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HATCH ACT: OPTIONS FOR REFORM

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERAL WORKFORCE,
U.S. POSTAL SERVICE AND LABOR POLICY

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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HATCH ACT: OPTIONS FOR REFORM

Wednesday, May 16, 2012,

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
SUBCOMMITTEE ON FEDERAL WORKFORCE, U.S. POSTAL SERVICE AND LABOR POLICY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m. in room 2247, Rayburn House Office Building, the Honorable Dennis Ross [chairman of the subcommittee], presiding.

Present: Representatives Ross, Chaffetz, Cummings, Norton, Lynch, Connolly, Gowdy and Davis.

Staff Present: Ali Ahmad, Majority Communications Advisor; Adam P. Fromm, Majority Director of Member Services and Committee Operations; Jennifer Hemingway; Majority Senior Professional Staff Member; Ashok M. Pinto; Majority Deputy Chief Counsel, Investigations; James Robertson, Majority Professional Staff Member; Cheyenne Steel, Majority Press Assistant; Peter Warren, Majority Legislative Policy Director; John A. Zadrozny, Majority Counsel; Krista Boyd, Minority Deputy Director of Legislation/Counsel; Ashley Etienne, Minority Director of Communications; Susanne Sachsman Grooms, Minority Chief Counsel; Devon Hill, Minority Staff Assistant; William Miles, Minority Professional Staff Member; Dave Rapallo, Minority Staff Director; and Safiya Simmons, Minority Press Secretary.

Mr. ROSS. Good morning.

I will now call the Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy to order.

Today's hearing is on the "Hatch Act: Options for Reform."

As we do in all our Oversight subcommittee and full committee hearings, I will state the Oversight Committee Mission Statement.

We exist to secure two fundamental principles. First, Americans have the right to know that the money Washington takes from them is well spent. Second, Americans deserve an efficient and 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 are getting from the 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. This is the mission of the Oversight and Government Reform Committee.

I will now recognize myself for an opening statement.

During my brief tenure as a member of Congress, I have seen how well intentioned legislation can have unintended consequences when applied to the real world. This is certainly true with respect to the Hatch Act. Originally enacted in 1939, the Hatch Act was needed to prevent an all too prevalent practice of Federal employees engaging in partisan, political activity using Federal resources.

The Hatch Act was last amended in 1993, a year in which employees were becoming accustomed to email for workplace communication and using other forms of electronic communication to share information with their colleagues. Technology's advance is only speeding up and the Hatch Act is in need of update.

Today's hearing builds on the committee's June 2011 hearing at which a bipartisan panel expressed support for making major changes in the Hatch Act statute. Furthermore, several bills have been introduced to repeal the Hatch Act's overreaching and arbitrary restrictions on State and local government workers who seek to run for office.

In short, there is a growing consensus that we should enact comprehensive Hatch Act reform. The Federal Government should not be in the business of making personnel policy for State and local government employees and the Office of Special Counsel should not be dedicating as much of its resources as it now does in pursuing complaints concerning State and local elections.

Rather, the Office of Special Counsel should be focused on cracking down on Federal workers who abuse the public trust and on protecting those Federal workers who are unfairly targeted by their managers for blowing the whistle on waste, fraud and abuse. Instead, we should craft legislation that preserves the intent of the Hatch Act and reflects the realities of today's workplace. Comprehensive reform should, for example, adopt a definition of Federal workplace that accounts for how Federal employees communicate today, which is oftentimes out of the office, on the go, with personal electronic devices.

I think we can all agree that our Nation's public servants should be prohibited from engaging in partisan, political activity. The Hatch Act has been largely successful at curbing overtly partisan politicking within the civil service. However, a fresh look is needed to address certain unforeseen challenges and unintended consequences. We will hear about some of those consequences today. I hope we are able to enact changes that prevent them from occurring in the future.

I would like to thank Mr. Cummings for his work on this important issue and I look forward to working with him, Chairman Issa and the Ranking Subcommittee member, Mr. Lynch, on moving Hatch reform legislation through the House of Representatives this Congress.

I thank the witnesses for appearing today and I look forward to your testimony.

I will now recognize the Ranking Member of the full committee, the gentleman from Maryland, Mr. Cummings, for an opening statement.

Mr. CUMMINGS. Thank you, Mr. Chairman, for holding this hearing today.

In March, I introduced H.R. 4152, the Hatch Act Modernization Act of 2012 which is co-sponsored by every Democratic member of the Subcommittee. This bill provides immediate, common sense and non-controversial fixes to the Hatch Act. Specifically, it implements recommendations for immediate reform proposed by Special Counsel Carolyn Lerner.

First, the bill eliminates the restriction that prevents state and local government employees from running for political office. Currently, if a State or local government employee works on a program that receives any amount of Federal funding, the Hatch Act prohibits that employee from running for office.

This restriction has led to a number of simply unjust results for public servants. For example, today we will hear from John Greiner, former Police Chief of the City of Ogden, Utah, who was removed from his position because he ran for State Senate. In another example, a Philadelphia transit cop was barred from running for his local school board because he works with an explosives detection dog paid for by a grant from The Department of Homeland Security. These results make no sense. Even worse, the Office of Special Counsel reports that 45 percent of its caseload now involves enforcing this restriction, diverting valuable resources from more critical issues.

The Hatch Act Modernization Act also implements a second recommendation made by the Special Counsel. It expands the range of penalties for Hatch Act violations. Right now, an employee who commits a Hatch Act violation, no matter how minor, must be fired unless the Merit Systems Protection Board unanimously votes to impose a lesser penalty. This bill makes it easier for the punishment to more appropriately fit the violation.

Finally, the bill includes a third provision to treat employees working for the District of Columbia as State and local government employees rather than as Federal employees. This provision is based on legislation championed by Congresswoman Eleanor Holmes-Norton that passed the House by a voice vote in the 111th Congress.

We will hear today from the Attorney General of the District of Columbia that without this change, he will not be able to run for another term in 2014. That just does not make sense.

Mr. Chairman, this bill is simple, straightforward and non-controversial. Last June at our first hearing on the Hatch Act, Chairman Issa, to his credit, said the committee would consider Hatch Act legislation before the election. He said, "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 a very short period."

The Chairman was right. That was nearly a year ago and time is running out. Although I support additional efforts to improve the Hatch Act, H.R. 4152 includes commonsense fixes that the Special Counsel needs now before the election. These provisions have widespread support and we can pass them immediately.

Mr. Chairman, I am hoping that we can work together to schedule a markup for May 31 when we return from the Memorial Day recess. There are many public servants, police officers, social workers, paramedics, who want to serve their country by holding public office. We should not make them wait any longer.

With that, I yield back.

Mr. ROSS. Thank you, Mr. Cummings.

I now recognize the gentleman from Massachusetts, the Ranking Member of the Subcommittee, Mr. Lynch, for an opening.

Mr. LYNCH. Thank you, Mr. Chairman.

I would also like to welcome our witnesses this morning and thank each of them for being here to help the Subcommittee with its work.

As the Ranking Member has pointed out, it has been nearly two decades since the Hatch Act was last amended. Throughout this time, we have witnessed significant legislative, workplace and technological developments that collectively have demonstrated a need for us to modernize this essential and landmark law.

Accordingly, I welcome this opportunity to examine how we can best bring the Hatch Act up to date to reflect our contemporary Federal workplace in a responsible and bipartisan manner that also safeguards the integrity and purpose behind the Act.

The original Hatch Act of 1939, and its subsequent amendments in 1993, together were intended to curtail on-the-job politics in the Federal workplace. The law itself attempts to walk a fine line between affording maximum respect to the constitutionally-protected freedoms of speech and expression and the compelling need to eliminate political coercion and partisan influence throughout the Federal civilian workforce.

In other words, the Hatch Act helps to ensure that those government employees tasked with carrying out policies and programming do exactly that while putting aside their individual political views.

As many of you have heard me state on several occasions, I truly believe that the Federal Government has one of the most dedicated and talented employee workforces anywhere in the world. The majority of our workers enter public service with an innate interest in doing right by their fellow citizens and making a positive difference on behalf of their country.

Nevertheless, there will always be a few bad actors who unfortunately use their official position to influence or advance a particular political agenda, party or partisan candidate. In those few cases, we, fortunately, have the provisions of the Hatch Act to rely upon as well as the Office of Special Counsel and the Merit Systems Protection Board, to carry out the duties of enforcement and punishment respectively.

As we prepare ourselves for another major presidential election and campaign cycle, which in many ways is already well underway, I appreciate Special Counsel Carolyn Lerner's renewed focus on ways to enhance and modernize the Hatch Act. With the advent of smart phones, blogging and other social mediums and technologies, the Federal workplace is clearly no longer our parents' workplace.

To that end, it is commonsense that we would now be reexamining the possibility of modernizing provisions of the Hatch Act. In

addition to updating the Hatch Act, the Office of Special Counsel has also put forth some reasonable suggestions for modifying the Hatch Act's reach into political activities of government employees on a State and local level.

I have heard of dozens of instances cited by Ranking Member Cummings and others involving state, county or municipal workers who are either prevented from pursuing elected office or in some cases, even fired because he or she ran for public office while employed in a capacity was in some way or another connected to Federal dollars.

Mr. Chairman, these reports are concerning and reflective of the need to promptly reexamine the Hatch Act in order to reduce the possibility of such unintended consequences. That said, I urge our Subcommittee to move swiftly to consider H.R. 4152, the Hatch Act Modernization Act of 2012, introduced by my colleague and friend, Mr. Cummings of Maryland. It is sponsored by every single Subcommittee member on this side of the aisle.

The bill will address a lot of the concerns being discussed here this morning. If there are additional Hatch Act related changes that the majority would like to see tackled, then at a minimum, H.R. 4152 should serve as the vehicle for accomplishing those changes.

Again, I thank each of our witnesses for being here with us today and I yield back the balance of our time.

Mr. ROSS. Thank you, Mr. Lynch.

I will now introduce our distinguished panel. We have with us the Honorable Carolyn N. Lerner, who is the Special Counsel, U.S. Office of Special Counsel; Ms. Anna Galindo-Marrone, Chief, Hatch Act Unit, U.S. Office of Special Counsel, here not to testify but for technical reference only I understand; and the Honorable Irvin Nathan, Attorney General, District of Columbia.

I would like to defer to my colleague from Utah, Mr. Chaffetz, to introduce our next guest.

Mr. CHAFFETZ. Thank you, Mr. Chairman.

I wanted to take just a moment and thank one of our own from Utah, Mr. Greiner, for being here.

He began his law enforcement career in Ogden in 1973 and later rose through the ranks and became the Ogden City Police Chief. In fact, in 2005, Mr. Chairman, he was named the Utah Chief of the Year, quite a distinction for somebody who served law enforcement so nobly for so long.

He was elected to serve a four year term in the Utah State Senate in 2006 but Mr. Greiner was fired by Ogden City on December 28, 2011 after a Federal panel ruled he violated the Hatch Act. Mr. Greiner's violation came when he signed a quarterly report for a Federal grant to upgrade the police dispatch system, money that went to the country not to the actual department. The city officials said the termination was necessary in order for Ogden to continue receiving future Federal funds and loans from the Federal Systems Merit Protection Board. Mr. Greiner was not only fired but was also banned by the Federal Government from serving as a law enforcement officer in Utah for 18 months starting in January 2012.

This is outrageous and something that needs to be rectified. I appreciate the bipartisan support, in particular the members on the

dais today. We appreciate the service of Mr. Greiner and appreciate your being here and sorry sir that you have had to go through this. Hopefully you can help us as we try to figure out the solution because I certainly don't think you were a part of the problem.

Thank you, Mr. Chairman, and I yield back.

Mr. ROSS. Thank you, Mr. Chaffetz.

Our next witness is Mr. Scott A. Coffina, a Partner at Drinker Biddle & Reath. Our last witness is Mr. Jon Adler, National President, Federal Law Enforcement Officers Association.

Pursuant to Committee rules, all witnesses will be sworn before they testify. Please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

[Witnesses respond in the affirmative.]

Mr. ROSS. May the record reflect that all witnesses answered in the affirmative. You may be seated.

In order to allow time for discussion, I would like you to limit your testimony to five minutes. Your entire written statement will be made a part of the record.

Now I will recognize Ms. Lerner for an opening statement.

WITNESS STATEMENTS

STATEMENT OF CAROLYN N. LERNER

Ms. LERNER. Thank you, Chairman Ross, Ranking Member Lynch, and members of the Subcommittee

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel's administration of the Hatch Act. With me today is Ana Galindo-Marrone, the Chief of OSC's Hatch Act Unit.

After being sworn in as Special Counsel last June, I reviewed OSC's Hatch Act program and quickly discovered the overreach of this otherwise very important law. At its best, the Hatch Act keeps partisan politics out of the workplace and prevents those in political power from abusing their authority. At its worse, the Act interferes with the rights of well qualified citizens to serve their local communities by running for State and local office.

This concern, along with others, prompted me to send Congress a legislative proposal to amend the Hatch Act. I applaud the bipartisan group of lawmakers in both the House and the Senate who introduced this legislation in March.

The primary reform in these bills is removing the Hatch Act's prohibition on State and local employees running for partisan elected office. Removing this restriction will promote good government and demonstrate respect for the independence of States and localities. It will also let OSC use other limited resources toward more effective enforcement of the Act.

Currently, State and local employees are ineligible to run for office if their jobs are in any way tied to a source of Federal funds. Both case law and substantial increase in Federal grant programs have greatly expanded the law's coverage. Hundreds of thousands of public servants, including first responders, health care workers and police officers, are now covered by this prohibition. This expan-

sive application of the law leads to absurd results. Here are some examples.

As Representative Cummings noted earlier, OSC recently had to tell Matthew Arlen, a police officer in a canine unit, that he couldn't run for the school board because his partner, a black Labrador, is funded through Federal grants. Mr. Arlen rightly questioned how much influence can my dog have over what I could do on the school board.

We told a paramedic he couldn't run for county coroner because some of the patients that he transports received Medicaid and we routinely advise deputy sheriffs that they can't run for sheriff. Thus, the most qualified candidates are often disqualified from running for office. This is especially a problem in smaller communities where the pool of potential candidates is very limited.

Not only is the reach of the Hatch Act too broad, its enforcement often is inconsistent with unfair results for several reasons. First, OSC can only investigate those cases where we receive the complaint, so using the Hatch Act as a weapon, candidates frequently file complaints against their opponents. An allegation that an individual is in violation of Federal law, even in the absence of any wrongdoing, can cast a cloud over a candidacy. Our enforcement efforts actually increase the level of partisanship in politically charged contests.

Second, OSC has no jurisdiction in non-partisan elections. This exemption creates confusion and inconsistent results between neighboring localities. For example, a school board election may be partisan in one county but non-partisan the next county over.

One final example, the law does not apply to elected officials and once someone has already been elected to office, they are free to run again in any partisan election. This again, leads to absurd results—like a deputy sheriff who cannot run against a sitting sheriff but that sheriff could run again not only for that office, but any other elected office for which he may choose.

