSA), initiated suspension proceedings against the former "big five" accounting firms in August and September of 2006. Among Barclay's duties within GSA, he is delegated the authority from the Administrator to determine and carry out suspension and debarment actions.[113] In his role, he also advises the Chief Acquisition Officer (CAO) and Administrator during suspension or debarment proceedings.[114]

The government will only award contracts to responsible firms. This means contracts will only be awarded to companies that, among other things, have adequate financial resources to perform the contract and a satisfactory record of integrity and business ethics. The suspension and debarment process enforces this policy. A suspended or debarred firm cannot be awarded a government contract. Suspensions and debarments require such due process protections as notice and the opportunity to present information and argument. The process is meant to protect the interests of the government, not to punish.[115]

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[112] Waxman Letter, Jan. 19, 2007 at 1.

[113] Barclay Interview at 8.

[114] *Id.* at 15.

[115] FAR § 9.4.

From July 26, 2006 through August, Barclay received reports from the Office of the Inspector General recommending debarment proceedings be initiated against the major accounting firms (KPMG, PriceWaterhouseCooper, BearingPoint, Ernst & Young, and Booz Allen Hamilton).[116] These recommendations were made in light of allegations that these firms obtained various travel rebates in connection with government work and did not pass the benefits of these rebates on to the government.[117] These companies eventually settled with the government without a determination of guilt.

Barclay initiated discussions with the five companies by issuing Show Cause letters between August 12 and September 6.[118] The objective of these letters was to make sure the firms had instituted appropriate remedial measures against the recurrence of the rebate problems.[119] Barclay would then decide whether he would need to initiate formal proceedings.[120]

Attorneys from the firms responded to the Show Cause letters by providing detailed descriptions of the remedial measures put in place to prevent a recurrence of the rebate problem.[121] Barclay reviewed these submissions and concluded the problems had been addressed.[122] Closeout letters were issued to the five firms between October 20 and November 9, 2006.[123] The Inspector General's office was advised that no suspension and debarment actions would be taken.[124]

At the time the Show Cause letters were issued, the Administrator's office was made aware of Barclay's actions. On September 7, Barclay e-mailed the Chief Acquisition Officer, Emily Murphy, regarding the action initiated against the major accounting firms.[125] This e-mail made its way up the chain to the Administrator's office.

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[116] George N. Barclay, Statement of George N. Barclay, Acting Suspension and Debarment Official, GSA, undated, (estimated date of preparation February 2007, produced to the Minority Staff in March 2007) [hereinafter Barclay Statement] at 1

[117] Barclay Statement at 1.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] E-mail from George Barclay, GSA to Emily Murphy, GSA, "Fw: heads up," (Sept. 7, 2006) (GSA 03-01-0011).

Not surprisingly, since this was the first time she had heard about this matter, the Administrator suggested to her Chief of Staff that the matter be suspended until she could be briefed on September 11, 2006.[126]

Subsequently, on September 14th, Alan Swendiman, GSA's then-General Counsel sent an e-mail to the Administrator explaining, "George Barclay advises me that everything seems to be fine."[127] This appears to be the end of the Administrator's "involvement" in the suspension and debarment matter.

The Committee has interviewed Barclay on this matter, and his statements corroborate the information provided to the Committee in his written statement and in the thousands of documents GSA has produced for the Committee. The Administrator's concern about the ramifications these potential suspensions could have throughout the government was reasonable and appropriate for any agency head. In fact, she did not have any effect upon Barclay's decision to issue the Show Cause letters or upon his subsequent conclusion that the firms had addressed the problems to the extent that he considered them to be currently responsible. Barclay states in a written statement produced to the Committee, "At no time did I receive any direct or indirect instruction or comment from the Office of the Administrator."[128] Barclay goes on to note, "I did not consider such expression (Doan's interest in the matter) as interference and I processed and concluded the matter as directed by the factual record in accordance with the prescribed process."[129]

This issue appears to have been pursued by the Majority solely due to *The Washington Post* article from January 19, 2006. Had *The Washington Post* interviewed Barclay, they would have realized that Barclay had provided briefings for prior Administrators in suspension actions, and there was nothing improper or unusual about the Administrator's interest in such matters that are conducted under her authority.

