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THE PERILS OF POLITICS IN GOVERNMENT: A REVIEW OF THE SCOPE AND ENFORCEMENT OF THE HATCH ACT

HEARING

BEFORE THE

OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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THE PERILS OF POLITICS IN GOVERNMENT: A REVIEW OF THE SCOPE AND ENFORCEMENT OF THE HATCH ACT

THURSDAY, OCTOBER 18, 2007

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT
MANAGEMENT, THE FEDERAL WORKFORCE,
AND THE DISTRICT OF COLUMBIA,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:06 a.m., in Room SD–342, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Subcommittee, presiding.

Present: Senator Akaka.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. This hearing will come to order.

I call this hearing of the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia to order. This hearing will examine the Hatch Act, how it is being enforced, and whether it needs to be enhanced or clarified.

Government works best if the American people know that their government works for them, regardless of the political party that is in charge. The Hatch Act is an indispensable tool for making sure that it does.

Equally important is the protection that the Hatch Act provides for Federal workers. The Hatch Act is a central part of a merit-based civil service system that replaced the political spoils system. It restricts Federal employees' partisan political action in order to protect them from being coerced to participate in political activities.

That is why the political briefings that the White House provided to political appointees throughout the Federal Government have increased concern about the Hatch Act. According to press reports, the White House provided briefings on election results and upcoming elections over several years to political appointees across the Federal Government. For example, a January 2007 presentation given at the General Services Administration included slides analyzing Senate and Governors' races that they predict to be competitive in 2008 elections. The White House briefing seemed designed to solicit Federal officials to engage in partisan political activities by suggesting that the White House would appreciate their assistance in the competitive races highlighted.

Such a practice has no place in any administration. In order for the Hatch Act to fulfill its purpose, we must ensure that it covers not only explicit coercion but also more subtle encouragement of Federal employees to assist the President's political party in elections.

At the same time, Federal employees remain free to vote as they choose, express their opinions on candidates and issues, and attend rallies and meetings while off duty. As a result of amendments passed in 1993, most Federal employees are free to take an active part in election campaigns.

The Hatch Act has not been looked at in-depth since the 1993 amendments. As we enter the 2008 election season, it is time for Congress to ask whether the statute is doing what it is intended to do, whether it is being enforced properly, whether the 1993 amendments worked well, and whether the statute needs updating.

Most employees know that they are not allowed to engage in political work while on duty, but they may not understand nor even know about the other restrictions. For example, Federal employees who know that they are permitted to work on a campaign while off duty may accidentally violate the Hatch Act because they do not understand that they cannot directly solicit donations for the campaign.

In particular, the line between casual workplace conversation and political activity that is not permitted on duty may be unclear to many employees. Does inviting a few work friends to a campaign rally after work violate the Hatch Act? Does it matter if an employee asks his friends by e-mailing rather than while chatting in a break room? Does it matter if the employee invites two friends or 20? How do employees know where the line is?

This uncertainty may discourage employees from engaging in conversation and off-duty political action that is allowed under the Hatch Act. This chilling effect is particularly likely because the Hatch Act states that an employee who violates the statute shall be removed from his or her position. That penalty can be reduced, and few employees actually lose their jobs under the Hatch Act. However, many employees may avoid doing anything that approaches the statute's reach for fear of putting their jobs on the line. I believe that the Hatch Act should be enforced vigorously, but that punishment should be more effectively targeted to fit the seriousness of the violation at issue.

Finally, I also am concerned about the difference in treatment between civil servants and Presidential appointees and White House staff when the Office of Special Counsel (OSC) finds a violation. The Merit Systems Protection Board does not have jurisdiction over violations by most Senate-confirmed political appointees and White House staff. Only the President can decide if these officials will be punished for violations. Furthermore, there are no requirements on the President to take any action on the OSC's findings. As a result, the President has little incentive to punish his political appointees and staff if they step over the line to help his political party. These officials are covered by the Hatch Act, but there is no way to enforce the statute if they violate it.

I have devoted a great deal of energy to protecting Federal employees' rights and benefits over the years, and I believe that the

Hatch Act is an integral part of the merit-based civil service system. Any changes to the Hatch Act must be carefully weighed as the statute reflects a well-thought-out balance between honoring civil servants' rights to political engagement and protecting them from political coercion.

I want to thank our witnesses for being here today to discuss these important issues, and I would like at this time to welcome to today's Subcommittee hearing the first panel of witnesses: James Byrne, Deputy Special Counsel in the U.S. Office of Special Counsel, and Chad Bungard, General Counsel, the Merit Systems Protection Board. I also welcome Ana Galindo-Marrone, the Chief of the OSC's Hatch Act Unit. I understand that you are here to respond to questions but you will not make an opening statement.

It is the custom of this Subcommittee to swear in all witnesses, and I would ask all of you to stand and raise your hand. Do you swear that the testimony you are about to give this Subcommittee is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BYRNE. I do.

Ms. GALINDO-MARRONE. I do.

Mr. BUNGARD. I do.

Senator AKAKA. Thank you very much. Let the record note that the witnesses did answer in the affirmative.

Now I would like to hear from our witnesses. Let me first call on Mr. Byrne for his testimony.

TESTIMONY OF JAMES BYRNE,[1] DEPUTY SPECIAL COUNSEL, U.S. OFFICE OF SPECIAL COUNSEL, ACCOMPANIED BY ANA GALINDO-MARRONE, CHIEF, HATCH UNIT, U.S. OFFICE OF SPECIAL COUNSEL

Mr. BYRNE. Chairman Akaka, I thank you for the opportunity to appear before this Subcommittee to discuss the Hatch Act. My name is Jim Byrne, and I am the Deputy Special Counsel of the U.S. Office of Special Counsel. I am joined today by Ana Galindo-Marrone, who has been our Chief of OSC's Hatch Act Unit since 2000.

The Hatch Act restricts the political activity of employees of the Federal Executive Branch, the District of Columbia, and State and local employees who work on federally funded programs. The Office of Special Counsel appreciates the Subcommittee's willingness to hold a hearing on the Hatch Act. This hearing brings visibility to the Hatch Act that can enhance awareness and understanding and deter violations of the law.

Today, I am pleased to provide our perspectives on the scope of the Hatch Act, how it is enforced, and possible enhancements. We will testify today from our experience in enforcing the Hatch Act from closed cases. And as you know, we cannot discuss the details of any ongoing investigations.

The Hatch Act was enacted in 1939 to address the spoils system that had dominated the Federal workplace, under which Federal employment and advancement depended upon party service and changing administrations rather than performance. Congress deter-

[1] The prepared statement of Mr. Byrne appears in the Appendix on page 29.

mined that placing limits on employees' partisan political activity was necessary for institutions to function fairly and effectively. The Hatch Act is essential to a government that operates under a merit-based system and serves all citizens regardless of partisan interests.

The Supreme Court in 1973 recognized that one of the primary purposes in enacting the Hatch Act was to ensure: That employment and advancement in government service not depend on political performance, and at the same time make sure that government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs.

Unfortunately, from recent headlines and our experience in investigations, the reasons for the Hatch Act remain compelling today. Commitment by public servants to a neutral, nonpartisan Federal workplace is critical to fair governance and the public trust. OSC is committed to its statutory mission to enforce the Hatch Act, and that commitment is demonstrated in the hard work of the career lawyers that work in OSC's Hatch Act Unit, who are here in this room today.

In the last 2 years, the unit has issued over 5,600 advisory opinions, received approximately 600 complaints, and investigated and completed 517 of those complaints. We resolved 68 of these without litigation, advising employees that they were in violation, and securing their willingness to comply. Some complaints have involved serious allegations of Federal employees using their official authority to interfere with elections, including targeting subordinates for political contributions. Similarly, in State and local cases we have investigated allegations of supervisors, including law enforcement officials, using their official authority to coerce political contributions from subordinates. We have been aggressive in outreach and enforcement to educate employees that political activity while on duty or in a Federal building is prohibited, regardless of the technology utilized.

This year, OSC completed a successful run of litigation involving the use of e-mail to engage in political activity while on duty or in a Federal building. We realize that unfortunate wording from a 2002 OSC Hatch Act advisory opinion on the use of e-mail had been misinterpreted as a "water cooler" exception for e-mail activity. As no such exception has ever existed under the Hatch Act, we rescinded the opinion in March, following several opinions where the MSPB agreed that using the e-mail system to engage in political activity while on duty or in a Federal building is prohibited by the Hatch Act.

Complaints under the Hatch Act have increased in number in recent years. We hope that the visibility of the Hatch Act by this hearing and by our own expanded investigations will reverse this trend as employees become more aware of their responsibilities.

We look forward to your questions.

Senator AKAKA. Thank you very much. Now we will hear from Chad Bungard.

TESTIMONY OF B. CHAD BUNGARD,[1] GENERAL COUNSEL, U.S. MERIT SYSTEMS PROTECTION BOARD

Mr. BUNGARD. Thank you, Chairman Akaka, for the opportunity to share information regarding the role of the Merit Systems Protection Board in enforcing the Hatch Act. I request that my written statement be included in the record.

MSPB adjudicates cases under the Hatch Act when the Special Counsel files a complaint seeking disciplinary action for an alleged violation of the Act. The complaint is heard by an administrative law judge under the terms of an interagency contract with the National Labor Relations Board. Generally, the procedures applicable to MSPB appellate cases also apply to Hatch Act cases. The Board does not have authority to consider a complaint alleging a violation of the Hatch Act by an individual who is a Presidential appointee with Senate confirmation.

If the ALJ determines that a Federal employee has violated the Hatch Act and that removal is warranted, the ALJ issues an initial decision ordering removal of the employee, which may be appealed to the full Board on petition for review. If on petition for review the Board decides that a Federal employee has violated the Hatch Act, the penalty must be either removal or suspension without pay for not less than 30 days. If the ALJ determines that a Federal employee has violated the Hatch Act but that the appropriate penalty is less than removal, the ALJ issues a recommended decision for consideration by the Board. A penalty of less than removal requires, by statute, a unanimous vote of the Board. The ALJ may initiate attempts to settle the complaint at any time during the proceeding. If a settlement is reached, the settlement agreement becomes the final and binding resolution of the complaint.

If the Board decides that an employee of a State or local agency whose principal employment is in connection with an activity financed, in whole or in part, by Federal funds has violated the Hatch Act, the outcome must be the penalty of removal or determination that no penalty is warranted. If the Board determines that removal is warranted and the State or local agency fails to comply with the Board's order or reinstates the employee within 18 months of the removal, the ALJ or the Board may order the Federal entity providing funding to the agency to withhold funds from the agency. The amount to be withheld may be the equivalent of 2 years of pay for the subject employee.

The Board's decision that a Federal employee violated the Hatch Act may be appealed to the U.S. Court of Appeals for the Federal Circuit. The Board's decision that a State or local agency employee violated the Hatch Act can be reviewed by an appropriate U.S. district court.

MSPB receives approximately 8,400 appeals in its headquarters, regional, and field offices each year. From January 2002 to September 2007, the Office of the Special Counsel brought 36 Hatch Act cases before the Board. Of that total, 15 cases involved State or local agency employees.

In 2006, the Board issued a series of decisions involving allegations of Hatch Act violations for engaging in political activity while

[1] The prepared statement of Mr. Bungard appears in the Appendix on page 32.

on duty in government offices. In three of these cases, the Board determined that the employee had engaged in political activity that was prohibited by the Hatch Act. In the fourth case, the Board reversed and remanded a decision by the administrative law judge dismissing the complaint, directing the parties to address factors identified in OSC's 2002 advisory opinion, along with any additional arguments that would support their views as to whether a Hatch Act violation occurred.

The Office of the Special Counsel rescinded its 2002 advisory opinion in March of this year stating that these Board decisions provide "clear guidance" and intimating that the Board held that the right to express opinions on political subjects and candidates was limited to off-duty expressions, that is, the "water cooler" exception is no longer valid. To the contrary, the Board has not decided whether an employee's on-duty expressions of his or her opinion on political subjects and candidates constitute "political activity," as prohibited under the Act. In all four of these Board decisions, the issue was whether the employees' communications exceeded the mere exchange of opinions and urged others to take specific action in support of or against specific partisan candidates.

As the data show, Hatch Act cases are a very small part of the Board's overall caseload. However, these cases are very significant to the Board's statutory mission of ensuring a merit-based Federal civil service system. The Board endeavors to adjudicate these cases promptly and efficiently, and in a manner that comports with the congressional intent underlying the Act.

I would be happy to answer questions at this time.

Senator AKAKA. Thank you very much. Mr. Byrne, you testified that the Special Counsel recently clarified that there is no "water cooler" exception for engaging in political activity via e-mail. Does a more traditional "water cooler" exception exist if a group of employees casually chat in the break room about their views on an upcoming election? Does that violate the Hatch Act?

Mr. BYRNE. Mr. Chairman, thank you for that question. The opinion that our office put out several years ago had no mention to any exception to the Hatch Act. We look at situations or examples like you are discussing in the totality of the circumstances to determine whether that activity rises to the level of a political activity designed to influence an election. And so there is no such animal as the "water cooler" exception. Each case is looked at under that microscope.

Senator AKAKA. Thank you. Mr. Bungard, from your experience at the Board, do you believe it is sufficiently clear to Federal employees where OSC and the MSPB have drawn the line between casual conversation and impermissible political action?

Mr. BUNGARD. Well, the Board certainly has not addressed whether it is permissible for one to express his political opinion either through e-mail or otherwise. That issue has not been before the Board, and it specifically stated such in two cases last year. The cases that were brought before the Board last year, all four cases mentioned in the 2007 press release by OSC, were communications that expressly advocated the election or defeat of a candidate and sent to multiple individuals.

Senator AKAKA. Mr. Byrne, does on-duty activity and support over a political cause that is not tied to a political party or election violate the Hatch Act? In other words, can employees put up pro- or anti-war posters in their offices?

Mr. BYRNE. Mr. Chairman, I might ask——

Senator AKAKA. This is in support of a political cause.

Mr. BYRNE. Correct, that may be interpreted as a partisan activity, rising to the level of the activity. I am going to look over my shoulder at Ms. Galindo-Marrone, if you will permit me, to probably address that issue, which I believe they have done repeatedly with advisory opinions in other matters, if you will allow.

Senator AKAKA. Thank you.

Ms. GALINDO-MARRONE. Good morning, Chairman Akaka. And, again, I also would like to thank you for giving me an opportunity to answer your questions and discuss OSC's enforcement of the Hatch Act.

And turning to your question, if the matter is not tied to a political party, partisan organization, or candidate for partisan political office, then certainly an employee would be allowed to post such an item, whether it is pro-war, anti-war, or any other matter that is in the news at the time.

Senator AKAKA. Yes. And this is a fine line. The everyday understanding of political activity includes activism on issues, even if they are not tied to political parties. Do employees understand this distinction?

Ms. GALINDO-MARRONE. I cannot answer for all employees, but certainly in terms of our outreach efforts and our efforts in issuing advisory opinions, when this issue is addressed we make it very clear that unless—and going back, again, to the definition of "political activity," it needs to be connected, tied to a candidate, a political party, or partisan organization so that if an individual is just making a statement about issues and not tying it to a candidate or a party, it would not be prohibited. And, in fact, we have an advisory opinion on that very issue up on our website.

Senator AKAKA. Mr. Byrne, many people in government and elsewhere use e-mail for both formal and informal communications. It is an easy and efficient way to communicate with a lot of people. However, unlike face-to-face conversations, e-mail recipients cannot judge the writer's body language or tone of voice, and misunderstandings about the writer's intent may be more likely.

To either one of you, have you found that these differences make it more likely that Federal employees will accidentally cross the line into political action when they meant to engage in casual banter?

Mr. BYRNE. I would like to address part of that, if I might, because that is a very good point about e-mail, somewhat a new means of communication for some of us, I suppose, where you do not have those expressions and the inflections and the tones and the body language.

But on the other side—and not that I am particularly on one side or the other on it—is the danger within e-mail that—I will not say the equivalent, but the possibility that it will be echoed on through forwarding and repeated forwarding and repeated forwarding, almost as though someone is making a conversation in the Grand

Canyon and it is echoing back and forth and continuing on indefinitely. So that is an additional danger or additional concern that one would add to the e-mail phenomena with communications.

Ms. Galindo-Marrone, do you have anything to add to that?

Ms. GALINDO-MARRONE. I guess I would like to add that just from our experience since the 2000 election, we continued to see a rise in terms of the use of e-mail to engage in political activity. And I think earlier you had asked about a bright line and the line between casual and impermissible. We take it seriously in the Hatch Act Unit when we receive these complaints and to look at each case on its own. We have to look at all the facts surrounding the communication—the number of recipients, the content, when it was sent, who it was sent to, etc.

Senator AKAKA. Well, when I hear a number like 5,600, it is enormous. And when you say you have to take each one on its own——

Ms. GALINDO-MARRONE. We are busy.

Senator AKAKA. It is very difficult.

Mr. Byrne, with the 2008 election season already gearing up, what actions is OSC taking to make sure Federal employees understand the Hatch Act? I think it was mentioned that education is going on, but I would like to know a little more detail about how you are making sure that Federal employees understand the Hatch Act.

Mr. BYRNE. Thank you, Senator. I was scribbling notes down as you were talking, and we continue our outreach program to various agencies to make them aware of this. Fortunately, or unfortunately, some higher-profile investigations have been covered in the media, and we think that raises the profile of the Hatch Act. This hearing, which we thank you for, raises the awareness of the Hatch Act. And I think part of your question was how are we preparing to deal with the potential rise in the number of cases. And we have just recently hired two new employees to bolster up the Hatch Act Unit: Nicole Eldridge out of Rhode Island and Justin Martell here in Northern Virginia.

I think Ms. Galindo-Marrone would like to add something.

Ms. GALINDO-MARRONE. If I may, I would also like to say that in gearing up for the 2008 Presidential election, we have been more actively posting advisory opinions on our website as we see new and unique issues or issues that keep repeating themselves. We are being more active in placing advisory opinions on our website as well as in this past year we took some time—and our Deputy Chief of the Hatch Act Unit did two DVDs targeted for both Federal employees and State and local employees that are available off our website to assist.

Senator AKAKA. You use the word "repeating." What are the most frequent types of Hatch Act complaints the OSC receives?

Ms. GALINDO-MARRONE. Candidacy violations, would be the majority of the cases that we see.

Senator AKAKA. Also, let me ask whether the types of complaints or requests for advisory opinions that you see have changed over time.

Ms. GALINDO-MARRONE. Could you give me a little bit more with respect to that question just to make sure that I answer correctly?

Senator AKAKA. Yes, and I am asking for complaints or requests for advisory opinions. And since the spoils system in 1939, many things have changed, of course, but I am just asking whether more recently the types of complaints or requests for advisory opinions that you see have changed over time.

Ms. GALINDO-MARRONE. The majority of the complaints and also the requests for advisory opinions continue to be in the area of candidacy. A number of employees request advisory opinions wanting to know whether they are covered by the Hatch Act, in particular State and local employees, and if they are covered, can they be candidates in particular elections?

Senator AKAKA. Mr. Byrne, your statement notes that the Hatch Act reflects a judgment that placing limits on employees' partisan political activity is necessary for the government to function fairly and effectively. High-level officials set the tone within agencies, and they are the officials most likely to be, of course, in the public eye. For those reasons, it is very important that they abide by the Hatch Act.

How has the Special Counsel's office dealt with its inability to bring Hatch Act charges to the MSPB against most Senate-confirmed Presidential appointees and White House staff?

Mr. BYRNE. Thank you, Senator, for that question, and I have a smile on my face when you say that, because obviously there is a difference. We follow the law. We are law enforcement, and we follow it within the constraints of the statutes. And we forward recommendations on presidentially appointed, Senate-confirmed individuals to the President and leave it to his discretion what to do in the discipline area.

I do not really have any comment other than I acknowledge the fact that there is a difference and appreciate the question.

Senator AKAKA. And you are following the law.

Mr. BYRNE. Yes, sir. We are following the law.

Senator AKAKA. Mr. Bungard, Hatch Act cases are a very small part of MSPB's caseload. Why do you believe this is the case?

Mr. BUNGARD. I really do not have an opinion on why OSC decides to bring cases before the Board and why they do not. But we have only had 36 decisions from 2002 to the present.

Senator AKAKA. Yes. I think you mentioned that there were 68 cases without litigation, as well. So, are the Hatch Act cases still considered a small part of your caseload?

Mr. BUNGARD. Very small part. We processed 8,400 appeals this year, and we have only had 36 Hatch Act cases since 2002.

Senator AKAKA. Mr. Bungard, are there other Federal personal statutes that have a similar default punishment of termination? If so, what are those statutes?

Mr. BUNGARD. I can certainly look into that and get back to you.[1]

Senator AKAKA. Mr. Byrne, State and local employees are subject to the Hatch Act only where their principal employment is in connection with programs financed by loans or grants made by the United States or a Federal agency. To either one of you, do you receive complaints about State and local employees who do not know

[1] The Court case appears in the Appendix on page 105.

they are covered by the Hatch Act until they are warned that they might have violated it?

Mr. BYRNE. I am pretty sure the answer is yes, but I would actually think Ms. Galindo-Marrone could probably answer that better.

Ms. GALINDO-MARRONE. Yes, certainly, we receive a number of complaints like that.

Senator AKAKA. Mr. Bungard, the determination whether a State or local employee is covered by the Hatch Act, is that determination often difficult? Do many State and local employees contest whether they are subject to the Hatch Act?

Mr. BUNGARD. Yes, that does come up. In fact, that came up in, I believe, a 2006 decision was *Special Counsel v. Phillips*. Did this individual fall within the Executive Branch? So that question does come up, and the Board does contemplate that from time to time.

Senator AKAKA. Also, does the Board have jurisdiction over State and local employees in other types of personnel actions?

Mr. BUNGARD. I do not believe so.

Senator AKAKA. Mr. Byrne or Ms. Galindo-Marrone, in your experience, have there been any changes in the seriousness of Hatch Act violations that you see?

Ms. GALINDO-MARRONE. I am so glad you asked that question because I wanted to supplement an earlier answer when you were talking about the different types of advisory opinions and the complaints, and I focused my response on saying that they continue to be candidacy. I could not give you numbers right now, but there has been what appears to us in the Hatch Act Unit to be an increase in the number of complaints that we are seeing involving what we consider serious allegations involving the use of official authority to interfere with the results of an election, and internally we call these the "coercion cases" where you have a supervisor or someone in authority soliciting or drawing in their subordinates to engage in political activity. And so we are starting to see in the last couple of years on the Federal, State, and local side more of those cases.

Senator AKAKA. Thank you.

Mr. Byrne, what is OSC's policy of releasing non-final Hatch Act investigation reports? To your knowledge, has this policy been followed by OSC leadership?

Mr. BYRNE. Thank you, Mr. Chairman. The release of any reports is at the complete discretion of the Special Counsel, Scott Bloch.

Senator AKAKA. I want to thank you, Mr. Byrne, Ms. Galindo-Marrone, and Mr. Bungard, again for taking the time to appear before the Subcommittee today. This area of the Hatch Act has been elusive in some ways, has been misunderstood, and I am glad that we are having this hearing. I hope that all Federal employees and others who come under the Hatch Act would consider trying to learn more about the fine lines, as this is where it is very difficult. And I know you continue to be certain that the correct advice is given, and I am hoping this raises the awareness of the Hatch Act, what its purpose is, and how it is used, so that it can be followed as closely as possible.

So I want to at this time thank you for coming today and helping us with our work here in the U.S. Senate. Thank you very much.

Mr. BUNGARD. Thank you.

Mr. BYRNE. Thank you, Mr. Chairman.

Ms. GALINDO-MARRONE. Thank you.

Senator AKAKA. Now I would like to welcome our second panel to the Subcommittee's hearing: Colleen Kelley, National President of the National Treasury Employees Union; John Gage, National President of the American Federation of Government Employees; and Tom Devine, Legal Director, Government Accountability Project.

As you know, it is the custom of this Subcommittee to swear in all witnesses, and I would ask all of you to stand and raise your right hand. Do you solemnly swear that the testimony you are about to give this Subcommittee is the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. KELLEY. I do.

Mr. GAGE. I do.

Mr. DEVINE. I do.

Senator AKAKA. Thank you very much. Let it be noted for the record that the witnesses answered in the affirmative.

As with the previous panel, I want the witnesses to know that while your oral statements are limited to 5 minutes, your entire statements will be included in the record.

Let me call on Ms. Kelley to please proceed with your statement.

TESTIMONY OF COLLEEN M. KELLEY,[1] NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Ms. KELLEY. Thank you very much, Chairman Akaka, for holding this hearing today, and I very much appreciate the opportunity to be here to discuss the Hatch Act. Your oversight of this important issue ensures that while the administration of Federal programs remains free of partisan political influence, rank-and-file career Federal employees may continue to participate as citizens in our Nation's political life.

Before the Hatch Act amendments that were implemented in 1994, Federal employees could not work on a campaign by planning events, coordinating volunteers, or helping in get-out-the-vote drives. They could not run for office within a party structure or attend conventions or rallies or meetings as the elected representative of a partisan organization, even on their non-work time. You may remember all the terrible things that some Members of Congress promised would happen if the Hatch Act was amended. After all the speeches and the dire predictions, however, the Hatch Act, as amended, has been a great success. While the National Treasury Employees Union (NTEU) would like to see less restrictions in some of the provisions, and we think that the penalties are much too harsh for most of the transgressions, by and large, it has allowed Federal workers to become more fully involved and to exercise their citizenship in a vital way.

NTEU believes, however, that some problems remain with the current Hatch Act. There is so much gray area in the regulations that even the Special Counsel's office couches its opinions and advisories with vague language. What happens in reality is that

[1] The prepared statement of Ms. Kelley appears in the Appendix on page 40.

Federal employees are often so confused about what is acceptable and what is not acceptable that they do choose not to exercise the rights, as you suggest. We are happy to say, however, that to the best of our knowledge, no NTEU member has ever been charged with a Hatch Act violation.

As we have said, the Hatch Act amendments are, for the most part, working well. There are some areas, however, that would work better if they were clarified and some others if they were modified, and we have supplied specific language in our written testimony. I would like to speak briefly to five of those.