These arbitrary results reinforce the need to let States and localities decide how best to restrict the political activity of their employees. In fact, each State already has their own ethics rules or mini-Hatch Acts covering this issue.

Despite my concerns about the unfair application of the Act, nearly half of OSC's Hatch Act caseload is made up of State and local cases. Over the past two years, we have conducted more than 500 investigations and issued thousands of advisory opinions. In these cases, we must conduct very fact specific, time consuming investigations to determine coverage and the State or local agency has to spend their resources answering our document requests and interview requests.

It is important to note that if the candidacy provision is removed, a State or local employee still could not engage in coercive conduct or misuse their authority for political gain. Without the candidacy provision OSC could target its resources on these types of cases in which actual misconduct is at issue. We could also do more outreach and education to help employees understand their obligations under the Act and prevent problems from happening in the first place.

A second important reform is modifying the penalty for Federal employees. As the law now stands, termination is the only penalty unless the MSPB Merit Systems Protection Board unanimously votes to mitigate the penalty. Even in these cases, the MSPB cannot impose a penalty of less than 30 days suspension.

This structure is overly restrictive and can lead to unjust results. It can even deter agencies from referring potential violations to my agency because they don't want to lose an otherwise good employee. The pending legislation allows for the same range of penalties which now apply to other disciplinary actions and passing this reform will aid OSC's enforcement efforts.

Finally, we have noted several other potential areas for legislative reform of the Hatch Act. These are described at greater length in my written testimony and given my time constraints, I am going to rely on that submission. I also know that other panel members will be addressing several of them.

Very briefly they include the following five issues: one, codify a definition of political activity; two, clarify the definition of the term "Federal workplace"; three, clarify the scope of the exemption for high level administration or White House employees; four, modify the Hatch Act's application to District of Columbia employees; and five, consider a statute of limitations.

I just want to note that these other areas are no where near as critical, in my mind, as the need to modify the State and local candidacy provision. I really want to stress that that is our most crucial need. While the other items are important, I really hope that we can emphasize change in that area.

[Prepared statement of Ms. Lerner follows:]

Testimony of Special Counsel Carolyn N. Lerner
United States Office of Special Counsel

House Committee on Oversight and Government Reform
Subcommittee on the Federal Workforce,
U.S. Postal Service and Labor Policy

May 16, 2012

Chairman Ross, Ranking Member Lynch, and Members of the Subcommittee:

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel's (OSC) administration of the Hatch Act. With me today is Ana Galindo-Marrone, the Chief of OSC's Hatch Act Unit.

It has been nearly 20 years since the last major revision of the Hatch Act, and reform is again needed. I appreciate the Subcommittee's consideration of this important issue and your willingness to consider our views as you work toward legislative reform.

OSC's primary mission is to protect the merit system and provide a safe and secure channel for government whistleblowers who report waste, fraud, abuse, and threats to public health and safety. The agency also protects veterans and service members from discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Finally, OSC enforces the Hatch Act, which was enacted in 1939 to restrict partisan political activity of federal employees and certain employees of state and local governments.

On June 14, 2011, I was sworn in as Special Counsel. During my initial months in office, I carefully reviewed OSC's Hatch Act program. I quickly discovered the overreach of this otherwise important federal law.

At its best, the Hatch Act keeps partisan politics out of the public workplace and prevents those in political power from abusing their authority to advance partisan political causes. At its worst, however, the Hatch Act causes the federal government to unnecessarily interfere with the rights of well-qualified candidates to run for local office.

This concern, along with several others about the current state of the law, prompted me to send Congress a legislative proposal for amending the Hatch Act in October of last year. I applaud the bipartisan group of lawmakers that introduced legislation in March to make these proposed reforms a reality.

The Hatch Act Modernization Act of 2012, H.R. 4152, was introduced on March 7, 2012. Companion legislation, S. 2170, was introduced on the same day in the Senate. And, similar legislation, H.R. 4186, was also introduced in the House on March 8, 2012.

Allowing State and Local Public Servants to Run for Partisan Elective Office

The primary reform in each of these good government bills is removing the Hatch Act's current prohibition on state and local employees running for partisan elective office. Removing this restriction will promote good government, demonstrate respect for the independence of states and localities, and allow OSC to better allocate its scarce resources toward more effective enforcement of the Hatch Act.

The Hatch Act's Broad Application Leads to Bad Outcomes for Affected State and Local Employees and their Communities

Under 5 U.S.C. § 1502, state and local public employees covered by the Hatch Act are ineligible to run for partisan elective office. A state or local employee is "covered" for purposes of the Hatch Act if the employee works "in connection" with an activity financed in whole or in part by federal loans or grants. In plain language, this means that state and local government employees cannot actively participate in their community's democratic electoral process if they are in some way tied to a source of federal funds in their professional lives.

In practice, the substantial increase in federal grant programs since 1940 and the case law interpreting the Hatch Act have extended the law's coverage well beyond Congress' initial intent to cover a small number of state and local public workers. Hundreds of thousands of public servants, in essentially every locality in the country, are now covered by this prohibition. OSC routinely finds first responders, healthcare workers, police officers, and many other positions across state and local government covered by the Hatch Act.

This expansive application of the law leads to absurd results and does nothing to advance the law's purpose or the public interest. For example, in 2011, OSC told Matthew Arlen, a police officer in a Philadelphia-area canine unit, that he could not run for the local school board because his partner, a black Labrador, is funded in part through Department of Homeland Security grants.

Mr. Arlen expressed his frustration in a recent Associated Press article on the Hatch Act. He rightly questioned, "How much influence can my dog have over what I could do on the school board?" Nevertheless, the Hatch Act prohibited Mr. Arlen from serving his community.

Unfortunately, Mr. Arlen's case is not unique. OSC similarly advised a paramedic in South Carolina that he could not run for county coroner because some of the patients he transports are Medicaid recipients. In another matter, OSC told a deputy controller that she could not run for county tax collector because some of her duties included auditing a federally funded program.[1]

[1] These cases, in which there is only a minor connection to federal funds, help illustrate some of the absurd results caused by enforcement of the candidacy prohibition. However, cases in which employees are significantly or fully funded by federal dollars often lead to equally unfair results. For example, OSC recently told a reemployment specialist for a State Department of Labor that he could not run for local office because his position is fully funded by a federal grant. Similarly, OSC recently told a maintenance worker for the New York State Canal Corporation that his candidacy was in violation of the Hatch Act because the agency received a federal grant that financed the personnel costs and supplies for various positions including maintenance workers. Despite being fully or significantly funded by federal dollars, these employees were not engaged in coercive conduct or the misuse of federal funds, and OSC sees no federal interest in preventing their candidacies.

In addition, OSC routinely advises deputy sheriffs that they are ineligible to run for sheriff. The number of local law enforcement Hatch Act cases has increased with the influx of federal grant dollars to local police departments after September 11, 2001. This is a disservice to local communities because the most qualified candidates for law enforcement and other positions are commonly disqualified from participating in a local election. The concern is especially acute in rural areas where the pool of potential candidates for elective office is limited by the area's population.

The Existing Prohibition on State and Local Workers Leads to Inconsistent and Unfair Results

While the reach of the Hatch Act is, on the one hand, too broad, OSC can only investigate those cases in which it receives a complaint. An allegation that an individual has violated federal law, even in the absence of wrongdoing or specific evidence, can cast a cloud over a candidacy. This fact has led opponents to discover the political utility of filing complaints with our office. In this way, the Hatch Act is increasingly being used as a political weapon. In these cases, our enforcement efforts actually increase the level of partisanship in politically-charged contests. Communities are again disserved by enforcement of this law, because Hatch Act complaints frequently create a campaign issue that distracts voters from the merits or policies of individual candidates.

In addition, OSC has no jurisdiction in states and localities that designate electoral contests as non-partisan. As this Committee discussed at its June 2011 hearing on the Hatch Act, this exemption for non-partisan elections creates confusing and inconsistent results between neighboring counties and cities. It is also unclear how the public interest is being served by the exception. For example, the Mayor of Chicago is elected on a non-partisan basis, which means that any employee in any position can run for that office without violating the Hatch Act. Yet, as discussed, elections for lower offices throughout the country are often partisan contests, and employees are routinely prohibited from stepping forward to serve.

These inconsistencies reinforce the need to allow states and localities to decide the appropriate level of restrictions in the political activity of their employees. Indeed, all 50 states already regulate the political activity of their public employees in some way. Michigan, for example, has chosen to restrict the electoral activity of its workers in a more tailored manner. Rather than a blanket candidacy restriction, employees are required under some circumstances to take a leave of absence in order to pursue their candidacy. The decision on the appropriate level of restrictions for public employees is best left to the judgment of a state or locality, and should not be decided by an unrelated connection to federal funds or the agenda of a political opponent.

Investigating State and Local Campaign Cases is a Poor Use of Tax Dollars

Despite my deep concerns about the impact of the Hatch Act on local communities and the rights of candidates, OSC is required by law to intervene in state and local contests hundreds of times a year through formal investigations. OSC also issues thousands of advisory opinions annually to potential state and local candidates.

Over 45% of OSC's overall Hatch Act caseload, including more than 500 investigations over the last two years and the vast majority of our advisory opinions, involved state and local campaign cases. These cases do not involve any allegation of coercive or abusive political conduct.

Rather, OSC must conduct a detailed and thorough inquiry into the financial and administrative structure of state and local agencies throughout the country. A determination on coverage is fact-specific, and depends on the specific functions of an individual employee and the structure of the state or local entity. State and local agencies must spend time and resources responding to document and interview requests.

Investigating hundreds of state and local campaign cases annually is a poor use of OSC's limited budget and creates a burden on state and localities who must respond to these investigations. It is also an improper function for the federal government.

Removing the Candidacy Prohibition Would Not Allow Employees to Misuse Federal Funds or Engage in Coercive Conduct to Support Their Own Candidacy

As demonstrated in the examples above, individual state and local employees have not engaged in any political misconduct or wrongdoing. Instead, they have chosen to step forward to participate in the democratic process in their communities. If the candidacy prohibition were removed, a covered state or local employee who runs for partisan political office would remain subject to the Act's prohibitions on misuse of official authority and coercive conduct. For example, a covered employee who runs for office would still be in violation of the Hatch Act if the employee:

- used federal (or any other public) funds to support his own candidacy;
- used his state or local office to support his candidacy, including by using official email, stationary, office supplies, or other equipment or resources; or
- compelled subordinates to volunteer for his campaign or contribute to the campaign.

By removing the candidacy provision, Congress would allow OSC to target its resources on conducting better and timelier investigations in cases involving actual misconduct, the objective initially sought by Congress.

I strongly encourage the Committee to Act quickly on legislation to remove this prohibition on state and local public servants.

Modifying Overly-Restrictive Penalty Structure

The Hatch Act Modernization Act of 2012 would also modify the Hatch Act's penalty structure for federal employees. OSC supports this reform because it will result in more flexibility and fairness in OSC's enforcement efforts. Current law requires that employees be removed from office for violating the Hatch Act -- unless the Merit Systems Protection Board (MSPB) unanimously finds that the violation does not warrant removal. Even in these cases, the MSPB may not impose a penalty of less than 30 days' suspension without pay. This structure is overly restrictive, can lead to unjust results, and may even deter agencies from referring potential violations to OSC.

The pending legislation would amend the penalty provisions of the Hatch Act to mirror the range of penalties provided in 5 U.S.C. § 1215, which apply to other disciplinary actions under OSC's jurisdiction. Under section 1215, depending on the severity of the action and other mitigating factors, the Board may impose a range of disciplinary actions consisting of removal, reduction in

grade, debarment from federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000. OSC supports this reform, and believes it will aid our enforcement efforts in federal sector cases.

Other Issues for Congress to Consider

In prior communications with Congress, OSC has noted several other potential areas for legislative reform of the Hatch Act to ensure that OSC's advisory and enforcement efforts are consistent with both congressional intent and the realities of the 21st century federal workplace. It is also important to clarify ambiguities in the law so that employees have full and fair notice of their obligations under the Hatch Act.

Codify a Definition of "Political Activity" and Clarify the Definition of "Federal Workplace"

The Hatch Act prohibits most federal employees from engaging in political activity while on duty, in uniform, in the federal workplace, or while using a federal vehicle. The statute, however, does not define "political activity." The Hatch Act's attendant regulations define the term as activity directed at the success or failure of a candidate for partisan political office, political party, or partisan political group. 5 C.F.R. § 734.101. Congress should consider defining "political activity" in the statute to make clear its intent regarding this prohibition and to provide clearer notice to federal workers on the law's prohibitions. OSC believes that the current definition in the regulations is appropriate.

In addition, the restriction on political activity can be confusing given technology-driven workplace developments not anticipated in 1993, when Congress last reformed the Hatch Act. For example, there is confusion about the application of the "on-duty" political activity prohibition to the telework model. Current telework policies have led to a large number of employees working from home several days a week and using government issued equipment to perform their duties where they reside. In general, the regulations define federal workplace as federally owned or leased space. Employees' homes do not meet the definition of federal workplace. While extending the definition of the federal workplace to an employee's home would be inappropriate, Congress may want to consider clarifying that the "on-duty" political activity prohibition applies to an employee while teleworking.

Additionally, although the statute currently restricts the use of government vehicles to engage in political activity it is silent as to government laptops, Blackberries, and iPhones. Agencies should be encouraged to develop clear computer-usage and government equipment policies. And, Congress may want to consider whether the use of ".gov" email addresses to engage in political activity, even while off duty, is consistent with the goals of the Hatch Act.

Similarly, the internet and social media have dramatically changed the way we gather and share information, communicate our views, or engage in the political process. These changes were not contemplated when the Hatch Act was last amended to restrict political activity on duty or in the federal workplace. OSC has issued detailed advisory opinions on the use of social media and the Hatch Act. Congress may want to consider OSC's guidance in this area in any effort to reform the Hatch Act.

Clarify the Scope of the Exemption for High Level and White House Employees

The Hatch Act, under 5 U.S.C. § 7324(b), exempts certain employees from the prohibition against engaging in political activity while on duty or in the federal workplace, as discussed above. This exemption includes an employee paid from an appropriation for the Executive Office of the President (EOP), the duties of whose position continue outside normal duty hours and while away from the normal duty post. The Committee's June 2011 Hatch Act hearing highlighted differing views on the proper scope of this exemption. Clarifying the scope of the §7324(b) exemption would benefit OSC's advisory efforts and all impacted employees.

In addition, section 7324(b) applies only to a Presidentially-appointed, Senate-confirmed (PAS) employee who "determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws." Clarifying the scope of this limitation would similarly benefit OSC's advisory efforts and impacted employees.

District of Columbia Employees

The Hatch Act, under 5 U.S.C. § 7322, includes in the definition of employee an individual employed or holding office in the government of the District of Columbia, other than the Mayor, a member of the City Council, or the Recorder of Deeds. According to this definition, the Hatch Act currently applies to all District of Columbia employees, including those in the judicial and legislative branches of government. In contrast, the Hatch Act's application to federal, state and local employees is limited to executive branch employees. Any Hatch Act reform should consider this discrepancy. Pending legislation in the House and Senate would move District of Columbia employees from the provisions of the federal Hatch Act to those that cover state and local employees under chapter 15 of title 5. The change would address the discrepancy cited above.

