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**INVESTIGATION OF POLITICAL ACTIVITIES BY  
WHITE HOUSE AND FEDERAL AGENCY  
OFFICIALS DURING THE 2006 MIDTERM  
ELECTIONS**



**U.S. OFFICE OF SPECIAL COUNSEL  
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## **INTRODUCTION**

### **I. Overview**

This report presents the U.S. Office of Special Counsel's (OSC) investigative findings regarding White House Office of Political Affairs (OPA) employees conducting political briefings for agency political appointees during work hours and in the federal workplace.<sup>1</sup> OSC's investigation eventually expanded to examine other Hatch Act concerns involving OPA employees and agency political appointees. The activities investigated by OSC occurred during President George W. Bush's administration (Bush II).

Specifically, in addition to the briefings mentioned above, OSC investigated:

- OPA's assistance to the campaigns of Republican candidates in coordination with the Republican National Committee (RNC).<sup>2</sup>
- The travel of high-level agency political appointees to events to support Republican candidates.
- The improper classification of travel by high-level agency political appointees as "official" when it was, in fact, political.
- The failure by agencies to collect reimbursement of government funds expended for political travel of high-level agency political appointees.

In the chapters that follow, OSC explains its findings and legal conclusions, and recommends certain practices and regulatory amendments that OSC believes should be adopted to ensure future compliance with the Hatch Act.<sup>3</sup>

### **II. Background**

In February 2007, OSC received a complaint that, among other things, then-OPA Deputy Director J. Scott Jennings conducted a political briefing at the U.S. General Services Administration (GSA). During this briefing, Mr. Jennings presented PowerPoint slides, dated January 26, 2007, that summarized the 2006 midterm elections and identified Republican incumbents whom the White House considered vulnerable in the 2008 elections. The presentation included slides depicting how 72-hour deployments, a grassroots campaign technique for securing late-deciding voters, had been successfully employed by the Republican Party during the 2004 election cycle.

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<sup>1</sup> "Agency" also refers to departments.

<sup>2</sup> The term "candidate" as used throughout this report refers to both incumbents and challengers.

<sup>3</sup> Because all of the officials who were involved in Hatch Act violations described in this report are no longer employed by the federal government, OSC cannot bring disciplinary actions against these employees.

OSC uncovered evidence that the OPA Director and Deputy Director provided similar political briefings to political appointees at 21 other federal agencies. As a result, OSC initiated its investigation of these political briefings. To that end, OSC requested from the White House and numerous executive branch agencies any information and documentation pertaining to the political briefings.<sup>4</sup> Information OSC received in response to its requests revealed that various White House employees were issued non-official RNC e-mail accounts, which they used in their efforts to support Republican candidates. Based on that information, OSC asked the RNC to produce copies of any and all e-mails sent or received by White House employees relating to the political briefings conducted by OPA staff. In response, the RNC produced several thousand pages of e-mail records.

A thorough review of the records provided by the White House, the RNC, and the agencies revealed that in addition to presenting political briefings, OPA staff and agency political appointees potentially were engaged in other activities prohibited by the Hatch Act. Specifically, evidence showed that, while on duty, OPA staff members coordinated the official travel of high-level agency political appointees in the Bush II administration for the purpose of assisting in the election or reelection of Republican candidates, a practice referred to as “asset deployment.” In light of this evidence, OSC created a task force to investigate these matters, as well.

### **III. Methodology**

In total, OSC received and reviewed approximately 100,000 pages of documentary evidence during its investigation. The documents largely consisted of e-mail communications between OPA employees and agency political appointees, and OPA employees and Republican candidates. Also reviewed were internal agency communications and memoranda, and internal White House communications and memoranda.<sup>5</sup>

OSC interviewed more than 80 individuals who served as political appointees during the Bush II administration. Several individuals were interviewed on multiple occasions. Among those interviewed were: former OPA Directors, Deputy Directors, and OPA Associate Directors, former Associate Directors of Scheduling, agency White House liaisons, agency Chiefs of Staff,

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<sup>4</sup> Federal agencies from which OSC initially requested information pertaining to political briefings include the following agencies: U.S. Department of Agriculture, U.S. Department of Commerce, U.S. Department of Defense, U.S. Department of Education, U.S. Department of Energy, U.S. Environmental Protection Agency, U.S. Department of Health and Human Services, U.S. Department of Homeland Security, U.S. Department of Housing and Urban Development, U.S. Department of the Interior, U.S. Department of Justice, U.S. Department of Labor, National Aeronautics and Space Administration, Office of National Drug Control Policy, Peace Corps, U.S. Office of Personnel Management, Office of Science and Technology Policy, U.S. Small Business Administration, U.S. Department of State, U.S. Department of Transportation, U.S. Department of the Treasury, United States Agency for International Development, and U.S. Department of Veterans Affairs.

<sup>5</sup> OSC also reviewed documentation pertaining to grant allocation and distribution. Because neither OSC’s preliminary review of that information nor witness testimony indicated any improper actions with respect to grant allocation or distribution, OSC did not further pursue the issue of grants as a component of this investigation.



agency scheduling staff, and agency political appointees in attendance at OPA’s briefings. OSC also interviewed eight career agency ethics officials.

Additionally, OSC reviewed memoranda, news articles, books, congressional reports, and scholarly publications to gain a better understanding of OPA’s history and operations during the administrations of former Presidents George H.W. Bush (Bush I) and William Jefferson Clinton (Clinton).

#### **IV. Organization of the Report**

This report is divided into five chapters as follows:

- Chapter One provides a historical overview of the Hatch Act and examines the provisions of the Act and the relevant legislative history that are germane to this investigation.
- Chapter Two includes OSC’s factual findings regarding OPA’s structure, function, and organization during the Bush II administration.
- Chapter Three describes the factual findings and analysis pertaining to OPA’s practice of conducting political briefings at federal agencies.
- Chapter Four examines the facts surrounding the activities of OPA employees, including the practice of coordinating the travel of high-level agency political appointees to events to support Republican candidates. This chapter concludes with a legal analysis of how these activities violated the Hatch Act.
- Chapter Five sets forth the factual findings and analysis regarding travel of high-level agency political appointees to support Republican candidates.

Chapters Three through Five conclude with recommendations for future Hatch Act compliance related to the activities discussed in this report.

## **CHAPTER ONE: APPLICABLE PROVISIONS OF THE HATCH ACT**

### **I. Overview**

This chapter traces the history of the Hatch Act. A synopsis of the current provisions of the Act follows, with particular emphasis on the provisions that are germane to this report. Specifically, the Act's prohibition against engaging in political activity while on duty and in a federal workplace, and the exemption of certain high-level political appointees from this prohibition, are discussed in detail throughout the report. In addition, the Act's prohibition against using one's official authority or influence to affect the result of an election is explained here for use as a reference in later chapters.

### **II. Historical Background**

The political activity of government employees has been a concern since the earliest days of the Republic. President Thomas Jefferson was among the first to express concern about this issue, and, as a result, the heads of the executive departments at the time ordered employees "not [to] attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and [the employees'] duties to it."<sup>6</sup> Nonetheless, the politicization of the federal workforce, the so-called spoils system, developed and persisted throughout the 19<sup>th</sup> Century. In 1881, a disgruntled office seeker who was denied an appointment in the new administration assassinated President James A. Garfield. This led Congress in 1883 to pass the Pendleton Act, making it unlawful to require federal employees to perform political favors or use their official authority to elicit political action from any person. The Act also created the Civil Service Commission as the agency that would enforce the Act.

Pursuant to the Pendleton Act, President Chester A. Arthur promulgated the Civil Service Rules, the first of which limited the political activities of federal employees and protected them from being coerced into engaging in political activity. In 1907, under President Theodore Roosevelt, who reiterated prior concern about the spoils system, the Civil Service Commission began recommending sanctions against employees who took an active role in partisan political management and campaigns.

Yet the problem of the politicization of the federal workforce persisted to the point where workers in New Deal jobs programs were forced to engage in political activity in the 1936 and 1938 congressional elections. As a result, in 1939, Congress passed An Act to Prevent

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<sup>6</sup> 7 Cong. Globe, 25th Cong., 3d Sess. app. 409 (1893) (statement of Sen. Rives) [available at http://digital.library.unt.edu/ark:/67531/metadc29275/m1/672/](http://digital.library.unt.edu/ark:/67531/metadc29275/m1/672/).

Pernicious Political Activities, now known as the Hatch Act.<sup>7</sup> In doing so, Congress determined that partisan activity by federal employees must be limited in order for public institutions to function fairly and effectively, and prescribed removal as the penalty for violators. Thus, after passage of this law in 1939, federal employees were prohibited, both on and off duty, from using their official authority or influence to affect the results of partisan elections, and virtually all such employees were prohibited, again both on and off duty, from taking an active part in political management or political campaigns.

Although employees of the Office of the President were likewise prohibited from using their official authority or influence to affect the results of elections, they were exempt from the restrictions concerning active participation in political management and political campaigns.<sup>8</sup> However, appropriations law principles prohibited the use of appropriated funds and government resources for political purposes by all employees, including those exempt from some of the political activity restrictions of the Act.<sup>9</sup>

The Supreme Court has repeatedly upheld the Hatch Act as constitutional, and has stated that it is the “judgment of history” and of the Court itself that “it is in the best interests of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited.”<sup>10</sup>

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<sup>7</sup> Pub. L. No. 76-252, 53 Stat. 1147 (codified as amended in scattered sections of 5 U.S.C.).

<sup>8</sup> In 1939, when the Hatch Act was enacted, “the appropriation for the ‘Office of the President,’ which provided for ‘personal services in the office of the President,’ was the only appropriation for personnel under the heading ‘Executive Office.’ Later that year, the Executive Office of the President (EOP) was established, and the Bureau of the Budget and other agencies were transferred to it. To reflect the change in organization, the next Appropriations Act carried a general heading for ‘Executive Office of the President.’ Instead of ‘Office of the President,’ the item covering ‘personal services’ was entitled ‘White House Office.’ With changes in form, the appropriation for the President’s personal staff has been carried under this item since then.” 1 U.S. Op. Off. Legal Counsel 54 (1977), 1977 WL 18021, at \*2 (citations omitted). Despite the establishment of the EOP, the U.S. Department of Justice Office of Legal Counsel (OLC) concluded the exemption from the Hatch Act was intended to apply only to persons paid from the item for the White House Office, which is the “lineal descendant” of the Office of the President. Id.<sup>9</sup> Memorandum from C. Boyden Gray, Counsel to the President, to White House Staff 3-4 (Nov. 27, 1991) (referencing both the Hatch Act and appropriations principles in advising EOP employees of the limits on political activity).

<sup>10</sup> U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 557 (1973) (affirming the constitutionality of the Hatch Act as applied to federal employees because the provisions of the Act were neither unconstitutionally vague nor fatally overbroad); see also United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (upholding the Hatch Act’s restrictions on partisan political management by federal employees); Oklahoma v. U.S. Civ. Serv. Comm’n, 330 U.S. 127 (1947) (upholding the constitutionality of the Hatch Act as applied to certain state and local employees).

### III. Current Law

The Hatch Act’s prohibitions remained largely unchanged until October 1993, when President Clinton signed legislation that substantially amended the Hatch Act.<sup>11</sup> These amendments struck a balance whereby most federal employees were now permitted to engage in partisan political management and campaigns in their personal capacities and on their own time. They were, however, strictly forbidden from engaging in political activity while on duty or in the federal workplace. In pertinent part, the Hatch Act defined “employee” as “any individual, other than the President and the Vice President, employed or holding office in . . . an Executive agency other than the General Accounting Office.”<sup>12</sup> Senator John Glenn, former Chairman of the Senate Committee on Governmental Affairs and a sponsor of the 1993 amendments to the Hatch Act, stated:

[W]hat we do by this legislation is we say basically that on the job . . . we tighten up the Hatch Act. We strengthen current prohibitions against on the job political activity by Government employees . . . and we say there will be no political activity on the job. There are no exceptions to that. There will be no political activity of any kind on the job.<sup>13</sup>

Like the original Hatch Act provisions, the constitutionality of the new statutory scheme was upheld in 2003.<sup>14</sup>

With respect to the on-duty prohibitions, the Hatch Act, codified at 5 U.S.C. § 7324, provides the following:

- (a) An employee may not engage in political activity --
  - (1) while the employee is on duty;
  - (2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof;
  - (3) while wearing a uniform or official insignia identifying the office or position of the employee; or

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<sup>11</sup> See generally Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (codified in scattered sections of 5 U.S.C.).

<sup>12</sup> 5 U.S.C. § 7322(1)(A). The General Accounting Office was renamed the U.S. Government Accountability Office effective July 7, 2004. See U.S. GAO – Our Name, <http://www.gao.gov/about/namechange.html> (last visited Jan. 4, 2011).

<sup>13</sup> 139 Cong. Rec. 15,739 (1993).

<sup>14</sup> See Burrus v. Vegliante, 336 F.3d 82 (2d Cir. 2003) (holding that the prohibition against engaging in “political activity” while on duty or in a federal building was not unconstitutionally vague or overbroad).

(4) using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.

(b)(1) An employee described in paragraph (2) of this subsection may engage in political activity otherwise prohibited by subsection (a) if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States.

(2) Paragraph (1) applies to an employee –

(A) the duties and responsibilities of whose position continue outside normal duty hours and while away from the normal duty post; and

(B) who is –

(i) an employee paid from an appropriation for the Executive Office of the President; or

(ii) an employee appointed by the President, by and with the advice and consent of the Senate, whose position is located within the United States, who determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws.

“Political activity” is defined as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”<sup>15</sup>

The attendant regulations to 5 U.S.C. § 7324(b) are 5 C.F.R. §§ 734.502-503.<sup>16</sup> Section 734.503 explains what constitutes “money derived from the Treasury of the United States” for purposes of 5 U.S.C. § 7324(b)(1).<sup>17</sup> Specifically, “. . . costs associated with a political activity are deemed not to be paid for by money derived from the Treasury . . . if the Treasury is reimbursed for the costs within a reasonable period of time.”<sup>18</sup> Further, “. . . costs associated with a political activity do not include any costs that the Government would have or have [sic] incurred regardless of whether the activity was political.”<sup>19</sup>

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<sup>15</sup> 5 C.F.R. § 734.101.

<sup>16</sup> Pursuant to 5 C.F.R. § 734.102(c), OPM is authorized to promulgate regulations concerning the Hatch Act.

<sup>17</sup> There is a typographical error in § 734.503 in that the reference to § 733.502(c) should be a reference to § 734.502(c), as there is no § 733.502 in the regulations.

<sup>18</sup> 5 C.F.R. § 734.503(a).

<sup>19</sup> 5 C.F.R. § 734.503(b).

Further insight into §7324(b) can be found in the legislative history. In 1993, the House Committee on Post Office and Civil Service of the 103<sup>rd</sup> Congress (Committee) issued a Report to accompany the Hatch Act Reform Amendments of 1993.<sup>20</sup> Therein, the Committee noted several “matters of special interest,” including the use of U.S. Treasury funds for political activities.<sup>21</sup> Specifically, the Committee discussed the amendments’ exception for certain “high-level political officials,” i.e., employees who meet criteria set out in 5 U.S.C. § 7324(b)(2), to engage in political activity while on duty. The Committee cautioned that “[d]espite the exception . . . the committee expects that most of the political activity that these officials engage in will be conducted off Government property and not during regular duty hours.”<sup>22</sup> The Committee specifically noted that it did not expect all activities of high-level political officials to be itemized such that the cost of every incidental phone call or the portion of their salary attributable to time spent on political activities must be reimbursed. It specifically admonished, however, that “. . . if a Government office is turned into a political boiler room, all the costs associated with that activity should be reimbursed.”<sup>23</sup>

Another provision of the Hatch Act that will be analyzed in this report is 5 U.S.C. § 7323(a)(1). This provision of the Act was not changed by the 1993 amendments. It provides that an employee of the federal government may not “use his official authority or influence for the purpose of interfering with or affecting the result of an election.” The attendant regulations to this section provide examples of prohibited activities to include: using one’s official title while participating in political activity; using one’s authority to coerce any person to participate in political activity; and soliciting, accepting, or receiving uncompensated individual volunteer services from a subordinate for any political purpose.<sup>24</sup>

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<sup>20</sup> H.R. Rep. No. 103-16 (1993).

<sup>21</sup> Id. at 22.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> 5 C.F.R. § 734.302.

## **CHAPTER TWO: THE WHITE HOUSE OFFICE OF POLITICAL AFFAIRS**

### **I. Overview**

OPA has been influential in American electoral politics since the 1970s. In this chapter, OSC traces the history of OPA and describes its organizational structure during the Bush II administration. In addition, OSC explains the functions of the OPA Director, Deputy Director, Associate Directors, and the Surrogate Scheduler, all of whom figure prominently in the chapters that follow. The individuals holding these positions during the Bush II administration played a role in the political briefings that will be addressed in Chapter Three. They were also involved in OPA's assistance to the RNC to help Republican candidates discussed in Chapter Four, and the coordination of travel of high-level agency political appointees during the 2006 election season discussed in Chapter Five.

### **II. Establishment of OPA**

While the White House has employed “political people” on its staff for decades, President James Earl “Jimmy” Carter, Jr., was the first to appoint someone to be exclusively responsible for dealing with political matters.<sup>25</sup> In response to criticism that his administration was staffed with “political novices” who lacked “political sensitivity,” President Carter appointed his scheduling deputy to the position of Assistant to the President for Political Affairs and Personnel.<sup>26</sup> That individual met regularly with the Chairman of the Democratic National Committee (DNC) in order to supervise party affairs and, at the direction of President Carter's Chief of Staff, initiated campaign planning efforts.<sup>27</sup> As such, the Office of Political Affairs and Personnel, a predecessor to today's OPA, was left to handle the “nuts-and-bolts campaign planning.”<sup>28</sup> In 1980, “the office was first set up with its own segment of the White House budget.”<sup>29</sup> Since then, the staff has been paid from U.S. Treasury funds and, like all career federal employees, is subject to federal ethics rules, financial disclosure requirements, and conflict of interest restrictions.<sup>30</sup>

Over the years, OPA has come to represent the centralization of electoral politics in the White House.<sup>31</sup> OPA has been staffed predominantly by individuals with sharp political instincts and expertise in political operations. Although OPA's influence varied depending on the

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<sup>25</sup> Kathryn Dunn Tenpas, Presidents as Candidates: Inside the White House for the Presidential Campaign 7 (Garland Publ'g 1997).

<sup>26</sup> Id.

<sup>27</sup> Id. at 8.

<sup>28</sup> Id.

<sup>29</sup> Bradley H. Patterson, Jr., The White House Staff: Inside the West Wing and Beyond 206 (Brookings Inst. 2000).

<sup>30</sup> Id. at 205.

<sup>31</sup> Kathryn Dunn Tenpas, Institutionalized Politics: The White House Office of Political Affairs, 26 Presidential Studies Quarterly, no. 2, Spring 1996, at 511 [hereinafter Tenpas, Institutionalized Politics].

administration, its functions appear to have been nearly identical since the Carter administration.<sup>32</sup>

### **III. OPA's Organizational Structure and Functions During the Bush II Administration**

During the Bush II administration, OPA resided in the White House Office, within the Executive Office of the President (EOP).<sup>33</sup> President George W. Bush appointed Kenneth Mehlman, the national field director of the Bush/Cheney 2000 campaign, to be his first Director of OPA. Working for Mr. Mehlman were five regional Associate Directors, also former members of the 2000 Presidential campaign. Matthew Schlapp, another Bush/Cheney 2000 veteran, served as the Deputy Director of the office.

Though its personnel frequently changed, certain aspects of the office remained constant during the Bush II administration. First, the organizational model implemented by Director Mehlman remained unchanged during both terms of the administration. Second, all of the individuals hired to fill the positions of Director, Deputy Director, and Associate Director brought to the office a wealth of political and campaign experience, which they used, as one witness stated, to serve as the “political eyes and ears for the President.” On a daily basis, the staff of OPA was involved in the following: supporting the President and his advisors in the planning, development, and coordination of long-range strategies for achieving Presidential priorities; interfacing with constituents and political groups to evaluate the levels of support for Presidential initiatives and policies; monitoring the political rhythm in key districts across the country; coordinating travel of senior White House officials; conducting political briefings for agency political appointees and key constituent groups visiting the White House; serving as liaisons between federal agencies and political groups as well as the national, state, and local Republican Party organizations; supporting the early efforts of President Bush's reelection campaign; assisting Republican incumbents with their reelection campaigns; and orchestrating the attendance of high-level agency political appointees at events hosted by Republican candidates.

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<sup>32</sup> OPA under the Clinton and Bush I administrations will be examined for historical perspective in Chapter Four. See *infra* pp. 71-73.

<sup>33</sup> “[EOP] consists of a group of federal agencies immediately serving the President. Among the oldest of these is the White House Office, where many of the President's personal assistants are located . . . . Entities have been placed within the EOP by both Presidential action and congressional determination. Some components have endured; others have been brief experiments. Some have been transferred to other quarters of the executive branch; others have been abolished with no successor. In large measure, the tenure and durability of an Executive Office agency is dependent upon the agency's usefulness to the President — as a managerial or coordinative auxiliary, a national symbol, or a haven of political patronage, among other considerations.” Harold C. Relyea, *The Executive Office of the President: An Historical Overview*, CRS Rep. No. 98-606, at Summary (March 17, 2008) [available at http://www.fas.org/sgp/crs/misc/98-606.pdf](http://www.fas.org/sgp/crs/misc/98-606.pdf).



## A. OPA Director and Deputy Director

During the Bush II administration, the OPA Director and Deputy Director were commissioned as Deputy Assistant and Special Assistant to the President, respectively.<sup>34</sup> Their duties included: overseeing OPA, advising the President on the political implications of various policies and initiatives, managing the support that the administration provided to political candidates, using political organizations around the country to promote the President's agenda, and identifying individuals around the country interested in serving the administration.

Between 2001 and 2007, three individuals held the position of OPA Director: Kenneth Mehlman, Matthew Schlapp, and Sara Taylor. Each of these individuals possessed an extensive background in partisan politics and campaign management. As noted above, Mr. Mehlman served as the national field director for the Bush/Cheney 2000 campaign. Mr. Schlapp served as a regional director for the Bush/Cheney 2000 campaign and as Deputy Director at OPA from 2001 to 2003, before being appointed to the position of Director. Ms. Taylor, who held the position during the second term of the Bush II administration, served as an executive director of the Bush/Cheney 2000 Michigan campaign, as an OPA Associate Director from 2001 to 2003, and as a strategist for the Bush/Cheney 2004 campaign.

Generally, it was the Director's job to use the collective expertise of the office to keep the President informed about political issues at both the national and state levels. As such, the Director frequently met with RNC officials who briefed him or her on emergent political issues. The Director also received updates on campaigns that the administration was interested in tracking, and used the information to align strategically the travel of high-level political appointees with the President's priorities in key congressional districts.

Also serving as a conduit of information from the White House, the OPA Director conducted briefings for political appointees at federal agencies. The briefings were instituted as a means to keep appointees engaged in the President's initiatives and agenda, to prevent appointees from losing their connection to the administration, and to provide an update on the political climate of the country including races that were of particular interest to the White House and the RNC. Political briefings at federal agencies were typically accompanied by a

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<sup>34</sup> Positions within the EOP are generally divided into two distinct categories: those individuals who are Presidentially appointed, receiving formal, signed commissions from the President; and those individuals who were appointed with Presidential approval. White House officials who are Presidentially appointed are considered "commissioned officers" in the White House. These commissioned officers are divided into three categories starting with the most senior: Assistant to the President, Deputy Assistant to the President, and Special Assistant to the President. For example, during the Bush II administration, a number of positions were commissioned as "Assistant to the President," such as the Chief of Staff, Deputy Chief of Staff, Counsel to the President, Press Secretary, and Assistant to the President for Legislative Affairs. See Patterson, *supra* note 29, at 220-21; Bradford A. Berenson, former Assoc. White House Counsel, *Legal Decision-Making in the Bush White House: Enron, the War on Terror, and Homeland Security* (June 30, 2004) [available at](http://www.rieti.go.jp/en/events/bbl/04063001.html) <http://www.rieti.go.jp/en/events/bbl/04063001.html>.

PowerPoint presentation. The Director was primarily responsible for the content of the PowerPoint slides, but Ms. Taylor and the former OPA Deputy Director Scott Jennings explained that OPA Associate Directors, as well as employees in the White House Office of Strategic Initiatives, helped collect the relevant data.

As did the Director, the Deputy Director frequently conducted political briefings for political appointees at federal agencies as well as for state and local political groups visiting the White House. In addition to assisting the Director with the day-to-day administration of the office, the Deputy Director worked with the White House Office of Presidential Personnel to recruit and evaluate applicants for political appointments.

## **B. OPA Associate Directors**

OPA Associate Directors were appointed to their positions with Presidential approval but were not commissioned officers of the President or senior White House employees.<sup>35</sup> Each Associate Director was responsible for one of five geographic regions of the United States. As Mr. Mehlman explained:

Each of those regional [Associate] Directors were people who had either worked on a campaign in that region, or worked, in some cases, at the RNC in that region, had knowledge of the region, had knowledge of the players, and knowledge of the people that were elected officials in the region. . . . Their job was to make sure that they were very much familiar with all of the political entities in the region, to help promote the President's policies in the region, to interface with relevant campaigns in the region, to help the members [of Congress].

Associate Directors were considered political experts on their particular geographic region of responsibility. This expertise encompassed the region's political landscape, contested congressional and local races, constituent interests, as well as key economic and regional issues. As stated by a former Associate Director:

It was expected that we would know more about our states, across the board, than anybody, and so it was important to be in constant contact . . . with people in the states, and move that information up the chain. And . . . I think that we were conduits of information . . . [W]e would try to gather information, we would try to be as aware as possible of what was happening, and make

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<sup>35</sup> Patterson, note 29, at 220-221.

sure that the President and senior officials were aware of what was going on in our states.

Associate Directors coordinated and planned the travel of senior White House officials including, but not limited to, the President, the Vice President, and the First Lady. Associate Directors vetted venues for upcoming events, secured attendees for events, and invited elected officials to greet the arriving President, Vice President or First Lady. In order to continue coordinating details on the ground, Associate Directors personally staffed the planned events, often traveling on Air Force One, from state to state, alongside the President and senior White House officials.

Associate Directors also coordinated travel of high-level agency political appointees. They processed hundreds of requests from members of Congress and state and local political groups seeking to have a high-level agency political appointee travel to their respective congressional districts. If the Associate Directors determined that the event matched the administration's agenda and electoral priorities, they communicated the request to the Associate Director of Scheduling (also called the Surrogate Scheduler) who, in turn, forwarded OPA-approved requests to the federal agencies. Subsequently, OPA furnished the travelling high-level agency political appointee with a summary of the political climate of the state where the event would be scheduled. Specifically, each Associate Director kept dossiers with up-to-date polling data as well as information on local elected officials, key campaigns, significant local issues, and the administration's priorities for his or her region of responsibility. A former Associate Director testified that members of Congress often submitted their requests for administration speakers directly to OPA for the specific purpose of having OPA forward their requests to agencies. During 2006 alone, OPA forwarded over 600 requests to agencies for events with high-level agency political appointees.<sup>36</sup>

Finally, Associate Directors regularly communicated with their respective counterparts at the RNC. Not unlike OPA, the political office at the RNC was divided into geographic regions manned by Desk Coordinators. The geographic region assigned to an RNC Desk Coordinator corresponded to the region assigned to an OPA Associate Director. As such, Associate Directors communicated with their RNC counterparts about matters politically relevant in their states, including sharing polling data, seeking updates on political candidates and elected officials, and addressing constituent concerns.

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<sup>36</sup> This figure is gleaned from documents called Suggested Memoranda. The specific methodology for calculating this figure is described in detail in Chapter Four, *infra* pp. 57-58.

### **C. OPA's Relationship With the White House Office of Scheduling and Appointments**

The White House Office of Scheduling and Appointments coordinated the President's schedule and maintained his daily calendar of appointments. This office was comprised of the Director of Scheduling and several Assistant Schedulers who divided responsibility for the President's schedule according to the days of the week. The functions of the Office of Scheduling and OPA were linked via the Surrogate Scheduler. The Surrogate Scheduler reported both to the Director of Scheduling and the Director of OPA and had separate duties in each office.

Like an OPA Associate Director, the Surrogate Scheduler was appointed to his or her position with Presidential approval but was not a commissioned officer or a senior White House employee. The Surrogate Scheduler had two distinct job functions. First, the Scheduler was responsible for finding and scheduling surrogates to appear at events on behalf of the President when the President was unable to attend. These events, as former Surrogate Scheduler Mindy McLaughlin explained, were referred to as "POTUS regrets."<sup>37</sup> In this role of filling and coordinating POTUS regrets, the Surrogate Scheduler reported to the Director of Scheduling.

The Surrogate Scheduler's other duty was to facilitate the appearance of high-level agency political appointees at events when members of Congress, candidates for elective office, and constituent groups so requested. Essentially, once the requests were received by OPA, and approved as described above, the Surrogate Scheduler relayed the requests to the appropriate federal agencies for completion. The Surrogate Scheduler met with OPA staff daily to discuss OPA's agenda and the status of pending requests for high-level agency political appointees.

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<sup>37</sup> "POTUS" refers to the President of the United States.

## **CHAPTER THREE: POLITICAL BRIEFINGS**

### **I. Overview**

This chapter addresses how OPA employees violated the Hatch Act by giving political briefings to agency political appointees during the Bush II administration. The briefings typically were given by the OPA Director or Deputy Director, who testified that the briefings were intended to boost morale among political appointees and provide an overview of the “political landscape.” However, witness testimony, e-mail messages, and PowerPoint slides used at some of the briefings indicate that the electoral success of the Republican Party, and possible strategies for achieving it, were often on the agenda. As such, these briefings constituted political activity. Because most of the briefings took place during normal business hours and in government buildings, many of the briefings implicated the Hatch Act’s prohibition against engaging in political activity while on duty or in a federal workplace.

Accordingly, OSC analyzes whether the OPA Director, Deputy Director, Associate Directors, Surrogate Scheduler, White House liaisons, and other political appointees – the administration employees who took part in the briefings – violated any of the Hatch Act’s prohibitions by coordinating, presenting, or attending the briefings. OSC concludes that pursuant to § 7324(b), both the OPA Director and Deputy Director were exempt from the Act’s proscription against engaging in political activity while on duty or in a federal workplace. However, the Associate Directors, Surrogate Scheduler, White House liaisons, and some other political appointees were not exempt from this provision. Thus, involvement of these non-exempt individuals in the briefings raises Hatch Act concerns that are discussed below. In addition, OSC concludes that by virtue of their positions, the OPA Director and Deputy Director, as well as some White House liaisons who required political appointees to attend the briefings, violated the Hatch Act’s prohibition against using their official authority or influence to affect the result of an election. Based on these findings, OSC recommends that in the future, briefings like the ones discussed below should not occur in the federal workplace or during normal business hours, and attendance should be completely optional.

### **II. Factual Findings**

#### **A. Purpose of Political Briefings**

OSC identified approximately 75 political briefings given by OPA employees to political appointees at 20 federal agencies between 2001 and 2007. Typically, these briefings were conducted by the OPA Director or Deputy Director. Associate Directors and the Surrogate Scheduler helped prepare the presentations and on rare occasions gave the presentations. Former OPA employees testified that they viewed working on political briefings as one of their official job duties.

The political briefings accomplished several objectives, one of which was to mobilize political appointees during election seasons. For example, in February 2002, OPA Director Mehlman instructed his staff that “[b]ecause this is a political year, regular, updated information will be important and interesting. We want to discuss targets, how people can help, our plan for coordinated activities, and (most importantly) what’s appropriate and legal.” In addition, the political briefings included information about the overall political climate, the economic landscape, the President’s job approval ratings, and the current and predicted makeup of Congress. Finally, according to Scott Jennings, Deputy Director during the 2006 election cycle, the political briefings were “morale boosting tools” that were “designed to let the appointees know that the White House appreciated . . . [and] cared very much about their service.” The purpose and content of the political briefings presented to agency political appointees remained largely the same throughout the Bush II administration.

