HATCHING A PLAN: FILLING THE ENFORCEMENT GAP IN THE HATCH ACT AND THE EXTRAORDINARY CASE OF KELLYANNE CONWAY

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ABSTRACT

There is a statutory gap between the Hatch Act and the enforcement statute for the United States Office of Special Counsel which needs to be closed. The gap arises because the enforcement statute fails to address individuals who are presidentially appointed but not Senate confirmed. By failing to address this influential class of federal employees, the gap leaves open the possibility for drastic and unpredictable variation in enforcing the Hatch Act. Using the 2019 Hatch Act case involving Kellyanne Conway as a case study, this note examines how the gap is a consequence of the way the enforcement statute for the United States Office of Special Counsel categorizes employees. Moreover, this note addresses constitutional issues connected to enforcement, analyzes how such issues could lead to future political battles, and weighs various options for closing the gap. This note concludes with the assertion that the gap should be closed by assigning enforcement discretion to both the President and the Merit Systems Protections Board for Hatch Act. This would allow for the most effective enforcement of the Hatch Act.

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INTRODUCTION

In June 2019, the United States Office of Special Counsel ("OSC") responded to complaints that Counselor to the President Kellyanne Conway had violated the Hatch Act.[1] Through a series of public interviews over the course of several months, OSC found that Ms. Conway used her federal position to espouse her opinion on a wide variety of political matters .[2] From the front lawn of the White House, Ms. Conway repeatedly denounced the Democratic Party's presidential candidates and their platforms, praised President Trump's campaign for the 2020 election and expressed her personal support for various GOP congressional candidates.[3] Upon investigation, OSC determined that Ms. Conway had given the interviews under her official federal capacity as Counselor to the President, a position directly appointed by the President within the Executive Office of the President ("EOP").[4]

Ms. Conway's actions constituted a Hatch Act violation of a scale and severity never seen before.[5] Her comments were not veiled or open to interpretation, nor did they reflect a sort of indirect support or slip of the tongue.[6] Instead, her comments were targeted, reoccurring, and consistent with each other, indicating that Ms. Conway's comments were made with intention.[7] The high visibility attached to her position resulted in extensive media

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1 *See* U.S. OFF. OF SPECIAL COUNSEL, OSC File Nos. HA-19-0631 & HA-19-3395, Report of Prohibited Political Activity Under the Hatch Act (Kellyanne Conway) (2019) [hereinafter "Kellyanne Conway Report"]; U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2019).
2 *Id.*
3 *Id.*
4 *Id.*
5 *See id.*
6 *See id.*
7 *See id.*

coverage.[8] Moreover, Ms. Conway was a repeat offender, having been the subject of a previous Hatch Act investigation in late 2017, for which she receiving training on the Hatch Act by OSC.[9] Faced with this unprecedented situation, OSC sent its official report detailing the findings to the President.[10] Along with the report, OSC sent a letter recommending Ms. Conway's termination.[11]

Enacted by Congress in 1939, the Hatch Act ostensibly ensures that the executive branch of the federal government remains non-partisan during partisan elections.[12] The Hatch Act applies to virtually all federal executive branch employees and remains a mainstay of Federal Civil Service Law.[13] Although the Hatch Act has been tweaked through minor amendments by Congress over the years, the main goal of the Hatch Act has persisted: keeping the government out of elections by prohibiting politics in the federal workplace.[14]

In the event that a federal executive branch employee violates the Hatch Act, the enforcement statute for OSC lays out two enforcement mechanisms.[15] One mechanism gives disciplinary discretion over the employee and their violation to the Merit Systems Protection Board ("MSPB"), and the other assigns disciplinary discretion to the President.[16] Determining which mechanism is to be implemented depends entirely on how the employee was hired.[17] If the employee's federal employment is the result of presidential appointment and Senate confirmation, then OSC implements the presidential enforcement mechanism.[18] If the employee's federal employment is not the result of presidential appointment and Senate confirmation, then OSC implements the MSPB mechanism.[19] This categorization of employees into two mutually exclusive groups is flawed. It presumes that there are only two

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8 *See* Joshua Gallu & Bill Allison, *Kellyanne Conway Should Be Removed From White House Job, U.S. Agency Says*, BLOOMBERG (Jun 13, 2019, 3:38 PM), https://www.bloomberg.com/news/articles/2019-06-13/kellyanne-conway-hatch-act.