First, to codify the "water cooler" rule that we heard discussed on the first panel. The current Special Counsel rescinded an earlier advisory opinion that allowed Federal employees to communicate by e-mail about political subjects within narrow parameters. If the content of a message expresses the sender's personal opinion about a candidate for partisan political office and the audience for the message is a small group of colleagues with whom the sender might otherwise engage in water-cooler talk, an e-mail message should be considered a substitute for permissible, face-to-face expression of personal opinion, which is not prohibited by the Hatch Act.

Second, clarify the union's right to conduct nonpartisan voter registration drives at Federal worksites. If the voter registration drive is non-partisan—that is, that it is open to all to register with whatever party, if any—there should be no other factors that are relevant. It should be allowed.

Third, repeat the mandatory removal penalty. The penalty needs to fit the crime. Fear of getting fired is an unnecessarily harsh penalty that often deters Federal employees from exercising the rights that they do possess.

Fourth, add a provision to Section 1215(b) of Title 5 requiring the President to report to Congress of any actions they take in response to findings by any relevant agency of violations of the Hatch Act or prohibited personnel practices by Senate-confirmed Presidential appointees. Make that reporting a requirement.

Fifth, at a minimum, allow Federal employees to run as independent candidates for local office, regardless of whether other candidates are running with the endorsement of partisan political groups. And, ideally, allow Federal employees to take leave to run for any partisan public office.

We have had enough time under the amendments to recognize that there is no danger to either the civil service or to the country at large in a Federal employee running for office as a member of a political party.

On a related topic, the Special Counsel has asked for an additional $2.9 million for Hatch Act investigations, noting that the office needs what they call to build a capability to do extended forensics. The decisions that have been made by the current Special Counsel do not lead me to support that request.

In conclusion, Mr. Chairman, it took almost 20 years of hard work by NTEU and other organizations to amend the Hatch Act to overcome all of the dire predictions of what would happen if we let Federal employees participate in their government's political structure. After all the speeches and the hand-wringing, however, the

Hatch Act amendments of 1994 have been a great success, and I would be glad to answer any questions that you have.

Senator AKAKA. Thank you very much. Mr. Gage, your testimony, please?

TESTIMONY OF JOHN GAGE,[1] NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. GAGE. Thank you, Senator, and thanks for calling this hearing. My name is John Gage, and I am the National President of the American Federation of Government Employees, AFL–CIO, which represents over 600,000 Federal Government workers. In 1993, AFGE was a strong supporter of modifications to the Hatch Act that clarified ambiguities in the law, allowed Federal workers to become more politically active during off-duty hours, and set standards that guarantee a strictly apolitical civil service.

AFGE continues to believe that appropriate application of the Hatch Act by the Office of Special Counsel helps to preserve a politically neutral workplace while balancing the First Amendment rights of government workers. At the same time, AFGE strongly urges Congress to exert its oversight role during the next election cycle to monitor OSC Hatch Act investigations against Federal workers for inconsistencies, disproportionate penalties for minor infractions, and retaliation against union officials.

The Hatch Act was passed in 1939 with the intention of ensuring that the Federal civil service would be politically neutral and the spoils system would be eliminated. On its face, the Hatch Act and its amendments establish three limitations on the political activities of Federal workers:

Federal and postal employees cannot engage in political activity while on duty, in any building where the business of the government is being conducted, while wearing a uniform or official insignia identifying them as public employees, or while using a government vehicle.

Federal employees are not permitted to run for partisan political office at any level.

And Federal employees are not allowed to solicit, accept, or receive political contributions from the general public, a superior, or while inside a government building.

But it is also important to note that the Hatch Act also serves to protect civic participation of Federal workers, including the right to register and vote for the candidate of their choice; to run as candidates for public offices in nonpartisan elections; to assist in voter registration drives; to contribute money to, and engage in, fundraising for political organizations or candidates; to attend political fundraising functions; and to express opinions about candidates and issues.

The provisions of the Hatch Act appear to draw fairly bright-line distinctions between what activities are and are not permissible by Federal employees. Federal workers have a right to participate in partisan political activities fully and freely, except when that par-

[1] The prepared statement of Mr. Gage with an attachment appears in the Appendix on page 47.

ticipation impacts the integrity of a competitive civil service free from political influences.

AFGE has serious concerns about inconsistencies in interpretation of the Hatch Act. The drafters of the Hatch Act and its 1993 amendments never anticipated the extent to which technology would change how workers communicate with each other. Wide access to e-mail, the pervasiveness of information available via the Internet, and instant and text messaging have profoundly broadened the ability of one worker to communicate with many individuals with a few strokes of the keypad. From the ease of sending attachments via e-mail to the almost instantaneous posting of videos on YouTube, the scope and quantity of information readily available was almost beyond comprehension only a few years ago. Simply put, people, including Federal employees, have much more ways to talk now than they did in 1939 or 1993.

In light of changes in communications technology, and to the public discourse as a whole, AFGE would like to bring to the attention of the Subcommittee issues where the application of the Hatch Act appears to lag behind the reality of the present-day workplace.

First, AFGE members have faced OSC investigations that were extensive, time-consuming, and chilling based on allegations of computer commission that were relatively minor e-mail situations that ran afoul of the current OSC's broad interpretation of the Hatch Act. In these situations, employees forwarded e-mails that included satire or jokes about political figures, announcements of events, or e-mails that are only political in nature upon closer review than the worker's initial cursory read. Often these e-mails are not shared with the entire workplace, but instead sent to a smaller group with whom the employee converses regularly.

Prior to the advent of computer communications, the employee might have shared the information with a small group of colleagues around the proverbial "water cooler" or during coffee breaks. The e-mails are forwarded because the worker simply wanted to share a funny joke and did so without much thought by a single click of the mouse. The mere act of forwarding an e-mail is not adopting the ideology of the e-mail's originator.

While AFGE does not condone political activity at the Federal workplace in violation of the Hatch Act, we do believe that the forwarding of e-mail with political undertones to a small group of colleagues is better addressed through the agency's computer usage policy than an OSC official investigation. For example, the Department of Veterans Affairs' Automated Information Systems Security Policy clearly states that "electronic mail users must exercise common sense, judgment, and propriety in the use of this Government resource." The VA system also includes a table of offenses and progressive discipline depending on the nature, scope, and occurrence of the offense and whether the worker's misbehavior affects the mission of the agency that should result in a penalty for the misbehavior most appropriate to the situation. AFGE believes this is a much more appropriate disciplinary process when agency computer policies are violated instead of a lengthy OSC investigation.

During previous administrations, the OSC conceded that relatively minor Hatch Act offenses should be considered "water cooler speech" and issued an advisory which has been removed from the

OSC website by Special Counsel Bloch. We believe the advisory offered a process more in line with expected workplace discourse. Constant misuse of e-mail after progressive discipline might require OSC involvement. Currently, the OSC can and does take action on a first event, even to a limited distribution. A one-time mistake by an employee with little or no impact on the workplace should not be punished in the same manner as partisan campaigning at the Federal worksite.

AFGE is also concerned about the harshness of penalties against workers for Hatch Act violations. A consideration of mitigating factors, the Douglas factors, is necessary to determine the degree of penalty most appropriate for Hatch Act violations. The presumptive penalty for Hatch Act violations is termination, with 30 days suspension as the minimum penalty. The Board must agree unanimously to settlements, even if the parties are in agreement. Just one dissent from a Board member will result in the employee's termination. With the possibility of presumed termination hanging over Federal employees who are the target of Hatch Act investigations, many Federal employees agree to a penalty far more severe than the offense, but one where they will not lose their jobs.

Under previous administrations, the OSC followed a version of progressive discipline short of seeking long suspensions or outright termination. However, the current OSC policy is that the Hatch Act does not provide for a warning to workers or an opportunity to cease and desist from a violation before seeking the harshest penalties. The resources spent by the OSC in pursuing harsh penalties are better applied to far more serious cases where there was a clear intent and pattern of abusing the worker's Federal employment for partisan political purposes.

Unlike most Federal workplace laws, the Hatch Act has no statute of limitations or even a deadline by which the OSC must file charges. In October 2007, AFGE is representing workers—many of them union officials—in OSC investigations that date back to the 2004 election cycle. The lack of a deadline or statute of limitations for filing charges provides the opportunity for workers to be targeted for retaliation because of their political or union affiliation. To prevent this type of retaliation, the establishment of a statute of limitations of 2 years—which covers an election cycle—is more appropriate to address partisan political activities on the job.

It is normal for workers to discuss the nature and circumstances of their employment. When the employer is the Federal Government, it is only natural that workplace discussions will include some discourse on political efforts to close or move facilities or increase or decrease an agency's budget because they directly impact the worker's employment. Workers will seek information about their bosses—the President and Congress—and engage in discussions about working conditions with colleagues in the workplace. Congress should fully utilize its oversight role to monitor Hatch Act prosecutions so that Federal employees can have free discourse about their jobs and the political decisions that affect them, while deterring those few employees who intentionally seek to use their civil service positions for partisan political purposes.

Thank you, Mr. Chairman.

Senator AKAKA. Thank you very much, Mr. Gage. Now we will hear from Mr. Devine.

TESTIMONY OF THOMAS DEVINE,[1] LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT

Mr. DEVINE. Mr. Chairman, thank you for inviting the testimony of the Government Accountability Project (GAP).

Separation of politics and Federal employment is the foundation for public service from a professional workforce. Unfortunately, the merit system in general, the Hatch Act in particular, and the civil service enforcement mechanisms that handle these duties, both are facing challenges unprecedented since the Watergate patronage scandals sparked passage of the Civil Service Reform Act of 1978.

The current threat of a politicized civil service is a reminder of why the Office of Special Counsel was created. Watergate revealed a massive Nixon Administration operation to replace the non-partisan civil service system with a politically loyal workforce dedicated to partisan election goals. Every agency had a shadow "political hiring czar" whose authority trumped the personnel offices' responsibilities. The White House Personnel chief prepared the "Malek Manual" as an encyclopedia for how to harass career employees out of the government by exploiting loopholes in civil service laws. Non-complying Federal employees would be replaced by applicants selected through a political rating system of 1 to 4, based on factors like partisan affiliation, campaign contributions, and future campaign value. The record of abuses led to the Civil Service Reform Act of 1978, including creation of the Office of Special Counsel to make sure this never happened again.

However, in 4 years there was another severe attack on the merit system, ironically, by then-Special Counsel Alex Kozinski, who kept a copy of the Malek Manual on his desk and used its techniques to purge the professional civil service experts from his own agency's staff. He then tutored Federal managers on how to circumvent civil service law without getting held accountable by the Special Counsel. Eventually, the OSC became what one Senate staffer called a "legalized plumbers unit," and that sparked passage of the Whistleblower Protection Act of 1989.

Today's political threats to the merit system have been less clandestine and more arrogantly brazen. Instead of shadow political czars, agency leaders are doing the political arm twisting themselves. Instead of harassment encyclopedias on how to circumvent merit system rights, safeguards are being openly canceled by experiments in running government "like a business" without the red tape of due process. Twenty years later, there is serious evidence that we have a hybrid deja vu all over again at the Office of Special Counsel as well.

This hearing is about policy reforms rather than unraveling the allegations about the current Office of Special Counsel leadership. But accountability is a policy issue of the highest order. Anti-corruption campaigns become magnets for cynicism unless the public knows and believes the answer to the question: Who is watching the watchdog?

[1] The prepared statement of Mr. Devine appears in the Appendix on page 54.

Particularly significant, the OSC is seeking more money to expand its Hatch Act enforcement program, and it is only sound business to check the investment's track record. The current Office of Special Counsel's record on the Hatch Act has been to accomplish less with more. In fiscal year 2006, the agency's $15 million budget was over $3 million more than in 2002, the last full year before the current leadership. Yet in the previous 3 years, the Special Counsel had produced 88 Hatch Act corrective actions out of 585 cases. In the next 3 years, with more money, they produced 89 corrective actions out of 793 cases. That office can and must do better.

A survey of lessons learned for recommendations on how they can do better is instructive. One, make sure that the Special Counsel allows the targets of its Hatch Act investigations to see and respond to the evidence before reports are concluded or released to the press. Draft reports should not be leaked to the press.

Two, the Privacy Act rights of targets and witnesses must be respected in those reports.

Three, the Office of Special Counsel should restore scrapped staff-developed quality standards in proposed case priority systems so we are not vulnerable to the phenomenon of scapegoating the small fry for the petty technical offenses that have been described this morning.

Fourth, the OSC Annual Report should resume disclosing the number of Hatch Act investigations that are being opened each year. If the Office of Special Counsel is to expand its duties on the Hatch Act—and they have requested more money—we believe that Congress should:

First, order a GAO investigation to identify wasteful spending at the OSC that could be redirected for these valid duties.

Second, initiate a GAO investigation of alleged merit system violations at the Office of Special Counsel since the 2005 cut-off for the current OPM Office of Inspector General investigation.

Third, receive the reports of that investigation and make sure that corrective action is properly enforced.

And, finally, require regular Senate staff briefings from OSC on the progress of any of its renewed work. GAP is on call for Committee staff to see if we can help break the broken record syndrome that again is threatening the merit system.

Thank you, Mr. Chairman.

Senator AKAKA. Thank you very much, Mr. Devine.

The default penalty for violating the Hatch Act is termination. That punishment is not often imposed, but it certainly is intimidating to Federal employees. Ms. Kelley's written testimony states that this severe penalty makes many employees afraid to exercise their rights. I would like to hear more from anyone on the second panel about this issue. Based on your discussions with Federal employees, do you know of examples of individuals who avoid activities that are allowed under the Hatch Act out of fear of risking their jobs?

Let me start with Ms. Kelley.

Ms. KELLEY. NTEU goes to great lengths to train NTEU leaders on the Hatch Act and on what they can and cannot do because we want them to maximize the rights that they have and to exercise them as every other American citizen does. But invariably the dis-

cussions lead to gray areas, such as the "water cooler" situation, or the issue of, well, what happens if they think I did something wrong, what is the penalty. And when the answer is termination, I would advise anyone who I represent that they do not want to be set up to be a test case before the Office of Special Counsel.

And so while we give them all the information and what the law is and what the history is, in the end if they believe for a minute that a manager could zero in on them and make them a test case for OSC, they back off and they decide that the interest they had in exercising their rights has been squelched quite a bit because they do not want to do that. And I understand that.

Like I said, we give them all the support, all the information, all the education, but there is a fine line that is not well defined in many instances, per my testimony. And I cannot guarantee them they will not be facing a proposed termination.

So I think that many who would step forward and exercise their rights do not do it because they see decisions coming out of the OSC, they see other Federal employees doing things that they could innocently find themselves doing with no ill intent, and surely with no intent to violate the law, and yet see themselves being brought up on those charges.

Senator AKAKA. Mr. Gage.

Mr. GAGE. I think your question is right on point, and I would like to quote from an administrative law judge on a case that we just got this decision on last month, and he says, "One can only hope that the United States Congress will revisit its 1993 amendments and make clear exactly what sort of conduct it intended to prohibit and what sort of penalties it intended to exact. It is hard to believe that it intended to exact a penalty of termination or a substantial suspension without pay for conduct as trivial as that for which Mr. Wilkinson is being punished and for conduct as trivial as that for which other Federal and State employees may be punished in the future." [1]

And this judge had to uphold the settlement, which was for 30 days suspension. But even in that, he said, "This is a complaint that should never have been filed and, having been filed, should have by a prosecutor with any sense of fair play been settled for a warning letter. Departing from its usual practice, the Special Counsel initiated this proceeding without first warning Mr. Wilkinson that it believed that his conduct violated the Hatch Act and without giving him an opportunity to cease such conduct."

There is another case, too, that we just received, and in this one, one of our union leaders had invited a Congressman to come to the VA hospital to show him the conditions at that hospital. No politics intended. This had been scheduled for almost 6 or 7 months ahead of time, but was postponed twice—once because of the death of Governor Ann Richards down in Texas. But our local president, because a Congressman came in to look at the VA conditions, received—had to undergo almost a year-long investigation. And this is the type of rule that I think are hidden because in their dismissal letter, the OSC says, "Typically, visits by candidates so close in time to the day of their elections are viewed presumptively as

[1] The Court document appears in the Appendix on page 105.

campaign events, which are prohibited in Federal room or building." This visit took place 5 weeks before an election. Now, is 6 weeks okay? Is 7 weeks okay?

There are some hidden rules here that I do not know how anyone can expect a Federal employee or a union official to be able to comply with.

Now, Congressmen do their jobs through their whole term, and we have to petition Congress through their whole term. But to say presumptively that any visit by a Congressman—and that is not even close to an election—will be viewed as a violation of the Hatch Act, there is something amiss here, Senator. This OSC has gone overboard in their interpretation of the Hatch Act.

Mr. DEVINE. Mr. Chairman, I think it is very clear how deeply GAP believes in the Hatch Act, but I am equally concerned that if OSC enforcement activities are expanded under that law, we could have a threat from a whistleblower retaliation based on dissent; whistleblower retaliation being branded as Hatch Act violations.

Consider what has happened in the area of national security. National security whistleblowers have been almost routinely attacked as aiding and abetting the enemy when they challenge Executive Branch breakdowns in homeland and national security. We are concerned that when whistleblowers challenge Executive Branch breakdowns in public service, they could be attacked for aiding and abetting the Democrats. I think it is very important that if this office's responsibilities and resources are expanded, that they be kept on a very tight leash to see that we do not abuse any increased powers.

Senator AKAKA. Thank you for that.

Ms. Kelley, Mr. Gage's testimony suggests that the Douglas factors for progressive discipline could be included in the Hatch Act. Ms. Kelley, you also testified that the Hatch Act punishments should fit the crime. Would you support incorporating the Douglas factors into the Hatch Act? Or would some other system be preferable?

Ms. KELLEY. Well, the idea that the Douglas factors would apply, just as they do to every other charge that an employee could find themselves faced with in the Federal sector, makes perfect sense. And then the question is the vehicle, whether the language needs to be in the Hatch Act or whether it is made clear through other means that Douglas factors applied to all workplace issues, including the Hatch Act. I mean, how that is done is—NTEU is interested in talking with you and working with you and with Mr. Gage in how that gets addressed. But the bottom line, I think we all agree, is that a single penalty of termination for an undefined offense, because there can be such a wide range of an inadvertent comment made to an e-mail sent to 10 or 20 people to a formal invitation to come and vote, with somebody or for somebody—I mean, there is such a wide range. So the idea that there is only one penalty just does not seem to make sense in any situation, including applying the Hatch Act.

Senator AKAKA. Mr. Gage, would you like to comment about that?

Mr. GAGE. I think Ms. Kelley said it well.

Senator AKAKA. Thank you.

Well, Mr. Devine, you suggested that the OSC should develop a system to prioritize Hatch Act cases. Could you tell us more about how such a system would work?

Mr. DEVINE. There is no need to reinvent the wheel on that type of project, Mr. Chairman. This was a multi-year project under the prior Special Counsel. There was a staff consensus on some standards to make sure we are not scapegoating the small fry, we are going after truly significant threats to the merit system. That should be put back in the active files, dusted off, reviewed, and implemented.

The idea that people should be facing the death penalty for relatively technical violations of this law, it cannot withstand any scrutiny at all. It is time to restore basic principles of attacking the conceptual threats and doing it in a professional manner. That just has not been happening.

Senator AKAKA. This question is for all of you, if you would care to respond. I would like to hear more about where the line between casual conversation and impermissible political action has been drawn where e-mail is involved. Ms. Kelley.

Ms. KELLEY. I do not think there is a clear line. I think that employees think about it the way they do business every day. They used to not have e-mail access, and they knew just how to talk, and if someone overheard you or thought you were saying or implying something, then you could be the subject of an allegation. But e-mail is a very different way to communicate, and it is just too easy. Very often, when I speak with NTEU leaders about other things, not just the Hatch Act, we talk about how casual it is and how easy it is to turn around, type something, hit send, and never think through the ramifications of what could happen when 10 or 20 or 100 people read that.

So I think there has to be consideration given to the change in how people communicate, all the questions around intent, I mean, the same logical factors have to be applied. And there does not seem to be an interest by this Office of Special Counsel in doing that. And it is not addressing the realities of the workplace today, in my view, and setting a lot of employees up for potential problems when they are not intentionally doing anything wrong.

I think intent is one of the things that is being totally lost when you think about the method of communication of e-mail. It is too casual. It is very risky.

Senator AKAKA. Mr. Gage.

Mr. GAGE. Yes, I think that is right. Intent does have a place here. And, also, you are not really—how is an employee coercing another employee on anything partisan by sending them an e-mail? But the past panel was talking about in your question to support the war or not, and the interpretation of issues, even on budgetary issues that an agency might be facing—and we have had people warned on talking about real conditions that are facing their agency coming from Congress on budget, closings. That is up to the line on the Hatch Act.

When you have only termination, 30 days suspension, and that can drill down to employees' opinions on real things that are happening to them, I think it is very clear that this law is being used to coerce Federal employees to stifle all discussion on the worksite

and that there are no clear lines so you better keep your mouth shut and not get in trouble. And I think that is wrong, and the Special Counsel has gone way too far in their interpretations of this.

Mr. DEVINE. Mr. Chairman, I think my colleagues are right. E-mails are being used for the same type of communications that used to be casual conversation. The problem is that we now have a permanent record of something that used to have about the same legacy as a popped soap bubble. So it means that there is a different context for casual communications. It should not be chilled, however. To me, the way to draw a line on this is not to ignore that something was said, but a much stronger criteria whenever an e-mail comes into play for OSC review is what are the reactions to follow up or match any of those communications.

This is truly an area, probably more than any other, the mention of the permanent record, where talk is very cheap. People are almost thinking out loud in e-mail. There really shouldn't be investigations or prosecutions pursued just on the basis of those types of communications. There has to be some corroboration through deeds.

Senator AKAKA. As Mr. Gage testified, it seems natural that Federal employees will talk amongst themselves about Presidential and congressional elections because these elections can greatly affect the conditions of their employment. This does not seem terribly problematic, but the challenge is how to accommodate this type of conversation while protecting workers from coercion.

Would it be feasible and desirable to amend the Hatch Act to make clear that political speech in the Federal workplace is permitted as long as it does not involve communications between a supervisor and subordinate or between a Federal official and a member of the public? Mr. Gage.

Mr. GAGE. I would be very supportive of that. I think that the original law was to stop coercion. It was not to stop all discussion. With that kind of standard, the Hatch Act would be a lot clearer to everyone, and that you would not see these type of huge penalties and these secretive and very chilling investigations removing all political discourse among employees who have no ability to coerce or force a colleague.

So I would be very much in favor of that, Senator.

Senator AKAKA. Ms. Kelley.

Ms. KELLEY. I think that just the concept of what you are allowed to do versus what you are not allowed to do—because today most of what is in the Hatch Act is what you cannot do, and that would clear up an awful lot of ambiguities for a lot of employees and also make it clear that they have their right of free speech just as every other American citizen does. So I would be very interested in working with you on language like that.

Mr. DEVINE. Mr. Chairman, I think that GAP's contribution to this answer is predictable. This goes to the heart of the concern raised earlier about whistleblowing being renamed as political campaigning. The law should be very clear that if an employee is blowing the whistle, that is, disclosing evidence that he or she reasonably believes, information that person reasonably believes is evidence of illegality, gross waste, gross mismanagement, abuse of au-

thority, or substantial and specific danger to public health or safety, that those free speech rights are not canceled because a politician is identified as participating in an election campaign or because it could have an impact on some pending election campaign.

It is a very sensitive boundary. The Hatch Act should not be abused to gag people from blowing the whistle merely because there are political consequences.

Senator AKAKA. Thank you. During the first panel, Mr. Byrne clarified that on-duty support of a political cause that is not tied to a political party or election does not violate the Hatch Act. Do you believe that Federal employees understand that distinction?

Ms. KELLEY. I do not think that many of them do, Mr. Chairman. I think they do not draw the distinction. What they see, again, are rules or opinions coming out from this Special Counsel saying you cannot do this and you cannot do that. And, therefore, they worry how wide of a net that actually throws.

I think there is a lot of misinformation out there among Federal employees, not just front-line employees but even managers. We have had situations at NTEU where employees are circulating a petition to a Congressman or a Senator asking for support of appropriate Federal pay or protection of retirement benefits, a Federal employee issue that they have every right to communicate with Congress on. And we have had managers tell them that it is a Hatch Act violation to ask them to send a letter to their Congressman on their lunch hour in a Federal building.

Well, NTEU intervenes and, of course, we straighten out the manager and the labor relations manager who gave bad advice, but that is just an example. Those kinds of things could put such a chill on employees. If they see that management is going to say they cannot even write a letter to their Congressman, then they surely are not going to be willing to assume that they can do these other things.

And I also would suspect that there have been some cases, and I do not have any specifics, but I would be surprised if there are not management officials out there saying you cannot put up a sign in your office that says you were for or against the war because it is political. I think there is an overgeneralization all the time. So whether it is statutory language or whether it is a Special Counsel putting out the kind of information that employees need, something is needed to correct that.

Senator AKAKA. Mr. Gage.

Mr. GAGE. Agencies routinely put out very chilling warnings on the Hatch Act, and an employee, when he gets these warnings, he is clearly going to err on the side of "I am not going to be talking politics, I am not even going to be talking legislative issues, I am not going to be talking anything."

We have had so many questions come to us where we will have a meeting of employees to talk about legislative issues, and people are afraid to come to the meeting because they saw a very severe Hatch Act warning that is distributed to every employee and talked about with such huge penalties for any type of misstep.

So I think there is clearly a problem here with the heavy-handedness of the penalties and then the gray area of, or not a gray area, but how employees see it as a gray area just talking about

a legislative issue, which they have perfectly every right to do, but they are erring on the side of just staying away from everything. And I really think that is unfortunate.

Now, I do not know how you correct that, but I know how you encourage it, and that is by sending out these really draconian warnings every 6 months or so, and especially during a political season.

Senator AKAKA. Mr. Devine.