## **B. Location and Scheduling of Political Briefings**

Political briefings generally were conducted in one of three venues: (1) agency headquarters; (2) the Eisenhower Executive Office Building (EEOB); or (3) private venues, such as the American Enterprise Institute or the Capitol Hill Club. A large number of the political briefings were open to an agency’s entire political staff, often including the head of the agency. At times, however, OPA presented its political briefings exclusively to the agency’s most senior political employees, i.e., non-career Senior Executive Service employees (SES) and Presidential appointees with Senate confirmation (PAS). On still other occasions, invitees to political briefings consisted of only agency Chiefs of Staff and White House liaisons.<sup>38</sup> Former OPA Director Sara Taylor stated that, regardless of whether the audience consisted of Schedule C, SES or PAS attendees, the content of political briefings remained unchanged.<sup>39</sup>

Of the approximately 75 political briefings that took place between 2001 and 2007, 22 briefings, the highest number in any one calendar year, were conducted in 2006. Half of those briefings occurred between August and October 2006. The next highest number was 17, in election year 2002. By comparison, twelve briefings occurred in 2005, ten in 2004, three in 2003, and 11 in 2001.<sup>40</sup>

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<sup>38</sup> A White House liaison was an individual occupying a politically appointed position, generally located within the immediate office of the agency head or closely associated with the agency’s Chief of Staff. The position of White House liaison, as explained to OSC by employees who held that position, as well as OPA officials, existed for the purpose of maintaining an open line of communication between an agency and the White House.

<sup>39</sup> OPM may grant hiring authority under Schedule C on a case-by-case basis in situations for which political appointments are appropriate. Schedule C appointees keep a confidential or policy-determining relationship with their supervisor and agency head.

<sup>40</sup> While the evidence suggests that there were likely many more political briefings that occurred during these time periods, the figures cited represent those briefings that OSC was able to identify conclusively from the documents reviewed in this investigation.

During the first term of the Bush II administration, there was no discernable pattern concerning the time of day at which the political briefings were scheduled; however, nearly all of the briefings, according to the documents reviewed, occurred between 10:30 a.m. and 6:00 p.m.<sup>41</sup> During the second term of the Bush II administration, an issue was raised with respect to the political briefings occurring during typical work hours. Specifically, in April 2005, an Executive Assistant in OPA advised the White House liaison at the U.S. Department of the Interior (DOI) that the White House Counsel's Office was uncomfortable with the idea of OPA presenting political briefings at agencies during work hours. Ms. Sara Taylor testified that the White House Counsel's Office advised that political briefings should be held after 5:00 p.m. to avoid using government resources for political activity. The evidence shows that on June 30, 2005, an OPA Associate Director sent an e-mail to the White House liaison at the U.S. Department of Education (DOEd) stating that political briefings "MUST take place after hours due to content . . . [at] 5PM or later." In spite of these warnings, between April 2005 and February 2007, OPA conducted 36 political briefings for political appointees at federal agencies.<sup>42</sup> Of the 30 political briefings for which OSC was able to discern a specific time of presentation, 14 were held before 5:00 p.m. None of the witnesses interviewed by OSC reported taking leave to attend any of the political briefings referenced in this report.

The evidence shows that in scheduling political briefings, it was routine for OPA to contact an agency's White House liaison to offer a political update, or for a White House liaison to request one directly from OPA. While many liaisons' requests for political briefings sought a broad political discussion in anticipation of the upcoming elections, other White House liaisons

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<sup>41</sup> OSC identified political briefings which took place at the following dates and times: March 12, 2001, 12:00 p.m.; April 2, 2001, time undetermined; April 6, 2001, 4:45 p.m.; April 11, 2001, 4:00 p.m.; May 18, 2001, 5:00 p.m.; July 12, 2001, 10:30 a.m.; August 6, 2001, time undetermined; August 14, 2001, time undetermined; August 15, 2001, time undetermined; November 30, 2001, 2:00 p.m.; December 14, 2001, 4:00 p.m.; January 6, 2002, time undetermined; January 28, 2002, time undetermined; February 6, 2002, 3:00 p.m.; February 7, 2002, time undetermined; March 5, 2002, 3:15 p.m.; March 6, 2002, 12:00 p.m.; March 8, 2002, 12:00 p.m.; March 12, 2002, 4:00 p.m.; March 21, 2002, 2:00 p.m.; March 25, 2002, 10:45 a.m.; April 11, 2002, 12:00 p.m.; April 16, 2002, 2:30 p.m.; September 6, 2002, time undetermined; September 12, 2002, 4:00 p.m.; November 8, 2002, 10:30 a.m.; November 26, 2002, 3:00 p.m.; December 17, 2002, 12:00 p.m.; February 21, 2003, 2:30 p.m.; March 5, 2003, 11:30 a.m.; March 14, 2003, 3:00 p.m.; January 12, 2004, 10:05 a.m.; March 8, 2004, 11:00 a.m.; March 19, 2004, 11:00 a.m.; March 30, 2004, time undetermined; April 2, 2004, 2:00 p.m.; April 14, 2004, 1:00 p.m.; May 18, 2004, 4:30 p.m.; June 24, 2004, 2:00 p.m.; July 15, 2004, 5:00 p.m.; September 22, 2004, 11:00 a.m.; and one briefing, at an undetermined time, shortly before the 2004 election.

<sup>42</sup> These political briefings took place on the following dates: April 18, 2005, 5:00 p.m.; April 20, 2005, 1:00 p.m.; May 4, 2005, 5:00 p.m.; June 9, 2005, 5:00 p.m.; July 11, 2005, 10:30 a.m.; July 25, 2005, 5:00 p.m.; July 26, 2005, 5:00 p.m.; August 16, 2005, 5:00 p.m.; August 29, 2005, time undetermined; September 15, 2005, 5:00 p.m.; October 26, 2005, time undetermined; December 19, 2005, 3:00 p.m.; January 10, 2006, 5:30 p.m.; January 20, 2006, 1:15 p.m.; March 7, 2006, 5:00 p.m.; March 14, 2006, 3:00 p.m.; March 21, 2006, time undetermined; April 17, 2006, 2:00 p.m.; April 19, 2006, 5:15 p.m.; April 20, 2006, 5:00 p.m.; May 22, 2006, time undetermined; June 28, 2006, 6:00 p.m.; July 21, 2006, 12:00 p.m.; August 8, 2006, 9:30 a.m.; August 14, 2006, 12:00 p.m.; August 16, 2006, time undetermined; September 5, 2006, 11:00 a.m.; September 8, 2006, 1:30 p.m.; September 12, 2006, 3:30 p.m.; September 19, 2006, 5:30 p.m.; September 20, 2006, 5:30 p.m.; September 25, 2006, 5:00 p.m.; September 26, 2006, time undetermined; November 16, 2006, 4:00 p.m.; January 26, 2007, 1:30 p.m.; and February 6, 2007, 4:00 p.m.

requested the briefings as a call-to-action to the agency's political appointees. For example, on September 6, 2006, Surrogate Scheduler Mindy McLaughlin forwarded a request from the White House liaison at the U.S. Department of Housing and Urban Development (HUD) to Ms. Taylor, stating that the White House liaison had asked for a "morale boosting meeting" with the HUD Schedule C appointees that would "put the fear of God in them about continuing to work hard and sign up for the 72hour." According to Ms. McLaughlin, the liaison was "really impressed with the impact Karl's meeting had on [the agency Chief of Staff] and thinks it will be helpful to the political appointees."

Similarly, on June 15, 2004, a White House liaison at the U.S. Department of Agriculture (USDA) asked OPA to give a briefing on the political strategy during the last months of the 2004 election cycle, stating that "[e]veryone knows the general strategy, but I think people need a pick-me-up reminder." More specifically, he wrote, "I feel like people need to hear the message about resisting the urge to travel to the districts of key committee chairmen and members for the sake of building relationships" because "the White House determines which members need visits and where we need to be strategically placing our assets." As in the political briefing request from HUD described above, the USDA liaison referred to earlier presentations, indicating that "[t]he briefing you gave to the Deployment team about a year ago would be perfect," and that he hoped for OPA's "regular presentation on strategic priorities (messages, states, etc.). Our folks just need to hear from someone higher level than me that we need to focus our efforts like a laser beam."

On August 24, 2006, another request to OPA from the White House liaison at the United States Agency for International Development (USAID) sought a political briefing that would "keep the troops informed, motivated and activated as we move forward toward the fall elections." Again, the White House liaison asked OPA for a "presentation similar to the one you and Mr. Rove gave two weeks ago . . . in the EEOB." He also recalled that a "similar briefing was held at USAID by either your office or the RNC back during the 2002 midterm election cycle for the politicals and we appreciated the presentation greatly." Thus, the evidence reflects that some White House liaisons viewed the briefings as a call to action for other appointees in their agencies, and based this on past experience with briefings.

### **C. Political Appointees Were Expected to Attend Political Briefings**

White House liaisons employed various strategies to communicate to political appointees that they were expected to attend political briefings. A former White House liaison explained that it was important to have a good turn-out when OPA staff presented a political briefing. One way the White House liaisons encouraged attendance was by appealing to the political appointees' commitment to the administration. For example, on June 6, 2004, in an e-mail



invitation to a political briefing, the White House liaison at the National Aeronautics and Space Administration (NASA) wrote:

The White House Office of Political Affairs has offered to come over to NASA to brief the appointees on all the current goings on in the political world. For those of you who have been to one of these briefings before, I know you can attest to their usefulness and for those of you who haven't, I would simply say that this can't be missed. . . . These briefings are usually only done for Cabinet Agencies, but they have seen the dedication the appointees here have shown and are happy to come over to see us.

The day before the scheduled political briefing, the White House liaison reminded political appointees that it would “be a very informative meeting, please make every effort to attend, if possible. And come with questions for them, [because] this is the time to ask.”

One DOI Chief of Staff, in addition to relying on his own influence to encourage attendance, invoked the agency Secretary's authority to ensure that an upcoming political briefing would be well-attended. Issuing a memorandum to the political appointees, the Chief of Staff wrote: “The Secretary has asked me to let you know that we will have a special presentation at the Politicals meeting on Monday, March 25. . . . Please make a special effort to attend.” Similarly, the White House liaison at the U.S. Department of Veterans Affairs (VA), advised political appointees:

The White House political team would like to come by to do an informal briefing and question and answer session on Friday, July 15, at 5:00 p.m. I know that it is not fun to attend a briefing on a Friday afternoon, but the Secretary would like to join as well and that is the best time for him.

While at some agencies political appointees were encouraged to attend political briefings given by OPA staff, at other agencies, attendance at briefings was mandatory. For example, the White House liaison at the U.S. Department of Health and Human Services (HHS) extended an invitation to the political appointees and stated: “This meeting is mandatory. It will essentially be the same large meeting that we had last year about this time. So, please clear your schedule, put your pom-poms on, and let's go!!!” On July 25, 2005, a White House liaison at the U.S. Department of Commerce (DOC) wrote to political appointees, “Please mark your calendars for a **mandatory meeting Tomorrow, July 26, in the Department Conference Room at 5pm.**” Likewise, a U.S. Department of the Treasury (Treasury) political appointee advised other agency appointees of an upcoming political briefing and noted, “This event is mandatory for all local

appointees unless on official leave.” Several former White House liaisons also told OSC that attendance at briefings was tracked, and the names of absentees were recorded. For example, a former White House liaison at the U.S. Department of Transportation (DOT) maintained a document on which political appointees were asked to indicate whether they could attend a briefing; if the response was “No,” they were required to provide a reason.

#### **D. PowerPoint Presentations Used During Political Briefings**

OSC obtained 11 different PowerPoint presentations that were given to political appointees in 2001, 2005, 2006, and 2007.<sup>43</sup> On average, each presentation contained 20 slides. The slides contained both text and graphs, providing statistics and polling data. The slides also identified administration priorities, vulnerable Republican races and geographic districts with hotly contested elections, and illustrated the success of 72-hour deployment efforts.

A significant portion of each PowerPoint presentation was devoted to analyzing past, present, and future elections. On average, 40 percent of the slides contained data concerning key congressional elections in a given year. In two PowerPoint presentations, however, 60 percent of the slides dealt specifically with upcoming elections.<sup>44</sup> Further, a PowerPoint presentation given on January 26, 2007, was almost entirely focused on elections. Specifically, it demonstrated the impact of the “GOP [Grand Old Party] ground-game” and reported voter turn-out and other trends from the 2006 midterm election cycle. It also listed the races that OPA predicted, based on the historical data, would be the targeted races for the 2008 elections. For example, a slide titled “Battle for Governors ‘07/’08,” identified all the states with 2007 and 2008 gubernatorial elections. The slide designated four states as “Republican Offense,” five states as “Republican Defense,” and five states as “Not Competitive.”

Other slides titled “2008 House Targets” and “2008 House GOP Defense” were also included as part of the January 26, 2007, PowerPoint presentation. The “2008 House GOP Defense” slide is depicted below.

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<sup>43</sup> OSC was unable to obtain every PowerPoint presentation used at political briefings during the Bush II administration. Witnesses, both presenters and attendees at political briefings, testified that the 11 PowerPoint presentations reviewed by OSC are an accurate reflection of the type of slides OPA staff used from 2001 to 2007.

<sup>44</sup> These presentations were dated October 26, 2005, and September 12, 2006.

### 2008 House GOP Defense

PRIORITY DEFENSE				SECONDARY DEFENSE					
			BC '04 %	'06 GOP %			BC '04 %	'06 GOP %	
PA	06	Gerlach	48%	51%	AK	AL	Young *	61%	57%
FL	13	Buchanan	56%	50%	CA	24	Gallegly *	56%	62%
NC	08	Hayes	54%	50%	CA	25	McKeon *	59%	60%
NM	01	Wilson	48%	50%	CA	41	Lewis *	62%	67%
CO	04	Musgrave	58%	46%	CA	42	Miller	62%	N/A
IL	06	Roskam	53%	51%	CA	52	Hunter *	61%	65%
CT	04	Shays	40%	51%	DE	AL	Castle *	46%	57%
OH	02	Schmidt	64%	51%	FL	10	Young *	51%	66%
VA	02	Drake	58%	51%	IL	10	Kirk	47%	53%
WY	AL	Cubin *	69%	48%	IL	14	Hastert *	56%	60%
CA	04	Doolittle	61%	49%	KY	02	Lewis	65%	55%
NV	03	Porter	50%	48%	LA	01	Jindal *	71%	88%
NY	25	Walsh	48%	51%	MD	06	Bartlett *	65%	59%
OH	15	Pryce	50%	51%	MI	03	Ehlers *	59%	63%
NY	29	Kuhl	57%	52%	MI	07	Walberg	54%	51%
NJ	07	Ferguson	53%	49%	NC	09	Myrick *	63%	67%
MI	09	Knollenberg *	51%	52%	OH	16	Regula *	54%	59%
					PA	15	Dent	50%	53%
					VA	11	Davis *	50%	55%

\* Member may not seek re-election

In explaining some of these PowerPoint slides to OSC, former OPA Directors and a Deputy Director stated that the slides did not identify all upcoming races, but instead focused on races that were considered to be close, competitive, or a target.

Mr. Mehlman commented on a similar slide titled “Competitive House Districts,” which was taken from a July 12, 2001, PowerPoint presentation and is depicted below.

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## Competitive House Districts

CD	Member	CD	Member
<b>107th Congress</b>		MN-01	Gutknecht
CA-03	Ose	MN-02	Kennedy
CA-04	Doolittle	MO-02	Akin
CA-23	Gallely	MO-06	Graves
CA-38	Horn	MS-03	Pickering
CO-06	Tancredo	MT-a1	Rehberg
CT-02	Simmons	NC-08	Hayes
CT-06	Johnson (redistricting)	NH-01	Sununu
FL-08	Keller	NH-02	Skeen
FL-22	Shaw	NJ-07	Ferguson
GA-07	Barr	NM-01	Wilson
GA-08	Chambliss	NY-01	Grucci
IA-02	Leach	OH-01	Chabot
IA-04	Ganske	OH-12	Tiberi
IA-05	Latham	OK-02	Carson
IL-10	Kirk	PA-04	Hart
IL-15	Johnson	PA-10	Sherwood
IL-20	Shimkus	PA-15	Toomey
IN-02	Pence	SC-04	DeMint
IN-08	Hostettler	SD-a1	Thune
KY-01	Whitfield	TN-04	Hilleary (openseat)
KY-03	Northup	TX-05	Sessions
KY-06	Fletcher	TX-14	Paul
LA-06	Baker	VA-02	Schrock
MD-08	Morella	VA-04	Forbes
ME-02	OPEN	WA-02	Larsen
MI-07	Smith	WA-05	Nethercutt
MI-08	Rogers	WV-02	Capito

He noted that the information on this slide was important for political appointees to know because it identified the districts that contained the most swing voters. Thus, Mr. Mehlman stated, the message conveyed to political appointees by this kind of slide was: “You’re able to reach out to people that on those public policy issues maybe are undecided, maybe are unengaged, and get them involved, too. This is an example of where you have the most impact on public policy, on public thinking, and also obviously . . . potential political impact.”

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Below is an example of another slide taken from the January 26, 2007, PowerPoint presentation.

### 2008 House Targets: Top 20

			BC '04 %	'06 DEM %
TX	22	Lampson	64%	52%
FL	16	Mahoney	54%	49%
CA	11	McNerney	54%	53%
OH	18	Space	57%	62%
IN	9	Hill	59%	50%
PA	10	Carney	60%	53%
PA	08	Murphy	48%	50%
KS	2	Boyda	59%	51%
PA	7	Sestak	47%	56%
IN	8	Ellsworth	62%	61%
NC	11	Shuler	57%	54%
TX	23	Rodriguez	57%	54%
WI	8	Kagen	55%	51%
GA	8	Marshall	61%	51%
IN	2	Donnelly	56%	54%
GA	12	Barrow	50%	50%
PA	4	Altmire	55%	52%
NY	19	Hall	54%	51%
NY	20	Gillibrand	54%	53%
SD	AL	Herse	60%	69%

In reference to this slide, Mr. Jennings explained to OSC that

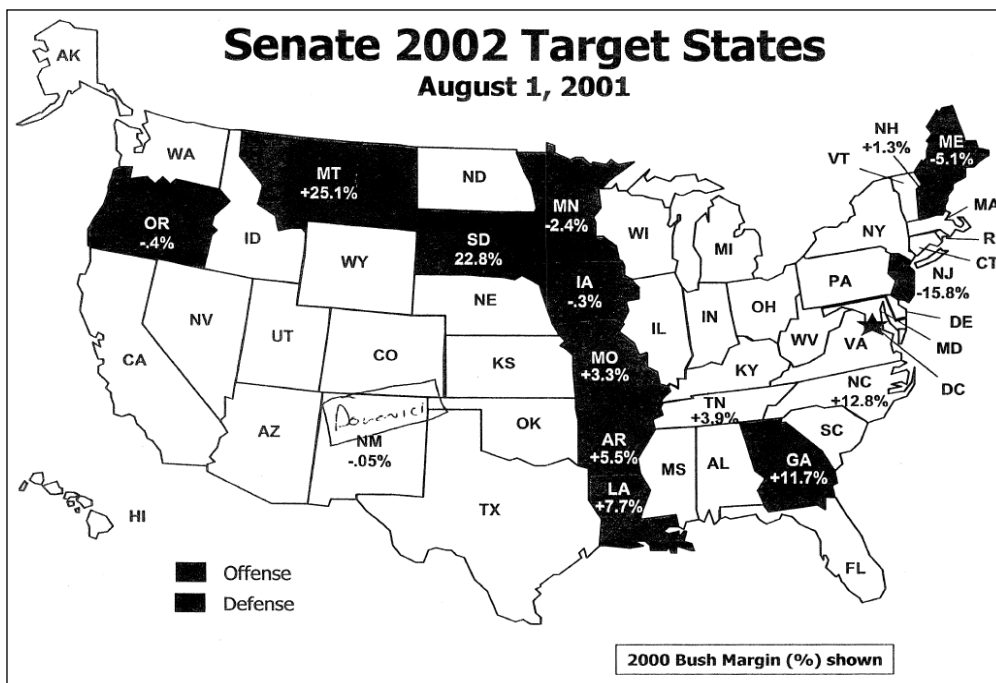
These lists [of targeted races] exist for two reasons. [O]bviously there is an electoral analysis going on here, so that's Point A. Point B, though, is if you're looking at it from a policy perspective, who are we going to be targeting? I think you can reasonably assume all of these people are going to be in precarious political positions.

Corroborating the testimony above, Mr. Mehlman explained that OPA highlighted "target states" because they represented geographic areas where there was "real interest in and real competitiveness with respect to public policy and also politics." In addition, Adrian Gray, a former Surrogate Scheduler, testified that the information about "target races" was important for political appointees to learn so they would understand the goals of the White House and why they were being asked to travel to a particular area of the country. Mr. Gray explained further

that slides identifying the top 20 candidates were presented to agency political appointees because:

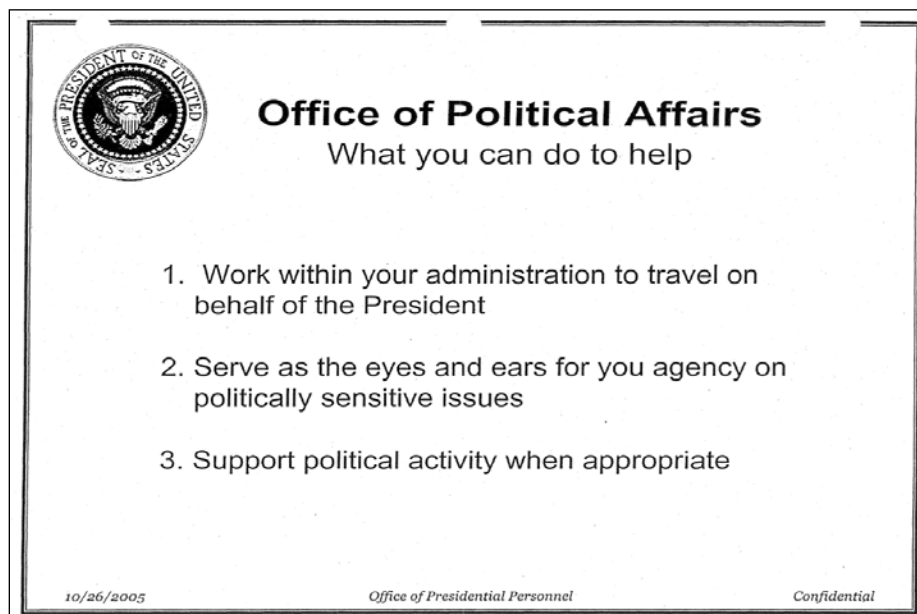
If we are gonna make political requests [of agency officials], and we are asking them to do races where there is no one even being challenged in the race, they're gonna look at us like we're not taking their time seriously. If we make a political request of a [Cabinet member] and they know that the request that we're passing along is because it's got some importance, then they're gonna take that more seriously.

A former White House liaison at the U.S. Environmental Protection Agency (EPA) told OSC that he understood slides with "target races, regions, states" to mean: "Here's the five places where if you can do something for this governor, et cetera et cetera, can you do it? So yes, there was always that correlation. If you are going to be in those areas, please include this person if you can." A DOI Chief of Staff referred to the map shown below as an example of a slide that he understood was used by OPA to underscore and predict close upcoming Senate races. He further recalled that the purpose of a map such as the one depicted below was to identify the states where PAS officials ought to consider engaging in political activity.



<sup>45</sup> This slide was taken from a PowerPoint presentation dated August 6, 2001. The notation on the slide in New Mexico contains the name "Domenici," the Senator from that state. OSC obtained a copy of this slide from a witness, who stated that he wrote "Domenici" during the presentation.

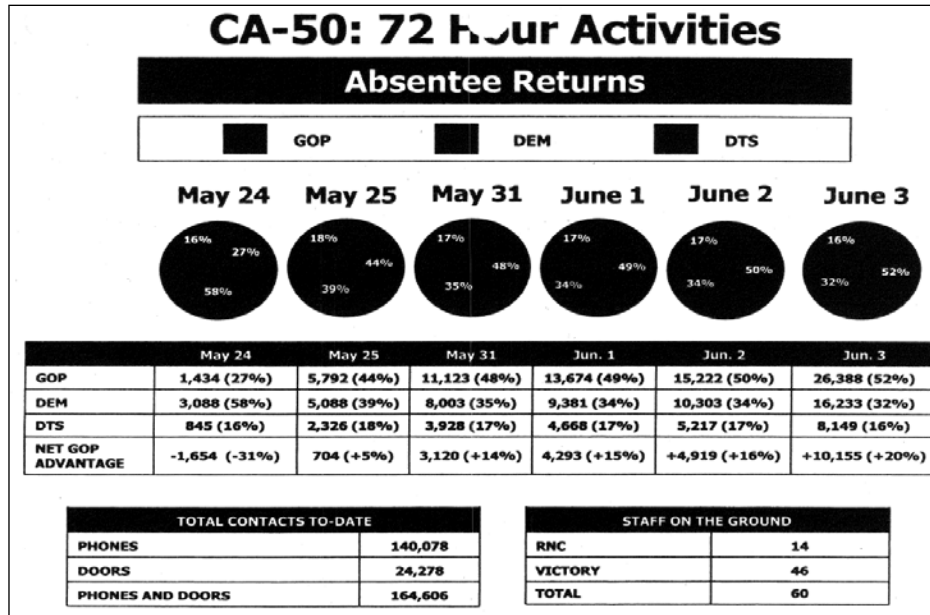
Finally, a review of the PowerPoint presentations also shows that the topic of 72-hour deployments was part of the political briefings agenda. OSC identified at least four PowerPoint presentations that depicted information about 72-hour deployments and/or the “GOP ground game,” and their value in boosting Republican voter turn-out.<sup>46</sup> Below are examples of slides with information about 72-hour deployments and other strategies for achieving electoral success.



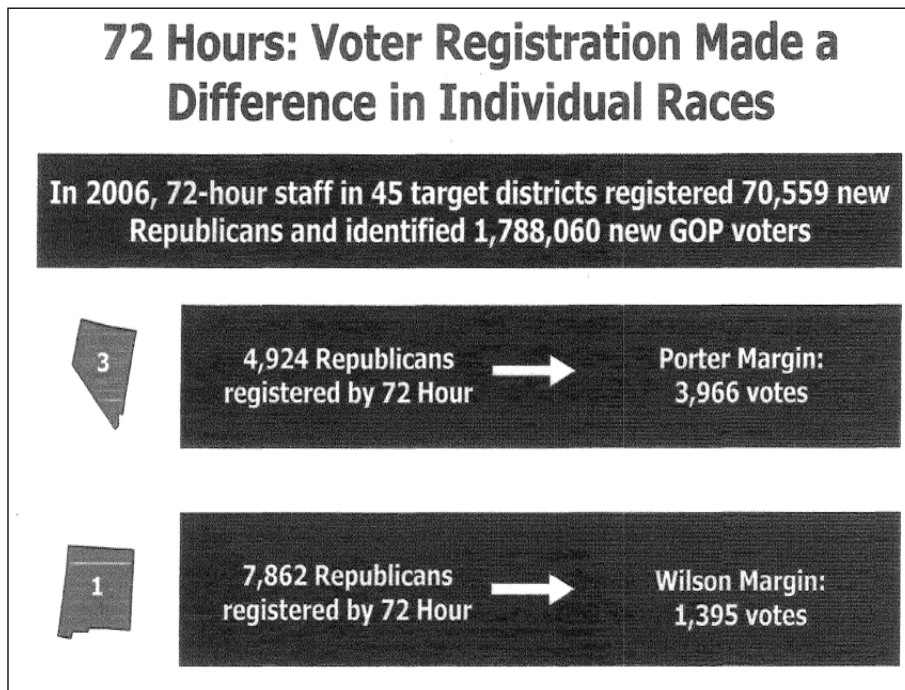
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<sup>46</sup> These presentations include: a presentation without a date; a presentation dated September 12, 2006; a presentation dated January 4, 2007; and a presentation dated January 26, 2007.



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<sup>47</sup> This slide was taken from a PowerPoint presentation dated September 12, 2006.

<sup>48</sup> This slide was taken from a PowerPoint presentation dated January 26, 2007.



	<b>Final Poll</b>		<b>Election Result</b>		<b>Δ</b>
	<b>54%</b> <b>38%</b>	<b>Hayes Kissell</b>	<b>50%</b> <b>50%</b>	<b>-16</b>	
	<b>50%</b> <b>37%</b>	<b>Northup Yarmuth</b>	<b>49%</b> <b>51%</b>	<b>-15</b>	
	<b>49%</b> <b>44%</b>	<b>Leach Loeb sack</b>	<b>48%</b> <b>51%</b>	<b>-8</b>	
	<b>47%</b> <b>46%</b>	<b>Hart Altmire</b>	<b>48%</b> <b>52%</b>	<b>-5</b>	
	<b>43%</b> <b>49%</b>	<b>Taylor Shuler</b>	<b>46%</b> <b>54%</b>	<b>-2</b>	

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Ms. Taylor stated that the purpose behind slides concerning 72-hour deployments was to illustrate the effects that late volunteering on campaigns had on election results. Ms. Taylor noted that the commentary accompanying these slides would have been that this “campaign activity turned a disadvantage into an advantage.”

**E. Political Appointees’ Impressions of Political Briefings**

As discussed above, former OPA staff testified that the purpose of political briefings was to boost the morale of the political appointees, to discuss the country’s political landscape, and to present information about past and upcoming elections. The evidence, however, shows a discrepancy between former OPA employees’ stated purpose for conducting the political briefings and the impressions the briefings had on some political appointees.

In interviews of former OPA employees, OSC inquired whether, during political briefings, political appointees were encouraged to volunteer for campaigns. The OPA employees consistently responded that the topic of volunteering was brought up by the audience, not by the presenters. Mr. Mehlman testified that only when the attendees expressed an interest in learning about assisting on campaigns would he have explained to them “the appropriate way to get involved.” He elaborated that his comments to the attendees would have included suggestions to consult with agency counsel, and that although “it was the President’s goal to achieve Republican wins, do it in an appropriate way” and contact the RNC. Similarly, Mr. Jennings commented: “I can reasonably assume that political appointees, most of whom have political

<sup>49</sup> This slide was also taken from a PowerPoint presentation dated January 26, 2007.

backgrounds, . . . are going to find an appropriate fashion to engage in campaigns. I don't recall it coming up [during political briefings], other than to say, if you do, here are the rules."

By contrast, on several occasions, appointees left the political briefings sensing a need to assist on campaigns. For example, following a September 2002 political briefing, a DOT employee sent an e-mail to the OPA Director, Deputy Director, and Surrogate Scheduler, stating: "I just wanted to say thank you for a great presentation this afternoon. You have definately [sic] left an impression on the politicals of DOT. I look forward to helping out with the campaign." On January 28, 2002, an appointee at HHS wrote to Mr. Mehlman: "I am a Schedule C appointee in the Dept. of Health and Human Services. Each time you spoke at one of the Schedule C briefings, you mentioned we should get involved in certain activities. Could you recommend how we could effectively do so?" The same appointee followed up two days later, writing:

I am a Schedule C appointee in the Dept. of Health and Human Services . . . . At 2 Schedule C briefings I attended, you said that each of us should get involved to help Republicans win/hold onto seats in the 2002 elections. Taking your advice, I contacted the RNC and asked if any positions on any committees, boards, etc., were available on which I could volunteer my time. I was told that none exist but I could help "lick stamps" if I wanted. While I have attended/organized many lick'em and stick'em parties, and no doubt will attend/organize them in the future, I was hoping for a more involved role. Any ideas on how I could become more involved and help you in your goal of achieving Republican wins?

When asked why he contacted OPA with these questions, the HHS political appointee stated that it was in his best interests to support the Republican Party because showing such support is what "got" him his job at HHS. A political appointee at NASA likewise suggested that one's political involvement played a role in receiving a political appointment and advancing in the political ranks. He noted that "in terms of the hiring preference, the campaign worker would get the first look" because volunteering demonstrated an applicant's level of dedication to the administration. Furthermore, while many former Schedule C appointees interviewed by OSC testified they did not have a clear recollection of specific political briefings, witnesses noted that the briefings were not party-neutral and consisted of discussions regarding the Republican Party's priorities in terms of the races identified to be competitive in the upcoming elections.

The evidence also showed that White House liaisons at several agencies systematically tracked political appointees' leave requests made for the purpose of working on campaigns.<sup>50</sup>

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<sup>50</sup> OSC was unable to determine the impetus for this practice. However, OSC learned that the RNC similarly tracked the campaign volunteer efforts of political appointees.

One Special Assistant to the Chief of Staff at the Peace Corps testified that she maintained a spreadsheet showing the agency’s political appointees and when and where they were deploying to be campaign volunteers. The witness explained that OPA wanted to know the level of participation by political appointees as a group, and that she believed OPA expected all appointees to volunteer. She also understood that supervisors were expected to permit political appointees to take leave so they could “go off and do 72-hour campaigns.” Although other witnesses from other agencies were not aware that their campaign activities were tracked, a Deputy Chief of Staff at the Peace Corps was not surprised and stated: “We are political. We wouldn’t be serving in these jobs if we weren’t political people. I think that’s across the board for every administration that comes through this town. We get in these political jobs because you’re usually engaged in some political process in some manner.”