Statute of Limitations

Under 5 U.S.C. § 1216(a)(2), OSC is required to investigate Hatch Act allegations after receiving a complaint, regardless of when the underlying conduct occurred. Congress has not provided a statute of limitations for Hatch Act allegations, and may want to consider this issue as it pursues other reforms to the Hatch Act.

Political Activity of State and Local Elected Officials

Pending legislation in the House and Senate would allow sheriffs to participate in designated political activities in their official capacity without violating the Hatch Act's prohibition on the use of official authority for political purposes. These proposed legislative changes are consistent with OSC's current understanding of the law in this area. In fact, OSC recently issued an advisory opinion that clarifies the scope of permissible political activity for all state and local elected officials. For example, in recognition of the fact that these individuals already hold a partisan political office, OSC concluded that state and local elected officials would not violate the Hatch Act by wearing their uniforms or using their titles while campaigning or supporting

another candidate for office. Congress may want to consider codifying these rules, which would provide greater clarity to affected state and local elected officials.

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Special Counsel Carolyn N. Lerner

Carolyn Lerner heads the United States Office of Special Counsel. Her five-year term began in June 2011. Prior to her appointment as Special Counsel, Ms. Lerner was a partner in the Washington, D.C. civil rights and employment law firm Heller, Huron, Chertkof, Lerner, Simon & Salzman where she represented individuals in discrimination and employment matters, as well as non-profit organizations on a wide variety of issues. She previously served as the federal court appointed monitor of the consent decree in *Neal v. D.C. Department of Corrections*, a sexual harassment and retaliation class action.

Prior to becoming Special Counsel, Ms. Lerner taught mediation as an adjunct professor at George Washington University School of Law, and was mediator for the United States District Court for the District of Columbia and the D.C. Office of Human Rights. Ms. Lerner is in *Best Lawyers in America* with a specialty of civil rights law and is one of *Washingtonian* magazine's top employment lawyers.

Ms. Lerner earned her undergraduate degree from the University of Michigan with highest honors, and her law degree from New York University (NYU) School of Law, where she was a Root-Tilden-Snow public interest scholar. After law school, she served two years as a law clerk to the Honorable Julian Abele Cook, Jr., Chief U.S. District Court Judge for the Eastern District of Michigan.

Mr. ROSS. Thank you, Ms. Lerner. I appreciate that.

Just as a reminder, your written testimony is a part of the record, so it is all inclusive.

With that, I would like to recognize Mr. Nathan for five minutes for an opening.

STATEMENT OF IRVIN B. NATHAN

Mr. NATHAN. Good morning, Mr. Chairman and Subcommittee members. I am Irv Nathan, the Attorney General for the District of Columbia.

I am very pleased I was invited here today to testify about proposals to reform the Hatch Act and to speak in favor of reforms that would treat the citizens of the District of Columbia like the citizens of all States and localities across the country, allowing them to choose their elected officials, whether in partisan or nonpartisan elections, without inappropriate Federal restrictions.

First, as a former General Counsel of the House, let me say how pleased I am to be back here at an institution for which I have such respect and admiration. Let me also comment as a person who has seen a lot of hearings that this is one of the rare hearings where everything that has been said on both sides of the aisle, we agree with and I believe that you agree with each other. I certainly hope that we can get these reforms passed. It is very important for the District of Columbia residents and for citizens around the country.

The short of it is that under the Hatch Act, the current way the District of Columbia employees are treated just like a Federal agency which is completely inappropriate. It has had very damaging effects. We have a number of elected officials, one of whom is on the dais, and I am pleased to see Ms. Norton here today, and we have elected ANC members, elected school board members and as I testified in my statement now the Attorney General position will become an elective position starting in 2014.

As it stands, since we are treated as a Federal agency, it means that people in those positions are not allowed to run for elective office in a partisan election. As an example, our ANC members are unpaid. These are private individuals they are unpaid, they are volunteers, they serve their neighborhoods, they serve the District, but because they are considered officeholders under the Hatch Act, they are precluded from running for partisan office. They cannot run for the City Council; they cannot run for mayor; they cannot run for our Congressperson's spot.

Similarly, our school board is in the same posture. They are elected on a non-partisan basis but they cannot run in partisan elections. As it applies to the Attorney General position, I was appointed by the Mayor, this was an appointive position beginning in 2011 when I was first appointed, and has now become an elective position in a partisan election.

It means if I wanted to run for this office, or more appropriately if some of my senior deputies who have been there for years, want to run for this position, they are not permitted to under the Hatch Act. Even more preposterously, if someone runs and is elected to the Attorney General position this term, if that person wanted to run for reelection, they would have to resign before they could run

for reelection, a loss to the public and something that makes no sense.

The solution, we suggest, is to pass the reforms that Congressman Cummings and his colleagues have proposed and also to make clear that District of Columbia employees should not all be lumped together. We also have judges and folks who work in the City Council, which is an elected position as well, and they should not be covered by the Hatch Act. It should be for Executive Branch employees.

We certainly support the basic notion of the Hatch Act. We are not looking for anybody to pressure or engage in partisan activities in carrying out their positions, but by not permitting them to run for election, you are depriving our electorate of their choices of people who are well qualified and you are depriving people who are in good position to help the city from running for election.

We urge you to modify the Hatch Act to pass the reforms that have been proposed and to make the tweak as it applies to the District of Columbia, that we be treated like local government officials and that it only apply to Executive Branch officials within the District Government.

Thank you very much.

[Prepared statement of Mr. Nathan follows:]

Good morning Mr. Chairman and Subcommittee members. I am Irv Nathan, Attorney General for the District of Columbia. I am pleased that I was invited here to testify today on proposals to reform the Hatch Act, and to speak in favor of reforms that would treat the citizens of the District of Columbia like the citizens of states and localities all across the country, allowing them to choose their elected officials, whether in partisan or non-partisan elections, without inappropriate federal restrictions.

First, as a former General Counsel of this great House, let me say how pleased I am to be back in this institution for which I have such respect and admiration. I am confident that the People's House will recognize, as it did last Congress, that reforms are needed in a law that was passed almost three quarters of a century ago to bring it into accord with modern-day realities and the needs of our electorate.

Second, I need to make clear how different the District of Columbia of today is from the District of Columbia of 1939 when the Hatch Act was first passed. Back then, the District had no elected officials. It was governed by three Commissioners who were appointed by the President and confirmed by the Senate. In the intervening years, with the arrival of partial Home Rule, we have an elected mayor, an elected city council, an elected School Board, and elected Advisory Neighborhood Commissioners. We also have an elected representative to this

body. Recently through the referendum provisions of our Home Rule charter, the citizens of the District of Columbia voted to make the office of the Attorney General an elected office. We raise more than 6 billion dollars locally, approximately 70% of our budget, from local taxes on our own citizens, transactions and property.

While we certainly support the basic purposes of the Hatch Act--to ensure that executive branch officials funded by federal dollars carry out their functions in a non-partisan fashion and do not use their offices to interfere with elections or raise campaign funds--we do not believe that employees of the District of Columbia Government should be treated like federal Executive branch employees. Rather, we believe that employees of the executive branch of the District of Columbia Government should be treated under the Hatch Act provisions that govern state and local officials whose employment is financed in part by federal funds. Similar to the federal legislative and judicial branches, the District's legislative and judicial branches should not be covered by the Hatch Act. Further, even District executive officials should not be prohibited by federal law from running for elective offices.

The principal distinction in the existing law and in the reforms proposed is that if considered as federal employees, no District official--other than the Mayor,

City Councilmembers or the Recorder of Deeds[1]-- can run for an elective office in a partisan election while if treated under the proposed reforms as all other state and local employees funded in part by federal funds all District employees could run for an elected office, whether in a partisan or non-partisan election.

Let me illustrate the unfairness, absurdity and damage to our citizens of the current law by reference to our Advisory Neighborhood Commissioners. These are elected, unpaid, part-time officeholders of the District of Columbia whose task is to represent their neighbors in improving the neighborhood and making recommendations to the District of Columbia Government. Under the current definitions of the Hatch Act and by including all District employees and officeholders as the equivalent of federal executive branch employees, ANC commissioners are barred by the Hatch Act from running in a partisan election. This means that a Commissioner, having been elected by his or her neighbors in a non-partisan election, may not run for Mayor or the City Council or the Congress without first resigning from the ANC office. This result is so absurd that the Office of Special Counsel, which is charged with enforcing the Hatch Act, has rendered an opinion that while ANC commissioners (even though they are not paid and only serve part-time) may not run in a partisan election, the OSC is unsure whether or how it can enforce this provision should an ANC member violate the

[1] In 1993, the Hatch Act was amended to permit three categories of officeholders to run for elected office in a partisan election. No coherent reason appears why the Recorder of Deeds is included.

law. By its action, or more accurately, its inaction, the OSC has made clear that it would prefer not to devote its limited resources to violations of this kind. This type of approach only breeds disrespect for the law, when it cannot be enforced with a straight face.

The issue has been brought home to me compellingly as a result of the recent referendum making the office of the Attorney General an elected one. In 2010, the Council of the District of Columbia passed the "Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2010." The legislation changed the position of Attorney General from one appointed by the Mayor (as I was) to one elected in a partisan election, beginning with partisan primaries in 2014, with the elected Attorney General to take office in 2015 for a four-year term and partisan elections every four years after that . Under the current Hatch Act, which treats all DC employees as federal executive branch officials, neither I nor any District employee or officeholder (other than the Mayor, Councilmembers, or the Recorder of Deeds) could run for the elected Attorney General position. Members of our local courts, which contain many well qualified candidates, could not run for the elected Attorney General position either. In order to be a candidate in an election for the Attorney General, I and other highly qualified deputies in my office (as well as any other District Government employees) would have to resign our employment before seeking office. And, of

course, unless the law is changed, the person elected as Attorney General in 2014 would have to resign the position in order to run for re-election.

H.R. 4152, and its companion bill in the Senate, S. 2170, would go a long way towards alleviating problems the current Hatch Act places on the District of Columbia and its employees. H.R. 4152 would amend the Hatch Act to treat the District of Columbia as a state or local agency, instead of its current designation as the equivalent of a federal executive branch agency. The legislation would also make clear that state and local employees, whose employment is financed in whole or in part by federal funds, can be a candidate for elective office, whether the election is held on a partisan or a non-partisan basis. The effect of these proposed changes would be that District Government employees would face no federal Hatch Act barriers if they choose to run for local, partisan office. It means that ANC Commissioners would be allowed to run for higher office, in the City Council or even Congress, without having to resign the positions to which they were first elected by their neighbors. (Indeed, because ANC Commissioners are unpaid, they receive no federal funds and, if the amendments pass, they will no longer be covered in any way by the Hatch Act.) It also means that an appointed Attorney General or his talented, experienced deputies could run for the office of Attorney General. And, of course, it also means that a future elected Attorney General will be able to run for re-election without having to resign from office. As

I stated earlier, the legislation should be amended so that similar to Congress, the Hatch Act does not apply to the District's legislative or judicial branches.

I also agree with comments previously voiced by the head of the Office of Special Counsel, Carolyn Lerner, that Congress should amend the Hatch Act to address the realities of the modern workplace, such as telework, social media and other internet-related issues. These issues are of great importance to District Government employees, many of whom telecommute, and should be addressed so that the Hatch Act is as sensible as possible.

If the reforms embodied in these proposed bills are enacted, as modified by our modest additional suggestions, District executive branch employees will no longer be treated like federal executive branch employees, but will be covered both under the provisions of the federal Hatch Act that applies to federally funded state and local employees and by the D.C. equivalent of the Hatch Act, namely the "Prohibition on Government Employee Engagement in Political Activity Act of 2010."[2] These laws serve all of the basic purposes of the Hatch Act to avoid partisanship in carrying out normal government functions while permitting citizens to have an unfettered choice of their candidates in elections. As the Chairman of this Committee so eloquently stated during the debate on the District of Columbia Hatch Act Reform Act of 2009 in the last Congress, "[H]ome rule by the District

[2] D.C. Law 18-335. This law became effective on March 31, 2011, but does not apply until "enactment by the Congress of an act excluding the District of Columbia from the coverage of 5 U.S.C. §§ 7321 through 7326 (Hatch Act)" and "upon inclusion of its fiscal effect in an approved budget and financial plan."

of Columbia will not be complete until we harmonize as many rights and responsibilities as we can to the District."[3]

It is my belief that H.R. 4152 and its companion Senate bill, with the previously suggested amendments, will help eliminate the unnecessary and ill-advised barriers of the current Hatch Act which prevent District of Columbia employees from seeking partisan elected local office and restrict the choices of our citizens for candidates for the limited number of elected positions we have in the District. I also believe that the legislation will move the District closer towards the important goal of greater Home Rule for our citizens.

Thank you for the opportunity to testify. I am happy to answer any questions you may have.

[3] 155 Cong. Rec. H9299 (daily ed. September 8, 2009) (statement of Rep. Issa).

Mr. ROSS. Thank you, Mr. Nathan.

I will now recognize Mr. Greiner for five minutes for an opening.

STATEMENT OF JON J. GREINER

Mr. GREINER. Good morning, Chairman Ross and members of the Committee on Oversight and Government Reform.

My name is Jon Greiner, former Police Chief of Ogden City, Utah, former Utah State Senator and Hatch Act violator. I appreciate the opportunity to appear before today to discuss my experience with the Office of Special Counsel and their enforcement of the Hatch Act.

Early in March 2006, I was recruited to run for the Utah State Senate by a number of legislators and representatives of the Utah Attorney General's Office. I scheduled time with the Ogden Mayor and City Attorney to talk about the City's position on the matter in the final days of the candidate filing period as their employee to get their approval as this service is determined by them to be in the best interest of the residents of Ogden City.

On about October 3, 2006, I was contacted by phone by an attorney of the Office of Special Counsel about an anonymous complaint allegedly filed against me regarding a potential Hatch Act violation. She asked that I summarize the current police department grants in a letter back to her. I sent her an email with that summary.

Over the next couple of weeks, we corresponded back and forth to give her everything she needed to conduct her investigation. She sends me a letter towards the end of October saying she believes I am in violation of the Hatch Act. We hire attorneys and get started trying to figure out what the encompassing part of all this means.

The best case law we could find at the time was a recent decision about a year old involving an assistant police chief named Richard Perkins out of Henderson, Nevada. We contact him, we contact others, and go through the limited amount of paperwork we could find in 2006 trying to comply with the request from the Office of Special Counsel.

By November 3, there was a response from the Special Counsel's Office outlining their desire to have me get out of the race or give up my job as a police chief. We responded trying to understand and trying work out things to no avail. They tell us in the correspondence towards the end of October of that year that they may seek a complaint against me and the city of Ogden.

I had suspended my campaign and tried to work through all of this to no avail. There was absolutely no negotiation with the Office of Special Counsel. There was nothing they wished to discuss with our attorneys, so we went through the election and I was elected. Two years later, we were put on notice that they were going to come after the city of Ogden for allowing me to run for elective office.

