Statement of Scott A. Coffina

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Committee on Oversight and Government Reform

Hearing On:

The Hatch Act: The Challenges of Separating Politics from Policy

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

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

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

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

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

The White House Office of Political Affairs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendations

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

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

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

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

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

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

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

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

Scott A. Coffina

Scott A. Coffina returned to Montgomery McCracken in March 2009 after serving as Associate Counsel to President George W. Bush from May 2007 until January 2009. Mr. Coffina's white collar practice focuses on internal investigations, political controversies, and a wide range of civil, criminal or regulatory enforcement actions. He also represents clients in government contracting disputes and compliance issues. Mr. Coffina also regularly counsels colleges and universities on campus security issues and compliance with the Jeanne Clery Campus Security Act.

Mr. Coffina 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. Mr. Coffina also has represented clients in affirmative anti-fraud litigation, pursuing recoveries, for example, against physicians who caused the submission of fraudulent claims to the diet drug settlement trust, and against individuals and companies who infringed copyrights or misappropriated trade secrets.

While serving as Associate Counsel to President George W. Bush, Mr. Coffina 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. Mr. Coffina 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. Mr. Coffina also served in the Administration of President Ronald Reagan, in the White House Office of Political Affairs.

Mr. Coffina also served from 1997-2001 as an Assistant United States Attorney in Philadelphia, 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*.

Mr. Coffina began his legal career with the highly respected law firms Wiley, Rein & Fielding in Washington, DC, 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.