Although none of the former OPA employees interviewed by OSC acknowledged that appointees were required to volunteer on campaigns, there is some indication that OPA employees were aware that the stature of their senior positions, alone, may have motivated the appointees to volunteer assistance to targeted Republican races. Mr. Jennings testified: “I would always hang around and stick around afterwards. It may sound quaint, but most people that came in contact with me, that was the closest to the President of the United States they would ever get.”

### **III. Legal Analysis**

#### **A. 5 U.S.C. § 7324(a)–(b) – Prohibitions on Political Activity and Exemptions Thereof**

As noted previously, the Hatch Act prohibits federal employees from engaging in political activity

- (1) while the employee is on duty;
- (2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof;
- (3) while wearing a uniform or official insignia identifying the office or position of the employee; or
- (4) using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.<sup>51</sup>

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<sup>51</sup> 5 U.S.C. § 7324(a).

The Hatch Act regulations define “political activity” as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”<sup>52</sup>

Certain high-level officials are exempt from some of the political activity restrictions listed above, provided the costs associated with their political activity are not paid for by money derived from the Treasury of the United States.<sup>53</sup> Specifically, anyone meeting the following criteria is exempt:

- (2) [A]n employee –
  - (A) the duties and responsibilities of whose position continue outside normal duty hours and while away from the normal duty post; and
  - (B) who is –
    - (i) an employee paid from an appropriation for the Executive Office of the President; or
    - (ii) an employee appointed by the President, by and with the advice and consent of the Senate, whose position is located within the United States, who determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws.<sup>54</sup>

Thus, a federal employee who meets the criteria set forth in § 7324(b)(2) (§ 7324(b) exemption) may engage in political activity while on duty or in any room or building occupied in the discharge of official duties (federal workplace), provided the political activity is not paid for with U.S. Treasury funds.<sup>55</sup> Conversely, a federal employee who does not satisfy these criteria may never engage in political activity while on duty, in a federal workplace, while wearing a uniform or official insignia, or using a vehicle owned or leased by the government of the United States.

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<sup>52</sup> 5 C.F.R. § 734.101.

<sup>53</sup> 5 U.S.C. § 7324(b)(1).

<sup>54</sup> 5 U.S.C. § 7324(b)(2).

<sup>55</sup> These officials, however, are still prohibited from: (1) using their official authority or influence for the purpose of interfering with or affecting the result of an election; (2) knowingly soliciting, accepting or receiving a political contribution from any person; (3) running for nomination or as a candidate for election to a partisan political office; (4) knowingly soliciting or discouraging the participation in any political activity of any person who has an application for any compensation, grant, contract, ruling, license, permit or certificate pending before the employing office of such employee; and (5) knowingly soliciting or discouraging the participation in any political activity of any person who is the subject of or a participant in an ongoing audit, investigation, or enforcement action being carried out by the employing office of such employee. See 5 U.S.C. §7323(a).

## 1. OPA's Political Briefings

Section 7324(a) of Title 5 of the United States Code applies to those individuals employed or holding office in an executive agency, other than the President and Vice President, who do not meet the criteria set forth in § 7324(b). EOP, which encompasses OPA, is considered to be an “executive agency” for purposes of the Hatch Act.<sup>56</sup> Below, OSC examines how OPA employees’ practice of giving political briefings while on duty or in the federal workplace violated the Hatch Act.

### a. OPA Employees Engaged in Political Activity When They Gave Political Briefings

Analyzing the meaning of political activity for Hatch Act purposes, the U.S. Court of Appeals for the Second Circuit found that there is no “lurking ambiguity in the term political activity.”<sup>57</sup> The court noted that § 7324 places broad prohibitions on “on-the-job and at-the-workplace” political activity, and that “any and all activity directed toward the success or failure of a political . . . candidate” violates the Hatch Act.<sup>58</sup>

Several former OPA employees and political appointees interviewed by OSC characterized political briefings as no more than informational discussions about the political landscape. These witnesses also testified that PowerPoint presentations shown during political briefings were simply a means by which the White House could reach out and stay connected to political appointees throughout the executive branch. The greater weight of the evidence, however, showed that the briefings went beyond these parameters. Indeed, former OPA Director Mehlman acknowledged that the political briefings were a time to “discuss targets, how people can help, [and] our plan for coordinated activities.” More pointedly, the testimony of Ms. Taylor, another former OPA Director, and an e-mail from another OPA employee confirm that in or about April 2005, the White House Counsel’s Office became concerned that the content of the political briefings was not appropriate for discussion during duty hours. White House Counsel’s Office advised OPA to conduct any such briefings after 5:00 p.m. to avoid the use of government resources for political activity. Preponderant evidence showed that achieving favorable outcomes for Republican candidates was on the agenda during many of the political briefings.

In addition, the PowerPoint presentations reflect the fact that OPA did not conduct the political briefings merely to discuss the “political landscape” and “stay connected” with political

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<sup>56</sup> See 19 U.S. Op. Off. Legal Counsel 103 (1995), 1995 WL 1767065 (concluding that for Hatch Act purposes, the White House Office is an executive agency); Application of 18 U.S.C. § 603 to Contributions to the President’s Re-election Committee, U.S. Op. Off. Legal Counsel (May 23, 2003), 2003 WL 25728359 (reaffirming conclusion that the Hatch Act applies to employees of the White House Office).

<sup>57</sup> Burrus v. Vegliante, 336 F.3d 82, 89 (2d Cir. 2003).

<sup>58</sup> Id. at 88-89.

appointees. Specifically, the presentations identified targeted congressional, and in some instances gubernatorial, races on slides showing information about “2008 House Targets: Top 20,” “Battle for Governors ‘07/’08,” and “2008 House GOP Defense.” A number of slides showed statistics illustrating the success of certain campaign strategies such as the 72-hour deployments. These slides show that OPA intended to convey to political appointees how they could be most effective in the effort to achieve Republican electoral wins.

Furthermore, e-mail communications between OPA and agency political appointees indicate that the presentations offered ideas on how the appointees could help with Republican campaigns. For example, after attending a briefing, one appointee wrote to OPA twice to follow up on the presenter’s request that attendees “get involved to help Republicans win/hold onto seats in the 2002 elections.” After he did not get from the RNC any suggestions that appealed to him, he turned to OPA for “ideas on how [he] could become more involved and help . . . achiev[e] Republican wins[.]” This appointee apparently believed that OPA could identify campaign activities for him where the Republican Party itself could not. What is more, some White House liaisons requested the political briefings to “put the fear of God” in appointees to sign up for the 72-hour deployments; give appointees a “pick-me-up reminder” that the White House would decide where to “strategically plac[e] our assets” because “we need to focus our efforts like a laser beam”; and “keep the troops informed, motivated and activated as we move forward toward the fall elections.” These requests specifically referenced past OPA political briefings, suggesting an understanding that the purpose of the briefings was to encourage attendees to get involved in campaign activities. OSC found no evidence that OPA declined the liaisons’ requests or agreed to conduct political briefings on the condition that it would only provide “information.”

Based on the foregoing, OSC concludes that many, if not all, of the political briefings were directed at the electoral success of the Republican Party. They were designed to communicate the Republican electoral strategy and mobilize political appointees to act in support of that strategy. Conducting these types of political briefings thus constituted “political activity” for Hatch Act purposes.

**b. Political Briefings Occurred in a Federal Workplace or While Employees Were on Duty**

The evidence shows that nearly all of the 75 political briefings of which OSC is aware were presented in conference rooms and auditoriums at federal agencies as well as at the

EEOB.<sup>59</sup> Moreover, OSC found no evidence that any restrictions or limitations were imposed on the time of day the political briefings were presented during the first four years of the Bush II administration. In or around April 2005, correspondence from OPA to a White House liaison at DOI referenced a concern of the White House Counsel’s Office about conducting political briefings during duty hours. However, even after April 2005, political briefings continued to occur during the work day, a few starting as early as 9:30 or 10:30 in the morning. Of the approximately 70 former political appointees interviewed by OSC who reported attending political briefings before and after 2005, none took leave to attend them.

Thus, OSC concludes that of the approximately 75 political briefings OPA conducted, a majority of them took place while presenters and attendees were on duty and/or in a federal workplace. Because in many circumstances giving these briefings constituted political activity under the Hatch Act, OSC now discusses whether either OPA employees or agency political appointees violated the Hatch Act by participating in briefings during duty hours and/or in the federal workplace.

## **2. Some OPA Staff Were Exempt From the § 7324(a) Political Activity Restrictions When They Gave Political Briefings**

### **a. Only Certain EOP Employees Are Exempt From the § 7324(a) Political Activity Restrictions**

A federal employee whose duties and responsibilities continue outside normal duty hours and while away from the normal duty post, and who is either a PAS or an employee paid from an EOP appropriation, may engage in political activity on the job or while in a federal workplace, provided the costs are not paid for by money derived from the U.S. Treasury.<sup>60</sup> The legislative history of § 7324(b) explains that this exemption was intended to apply only to “high-level political officials.”<sup>61</sup> This narrow exemption was created to solve a problem whereby PAS or high-level EOP employees (§ 7324(b) employees) would never have an opportunity to be “off the clock” to engage in political activity because they are considered to be on duty and on-call by the President at all times.<sup>62</sup> Congress determined that § 7324(b) employees should be permitted to engage in political activity while on duty or in the federal workplace, provided the costs

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<sup>59</sup> OSC notes that, according to an Associate Counsel to the President, three rooms in the White House complex are purportedly exempt from the Hatch Act prohibitions on political activity in “a room or building occupied in the discharge of duties by an individual employed or holding office in the Government of the United States.” See Letter from Dawn Chirwa, Assoc. Counsel to the President, to Karen Dalheim, Att’y, OSC (Mar. 5, 1997) (on file with author). These rooms are identified as The Ward Room, The Roosevelt Room, and The Indian Treaty Room. *Id.* OSC does not necessarily agree with these designations, but resolution of this issue is unnecessary to the outcome of this investigation. The term “a room or building occupied in the discharge of duties by an individual employed or holding office in the Government of the United States” is defined in the Hatch Act regulations at 5 C.F.R. § 734.101.

<sup>60</sup> 5 U.S.C. § 7324(b)(1)-(2).

<sup>61</sup> H.R. Rep. No. 103-16, at 22 (1993).

<sup>62</sup> *Id.*

associated with that activity are not derived from U.S. Treasury funds.<sup>63</sup> Conversely, Congress noted that those employees who “work their ordinary duty hours and perform their responsibilities for the Government” would still be free to engage in political activity “on their own time.”<sup>64</sup> Therefore, employees who work their expected duty hours, but merely remain accessible after hours by way of a personal digital assistance device, for instance, are still prohibited from engaging in political activity while on duty or in the federal workplace.

The EOP employees at issue in this investigation are, in particular, OPA employees and the Surrogate Scheduler. None of these employees were PAS.<sup>65</sup> OPA employees and the Surrogate Scheduler were paid from the EOP appropriation; therefore, those employees met one criterion of the § 7324(b) exemption. Accordingly, OSC considers which of these employees met the threshold criterion, that is, employees whose duties and responsibilities continued outside normal duty hours and while away from the normal duty post.

It may be that officials in the Bush II White House believed that all employees paid from the appropriation for the EOP, including all OPA employees and the Surrogate Scheduler, were exempt from the Hatch Act’s on-duty restrictions. However, if Congress had intended such a result, it would not have included the threshold criterion requiring exempt officials to have responsibilities that continue beyond normal duty hours and while away from the normal duty post. To determine whether any OPA employees or the Surrogate Scheduler were considered to be continuously on duty, OSC looked to the Annual and Sick Leave Act (Leave Act), which governs leave requirements applicable to all federal employees, including those employed in the EOP.<sup>66</sup> The Leave Act specifically exempts certain categories of executive branch employees from its application because “such officers never completely divest themselves of their responsibilities and actually are on duty at all times.”<sup>67</sup>

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<sup>63</sup> Id.

<sup>64</sup> Id. at 23.

<sup>65</sup> OSC emphasizes that the PAS status does not automatically confer § 7324(b) employee status. In order to be considered a § 7324(b) employee, a PAS must hold a position located within the United States, and must determine policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws. See 5 U.S.C. § 7324(b)(2)(B)(ii).

<sup>66</sup> See 5 U.S.C. § 6301 *et seq.* The legislative history on the Hatch Act Reform Amendments of 1993 indicates that Congress recognized that the Leave Act can be used to help determine who is presumed to be on duty at all times. See H.R. Rep. No. 103-16, at 23 (1993). In addition, in a 1995 opinion, OLC, in considering which executive branch employees meet the criterion of § 7324(b), that is, who are presumed to be on duty at all times, looked to 5 U.S.C. § 6301(2)(x)-(xi) for guidance. See 19 U.S. Op. Off. Legal Counsel 47 (1995), 1995 WL 1773222, at \*22 n.56. Also, although OLC did not specifically identify all positions that qualify for the § 7324(b) exemption, it recognized that OSC has the authority to make that determination. Id. at \*22 n.55.

<sup>67</sup> H.R. Rep. No. 95-1946, at 2 (1978). Additionally, the legislative history to the Leave Act Amendments of 1953, introducing the § 6301(2)(x)-(xi) exemptions for certain executive branch officers, explains that “the removal of such officials from the existing leave system is based on the theory that such officials are, by virtue of their respective offices and positions, actually on duty at all times, including periods of vacation or sickness.” P.L. 83-102, Annual Sick and Leave Act of 1951—Exemption of Certain Officers, S. Rep. No. 83-629, at 3 (1953), reprinted in 1953 U.S.C.C.A.N. 1793, 1795-96, 1953 WL 3085.



In particular, the Leave Act identifies two categories of executive branch employees who are exempt from its provisions. These two categories of employees do not accrue annual or sick leave and are not required to use such leave when they are not reporting for duty on a day on which they would otherwise work and receive pay.<sup>68</sup> The first category includes Presidential appointees whose rate of basic pay exceeds the highest base pay on the General Schedule.<sup>69</sup> The second category is comprised of individuals who are “officer[s] in the executive branch . . . designated by the President” as being exempt from the Leave Act irrespective of their basic rate of pay.<sup>70</sup> The Leave Act’s attendant regulations set forth three criteria an officer must meet in order for the President to designate the officer as exempt from the Leave Act: (1) the officer must be a Presidential appointee; (2) the officer may not be a United States attorney or United States marshal; and (3) the officer’s job responsibilities must continue outside normal duty hours and while away from the normal duty post.<sup>71</sup>

Below, OSC addresses the issue of which OPA employees who were involved in conducting or organizing political briefings met the requirements of the § 7324(b) exemption.

#### **i. OPA Director**

During the Bush II administration, the OPA Director was appointed by the President to the position of Deputy Assistant to the President. A review of 2006 White House staff salaries indicates that the then-Director of OPA earned a rate of basic pay in excess of the highest amount available under the General Schedule, and as such, was exempt from the Leave Act under § 6301(2)(x).<sup>72</sup> Therefore, the OPA Director was a high-level political official presumed to be continuously on duty. Accordingly, OSC concludes that the Director was a § 7324(b) employee who was permitted to engage in political activity while on duty or in a federal workplace, provided the costs associated with that activity were not derived from the U.S. Treasury.

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<sup>68</sup> 5 U.S.C. § 6302(a).

<sup>69</sup> 5 U.S.C. § 6301(2)(x). In addition to those employees within EOP who would be exempt from the Leave Act under 5 U.S.C. § 6301(2)(x), PAS officials occupy positions that are placed by law in the Executive Schedule for purposes of compensation. See 5 U.S.C. §§ 5311-16. Accordingly, PAS are exempt from the Leave Act because, as specified by § 6301(2)(x), they are officers in the executive branch, appointed by the President, and their basic rate of pay exceeds the highest rate payable under the General Schedule. Note that the lowest rate of pay under the Executive Schedule, Level V, exceeds the highest pay rate available under the General Schedule, GS-15, Step 10. This comparison does not take into account locality adjustments to pay under the General Schedule. Such a comparison to the basic pay is found at 5 U.S.C. § 5302(8).

<sup>70</sup> 5 U.S.C. § 6301(2)(xi); see also 5 C.F.R. § 630.211.

<sup>71</sup> 5 C.F.R. § 630.211(b).

<sup>72</sup> This was consistent with and verified for years 2004-2008. Compare Dan Froomkin, 2006 White House Staff List – Salaries, Wash. Post, July 19, 2006, <http://www.washingtonpost.com/wp-srv/opinions/graphics/2006stafflistsalary.html>, with U.S. Office of Personnel Management (OPM), 2006 General Schedule (Base), <http://www.opm.gov/oca/06tables/indexGS.asp>.

## ii. OPA Deputy Director

The Deputy Director of OPA during 2006 was also a Presidential appointee. In addition, he testified that when he was promoted from an OPA Associate Director to the position of Deputy Director, he was commissioned as a Special Assistant to President. As such, he was no longer allowed to accrue leave hours because he was presumed to be on duty at all times. A review of the contemporaneous White House staff salaries indicates that in 2006 the Deputy Director did not earn a rate of basic pay in excess of the highest rate under the General Schedule.<sup>73</sup> Therefore, the Deputy Director was not exempt from the Leave Act under § 6301(2)(x). However, because he was not permitted to accrue leave hours, it is presumed that the President designated him as exempt from the Leave Act under § 6301(2)(xi).<sup>74</sup> If so, as a high-level political official, the Deputy Director was permitted under § 7324(b) to engage in political activity on duty or in the federal workplace, provided that the costs associated with that activity were not derived from the U.S. Treasury.<sup>75</sup>

## iii. OPA Associate Directors and the Surrogate Scheduler

By contrast, OPA employees interviewed by OSC indicated that OPA Associate Directors and the Surrogate Scheduler fell into that group of White House staff members who, though appointed with Presidential approval, were not Presidentially appointed. They were hired by and reported to Presidentially-appointed commissioned officers, i.e., the Director or Deputy Director. A number of former OPA Associate Directors stated that the Director and the Deputy Director set the agenda for OPA and assigned and reviewed the work of the Associate Directors. Additionally, Associate Directors and the Surrogate Scheduler earned leave, were expected to use it to justify absence from work, and were paid less than the highest rate of basic pay under the General Schedule at the time.<sup>76</sup> The facts that some of these employees worked long hours and, at times, traveled outside of the Washington, D.C. area are not dispositive. In light of these findings, OSC concludes that OPA Associate Directors, the Surrogate Scheduler, and all other OPA employees during the Bush II administration, other than the Director and Deputy Director,

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<sup>73</sup> Again, this was consistent with and verified for years 2004-2008. Compare Dan Froomkin, 2006 White House Staff List – Salaries, Wash. Post, July 19, 2006, <http://www.washingtonpost.com/wp-srv/opinions/graphics/2006stafflistsalary.html>, with OPM, 2006 General Schedule (Base), <http://www.opm.gov/oca/06tables/indexGS.asp>.

<sup>74</sup> OSC has no documentary evidence confirming that the President designated the OPA Deputy Director exempt from the Leave Act pursuant to § 6301(2)(xi).

<sup>75</sup> Note that there may be some employees who are exempt from the Leave Act but who are not § 7324(b) employees, e.g., a doctor in the Veterans Health Administration of the Department of Veterans Affairs. Arguably, such employees would never be permitted to engage in any political activity because they are presumed to be “continuously on duty.” However, the legislative history of the Hatch Act clarifies that these employees are to be considered covered by the Hatch Act during normal duty hours. “On their own time, however, these individuals are free to engage in political activity.” H.R. Rep. No. 103-16, at 23 (1993).

<sup>76</sup> Compare Dan Froomkin, 2006 White House Staff List – Salaries, Wash. Post, July 19, 2006, <http://www.washingtonpost.com/wp-srv/opinions/graphics/2006stafflistsalary.html>, with OPM, 2006 General Schedule (Base), <http://www.opm.gov/oca/06tables/indexGS.asp>.

were not presumed to be continuously on duty and were not the type of high-level political officials to whom § 7324(b) was intended to apply. Therefore, the Hatch Act prohibited these individuals from engaging in political activity while on duty or in a federal workplace.

**b. OPA Director and Deputy Director Were Exempt From § 7324(a) When They Gave Political Briefings**

The OPA Director and the Deputy Director typically were the two OPA employees who presented political briefings to appointees at federal agencies. As explained above, many of these political briefings were directed at the electoral success of the Republican Party and its candidates, and thus constituted political activity for purposes of the Hatch Act. However, because the OPA Director and Deputy Director were exempt from the Hatch Act's prohibition against on-the-job political activity, neither the Director nor the Deputy Director violated § 7324(a) by presenting political briefings. Nevertheless, the Hatch Act prohibits the use of U.S. Treasury funds to pay for political activity. In the next chapter of this report, OSC will examine, in greater detail, the general political activities of OPA employees. As a component of that examination, OSC will also address whether costs arising from the political activity of OPA employees should have been reimbursed to the U.S. Treasury, including those possibly associated with the OPA activity described in this chapter.

**c. Other OPA Staff May Have Violated § 7324(a) by Giving Political Briefings**

Witnesses testified that, on rare occasions, the Surrogate Scheduler or Associate Directors gave political briefings. As explained above, they were not exempt from the Hatch Act's prohibition against engaging in political activity while on duty or in the federal workplace. If the Surrogate Scheduler or the Associate Directors gave briefings that constituted political activity under the Hatch Act while on duty or in the federal workplace, they violated the Act. The evidence was insufficient to permit OSC to conclude that the Surrogate Scheduler or the Associate Directors violated the Act.

**3. Agency Political Appointees May Have Violated § 7324(a) When They Attended Political Briefings Presented by OPA Employees**

Throughout the Bush II administration, nearly all of the 75 political briefings of which OSC is aware were presented in conference rooms and auditoriums at various federal agencies, as well as at the EEOB. OSC determined that even after April 2005, when the White House Counsel's Office apparently expressed some concern regarding the time of day when political briefings ought to be presented, briefings continued to take place during the workday and/or in the federal workplace. As discussed in the preceding sections, none of the 70 agency political

appointees interviewed by OSC reported taking leave to attend political briefings. Because at least on some occasions political appointees attended political briefings while they were on duty or in a federal workplace, OSC will examine whether they engaged in political activity.

As set forth above, political briefings given by OPA staff and attended by political appointees did not merely cover information concerning the country's political climate or Presidential agenda and priorities. In fact, a review of the PowerPoint slides reveals that these political briefings, some almost in their entirety, were comprised of lists of targeted congressional districts, names of current and future vulnerable Republican candidates, and the benefits of certain campaign strategies employed to assist in the races identified as close. Indeed, in an e-mail to Mr. Mehlman, a political appointee at HHS referred to political briefings he attended during which the presenter said that "each" appointee should "get involved to help Republicans win/hold onto seats." One week later, the same presenter sent an e-mail to OPA staff, noting that his intent was to disseminate information pertaining to Republican electoral goals and strategy during political briefings. In the e-mail, the presenter stated that because 2002 was "a political year, regular, updated information will be important and interesting." The presenter elaborated by explaining that OPA will "want to discuss targets, how people can help, and [OPA's] plan for coordinated activities . . . ."

Several White House liaisons echoed their understanding that at least one of the motivations for presenting political briefings was to encourage attendees to get involved in campaign activities. Specifically referencing past OPA political briefings, these liaisons invited OPA staff to come to the federal agencies to "put the fear of God" in the political appointees to get involved in volunteering for 72-hour deployments, to give appointees a "pick-me-up reminder," and to keep appointees "informed, motivated and activated" in anticipation of upcoming elections. Based on the above, it is clear that many of the political briefings presented by the OPA Director and Deputy Director were akin to political party meetings held to discuss election strategy.

Attending a political gathering for the purpose of promoting the success or failure of a political party, candidate for partisan political office, or partisan political group, constitutes political activity. However, despite evidence that OPA's intent when giving certain political briefings was to disseminate information pertaining to vulnerable Republican candidates and electoral strategy, a number of other briefings covered a range of additional subjects, such as the country's general political climate and the President's approval ratings. Discussing such matters would not constitute political activity for purposes of the Hatch Act. Furthermore, agency political appointees were not always aware of the content of upcoming political briefings and, at times, attended the briefings after being told by White House liaisons or Chiefs of Staff that attendance was mandatory. Thus, under those circumstances, OSC has insufficient evidence to

conclude that political appointees engaged in political activity in violation of the Hatch Act by attending political briefings while on duty or in the federal workplace.

There is, nonetheless, substantial evidence that some agency political appointees did have knowledge that Republican candidates and electoral priorities would be identified and discussed during political briefings, due to their previous attendance at political briefings. For example, some White House liaisons evidenced their familiarity with the content of OPA's political briefings by requesting from OPA a "regular presentation of strategic priorities" or a briefing similar to one held "back during the 2002 midterm election cycle" by "either [OPA] or the RNC." Where political appointees had such knowledge in seeking political briefings and attended them while on duty or in the federal workplace, they violated the law by engaging in political activity prohibited by § 7324(a).<sup>77</sup>

#### **B. 5 U.S.C. § 7323(a)(1) – Prohibition Against the Use of Official Authority or Influence for the Purpose of Interfering With or Affecting the Result of an Election**

All federal employees, including PAS and high-level EOP employees, are subject to 5 U.S.C. § 7323(a)(1), which provides that an employee may not "use his official authority or influence for the purpose of interfering with or affecting the result of an election."<sup>78</sup> Pursuant to the Act's implementing regulations, a federal employee is prohibited by § 7323(a)(1) from, among other things: using his or her official title while participating in political activity; using his or her authority to coerce any person to participate in political activity; and soliciting, accepting, or receiving uncompensated individual volunteer services from a subordinate for any political purpose.<sup>79</sup> A concern of Congress in passing the Hatch Act was to ensure that "employees [are] free from pressure and from express or tacit invitation[s] to . . . perform political chores in order to curry favor with their superiors."<sup>80</sup>

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<sup>77</sup> As noted above, the Hatch Act restricts the political activity of most federal executive branch employees. Certain covered employees are prohibited from engaging in political activity while on duty or in the federal workplace. *See* 5 U.S.C. § 7324(a)(1)-(2). The political briefings at issue in this report were attended by agency political appointees, including Schedule Cs, non-career SES, and PAS, all of whom are covered by the Hatch Act. Because Schedule C and non-career SES appointees do not meet the criteria of the § 7324(b) exemption, they are prohibited from engaging in political activity on duty or in a federal workplace. Many PAS are exempt from the § 7324(a) restrictions on political activity provided they meet the requirements of § 7324(b), that is, their positions are located within the United States, their duties and responsibilities continue outside normal duty hours and while away from the normal duty post, and they determine policies to be pursued in the United States in relations with foreign powers or in the nationwide administration of Federal laws.

<sup>78</sup> As noted above, the Hatch Act defines "employee" as "any individual, other than the President and the Vice President, employed or holding office in . . . an Executive agency other than the General Accounting Office." 5 U.S.C. § 7322(1)(A).

<sup>79</sup> 5 C.F.R. § 734.302.

<sup>80</sup> *Letter Carriers*, 413 U.S. at 566.

Below, OSC examines whether OPA employees and/or political appointees at federal agencies violated § 7323(a)(1) when they presented or organized political briefings at federal agencies.

### **1. OPA Employees Violated § 7323(a)(1) by Giving Briefings That Constituted Political Activity**

As set forth above, OPA Directors and Deputy Directors typically gave the political briefings. Both were high-level political officials within the EOP and commissioned officers of the President. While a White House commissioned officer does not per se supervise political appointees at federal agencies, both the commission from the President and the title of Deputy Assistant or Special Assistant to the President carry an air of authority and influence. Expressing this sentiment, former Deputy Director Jennings affirmed the weight of his position in the White House by noting that he was the closest that most political appointees would come to meeting the President of the United States. As the highest-ranking employees at OPA, the Director and Deputy Director also vetted applicants for political appointments at federal agencies; assisted agencies with selecting individuals to serve as White House liaisons; and implemented a series of efforts, such as briefings at the White House and at the federal agencies, to keep political appointees connected to the White House and to boost morale.

Former White House liaisons testified that OPA's invitations to political briefings were considered to be a particular honor. The liaisons viewed these briefings as valuable opportunities to interact with high-level White House officials and gain certain information these officials deemed important. As a result, White House liaisons and some agency Chiefs of Staff wanted to demonstrate to the White House the level of their responsiveness by having a briefing attended by most, if not all, of the agency's political appointees, and by encouraging the appointees to come prepared with questions.

When forwarding OPA's political briefings invitations to political appointees, several White House liaisons added detailed information about the OPA employee who would be presenting the briefing, including the employee's name, title, and professional background.<sup>81</sup> At other agencies, White House liaisons mandated appointees' attendance at the political briefings and required explanations for absence. The evidence also shows that the content of several political briefings energized political appointees about upcoming elections and, after attending a political briefing, one appointee was inspired to do more than merely "lick stamps" for vulnerable Republicans.

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<sup>81</sup> Furthermore, slides taken from the July 12, 2001, and the August 6, 2001, PowerPoint presentations depict the name and title of the OPA employee presenting the respective briefing.

Historically, the case law addressing the Hatch Act's prohibition against using one's official authority or influence to affect the result of an election concerns the supervisor/subordinate relationship and circumstances in which a supervisor requests, and a subordinate performs, political chores. By its terms, however, the Act applies more broadly than that because a federal employee's influence can extend to situations where the supervisor/subordinate relationship is not at play. Recognizing this, the regulations state that § 7323(a)(1) would prohibit using one's official title while engaging in any political activity, regardless of whether subordinates are present.<sup>82</sup> Although the OPA Director and Deputy Director did not have a traditional supervisor/subordinate relationship with political appointees at federal agencies, OSC maintains that the actual or perceived authority the Director and Deputy Director possessed, in combination with the level of discretion they exercised in vetting and approving political appointments, created the type of administrative influence and control characteristic of the relationship between a supervisor and a subordinate.<sup>83</sup> Furthermore, based on the determination that conducting political briefings to shape electoral strategies and recruit campaign volunteers constituted political activity and encouraged political appointees to volunteer for campaigns, OSC concludes that the OPA Director and Deputy Director violated § 7323(a)(1) and its implementing regulations when giving these briefings in their official capacity.<sup>84</sup>

Even if a supervisor/subordinate relationship did not exist between the OPA Director and Deputy Director and agency political appointees, the Director and Deputy Director still violated § 7323(a)(1) when giving briefings that constituted political activity. The evidence shows that the Director and Deputy Director were identified by their official title on both e-mail invitations distributed to agency personnel before a political briefing and on the introductory PowerPoint slides that were displayed during the briefings. Using one's official title while encouraging others, subordinates or not, to assist Republican campaigns constituted an unlawful use of official influence to affect the outcome of an election in violation of the Hatch Act.

## **2. Some White House Liaisons at Federal Agencies Violated § 7323(a)(1)**

Often White House liaisons occupied senior positions within their respective federal agencies. Typically, White House liaisons reported to the agency Chief of Staff or directly to the head of the agency. One liaison interviewed by OSC described himself as a "leader" of the

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<sup>82</sup> 5 C.F.R. § 734.302(b)(1).

<sup>83</sup> The Merit Systems Protection Board (Board) recently found a use of official authority violation where a traditional supervisor/subordinate relationship did not exist. The Board held that an agency Contracting Officer Technical Representative had authority over privately employed government contractors and violated § 7323(a)(1) by sending them e-mails promoting then-Senator Obama's candidacy for President. *Special Counsel v. Ware*, 114 M.S.P.R. 128 (2010) (adopting Administrative Law Judge's Recommended Decision on the violation, but increasing the recommended penalty of a 60-day suspension to removal from federal employment).

<sup>84</sup> See 5 C.F.R. § 734.302(b)(2).

political appointees within his agency; another liaison understood his position to reflect the “face of the White House” for the political appointees.

Most White House liaisons were tasked with handling personnel matters involving applicants for political appointments and current political appointees at their respective agencies. In that capacity, the White House liaisons interviewed applicants seeking appointments, recommended appointees for raises and/or promotions, conducted meetings of all appointees, kept track of appointees’ leave requests, informally reviewed the performance of some of the appointees, and occasionally resolved disciplinary matters. Such responsibilities are generally handled by individuals who are expected to have supervisory authority over a staff of subordinate employees. Therefore, where White House liaisons maintained a level of administrative control and influence over other agency political appointees, the liaisons could be considered superior to, or in a position of authority or influence over, such appointees.

