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THE HATCH ACT: THE CHALLENGES OF SEPARATING POLITICS FROM POLICY

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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THE HATCH ACT: THE CHALLENGES OF SEPARATING POLITICS FROM POLICY

TUESDAY, JUNE 21, 2011

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 3:02 p.m., in room 2154, Rayburn House Office Building, Hon. Darrell E. Issa (chairman of the committee) presiding.

Present: Representatives Issa, Walberg, Lankford, Amash, Buerkle, Meehan, Gowdy, Cummings, Maloney, Norton, and Connolly.

Staff present: Molly Boyl, parliamentarian; Steve Castor, chief counsel, investigations; Kate Dunbar, staff assistant; Jessica L. Laux and John A. Zadrozny, counsels; Ashok M. Pinto, deputy chief counsel, investigations; Krista Boyd, minority counsel; Carla Hultberg, minority chief clerk; William Miles, minority professional staff member; Susanne Sachsman Grooms, minority chief counsel; and Mark Stephenson, minority senior policy advisor/legislative director.

Chairman ISSA. The hearing will come to order.

The Oversight Committee exists to secure two fundamental principles: First, Americans have a right to know the money Washington takes from them is well-spent. And, second, Americans deserve an efficient, effective government that works for them.

Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold government accountable to taxpayers, because taxpayers have a right to know what they get from their government. We will work tirelessly, in partnership with citizen watchdogs, to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy.

I will yield to myself.

Today's hearing will examine the Hatch Act's enforcement difficulties and regulatory cost.

The Hatch Act is inherently a partisan question, but this committee has looked at it under both Republicans and Democrats. We have seen, or failed to see, discrepancies in the past. Today's hearing is not on a failure by either party during their time running the executive branch, but, rather, to review the status of and condition of the Hatch Act and to determine whether there are meaningful changes that should be made to both protect the public and to protect political appointees from inadvertently violating the act. Inconsistencies within the act and/or loopholes need to be reviewed.

This committee takes seriously the use of political office for political purposes. We are not paid to run for re-election or to support a President's run for re-election, but, rather, if you are taking the Federal payroll, you are expected to do the job for which you have been selected or appointed.

The Oversight Committee is intending to author such legislation as may be necessary and will affect the next President. Necessarily, we will, in fact, work on a bipartisan basis to find any and all changes necessary to take effect upon the inauguration of the next President. Although this is 18 months and it seems like a long time, in political time it is very short.

So this will be the first of as many hearings as are necessary to determine those changes, evaluate them, hold public comment on those potential changes, and implement those changes effective January 2013.

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

Mr. CUMMINGS. Thank you very much, Mr. Chairman, and I want to thank you for calling this hearing.

The Hatch Act was passed to ensure that Federal Government employees work on behalf of the American people rather than the political party that happens to be in power. The Hatch Act prohibits Federal employees from engaging in political activity on Federal property and from using their official authority to influence elections. The Hatch Act strikes a balance between protecting the free-speech rights of hardworking public servants and ensuring that government operations are being conducted appropriately.

This committee has conducted significant oversight work on the Hatch Act in the past. After determining that the White House officials provided political briefings to agency political appointees prior to the 2006 midterm elections, the committee conducted an investigation into the activities of the White House Office of Political Affairs. In 2008, former Chairman Henry Waxman issued a staff report of that investigation, concluding that the Office of Political Affairs enlisted agency heads across government in a coordinated effort to elect Republican candidates to Congress. This report recommended eliminating the Office of Political Affairs.

The Office of Special Counsel, an independent agency charged with providing guidance and enforcement of the Hatch Act, conducted a parallel investigation and issued a report of its findings on January 21, 2011. The report concluded that numerous White House officials and political appointees in the previous administration had violated the Hatch Act.

On January 20, 2011, it was reported that the President would close the Office of Political Affairs. I believe this is an improvement that should have been made back in 2008.

Another significant improvement is the appointment of a new special counsel, Carolyn Lerner, who was sworn in just last week. The Hatch Act is meaningless without responsible enforcement. Unfortunately, the Office of Special Counsel experienced significant problems under its previous leader, who was sentenced to 1 month in prison for contempt of Congress for lying in statements made to this very committee.

Now is the chance for the Office of Special Counsel to turn the page. And I look forward to working with the new special counsel on the implementation of the Hatch Act as well as efforts to strengthen whistleblower protections for Federal workers.

I also look forward to working with the chairman and the new special counsel on bipartisan legislation to update and clarify the Hatch Act. The witnesses before us today will express concern that a report issued by the Office of Special Counsel in January was unfair because it established a new interpretation of the Hatch Act that employees were unaware of prior to the report. Many other Federal employees feel the same way. They find themselves penalized after the fact for actions they did not realize were against the rules.

Increased training is always helpful to help prevent these problems, but it also may be helpful to revisit some of these issues legislatively. For example, the Hatch Act does not provide for a graduated penalty system, and Federal employees have been subjected to varying interpretations of the appropriate use of email.

I want to thank all the witnesses for coming here today. I look forward to your testimony. I hope that, by working together in a bipartisan manner, we will be able to achieve the right balance for the American people and for our Federal employees.

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

Chairman ISSA. I thank the Member.

All Members will have 7 days to submit opening statements and additional materials.

We now recognize our panel of witnesses.

Professor Richard Painter is a professor of corporate law at the University of Minnesota Law School and a former associate counsel to President George W. Bush from 2005 to 2007.

Mr. Scott Coffina is a partner at the law firm of Montgomery & McCracken and a former associate counsel, also, to President George W. Bush from 2007 to 2009.

Ms. Ana Marrone is the chief—is the current chief of the U.S. Office of Special Counsel for the Hatch Act.

Pursuant to the committee rules, I would ask all to rise, raise their right hands, and take the oath.

[Witnesses sworn.]

Chairman ISSA. Let the record indicate that all witnesses answered in the affirmative.

Please be seated.

I believe all of you have seen this before, but just for clarification, your entire written statement will be placed in the record. We strongly encourage you to use your 5 minutes for things not just in the record, but it is up to you. When the light turns yellow, please try to summarize. When it turns red, please yield to the next person.

Professor Painter.

I am afraid you are going to have to either pull it closer or hit the microphone button.

STATEMENTS OF RICHARD W. PAINTER, PROFESSOR OF CORPORATE LAW, UNIVERSITY OF MINNESOTA LAW SCHOOL, FORMER ASSOCIATE WHITE HOUSE COUNSEL TO PRESIDENT GEORGE W. BUSH, 2005–2007; SCOTT A. COFFINA, PARTNER, MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP, FORMER ASSOCIATE WHITE HOUSE COUNSEL TO PRESIDENT GEORGE W. BUSH, 2007–2009; AND ANA GALINDO-MARRONE, HATCH ACT UNIT CHIEF, U.S. OFFICE OF SPECIAL COUNSEL

STATEMENT OF RICHARD W. PAINTER

Mr. PAINTER. Mr. Chairman and members of the committee, thank you very much for inviting me to testify today.

For 2½ years, from 2005 to 2007, I was the chief White House ethics lawyer. The White House Counsel's Office had another lawyer cover Hatch Act issues, but I was consulted on Hatch Act matters, and I included Hatch Act compliance in my monthly lectures for incoming White House staff.

The Office of Political Affairs, I believe, does not belong in the White House. And I believe that partisan political activity by White House staff and other government employees in the executive branch is inconsistent with their official duties. There are several problems I see with it.

First, the legal distinctions are very difficult to make. This report from the Office of Special Counsel, I believe, makes that abundantly clear. Figuring out which events are official events, which events are political events can be extraordinarily difficult. Figuring out who pays for what can be very difficult. And figuring out how to use email, whether an email is an official email or a political email, can be difficult. If you make the wrong decision and send an official email through a political email system, you risk losing the record and violating the Presidential Records Act. There are too many legal problems with having executive-branch employees and White House staff wearing two hats at the same time—the political and the official.

Second, it is conflict of commitment. One hundred percent of U.S. Government employees' time should be devoted to the public interest, to the work of the U.S. Government, not to the work of a political party. Too much time is spent by some executive-branch employees, particularly close to an election, on political work that detracts from official duties.

And, finally, and my most serious concern, is conflict of interest. And I discuss this more in my written testimony. When you have political events, particularly fundraisers, that executive-branch employees and high-ranking White House staff and agency employees attend in the evening hours and speak with donors about what they want and what they don't want and all of that is done in a personal capacity and then those very same people go to the office the next morning to make official-capacity decisions, sometimes allocating billions of dollars in our budget or deciding whether to regulate an industry and how, those discussions, had in a so-called personal capacity, can have a direct impact on official policy. I believe the conflict of interest is insurmountable.

So, therefore, I am strongly of the view—I know the law is not this way—but I am strongly of the view that the law should prohibit partisan political activity by executive-branch employees other than the President and the Vice President.

Whatever the law is, it needs to be a lot clearer than it is today in this area. There are a number of issues addressed in the report by the Office of Special Counsel where I think the law has been very unclear. Who, for example, in the White House, on the White House staff, is a so-called 24/7 employee who can engage in political activity during the day, during the workday, in a U.S. Government building?

The law says that anyone who is paid out of the budget of the Executive Office of the President whose duties extend beyond normal working hours and away from the office is exempt from the Hatch Act restrictions with respect to political activity in a U.S. Government building during the workday. Well, I have worked in the White House, and I have seen almost nobody go home at 5 o'clock. I have seen very few people go home at 6 o'clock or 6:30, 7 o'clock—a lot of people there in the evening very late, working weekends, working from home on official U.S. Government business.

So it would seem to me—and I know that the White House, under several administrations, has operated under the assumption that many White House staff members are so-called 24/7 and therefore qualify for this exemption. I do not agree with the exemption; I don't think it ought to be there. But it is there, and that is how it has been interpreted under several administrations.

And now the Office of Special Counsel report has taken the position, referring to the Leave Act—and I think has made a credible argument—but referring to the Leave Act, has said that basically commissioned officers in the White House only may participate in political activity of this sort.

So this is a serious concern, that the law is not clear in this area. And, therefore, I believe strongly that the law needs to be clearer, that the law, in my view, should simply prohibit the political activity of this sort, but we need a clear message to executive-branch employees as to what they can do and what they cannot do.

I believe my time has now expired.

[The prepared statement of Mr. Painter follows:]

Testimony of Richard W. Painter

S. Walter Richey Professor of Corporate Law

University of Minnesota Law School

Before the U.S. House of Representatives Committee on Oversight and Government Reform

June 21, 2011

Mr. Chairman and Members of the Committee:

Thank you for inviting me to testify today. For two and a half years from 2005 to 2007, I was Associate Counsel to the President and chief White House ethics lawyer. The White House Counsel's Office had another lawyer cover Hatch Act issues but I was consulted on Hatch Act matters and I included Hatch Act compliance in my monthly ethics lectures for incoming White House staff.

Partisan political activity was conducted and coordinated by the White House Office of Political Affairs (OPA) from the Reagan Administration until President Obama closed the office in January 2011. OPA operated under the assumption that partisan politics is conducted in a "personal" capacity – as the Hatch Act requires. OPA, however, has grown in size and stature over the years and its work has had a substantial impact on official government policy. At least some of this partisan political activity is in my view incompatible with the official duties of White House staff and other Executive Branch employees.[1]

White House lawyers police the boundary between partisan politics and government work by removing official titles from political communications, instructing White House staff to use separate communications equipment for political activity, making sure political organizations pay the cost of political activity, and similar prophylactic measures. Until 2011, it was assumed that most White House staff were so called "24/7" employees who were permitted to

[1] Richard W. Painter, Getting the Government America Deserves: How Ethics Reform Can Make a Difference (Oxford 2009) at 245-253; Richard W. Painter, Separation of Politics and State, op-ed, New York Times, June 14 2010 at A-23.

engage in personal capacity political activity during daytime and evening hours in government buildings.[2] The Office of Special Counsel must have been aware that such was the practice; it had been going on for a long time. White House staff members were repeatedly reminded in the White House Staff Manual and by White House lawyers to keep this political work separate from their official work, but this political work was permitted. Many Executive Branch agencies accommodated similar political work by senior appointees, although intelligence agencies and some other parts of the government are subject to additional Hatch Act restrictions. The approach to these matters was substantially similar during the Clinton Administration and the George W. Bush Administration[3] and I believe during the first two years of the Obama Administration.

Experience has shown that this approach does not work. In many instances it is difficult to distinguish between an official communication and a political communication when the subject matter is the President's policy agenda that concerns political constituencies. An official email sent over a political server (DNC, RNC or some other) may be lost, risking a violation of the Presidential Records Act. A political email sent over a government server creates at least the appearance of a Hatch Act violation (the email may not impose additional cost on the government but the official email account implies official endorsement). Official titles may not be used when a White House staff member speaks for a political fundraiser (the term "Presidential advisor" is sometimes used instead), but the subject of the speech is almost invariably the President's policies and just about everyone in the room knows that the speaker works at the White House. Nobody, for example, could pretend with a straight face that Karl Rove was simply a Republican from Texas with a day job in Washington who addressed political gatherings only in a personal capacity, or that Rahm Emanuel was a Chicago Democrat who wanted to pursue politics when he could get away from his day job, which like Karl Rove's just happened to be in the White House. The Hatch Act

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[2] Painter, Getting the Government America Deserves at 246.