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[126] E-mail from Lurita A. Doan, GSA to John F. Phelps, GSA, "Re: Pending Actions Against Accounting Firms," (Sept. 10, 2006) (GSA 03-01-0010A).

[127] E-mail from Alan Swendiman, GSA to Lurita A. Doan, GSA, "Re: Pending Actions Against Accounting Firms," (Sept. 14, 2006) (GSA 03-01-0013).

[128] Barclay Statement at 2.

[129] *Id.*.

VIII. Alleged Hatch Act Violation

FINDING: ***On January 26, 2007 at the conclusion of a staff luncheon attended by GSA political appointees, several witnesses reported that the Administrator made an offhand comment about "helping our candidates," an alleged violation of the Hatch Act. Any concerns that this was inappropriate were addressed immediately, and the discussion was terminated. There is no evidence to support the additional allegations that follow-up discussions centered on efforts to exclude Speaker Pelosi from the ceremonial opening of a federal building in her congressional district. No evidence was found that any GSA officials improperly considered the prospect of inviting Senator Martinez to the opening of a federal courthouse in Miami, Florida.***

According to Chairman Waxman's March 6, 2007 letter to the Administrator, officials from the GSA Office of Inspector General reported a potential Hatch Act violation by the Administrator to the U.S. Office of Special Counsel (OSC).[130] It has never been clear why the referral was not sufficient. In any event, the Committee wanted to investigate this matter, too.

The OSC is an independent federal investigative and prosecutorial agency charged with enforcing the Civil Service Reform Act, the Whistleblower Protection Act, and the Hatch Act.[131] Under the Hatch Act,[132] officers and employees of the executive branch, other than the President and Vice President, are restricted in the following ways:

(1) They may not use their "official authority or influence for the purpose of interfering with or affecting the result of an election."

(2) They are generally restricted from soliciting, accepting or receiving political campaign contributions from any person.

(3) They may not run for elective office in most "partisan" elections.

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[130] Waxman Letter, March 6, 2007 at 7.

[131] U.S. Office of Special Counsel website, http://www.osc.gov/intro.htm (last visited Mar. 22, 2007).

[132] 5 U.S.C.§ 7321 et seq. (2006).

> (4) They are prohibited from soliciting or discouraging participation in any political activities by a person who has an application for a grant, contract or other funds pending before their agencies, or is the subject of an ongoing audit or investigation by their agencies.
>
> (5) They are generally prohibited from engaging in partisan campaign activity on federal property, on official duty time, while wearing a uniform or insignia identifying them as federal officials or employees, or while using a government vehicle.[133]

According to Chairman Waxman, Doan is alleged to have made comments that fall within the prohibitions of the Hatch Act. On March 6 the Chairman wrote:

> Another area of concern involves allegations that you asked GSA officials in a January teleconference how the agency could be used to help Republican political candidates.
>
> * * *
>
> I understand that you convened a nationwide teleconference on January 26, 2007, from GSA headquarters with your senior staff and as many as 40 GSA political appointees across the country. The meeting was held in order to hear presentations by J. Scott Jennings, a Special Assistant to the President and the Deputy Director of Political Affairs in the White House, and John ("J.B.") Horton, GSA's liaison to the White House, about national polling data from the November 2006 elections. I have been told that you spoke after the presentations were finished. In your remarks, according to multiple sources, you asked the GSA officials participating in the teleconference how the agency could help "our candidates" in the next elections.
>
> I have been told that one Regional Administrator responded to your inquiry by describing an effort to exclude House Speaker Nancy Pelosi from an upcoming opening of an environmentally efficient "green" courthouse in San Francisco. I have also been told that you then raised concerns about the upcoming opening of a courthouse in Florida. According to this account, you noted that former President Bill Clinton had expressed interest in attending, and you stated that an effort should be made to get Senator Mel Martinez, the General Chairman of the Republican National Committee, to attend.