9 This investigation culminated in a March 2018 Hatch Act report. *See* U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2018).

10 *See* Kellyanne Conway Report, *supra* note 1.

11 Gallu & Allison, *supra* note 8.

12 *See* 5 U.S.C. § 7323(a)(1); 5 C.F.R. § 734.302(a).

13 *See* 5 U.S.C. § 7322(1).

14 *See* 5 C.F.R. § 734.302(a).

15 *See* 5 U.S.C. §1215.

16 *Id.*

17 *Id.*

18 *See* 5 U.S.C. §1215(b).

19 *See* 5 U.S.C. §1215(a).

possible hiring processes for federal employment.[20] Not all employees fit comfortably into one of these two categories.[21] A problem arises if an employee is not easily classified into either category of employees.[22] This begs the question: which enforcement mechanism should be implemented if an individual's federal employment is the result of a different hiring process, specifically one that does not fit comfortably into either group?

Ms. Conway's federal employment is not the result of Senate confirmation.[23] Her employment is the result of presidential appointment only.[24] Thus, Ms. Conway is a not a presidentially appointed and Senate confirmed employee.[25] However, in sending a letter of recommendation to the President, OSC effectively applied the enforcement mechanism reserved for Senate confirmed individuals to a non-Senate confirmed individual.[26] As Ms. Conway is not Senate confirmed, it would appear improper to implement the presidential enforcement mechanism reserved for Senate confirmed individuals.[27] On the other hand, Ms. Conway's status as a presidential appointee employed in the EOP makes implementing the MSPB mechanism against an employee in her position a deeply uncomfortable proposition. This outcome raises significant questions regarding the enforcement of the Hatch Act, because it is not immediately clear which enforcement mechanism OSC should (or could) have implemented in the Conway case.[28]

Kellyanne Conway's case underscores a problem with leaving such a question unanswered. Although the events surrounding Ms. Conway's Hatch Act violations avoided turning into a legal dispute, a far different outcome could have developed had one or two minor circumstances been different.[29] Using Ms. Conway's case as a case study while keeping the main purpose of the Hatch Act in mind, this note will introduce OSC's enforcement statute and the two enforcement mechanisms more fully and analyze why they are imperfectly suited for enforcing the Hatch Act. Such analysis requires looking at the

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[20] §1215(b) makes it clear that the presidential mechanism is only to be used for presidentially appointed and Senate confirmed ("PAS") employees, meaning all other employees are to be included under the MSPB mechanism. *See* 5 U.S.C. §1215(b).
[21] See *id.*
[22] See *id.*
[23] *See Trump Names Kellyanne Conway as Presidential Counsellor*, BBC (Dec. 23, 2016), https://www.bbc.com/news/world-us-canada-38406250.
[24] *Id.*
[25] *See* 5 U.S.C. §1215(b).
[26] *See id.*
[27] *See id.*
[28] *See* Kellyanne Conway Report, *supra* note 1; U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2019).
[29] *See* Kellyanne Conway Report, *supra* note 1. The specifics of these circumstances and their potential repercussions will be discussed later in this note.

statutory support for how the Hatch Act and how each mechanism applies to three categories of employees: (1) presidentially appointed and Senate confirmed ("PAS") employees, (2) presidentially appointed, but *non*-Senate confirmed ("PANS") employees, and (3) non-presidentially appointed, non-Senate confirmed ("NP") employees. Additionally, this note will also consider how each mechanism and employee category might specially pertain to EOP employees.[30]

Part I introduces the Hatch Act by providing an overview of the Hatch Act's history and purpose while also introducing the statutory basis for the Hatch Act and OSC's enforcement statute. It concludes with a brief analysis concerning how the Hatch Act functions, outlining which employees the Hatch Act applies to, what activities are covered, and when and where employees are considered on duty. Part II concerns the OSC's enforcement statutes, comparing and contrasting the two enforcement mechanisms. A particular focus of Part II is on how the enforcement mechanisms pertain to each category of employee (PAS, NP, PANS). Last, Part III demonstrates what a worse-case scenario would look like and considers three potential options for closing the gap. Part III also addresses possible constitutional ramifications that are attached to the gap and the options, including whether the MSPB, and by extension the Federal Circuit, could find jurisdiction over a PANS employee for violating the Hatch Act. Part III concludes by arguing that the gap should be closed in favor of leaving disciplinary discretion over PANS employees to both the President and the MSPB.