[3] See Kathryn Dunn Tempas, Institutionalized Politics: The White House Office of Political Affairs, Presidential Studies Quarterly (Spring 1996); Bradley H. Patterson, The White House Staff: Inside the West Wing and Beyond (2000) at 210. I cite these publications, multiple newspaper articles and other sources in comments to my blog post on Legal Ethics Forum titled "Office of Special Counsel Releases Report on White House Political Activity" (January 27, 2011), www.legalethics forum.com.

demands this separation of politics and state, but the distinction is more theoretical than real.[4]

Dual official and political functions of White House staff give political operatives and campaign contributors far reaching influence over government policy at the highest levels. A White House official who learns what a contributor wants at a political fundraiser on Thursday night will not forget the contributor's request at a White House staff meeting on Friday morning. If the White House official forgets the request for any reason, he can have another "personal capacity" political conversation with the contributor on a DNC or RNC cell phone immediately before the White House staff meeting to discuss "what you told me last night on how best to advance the President's political agenda." The campaign contributor's request, made at a political fundraiser, will impact official policy without any thought given to the "capacity" in which the official heard it. Likewise, White House personnel decisions may be impacted when DNC or RNC political operatives tells White House staffers that a troublesome appointee needs to be removed from an agency, or that a primary candidate should be given a job in the Executive Branch so he won't challenge an incumbent. Reducing the amount of partisan political work by White House staff will not make political influence on official decisions go away, but instances of excessive political influence will be less frequent if political operatives are not working inside the White House.

The Office of Special Counsel (OSC), in a 2011 report on the 2006 election cycle, made a small dent in dual official and political tasking of White House staff. OSC now takes the position that the Hatch Act regulations permit only the most senior White House staff members to participate in partisan political activity in government buildings during the workday.[5] This position is contrary to the way the White House has been run for many years. Indeed President Obama shut down OPA within days of when this Report was released.[6] If he had not done so,

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[4] See Painter, New York Times op-ed, supra note 1.

[5] See Office of Special Counsel, Investigation of Political Activities by White House and Federal Agency Officials During the 2006 Midterm Elections at 33-34 (January 2011)

[6] See Jeff Zeleny, Obama Will Move Political Operations to Chicago, New York Times, January 20, 2011.

dramatic changes would have been required to prevent OPA staff and other White House staff from violating the Hatch Act regulations as they were now interpreted by OSC.

There are two problems with the OSC's new position.

First, it does not go far enough. The most senior White House staff, those whose influence on official policy is the greatest, may continue to engage in personal capacity political activity in government buildings day and night. All White House staff may continue to engage in personal capacity political activity off site during the weekends and evenings. Although they may not solicit contributions, they may give speeches at political fundraisers and listen to contributors who make known what they expect in return for their generosity. In other words, the OSC's interpretation of the Hatch Act in the Report makes a very small dent in the problem of partisan political activity in the White House.

The second problem is that the OSC did not make its interpretations of the Hatch Act clear in the 2006 and 2008 election cycles, and OSC guidance continues to be sufficiently ambiguous that there is a risk of Hatch Act violations by White House staff and other Executive Branch officials in the 2012 election cycle. The OSC Report retrospectively addresses isolated issues such as which White House staff may engage in partisan political activity in government buildings during normal working hours and how OSC believes political briefings should be conducted in the agencies. Identifying violations four years later through arguable ex-post rule interpretation, however, is not a helpful way to enforce the Hatch Act. Furthermore, many questions still are not adequately answered such as what a government official may say about his or her official job when giving a political speech, what can be said about a person's official job in an invitation or other promotional materials for a political event, what constitutes political fundraising (which is prohibited under the Hatch Act) and what government officials may say at political fundraisers (is there a difference for example between a speaker thanking donors for their "support for the President and his agenda" and the speaker asking donors to give more money?).

In sum, I commend the OSC for sending a message that the Hatch Act will be more strictly construed and enforced than it has been in the past, but I am concerned about ambiguities on a range of issues. I am also concerned about the utility of some distinctions embodied in Hatch Act regulations. The 2011 Report, for example, references the Leave Act to distinguish between high level White House staff who may engage in political activity in government buildings 24/7 and other White House staff who may not do so.[7] This distinction could be a correct interpretation of the regulations, but it fails to address a larger problem: immersing high level White House staff in partisan politics during the workday – or at any time -- distorts official government policy. It should not be allowed.

Similarly it makes little difference who paid what portion of air fare for a trip by a White House employee who speaks at a political fundraiser if donors at the fundraiser can use the opportunity to secure a billion dollar defense contract, a bailout for a badly managed bank or lenient financial services regulation that makes bailouts necessary in the first place. The better rule – a rule that probably will have to come from Congress and not from the OSC – is that a White House official should not be at the political fundraiser at all.

I commend President Obama for building upon President Bush's strong commitment to government ethics. The President's Executive Order of January 21, 2009 addressed the revolving door from government to the private sector, and somewhat diminished the influence of lobbyists. The President closed OPA and moved much of his political operations to Chicago at about the same time as the OSC issued its report in 2011. This should have been done earlier (I have urged for several years that OPA be closed[8] and Senator McCain said in the Presidential campaign that he would close OPA). This development will lead to real change if the President curtails the political activities of remaining White House staff, although I am not sure this activity has been curtailed as much as it should be (the White House political event with Wall Street supporters earlier this

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[7] OSC Report supra at 34-35

[8] See Getting the Government American Deserves, supra, Chapter 10 and my New York Times op-ed, Separation of Politics and State, supra.

year suggests otherwise[9]). I hope the President follows through with his promise to improve ethics in government by insisting that White House staff – other than the President and Vice President – devote their time exclusively to official work while persons outside the government work for political campaigns.

Meanwhile, I hope this Committee will consider legislation that would sharply curtail the range of permissible work for political campaigns by White House staff and senior appointees in the Executive Branch. Now is an ideal time to reach a bipartisan consensus on such legislation, particularly if the new rules were to go into effect in early 2013. Partisan political operations will be more effective, and subject to fewer constraints, if they are run from outside the White House. The White House staff will strengthen the President's political stature if they focus not on political campaigns but on how to do the best job possible implementing the President's policies for this Country.

Thank you Mr. Chairman. I will be pleased to answer questions from Members of the Committee.

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[9] See Nicholas Confessore, Obama Seeks to Win Back Wall St. Cash, New York Times, June 12, 2011.

Chairman ISSA. It is. But, not as a form of a question, but if you will clarify for our freshmen what constitutes a commissioned officer in the White House, so that the new Members understand.

Mr. PAINTER. There are 100 commissioned officers, I believe, in the White House. And those are assistants to the President, of which there are 25; deputy assistants to the President, of which there are 25; and special assistants to the President—and associate White House counsels, of which there are approximately 50.

Chairman ISSA. Thank you. None of whom are uniformed commissioned officers is what I was hoping you would clarify.

Mr. PAINTER. Oh, yes. That is true, Mr. Chairman. They are not uniformed.

Chairman ISSA. Thank you.

Mr. Coffina.

STATEMENT OF SCOTT A. COFFINA

Mr. COFFINA. Chairman Issa, Ranking Member——

Chairman ISSA. You have the same microphone problem, if you could, please.

Mr. COFFINA. Chairman Issa, Ranking Member Cummings, and members of the committee, my name is Scott Coffina, and I appreciate your invitation to sit before you today to discuss how effectively the Hatch Act accommodates the intersection of politics and policy in the White House.

I have had the privilege of serving in the White House two times, first as a staff assistant in the Office of Political Affairs under President Reagan, where I worked under the restrictions of the Hatch Act, and then as associate counsel to President George W. Bush from 2007 to 2009, where my responsibilities included advising the Office of Political Affairs and the rest of the White House staff on the Hatch Act.

While the Hatch Act recognizes the unique Federal employment environment of the White House, where the President has the dual role as head of state and head of his political party, the specific rules of the road for White House employees have never been entirely clear. Advising the White House staff on the contours of the law, therefore, has been more of an art than a science. This committee is doing a service to current and future members of the White House staff by considering how the parameters of the Hatch Act might be refined and clarified to guide their future conduct.

The White House Office of Political Affairs generally has been the organizational hub for the President's political advisors. OPA historically has been responsible for facilitating the President's communications with supporters, national campaign committees, and the campaigns of House and Senate candidates, and to plan and coordinate his political activities.

It is important to consider, however, that "political affairs" does not necessarily mean "partisan affairs." OPA also supports the President in a wide range of official matters, serving as an important conduit to and from the President's supporters on policy issues, personnel decisions, and appointments. Sound political advice on how policy proposals will be received by the public and their chances for success is an important part of Presidential governance.

Having a defined office within the White House to support the President in his political role, as well as in his official role, allows for greater discipline and accountability to Congress and to OSC in carrying out their respective oversight and enforcement responsibilities. Therein lies the concern with the White House's decision in January to disband the Office of Political Affairs: a lack of transparency into the political activities of the White House.

OPA may have outsourced to the President's re-election campaign office in Chicago, but politics in the White House does not just go away. This committee has rightfully been concerned about how political activities within the White House will be coordinated and executed going forward, which is becoming increasingly more important as the President's re-election campaign heats up.

Last week, the New York Times reported that President Obama hosted a group of Wall Street executives, many of them long-time donors, in a meeting in the Blue Room of the White House that was organized by the Democratic National Committee. When asked about this event last week, the White House Press Secretary described it as "the President meeting with his supporters in the business arena to solicit ideas about how to improve the economy." It is unclear why the Democratic National Committee would have been used to organize a meeting to solicit advice on the economy. Indeed, this meeting seems to walk a fine line between official and political, with all the attendant Hatch Act concerns.

With the Political Affairs Office closed, it is unclear who at the White House would be involved in this outreach to key supporters of the 2008 campaign and ensuring that they complied with the Hatch Act and the Presidential Records Act.

Turning to the Office of Special Counsel report, the report released in January about the 2006 election cycle raises a number of important issues concerning the intersection of politics and policy. Unfortunately, OSC did not consider these issues in a constructive way, employing inappropriate legal standards, drawing conclusions based on ambiguous evidence about activities for which the statute provides minimal guidance, and failing to consider important information that would place these activities in a fuller context.

One important issue raised by the OSC report is determining the scope of Hatch Act exemption on its workplace restrictions for employees within the White House. The Hatch Act supplies a standard: those whose duties continue outside of normal business hours and while away from their normal duty post. However, OSC applied a separate employment statute governing pay levels and leave requirements to determine that less-senior members of OPA fell outside of the exemption.

The job requirements of associate directors should have qualified them for the exemption, but OSC applied a standard that relies on status, not function. Since the Hatch Act itself provides a standard by which to evaluate, it is improper for OSC to look to the Leave Act instead. The decision to rely on the Leave Act was outcome-determinative. If OSC had fairly evaluated the job responsibilities of associate directors under the terms of the Hatch Act, OSC could not support its conclusion that they violated the statute by engaging in political activity while on duty.

More importantly, if associate directors of political affairs cannot participate in political activities while on duty, they also cannot support the political activities of the President himself. In other words, under OSC's reasoning, the President cannot rely upon junior members of his staff for logistical support for his own political activities. This begs the question about what duties the associate directors have performed in the current White House.

The OSC report also raises one more complex Hatch Act issue, that being the classification of certain Presidential or Cabinet-level travel as official, political, or mixed, which is important to ensure the proper allocation of costs. In its report, OSC concludes that certain events were misclassified as official trips and should not have been funded at taxpayer expense because of evidence that such events were politically inspired without evaluating the content of the events themselves, which I submit is a far more objective and easier standard to employ.

In——

Chairman ISSA. In conclusion?

Mr. COFFINA. Yes.

In conclusion—and I have a number of recommendations that might clarify the rules of the road. But I think that the OSC has provided an impossibly subjective standard in terms of trying to evaluate and discern the motivation behind a political activity and official event, whereas there are objective criteria that we might employ.

[The prepared statement of Mr. Coffina follows:]

Chairman Issa, Ranking Member Cummings, and members of the Committee, my name is Scott Coffina, and I appreciate your invitation to sit before you to discuss the Hatch Act.

The report issued by the Office of Special Counsel ("OSC") on January 24, 2011, and the decision by President Obama that same week to close the White House Office of Political Affairs have once again brought into focus a recurring investigative subject of this Committee: How effectively the Hatch Act accommodates the intersection of politics and policy in the White House.

I have had the privilege of serving in the White House two times; first, as a staff assistant in the Office of Political Affairs under President Ronald Reagan, where I worked under the restrictions of the Hatch Act, and then as Associate Counsel to President George W. Bush from 2007 to 2009, where my responsibilities included advising the Office of Political Affairs and the rest of the White House staff on the Hatch Act.