There's a hearing before an administrative law judge in early 2009. Again, the attorneys in the State of Utah don't understand the Act. It became an issue of do we get discovery, do we get to have witnesses, do we get to have anything that at a hearing before a judge or others and we got nothing.

We appeal the conviction of the ALJ to the Merits Systems Protection Board and in a decision in November 2011, they ruled that the ALJ was correct in her interpretation of the Hatch Act law and directed my termination from the city happen by the end of 2011 or that the city forfeit two years of my salary as a penalty and future grant money.

To that point, there were hundreds of pages of legal documents on both sides of this issue outlining the selective enforcement and the misunderstanding by the State attorneys; there were several hundred thousands of dollars in attorneys' fees spent to try and understand the public good of this civil law that impacts State and local government without any consideration of the mitigating circumstances, including the penalties as outlined by Representative Chaffetz to myself. I cannot have an executive position in the State of Utah in law enforcement as a prohibition for 18 months. That exceeds penalties Federal courts give convicted felons who have committed crimes for which jail is a possible remedy.

I offer up Barry Bonds, 30 days house arrest and a $4,000 fine for lying to a Federal grand jury. That penalty is minimal in comparison to what the Hatch Act has imposed on me for nothing more than being a point of contact in a grant for which the city of Ogden's police department did not receive one penny.

Thank you for your time and I am prepared to answer any questions you may have.

[Prepared statement of Mr. Greiner follows:]

Irvin B. Nathan – Attorney General for the District of Columbia

Irvin B. Nathan is the Attorney General for the District of Columbia. He was appointed to this position by Mayor Vincent Gray in January 2011 for a four-year term and unanimously confirmed by the Council of the District of Columbia. Prior to his arrival at the Office of Attorney General, he was the General Counsel of the United States House of Representatives, where he served from November 2007 until January 2, 2011. For more than 30 years, he practiced with the Washington, DC law firm of Arnold and Porter, where he was a senior litigating partner and head of the firm's white-collar criminal defense practice. He has served as a Deputy Assistant Attorney General and Principal Associate Deputy Attorney General in the United States Department of Justice. He also served as the Vice Chair of the Board of Professional Responsibility of the District of Columbia and as an adjunct professor at the Georgetown University Law Center and the University of San Diego Law School. He is a graduate of the Johns Hopkins University and Columbia University Law School.

Testimony of Jon J. Greiner on "Hatch Act: Options for Reform" before the Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, U. S. Postal and Labor Policy; May 16, 2012.

Good morning Mr. Chairman and members of the Committee on Oversight and Government Reform. I appreciate the opportunity to appear before you today to discuss my experience with the Office of Special Counsel and their enforcement of the Hatch Act.

In early March 2006 I was recruited to run for a Utah State Senate seat by a number of legislators and representatives of the Utah Attorney General's (AGs) office. I schedule time with the Ogden Mayor and City Attorney to talk about the city's position on the matter in the final days of the candidate filing period, as their employee, and get their approval as this service is determined by them to be in the best interests of the residents of Ogden City.

On about October 3, 2006 I was contacted by phone by an attorney of the Office of Special Counsel (OSC) about an anonymous complaint allegedly filed against me regarding a potential Hatch violation. She asks that I summarize the current police department grants in a letter back to her. I send her an E-Mail with the summary.

For the rest of that week I sent her every requested document by Fax, she had refused to have it by overnight mail, regarding any grants within the Ogden Police Department, (OPD). We had a couple of Justice Assistance Grants managed by an Assistant Chief that were primarily for a multi law enforcement jurisdiction drug Strike Force in two Utah counties, we had an old bullet proof vest grant which was managed by Ogden Police Department's Lieutenant assigned to the Strike Force, there was a Universal Hire Grant that had expired in June 2006 managed by another Ogden Police Lieutenant, and there was a Technology grant requested by Ogden City, managed by the Ogden Fire department and administered by the Weber/Morgan county dispatch center. The technology grant was for the benefit of all the other police/fire departments in Weber/Morgan county and the State of Utah, UCAN network, to hook into what Ogden had built in the combined public safety building in 1999. I had been listed as a police point of contact in the technology grant and the Ogden Police Department had nothing else to do with the grant to include not receiving any federal grant money. The grant required quarterly reports that were brought to me to be signed by the grant administrator of the dispatch center which comes under Weber County government because I was listed as a point of contact for Ogden City. This grant ended up being the principal Hatch Act violation document; it probably could have been signed by the Sheriff as a law enforcement point of contact if we had known there was an issue with the federal government and the grants.

By the 12th of October I have sent her, the OSC attorney, several hundred pages in this manner. I leave for an IACP police convention on the 12th or 13th. I am at the convention and somewhere towards the end of the convention I get an E-Mail from the OSC attorney saying she thinks I am in violation of the Hatch Act.

I return to Ogden on about the 19th and find there are several newspaper articles being written about my perceived violation, source of the information unknown. The newspapers were claiming the Utah State Democratic party chairman had singled me out as a potential violator and contacted the Office of Special Counsel, I also find the letter from the OSC attorney in my in basket, dated the 16th.

I immediately contact an attorney in Salt Lake City who gets me in to see him either the 20th or the 23rd. I also suspend my campaign and tell my opponent in the Senate election of the OSC letter and make my campaign suspension known to the media. I show the letter to the Mayor on the 24th and also talk to the city attorney. Between the 24th and 31st my attorneys talk to OSC attorney, the AG attorneys and the Senate President who is an attorney and others about what it is that I have allegedly done.

A recent Hatch case, OSC/MSPB, involving an assistant police chief Richard Perkins, in Nevada, CB-1216-04-0017-T-1, and others in law enforcement positions are found about Hatch decisions by the attorneys. My attorneys call everyone associated with the OPD grants the OSC attorney has identified in her letter and send a letter to her on about the 31st outlining those conversations and the overall legal advice we have received and what can be found in case law. There is a formal request from the Utah Senate President to the AG's office for an opinion in this time period. The AG's office pulls up a previous opinion from the early 1990s they had and independently researches case law. Their conclusions mirror the dissenting opinion of the Merit Service Protection Board on this case involving me. There also is the refusal of the OSC during this time period to give any advisory opinions, internal policy procedure documents or their archive of similar cases for the attorneys to read. The Perkins case file indicates such internal policy documents exist in the ALJ decision and indicates the OSC should try to work with potential offenders.

By the 3rd of November there is a response from the Office of Special Counsel's office. My attorney sends a response outlining what the city is doing to remove me from all perceived connections to grants, like what the Perkins decision directs, OSC operational letters discuss, and asks for an ability to work the issue out. The amount of the police department federal grant money, managed by the Ogden comptroller, for Ogden Police and other police agencies is estimated to be less than 1% of the overall Ogden Police department budget. This is a "de minimis" standard discussed in other case law and less than the 4% in the Perkins case brought forward by the Utah Attorney General's office. The OSC office responds that they may seek a complaint. All legal advice given to me at this point is to continue the campaign until a solution for everyone's concerns

Mr. ROSS. Thank you, Mr. Greiner.

Mr. Coffina, you are recognized for five minutes for an opening.

STATEMENT OF SCOTT A. COFFINA

Mr. COFFINA. Chairman Ross, Ranking Member Lynch and distinguished members of the Subcommittee, my name is Scott Coffina and I appreciate the opportunity to share my thoughts on reform of the Hatch Act.

As a former Associate Counsel for President George W. Bush whose responsibilities included advising and training the White House staff on the parameters of the Hatch Act, and as a former staffer in President Reagan's Office of Political Affairs who had to work under its restrictions, I applaud this committee's efforts to enact sensible changes to this law.

The Hatch Act serves a very important purpose for our Federal Government, freeing the government workplace from partisan political influence and coercion. The Hatch Act does protect Federal workers from political pressure when performing their jobs and benefits the public by delivering performance that is free from partisan political influence.

Still, the benefits of the Hatch Act come with a price. Its restrictions on political activity implicate the First Amendment rights of millions of Federal employees as well as those of State and local government officials whose jobs are funded at least in part with Federal dollars. Because political activity is at the heart of First Amendment protection, restrictions on political activities must be carefully considered to be sure they serve the purpose of keeping the government workplace free of partisan political influence and corruption.

It was in this spirit that the last significant overhaul of the Hatch Act was enacted in 1993. The 1993 amendments dramatically loosened the restrictions of the Hatch Act that essential locks government employees out of the political process entirely. With a laudable focus on protecting the integrity of the government workplace, the changes enacted in 1993 struck the appropriate balance by allowing most Federal employees to engage in political activity while off duty while maintaining strict restrictions on political activity in the government workplace.

The Office of Special Counsel has done a commendable job of trying to maintain that balance between the First Amendment and its mandate to enforce the Hatch Act and provide guidance to government employees on what the law does and does not permit. Its program of providing advisory opinions gives practical, timely guidance to prudent government employees or counsel who ask questions before engaging in conduct about which the law is unclear.

Still, in recent years, we have seen ambiguities in the Hatch Act lead to confusion in government ranks and uneven enforcement by the Office of Special Counsel. In addition, a lot has changed over 20 years and the time is right to consider amending the law to address its ambiguities, to keep pace with technology and to address the areas where the law does not work well or doesn't meaningful serve its purposes.

The touchstone of reform ought to be striking the right balance between First Amendment rights and reinforcing those provisions

of the Hatch Act that most serve its goals, namely that Federal employees may not use their official authority or influence to interfere with the outcome of an election, may not solicit or accept political contributions, may not pressure subordinates or colleagues to engage in political activity, may not solicit or encourage political activity by anyone within the business before their agency and may not use official resources towards political ends.

With these principles in mind, I believe that necessary and sensible Hatch Act reform would include the following changes. One is lift the prohibition on State and local employees running for political office. All three of the bills proposed so far include this commonsense reform. This arbitrary restriction only on State and local officials whose jobs are supported by Federal funds taxes the resources of the Special Counsel without appreciably advancing the goals of the Hatch Act.

Two, introduce graduated sanctions to address minor infractions as proposed by Representative Cummings. Most government employees try to play by the rules. If they mistakenly wear a campaign button in the office, a warning should be sufficient to vindicate the law.

Three, treat outside political communications during the work day from personal smartphones and BlackBerrys in the same manner as personal phone calls and emails. Technology has made it possible to quickly send political messages to outsiders without using government resources or significantly disrupting the sender's work day. It has also made the requirement that when employees leave the Federal building to do so impractical and unenforceable.

Political communication should be permitted in the same manner that personal calls are permitted as long as they are not excessive, are not directed to other employees or otherwise violate the Hatch Act.

Four, Federal employees who wish to post permissible political messages on blogs or social media pages should not have their government title appear on those pages even if only in their profile. In my view, there is too much risk that the title will land undue weight to the otherwise personal political views of the employee. Similarly, government employees whose title appears on their social media pages should be responsible to remove any political fundraising solicitations placed on their page by others within a reasonable time.

Five, the definition of who is included in the relaxed restrictions for certain White House employees and senior government officials should be clarified. First, there should be a presumption that all appointed White House employees fall within the relaxed restrictions. Second, all White House employees, except perhaps those in the national security area, should be permitted to assist the President and Vice President in their political activities.

Under the standards employed by the Office of Special Counsel in its January 2011 report on the Bush Administration, only high level White House employees can assist the President with the preparation and execution of a political trip which simply is not practical.

Sixth, and finally, recent controversy involving both parties demonstrates the importance of properly allocating the cost of political

and official events to ensure that the public is not underwriting political activity. The classification of events whether official or political should be done primarily according to objective criteria about the origin and execution of the event rather than focusing on the subjective motivation behind them. Some questions aimed at evaluating these events objectively are set forth in my written testimony.

Once again, I appreciate the Committee's bipartisan efforts for meaningful Hatch Act reform and the opportunity to share my thoughts with you today. I would be happy to address any questions you might have.

[Prepared statement of Mr. Coffina follows:]

Chairman Ross, Ranking Member Lynch and members of the subcommittee, my name is Scott Coffina, and I appreciate your invitation to share my thoughts on reform of the Hatch Act. As a former Associate White House Counsel for President George W. Bush whose responsibilities included advising and training the White House staff and others in the federal government on the parameters of the Hatch Act, and as a former staffer in President Reagan's Office of Political Affairs who had to work under its restrictions, I applaud this Committee's efforts to enact meaningful Hatch Act reform.

The proposals that have been introduced would provide rational and necessary improvements to the current law. The bill introduced by Representative Cummings would address a glaring problem with enforcing the Hatch Act by providing graduated sanctions for violations. The current penalty – presumptive termination from federal employment no matter how minor the offense – is in many cases unfair and actually undermines enforcement of the law as compassionate supervisors look the other way in order not to subject a subordinate to such a severe penalty for a minor infraction. It also can chill the exercise of millions of people's First Amendment rights during campaign season, as government employees refrain from even permissible off-duty political activity in order to stay well inside the foul lines.

All of the bills also would eliminate the arbitrary restriction on state and local officials running for elected office, which forces them to surrender their jobs if they want to advance their public service by running for elected office. The proposed legislation reflects a consensus that whatever benefit there might be to prohibiting current state and local officials from running for elected office is far outweighed by the loss to the public of qualified, motivated people in one or the other position.

However, while these proposed changes to the Hatch Act are important, they do not amount to the "overhaul" for which bipartisan support was expressed during the full committee's hearing last summer. This committee ought to take advantage of this rare consensus to tackle some of the more difficult issues surrounding the interpretation and enforcement of this law. For example, the law should be updated to address the enormous technological advances in communications over the years. The ubiquitousness of smart phones creates a real obstacle to enforcing the Hatch Act prohibition on federal employees participating in political activity in the workplace, which literally requires employees to leave the building to make a phone call or send an email for a partisan political cause. However, the ease with which employees can dash off a "political" email from their own personal smart phones (not using government resources) makes the time to go outside seem wasteful and the enforcement of this restriction quite impractical.

Useful amendments to the Hatch Act ought to account for the ease with which government employees can communicate with others on political matters without the use of

government resources and with minimal disruption to the work day. Outside political communications (from personal devices) should be treated in the same manner as personal communications, which are generally permitted in the workplace as long as they don't interfere with an employee's work. With such routine and modest communications permitted, the Office of Special Counsel could focus its enforcement efforts on vindicating the true purpose of the Hatch Act – maintaining a federal government workplace that is free from partisan political influence or coercion. To that end, it is vitally important to maintain and enforce the prohibitions on federal employees engaging in political activity directed at their colleagues within the government workplace, requesting subordinates to assist a political candidate or party, or using their position or title – or government resources – to advance the cause of a political party or candidate. And of course, the prohibition on political fundraising in a federal building, which is a felony under 18 U.S.C. § 607, should continue to be strictly enforced.

Moreover, blogs, Twitter, Facebook and other social media represent avenues for political communications where an employee's "public servant" and private citizen personae can overlap, creating additional Hatch Act enforcement challenges. While new legislation to establish the proper use of these media under the Hatch Act could be useful, the fear is that technology will continue to outpace the law. The Office of Special Counsel just last month issued updated guidance for the use of social media, and should continue to update its guidance as new questions and technologies arise, so that federal employees clearly understand how the Hatch Act applies to social media.