I. THE HATCH ACT AND ITS APPLICATION

A. History

The Hatch Act's history reveals a decades-old effort dedicated to keeping political influence out of the federal civil service.[31] The Hatch Act's immediate predecessor, the Pendleton Act of 1883, greatly advanced the relevance of meritocracy within the federal civil service.[32] With the Pendleton Act, Congress sought to curb the practice of political patronage, a practice which had plagued the federal government since the early days of the United States.[33] The Pendleton Act also created the Civil Service Commission, which

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[30] This category necessarily includes some overlap with the three categories of employees.

[31] *See* COMM'N ON POLITICAL ACTIVITY OF GOV'T PERSONNEL, A COMM'N REPORT, Vol. 1 (1968).

[32] *Id.*

[33] Political appointment following an election was commonplace and involved elected politicians distributing federal government positions among friends and political

preceded the Merit Systems Protection Board, to more concretely ensure the Pendleton Act's effectiveness.[34] While this constituted a major step towards ending the "spoils system," federal positions continued to be wielded as political tools well into the 20th Century.[35] The 1936 and 1938 election cycles saw individuals using their federal offices for the purpose of coercing campaign contributions.[36] This behavior was widely derided by both the public and the media, and the backlash that followed prompted Congress to correct for the areas not covered by the Pendleton Act while expanding upon its successes.[37] Officially titled "[a]n Act to Prevent Pernicious Political Activities," the Hatch Act was made into law on August 2, 1939.[38]

Significantly, the Hatch Act's passage into law represents a culmination of bipartisan efforts led by New Mexico Democratic Senator Carl Hatch to limit the federal government's influence in elections.[39] In fact, the Hatch Act was seen as a criticism of the practices employed by President Franklin Roosevelt's administration and the Democratic Party during previous elections.[40] In designing the Hatch Act, Congress incorporated material taken from the Hatch Act's predecessors.[41] For example, Congress drew direct inspiration from Civil Service Commission Rule I, which had made it illegal for federal employees to use their positions for the purposes of coercing political results.[42]

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backers. Naturally, this "spoils system" runs counter to the idea that positions ought to be filled based on an individual's merit, not their political connections. *See* Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 230 (2005) (authored by Scott J. Bloch, Special Counsel of the OSC under President George W. Bush from 2003-2008).

34 *Id.*

35 *Id.*

36 For example, Democratic Party officials in Pennsylvania had been consulted in filling positions in the depression-era Works Progress Administration.

37 A series of newspaper articles in 1938 revealed widespread patronage in the Works Progress Administration, which lead to a Senate investigation. *See* Bloch, *supra* note 33, at 231.

38 *See id.* at 230.

39 *Id.* at 231.

40 *See id.*

41 *See* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 568-69 (1973) (noting the identical coverage between the Hatch Act and Civil Service Rule 1).

42 *Id.* Civil Service Commission Rule I was issued by President Arthur and later expanded by President Theodore Roosevelt. Presidential involvement was a fundamental part of the Civil Service Commission, a feature which was carried over into the Hatch Act. This means that presidential involvement has been a core feature of the Hatch Act since its inception. *See* Bloch, *supra* note 33, at 230.

B. Purpose of the Hatch Act

The purpose of the Act is to keep the federal workforce separate from partisan political elections.[43] This is based on the premise that a nonpartisan workforce is more suited to carry out governmental functions effectively, because it is not laden with political pressures and interference.[44] In practice, this occurs by regulating what activities federal employees can or cannot do while on duty.[45] These prohibitions ensure that the taxpayer-funded employees of the federal government cannot use their government positions and resources to impact elections.[46] On the other hand, by keeping the federal workforce and elections separate, the Hatch Act also keeps elections out of government.[47] Thus, federal employees cannot be subjected to the political opinions of their superiors or coworkers, nor can they subject others to their own political opinions.[48] As a result, the Hatch Act ensures fair elections, removes bias from the federal workplace by curbing political favoritism and discrimination, and generally safeguards the maintenance of the government as a merit-based, nonpartisan place of work.[49]