Mr. DEVINE. Mr. Chairman, this is a more conceptual response. The last 6 years have been the Dark Ages in the Executive Branch for freedom of speech. In my 29 years at GAP, the chilling effect is unprecedented for freedom of speech in the civil service. Bad sweeps aside, the distinctions of what is on the right or the wrong side of legal boundaries, you cannot open up your mouth. And it is very important that if the good-government agencies are going to step up their enforcement for misuse of free speech, they ought to be correspondingly stepping up their enforcement for the valid cherished exercises of free speech, such as whistleblowing.

Senator AKAKA. Thank you.

Ms. Kelley, both AFGE and NTEU—this is also for Mr. Gage—invest in educating your members about the Hatch Act. Are you engaging in any additional efforts to ensure that your members understand the Hatch Act as the 2008 elections approach?

Ms. KELLEY. Definitely. Each election cycle we gear up the training that we have always done over the years and then enhance it in an effort to get it to as many employees as possible. We start that through our NTEU leadership structure, and then our chapters across the country do that. And we do it not only to caution them on what the rules are, but because we want them to understand and be comfortable so that more and more Federal employees exercise the rights they have and that they should be exercising to be active in the political process. And without that information and education, there are too many of them who believe that it is the way it was before 1993 and that there are still those rules.

It is not unusual for me to meet with our members who think they still cannot do things that they have been able to do for the last 12 years. So that is our goal, and we absolutely enhance those and ratchet them up with each new election cycle because of things we learn, because of problems we hear in the workplace, to try to help clarify, and to remove the obstacles from employees exercising these rights.

Senator AKAKA. Mr. Gage.

Mr. GAGE. Yes, we have been hit pretty hard in the last two election cycles with our activists. Quite a few cases and investigations. We are pulling all of our activists into Pittsburgh at the end of this month, and a large part of that conversation will be on how to handle yourself in the light of the Special Counsel and the Hatch Act. And I must say we are also taking all our VA activists, about 500 of them, to Hawaii in November, and we look forward to that, and we will be talking with them there about the Hatch Act.

But it is a slippery slope because all you can do, even when you train people, is say do not do this, do not do that, do not even come close to it because you will be prosecuted and your job is on the line. So it is really tough training to get people to understand what

they cannot do, and even hardened union activists, to be able to tell them and for them to exercise what they should be able to do as citizens.

So it is a very difficult thing, and I am sure Ms. Kelley—and I know I do—we put a lot of time, money, and effort into trying to not have our people lose their jobs. But when you just look at our laundry list in our union of people who have been investigated—for nothing, for trivial things—it just resonates across our activists and has a chilling effect on really seasoned union people who are trained, who are still volunteers and do not want to lose their job, let alone on a rank-and-file member or employee.

Senator AKAKA. To both of you again, only the President can punish certain political appointees and White House staff for Hatch Act violations. Does this create an impression with your members that the Hatch Act is enforced unfairly? Mr. Gage.

Mr. GAGE. I was down in New Mexico, and Vice President Cheney had a political rally at the stadium there. Kirkland Air Force Base is one of our unions. E-mails went out from management that people would have approved leave and could not wear their uniform or any insignia. Free passes were passed out by the Public Relations Office of the base. And we complained, and that investigation went nowhere. And I really could not understand. It just seemed so blatant, all this activity occurring on the base, passing out tickets for management as well as advertising the issue and encouraging employees to go.

Now, that seems to be over the line, yet nothing became of it.

Ms. KELLEY. Anytime there is a double standard, employees notice it, especially when the harsher implementation seems to be aimed at the front-line employees rather than those who head up the agencies. So surely it is noticed. Because of the differences in handling when there are allegations against political appointees, and because of all the press coverage, of course, that brings it to the attention of the employees.

But as I said in my testimony, I believe there should be a requirement on the part of the White House that when these allegations are made, they should be required—he or she should be required to submit a report to Congress of the allegations made and of the results of the investigation. They should not be allowed to be swept under the carpet just because it is a political appointee, because we surely do not see that kind of a handling when there are allegations against front-line employees.

Senator AKAKA. Ms. Kelley, your written testimony contains a proposal to require the President to report to Congress on his or her actions in response to an OSC finding that a Senate-confirmed political employee violated the Hatch Act. Can you tell me more about that proposal?

Ms. KELLEY. Well, I just do not think it should be allowed to be swept under the carpet. There should be accountability there. There surely is accountability for every other Federal employee in any position across the government. And it should not be allowed to be shrouded in secrecy. The assumption will always be that they got a free pass because they are a political appointee, and whether they did or did not, whatever the facts were in the case, that should be at least required to be reported back to Congress for Con-

gress to decide whether or not the White House acted appropriately. And at this point, there is no accountability there at all, and we think that is unacceptable.

Senator AKAKA. Mr. Gage and Mr. Devine, do you have any comments to make about that?

Mr. DEVINE. Yes, Mr. Chairman. This is an inexcusable conceptual conflict of interest. It is an Achilles heel for the legitimacy of the Hatch Act. If the President has the final word on whether his political appointees or her political appointees have illegally tried to benefit the President's party, what in the world is the public policy justification for not subjecting this type of illegality to the normal system of legal accountability?

Senator AKAKA. Mr. Gage, do you have any comments?

Mr. GAGE. No, Mr. Chairman.

Senator AKAKA. Mr. Devine, I want to thank you for your long service working to protect the whistleblowers—you mentioned that several times here—an issue that is very important to me. I think you know that I have been pressing this and have been trying to get reform enacted.

I would like to hear a little more about how the Hatch Act fits into the system of protecting the merit-based civil service system and how it interacts with statutes such as the Whistleblower Protection Act. Can you speak to that issue?

Mr. DEVINE. I would almost analogize the relationship between the Hatch Act and the Whistleblower Protection Act to the Privacy Act and the Freedom of Information Act. They are two sides of the same coin. Although they are serving what can appear to be inconsistent directions of law enforcement, the reality is they are both united by a common principle: Defending freedom of speech where it furthers public service to the taxpayers, and restricting speech which is trying to politicize public service to the taxpayers. This is a very delicate balance, and it means that the agency responsible to set that balance has to have sound legitimacy based on earned trust through its competence to enforce the law in both those directions; and its objectivity so that politics does not shade how it sets those scales.

Senator AKAKA. Thank you for that. Mr. Gage, you mentioned cases in which OSC is investigating Hatch Act allegations that date back to 2004. When were these investigations started? And have you received any explanation for the delay?

Mr. GAGE. No, and neither have the people who are subjected to these investigations. That is why, in our testimony, I really call for a statute of limitations. This cannot be allowed to go on forever that people are just under the cloud of an investigation. Along with putting in realistic penalties, a statute of limitation I think is just basic due process for the people who are facing this type of charge.

Senator AKAKA. Mr. Devine, your testimony is quite critical of the current Special Counsel as well as former Special Counsel Alex Kozinski. As we look to the future, how can Congress work to improve the independence, effectiveness, and accountability of the Special Counsel?

Mr. DEVINE. I think that your Subcommittee is making a very good start in its efforts for the Office of Special Counsel reauthor-

ization. That has the potential to really change how operations occur on the ground within the Office of Special Counsel.

The second answer to your question, though, Mr. Chairman, is—again, not reinventing the wheel at all. The magic word is oversight, oversight, oversight. And our organization is glad to help to the extent that the Subcommittee wants to expand its investigative efforts, by sharing the allegations that we have been receiving from whistleblowers within the Office of Special Counsel about the breakdown in the merit system internally there.

That to me is probably the most significant weather vane for whether that agency is trustworthy to police the rest of the merit system. Are they respecting those principles in the Special Counsel's own house?

Senator AKAKA. Well, let me ask a final question of Ms. Kelley and Mr. Gage. Can each of you tell me about any recent problems or any recent concerns that you have had with conducting non-partisan voter registration in Federal buildings? Ms. Kelley.

Ms. KELLEY. Well, I would describe our problems, they tend to be, again, in the area just of ignorance by management officials. And so we say we are going to do voter registration, and they say, "We cannot because it is Federal property," or "We cannot because there is a candidate in that area who is running for office who has been endorsed," which has and should have nothing to do with anything. So then we have to educate them. It takes weeks. Sometimes we have to reschedule the voter registration drive until they can get their facts right and get those above them to tell them that NTEU is right and that they are misreading the rules under the Hatch Act.

So it is a constant problem with misinformation out there even in the management ranks who, again, put a very chilling effect on NTEU members who want to participate and they are grateful for the opportunity to be able to register to vote right there at the worksite.

So I do not have any reports where we have been denied, where they have shut us down, because in the end we are able to convince them that they are wrong and that they are misreading the statute. But it is tedious, it is time-consuming, and it is ongoing.

Senator AKAKA. Mr. Gage.

Mr. GAGE. Ms. Kelley may have done a better job than that to us, but when the AFL endorsed, and we are a member of the AFL, we were blocked from doing any voter registration in the agencies that we represent. And that interpretation is relatively recent. That does not go back. If an umbrella organization endorses that you are estopped from doing non-partisan voter registration, I just do not understand it. And I think that any group or any legitimate group should be able to do non-partisan voter registration. Voter registration is not a partisan activity. Yet we were blocked in agency after agency simply because an umbrella organization endorsed a candidate.

Ms. KELLEY. Mr. Chairman, if I could just clarify, the situations I talked about where education is so important because the agencies have misinformation. We are in a pre-endorsement environment. Once NTEU, because of the way the rules are interpreted today, we work very hard to make sure that we do as many voter

registration drives as possible before there is an NTEU endorsement of a candidate in a Presidential election. But up until that point, we have these ongoing problems with misinformation.

In my testimony, what I suggest is that it should be made clear that under the Hatch Act that should not be a requirement—it should not matter if an organization has endorsed or not. The fact is if it is a voter registration drive that is open voter registration, that anyone can register for any party if they so choose and everyone is invited and accessibility is made, then what difference does it make if there has been an endorsement or not? It is a voter registration for every American citizen who has the right to vote. And that should be something that should be supported by not just the Hatch Act but by any legislation that is passed for full participation.

Senator AKAKA. Mr. Devine.

Mr. DEVINE. Mr. Chairman, I would just like to make a P.S. to an earlier comment that I think is in the background to today's hearing. You expressed recognition of GAP's work for whistleblowers. I think it is important to get in the public record appreciation for your leadership on whistleblower issues. We gave you a Public Service Award at our GAP's 30th anniversary recently, because whistleblowers need 100 of you in the Senate. And we are very hopeful that after 8 years of work by your staff that in the next few weeks the Whistleblower Protection Act will be born again in the Senate and that we will finish the job this fall.

Senator AKAKA. Well, thank you very much. I want to thank you and all of our witnesses today for the time you spent in preparing, presenting, and responding with valuable information to this Subcommittee. We appreciate the hard work that all of you do to ensure that the Federal Government works for the American people regardless of the party in the White House, and that Federal employees are free from political coercion in the workplace.

Today's hearing highlights the need to improve the education that Federal employees receive on the Hatch Act. We need to make sure that all Federal employees receive complete and accurate information to understand their obligations under the Hatch Act. Additionally, we need to ensure that the rules governing Federal employees' conduct are clear and understandable. Furthermore, I am troubled that the civil servants could lose their jobs for engaging in casual political banter at work while White House staff and Senate-confirmed political appointees effectively are insulated from punishment for Hatch Act violations.

This Subcommittee will continue its attention to the Hatch Act in the future, and, again, I want to thank you for helping us do that. The hearing record will be open for one week for additional statements or questions other Members may have.

This hearing is adjourned.

[Whereupon, at 11:51 a.m., the Subcommittee was adjourned.]

APPENDIX

FOR OFFICIAL USE ONLY

UNTIL RELEASED BY THE SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA

STATEMENT OF JAMES BYRNE

DEPUTY SPECIAL COUNSEL

U.S. OFFICE OF SPECIAL COUNSEL

BEFORE THE

UNITED STATES SENATE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

SUBCOMMITTEE ON

OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND

THE DISTRICT OF COLUMBIA

HEARING ON:

THE PERILS OF POLITICS IN GOVERNMENT: A REVIEW OF THE SCOPE AND ENFORCEMENT OF THE HATCH ACT

Thursday, October 18, 2007

Washington, DC

Chairman Akaka, Senator Voinovich, I thank you for the opportunity to appear before this subcommittee to discuss the Hatch Act. It is also an honor to appear beside Chairman Neil McPhee.

My name is Jim Byrne and I am Deputy Special Counsel of the U.S. Office of Special Counsel. I am joined today by Ms. Ana Galindo-Marrone, who has been the Chief of OSC's Hatch Act Unit since 2000.

The Hatch Act restricts the political activity of employees of the federal executive branch, the District of Columbia and, state and local employees who work on federally-funded programs. The Office of Special Counsel appreciates the committee's willingness to hold a hearing on the Hatch Act. The visibility this hearing brings to the Hatch Act can create and enhance awareness and understanding, and deter violations of the law, which is very useful to our law enforcement mission.

The Hatch Act received enhanced visibility this year with the establishment of our Special Task Force to investigate possible violations within the executive branch, and earlier, with our case involving the administrator of the General Services Administration.

Today, I am pleased to speak for the Office of Special Counsel to provide our perspectives on the scope of the Hatch Act, how it is enforced and possible enhancements and clarifications of the law. We will testify today from our experience in enforcing the Hatch Act, but only from cases that we have closed. As you know, we cannot discuss the details of ongoing investigations.

The Hatch Act was enacted in 1939 to address the spoils system that dominated the federal workplace in the nineteenth and early twentieth centuries, under which federal employment and advancement depended upon party service and changing administrations rather than meritorious performance. In passing the law, Congress determined that placing limits on employees' partisan political activity was necessary for public institutions to function fairly and effectively. The Hatch Act is essential to ensuring that our government operates under a merit-based system and serves all citizens regardless of partisan interests.

Indeed, the Supreme Court recognized that one of the primary purposes in enacting the Hatch Act was to ensure:

> that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs.

Civil Service Commission v. National Ass'n of Letter Carriers, 413 U.S. 548, 566 (1973).

Unfortunately, as we look at recent news headlines and at the experience of OSC in the last couple of years in its own investigations, it is clear that the reasons for the passage of the Hatch Act remain as compelling today as they were years ago. Critical to good and fair governance and to maintaining the public trust is a commitment by public servants to a neutral, nonpartisan federal workplace.

OSC is committed to its statutory mission to enforce the Hatch Act and that commitment is demonstrated in the hard work of the career lawyers that work in OSC's Hatch Act Unit. In the last two years, the staff issued over 5600 advisory opinions. Also, during this time the Unit received approximately 600 complaints and investigated and completed 517 complaints. We were able to resolve approximately 68 of these complaints informally, i.e., without litigation, by advising employees that they were in violation of the Hatch Act and securing their willingness to come into compliance with the law.

A number of the complaints we investigated, or are currently investigating, involved serious allegations of federal employees using their official authority to interfere with the results of elections, including instances where supervisors targeted subordinates for political contributions. Similarly, in state and local cases we investigated allegations of supervisors, including some law enforcement officials, using their official authority to coerce subordinates into contributing to a political party or candidate.

Also, OSC has been very proactive through its outreach and enforcement efforts in educating federal employees that political activity while on duty or in a federal building is prohibited. In particular, we have emphasized that this prohibition is not affected by the type of technology utilized.

Earlier this year, OSC completed a successful run of litigation involving the use of e-mail to engage in political activity while on duty or in a federal building. During this litigation, however, it was apparent that some unfortunate wording from a 2002 OSC Hatch Act advisory opinion concerning the use of e-mail had been misinterpreted by some to constitute a "water cooler" exception for e-mail activity. No such exception for engaging in political activity via e-mail has ever existed under the Hatch Act. We rescinded this opinion in March, following several opinions from the MSPB in cases such as Wilkinson,[1] Morrill[2] and Eisinger[3]. In each of these cases the MSPB agreed with OSC that using the e-mail system to engage in political activity while on duty or in a federal building was prohibited by the Hatch Act. And in two other cases, although the MSPB did not reach the merits because it was ruling on motions to dismiss by the Respondents, the MSPB concluded that OSC had not failed to state a claim when it charged federal employees with violating the Hatch Act by disseminating e-mail messages that showed support for a Presidential candidate and told the recipients how to vote.

Complaints brought under the Hatch Act have been rising in number in recent years. We hope that the visibility brought to the Hatch Act by this hearing, as well as by our own expanded investigations, will reverse the trend, as employees become more aware of their responsibilities.

Thank you for your time; we look forward to taking your questions.

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[1] Special Counsel v. Wilkinson, 104 M.S.P.R. 253 (2006).
[2] Special Counsel v. Morrill, 103 M.S.P.R. 143 (table) (2006) (affirming the Administrative Law Judge's Initial Decision (Docket Number CB-1216-05-0027-T-1; Dec. 27, 2005)).
[3] Special Counsel v. Eisinger, 103 M.S.P.R. 252 (2006).

Hearing Statement of B. Chad Bungard, General Counsel
U.S. Merit Systems Protection Board

Before the

Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

The Perils of Politics in Government: A Review of the Scope and Enforcement of the Hatch Act

October 18, 2007

I am delighted to accept the invitation from Chairman Daniel Akaka and Ranking Member George Voinovich to share information regarding the role of the Merit Systems Protection Board (MSPB) in enforcing the Hatch Act. The Subcommittee has asked me to address the following issues:

1. The Board's processing and adjudication of Hatch Act cases;
2. The scope of the MSPB's jurisdiction over Hatch Act cases;
3. The extent of the Board's Hatch Act caseload (absolute numbers as well as the percentage of the Board's overall caseload); and
4. Recent developments in the Board's case law under the Hatch Act with special attention to the "water cooler exception."

BACKGROUND AND SCOPE OF MSPB JURISDICTION OVER HATCH ACT CASES

The Hatch Political Activities Act (Hatch Act) governs the extent to which government employees at the federal, state and local levels may engage in political activity. Under amendments enacted by Congress in 1993, most federal and District of Columbia government employees are permitted (with significant limitations) to take an active part in partisan political management and campaigns. The Board does not have authority to consider a complaint alleging a violation of the Hatch Act by an employee in a confidential, policy-making, policy-determining, or policy-advocating position who was appointed by the President, by and with the advice and consent of the Senate (other than an individual in the U.S. Foreign Service.)

ADJUDICATION OF HATCH ACT CASES BEFORE THE BOARD

The Merit Systems Protection Board adjudicates complaints alleging violations of the Hatch Act that are filed by the Office of Special Counsel. The complaint is heard by an Administrative Law Judge (ALJ), for the MSPB, not an administrative judge employed by the MSPB. Under the terms of an inter-agency contract, MSPB uses the services of administrative law judges from the National Labor Relations Board. The respondent (employee) has a right to answer the complaint, to be represented, to a hearing, and to a written decision. Hearings generally are open to the public. The judge may order a hearing or any part of a hearing closed when doing so would be in the best interest of the respondent, a witness, the public, or any other person affected by the proceeding.

Except as otherwise provided, the procedures applicable to MSPB appellate cases also apply to Hatch Act disciplinary actions. That is, ALJs have the authority to, among other things, issue subpoenas, rule on discovery motions, order a hearing, impose sanctions, and issue decisions. The Special Counsel must establish a violation of the Hatch Act by a preponderance of the evidence.

ALLEGATIONS AGAINST FEDERAL EMPLOYEES

If the ALJ determines that a Federal employee has violated the Hatch Act and that removal is warranted, the ALJ issues an initial decision ordering removal of the employee which may be appealed to the Board on petition for review. If, on petition for review, the three-member Board decides that a Federal employee has violated the Hatch Act, the penalty must be either removal or a suspension without pay for not less than 30 days.

If the ALJ determines a Federal employee has violated the Hatch Act, but that the appropriate penalty is less than removal, the ALJ issues a recommended decision for consideration by the Board. The parties may file exceptions to the recommended decision and replies to the exceptions. The Board considers the recommended decision, any exceptions that have been filed, as well as any replies to those exceptions and issues a final written decision. By statute, a penalty of less than removal requires a unanimous vote of the Board. (5 U.S.C. § 7326)

The ALJ may initiate attempts to settle the complaint at any time during the proceeding. If a settlement is reached, the settlement agreement becomes the final and binding resolution of the complaint.

ALLEGATIONS AGAINST STATE OR LOCAL AGENCY EMPLOYEES

If the Board decides that an employee of a state or local agency whose principal employment is in connection with an activity financed in whole or in part by Federal funds has violated the Hatch Act, the outcome must be the penalty of removal or a determination that no penalty is warranted. If the Board determines that removal is warranted and the state or local agency fails to comply with the Board's order or reinstates the employee within 18 months of the removal, the ALJ or the Board may order the Federal entity providing funding to the agency to withhold funds from the agency. The amount to be withheld may be the equivalent of two years of pay for the subject employee.

RIGHT OF JUDICIAL REVIEW

The Board's decision that a Federal employee violated the Hatch Act may be appealed to the U. S. Court of Appeals for the Federal Circuit. The Board's decision that a state or local agency employee violated the Hatch Act can be reviewed by an appropriate U.S. district court.

THE MERIT SYSTEMS PROTECTION BOARD'S HATCH ACT CASELOAD

The MSPB receives approximately 8,400 appeals in its headquarters, regional and field offices each year. From January 2002 to September 2007, the Office of the Special Counsel brought 36 Hatch Act cases before the Merit Systems Protection Board. Of that total, 15 cases involved state or local agency employees. The outcomes were as follows:

- 12 Decisions upholding the findings of the Office of Special Counsel
- 3 Decisions modifying the findings of the Office of Special Counsel

- 3 Decisions reversing the findings of the Office of Special Counsel
- 12 Settlements
- 6 Dismissals before final decision

The most frequent types of Hatch Act violations that were committed by state or local agency employees were: running as a candidate in a partisan election (9 cases) and using official authority to influence or affect an election (3 cases). Although there was a spike in the number of cases brought against state and local employees in 2005 (when 9 cases were filed), our data do not reflect a steady increase in the number of such cases during the period in question.[1]

RECENT DEVELOPMENTS IN HATCH ACT CASELAW

On May 30, 2002, the Office of the Special Counsel issued an advisory opinion regarding the use of electronic messaging devices to engage in political activity. The advisory sought to preserve the rights of Federal employees to express their opinions on political subjects and candidates both publicly and privately, while upholding the Act's prohibition on engaging in political activity while in uniform, on duty, in a government building, or in a government vehicle. The advisory opinion concluded that "the Hatch Act does not prohibit 'water-cooler' type discussions and exchanges of opinion among co-workers concerning the events of the day (including political campaigns)."

In 2006, the Merit Systems Protection Board issued a series of decisions involving the issue of whether the use of government email constitutes a Hatch Act violation. In 3 of these cases, the 3-Member

[1] In 2002, two cases were filed. In 2003 and 2007 no cases were filed. In 2004, one case was filed and in 2006, three cases were filed.

Board determined that, the employee had engaged in political activity that was prohibited by the Hatch Act. First, in Special Counsel v. Morrill, 103 M.S.P.R. 143 (2006), OSC alleged that Morrill, a career civilian employee with the Naval Inventory Control Point (NICP), sent an e-mail to over 300 agency NICP employees and other individuals directing recipients to take specific action in support of a partisan candidate for a local legislature. With the subject line "Halloween Party for Tim Holden," the message directed recipients to "see attached. post, distribute widely, make phone calls and make this the event that will be remembered above all others!!!!" The e-mail message also contained an attached announcement for Tim Holden's Halloween Party, hosted by the Harrisburg Region Central Labor Council. The announcement encouraged all recipients to attend the party and "meet Tim Holden" and stated that Holden "has spent his career supporting Working Families," "is surprising everyone by leading in the Polls," and "must have the support of Working Families to WIN!" The administrative law judge determined that Morrill engaged in "political activity" in violation of the Hatch Act and should be suspended for 60 days. The Board denied Morrill's petition for review.

Second, in Special Counsel v. Eisinger, 103 M.S.P.R. 252 (2006), OSC alleged that Eisinger, an employee of the Small Business Administration, made numerous telephone calls and used his government computer to draft documents and send over 100 e-mails directed towards the success of the Green party, while on duty or in a room or building occupied in the discharge of his official duties. The Board adopted the ALJ's determination that the employee violated the Hatch Act and should be removed.

Third, in Special Counsel v. Wilkinson, 104 M.S.P.R. 253 (2006), the Board held that a career federal employee of the Environmental

Protection Agency (EPA), who forwarded a letter from the Democratic National Committee (DNC) that was signed by the Chairman of the DNC to 31 fellow employees by e-mail using a government computer while on duty in his government office had engaged in "political activity" in violation of the Hatch Act. The text of the DNC letter asked readers to "foil George Bush's alleged attempt to steal victory, to watch the Gore-Bush debate and vote in online polls, write a letter to the editor, and call in to talk radio programs." The letter also told the readers that their "actions immediately after the debate tonight can help John Kerry win on November 2".

In Special Counsel v. Davis and Sims, 102 M.S.P.R. 288 (2006), the ALJ dismissed the complaint on the grounds that it did not allege a Hatch Act violation. The Board reversed and remanded this decision, finding that Sims' actions in forwarding an e-mail to 22 individual addressees and Davis' actions in forwarding an email to 27 individual addressees could support a finding of Hatch Act violations. The subject line of Sims' message was "FW: Fwd: Fw: Why I am supporting John Kerry for President?" Sims message began with "Some things to ponder ....." and included a copy of a letter allegedly written by John Eisenhower, son of former Republican President Eisenhower, which explained why he supported John Kerry for President. The subject of Davis's message was "FW: Your Vote," and in the body of the message was a copy of an e-mail attacking Senator Kerry and inviting recipients to pass along the "I VOTE THE BIBLE" button. On remand, the Board directed the parties to address factors identified in OSC's 2002 Advisory Opinion "Use of Electronic Messaging Devices to Engage in Political Activity" along with any additional arguments that would support their views as to whether a violation occurred.

The Office of the Special Counsel rescinded its 2002 advisory opinion in March of this year stating that these Board decisions provide "clear guidance" and intimating that the Board held that the right to express opinions on political subjects and candidates was intended to apply to off-duty expressions, *i.e.*, that the "water cooler exception" is no longer valid. To the contrary, the Board has not decided whether an employee's on-duty expressions of his or her opinion on political subjects and candidates constitute "political activity," as prohibited under the Act. In all four of these Board decisions, the issue was whether the employees' communications exceeded the mere exchange of opinions and urged others to take specific action in support of or against specific partisan candidates.

