

Testimony of Scott A. Coffina

Before the United States House of Representatives

Committee on Oversight and Government Reform

Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy

Hearing On:

Hatch Act: Options for Reform

Wednesday, May 16, 2012

Washington, DC

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.)

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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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Scott A. Coffina is a partner in the firm's White Collar Criminal Defense and Corporate Investigations Team. His practice focuses on internal investigations, False Claims Act litigation, political-legal controversies, and additional civil, criminal or regulatory enforcement actions.

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A former Associate Counsel to President George W. Bush from May 2007 until January 2009 and a former Assistant U.S. Attorney, Scott has substantial experience with Congressional oversight matters and high-stakes prosecutions.

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Scott has represented corporate, university and individual clients in a wide range of matters including allegations of improper marketing by pharmaceutical companies, false claims by a medical device manufacturer, fraudulent mortgage lending, fraud in Small Business Administration programs, income tax fraud, and violations of the Clery Act. He also has represented clients in affirmative anti-fraud litigation and pursuing recoveries.

While serving as Associate Counsel to President George W. Bush, Scott represented the interests of the President and Executive Branch in Congressional oversight matters and other investigations, and advised the White House staff on a wide range of political, government ethics and election law issues, including compliance with the Hatch Act. Scott also acted as the White House legal liaison to the Department of Energy, the Department of Veterans Affairs, the Federal Election Commission and the Office of Special Counsel, and evaluated and recommended candidates for federal judiciary appointments by the President. Scott also served in the Administration of President Ronald Reagan, in the White House Office of Political Affairs.

Scott served as an Assistant United States Attorney in Philadelphia from 1997-2001, pursuing monetary recoveries for fraud against the government under the False Claims Act and other statutes, and defending the United States and federal employees in civil rights, employment discrimination, medical malpractice and other litigation. He successfully argued twice before the Third Circuit Court of Appeals, in *Elman v. United States* and *Taylor v. Garwood*.



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Scott A. Coffina | Page 2

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In General. Scott is a frequent author and speaker. He has testified before Congress on political-legal issues, commented on national news programs concerning political-legal controversies and authored op-eds and articles for publications such as *National Review Online*, *Politico.com* and *The Legal Intelligencer*. He is a member of DRI and the committee on Government Enforcement and Corporate Compliance. He began his legal career with the highly respected law firms Wiley, Rein & Fielding in Washington, D.C., and Miller, Alfano & Raspanti in Philadelphia, where he focused on developing anti-fraud investigations on behalf of major health insurers and whistleblowers, and on representing companies in fast-track government contracts litigation. Scott joined Drinker Biddle from Montgomery McCracken Walker & Rhoads in Philadelphia.

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PROFESSIONAL AND CIVIC ASSOCIATIONS

Member, Leadership Philadelphia, 2006-2007

Member, DRI, Government Enforcement and Corporate Compliance Committee

PUBLICATIONS

"The Hatch Act: A Shadowy Minefield for Federal Employees", *The Legal Intelligencer*, July 2011.

"New Jersey State Senate: Your Move", *The Legal Intelligencer*, January 14, 2011.

"Claiming the Fifth in Civil Litigation", *ABA Litigation*, Fall 2002.

SPEAKING ENGAGEMENTS

The Hatch Act: The Challenges of Separating Politics from Policy, Witness before the House Oversight Committee Hearing, June 21, 2011.

Good Day Philadelphia, Fox Broadcasting Company, November 10, 2010.

Ethics and Internal Investigations, Technology and Research Compliance Seminar for the National Association of College and University Attorneys, November 2010.

Internal Investigations, DRI Annual Meeting, October 2010.

Fox & Friends, Fox News Channel, June 1, 2010.

Hannity, Fox News Channel, May 28, 2010.

Commencement Speaker, MMI Preparatory School, Freeland, PA, May

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Scott A. Coffina | Page 3

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Nuts and Bolts for Federal Sentencings, Pennsylvania Association of Criminal Defense Lawyers' "Criminal Law For the Experienced" Seminar, November 2006.

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Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
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1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2009. Include the source and amount of each grant or contract.

None

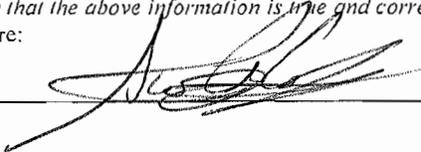
2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

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I certify that the above information is true and correct.
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