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[133] Jack Maskell, Congressional Research Service, *"Hatch Act" and Other Restrictions in Federal Law on Political Activities of Gov't Employees*, CRS no. 98-885 A, Oct. 23, 1998 [CRS Hatch Act Report].

So far, seven of the 14 interviews conducted by the Majority staff during the course of the investigation related to the Hatch Act allegation.[134] The Majority, under threat of subpoena, compelled the attendance of seven politically appointed GSA officials who were in attendance at the January 26, 2007 teleconference. Six of seven witnesses appeared "voluntarily," and one, Emily Murphy, appeared pursuant to subpoena.

According to the Congressional Research Service, to violate the official authority provision of the Hatch Act, the official must use or attempt to use his or her authority or influence to affect the results of an election.[135] This provision has generally been directed at coercive activities, including the coercion by federal supervisory personnel of those employees whom they supervise to engage in partisan political activities.[136] The request or direction by a supervisor to an employee he or she supervises to engage in partisan political activity, or to use resources, time or supplies in such activity may, therefore, implicate this section of the Hatch Act, particularly because of the inherently coercive nature of the supervisor-supervisee relationship.[137]

Examples of significant Hatch Act violations include:

- OSC also filed a complaint for disciplinary action against an employee with a federal agency, charging that he violated the Hatch Act by engaging in political activity on behalf of a Congressional candidate while on duty and in the federal workplace. **The employee sent an e-mail to over 300 agency employees inviting them to attend a "meet the candidate" event for Congressional candidate Tim Holden.** (emphasis supplied).[138]

- One complaint was against a federal employee who sent an e-**mail message to about 22 coworkers**. The message contained a letter purporting to be written by John Eisenhower, son of former President Eisenhower that states, among other things: " … **I intend to vote for the Democratic Presidential candidate, Sen. John Kerry"**; " … the word 'Republican' has always been synonymous with the word 'responsibility' … [t]oday's whopping deficit of some $440 billion does not meet that criterion."; "Sen. Kerry, in whom I am willing to place my trust, has demonstrated that he is courageous, sober, competent … I will vote for him

[134] Sisk Interview; Smith Interview; Berkholtz Interview, Monica Interview, Busch Interview, Millikin Interview, and Murphy Deposition.

[135] CRS Hatch Act Report at 6.

[136] *Id.*

[137] *Id.*

[138] Office of Special Counsel, Successful Case Summaries (2004 and 2005), http://www.osc.gov/successfulcase.htm#hatch06 (last visited Mar. 27, 2007).

enthusiastically …." Prior to forwarding the above-referenced e-mail, she added the following statement: "Some things to ponder……..." (emphasis supplied).[139]

The facts of the brown bag lunches are largely not in dispute. Starting in September 2006, the White House liaison for GSA, John "J.B." Horton, convened a monthly brown bag lunch meeting for agency political appointees.[140] Horton arranges for speakers to make presentations monthly. Since September 2006, there have been six brown bag luncheons. At four of the six, members of the White House staff presented to the GSA group on the workings of their respective offices.

Chairman Waxman's letter to the Administrator alleges that the Administrator convened these meetings.[141] There is, however, no evidence in support of this allegation. Six witnesses called by the Majority have testified unambiguously that Horton organized these luncheons.[142]

A. Allegation Relating To Helping Our Candidates

Chairman Waxman alleges that at the conclusion of the January 26, 2007 presentation by White House Deputy Director of Political Affairs Scott Jennings, Doan violated the Hatch Act by asking "GSA officials participating in the teleconference how the agency could help 'our candidates' in the next election."[143] These comments are alleged to have occurred in January 2007, a time when there are no candidates for any election. The Majority's willingness to pursue this alleged offhand comment is puzzling at best.