While overall very helpful, I believe that the OSC's April 4, 2012 guidance on social media is too permissive in two respects. First, the OSC takes the position that it is permissible for federal employees to use social media outlets, while off-duty, to advocate for or against a political party or candidate, although they may not refer to their official positions or titles while engaged in those efforts. While that is consistent with the terms of the Hatch Act, I believe the OSC mistakenly interprets the statute to permit federal employees to engage in political activity in this matter even if their official title is identified as part of their profile. This is akin to allowing an employee to publish a political advocacy piece on personal letterhead that identifies her title, which I am confident the Hatch Act does not permit. The Hatch Act strictly forbids federal employees from using their position or title to affect the outcome of an election, and it should follow that federal employees who wish to engage in political advocacy through their social media pages must erase their title from their profile while engaging in these efforts. A political screed posted on the social media page of "John Smith, Assistant Secretary of Commerce" could send a decidedly different message than that same message on the page of "John Smith." If one's title can be readily associated with the political activity, it seems the Hatch Act has been violated.

Second, I question whether it is appropriate for the OSC to absolve federal employees of the responsibility to remove links to political fundraising sites that might have been posted on their social media site by a "friend," "follower" or other third party. The OSC historically has strictly enforced the Hatch Act's prohibition on fundraising by federal employees, and it thus seems inconsistent to allow links for political fundraising to remain on their web pages indefinitely, even if put there by others. It does not seem unduly burdensome for employees to monitor their social media pages (a good practice anyway, for a variety of reasons) and remove links to political fundraising sites within a reasonable period of time, especially if their position or title is identified in their profile.

The Committee also ought to seize the momentum for reform to amend the statute to clarify the provisions regarding political activities by White House employees and senior administration officials, which continually generate fodder for accusations by the opposition party about abuse of office and the misuse of taxpayer money.

In recognition of his role as the head of his political party, the president is expressly exempt from the restrictions of the Hatch Act, as is the vice-president. The law also provides fewer restrictions for Senate-confirmed administration officials and "24/7's" on the White House staff – those employees who are always "on call" -- permitting them to engage in political activity while on duty since they are never technically off duty. However, in its 2011 report on political activities during the Bush Administration, the Office of Special Counsel essentially ignored the 24/7 standard found in the Hatch Act and applied the Leave Act instead, under which lower-level White House staffers would not qualify for the relaxed restrictions applicable to "24/7" employees. In reality, most of the White House staff is always on call, and thus should meet the 24/7 standard. By incorrectly applying the Leave Act rather than the standard contained within the Hatch Act itself, the OSC concluded – wrongfully – that lower-level employees in the Bush White House had violated the law by facilitating political and mixed travel by Administration officials.

The implications of this misinterpretation of the Hatch Act go far beyond the staffers undeservedly tarnished by the OSC's report. For if lower-level White House employees cannot, by the OSC's standards, engage in political activity while on duty, they necessarily cannot support the president's political activity either. Thus, many of the scheduling and logistical tasks which the president must rely upon White House staff members to perform, would, by the OSC's interpretation, violate the Hatch Act.

The president of course needs the support of staff members at all levels for both official and political activities, and no president wants to put devoted staffers who work long hours serving the public for modest pay in legal peril, but the Special Counsel's interpretation of the Hatch Act does exactly that. The Hatch Act should be amended to make explicit that White

House staffers always may assist in the planning and execution of the political activities of the president or vice president themselves. Moreover, the Hatch Act or interpretative regulations should make clear that all appointees on the White House staff, whether or not they are commissioned officers, presumptively qualify for the relaxed restrictions under the 24/7 standard.

These clarifications would not sanction unlimited political activity by the White House staff. Rather they would accommodate the reality that the White House is a unique government workplace led not only by the head of state, but by the leader of a political party who is himself exempt from the Hatch Act, and not put hardworking White House staffers in legal harm's way. The law's prohibitions on political fundraising, improper use of one's official position or title for political purposes, and the use of taxpayer money for political purposes, which apply to all federal employees, should remain in effect and be vigorously enforced.

Additionally, the standards for distinguishing official, political and "mixed" travel by the president and high-level administration surrogate speakers who may engage in campaigning while on duty need to be clarified so the related expenses can be properly allocated. For while the president is exempt from the Hatch Act, even he may not spend Treasury funds for partisan political purposes.

The classification of official vs. political expenses can be more art than science, and the president deserves the benefit of the doubt that events the White House classifies as "official," are properly designated as such. However, over the past year, there has been a disturbing pattern of "official" trips by the president to key battleground states in the upcoming election for events that have the look and feel of pure campaign rallies.

Consider, for example, the president's remarks at an official event last November in Pennsylvania, on the jobs bill. At this speech in the Scranton High School gym, the president criticized Republicans for "blocking" this legislation, prompting "boos" from his audience. According to the transcript of the "Remarks on the American Jobs Act," released by the White House Press Office, the president then touted his own accomplishments across the board, to the delight of the crowd:

> But here's the good news, Scranton. Just like you don't quit, I don't quit. (Applause.) I don't quit. So I said, look, I'm going to do everything that I can do without Congress to get things done. (Applause.) . . . So let's just take a look over the past several weeks. We said, we can't wait. We just went ahead and started taking some steps on our own to give working Americans a leg up in a tough economy. For homeowners, I announced a

new policy that will help families refinance their mortgages and save thousands of dollars. (Applause.) For all the young people out here -- (applause) -- we reformed our student loan process to make it easier for more students to pay off their debts earlier. (Applause.) For our veterans out here -- and I see some veterans in the crowd -- (applause) -- we ordered several new initiatives to help our returning heroes find new jobs and get trained for those jobs. (Applause.) . . . .

And in fact, last week I was able to sign into law two new tax breaks for businesses that hire veterans, because nobody out here who is a veteran should -- we have to make sure that they are getting the help that they need.

AUDIENCE MEMBER: Thank you, Mr. President!

THE PRESIDENT: And by the way, I think we're starting to get, maybe, to the Republicans a little bit, because they actually voted for this veterans bill. I was glad to see that. (Applause.)

* * * *

Now, I know you hear a lot of folks on cable TV claiming that I'm this big tax-and-spend liberal. Next time you hear that, you just remind the people who are saying it that since I've taken office, I've cut your taxes. (Applause.)

Your taxes today -- the average middle-class family, your taxes today are lower than when I took office, just remember that. (Applause.) We have cut taxes for small businesses not once, not twice, but 17 times.

Aside from these comments more befitting a campaign rally than an effort to advance a piece of jobs legislation, this trip to Pennsylvania for this "official" event represented a curious detour on a trip to New York City for three political fundraisers that same evening. Query why the president could not make his remarks on the economy somewhere in politically "safe" New York, instead of in a high school gym in "battleground" Pennsylvania. The ultimate question, of course, is whether the taxpayers or the president's reelection campaign should have paid for this portion of his trip.

A three-state swing last month by the president on college campuses in North Carolina, Colorado and Iowa included remarks following the same pattern as those in Scranton – criticizing, indeed, mocking, Republicans while touting his own accomplishments. These events, ostensibly on student loans, evoked substantial public criticism for resembling campaign rallies more than policy speeches. No one should begrudge a president running for reelection from

trumpeting his record and criticizing his opposition, but he should not do so at taxpayer expense in a setting indistinguishable from a campaign rally.

Last fall, the Office of Special Counsel issued guidance for classifying political and official activities, and the Department of Justice wrote an authoritative legal opinion in 1982 that is specific to the allocation of costs for presidential travel. Both sources recognize the need for a case-by-case analysis of each event. The DOJ opinion also states that generally, if the purpose of an event is to promote the partisan aims of a candidate, then expenses related to the event are political in character. The OSC likewise considers the motivation for an event, as well as the nature of the official's remarks and whether the event was open, among other factors.

Evaluating events in which the president or senior-level officials participate as political or official by virtue of their apparent purpose or motivation is necessarily subjective and invites endless second-guessing by political opponents and even the Office of Special Counsel. To illustrate, in its report criticizing the Bush Administration last year, the OSC disputed the classification of one trip as official because the participating Administration official understood that the event would help an incumbent, even though the OSC offered no criticism of how the event itself was conducted. The OSC criticized another "official" event because the participating Cabinet official acknowledged the House member in whose district it occurred (and who was in attendance at the event) as "a strong and effective advocate for your interests in the Congress." Notably, at the jobs speech in Scranton discussed above, President Obama acknowledged Pennsylvania Senator Bob Casey, who is up for reelection this year, as a "great Senator" even though Senator Casey did not even attend the event. He did not, however, acknowledge Pennsylvania's Republican Senator, Pat Toomey.

The Committee ought to work with the OSC to develop more objective criteria to evaluate whether events are "official" or "political," and thus whether or not they should be paid for with taxpayer money. One suggestion would be to de-emphasize (although not entirely ignore) the subjective motivation behind a particular activity in favor of more objective criteria about its origination and execution, such as:

- Do the theme and content of the remarks reflect a matter of public concern, particularly in the locality where the event occurred?
- Do the remarks and the setting align with the stated official purpose of the event or resemble a campaign stump speech and rally?
- Where did the idea for the event originate from? Is it part of an overall strategy to advance a particular public policy or did it come from the president's political advisers or campaign staff? Did an invitation to participate in an "official" event in the district of an embattled incumbent originate from her Congressional office or from her campaign staff?
- Was the official event added to a pre-existing political trip?

- Is there a logical nexus between the selected location and the subject matter of the event aside from a potential political benefit? Is there a pattern of events in battleground states without such a nexus, suggesting a purpose to the events that is predominantly political rather than official?

Ideally, these criteria would be considered by staffers in the planning stages of events, rather than as part of an investigation of a complaint from a member of the public, the media or the political opposition, which the current lack of objective standards continually invites.

Thank you again for the opportunity to share my views on Hatch Act reform. I appreciate this Committee's efforts to modify the statute to make it more clear, and more fair, to the millions of public servants affected by this law while reinforcing the Hatch Act's essential purpose of keeping improper political influence out of the government workplace.

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May 16, 2012

House Subcommittee on Federal Workforce, U.S. Postal Service and the District of Columbia Hearing

Chairman: The Honorable Dennis Ross
Ranking Member: The Honorable Stephen Lynch

Hearing: "Hatch Act: Options for Reform"

Federal Law Enforcement Officers Association
Witness Statement: Jon Adler, National President

Chairman Ross, Ranking Member Lynch, and Distinguished Members of the committee, on behalf of the 26,000 membership of the Federal Law Enforcement Officers Association (FLEOA), I thank you for the opportunity to appear before you today. My name is Jon Adler and I am the National President of F.L.E.O.A. I am proud to represent federal law enforcement officers from over 65 different agencies. My testimony will primarily respond to the current penalty provisions of the Hatch Act, and the manner which alleged violations are investigated.

Under the current statute, removal is presumptively appropriate for a federal employee's violation of the Hatch Act. The MSPB has limited discretion to mitigate the penalty, by unanimous vote to no less than 30-day suspension, and has been mandated by the federal circuit court to consider mitigation factors referred to as "Purnell Factors" in exercising its limited discretion to mitigate. If the MSPB unanimously decides to mitigate pursuant to the "Purnell" factors, this typically involves a cumbersome appeal to the full three person Board in Washington, DC., and requires unanimous consent.

In fact, the Hatch Act penalty is draconian as it currently stands, because mitigation opportunity is limited and obviously slender. The proposed penalty amendment under the Hatch Act Modernization Act of 2012 greatly

Mr. ROSS. Thank you, Mr. Coffina.

Mr. Adler, you are recognized for five minutes for an opening.

STATEMENT OF JON ADLER

Mr. ADLER. Thank you, Chairman Ross, Ranking Member Lynch, distinguished members. This is a rare instance for me where I actually agree with everyone on my panel. Therefore, I don't think I don't want to waste everyone's time by sort of restating what has already been said. I am proud everyone is working so well together to address this important issue.

I mean the main theme here is we don't want the Hatch Act to become a hatchet act. I think, based on the recommendations expressed, we are definitely going in the right direction. I think the Hatch Act Modernization Act put forth by Ranking Member Cummings is on point. It is a proactive effort to address the serious issues from my perspective and my membership, representing 26,000 members of the Federal law enforcement community, the concerns in terms of the penalties, as Mr. Coffina stated, having those lesser penalties to address an issue of a button, a screensaver or something where technically it might be a violation of the current statute but it doesn't rise to the level of termination. Certainly it should ease the resource pressures on Ms. Lerner and her very well organized staff.

Having said that, I think it is more important to yield my time so that we can get to questions and other comments that are relevant to moving this forward to a collective understanding and proper conclusion.

I am here to answer any questions. Thank you.

[Prepared statement of Mr. Adler follows:]

ameliorates the mandated removal penalty by allowing lesser penalties than termination of employment to be imposed for a Hatch Act violation. The amended penalty section properly removes the three-person Board in Washington, DC as the exclusive mitigating authority, and relegates penalty determinations to the individual presiding Board judges nationwide who are accustomed to assessing reasonable penalties based upon the unique circumstances of each case, including the Purnell factors. This would reduce the imposition of removal to only the most egregious cases, instead of the presumptive application of removal to any Hatch Act violation.

One of the emerging issues with the application of the Hatch Act relates to how the "Federal Workplace" is defined. The statute does not define this, but does impose an "on-duty" prohibition. Since an increasing number of federal employees are authorized to work from home, it stands to reason that the current statute needs to be amended to address this. Therefore, it would be prudent to amend the act so as to provide notice to an employee of how the Hatch Act applies to work at home.

Computers and the internet pose another challenge for the Hatch Act. Alleged Hatch Act violations relating to the misuse of government computers, i.e., email and internet access, tend to be addressed administratively. Under the current statute, it is inappropriate for management to issue a written reprimand alleging Hatch Act violations without going through the OSC. This process is often circumvented by management as a means to quickly resolve these types of violations. It would stand to reason that a "Modernization" act would address the impact the cyber world has on the Hatch Act.

As it is said, it's always good to know the rules up front. The Hatch Act Modernization Act of 2012 is a strong step towards clarifying emerging issues, as well as addressing the severity of the current penalty system. I'd be happy to answer any questions the committee may have.

The Honorable Dennis Ross
Opening Statement
Hatch Act: Options for Reform
May 16, 2012

During my brief tenure as a member of Congress, I have seen how well-intentioned legislation can have unintended consequences when applied to the real world. This is certainly true with respect to the Hatch Act.

Originally enacted in 1939, the Hatch Act was needed to prevent an all too prevalent practice of federal employees engaging in partisan political activity using federal resources.

The Hatch Act was last amended in 1993, a year in which employees were becoming accustomed to e-mail for workplace communication and using Adobe PDF to share information with their colleagues.

Technology's advance is only speeding up, and the Hatch Act is in need of an update.