The presidency sits at a crossroads where politics and policy necessarily intersect. Nearly every presidential issue is either affected by or impacts the political landscape. A president developing and presenting his policy agenda must consider the politics as well – even the most effective policies will fail without the support of the public and like-minded Members of Congress. Consider the importance the White House placed on the January 2010 special election for the Massachusetts Senate seat – the so-called "60th vote" for a filibuster-free Democratic majority – and how the make up of the House and Senate can influence how bold or tepid a certain policy initiative might be. And as a president runs for re-election, his policy initiatives and public activities are inevitably shaped by the electoral map. To some degree in every White House, politics drives policy and policy drives politics; it is a dynamic imbued in our democracy and in the vibrant presidency that we have at the center of our government.

Moreover, in addition to being head of state, the president is uniformly recognized as the head of his political party. That role carries with it certain political responsibilities, which the Hatch Act accommodates by expressly excluding the president (and vice president) from its restrictions on the political activities of federal and state employees. Those responsibilities include helping to get like-minded candidates elected to Congress in order to advance his policies. Of course, the president cannot conduct his political activities alone. The singular demands of the presidency require a large dedicated staff to plan and coordinate all of his events, political and official. The Hatch Act recognizes this as well, permitting certain members of the White House staff whose duties continue outside of working hours and while away from their normal duty post – essentially, staffers who are always "on-call" – to engage in political activity while on duty and while in a federal building, which are forbidden zones for most other federal employees.

The White House Office of Political Affairs

The White House Office of Political Affairs was first formally organized in the Reagan Administration, and has been part of the White House organizational structure for over 30 years and 5 presidencies. Called OPA for short, this office generally has been the organizational hub for the president's political advisers. While always the subject of some controversy due to its name if not its conduct – "what place does the Office of *Political* Affairs" have in the White

House anyway?" – it is in the view of many an appropriate vehicle to organize and implement the president's communications with supporters, the national campaign committees and the campaigns of House and Senate candidates, and to plan and coordinate his political activities. It is important to consider, however, that "Political Affairs" does not necessarily mean "Partisan Affairs." OPA also supports the president on a wide range of official matters, serving as an important conduit to and from the president's supporters on policy issues, personnel decisions and appointments. In the politics-is-policy dynamic, sound political advice on how policy proposals will be received by the public, and their chances for success, is an important part of presidential governance.

OPA also serves an appropriate clearinghouse function, being in position to know the president's and cabinet members' official travel calendars and thus being able to identify opportunities to add political events in response to requests from House and Senate candidates. This coordinating role, for a number of logistical, legal and policy reasons, cannot simply be handed off to the party committee.

Having a defined office within the White House to support the president in his political role – as well as in his official role – allows for greater discipline in the engagement in appropriate political activity by members of the White House staff and provides for greater accountability by Congress and the Office of Special Counsel in carrying out their respective oversight and enforcement responsibilities. Therein lies the concern with the White House's decision in January to disband the Office of Political Affairs – a lack of transparency into the political activities of the White House. OPA may have been "outsourced" to the President's re-election campaign office in Chicago, but politics in the White House does not just go away. Where are those decisions being made now, and by whom? Who at the White House will be making decisions on how to allocate the precious commodity of the president's time in the face of the competing demands of his official duties and his re-election campaign? Who in the White House will be considering requests from other candidates for the president, First Lady or senior officials to attend a fundraiser or rally? With no defined political operation in the White House, who does the White House Counsel's Office advise about the Hatch Act and other legal restrictions on political activity? Also, what steps have been taken at the campaign committee to ensure the preservation of documents related to the official activities on which they may be consulted, in compliance with the Presidential Records Act?

These are questions about which the Committee rightfully has been concerned, and they are not merely academic. Last week, the New York Times reported that President Obama hosted a group of Wall Street executives, many of them longtime donors, in a meeting in the Blue Room of the White House that was organized by the Democratic National Committee. When asked about this event last week, the White House press secretary described it as the president meeting "with his supporters in the business arena to solicit ideas about how to improve the economy." It is unclear why the Democratic National Committee would have been used to organize a meeting to solicit advice on the economy. Indeed, this meeting seems to walk a fine line between official and political, with all of the attendant Hatch Act concerns. The Huffington Post also revealed a memo wherein the president's campaign aides suggested that the White House make additional efforts to court disaffected donors from the 2008 campaign. With the political affairs office closed, it is unclear who at the White House would be involved in organizing and executing

meetings ostensibly to solicit policy input from key supporters of the 2008 campaign and in ensuring that they complied with the Hatch Act and campaign finance laws.

The White House and the Hatch Act, and the Office of Special Counsel Report

The report released in January by the Office of Special Counsel about the Bush Administration's political activity in the 2006 election cycle raises a number of important Hatch Act issues with which successive Administrations have wrestled for years. Unfortunately, the Office of Special Counsel did not consider these issues in a constructive way, employing inappropriate legal standards, drawing conclusions based upon ambiguous evidence about activities for which the statute (and OSC) provides minimal guidance, and failing to consider important information that would place these activities in a fuller context.

One important issue raised by the OSC report is determining the scope of the Hatch Act's exemption on its workplace restrictions for employees within the White House. In order to provide meaningful guidance to White House employees on the extent and propriety of contemplated political activity, one first must determine who may engage in those activities in the first place. The Hatch Act supplies a standard – those whose duties continue outside of normal business hours and while away from their normal duty post. Curiously, the Office of Special Counsel did not apply this standard in concluding that Associate Directors of Political Affairs and "Surrogate Schedulers," who were relatively junior employees hired by more senior White House staff members, violated the Hatch Act by engaging in political activity while on duty, particularly by coordinating the political travel of Cabinet Secretaries and other high-level government officials.

The reality of White House life is that most employees are on call virtually all the time, and thus properly are "exempt" by the Hatch Act from its restrictions on political activity during working hours. The Office of Special Counsel interviewed many of these former employees and presumably asked them about their work schedules. However, rather than applying that information to the standard in the Hatch Act, OSC applied a separate employment statute governing pay levels and leave requirements. Accordingly, OSC (correctly) found that the Director and Deputy Director of Political Affairs were permitted to engage in political activity, including political briefings, by virtue of their positions, but their subordinates were not. From my own observation, the duties of Associate Directors and the Surrogate Scheduler certainly seemed to continue outside the normal duty hours and the regular posts of federal employees as they left the Eisenhower Executive Office Building at 10:00 p.m. and traveled on weekends in support of presidential events, but OSC applied a standard that relies on status, not function. Since the Hatch Act itself provides a standard by which to evaluate whether an employee is exempt or not, and OSC presumably had the facts about their work demands generated by its own interviews, it was improper for OSC to look to the "Leave Act" instead.

The report does not explain why OSC relied upon the Leave Act rather than the terms of the Hatch Act itself, but this decision was outcome-determinative. If OSC had fairly evaluated the job responsibilities of the Associate Directors and surrogate schedulers under the terms of the Hatch Act, OSC could not support its conclusion that they violated the statute. Moreover, if Associate Directors of Political Affairs could not participate in political activities while on duty,

they also could not support the political activities of the president himself. In other words, under OSC's reasoning, the president cannot utilize junior members of his staff for logistical support for his own political activities. OSC, perhaps recognizing the impracticality of this restriction, did not conclude, or even suggest, that their support of the president's political activities violated the Hatch Act, only that their coordination of Cabinet Members' political activity did. The statute itself, though, makes no such distinction, underscoring the flawed analysis by OSC.

The shame of the OSC report is that these former White House employees, doing the same things that their predecessors of both parties have done for 30 years without censure by OSC, believed in good faith that they were permitted to engage in appropriate political activities while on duty – and, under a fair reading of the statute, were correct in that belief – but now have been tarred as lawbreakers based on this faulty analysis. Beyond these individuals, under OSC's analysis, there now exists the practical problem of the president being unable to rely upon the support of his own junior staffers for his lawful political activities, which presents major logistical problems. It also begs the question about what duties the Associate Directors of Political Affairs have performed in the current White House, which the OSC report does not address.

Another critical issue implicated by OSC's report involves the use of official government resources for political purposes. While recognizing the need for certain employees on the White House staff to participate in political activity while on duty, the Hatch Act rightly prohibits the cost of those activities to be paid for with taxpayer funds. As recounted in the OSC report, members of OPA were given Republican National Committee blackberries and computers to facilitate their political activities, consistent with this prohibition on the use of official resources. The report also noted that some RNC employees worked physically in the Office of Political Affairs for a period of time. OSC viewed the need for RNC equipment and employees as evidence of "a political boiler room" in the OPA, as a result of which it was inappropriate for the taxpayers to pay the salaries of the OPA staffers. Certainly, it is fair to ask whether the need for additional resources from the RNC suggests such a high degree of political activity within OPA that it was inappropriate for taxpayers to pay the salaries of these OPA staffers. But OSC did not consider the evidence in an evenhanded way, and as a result, found Hatch Act violations that the evidence does not support. The evidence presented in the report obviously portrays a level of political activity within OPA. But to what degree? We don't know, because the OSC never considered, or at least never presented, the level of political activity by these employees in the context of their other, *official* responsibilities. Surely, one's view of the degree of political activity would be affected by whether it constituted 20% of their responsibilities, 50% or 80%. But the report omitted this critical part of the analysis, although OSC presumably had this information from its interviews of these employees.

Additionally, the report looks at the use of RNC assets only as reflecting an active political operation in violation of the Hatch Act. It ignores the essential purpose of using the party's assets instead of official equipment for political communications, which is to comply with one of the bedrock principles of the Hatch Act, from which no federal employees are exempt – the prohibition on using official resources for political purposes. Compliance with this principle of the Hatch Act logically is also the reason that extra manpower was imported from the RNC – to lessen the political workload of OPA staffers, but the OSC's report does not explore that likely explanation.

Finally, the OSC report raises one of the more complex issues surrounding the requirements of the Hatch Act, that being the classification of certain presidential or cabinet level travel as official, political or mixed, which is important to ensure the proper allocation of costs. This Committee is familiar with these challenges from its own investigation of political and official travel in the 2006 election cycle. Classifying trips and other events necessarily must be done on a case-by-case basis, given many variables and a historic lack of guidance from the Hatch Act statute and regulations or from OSC. My own analysis would start with the Hatch Act's definition of political activity – whether the event as planned and executed was directed toward the election or defeat of a candidate or party – but as the OSC report discusses, questions about the origin and motivation of a proposed "official" event should factor into the analysis as well.

In its report, OSC concludes that certain surrogate events were misclassified as "official" trips and should not have been funded at taxpayer expense because of evidence that such events were politically inspired, without evaluating the content of the events themselves. Significantly, there is virtually no analysis in the report of how the identified "official" events were carried out, only that there was recognition by some in OPA or by senior officials that the "official" events they were participating in would be helpful to an endangered incumbent. To be sure, an "official" event in a battleground district that is contrived solely between OPA and the Member's campaign team would raise serious Hatch Act concerns, no matter how the actual event was carried out. But the OSC report's focus on the motivation behind official events to the exclusion of the execution of those events sets an impossibly subjective standard. Indeed, the standard employed by the OSC in its report would require the discernment of subjective intent and invite endless second-guessing about whether <u>any</u> policy event is improperly financed by taxpayers merely because it occurs during election season or in a political battleground. Is three months before an election a sufficient amount of time to hold an official event with a vulnerable Senator, or must it be four months, six months or nine months? How "vulnerable" must a Congresswoman be in her race for re-election to cast suspicion on the "political motivation" behind an official event? Dead heat in the polls? Five points down? Five points up? Ten points ahead but losing steam?

President Obama has visited Ohio, a key swing state for 2012, 14 times while he has been in office, including at least 3 visits in the three months before the 2010 midterms. Last week, he visited North Carolina, another 2012 battleground, for a speech on the economy, before continuing on to Florida and Puerto Rico for political fundraisers, while the First Lady held a meeting with military families amidst a series of fundraisers in California. According to the standard by which it judged the actions of the Bush Administration, OSC must question the origin of those "official" events last week and whether their costs properly should be paid for by the taxpayers or by the president's re-election committee. But should OSC be the arbiter of every "official" event by an Administration official in an election year? It seems a rather impractical, almost absurd, proposition – an OSC staffer would have to serve virtually as a White House "hall monitor" to make an evaluation – but that is the logical conclusion of OSC's analysis in its recent report. Realistically, any Administration should be given a large degree of deference in how and where its official events are chosen, as long as the events are not consummated as campaign rallies.