In addition to their personnel responsibilities, some White House liaisons had instrumental roles in coordinating and scheduling political briefings at their respective agencies. In circumstances where White House liaisons knew that the scheduled political briefings were going to include discussions about targeted races and electoral strategy, mandated appointees’ attendance at the briefings, and tracked which appointees signed up to volunteer for Republican campaigns, these liaisons violated the Hatch Act’s prohibition against the use of official authority or influence for the purpose of affecting the result of an election.<sup>85</sup>

#### **IV. Recommendations**

Based on the evidence gathered during this investigation, many of the political briefings presented by OPA staff during the Bush II administration addressed upcoming elections, targeted congressional districts, and ways in which appointees at the federal agencies could help by volunteering in those targeted races. In light of the content of the PowerPoint slides and the testimony of many witnesses, these briefings created an environment aimed at assisting Republican candidates, constituting political activity within the meaning of the Hatch Act.

Going forward, OSC recommends that political briefings, such as the ones described in this report, take place outside of the federal workplace and during off-duty hours. OSC emphasizes that it does not suggest that the White House must restrict its communication with political appointees regarding, for example, the President’s executive priorities, policies, and legislative agenda. On the other hand, communications pertaining to soliciting campaign volunteers and identifying electoral strategies and targets constitute partisan political activity and therefore, in order to comply with the Hatch Act, should not take place in the federal workplace or while participants are on duty. In addition, as discussed above, given that White House

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<sup>85</sup> See 5 U.S.C. § 7323(a)(1).



employees exert influence over agency political appointees, careful consideration should be given to who organizes and hosts these types of political briefings. For example, White House employees involved in these briefings should not use their official titles in connection with these briefings, use government resources to prepare these briefings, or invite subordinates or others over whom they have influence to such briefings or any other political events.

Finally, while not the focus of this investigation, we note that White House liaisons and other agency political appointees are covered by the Hatch Act and do not qualify for the § 7324(b) exemption. We would caution, therefore, that White House liaisons and all other political appointees must avoid coordinating political briefings that constitute political activity while they are on duty or in the federal workplace. In addition, political appointees should not be required to attend any briefings that would constitute political activity. Lastly, White House liaisons and other agency political appointees should not invite subordinates or others over whom they have influence to said briefings or any political events.

## **CHAPTER FOUR: AS THE 2006 ELECTIONS DREW NEARER, OPA BECAME A PARTISAN POLITICAL ORGANIZATION**

### **I. Overview**

In addition to the political briefings addressed in the previous chapter, OSC's investigation uncovered evidence of a much broader involvement of OPA employees in on-duty political activities directed at the success of Republican candidates during the 2006 election season. The evidence shows that certain activities conducted by OPA employees constituted prohibited political activity under the Hatch Act. Specifically, OSC's investigation revealed that OPA was essentially an extension of the RNC in the White House. Thus, OPA:

- Worked with the RNC to develop a “target list” consisting of those Republican candidates involved in close races.
- Encouraged high-level agency political appointees to attend events with targeted Republican candidates in order to attract positive media attention to their campaigns, a practice called “asset deployment.”
- Utilized the services of several RNC Desk Coordinators – who worked inside the White House – to help coordinate high-level political appointees' travel to both political and official events with Republican candidates.
- Kept track of Republican candidates' fundraising efforts as well as high-level agency political appointees' attendance at events with targeted candidates.
- Encouraged political appointees, on behalf of the RNC, to participate in 72-hour deployment efforts.

As explained below, OSC has concluded that all of these activities constituted “political activity” because they were directed at the electoral success of Republican candidates and the Republican Party as a whole. These activities took place in federal buildings and during normal business hours in violation of the Hatch Act. And although the OPA Director and Deputy Director, at whose direction these activities occurred, were exempt from the Hatch Act's prohibition against engaging in political activity while on duty or in a federal workplace, the regulations require that the costs associated with the political activity of exempt employees be reimbursed to the U.S. Treasury when the activity is more than incidental.<sup>86</sup> Here, the entire OPA staff was enlisted in pursuit of Republican success at the polls and many OPA employees believed that effort was part of their official job duties. Based on the extent of the activities described below, OSC concludes that the political activities of OPA employees were not incidental to their official functions, and thus U.S. Treasury funds were unlawfully used to finance efforts to pursue Republican victories at the polls in 2006. OSC concludes this chapter with recommendations for avoiding like violations in the future.

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<sup>86</sup> See 5 C.F.R. § 734.503(b); H.R. Rep. No. 103-16, at 1-3 (1993).

## **II. Factual Findings**

Former OPA Director Mehlman testified that “the Office of Political Affairs does, by definition, partisan political activity.” Sara Taylor, another former Director, echoed this sentiment and clarified that OPA’s job was “to help the President. And one of the ways we help the President is to help members of Congress.” The following is a summary of some of the ways in which OPA employees performed these roles.

### **A. OPA and the RNC Worked Together on a Routine Basis**

OPA regularly coordinated its activities with the RNC. OPA staff attended weekly RNC meetings and dialed into RNC’s conference calls. Former Deputy Director Scott Jennings recalled that he and Ms. Taylor met with the RNC Chairman and representatives of the Republican Governors Association (RGA), National Republican Congressional Committee (NRCC), and the National Republican Senatorial Committee (NRSC) every Tuesday morning. These were opportunities for OPA employees “to compare notes” with the political staff at the RNC. In turn, OPA briefed the RNC on various Presidential initiatives and policies. Mr. Mehlman stated that because a common goal of both entities was to avoid duplicating efforts and resources of the Republican Party and the President as its leader, OPA and RNC staff members frequently met to discuss hotly contested races and to strategize on the deployment of administration assets to assist those races. Further, Mr. Mehlman explained that OPA “would interact with the RNC on a number of different issues that were important both to the RNC and to the President.”

Mr. Mehlman characterized OPA’s interaction with the RNC as an integral component of OPA employees’ job functions. In fact, OPA employees were given dual sets of computers, printers, e-mail accounts, and telephones. One set was provided and maintained by the White House for use on official government business. The second set was furnished by the RNC. Mr. Mehlman understood that the separate system “wasn’t required, [but] the best practice would be to have RNC e-mail, et cetera,” for the activities that were “purely political and involved working on campaigns.”

In addition, OPA employees sometimes traveled for partisan political purposes, at the request of the RNC. Mr. Jennings recalled an occasion when the entire OPA staff traveled to an RNC meeting. The White House financed the trip in advance, and the RNC reimbursed the government. Mr. Jennings also traveled with senior White House officials to fundraisers sponsored by the RNC. On at least one of those occasions, the White House again advanced the travel costs and subsequently received reimbursement from the RNC.

## 1. OPA Served as a Link Between the RNC and Agency Political Appointees

The evidence shows that OPA acted as a liaison between the administration and the RNC by facilitating communications between the RNC and agency political appointees in a variety of circumstances. Some of the communications pertained to purely political events, such as invitations to fundraisers hosted by the RNC, RGA, NRSC, or NRCC, which OPA forwarded to agency political appointees. Mr. Jennings explained that OPA would serve as the liaison between the group that organized the fundraiser and the high-level agency political appointee being invited to speak at the event.

In addition, OPA forwarded to high-level agency political appointees invitations to various non-fundraising events. For example, on May 10, 2006, the RNC sent Surrogate Scheduler McLaughlin an invitation for then-U.S. Department of Labor (DOL) Secretary Elaine Chao to participate in an Asian Pacific American Heritage Month event at the RNC. When she forwarded the invitation to DOL, Ms. McLaughlin indicated that OPA, based on a suggestion from the RNC, recommended the Secretary's attendance at the event. Similarly, on October 26, 2006, the RNC's Communications Department contacted an Associate Director at OPA to "get a dialogue started on some folks that might be able to help out [Arizona Senator Jon] Kyl."<sup>87</sup> Ms. McLaughlin, who was included in the October 26 e-mail exchange for the purpose of accommodating the RNC's request, responded to the Associate Director with updates on the schedules and upcoming travel plans for several Cabinet Secretaries.

OPA also served as a liaison between the RNC and agency political appointees to discuss recruitment for the 72-hour deployments. A former OPA Associate Director testified that while she was at OPA, political appointees from various agencies frequently contacted her asking about how they might get involved in 72-hour deployments. She would either provide them with contact information for the RNC staff responsible for the 72-hour deployments or direct them to an upcoming RNC recruitment event. At some point, to streamline the process of sharing information about campaign volunteering and to make introductions between the White House liaisons and the RNC, OPA staff began coordinating conference calls. During these calls, RNC staff members highlighted key races in the upcoming elections, identified important geographic regions for travel, described available volunteer opportunities, and noted sign-up deadlines. Another method OPA used to help the RNC gain volunteers was to have a White House liaison serve as the "point person" at his or her agency for political appointees to contact. Mr. Jennings recalled that to prepare the White House liaisons for this role, OPA helped the RNC schedule a meeting at which the RNC could make a presentation to all of the White House liaisons.

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<sup>87</sup> Senator Kyl was listed as a targeted Senator on OPA's Final Push Matrix, a document which served as one version of a list of targeted races used by OPA staff and the Surrogate Scheduler to prioritize Republican candidates' requests for assistance from the administration. The concept of a "target list" and the Final Push Matrix document are discussed in further detail in this chapter.

To engage agency political appointees in the 72-hour deployment efforts discussed during these calls and meetings, White House liaisons were instructed to provide information about available opportunities to political appointees who wanted to volunteer. As a result, White House liaisons passed on information to political appointees at their respective agencies. Some liaisons discussed volunteering for 72-hour deployments with the appointees at their agencies. Others used their personal e-mail accounts to disseminate relevant dates for upcoming meetings. Others, still, obtained the appointees' personal contact information and forwarded it directly to OPA.

The evidence shows that the RNC tracked, by agency, the political appointees who were signed up to assist on campaigns. The Administration Tracker, a multi-page spreadsheet created and distributed by the RNC, contained the names of all of the agency political appointees who were signed up to deploy to targeted races and campaigns in 2006. A former White House liaison at the Peace Corps testified that she used the Administration Tracker to monitor how many appointees from each agency were signed up across the federal government. This agency-specific volunteer tracking spurred a "friendly competition" among some White House liaisons to see who could enlist the most volunteers. On one occasion, a White House liaison at DOEd reminded political appointees to identify their agency when signing up for an upcoming 72-hour deployment, writing: "Remember to include Dept of Education and/or our reference code 4c451. The RNC is tracking volunteer numbers by agency."

## **2. OPA Tracked the Success of Republican Fundraising Efforts**

OPA staff tracked the amount of money raised at fundraisers held by Republican candidates and national, state, and local Republican groups. Several former OPA employees testified that they understood this task to be political activity. As a result, they typically used the computers and e-mail accounts provided to them by the RNC. They did not, however, refrain from engaging in these activities while on duty or in their offices.

The Surrogate Scheduler collected and analyzed information about fundraisers for the OPA Director's review. Ms. McLaughlin testified that she tracked fundraisers on a spreadsheet that she inherited from her predecessor. She described this document as a Microsoft Excel spreadsheet that contained information showing: the dates and locations of fundraising events; the attending administration official(s), e.g., the President, the Vice President, the First Lady, senior White House staff, and/or high-level agency political appointee; the fundraiser's host(s); the number of attendees; and the amount of money raised at the event. Ms. McLaughlin circulated the document to other OPA employees and staff at the RNC.

Associate Directors generally contacted the campaigns and local party groups in their respective regions to obtain the most current dollar amounts raised. From time to time, RNC employees were also asked to verify the amounts raised at fundraisers. A former RNC staff member explained that she was often required to call campaigns directly when asked by OPA to verify fundraising figures.

### **3. During the 2006 Midterm Elections, OPA Received Assistance From Several RNC Desk Coordinators**

When high-level agency political appointees traveled to Republican events recommended by OPA, the trips were reported to the OPA Associate Director in charge of the region where the event took place. As explained below, the volume of incoming requests and administration travel significantly increased in the three to four months preceding the 2006 midterm elections. During this time, Associate Directors received assistance from several RNC Desk Coordinators – employees of the RNC responsible for managing political events within corresponding geographic regions of the country. Ms. Taylor explained that “[Desk Coordinators] were hired in advance of elections because it’s a very high travel period in the White House,” and “[i]t was determined there was a need to have help in a specific area that was political, and you needed people with very specific political knowledge. That was the service that [the Desk Coordinators] were able to provide.”

These RNC Desk Coordinators actually reported for work at the OPA during the six months leading up to the 2006 midterm elections. While at OPA, the Desk Coordinators effectively became members of that office in that they were provided working space and were paired with OPA Associate Directors who reviewed their activities and their work. Desk Coordinators communicated with campaigns on behalf of OPA, attended daily OPA meetings, and were copied on various documents that the Surrogate Scheduler circulated among OPA staff. In addition, the Desk Coordinators provided support to Associate Directors for a number of political tasks. They reviewed media sources for information on key races identified by the White House and the RNC. They also researched and updated facts concerning the political climate of states to which administration officials were scheduled to travel. Using this information, they drafted and edited state political briefing documents. Shortly after the November 2006 elections, the Desk Coordinators left OPA.

#### **B. OPA Deployed Administration Officials to Help the Republican Party and Its Candidates by Appearing at Events**

During the Bush II administration, staff members for Republican candidates regularly asked OPA to provide administration speakers, typically high-level agency political appointees,

at campaign events.<sup>88</sup> OPA worked with agency White House liaisons to provide the requested high-level appointees to attend the events. Mr. Mehlman explained that this “asset deployment” was “the attempted effort to try to make sure that if you were gonna help a candidate for office . . . you try to do it in a methodical way . . .” Mr. Jennings and Ms. McLaughlin indicated that it was common knowledge among campaign staff members that they could seek support from OPA. Mr. Mehlman explained that OPA tried to encourage campaigns to send their requests for administration speakers to OPA. Then, “working with our colleagues at the RNC and other places, [OPA tried to] thoughtfully recommend where people should go.” As explained below, OPA deployed administration speakers as assets to help candidates targeted by the RNC during the 2006 midterm elections.

### **1. During the Bush II Administration, OPA Arranged for High-Level Agency Political Appointees to Speak Before National, State, and Local Republican Groups and at Republican Campaign Events**

In support of Republican groups and campaigns, OPA filled requests from state and local Republican groups with speakers at upcoming events such as Lincoln Day Dinners.<sup>89</sup> Mr. Mehlman explained that having an administration appointee as a keynote speaker at a party event was significant because it was perceived to drive press coverage, attract attendees, and motivate fundraising efforts. With respect to Lincoln Day Dinners in particular, OPA’s responsibilities were two-fold. At the start of a calendar year, OPA began matching administration speakers with potential dinners. For example, early in 2007, Surrogate Scheduler McLaughlin circulated to OPA staff a draft list of counties around the country where a dinner might be held. OPA chose the counties identified on the draft list based on “2006 activity” and whether the counties were located in “targeted districts” and thus correlated to close races. OPA’s Associate Directors and the Associate Director in the White House Office of Strategic Initiatives made recommendations for amending the list. The Political Director at the RNC also participated in this process by identifying state counties with “the biggest Lincoln Day / Spring GOP dinners.”

Once OPA finalized its list, Ms. McLaughlin contacted the groups located in the highlighted counties and offered to help secure administration speakers to give keynote speeches. On January 16, 2007, for example, she wrote to individuals at state and local Republican organizations: “I’m the Surrogate Scheduler at the White House. . . . We are strategically targeting Lincoln Day, Reagan Day, or Winter GOP dinners for County GOPs. In Louisiana, we are particularly interested in the following parishes because of their important [sic] to the LA-03

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<sup>88</sup> It was not unusual for individuals seeking to invite high-level agency political appointees to events to submit their requests to several offices in the White House at the same time. However, because this investigation focused on OPA’s activities, and not the activities of other offices in the White House, the factual findings laid out in this chapter pertain only to the manner in which OPA received, prioritized, and filled the incoming requests.

<sup>89</sup> Mr. Mehlman explained that a Lincoln Day Dinner is an annual party-building event, hosted by a state or local Republican Party, for the purpose of bringing together political activists to talk about common concerns and goals.

and Governor's race." Ms. McLaughlin sent many other e-mails to state and local Republican political groups conveying similar information. Sometimes an Associate Director contacted the local Republican group to offer "any help from the White House when it comes to surrogates."

Another method by which OPA employees and the Surrogate Scheduler supported Republican campaigns was to find administration appointees to headline fundraisers. On some occasions, the campaigns contacted OPA with a speaker already in mind. For example, on October 13, 2006, New Jersey U.S. Senate candidate Thomas Kean's staff asked OPA to provide a Cabinet Secretary or "someone like [B]olton or [T]ony [S]now" to speak at an upcoming event.<sup>90</sup> Although Kean's staff ultimately declined assistance from administration appointees, the Surrogate Scheduler indicated that future assistance would be available, if needed, writing: "Please let Sara [Taylor] or I know if you need further assistance. We have a number of Administration folks heading up to NJ in the next few weeks." In another instance, a staff member on Florida Representative Clay Shaw's campaign contacted OPA five days before the 2006 general election, asking for an administration speaker who would be a "moderate draw for a rally OR message event."<sup>91</sup> An Associate Director responded, "We've possibly got some cabinet secretaries, but little else that hasn't already been allocated."

At other times, OPA initiated efforts to send administration appointees to fundraisers. For example, after the midterm elections but before a runoff election, one Associate Director wrote to a candidate's staff member: "I know that we are inching closer to a final date for the runoff and wanted to check in and see if . . . y'all would be interested in a top-level surrogate to help raise some cash? Please advise – Thanks."

OPA staff attempted to make high-level agency political appointees available for requested fundraisers. For example, on October 21, 2006, Ms. McLaughlin advised the White House liaison at HUD: "The Michigan folks called [an Associate Director] on Friday after you guys told them [the event] was off complaining about it. I guess they think they'll get \$20K and have a decent attendance. They are pushing us to send someone else in [Secretary Alphonso] Jackson's place now." The liaison responded: "The Secretary would reconsider if we told him he had to. At this point, could we make a strong enough case, and would [Michigan GOP] come through?" Confirming that the Michigan GOP was still interested in a high-level agency political appointee, the Associate Director suggested to Ms. McLaughlin that perhaps a conference call by HUD Secretary Jackson, in lieu of a visit, would suffice, writing: "I think we can make this work and then HUD will owe us one. However, if we can get [DOC Secretary Carlos] Gutierrez, I think that's the better fit."

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<sup>90</sup> Mr. Kean was identified as a targeted Senator on OPA's Final Push Matrix.

<sup>91</sup> Representative Shaw was listed as a Tier 1 priority on the Final Push Matrix.



The evidence also shows that matching administration speakers with Republican campaign events was not unique to the 2006 midterm election cycle. In 2007, looking forward to the 2008 elections, an OPA Associate Director contacted a political consultant for Washington State Representative Dave Reichert and asked the consultant to send OPA “[a] ‘wish list’ of your top 10 WH/Administration surrogates. Start the list from 1 to 10 (1 being most desirable, 10 less desirable).”

## **2. OPA and Republican Groups Created the “Target List” to Prioritize the Travel of High-Level Agency Political Appointees**

OPA did not fulfill every speaker request by campaigns or Republican groups. Rather, the OPA Director and Associate Directors identified certain requests as worthwhile, in that they involved a race that had been deemed competitive or a target. Former OPA Deputy Director Jennings explained that in this context, “target” is “a term most political people use to generically describe the type of regions or races that expect to see more intense political activity than others.” In order to readily identify which requests corresponded to these “target” races or regions, OPA referred to a so-called “target list,” which it had devised together with the White House Office of Strategic Initiatives, the RNC, and the NRCC. Ms. McLaughlin recalled to OSC that the target list was a Microsoft Excel spreadsheet that detailed the names, states and district numbers of Republican candidates whom OPA deemed vulnerable. The rationale for the target list was that candidates involved in the most competitive races needed the most “help” from the administration, such as preferential allocation of assets, including participation in the event by high-level agency political appointees. Thus, the list illustrated to political appointees where, geographically, the White House viewed their travel to be most beneficial, i.e., which media markets received the most attention and where the most competitive races were taking place.

Ms. McLaughlin identified a document titled Final Push Surrogate Matrix (Final Push Matrix) as similar to a target list from which she worked. The Final Push Matrix was a Microsoft Excel style spreadsheet, the first column of which contained names of targeted Republican candidates. For example, the list of congressional candidates, totaling over 70 entries, was divided into tiers of priority from “Tier 1” to “Tier 3” of candidates identified for defense, and “Tier 1 Offense” and “Tier 2 Offense.” Targeted senators and governors were identified without a priority designation, each list totaling 14 and 26 entries, respectively. As Mr. Jennings explained:

Tier One [candidates] are considered to be more important . . . than Tier Two or Tier Three. . . . The collective political judgment of us at OPA, our counterparts at the RNC, and the relevant congressional and Senate committees was that [for example] Geoff

Davis' race [a Tier One priority] was . . . more competitive than Ron Lewis' race [a Tier Three priority].

After identifying which requests for high-level political appointees involved target races or districts, the OPA Director and Associate Directors forwarded the requests to the Surrogate Scheduler. According to former Surrogate Scheduler Gray, he “did not have the authority to overrule what OPA suggested,” but prioritized the invitations before forwarding them to the appropriate agencies. Mr. Gray explained that he used the target list to put the requests in order of importance, “[s]o if a request came in from somebody on that list, . . . all else being equal, I would give a name on that list more priority than a name not on that list. . . . If the request was a priority, we would communicate it as such.” In 2006, the following Republican candidates were at the top of the target list, and as such, received the most assistance: Pennsylvania Senator Rick Santorum (15 visits); New Mexico Representative Heather Wilson (12 visits); Ohio Representative Steve Chabot (10 visits); Kentucky Representative Geoff Davis (9 visits); Indiana Representative Mike Sodrel (9 visits); and Connecticut Representative Nancy Johnson (9 visits).<sup>92</sup>

### **3. Earning Media for Targeted Candidates**

As the 2006 midterm elections approached, candidates involved in contentious races made more requests for administration speakers than those who were favored in their elections. Discussing this trend, Ms. Taylor explained:

If you look at the 435 members of Congress, the ones who are typically in tough elections typically do the most activity. Ones who are not in tough elections, or who don't have somebody running against them, they sit back and take it a little more easy. So it's a little bit of a chicken and an egg scenario. People who are most engaged and most interested and are most aggressive about securing surrogates typically have to be the people who believe that they're in a challenging race.

Witnesses with campaign experience testified that earned media is a valuable asset for vulnerable candidates because it can draw positive attention to their candidacies.<sup>93</sup> As Mr. Jennings explained, many members of Congress are “desperate to get on television” in the fall of an election year. At least two former Associate Directors further stated that any event featuring

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<sup>92</sup> The data for this analysis were derived from the 2006 Suggested Memoranda as described below. In this instance, OSC utilized data from the 2006 Suggested Memoranda for all 17 agencies.

<sup>93</sup> Earned media refers to free favorable publicity gained through a variety of outlets, such as newspapers, television, radio, and Internet, and may include a variety of formats, such as news articles, editorials, and polls. [http://en.wikipedia.org/wiki/Earned\\_media](http://en.wikipedia.org/wiki/Earned_media) (last visited Jan. 17, 2011).

high-level agency appointees is an effective tool for garnering media coverage for the host, and that having an administration appointee at a press conference, a speech given to a civic group, a grant announcement, or even a visit to a nursing home, are all methods by which a candidate can attract attention to the event. These former Associate Directors noted that high-level agency political appointees, even when attending non-campaign events, attract cameras and newspapers and that, in turn, raises the stature and coverage of the event.

Illustrative of this fact is a September 2006 e-mail exchange between an OPA Associate Director and a staff member of Ohio Senator Mike DeWine.<sup>94</sup> Using his RNC e-mail account, the Associate Director inquired whether any of the following events would be considered “helpful to DeWine”: (1) a visit to a Goodyear Tire Facility by DOT’s National Highway Traffic Administrator; (2) remarks by DOL’s Director of the Women’s Bureau at a Working Women in Transition Workshop and Graduation; (3) remarks by DOC’s Assistant Secretary for Manufacturing and Services at the Annual Meeting of the Cleveland Chapter of the National Tooling and Machining Association; and (4) a visit by the Office of National Drug Control Policy’s Deputy Director to the Drug Free Communities and Major Cities Meeting. Two of the events were “open press”; one event was “TBD press”; and one event was marked as closed to the press. In response to the Associate Director’s e-mail, a member of Senator DeWine’s staff recognized that the events would be helpful, but expressed reservations about the event marked “closed press.” This illustrates the value to candidates of events, even when official, where press would be in attendance.

The evidence underscores the notion that Republican candidates wished to capitalize on the administration assets available to them by ascertaining which official events would garner the most coverage and thus would be the most effective. For example, in a May 2006 e-mail, Ms. McLaughlin wrote to DOL political appointees:

I have received several questions from our congressional members about what type of official events the Secretary does that garner the most press and are, by virtue of that, the most effective. Do you have any thoughts on this? I think they are looking to know if a roundtable with civic leaders, a Chamber event, a plant tour, etc. . . are the best things to do or not. This will deeply affect what they will ask for from your office.

Other Republican candidates did not specify in what capacity, official or political, a high-level agency political appointee was being asked to attend an event. For example, on February 24, 2006, Ms. McLaughlin forwarded a request from Martha Rainville, a congressional candidate from Vermont, to DOL, adding:

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<sup>94</sup> Senator DeWine was listed as a target Senator on OPA’s Final Push Matrix.

She is requesting the Secretary for an event (either official or FR [fundraiser]). We have a chance to pick this seat up and would like to be helpful in any way we can. Also, this might be a good place to go on one of our policy pushes (i.e. economic push, energy push, etc.).<sup>95</sup>

Four days later, an OPA employee clarified: “Martha Rainville is currently Adjutant General of Vermont National Guard. Her resignation is effective April 1<sup>st</sup>, so any event before then can be an official event.”<sup>96</sup> Similarly, on May 2, 2006, Ms. McLaughlin advised the staff at DOL: “Cong. [Curt] Weldon (R, PA-07) and Cong. Nancy Johnson (CT-05) are both requesting the Secretary for a FR and/or Official Event in their districts. I’ll get you details on what they are asking for.”<sup>97</sup> On August 23, 2006, Ms. McLaughlin followed up, writing: “I saw on the Cabinet report that the Secretary will be in Norfolk, VA on October 3<sup>rd</sup>. Do you think she’d be willing to do an event (either official or political) with Cong. Thelma Drake (VA-02)? Drake is a priority for us.”<sup>98</sup>

Eight days before the election, Representative Sue Kelly from New York submitted to OPA an “urgent request” for an earned media event.<sup>99</sup> The Associate Director in charge of the region that included the State of New York explained to Ms. McLaughlin, “I think they are open to political or official events – they just want to earn media.”

On June 8, 2006, Ms. McLaughlin advised several White House liaisons:

In case you haven’t marked your calendars yet, the next Jobs Day push will be Friday July 7<sup>th</sup>. Like always, I’ll be sending Cabinet Liaison a list of cities that are important to OPA. As you know, half of this project is getting good press on the status of the economy. The other half is getting good press for incumbent officials and your principal. If you do not have the appropriate information on the latter, please let me know.

Similarly, on May 5, 2006, Ms. McLaughlin asked the staff at DOL as follows:

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<sup>95</sup> Ms. Rainville was identified as a Tier 1 Offense candidate on OPA’s Final Push Matrix.

<sup>96</sup> This e-mail is an example of the practice of manipulating official business to serve the ends of Republican candidates. Chapter Five addresses this problem in more detail.

<sup>97</sup> Representative Weldon was identified as a Tier 1 priority candidate on OPA’s Final Push Matrix. As noted above, Representative Johnson was also a Tier 1 candidate.

<sup>98</sup> Representative Drake was identified as a Tier 1 priority on the Final Push Matrix.

<sup>99</sup> Representative Kelly was identified as a Tier 3 priority on the Final Push Matrix.

We had heard that the Secretary had done a grant announcement [for] a \$5 million project in Northern CA from DC this week. I believe this grant affects the constituents of Cong. Pombo and Cong. Doolittle, 2 of our targeted folks. Do you think we can send a DoL surrogate out there to physically hand out a check? I think it would be helpful in terms of good press in a much needed area.<sup>100</sup>

A September 18, 2006, e-mail from an Associate Director to a staff member of Representative Curt Weldon underscores OPA’s involvement in encouraging high-level agency political appointees to travel to targeted regions and districts. The Associate Director wrote:

[W]e are working with the agencies to help lock down their travel for the last month before the campaign. Below is a list of Cabinet Officials that we have requests in to either do an official event or political event for you. Please let me know if you agree with this list or [if] there are any additions/deletions. Some of these might already be in the works and you have been dealing with the agencies already. Of course I can’t make a guarantee that all of these folks will do events – but this is what OPA will be pushing them to do: Cino[;] Chao (I think this is locked in)[;] Leavitt[;] Waters[; ]Paulson[;] Also – Kempthorne is doing more and more so let me know if you are interested in him.

Likewise, OPA was interested in tracking those trips by high-level agency political appointees where “good press for incumbents” could be obtained. In an e-mail dated March 3, 2006, Ms. McLaughlin noted to the Confidential Assistant to the GSA Administrator, “I’m particularly interested in any grant announcements (or anything where checks are handed out) that might be good press for incumbents.”

#### **4. OPA Tracked the Travel of High-Level Agency Political Appointees to Events with Targeted Republicans**

A former OPA intern stated that OPA’s ultimate objective in coordinating travel of high-level administration appointees at the request of Republican candidates was to “get Republicans elected” and that “[s]ome needed more help than others. But, ‘get them elected,’ . . . that is what I saw going on.” In the words of Mr. Mehlman, the message to campaigns was, “If you need someone from the administration to come and be supportive, let us know, and we’ll work to try and coordinate it, expedite it, and make it effective for you.” As a result of OPA’s efforts, high-

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<sup>100</sup> California Representative Richard Pombo was listed as a Tier 1 candidate the Final Push Matrix. California Representative John Doolittle was listed as a Tier 2 candidate.

level political appointees often traveled for the exclusive purpose of participating in campaign-related events, aligned official business travel with requests for participation in campaign events in targeted districts, or created nominally official events with targeted incumbents to draw positive attention to their campaigns.<sup>101</sup>

On December 12, 2005, Ms. McLaughlin sent an e-mail to White House liaisons at federal agencies advising: “This year and next promise to be very full of activity as we prepare for the midterm elections. In the coming months you will be receiving more and more requests for travel in targeted regions.” To keep track of the many speaker requests that were sent by OPA to federal agencies, OPA and the Surrogate Scheduler created agency-specific memoranda titled “Secretary [Last Name] Suggested Event Participation” (Suggested Memoranda), which listed OPA’s suggestions for travel by each Cabinet Secretary and other high-level agency political appointees.<sup>102</sup> These Suggested Memoranda identified OPA requests for upcoming events, the Republican candidates hosting them, and the agency political appointee attending the events. The Suggested Memoranda were reviewed by the OPA Director and forwarded to the agencies’ White House liaisons, Chiefs of Staff, and/or the scheduling staff. OPA staff and the Surrogate Scheduler recorded on the Suggested Memoranda which events were completed by the agency political appointees, which events remained outstanding, and which events were regretted, retracted, or cancelled. For example, where an agency political appointee declined to attend an event, the event was identified as “regretted” on the Suggested Memorandum to that agency; invitations for events that were withdrawn by the requestors were marked as “retracted”; and “cancelled” events were cancelled for a variety of reasons.

Only events with Republican candidates appearing on the target list were included in OPA’s Suggested Memoranda to the agencies. A former Associate Director explained to a White House liaison at DOI, “You can be assured that we would not ask for these events unless they were priorities . . . .” In fact, attendance at events with non-priority candidates was discouraged. For example, in an e-mail dated August 9, 2006, Ms. McLaughlin asked the White House liaison at DOL: “Do you know why [the Secretary] is doing an event for [Ohio Representative Ralph] Regula when we’ve explicitly asked the Cabinet to curtail events for non-priority members? Especially in Ohio, where there are tons of folks to help?”<sup>103</sup> Mr. Jennings explained that OPA would “have considered it a waste of time for a Secretary to do a fundraiser for a member who was not in a target race or in a competitive race.” He continued: “From the

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<sup>101</sup> Chapter Five addresses in detail the practice of holding “official” events as a pretext for helping incumbents get reelected. There, OSC explains that these events were “political” and thus should not have been financed with funds derived from the U.S. Treasury.

<sup>102</sup> OSC is in possession of OPA Suggested Memoranda for calendar years 2005, 2006, and 2007.

<sup>103</sup> Representative Regula was not identified as a priority or a targeted candidate on OPA’s Final Push Matrix.

legislative affairs view point, it may have been a good use of time. However, [OPA's] outlook tended to be more political.”

