

## Written Statement of Henry J. Kerner

Chairman Cummings and Ranking Member Jordan, I thank you for the opportunity to appear before this committee to discuss the important work done by the U.S. Office of Special Counsel's Hatch Act Unit.

The Hatch Act was passed in 1939 to ensure that government employees—at all levels—administer the laws equally and without political bias. For nearly 80 years the Hatch Act has served as a bulwark against undue partisan influence in the operations of the executive branch. Although it has been amended over the years, the central purpose of the Hatch Act remains unchanged: to separate the nonpartisan governance of the country from partisan political campaigning.

This should not be a controversial objective. When performing their government jobs, employees have an obligation to serve the American people rather than the interests of a political party or candidate. By maintaining this separation, the Hatch Act protects two groups—federal workers and the American public.

The Act protects federal workers from the coercive evils of a political spoils system and in doing so protects the American public from partisan administration of the laws. It also helps to ensure that taxpayer dollars are appropriately spent on government programs, not political campaigning. As the Supreme Court has stated in upholding the constitutionality of the Hatch Act:

it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.<sup>1</sup>

To achieve these worthy goals, the Hatch Act places certain limitations on the political activity of federal executive branch employees. Many of these restrictions reasonably limit the time and place in which employees may engage in political activity. As defined in the Hatch Act regulations, “political activity” is any activity directed toward the success or failure of a political party, partisan political group, or candidate for partisan political office. This definition encompasses far more than explicitly saying vote for one candidate or do not vote for another. For example, the Second Circuit found that a poster ostensibly listing two presidential candidates' positions on workplace issues was prohibited political activity when displayed in the workplace, even though the poster did not mention voting or the presidential election. One of the Act's core restrictions, that employees cannot engage in political activity while on duty or in the federal workplace, exists for the simple reason that while on the job, employees should be working on behalf of the American people and not campaigning for a political party or candidate.

A separate restriction prohibits government employees from using their official authority or influence to interfere with or affect the results of an election. All federal employees have some degree of official authority by virtue of their government positions. That authority is to be used

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<sup>1</sup> *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973).

impartially for the benefit of the American people. To allow otherwise would erode public confidence in the American system of representative democracy.

I believe in the importance of the First Amendment and respect the rights of individuals to fully participate in the political process of our democracy—and so does the Hatch Act. But, the First Amendment does not, of course, provide an absolute bar to government regulation of speech. Many Americans are familiar, for example, with the idea that you cannot yell “fire” in a crowded theater. Because the Hatch Act regulates and limits speech that is otherwise generally protected by the First Amendment, it has been the subject of multiple constitutional challenges. None of those challenges have been successful.

The Supreme Court twice has affirmed the Hatch Act’s constitutionality as a permissible regulation of speech. Most recently, the Court said that Congress’s balancing of the free speech rights of employees against the interests of the government is “sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act.”<sup>2</sup>

Importantly, most of the Hatch Act’s restrictions do not limit speech by employees acting as private citizens; rather, they deal with speech that is connected to that employee’s government service. In its ruling, the Supreme Court said the Hatch Act had “struck a delicate balance between fair and effective government and the First Amendment rights of individual employees.”

The Hatch Act is not the only restriction on political speech that exists. As a former congressional staffer, I am well aware of the restrictions placed on congressional staff, and even Members, in regard to mixing political activity with one’s official duties. And just like the Hatch Act, those restrictions play a crucial role in ensuring the American people are secure in the knowledge that their government is working on their behalf, regardless of how they voted, or which party or candidate they support.

It may be easy to forget just how obviously important it is that the federal workforce be—and be perceived as—unaffected by partisan politics. But to understand why the Hatch Act remains important, just consider what would happen if that were not the case. The Office of Special Counsel has investigated numerous Hatch Act violations that show just what a pernicious effect the mixing of political and official duties can have.

Take the case of an Internal Revenue Service call center employee who answered questions from the public about their tax liabilities. The employee typically handled over 40 calls per day. In the weeks immediately before a presidential election, the employee repeatedly spelled his name for callers by using words explicitly tied to the election of a presidential candidate. As in, “E, for Elect, O, for Obama, N, for November.” Members of the public who called expecting to receive information about their taxes instead were subjected to taxpayer-funded campaign messages. Some callers may have agreed with the employee’s political views while others probably did not. But that is beside the point. The point is that none of the callers should have had to think about

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<sup>2</sup> *Id.* at 564.

whether the IRS was being used to promote the president's reelection. That employee served a 100-day suspension.

Or how about the case of a Bureau of Engraving and Printing employee who oversaw contractor employees. That federal employee sent political fundraising emails to contractors that she had the authority to replace. What must those contractors have thought when they received those fundraising emails? How much did they think they had to contribute, out of their own pockets, in order to keep their positions at the Bureau? It is easy to understand the corrosive effect that such an abuse of power can have on the integrity of government contracting. A judge initially sentenced that employee to a 60-day suspension. However, given the severity of the violations, OSC successfully petitioned the Merit Systems Protection Board for the employee's removal.

As a more prominent example, consider the Cabinet secretary who was invited to speak at an event in her official capacity. Because she was speaking in her official capacity, her travel and comments were funded by American taxpayers. But rather than limiting her comments to the work of the administration, she chose to advocate for the President's reelection and the election of a gubernatorial candidate. These were pure campaign statements and unrelated to the work of the administration. As a result of OSC's subsequent investigation, OSC issued a report to the President, and the U.S. Treasury was refunded the cost of her political activity.