Recommendations

For reasons that are not entirely clear, but that I know are of interest to this Committee, the OSC report did little to clarify the practical restrictions of the Hatch Act in the unique federal workplace of the White House. Nevertheless, we should not throw up our hands. White House employees deserve the minimal due process element of proper notice about the boundaries of the Hatch Act before they rightfully can be found to have violated it and potentially lose their jobs. At the same time, there is indisputably a proper place for oversight by the Congress, and for enforcement of the Hatch Act by OSC. Aside from the relatively clear prohibitions on political fundraising, on using one's title while engaging in political activity, and on promising or threatening another's professional advancement in exchange for them engaging in political activities, some commonsense rules of the road might be:

1. Employees at the White House should be able to inform and advise the president on political matters and to support directly the political activities of the president, subject to the overriding Hatch Act consideration that the costs of partisan political activities are not borne by the taxpayers. This Committee, or OSC in its rulemaking capacity, might consider a reasonable timekeeping requirement to allow for some evaluation of the percentage of time spent by "exempt" government employees on partisan political activities to ensure that taxpayers are not footing the bill for an arm of a political party.

2. The use of "hard assets" supplied by a national political party in furtherance of political activities should be encouraged, to adhere to the Hatch Act prohibition against using official resources for political purposes. However, the requirements of the Presidential Records Act necessitate strict document backup and retention policies, periodic review of emails transmitted via political party smart phones or similar devices, and training of employees to ensure that all official records are captured and retained for the National Archives.

3. To the extent possible, the determination of presidential and surrogate travel as official, political, or mixed, should be made according to objective information about the origin and, more importantly, the execution of the events. Requests by Senators or Members of Congress for participation by the president or cabinet members in official events within their districts properly should originate within their congressional offices, not within their reelection campaigns. Official activities around the country that originate within the White House should be rooted in a policy initiative, and related events should have a logical nexus to that policy initiative.

4. An official event added on to a previously-scheduled political event logically might be viewed more skeptically than a political event added to an official event, but in either circumstance, how the official event is executed should be paramount. The essential question is whether the official event advocated the election or defeat of a political candidate or party, amounting essentially to a campaign rally. Courteous acknowledgment of a Member's attendance at the event, or of his or her public service, should not transform an official event into a political one.

5. The clear restrictions of the Hatch Act on all White House staffers should be vigorously adhered to and enforced. Officials should not use their official position or authority to influence or affect the outcome of an election; official titles should not be used at political events; neither threats nor promises should be used to enlist subordinates, colleagues or anyone else to engage in political activity; the White House should not be used for fundraising; and appropriated money should not be used for political purposes. These restrictions are the primary guarantors of a workplace free from political pressure and improper influence, which, after all are what the Hatch Act was enacted to combat.

6. Finally, a constructive engagement between the White House and OSC on matters related to the Hatch Act should be fostered whereby these parties work through issues together at the front end, before borderline practices result in allegations of wrongdoing and costly investigations years after the fact. Personally, I found meeting informally with my fellow panelist Ana Galindo-Marrone to be very helpful in understanding and offering advice to my colleagues on some of the issues of concern to OSC, which obviously may evolve from one election cycle to the next.

Thank you once again for this opportunity to share my views of the application of the Hatch Act to the unique environment of the White House.

Chairman ISSA. Thank you.

Ms. Marrone, I think he was talking about you.

Ms. GALINDO-MARRONE. He was.

Chairman ISSA. You are recognized to respond in any way you want to respond.

STATEMENT OF ANA GALINDO-MARRONE

Ms. GALINDO-MARRONE. Mr. Chairman Issa, Representative Cummings, and members of the committee, I thank you for the opportunity to appear before this committee to discuss the Hatch Act.

My name is Ana Galindo-Marrone, and I am a career civil servant. I have been the chief of the Hatch Act Unit at OSC since 2000. I am pleased to speak about OSC's experience enforcing the Hatch Act. The visibility this hearing brings to the Hatch Act can enhance awareness and understanding and deter violations of the law, which is central to our mission.

The Hatch Act restricts the political activity of Federal executive-branch employees, District of Columbia employees, and State and local employees who work on federally funded programs.

The law was enacted in 1939 to address the spoils system that dominated the Federal workplace in the 19th and early 20th centuries, under which Federal employment and advancement depended largely upon political 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 the purposes enacting the Hatch Act were to ensure: the impartial execution of the laws; that the rapidly expanding government work force should not be employed to build the powerful, invincible, and perhaps corrupt political machine; and that employment and advancement in the governmentservice not depend on political performance; and, at the same time, to make sure that government employees would be free from pressure and from expressed 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 on their own beliefs.

The reasons for the passage of the Hatch Act remain as compelling today as they were when it was first enacted. 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.

Growing public awareness of OSC's enforcement efforts and increased media attention contributed to record numbers of Hatch Act complaints received and advisory opinions issued in fiscal year 2010. During that year, Hatch Act Unit staff, which consists of only 15 employees, issued well over 4,000 advisory opinions. Also during that time, the unit received 526 complaints and investigated and resolved 535 cases. Many of these cases were resolved informally

without litigation by advising employees they were in violation of the act and securing their willingness to comply with the law.

A number of the complaints the unit investigated or is currently investigating concern allegations of Federal employees using their official authority to effect the results of elections, including instances where supervisors targeted subordinates for political contributions. Similarly, in State and local cases, the unit investigated allegations of supervisors, including law enforcement officials, using their official authority to coerce subordinates into making political contributions.

The unit has been proactive through its advisory and outreach efforts in educating employees about the act. In particular, the unit is responsible for a nationwide program that provides Federal, District of Columbia, and State and local employees, as well as the public at large, with legal advice.

The unit is also active in OSC's outreach program. In the last fiscal year, the unit conducted approximately 30 outreach presentations. Many of these programs involved high-level agency officials. Notably, several of these programs were conducted as roundtable discussions with political appointees in attendance.

As part of OSC's outreach efforts, Hatch Act publications are available upon request on OSC's Web site and distributed during outreach programs. Currently, some of our efforts are focused on educating Federal employees about the Hatch Act and the use of technologies, including email, blogs, social media such as Twitter and Facebook.

OSC also enforces compliance with the Hatch Act by investigating complaints and, in some cases, seeking disciplinary action. In the last 12 months, OSC has sought disciplinary action in several cases involving Federal employees who engaged in prohibited political activity, including using a government computer to make political contributions or emailing invitations to political fundraisers while on duty, soliciting political contributions from subordinates via email, and hosting political fundraisers. The MSPB, the Merit Systems Protection Board, has found that engaging in such prohibited activity warrants disciplinary action.

The Hatch Act was last amended in 1993. OSC looks forward to working with Congress if it determines that the act should be amended again.

Thank you, and I look forward to taking your questions.

[The prepared statement of Ms. Galindo-Marrone follows:]

Chairman Issa, Representative Cummings, and members of the Committee, I thank you for the opportunity to appear before this Committee to discuss the Hatch Act.

My name is Ana Galindo-Marrone. I am a career civil servant, and I have been Chief of the Office of Special Counsel's (OSC) Hatch Act Unit since 2000.

I am pleased to speak about OSC's experience enforcing the Hatch Act. The visibility this hearing brings to the Hatch Act can enhance awareness and understanding, and deter violations of the law, which is central to our mission.

The Hatch Act restricts the political activity of federal executive branch employees, District of Columbia employees, and state and local employees who work on federally-funded programs. The law 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 largely upon political 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 the purposes in enacting the Hatch Act were to ensure:

> the impartial execution of the laws [,] . . . that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine [,] . . . and 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 Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548,565-66 (1973).

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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 ("the Unit"). Growing public awareness of OSC's enforcement efforts and increased media attention contributed to record numbers of Hatch Act complaints received and advisory opinions issued in fiscal year 2010. During that year, Hatch Act Unit staff, which consists of only fifteen employees, issued well over 4,000 advisory opinions. Also, during that time the Unit received 526 complaints and investigated and resolved 535 cases. Many of these cases were resolved informally, i.e., without litigation, by advising employees that they were in violation of the Hatch Act and securing their willingness to comply with the law. A number of the complaints the Unit investigated or is currently investigating concern allegations of federal employees using their

official authority to affect the results of elections, including instances where supervisors targeted subordinates for political contributions. Similarly, in state and local cases the Unit investigated allegations of supervisors, including some law enforcement officials, using their official authority to coerce subordinates into making political contributions.

The Hatch Act Unit has been proactive through its advisory and outreach efforts in educating employees about the Act. In particular, the Unit is responsible for a nationwide program that provides federal, District of Columbia, state and local employees, as well as the public at large, with legal advice about the Hatch Act.

The Unit is also active in OSC's Outreach Program. In fiscal year 2010, the Hatch Act Unit conducted approximately 30 outreach presentations to various federal agencies and employee groups concerning federal employees' rights and responsibilities under the Act. Many of these programs involved high-level agency officials. Notably, several of these programs were conducted as roundtable discussions with political appointees in attendance. As part of OSC's outreach efforts, Hatch Act publications are available upon request, on OSC's website, and distributed during outreach programs. Currently, some of these efforts are focused on educating federal employees about the Hatch Act and the use of technologies, including e-mail, blogs, or social media such as Twitter and Facebook.

OSC also enforces compliance with the Hatch Act by investigating complaints and, in some cases, seeking disciplinary action by filing an action with the Merit Systems Protection Board (MSPB). In the last 12 months, OSC sought disciplinary action in several cases involving federal employees who engaged in prohibited political activity, including using a government computer to make political contributions or e-mailing invitations to political fundraisers while on duty; soliciting political contributions from subordinates via e-mail; and hosting political fundraisers. The MSPB has found that engaging in such prohibited political activity warrants disciplinary action.

The Hatch Act was last amended in 1993. The OSC looks forward to working with Congress if it determines that the Act should be amended again.

Thank you. I look forward to taking your questions.

Chairman ISSA. Thank you.

I will recognize myself for the first round.

Could you put the slide up?

I think, Ms. Galindo-Marrone, this is from the Web site of the Office of the President. Can you say whether or not the announcement made in January that the political office was being closed, that it has been closed? Or does this mean that it is still open but still in the process of closing?

Ms. GALINDO-MARRONE. I am sorry. This announcement appears—Chairman, this announcement appears where? I am sorry?

Chairman ISSA. This is on the White House Web site.

Ms. GALINDO-MARRONE. Oh, the White House Web site. I am sorry.

Chairman ISSA. So, I mean, the question is, if it is still on the Web site as of today, 6 months after an announcement of its closing, since you work directly on this, is there still an office, are there still any personnel? Or is this just an oversight, that it still essentially appears to be in place?

Ms. GALINDO-MARRONE. I am not aware of the White House's Office of Political Affairs——

Chairman ISSA. So this is just legacy, as far as you know?

We asked somebody from the White House to come, and we got a refusal for anyone to come from the White House, so this is one of our questions.

Mr. Coffina, you said you can't actually operate without this, without having somebody doing the same job. To your knowledge, is there an office there or are other people just doing that job?

Mr. COFFINA. Mr. Chairman, I don't know if they have officially closed the office. I do suspect from my own experience that somebody is advising the President on political events, political activities, and also handling some logistics for them. But I don't know the structure right now.

Chairman ISSA. Okay, I am going to ask a broad question, and I will start off by characterizing it.

On this side of the dais, we have a much different set of rules, and although it attempts to mirror the Hatch Act—it is a great question for all of you—well, particularly for our two former counsels. One of the things that we have to look at here is, anything we ask the administration to do we have to try to mirror something similar here on the Hill. If we don't, then it would be inappropriate relative to our oversight of their branch versus fairness here.

Is it fair to say that, in the past, people working in the White House consistently reached out and asked donors for money, during previous administrations and probably still today, in their exempt role? I didn't say political activities. I said, asked for money, solicited people to give money to the campaign to elect or re-elect the—or, re-elect the President.

Please, Mr. Painter, Professor.

Mr. PAINTER. I would very much hope not, because solicitation of contributions is prohibited under the Hatch Act, both in a personal capacity and in a political capacity. They may speak at the fundraiser, but they may not ask for money.

Chairman ISSA. But if a Cabinet officer—some are prohibited, but some are not—or any number of other people in the Office of

the President or in the administration, if they regularly are noted as the person that is going to speak, talk, converse, mingle with people at a fundraiser, are you saying that they are simply being used to gain that funding but they don't make the ask, even though they are there overtly to thank everyone for being there?

Mr. PAINTER. Yes, I believe the distinction is artificial. It is a distinction made under the law as it now stands. I do not think they ought to be there, I do not think they ought to be speaking at those fundraising events, for exactly the reason you describe.

Chairman ISSA. And I take from Mr. Coffina's statement, a line that is hard to discern, which is, it is hard to figure out what is a political related to the policy of the President, the ongoing legislation, such as the example of meeting with people who happen to be donors but also happen to be knowledgeable people in the business arena.

But is it so hard to have a clear cutoff that people who are on the Federal payroll for the executive branch may not attend fundraisers on behalf of the President's re-election or similar activities for the party of the President?

Mr. PAINTER. I believe that works. The President and the Vice President of the United States may attend, and so may you. You are an elected Member of Congress.

Chairman ISSA. Trust me, if I don't come, I am not getting reelected.

