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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

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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.