CONCLUSION

As the data show, Hatch Act cases are a very small part of the Board's overall caseload. However, these cases are very significant to the Board's statutory mission of ensuring a merit-based Federal civil service system. The Board endeavors to adjudicate these cases promptly and efficiently, and in a manner that comports with the congressional intent of the Act.

Statement of

Colleen M. Kelley

National President

National Treasury Employees Union

Submitted for the Hearing Record

Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

Senate Committee on Homeland Security and Governmental Affairs

On

The Perils of Politics in Government: A Review of the Scope and Enforcement of the Hatch Act

October 18, 2007

1750 H Street, N.W. • Washington, D.C. 20006 • (202) 572-5500

Chairman Akaka, Ranking Member Voinovich and distinguished Members of the Subcommittee, my name is Colleen Kelley and I am the National President of the National Treasury Employees Union (NTEU). NTEU represents some 150,000 federal employees in 30 different federal agencies and departments. I appreciate the opportunity today to discuss "The Perils of Politics in Government: A review of the Scope and Enforcement of the Hatch Act". Your oversight of this important issue ensures that while the administration of federal programs remains free of partisan political influence, rank and file career federal employees may continue to participate as citizens in our Nation's political life

Almost seventy years ago, the Federal government underwent a transformation. In the space of a few years, some 300,000 new employees were hired to fill the ranks at new agencies. None of these employees were under the jurisdiction of the Civil Service Commission. Many of the positions were filled with individuals who were essentially rewarded with Federal jobs for their political activities and contributions. It was in that tainted atmosphere that the Hatch Act was passed. Despite the fact that the past bears little resemblance to the present, with many protections against coercion built into our Civil Service system, it took almost twenty years of hard work by NTEU and like organizations to amend the Hatch Act to reflect the times in which we live. Before the Hatch Act amendments of 1994, employees could not work on a campaign (plan events, coordinate volunteers, help get-out-the-vote drives); run for party office; attend conventions, rallies or meetings as the elected representative of a partisan organization; or raise funds for a union's political action committee from their fellow union members, even on their non-work time. The 1994 amendments eliminated those unnecessary restrictions and struck a sensible compromise. Under them, most federal employees are now allowed to engage in political activities on their own time, away from the worksite while prohibitions against on-duty

political activity, as well as the solicitation of campaign contributions from members of the public, have been maintained.

You may remember all the terrible things that some Members of Congress promised would happen if the Hatch Act was amended. "Union bosses" would have unlimited opportunities to discriminate against employees who did not agree with their political agenda. "The pillar of impartiality and nonpartisanship upon which the integrity of the civil service was built" would be torn down. After all the speeches and dire predictions, however, the Hatch Act as amended has been a great success: it has struck a fair balance between federal employees' rights to engage in political activity as citizens and the government's interest in the non-partisan administration of federal programs. While NTEU would like to see more loosening of some of the provisions, and we think the penalties are much too harsh for most of the transgressions, by and large, the Amendments have allowed Federal workers to become more fully involved in our form of government, to exercise their citizenship in a vital way.

There remain some problems with the Hatch Act, though. There is so much gray area in these regulations that even the Special Counsel's office couches its opinions and advisories with equivocal language such as, "The determination whether an employee has engaged in prohibited political activity on duty or in a government building or vehicle must necessarily be made on a case-by-case basis". What happens in reality is that federal employees are often so confused about what is acceptable and what is not acceptable that they choose not to exercise the rights that Congress intended them to retain. The regulations revised this past January (5 CFR 734.306) contain one 14- line section that is accompanied by a page and a half (19 in all) of examples explaining them. Given this state of affairs, we spend a fair amount of time trying to

inform our members of their rights and responsibilities in regard to the Hatch Act. We are happy to say that, to the best of our knowledge, no NTEU member has ever been charged with a Hatch Act violation. While we try to do a good job of educating our members about what they can and cannot do, the severe penalty of mandatory removal makes many employees afraid to exercise their rights. We would like to see less serious violations of the Hatch Act have less serious consequences. Tailor the penalty to fit the crime.

Enforcement of the Hatch Act falls within the purview of the Office of Special Counsel. The present Special Counsel has taken up some high profile cases, such as the one involving the head of the General Services Administration, Ms. Lurita Doan. We do think that Ms. Doan overstepped in having a political brown-bag lunch at GSA, but we caution the Committee that there could be dangers in trying to fix this problem with legislation. We need to remember that current law already prohibits Ms. Doan from using her official authority to promote political candidates and parties, and it also prohibits on-duty political activity by the political appointees who attended the lunch. Additional legislation is not necessary to address the concerns raised by these political briefings and we fear that legislative changes addressed at Doan and related matters would unnecessarily place at risk the hard-fought rights of rank and file career employees, whose conduct is not even at issue in these cases. The Special Counsel has asked for an additional $2.9 million for Hatch Act investigations, noting that the office "needs to build a capability to do extended forensics". I don't exactly know what that means, but the decisions that have been made by the present Special Counsel do not lead me to support his request. In addition, this funding would likely have to come out of money already designated by the Financial Services and General Government appropriations for other things. I can't think of any funding in the bill that would be better spent on investigations by that office.

There is no way around the fact that the present Special Counsel seems to have lost all sense of proportion in exercising his prosecutorial discretion under the Hatch Act by pursuing the removal of relatively low-ranking career employees for what are at most technical violations of the prohibition against on-duty political activity, such as sending an e-mail with political content to a small group of friends and work colleagues. The previous "water cooler" rule, so called because it dealt with the casual talk of employees among a group even if the talk was of a political nature, was issued in an Advisory Opinion in 2002 by the previous Special Counsel. It basically said that if the content of the message expressed the sender's personal opinion about a candidate for partisan political office, and the audience for the message is a small group of colleagues with whom the sender might otherwise engage in "water cooler" talk, an e-mail message could be considered a substitute for permissible face-to-face expression of personal opinion, which is not prohibited by the Hatch Act.. The present Special Counsel, however, has rescinded the Advisory Opinion in a press release, declaring, "No political activity means no political activity, regardless of the specific technology used." We disagree with his interpretation of the law, and believe that OSC's time and resources would be better spent investigating claims of whistleblower retaliation than on such trivial pursuits. It is important to note, as well, that this Special Counsel is himself under investigation by OPM for allegedly retaliating against employees who disagree with him.

One of the rights federal employees hold dear is the right to hold voter registration drives in federal buildings. Even with the restrictions of place – not in any room or building occupied in the discharge of official duties by a government employee, it is still an important right. This Special Counsel has gone beyond any who preceded him by asserting that a union is prohibited from conducting a voter registration drive in a federal building if it engages in certain free speech

activities completely unrelated to voter registration drives, such as endorsing a candidate for office. This Special Counsel has even indicated that critical comments about a candidate on a union web site could be grounds for prohibiting an on-site voter registration drive. NTEU agrees that any voter registration activity in a federal building should be non-partisan, but that is a factual issue that is easily determined. As long as all potential registrants are indeed registered with whatever party affiliation (if any) that they choose, it is a non-partisan, legally acceptable drive. Other actions by federal employee sponsors of a voter registration drive are irrelevant and should not be a factor in whether the drive should be allowed on federal property.

CHANGES TO THE HATCH ACT:

As we have said, the Hatch Act as amended is, for the most part, working well. There are some areas, however, that would work better if they were clarified and some that would work better if they were modified:

- Codify the "water cooler" rule by making it clear that the Hatch Act's prohibition against on-duty political activity does not prohibit employees from merely expressing their personal opinions. We suggest the following language: In Section 7324: "(b) An employee retains the right to express his opinion on political subjects and candidates, notwithstanding paragraph (a) of this subsection, provided that the employee does not use his or her authority to coerce any person to participate in political activity."

- Clarify the union's right to conduct non-partisan voter registration drives. In Section 7323: Add "(d) A Federal labor organization as defined under section 7103 shall have

the right to engage in voter registration at reasonable times and places at the worksite where it is the exclusive representative, provided that individuals are permitted to register without regard to political affiliation."

- Delete the mandatory removal penalty. Change section 7326 to read: "An employee or individual who violates section 7323 or 7324 of this title shall be disciplined appropriately in light of the violation committed. An employee or individual who violates section 7323 or 7324 may be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual."

- Add a phrase to 5 U.S.C. 1215(b) requiring the President to report to Congress on his or her actions in response to the findings by any relevant agency of violations of the Hatch Act or prohibited personnel practices by Senate-confirmed Presidential appointees.

- Allow federal employees to run as independent candidates for local office, regardless of whether other candidates are running with the endorsement of partisan political groups.We've had enough time under the Hatch Act's exceptions that are applicable to specified localities to recognize that there is no danger to either the civil service or the country at large in a federal employee running for local office as an independent candidate in a partisan election.

- Allow federal employees to take leave to run for partisan office. The same rationale as above applies here.

- Change Section 7325 to include the District of Columbia. It makes no sense to create a rule that deals with municipalities that have large numbers of federal workers and leave the District of Columbia out of the rule.

STATEMENT OF
JOHN GAGE
NATIONAL PRESIDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO

Mr. Chairman and Members of the Committee: my name is John Gage, and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE), which represents over 600,000 federal government workers. In 1993, AFGE was a strong supporter of modifications to the Hatch Act that clarified ambiguities in the law, allowed federal workers to become more politically active during off duty hours, and set standards that guarantee a strictly apolitical civil service.

AFGE continues to believe that appropriate application of the Hatch Act by the Office of Special Counsel (OSC) helps to preserve a politically neutral workplace while balancing the First Amendment rights of government workers. At the same time, AFGE strongly urges Congress to exert its oversight role during the next election cycle to monitor OSC Hatch Act investigations against federal workers for inconsistencies, disproportionate penalties for minor infractions and retaliation against union officials.

The Hatch Act was passed in 1939 with the intention of ensuring that the federal civil service would be politically neutral and the spoils system would be eliminated. On its face, the Hatch Act and its amendments establish three limitations on the political activities of Federal workers:

- Federal and postal employees cannot engage in political activity while on duty, in any building where the business of the government is being conducted, while wearing a uniform or official insignia identifying them as public employees, or while using a government vehicle.
- Federal employees are not permitted to run for partisan political office at any level.
- Federal employees are not allowed to solicit, accept or receive political contributions from the general public, a superior, or while inside a government building.

It is also important to note that the Hatch Act also serves to protect civic participation of federal workers, including the right to:

- Register and vote for the candidate of their choice,
- Run as candidates for public offices in nonpartisan elections,
- Assist in voter registration drives,
- Contribute money to, and engage in, fundraising for political organizations or candidates,
- Attend political fundraising functions, and
- Express opinions about candidates and issues.

The provisions of the Hatch Act appear to draw fairly bright-line distinctions between what activities are and are not permissible by federal employees. While the government has a compelling or overriding reason to

require that federal workers not politicize the workplace, the Supreme Court has held that actions to restrict the right of government employees to be politically active must be limited and must rest upon a clear showing by the government of a need for restriction, and that such restrictions be clearly defined and narrowly tailored to address only that particular need. Federal workers have a right to participate in partisan political activities fully and freely, except when that participation impacts the integrity of a competitive civil service free from political influences.

AFGE does have concerns about inconsistencies in interpretation of the Hatch Act. The drafters of the Hatch Act and its 1993 amendments never anticipated the extent to which technology would change how workers communicate with each other. Wide access to e-mail, the pervasiveness of information available via the internet, and instant and text messaging have profoundly broadened the ability of one worker to communicate with many individuals with a few strokes of the keypad. From the ease of sending attachments via e-mail to the almost instantaneous posting of videos on YouTube -- the scope and quantity of information readily available was almost beyond comprehension only a few years ago. Simply put, people, including federal employees, have much more to talk about than in 1939 or 1993, and a lot more people with whom they can share their thoughts.

In light of changes in communications technology, and to the public discourse as a whole, AFGE would like to bring to the attention of the Subcommittee issues where the application of the Hatch Act appears to lag behind the reality of the present-day workplace and caused an apparent heavy-handedness by the OSC in meting out discipline with little or no regard to the extent or influence of the alleged Hatch Act infraction by the federal employee.

1. **Computer Communications** – Recently AFGE members have faced OSC investigations that were extensive, time-consuming, and chilling based on allegations of relatively minor e-mail situations that run afoul of the current OSC's broad interpretation of the Hatch Act. In these situations, employees forwarded e-mails (often because they were requested to do so by the original sender of the e-mail) that included satire or jokes about political figures, announcements of events with political undertones or e-mails that are only political in nature upon closer review than the worker's initial cursory read. Political jokes or satire are sometimes only apparent when the reader reaches the tagline at the end of the e-mail, almost like a footnote. Often these e-mails are not shared with the entire workplace, but instead sent to a smaller group with whom the employee converses regularly. Prior to the advent of computer communications, the employee might have shared the information with a small group of colleagues around the proverbial "water cooler" or during coffee breaks. The e-mails are forwarded because the worker simply wanted to share a funny joke. Without much thought,

workers send these communications to colleagues by e-mail with a single click of the mouse. The mere act of forwarding an e-mail is not adopting the ideology of the e-mail's originator.

While AFGE does not condone political activity at the federal workplace in violation of the Hatch Act, we do believe that the forwarding of e-mail with political undertones to a small group of colleagues is better addressed through the agency's computer usage policy than an OSC official investigation. For example, the Department of Veterans Affairs' Automated Information Systems Security Policy clearly states that "electronic mail users must exercise common sense, judgment, and propriety in the use of this government resource." The VA Automated Information Systems Security Policy also includes a table of offenses and progressive discipline depending on the nature, scope, and occurrence of the offense. As such, the behavior would be scrutinized under the normal Douglas factors (Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981) to determine how seriously the employee's misbehavior affects the mission of the agency, which should result in a penalty for the misbehavior most appropriate to the situation. The Douglas factors include the nature and seriousness of the offense, whether the offense was intentional or inadvertent, the employee's past disciplinary record, and the potential for the employee's rehabilitation (such as a warning or counseling on the agency's computer policy). AFGE believes this is a much more appropriate disciplinary process when agency computer policies are violated instead of a lengthy OSC investigation.

During previous administrations, the OSC conceded that relatively minor Hatch Act offenses should be considered "water cooler speech", and issued an advisory which was removed from the OSC website by Special Counsel Scott Bloch. We believe the advisory offered a process more in line with expected workplace discourse. Constant misuse of e-mail after counseling, warning, or other progressive discipline might require OSC involvement. Currently, the OSC can and does take action on a first event, even to a limited distribution. A one-time mistake by an employee with little or no impact on the workplace should not be punished in the same manner as partisan campaigning at the federal worksite.

2. **Penalties** – A consideration of mitigating and aggravating factors such as those set forth in Douglas is necessary to determine the degree of penalty most appropriate for Hatch Act violations. The presumptive penalty for Hatch Act violations is termination, with 30 days suspension as the minimum penalty. Recommended settlements between the OSC and the employee are automatically appealed to the Merit Systems Protection Board (the Board), even if the parties are in agreement. The

Board must agree unanimously to the settlement—even one dissent from a Board member will result in the worker's termination. The only cases that are not subject to an automatic appeal to the Board are those where the Administrative Law Judge found that the worker should be terminated.

With the possibility of presumed termination hanging over federal employees who are the target of Hatch Act investigations, many federal workers agree to a penalty far more severe than the offense, but one where they will not lose their jobs. Under previous administrations, the OSC followed a version of progressive discipline short of seeking long suspensions or outright termination. However, the current OSC policy is that the Hatch Act does not provide for a warning to workers, or an opportunity to cease and desist from a violation before seeking the harshest penalties. The resources spent by the OSC in pursuing harsh penalties are better applied to far more serious cases where there was a clear intent and pattern of abusing the worker's federal employment for partisan political purposes.

3. **Statute of Limitations** – Unlike most federal workplace laws, the Hatch Act has no statute of limitations or even a deadline by which the OSC must file charges. In October of 2007, AFGE is representing workers—many of them union officials--in OSC investigations that date back to the 2004 election cycle. The lack of a deadline or statute of limitations for filing charges provides the opportunity for workers to be targeted for retaliation because of their political or union affiliation. To prevent this type of retaliation, the establishment of a statute of limitations of two years (which covers an election cycle) is more appropriate to address partisan political activities on the job.

Conclusion

It is normal for workers to discuss the nature and circumstances of their employment. When the employer is the federal government, it is only natural that workplace discussions will include some discourse on political efforts to close or move facilities or increase or decrease an agency's budget because they directly impact the worker's employment. Workers will seek information about their bosses—the President and Congress—and engage in discussions about working conditions with colleagues in the workplace. Congress should fully utilize its oversight role to monitor Hatch Act prosecutions so that federal employees can have free discourse about their jobs and the political decisions that affect them, while deterring those few employees who intentionally seek to use their civil service positions for partisan political purposes.

That concludes my statement. I will be happy to answer any questions.

CASE SUMMARIES OF AFGE MEMBER HATCH ACT INVESTIGATIONS

Satirical Resume

- AFGE Local President Donald Thompson was investigated by the OSC on a suspected Hatch Act violation for forwarding an e-mail of a satirical "George Bush resume" to a list of his Local membership.
- The worker did not create the resume—in fact it was widely circulated on the internet and could be found by doing an online search of "political jokes".
- The e-mail in question was sent in 2003, over a year prior to the 2004 election, and could not have been a political action because it was unclear who the 2004 Presidential candidates would be.

Nonpolitcal Joke

- An AFGE member who is very active in the union forwarded an e-mail about President Bush and quiche to two people. He happens to be a Republican who supports the President but thought the joke was funny.
- The matter is still pending.

Halloween Party Invitation

- AFGE Local President Rocky Morrill was investigated by the OSC and charged with a Hatch Act violation for forwarding an e-mail about an AFL-CIO central labor council (CLC) Halloween party that included a mention that a local member of Congress was also attending the party.
- The e-mail was only sent to AFGE Local members who also belong to the CLC.
- The invitation did not include a request for fundraising on behalf of the member of Congress, and did not endorse him as a candidate.
- After a lengthy OSG investigation and proceedings before an Administrative Judge and the MSPB over several years, the

AFGE Local President was given a 60 day suspension for 30 seconds of conduct.

In Contrast, a Federal Management Rally Invitation

- A few weeks prior to the 2004 Presidential election, the Kirtland Air Force Base Public Affairs Director sent an e-mail to all employees of the base inviting them to a Bush-Cheney rally in Albuquerque, New Mexico.
- The Washington Post reported that the e-mail stated that the Hatch Act prohibited attending the rally while in uniform and on work-time, but all leave had been pre-approved for the rally.
- Rally tickets were available at the Public Affairs Office.
- To AFGE's knowledge, the Public Affairs Director was not charged with a Hatch Act violation.

Promotional Stickers

- Multiple AFGE members were investigated by the OSC because they wore AFGE promotional stickers that included the insignia of the base where they worked and campaign buttons for a particular candidate while attending an off-site Labor Day parade on their own time.
- The same stickers were very prevalent at the parade, and were also seen on the clothes of children, non-government workers and a few dog leashes.
- The OSC investigation was based on an allegation that the insignia of the base was "official" government property that might appear to endorse one candidate over another.
- No one was ultimately charged, but over 15 people were subject to an investigation.

Discussion of Work Issues

- Two AFGE Local Presidents and the Executive Board of the locals were subject to an OSC investigation based on e-mails addressed to Board Members discussing an attempt to keep the facility where they work from being closed. Some of the e-mails contained budget proposals and position statements of

candidates sent without comment. One allegedly included information about an AFL-CIO off-site event sent for informational purposes only to the E-Board per their request.

- Immediately prior to the launching of the investigation, the AFGE Local Presidents had disagreed with management regarding the care of a patient who wandered away from the facility in question who subsequently died of exposure when management halted the search for him.
- Since their disagreement with management, the two AFGE Local Presidents have been subject to an OSC investigation dating back to events from 2004.

Nonpartisan Voter Registration

- OSC has advised AFGE union leaders that it is a violation of the Hatch Act for them to register fellow union members to vote at federal worksites, even when they are "off the clock".
- Some federal workers, such as those at the Social Security Administration, are required to provide voter registration forms to the general public as a part of their duties but could be terminated via an OSC prosecution for doing the exact same action in an employee break room.

TESTIMONY OF THOMAS DEVINE,
LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT

MR. CHAIRMAN:

Thank you for inviting the testimony of the Government Accountability Project. (GAP) Your oversight of political threats to the civil service could not be more timely, or significant. Separation of politics and federal employment is the foundation for public service from a professional workforce. Unfortunately, the merit system in general, the Hatch Act in particular, and the civil service enforcement mechanisms for both are facing challenges unprecedented since the Watergate patronage scandals sparked passage of the Civil Service Reform Act of 1978.

GAP is a non-profit, non-partisan public interest organization whose mission is to support whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led the outside campaigns for passage of the Whistleblower Protection Act in 1989, subsequent amendments to the Act in 1994, and, working since 1999 with this Committee and recently with a coalition of nearly 50 other public interest organizations, the campaign to again restore the discredited WPA through this Committee's legislation, S 274. The House counterpart legislation, HR 985, the Whistleblower Protection Enhancement Act of 2007, passed in March by an overwhelming bipartisan majority, 331-94. Personally, my introduction to public interest law was researching and co-authoring *Blueprint for Civil Service Reform*, a Fund for Constitutional Government report on Watergate-era political hiring, firing and Hatch Act abuses.

Since the U.S. Office of Special Counsel's (OSC) creation, in 1978, as the merit system watchdog and Hatch Act civil prosecutor, GAP has closely monitored its work. At times, we have worked in partnership with Special Counsels; under other circumstances,

we have served as harsh critics. Our only criterion for that choice has been whether its leadership has served or disserved its mission of guarding the merit system. Throughout the last 28 years, we have regularly represented whistleblower clients before the OSC, and OSC employees blowing the whistle on OSC. In representing OSC employees, we have learned through hands on experience how the agency operates in practice. This is not always the same reality described by Special Counsels' in their congressional testimony.

HISTORICAL CONTEXT

The current threat of a politicized civil service is a reminder why the OSC was created. The Watergate investigation revealed a massive Nixon administration operation to replace the non-partisan civil service system with a politically loyal workforce dedicated to partisan election goals. Every agency had a shadow "political hiring czar" whose operation trumped normal civil service authority of personnel offices. Then-White House Personnel Office chief Fred Malek teamed up with Alan May to prepare the "Malek Manuel" as an encyclopedic guide for how to harass career employees out of the government by exploiting loopholes in civil service laws. Non-complying federal employees would be replaced by applicants selected through a political rating system of 1-4, based on factors such as campaign contributions and future campaign value. The Watergate Committee's public record of the abuses led to creation of the Ink Commission, whose exhaustive study and recommendations were the foundation for the Civil Service Reform Act of 1978, including creation of the Office of Special Counsel to see that this type of merit system abuse never happened again.

However, in four years there was another severe attack on the merit system. Ironically, the assailant was then-Special Counsel Alex Kozinski, who kept a copy of the Malek Manuel on his desk. He used its techniques to purge the professional civil service experts on his own staff, and replace them with employees who viewed whistleblowers as crazy troublemakers, disloyal to the President. He taught courses to federal managers on how to fire whistleblowers without getting caught by his own investigators, using the OSC Investigations Manual as a handout. He tutored Secretary Watt on how to purge a whistleblowing coal mine inspector from the Department of Interior. The OSC became what one Senate staffer called "a legalized plumbers unit." Mr. Kozinski's abuses were the major catalyst for passage of the Whistleblower Protection Act of 1989, and he was forced to resign. A few years later 43 Senators voted against his confirmation for a seat on the Ninth Circuit Court of Appeals, after Senator Levin's intensive investigation of Kozinski's Special Counsel tenure.

The current political threats to the merit system have been less clandestine, and more arrogantly brazen. Instead of shadow political czars, agency leaders are doing the political arm twisting. Instead of harassment encyclopedias on how to circumvent merit system rights, those safeguards have been openly canceled by department wide experiments in running government "like a business" without the red tape of due process.

Twenty years later it appears we also have a hybrid *déjà vu* all over again with the current Special Counsel, Scott Bloch. That creates a double whammy effect on the merit system: The OSC is in crisis at the time a legitimate, credible Special Counsel is needed most to find the truth whether the abuses at GSA were an aberration, or the tip under a Hatch Act iceberg. There's a real need to trust the Special Counsel's performance on two

levels – 1) ability to get results; and 2) objectivity. Under its current leadership, however, the OSC flunks both criteria. The basis for these conclusions is summarized below.

HATCH ACT TRACK RECORD

. The OSC is seeking more money to expand its Hatch Act enforcement program. It is only sound business to check the investment's track record. Under Mr. Bloch, the OSC's Hatch Act record has been to accomplish less with more. In FY 2006 the agency's $15 million budget was over $3 million more than in 2002, the last full year before his arrival. Yet from 2001-2003 the OSC produced 88 Hatch Act corrective actions or disciplinary actions in 595 cases, or fifteen per cent. With more resources, from FY 2003-2006 the corresponding figures were 89 corrective or disciplinary actions out of 792 cases, or 11%. Furthermore, controversy about the Special Counsel has overshadowed his investigations.

A survey of recent practices helps to explain the drops in credibility, and performance:

* In the recent Doan General Services Administration investigation, before allowing her to see and respond to the evidence the OSC leaked a draft copy of the report, recommending termination, to the media.

* When OSC released the subsequent report, the recommendation for termination had vanished. So had the Privacy Act rights of individuals whom Ms. Doan targeted with ugly attacks in the public record, because their names were not redacted.

* When Mr. Bloch took office, the OSC scrapped staff-developed quality standards and a proposed case priority system, among other case processing advances.

* In FY 2005 the OSC Annual Report stopped disclosing the number of Hatch Act complaints referred for field investigation. In FY 2003 and 2004, there had been 35 and 25, respectively.

* In FY 2005 the OSC Annual Report stopped disclosing the number of outreach programs to prevent Hatch Act violations through education, after conducting 43 the previous year.

