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**OSC Advisory Regarding Mixed Travel by Presidentially-Appointed /
Senate Confirmed (PAS) Employees**

OSC offers the following guidance regarding high-level political appointees' participation in political events during trips that also include official business.

The Hatch Act ("The Act") prohibits federal executive branch employees from engaging in political activity while on duty, in the federal workplace, in uniform, or in a vehicle owned or leased by the federal government. 5 U.S.C. § 7324(a). However, the Act exempts from this prohibition those employees who are deemed to be on duty at all times and who are appointed by the President with Senate confirmation (PAS). 5 U.S.C. § 7324(b). As a caveat to this exemption, the Act provides that the costs associated with these employees' political activity may not be paid for with money derived from the United States Treasury. 5 U.S.C. § 7324(b)(1). As a result, in cases involving mixed travel, that is, when an exempt employee attends both official and political events during the same trip, agencies must apportion the travel costs between the federal government and the relevant political organization or candidate, and ensure that the Treasury is appropriately reimbursed. Below, we offer step-by-step advice for agency ethics officials to use when addressing this issue.

A. Who Is Exempt?

A PAS employee whose duties and responsibilities continue outside normal duty hours and while away from the normal duty post 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 Treasury.¹ 5 U.S.C. § 7324(b)(1)-(2). Note that not all PAS employees fall under the exemption. Specifically, the exemption applies only to a PAS "whose position is located within the United States and who determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws." 5 U.S.C. § 7324(b)(2)(B)(ii).

The legislative history of § 7324(b) of the Hatch Act explains that this exemption was intended to apply only to "high-level political appointees." House Committee on Post Office and Civil Service, *Federal Employees Political Activities Act of 1993, Report to Accompany H.R. 20, 103rd Cong.* (H.R. Rep. No. 103-16) (1993) pp. 22-23 ¶ 25 and pp. 26-27. This narrow

¹ Even though exempt employees are permitted to engage in political activity while on duty or in the federal workplace, they remain subject to the Hatch Act's other prohibitions. These include the prohibition against using their official authority or influence to affect the result of an election; soliciting, accepting, or receiving political contributions; being candidates for partisan elections; and soliciting or discouraging the political activity of someone who has business pending before their agencies. See 5 U.S.C. 7323(a).

exemption was created to ensure that high-level PAS employees, who are considered to be on duty and on-call by the President at all times, would be able to engage in political activity if the activity was not paid for with funds from the U.S. Treasury. *Id.* at 22.

B. What Constitutes a “Political” Event?

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.” 5 C.F.R. § 734.101. Thus, any event that meets this definition is a political event, and the costs of attending the event may not be paid for with funds from the U.S. Treasury. It is not always clear whether an event is official or political. However, OSC has identified multiple factors to consider when determining whether an event is political for purposes of the Hatch Act.² When making this determination, officials should consider the following factors.³

1. Identify the type of event, e.g. ribbon cutting, grant announcement, etc;
2. Ascertain whether candidates (including incumbents seeking reelection) will be present and what their role will be;
3. Determine who will be speaking at the event and the target audience. If party officials will be speaking to known donors, for example, then the event is most likely a political one;
4. Assess the relationship, if any, between the event and official agency business;
5. Determine who invited the agency official to attend and who is organizing the event (e.g., congressional office, campaign staff, other agency officials, political party, etc.). If, for example, the request came from a campaign manager or the event is being organized by a party organization, then the event is likely to be political;
6. Ask whether a candidate’s request is a reason for the agency official to attend the event;
7. Determine whether the event was scheduled prior to the candidate’s involvement, or vice versa. If the employee planned to attend before the candidate became involved, then it is more likely to be of an official nature;
8. Inquire about the agency official’s motivation for attending the event;
9. Consider the frequency of similar types of events during non-election years and whether agency officials participated in such events in those years;
10. Consider the proximity of the event to the date of the election. Events with candidates that take place two weeks before an election are more likely to be for political purposes than events that occur, for example, eight months before an election.

² We understand that in the past, some agencies have utilized a “reasonable relation” standard set forth in an opinion from the Department of Justice’s Office of Legal Counsel to determine whether an event is official or political for purposes of cost allocation. *See* 6 Op. Off. Legal Counsel 214 (1982). However, that opinion applies only to mixed travel by the President and the Vice President, who are specifically exempt from all of the Hatch Act’s prohibitions because they have dual roles as the heads of both the executive branch and their political party. *See* 5 U.S.C. § 7322(1). Other federal employees, including high-level political appointees, have only official functions and are subject to the Hatch Act. Thus, the standards articulated in the Act and its attendant regulations dictate what constitutes “political activity” for these individuals.

³ This list is illustrative and is by no means exhaustive. In some cases, one or more of these considerations may not apply, and depending on all the circumstances, some may be more useful than others in classifying an event. Other facts peculiar to a particular event may tend to indicate the nature of the event, and they should be considered as well.

11. Find out whether the event is open or closed to media. An event that is open to the media is more likely to be political than one that is closed to the press.
12. Review the PAS's prepared remarks if he or she plans to speak at the event. In addition, after the event, agency ethics officials should review the PAS's actual remarks, as well as remarks made by other speakers, to assess whether the remarks were political in nature.

These factors are intended to help determine whether the official aspect of an event is bona fide or merely a pretext for helping a candidate or political party. Consider the following examples:

A. A staffer from Representative X's reelection staff contacts a Cabinet Secretary's scheduler asking whether the Secretary can attend an event with the Representative in his district in October 2012. The staffer suggests either a ribbon-cutting at a new facility that is related to the Cabinet Department's mission or a panel discussion on Department-related issues before the party's county committee. Because the media will be present, the staffer also asks if the Secretary would make remarks about the Representative's successful efforts to pass legislation in an area germane to the Department's mission. When the scheduler e-mails the Secretary to see whether she will attend, the Secretary replies: "I would be happy to help out Representative X because he is facing a tough race and the administration would not want the opposing party to take over that seat. Please work out a time for me to visit his district in October; maybe there is a grant announcement I could make there?"

