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

STATEMENT OF JAMES BYRNE

DEPUTY SPECIAL COUNSEL

U.S. OFFICE OF SPECIAL COUNSEL

BEFORE THE

UNITED STATES SENATE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

SUBCOMMITTEE ON

**OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE,
AND**

THE DISTRICT OF COLUMBIA

HEARING ON:

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

Thursday, October 18, 2007

Washington, DC

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

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

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

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

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

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

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

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

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

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

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

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

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

Earlier this year, OSC completed a successful run of litigation involving the use of e-mail to engage in political activity while on duty or in a federal building. During this litigation, however, it was apparent that some unfortunate wording from a 2002 OSC Hatch Act advisory opinion concerning the use of e-mail had been misinterpreted by some to constitute a "water cooler" exception for e-mail activity. No such exception for engaging in political activity via e-mail has ever existed under the Hatch Act. We rescinded this opinion in March, following several opinions from the MSPB in cases such as Wilkinson,¹ Morrill² and Eisinger.³ In each of these cases the MSPB agreed with OSC that using the e-mail system to engage in political activity while on duty or in a federal building was prohibited by the Hatch Act. And in two other cases, although the MSPB did not reach the merits because it was ruling on motions to dismiss by the Respondents, the MSPB concluded that OSC had not failed to state a claim when it charged federal employees with violating the Hatch Act by disseminating e-mail messages that showed support for a Presidential candidate and told the recipients how to vote.

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

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

¹ Special Counsel v. Wilkinson, 104 M.S.P.R. 253 (2006).

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

³ Special Counsel v. Eisinger, 103 M.S.P.R. 252 (2006).