The OSC's Hatch Act track record is consistent with the drop in its performance on prohibited personnel practice cases. In 2002 the OSC obtained 126 corrective actions for retaliation victims. Despite an extra year and over twice the budget resources, in FY's 2005 and 2006 combined, the OSC obtained 97 corrective actions. In FY 2006 the Office only obtained corrective action for 2.49% complainants, the lowest rate in its history.

OBJECTIVITY

For the last 2.5 years, the President's Council on Integrity and Efficiency (PCIE) has assigned the Office of Personnel Management (OPM) Office of Inspector General (OIG) to investigate a Whistleblower Protection Act complaint against the Special Counsel, Mr. Bloch. The case was filed by a group of anonymous OSC staff, joined by GAP, Public Employees for Environmental Responsibility (PEER), and the Project On Government Oversight (POGO). The issues in the investigation are summarized below. But more directly relevant, the probe creates a potential for conflict of interest that, through his actions, Mr. Bloch has proven he cannot rise above. In fact, OSC leadership has aggressively obstructed the investigation. To illustrate, the OSC --

* gagged employees from confidential interviews with OPM, requiring that an OSC representative be there to listen.

* barred members of the Office's professional staff from interviews with the OPM OIG, on strained grounds of attorney client privilege that could compete with current Executive Privilege claims used to avoid Justice Department testimony to Congress.

* had Federal Protective Services (FPS) officer forcibly remove a well-known internal whistleblower in front of other OSC staff when OPM first came to investigate. The FPS dismissed the charges when the OSC could not produce witnesses, but the message was a clear warning to others.

Throughout, Mr. Bloch has passively encouraged his supporting coalition of religious organizations to openly, repeatedly refer to him as a victim of whistleblower retaliation in the PCIE probe, harassed for challenging immoral sexual diversity in the federal workforce.

The point of raising these motives and conflicts is not to attack Mr. Bloch. It is that through obstruction, threats and counterattacks, he has made himself a bigger issue than the alleged Hatch Act violations his staff is investigating. The charges and countercharges of who is retaliating against whom are trumping the merit system issues. The distraction directly threatens the legitimacy, and impact, even of good faith work by his staff. For example, despite the abuse of power and gross mismanagement, OSC investigators found significant evidence of political strong arm tactics that violate the Hatch Act. Even the OSC's diluted recommendations should have been taken seriously. Instead, President Bush has ignored them. That option may not have existed if the charges had come from an organization whose motives weren't an issue of public controversy.

A CALL FOR ACCOUNTABILITY

While this hearing is about policy reforms rather than unraveling allegations, accountability is a policy issue of the highest order. Anti-corruption campaigns become magnets for cynicism unless the public knows and believes in the answer to the question, "Who is watching the watchdog?" The sheer volume of allegations against Mr. Bloch – before and after, connected with and independent of the OPM OIG investigation – mandate resolution and interim safeguards for the OSC to be functional in its mission. This conclusion is inescapable even after a glance at the list of accumulating charges.

Issues under PCIE investigation

It is startling that the OIG has had to spend 2.5 years investigating charges that during the first 1.5 years of his term Mr. Bloch –

* created a hostile work environment by repeatedly retaliating against career OSC staff members, culminating in the involuntary reassignment of twelve career employees for whistleblowing;

* imposed non-disclosure policies on career staff in violation of the anti-gag statute and the Lloyd Lafollette Act, which guarantees all federal employees the right to communicate with Congress

* abandoned merit-based competitive hiring for career positions and misused special hiring authorities;

* refused to enforce existing statutory prohibitions against sexual orientation discrimination in the federal workforce, and provided misleading statements to Congress about this; and

* Abused his authority with disparate and politically-motivated treatment for two high-profile Hatch Act complaints.

* hastened the termination date of the employees who refused the geographic reassignments in retaliation for whistleblowing, First Amendment activity, and/or the assertion of their legal rights to hire counsel and challenge the illegal reassignments; and

* declined to permit employees to remain on at OSC headquarters in positions they were qualified to hold, in retaliation for whistleblowing or exercise of other merit system rights.

Issues outside the scope of the PCIE investigation

The PCIE investigative results will be significant findings. However, the almost surreal delays raise questions about even that probe's reliability. At best, due to the obstruction and delays the PCIE report will be primarily of historical significance for conclusions about Mr. Bloch's performance. Unfortunately, in terms of respect for the merit system it appears that since 2005 the environment and morale within OSC has deteriorated. And over time, it has become clear that the scope of the OIG investigation –

retaliation violating the rights of a group of employees – only illustrates a far broader merit system breakdown at the OSC. For example, GAP continues to receive evidence that –

*OSC management gagged the staffer for its Customer Service Unit (created to reassure this subcommittee that complainants will be heard) from talking to other OSC staff about what she heard and learned from her interviews.

* when the same staffer blew the whistle on this fraud to Mr. Bloch, she was gagged from further communications with him and threatened with termination. Over a six week period her desk then moved six times, including just outside the men's room and in a storage area for file cabinets, books and old furniture that nearly hit her.

* OSC management again is branding whistleblowers as "crazies."

* the agency is replacing purged employees without first posting vacancy announcement, rendering merit-based competition impossible.

* Mr. Bloch is bloating the payroll and burrowing in political allies by reclassifying political jobs into competitive service positions, and burrowing in pre-selected political appointees to permanent civil service spots. In one case the beneficiary of a redundant job received a $154,000 salary.

* OSC management is overruling merit system panel recommendations to place pre-selected candidates without qualifications or prior experience.

* the agency diverted funds appropriated for five staff additional positions on the Disclosure Unit, raising questions about how funding for increased Hatch Act work would be spent.

* Mr. Bloch reassigned staff from prohibited personnel practice cases to legally unauthorized but high profile projects such as investigating the U.S. Attorney's Office firings, a controversy for which the Special Counsel does not have jurisdiction.

* Mr. Bloch has hired no bid, buddy system consultants with vague duties, as occurred with the boarding school headmaster for his son.

The patterns that began in 2004-05 have intensified, rather than eased up. Through last week we have continued to receive allegations and information that indicates intensifying harassment within the OSC. The Office of Special Counsel is in the process of imploding.

RECOMMENDATIONS

It is with deep frustration that I am acting on my duty to share what whistleblowers are revealing about Mr. Bloch. As illustrated by current threats to the Hatch Act, the merit system needs an effective Special Counsel. A dysfunctional OSC creates extra work and makes the job far harder both for Congress and public interest NGO's.

What can be done? We suggest that the Justice Department conduct any expanded Hatch Act investigation. The career staff at DOJ has retained professional respect and credibility despite former Attorney General Gonzalez, and the probe could be an opportunity for the new Attorney General to prove politics no longer rules law enforcement at Justice.

If it is necessary to permit continued OSC control of Hatch Act investigations, we suggest three steps to defend both the taxpayers and the integrity of any results.

1) Conduct a GAO audit to identify wasteful spending that could be redirected for expanded Hatch Act work.

2) Initiate a GAO investigation of alleged merit system violations since the 2005 cutoff for the OPM case. The GAO investigation should include the controversial actions in the Doan investigation, and be ongoing while Mr. Bloch concludes Hatch Act work. The steady oversight could prevent opportunities to continue with current patterns.

3) Require regular briefings Senate staff briefings from OSC on the progress in all its Hatch Act investigation

Thank you for this opportunity to contribute to the record. The controversy behind this hearing is the newest generation of scandals that have recurred in the 1970's, 1980's and now again in the millennium. GAP is on call for committee staff, however we can be helpful in ending this broken record syndrome.

BACKGROUND
THE PERILS OF POLITICS IN GOVERNMENT: A REVIEW OF THE SCOPE AND ENFORCEMENT OF THE HATCH ACT
October 18, 2007

The Hatch Act

The Hatch Act restricts the political activity of employees of the federal government, the District of Columbia (DC), and certain state and local employees. The purposes of the Hatch Act include ensuring that federal resources are not directed for partisan political goals; promoting a merit-based federal civil service system, rather than a political spoils system; and protecting federal employees from being coerced to participate in political activities. Originally enacted in 1939, the Hatch Act was amended most recently in 1993, and it has not been examined in depth since then.

A. Hatch Act Restrictions

Generally, the Hatch Act prohibits employees of federal executive branch (other than the President and Vice President) and the District of Columbia from:

(1) Using their official authority or influence for the purpose of interfering with or affecting the result of an election.

(2) Soliciting, accepting, or receiving political campaign contributions.

(3) Running for elective office in partisan elections.

(4) 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) Engaging in political activity on federal property, while on duty, while wearing a uniform or insignia identifying them as federal officials or employees, or while using a federal government vehicle.[1] (Certain Senate-confirmed appointees and White House staff are exempt from this provision.).[2]

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[1] *See* 5 U.S.C. §§ 7323-24.

[2] These employees are exempt from the prohibition against political activity while on duty, wearing a uniform, on federal property, or in a government vehicle if their duties continue outside normal duty hours and while away from the normal duty location and if they are either paid through the Executive Office of the President or are Senate-confirmed presidential appointees within the United States who determine policies in relations with foreign powers or in the nationwide administration of Federal laws. *See ibid.* at § 7324(b).

Support for a political issue that is not directed to the success or failure of a political candidate, party, or partisan political group is not "political activity" within the meaning of the statute. For example, the Hatch Act does not prohibit a federal employee from advocating a pro- or anti-war position while on duty.

Similar restrictions apply to state and local executive branch employees who are principally employed in connection with programs financed by loans or grants made by the United States or a federal agency.[3] Covered state and local employees may not use their official authority for the purpose of interfering with or affecting the result of an election; directly or indirectly coerce or advise a State or local employee to contribute anything of value to anyone for a political purpose; or be a candidate in a partisan election.[4] Employees of private nonprofit organizations that receive federal funds are not covered by the Hatch Act, unless another federal statute states that the organization shall be considered a state or local agency for purposes of the Hatch Act.[5]

Certain executive branch employees are further restricted under the Hatch Act, and may not "take an active part in political management or political campaigns" even while off duty.[6] These further restricted employees include all career appointees to the Senior Executive Service, employees of agencies or offices that conduct work related to elections and national intelligence, and employees of certain agencies or offices that conduct prosecutorial or adjudicative functions.[7]

Before amendments passed in 1993, these further restrictions on taking an active part in political management or political campaigns applied to all employees covered by the Hatch Act.[8] As a result of these amendments, most employees may participate in

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[3] *See ibid.* at §§ 1501-08. Employees of state-supported educational or research institutions are exempt from these provisions of the Hatch Act. *See ibid.* at § 1501(4)(B).

[4] *See ibid.* at §§ 1502-03.

[5] Head Start and Community Services Block Grant programs are subject to the Hatch Act under 42 U.S.C. §§ 9851(a) and 9918(b), respectively.

[6] *See* 5 U.S.C. § 7323.

[7] *See ibid.* Employees of the Federal Elections Commission, Election Assistance Commission, Central Intelligence Agency, Federal Bureau of Investigation, Defense Intelligence Agency, Office of the Director of National Intelligence National Geospatial-Intelligence Agency, National Security Agency, National Security Council, Secret Service, Criminal Division of the Department of Justice, Office of Criminal Investigation of the Internal Revenue Service, Administrative Law Judges (positions described at 5 U.S.C. § 5372), Contract Appeals Boards (positions described at 5 U.S.C. § 5372a), Office of Special Counsel, and Merit Systems Protection Board are further restricted. Additionally, the statute lists two offices that no longer exist, such as the Office of Investigative Programs of the Customs Service and the Office of Law Enforcement of the Bureau of Alcohol, Tobacco and Firearms.

[8] *See* Public Law No. 103-94, 107 Stat. 1001.

election campaigns by advising the campaign, distributing materials, organizing rallies or meetings, or making speeches for candidates, so long as they do not violate any other provision of the Hatch Act, for example by doing campaign work while on duty or personally soliciting or accepting campaign contributions.[9]

Federal employees who live near DC or in areas with high concentrations of federal employees, as designated by the Office of Personnel Management, are exempt from certain provisions of the Hatch Act for local elections only.[10] Federal employees in these designated areas may run for office in a partisan election as an independent, may engage in fundraising, and may take an active part in political management or political campaigns in the municipality or other political subdivision in which they reside.

B. Enforcement of the Hatch Act

The Office of Special Counsel (OSC) is charged with enforcing the Hatch Act.[11] The OSC issues advisory opinions to persons seeking advice about the application of the Hatch Act, investigates allegations of Hatch Act violations, and prosecutes Hatch Act violations. The Merit Systems Protection Board (MSPB or the Board) is responsible for independent adjudication of Hatch Act charges and other federal employee personnel actions in accordance with merit system principles.

The OSC frequently issues warning letters instead of prosecuting Hatch Act violations before the MSPB if the alleged violation is not egregious. Additionally, the OSC can settle cases with employees charged with Hatch Act violations by agreeing upon a punishment without going through the MSPB process.

Few Hatch Act cases are brought before the MSPB. The MSPB informed OGM Subcommittee staff that the Special Counsel has brought 28 Hatch Act cases before the Board since January 2004. Fifteen of those cases were settled or dismissed before decision.

When the OSC brings a Hatch Act case to the MSBP, an Administrative Law Judge (ALJ) hears the case.[12] The ALJ may initiate attempts to settle the case informally at any time, and any settlement agreement is final and binding on the parties.[13]

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[9] *See* Office of Special Counsel, *Political Activity and the Federal Employee* (Dec. 2005), at p. 5, *available at* www.osc.gov/documents/hatchact/ha_fed.pdf; 5 C.F.R. §§ 734.203-06.

[10] *See* 5 U.S.C. § 7325; 5 C.F.R. § 733.107.

[11] The OSC is an independent federal agency charged with enforcing the Civil Service Reform Act and the Whisteblower Protection Act, in addition to the Hatch Act. *See generally* www.osc.gov.

[12] *See* 5 C.F.R. §§ 1201.125(a). The MSPB informed OGM Subcommittee staff that ALJs from the National Labor Relations Board hear the cases pursuant to an inter-agency contract.

The Hatch Act provides for a presumed penalty of termination for any violation, which can be reduced only by unanimous agreement of the three-member Board that termination is not warranted.[14] The minimum punishment permitted under the statute is a 30-day suspension without pay.[15] If the ALJ determines that removal is warranted, he or she issues an initial decision ordering removal of the employee, which may be appealed to the MSPB. If the ALJ determines that a lesser penalty is warranted, he or she issues a recommended decision for consideration by the Board.[16]

An MSPB decision concluding that a federal employee violated the Hatch Act may be appealed to the Court of Appeals for the Federal Circuit, and an MSPB decision concluding that a state or local employee violated the Hatch Act may be reviewed by a U.S. district court.[17]

C. Recent Significant Investigations

In February 2007, the OSC began investigating Lurita Doan, Administrator of the General Services Administration (GSA), after the GSA Inspector General referred Hatch Act allegations to the OSC.[18] The investigation arose from a January 26, 2007 luncheon for GSA political appointees.[19] During that luncheon, J. Scott Jennings, Deputy Director for Political Affairs in the White House, provided a presentation about the 2006 election results, as well as possible competitive congressional and gubernatorial races in 2008.[20] The OSC concluded that at the end of the presentation, Lurita Doan asked how GSA could help "our candidates."[21]

On May 18, 2007, the OSC concluded that Ms. Doan violated the Hatch Act prohibition on using her official authority to influence the results of election. The OSC's conclusion relies in part on regulations stating that this prohibition includes soliciting, accepting, or receiving uncompensated volunteer services from a subordinate for any

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[13] *See* 5 C.F.R. §§ 1201.121 and 1201.41.

[14] *See* 5 U.S.C. § 7326.

[15] *See* 5 U.S.C. § 7326.

[16] *See* 5 C.F.R. §§ 1201.125.

[17] *See* 5 C.F.R. §§ 1201.127.

[18] *See* U.S. Office of Special Counsel, *Report of Prohibited Political Activity Under the Hatch Act* (May 18, 2007), File No. HA-07-1160 (Lurita A. Doan), at 2 (hereafter "OSC Doan Report").

[19] *See ibid.*

[20] *See ibid.* at p. 4; *see also* R. Jeffrey Smith, "Political Briefings at Agencies Disclosed," *Washington Post* (Apr. 26, 2007), at A01, *available at* www.washingtonpost.com/wp-dyn/content/article/2007/04/25/AR2007042503046.html.

[21] *See* OSC Doan Report, at pp. 4-13.

political purpose, as well as using one's authority to coerce any person to participate in political activity.[22]

Because Ms. Doan is a Senate-confirmed presidential appointee, the MSPB does not have jurisdiction to adjudicate her case, and the President decides whether to take any action on the Special Counsel's report.[23] To date, the President has not taken any action with regard to this report.

In April 2007, the OSC announced that it would expand its investigation to determine whether there had been Hatch Act violations in connection with similar White House briefings conducted across the executive branch over several years.[24] This broader investigation may focus in part on whether White House officials violated the Hatch Act by implicitly (or explicitly) soliciting federal officials to use their influence over federal grants, policy decisions, and other matters to aid Republican electoral candidates.[25]

D. Policy Issues of Possible Concern

1. Electronic communications

The Hatch Act was last amended in 1993, before email use was widespread. Many employees use email for both formal/official and informal/personal communication.

In May 2002, the OSC issued an advisory opinion stating that informal "water cooler" type discussions of political opinions are not prohibited by the Hatch Act, regardless of whether the discussions are oral or by electronic communication.[26] However, the Advisory Opinion warned that use of electronic messaging to engage in the equivalent of political leafleting or electioneering may be prohibited political activity under the Hatch Act.

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[22] *See* OSC Doan Report, at pp. 15-17; 5 C.F.R. § 734.302(b).

[23] *See* 5 U.S.C. § 1215(b)

[24] *See e.g.*, Jessica Brady, "Enforcement Agency Expands Hatch Act Probe," *Congress Daily* (Apr. 25, 2007), *available at* www.govexec.com/dailyfed/0407/042507cdam2.htm.

[25] *See e.g.*, Tom Hamburger, "High-Profile Probe by Low-Key Office," *Los Angeles Times* (Apr. 24, 2007), *available at* www.latimes.com/news/politics/la-na-probe24apr24,0,3535547.story?coll=la-home-headlines; *see also* Congressional Research Service, Memorandum from Jack Maskell, Legislative Attorney, *Political Briefings at Federal Agencies and Hatch Act Considerations* (Oct. 3, 2007), available upon request.

[26] *See* Office of Special Counsel, Federal Hatch Act Advisory, Use of Electronic Messaging Devices to Engage in Political Activity (May 2002), available upon request to OSC or OGM Subcommittee staff.

Several recent MSPB decisions concluded that an employee had violated the Hatch Act by sending partisan political emails.[27] In response, in March 2007, the OSC removed the May 2002 email "water cooler" Advisory Opinion from its website. At the same time, the OSC issued a press release stating that the "decisions by the MSPB have brought clarity to the email issue and dispel any misconceptions in the federal community that using government email to circulate partisan political messages was an exception to the Hatch Act's prohibition against engaging in political activity while on duty or in a federal building."[28]

2. State and local officials

When the Hatch Act was extended in 1940 to state and local officials working in connection with federally-financed programs, the reach of federal government programs was far narrower than it is today. With the proliferation of federal grant programs, in particular homeland security grants, many local officials that traditionally did not fall under the Hatch Act may be brought within the statute's reach.[29] In some places, certain state or local employees will be covered by the Hatch Act because their positions are funded by federal dollars while others with the same duties will not simply because their positions are funded from different sources.

Some local officials may not know that they are covered by the Hatch Act or understand the Hatch Act's restrictions. Recently, a district court in Alabama upheld an MSPB decision concluding that a state public health administrator violated the Hatch Act by running for the Alabama House of Representatives. The court concluded that the employee unreasonably relied on previous advice that he was not subject to the Hatch Act after receiving a warning from the OSC.[30]

3. Training

Although the OSC offers guidance on the Hatch Act and federal employee unions invest in training their members on its requirements, responsibility for Hatch Act training lies primarily with individual agencies. Some federal employees may receive inadequate training or inaccurate information about the Hatch Act. For example, OGM Subcommittee staff were told that at one agency, Hatch Act training is included in a variety of training modules from which employees self-select training, so some employees may not receive Hatch Act training. Another agency sends out annual

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[27] *See* Office of Special Counsel press release, *OSC Removes Hatch Act Advisory for 'Water Cooler' Political Email: Four Board Decisions Clarify Illegality of Such Email* (Mar. 14, 2007), *available at* http://www.osc.gov/documents/press/2007/pr07_06.htm.

[28] *See ibid.*

[29] For example, last year the OSC brought charges against a local county sheriff. *See* U.S. Office of Special Counsel Fiscal Year 2006 Annual Report, at p. 28, *available at* www.osc.gov/documents/reports/ar-2006.pdf.

[30] *See Grantland v. Merit Systems Protection Board* (N. D. Ala. June 2007).

reminders to employees telling them that they are responsible for knowing the laws and guidelines that pertain to federal employees and should take the time to review them.

4. Presumptive punishment of termination

Given the broad scope of the Hatch Act, the presumptive punishment of termination, which can only be reduced to a minimum of a 30-day suspension without pay by unanimous agreement of three Board members, can be quite severe in some cases. The potential for losing one's job may chill federal employees from engaging in political expression that is permitted under the Hatch Act, especially when federal employees are unsure of exactly what the Hatch Act prohibits.

5. Political appointees and White House staff

While most federal employees face potential loss of employment under the Hatch Act, only the President can decide if Senate-confirmed presidential appointees and White House staff will be punished for Hatch Act violations. Presidents have little incentive to punish appointees and White House staff for crossing the line to support them or their allies in elections.

There is an inherent tension between the merit-based civil service system and the system of political appointments. On one hand, every President wants his staff and appointees to advance his political goals and he appoints people that he believes will do so. On the other hand, the Hatch Act applies to virtually all federal employees and has a broad purpose of ensuring that federal resources are not directed for partisan political goals. These tensions are not easily resolved and may create a sense that, although the Hatch Act applies to virtually all federal employees, it is not evenly enforced.

E. History of the Hatch Act

The earliest predecessor of the Hatch Act dates back nearly to the founding of the Nation. In 1801, the heads of federal departments, at President Thomas Jefferson's direction, issued an order stating that although it is "the right of any officer [federal employee] to give his vote at elections as a qualified citizen ... it is expected that he will not attempt to influence the votes of others nor take part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it."[31]

The Civil Service Act of 1883, known as the Pendelton Act, contained several provisions similar to current Hatch Act provisions. The Pendelton Act declared that "no person in the public service is for that reason under any obligations to contribute to any

[31] *See Political Activity and the Federal Employee, supra*, at p. 2; *U.S. Civil Serv. Commission v. Ntl. Assoc. of Letter Carriers*, 413 U.S. 548, 557 (1973) (hereafter "*Letter Carriers*") (quoting the order).

political fund, or to render any political service" and that "no person in said service has any right to use his official authority or influence to coerce the political action of any person or body."[32] The Pendleton Act also created the Civil Service Commission – the precursor of several federal agencies including the MSPB and OSC – which could investigate, adjudicate, and recommend sanctions for federal government employees who violated the Pendleton Act.[33]

In 1907, President Theodore Roosevelt issued an executive order restricting federal employees' off-duty participation in political management or political campaigns.[34]

In response to the growth of New Deal federal programs and allegations that program funds were misused to promote Democratic candidates in the 1938 elections, Congress passed the Hatch Act in 1939. The Act officially was titled "An Act to Prevent Pernicious Political Activities," but became known as the Hatch Act after its chief proponent Senator Carl Hatch of New Mexico. Many of the original Hatch Act's provisions are very similar to provisions of the current Hatch Act, restricting federal executive branch employees' political activities and forbidding federal employees for promising, awarding, or depriving any person of any government benefit of employment as a reward or punishment for political activity.[35] In 1940, the Hatch Act was extended to state and local employees whose principal employment is in connection with an activity financed by federal government loans or grants.[36]

The Hatch Act originally required removal for violating the Act. In 1950, it was amended to permit the adjudicators (at that time, the Civil Service Commission) to impose a lesser penalty by unanimous vote with a minimum suspension of 30 days without pay.[37]

The Civil Service Reform Act of 1978 abolished the Civil Service Commission, and its investigative and adjudicative functions related to the Hatch Act were divided between the OSC and MSPB.[38]

In 1976 and 1990, Presidents Ford and Bush, respectively, vetoed Hatch Act amendments to permit most covered employees to take an active part in political

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[32] *See Letter Carriers* at 558; 22 Stat. 404.

[33] *See Letter Carriers* at 558-59.

[34] *See Letter Carriers* at 559 (citing the Twenty-Fourth Annual Report of the Civil Service Commission (1908), at p. 104).

[35] *See* Public Law No. 252; 53 Stat. 1147.

[36] *See Letter Carriers* at 561; 54 Stat. 767.

[37] *See Letter Carriers* at 562; 76 Stat. 750.

[38] *See* Public Law No. 95-454, 92 Stat. 1111

campaigns while off-duty.[39] In 1993, similar legislation, discussed above, entitled the Federal Employees Political Activities Act became law.[40]

Additional Resources

Office of Special Counsel website, www.osc.gov.

Office of Special Counsel, *Political Activity and the Federal Employee* (Dec. 2005), *available at* www.osc.gov/documents/hatchact/ha_fed.pdf.

U.S. Office of Special Counsel, *Fiscal Year 2006 Annual Report, available at* www.osc.gov/documents/reports/ar-2006.pdf.

Merit Systems Protection Board website, www.mspb.gov.

Congressional Research Service, Memorandum from Jack Maskell, CRS Legislative Attorney, to House Committee on Oversight and Government Reform, *Meetings, Conferences as "Political Activities" in a Federal Office, and "Hatch Act" Considerations* (March 26, 2007), *available at* http://oversight.house.gov/documents/20070328154603-20874.pdf.

Congressional Research Service, Memorandum from Jack Maskell, Legislative Attorney, *Political Briefings at Federal Agencies and Hatch Act Considerations* (October 3, 2007), available upon request.

Congressional Research Service, *Hatch Act Amendments: Political Activity and the Civil Service* (updated Oct. 16, 1997). Order code IB87153, available upon request to CRS.

Government Accountability Office, *U.S. Office of Special Counsel's Procedures for Assigning Incoming Cases to and within Organizational Units* (Jan. 12, 2007), GAO-07-263R.

