

Testimony of Richard W. Painter

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Before the U.S. House of Representatives Committee on Oversight and
Government Reform

June 21, 2011

Mr. Chairman and Members of the Committee:

Thank you for inviting me to testify today. For two and a half years from 2005 to 2007, I was Associate Counsel to the President and chief White House ethics lawyer. The White House Counsel's Office had another lawyer cover Hatch Act issues but I was consulted on Hatch Act matters and I included Hatch Act compliance in my monthly ethics lectures for incoming White House staff.

Partisan political activity was conducted and coordinated by the White House Office of Political Affairs (OPA) from the Reagan Administration until President Obama closed the office in January 2011. OPA operated under the assumption that partisan politics is conducted in a "personal" capacity – as the Hatch Act requires. OPA, however, has grown in size and stature over the years and its work has had a substantial impact on official government policy. At least some of this partisan political activity is in my view incompatible with the official duties of White House staff and other Executive Branch employees.¹

White House lawyers police the boundary between partisan politics and government work by removing official titles from political communications, instructing White House staff to use separate communications equipment for political activity, making sure political organizations pay the cost of political activity, and similar prophylactic measures. Until 2011, it was assumed that most White House staff were so called "24/7" employees who were permitted to

¹ Richard W. Painter, *Getting the Government America Deserves: How Ethics Reform Can Make a Difference* (Oxford 2009) at 245-253; Richard W. Painter, Separation of Politics and State, op-ed, New York Times, June 14 2010 at A-23.

engage in personal capacity political activity during daytime and evening hours in government buildings.² The Office of Special Counsel must have been aware that such was the practice; it had been going on for a long time. White House staff members were repeatedly reminded in the White House Staff Manual and by White House lawyers to keep this political work separate from their official work, but this political work was permitted. Many Executive Branch agencies accommodated similar political work by senior appointees, although intelligence agencies and some other parts of the government are subject to additional Hatch Act restrictions. The approach to these matters was substantially similar during the Clinton Administration and the George W. Bush Administration³ and I believe during the first two years of the Obama Administration.

Experience has shown that this approach does not work. In many instances it is difficult to distinguish between an official communication and a political communication when the subject matter is the President's policy agenda that concerns political constituencies. An official email sent over a political server (DNC, RNC or some other) may be lost, risking a violation of the Presidential Records Act. A political email sent over a government server creates at least the appearance of a Hatch Act violation (the email may not impose additional cost on the government but the official email account implies official endorsement). Official titles may not be used when a White House staff member speaks for a political fundraiser (the term "Presidential advisor" is sometimes used instead), but the subject of the speech is almost invariably the President's policies and just about everyone in the room knows that the speaker works at the White House. Nobody, for example, could pretend with a straight face that Karl Rove was simply a Republican from Texas with a day job in Washington who addressed political gatherings only in a personal capacity, or that Rahm Emanuel was a Chicago Democrat who wanted to pursue politics when he could get away from his day job, which like Karl Rove's just happened to be in the White House. The Hatch Act

² Painter, *Getting the Government America Deserves* at 246.

³ See Kathryn Dunn Tempas, *Institutionalized Politics: The White House Office of Political Affairs*, *Presidential Studies Quarterly* (Spring 1996); Bradley H. Patterson, *The White House Staff: Inside the West Wing and Beyond* (2000) at 210. I cite these publications, multiple newspaper articles and other sources in comments to my blog post on Legal Ethics Forum titled "Office of Special Counsel Releases Report on White House Political Activity" (January 27, 2011), www.legaethicsforum.com.

demands this separation of politics and state, but the distinction is more theoretical than real.⁴

Dual official and political functions of White House staff give political operatives and campaign contributors far reaching influence over government policy at the highest levels. A White House official who learns what a contributor wants at a political fundraiser on Thursday night will not forget the contributor's request at a White House staff meeting on Friday morning. If the White House official forgets the request for any reason, he can have another "personal capacity" political conversation with the contributor on a DNC or RNC cell phone immediately before the White House staff meeting to discuss "what you told me last night on how best to advance the President's political agenda." The campaign contributor's request, made at a political fundraiser, will impact official policy without any thought given to the "capacity" in which the official heard it. Likewise, White House personnel decisions may be impacted when DNC or RNC political operatives tells White House staffers that a troublesome appointee needs to be removed from an agency, or that a primary candidate should be given a job in the Executive Branch so he won't challenge an incumbent. Reducing the amount of partisan political work by White House staff will not make political influence on official decisions go away, but instances of excessive political influence will be less frequent if political operatives are not working inside the White House.