This alleged violation of the Hatch Act was referred to the Office of Special Counsel for investigation by GSA Inspector General Miller.[144] Seven GSA officials were

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[139] *Id.*

[140] There have been seven brown bag luncheons. The dates and topics have been as follows: 1) Sept. 13, 2006 – Hatch Act; 2) Oct. 23, 2006 – WH Presidential Personnel; 3) Nov. 16, 2006 – WH Legislative Affairs; 4) Dec. 18, 2006 – Holiday Lunch with the Administrator; 5) Jan. 26, 2007 – WH Political Affairs; and 6) Mar. 8, 2007 – WH Press Office.

[141] Waxman Letter, Mar. 6, 2007 at 7.

[142] Sisk Interview at 11; Smith Interview at 12-13; Berkholtz Interview at 13-14; Busch Interview at 13-14; Milliken Interview at 14; and Murphy Deposition at 14.

[143] Waxman Letter, Mar. 6, 2007 at 7.

[144] *Id.*

questioned about this allegation. Six of the seven officials have some recollection of the Administrator mentioning the phrase "our candidates."[145]

Matthew Sisk was asked:

> Q Several witnesses have told us that, following the presentation, Doan addressed the group; and she said something to the effect of how can we use GSA to help our candidates in the next election. Do you recall this?

He responded:

> A I do.[146]

Michael Berkholtz was asked:

> Q At the end of the presentation, witnesses have told us that Administrator Doan addressed the group and said something to the effect of how can we use GSA to help our candidates in the next election. Do you recall words to that effect?
>
> A The phrase of that -- I recall some phrase, but that was similar to is there anything we can do to help. I don't think -- I don't recall it being specific to elections.[147]

Not all witnesses responded in the affirmative to the Majority's leading questions. Region 1 Administrator Dennis Smith did not recall any such discussion of helping candidates in the next election.

> Q Do you recall -- other witnesses have told us that during this question and answer period Administrator Doan said something to the effect that how can we -- what can GSA do to help out candidates in the next election? Do you recall a comment like that, to that effect?
>
> A No, I do not.[148]

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[145] Six witnesses concurred that the Administrator made a reference to our candidates. Sisk Interview at 16-17; Berkholtz Interview at 17-18; Monica Interview at 16; Busch Interview at 16; Milliken Interview at 18-19; Murphy Deposition at 22-23. Dennis Smith does not. Smith Interview at 21-22.

[146] Sisk Interview at 16-17.

[147] Berkholtz Interview at 17-18.

[148] Smith Interview at 21-22.

B. Allegation Relating to Speaker Pelosi

Chairman Waxman's March 6 letter alleged that the Administrator facilitated a conversation with GSA political appointees at the January 26 luncheon about ways in which Speaker Pelosi can be "excluded" from "an upcoming opening of an environmentally efficient 'green' courthouse (sic) in San Francisco."[149]

Six GSA officials were "interviewed" on this topic, and five of the six did not recollect events in this manner. Matthew Sisk testified that Speaker Pelosi's name was mentioned. He recollects no effort to keep her away.[150] Dennis Smith testified that he recollects nothing about the discussion of Speaker Pelosi other than her name was mentioned.[151] Michael Berkholtz recalled Speaker Pelosi's name being mentioned, but recalls no discussion of keeping her away from the grand opening.[152] If anything, Berkholtz said there may have been some frustration in trying to schedule the Speaker's appearance.[153] Berkholtz's recollection of frustration is borne out in the correspondence within GSA. Because the federal building was in the Speaker's district, it was important to secure her participation in the ceremonial opening.[154] Scheduling difficulties between GSA and the Speaker's office did produce some frustrations. Christiane Monica testified that to her recollection the discussion about the Speaker was merely in relation to being invited. Monica stated, "I believe there was a comment about Speaker Pelosi receiving an invitation to the opening of the courthouse."[155] Justin Busch also did not recall events as the Majority had suggested. An excerpt from Busch's "interview" transcript reads as follows:

> Q And that Mr. Stamison brought up the issue of Speaker Nancy Pelosi, that she was attending?
>
> A Uh-huh.