Government Accountability Office, *U.S. Attorneys: Laws, Rules, and Policies Governing Political Activities* (July 2000), GAO/GGD-00-171.

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[39] *See* Congressional Research Service, *Hatch Act Amendments: Political Activity and the Civil Service* (updated Oct. 16, 1997). Order code IB87153, available upon request to CRS.

[40] *See* Public Law No. 103-94, 107 Stat. 1001.

Questions and Responses for the Record from James Byrne

"The Perils of Politics in Government: A Review of the Scope and Enforcement of the Hatch Act" Hearing held on October 18, 2007

United States Office of the Special Counsel's Response to Questions for the Record From Senator Daniel K. Akaka

1. **In response to my question whether it is a violation of the Hatch Act "if a group of employees casually chat in the break room about their views on an upcoming election," you testified, "We look at situations or examples like you are discussing in the totality of the circumstances to determine whether that activity rises to the level of a political activity designed to influence an election. And so there is no such animal as the 'water cooler' exception." (Draft Trans. p. 16).**

   Federal employees are not likely to interrupt a casual chat to consult an ethics officer about their conversation.

   a) **Do you believe that employees receive sufficient guidance to know when, under the totality of circumstances, a casual chat might violate the Hatch Act?**

   RESPONSE: OSC provides Hatch Act training and guidance through live presentations, training videos and various publications. Also, OSC has telephone and email hotlines dedicated to issuing Hatch Act advisory opinions. Lastly, OSC's website has a plethora of Hatch Act information, including previously issued advisory opinions, publications, PowerPoint presentations, frequently asked questions, etc. Thus, federal employees should know their rights and responsibilities under the Hatch Act. Employees with questions about the legality of their actions should contact OSC for an advisory opinion or speak to their designated agency ethics official before taking action.

   b) **Do you believe that federal employees may accidentally violate the Hatch Act in the course of a political discussion?**

   RESPONSE: Most government employees know about their responsibilities under the Hatch Act and make every effort to observe the letter and spirit of the law As the Board in Special Counsel v. Wilkinson, 104 M.S.P.R. 253, n.2 (2006), pointed out, it has previously rejected a finding that an employee's conduct must be knowing and willful to constitute a violation of the Hatch Act. The Board explained that it earlier noted that to establish a violation of the Hatch Act, OSC must demonstrate only that an employee covered by the Act engaged in political activity

prohibited by the Act, and that the employee's intent is relevant only to the determination of the penalty to be imposed for the penalty. Id. (citing Special Counsel v. Alexander, 71 MSPR 636, 646 (1996)).

c) **In light of the possibility that a casual chat could violate the Hatch Act, is the presumptive penalty of termination too harsh?**

RESPONSE: OSC is a law enforcement agency that investigates and enforces the laws under our jurisdiction including the Hatch Act. I am reluctant to form an opinion on what Congress has decided is the appropriate penalty scheme for violating the Act.

d) **Would you support incorporating the Douglas factors[1] for progressive discipline into the Hatch Act?**

RESPONSE: Many of the Douglas factors seem inapplicable to Hatch Act matters. The MSPB considers mitigating factors in determining the appropriate penalty in Hatch Act cases. These factors include the nature of the offense and the extent of the employee's participation; the employee's motive and intent; whether the employee sought advice of counsel; the political coloring of the employee's activities; whether the employee has ceased the activities; and the employee's past employment record. Special Counsel v. Purnell, 37 M.S.P.R. 184 (1988).

2. **With regard to when the Office of Special Counsel (OSC) might deem electronic communications to be "political activity" prohibited by the Hatch Act –**

a) **When an employee forwards an email written by another person, are the complete contents of the email attributed to the employee in the same way that they would be if the employee had written the email?**

RESPONSE: Assuming the email at issue is directed at the success or failure of a candidate for partisan office or a political party, forwarding such an email written by another is no different than distributing campaign materials prepared by another. Indeed, many of the emails we have seen over the years appear to have originated with the political campaigns, parties, etc.

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[1] See Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981).

b) Does the OSC consider forwarding political satire or political cartoons concerning a political party or a partisan politician to be political activity in violation of the Hatch Act?

RESPONSE: These types of questions are very fact specific. Unfortunately, insufficient facts have been presented for OSC to opine on whether sending of emails, described as political cartoons or political satire, constitute political activity within the meaning of the Hatch Act. Generally, it is OSC's opinion that an employee who is on duty or in a federal building may not use email or other means to engage in activity that is directed at the success or failure of any a candidate for partisan public office, political party or partisan group. Where the line of humor ends and political activity begins is fact specific and no bright line rule can be imposed. Humor is not a defense if the activity is designed to bring success or failure to a candidate or party. Where the content does not reasonably convey an attempt to bring success or failure to a candidate or party, the content might not be a violation of the Hatch Act prohibition on political activity. However, it should be noted that humor can sometimes be mixed in with powerful effect with political diatribe designed to cast a candidate or party in a dark or unfavorable light, and in those situations, it could violate the Hatch Act even though many might consider it funny. Such an example was a case in which the employee sent humorous posters lampooning the Kerry/Edwards team under the guise of movie posters, and then also attached an RNC video that satirized Senator Kerry as a "flip flopper." While the video was rendered in an objective way, showing Senator Kerry in his own words from actual taped programs, it was clear that the entire sweep of the video was to defeat Sen. Kerry and help President Bush win reelection. The overall effect of what the sender sent in the emails on duty and in a federal building did result in a Hatch Act violation. That employee served a suspension.

3. According to testimony presented at the hearing, federal employee unions perceive the OSC as more likely to pursue punishment for first-time violations of the Hatch Act without first issuing a warning letter than the Office has been in the past.

a) Under what circumstances does the OSC pursue punishment for first-time violations of the Hatch Act without first issuing a warning letter?

RESPONSE: While the union's testimony is directed at the prosecutorial discretion of the Special Counsel, it fails to capture the policy that OSC has always employed. OSC may pursue punishment for first-time violations of the Hatch Act without first issuing warning letters, where the employee had been warned by their employer about such prohibited activity or where the employer or other source provided the employee with sufficient information about the Hatch Act, that the employee knew or

should have known that the activity is prohibited. Also, OSC may pursue punishment without first providing a warning letter in those instances involving political coercion of subordinates. Central to OSC's decision is the seriousness of the offense, whether the violation is ongoing or is about to occur, and the deterrent effect prosecution will have on future violations. For example, if OSC receives a complaint concerning a federal employee who is running for office, OSC would attempt to bring the federal employee into compliance with the Hatch Act by warning the employee that he or she is in violation of the Act and that to comply with law he or she should withdraw the candidacy or resign from employment. Similarly, if a federal employee is about to host a fundraiser we would warn the employee and request that he or she cancel the event. Almost all HA matters are closed with letters and only a small percentage of cases are prosecuted annually, as the figures in our annual report demonstrate. In the arena of political activity through email, OSC was measured and slow to prosecute over the years, but when it became clear employees were refusing to cease their use of email to leaflet the federal workplace in spite of being warned by OSC and/or the agency that this might result in a Hatch Act violation, OSC used its prosecutorial discretion to enforce the law. OSC's effort resulted in a series of favorable MSPB rulings that help clarify that using email while on duty or in a federal building to engage in political activity is a violation of the Hatch Act.

b) **Has the OSC changed its policy or practice for pursuing punishment for first-time violations of the Hatch Act, rather than issuing a warning letter? If so, please explain in detail why.**

RESPONSE: OSC has not changed its policy or practice for pursuing punishment for first –time violations of the Hatch Act as evidence by the fact that about 90% of such cases are closed with letters and no punishment is pursued. OSC has consistently issued warning letters where OSC found that the employee had no knowledge of the Hatch Act or where an employee chose to come into compliance with law.

4. **Why did OSC Annual Reports after 2004 stop reporting "Complaints referred for further investigation"?**

RESPONSE: Prior to 2004 there were only to two full-time attorneys assigned to the Hatch Act Unit. Therefore, many cases had to be referred to the Investigation and Prosecution Division for investigation. Once the Hatch Act Unit reached more adequate staffing levels the Unit was able to handle the investigative workload. Because the Hatch Act cases now remain in the Unit from start to finish, OSC no longer reports investigative referrals.

5. **Does the OSC report to agency heads under 5 U.S.C. § 1214(e) when the Office has found reasonable cause to believe that the Hatch Act had been violated?**

   a) **If so, how many such reports have been made in each of the last five years?**

   b) **In response to each of these reports, did the agency head provide the corrective action certification required under § 1214(e)(2)? If not:**

      - **Please describe each instance in which the agency failed to provide the required response.**

      - **Please describe the enforcement action, if any, the OSC subsequently took in each instance where the certification was not provided.**

   c) **Please provide the Subcommittee with copies of the ten most recent reports under 5 U.S.C. § 1214(e).**

   RESPONSE: OSC does not construe § 1214(e) as applying to Hatch Act violations. OSC has exclusive statutory authority to enforce the Hatch Act. See 5 U.S.C. §§ 1504-1508 and 7326. In contrast, § 1214(e) applies generally when OSC has reasonable cause to believe that certain other violations of law, rule, or regulation have been identified during an investigation under title 5, but which OSC itself does not have authority to enforce (for example, a violation of the Federal Acquisition Regulations). Section 1214(e) provides a mechanism whereby OSC may, in appropriate cases, facilitate resolution of such apparent violations by requiring a report to and response from the officials with authority to address such violations (*i.e.*, the heads of the agencies involved). As a matter of statutory construction, it is clear that Congress intended approaching agencies to bring corrective action for personnel violations to agency heads first, but did not express any such requirement or preference under the Hatch Act. One reason might be that Hatch Act violations often do not affect the workplace such as when an employee engaged in political activity on the job with persons outside the government, or when employees solicit campaign contributions from persons outside the government, or in their off duty hours, or run for partisan office, or consent to be listed on a campaign event as a host, or use their official titles in invitations to campaign events. There are many other examples of this. In fact, a majority of Hatch Act violations occur outside of work or are unconnected with the workplace.

6. **With respect to the Hatch Act, has the OSC complied with the requirement in 5 U.S.C. § 1219(a) to "maintain and make available to the public ... [a] list of matters referred to heads of agencies under subsection (e) of section 1214, together with certifications from heads of agencies under such subsection"? If so, where can the public access the information? If not, what is the OSC's basis for not complying with the requirement?**

   RESPONSE: See answer to question number 5.

7. **Does the OSC use a case priority system for Hatch Act cases? If not, does the Office plan to implement one?**

   RESPONSE: Yes, OSC uses a case priority system for Hatch Act cases.

8. **Did the previous Special Counsel's office develop a case priority system for Hatch Act cases? If so, did the OSC decide against implementing that system? If so, please explain in detail the basis for that decision.**

   RESPONSE: Since approximately 2002 or 2003, the Hatch Act Unit has been operating under the same case priority system. In general, the system is directed at processing those complaints first where on the basis of the evidence in the file there are reasonable grounds to believe the complaint concerns a serious and existing violation, which may require corrective or disciplinary action and/or is in the public's interest to have a prompt resolution of the complaint. Complaints, after being reviewed by the Unit Chief or Deputy Chief, will be designated as Category I, II, or III. Significant Congressional, White House or media interest may affect the level at which a case is categorized. Moreover, within a category, cases receiving such interest will be assigned greater priority.

   Category I complaints (high priority) involve the most serious violations <u>and</u> where the subject is presently engaged in the prohibited activity or where there is evidence that the violation was knowing and willful. Examples of category I cases include the following: 1) misuse of official authority/coercion cases; 2) candidacy cases and 3) solicitation cases.

   Usually, Category II complaints (mid-level priority) involve past serious violations, less serious ongoing violations and less serious violations where there is evidence that the violation is knowing and willful. Examples of less serious violations include the following: 1) posting or displaying partisan posters, photographs, etc.; 2) use of official title while engaged in political activity; and 3) writing a speech for a candidate while on duty.

Category III (low level priority) complaints consists of cases involving no apparent Hatch Act prohibited activity or past violations which do not appear to be knowing and willful.

9. **What policies or procedures does the OSC have to protect whistleblowers from retaliation for providing information in Hatch Act and other investigations?**

RESPONSE: Federal employees who provide information in Hatch Act and other OSC investigations are protected by law from retaliation by their agencies for doing so, under 5 U.S.C. §§ 2302(b)(8), (b)(9), and/or (b)(12). OSC takes retaliation allegations from individuals who cooperate in those investigations very seriously. In addition to its authority to seek corrective action and disciplinary action from the MSPB for retaliatory personnel actions by agencies (see 5 U.S.C. §§ 1214(b)(2)(B) and 1215), OSC is also authorized to use procedures set forth at 5 U.S.C. §§ 1214(b)(1) and 1204(e)(1)(B) to seek stays of personnel actions and protective orders, in aid of safeguarding whistleblowers from retaliation for providing information in OSC investigations.

10. **After the press obtained an unredacted copy of the OSC's Hatch Act report on Lurita Doan, did the OSC take any corrective action to protect those witnesses and to protect witnesses' identities in the future?**

RESPONSE: The identities of the witnesses were already known before the release of the May 18, 2007 OSC Report of Investigation in the Doan matter. The names of witnesses on page 10 of the report were contained in a report issued March 28, 2007 by the minority staff of the House Committee on Oversight and Government Reform: *"Allegations of Misconduct at the General Services Administration: A Closer Look" (T. Davis).* Therefore, those names were already in the public record. The facts of this case are such that it would be difficult to fashion a corrective action to protect identity of witnesses in the future, especially if their identity is public record in Congressional websites before OSC even writes a report. OSC does adopt every reasonable measure when prudent and in the public interest to protect witness names from public dissemination, especially when the witnesses ask for protection.

11. **What is the OSC's explanation for how the draft Hatch Act report on Lurita Doan was obtained by the media?**

RESPONSE: On July 12, 2007, Special Counsel Scott Bloch provided sworn testimony specifically addressing this question at a hearing on "Ensuring a Merit-Based Employment System: An Examination of the Merit Systems Protection Board and the Office of Special Counsel," before the House Committee on Oversight and Government Reform's Subcommittee on Federal Workforce, Postal Service, and the District of Columbia. An official transcript of this hearing is not

publicly available. However, in response to Questions for the Record from the Honorable Tom Davis (R-VA), OSC provides below the Special Counsel's testimony from the July 12th hearing:

> *As I said during the hearing, this issue is a red herring and has no bearing on the very serious Hatch Act violation investigated by the expert career attorneys at our agency. We have submitted a letter I sent to Ms. Doan's attorney, Mr. Nardotti, explaining that I did not authorize and do not believe OSC released the report.*
>
> *The Doan Report was initially released from a GSA source. We were informed of that by a reporter. I never saw a prior version of OSC's report printed publicly, did not authorize such to be released, and do not believe it is relevant to the matter pending before the President.*
>
> *I have the power to release a report that I believe is in the public interest or for other reasons outlined in Subsection Q of our Routine Use exceptions to the Privacy Act, published in the federal register. In this case, I did not deem it so and apparently Ms. Doan or someone in her office decided to release it. That a prior version of the report found its way into the public domain is of no relevance.*
>
> *The report that was released by GSA, presumably obtained from Ms. Doan, contained evidence that was arguably reflective of a greater degree of misconduct on the part of the Administrator, the earlier draft report's unfortunate release is of no consequence or weight.*
>
> *Certainly it should not be of any consequence to the President who received a similar recommendation in the final language in my letter to him. The matter is properly in the hands of the President, and we have said that is all that need be said on the matter.*

12. Both Colleen Kelley, of the National Treasury Employees Union, and John Gage, of the American Federation of Government Employees (AFGE) testified at the hearing about difficulties in carrying out non-partisan voter registration drives on federal property.

If a labor organization has not endorsed any political candidates in the next election cycle, does the Hatch Act prohibit the organization from conducting a non-partisan voter registration in a federal building?

RESPONSE: OSC's position on this matter has been addressed in a series of advisory opinions that are posted on our website. Please see attached exhibit 1.

These opinions are also available at:

- http://www.osc.gov/documents/hatchact/federal/fha34014.pdf
- http://www.osc.gov/documents/hatchact/federal/fha-32.pdf
- http://www.osc.gov/documents/hatchact/federal/fha-31.pdf

13. **Did the OSC investigate AFGE's allegation that the invitation extended to employees of Kirtland Air Force Base in August 2004 to attend a rally for George W. Bush violated the Hatch Act? If not, why? If so, please describe in detail the results of that investigation.**

RESPONSE: Yes. OSC's investigative findings were summarized in the determination letters we issued closing the Kirtland Air Force Base matter. Please see attached exhibit 2

EXHIBIT 1

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

Mr. Xxxx Xxxxx
XXXXXXXXXX
XXXxxxxxxxx.
Xxxxxxxxxx, XX. xxxxx

Re: OSC File No. AD-06-xxxx

Dear Mr. Xxxxxx:

This letter is in response to your request for an advisory opinion concerning the Hatch Act. The Office of Special Counsel (OSC) is authorized pursuant to 5 U.S.C. § 1212(f) to issue opinions under the Act. Specifically, you seek clarification on the issue of federal employees conducting voter registration drives in the federal workplace. First, you ask OSC to update our 2004 advisory opinion dealing with the American Federation of Government Employees (AFGE)'s ability to conduct nonpartisan voter registration drives. Second, you ask OSC to clarify conditions under which voter registration efforts might continue even after AFGE makes an endorsement of a partisan political candidate. These issues are addressed below.

As you know, the Hatch Act, 5 U.S.C. §§ 7321-7326, governs the political activity of federal civilian executive branch employees. The Hatch Act generally permits most federal employees to actively participate in partisan political management and partisan political campaigns. Covered employees, however, are prohibited from, among other things, engaging in political activity while on duty, in a government office or building, while wearing an official uniform, or using a government vehicle. 5 U.S.C. § 7324. Political activity has been defined as activity directed toward the success or failure of a political party, candidate for a partisan political office or partisan political group. 5 C.F.R. § 734.101.

In April 2004, OSC advised you that the Hatch Act would prohibit a federal employee, while on duty or in his or her workplace, from participating in a partisan voter registration drive, e.g., a drive aimed at helping a political party or candidate succeed. We also advised you that in determining whether a voter registration drive is partisan, OSC considers all of the circumstances surrounding the drive. We provided you with several factors that are relevant in making this determination.[1] We then advised you that we believe it would be difficult for a union, or any other organization, to conduct a truly nonpartisan voter registration drive once it has endorsed a candidate for partisan political office because, at that point, the organization has become

[1] Those factors include: 1) the political activities of the sponsoring organization, 2) the degree to which that organization has become identified with the success or failure of a partisan political candidate, issue or party (e.g., whether it has endorsed a candidate); 3) the nexus, if any, between the decision to undertake a voter registration drive and other political objectives of the sponsor; 4) whether particular groups are targeted for registration on the basis of their perceived political preference; and 5) the nature of the publicity circulated to targets of the drive immediately prior to or during the drive

EXHIBIT 1

identified with the success of the endorsed candidate. Our position on this issue has not changed since 2004.

In May 2004, OSC issued you an opinion advising that because AFGE had become identified publicly and repeatedly with the failure of then-Presidential candidate George W. Bush, it was unable to conduct a truly nonpartisan voter registration drive at that time, even though AFGE had not yet officially endorsed a candidate in the 2004 Presidential election. This conclusion was based on evidence showing that AFGE had encouraged its members to direct their efforts at President Bush's removal, planned to become involved in and make an impact on the 2004 Presidential election, and believed that voter registration was an important tool in advancing these goals.[2] This conclusion was also based on the fact that AFGE has a history of using voter registration as a tool to further its announced political objectives.

We recognize that President Bush is no longer a candidate for partisan political office and that the 2004 Presidential election is long over, and thus, AFGE is no longer identified with the failure of President Bush as a candidate. However, AFGE has done nothing since the 2004 election to indicate that it does not have partisan reasons for wanting to organize and conduct voter registration drives in the federal workplace. In fact, to the contrary -- in the January/February 2006 issue of *The Government Standard*, AFGE's newsletter, AFGE National President John Gage states:

> AFGE is coming out swinging for the upcoming midterm elections in 2006. We have sophisticated political mobilization plans and enhanced communications capabilities. We are ready to call upon and inspire our members to join our political efforts.

In the March/April 2006 issue of the *The Government Standard*, Mr. Gage states:

> We can win back Congress for the American people. And we've got a plan to do just that. We must increase the number of AFGE members, increase the number of active and informed AFGE members, and increase the number of AFGE members who vote.

In addition, an article in the same issue of AFGE's newsletter notes that, at the opening plenary session of AFGE's 2006 Legislative and Grassroots Mobilization Conference, Mr. Gage said that AFGE will continue its issue and voter mobilization efforts.[3] These statements of Mr. Gage suggest that AFGE is continuing to use voter registration as a means to further its objective of promoting candidates for partisan political office.

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[2] This evidence was found in articles and publications posted on AFGE's website.

[3] Even the AFGE Time Capsule, a five-part series from *The Government Standard* celebrating 70 years of AFGE history notes that, "[i]n the early eighties, the Legislative Department added more staff and was renamed the Political Affairs and Legislative Department. Greater emphasis was placed on voter registration, getting out the vote and fundraising under the Committee on Federal Employees Political Education (COFEPE), which was later renamed the AFGE Political Action Committee (AFGE-PAC)." See May/June 2002 issue.

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When the purpose of a voter registration drive is to further a partisan political agenda, that drive should not take place in the federal workplace. As the District Court for the District of Columbia noted in 1984, "[t]he partisan evils which voter registration drives may breed do not all occur at the registration table: civil servants may face subtle or overt pressures to assist in conducting those drives, not to mention registering for a certain party themselves and voting as the union would wish them to." AFGE v. O'Connor, 589 F. Supp. 1551 (D.D.C. 1984), vacated, AFGE v. O'Connor, 747 F.2d 748 (D.C. Cir. 1984), cert. denied, NTEU v. O'Connor, 474 U.S. 909 (1985). The Hatch Act was intended to protect federal employees from these pressures, particularly while they are at work. Thus, if the purpose of the voter registration drives you inquire about is to further AFGE's partisan political agenda (*i.e.*, support candidates for partisan political office), as it appears to be from Mr. Gage's statements, then the Hatch Act would prohibit federal employees from participating in such a drive while on duty and/or in the federal workplace.

Notwithstanding the above, at this time we are unable to provide you with more specific guidance about whether AFGE might be able to conduct a truly nonpartisan voter registration drive. In 2004, your request for an opinion on this issue was made during a national Presidential election, and there was sufficient evidence to conclude that AFGE was engaging in a national effort to get one candidate elected. Unlike 2004, this year there are only Congressional, state and local elections, and thus, we do not expect to see the same kind of national effort by AFGE to get one candidate elected. In addition, it is impossible for us to know the extent of every local AFGE's political efforts, and it is the locals whom we imagine would be responsible for conducting most of the voter registration drives. Thus, without a particular voter registration drive to analyze, we are unable to provide you with further guidance on this issue at this time.

You also ask OSC to clarify conditions under which voter registration efforts might continue even after AFGE makes an endorsement of a partisan political candidate. Specifically, you seek confirmation that AFGE's tradition of coordinating with nonpartisan groups, such as the League of Women Voters, to conduct voter registration drives after AFGE endorses a candidate complies with the Hatch Act. You explained that use of space in government buildings often is not offered to outside groups, so AFGE may reserve space for voter registration and ask a nonpartisan group to conduct the drive so that impartiality is maintained.

Again, whether such a voter registration drive would be permissible in the federal workplace depends on the circumstances surrounding the drive, and in particular, whether the union is controlling the drive or appearing to be connected to it. If the union is still perceived as being involved with or coordinating the drive, then the concerns regarding partisanship discussed above will still be present, even if another group conducts the drive. For example, one factor to consider is where the drive will be held. If the drive is going to be held in a space that is typically used by the union, such as a union office or meeting room, then the drive may still be seen as being conducted by the union. Another factor to consider is who will *actually* be conducting the voter registration drive. For example, if the League of Women Voters is listed as the "host" of the drive, but union officials and/or members are actually doing the work of the drive, then the union will still be viewed as the one conducting the drive.

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Other factors relevant to this issue include the type of publicity circulated prior to or during the voter registration drive and whether particular groups are targeted for registration on the basis of their perceived political preference. For example, if the materials advertising an upcoming drive mention the union or suggest that the nonpartisan organization is coming at the invitation of the union, then the union will be connected to the drive in employees' minds. Similarly, if materials advertising the drive are circulated only to union members, the voter registration drive may be perceived as a union activity. In addition, it would appear that a particular group, *i.e* , union members, is being targeted based on their perceived political preference.

Therefore, while the Hatch Act would not prohibit federal employees from participating in a voter registration drive conducted by a nonpartisan organization under the scenario discussed above, there must be no suggestion or implication to employees that the union is in *any* way involved with or coordinating the drive. Because once the union has endorsed a candidate for partisan political office or otherwise become identified with the success or failure of such a candidate, the union would not be able to conduct a truly nonpartisan voter registration drive.

Lastly, as we repeatedly have stressed in the past, because of the 1993 amendments to the Hatch Act, most federal employees are now able to participate in partisan voter registration drives, provided they are not conducted while on duty, in a government office or building, while wearing an official uniform or insignia, or using a government vehicle.

Please contact me at (202) 254-3650 if you have additional questions regarding this matter.

Sincerely,

Erica N. Stern
Attorney
Hatch Act Unit

EXHIBIT 1

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

May 25, 2004

Mr. _____

Re: OSC File No. AD-04-xxxx

Dear Mr. _____:

This letter is a follow-up to an advisory opinion the Office of Special Counsel (OSC) issued you on April 14, 2004, and in response to several federal agencies' requests for advisory opinions concerning AFGE's desire to conduct voter registration drives in the workplace. In the April 14 opinion, we advised that the Hatch Act would prohibit a federal employee, while on duty or in his or her workplace, from participating in a partisan voter registration drive. In addition, we gave general guidance regarding some factors that OSC considers in determining whether a voter registration drive is partisan.