The Office of Special Counsel (OSC), in a 2011 report on the 2006 election cycle, made a small dent in dual official and political tasking of White House staff. OSC now takes the position that the Hatch Act regulations permit only the most senior White House staff members to participate in partisan political activity in government buildings during the workday.⁵ This position is contrary to the way the White House has been run for many years. Indeed President Obama shut down OPA within days of when this Report was released.⁶ If he had not done so,

⁴ See Painter, New York Times op-ed, supra note 1.

⁵ See Office of Special Counsel, Investigation of Political Activities by White House and Federal Agency Officials During the 2006 Midterm Elections at 33-34 (January 2011)

⁶ See Jeff Zeleny, Obama Will Move Political Operations to Chicago, New York Times, January 20, 2011.

dramatic changes would have been required to prevent OPA staff and other White House staff from violating the Hatch Act regulations as they were now interpreted by OSC.

There are two problems with the OSC's new position.

First, it does not go far enough. The most senior White House staff, those whose influence on official policy is the greatest, may continue to engage in personal capacity political activity in government buildings day and night. All White House staff may continue to engage in personal capacity political activity off site during the weekends and evenings. Although they may not solicit contributions, they may give speeches at political fundraisers and listen to contributors who make known what they expect in return for their generosity. In other words, the OSC's interpretation of the Hatch Act in the Report makes a very small dent in the problem of partisan political activity in the White House.

The second problem is that the OSC did not make its interpretations of the Hatch Act clear in the 2006 and 2008 election cycles, and OSC guidance continues to be sufficiently ambiguous that there is a risk of Hatch Act violations by White House staff and other Executive Branch officials in the 2012 election cycle. The OSC Report retrospectively addresses isolated issues such as which White House staff may engage in partisan political activity in government buildings during normal working hours and how OSC believes political briefings should be conducted in the agencies. Identifying violations four years later through arguable ex-post rule interpretation, however, is not a helpful way to enforce the Hatch Act.

Furthermore, many questions still are not adequately answered such as what a government official may say about his or her official job when giving a political speech, what can be said about a person's official job in an invitation or other promotional materials for a political event, what constitutes political fundraising (which is prohibited under the Hatch Act) and what government officials may say at political fundraisers (is there a difference for example between a speaker thanking donors for their "support for the President and his agenda" and the speaker asking donors to give more money?).

In sum, I commend the OSC for sending a message that the Hatch Act will be more strictly construed and enforced than it has been in the past, but I am concerned about ambiguities on a range of issues. I am also concerned about the utility of some distinctions embodied in Hatch Act regulations. The 2011 Report, for example, references the Leave Act to distinguish between high level White House staff who may engage in political activity in government buildings 24/7 and other White House staff who may not do so.⁷ This distinction could be a correct interpretation of the regulations, but it fails to address a larger problem: immersing high level White House staff in partisan politics during the workday – or at any time -- distorts official government policy. It should not be allowed.

Similarly it makes little difference who paid what portion of air fare for a trip by a White House employee who speaks at a political fundraiser if donors at the fundraiser can use the opportunity to secure a billion dollar defense contract, a bailout for a badly managed bank or lenient financial services regulation that makes bailouts necessary in the first place. The better rule – a rule that probably will have to come from Congress and not from the OSC – is that a White House official should not be at the political fundraiser at all.