Today's hearing builds on the Committee's June 2011 hearing, at which a bipartisan panel expressed support for making major changes in the Hatch Act statute. Furthermore, several bills have been introduced to repeal the Hatch Act's over-reaching and arbitrary restrictions on state and local government workers who seek to run for office.

In short, there is a growing consensus that we should use to enact comprehensive Hatch Act reform. The federal government should not be in the business of making personnel policy for state and local government employees, and the Office of Special Counsel should not be dedicating as much of its resources as it now does to pursuing complains concerning state and local elections. The OSC should be focused on cracking down on federal workers who abuse the public trust and on protecting those federal workers who are unfairly targeted by their managers for blowing the whistle on waste, fraud and abuse.

Instead, we should craft legislation that preserves the intent of the Hatch Act and reflects the realities of today's workplace. Comprehensive reform should, for example, adopt a definition of "federal workplace," that accounts for how federal employees communicate today – which is oftentimes out of the office, on the go, with personal electronic devices.

I think we all can agree that our nation's public servants should be prohibited from engaging in partisan political activity. The Hatch Act has been largely successful at curbing overtly partisan politicking within the civil service. However, a fresh look is needed to address certain unforeseen challenges and unintended consequences. We will hear about some of those consequences today. And I hope we are able to enact changes that prevent them from recurring in the future.

I would like to thank Mr. Cummings for his work on this important issue and I look forward to working with him, Chairman Issa, and Mr. Lynch on moving Hatch Act reform legislation through the House of Representatives this Congress.

I thank the witnesses for appearing here today and look forward to your testimony.

Mr. ROSS. Thank you, Mr. Adler.

I also want to echo your sentiments about the cooperation, especially with my colleagues and Ranking Member Cummings for his bill in this regard.

Ms. Lerner, with regard to investigations under the Hatch Act and violations, how much money does OSC spend annually investigating State and local Hatch Act claims?

Ms. LERNER. It is tough to put a number on it. I can tell you our agency's entire budget is around $18.5 million. We have about 110 employees altogether and have 8 employees in our Hatch Act Unit. Our whole agency gets about 4,600 individual cases per year through all of our program areas, and the numbers are going up pretty significantly. We have had a 10 percent increase.

Mr. ROSS. Would you say exponentially?

Ms. LERNER. Yes. We are seeing exponential growth in every single one of our program areas.

Mr. ROSS. In terms of complaints?

Ms. LERNER. In terms of complaints in the Hatch Act Unit, in every one of our units. We also do disclosures, we do USRO, we do prohibitive personnel practices like retaliation, so we are really stretched.

Mr. ROSS. Could you pinpoint dollarwise? Is it hard?

Ms. LERNER. I really hesitate to put a dollar number on it. I can give you specific numbers about the number of cases that we have in our Hatch Act Unit.

Mr. ROSS. Would you say the State and local Hatch Act workload is greater than, equal to or less than for Federal Hatch Act violation investigations?

Ms. LERNER. It is about 45 percent of our entire Hatch Act load. Our Hatch Act load right now is over 1,000 cases, Federal, State and local, every year and about 3,000 advisory opinions every year.

Mr. ROSS. Would you say the State and local investigations under the Hatch Act is interfering with the Federal?

Ms. LERNER. Absolutely.

Mr. ROSS. No question about it?

Ms. LERNER. Absolutely. We have serious cases, the coercion cases, the misconduct cases. As I mentioned, where I would really like to be able to put some resources is in the education and outreach so we can prevent these things from happening in the first place. So many people, you heard the testimony today, people don't understand the Hatch Act. If we are going to hold employees responsible for being in compliance, we have an obligation to them to do some outreach and education.

Mr. ROSS. Another aspect of the Hatch Act that is disconcerting to me, especially this being an election year, have you found the candidates for political office use the Hatch Act against each other during these elections?

Ms. LERNER. Absolutely.

Mr. ROSS. Is it pretty prevalent?

Ms. LERNER. I would say it is. We are seeing this happen at both the individual level with individual candidates. We often get complaints from an opponent in a political race, not just Republicans versus Democrats. Sometimes it is in the primary and a Democrat

will file a complaint against a fellow Democrat or a political organization.

Mr. ROSS. The mere allegation alone is damaging enough regardless of the substance?

Ms. LERNER. Absolutely.

Mr. ROSS. I understand there is an OSC investigation involving Secretary Sebelius with regard to a gubernatorial campaign. Do know the status of that investigation?

Ms. LERNER. We talked with your staff about the status of that investigation which has been reported publicly. We received Chairman Issa's letter which alleged a potential violation of the Hatch Act. As I mentioned, we discussed this with the committee prior to the hearing but in accordance with our policies, I cannot really add anything further at this time.

Mr. ROSS. Can you comment as to when you think that report might be issued?

Ms. LERNER. It is being actively investigated and I hesitate to give you a date that may or may not be right. As I mentioned, we have eight lawyers to cover all of our Hatch Act cases, but we are making this one obviously a priority. We will get through it very quickly as we can.

Mr. ROSS. Thank you.

Mr. Greiner, with regard to the allegations against you and the violations found, specifically what was the amount of the grants involved?

Mr. GREINER. I can go back to each of the grants. There were four grants, they were all multi-jurisdictional type grants. We try to do that to get the grants. The grant that was the focal point of the decision by the ALJ was a $400,000 grant for a dispatch center that had nothing to do with the police department.

Certainly we get the benefit of the dispatch center being there but it was a cooperative effort that was put together to try and get some grant money for State communications sites to improve the connection between police and fire departments in two counties. We had already built a new building with that.

Mr. ROSS. Upon receipt of the grant money, did you have any control over where it went?

Mr. GREINER. No, and not one penny came to the police department I managed.

Mr. ROSS. You had absolutely no authority over the delivery or distribution of the grant money?

Mr. GREINER. Not one penny.

Mr. ROSS. You talked about several hundred thousand dollars with regard to lawyer fees. How much did it personally cost you to defend yourself in this confrontation?

Mr. GREINER. I was out of pocket over $30,000 personally before the Office of Special Counsel filed a complaint against the city and then the city picked up the remainder of the tab.

Mr. ROSS. Thank you. My time has expired and I will now recognize the Ranking Member of the full Committee, Mr. Cummings from Maryland.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Ms. Lerner, on March 7, I introduced the Modernization Act. The legislation implements two recommendations the Special Counsel

made for immediate reform. First, the legislation eliminates the Hatch Act prohibition on State and local government employees running for office. I understand that is very important to you. This would take the Federal Government out of the business of telling State and local government employees such as Mr. Greiner whether they can serve their country by running for elected office.

Ms. Lerner, can you explain why eliminating this provision is so important to you and your office?

Ms. LERNER. Sure. I would like to start though by thanking you, Mr. Cummings, for introducing the Hatch Act legislation. I appreciate that very much. Your efforts are truly appreciated.

The reason this is so important as I mentioned in my opening statement, there are a number of reasons the State and local provision is so important to my office. First, just from the standpoint of fairness, I don't think I have talked to anybody, either here in Congress or in government, who thinks that it is fair that people cannot serve their local communities just because they are employed by State or local government that receives some money. It can be a very small amount or they can just be touched by Federal funds, so there doesn't have to be a strong connection, and then they can't serve, they can't run for office.

It is first the issue of fairness. Is this really something we want to do? Is it the proper role for us to be telling State and local governments how their employees should be behave? As I also mentioned, most States have their own rules for how their employees should behave. Most states have their own rules that would cover this issue. They have either mini-Hatch Acts or ethics rules. I think it is appropriate for those States and localities to enforce prohibitions on their own employees.

Mr. CUMMINGS. I am sure you have taken a look at those State provisions. There was an intent when this Hatch Act was developed to address certain issues. I guess what I am trying to figure out have circumstances changed over time and they become outdated? If the States are doing this, what is the difference between what a State is doing and what the feds are doing now? Do you follow me?

Ms. LERNER. I am. I think what has happened since this Act was first enacted and since it has been amended is that there has been an influx of Federal funds into the States, particularly after 9/11 in the law enforcement area. Now virtually every law enforcement agency at the State and local level receives some Federal funds. The breadth of this Act is much, much larger than it was ever intended.

There are sort of three parts to this. One is the running for partisan political office and that is the only thing the legislation would strongly affect. The coercion issue and the improper use of office would still be there, so we would have enforcement ability in those two areas. As far as I can see, there is no real purpose in saying someone cannot run for office just because they happen to work for a State or local government that receives some Federal funds or that their job is touched by some Federal funds.

Mr. CUMMINGS. What was the original intent? Do you understand what I'm saying was it to try and block people from running

for office? Was it that people in office were saying we don't want people running against us? Are you following what I am saying?

Ms. LERNER. I think the original intent was to try and keep politics out of the civil service. Frankly, it is having the opposite effect now. It is becoming much more politicized because of this provision. I think it was never intended to do that and these consequences were unforeseen at the time.

Mr. CUMMINGS. So you are seeing situations where you have a law, you have to enforce it, but you yourself look at it and say, wait a minute, there is something awfully wrong here?

Ms. LERNER. Yes. Within a couple months of my taking office in June, I was having conversations I think with both you and Chairman Issa about this law. We sent over some proposed legislation in October to try and resolve it. We are going to enforce the law. The way the law reads right now, it is not something I am particularly comfortable doing but we are going to enforce it because that is our job, but I sure hope you all can change it.

Mr. CUMMINGS. Thank you.

Thank you, Mr. Chairman, for your courtesy. I really appreciate it.

Mr. ROSS. Thank you.

I now recognize the gentleman from Massachusetts, the Ranking Member of the Subcommittee, Mr. Lynch, for five minutes.

Mr. LYNCH. Thank you, Mr. Chairman.

I want to thank all the witnesses. It is unusual that we get a whole panel that basically agrees and as well, that agreement is reflected up here on the dais. Since we all agree this is a good idea, we will probably have to kick it upstairs to party leadership and they will come up with some reasons why we really don't agree because this can't happen.

Mr. Adler, first of all, I want to acknowledge that this is actually National Police and Peace Officer Week. From the dais on both sides, we want to acknowledge the fact that you and your members do some terrific work in protecting us and the government, the Capital and also the Federal Government and the Nation. We appreciate the risk that you confront every single day. These have been some tough months for law enforcement all across the country. Our prayers and thoughts go out to you and your members. We really appreciate the work you do every day.

You were very economic in your remarks initially, so I have to punish you for that. In terms of education on the Hatch Act, as Counsel Lerner has pointed out, after 9/11 a lot of Federal money got pushed out to both police and fire, fire grants, cops grants, so now this connection, however tenuous it might be, is there and precludes people from running for office and other limitations are put on you as well.

How do your folks get educated on the Hatch Act? Are they advised in advance or is it when they trip up and all of a sudden it comes down on them?

Mr. ADLER. Maybe it is a whisper in advance. I think we could learn from the other areas of training that we get by way of ethics, sexual harassment, computer security where we get these online training sessions where we can actually see something. I think typically what happens is whether it comes down from the Attor-

ney General or there is some memo that will come down prior to an election, right about now, that gets circulated. It could be a three, four or five page letter, fun size probably eight, which is a challenge for me, and although it may be well written and thorough, it doesn't exactly rise to the same level or the same effect that other types of training the government delivers again by way of ethics training and other areas of importance.

As Ms. Lerner said, there is an absolutely better outreach and education. I think certainly we could use examples and Mr. Coffina hit upon it, a screen saver issue, a Facebook posting. We now have people authorized to work out of their home, so if during your lunch period at home, which I guess they decide, they go on their computer and make a Facebook entry, do they really understand what they are doing?

I think, in general, everyone has sort of a broad sense as to what the Hatch Act is, but when you break it down, as Ms. Lerner made clear, we are putting her on the spot when someone technically violates the Hatch Act unwittingly, that they are subject to termination, which is unfair and unreasonable.

Mr. LYNCH. By having a graduated penalty process where some of the very minor you know, wearing a pin as Mr. Coffina indicated, it is the death penalty, basically severance from employment is what has to happen. That graduated penalty process may be a warning, take off the button, that type of thing would certainly lighten the load for Ms. Lerner and her staff.

This all seems to be commonsense. You would think we should be able to come up with these modest and I think very sound recommendations.

I am going to suspend as well. Thank you. I yield back.

Mr. ROSS. Thank you, Mr. Lynch.

I now recognize the gentlelady from the District of Columbia, Ms. Norton, for five minutes.

Ms. NORTON. Thank you very much, Mr. Chairman.

I appreciate you invited a witness from the District of Columbia and a particularly well qualified witness so we can get to this longstanding issue.

This House actually, I think in my first term in Congress, actually changed the Hatch Act not to apply to the District. The bill did not pass the Senate and here we are again more than 20 years later.

Mr. Nathan, at page six, you say, "I stated earlier, the legislation should be amended so that similar to Congress, the Hatch Act does not apply to the District's legislative or judicial branches." Do you have any issue with the legislation with respect to the District of Columbia as it is now framed in the bill?

Mr. NATHAN. We support the bill which would move the District of Columbia away from being treated as a Federal agency and being treated more like a State and local jurisdiction and obviously allowing people to run in partisan elections.

I think it could be a tweak to make it clear that when it talks of the D.C. Government, it is talking about the Executive Branch of the D.C. Government. We would be prepared to supply some language to that effect because the Federal Hatch Act does not apply

to the judiciary or to legislative personnel, not only members of Congress but staff as well. I think it ought to be parallel.

Ms. NORTON. I would appreciate receiving your suggestions on that modification.

Mr. NATHAN. I would be delighted.

Ms. NORTON. Mr. Coffina, I must tell you, you waded into an area that I don't envy you for doing. That has to do with the President and his employees as they make trips during campaign season. I must tell you it reminded me of what we go through here when we are putting out a newsletter and we have to see what words can or cannot be used. It is a painful exercise.

You speak about the President's trip on student loans, I think. On student loans we get into a subject that comes up during every election. It is perhaps the most partisan of issues. You suggest there is a way to somehow thread this needle. I think it is important that you point out examples that are indeed troublesome.

In the case of student loans, this was a matter that was not in the Republican budget at all and the President kind of barnstormed where you might expect him to, student campuses, and discussed this issue. It was the first time the issue had been discussed in the Congress. It was profoundly an official issue. You say, I think with great fairness, that this matter involves the subjective, second guessing, but you do suggest there are ways to solve it.

I have my doubts, Mr. Coffina, because you indicate there is an authoritative legal opinion from 1982 and I can tell you, I don't think anybody can find any campaign since 1982 where this was not a major issue for the other side, so I have my doubts about what to do about it. Your notion about the theme of the remarks, free existing or not, again, I am struck with how this might be quite unenforceable.

I hate to see something that may be a violation not be tagged but I must say there has to be a way other than going through a list the way we do when we go to franking to see if that word or this word should have been used or that detour or why they do this or was it because of this or that reason. It strikes me that we are into a thorn here.

I would like to note if you really think that these suggested notions of how to evaluate whether the trip is political or not. Do you suggest they haven't been used? Has anybody ever sought to enforce these? Has there been an enforcement action that anybody paid attention to?

