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On

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

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

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

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

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

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

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

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

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

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

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

CHANGES TO THE HATCH ACT:

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

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

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

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

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

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

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

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

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