In addition to the agency-specific Suggested Memoranda, the Surrogate Scheduler maintained a master tracking document that reflected the status of all of the events in 2006 in which OPA was asked for assistance by Republican campaigns or groups. For each request to OPA, the document listed the requester, the “asset,” the asset’s employing agency, the category of the event, i.e., official or political, a description of the event, the city and state where the event would take place, the date of the event, and the status of the request. Ms. McLaughlin explained that “asset” referred to the Cabinet member or sub-Cabinet official asked by OPA to attend the event. In the status column, each event was labeled either “A – Completed,” “B – Scheduled,” “C – Scheduling,” or “D – Requesting.” For several requested events, the “Category” column was marked “TBD.” For example, the document reflects that Senator DeWine requested a “Fundraiser or Official Event” with DOC Secretary Gutierrez to take place on September 21, 2006. Similarly, New York Representative Vito Fossella requested a fundraiser or official visit with DOT Acting Secretary Maria Cino, the date for which was “TBD October 2006.”

### **5. Travel of High-Level Agency Political Appointees Tracked by OPA Dramatically Increased in 2006**

As part of its investigation, OSC examined all travel tracked by OPA in 2006. OSC also reviewed documents showing the amount of travel tracked by OPA in the non-election years of 2005 and 2007. OSC does not assert that these OPA-tracked events represent all of the travel of high-level agency political appointees in a given year.

As noted above, OPA staff tracked travel of high-level agency political appointees in documents titled Suggested Memoranda. OSC reviewed OPA’s Suggested Memoranda for 14 federal agencies for calendar years 2005, 2006, and 2007.<sup>104</sup> For calendar year 2005, each of OPA’s Suggested Memoranda was dated on or about November 20, 2005, reflecting travel suggested by OPA for 2005. For calendar year 2006, OPA’s Suggested Memoranda were dated

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<sup>104</sup> These include, along with the respective principals: USDA (Secretary Mike Johanns); DOC (Secretary Carlos Gutierrez); DOEd (Secretary Margaret Spellings); Department of Energy (Secretary Samuel Bodman); EPA (Administrator Stephen Johnson); HHS (Secretary Michael Leavitt); Department of Homeland Security (Secretary Michael Chertoff); HUD (Secretary Alphonso Jackson); DOI (Secretary Gail Norton & Secretary Dirk Kempthorne); DOJ (Attorney General Alberto Gonzales); Office of National Drug Control Policy (Director John Walters); Small Business Administration (Administrator Steve Preston & Administrator Hector Barreto); DOT (Secretary Norman Mineta & Secretary Mary Peters & Deputy and/or Acting Secretary Maria Cino); and VA (Secretary James Nicholson).

on or about November 28, 2006, also showing travel for 2006.<sup>105</sup> Finally, for calendar year 2007, the Suggested Memoranda OSC was able to obtain were dated earlier in the year. Specifically, out of the 2007 Suggested Memoranda produced to OSC for 14 federal agencies, three were dated March 6, 2007; four were dated April 17, 2007; six were dated April 24, 2007; and one was dated July 13, 2007.

Looking at each year individually, the evidence shows that in 2006, as depicted in Chart 1 below, OPA tracked 635 events for completion by high-level agency political appointees. The data shows that of the 635 events, 375 were completed. These 375 events included both official and political gatherings, nearly all of which were held outside the Washington, D.C. metropolitan area. Of the 375 events, 300, or 80 percent, as depicted in Chart 2 below, were hosted by targeted Republican candidates.<sup>106</sup> Furthermore, DOL Secretary Chao's travel was not captured in the 2006 figures cited above because OSC was not provided with similar Suggested Memoranda for Secretary Chao for 2005. However, it is worth noting that between January 1 and November 6, 2006, Secretary Chao completed 36 events, 25 of which were with a Republican candidate.

By comparison, in 2005, as shown in Chart 1 below, OPA tracked a total of 154 events, or approximately one-fourth of the events tracked in 2006. Of the 154 tracked events, high-level agency political appointees completed 128 events. As shown in Chart 2, of those 128 events, only 53, or 41 percent, were hosted by a Republican candidate.

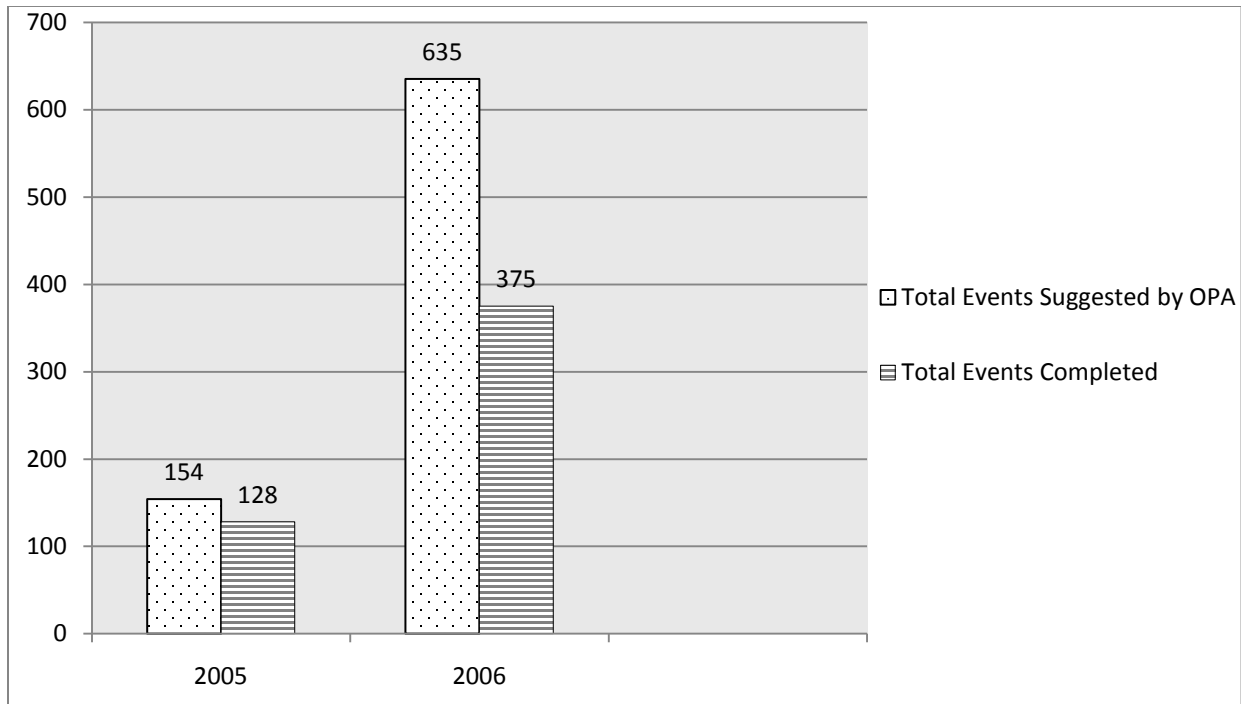
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<sup>105</sup> Because the focus of OSC's investigation was the travel of high-level agency political appointees preceding the 2006 midterm elections, e.g. travel completed prior to November 7, 2006, the figures that OSC derived from the Suggested Memoranda and cited to in this report exclude any event identified on the Suggested Memoranda with a date past November 6 or with an undetermined date in November. For example, OSC excluded any event identified as "scheduled" for "TBD November."

<sup>106</sup> No event tracked by OPA and listed on its 2006 Suggested Memoranda was hosted or requested by a Democratic candidate.

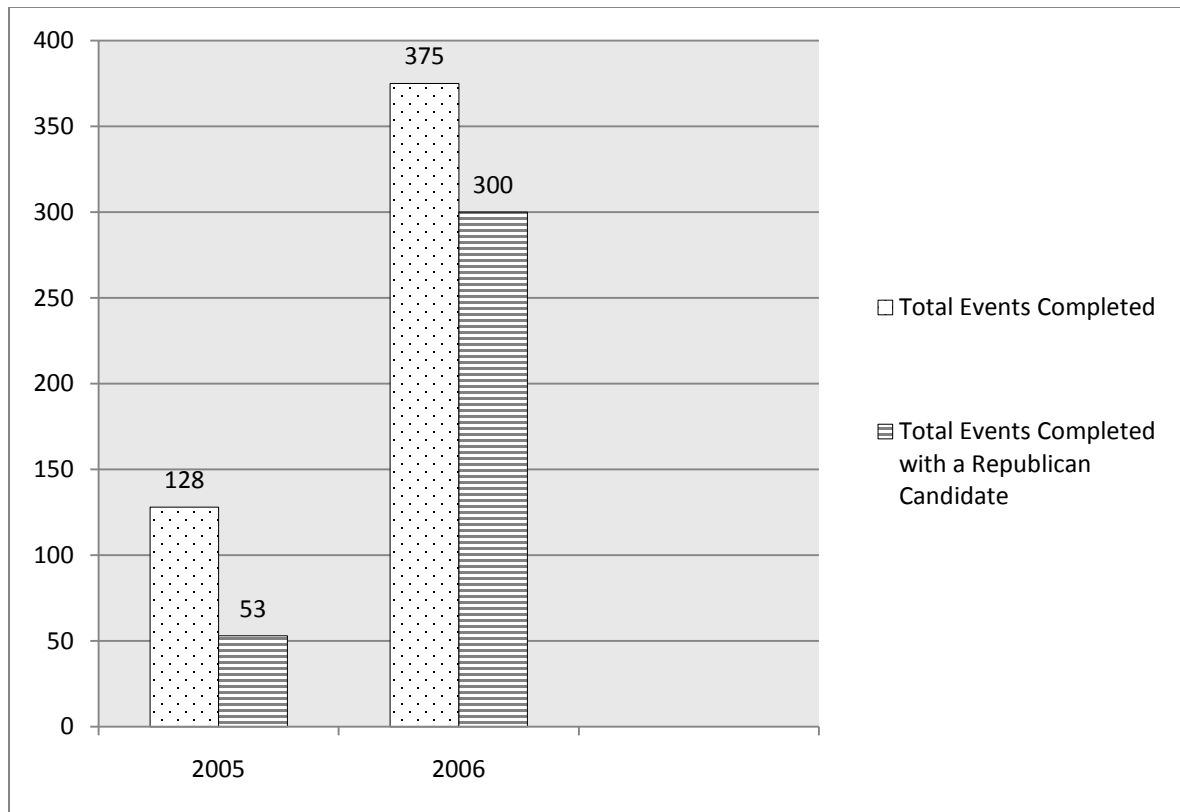




**Chart 1: Events Tracked by OPA and Completed by High-Level Agency Political Appointees – Comparison of Non-Election (2005) to Election (2006) Years, January 1 Through November 6.<sup>107</sup>**

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<sup>107</sup> The data in this graph were derived from the Suggested Memoranda for 2005 and 2006 for 14 agencies.



**Chart 2: Events Completed by High-Level Agency Political Appointees With Republican Candidates – Comparison of Non-Election (2005) to Election (2006) Years, January 1 Through November 6.<sup>108</sup>**

Next, OSC compared these figures with data extracted from OPA’s Suggested Memoranda for 2007 in an effort to determine whether the dramatic increase in events was specific to the 2006 midterm elections or part of a larger upward trend from 2005 to 2006 and beyond. As noted above, three of the 2007 Suggested Memoranda were dated March 6, 2007. These Suggested Memoranda were for the Office of National Drug Control Policy (ONDCP) Director John Walters, U.S. Department of Homeland Security (DHS) Secretary Michael Chertoff, and U.S. Department of Justice (DOJ) Attorney General Alberto Gonzales. Four of the Suggested Memoranda were dated April 17, 2007 (April 17 Suggested Memoranda). They were for the HHS Secretary Michael Leavitt, EPA Administrator Stephen Johnson, DOC Secretary Gutierrez, and DOI Secretary Dirk Kempthorne. An additional six Suggested Memoranda were dated April 24, 2007 (April 24 Suggested Memoranda). They were for HUD Secretary Jackson, USDA Secretary Mike Johanns, DOEd Secretary Margaret Spellings, Small Business Administration (SBA) Administrator Steve Preston, DOT Secretary Mary Peters, and VA Secretary James Nicholson. Finally, one Suggested Memorandum for the U.S. Department of Energy (DOE) Secretary Samuel Bodman was dated July 13, 2007.

<sup>108</sup> The data in this graph were derived from the Suggested Memoranda for 2005 and 2006 for 14 agencies.

To derive data for a comparison of non-election years, i.e., 2005 and 2007, with election year 2006, OSC reviewed the four April 17 Suggested Memoranda and the six April 24 Suggested Memoranda. OSC then compared the data contained in the April 17 and April 24 Suggested Memoranda to data for the same agencies, during the same time frame in 2005 and 2006, namely January 1 through April 17, and January 1 through April 24, respectively.

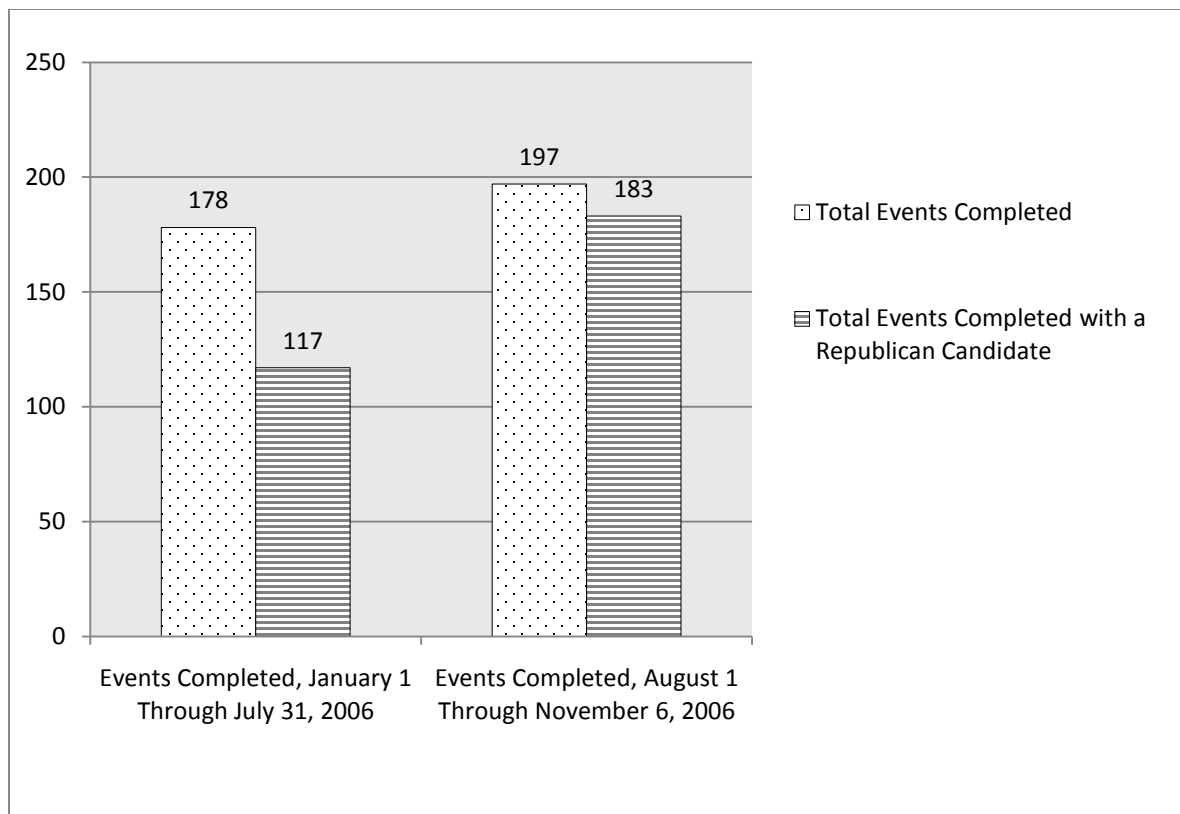
A review of the data shows that there was a marked decline in the number of events OPA tracked in non-election years. Specifically, through April 17, 2005, OPA tracked one event. By comparison, during that same time frame in 2006, OPA tracked 54 events. In 2007, OPA tracked only five events during the January through April 17 time frame.

A comparison of the April 24 Suggested Memoranda shows a parallel trend. From January 1 through April 24, 2005, OPA tracked 12 events. During the same four months in 2006, however, OPA tracked 58 events. In the same time frame in 2007, the number again decreased, and OPA tracked only 21 events. It is especially worth noting that in 2005, none of the suggested events included a Republican candidate, yet in the election year 2006, 26 of the 58 events were completed with a Republican candidate. By comparison, in 2007, after the election, only four of the 21 tracked events were completed with a Republican candidate.

At least two former OPA employees testified about the difference in the number of events completed in non-election versus election years. Ms. Taylor explained that an election cycle signified an influx in requests for appearances of high-level agency political appointees “because incumbents tend to become much more engaged as it gets closer to the election.” Similarly, Mr. Jennings testified that the increase in travel was due to the “ramp up” in an election cycle.

**a. In the Months Before the 2006 Midterm Elections, OPA Engaged in “Final Push Efforts” to Assist Republican Candidates**

OPA’s efforts to prioritize and schedule the travel of high-level agency political appointees resulted in a significant increase in the number of completed events in the three months before the 2006 midterm elections. In the first seven months of 2006, a total of 178 OPA-tracked events were completed. Strikingly, an additional 197 events were completed during the final three months before the elections. See Chart 3 below. Thus, during those final three months, high-level agency political appointees were completing an average of 66 events per month, 93 percent of which involved a Republican candidate.



**Chart 3: Events Suggested by OPA and Completed by High-Level Agency Political Appointees in the Three Months Immediately Prior to 2006 Midterm Elections.<sup>109</sup>**

Mirroring these trends, much of the written communication from OPA and the Surrogate Scheduler to federal agencies during the final months before the 2006 midterm elections pertained to travel connected to the upcoming elections. For example, in July 2006, Ms. McLaughlin advised the political staff at 17 agencies as follows:

With only 4 months left before the end of the 05-06 cycle, I am interested to speaking [sic] with each of you regarding what is and what is not possible in terms of your current (and future) OPA surrogate requests. . . . On that note, we are now asking each agency to do at least 5 OPA recommended event [sic] per month from now until November.

In or about August 2006, Ms. McLaughlin began counting down for the agencies the number of days left before the elections. She tracked the number of days from 88, to 84, to 42, to 35, to “28 days and counting.” In this countdown correspondence, Ms. McLaughlin thanked the agencies for working through the issues in scheduling events, urged them to complete any outstanding travel requests, and commended them for doing a great job and noting they were

<sup>109</sup> The data in this graph were derived from the 2006 Suggested Memoranda for 14 agencies

“almost done.” Continuing from 21 days, to 19, to 15, to 8, Ms. McLaughlin kept track of the upcoming midterm elections. On October 19, 2006, 19 days before the election, she wrote to political appointees at DOI:

I was just looking through Secretary Kempthorne’s memo and wanted to say a quick thank you for getting so many of these scheduled. I think you have a good plan here that is going to cover a lot of our strategic areas and will do a lot of good. I know some of the folks on our list can be ‘challenging,’ but we are confident of a good result on 11/7. . . . P.S. Only 19 days to go.

The final days before the 2006 midterm elections were critical to the administration and OPA called this period “crunch time.” On September 12, 2006, writing to the White House liaison at the VA, Ms. McLaughlin laid out the “surrogate plan for the last 2-3 weeks.” Therein, she highlighted seven congressional races to which OPA was “thinking of deploying” Secretary Nicholson. She concluded her e-mail by noting:

All Cabinet Secretaries are being asked to withhold from international travel until after 11/7. We need [Secretary Nicholson] to be around for “emergenc” [sic] events as well as these seven:

1. CT-2: Simmons
2. FL-22: Shaw
3. IA-02: Leach
4. NV-3: Porter
5. OH-15: Pryce
6. VA-2: Drake
7. WY-a1 [sic]: Cubin.

Throughout September, OPA and the Surrogate Scheduler continued to contact several agencies, outlining their “top priorities” for travel “going into November.” Writing to a political appointee at DOC on September 22, 2006, Ms. McLaughlin explained: “We have come up with a list of events that our highest priority congressional incumbents have requested for the Secretary. We are asking them to happen somewhere between October 9-November 3<sup>rd</sup> to be the most effective.” Political appointees at DOL, VA, and HHS received similar “last push requests” for travel in the final weeks before November 7, 2006. In at least one of these requests, Ms. McLaughlin emphasized that all the listed events “really need to happen.”

During the final “crunch time,” one tool OPA used to track electoral priorities and its efforts of deploying high-level agency political appointees to events with Republican candidates was a document referred to as the Final Push Matrix. According to a former OPA Associate Director, the term “final push” is political vernacular for the “final 2 weeks before an election,” a time frame during which it was considered especially important to provide a great deal of support to the targeted candidates. As discussed above, the Final Push Matrix was a Microsoft Excel spreadsheet on which the columns were divided by date from October 23 through November 6, 2006, and each row represented a targeted Republican candidate, including members of the U.S. House, U.S. Senate, and governors. When an administration appointee attended a targeted candidate’s event, the appointee’s name was entered into the cell corresponding to the date of the event.

The evidence overwhelmingly shows that the events catalogued on the Final Push Matrix were coordinated with the specific purpose of supporting the election or reelection of vulnerable Republicans. However, numerous trips listed on this matrix appeared on both OPA’s Suggested Memoranda to the agencies and the master tracking document, where they were improperly categorized as “official” government events.

Finally, the focus on the final weeks before the midterm elections was not unique to 2006. Evidence shows that the last two weeks before the 2002 midterm elections received similar attention. To illustrate, in an August 8, 2002, e-mail, then-Surrogate Scheduler Gray wrote to several White House liaisons asking: “FINAL TWO WEEKS: Wherever possible, can we put a hold on schedules for the final two weeks on the campaign season (October 21-November 5). . . . Our goal is to duplicate [previous efforts] for our final targets using cabinet members and other administration officials.” In another 2002 e-mail to DOI appointees, Mr. Gray listed events for five different Republican candidates that the DOI Secretary was requested to attend as part of a “final swing” effort. Mr. Gray explained that the listed event for each candidate was necessary because, for example, the “[l]atest polling has him up about 7 points,” or the “[l]atest internal polling has him down.”

#### **b. OPA’s Partisan Political Activity Related to the 2006 Midterm Elections Declined After November 7, 2006**

OSC observed two trends immediately following the 2006 congressional elections. First, there was a precipitous decline in the number of requests to or by OPA for travel to events with Republican candidates or groups. In fact, in December 2006, e-mails between OPA and the agencies discussing surrogate travel became sparse. After April 2007, OSC discovered no further evidence of coordination between OPA and federal agencies regarding travel to events. Indeed, “there was official travel going on [in 2007],” explained Mr. Jennings, “it just wasn’t going through our office.”

Second, OPA's tone changed in the few travel-related e-mails that were sent to federal agencies after November 7, 2006. As noted above, during the final weeks before the elections, e-mail communications pertaining to travel was filled with urgent requests for "priority" events and "push" efforts. The correspondence included requests for agencies to complete a certain number of events per month, to "hold off" on international travel until after the election, and to "urgently" assist troubled campaigns. Conversely, shortly after the November 7, 2006, elections, OPA's requests for agencies to complete events lacked any sense of urgency. For example, in a November 9, 2006, e-mail to the Chief of Staff and White House liaison at DOE, Surrogate Scheduler McLaughlin inquired: "Is the Secretary going to do this event by chance? Not a big push . . . ." On the same date, OPA contacted DOI in reference to a proposed event with the New Jersey Representative Scott Garrett, noting that because he had been reelected, doing an event with him "would be good, but not a push." Similarly, after the election, OPA indicated via e-mail to HUD and DOEd that certain events were not "a push." Likewise, OPA's requests throughout 2007 lacked any sense of exigency, and indicated that those trips were not a priority or "not a push."

### **III. Legal Analysis**

The following analysis assesses whether any OPA employees or the Surrogate Scheduler violated the Hatch Act by engaging in activity directed at assisting the Republican Party and its candidates.<sup>110</sup> First, OSC addresses whether any such activity constituted "political activity" as defined in the Hatch Act regulations, and concludes that it did.<sup>111</sup> Second, OSC concludes that the political activity of employees qualifying for the § 7324(b) exemption was not incidental to operating OPA for official business. Thus, failure to reimburse the U.S. Treasury for the costs associated with that activity violated the Hatch Act.

#### **A. OPA Staff and the Surrogate Scheduler Engaged in Political Activity for Purposes of the Hatch Act**

One of OPA's official functions was to advise the President on matters of policy. As discussed earlier in this chapter, OPA staff, under the direction of the Director and the Deputy Director, routinely worked with constituents and political groups to, among other things: evaluate levels of support for Presidential policies and initiatives; plan and develop long range strategies to achieve Presidential priorities; maintain contact with national, state, and local Republican groups; and monitor the political rhythm in key districts across the country. In order to properly advise and assist the President, OPA staff necessarily remained informed about the

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<sup>110</sup> For purposes of the legal analysis, any reference to OPA staff or OPA employees includes the Surrogate Scheduler.

<sup>111</sup> See 5 CF.R. § 734.101.

current political environment. OSC believes these types of functions, which relate to the policies, initiatives, and agenda of the President, are not political activity under the Act.

However, OPA staff, again under the direction of the Director and the Deputy Director and their superiors, also engaged in activities that went beyond merely gathering politically relevant information for the purpose of advising the President on matters of policy. OPA employees, particularly during the 2006 midterm election season, methodically coordinated administration support to aid the campaigns of Republican candidates. In fact, one former OPA intern observed that OPA's goal was, in sum, to "get Republicans elected." For example, OPA acted as a liaison between the RNC and political appointees to shore up volunteers for 72-hour deployments. As set forth in Chapter Three, OPA conducted political briefings at numerous agencies where PowerPoint presentations were displayed noting targeted candidates. OPA also maintained a target list of Republican candidates to guide the prioritization of candidates' requests for appearances by high-level political appointees. During the same time period, OPA also tracked fundraisers by identifying the number of attendees and amount of money raised at events where high-level political appointees gave keynote addresses. When campaigns contacted OPA to seek administration appointees to speak at their events – which, by itself, shows OPA's cooperation with and support for political candidates – OPA used the target list to guide the allocation of assets and deploy appointees as speakers to best achieve Republican success in close races. All of these activities constituted political activities under the Hatch Act.

OPA's purpose in keeping the target list and directing travel according to the list was no secret. Indeed, e-mails from the Surrogate Schedulers and OPA employees during the Bush II administration speak for themselves:

- "We are strategically targeting Lincoln Day, Reagan Day, or Winter GOP dinners for County GOPs . . . in [certain Louisiana] parishes because of their important [sic] to the LA-03 and Governor's race."
- "We have a number of Administration folks heading up to NJ in the next few weeks to help Kean as well."
- "I know that we are inching closer to a final date for the runoff and wanted to check in and see if . . . y'all would be interested in a top-level surrogate to help raise some cash?"
- "[A]s we prepare for the midterm elections . . . you will be receiving more and more requests for travel in targeted regions."
- "[Martha Rainville] is requesting the Secretary for an event (either official or FR). We have a chance to pick this seat up and would like to be helpful in any way we can."
- "Do you think [the Secretary would] be willing to do an event . . . with Cong. Thelma Drake (VA-02)? Drake is a priority for us."



- “With only 4 months before the end of the 05-06 election cycle . . . we are now asking each agency to do at least 5 OPA recommended event [sic] per month from now until November.”
- “We have come up with a list of events that our highest priority congressional incumbents have requested for the Secretary. We are asking them to happen somewhere between October 9-November 3 to be the most effective.”
- “FINAL TWO WEEKS: Wherever possible, can we put a hold on schedules for the final two weeks on the campaign season (October 21-November 5). . . . Our goal is to duplicate [previous efforts] for our final targets using cabinet members and other administration officials.”

That OPA’s purpose in coordinating administration appointees’ travel to targeted districts to support Republican candidates’ campaigns constituted political activity under the Hatch Act can hardly be debated in light of these statements.

Besides using RNC-provided office equipment and e-mail accounts, an even more striking indicator of political activity within OPA was the daily presence of several RNC Desk Coordinators during the six months leading up to the 2006 midterm elections. Specifically, in the last few months before the 2006 elections, several Desk Coordinators, while still employed by the RNC, began to report for duty to the offices of OPA rather than the RNC. While at OPA, the Desk Coordinators were assigned their own working space and were paired with OPA Associate Directors who supervised their activities and reviewed their work. In this manner, the Desk Coordinators undertook responsibilities otherwise borne by OPA staff. Evidence revealed that the Desk Coordinators became so integrated into the activities of OPA that they were expected to attend daily OPA meetings, were copied on various internal documents circulated only among OPA staff, and were frequently asked to communicate with outside groups, including campaigns, on behalf of OPA. Shortly after the November 2006 elections, these Desk Coordinators ceased reporting to OPA’s offices.

OSC acknowledges that providing sound advice about the political implications of Presidential policies is important for achieving various policy objectives. OSC also acknowledges that individuals who are asked to provide this type of advice are more effective in doing so if they are able to maintain contacts with the national, state, and local elected officials across the country. Undeniably, maintaining political contact with voters, political parties, and public interest groups enables OPA staff to provide sound recommendations to the President and is not prohibited by the Hatch Act. However, the systematic, partisan political activity described in this report, including strategically supplying targeted candidates with administration support to secure electoral gains, goes far beyond a need for political information to effectively advise the President. It is, in fact, the type of electioneering proscribed by the Hatch Act. Reflecting on

this topic, Richard W. Painter, a former Associate Counsel to the President in the Bush II administration, noted:

[C]oncurrent political and official roles put people in a position that is difficult and arguably untenable. Critics will blame Office of Political Affairs staff members and other officials who engage in political activity for poor ethical judgment when problems arise. These problems, however, may be inevitable if government officials continue to be asked to perform official and political roles concurrently. The public image of the White House and the rest of the government will suffer as a consequence.<sup>112</sup>

## **B. OPA Staff and the Surrogate Scheduler Violated the Hatch Act When They Engaged in Political Activity While on Duty or in a Federal Workplace**

### **1. Non-Exempt Employees – OPA Associate Directors and the Surrogate Scheduler**

As explained in Chapter Three, only OPA employees who qualify for the § 7324(b) exemption, i.e., high-level officials whose duties and responsibilities continue outside normal duty hours and while away from the normal duty post, may engage in political activity while on duty or in a federal workplace. OSC has concluded that during the Bush II administration, OPA Associate Directors and the Surrogate Scheduler did not qualify for the § 7324(b) exemption, and thus were not permitted to engage in any political activity while they were on duty or in a federal workplace. As a result, the Associate Directors and the Surrogate Scheduler violated the Hatch Act by performing, while on duty or in the federal workplace, the duties described in this chapter that constitute political activity. However, because these individuals engaged in the prohibited activities at the direction of their superiors, OSC below analyzes the larger problem: the use of OPA as a whole to pursue partisan advantage at the polls.

### **2. Exempt Employees – OPA Director and Deputy Director**

During the Bush II administration, the OPA Director and Deputy Director occupied high-level positions within the EOP in that their duties and responsibilities continued outside normal duty hours and while away from the normal duty post. As a result, the Director and the Deputy Director were exempt from the § 7324(a) restrictions, and thus, were permitted to engage in political activity while they were on duty or in a federal workplace. Notwithstanding this

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<sup>112</sup> Richard W. Painter, Getting the Government America Deserves: How Ethics Reform Can Make a Difference 252 (Oxford Univ. Press 2009). Currently, Mr. Painter is the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School.

exemption, however, the Hatch Act requires that any costs associated with such permitted political activity not be paid for with U.S. Treasury funds. OSC examines this issue in greater detail below.

**a. The Costs Associated With Political Activity May Not Be Paid for With Money Derived From the U.S. Treasury**

Although the Director and Deputy Director, who oversaw the activities of OPA and its staff, were permitted to engage in political activity while on duty or in a federal workplace, according to the legislative history of the Hatch Act, Congress expected that “most of the political activity that these officials engage in will be conducted off Government property and not during regular duty hours.”<sup>113</sup> Where such on-the-job activity occurs, the Hatch Act requires that costs associated with that activity not be paid with U.S. Treasury funds.