Mr. PAINTER. Absolutely.

Chairman ISSA. But leaving aside the elected officials, would you say that, in changing the Hatch Act, one thing we should consider is a bright line that prohibits employees of the President effectively from attending fundraisers?

Mr. PAINTER. Absolutely, yes. I would agree with that.

Chairman ISSA. How should we define the difference between a postal worker who attends who simply happens to work indirectly for the executive branch and where the bright line should be under the Hatch Act?

Mr. PAINTER. That is a more difficult determination, but the political appointees often are either—some of them are Schedule C. Political appointees are easier to designate than the—you can designate the difference between a political appointee and a career civil servant. We do that throughout the United Sates Government. So that would be part of the drafting process for a statute, to designate those Federal employees who may not attend political fundraisers. But it essentially would be the politicals.

Chairman ISSA. Right.

My time has expired, but, Ms. Marrone, would you tell me how that would be if we made that sort of a change to the Hatch Act, a bright line at some level of either level of service or a political appointee? Would that make your enforcement clearer relative to that political activity most commonly called fundraising?

Ms. GALINDO-MARRONE. Currently, the rules, the law does permit all individuals covered by the Hatch Act to attend fundraisers. And, in fact, if the individual does not solicit but they are there as a guest speaker in attendance, as long as they don't personally solicit for the contributions, it is not prohibited.

In terms of drawing a distinction between the civil service and the political appointees, the Hatch Act regulations that are written by OPM indicate that political appointees may be further restricted.

Chairman ISSA. Thank you.

Okay. I think I will go to the ranking member, if you don't mind.

The ranking member is recognized for his questions.

Mr. CUMMINGS. Thank you very much.

I want to go back to a question that the chairman asked about the closure of the political office. My understanding is that White House counsel briefed the staff, both Republican and Democratic staff, on June the 10th, and this issue was specifically addressed. And the White House said that the office was closed and that the Web site was a legacy issue that needs to be fixed. And they need to do that. I would agree that it should not have something on a Web site that is not accurate or what have you.

OSC generally provides guidance on the Hatch Act issues through advisory opinions. In 2002, OSC issued an advisory opinion that permitted executive-branch employees some limited use of emails to engage in partisan political activities when it was similar to a social conversation around a watercooler.

Ms. Marrone—is it "Marrone?"

Ms. GALINDO-MARRONE. "Marrone."

Mr. CUMMINGS. Is that an accurate explanation of the 2002 guidance?

Ms. GALINDO-MARRONE. There was a lot of confusion surrounding the 2002 guidance. The 2002 guidance was an attempt to address what we saw in the 2000 election going forward, where Federal employees began to use their emails, their emails at work, to engage in political activity. In an attempt to address the issue, we put out this advisory opinion that, in explaining that email could not be used to engage in political activity, what was not prohibited still were watercooler-type conversations.

But it became known as the watercooler exception, and there has never been such an exception. When we look at what is prohibited, we look at the definition of political activity, and it is activity directed at the success or failure of a candidate for partisan office, political party, or partisan group.

So if the conversation, whether it be via email or in person, does not fall within that definition, then it is permissible. But if it is activity directed at the success or failure of a candidate or one of the other groups, then it would be prohibited.

Mr. CUMMINGS. So you are telling us that, in March 2007, OSC basically rescinded the 2002 advisory opinion. Is that an accurate statement?

Ms. GALINDO-MARRONE. We rescinded it because we felt that the Federal community found it confusing.

Mr. CUMMINGS. Uh-huh.

Now, that is not an insignificant difference, is it? In other words, this is saying that something is permissible for 5 years and then saying that the same actions were no longer permissible. Can you explain why OSC's guidance on this issue changed? Because I don't see that as being insignificant at all.

Ms. GALINDO-MARRONE. Sure. The position of the office is that the opinion—the guidance has never changed. The way it was being interpreted was the issue. Watercooler-type conversations have always been permissible, in that if the conversation, the communication is not directed at the success or failure of a candidate, then it is permissible.

And that has been the consistent position of the office. But some of the readers of the advisory opinion found it confusing. That is why we rescinded it, not because we were changing our position on the issue.

Mr. CUMMINGS. Now, do you still get inquiries about that issue, this watercooler email issue?

Ms. GALINDO-MARRONE. We receive a number of inquiries about political activity on duty, including the use of the email system.

Mr. CUMMINGS. Uh-huh. The reason why I ask that is we are hearing a lot of workers and employee groups sort of complain about the two conflicting opinions and continued confusion over what an employee can and cannot say, particularly in a casual email.

Do you think that you have provided the—do you think it deserves even more clarification? And do you see a very thin line?

Ms. GALINDO-MARRONE. We have——

Mr. CUMMINGS. So this is a case-by-case thing, isn't it?

Ms. GALINDO-MARRONE. It is. It is. And the devil is in the details. We, as I think I indicated in the opening statement, we issued over 4,000 advisory opinions last year. So there is certainly a need for us to do outreach and continue to provide guidance.

Sometimes these issues, there are shades of grey. So we have to look at the actual activity, the communication, in order to be able to assist and guide the employee in trying to figure out whether it is prohibited or not.

Mr. CUMMINGS. Let me ask you this. What are some of the challenges that email and social media pose for OSC and the agencies in terms of interpreting and enforcing the Hatch Act? With technology being what it is today and changing, you have one kind of technology this morning, and then it is outdated this afternoon.

Ms. GALINDO-MARRONE. Certainly. Well, we recently—and I have copies with me if anyone is interested—but we recently issued a pretty comprehensive advisory on social media, as issues started to come up within the last 12 months concerning the rapid use of it.

And some of the issues, for example, include what employees can or can't do with respect to posting on their Facebook page or in terms of posting tweets, including also issues about soliciting on their Facebook page; or what if a friend posts something onto their page that is a solicitation, are they responsible for removing that post or not?

In addition, we have received a number of issues in this area concerning the profile that many individuals have on their Facebook page, and the fields. And employees are confused as to whether they can populate the fields with their employment position.

Mr. CUMMINGS. Uh-huh.

I see my time is up. Thank you.

Chairman ISSA. I thank the gentleman.

We now recognize the gentleman from South Carolina, in his fresh seersucker suit, Mr. Gowdy.

Mr. GOWDY. It was the only suit that was clean, Mr. Chairman. Thank you.

Professor Painter, I wrote as quickly as I could while you were talking, and I ran out toward the end. You said 100 percent of government employee time should be spent on doing?

Mr. PAINTER. The business of the U.S. Government.

Mr. GOWDY. Does your opinion extend to what is called official time?

Mr. PAINTER. It extends to official time and to personal time. I do not believe that the political appointees in the government should be in their personal capacity——

Mr. GOWDY. When I say official time, I am talking about union-related activities on government time.

Mr. PAINTER. I have not considered union-related activities in my analysis here.

Mr. GOWDY. Well——

Mr. PAINTER. I would have to think about that, because that is a serious concern, the union-related political activities.

Mr. GOWDY. How long do you think it would take you to think about it? Because the analysis—I mean, you were pretty clear, a hundred percent of the time should be spent doing a hundred percent of the people's work.

Mr. PAINTER. Yes.

Mr. GOWDY. Does that include lobbying Congress and union-related activities?

Mr. PAINTER. On the official clock?

Mr. GOWDY. Yes.

Mr. PAINTER. Oh, during their official time, when they are actually supposed to be at work.

Mr. GOWDY. Well, that is what official time means, is that you don't have to do your day job; you can spend all your time on union-related activities.

Mr. PAINTER. I haven't looked carefully at that area. I don't like it. I mean, my initial reaction is, that shouldn't be going on.

Mr. GOWDY. Would you be gracious enough to take a look at it and let me know what your perspective is? Because you have obviously studied this issue more than I have.

Mr. PAINTER. Yes. The union-related work I have not looked at in detail, but I am concerned about that.

Mr. GOWDY. Good.

Mr. PAINTER. If, on the official time, there is lobbying going on that is focused on the political—I mean, the political activity that I am talking about here is campaigns. There is a separate set of issues that surrounds lobbying Congress and there is a separate set of rules that governs lobbying Congress——

Mr. GOWDY. Right.

Mr. PAINTER [continuing]. As opposed to political activity geared toward elections. So those are two sets of categories, and these unions are doing both.

Mr. GOWDY. I get that. I get that. If you would just look and maybe just, I don't know, write a paper on it or publish an article or something that——

Mr. PAINTER. Yes.

Mr. GOWDY. Put it where I can read it, though, so maybe in a newspaper, because I may not have access to your trade journals or something like that. I would be curious what your analysis is.

Mr. PAINTER. Thank you.

Mr. GOWDY. Ms. Marrone, let me ask you a couple questions. In South Carolina, sheriffs run in partisan elections. In other States, they do not, which creates the anomaly that in South Carolina, say, a current U.S. marshal, as I understand it, cannot run for sheriff, but in another State they could?

Ms. GALINDO-MARRONE. Under the Hatch Act, State and local employees that are covered by the Hatch Act—and it is not all State and local employees—but assuming they are covered because they have duties in connection with federally funded programs, there is an exemption for elected officials to run for partisan elective office.

Mr. GOWDY. No, no, no. I mean a current U.S. marshal, a current——

Ms. GALINDO-MARRONE. So Federal?

Mr. GOWDY [continuing]. A current DEA agent, a current Bureau agent. Can they run for sheriff in South Carolina because it is partisan? And do you see any anomaly in the fact that they can run in States where it is nonpartisan?

Ms. GALINDO-MARRONE. Currently, under the Hatch Act, if the election is partisan, they would be prohibited from running in such an election.

Mr. GOWDY. So, in South Carolina, a Federal prosecutor can run for State court judgeship because that is nonpartisan. But if they want to step across the North Carolina line, they cannot run for judgeship in North Carolina because it is partisan.

Ms. GALINDO-MARRONE. Yes, if they are covered by the Hatch Act.

Mr. GOWDY. What is the explanation for that? Because I am struggling with it.

Ms. GALINDO-MARRONE. I guess you would—I would say Congress, I think, would be in the best position to address that——

Mr. GOWDY. So you would agree that it doesn't make any sense.

Ms. GALINDO-MARRONE. I don't have an opinion on that.

Mr. GOWDY. Sure you do. Everybody has an opinion on it.

Ms. GALINDO-MARRONE. We are responsible for enforcing the law. And, currently, the law does make those distinctions——

Mr. GOWDY. Can a Federal prosecutor attend a political fundraiser?

Ms. GALINDO-MARRONE. Yes.

Mr. GOWDY. Can a Federal prosecutor be on the host committee?

Ms. GALINDO-MARRONE. No.

Mr. GOWDY. Can a Federal prosecutor speak at that fundraiser?

Ms. GALINDO-MARRONE. Are we talking about a U.S. attorney or——

Mr. GOWDY. An assistant U.S. attorney.

Ms. GALINDO-MARRONE. An assistant United Sates attorney. They would be able to speak at the fundraiser as long as they are not soliciting for political contributions.

Mr. GOWDY. They can contribute.

Ms. GALINDO-MARRONE. They can contribute.

Mr. GOWDY. They can't solicit. Can they ask for help? If they are introducing their U.S. Senator, can they say, we would like you to help Senator Issa or Senator Cummings?

Ms. GALINDO-MARRONE. They could solicit for votes——

Mr. GOWDY. But not for money.

Ms. GALINDO-MARRONE [continuing]. But not for money.

Mr. CONNOLLY. Run, Darrell, run.

Mr. GOWDY. Wow. Thank you.

Chairman ISSA. But they can be contributors, so they can be on the host list, because they gave a certain amount and they are put on that list. Or do they fall prey to someone who printed something?

Ms. GALINDO-MARRONE. That has happened from time to time, that they have made a contribution and they appear on the host committee, and now they appear to be soliciting.

Chairman ISSA. Thank you for making the case for intervention by Congress.

The gentlelady from the District of Columbia.

Ms. NORTON. I appreciate this hearing, Mr. Chairman, as we approach another election.

I must say, the line-drawing in the White House I find particularly difficult. But there are millions of—what is it, almost 3 million—Federal employees who also come under the Hatch Act. They are probably more political than most; they are highly educated people. And they are very law-abiding people.

I just hope—you know, when we lawyers get a hold of something, we tend to really make it confusing. For example, I am a member of the Congressional Black Caucus. It has an event every single year. We have had to have two briefings—this is our own ethics that the chairman spoke of—we have had to have two briefings. And the kind of thing that I think gets people stumbled, for example, is we learned that you could go to an event if there was finger food and you could sponsor an event if there was finger food, but if it was a hotdog, that was a meal and you couldn't eat that. Do you see how this trivializes—that is what they said with a straight face.

When I think of with Federal employees who are held to Hatch Act standards, I am concerned that the law may make a mockery of itself. Because the Hatch Act says that there is only one penalty, as I understand it, for violation of the Hatch Act for a Federal employee, and that is removal. Pretty nuclear. Is that true?