Mr. COFFINA. Congresswoman, I personally sympathize with the complexity that you have described, having dealt with this myself when I worked in the White House trying to sort out, as I had events and expenses I needed to approve, is this political, is this official and what are standards to apply. It is very difficult.

Unfortunately, the current standards in place for it don't go anything beyond saying it is a subjective evaluation and must necessarily turn on the facts. What I tried to do in my written testimony, I tried to introduce and reflect the objective criteria I tried to apply when I was making these determinations myself, understanding that subjective motivation and where did this event come from is a part of it.

There are certain yes or no questions that you can ask to try to say which is the better way to classify this, what is the better way to make sure the expenses for this trip are properly borne by the public or properly borne by a political party. I was looking for objective criteria that might help guide that.

Ms. NORTON. Mr. Coffina, you say tried to use these criteria when you were in the White House. Were you able to use them? Did others in the White House use them? Were they useful then?

Mr. COFFINA. Yes, I found them to be useful. I found in evaluating, for example this was an issue in the Office of Special Counsel's report from 2011, if a surrogate event took place in a district of an incumbent, the question was is this politically motivated to help the incumbent? This is an objective question. Where did the event come from? Where did the request come from? Did the member's official office invite the President or a surrogate to participate in that local official event or did it come and originate within a campaign staff?

Mr. ROSS. Unfortunately, the gentlelady's time has expired but we will be able to supplement the record with questions to the panel as well.

With that, I will recognize the gentleman from Virginia, Mr. Connolly, for five minutes.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Thank you to the panel for some thought provoking testimony.

Ms. Lerner, you heard Mr. Coffina enumerate a number of what he characterized as practical, common sense changes to the Hatch Act that would make it more workable. What is your reaction to his enumerated list?

Ms. LERNER. In the category of political travel, I want to just note that we did issue a very extensive, thorough advisory this past fall on October 6, 2011. We put a lot of thought into how best to give guidance to the government and to employees about political travel. I think that really has, in many ways, moved the ball forward and provided the type of clarity that has been needed. Ms. Galindo-Marrone can address that issue a bit more as well.

Mr. CONNOLLY. But did you have any major exceptions to Mr. Coffina's list? You have already testified you want to see changes to the Hatch Act?

Ms. LERNER. I do. I have to tell you quite honestly, we are not seeing a lot of cases about these other peripheral issues—political travel, social media, and frankly the Facebook stuff hasn't been an issue. Email is a little bit more of an issue. On the social media issue, certainly the Internet and social media have dramatically changed the way we gather and share information and the way Federal employees use it has implications, but as an enforcement issue, it really hasn't been much of an issue. We have had maybe two or three of these cases.

Mr. CONNOLLY. In response to Mr. Cummings' question to you, he asked why does the Hatch Act cover State and local government, what was the thinking? Your response was, "I think the thinking was to try to protect civil service from partisan overt political activity." God knows we have seen in American history, State and local governments used as instruments of a political machine, organization or even candidates. That goal might be a worthwhile

one but the question is do we need a Federal umbrella to be dictating to State and local governments how they want to conduct their own business?

Did I understand your answer? You said that was the purpose and then you said, but it seems to have the opposite desired effect. What did you mean? What is the opposite? Are State and local governments being taken over by political machines?

Ms. LERNER. Let me clarify that the only aspect of the State and local candidates' provision that we are advocating to reform is the ability for folks to run for election, partisan political election. They can already run for non-partisan positions.

Coercion matters would still be within our jurisdiction. Improper use of political office would still be covered. The stuff that I think was originally intended to be covered on the State and local level would not be affected at all.

The reason that the running for partisan political office is creating a lot more angst is because it is being used primarily as a weapon. We can only take on those cases when a complaint is filed with our office. We don't go looking for them. The folks who file these complaints, for the most part, are political opponents. It is coming within party, so in a primary a Democrat could file a complaint against a fellow Democrat who they are running against.

Mr. CONNOLLY. Just an observation, running for partisan political activity as opposed to running for non-partisan political activity, in Virginia many cities and many towns run ostensibly on a non-partisan basis, getting around the Hatch Act.

Ms. LERNER. Yes.

Mr. CONNOLLY. It is an enormous fiction that everybody understands. For example, Mr. Cantor, the Majority Leader in this House, one of his key aides is an elected official in Fairfax City in my district, does a good job, but there is no fiction about what party affiliation he has and what he does on his day job. While it is a useful tool, I guess, to get around the Hatch Act, I am not sure it actually achieves the desired outcome.

Ms. LERNER. The Mayor of Chicago is a non-partisan election.

Mr. CONNOLLY. Yes, he is. He is very non-partisan. I know him personally.

Ms. LERNER. Whoever happens to be in that position at the time. You raise an important point and it creates this feeling of unfairness. We have gotten lots of complaints from folks saying, you didn't tell the person in the county over that they couldn't run and they work for the government. We get a lot of those complaints. We have to say we are really sorry but in that county, school board is non-partisan. It creates this feeling about arbitrariness and unfairness. It shouldn't matter what county you live in.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Mr. ROSS. Thank you.

Before I recognize our next member, I recognize Mr. Lynch for submission of a report.

Mr. LYNCH. Thank you, Mr. Chairman.

I would ask unanimous consent that the Committee may accept this testimony, "The Hatch Act, Options for Reform," a statement submitted for the record by the Federal Managers Association.

Mr. ROSS. Without objection, it shall be made a part of the record.

Mr. ROSS. Thank you.

I now recognize the gentleman from South Carolina, Mr. Gowdy, for five minutes.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. Chairman, it has been 15 years since I was subject to the Hatch Act so forgive me if I am playing catch-up a little bit. Who would be the most knowledgeable panel member for me to pose my question to?

Mr. ROSS. Ms. Lerner.

Ms. LERNER. It depends on what your question is about.

Mr. GOWDY. It is kind of remedial. My understanding is Executive Branch employees may not solicit campaign contributes from their peers.

Ms. LERNER. That is right.

Mr. GOWDY. Are there any exceptions to that?

Ms. LERNER. I am actually going to punt this one to Ana Galindo-Marrone who is the Chief of our Hatch Act Unit and knows every detail about how the Hatch Act affects Federal employees.

Mr. GOWDY. That sounds like a great person to punt it to. Are there any exceptions to that general rule?

Ms. GALINDO-MARRONE. Good morning, Congressman.

First, the solicitation prohibition is broader than just prohibiting Federal employees from soliciting other colleagues. The prohibition extends to anyone, so no Federal employee in the Executive Branch can solicit, accept or receive political contributions. The one exception concerns Federal labor organizations and Federal employee organizations.

Mr. GOWDY. That is what I thought. Why that exception?

Ms. GALINDO-MARRONE. I am not sure of the reason why.

Mr. GOWDY. You were just described as the most knowledgeable person on this issue. If you can't tell me why there is an exception for Federal labor organizations, who can I ask?

Ms. GALINDO-MARRONE. I reviewed very briefly last night in preparation for this the legislative history and it is somewhat scant in terms of what Congress was thinking when the exception was introduced. It does have some limitations, so there are some qualifiers in terms of the exception if you want me to go over that.

Mr. GOWDY. Sure.

Ms. GALINDO-MARRONE. The Federal labor organizations, although the members of those groups can solicit, they still cannot solicit, accept or receive while on duty or in the Federal workplace, the solicitation.

Mr. GOWDY. Is there something called official time?

Ms. GALINDO-MARRONE. Correct, but under the Hatch Act, even official time, union official time is considered on duty for purposes of the Hatch Act.

Mr. GOWDY. So you still cannot solicit?

Ms. GALINDO-MARRONE. Correct.

Mr. GOWDY. If you are at a United States Attorney's office, you cannot solicit, participate, but can you show up at a political event after hours?

Ms. GALINDO-MARRONE. After hours, any Federal employee can attend a political event.

Mr. GOWDY. Can their name be on a host committee?

Ms. GALINDO-MARRONE. It cannot. I was going to explain in terms of the union exception, the solicitation is only specific to the union's pact and cannot be directed at anyone that is a subordinate, so when terms of lets say a fundraising event where there is a host committee, typically even union members will not be able to be listed as a member of the host committee.

Mr. GOWDY. I am still trying to understand why there would be an exception for Federal labor organizations. Could you hazard a guess?

Ms. GALINDO-MARRONE. I could try to hazard a guess if I did some more research and maybe we supplemented a response after today's hearing.

Mr. GOWDY. Mr. Chairman, you are the most knowledgeable person I know.

Mr. ROSS. If I am you reference on that, we are not in good shape here.

The gentleman from Massachusetts.

Mr. LYNCH. I might be able to illuminate a little bit. Up until 1993, I believe, the United States Postal Service was prohibited, any postal worker from getting involved in a campaign at all. At that point, letter carriers, clerks who really had a rather peripheral role in the Federal appropriations process were granted the ability, they were given relief under the Hatch Act. This may have been something that happened at that time where we basically removed them from limitations on the Hatch Act. This may have been something that happened at that point.

Mr. GOWDY. I thank the Ranking Member. To your knowledge, is it limited to just postal employees, this exception?

Ms. GALINDO-MARRONE. It includes all Federal labor organizations and Federal employee organizations that had a pact in existence in 1993 when the Act was passed.

Mr. GOWDY. Mr. Chairman, can I ask one more question?

Mr. ROSS. Without objection, yes.

Mr. GOWDY. I want you to assume there is a county employee who wants to run for coroner, which is still an elected position in South Carolina. Some people call them medical examiners, some jurisdictions have forensic pathologists. We still have coroners. The office that employs this putative coroner receives some Federal grant monies.

Does this person who seeks to run for partisan office as coroner have to resign his or her job, take leave without pay, not campaign during working hours? What are the limits, even if it is just a small amount of a Federal grant that goes to an office that happens to employ this person, how would he or she be impacted?

Ms. GALINDO-MARRONE. If the individual has duties in connection with the Federal grants that are being received by the office, that is the first qualifier. It is not enough that the agency received Federal grants, the individual would have to have duties in connection with the Federally-financed programs.

If that is the case, then currently, as the law reads, the individual would have to resign from their State or local employment in order to run for partisan office.

Mr. GOWDY. Is there any weighing of how much connection that person would have? Maybe they had 5 percent supervisory role or is it just a bright line test?

Ms. GALINDO-MARRONE. Currently, there is some case law in terms of a de minimis exception and the case law on that point is less than one-tenth of one percent of the person's time in connection. Typically, in the office, we look at 2 percent or less to be de minimis.

Mr. GOWDY. Thank you, Mr. Chairman.

Good morning to the Attorney General from the District of Columbia.

Mr. NATHAN. Good morning. It is good to see you again.

Mr. ROSS. Thank you.

I will now recognize the gentleman from Illinois, Mr. Davis, for five minutes.

Mr. DAVIS. Thank you very much, Mr. Chairman.

I want to thank all of the witnesses for coming.

I believe that all of us here believe in the importance of the Hatch Act and continuing its prohibition on Federal employees engaging in political activity while on duty, in the Federal workplace while using Federal vehicles.

However, we also recognize that new technology such as laptops, andBlackBerrys and new workplace developments such as telework have made it not always clear to employees what constitutes on duty and the Federal workplace.

I appreciate the panelists making themselves available this morning to discuss how we can address updating the realities of the 20th Century Federal workplace and clarify what might be ambiguities in the law. Ms. Lerner, you pointed out that one of the ambiguities in the statute that the Office of Special Counsel would like Congress to address is the definition of political activity. You recommended that Congress codify the definition of political activity that is currently set forth in the Hatch Act regulations.

Could you elaborate for us why you believe this term needs to be defined in the statute even though it is already defined in the regulations?

Ms. LERNER. The Hatch Act regulations current define the term as "activity directed at the success or failure of a candidate for partisan political office, political party or partisan political group." That is 5 C.F.R. §734.101. We have been using that definition that is in the regulations to define what is political activity.

We think that Congress, in 1993, created a bright line rule that prohibited most Federal employees from engaging in political activity while on duty but they kind of missed the step of defining what political activity means, so we have been using the definition that is in the regs. That is a perfectly good definition; it just seems to make sense that it be codified.

Mr. DAVIS. I am thinking of situations that I have personally known where individuals may have been working for State government and there might have been some grant activity from the Federal Government that funded a part of what it was that they did.

I am recalling one woman who ran for the State Senate and she was forced to resign from her office, although she did file a lawsuit later on after she lost and got her job back and was compensated. I never quite understood that but that is what happened in that particular case. Her union backed her and they won.

Mr. Nathan and Mr. Coffina, what thoughts do you have on Ms. Lerner's recommendation?

Mr. NATHAN. My focus is on the District of Columbia. Mr. Cummings asked the question what has changed since 1939 when the Hatch Act was passed. With respect to the District of Columbia, there has been substantial change because in 1939 we had no elected officials in the District of Columbia. We had three appointed commissioners by the President, confirmed by the Senate and that was the full extent of it.

Now, as a result of partial home rule, we have a Congresswoman who is elected from the District of Columbia; we have a Mayor; we have a City Council; we have a school board; we have our neighborhood commissioners and now the Attorney General's Office is going to be elected.

It is important so the citizens of the District of Columbia can elect their representatives that they be allowed to run whether it is in a partisan or non-partisan election. I don't think it makes any difference and that the people in those offices or in other offices in the District can run. Our main focus here is on ensuring that the District of Columbia under the modified Hatch Act, under the reforms that you pass, are not considered to be an executive agency of the Federal Government, but a State or local government and that we be allowed to run in partisan elections as local officials should be as well.

Mr. DAVIS. Thank you very much.

Thank you, Mr. Chairman.

Mr. ROSS. Thank you.

That will complete our hearing today. I would ask the members who have additional questions to send those supplemental questions to the panelists within the next seven days. I will ask the panelists to respond accordingly.

With that, I want to thank you for taking the time today on this very important issue.

This Subcommittee now stands adjourned.

[Whereupon, at 10:48 a.m., the subcommittee was adjourned.]

Chairman Ross, Ranking Member Lynch and Members of the House Oversight and Government Reform Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy:

On behalf of the over 200,000 managers, supervisors, and executives in the federal government whose interests are represented by the Federal Managers Association (FMA), we would like to thank you for allowing us to express our views regarding reforms to Title 5 of U.S. Code, commonly referred to as the Hatch Act.

Established in 1913, FMA is the largest and oldest association of managers and supervisors in the federal government. FMA originally organized within the Department of Defense to represent the interests of its civil service managers and supervisors, and has since branched out to include nearly forty different federal departments and agencies. We are a nonprofit, professional, membership-based advocacy organization dedicated to promoting excellence in the federal government.

Background of the Hatch Act

Established in 1939, the Hatch Act regulates the political activities of federal employees and some state and local government workers to ensure their positions within public administration are not wrongfully used to influence our country's political system.

While the Hatch Act was enacted more than seventy years ago, it has only been reformed once. In 1993, restrictions were eased to encourage federal employees to be more politically active. Now, most federal employees are eligible to run for nonpartisan offices, contribute to political organizations, get involved in political groups, and campaign for candidates by making speeches, distributing literature and signing nominating petitions. The remaining restrictions on federal employees' activities include: banning them from using their authority to exert influence over an election; encouraging or discouraging political activity by anyone with business before their agency; participating in political work while on duty, in uniform, in the office or in a government vehicle; running for partisan office; and, wearing political buttons or paraphernalia while on duty.