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[149] Waxman Letter, Mar. 6, 2007 at 7.

[150] Sisk Interview at 18-19.

[151] Smith Interview at 20-21.

[152] Berkholtz Interview at 18-19.

[153] *Id.*

[154] E-mail from Gene P. Gibson, GSA to Peter Stamison et al., GSA, "Word from Congresswoman Pelosi's Office," (Mar. 2, 2007) (GSA W-02-0496).

[155] Monica Interview at 17-18.

Q Do you recall that?

A I do recall that.

Q What was that conversation?

A I remember that he brought up the courthouse, and I do remember him bringing up Speaker Pelosi's name, and who else could we also get to attend that meeting? And other than that, it gets a little hazy for me, guys. I really spent a lot of time trying to think about what I remember, and to be honest with you, it was towards the end of the meeting, and I was eating a Subway sandwich -- that I can remember; I do that almost every day -- and I was hoping that things would wrap up.[156]

Busch was not the only GSA staffer to testify that the discussion of Speaker Pelosi was unmemorable and not as the Majority has suggested. Jennifer Millikin testified similarly:

Q And so in your recollection there was some discussion of a green courthouse and Nancy Pelosi's name was mentioned?

A Correct.

Q Do you recall whether they mentioned wanting her to show up or not wanting her to show up?

A I don't recall that, no.[157]

The suggestion that Doan desired to prevent Speaker Pelosi from attending the ceremonial opening of the San Francisco federal building does not square with the documentary record. On December 15, 2006, Doan wrote to the President inviting his attendance at the opening of the San Francisco federal building.[158] In this correspondence, Doan remarks, "as one of the most important federal buildings constructed in years, the grand opening ceremony and dedication is expected to draw officials from city, state, and federal levels of government, including Speaker-elect Nancy Pelosi."[159] On January 8, 2007 as the invitation list for the San Francisco federal

[156] Busch Interview at 17-18.

[157] Milliken Interview at 22-23.

[158] Letter from Lurita A. Doan, Administrator, GSA to George W. Bush, President, United States (Dec. 15, 2006) (GSA W-02-0503).

[159] *Id.*

building ceremonial opening were being drawn up, GSA officials recommended that the Regional Administrator personally invite Speaker Pelosi.[160] Communications and correspondence between GSA officials and the Speaker's office continued.[161] On March 2 GSA officials inquired as to the Speaker's availability for June 7 or 8.[162] The Speaker's office countered with a July 9 suggestion.[163]

C. Allegation Relating to the Invitation to Florida Sen. Martinez to the Opening of a Florida Federal Building

Chairman Waxman's March 6 letter alleged that the Administrator acted improperly by noting at the January 26 luncheon that Senator Mel Martinez should be invited to attend the ceremonial opening of the Florida courthouse. Chairman Waxman wrote to the Administrator, "You noted former President Clinton had expressed interest in attending, and you stated an effort should be made to get Senator Mel Martinez, the General Chairman of the Republican National Committee to attend."[164] What Chairman Waxman fails to mention in this letter is that Mel Martinez is currently the junior Senator from the state of Florida.[165] To this end, it would be reasonable and appropriate for the GSA Administrator to suggest an invitation to Senator Martinez. The senior Senator from Florida, Bill Nelson, was also invited to the opening of the courthouse.[166]

GSA has a longstanding practice to invite local, state, and federal officials to ceremonial openings of federal buildings. GSA official Jennifer Milliken testified to this:

> In events that I have done my entire political career we always outreach to State and Federal public officials for obvious reasons.

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[160] E-mail from Jeffrey E. Neely, GSA to Peter T. Glading, GSA, "Re: SF Fed Bldg Dedication" (Jan. 8, 2007) (GSA W-02-0487).