The Act’s attendant regulations provide that “[c]osts associated with a political activity are deemed not to be paid for by money derived from the Treasury of the United States if the Treasury is reimbursed for the costs within a reasonable period of time.”<sup>114</sup> The regulations further instruct that “costs associated with a political activity do not include any costs that the Government would have or have [sic] incurred regardless of whether the activity was political.”<sup>115</sup> For example, where a Cabinet Secretary holds a catered political reception in his or her office, and a security detail attends the reception to provide security for the Secretary, the Hatch Act does not require reimbursement of the costs associated with the use of the Secretary’s office, the Secretary’s salary, or the costs of the security detail.<sup>116</sup> This is because the Secretary would have had a security detail in the office regardless of what type of event was taking place.<sup>117</sup>

Lastly, as discussed above, the legislative history reflects that Congress did not expect that all activities of high-level political officials be itemized such that the cost of every phone call, a few photocopies, or the portion of their salary attributable to time spent on political activities must be reimbursed.<sup>118</sup> It specifically admonished, however, that “. . . if a Government office is turned into a political boiler-room, all the costs associated with that activity should be reimbursed.”<sup>119</sup> Likewise, OSC has advised in the past that an agency’s policies concerning limited personal use of government equipment can serve as a guide for determining what costs are truly incidental. Thus, for example, the cost of using government resources for incidental, political communications need not be reimbursed, but the cost of using those resources for

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<sup>113</sup> H.R. Rep. No. 103-16, at 22 (1993).

<sup>114</sup> 5 C.F.R. § 734.503(a).

<sup>115</sup> 5 C.F.R. § 734.503(b).

<sup>116</sup> See 5 C.F.R. § 734.503(b); § 734.503 ex. 1.

<sup>117</sup> 5 C.F.R. § 734.503(b).

<sup>118</sup> H.R. Rep. 103-16, at 22 (1993).

<sup>119</sup> *Id.*

political activity on a recurring, non-incident basis should be reimbursed.<sup>120</sup> As explained below, the political activity of OPA staff and the Surrogate Scheduler was not incidental to the official functions of the office, and as such, costs associated with that activity would not have been incurred in its absence.

### **b. The Political Activity of OPA Staff and the Surrogate Scheduler Was More Than Incidental**

Based on the preceding, at the point where the volume of political activity conducted by OPA Director, Deputy Director, or at their direction went beyond incidental, Congress expected that U.S. Treasury funds not be used to finance such activity. In order to make this assessment, OSC had to consider not only the individual activity of the OPA Director and Deputy Director, but also any activity performed at their direction, i.e., the activity of OPA staff and the Surrogate Scheduler.

The evidence gathered during this investigation shows that partisan political activity was in no way incidental to OPA's functions. Indeed, OPA employees routinely worked with the RNC to strategize about how to best utilize administration assets to help targeted candidates. As the evidence discussed in this chapter demonstrates, OPA staff, under the direction of the Director and Deputy Director, focused a significant portion of their daily activities, at least during the 2006 midterm election cycle, on assisting with the electoral goals of Republican candidates involved in targeted races. Several OPA employees viewed this as a part of their official job functions. They helped draw positive attention to these vulnerable Republican candidates by strategically dispatching high-level agency political appointees to predetermined areas of the country. This large-scale deployment was guided by a target list of competitive races that was created by OPA in cooperation with the RNC. The trends explored in this chapter show the degree to which, in 2006, the focus of the OPA staff shifted from gathering politically relevant information to advance the functions of government, to assisting or supporting the Republican Party's electoral priorities.

OPA's support was not limited to recommending and requesting that high-level political appointees be available for events with Republican candidates. It also included tracking fundraisers attended by administration appointees, motivating political appointees at executive agencies via political briefings, and working in close coordination with the RNC. Especially during the last three months preceding November 7, 2006, OPA staff ensured that federal agencies timely filled requests from Republican candidates who sought high-level agency political appointees to speak at events in order to garner media attention. What is more, as noted

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<sup>120</sup> See Letter from William E. Reukauf, Associate Special Counsel for Prosecution, OSC, Reimbursement of de minimis expenses for PAS employees (Feb. 25, 2000), available at <http://osc.gov/documents/hatchact/federal/fha-24.pdf>.

above, RNC Desk Coordinators worked out of OPA offices full-time in order to more effectively support Republican candidates.

In 2006, the partisan political activity of OPA staff was not incidental to the functions of the office. Instead, the OPA Director and Deputy Director focused the time and energy of OPA staff to help advance the Republican Party's electoral prospects, thereby transforming the office into a setting akin to a political boiler room. Because bolstering candidates' campaign efforts and helping advance a political party's electoral prospects is not something that the government would have paid for otherwise, U.S. Treasury funds should not have been used to pay for this political activity. Using U.S. Treasury funds to finance such activity, including employees' salaries, violated the Hatch Act.

In light of the issues addressed in this report about OPA's political activities, which, as explained below, were not unique to the Bush II administration, OSC offers guidance regarding how OPA may prevent similar violations of the Hatch Act in the future.

#### **IV. OPA During Prior Administrations**

In order to formulate recommendations to bring the activities of OPA into compliance with the Hatch Act, OSC reviewed OPA as it existed during prior administrations (pre-Bush II). OSC notes that it did not investigate the practices of OPA in prior administrations, and makes no findings as to whether any such practices were in conflict with the Hatch Act. Instead, OSC's review serves two purposes. First, it lends a historical perspective to the activities of OPA during the Bush II administration that were the subject of this investigation. Second, and perhaps more importantly, it shows that the aspects of OPA that came in conflict with the Hatch Act during the Bush II administration have apparently existed for decades.

A review of news articles, scholarly journals, and government publications reveals that OPA staff in prior administrations worked closely with their counterparts in the RNC and the DNC. For example, OPA's second Director under Bush I explained that he held a weekly "political directors meeting" to include his counterparts at the RNC, NRCC, and the RGA for the purpose of working out what those organizations "needed from the administration."<sup>121</sup> Comparable allegations of involvement between OPA and the DNC abounded during the Clinton administration.<sup>122</sup> For example, a 1997 Washington Times article exposed memoranda titled "Recommended Cabinet Travel," co-authored by a member of President Clinton's OPA staff and "DNC-paid 'volunteers' in the White House."<sup>123</sup> These "Recommended Cabinet Travel" memoranda were alleged to have been distributed to Cabinet Secretaries in anticipation of travel

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<sup>121</sup> Patterson, note 29, at 207-208.

<sup>122</sup> Id. at 212.

<sup>123</sup> Paul Bedard, Cabinet Members Were Pushed to Go On Campaign Trail; Most Fulfilled White House's Requests, Wash. Times, Dec. 1, 1997, at A1.

in support of vulnerable Democratic candidates. The article also examined additional documents from President Clinton’s OPA and reported that “the White House political affairs office organized a massive effort to enlist 10 Cabinet members . . . to campaign for President Clinton’s reelection and for troubled Democrats in 1994 . . . .”<sup>124</sup> The article noted that “[o]ne key memo . . . addressed to the [Clinton] White House political director . . . details a plan for 89 campaign-related trips by 10 Cabinet heads and three other top administration officials.”<sup>125</sup> Likewise, the concept of official agency events being utilized to “earn media” for targeted candidates is not unique to the Bush II administration. For a 1994 article, a journalist at The National Journal interviewed “campaign operatives” who explained that they sought out Cabinet Secretaries who could do official policy events to garner free media attention for the Democratic candidates involved in close races.<sup>126</sup>

Also, during the administration of President Ronald Reagan, the political activities of OPA staff caused some concern. For example, the second Director of OPA during the Reagan administration left his position with the office in 1983 to run the President’s reelection campaign.<sup>127</sup> When he left, according to one account, the Director “took the entire political shop with him and it was not replaced. The U.S. Government Manual does not have a listing for the Office of Political Affairs for the years 1984-1985.”<sup>128</sup>

Former Associate White House Counsel Painter has reflected on the intricacies of OPA’s existence in relation to the Hatch Act. In his discussions on the subject, Mr. Painter highlighted the difficulties faced by attorneys in the White House Counsel’s Office who are asked to advise EOP employees, including OPA staff, on how official and political roles may be reconciled:

For legal advisors, in particular, the combination of official with political work is fraught with difficulty. Regardless of synergies between official capacity political advice and personal capacity political activity, the Hatch Act requires the two to be separate. In instances in which the formalities of separation are not properly observed, the White House comes under intense criticism. At the same time, employees who engage in both types of activity may have difficulty, conceptually, separating functions they perceive to revolve around a single objective: the political success of the [P]resident and his policies.<sup>129</sup>

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<sup>124</sup> Id.

<sup>125</sup> Id.

<sup>126</sup> James A. Barnes, Like His Home-State Razorbacks Clinton’s Cabinet Pays to Win, National Journal, Apr. 9, 1994, at 852.

<sup>127</sup> Tenpas, Institutionalized Politics, supra note 31, at 515.

<sup>128</sup> Id. at 515 n.30.

<sup>129</sup> Painter, supra note 112, at 249.

Likewise, OSC attorneys, during investigative interviews, observed the “conceptual difficulty” the OPA staff during the Bush II administration experienced in separating their official and political functions. With respect to the RNC e-mail accounts, for instance, some OPA staff professed their confusion and simply defaulted to using their RNC accounts for all communication. Others confidently believed that the Hatch Act permitted them to engage in full-time political activity as their official job. This lack of understanding was common to OPA Directors, Deputy Directors, Associate Directors, Surrogate Schedulers, and paid RNC staff members who worked at OPA during the 2006 midterm election cycle.

## V. Recommendations

The Hatch Act provides that U.S. Treasury funds cannot be used to pay for the political activities of those select officials who are permitted, by the § 7324(b) exemption, to engage in political activity while on duty or in the federal workplace.<sup>130</sup> The legislative history of the 1993 Hatch Act Reform Amendments makes it clear that Congress intended that if the political activity of exempt employees was more than incidental, the costs associated with that activity should be reimbursed. Further, if an office engages in so much political activity that it becomes akin to a political boiler room, all the costs associated with that activity, including costs related to activities of exempt employees, must be repaid.<sup>131</sup>

OSC cannot pinpoint with certainty the period of time during which OPA rose to the level of a “political boiler-room” during the Bush II administration. However, OPA engaged in a significant amount of political activity during the 2006 midterm election cycle, such as: conducting partisan political briefings for agency personnel; developing and managing lists of targeted Republicans in upcoming elections; coordinating the travel of high-level agency political appointees to events with targeted Republican campaigns; interfacing and strategizing with the RNC, NRCC, and other political groups; suggesting participation in 72-hour deployment efforts; tracking the results of such volunteer efforts; and tracking money raised at fundraisers attended by administration officials. The sheer volume of political activity is also evidenced by the daily presence of RNC Desk Coordinators working in OPA in the period before the election and the use of office equipment provided by the RNC.

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<sup>130</sup> Appropriations laws also may forbid the use of appropriated funds for political purposes. See 31 U.S.C. § 1301(a) (providing that “appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law”). OLC has interpreted this provision, then found at 31 U.S.C. § 628, as prohibiting the use of appropriated funds for the “personal private activities of Government officers and employees” to include political activities and political travel. See Memorandum from John M. Harmon, Acting Asst. Att’y Gen., OLC, to Robert J. Lipshutz, Counsel to the President 3 (Mar. 15, 1977) [hereinafter Political Trips Memorandum] (on file with author). In particular, OLC saw “no difference between using appropriated funds for political or other non-official travel, which we concluded at the outset of this memorandum was generally improper, and using appropriated funds to pay the salaries of personnel who are engaged in political or other non-official support activities in connection with such travel.” *Id.* at 14.

<sup>131</sup> H.R. Rep. 103-16, at 22-23 (1993).

The Hatch Act regulations clearly state that political activity is “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group” and that such political activity is prohibited.<sup>132</sup> Therefore, because most OPA employees and the Surrogate Scheduler are not exempt under § 7324(b), they are barred from engaging in the noted activities while on duty or while in the federal workplace.

The Director and Deputy Director, on the other hand, were permitted to engage in political activity on duty and in the federal workplace provided the costs associated with the activity were reimbursed to the Treasury.<sup>133</sup> However, Congress expected that on-the-job political activity by § 7324(b) employees would be kept to a minimum. The legislative history indicates that the exemption was meant to afford certain high-level officials the same opportunities to engage in political activity that the Hatch Act Reform Amendments allowed non-exempt employees, that is, to engage in political activity off-the-job.<sup>134</sup> Because they are presumed to be continuously on duty, the exemption was necessary to put them on equal footing with the rest of the federal workforce.<sup>135</sup> Further, the House Report accompanying the Hatch Act Reform Amendments noted that “[d]espite the exception, the committee expects that most of the political activity that these officials engage in will be conducted off Government property and not during regular duty hours.”<sup>136</sup>

Accordingly, although the plain language of the Hatch Act and its regulations place no limitations on the extent to which § 7324(b) employees can engage in political activity on duty and in the federal workplace as long as the costs are reimbursed, OSC maintains that imposing no restraints at all goes beyond what Congress intended. Further, a potentially pernicious situation arises where, as here, § 7324(b) employees supervise a staff of non-exempt employees and direct them to engage in on-duty political activity. Thus, OSC recommends that the regulations concerning § 7324(b) exemption should be revised to reflect Congress’ intent that the exemption be interpreted narrowly.

OPA employees should avoid engaging in political activities to prevent it from transforming from an official government office into a partisan political operation. Foremost, individuals employed by a political party or partisan political group should never be permitted to operate out of government offices.<sup>137</sup> Doing so converts an office funded with U.S. Treasury funds into an extension of a political party or partisan political group. In addition, OPA employees should not participate in RNC or DNC events in their official capacities. Although

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<sup>132</sup> See 5 C.F.R. § 734.101.

<sup>133</sup> See 5 U.S.C. § 7324(b).

<sup>134</sup> H.R. Rep. 103-16, at 22 (1993).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See Political Trips Memorandum, *supra* note 130, at 20 (stating that “volunteers” engaged in purely political work “should not use Government office space, facilities, or supplies” so as to “avoid any appearance of undue involvement of White House staff in purely political matters”).



they are permitted to take an active part in political management, they should do so in their personal capacities and outside of the federal workplace.

OSC also recommends that OPA should not coordinate, or be involved in, the political travel of high-level agency political appointees to aid congressional campaigns. This function should be handled by partisan political groups such as the RNC, DNC, NRCC, and DCCC.<sup>138</sup> As Mr. Painter has stated:

White House Office of Political Affairs staff members do not enhance their own advisory role by recruiting other executive branch agency officials to engage in personal capacity political activity. This does little to politically inform White House decision making and may introduce unwanted politicization into the agencies.<sup>139</sup>

Additionally, OSC recommends that OPA should not be involved in coordinating or suggesting, via official announcements, that high-level agency political appointees attend official events in order to generate favorable media coverage for political candidates. Because the purpose of such travel is to achieve electoral success, it follows that it is not in fact official and U.S. Treasury funds should not be used to cover its cost.

In an election year, activities of OPA employees dealing with individuals running for partisan elected office appear to be political activity, should be scrutinized closely and, where appropriate, handled by an outside political organization funded with non-U.S. Treasury funds. As Mr. Painter noted, “[T]here is a powerful argument that having an Office of Political Affairs that is active in political campaigns is not necessary or even a desirable component of the political advisory function in the White House.”<sup>140</sup>

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<sup>138</sup> The activity described in this chapter also implicates federal regulations concerning ethical conduct. EOP employees currently are subject to the same standards that apply to all executive branch employees. 3 C.F.R. § 100.1. In pertinent part, the regulations state that employees “shall not use public office for private gain,” they “shall protect and conserve Federal property and shall not use it for other than authorized purposes,” and they “shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part.” 5 C.F.R. § 2635.101(b)(7), (9), (14). In light of the standards of conduct, OLC has opined that where government employees are involved in political matters, such as coordinating purely political trips “. . . that would ordinarily be taken care of by a political organization or candidate for office, there may be an appearance that the public office is being unduly used for the benefit of the political party. . . .” Political Trips Memorandum, *supra* note 130, at 15. Thus, OLC recommended that “. . . partisan political activities be the responsibility of the [relevant political party] or other outside organization. . . .” *Id.*

<sup>139</sup> Painter, *supra* note 112, at 249.

<sup>140</sup> *Id.* While the recommendations and issues discussed herein are specific to OPA, it should be noted that they potentially apply to all individuals, other than the President and Vice-President, employed within the EOP. Consequently, simply re-naming OPA, or moving its functions to another White House office such as the Office of Cabinet Liaison, Office of Strategic Initiatives, Office of Intergovernmental Affairs, etc., is not a viable solution under the law.

In October 2008, the U.S. House of Representatives' Committee on Oversight and Government Reform (Oversight Committee) issued a Draft Report titled "The Activities of the White House Office of Political Affairs." In its report, the Oversight Committee found that OPA "Under the Bush [II] Administration ran a full-fledged political operation that enlisted agency heads across government in a coordinated effort to elect Republican candidates to Congress."<sup>141</sup> The Oversight Committee further opined that said OPA activity represented "a gross abuse of the public trust."<sup>142</sup> In light of its findings, the Oversight Committee recommended the following:

To prevent a repetition of the abuses of the White House Office of Political Affairs, Congress should revise the Hatch Act. American taxpayers should not pay the salaries of White House officials when they are engaged in helping to elect members of the President's political party. They should also not pay the travel expenses of cabinet and other senior officials who fly across the country to boost the reelection chances of vulnerable members of Congress.

For these reasons, the Committee recommends that Congress develop legislation to eliminate the White House Office of Political Affairs. If this is not politically feasible, Congress should adopt reforms to ensure that the office serves the interests of the taxpayer rather than the political party of the President.<sup>143</sup>

Regardless of whether Congress decides to follow this recommendation, OSC recommends that to address some of the issues raised in this report the Hatch Act's attendant regulations should be reviewed and amended as necessary. OSC would welcome the opportunity to work with the U.S. Office of Personnel Management (OPM) to evaluate the current regulations and offer suggestions for clearer guidance and more contemporary examples consistent with the findings of this investigation.

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<sup>141</sup> Staff of H. Comm. on Oversight and Gov't Reform, 110th Cong., The Activities of the White House Office of Political Affairs 23 (Comm. Print 2008).

<sup>142</sup> Id.

<sup>143</sup> Id.

## **CHAPTER FIVE: POLITICAL TRAVEL OF HIGH-LEVEL AGENCY POLITICAL APPOINTEES**

### **I. Overview**

As discussed in Chapter Four, OPA arranged for high-level agency political appointees to appear at events to assist Republican candidates identified as targeted by RNC and OPA staff. Employees at the agencies where the political appointees were employed were then responsible for coordinating the appointees' trips. During this investigation, OSC found that several agencies classified such trips as official government business when, in fact, the trips were directed at the success of targeted Republican candidates. Because those trips were classified as official, funds from the U.S. Treasury were used to finance the trips and reimbursement from the relevant campaigns was never sought. In other cases, even when trips were correctly designated as political, agencies used U.S. Treasury funds to cover the costs associated with the trips and did not recoup those funds as required by the Hatch Act and its regulations.

Below, OSC reviews a number of trips from 2006 that fall into each of these categories. OSC concludes this chapter with recommendations concerning the method agency officials should use to classify travel to events during an election year to ensure future Hatch Act compliance. OSC also recommends that the costs of attending events classified as political should be paid in advance by the candidate, a political organization, or the traveler. In the Appendix, OSC provides an example of a system agencies can adopt to ensure that this occurs. In furtherance of these recommendations, OSC also believes that the Hatch Act regulations, rather than permitting post-travel reimbursement, should be amended to expressly prohibit the use of U.S. Treasury funds to finance political travel by § 7324(b) employees.

### **II. Factual Findings and Analysis**

#### **A. OPA Staff Regularly Recommended That High-Level Agency Political Appointees Attend Events With Targeted Republican Candidates**

Throughout the 2006 election cycle, OPA staff, in cooperation with the RNC, strategically aligned the travel of high-level agency political appointees, typically PAS, to events hosted by targeted Republican candidates. This was done for the purpose of garnering media attention and supporting fundraising efforts for Republican campaigns. Employees who worked in the Bush II administration acknowledged that OPA offered to produce high-level appointees to help in targeted races, a practice referred to as "asset deployment." The purpose of dispatching high-level appointees to appear at events with candidates was to "get Republicans elected." Former OPA Director Mehlman stated that his office conveyed to campaigns that "[i]f

you want someone from the administration to come be supportive, let us know, and we'll work to try and coordinate it, and expedite it, and make it effective for you.”

OPA's suggested events included both “official” and “political” events. Either type of event could be beneficial to a candidate's campaign. As former Surrogate Scheduler McLaughlin explained, “An official event would be advantageous to a member because . . . a surrogate . . . could use their official title.” In addition, Ms. McLaughlin understood that official events were beneficial because they received more press coverage than political ones and could be paid for by the agency rather than the campaign. In light of these advantages, so-called “official” events could help a campaign as much as, or more than, political events could. As described in Chapter Four, on February 24, 2006, Ms. McLaughlin forwarded a request from Martha Rainville to staff at DOL, adding: “She is requesting the Secretary for an event (either official or FR). We have a chance to pick this seat up and would like to be helpful in any way we can.” Four days later, an OPA employee wrote: “Martha Rainville is currently Adjutant General of Vermont National Guard. Her resignation is effective April 1<sup>st</sup>, so any event before then can be an official event.”<sup>144</sup> In fact, Ms. McLaughlin testified, “As we got closer to the election date, requests that had involved fundraisers sort of dropped off, or were retracted,” because “raising money at that point is not that important.” Instead, campaigns “cared more about having message events, whether political or official,” among other things.

The number of such trips substantially increased as the November 2006 elections approached. Correspondence between Ms. McLaughlin and agency appointees reveals this trend. For example, in July 2006, Ms. McLaughlin advised the political staff at 17 agencies:

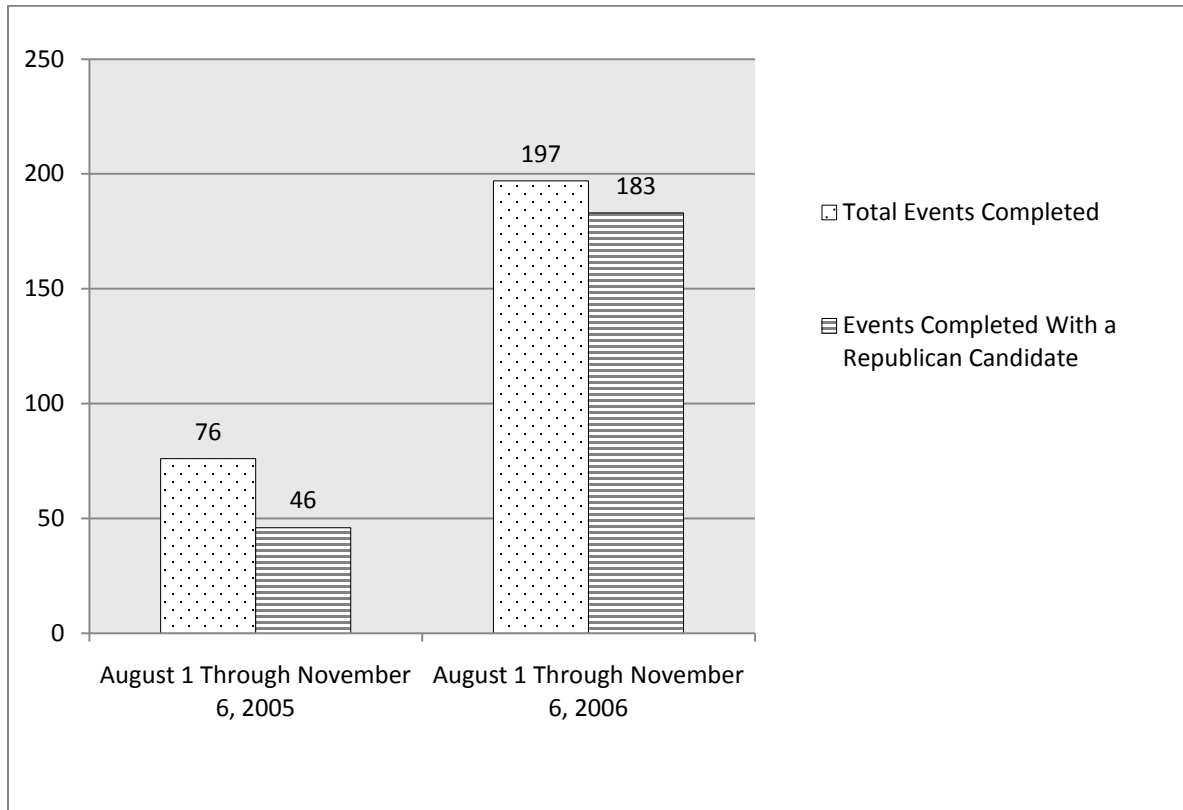
With only 4 months left before the end of the 05-06 cycle, I am interested to speaking [sic] with each of you regarding what is and what is not possible in terms of your current (and future) OPA surrogate requests. . . . On that note, we are now asking each agency to do at least 5 OPA recommended event [sic] per month from now until November.

In addition, throughout September 2006, OPA employees and Ms. McLaughlin contacted several agencies, outlining their “top priorities” for travel “going into November.” Writing to DOC on September 22, 2006, Ms. McLaughlin explained OPA's effort: “We have come up with a list of events that our highest priority congressional incumbents have requested for the Secretary. We are asking them to happen somewhere between October 9-November 3<sup>rd</sup> to be the most effective.” VA, HHS, and DOL received similar “last push requests” for travel in the final weeks before November 6, 2006. In these requests, Ms. McLaughlin emphasized that all the listed events “really need to happen.”

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<sup>144</sup> This e-mail is an example of the practice of manipulating official business to benefit Republican candidates.

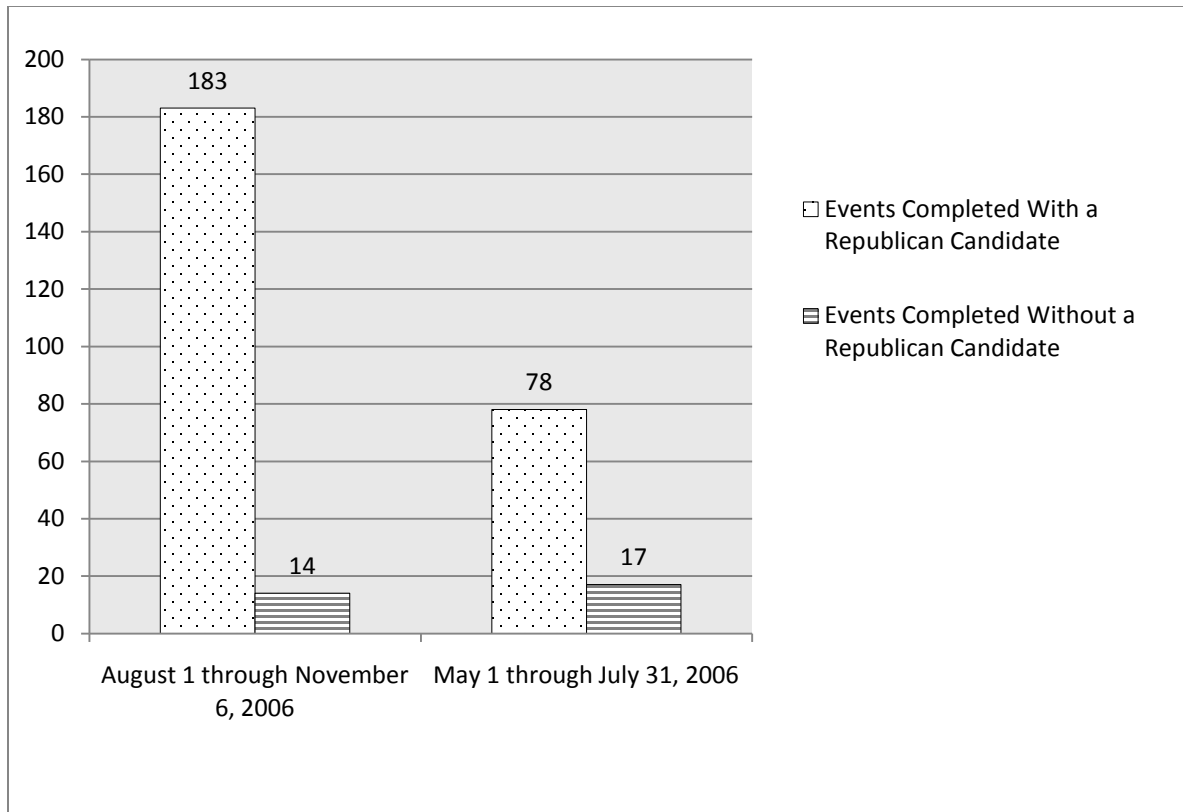
As Chart 4 below illustrates, between August 1 and November 6, 2006, i.e., the final three months before the 2006 midterm elections, high-level agency political appointees completed 197 events tracked by OPA. Of these 197 events, 183 events were held with a Republican candidate. By comparison, during the same time frame in 2005, i.e., August 1, 2005, through November 6, 2005, high-level agency political appointees completed a total of 76 events. Of these events, 46 were held with a Republican candidate.



**Chart 4: Events Tracked by OPA and Completed by High-Level Agency Political Appointees – Comparison of Non-Election (2005) to Election (2006) Years, August 1 Through November 6.<sup>145</sup>**

A review of the data also shows that in 2006, high-level agency political appointees were completing a disproportionately large number of events with Republican candidates between August 1 and November 6, 2006, as compared to May 1 through July 31, 2006. For example, between August 1 and November 6, 2006, high-level agency political appointees completed 183 events with a Republican candidate, while only 14 events were completed without a Republican candidate. By comparison, between May 1 and July 31, 2006, high-level agency political appointees completed 78 events with a Republican candidate and 17 events without such a candidate. See Chart 5 below.

<sup>145</sup> The data in this chart were derived from the 2005 and 2006 Suggested Memoranda for 14 agencies.



**Chart 5: Events Tracked by OPA and Completed by High-Level Agency Political Appointees in 2006 – Comparison of August 1 Through November 6, 2006, to May 1 Through July 31, 2006.<sup>146</sup>**

While OPA worked with the RNC to develop lists of targeted campaigns and advised agencies which events were priorities, OPA relied on agency officials to coordinate the travel plans and ensure that the events were completed. Generally, Chiefs of Staff and White House liaisons were responsible for implementing OPA’s travel requests. Some invitations indicated whether the proposed event was to be “official” or “political.” Sometimes, however, the invitations did not contain specific information about the upcoming events. In those circumstances, the details and the nature of the events were subsequently coordinated between the inviting party and political appointees at the relevant agency. OPA employees testified that during the Bush II administration, decisions pertaining to the classification of agency travel as either official or political were ultimately made by the employees at the federal agencies, not the OPA.

<sup>146</sup> These data were derived from the 2006 Suggested Memoranda for 14 agencies.

## **B. U.S. Treasury Funds Were Used to Pay for High-Level Agency Political Appointees to Travel to Events Aimed at the Success of Republican Candidates in 2006**

The high-level agency political appointees, i.e., PAS, for whom OPA created Suggested Memoranda, which outlined the events that OPA recommended for their travel, were exempt from the Hatch Act's prohibition against engaging in political activity while on duty or in a federal workplace.<sup>147</sup> Recall that these § 7324(b) employees – so called because of the section of Title 5 of the U.S. Code providing for this exemption – include individuals who are presumed to be on duty at all times and who are either paid from an EOP appropriation or are PAS officials whose position is located within the U.S. and who determine policies to be pursued by the U.S. in relation with foreign powers or in the nationwide administration of federal laws.<sup>148</sup> Notwithstanding the exemption, the Hatch Act provides that the costs associated with § 7324(b) employees' political activity cannot be paid for with U.S. Treasury funds.<sup>149</sup> The Hatch Act regulations provide that political activity is deemed not to be paid with money derived from the U.S. Treasury if the associated costs are reimbursed to the Treasury “within a reasonable period of time.”<sup>150</sup> Even in cases of mixed travel, i.e., where a trip has both official and political components, the travel costs and expenses must be apportioned according to the time spent at each activity so that the cost attributable to attending a political event can be reimbursed to the government.<sup>151</sup>

Accordingly, when § 7324(b) employees engage in political activity, care must be taken to ensure that U.S. Treasury funds are not used to finance the activity and any costs advanced are reimbursed within a reasonable time. First, agency officials must determine whether an activity is “official” or “political” in nature. Second, for activities determined to be “political,” agencies must have a mechanism to ensure either that U.S. Treasury funds are not used or that the appropriate party reimburses the Treasury in a timely manner for the political travel costs. Below, OSC presents a sampling of political trips in 2006 to illustrate that employees in the Bush II administration incorrectly classified political events as official, or in some cases, failed to

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<sup>147</sup> See 5 U.S.C. § 7324(b).

<sup>148</sup> See 5 U.S.C. § 7324(b)(2).

<sup>149</sup> 5 U.S.C. § 7324(b)(1).