It is the duty of the Office of Special Council (OSC) to ensure federal employees are not violating the Hatch Act and to issue reprimand for those who misuse their position within government. As specified by OSC, any employee found in violation of the Hatch Act will be removed from their position. In rare occasions, the Merit System Protection Board can issue an unpaid suspension of no less than thirty days, if permanent removal is not warranted. At FMA, we take all necessary precautions to ensure our members can take part in political activity without violating the Hatch Act, including regular reminders on correspondence of political nature of the consequences of Hatch Act violations. However, in the age of social networking and advancing technology, sharing political information has become incredibly easy. This has led to federal employees inadvertently sharing political information, as well as avoiding political activity at all costs out of fear of the consequences. FMA feels the current penalties for the Hatch Act prevent federal employees from being fully involved and active citizens.

H.R. 4152 – The Hatch Act Modernization Act of 2012

The Federal Managers Association applauds Representative Cummings (D-Md.) and his colleagues for their efforts to construct this important legislation, encouraging local, state, and federal workers to become more politically involved. As an advocate for federal managers, FMA supports H.R. 4152, particularly the language modifying the current penalties for those who violate the Hatch Act. Amending the penalties to a tiered system is more conducive for encouraging a civic-minded federal workforce.

As the Hatch Act stands, FMA feels it is unfair for a first offense to result in termination without a review of actions. Our experience has shown most Hatch Act violations are unintentional, and the vast majority of federal employees are not inclined to fervently use their position within the federal government for political gain.

H.R. 4152 changes the penalty structure to allow for alternative consequences for initial offenses, prior to termination. The legislation states, "an employee or individual who violates section 7323 or 7324 shall be subject to removal, reduction in grade, debarment from federal employment for a period not to exceed five years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000." This language is more in tune with other disciplinary actions pertaining to the federal workforce and allows for the thorough consideration of Hatch Act violations before a penalty is issued.

S. 2170 – The Hatch Act Modernization Act of 2012

In conjuncture with H.R. 4152, the Senate introduced companion reform legislation, S. 2170. This bipartisan legislation calls for the same changes as the House bill. FMA is encouraged Hatch Act reform is receiving bicameral, bipartisan support. The House and Senate bill are positive steps towards creating a supportive work environment for federal employees to become politically engaged. FMA feels politically-minded federal workers are more engaged and take pride in their work and can better serve their agencies and the citizens they serve.

Office of Special Counsel Recommendations

In October 2011, the Office of Special Counsel (OSC) released recommendations for changes to the Hatch Act. OSC called for reform to penalties for violating the Hatch Act with language identical to that used in both H.R. 4152 and S. 2170. FMA appreciates OSC for recognizing the discrepancy between the violation and the punishment. The changes OSC calls for better reflect the state of the federal workforce and work to update this seventy-three year-old law.

FMA Recommendations for Reform

The Federal Managers Association is pleased with the legislation the House and Senate have introduced, calling for overdue reforms to the Hatch Act. FMA is further pleased the legislation in both chambers is reflective of the recommendations made by the Office of Special Counsel.

Penalties for violating the Hatch Act should be dependent on the situation, not an automatic or mandatory removal for everyone. Making termination the only penalty possible is unreasonable, given the wide range of possible offenses under the Hatch Act; a one-size fits all penalty is rarely a truly effective one. There is no justice in a sweeping, mandatory removal policy across the federal workforce. FMA further recommends that OSC build a review process to ensure a consistent application of penalties for those found guilty of misusing their positions within government. The OSC should review violations on a case-by-case basis in order to promote a fair justice process, as well as accountability within the federal government.

Conclusion

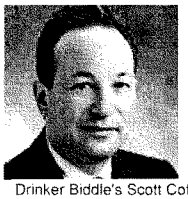
FMA strongly supports this reform legislation of the Hatch Act and is pleased that this reform is promoted by all political parties and both houses of Congress. Automatic removal for a first offense does not reasonably weigh the severity of the violation. The Hatch Act has not been reformed in almost twenty years. It is time to examine and modify penalties of the Act, to distinguish between those who mistakenly violate the Act and those who knowingly take advantage of their position within government. FMA stands ready to work with the Subcommittee and other Members of Congress to affect common sense Hatch Act reforms.

Amending the Hatch Act

Congress should go beyond proposed changes and tackle more difficult issues, such as updating the law to address technological advances in communications.

By Scott A. Coffina

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Drinker Biddle's Scott Coffina

The heightened political energy of an election year inevitably brings renewed attention to the Hatch Act, the law that limits the political activities of federal and many state and local employees. This attention is enhanced this year due to recent legislation proposed to amend the statute to address several glaring problems with its enforcement.

The bill would eliminate the prohibition on state and local officials from running for office in a partisan election, and would provide for graduated sanctions for Hatch Act violations rather than the sole, presumptive penalty of termination — the career death sentence! — for even minor or unintentional violations. Such a draconian penalty can be unfair to the employee, and also hinders enforcement of the Hatch Act as compassionate supervisors look the other way in order not to subject a subordinate to such a severe penalty for a minor offense. It also can chill the exercise of millions of people's First Amendment rights during campaign season, as government employees refrain from even permissible off-duty political activity in order to stay well inside the chalk line.

The proposed changes to the Hatch Act are important, but do not amount to the "overhaul" for which bipartisan support was expressed during a hearing last summer before the House Oversight and Government Reform Committee. Congress ought to take advantage of this rare consensus to tackle some of the more difficult issues surrounding the act's interpretation and enforcement. For example, Congress should update the law to address the enormous technological advances in communications over the years.

The ubiquitousness of cellphones and personal e-mail devices creates a real obstacle to enforcing the Hatch Act prohibition on federal employees participating in political

activity in the workplace, which literally requires employees to leave the building to make a phone call for a partisan political cause. However, the ease with which employees can dash off a "political" e-mail from their own personal smartphones (not using government resources) makes the time of going outside seem wasteful and the risk of detection quite minimal. Moreover, the use of e-mail, Twitter, Facebook and other social media represents new avenues for political communications where an employee's "public servant" and "private citizen" personae can overlap, creating additional Hatch Act enforcement challenges. Useful amendments ought to account for the ease with which government employees can communicate with others on political and personal matters, and focus instead on the most important bars against using one's position or title, or government resources, to advance the cause of a political party or candidate in a partisan election.

In addition, Congress ought to seize this rare momentum to amend the statute — the last revisions to the Hatch Act were 19 years ago — to clarify the provisions regarding political activities by White House employees and senior administration officials, which continually generate fodder by the opposition party for accusations about abuse of office and the misuse of taxpayer money. In recognition of his role as the head of his political party, the president is expressly exempt from the restrictions of the Hatch Act, as is the vice president. The law also provides fewer restrictions on Senate-confirmed administration officials and "24/7's" on the White House staff — those employees who are always "on call" — permitting them to engage in political activity while on duty since they are never technically off duty.

However, in a 2011 report on political activities during the Bush administration, the Office of Special Counsel (OSC), which enforces the Hatch Act, essentially ignored the 24/7 standard found in the act and applied the Annual and Sick Leave Act instead, under which lower-level White House staffers would not qualify for the relaxed restrictions applicable to 24/7 employees. In reality, most of the White House staff is always on call, and thus should meet the 24/7 standard. By incorrectly applying the Leave Act, the OSC concluded — wrongfully — that lower-level employees in the Bush White House had violated the law by facilitating political and mixed travel by administration officials.

The implications of this misinterpretation go far beyond the staffers undeservedly tarnished by the OSC report. For if lower-level White House employees, by the OSC's reckoning, cannot engage in political activity while on duty, they necessarily cannot support the president's political activity, either. Thus, many of the scheduling and logistical tasks that the president must rely upon White House staff members to perform, would, by the OSC's interpretation, violate the act.

No president wants to put devoted staffers who work long hours serving the public for modest pay in legal peril, but the OSC's interpretation of the Hatch Act does exactly that. Congress should make it explicit that White House staffers always may assist in the planning and execution of the political activities of the president or vice president themselves.

Moreover, the Hatch Act should make clear that all appointees on the White House staff, whether or not commissioned officers, presumptively qualify for the relaxed restrictions under the 24/7 standard. These clarifications would not sanction unlimited political activity by White House staff. Rather they would accommodate the reality that the White House is a unique government workplace led not only by the head of state, but by the leader of a political party who is himself exempt from the Hatch Act, and not put hardworking staffers in legal harm's way. The prohibitions on political fundraising, improper use of official position or title for political purposes and the use of taxpayer money for political purposes should remain in effect and vigorously enforced.

The purpose of the proposed amendments to the Hatch Act are to spare government employees from some of this law's harshest applications. This motive is to be applauded, but its execution should be complete, with comprehensive amendments that truly meet that goal.

Scott A. Coffina is a former associate counsel to President George W. Bush and a former assistant U.S. attorney. He is a partner at Drinker Biddle & Reath.

NATIONAL SHERIFFS' ASSOCIATION

May 15, 2012

The Honorable Dennis A. Ross, Chair
The Honorable Stephen F. Lynch, Ranking Member
House Subcommittee on Federal Workforce, U.S. Postal Service, and Labor Policy
House Committee on Oversight and Government Reform
Washington, D.C. 20515

Dear Chairman Ross and Ranking Member Lynch:

I would like to thank you for allowing the National Sheriffs' Association (NSA) to submit a statement for the record for the House Subcommittee on Federal Workforce, U.S. Postal Service, and Labor Policy on "Hatch Act: Options for Reform," held on May 16, 2012.

On behalf of the National Sheriffs' Association (NSA) and the 3,079 elected sheriffs nationwide, I am writing to express the significant need to reform the federal Hatch Act, particularly as it applies to the Office of Sheriff.

As you know, the federal law governing political activities by federal employees, known as the "Hatch Act," was originally enacted in 1939 to prohibit federal employees from engaging in partisan political activity to curtail possible corruption. The provisions of the Hatch Act were, soon after enactment, expanded and amended in 1940 to impose statutory restrictions on certain state and local governmental employees whose principal employment was in connection with a federally funded activity.

While 1993 amendments to the Hatch Act allow most federal, state, and local employees to engage in personal, off-duty voluntary partisan political activities; speech; and expression, there are still express statutory prohibitions under the current Hatch Act that apply to sheriffs and their deputies.

Currently, the Hatch Act restricts the political activity of individuals principally employed by state, county, or municipal executive agencies who have duties in connection with programs financed in whole or in part by federal loans or grants. Moreover, allowable "political activities," as they apply to the Office of Sheriff, are ambiguous at best which has resulted in unfair and increasing claims of violations of the Hatch Act against a sheriff, especially during an election cycle. Finally, there is no statute of limitations or deadline by which the Office of Special Counsel (OSC) – the governing body which investigates Hatch Act violations - must file charges for alleged violations of the Hatch Act.

To help clarify the standards by which the Hatch Act may be applied in future elections, Congressman Bob Latta (R-OH) and Congressman Tim Holden (D-PA) introduced **H.R. 498 – the State and Local Law Enforcement Hatch Act Reform Act of 2011** in the 112th Congress. Congressman Latta and Congressman Holden also introduced this legislation in the previous 111th Congress.

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A key priority for NSA and the nation's sheriffs, H.R. 498 would accomplish three goals: 1) allow state and local law enforcement officers to be a candidate for the Office of Sheriff—an elected Office—without being forced to quit their jobs; 2) clarify current law to allow sheriffs to endorse political candidates without fear of potentially violating the Hatch Act; and 3) establish a statute of limitations of 6 months to file a claim against a state or local law enforcement officer for an alleged violation of the Act.

Firstly, H.R. 498 would allow state and local law enforcement officers, whose employment is funded in part or in whole by a federal grant, to run for the Office of Sheriff without having to quit their jobs. Currently, a state or local law enforcement officer covered under the Act is prohibited from being a candidate for the Office of Sheriff which severely limits the number of qualified candidates for Sheriff—the chief law enforcement officer of a county. Furthermore, current law may also place a significant financial burden on the individuals (as they now lack a job while campaigning). This provision ensures that they can stay employed while seeking the Office of Sheriff.

Additionally, in the post-9/11 and post-Katrina America, more than six decades since the enactment of the original Hatch Act, there is virtually no local law enforcement agency that does not receive some amount or type of federal funds to enhance their anti-terrorism and emergency response activities. As such, this section of the current Hatch Act law is outdated for the new reality, particularly as it applies to state and local law enforcement.

Secondly, H.R. 498 would clarify current law to allow sheriffs, in their official capacity, to participate in political activities. Moreover, it also clarifies allowable political activities of a sheriff to include, but not limited to, endorsing a candidate through print, radio or TV ads, speaking at political events, attending or sponsoring fundraisers.

While the intent of §1502(a)(1) of the Hatch Act may be to prohibit an individual from abusing his or her official authority to influence or interfere with an election is valid, §1502(a)(1) is overreaching and ambiguous when applied to the Office of Sheriff. The Office of Sheriff is unique in that it is both an ***elected*** *and* ***uniformed position***. Consequently, sheriffs have unfairly been subjects of claims of potential violations of the federal Hatch Act due to the inherent and unique nature of the elected Office which requires him or her to be on duty 24 hours a day/7 days a week/365 days a year.

Recently, the Office of Special Counsel came down with a position that elected officials (such as sheriffs), whose elected position is their principal employment, would not violate the Hatch Act by using their title and/or wearing an official uniform or insignia while engaging in political activity. While we are extremely pleased with the recent position from OSC, we continue to maintain that a statutory change is needed to ensure that the issue is permanently taken care of and clarified by law.

Finally, the bill would implement a statute of limitations of 6 months to file a claim against a state or local law enforcement officer or a sheriff for alleged violation of the Hatch Act. The penalty for violating the Hatch Act is removal of the employee from his or her position with the state or local agency and debarment from employment with a state or local agency within the same state for the following 18 months. Currently, there is no statute of limitations. In recent years, individuals have used potential violations that occurred years past by filing a claim with the Office of Special Counsel to use as a political attack against an incumbent sheriff during an election cycle. The statute of limitations will ensure that claims must be filed within six months of the alleged violation.

Undoubtedly, federal legislation to amend this antiquated law is significantly needed to ensure that our citizens can elect the best candidate as their local sheriff and that state and local law

enforcement officers are not unfairly and unnecessarily penalized. We applaud Congressman Latta and Congressman Holden for their leadership on this critical issue and urge for the swift passage of **H.R. 498 – the State and Local Law Enforcement Hatch Act Reform Act of 2011** during the remainder of the 112th Congress.

On behalf of the National Sheriffs' Association, I greatly appreciate the opportunity to submit a statement for the record on the need to amend the federal Hatch Act, particularly as it applies to the Office of Sheriff. Please do not hesitate to contact me if the Subcommittee has any further questions or needs any further information.

Sincerely,

Aaron D. Kennard, Sheriff (ret.)
Executive Director

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