



Statement of

The Honorable Carol Fortine Ochoa

Inspector General

U.S. General Services Administration

before the

U.S. House of Representatives

Committee on Transportation and Infrastructure

Subcommittee on Economic Development, Public Buildings,
and Emergency Management

concerning

“Landlord and Tenant: The Trump Administration’s Oversight of the Trump
International Hotel Lease”

September 25, 2019

Chairman Titus, Ranking Member Meadows, and Members of the Subcommittee:

Thank you for the opportunity to testify here today regarding the Office of Inspector General's (OIG) Evaluation of the General Services Administration's (GSA) Management and Administration of the Old Post Office Lease.

INTRODUCTION

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

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

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

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

resolution of these issues, including a possible solution satisfactory to all parties; and the uncertainty over the lease remains unresolved.

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

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

BACKGROUND

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

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

The relevant provisions are as follows:

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

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

FACTS

Emoluments

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

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

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

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

Section 37.19

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

The version of the Interested Parties provision used in the OPO lease was taken from GSA's 1999 outlease of the historic Tariff Building in Washington,

D.C., for the Hotel Monaco. The revised clause used in the Monaco Hotel lease stated in full:

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

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

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

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

GSA Review of 37.19

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

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

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

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

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

Contracting Officer's Decision

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

ANALYSIS

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

We surveyed sources that show the contemporaneous use and meaning of the term "emolument" during the Founding Era. We reviewed the Supreme Court opinions that might show general usages over long periods of time. Finally, we reviewed evidence of the first President's business activities that

might be relevant to our inquiry. We found evidence that the term “emolument” as used historically and today includes the gain from private business activities, confirming GSA’s assumption that the Old Post Office lease raises at least potential constitutional issues.

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

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

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

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

Finally, OGC also could have sought guidance from OLC directly, but did not. We found that OGC is familiar with seeking guidance from OLC, and had requested advice from OLC previously. OGC confronted a similar problem 20 years ago when OGC sought guidance on a complex business structure

between six entities, in which two Members of Congress held beneficial interests through blind or excepted trusts, and a real estate investment trust that held government leases. The proposal raised a question whether the interests of the Members under the proposed transaction violated the criminal statutes, based on the 1808 Act that prohibited Members from entering in or holding federal government contracts. OGC sought guidance from OLC because of the statutory bar to Members of Congress contracting with the government. Within two months, OLC issued two opinions that rejected several alternatives suggested by the entities at issue, but also identified for GSA's General Counsel one alternate arrangement suggested by the entities that satisfied the law. OGC charted a different course here.

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

Emoluments and Section 37.19

The primary clause of Section 37.19 states:

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

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

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

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

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

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

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

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

CONCLUSION

We found that GSA, through its Office of General Counsel and Public Building Service, recognized that the President's business interest in the OPO lease raised issues under the Constitution's Emoluments Clauses that might cause a breach of the lease, but decided not to address those issues in connection with the management of the lease. We also found that OGC

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

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

RECOMMENDATION

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

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

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

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