Since issuing that opinion, we have learned of AFGE's plans to conduct voter registration drives in various agencies across the country. We also now have more information regarding AFGE's political activities. We understand that at this time, AFGE has not endorsed a candidate in the 2004 Presidential election.[1] However, since at least the election of 1984,[2] AFGE has endorsed partisan candidates in federal elections, including Presidential elections. Thus, over the years AFGE has become identified with the success or failure of candidates in partisan elections. The evidence we have obtained, as explained further below, has led us to conclude that, in the current election cycle, AFGE has become identified publicly and repeatedly with the failure of a Presidential candidate, namely, George W. Bush. Therefore, we have concluded, as we did in 1984, that AFGE is unable to conduct a truly nonpartisan voter registration drive. As such, the Hatch Act would prohibit federal employees, while on duty or in their workplace, from participating in a voter registration drive conducted by AFGE.

The information we have gathered from AFGE's website supports the conclusion stated above. For example, there is information posted under the heading "Election 2004" about AFGE's 2004 Media Campaign and the two ads it is currently running in South Carolina. Both ads are critical of the Bush Administration on the issues of privatization within the Veteran's Administration and government contracts awarded to certain corporations. One ad states, "And when contractors go over budget or commit fraud? It seems as long as [big corporations] keep writing bit [sic] contribution checks to the Bush Campaign, they just keep getting more government contracts." In addition, posted under this same heading is the statement, "Come

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[1] However, AFL-CIO has endorsed Senator John Kerry in the 2004 Presidential election. Thus, an argument could be made that because of AFGE's close affiliation with AFL-CIO, AFGE has also become identified with the success of Senator Kerry.

[2] See AFGE v. O'Connor, 589 F. Supp. 1551 (D.D.C. 1984), vacated, AFGE v. O'Connor, 747 F.2d 748 (D.C. Cir. 1984), cert. denied, NTEU v. O'Connor, 474 U.S. 909 (1985).

EXHIBIT 1

back soon for more information on the 2004 Media Campaign and AFGE's efforts to impact the outcome of the presidential race."

Also posted on AFGE's website is its publication, The Government Standard. In the January/February 2004 issue of this publication is a message from AFGE National President John Gage that clearly advocates against the current Administration. Mr. Gage makes comments about Congress being "led by rogue Republicans," and about "[t]he Administration's brass-knuckle tactics," and states that, "[i]t is particularly disgusting now to recall how this Administration repeatedly raised the red, white and blue to justify their actions when, in hindsight, it has become so clear that the only color they really care about is green." In addition, Mr. Gage states, "we are targeted as a big red bulls-eye by this Administration." These statements by Mr. Gage were made in his capacity as AFGE President and printed in an official AFGE publication.

In the March/April 2004 issue of The Government Standard is an article about the annual Civil, Women and Workers' Rights Caucus titled, "Protecting Our Rights . . . Saving Our Jobs." The article notes that conference participants were invited to discuss topics pertinent to AFGE members, such as voter registration, privatization and the elimination of collective bargaining rights, and equal employment opportunity and civil rights. At the conference, members were encouraged to "become active in the election process by educating and registering voters in AFGE's membership and in their respective agencies." Voter education and registration was also emphasized as playing a role in combating alleged threats by the Bush Administration. The article stresses that "this is a time to rally together against the Bush Administration and, moreover, unite under the common thread of AFGE membership."

This article, as well as other postings on AFGE's website, demonstrates not only that AFGE is dissatisfied with the current Administration, but goes further to encourage that efforts of AFGE members should be directed at the Administration's removal. In addition, its website makes it clear that AFGE plans to become involved in and make an impact on the 2004 Presidential election and that voter registration is an important tool in advancing that goal.

OSC has also received information about activities of AFGE regional and local representatives which indicates that AFGE has become identified with the failure of Presidential candidate George W. Bush. Currently, OSC is investigating three AFGE officials for allegedly engaging in political activity while on duty and/or in a federal workplace. One official circulated throughout a federal office an AFGE regional newsletter that stated, "Protect yourself and your country: Vote George Bush out of office!"

In a second case, we have obtained evidence that another AFGE official explicitly advocated Mr. Bush's defeat by making statements to federal employees at a new employee orientation program, such as, "the only way to stop this administration and keep government employees' jobs safe is to vote Democratic in the upcoming election." Lastly, we are investigating an AFGE official who sent an e-mail purporting to be President George W. Bush's resume to over seventy individuals. The document sets forth, in resume format, President Bush's education, work experience, and "accomplishments" as Governor of Texas and as President, and other matters relating to his career. The document is filled with allegations of incompetence and

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malfeasance and is clearly directed at Mr. Bush's defeat in the upcoming election. At the end of the document, the following statement is flashing: "Please send this to every voter you know."

Thus, based on the complaints OSC has received so far, it appears that AFGE officials have already become politically active in the 2004 Presidential election and that their message is aimed at the failure of George W. Bush.

It is evident that organizing and conducting voter registration drives is significant to AFGE for achieving its political goals. When one of those goals is the failure of a partisan political candidate for President, it is clear to us that voter registration is being used as a tool to further AFGE's announced political objectives.

In fact, AFGE has a history of using voter registration as such a tool. Twenty years ago, when OSC first issued an advisory opinion on this subject, it was apparent that AFGE considered voter registration a crucial instrument in advancing the campaigns of candidates it supported. For example, one AFGE official stated, "AFGE National leadership was not surprised by President Reagan's announcement to run for and seek a second term. The battle lines are drawn, and it is time to speak out! One way to 'speak-out' is to vote. If you are not a registered voter please contact any of our stewards, and we will assist you with voter registration in this area." OSC has no evidence that AFGE's motives for conducting voter registration have changed, and all indications are that they remain the same.

We would like to reiterate, however, that the fact that AFGE uses voter registration as a tool to further its political objectives no longer means, as it did twenty years ago, that federal employees cannot participate in its voter registration drives. Because of the 1993 amendments to the Hatch Act, most federal employees are now able to participate in partisan voter registration drives, provided that they are not conducted while on duty, in a government office or building, while wearing an official uniform or insignia, or using a government vehicle.

At this time, we believe that, for the foregoing reasons, AFGE is unable to conduct a truly nonpartisan voter registration drive. As such, the Hatch Act would prohibit federal employees, while on duty or in their workplace, from participating in a voter registration drive conducted by AFGE. Please contact OSC attorneys Ana Galindo-Marrone or Erica Stern at 202-254-3650 if you have additional questions regarding this matter.

Sincerely yours,

/s/

William E. Reukauf
Associate Special Counsel
for Investigation and Prosecution

EXHIBIT 1

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

Federal Hatch Act Advisory:
Voter Registration Drives in the Workplace

April 14, 2004

Mr. _____

Re: OSC File No. AD-04-xxxx

Dear Mr. _____:

This letter is in response to your request for an advisory opinion concerning the Hatch Act. The Office of Special Counsel (OSC) is authorized pursuant to 5 U.S.C. § 1212(f) to issue binding opinions under the Act. Specifically, you ask us to reconsider an opinion we issued on April 6, 1984, regarding voter registration drives conducted by unions and to provide guidance on how a union that has endorsed a candidate can conduct a nonpartisan voter registration drive in a federal workplace. Although the Hatch Act was amended subsequent to our previous opinion on this subject, the guiding principles of that opinion remain current and relevant to the present analysis, as explained below.

On April 6, 1984,[1] OSC issued an advisory opinion concluding that voter registration drives, sponsored or conducted by a union that has endorsed partisan candidates and has issued public statements to its members emphasizing the importance of voter registration in advancing the campaigns of these candidates, ineluctably must be partisan for purposes of the Hatch Act. Accordingly, we advised that participation by federal employees in such drives would constitute taking an active part in political campaigns and, thus, would be prohibited political activity under the Act.

As you know, Congress passed legislation in 1993 that significantly amended the Hatch Act as it applies to most federal employees. Most federal employees are now permitted to actively participate in partisan political management and partisan political campaigns.[2] The amendments, however, specifically prohibited any political activity in the workplace. Thus, federal employees are now prohibited from, among other things,

[1] At that time, federal employees were prohibited from taking an active part in political management or political campaigns

[2] Federal employees in certain specified agencies and positions remain subject to the Hatch Act prohibitions in effect prior to the 1993 amendments and are not permitted to actively participate in partisan political management and partisan political campaigns. See 5 U.S.C. § 7323(b)

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engaging in political activity while on duty, in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof, while wearing a uniform or official insignia identifying the office or position of the employee, or using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof. 5 U.S.C. § 7324. Political activity has been defined as activity directed toward the success or failure of a political party, candidate for a partisan political office or partisan political group. 5 C.F.R. § 734.101. Therefore, the Hatch Act would prohibit a federal employee, while on duty or in his or her workplace, from participating in a partisan voter registration drive, e.g., a drive aimed at helping a political party or candidate succeed.

In determining whether a voter registration drive is partisan, OSC considers all of the circumstances surrounding the drive. Some of the factors relevant to this inquiry, as discussed in our 1984 opinion, include: 1) the political activities of the sponsoring organization; 2) the degree to which that organization has become identified with the success or failure of a partisan political candidate, issue or party (e.g., whether it has endorsed a candidate); 3) the nexus, if any, between the decision to undertake a voter registration drive and the other political objectives of the sponsor; 4) whether particular groups are targeted for registration on the basis of their perceived political preference; and 5) the nature of publicity circulated to targets of the drive immediately prior to or during the drive.

In your letter requesting this advisory opinion, you state that AFGE conducts voter registration in a "strictly non-partisan fashion." However, as we explained in our 1984 opinion, because voter registration is frequently used as a tool in partisan political campaigns, we cannot accept at face value the assertion that a planned registration drive is nonpartisan. This is particularly true once a union has endorsed a candidate for partisan political office, because at that point, the union has become identified with the success of the endorsed candidate. As such, it is not enough for the union to agree not to solicit registrants on the basis of political party or candidate preference or not to advocate or display support for a particular party or candidate during the drive. If the union's voter registration drive is part of an effort to advance the campaign of its endorsed candidate, federal employees would not be able to participate, because the Hatch Act prohibits them from engaging in activity directed towards the success of a candidate for partisan political office while on duty or in a federal building.

In sum, the issue you present to our office requires a very fact specific analysis. In light of the above, we believe it would be difficult for a union, or any other organization, to conduct a truly nonpartisan voter registration drive once it has endorsed a candidate for partisan political office. Keep in mind, though, that because of the 1993 amendments, most federal employees are now able to participate in partisan voter registration drives, provided that they are not conducted while on duty, in a government office or building, while wearing an official uniform or insignia, or using a government vehicle. Thus,

EXHIBIT 1

viable means exist by which unions can encourage its members to exercise their fundamental right to vote and participate in the democratic process.

Please contact OSC attorney Erica Stern at 202-254-3650 if you have additional questions regarding this matter.

Sincerely yours,

_____/s/_____

Scott J. Bloch
Special Counsel

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

March 24, 2005

The Honorable James G. Roche
Secretary of the Air Force
1670 Air Force Pentagon, Room 4E864
Washington, DC 20330-1670

Re: OSC File No. HA-04-2750

Dear Secretary Roche:

The United States Office of Special Counsel (OSC) received the enclosed complaint alleging a violation of the Hatch Act, 5 U.S.C. § 7321 et seq. Specifically, it was alleged that while on duty and in a federal building, Ms. Deborah Mercurio sent an electronic mail message to all Kirtland Air Force Base employees and members of the uniformed services inviting them to attend a Bush/Cheney '04 Rally with President Bush. For the reasons explained below, we have decided to take no further action against Ms. Mercurio, but are referring this matter to your office for any action you deem appropriate.

After receiving the enclosed complaint, our office conducted an investigation into this matter. Our inquiry revealed that on August 24, 2004, Vice Commander Colonel William Cleckner announced that President Bush would be landing at Kirtland Air Force Base on August 26th and military employees would be permitted to meet the President at the flight line. Col. Cleckner explained that because civilian employees would not be afforded the opportunity to meet the President, the White House had offered 500 tickets to Kirtland base employees for a Bush event scheduled on the afternoon of August 26th. Col. Cleckner then instructed Ms. Mercurio, Director of the Office of Public Affairs, to "get the word out" to the base that tickets to the Bush event were available by sending an e-mail to all Kirtland employees concerning the event.

Based on Col. Cleckner's instruction, Ms. Mercurio drafted an e-mail to all staff. The final version stated:

> The White House has extended an invitation to TEAM KIRTLAND to attend President Bush's speech downtown at the Convention Center on Thursday, August 26. Doors open at 12:00 p.m. and no one is to arrive later than 2:00 p.m. For those interested, please stop by the Wing PA office for tickets. Civilians are authorized leave (i.e. annual leave, comp time). Military personnel are **not** to wear uniforms and should not represent themselves as attending in their official military capacity. DoD'[s] general policy states that DoD personnel acting in their official capacity may not engage in activities that associate DoD with any partisan, political campaign or election, candidate, cause or issue.

(emphasis in original).

Our investigation further revealed that prior to sending out the above e-mail, Ms. Mercurio contacted Assistant Staff Judge Advocate Captain Terrence McCollom and asked him to review her draft of the e-mail message. Captain McCollom recommended that the language concerning military personnel wearing uniforms and attending in their official capacity be added to the e-mail. In addition, Captain McCollom revised the final sentence of the e-mail.

After meeting with Captain McCollom, Ms. Mercurio showed the final draft of the e-mail to Col. Cleckner. He read it, made no changes, and approved its issuance. Therefore, Ms. Mercurio sent the above message to all Kirtland employees at approximately 5:09 p.m. on August 24, 2004.

Despite the warnings contained in the last two sentences, Ms. Mercurio, Captain McCollom and Col. Cleckner all assert they did not know at the time the e-mail was sent that the event on August 26th was a Bush/Cheney '04 Rally with President Bush. Ms. Mercurio stated that it was unclear whether the event was political or official. She explained that she included this information in the e-mail as a precaution due to the "political season" and the approaching elections.

A. Sending the E-Mail Was Prohibited Political Activity

The Hatch Act applies to individuals employed or holding office in an executive branch agency, but does not apply to members of the uniformed services. 5 U.S.C. § 7322(1). As a civilian employee of the Department of the Air Force, Ms. Mercurio is subject to the provisions of the Hatch Act, 5 U.S.C. §§ 7321–7326. The Act generally permits most federal employees to actively participate in political management and political campaigns. 5 U.S.C. § 7323(a). However, most federal employees are prohibited from engaging in political activity: (1) while on duty; (2) in any room or building occupied in the discharge of official duties by an individual employed by the federal government; (3) while wearing a uniform or official insignia; or, (4) using any vehicle owned or leased by the federal government. 5 U.S.C. § 7324(a). Political activity is defined as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." 5 C.F.R. § 734.101.

The e-mail that Ms. Mercurio sent on August 24th invited all Kirtland employees to attend a Bush/Cheney '04 campaign rally with President Bush. At the time, Bush was a candidate for President, a partisan political office. Therefore, sending the August 24th e-mail constituted an activity directed towards the success of Bush's candidacy for partisan political office. Ms. Mercurio acknowledged that she sent the e-mail while she was on duty and while in a federal building. Thus, we have concluded that Ms. Mercurio engaged in activity prohibited by the Hatch Act.

B. Distributing the Campaign Rally Tickets from the Office of Public Affairs Was Prohibited Political Activity

Our investigation further revealed that the White House gave Col. Cleckner the tickets to the Bush/Cheney '04 Rally. Col. Cleckner forwarded the tickets to the Office of Public Affairs for distribution to all interested Kirtland employees. We understand that tickets remained available in the Office of Public Affairs until allegations concerning the Hatch Act were raised.

Distributing tickets to a partisan campaign rally constitutes political activity. Therefore, it was a violation of the Hatch Act for any civilian Office of Public Affairs employee to distribute or make available tickets to the April 26th Bush/Cheney '04 campaign rally while they were on duty or in any room or building occupied in the discharge of official duties. Thus, it appears that Ms. Mercurio and/or other employees of the Office of Public Affairs engaged in prohibited political activity by distributing tickets to a partisan campaign rally.

C. There Are Mitigating Factors that Weigh Against OSC Seeking Disciplinary Action Against Ms. Mercurio in this Matter

Although we believe that the above activities violated the Hatch Act, we have decided to take no further action in this matter because it does not appear that Ms. Mercurio engaged in a knowing or willful violation of the Hatch Act. First, the evidence shows that Ms. Mercurio sent the April 24th e-mail and distributed tickets to the event because Vice Commander Colonel Cleckner instructed Ms. Mercurio to do so. Ms. Mercurio denies that she would have sent the e-mail otherwise. Second, Ms. Mercurio states that it is part of her job duties to promote morale, welfare, and recreation. Therefore, Ms. Mercurio explains it did not seem unusual for Col. Cleckner to instruct her to send out an e-mail with information on how Kirtland employees could see their commander in chief. In addition, Ms. Mercurio claims that she did not know that the event with President Bush was a campaign rally, and denies that she sent the e-mail to help Bush get reelected.

Lastly, Ms. Mercurio sought out and relied upon the advice of the Kirtland Legal Office and the Kirtland base Vice Commander concerning the legality of sending the e-mail to all Kirtland employees. Specifically, Ms. Mercurio asked Captain McCollom to review her message prior to sending it out. He reviewed the draft, made changes, and advised Ms. Mercurio that it was permissible to send out. Furthermore, Col. Cleckner reviewed and approved the e-mail message prior to Ms. Mercurio sending it to all Kirtland employees.

Based on the above, we do not believe that Ms. Mercurio engaged in a knowing or willful violation of the Hatch Act. Consequently, we have sent Ms. Mercurio a letter warning her that any future violations of the Act will result in charges being brought against her before the Merit Systems Protection Board.

As explained above, the Hatch Act only applies to civilian employees and does not apply to members of the uniformed services. Therefore, OSC is unable to further investigate and/or seek any disciplinary action against Colonel Cleckner for instructing Ms. Mercurio or other Office of Public Affairs employees to engage in prohibited political activity. Consequently, pursuant to 5 U.S.C. § 1215(c)(1), we are referring this matter to your office for any action that you deem appropriate.

Please contact OSC attorney Amber Bell at (202) 254-3650 if you have any further questions concerning this matter.

Sincerely yours,

Scott J. Bloch

Enclosure

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

March 24, 2005

Mark Roth, Esquire
General Counsel
American Federation of Government Employees
80 F Street, N.W.
Washington, D.C. 20001

Re: OSC File No. HA-04-2750

Dear Mr. Roth:

The Office of Special Counsel has completed its review of information concerning allegations that Ms. Deborah Mercurio may have engaged in political activity prohibited by the Hatch Act. Specifically, it was alleged that on August 24, 2004, while on duty and in a federal building, Ms. Mercurio sent an electronic mail message (e-mail) to all Kirtland Air Force Base employees inviting them to attend a Bush/Cheney '04 Rally with President Bush. For the reasons explained below, we have decided to take no further action and to close our file in this matter.

As a civilian employee of the Department of the Air Force, Ms. Mercurio is subject to the provisions of the Hatch Act, 5 U.S.C. §§ 7321–7326. The Act generally permits most federal employees to actively participate in political management and political campaigns. 5 U.S.C. § 7323(a). However, most federal employees are prohibited from engaging in political activity: (1) while on duty; (2) in any room or building occupied in the discharge of official duties by an individual employed by the federal government; (3) while wearing a uniform or official insignia; or, (4) using any vehicle owned or leased by the federal government. 5 U.S.C. § 7324(a). Political activity is defined as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." 5 C.F.R. § 734.101.

After receiving your complaint concerning the above allegations, our office conducted an investigation into this matter. Our inquiry revealed that on August 24, 2004, Vice Commander Colonel William Cleckner announced that President Bush would be landing at Kirtland Air Force Base on August 26th and military employees would be permitted to meet the President at the flight line. Col. Cleckner explained that because civilian employees would not be afforded the opportunity to meet the President, the White House had offered 500 tickets to Kirtland base employees for a Bush event scheduled on the afternoon of August 26th. Col. Cleckner then instructed Ms. Mercurio, Director of the Office of Public Affairs, to "get the word out" to the base that tickets to the Bush event were available by sending an e-mail to all Kirtland employees concerning the event.

Based on Col. Cleckner's instruction, Ms. Mercurio drafted an e-mail to all staff. The final version stated:

> The White House has extended an invitation to TEAM KIRTLAND to attend President Bush's speech downtown at the Convention Center on Thursday, August 26. Doors open at 12:00 p.m. and no one is to arrive later than 2:00 p.m. For those interested, please stop by the Wing PA office for tickets. Civilians are authorized leave (i.e. annual leave, comp time). Military personnel are **not** to wear uniforms and should not represent themselves as attending in their official military capacity. DoD'[s] general policy states that DoD personnel acting in their official capacity may not engage in activities that associate DoD with any partisan, political campaign or election, candidate, cause or issue.

(emphasis in original).

Prior to sending out the above e-mail, Ms. Mercurio contacted Assistant Staff Judge Advocate Captain Terrence McCollom and asked him to review her draft of the e-mail message. Captain McCollom recommended that the language concerning military personnel wearing uniforms and attending in their official capacity be added to the e-mail. In addition, Captain McCollom revised the final sentence of the e-mail.

After meeting with Captain McCollom, Ms. Mercurio showed the final draft of the e-mail to Col. Cleckner. He read it, made no changes, and approved its issuance. Therefore, Ms. Mercurio sent the above message to all Kirtland employees at approximately 5:09 p.m. on August 24, 2004.

Despite the warnings contained in the last two sentences, Ms. Mercurio, Captain McCollom and Col. Cleckner all assert they did not know at the time the e-mail was sent that the event on August 26th was a Bush/Cheney '04 Rally with President Bush. Ms. Mercurio stated that it was unclear whether the event was political or official. She explained that she included this information in the e-mail as a precaution due to the "political season" and the approaching elections.

A. Sending the E-Mail Was Prohibited Political Activity

As explained above, most Hatch Act covered employees are prohibited from engaging in political activity: (1) while on duty; (2) in any room or building occupied in the discharge of official duties by an individual employed by the federal government; (3) while wearing a uniform or official insignia; or, (4) using any vehicle owned or leased by the federal government. 5 U.S.C. § 7324(a). Political activity is defined as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." 5 C.F.R. § 734.101.

The e-mail that Ms. Mercurio sent on August 24th invited all Kirtland employees to attend a Bush/Cheney '04 campaign rally with President Bush. At the time, Bush was a candidate for

President, a partisan political office. Therefore, sending the August 24th e-mail constituted an activity directed towards the success of Bush's candidacy for partisan political office. Ms. Mercurio acknowledged that she sent the e-mail while she was on duty and while in a federal building. Thus, we have concluded that Ms. Mercurio engaged in activity prohibited by the Hatch Act.

B. Distributing the Campaign Rally Tickets from the Office of Public Affairs Was Prohibited Political Activity

Our investigation further revealed that Col. Cleckner gave the Office of Public Affairs the tickets to the Bush event to make available to Kirtland employees. According to Deputy Director Morgan O'Brien, the tickets to the Bush/Cheney '04 event were on his desk until approximately 10:00 a.m., at which time he placed the tickets on a table in the reception area because he was distracted by the barrage of phone calls, e-mails and visits from people requesting tickets. We understand that tickets remained available in the Office of Public Affairs until allegations concerning the Hatch Act were raised.

Distributing tickets to a partisan campaign rally constitutes political activity. Therefore, it was a violation of the Hatch Act for any civilian Office of Public Affairs employee to distribute or make available tickets to the April 26th Bush/Cheney '04 campaign rally while they were on duty or in any room or building occupied in the discharge of official duties. Thus, it appears that Ms. Mercurio and/or other employees of the Office of Public Affairs engaged in prohibited political activity by distributing tickets to a partisan campaign rally.

C. There Are Mitigating Factors that Weigh Against Seeking Disciplinary Action in this Matter

Although we believe that the above activities violated the Hatch Act, we have decided to take no further action in this matter because it does not appear that Ms. Mercurio engaged in a knowing or willful violation of the Hatch Act. First, the evidence shows that Ms. Mercurio sent the April 24th e-mail and distributed tickets to the event because Vice Commander Colonel Cleckner instructed Ms. Mercurio to do so. Ms. Mercurio denied that she would have sent the e-mail otherwise. Second, Ms. Mercurio stated that it is part of her job duties to promote morale, welfare, and recreation. Therefore, Ms. Mercurio explained it did not seem unusual for Col. Cleckner to instruct her to send out an e-mail with information on how Kirtland employees could see their commander in chief. In addition, Ms. Mercurio claimed that she did not know that the event with President Bush was part of a campaign rally, and denied that she sent the e-mail to help Bush get reelected.

Lastly, Ms. Mercurio sought out and relied upon the advice of the Kirtland Legal Office and the Kirtland base Vice Commander concerning the legality of sending the e-mail to all Kirtland employees. Specifically, Ms. Mercurio asked Captain McCollom to review her message prior to sending it out. He reviewed the draft, made changes, and advised Ms. Mercurio

that it was permissible to send out. Furthermore, Col. Cleckner reviewed and approved the e-mail message prior to Ms. Mercurio sending it to all Kirtland employees.

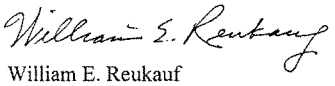
Based on the above, we do not believe that Ms. Mercurio engaged in a knowing or willful violation of the Hatch Act. Consequently, we have closed our file in this matter.

We have, however, advised Ms. Mercurio that should she again engage in prohibited political activity while employed by the federal government we will consider such activity to be a willful and knowing violation of the Act. Such violations are subject to prosecution before the Merit Systems Protection Board and could result in Ms. Mercurio's removal from her employment.

Please be advised that OSC is unable to take any action against Colonel Cleckner for instructing Ms. Mercurio to engage in prohibited political activity because Colonel Cleckner is a member of the uniformed services, and not subject to the restrictions of the Hatch Act. See 5 U.S.C. § 7322(1). However, pursuant to 5 U.S.C. § 1215(c)(1), we have referred this matter to the Secretary of the Air Force for any action he deems appropriate.

Please contact OSC attorney Amber Bell at (202) 254-3667 if you have any further questions.