Ms. GALINDO-MARRONE. Well, the penalty provision for Federal employees is different than it is for State and local employees. For State and local employees, the only penalty is removal. For Federal employees, the presumptive penalty is removal, but if by a unanimous vote of the MeritSystems Protection Board there is found to be mitigating factors, then the penalty can be something less than removal.

Ms. NORTON. Why was that chosen instead of the kinds of penalties we find in American law generally? Why not have penalties that put an employee on notice, if you do these kinds of things, you will get this kind of thing? The whole point of the law is the deterrent effect.

Does the Merit Systems Protection Board often unanimously mitigate the penalty?

Ms. GALINDO-MARRONE. I would say, just in my experience from the last year, of the cases that I mentioned in my opening statement, one was mitigated from removal to 120 days suspension, but the other cases were removals.

Ms. NORTON. How many removals?

Ms. GALINDO-MARRONE. To give you an accurate answer, I would have to get back to you with that.

Ms. NORTON. I would ask that you send that information to the chairman and the ranking member and that they share it with us.

What is the argument against a graduated penalty?

Ms. GALINDO-MARRONE. OSC, at this time, doesn't have an opinion as to whether that would be a good or a bad thing.

Anecdotally, I can share that, from time to time, agencies seem reluctant to refer Hatch Act complaints to our office for concern that, if it is a case where the office, after investigating, finds that it warrants a prosecution, that they might lose a good employee.

Ms. NORTON. So, since the only penalty is removal, far from a deterrent effect, the nature of the penalty is such, I take it, that is so disproportionate, as it were, to the crime, that perhaps many violations do, in fact, not get referred, and therefore the violations, perhaps, are encouraged to continue.

Ms. GALINDO-MARRONE. Well, certainly, if Congress wants to consider making revision, that is something that OSC would be willing and eager to assist with.

Ms. NORTON. You know, Mr. Chairman, this is a very old law, and I can understand how when there was no experience with it—now that we have almost 3 million employees, it does seem to me that fair notice is a part of due process. And fair notice says, this is how serious we take certain aspects of this violation to be. Federal employees—I am not sure about the White House—but Federal employees, it seems to me, would be very alert to try to abide by the Hatch Act if that was the case.

Chairman ISSA. Would the gentlelady yield?

Ms. NORTON. Yes, sir, Mr. Chairman.

Chairman ISSA. I couldn't agree with you more, that—I have checked, and none of our staff was working here when this law was passed. So, clearly, whoever misinformed us so clearly on writing the law is no longer——

Ms. NORTON. It was 1939, Mr. Chairman.

Chairman ISSA. Exactly. Well, I have some old staff on my side. But you are absolutely right. That is the reason we are holding this hearing, in hopes that we can find this and other problems, working with the special counsel, so that, in fact, we can draft changes that make sense for the entire Federal work force.

I yield back.

Ms. NORTON. Thank you, Mr. Chairman.

Chairman ISSA. We now recognize the gentleman from Michigan, Mr. Walberg, for his line of questioning.

Mr. WALBERG. Thank you, Mr. Chairman.

And thank you to the panel for being here.

And I guess, for full disclosure, I take a position right now that I am not sure that government is capable of putting together a

campaign or political activity act that will ever work totally. But we have what we have, and we have to deal with it.

So let me—I have some questions, just in general, for the whole panel. But, specifically, just to make sure that there is understanding on my part—I will ask Ms. Marrone first—what are the civil and criminal penalties for violating the Hatch Act?

Ms. GALINDO-MARRONE. There are no criminal penalties. The civil penalties for State and local is removal from employment. With respect to Federal employees, it is a range, from a 30-day suspension, no less than a 30-day suspension, to removal. But, again, the presumptive penalty so the starting point is removal for Federal employees.

Mr. WALBERG. No criminal penalties?

Ms. GALINDO-MARRONE. No criminal penalties.

Mr. WALBERG. Any good reason why not——

Ms. GALINDO-MARRONE. Not that I am——

Mr. WALBERG [continuing]. That you have been able to determine?

Ms. GALINDO-MARRONE [continuing]. Aware of.

Mr. WALBERG. Okay.

For the whole panel—and feel free to jump in, as you care to answer—but do you have any issues with the fact that political activity is not defined under the actual Hatch Act statute but is allowed to be defined by regulation?

Professor Painter.

Mr. PAINTER. Well, it has to be defined much more clearly, either through statute or through clear regulation.

To say that anything that might improve the electoral chances of the President or the President's political party is political activity is excessively broad. The President and his administration are going to want to do what they need to do to get re-elected and to get Members of their party re-elected. So that definition doesn't work.

And we need a definition that is clear, that focuses on the actual campaigns—the activities of political campaigns, fundraising and other activities. And, in my view, we ought to have a rule that then prohibits the political appointees, not the career appointees but the political appointees, from engaging in any of that conduct.

Mr. WALBERG. Mr. Coffina.

Mr. COFFINA. I generally agree with Professor Painter on that. I think that the definition, as it is written in the regs, of political activity would actually serve fairly well if it was the definition of partisan political activity.

But as for political activity generally, because, as Professor Painter explained, policy and politics intertwine so frequently, I think it is very difficult sometimes to draw the line based on that, and you start to get into subjective distinctions that do not provide employees with fair notice of what the law is.

Mr. WALBERG. Ms. Marrone.

Ms. GALINDO-MARRONE. The definition of political activity is broad, but it is meant to only address partisan activity. But, again, it is through working through the regs and looking at other definitions that you arrive at that understanding.

But, certainly, at a minimum, updating the regs with more current examples that really address the reality that we see today in the workplace would be very helpful.

Mr. WALBERG. Regarding the executive political activity more generally, what is the distinction between political activity and partisan activity?

Ms. Marrone? I will start that direction and come back this way.

Ms. GALINDO-MARRONE. Sure.

I would argue that it is the same, because the definition of political activity ties through to the success or failure of a political party, candidate for partisan political office, or partisan political group. So when you parse out all the different components, it is always directed at partisan activity.

So, for example, if you had an employee that was engaged in activity in the office that was directed at a nonpartisan candidate, the Hatch Act would not prohibit that activity, even though they are both elections——

Mr. WALBERG. So, in reality, it is all partisan?

Ms. GALINDO-MARRONE. It is partisan.

Mr. WALBERG. Mr. Coffina.

Mr. COFFINA. Congressman Walberg, I believe you have touched upon, you know, the primary concern that you have with the vagueness of the definition.

And to sort of use an example, you can look at the Blue Room meeting that I referred to in my statement that took place at the White House, where the President hosted donors. One can look at that as political activity if you look at the circumstances and note that the Democratic National Committee coordinated that event and issued the invitations for it. But, at the same time, the description of the event as it occurred, it seems to have been on policy matters where the President was soliciting advice about the economy.

Mr. WALBERG. But the reality, again, is it is partisan, wouldn't you say?

Mr. COFFINA. Well, I think it had partisans in it. I think probably the intent of it was partisan. But that is where you get into this very fine line that is difficult to draw. It looks like the content was official, but, certainly, the population of attendees and probably the purpose of it was partisan and political.

Mr. WALBERG. Okay.

Mr. PAINTER. President Roosevelt or one of his assistants in the White House once said, spend and spend and spend and elect and elect and elect. I mean, the objective, of course, of any administration is to do that which will lead to the political success of the President and his political party. I just don't see that a definition that focuses on that objective is a narrow enough definition of political activity to work.

When we have almost a trillion dollars of stimulus money being spent, of course it is spent with a hope of political success. It may not work, but that is a different issue.

You know, I think we need a much narrower, more specific definition of partisan political activity that focuses on the activities of the campaign. And that is what the Hatch Act is directed at, not

at everything else that goes on in government that might lead to success.

Mr. WALBERG. Thank you.

Chairman ISSA. I thank the gentleman.

The gentleman from Virginia, Mr. Connolly.

Mr. CONNOLLY. Thank you, Mr. Chairman.

And welcome, to the panel.

Mr. Coffina, you worked in the Bush White House.

Mr. COFFINA. I did, Congressman.

Mr. CONNOLLY. And you indicated that you were in agreement with Professor Painter about certain aspects of the definition of what constitutes a political activity and trying to constrain them?

Mr. COFFINA. Yes.

Mr. CONNOLLY. In the Bush White House, is it not true that the Office of the Special Counsel found blatant examples of violation of the Hatch Act being conducted by the Office of Political Affairs—for example, political briefings to GSA and other Federal agencies highlighting vulnerable Members of their parties, Members of Congress, at the time, throughout the 2006 campaign season, in order to basically highlight the vulnerability and a strategy to help? Were you aware of that?

Mr. COFFINA. Well, Congressman, I was not in the White House during the time of those briefings, so I am a little bit hamstrung to comment on how they were executed. Because, to me, the important part of those briefings is not simply that they took place but how they took place.

Mr. CONNOLLY. But you are aware of the fact that OSC, in fact, did a report on these and cited them as violations of the Hatch Act?

Mr. COFFINA. Oh, of course I am aware of that, yes.

Mr. CONNOLLY. Okay. And, presumably, the action of the Obama White House to abolish that office in part grew out of the controversy surrounding that activity. Is that not correct?

Mr. COFFINA. Well, I think there have been controversies surrounding the Office of Political Affairs and its existence going back to when it was formed under President Reagan. So I can't speak to why the Obama administration made that decision. I know President Obama, when he was candidate Obama, spoke about abolishing it right away, and he ultimately made the decision 2 years later. But I am not privy to why he made the decision or why he did it then.

Mr. CONNOLLY. Professor Painter, I thought I saw you shaking your head.

Mr. PAINTER. Well, I think it ought to be abolished. I think the President did the right thing, abolishing it. I wish he had done that 2 years earlier. I don't think the arrangement works, to have an Office of Political Affairs.

But he needs to not just abolish the Office of Political Affairs but shut down partisan political activity in the White House, period. It doesn't help just to shut down the office and then have people lingering back in the White House who are doing the same type of stuff in a different office.

Mr. CONNOLLY. Okay. Thank you.

Ms. Galindo-Marrone, one of the strange aspects of—I mean, whenever you regulate, you are going to get, sadly, sometimes, into

the weeds. But one of the weeds involves photographs with the President of the United States. And there are actually restrictions on which photographs can be used and when. Is that correct?

Ms. GALINDO-MARRONE. Yes.

Mr. CONNOLLY. So, for example, if the President is up for re-election—although presumably every President in his first term is up for re-election, but all right—the year of the re-election, and Sally Q just happens to be at the USDA in the atrium, and there is the President, and someone takes her picture with the President, and proudly she puts it up in her cubicle because she is with the President.

That is actually a violation of the Hatch Act in a re-election year?

Ms. GALINDO-MARRONE. If the President is already a candidate, depending on the picture, it may or may not be a violation.

Mr. CONNOLLY. Depending on the picture?

Ms. GALINDO-MARRONE. That is correct. According to the regs, Federal employees may not display pictures of candidates in their offices or in Federal buildings.

So a unique situation occurs each time we have a President running for re-election because the incumbent still continues to be the head of the executive; at the same time, the incumbent is now a candidate. So we try to strike a balance by saying that official photographs can continue to be displayed, but if it is not an official photograph, it should not be displayed.

And even as to official photographs, just to highlight sometimes the issues, we have had individuals in the past that have painted horns or halos on pictures or placed the pictures upside-down in order to demonstrate their support or opposition for a candidate. So even as to the official photograph, we indicate that they should be displayed in a traditional size and manner.

Mr. CONNOLLY. Do you think most members of the work force are aware of that?

Ms. GALINDO-MARRONE. I am sorry?

Mr. CONNOLLY. Is that a regulation or a guidance that——

Ms. GALINDO-MARRONE. That is a guidance we——

Mr. CONNOLLY. No, no. Is it widely known within the Federal work force?

Ms. GALINDO-MARRONE. Well, I would like to think so. Every time I go out and I do outreach for the last 8, 9 years, I have been talking about the guidance. It is published on our Web site. But it is a big Federal Government work force, and we are a small agency.

Mr. CONNOLLY. Well, Mr. Chairman, my time is up, and I thank you. But I have to say, I think we do need a Hatch Act to set the rules of engagement, but when you actually prohibit somebody from a personal photograph with the President because it is a re-election year, to me, that crosses the line.

Chairman ISSA. Would the gentleman yield?

Mr. CONNOLLY. Yes, absolutely.

Chairman ISSA. You know, I have an old friend down in Alabama, and he says, you know, that is as clear as mud. And I think the gentleman did a good job of pointing that out.

Mr. CONNOLLY. Thank you, Mr. Chairman.