<sup>150</sup> 5 C.F.R. § 734.503(a). Additionally, 5 C.F.R. § 734.503(c) provides the formula officials are required to use when determining the appropriate allocation of costs for mixed travel involving both official and political components.

<sup>151</sup> See 5 C.F.R. § 734.503(c). For federal and Presidential election activities, agencies should follow the Federal Election Commission's (FEC) formula for apportioning the costs of mixed travel. 5 C.F.R. § 734.503(d); see also 11 C.F.R. § 106.3 (giving the apportionment formula for travel to federal campaign events); 11 C.F.R. §§ 9004.7, 9034.7 (providing the formula for allocating the costs of travel to Presidential and Vice Presidential campaign events).

recoup funds for events classified as political.<sup>152</sup> These failures resulted in the use of U.S. Treasury funds to pay for political activity.

In addition to the improper use of U.S. Treasury funds, when a political trip is incorrectly classified as official, the traveler's participation during the event, in his or her official capacity, may violate § 7323(a)(1). As noted above, while certain PAS are § 7324(b) employees, they are still prohibited from using their official authority or influence to affect the result of an election. Moreover, while the majority of the travel discussed in this report involved travel by PAS, i.e., § 7324(b) employees, the determination of whether travel is official or political is important to all federal employees. Specifically, where a non-§ 7324(b) employee, in his or her official capacity, attends a political event incorrectly classified as official, that employee may have engaged in prohibited political activity in violation of § 7323(a)(1) and while on duty in violation of § 7324(a). Also, U.S. Treasury funds would have been used improperly to finance that political trip.

## **1. Department of Veterans Affairs**

On August 11, 2006, Ms. McLaughlin sent an e-mail to the White House liaison at the VA that read:

Congresswoman Deborah Pryce (OH-15) is requesting the Secretary for an official event in her district. I believe her office sent an official invitation to you via mail in late July. I'll fax you a copy of it as well. Pryce is a top priority definitely on our radar, so if you can get up to Columbus, that would be helpful.

Representative Pryce's 2006 reelection campaign was identified on OPA's Final Push Matrix as a "Tier 1" priority.

On September 12, 2006, Ms. McLaughlin again contacted the VA's White House liaison and explained: "As a preview, below are the folks we are thinking of deploying the Secretary in for. We are checking with all of them now as to whether or not an event with the Secretary will be beneficial at crunch time." She then listed seven Republican incumbents, including Representative Pryce. On September 22, 2006, Ms. McLaughlin contacted the White House liaison a third time and advised that OPA had come up with a list of events for which the Secretary's appearance was requested. In an e-mail entitled "last push requests," she identified four "highest priority congressional incumbents" and instructed the White House liaison that an event with each incumbent needed to "happen somewhere between October 9 – November 3<sup>rd</sup> to

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<sup>152</sup> Later in this chapter, OSC makes recommendations regarding how to properly analyze whether an event is "official" or "political" in nature. See *infra* pp. 95-100.



be the most effective.” Representative Pryce was identified as one of the four priority incumbents. The e-mail also noted that Representative Pryce’s staff had not yet determined what type of event was being proposed.

According to documents produced to OSC, VA Secretary James Nicholson attended an event with Representative Pryce on October 10, 2006. The event consisted of a tour of the site where a new ambulatory clinic was being built, a meet-and-greet with local veterans and Representative Pryce, and a press conference with Representative Pryce. The VA classified this event as official. Although meeting with veterans and touring a future VA facility bear some relation to the VA’s official business, OSC submits that the evidence shows that the Secretary’s appearance was politically motivated. Specifically, the Surrogate Scheduler repeatedly asked the White House liaison to send Secretary Nicholson to an event with Representative Pryce, a high priority, because it would be “beneficial at crunch time.” Furthermore, the event took place during a window that the Surrogate Scheduler identified as “the most effective” time frame to help Pryce’s campaign. Finally, as late as September 22, over a month after the trip was originally proposed, the agenda for the event had not yet been created. Thus, it appears as though the tour and meet-and-greet merely served as a pretext to have Secretary Nicholson make an appearance with Representative Pryce in order to draw positive attention to her campaign “at crunch time.” Looking at the totality of the circumstances, OSC concludes that the event should have been classified as political and the costs associated with it reimbursed to the U.S. Treasury. Using U.S. Treasury funds to finance this trip violated the Hatch Act.

Moreover, Secretary Nicholson attended three events with Republican congressional candidate Doug Roulstone on July 6, 2006, in the State of Washington. The VA classified these events as political. On September 5, 2006, 60 days after the events took place, the White House liaison contacted an OPA Associate Director asking if he could “gently prod” the Roulstone campaign for \$694.73 as “reimbursement for the trip on July 6.” The Associate Director then asked the White House liaison whether that amount included any costs for an official component, adding, “Needless to say, trying to save the campaign as much \$\$ as possible.” The White House liaison responded that the \$694.73 in fact reflected the portion owed to the VA by the campaign. During its investigation, OSC asked VA staff whether the Roulstone campaign ever reimbursed the agency. To date, the VA has not produced any evidence showing that it has received the \$694.73 due from the 2006 Roulstone campaign. Although the VA correctly designated these three events as political, using U.S. Treasury funds for a political purpose without seeking, and receiving, reimbursement within a reasonable time is a violation of the Hatch Act.

## 2. Department of Transportation

Five days before the November 7, 2006, elections, Representative Nancy Johnson, listed as “Tier 1” on OPA’s Final Push Matrix, hosted DOT’s Acting Secretary Maria Cino at an event in Waterbury, Connecticut. On October 18, 2006, Ms. McLaughlin e-mailed DOT’s White House liaison inquiring whether upcoming trips with Connecticut Representatives Chris Shays and Nancy Johnson were going to be “official events.” The White House liaison responded that the events were, in fact, official and that they were “probably ‘transportation tours.’” The White House liaison testified that “transportation tour” was a term used to describe an event where the Secretary and a “member go out and look at a road or a bridge in their district.”

On November 2, 2006, the day of the event with Representative Johnson, Acting Secretary Cino sent an e-mail at 7:05 a.m. to three individuals at “rnchq.org” and “mac.com” e-mail accounts.<sup>153</sup> In the e-mail, Acting Secretary Cino noted that she was “. . . going to get a plane to campaign for Nancy Johnson.” At 7:43 a.m., 38 minutes later, Acting Secretary Cino sent another e-mail in which she wrote that she was “[o]ff to CT for Mrs[.] Johnson . . . .”

The Official TDY Traveler Authorization for Acting Secretary Cino reflects that DOT classified travel to this event as official. Several facts, however, indicate that the motivation for the event was political. First, Representative Johnson was on the target list as a “Tier 1” candidate. Second, Acting Secretary Cino was under the impression that the purpose of her trip to Connecticut, which occurred just five days before the election, was to “campaign for Nancy Johnson.” Finally, the Surrogate Scheduler’s involvement indicates that the trip was not genuinely official. Indeed, former OPA Deputy Director Jennings testified that in non-election years, OPA was not involved in coordinating official travel.<sup>154</sup> OSC concludes, therefore, that the trip was political in nature, and thus using U.S. Treasury funds to pay for it violated the Hatch Act.

## 3. Department of the Interior

On October 20, 2006, former OPA Director Sara Taylor sent an e-mail to several OPA Associate Directors informing them that Secretary Dirk Kempthorne “Wants to help Taylor, Pombo and Gov. Pawlenty.” North Carolina Representative Charles Taylor was seeking reelection in 2006 and was listed as a “Tier 1” priority on OPA’s target list.<sup>155</sup> Former DOI appointees testified that when Secretary Kempthorne expressed a desire to help elected officials

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<sup>153</sup> The names of the individual e-mail account holders were redacted before the documents were produced to OSC. OSC was unable to determine the identities of these individuals.

<sup>154</sup> Specifically, he said that “there was certainly official travel going on [in 2007] . . . it just may have been that they didn’t come through our office at that time.”

<sup>155</sup> Similarly, California Representative Richard Pombo and Minnesota Governor Tim Pawlenty were up for reelection in 2006.

in 2006, they interpreted it to mean he wanted to help those individuals with their reelection efforts.

In response to the October 20, 2006, e-mail, the OPA Associate Director responsible for the region including North Carolina noted that a “mock-up” of a proposed Visitor’s Center in Representative Taylor’s district might provide a good backdrop for an event with Secretary Kempthorne and Representative Taylor. Ms. McLaughlin forwarded information about the Visitor’s Center, along with a point of contact on Representative Taylor’s staff, to the scheduling staff at DOI. The trip agenda indicated that between 3:00 and 3:30 p.m. on November 6, 2006, an open press event would take place at the Blue Ridge Parkway Headquarters, the site of the mock-up of the proposed new Visitor’s Center. In addition to touring the parkway, Secretary Kempthorne was scheduled to participate in a 30-minute press conference along with Representative Taylor and the North Carolina Transportation Superintendent. Secretary Kempthorne and Representative Taylor were each set to deliver remarks, but the Superintendent was not. According to DOI trip authorization documents, Secretary Kempthorne’s travel to tour the Blue Ridge Parkway and the Visitor’s Center mock-up was classified as “official business.” The stated purpose of the trip was to “tour/participate in the Blue Ridge Parkway Destination Center Construction Project with Congressman Charles Taylor and [National Park Service] employees.”

There is no evidence that DOI had any plans for Secretary Kempthorne to travel to North Carolina for a tour of the Visitor’s Center mock-up or the Blue Ridge Parkway before the Secretary expressed an interest in helping Representative Taylor. Rather, the evidence supports a conclusion that OPA coordinated the event in order to help Representative Taylor on the eve of the election.<sup>156</sup> Based on the event’s immediate proximity to the date of the election, Secretary Kempthorne’s personal interest in providing assistance to Representative Taylor’s reelection bid, and the absence of preexisting plans for Secretary Kempthorne to tour those locations, OSC concludes that the Secretary’s attendance at the November 6 event was political activity. Any official funds spent on Secretary Kempthorne’s travel to this event, without subsequent reimbursement to the U.S. Treasury, were expended in violation of the Hatch Act.

In addition, OPA’s Suggested Memorandum to DOI shows that on November 3, 2006, Secretary Kempthorne traveled to Phoenix, Arizona, for an “Official Native American Event” with Arizona Representative Rick Renzi. The following day, Secretary Kempthorne attended a second event with Representative Renzi in Payson, Arizona. OPA’s target list identified Representative Renzi as a “Tier 2” priority in 2006, and the event appeared on the Final Push Matrix discussed in Chapter Four. According to the trip agenda prepared by DOI staff, the Payson event was labeled “open press” and the event’s intended purpose was to provide

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<sup>156</sup> A review of the 2006 Suggested Memoranda shows that Representative Taylor hosted two other official events with high level agency officials.

“Remarks and Discussion on Fire Danger to Payson, AZ with Congressman Renzi.” Secretary Kempthorne’s talking points for the event included statements such as, “I am delighted to be here in Payson with Rep. Rick Renzi, whom I have known for many years and who is a strong and effective advocate for your interests in the Congress,” and “Rick Renzi has been a champion of the need for thinning and removing hazardous fuels . . . and is also working to resurrect local timber businesses in rural Arizona.” DOI classified both of the Renzi events as official.

The circumstances surrounding Secretary Kempthorne’s trip to Arizona suggest a political motive. Again, the proximity of November 3 and 4 events to the date of the election, as well as their being on the Suggested Memorandum to DOI and the Final Push Matrix, respectively, raise questions as to the events’ true purpose. Moreover, Secretary Kempthorne’s praise for Representative Renzi’s performance in Congress at the Payson event was a clear political endorsement before the media. As discussed earlier, events featuring high-level agency political appointees and candidates in close races are intended to draw positive attention, earn media, and potentially influence the outcome of contentious races. In this context, Secretary Kempthorne’s appearances with Representative Renzi were official in name only. In reality, these events constituted political activity because they were directed toward Representative Renzi’s electoral success. As such, reimbursement of travel-related costs and expenses for the November 3 and 4 events should have been sought and obtained within a reasonable time. Failure to do so was a misuse of U.S. Treasury funds and a violation of the Hatch Act. To date, OSC has received no information that reimbursement has occurred.

#### **4. Office of National Drug Control Policy**

On April 4, 2006, a political appointee at ONDCP prepared a pre-travel document entitled “Read Ahead for the Deputy Director Maryanne Solberg” in anticipation of an April 11, 2006, event with Representative John Doolittle of California. Representative Doolittle was identified by OPA as a “Tier 2” targeted incumbent. The pre-travel document detailed two roundtable discussions between Deputy Director Solberg and Representative Doolittle on April 11 and 12, and stated that the purpose of these events was “to support Congressman Doolittle who holds a vulnerable seat in this election, and to give local communities in his district an idea of programs they can implement to fight drug use in their area.” The events were classified as official and ONDCP did not seek reimbursement for Deputy Director Solberg’s travel costs. However, an event, the purpose of which is to “support” a candidate who “holds a vulnerable seat in this election,” cannot legitimately be designated as official. Participation in that type of event was political activity as defined by the Hatch Act, and using U.S. Treasury funds to pay for the costs related to this travel, without seeking and obtaining timely reimbursement, was a violation of the Hatch Act.

The evidence also shows that another ONDCP official engaged in travel that was incorrectly classified as official. Specifically, Jack Claypoole, Administrator of the Drug Free Communities program, spoke to the Bucks County, Pennsylvania, drug-free coalition along with Pennsylvania Representative Michael Fitzpatrick on October 23, 2006.<sup>157</sup> Representative Fitzpatrick's 2006 reelection bid was highly contentious, and OPA identified him as a "Tier 1" priority on the target list. Three months before the event, Administrator Claypoole asked the White House liaison whether more than one event could take place during the Bucks County trip given that there were numerous drug-free coalitions there and "support for Congressman Fitzpatrick" could be garnered. In subsequent discussions between Administrator Claypoole and the White House liaison about the event, the liaison rejected a proposal to extend an invitation to the event to Pennsylvania Senator Arlen Specter, explaining: "I vote no on Specter [sic] and I doubt he'll even show. We are doing this event for Fitzpatrick. We want him to get all of the attention."

This event was designated as official because, as a former ONDCP employee testified, in 2006, ONDCP "was not involved in political travel."<sup>158</sup> Nonetheless, the facts indicate that the trip to Bucks County had a strong partisan political component, despite its general relevance to drug policy. The proximity of this event to the November 7, 2006, election, Administrator Claypool's belief that his appearance at the event would help obtain "support for Congressman Fitzpatrick," and the White House liaison's desire to ensure that Representative Fitzpatrick would "get all of the attention" created by the event, indicate that the real reason for the event was to help get Representative Fitzpatrick reelected. Indeed, Administrator Claypoole's e-mail to the White House liaison suggests that the large number of drug-free coalitions in Bucks County provided a pretext for him to go there and help Representative Fitzpatrick. Thus, the event was political activity for Hatch Act purposes, and reimbursement of travel-related costs and expenses should have been sought and obtained within a reasonable time. Failure to do so was a violation of the Hatch Act.

## **5. Department of Housing and Urban Development**

On October 31, 2006, seven days before the midterm elections, HUD Secretary Alphonso Jackson traveled to Connecticut. Upon arrival, the Secretary made a brief stop at a local HUD field office, and then traveled to the district of Connecticut Representative Rob Simmons, considered a "Tier 1" candidate on OPA's Final Push Matrix. Secretary Jackson spent 45 minutes with Representative Simmons visiting the Welles Country Village Retirement Home and

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<sup>157</sup> Contemporaneous e-mails from the BlackBerry of Administrator Claypoole acknowledge his presence at the October 23, 2006, event.

<sup>158</sup> In fact, federal law prohibits all PAS at ONDCP from engaging in federal election campaign activity. See 21 U.S.C. § 1703(a)(5). Although the statute did not prohibit Administrator Claypoole from engaging in such activity because he was not a PAS, a former ONDCP employee told OSC that, internally, ONDCP extends the prohibition to all ONDCP employees.

making a grant announcement. Secretary Jackson then traveled across the state to meet with Representative Nancy Johnson,<sup>159</sup> who was also listed on the Final Push Matrix as a “Tier 1” Republican incumbent. The Secretary made a separate grant announcement in Representative Johnson’s district, at the Daughters of Mary of the Immaculate Conception. Both grant announcements were classified as official HUD events.

Both Representative Simmons and Representative Johnson were involved in hotly contested races in 2006. That the October 31 events took place within one week of the election and were tracked by OPA as part of the “final push” efforts suggest that Secretary Jackson’s appearance at both events constituted political activity as defined by the Hatch Act. Again, using U.S. Treasury funds to pay for the costs related to these events, without seeking and obtaining reimbursement of those funds, violated the Hatch Act.

In addition to the October 31 travel, OPA’s 2006 Suggested Memorandum to HUD lists as “completed” an April 19, 2006, fundraiser on behalf of Representative Elton Gallegly of California. Travel records obtained from HUD reflect that Secretary Jackson attended a political event in California on April 19, 2006. Specifically, on April 14, 2006, an agency employee sent an e-mail to HUD’s White House liaison and approximately 20 other agency officials with the subject line, “Political event added in Los Angeles on 4/19.” A document labeled “Gallegly 4-19-06” was attached to the e-mail.<sup>160</sup> In addition, the Secretary’s Event Information Sheet indicated that a fundraiser for Representative Gallegly featuring Secretary Jackson was scheduled for April 19, 2006. Moreover, documents submitted by Representative Gallegly’s Principal Campaign Committee to the Federal Election Commission (FEC) indicated that on April 19, 2006, 11 individuals made contributions to his campaign. By contrast, Secretary Jackson’s travel voucher only accounted for roundtable discussions and two keynote addresses that took place on April 18, 19, and 20. The agency’s Associate General Counsel classified the entire April trip as “official travel” in a memorandum dated April 28, 2006. Neither the travel voucher nor the memorandum mentioned the Gallegly fundraiser. During its investigation, OSC found no evidence that reimbursement was sought for the costs associated with Secretary Jackson’s attendance at that event.

The Gallegly fundraiser is only one of several examples of HUD’s failure to account for a political event attended during mixed travel. Also listed by OPA on the 2006 Suggested Memorandum as “completed” was a June 9, 2006, fundraiser with Representative Thad McCotter in Detroit, Michigan. Internal HUD documents noted that Secretary Jackson was in Detroit on June 9 and June 10, 2006, to visit HUD’s Detroit field office and to give the keynote address at a Council on Legal Education Opportunity seminar. However, the Associate General Counsel’s memorandum concerning the Detroit trip did not reference the McCotter fundraiser.

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<sup>159</sup> As described above, Congresswoman Johnson hosted at least eight more agency heads during her campaign.

<sup>160</sup> The attachment was not produced to OSC.

After discussing only the field office visit and the seminar, the Associate General Counsel concluded that “this was official travel.”

OSC was not provided with any documents indicating that HUD sought reimbursement of the costs associated with Secretary Jackson’s travel to the McCotter fundraiser. Of particular concern are the memoranda prepared by HUD’s Office of the General Counsel (OGC), which omitted any reference to the Gallegly and the McCotter fundraisers.<sup>161</sup> Without specifying that a trip includes both official and political components, agencies cannot properly apportion the costs associated with political activity, and, consequently, U.S. Treasury funds are improperly used to pay for the costs of partisan political activity.

A third instance of HUD’s failure to seek reimbursement of costs associated with political activity occurred with respect to an October 12, 2006, “community event” that Secretary Jackson attended in Minnesota with Representative Mark Kennedy, who was a candidate for the U.S. Senate in 2006. The event was designated as political on Secretary Jackson’s Confidential Schedule and Travel Order Request and Authorization. Specifically, the Secretary’s Confidential Schedule reflects that on October 12, 2006, Secretary Jackson was to participate in approximately 45 minutes of official activity and one hour of political activity, thus obliging the Kennedy campaign to bear financial responsibility for over 50 percent of the total travel costs. OPA identified the fundraiser as “completed” on the 2006 HUD Suggested Memorandum. However, a memorandum from HUD’s Acting Associate General Counsel apportioned the trip as 91 percent official and 9 percent political. During its investigation, OSC asked OGC about this discrepancy. In response, HUD acknowledged that the Kennedy campaign actually owed 57 percent of the total trip cost, or \$542.46, as opposed to the \$85.85 previously assessed. However, HUD has provided no evidence showing that the balance owed for Secretary Jackson’s political travel has been sought or received by HUD. Therefore, U.S. Treasury funds apparently were used to finance Secretary Jackson’s political activity in violation of the Hatch Act.

Finally, OPA’s Suggested Memorandum for HUD indicates that on October 27, 2006, Secretary Jackson attended two events with Representative Shays in Connecticut. HUD documents show that on that date, Secretary Jackson went to a “political reception” and luncheon with Representative Shays. As late as March 11, 2009, however, HUD acknowledged that the Shays campaign owed an outstanding balance of \$232.30 because the agency previously had miscalculated the political portion of the Secretary’s trip. To date, HUD has not produced any evidence showing that it has sought or received reimbursement for the outstanding costs. Again, failure to obtain timely reimbursement violates the Hatch Act.

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<sup>161</sup> OSC is uncertain whether the OGC attorneys were ever informed of the events, believed that the Secretary’s attendance at the events did not need to be taken into account when classifying the Secretary’s travel, or consciously excluded the events from their analyses.

## 6. Department of Education

On February 23, 2006, DOEd Secretary Margaret Spellings attended two events with Rick O'Donnell, a "Tier 1" candidate from Colorado who was running for a seat in the U.S. House of Representatives. At the time, Mr. O'Donnell was Chairman of the Colorado Commission on Higher Education. The first event was a fundraising breakfast for Mr. O'Donnell and was classified as "political" by DOEd. Following the fundraising breakfast, Secretary Spellings attended an event described as "Remarks and Q&A with Rick O'Donnell." This second event was classified as official. After the trip, DOEd determined that O'Donnell's campaign was responsible for 35 percent of the costs of Secretary Spellings' trip to Denver on that date.

A look behind the scenes, however, shows that Secretary Spellings' attendance at the second event actually was intended to support Mr. O'Donnell's campaign. On February 7, 2006, an individual from O'Donnell's campaign staff sent an e-mail to Surrogate Scheduler McLaughlin with the subject line, "RE: Spellings event for O'Donnell on 2/23" using an e-mail address ending in "rickodonnell.com." The staff member asked: "Do you need a proposal today? We definitely would like to schedule an event in the Denver area that morning." The campaign staff member continued: "We are thinking a fundraising breakfast round-table and then we could pop into a school on the way to the airport . . . . Yes we definitely want her and I will get back to you with a proposal shortly." Thereafter, Ms. McLaughlin e-mailed the campaign's proposal to the White House liaison at DOEd, who, in turn, forwarded it to the agency's OGC. The origin of the proposal, i.e., a campaign staff member, could be traced on this e-mail chain.

The campaign's proposal, which was entitled "Proposed Schedule with Rick O'Donnell[,] Candidate for U.S. House of Representatives, CO-7," began, "The following proposed schedule assists the campaign both with fundraising as well as earned media by playing to Mr. O'Donnell's strengths as the Governor's Cabinet appointee overseeing the Colorado Commission on Higher Education." The proposal then outlined the itinerary for both events, listing the purpose of the second event as "Earned media." The second event was described as a town hall meeting at a local school, where the Secretary would speak about "her priorities regarding high school reform" and "[reflect] on the important work Colorado is undertaking in this area under Mr. O'Donnell's leadership." OGC attorneys told the White House liaison that the introductory language "raises issues," so the campaign subsequently submitted another proposal that was identical to the first except for the introductory language, which had been changed to read, "Mr. O'Donnell is the Governor's Cabinet appointee overseeing the Colorado Commission on Higher Education." As a result, Secretary Spellings attended the event and DOEd used appropriated funds to pay for it. Because this event evolved from the request of a candidate's campaign to "assist the campaign" by earning media and highlight the candidate's



“important work,” it should not have been classified as official.<sup>162</sup> Using appropriated funds to send Secretary Spellings to the event violated the Hatch Act.

## **7. Department of Agriculture**

On November 1, 2006, USDA Secretary Mike Johanns took a two-day trip to New Mexico, Arizona, and Nevada for three “final push” events involving Representative Wilson, Representative Renzi, and Senator Kyl. OPA’s target list prioritized these incumbents as follows: Representative Wilson was a “Tier 1” priority; Representative Renzi was a “Tier 2” priority; and Senator Kyl was a targeted Senator. According to the travel schedule, Secretary Johanns was to travel to the Albuquerque Forest Service Human Capital Management Facility for a media briefing and a tour of the facility with, among others, Representative Wilson and New Mexico Senator Pete Domenici.<sup>163</sup> Later that day, the Secretary was scheduled to attend an Arizona Republican Party Photo Opportunity and Reception with Senator Kyl. A roundtable discussion with Representative Renzi was scheduled for the following day, November 2, 2006, at 7:30 a.m. USDA classified two of these three events as official.

OSC disagrees with these classifications. The Arizona Republican Party Photo Opportunity and Reception was obviously political and it was properly classified and processed for reimbursement. The other two events, however, appeared on OPA’s Final Push Matrix and took place within a week of the midterm elections, indicating a political motivation for the events. Additionally, the two candidates were involved in highly competitive races that were targeted by OPA. As a result, Secretary Johanns’ attendance at these events was political activity as defined by the Hatch Act and a reimbursement of travel-related costs and expenses should have been sought and obtained within a reasonable time. Failure to do so was a violation of the Hatch Act.

## **8. Department of Health and Human Services**

According to OPA’s Suggested Memorandum to HHS, on October 27, 2006, Secretary Michael Leavitt attended a fundraiser for Senate candidate Mark Kennedy in Minneapolis, Minnesota. On or about October 27, 2006, “Mark Kennedy ‘06” filed a “48 Hour Notice of Contributions/Loans Received” form with the FEC. The FEC Notice identified eight individuals who, on October 27, 2006, made substantial donations to “Mark Kennedy ‘06.” However, the documentation provided to OSC by HHS regarding the Secretary’s October 27, 2006, travel to

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<sup>162</sup> OSC notes that in February 2006, before OSC began the investigation that prompted this report, OSC advised attorneys at DOE that Secretary Spellings could attend the town hall meeting in her official capacity as long as the discussion covered only official topics. OSC was not privy to the e-mails or the proposal from the campaign until they were produced in 2009 in connection with this investigation. This incident underscores the importance of taking into account all available information before determining whether an event is official or political. For more on this, please see the Recommendations section below, *infra* pp. 93-103.

<sup>163</sup> Senator Domenici was not seeking reelection in 2006.

Minnesota indicates that the trip was classified as official, despite his attendance at a political fundraiser. In fact, the “remarks” sections of the Secretary’s Traveler Authorization and Travel Voucher identified the official purpose of the travel as “Value Driven Healthcare.” Failure to determine what percentage of U.S. Treasury funds was used to pay for political activity, and ensuring that those costs were reimbursed to the Treasury, was a violation of the Hatch Act.

## **9. Small Business Administration**

OPA’s 2006 Suggested Memorandum to SBA listed as completed two October 2, 2006, events involving SBA Administrator Steve Preston and Montana Senator Conrad Burns. OPA’s Final Push Matrix identified Senator Burns as being in a targeted race. OPA listed one of the events with Senator Burns as official on its Suggested Memorandum; the second event was identified as a “Political Small Business event.” By contrast, an SBA press release publicizing both events stated that Administrator Preston and Senator Burns would be announcing the opening of a satellite office in Billings, Montana, followed by a “small business roundtable.” Based on the records SBA provided, OSC found no indication that any portion of Administrator Preston’s trip was classified as political or that the agency sought reimbursement of the appropriate portion of the travel expenses. Arguably, however, the timing of the events and the fact that Senator Burns was in a targeted race, suggest that both events may have occurred for political purposes. Moreover, because Administrator Preston attended an event on October 2, 2006, that OPA called a “Political Small Business event” on the Suggested Memorandum, OSC believes it may have been political activity. If the true nature of these events was indeed political, as the evidence suggests, then reimbursement of costs and expenses should have been sought and received by SBA within a reasonable time after the event.

## **10. Department of Energy**

Finally, the evidence shows that in addition to the customary costs of travel such as lodging, meals, and transportation expenses, at least one Cabinet member used government-owned aircraft, rather than commercial or private airlines, to travel to several events recommended by OPA and hosted by targeted candidates. Specifically, several DOE documents entitled “Request for Official Travel on Government Aircraft” indicate that in 2006, Secretary Samuel Bodman used Department of Defense and Federal Aviation Administration aircraft to travel to six events with Republican incumbents appearing as priorities on OPA’s target list.

The six events were: (1) a January 6, 2006, Energy Summit with Pennsylvania Representatives Tim Murphy and Melissa Hart, who were “Tier 3” priorities on the target list;<sup>164</sup> (2) a February 23, 2006, visit to GT Solar Technologies with New Hampshire Representative

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<sup>164</sup> \$2,100 for Federal Aviation Administration aircraft.

Charles Bass, a “Tier 2” incumbent;<sup>165</sup> (3) a June 2, 2006, Fuel Cell Technology Event with Representative Simmons, a “Tier 1” incumbent;<sup>166</sup> (4) an October 10, 2006, Energy Event with Representative Chabot, a “Tier 1” priority on the target list;<sup>167</sup> (5) an October 11, 2006, Energy Event with Indiana Representative Chris Chocola, another “Tier 1” priority; and (6) an October 27, 2006, Energy Event included on the Final Push Matrix with Representative Davis, also a “Tier 1” priority.<sup>168</sup> Collectively, the total airfare for these six trips cost approximately \$30,795. At this time, OSC has insufficient information to reach a conclusion as to whether one or more of these events should have been classified as political and reimbursement should have been sought. Due to the seriousness of using government aircraft to attend political events, however, OSC has opened a separate investigation into these events.

### **III. Discussion and Recommendations**

At the outset, we note that the trips discussed in this chapter most likely are not the only instances in which agency officials traveled for political purposes with appropriated funds. Many agencies were unable to produce the relevant documents to OSC due to the passage of time and other factors. Thus, the amount of money improperly used for political trips that agencies classified as official likely is much greater than what is reflected in this report. This underscores the need for agencies to properly distinguish political events from official ones.

As the trips described above demonstrate, the line between official and political is not always clear at first glance. In order to avoid using funds derived from the U.S. Treasury to pay for the political activity of § 7324(b) employees such as those mentioned in this chapter, agencies must be able to determine whether events attended by these high-level agency political appointees are directed toward the success of a political party, partisan political group, or candidate for partisan political office. Any event meeting that definition must be classified as “political” and the agency political appointee’s travel costs associated with attending the event must be reimbursed to the U.S. Treasury. Even in cases of mixed travel, the travel costs and expenses must be properly apportioned.<sup>169</sup>

The evidence shows that when classifying events attended by high-level agency political appointees, agencies often employed either a “reasonable relation” standard set forth in a 1982 OLC opinion, or looked at whether the event would include express advocacy, to determine whether travel expenses must be reimbursed to the U.S. Treasury. Below, OSC explains why these standards are not applicable to determining whether an agency political appointee’s

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<sup>165</sup> \$10,000 for Department of Defense aircraft.

<sup>166</sup> \$4,600 for Department of Defense aircraft.

<sup>167</sup> \$10,000 for Federal Aviation Administration aircraft, multi-day trip including October 10-11, 2006.

<sup>168</sup> \$4,095 for Federal Aviation Administration aircraft.

<sup>169</sup> See 5 C.F.R. § 734.503(c)(1) (providing the formula for determining the proper allocation of costs for mixed travel).

attendance at an event implicates the Hatch Act, and provides advice for future classification in accordance with the Act. Only a candid, comprehensive review of the facts surrounding an event will prevent the improper payment of U.S. Treasury funds for political activity.

### **A. Non-Hatch Act Standards Are Inapplicable**

Based on an OLC opinion titled “Payment of Expenses Associated with Travel by the President and Vice President,” some agencies were under the impression that if a proposed event was “reasonably related” to an official purpose, then the event could be designated as official.<sup>170</sup> However, this opinion is inapposite because the President and the Vice President are explicitly exempt from the Hatch Act’s prohibitions.<sup>171</sup> Indeed, by its terms, the opinion is limited to “the unique context presented by the peculiar functions and responsibilities of the President and Vice President” in that they have dual roles – official roles as governmental leaders and political roles as leaders of their political party.<sup>172</sup> “Thus, it is simply not possible to divide many of the actions of the President and Vice President into utterly official or purely political categories. To attempt to do so in most cases would ignore the nature of our political system and the structure of our government.”<sup>173</sup>

All other federal executive branch employees, on the other hand, have only official functions and are subject to the Hatch Act; therefore, a distinction can and must be made between their official and political activities. The Hatch Act forbids the use of federal funds to pay for even the permissible political activity of § 7324(b) employees. Because of the OLC opinion’s narrow focus on Presidential and Vice Presidential travel, the standards articulated in the opinion do not apply to classifications of travel by political appointees, including agency heads and other high-level officials.

