

**THE PERILS OF POLITICS IN GOVERNMENT:
A REVIEW OF THE SCOPE AND ENFORCEMENT
OF THE HATCH ACT**

HEARING

BEFORE THE

OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE, AND THE
DISTRICT OF COLUMBIA SUBCOMMITTEE

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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Hatch Act is an integral part of the merit-based civil service system. Any changes to the Hatch Act must be carefully weighed as the statute reflects a well-thought-out balance between honoring civil servants' rights to political engagement and protecting them from political coercion.

I want to thank our witnesses for being here today to discuss these important issues, and I would like at this time to welcome to today's Subcommittee hearing the first panel of witnesses: James Byrne, Deputy Special Counsel in the U.S. Office of Special Counsel, and Chad Bungard, General Counsel, the Merit Systems Protection Board. I also welcome Ana Galindo-Marrone, the Chief of the OSC's Hatch Act Unit. I understand that you are here to respond to questions but you will not make an opening statement.

It is the custom of this Subcommittee to swear in all witnesses, and I would ask all of you to stand and raise your hand. Do you swear that the testimony you are about to give this Subcommittee is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BYRNE. I do.

Ms. GALINDO-MARRONE. I do.

Mr. BUNGARD. I do.

Senator AKAKA. Thank you very much. Let the record note that the witnesses did answer in the affirmative.

Now I would like to hear from our witnesses. Let me first call on Mr. Byrne for his testimony.

**TESTIMONY OF JAMES BYRNE,¹ DEPUTY SPECIAL COUNSEL,
U.S. OFFICE OF SPECIAL COUNSEL, ACCOMPANIED BY ANA
GALINDO-MARRONE, CHIEF, HATCH UNIT, U.S. OFFICE OF
SPECIAL COUNSEL**

Mr. BYRNE. Chairman Akaka, I thank you for the opportunity to appear before this Subcommittee to discuss the Hatch Act. My name is Jim Byrne, and I am the Deputy Special Counsel of the U.S. Office of Special Counsel. I am joined today by Ana Galindo-Marrone, who has been our Chief of OSC's Hatch Act Unit since 2000.

The Hatch Act restricts the political activity of employees of the Federal Executive Branch, the District of Columbia, and State and local employees who work on federally funded programs. The Office of Special Counsel appreciates the Subcommittee's willingness to hold a hearing on the Hatch Act. This hearing brings visibility to the Hatch Act that can enhance awareness and understanding and deter violations of the law.

Today, I am pleased to provide our perspectives on the scope of the Hatch Act, how it is enforced, and possible enhancements. We will testify today from our experience in enforcing the Hatch Act from closed cases. And as you know, we cannot discuss the details of any ongoing investigations.

The Hatch Act was enacted in 1939 to address the spoils system that had dominated the Federal workplace, under which Federal employment and advancement depended upon party service and changing administrations rather than performance. Congress deter-

¹The prepared statement of Mr. Byrne appears in the Appendix on page 29.

from James Byrne response to QFR's, which are also under oath, just as his verbal testimony.

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5. Does the OSC report to agency heads under 5 U.S.C. § 1214(e) when the Office has found reasonable cause to believe that the Hatch Act had been violated?

a) If so, how many such reports have been made in each of the last five years?

b) In response to each of these reports, did the agency head provide the corrective action certification required under § 1214(e)(2)? If not:

- Please describe each instance in which the agency failed to provide the required response.
- Please describe the enforcement action, if any, the OSC subsequently took in each instance where the certification was not provided.

c) Please provide the Subcommittee with copies of the ten most recent reports under 5 U.S.C. § 1214(e).

RESPONSE: OSC does not construe § 1214(e) as applying to Hatch Act violations. OSC has exclusive statutory authority to enforce the Hatch Act. See 5 U.S.C. §§ 1504-1508 and 7326. In contrast, § 1214(e) applies generally when OSC has reasonable cause to believe that certain other violations of law, rule, or regulation have been identified during an investigation under title 5, but which OSC itself does not have authority to enforce (for example, a violation of the Federal Acquisition Regulations). Section 1214(e) provides a mechanism whereby OSC may, in appropriate cases, facilitate resolution of such apparent violations by requiring a report to and response from the officials with authority to address such violations (i.e., the heads of the agencies involved). As a matter of statutory construction, it is clear that Congress intended approaching agencies to bring corrective action for personnel violations to agency heads first, but did not express any such requirement or preference under the Hatch Act. One reason might be that Hatch Act violations often do not affect the workplace such as when an employee engaged in political activity on the job with persons outside the government, or when employees solicit campaign contributions from persons outside the government, or in their off duty hours, or run for partisan office, or consent to be listed on a campaign event as a host, or use their official titles in invitations to campaign events. There are many other examples of this. In fact, a majority of Hatch Act violations occur outside of work or are unconnected with the workplace.

I think it pre-judicial for him to make this claim when a federal judge issued a contrary ruling and OSC did not appeal it. See page 2 of Larson v. OSC, docket no. 05-537, 2006 WL 5085253 (D.D.C. Oct. 30, 2006). The federal judge found 1214(e) applies to laws within OSC's jurisdiction.

6. **With respect to the Hatch Act, has the OSC complied with the requirement in 5 U.S.C. § 1219(a) to “maintain and make available to the public ... [a] list of matters referred to heads of agencies under subsection (e) of section 1214, together with certifications from heads of agencies under such subsection”? If so, where can the public access the information? If not, what is the OSC’s basis for not complying with the requirement?**

RESPONSE: See answer to question number 5.

7. **Does the OSC use a case priority system for Hatch Act cases? If not, does the Office plan to implement one?**

RESPONSE: Yes, OSC uses a case priority system for Hatch Act cases.

8. **Did the previous Special Counsel’s office develop a case priority system for Hatch Act cases? If so, did the OSC decide against implementing that system? If so, please explain in detail the basis for that decision.**

RESPONSE: Since approximately 2002 or 2003, the Hatch Act Unit has been operating under the same case priority system. In general, the system is directed at processing those complaints first where on the basis of the evidence in the file there are reasonable grounds to believe the complaint concerns a serious and existing violation, which may require corrective or disciplinary action and/or is in the public’s interest to have a prompt resolution of the complaint. Complaints, after being reviewed by the Unit Chief or Deputy Chief, will be designated as Category I, II, or III. Significant Congressional, White House or media interest may affect the level at which a case is categorized. Moreover, within a category, cases receiving such interest will be assigned greater priority.

Category I complaints (high priority) involve the most serious violations and where the subject is presently engaged in the prohibited activity or where there is evidence that the violation was knowing and willful. Examples of category I cases include the following: 1) misuse of official authority/coercion cases; 2) candidacy cases and 3) solicitation cases.

Usually, Category II complaints (mid-level priority) involve past serious violations, less serious ongoing violations and less serious violations where there is evidence that the violation is knowing and willful. Examples of less serious violations include the following: 1) posting or displaying partisan posters, photographs, etc.; 2) use of official title while engaged in political activity; and 3) writing a speech for a candidate while on duty.