[The prepared statement of Hon. Gerald E. Connolly follows:]

Statement of Congressman Gerald E. Connolly
Committee on Oversight and Government Reform
June 21, 2011

According to the Office of Special Counsel (OSC), blatant violations of the Hatch Act occurred during the Bush Administration. Among the most egregious examples were briefings conducted by White House Office of Political Affairs staff to GSA and other agencies, which were designed to assist vulnerable members of Congress leading up to the 2006 elections. I would ask unanimous consent that the OSC report on violations of the Hatch Act during the 2006 elections be submitted for the record.[1]

Following issuance of the OSC report on these violations, the Obama Administration shut down the Office of Political Affairs. This reform provided an additional buffer between governing and politics. As Professor Painter noted in his written testimony, this is a commendable reform which could curtail political activity in the White House. While it would be impossible and undesirable to separate White House staff from politics completely, this kind of correction was necessary following Bush-era abuses.

Some have suggested that additional legislative reforms would strengthen the Hatch Act. Perhaps it would be instructive to observe and learn from the Obama Administration's restructuring of political staff to see if additional legislation is necessary following the elimination of the Office of Political Affairs. If additional legislation is necessary, it should preserve any Administration's ability to operate nimbly while prohibiting clearly political activity like briefing agency heads on how to help vulnerable members of Congress. Given resource constraints on the legislative and executive branches, it is important to preserve their ability to govern while preserving separation between administrative and political functions. Finally, any Hatch Act amendments should address the lack of flexibility in penalties for violations, which currently are limited to dismissal. Such a punishment may not make sense for a single violation of the Hatch Act by a federal employee.

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[1] http://www.osc.gov/documents/hatchact/STF%20Report%20Final.pdf

Chairman ISSA. The gentlelady from New York, Ms. Buerkle.

Ms. BUERKLE. Thank you, Mr. Chairman. And thank you for calling this hearing today on a very important topic.

I just want to follow up with something my colleague, Mr. Connolly, brought up, and that is the OSC findings and the report that was done. And I will address this question to Ms. Galindo-Marrone.

In that—and we have heard testimony today that, really, it just wasn't the Bush administration; this is a systemic problem that we see. But the OSC report only focused on George W. Bush's presidency. Can you explain why the scope was so narrow?

Ms. GALINDO-MARRONE. We investigated the Bush administration, because those were the allegations that we were investigating. However, we took note in the report that it seems that this is a problem that has occurred in previous administrations, so that this was not a unique circumstance to the Bush administration, but we were investigating the case we had before us.

Ms. BUERKLE. But the concern would be that we singled out George Bush's presidency rather than looking at the whole scope of where the problems might be.

Also, that report, the timeframe was 2009–2010. It was released in 2011?

Ms. GALINDO-MARRONE. It was released in 2011.

Ms. BUERKLE. And so it investigated—it looked back at 2006. That seems like a long time for that report. It seems like it took a long time for that report to get done.

Why wasn't President Obama—I mean, that was 2 years of his presidency. Why wasn't he included in any of that report?

Ms. GALINDO-MARRONE. The investigation and the allegations arose in 2007. So the majority of the evidence, as we gathered the evidence, centered around the 2006 activities. We typically do not—that I am aware of, we have never combined. I mean, we investigate the case we have before us, and we don't look to another administration in terms of first completing the investigation that we have before us.

Ms. BUERKLE. I want to move on to my next question, but just if you could, do you know who waged or who made the allegation and made the complaint?

Ms. GALINDO-MARRONE. Well, it arose from a complaint that was filed concerning activities at the General Services Administration. So we first received a complaint concerning a political briefing that occurred at GSA. And then, while we were investigating that one case, we learned of additional briefings that had occurred throughout 22 Federal agencies, so we opened a separate case.

Ms. BUERKLE. Thank you.

Mr. Coffina, I don't know if you would like to comment on that. Quickly, if you could, so I can get to my next question.

Mr. COFFINA. On what, Congresswoman?

Ms. BUERKLE. On the OSC study. It seemed like you wanted to say something or had a comment to make.

Mr. COFFINA. Well, you know, I think that they did acknowledge, I think, in one sentence that there was some historical fact of these events that they called out in their report as having occurred in

prior administrations. In fact, you know, the history of political briefings goes back, I believe, as far as President Reagan.

The Political Affairs Office has had a fair amount of continuity, in terms of through both Democratic and Republican administrations, in terms of the types of things that they have done. And I think that with that type of historical precedent, without any enforcement action by the Office of Special Counsel, I think it is, you know, especially unfortunate that members of the Bush administration, specifically hardworking, more junior members of the administration, were sort of labeled as law-breakers, when they, I believe, in complete good faith that what they were doing was within the law, simply followed the practices that their predecessors of both parties have done.

Ms. BUERKLE. Thank you.

My next question is really for all three of you, and I am not sure we will get to hear from all three of you, so let's start with Professor Painter.

What are the restrictions on the meetings such as that was held at the White House and organized by the DNC?

Mr. PAINTER. I do not know all of the facts about that meeting, and I am hearing conflicting views as to whether it was political or official.

If it is an official-capacity meeting in which official policy is being discussed by White House staff members acting in their official capacity, the DNC should not be organizing the meeting. The White House should be organizing the meeting. If the DNC is setting up the meeting, that is a political meeting. In a political meeting, the White House staff who participate in that meeting are doing so in a personal capacity without use of official title, in a personal capacity, and they are talking about political campaigns or whatever they want to talk about, other than asking people for money—that is the one thing they cannot do, is solicit contributions.

I would never have agreed to having such a meeting going on in the White House itself, in any room of the White House. I know there is controversy about that, but I would not want to see those meetings, quite frankly, going on on Federal property. What the legal restrictions are is somewhat more ambiguous.

Ms. BUERKLE. It seems to me, with the DNC sending out the invitations and organizing it, it smacks the partisan, political, what we are talking about here, that really shouldn't be allowed.

I see I am out of time. I yield back. Thank you, Mr. Chairman.

Chairman ISSA. Thank you.

I apologize that so many Members were unable to get into a previous—or into this hearing because it is not yet the voting time. But I have been asked, would each of you agree to accept, if you will, friendly interrogatories, a series of questions that you may answer in a reasonable period of time, so that Members who were not here could ask questions after they have looked at the record?

Ms. GALINDO-MARRONE. Certainly.

Mr. COFFINA. Yes.

Mr. PAINTER. Absolutely.

Chairman ISSA. Okay. So our normal policy is to hold the record open only for 5 days. In this case, we are going to hold this record

open for 30 days so they can ask questions, and we will extend it even further if you need more time to answer.

[The information referred to follows:]

[NOTE.—The information referred to was not provided to the committee.]

Chairman ISSA. Let me just ask one closing question. Do you all agree that, whatever we do with the Hatch Act, we must have a carveout for the security of Cabinet officers, particularly the President and Vice President—in other words, some accommodation within the Hatch Act to recognize that the locations in which the President may have meetings with supporters and the like has to be consistent with some form of security for himself and other key members that may in the future Hatch Act be allowed to participate?

That is really—I am hoping it is a softball question, but it is one that I am deeply concerned that we not create a situation in which we put certain officials in a position where, in order to have the kind of meetings they need to, they find themselves in facilities inappropriate, recognizing the White House is the most appropriate place, usually, for the President.

Mr. Painter, yes, sir?

Mr. PAINTER. Yes. I would—my view of that, it ought to be only the President and the Vice President who engage in partisan political activity. But if other officials are allowed to do so, we have to provide security, and who pays for the security is not the point.

Chairman ISSA. Okay.

We have had one other Member arrive for a first round. We recognize the gentlelady from New York, Ms. Maloney, for 5 minutes.

Mrs. MALONEY. Well, I just want to thank you and the ranking member for holding this hearing. And I am going to put my questions in writing, in the interest of other meetings we have to get to. Thank you.

Chairman ISSA. Thank you.

And since we previously agreed to answer an interrogatory style set of questions, I want to thank you once again for your patience and your participation.

And this hearing is adjourned.

[Whereupon, at 4:15 p.m., the committee was adjourned.]

[Additional information submitted for the hearing record follows:]

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July 22, 2011

The Honorable Darrell E. Issa
Chairman
House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Dear Chairman Issa:

I am pleased to provide the following responses to questions posed by the Committee in connection with its June 21, 2011 hearing entitled "The Hatch Act: The Challenges of Separating Politics from Policy."

1. Please provide your reviews regarding the basic problems with enforcement of the current Hatch Act statutory framework.

Response: There are a number of enforcement problems with the Hatch Act as it is currently structured, but I think Congresswoman Holmes Norton touched upon the most significant one, that being the penalty provision. The presumptive penalty for a Hatch Act violation is termination from government employment, and an employee found to have violated the Hatch Act has to negotiate or litigate with the Office of Special Counsel in order to get a lesser sanction, the statutory minimum being a 30-day suspension without pay. These sanctions are imposed without regard to an employee's intent or good faith misunderstanding of the law. There is no warning provision nor any graduated sanctions.

The presumptive "career death penalty" for even minor infractions of the Hatch Act presents a major enforcement challenge. First, there is a sense of unfairness that someone can lose their government job merely because he or she displays a picture of the president that is "unofficial" or merely exceeds standard size. Even for more substantial but unintentional violations, a warning or a more moderate sanction would seemingly be more appropriate than termination, while still vindicating the essential purpose of the law, which is to provide a workplace free of political pressure.

Second, the severe penalty likely has a chilling effect on federal employees' participation in lawful after-hours political activities, so that they avoid any hint of a Hatch Act violation. The restrictions of the Hatch Act necessarily infringe upon the First Amendment rights of federal and many state employees. Recognizing that such restrictions should be as narrowly drawn as

possible, Congress amended the Hatch Act in 1993 to liberalize the off-duty political activities of federal employees. Unfortunately, because some areas of the law remain unclear, enforcement has been inconsistent, and the sanctions are so severe, many employees self-censor their after-hours political activity, to the detriment of the exercise of their own First Amendment rights, and to the political process as a whole.

More practically, because the penalty is so severe, managers understandably are reluctant to report Hatch Act violations, and OSC might even be reluctant to pursue cases where the sanction is so disproportionate to the conduct. The inclusion of more graduated sanctions into the statutory framework could result in more predictable enforcement that will help clarify and reinforce the law.

Another challenge with enforcement of the Hatch Act has been inconsistent enforcement by OSC. Within the past two months, OSC has determined that the District Attorney in Montgomery County, Pennsylvania, violated the Hatch Act when she ran for her office in 2007, because she was employed at the time as the First Assistant District Attorney, and the office received federal grant money. However, this District Attorney's two immediate predecessors also ran for the top post while serving in the office, and OSC made no such finding that they had violated the Hatch Act. Moreover, OSC expressly permitted an employee of that same District Attorney's Office to run for judge while remaining on the job in 2008. Notwithstanding OSC's finding about the Montgomery County District Attorney's election in 2007, OSC exercised its discretion – the source of which is unclear from the statute and regulations – not to pursue sanctions against her. At the same time, however, OSC is seeking sanctions against a South Carolina Department of Transportation worker who held on to his job while running for his county council.

OSC's different approach to these similar situations represents just one example of inconsistent enforcement activity by OSC. Another example was raised by Congresswoman Buerkle at the hearing, specifically OSC's extensive investigation of political activity by the Bush Administration in the 2006 election cycle, and its failure to look into whether the Obama Administration – which is currently subject to OSC's jurisdiction – engaged in the same political activities and how they were carried out. For OSC not to have looked at the political activities of the current administration, particularly under the novel standards it applied to the conduct of the Bush Administration, represents a glaring example of inconsistent enforcement of the Hatch Act. The Bush Administration is history; OSC overlooked the administration whose political activities it still could affect.

A third enforcement problem under the current Hatch Act, also raised at the hearing, are seemingly arbitrary lines drawn between what is permitted political activity and what is not. For example, a government employee may remain in their position while running for judge in a nonpartisan election, as some states conduct, but must resign if running in a partisan election, as held in other states. Thus, whether an employee can hold on to her job while campaigning in an election depends arbitrarily upon which state she resides in and how its elections are structured. However, the same problems that the Hatch Act aims to address – preventing coerced political activity, using one's position to leverage campaign contributions, etc. – would seem to be present regardless of whether the employee is a candidate in a partisan election or a nonpartisan election.

On a related point, given the wide range of permissible conduct in which federal officials may engage in connection with political fundraising activities, the prohibition on the use of their official titles in an invitation or in their introduction at the event itself seems to be an arbitrary and ineffectual line drawn by the Hatch Act and its regulations. The title of a federal official with sufficient notoriety to be the featured guest and "draw" at a political fundraiser will already be known to people a campaign seeks to invite to the event, and the reality is, title or not, it is because of the "special guest's" official position that some contributors will choose to attend. It thus is a legal fiction that the federal official is not using his official title to influence the outcome of an election if he is introduced as "The Honorable" or "Special Guest," rather than as the "Deputy Secretary." The Committee ought to consider whether the law should curtail the participation in political fundraising activities by federal officials, or, alternatively, whether it should allow the use of official titles, which inevitably are associated with any federal official who is a desirable fundraising speaker.