This example illustrates an event that should be classified as political. Even though the proposed event will likely involve matters related to the Department's work, several facts signify that the real reason for holding the event is to further the Representative's campaign and not to advance the Department's mission. First, plans for the event were initiated by a campaign staffer, not the Representative's congressional office, indicating that official congressional business is not the focus of the event. Second, the staffer has not finalized plans for the event; rather, the agenda is still up in the air and may even include meeting with a partisan political group. This suggests that the primary reason for the event is to create an opportunity for voters to see the Representative with the Secretary in the month before the election and that the substance of the event is secondary. Third, the remarks that the staffer asks the Secretary to make before the press would highlight the Representative's achievements rather than administration goals or successes. Making such remarks, even though somewhat related to the Department's mission could be construed as an endorsement of the Representative's candidacy, particularly in light of the fact that it was the campaign that suggested the content of the remarks. Finally, the Secretary's response to her scheduler makes clear that she is willing to appear at any kind of event with Representative X so that he retains his seat in the upcoming election. Given the Secretary's motivation, it would be inappropriate to schedule an "official" event with the Representative in response to the campaign staffer's request.

B. Representative Y represents a district located on the U.S. border with Mexico; addressing illegal immigration is one of her top priorities. Throughout her term, she has proposed earmarks to help her district deal with the problem and has encouraged local law enforcement officials to apply for grants from the pertinent government agency. In order to bring attention to her positions on the subject, she has always asked the PAS in charge of the

agency to make grant announcements in person with her, and the PAS has done so twice in the past two years. Now, Representative Y is up for reelection. Due to the voters' strong opinions on the issue of illegal immigration, the race is very contentious. The agency has decided to award another grant to a sheriff's office in Representative Y's district, and once again she has asked the PAS to appear in person to make the announcement sometime in October through mid-November 2012. When the PAS's scheduler forwards the request from Representative Y's congressional office, the PAS responds: "I will if my schedule permits. The issue is very hot right now, so please arrange my travel if at all possible."

This event can be classified as official. Even though Representative Y is up for reelection in a contentious race, other factors tend to show that the request concerns a bona fide official event. First, the request originated with the congressional staff, unlike example A above. Second, unlike the previous example, the invitation is for a specific event rather than one that has not yet been planned. Third, although the congressional aide has suggested that the announcement take place in October 2012, the e-mail also indicates that the event will be just as important to Representative Y in mid-November, i.e., after the election. Finally, making grant announcements in this district is something that the PAS historically has done, even outside of the election season. This, coupled with the PAS's motivations for attending, i.e., to address a "hot" issue, shows that the PAS has the administration's policy goals in mind when agreeing to travel to Representative Y's district. Thus, despite the fact that the event will be open to the press, it can be classified as official.

An event may not fit neatly into one of these hypothetical scenarios. Because the circumstances of events under consideration will vary widely, agency officials should evaluate them on a case-by-case basis.

C. What Is the Formula for Apportioning Costs Incurred During Mixed Travel?

The costs associated with an exempt employee's attendance at a political event during a mixed trip may not be paid using funds from the United States Treasury. See 5 U.S.C. § 7324(b)(1). If ethics officials conclude that the employee will be attending both official and political events during a single trip, then the employee must ensure that government funds are not used to finance the political portion of the trip.

The Hatch Act regulations state that for activity related to federal elections, the method of allocation is set by the Federal Election Campaign Act or the Presidential Election Campaign Fund Act, as appropriate, and Federal Election Commission regulations. 5 C.F.R. § 734.503(d). For all other elections, such as gubernatorial or local races, agencies should follow the formula set forth in the Hatch Act regulations, pursuant to which costs must be apportioned according to the time spent at each event.

To determine what portion of the travel costs must be reimbursed to the Treasury under the Hatch Act formula, one must first calculate the "total activity time" by adding the time spent at

official events to the time spent in political meetings, receptions, and rallies.⁴ 5 C.F.R. § 734.503(c)(1). Then, multiply the percentage of the total activity time spent engaging in political activity by the total travel cost to reach the amount for which the relevant campaign or political party is responsible.⁵ Id.

Costs associated with traveling to political events are deemed not to be paid for using Treasury funds if the Treasury is reimbursed “within a reasonable period of time.” 5 C.F.R. § 734.503(a). Neither the Hatch Act nor the pertinent regulations state what amount of time is “reasonable.” However, it is important to obtain reimbursement as soon as possible because campaign committees could dissolve before agencies invoice them, making it impossible to recoup the costs from the campaign. Thus, OSC recommends that agencies seek reimbursement within 30 days of the event, which corresponds to a typical credit card billing cycle. If the campaign does not repay the Treasury, then ultimately the traveler is responsible for reimbursing the cost of his or her attendance at a political event.

As always, OSC is available to assist agency ethics officials when considering the issues discussed here. Please call (202) 254-3650 or (800) 85-HATCH to speak with a Hatch Act attorney.

⁴ “Total activity time” does not include time spent actually traveling, in private study, or resting. 5 C.F.R. § 734.503(c)(1).

⁵ Total travel cost does not include employee salaries or the travel expenses of any other government employee who is “required in the performance of his or her duties to accompany or assist the person engaging in the political activity,” such as a personal security detail. See 5 C.F.R. § 734.503(b).