[161] E-mail from Donna P. Shepard, GSA to Peter G. Stamison, GSA, "Call from Congresswoman Pelosi's Office" (Jan. 26, 2007 1:03 PM) (GSA W-02-0490); E-mail from Gene P. Gibson, GSA to Donna P. Shepard, GSA, "Re: Hold on Date" (Feb. 20, 2007) (W-02-0495).

[162] E-mail from Gene P. Gibson, GSA to Peter Stamison et al., GSA, "Word from Congresswoman Pelosi's Office," (Mar. 2, 2007) (GSA W-02-0496).

[163] *Id.*

[164] Waxman Letter, March 6, 2007 at 7.

[165] Mel Martinez, U.S. Senator official website, http://martinez.senate.gov/public/.

[166] Invited Guests, Dedication of U.S. Courthouse, Miami, Florida (Jan. 26, 2007 and Feb. 8, 2007) (W-02-0515).

You are there, and you want them to be a part of the event.

Milliken was asked whether GSA makes a practice of tying invitations to public events to party affiliation. The testimony reads as follows:

> Q And in the process of being courteous and inviting these officials, you don't draw a distinction between party affiliation?
>
> A No.

Having testified clearly that GSA does not discriminate based on party affiliation when drawing up its invitation list, Majority Counsel was not satisfied. The follow-up produced an odd exchange.[167]

> Q When you are planning or staffing an event, is it your job or your office's job to see how you can keep an official away from that event?
>
> A Not my job. No.
>
> Q That is not your practice?
>
> A Not my practice, even if it was my job. But, no, it is not my job either.

The invitation list for the courthouse opening in Miami followed GSA's practice of having a nonpartisan guest list. Both Republicans, such as, former Governor Jeb Bush, and Democrats, such as Miami Garden's Mayor Shirley Gibson were among the invitees. In fact, the entire Florida congressional delegation was among the invited guests. There is no basis to the allegation that the Administrator acted improperly with respect to the discussion of Senator Martinez's participation at the ceremonial opening of the Miami federal courthouse.

D. White House Official Scott Jennings Terminated Question and Answer Session

Several witnesses have provided testimony that the Question and Answer session following the luncheon was very short. The Administrator made some comments, there were some discussions about the ceremonial grand openings of federal buildings in San Francisco and Miami, and the meeting adjourned. The record is clear that when the

[167] Millikan Interview at 30.

discussion referenced public officials by name, such as Speaker Pelosi and Senator Martinez, Scott Jennings, the luncheon's presenter called the meeting to a close.[168]

For example, Christiane Monica testified:

> Q You said that Mr. Jennings said something along the lines of, "this is not a conversation we need to be having at this point"?
> A Correct.
>
> Q And immediately after he said that, the meeting adjourned; did it not?
> A Correct.[169]

Michael Berkholtz testified similarly:

> Q And when somebody said it is not an appropriate time to have this conversation, did the conversation end?
> A Yes. To the best of my recollection, yes.[170]

Terminating a conversation that included partisan politics is to be commended. A prompt termination of this discussion should serve to mitigate the perception of an alleged Hatch Act violation.

IX. Conclusion

To date in this exercise, the Majority has failed to establish that the Administrator has engaged in any misconduct. Instead, there is no contract for a diversity study (but there are crippled efforts to improve diversity practices at GSA), no interference with the Sun Microsystems contract negotiations, no interference with the debarment and suspension process, and when possible Hatch act issues arose, they were appropriately addressed.

Importantly, this investigation has shown the Majority will pursue an investigation on the flimsiest of evidence and use its authority in ways never previously imagined. A public airing of all these matters will serve the public interest in exposing the serious flaws in this investigation.

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[168] Berkholtz Interview at 20; Monica Interview at 18-19; Busch Interview at 18-19; and Murphy Interview 25-26.

[169] Monica Interview at 24.

[170] Berkholtz Interview at 24.