The advances of technology have created still more examples of Hatch Act enforcement challenges. The proliferation of personal email devices creates a real obstacle to enforcing the rule that federal employees may not participate in political activity in the workplace. The ease with which employees can dash off a partisan political email from their own personal accounts (not using government resources) makes the time of going outside to do so seem wasteful, and the likelihood of detection quite minimal. Moreover, the use of email, Twitter, Facebook and other social media represent new avenues for political communications where an employee's "public servant" and private citizen personae can overlap, creating additional Hatch Act enforcement challenges. The MSPB, in cooperation with OSC and under the oversight of this Committee, ought to develop new, clear regulations to guide employees' use of these newer communication outlets.

Finally, OSC's use of inapplicable and highly subjective standards in its evaluation of the conduct of the Bush Administration creates a significant enforcement challenge. As I discussed in my written and oral testimony, the use of the Leave Act to conclude that lower-level White

House employees may not engage in political activity while on-duty means that the president cannot rely upon his own staff for logistical support for his own permitted political activity, or, as a minimum, must rely upon higher-level White House employees whose time should be spent on other things. Moreover, OSC's examination of the motivation behind, rather than the execution of, official and "mixed" activities during campaign season makes the evaluation of whether such events comply with the Hatch Act entirely subjective and thus unpredictable. Without objective standards, the enforcement of any law is exceedingly difficult. The Committee ought to continue to press OSC to explain and clarify the standards it applied in the investigation of the Bush Administration, so the current and future administrations have clear guidance on the parameters of the law.

2. What specific structural changes to any aspect of the Hatch Act do you recommend?

Response: Please see my Response to Question 1 for several recommendations, such as the addition of warnings and graduated sanctions (when appropriate) to the Hatch Act's penalty provisions.

I would also recommend making explicit that employees of the Executive Office of the President, at any level, may participate in "political activity" while on duty if done in support of the President's or Vice President's political activities. This clarification would be consistent with the relaxed restrictions for the EOP that exist today, in recognition of the President's and Vice President's explicit exemption from the Hatch Act and their need for extensive staff support. It also would prevent lower level White House employees from getting embroiled in enforcement actions that threaten their jobs, which OSC has invited by the standards it used in its report on the Bush Administration.

Finally, as suggested above, the Committee might consider extending the prohibition on government employees running for office in a partisan election to nonpartisan elections, since the temptations of improper influence and the use of one's official position to advance a political campaign are not, as a practical matter, limited to partisan elections. Moreover, many "nonpartisan" elections are nonpartisan in name only, and it is widely known with which party the respective candidates are affiliated.

3. Are there additional recent activities or events within the Executive Branch that remain a source of concern for you?

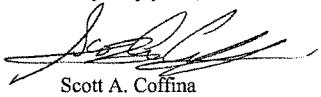
Response: My primary concern about the Executive Branch is to understand how political matters are being handled at the White House in the aftermath of the president closing the Office of Political Affairs. We are entering a re-election campaign season where Hatch Act

and related issues will constantly arise, and the White House should explain what steps it has taken to ensure compliance within the White House and throughout the Executive Branch. For one thing, it is important to understand how the White House has considered and applied the standards utilized by OSC in its Bush Administration report to govern its political activities. A related area of concern would be getting assurance that the White House has taken appropriate steps to preserve records in the possession of the re-election committee in Chicago that might relate to official business and thus be subject to the Presidential Records Act.

Finally, I am concerned at the reported level of activity between the president's re-election committee and the White House aimed at advancing the president's re-election campaign. One example is the dubious White House explanation of the DNC-sponsored donor meeting with the president in the Blue Room of the White House this past March, specifically, the apparent inconsistency between the White House press secretary's explanation that the president was seeking advice on the economy and job creation from supporters, and the Democratic sponsorship of that event, which did not appear on the president's schedule for that day. I am equally concerned about the memo from the president's campaign staff discussed on *the Huffington Post* web site on June 13, 2011, which advised the Administration to solicit substantive input from 2008 supporters for the sole purpose of making those supporters feel like they have sufficient access. Obviously, the Administration can and should solicit helpful advice from anyone who can provide it. However, our country simply faces too many problems for the Administration to generate "official" meetings with the president's supporters simply to motivate them for his re-election campaign, as suggested by the campaign memo. In a similar vein, it is very troubling that the re-election committee has considered enlisting the White House chef in a food-tasting fundraising event. Between that and the unseemly raffling off of "Dinner with Barak and Joe" to campaign contributors, the Committee ought to explore whether the White House is maintaining the Hatch Act's bright line prohibition against using official resources for political purposes.

Thank you very much for the opportunity to participate in the Committee's hearing, and to express my views on the Hatch Act. If I can ever be of service to you again, please don't hesitate to call upon me.

Very truly yours,



Scott A. Coffina

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Responses to Questions for Richard W. Painter

From the Chairman

House Committee on Oversight and Government Reform

Hearing on "The Hatch Act: The Challenges of Separating Politics from Policy"

July 22, 2011

Question 1: Please provide your views regarding the basic problems with enforcement of the current Hatch Act statutory framework.

Hatch Act enforcement focuses too much on technicalities such as which email account was used for a political communication, whether a Member of Congress requested executive branch official action through his political office or official office, the time of day a political briefing is held at a government agency, whether a government employee takes leave and gets vacation under the Leave Act (for purposes of determining whether a "24/7" Hatch Act exception allows the employee to engage in political activity in government buildings during normal working hours); the manner in which a photograph of the President is displayed in a government office, and many other distinctions that have little to do with potential harm to the public interest from partisan political activity by government employees.

Hatch Act enforcement also focuses too much on who pays for what. The recent OSC Report on the 2006 election cycle, for example, recounts many instances in which campaign reimbursement of government agencies for political travel fell short by a few hundred dollars. These instances of underpayment may have been technical violations of the Hatch Act, but this should not be the principal concern of the Hatch Act. As pointed out in my response to Question 2 below, the political travel by senior government officials is deeply problematic regardless of who pays for it. To the extent political travel and other political activity influence official decisions, taxpayers are at risk of losing billions of dollars to government waste and ineffectiveness. Distancing executive branch decisions makers -- other than the President and Vice President who run for elected office -- from political campaigns and campaign contributors seeking to influence official decisions should be the objective of the Hatch Act. Who pays for what portion of a trip costing a few hundred or even a few thousand dollars is a secondary concern.

The absurd technicalities in Hatch Act enforcement are highlighted by recent controversy over a Democratic National Committee (DNC) orchestrated meeting with Wall Street executives in the White House Blue Room this past March. The White House and the DNC argued that the Blue Room meeting was permissible because the Blue Room is a part of the White House where such meetings can take place and because the DNC reimbursed the White House $68 for the cost of the meeting (coffee and juice from the White House Mess?). This is perhaps technically correct, or perhaps not, but that should not be the point. The DNC should not be permitted to set up any

meeting between senior White House officials and major DNC donors from the financial services industry, particularly if government policy toward the industry will likely be discussed. The quid pro quo is obvious. Financial services executives have had disproportionate access to high ranking government officials for a long time, and for at least the past twenty years the government has pursued a controversial approach to regulating – and deregulating – financial services. Donor access to White House officials is the problem – not where the meeting took place or who paid for the coffee – and the Hatch Act should address that problem.

Another controversy has arisen over a campaign video apparently filmed by the President in the Map Room. This video was targeted at smaller donors who ordinarily do not get anything for their donation but a chance to support a candidate they believe in. This time the small donors enter a raffle in which the winner gets to have dinner with the President – the type of meeting that large donors get for the asking. The President's critics, including the Chairman of the Republican National Committee, now claim that the video was "criminal" because it was filmed in the Map Room (whereas it presumably would have been legal if filmed in the President's upstairs living quarters). All of this, however, should be beside the point. The video and the raffle reach out to donors who have little or no chance of influencing policy with their donations; their threat to the separation of politics from policy – the concern of this Hearing – is minimal. Whereas the Blue Room meeting with Wall Street donors is highly problematic regardless of who paid for the coffee, the campaign video and raffle are far less problematic regardless of where the video was filmed.

Question 2: What specific structural changes to any aspect of the Hatch Act do you recommend?

There needs to be a more precise and narrower definition of prohibited political activity. Political activity has been defined in the Office of Personnel Management's Regulations 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. This definition is overbroad

Much of what government does elicits some response from voters and thereby influences the results of partisan elections. The resolution of the current budget talks is one example; so is a decision to build a bridge in a particular congressional district or to close a military base in another. Nobody would say that these actions – regardless of the political motives -- violate the Hatch Act, even though they all arguably come within the above definition of political activity.

It thus makes little sense to parse out various components of politically motivated actions such as the substantive decision to build a bridge in a congressman's district and the timing of the announcement of the substantive decision or a formal ceremony marking the beginning or end of its implementation. Indeed it is the substantive decision itself that has the greatest impact on the public (here the taxpayers) not when or how it is announced or commemorated. It also makes little difference whether a congressman went through the charade of requesting through his

official office rather than his political office the ceremonial role for an executive branch official such as the Secretary of Transportation. We know why the congressman wants the bridge, and why he wants it announced at a certain time and in a certain manner. We also know who ends up paying for it.

If Congress wishes to control politically motivated substantive decisions – here waste of taxpayer money for political purposes—Congress should address earmark reform and other controls of the government decision making process. The current Hatch Act regulations will not solve this problem and nobody will believe that a decision is not politically motivated because the Hatch Act was technically complied with.

The focus of the Hatch Act by contrast should be a narrower set of activity: direct contact between executive branch officials and partisan political operatives for purpose of fundraising or coordinating political campaigns. The definition should encompass any interaction of an executive branch official with a campaign or political party other than arms-length interaction with the campaign or party in an official capacity in the same manner in which the official interacts with any other outside organization. If the campaign or political party calls the official with a request for official action, and the official handles the request as he or she would any other request from an outside group (for example the Chamber of Commerce) the interaction should fall outside the definition of political activity (the official is also bound by the Office of Government Ethics impartiality rules and other government ethics rules). If the campaign or political party calls the official to coordinate with the official for purposes of furthering a political objective that the official also seeks to further (for example planning a fundraiser) the interaction is partisan political activity rather than an official interaction. In sum, the crucial distinction should be whether or not the official interacts with the campaign in an official capacity subject to all of the government ethics rules that apply to official capacity interaction with an outside organization (impartiality, not using public office for private gain, etc.). If not, the communication with the candidate or political party is political. Examples of activity that would almost always be political would include attendance at a campaign rally or fundraiser, meeting with campaign operatives to plan strategy, canvassing voters for a candidate or political party, voter registration drives and get out the vote drives, and distributing campaign literature in hard copy or by email.

Once a more precise definition of political activity is established, the Hatch Act's prohibition on such activity should be broader than it now is. The better rule would prohibit all partisan political activity at any time by any political appointees in the executive branch (e.g. persons other than the President and Vice President and career civil servants). This would include partisan political activity conducted in a so called "personal capacity." Such activity is currently permitted, and some "24/7" political appointees can engage in partisan political activity during normal working hours in government buildings. It is this activity that puts government officials in regular contact with political operatives, fundraisers and donors, and it is this activity that is most likely to corrupt the substantive decisions of government. Many of these political

appointees only serve in government for a short time, and many of them worked for political campaigns before they entered government service. Their brief time in government – often in very influential positions – is an appropriate time to take a break from partisan political activity and focus exclusively on government. These officials cannot simultaneously serve two masters, and the Hatch Act should require that they not attempt to do so.

If this Committee chooses not to propose a bill implementing such a broad reform, it should propose a bill that at a minimum removes the exemption that allows so called "24/7" employees to engage in partisan political activity during normal working hours in government buildings (including most notably the White House). These highly influential employees – whose decisions are most likely to be skewed by partisan political politics – should not engage in partisan political activity at all. They certainly should not be permitted to do so when and where other government employees may not do so.

Question 3: Are there additional recent activities or events within the executive branch that remain a source of concern for you?

The President should be commended for shutting down the Office of Political Affairs (OPA) and moving his political operatives out of the White House. This step, which Senator McCain had urged in 2008, was long overdue. I am concerned, however, that partisan political activity continues inside the White House and that White House activity – including the Blue Room meeting with Wall Street donors mentioned above – is now coordinated from outside. The President should be urged by both Democratic and Republican members of this Committee to instruct all White House staff to focus exclusively on their official duties while campaign workers in Chicago and elsewhere focus on his reelection.

This Committee should work with the White House Counsel's office to assure that partisan political operatives do not have an impact on Presidential personnel decisions, particularly the dismissal of political appointees. Inspectors general and U.S. Attorneys in particular should be immune from partisan politics. The 2009 firing of Gerald Walpin, an inspector general at Americorps, was highly problematic, particularly when Walpin was accused of mishandling his investigation of a high profile Democratic Party politician. The firing or non-reappointment of several U.S. attorneys in the Bush Administration also gave rise to serious concerns. Even with reform of the Hatch Act, politics will have some influence on policy, and Congress may want to consider whether some appointees such as inspectors general and U.S. attorneys should be further insulated from political pressure through a different statutory process for their appointment and removal.

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