Without the Hatch Act's reasonable restrictions on political activity, cases like these could quickly multiply and severely damage the public's confidence in the nonpartisan operation of government. And the more visible the violation, the more quickly that damage can be done.

Which brings us to Ms. Kellyanne Conway. As stated in OSC's 2019 report to the President, Ms. Conway's egregious and repeated Hatch Act violations, combined with her unrepentant attitude, are unacceptable from any federal employee, let alone one in such a prominent position. Her conduct hurts both federal employees, who may believe that senior officials can act with complete disregard for the Hatch Act, and the American people, who may question the nonpartisan operation of their government.

Some have questioned why the Hatch Act should apply to someone like Ms. Conway, who is a former campaign manager for President Trump and presently serves as one of his senior counselors. But there is a distinction between working as a senior advisor who promotes the administration's policies and engaging in political campaigning. Being an advisor does not inherently require Ms. Conway to leverage her official authority to attack candidates or otherwise engage in political activity under the Act.

Political activity, as defined in the Hatch Act, can colloquially be understood as campaign-related activity. That means the types of actions you would expect to be part of an election campaign. For example, it could be directly criticizing the opposing candidates, either through their policy decisions or personally; or making statements about the candidate in a way to dissuade voters from supporting them, either by directly saying don't vote for this person, or through more subtle means.

An individual can still be a senior presidential advisor and not engage in political activity under the Act. The American people elected President Trump to enact policies and legislation to benefit all Americans. To do so, the administration must necessarily persuade lawmakers and the public that its policies are appropriate and beneficial. Similarly, it must argue against policies and legislation with which it disagrees. This type of work is at the core of the American political process and is entirely permissible under the Hatch Act. It is not at all what the Hatch Act defines as “political activity.”

When viewed through that lens, it is clear how Ms. Conway’s conduct violated the Hatch Act. As fully documented in the report, Ms. Conway used her official authority, not to persuade lawmakers or the public about particular policies, but to argue in support of President Trump’s reelection and in opposition to the election of the Democratic Party’s candidates for president. Her comments were indistinguishable from the partisan attacks that a campaign official would make. For instance, Ms. Conway repeatedly attacked the personal character of multiple Democratic Party candidates. Such attacks, which Ms. Conway is permitted to make as a private citizen, are wholly unrelated to the work of governing on behalf of the American people. Rather, they serve only to further President Trump’s reelection campaign. Therefore, it is inappropriate—and, in fact, unlawful—for Ms. Conway to use her official authority to engage in those attacks.

When Congress passed the Hatch Act it recognized the inevitability that senior advisors to the President, such as Ms. Conway, would be involved in campaign activity. For that reason, certain senior officials may engage in limited political activity while on duty or in the federal workplace, such as by writing a campaign speech or hosting a political meeting with party leaders.

But even those officials are prohibited from using their official authority to influence the results of an election. Congress recognized that absent that prohibition, those officials could demand or otherwise coerce other government employees, including nonpartisan career employees, to volunteer on behalf of a campaign. Or they could use their positions to secure television interviews and, rather than focus exclusively on the work of the administration, use that platform to engage in partisan attacks against political opponents.

The Hatch Act’s rules are not new and senior White House officials in prior administrations have had to comply with the law. It is not unusual for an administration to have former high-ranking campaign officials like Ms. Conway serve in senior government roles. When those officials ran afoul of the Hatch Act, OSC issued reports to the President and the officials came into compliance. What is new, however, is OSC having to issue multiple Hatch Act reports on the same senior official to the President. Ms. Conway’s conduct reflects not a misunderstanding of the law, but rather a disregard for it.

OSC has received numerous Hatch Act complaints against Ms. Conway. As with all Hatch Act complaints that OSC receives, career Hatch Act Unit attorneys conducted thorough and impartial investigations of her alleged political activity. In 2018, OSC issued a report to the President documenting multiple Hatch Act violations by Ms. Conway. Although Ms. Conway had an opportunity to respond to that report, she chose not to do so.

The most recent report was the result of a months-long investigation that included substantial communication with the White House. OSC repeatedly offered Ms. Conway the opportunity to come into compliance with the law. She refused to do so. In fact, the frequency of her Hatch Act violations only increased. Anticipating that, like before, Ms. Conway would not respond to the investigative report, and faced with her knowing refusal to comply with the law, OSC sent the report to the White House on May 29 and requested Ms. Conway's comments by May 30. When the White House asked for an extension of time to respond, we granted that request. We actually granted multiple requests—ultimately providing approximately two weeks for Ms. Conway to respond.

However, after two weeks had passed, it became clear that Ms. Conway was not planning to respond. Accordingly, we referred the report to the President on June 13 based upon Ms. Conway's egregious, repeated, and very public violations of the law.

As stated in the report, Ms. Conway's conduct created an unprecedented challenge to OSC's ability to enforce the Hatch Act. I hold no personal animus toward Ms. Conway. My actions and decisions related to OSC's reports were motivated solely by my duty to oversee enforcement of the Hatch Act and counter the obvious harms caused by Ms. Conway's violations. Such harms include the false message her conduct sent to other federal employees that they need not abide by the Hatch Act or that senior officials are above the law.

At a time when the country appears sharply divided on partisan lines, the public must be able to trust that regardless of which party is in power, or which candidate a federal employee supports, federal law is administered uniformly and without partisan bias. The Hatch Act is critically important when it comes to preserving that public trust. OSC's career Hatch Act Unit attorneys have a long record of impartially applying the Hatch Act to all covered federal employees. And where federal employees fall short of the standards that Congress has mandated, OSC will continue to enforce the law and preserve the distinction between governing and campaigning.

Thank you. I look forward to answering your questions.