I commend President Obama for building upon President Bush's strong commitment to government ethics. The President's Executive Order of January 21, 2009 addressed the revolving door from government to the private sector, and somewhat diminished the influence of lobbyists. The President closed OPA and moved much of his political operations to Chicago at about the same time as the OSC issued its report in 2011. This should have been done earlier (I have urged for several years that OPA be closed⁸ and Senator McCain said in the Presidential campaign that he would close OPA). This development will lead to real change if the President curtails the political activities of remaining White House staff, although I am not sure this activity has been curtailed as much as it should be (the White House political event with Wall Street supporters earlier this

⁷ OSC Report supra at 34-35

⁸ See Getting the Government American Deserves, supra, Chapter 10 and my New York Times op-ed, Separation of Politics and State, supra.

year suggests otherwise⁹). I hope the President follows through with his promise to improve ethics in government by insisting that White House staff – other than the President and Vice President – devote their time exclusively to official work while persons outside the government work for political campaigns.

Meanwhile, I hope this Committee will consider legislation that would sharply curtail the range of permissible work for political campaigns by White House staff and senior appointees in the Executive Branch. Now is an ideal time to reach a bipartisan consensus on such legislation, particularly if the new rules were to go into effect in early 2013. Partisan political operations will be more effective, and subject to fewer constraints, if they are run from outside the White House. The White House staff will strengthen the President's political stature if they focus not on political campaigns but on how to do the best job possible implementing the President's policies for this Country.

Thank you Mr. Chairman. I will be pleased to answer questions from Members of the Committee.

⁹ See Nicholas Confessore, Obama Seeks to Win Back Wall St. Cash, New York Times, June 12, 2011.

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Professor Richard W. Painter received his B.A., summa cum laude, in history from Harvard University and his J.D. from Yale University, where he was an editor of the *Yale Journal on Regulation*. Following law school, he clerked for Judge John T. Noonan Jr., of the United States Court of Appeals for the Ninth Circuit and later practiced at Sullivan & Cromwell in New York City and Finn Dixon & Herling in Stamford, Connecticut.

He has served as a tenured member of the law faculty at the University of Oregon School of Law and the University of Illinois College of Law, where he was the Guy Raymond and Mildred Van Voorhis Jones Professor of Law from 2002 to 2005.

From February 2005 to July 2007, he was Associate Counsel to the President in the White House Counsel's office, serving as the chief ethics lawyer for the President, White House employees and senior nominees to Senate-confirmed positions in the Executive Branch. He is a member of the American Law Institute and is an advisor for the new ALI Principles of Government Ethics. He has also been active in the Professional Responsibility Section of the American Bar Association.

Professor Painter has also been active in law reform efforts aimed at deterring securities fraud and improving ethics of corporate managers and lawyers. A key provision of the Sarbanes-Oxley Act of 2002, sponsored by Senator John Edwards, requiring the SEC to issue rules of professional responsibility for securities lawyers, was based on earlier proposals Professor Painter made in law review articles and to the ABA and the SEC. He has given dozens of lectures on the Sarbanes-Oxley Act to law schools, bar associations, and learned societies, such as the American Academy of Arts and Sciences. Professor Painter has provided invited testimony before committees of the U.S. House of Representatives and the U.S. Senate on private securities litigation and the role of attorneys in corporate governance.

His book, *Getting the Government America Deserves: How Ethics Reform Can Make a Difference*, was published by Oxford University Press in January 2009. He has written op-eds on government ethics for various publications including the *New York Times*, the *Washington Post* and the *Los Angeles Times*, and he has been interviewed several times on government ethics and corporate ethics by National Public Radio All Things Considered as well as Minnesota Public Radio News.

Professor Painter is the author of two casebooks: *Securities Litigation and Enforcement* (with Margaret Sachs and Donna Nagy; West 2003; Second Edition, 2007) and *Professional and Personal Responsibilities of the Lawyer* (with Judge John T. Noonan Jr.; Foundation 1997; Second Edition, 2001) (3rd Edition forthcoming). He has written dozens of articles, book reviews, and essays, including a series of papers with Minnesota colleague Claire Hill on the personal responsibility of investment bankers, an essay on government ethics and bailouts, and another paper "*Ethics and Corruption in Business and Government: Lessons from the South Sea Bubble and the Bank of the United States*" that was published by the University of Chicago Law School as the 2006 Maurice and Muriel Fulton Lecture in Legal History. His essay, "*The Dubious History and Psychology of Clubs as Self Regulatory Organizations*," appeared in the *American Academy of Arts and Sciences Occasional Paper Series* in 2004.