Sincerely yours,



William E. Reukauf
Associate Special Counsel for
Investigation and Prosecution

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

March 24, 2005

Ms. Deborah Mercurio
Director, Office of Public Affairs
377th Air Base Wing
Kirkland Air Force Base
2000 Wyoming Boulevard, SE, Suite A-1
Kirkland Air Force Base, NM 89117

Re: OSC File No. HA-04-2750

Dear Ms. Mercurio:

The Office of Special Counsel has completed its review of information concerning allegations that you may have engaged in political activity prohibited by the Hatch Act. Specifically, it was alleged that on August 24, 2004, while on duty and in a federal building, you sent an electronic mail message (e-mail) to all Kirtland Air Force Base employees inviting them to attend a Bush/Cheney '04 Rally with President Bush. For the reasons explained below, we have decided to take no further action and to close our file in this matter.

As a civilian employee of the Department of the Air Force, you are subject to the provisions of the Hatch Act, 5 U.S.C. §§ 7321–7326. The Act generally permits most federal employees to actively participate in political management and political campaigns. 5 U.S.C. § 7323(a). However, most federal employees are prohibited from engaging in political activity: (1) while on duty; (2) in any room or building occupied in the discharge of official duties by an individual employed by the federal government; (3) while wearing a uniform or official insignia; or, (4) using any vehicle owned or leased by the federal government. 5 U.S.C. § 7324(a). Political activity is defined as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." 5 C.F.R. § 734.101.

After receiving a complaint concerning the above allegations, our office conducted an investigation into this matter. Our inquiry revealed that on August 24, 2004, Vice Commander Colonel William Cleckner announced that President Bush would be landing at Kirtland Air Force Base on August 26th and military employees would be permitted to meet the President at the flight line. Col. Cleckner explained that because civilian employees were not afforded the opportunity to meet the President, the White House had offered 500 tickets to Kirtland base employees for a Bush event scheduled on the afternoon of August 26th. Col. Cleckner instructed you, as the Director of the Office of Public Affairs, to "get the word out" to the base that tickets to the Bush event were available by sending an e-mail to all Kirtland employees concerning the event.

Based on Col. Cleckner's instruction, you drafted an e-mail to all staff. The final version stated:

> The White House has extended an invitation to TEAM KIRTLAND to attend President Bush's speech downtown at the Convention Center on Thursday, August 26. Doors open at 12:00 p.m. and no one is to arrive later than 2:00 p.m. For those interested, please stop by the Wing PA office for tickets. Civilians are authorized leave (i.e. annual leave, comp time). Military personnel are **not** to wear uniforms and should not represent themselves as attending in their official military capacity. DoD'[s] general policy states that DoD personnel acting in their official capacity may not engage in activities that associate DoD with any partisan, political campaign or election, candidate, cause or issue.

(emphasis in original).

Prior to sending out the above e-mail, you contacted Assistant Staff Judge Advocate Captain Terrence McCollom and asked him to review your draft of the e-mail message. Captain McCollom recommended that the language concerning military personnel wearing uniforms and attending in their official capacity be added to the e-mail. In addition, Captain McCollom revised the final sentence of the e-mail. You also asked Captain McCollom if they should add a sentence saying that they were not endorsing the Bush event. McCollom supposedly indicated that this was not necessary.

After meeting with Captain McCollom, you showed the final draft of the e-mail to Col. Cleckner. He read it, made no changes, and approved its issuance. Therefore, you sent the above message to all Kirtland employees at approximately 5:09 p.m. on August 24, 2004.

Despite the warnings contained in the last two sentences, you, Captain McCollom and Col. Cleckner all assert you did not know at the time the e-mail was sent that the event on August 26th was a Bush/Cheney '04 Rally with President Bush. You state that it was unclear whether the event was political or official. You claim that you included this information in the e-mail as a precaution due to the "political season" and the approaching elections.

A. Sending the E-Mail Was Prohibited Political Activity

As explained above, most Hatch Act covered employees are prohibited from engaging in political activity: (1) while on duty; (2) in any room or building occupied in the discharge of official duties by an individual employed by the federal government; (3) while wearing a uniform or official insignia; or, (4) using any vehicle owned or leased by the federal government. 5 U.S.C. § 7324(a). Political activity is defined as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." 5 C.F.R. § 734.101.

The e-mail that you sent on August 24th invited all Kirtland employees to attend a Bush/Cheney '04 campaign rally with President Bush. At the time, Bush was a candidate for President, a partisan political office. Therefore, sending the August 24th e-mail arguably constituted an activity directed towards the success of Bush's candidacy for partisan political office. You acknowledged that you sent the e-mail while you were on duty and while in a federal building. Thus, we have concluded that you engaged in activity prohibited by the Hatch Act.

B. Distributing the Campaign Rally Tickets from the Office of Public Affairs Was Prohibited Political Activity

Our investigation further revealed that Col. Cleckner gave the Office of Public Affairs the tickets to the Bush event to distribute to Kirtland employees. According to Deputy Director Morgan O'Brien, the tickets to the Bush/Cheney '04 event were on his desk until approximately 10:00 a.m., at which time he placed the tickets on a table in the reception area because he was distracted by the barrage of phone calls, e-mails and visits from people requesting tickets. We understand that tickets remained available in the Office of Public Affairs until allegations concerning the Hatch Act were raised.

Distributing tickets to a partisan campaign rally constitutes political activity. Therefore, it was a violation of the Hatch Act for any civilian Office of Public Affairs employee to distribute or make available tickets to the April 26th Bush/Cheney '04 campaign rally while they were on duty, or in any room or building occupied in the discharge of official duties. Thus, it appears that you and/or other employees of the Office of Public Affairs engaged in prohibited political activity by distributing tickets to a partisan campaign rally.

C. There Are Mitigating Factors that Weigh Against Seeking Disciplinary Action in this Matter

Although we believe that the above activities violated the Hatch Act, we have decided to take no further action in this matter because it does not appear that you engaged in a knowing or willful violation of the Hatch Act. First, the evidence shows that you sent the April 24th e-mail and distributed tickets to the political rally because Vice Commander Colonel Cleckner instructed you to do so. You deny that you would have sent the e-mail or distributed the tickets otherwise. Second, you state that it is part of your job duties to promote morale, welfare, and recreation. Therefore, you explain it did not seem unusual for Col. Cleckner to instruct you to send out an e-mail with information on how Kirtland employees could see their commander in chief. In addition, you claim that you did not know

that the event with President Bush was part of a campaign rally, and deny that you sent the e-mail to help Bush get reelected.[1]

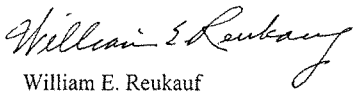
Lastly, you sought out and relied upon the advice of the Kirtland Legal Office concerning the legality of sending the e-mail to all Kirtland employees. Specifically, you asked Captain McCollom to review your message prior to sending it out. He reviewed the draft, made changes, and advised you that it was permissible to send out. Furthermore, Col. Cleckner reviewed and approved the e-mail message prior to you sending it to all Kirtland employees.

Based on the above, we do not believe that you engaged in a knowing or willful violation of the Hatch Act. Consequently, we have closed our file in this matter.

Please be advised, however, should you again engage in prohibited political activity while employed by the federal government we will consider such activity to be a willful and knowing violation of the Act. Such violations are subject to prosecution before the Merit Systems Protection Board and could result in your removal from your employment.

Please contact OSC attorney Amber Bell at (800) 854-2824 if you have any further questions concerning this matter.

Sincerely yours,



William E. Reukauf
Associate Special Counsel for
Investigation and Prosecution

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[1] In the absence of evidence to the contrary, our office accepts your explanation that you did not know that the event was political. Throughout our investigation, you stated that it was unclear whether the event was political or official. However, neither you nor any other Kirtland staff bothered to ask or further inquire about the nature of the event. Furthermore, we find it somewhat questionable that Kirtland would refuse to supply flags for the event due to concerns that it might be political, but at the same time would ignore these concerns when sending out invitations to the event. At best, this appears to be negligence on the part of Kirtland Air Force Base and we would strongly advise that in the future you ascertain more information about events prior to inviting the staff to attend.

Post-Hearing Question for the Record
From Senator Daniel K. Akaka

Submitted to Chad Bungard, General Counsel
Merit Systems Protection Board

"The Perils of Politics in Government:
A Review of the Scope and Enforcement of the Hatch Act"
October 18, 2007

QUESTIONS PRESENTED

1. Are there any other statutes that have a similar default punishment of termination? If so:

    a. Do these statutes require unanimous consent of the Board members to deviate from imposing termination?

    b. Under what circumstances can the Board deviate from imposing termination?

    c. What are the minimum punishments, if any, specified in these statutes?

RESPONSE

The Hatch Act penalty provisions, both in their scope and their specificity of the resulting penalties seem to be unique. No other part of the Labor-Management and Employee Relations section of Title 5 contains such specific penalty provisions that are applicable to all Federal, state and local employees as the Hatch Act. However, as discussed below, there are other less rigid statutes providing for a default punishment of termination that apply to specific agencies and occupations.

The Hatch Act prohibits certain political activities by the government workforce and lays out a strict penalty scheme for any violation. If the Merit Systems Protection Board determines that a Federal employee has violated the Hatch Act, the penalty must be either removal or a suspension without pay for not less than 30 days. A penalty of less than removal requires a unanimous vote of the Board. 5 U.S.C. § 7326; 5 C.F.R. § 1201.126(c). If the Board decides that a state or local employee has violated the Hatch Act, the Board may order a penalty of removal or determine that no penalty is warranted. There is no option to impose any other type of discipline. 5 U.S.C. §§ 1505-1506; 5 C.F.R. § 1201.126(b).

One less rigid statute that provides for a default punishment of termination applies to the Internal Revenue Service. This statute, the Restructuring and Reform Act of 1998 (RRA), is found at 26 U.S.C. § 7804 note, contains a section entitled: "Termination of Employment for Misconduct." Section 1203(a) of the RRA provides that, subject to the provisions of subsection (c), the Commissioner of Internal Revenue shall terminate an

employee if there is a final administrative or judicial determination that such employee committed a willful act or omission listed in Section 1203(b) of the RRA[1] (emphasis added). Section 1203(c)(1) gives the Commissioner sole discretion to take a personnel action other than termination for an act or omission set out in subsection 1203(b). Pursuant to subsection (c)(3), an action taken under subsection (c)(1) may not be appealed in any administrative or judicial proceeding. In other words, the Commissioner's decision to grant or withhold relief from termination is not subject to administrative or judicial review. *See James v. Tablerion*, 363 F.3d 1352, 1360 (Fed. Cir. 2004). Pursuant to subsection (c)(2), the Commissioner may not delegate this discretion to any other IRS official.

If an IRS employee appeals a removal action taken under subsection 1203(a) of the RRA to the Merit Systems Protection Board, the Board would have to find that a violation as provided in subsection 1203(b) had not occurred in order to set aside the termination. As discussed above, the Board may not order the Commissioner to ameliorate the termination penalty. However, nothing in the statute precludes the Commissioner from initiating a second adverse action with a penalty less than termination.

Another similar statute is found at 5 USC § 7371(b) which provides that: "Any law enforcement officer who is convicted of a felony shall be removed from employment as a law enforcement officer on the last day of the first applicable pay period following the conviction notice date." Arguably, this statute mandates removal from a law enforcement position upon conviction for a felony, but does not mandate complete removal from Federal service. Subsection (c)(2) provides that: "This section does not prohibit the employment of any individual in any position other than that of a law enforcement officer." Like appeals of removals under the IRS statute, MSPB review of removals from law enforcement positions pursuant to 5 U.S.C. § 7371 is limited. Such review is limited to whether: a) the employee is a law enforcement officer; b) the employee was convicted of a felony; or c) the conviction was overturned on appeal.

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[1] Examples include not filing tax returns, understatement of tax liability, assault or battery on a taxpayer and violation of any right of another under the Constitution.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ADMINISTRATIVE LAW JUDGE

SPECIAL COUNSEL,
Petitioner,

v.

ROBERT WILKINSON

Respondent.

DOCKET NUMBER
CB-1216-06-0006-B-1

DATE: August 8, 2007

Amber Bell Vail, Esquire, Washington, D.C., for the Petitioner.

J. Ward Morrow, Esquire, American Federation Government Employees, Washington, D.C., for the Respondent.

Recommended Decision Following Remand

BEFORE

Arthur J. Amchan
Federal Administrative Law Judge

Procedural Background & Findings of Fact

On December 15, 2005, Petitioner, the Office of Special Counsel (OSC) filed a Complaint for Disciplinary Action alleging that Respondent Robert Wilkinson violated 5 U.S.C. Section 7324 (the Hatch Act) and regulations promulgated at 5 C.F.R. Section 734.306(a) by engaging in political activity while on duty and while in his government office.

5 U.S.C. Section 7324 in pertinent part provides:

(a) An employee may not engage in political activity-

(1) while the employee is on duty;
(2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof;
(3) while wearing a uniform or official insignia identifying the office or position of the employee; or
(4) using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.

"Political Activity" is not defined in the Hatch Act. However, Office of Personnel Management (OPM) regulations at 5 CFR Section 734.101 provide, "*[p]olitical activity* means an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group."[1]

Respondent Wilkinson, a career federal employee employed in the hazardous waste enforcement branch of EPA Region 6 in Dallas, Texas, admits that on September 30, 2004, at about 2:30 p.m., while on duty and while in his government office, he forwarded an electronic email message via his government computer, to three EPA electronic mailbox groups. There are 31 individuals with mailboxes in these groups, all employed in the hazardous waste enforcement branch. Wilkinson knows all of these individuals and was in daily contact with them. The Special Counsel does not allege that Wilkinson is a supervisor, or that he had any sort of oversight responsibilities for any of the recipients of his email.[2]

Wilkinson's email did not contain any message; it forwarded an email to him from his wife, who is not a government employee, which in turn contained

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[1] OPM is granted authority to promulgate regulations relating to federal employment at 5 U.S.C. Section 1103.

[2] EPA Region 6 has approximately 925 employees; the Hazardous Waste Enforcement Branch has 32 employees and is part of the Compliance Assurance and Enforcement Division, which has approximately 110 employees, attachment C to Respondent's motion to dismiss.

an email from Terry McAuliffe, Chairman of the Democratic National Committee. Ms. Wilkinson received the McAuliffe email from Danielle Darley, who is her daughter and Robert Wilkinson's step-daughter. The McAuliffe email was transmitted to Ms. Darley, who at the time was a college student, at 11:29 a.m. on September 30. Neither Ms. Wilkinson nor Ms. Darley has any connection to the Democratic National Committee, the Democratic Party or any other partisan political organization.[3]

The McAuliffe email stated:

> Dear Danielle Darley,
>
> Tonight, don't let George Bush's henchmen steal another victory. We need your online help immediately after the debate, so save this email, print it out, and have it ready with you as you watch the first Presidential debate tonight.
>
> We all know what happened in 2000. Al Gore won the first debate on the issues, but Republicans stole the post-debate spin. We are not going to let that happen again, and you will play a big role.
>
> Immediately, after the debate we need you to do three things: vote in online polls, write a letter to the editor, and call in to talk radio programs. Your 10 minutes of activism following the debate can make the difference...

Petitioner has requested the Board to issue an appropriate penalty to Wilkinson under 5 U.S.C. Section 7326, which provides that an employee who violates Section 7324 shall be removed from his position. However, the Board by unanimous vote may find that a violation does not warrant removal and impose a penalty of not less than 30 days suspension without pay.

Respondent filed an Answer to the Complaint on January 3, 2006. He denied engaging in political activity on duty. As an affirmative defense he alleged that his conduct fell within the scope of allowed political discourse

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[3] Affidavits of Deborah Wilkinson and Danielle Darley, attachments A & B to Respondent's Motion to Dismiss, dated January 26, 2006.

sanctioned by the Office of Special Counsel in its "Federal Hatch Act Advisory, FHA-27" issued on May 30, 2002. He also alleges that a 2004 EPA Ethics Training document also sanctions his conduct. On January 26, 2006, Wilkinson filed a motion praying that the MSPB dismiss the Complaint.

The Office of Special Counsel responded to Wilkinson's motion on February 13, 2006 and filed a cross-motion for summary adjudication.

This Judge's Initial Decision and Order Granting Summary Judgment

On March 3, 2006, I issued an Initial Decision and Order Granting Summary Judgment in favor of Respondent. I concluded first that Mr. Wilkinson's conduct did not violate the Hatch Act. I reached this conclusion on the following grounds:

1. The Hatch Act does not define the term "political activity" and there is nothing in the Act that specifically prohibits Mr. Wilkinson's conduct;
2. The legislative history of the Hatch Act, particularly House Report No.103-16, strongly suggests that Congress did not intend the term "political activity" to cover conduct such as that engaged in by Mr. Wilkinson.
3. The "rule of lenity," the proposition that penal statutes must be strictly construed and that any ambiguity must be resolved in favor of the Respondent, mandated dismissal of the Complaint. In this regard, I relied in part on a 2002 Office of Special Counsel Advisory, which suggests that an email in support of a partisan candidate that is sent by a federal employee to a limited, but unspecified number of coworkers, does not constitute a Hatch Act violation.

Finally, I noted that in every other case, that I was familiar with, a federal employee, or state employee covered by the Hatch Act, for whom termination or suspension was sought, had received specific prior notice that his or her conduct

violated the Act. In light of this, I suggested that the Board find that unless the Special Counsel established that an employee had received information about the Act that would cause a reasonably prudent person to avoid their violative conduct, that it dismiss the Complaint.

The Board's December 14, 2006 Opinion and Order

On December 14, 2006, the unanimously reversed my initial or recommended decision, finding that Robert Wilkinson violated the Hatch Act and remanding this case to me to allow the parties to present evidence and argument as to the appropriate penalty.

The Board found that the DNC letter distributed by Wilkinson constituted "campaign literature" and thus constitutes "political activity" within the meaning of the Hatch Act. It reasoned that the "political activity" prohibited in 5 U.S.C. section 7324 from being engaged in a government office on government time is broader than "political activity" which is specifically prohibited by 5 U.S.C. section 7323(a), i.e., using one's official authority or influence for the purpose of interfering with or affecting the results of an election; running for partisan political office; soliciting or accepting a political contribution from certain persons.[4]

The Board also rejected my suggestion that it impose a *scienter* element into the Special Counsel's burden in establishing a violation of the Hatch Act. Thus the Board made it clear that a federal employee who engages in activity that is deemed to be "political activity" by the Special Counsel and the Board is subject to termination unless it unanimously decides a lesser penalty, but not less than a 30 day suspension, is warranted. Such activities would include those by an employee, who without forewarning wore a partisan political campaign button to work on a single day, or anything else that the Special Counsel and the Board determine constitutes "political activity" under the statute.

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[4] In an earlier decision, *Special Counsel v. Sims*, 2006 MSPB 151, 102 M.S.P.R. 288 (2006), the Board reversed this judge and found that the rule of lenity is not applicable to the issue of whether or not an employee has violated the Hatch Act.

The Board remanded this case to allow the parties to present evidence and argument as to the appropriate penalty. It directed, however, that I am not to consider the statements made by the Office of Special Counsel in its 2002 Hatch Act Advisory because that document advised federal employees to contact the Office of Special Counsel for advice and thus Mr. Wilkinson could have contacted OSC if he did not understand whether or not it applied to his proposed actions.

Procedural History Following Remand

On February 2, 2007, I issued a prehearing order allowing discovery through March 31, and scheduling an evidentiary hearing on July 20, 2007. This hearing was postponed after the parties informed me that had reached a settlement of this matter. The parties submitted a joint settlement agreement to me on July 31, 2007.

Terms of the Settlement

The parties agreed that as a penalty for sending the DNC email to his 31 coworkers while on duty in a government building, Robert Wilkinson will be suspended for 30 consecutive work days without pay. He agrees to waive any and all rights to challenge this disciplinary action. The OSC agrees not to reinstitute the instant Hatch Act complaint absent a material breach of the terms of the Agreement.

OSC agrees that based on mitigating factors articulated in Respondent's Memorandum Regarding Mitigation Factors that a 30 day suspension is warranted. While OSC has not stipulated to the facts contained in the memorandum, I interpret its willingness to rely on the assertions in the memorandum as the equivalent of a stipulation.

Facts Stated in Respondent's Memorandum

Respondent's memorandum addresses the six penalty factors generally utilized by the Board in assessing a penalty under 5 U.S.C. 7326, *Special Counsel v. Collier,* 101 M.S.P.R. 391 (2006).

1) Nature of the offense and extent of employee's participation. The memorandum notes that this was the first and only Hatch Act violation by Respondent and that his role in the offense was merely forwarding the DNC letter, which was forwarded to him by his wife, to 31 coworkers with three keystrokes on his computer;
2) Motive and Intent. Respondent contends that he was completely unaware that he might be violating the Hatch Act by forwarding the DNC email. I note further that there is nothing in this record that would permit the inference that Mr. Wilkinson should have, with the exercise of reasonable diligence, been aware that forwarding the DNC email was a Hatch Act violation.
3) Whether the employee received advice of counsel regarding the violative activity. Mr. Wilkinson did not receive legal advice either from his own counsel or from the Special Counsel as to whether forwarding the DNC email violated the Hatch Act, prior to hitting the keys on his computer. I again note that this distinguishes Mr. Wilkinson's case from the great majority of Hatch Act cases which have been litigated. Typically, the Respondent is told by the Special Counsel that his or her conduct, i.e., running for partisan political office, violates the Act. Only after the employee persists in his candidacy does the Special Counsel file a Complaint with the Board.
4) Political coloring of the Employee's Activities. Respondent does not dispute that he forwarded a letter created by the Democratic National Committee that encourages recipients to

take actions supporting the candidacy of Senator John Kerry for President.

5) The employee has ceased the violative activity. There is no evidence that Mr. Wilkinson violated the Hatch Act on any occasion other than the one occasion on which hit a key on his computer three times.
6) The employee's past employment record. Mr. Wilkinson has been employed by the United States Environmental Protection Agency since 1988. Since 1992, he has been a scientist/enforcement officer in the hazardous waste program of the Enforcement Division of EPA.

Recommended Decision

I recommend that the Board approve the parties' settlement agreement and suspend Respondent for thirty days. I do so only because any greater penalty would be a gross miscarriage of justice and because of the great risk for Mr. Wilkinson if he further challenges the Board's decision, i.e., a longer suspension, and even termination.

However, this is a Complaint that should never have been filed and having been filed, should have, by a prosecutor with any sense of fair play, been settled for a warning letter. Departing from its usual practice, the Special Counsel initiated this proceeding without first warning Mr. Wilkinson that it believed that his conduct violated the Hatch Act and without giving him an opportunity to cease such conduct. This is unfair because, unlike the numerous cases in which government employees have run for partisan political office, nothing in the statute specifically prohibits Mr. Wilkinson's conduct. It is not a good idea for federal employees to be sending politically charged emails to coworkers or

anyone else on government time; but that is a different issue than whether one should lose his or her job for such conduct.

I fail to see any socially useful purpose in suspending Mr. Wilkinson in the circumstances of this case. His conduct is analogous to a government employee taking a single government pen home and not returning it. While it is illegal to take government property for personal use, no reasonable person would seek to fire an employee for such a trivial offense. Likewise, assuming that Mr. Wilkinson's conduct constitutes "political activity," his conduct in sending one email to thirty-one co-workers is an incredibly trivial violation of the Act. Moreover, one must assume that Mr. Wilkinson performs a valuable social function in protecting the environment, services that will now be lost for one month for absolutely no legitimate reason.

It is important to reiterate the fact that given the broad definition of "policy activity" adopted by the Special Counsel and the Board, a federal employee can now be terminated for wearing a partisan political campaign button to work on a single occasion, passing out a single piece of campaign literature and anything else the Special Counsel and the Board deem to constitute "political activity"—unless the Board *unanimously* decides to impose a lesser penalty.

As to emails in particular, I am most troubled by the following portions of the Board's December 14, 2006 opinion and order:

> We note, however, that the ALJ should not consider in mitigation the respondent's asserted confusion resulting from the information set forth in OSC's May 30, 2002 Hatch Act Advisory Memorandum regarding the "Use of Electronic Messaging Devices to Engage in Political Activity." We find the respondent's asserted confusion

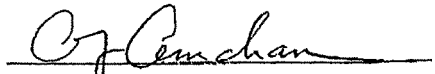
> particularly unpersuasive given the OSC's 2002 advisory memorandum, upon which the respondent asserts he relied in deciding that sending the email at issue in this appeal did not violate the Hatch Act, provides that the determination as to whether an employee has engaged in political activity on duty or in a government building or vehicle must be necessarily be made on a case-by-case basis and specifically encourages employees to contact OSC "for advice about these matters as they arise...Thus, the respondent's purported confusion regarding the information provided in OSC's advisory memorandum could have been alleviated if he had, in fact, fully followed the OSC information upon which he asserts he relied by contacting OSC and asking for OSC's opinion regarding his proposed actions.

First of all, this misstates the record in this case. Mr. Wilkinson never claimed to have read the 2002 Advisory before forwarding the DNC email and there is no evidence that he did so. The significance of the Advisory is that, in the email context, even the Special Counsel is not sure of where the line is to be drawn between conduct which violates the Act and conduct which does not do so.

One can only hope that the United States Congress will revisit its 1993 amendments and make clear exactly what sort of conduct it intended to prohibit and what sort of penalties it intended to exact. It is hard to believe that it intended to exact the penalty of termination or a substantial suspension without pay for conduct as trivial as that for which Mr. Wilkinson is being punished and for conduct as trivial as that for which other federal and state employees may be punished in the future.

Recommendation

I hereby recommend that the Board grant the parties' joint settlement agreement and suspend Robert Wilkinson for thirty (30) day without pay.



Arthur J. Amchan
Federal Administrative Law Judge

FINALITY

This initial decision will become final on September 12, 2007, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

CERTIFICATE OF SERVICE

¶1 I certify that the attached Recommended Decision was sent by regular mail this day to each of the following:

Petitioner

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Respondent

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Respondent's Representative

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Assistant General Counsel
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80 F Street, N.W.
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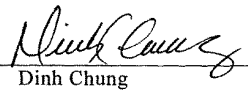
August 8, 2007
(Date)



Dinh Chung
Case Management Specialist