The second standard upon which agency personnel often relied in designating travel as official or political is whether the high-level agency political appointee would expressly advocate for a candidate at the event. Witnesses testified that an event held with an incumbent was deemed “official” if the agenda did not include speeches or other activity that overtly promoted the reelection of the incumbent. Furthermore, even events likely to have electoral consequences could be classified as official as long as no one expressly advocated for the election (or defeat) of a candidate.

Neither the Hatch Act nor its regulations require an activity to include express advocacy for or against a candidate to constitute political activity. Rather, the Hatch Act regulations define

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<sup>170</sup> See 6 Op. Off. Legal Counsel 214 (1982), 1982 WL 170689; Political Trips Memorandum, *supra* note 130 (addressing “Political Trips” taken by the President and Vice President).

<sup>171</sup> See 5 U.S.C. § 7322(1).

<sup>172</sup> 6 Op. Off. Legal Counsel at 215.

<sup>173</sup> *Id.*

political activity more broadly as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”<sup>174</sup> There is no requirement that an employee explicitly advocate for or against a candidate. Instead, an appearance at an event constitutes political activity if the aim of the appearance is the success or failure of a political party, partisan candidate, or partisan group. Accordingly, the express advocacy standard is too narrow to use when evaluating agency officials’ travel for purposes of the Hatch Act.

## **B. Correctly Classifying Events as Official or Political for Hatch Act Purposes**

Because the standards described above are inapposite for Hatch Act purposes, determining whether travel by high-level agency political appointees should be classified as official or political under the Hatch Act requires a frank and thorough factual analysis of each event. While events like fundraisers and rallies, for example, can easily be identified as political, the nature of other events is less obvious. Ostensibly, many of the events on OPA’s Suggested Memoranda to the agencies bore some relation to the pertinent agency’s overall mission. Given the circumstances, however, the mere existence of a “reasonable relation” or the absence of express advocacy does not suffice to properly classify an event as official because it could still be held for the electoral interests of a partisan political candidate.<sup>175</sup> Recall the Surrogate Scheduler’s e-mail to DOL White House liaison asking whether the Secretary could make a grant announcement in person in California, rather than from Washington, D.C., in order to earn media for two targeted incumbents. While awarding grants can be an official activity, this e-mail reveals the manipulation of agency business to help targeted candidates. In light of this practice, more than a “reasonable relation” to an agency’s business is required to classify an event as official. For Hatch Act purposes, care must be taken to ensure that the official nature of an event is bona fide, substantial, and not merely a guise for a political endorsement.<sup>176</sup>

To do so, agencies must take into account all relevant facts to identify the predominant purpose of the event in question. Examples of circumstances to consider include: (1) the type of event and the reason for holding it; (2) whether candidates (including incumbents seeking

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<sup>174</sup> 5 C.F.R. § 734.101.

<sup>175</sup> To illustrate, in 2006, numerous “official” events were listed on OPA’s Suggested Memoranda as “retracted,” i.e., the invitation had been withdrawn by the requester. If the event is truly “official,” questions arise as to the real purpose of an event when the agency political appointee does not attend the event after the invitation is withdrawn by the requesting party, who, during an election year, is often a vulnerable incumbent.

<sup>176</sup> Using marginally business-related events to justify official travel also has occurred in the context of hometown visits by high-level government officials. Gregory Walden, former counsel to Presidents Reagan and George H.W. Bush, has written and testified before Congress on this topic, and many of his recommendations are also applicable to distinguishing truly official events from political ones. See Gregory S. Walden, On Best Behavior: The Clinton Administration and Ethics in Government 479-489 (Hudson Inst. 1995); Compliance by Senior Executive Branch with Federal Travel Guidelines: Hearing Before the Subcomm. on Government Management, Information and Technology of the H. Comm. on Government Reform and Oversight, 104th Cong. (1996) (statement of Gregory S. Walden).

reelection) will be present at the event and what their role will be; (3) the relationship, if any, between the event and official agency business; (4) whether a candidate's request is one reason for the agency political appointee to attend the event; (5) whether the event was scheduled prior to a candidate's involvement or after; (6) the agency political appointee's motivation for attending the event; (7) the frequency of similar types of events during non-election years and whether agency political appointees participated in such events in those years; (8) the proximity of the event to the date of the election; (9) who invited the agency political appointee to attend (e.g., congressional office, campaign staff, OPA, other agency officials, political party); (10) the parties responsible for planning and organizing the event; (11) whether the event is open or closed to media; (12) remarks made during the event by any person; and (13) other event invitees and the audience, i.e., whether party operatives or donors will be present.<sup>177</sup> Only a candid analysis of all the circumstances will reveal whether the official aspect of an event is bona fide or just a pretext for helping a candidate. Failure to classify events with the Hatch Act in mind will continue to result in the unlawful use of U.S. Treasury funds to pay for political activity.

For example, proximity of the event to the date of an election is a critical factor. Candidates seek to gain voter support in the final months and weeks before an election by, among other things, earning media to show what they are doing or will do for their constituents. Official appearances with Cabinet members and other high-level agency political appointees draw positive attention to candidates and their campaigns and the evidence demonstrates that OPA used administration assets the most during the final three months before the 2006 elections.

Most of the events described in this chapter occurred in the last few months before the November 2006 elections. During that time, the pressure to earn positive media attention is the most acute and, as Mr. Jennings explained, members of Congress are “desperate to get on television” in the fall of an election year. Research shows that media coverage during the final three months before an election is more valuable than coverage earlier in the cycle. For example, on June 8, 2006, the FEC transmitted to Congress its revised regulations regarding communications that are coordinated with political parties and candidates for federal office.<sup>178</sup> These regulations address whether such advertisements and communications would constitute an in-kind contribution to the candidate or party. In its Explanation and Justification, the FEC stated that “commentators agreed that a time frame is helpful in identifying communications that

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<sup>177</sup> This list is intended to serve as a guide. OSC notes that in some cases, one or more of these considerations may not apply, and that depending on all the circumstances, some may be more useful than others in classifying an event. In addition, this is not an exhaustive list. Other facts peculiar to an event tending to indicate the nature of an event may exist in some cases, and they should be considered as well.

<sup>178</sup> 71 Fed. Reg. 33190 (June 8, 2006) (codified at 11 C.F.R. § 109). In response to the decision of the Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008), the FEC revised its regulations regarding coordinated communications, effective December 1, 2010. These revisions do not affect the information cited in this report.

are made for the purpose of influencing an election” and that “proximity to an election factors into the value of the communication.”<sup>179</sup> The FEC further noted:

[N]early all Senate and House candidate advertising takes place within 60 days of an election. Senate candidates aired 91.60 percent and 94.73 percent of their advertisements within 60 days of the primary and general election respectively. . . . House candidates aired 88.16 percent and 98.09 percent of their advertisements within 60 days of the primary and general elections, respectively.<sup>180</sup>

Additionally, the report stated that earlier than 90 days before an election, “the amount of candidate advertising approaches zero.”<sup>181</sup>

VA Secretary Nicholson’s October 10, 2006, trip to Ohio to tour a future ambulatory clinic, meet with veterans, and hold a press conference with Representative Pryce illustrates the importance of the time frame in which an event occurs. For that event, Ms. McLaughlin repeatedly checked in with the White House liaison at the VA about “deploying” the Secretary to events that would be “beneficial at crunch time,” and that an event with Representative Pryce needed to “happen somewhere between October 9 – November 3<sup>rd</sup> to be the most effective.” The fact that the event took place not only within the last three months before the election, but also within the time frame suggested by Ms. McLaughlin, shows a clear political motivation for the Secretary’s attendance, despite its loose connection to VA business. OSC therefore recommends that heightened scrutiny occur when classifying events as official when the events are planned to take place in the final three months preceding an election.

The Nicholson/Pryce event, to which Ms. McLaughlin repeatedly referred as a “top priority” because it would be “beneficial at crunch time,” demonstrates another important consideration when classifying an event – whether the event is organized before or after plans are made to have the agency political appointee meet with a candidate. Put another way, the individual responsible for classifying the event must ask whether the event would have been planned absent an invitation from a candidate. Here, the clinic tour and meet-and-greet were planned only after both Representative Pryce and OPA contacted the VA asking for the Secretary to appear with Representative Pryce. In fact, on September 22, 2006, more than one month after the event had been proposed and less than three weeks before the event took place, the agenda for the event had yet to be established. Thus, it seems obvious that VA and OPA staff arranged the event to put Secretary Nicholson next to a vulnerable incumbent less than one month before

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<sup>179</sup> 71 Fed. Reg. 33194 (June 8, 2006).

<sup>180</sup> Id.

<sup>181</sup> Id.

the election – and made it appear official so the candidate would not have to pay for the publicity. But these facts were ignored, and the event was classified as official.

DOI Secretary Kempthorne’s November 6, 2006, event with Representative Taylor is another example of an agency ignoring indications that an event is politically motivated and classifying it as official. The Secretary had no plans to visit North Carolina until he told Ms. Taylor that he wanted to help Representative Taylor get reelected. Subsequently, it was an OPA employee, not a DOI staff member, who suggested the Secretary visit a mock-up of a proposed Visitor’s Center at the Blue Ridge Parkway Headquarters. This event was arranged not to further DOI business, but to bring positive attention to Representative Taylor on the eve of the election.

The Kempthorne/Taylor event also highlights the importance of the traveler’s own motivation when determining whether an event is official or political. Secretary Kempthorne wanted to help Representative Taylor, and this desire was the impetus for scheduling the event. Similarly, DOT Acting Secretary Cino believed that the purpose of her attending the November 2, 2006, transportation tour in Connecticut was “to campaign for Nancy Johnson.” Had the individuals responsible for classifying travel taken into account the travelers’ motivations, they would have seen that the events were held for political purposes. Even though these officials were permitted to engage in political activity while on duty, they should not have used their positions and agency resources to do so. Rather, the cost of attending these events should have been reimbursed to the U.S. Treasury because they were directed at the success of partisan political candidates.

Likewise, planning official agency events to accommodate a request from a member of Congress who is seeking reelection calls into question the purpose of an event. Events truly necessary to carry out agency business ordinarily are proposed and planned by agency staff. Requests from congressional incumbents for an agency principal to attend an event, particularly in the last three months before an election and with media present, indicate that legislators are attempting to use the executive branch to further their electoral goals. OPA encouraged and facilitated this practice during the Bush II administration, resulting in the expenditure of untold amounts of U.S. Treasury funds that had been appropriated to accomplish the agency’s mission – not to “get Republicans elected.”

Similarly, when a request for a high-level political appointee to attend an event originates with campaign staff, rather than congressional staff or a candidate’s employing office, alarm bells should ring. For example, the so-called “official” event with DOEd Secretary Spellings and candidate O’Donnell originated with Mr. O’Donnell’s campaign staff, not his official staff at the Colorado Commission on Higher Education. DOEd’s OGC was aware of this, as well as the campaign’s proposal stating that the event would assist Mr. O’Donnell’s campaign through earned media, but did not view these as relevant facts in determining whether Secretary Spellings



could attend in her official capacity. On the contrary, all available information concerning the origin of a proposed event is relevant and should be carefully considered.

In addition, agency staff will need to inquire whether the event is open or closed to the media, and if a candidate will be present, what his or her role will be. Special attention should be paid to events where an incumbent is going to make a speech, provide any remarks, participate in a photo opportunity, or receive any type of attention from the media. Likewise, if the agency official intends to speak at an event, the content should be vetted to ensure it is free of any language that could be interpreted as endorsing a candidate for partisan elected office. For example, a close evaluation of DOI Secretary Kempthorne's November 4, 2006, talking points concerning Representative Renzi – that he is a “strong and effective advocate for your interests in the Congress” – along with the fact that the event was open to the press, should have signified to DOI staff that the event was political rather than official. Likewise, DOEd Secretary Spellings' remarks, proposed by the campaign as “reflecting on the important work Colorado is undertaking . . . under Mr. O'Donnell's leadership” at an open-press event should have raised a red flag concerning the real reasons for the event, particularly given the campaign's statement that such an event would assist Mr. O'Donnell's campaign by earning media. An agency official's remarks, as well as all other aspects of an event, should also be assessed after a trip is completed to be sure that an event initially labeled official in fact included only official activities before allowing U.S. Treasury funds to pay for the trip.

To ensure that each event receives an objective and candid review, OSC recommends that career staff be involved in determining whether an event is official or political. In particular, the Designated Agency Ethics Official (DAEO), after being supplied with all the relevant facts, communications, and circumstances, should analyze whether the Hatch Act would permit the use of U.S. Treasury funds. The DAEO should review every event on the official's itinerary so that in the case of mixed travel, the costs of political events can be apportioned. This review should be completed in advance of the travel and also upon completion of the event to make certain that the costs of political activity are not paid with official funds.

### **C. Obtaining Reimbursement for the Costs of Traveling to Political Events**

When agencies designate travel as political based on the foregoing factors, two important considerations remain. First, the Hatch Act requires that if U.S. Treasury funds were used to pay for the official's travel to a political event, the agency must seek and receive reimbursement of those costs in a timely manner.<sup>182</sup> The evidence shows that at several agencies, the costs and expenses associated with political travel were never reimbursed to the U.S. Treasury. When an

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<sup>182</sup> 5 C.F.R. § 734.503(a). In the case of mixed travel, i.e., where a § 7324(b) employee attends both official and political events during the same trip, the total travel costs must be apportioned according to the time spent at each event. See 5 C.F.R. § 734.503(c) (explaining the formula for apportioning travel costs).

agency is unable to recoup the costs of travel to a political event from the relevant campaign, political group, or political party in a timely manner, the traveler, that is, the agency Secretary or other high-level political appointee, ultimately should be responsible for refunding the outstanding amounts. Indeed, the political activity of a federal employee, including §7324(b) employees, is personal activity.

OSC recommends that the Hatch Act regulations be amended to require agencies to obtain payment in advance for costs and expenses associated with traveling to a political event. A system to receive prepayment should be in writing and should include career staff, such as the DAEO and the Financial Officer, to ensure that the funds are properly obtained regardless of the turnover of political appointees or a change in administration. In addition, the regulations should explicitly state that where payment is not received from the relevant campaign or political group, the traveler is responsible for paying travel costs in advance. Such a system would ensure that the U.S. Treasury does not fund political travel. Similarly, for costs of political activity that do not involve travel, the exempt employee whose political activity is at issue should be ultimately responsible for reimbursing the U.S. Treasury.

In a memorandum dated March 19, 2010, one federal executive agency established procedures that offer a good example of the practices suggested above.<sup>183</sup> This agency requires PAS to submit all requests for appearances at political events to the OGC for review and oversight. The campaign, political party, or other outside entity that invited the PAS must pay travel costs in advance of the trip, even in cases of mixed travel. If the campaign or political party does not provide payment, then the PAS is personally responsible for advancing the cost. The agency further requires a post-event review to compare the pre-event estimates to the actual political costs of the trip. If the actual political costs were greater than what was estimated, then the outside entity must immediately reimburse the agency and, if the entity does not do so, the PAS must pay the outstanding cost. The OGC at this agency will not close its file on the trip until the PAS signs a document personally certifying that final reconciliation of the political costs has been made and provides supporting documentation. OSC believes that OGC's involvement, requiring advance payment for political costs, and holding the PAS personally responsible for political costs will prevent the use of U.S. Treasury funds for political activity.

In this vein, OSC notes that theoretically, federal regulations concerning the § 7324(b) exemption would permit a high-level political appointee to obligate appropriated funds to finance a wholly political trip – that is, one in which every event on the itinerary is classified as political – provided the costs are reimbursed to the Treasury in a timely manner.<sup>184</sup> The evidence shows that if certain events described above had been properly classified as political, then the pertinent

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<sup>183</sup> See Memorandum on Political Activity Guidance: Procedures for Vetting Invitations to Political Events and Allocating Travel Expenses of Mixed Official/Political Travel (Mar. 19, 2010) (attached to this report as the Appendix, *infra* pp. 109-17).

<sup>184</sup> See 5 C.F.R. § 734.503.

trip would have had no official component and would not have constituted mixed travel. For example, DOI Secretary Kempthorne’s trip to tour the Blue Ridge Parkway Headquarters with Representative Taylor had no genuinely official component; nor did his trip to Arizona to appear with Representative Renzi at two separate events. OSC submits that in such circumstances, § 7324(b) employees should not be permitted to use U.S. Treasury funds to finance travel to the event, even if they intend to obtain reimbursement from the relevant campaign after the fact. Rather, travel to the event should be treated like any other personal travel, such as a family vacation.

Indeed, the § 7324(b) exemption was meant to be a concession for employees deemed to be on duty at all times who, for that reason, could not take advantage of the right afforded to non-exempt employees to engage in political activity on their own time. In fact, Congress explained that “despite the exception . . . the committee expects that most of the political activity that these officials engage in will be conducted off Government property and not during regular duty hours.”<sup>185</sup>

Allowing § 7324(b) employees to advance U.S. Treasury funds to pay for their political activity does more than place them on equal footing with the rest of the federal workforce; it permits them to use their official positions, including government resources, for the benefit of partisan political groups or candidates – a practice the Hatch Act was designed to prevent.<sup>186</sup> Accordingly, OSC proposes that OPM revise the Hatch Act regulations to make clear that U.S. Treasury funds may not be used to finance wholly political travel, even if the costs ultimately would have been reimbursed.

Furthermore, OSC recommends that the Hatch Act regulations be amended to set a clear deadline for reimbursing political costs to the U.S. Treasury instead of requiring reimbursement for the costs of political activity “within a reasonable period of time.”<sup>187</sup> Because what period of time is “reasonable” is open to interpretation, OSC proposes a 30-day time period, similar to a typical credit card billing cycle, for obtaining reimbursement. Furthermore, the regulations should make clear that if the campaign or political party does not timely reimburse the government, then the exempt employee will be billed for the outstanding amount because political activity is tantamount to personal activity.<sup>188</sup>

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<sup>185</sup> H.R. Rep. No.130-16, at 22 (1993).

<sup>186</sup> Abusing the § 7324(b) exemption such that appropriated funds are used to finance political activity also implicates federal regulations concerning ethical conduct. In pertinent part, federal regulations state that federal employees “shall not use public office for private gain,” they “shall protect and conserve Federal property and shall not use it for other than authorized activities,” and they “shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part.” 5 C.F.R. § 2635.101(b)(7), (9), (14).

<sup>187</sup> See 5 C.F.R. § 734.503(a).

<sup>188</sup> OSC also notes that the costs of political activity by § 7324(b) employees, whether through travel or other activities, may be considered a “contribution” for purposes of campaign finance laws enforced by the FEC. See 11 C.F.R. § 100.79.

The second consideration raised by events classified as political is that, although § 7324(b) employees are permitted to engage in political activity while on duty, they remain subject to several other Hatch Act restrictions. Among these are the prohibitions against soliciting, accepting, or receiving political contributions and soliciting or discouraging the political activity of persons with business before their employing agency.<sup>189</sup>

Moreover, § 7324(b) employees may not use their official authority or influence to affect the result of an election.<sup>190</sup> This means that they must attend political events in their personal, not official, capacities, and must use the generic title “The Honorable,” if applicable, rather than their official titles.<sup>191</sup> Also, § 7324(b) employees may not trade on their official positions, and the expertise acquired in those positions, to advocate for or against a political party or partisan political candidate at a political event. The prohibition against the use of official authority or influence forbids agency officials from soliciting, accepting, or receiving uncompensated services from subordinate employees for a political purpose.<sup>192</sup> Accordingly, when a § 7324(b) employee attends a political event, other federal employees should not be involved in planning the event or, for example, preparing the appointee’s remarks. And, other than security personnel who must remain with the appointee at all times, agency employees should not be asked to attend the event with the agency appointee. Nor should they be permitted to accompany the appointee even if they are like-minded and wish to attend.<sup>193</sup>

In conclusion, the Hatch Act requires a strict separation between official agency functions and political activity. Government business must not be manipulated and used as a resource for the electoral benefit of the governing administration’s political party, and the federal workforce “should not be employed to build a powerful, invincible, and perhaps corrupt political machine.”<sup>194</sup> The evidence presented in this report shows a systematic misuse of federal resources. However, as this investigation revealed, such practices are not unique to the Bush II administration. Thus, OSC hopes that this report is informative for the federal workforce and clarifies misconceptions regarding the Hatch Act so that future abuses can be avoided.

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<sup>189</sup> 5 U.S.C. § 7323(a)(2), (4).

<sup>190</sup> 5 U.S.C. § 7323(a)(1).

<sup>191</sup> See 5 C.F.R. § 734.302(b)(1).

<sup>192</sup> 5 C.F.R. § 734.302(b)(3)

<sup>193</sup> Provided such employees are not on duty, they would be permitted to attend the event separately.

<sup>194</sup> Letter Carriers, 413 U.S. at 565.

## APPENDIX

### **Memorandum: Political Activity Guidance: Procedures For Vetting Invitations To Political Events And Allocating Travel Expenses Of Mixed Official/Political Travel**

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#### **I. Political Event Review Procedures**

As soon as a Presidential appointee with Senate confirmation (PAS) receives an invitation requesting that he or she attend, speak or otherwise participate in a political event, and the PAS is interested in accepting the invitation, the PAS will follow the procedures below:

##### Develop Information Concerning Event

1. Send a letter to the host organization requesting additional information about the event and laying forth the ground rules that govern the PAS's participation.
2. After receiving the host organization's response, complete the "Political Activity Review" form (Appendix A).

##### Review of the Political Activity Form by Chief of Staff and the Office of General Counsel

3. Deliver the fully completed "Political Activity Review" form and a copy of all correspondence from the host organization to the Chief of Staff.
4. The Chief of Staff will review the "Political Activity Review" form and attached documents, as necessary. If the Chief of Staff concurs that the official event(s) listed in Section II will serve an agency function and concludes that the expected attendees at the political event(s) have not been targeted because they have business before this agency, he will sign the form and forward the package to the Office of General Counsel (OGC) for review. The Chief of Staff may consult with OGC when making the above determinations.
5. OGC will review the "Political Activity Review" form and determine the estimated political travel costs that must be paid by the host organization or other outside entity. OGC will give the signed form to Chief of Staff, and the Chief of Staff will return it to the PAS.

##### Confirming Attendance at the Event

***Only after the Chief of Staff and OGC have reviewed and signed the "Political Activity Review" form may the PAS accept the invitation to attend and/or participate in the political event.***

6. If the PAS accepts the host organization's invitation and attendance at the political event will require the PAS to travel, the PAS will discuss with the host organization the advance payment of the estimated political travel costs.

- Political Event Only Trips: The agency may not pay for any portion of the travel costs of the trip. The PAS must make appropriate travel arrangements with the outside organization and arrange for outside payment of all travel costs. **The PAS will not use his/her, the agency's or other agency official's Government credit card in making these arrangements.**
- Mixed Official/Political Event Trips: When the PAS will attend a political event on a trip that also includes official travel, the PAS will provide the total estimate of political travel costs to the outside organization and *require that (1) payment be made to the agency in advance of the travel, or (2) the outside organization provide payment in-kind.*

The PAS is responsible for ensuring that payment of the estimated political travel costs is made in advance of the travel. If the outside organization cannot provide payment in advance of the travel, the PAS must pay the estimated political travel costs and may seek reimbursement from an outside entity.

7. Payments received by the agency from an outside entity to pay for political costs must be recorded on the "Worksheet for Determining Actual Amount of Political Costs" (Appendix B) and supported by documentation. For example, if the outside entity pays via check, a copy of the check should be attached to Worksheet for Determining Actual Amount of Political Costs. If the outside entity provides in kind payment (e.g., buys the airline ticket or provides hotel room), a receipt of the in-kind payment showing that the agency did not pay for the travel expense should be attached.

#### Review of the Invitation

8. The host organization must forward a draft of the invitation and any other public communications regarding the political event to the agency OGC review.
9. OGC must sign off on the invitation and other public communications regarding the political event before the hosting organization may publicly distribute the invitation or other public communications.

#### Adding Official or Political Event(s) to an Existing Political Trip

10. Before the PAS adds an official event to an existing political trip, the official event must be reviewed by the Chief of Staff to ensure that the event serves a needed agency function and furthers the agency's mission.
11. The PAS must provide the Chief of Staff with:
  - A full description of the proposed official event.
  - An explanation on how this event furthers this agency mission.
  - Who suggested or requested that the PAS attend this event.
  - Who else will be present at or invited to attend the official event.

- The approximate duration of the event.
- An estimate of any additional travel costs if the PAS attends this official event.

The Chief of Staff may consult with OGC to determine whether it is appropriate to add the official event to the existing political trip.

12. If the PAS wishes to add a political event to an existing trip, the PAS must send a letter to the host organization as described in paragraph 1.1 above. The PAS then provides the Chief of Staff with:

- A full description of the new political event.
- The proposed venue.
- Any sponsors or affiliated entities.
- Summary description of the proposed invitees.
- The expected number of attendees at the event.
- Description of the PAS's role at the event.
- The approximate duration of the event.
- An estimate of any additional travel costs if the PAS attends this political event.

13. If a political or official event is added, the PAS must deliver the package with the information concerning the new political and/or official events to OGC and OGC will reconfigure the estimated political costs for the trip.

## **II. After the Political Event/Trip**

1. If the PAS did not travel outside of the Washington DC Metro area to attend the political event, no additional consultation with OGC is necessary. The PAS should retain a copy of the signed "Political Activity Review" form.
2. For trips involving both official and political events, the "Worksheet for Determining Actual Amount of Political Costs" (Appendix B) must be completed. This worksheet should be completed at the same time the PAS's travel voucher is created.
3. The completed "Worksheet for Determining Actual Amount of Political Costs," a copy of the PAS's final itinerary for the trip and a copy of PAS's travel voucher must be forwarded to OGC.
4. OGC will review the package and determine the total actual political costs incurred during the trip. If the estimate of the political costs is greater than the total actual political costs, then the agency owes the outside entity the difference. However, if the estimate of political costs is less than the total actual political costs, the outside entity has to immediately reimburse the agency the difference. **When the outside entity does not immediately reimburse the agency, the PAS will do so.**

5. The PAS shall sign and certify on the "Worksheet for Determining Actual Amount of Political Costs" that final reconciliation of the political costs has been made. A notification that this certification has been made must be sent to the OGC attorney who signed the "Worksheet for Determining Actual Amount of Political Costs."
6. OGC will close out its file in this matter.

**When agreeing to travel to attend a political event, the PAS should remember that he or she is engaging in such activities in his or her personal capacity. Consequently, if any costs associated with the PAS engaging in the political activity are not paid by an outside entity, the PAS will be personally liable for such costs and will reimburse the agency for any that it has borne.**

Please be advised that any unreimbursed payment for transportation expenses incurred by a PAS on behalf of any candidate or political committee of a political party may be considered a "contribution" under the Federal campaign finance laws. See 11 C.F.R. § 100.79. Questions concerning this matter should be directed to the Federal Election Commission.



APPENDIX A

**POLITICAL ACTIVITY REVIEW**

Name of PAS: \_\_\_\_\_

<b>I. Information about the Political Event</b>		
Name and Location of Event	Date of Event	Time of Event
Description of Event		
Name of Organization Hosting the Event	Name of Sponsor(s) or Affiliated Entities	
Description of Proposed Invitees	Number of Expected Attendees	
Role of PAS at the Event <i>(e.g. attendee, speaker, special guest)</i>		

Attach the hosting organization's draft invitation for the event

<b>II. Mixed Official and Political Travel</b>	
Will attendance at the political event require the PAS to travel outside the Washington DC Metro Area? <input type="checkbox"/> Yes <input type="checkbox"/> No <i>If yes, all applicable information below must be provided. If no, skip Sections II and III.</i>	
Date(s) of Travel	Location(s) of Travel
Date and Name of <b>Political Event(s)</b> the PAS will Attend While on Travel	Total Duration in Minutes
1.	1.
2.	2.
3.	3.
4.	4.
<b>Total Minutes for Political Events =</b>	

Name, Description and Justification for each <b>Official Event</b> the PAS Will Attend While on Travel  1.   2.   3.   4.	Date and Total Duration in Minutes 1.   2.   3.   4.
<b>Total Minutes for Official Events =</b>	
Was each of the above official events on the PAS's schedule before he or she received the invitation to attend the political event(s)? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Name and Position Title of Each Agency Official Who Will Be Accompanying the PAS on the Trip (excluding security personnel):	

Attach a copy of the PAS's draft itinerary for this trip.

<b>III. Estimated Trip Expenses</b>			
Travel Fares <small>(Airfare, Train fare)</small>	\$ _____	Hotel/Lodging	\$ _____
Per diem	\$ _____	Other Expenses <small>(Rental car, local transportation)</small>	\$ _____
<b>Total Estimated Trip Costs</b>			<b>\$ _____</b>
Intended Form of Payment for Political Costs by Outside Entity or PAS: <input type="checkbox"/> In-Kind (e.g. political party provides airline ticket) <input type="checkbox"/> Check/other monetary instrument			

Attach a copy of the PAS's trip authorization with estimated expenses.

<b>IV. PAS Certification</b>		
<b>Certification:</b> I certify that the answers above are truthful and correct. I understand that I am liable for all costs associated with my attendance at the political event(s).	Signature	Date Signed

V. Chief of Staff Review		
<b>REVIEW FINDINGS:</b> Based upon the facts above, the agency official's participation in the political event(s) does not violate 5 U.S.C. §7323(a)(4), and I concur that the above official event(s) serves an agency function and furthers this agency's programs and interests.	Signature	Date Signed

VI. Office of General Counsel Review		
<b>REVIEW FINDINGS:</b> Based upon the facts above, the Agency official could attend and participate in the political event in his/her personal capacity, as long as costs of engaging in the activity are not paid by the agency or the U.S. Treasury. The estimate of total political costs, as determined below, is <b>\$ _____.</b>	Signature	Date Signed
<b>ESTIMATE OF POLITICAL COSTS:</b> _____ Total Political Minutes PLUS _____ Total Official Minutes = _____ Total Activity Time _____ Total Political Minutes DIVIDED BY _____ Total Activity Time = _____ % for Political Reimbursement _____ Total Estimate of Trip Costs MULTIPLIED BY _____ % for Political Reimbursement = \$ _____ <b>Total Estimate of Political Costs</b>		
<input type="checkbox"/> OGC reviewed and approved the draft invitation to the political event on _____ (date) _____ (initial)		

VII. PAS Re-Certification		
<b>CERTIFICATION:</b> I have reviewed the total estimate of political costs, and I understand that if I choose to attend the political event(s) that I must ensure that payment of the estimated political costs is made in advance of the travel. I hereby certify that I <input type="checkbox"/> will <input type="checkbox"/> will not (check one) attend the political event(s) listed in Section II.	Signature	Date Signed



Attach a copy of the PAS's travel expense report and receipts for air and/or train fare.

**IV. Office of General Counsel Review**

**REVIEW FINDINGS:** Based upon the facts above, the total actual political costs for this trip, as determined below, is \$ \_\_\_\_\_. Therefore, the agency

is owed  must pay

\$ \_\_\_\_\_ from/to the outside entity.

Signature

Date Signed

**ACTUAL POLITICAL COSTS:**

\_\_\_\_\_ Total Political Minutes PLUS \_\_\_\_\_ Total Official Minutes = \_\_\_\_\_ Total Activity Time

\_\_\_\_\_ Total Political Minutes DIVIDED BY \_\_\_\_\_ Total Activity Time = \_\_\_\_\_ % for Political Reimbursement

\_\_\_\_\_ Total Actual Trip Costs MULTIPLIED BY \_\_\_\_\_ % for Political Reimbursement = \$ \_\_\_\_\_

**Total Actual Political Costs**

**Reconciling Estimate and Actual Costs:**

\$ \_\_\_\_\_ Total of Estimated Political Costs Paid in Advance or Provide In-Kind MINUS  
 \$ \_\_\_\_\_ Total Actual Political Costs = \$ \_\_\_\_\_. (if negative, outside entity owes the agency the amount; if positive, the agency owes outside entity the amount)

**Agency owes the outside entity \$ \_\_\_\_\_**

**The outside entity owes agency \$ \_\_\_\_\_**

**V. FINAL RECONCILIATION**

**Certification:** I hereby certify that the political travel costs of the above trip have been paid in full by the above-named outside entity, and the agency has reimbursed the outside entity for any overpayment of political expenses made in advance.

Signature

Date Signed