For this purpose to be upheld, the Hatch Act needs to cover as many employees as possible.[50] This broad coverage includes employees with influence.[51] Ostensibly, the more power and influence a person has, the more vital it becomes that the Hatch Act covers them. Presumably, a senior employee who occupies an influential federal position has a greater ability to misuse their seniority and sway elections and political results.[52] Thus, the severity of potential harm increases the more senior and influential an employee is. Meaning that the Hatch Act needs to apply to senior agency officials for the Hatch Act to fulfill its purpose.[53] Otherwise, the Hatch Act cannot succeed in keeping politics and the federal workforce separate.

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43 *See Nat'l Ass'n of Letter Carriers*, 413 U.S. at 556 (stating the purpose of the Hatch Act); 5 U.S.C. § 7323(a)(1); 5 C.F.R. § 734.302(a).
44 *See* United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 100 (1947).
45 *See* 5 U.S.C. § 1215(a).
46 *See* 5 U.S.C. § 7322(1); 5 C.F.R. § 734.302(b)(1).
47 *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 471 (1995) (finding that the Hatch Act was intended to protect the rights of federal workers); *see generally* 5 U.S.C. § 7324(a); 5 CFR § 734.302(b)(1)-(3).
48 *See* 5 U.S.C. § 7324(a).
49 *See Nat'l Ass'n of Letter Carriers*, 413 U.S. at 556.
50 *See United Pub. Workers of Am.*, 330 U.S. at 101 (noting that the Hatch Act is intended to apply to "hundreds of thousands of United States employees" to prevent cumulative negative effects).
51 *Id.* at 102 (noting that the Hatch Act applies to a broad range of "government employees, whether industrial or administrative").
52 *Id.*
53 *United Public Workers,* 330 U.S. at 101.

For reasons to be discussed later in the note, enforcement over high level Presidential appointees requires some sort of action by the President.[54] As such, the President plays a crucial role in allowing the Hatch Act to function as intended.[55] The importance of the President's role in upholding the purpose of the Hatch Act cannot be overstated and is demonstratively exemplified by the outcome of the Kellyanne Conway Hatch Act saga. In using her taxpayer funded federal position to advocate for the President's election campaign, Ms. Conway directly contradicted the Hatch Act's purpose.[56] Nonetheless, following OSC's June 2019 report and the letter of recommendation in which OSC advocated for Ms. Conway's termination from federal employment, President Trump refused to enforce any kind of discipline.[57] In effect, he chose not to enforce the Hatch Act on any level.[58] Instead, President Trump praised Ms. Conway's actions, rewarding her for breaking a longstanding rule of law.[59] This contradicts the fundamental premise underlying the Hatch Act.

The fact that the President can choose not to do anything following a Hatch Act violation underscores a potential weakness in the Hatch Act. The Hatch Act is predicated on the expectation that the President will uphold the purpose of the Hatch Act as part of his duty in upholding the laws of the nation.[60] For the President to carve out an exception for his closest advisors is to effectively place said advisors beyond the reach of the Hatch Act. In short, this flaunts the law and contradicts the purpose of the Hatch Act.

C. Previous Challenges to the Hatch Act

OSC's report detailed Kellyanne Conway's sustained pattern of conduct in violation of the Hatch Act and recommended the termination of her federal employment.[61] The White House responded with a letter, in which it mustered a vague, largely unsupported legal argument alleging that OSC's actions were unconstitutional and designed to strip away Ms. Conway's free speech rights.[62] This sentiment was later directly echoed by President Trump.[63]

Historically, the Hatch Act has not been without its detractors. An intentional, but controversial consequence of the Hatch Act is the limitation on

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54 *See* 5 U.S.C. § 1215(a).
55 *Id.*
56 *See* U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2019).
57 *See id.*; Gallu & Allison, *supra* note 8.
58 *See* Gallu & Allison, *supra* note 8.
59 *Id.*
60 *See* 5 U.S.C. § 1215(a).
61 *See* U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2019).
62 *See* Letter from White House to Special Counsel Henry J. Kerner (Jun. 11, 2019).
63 *See* Gallu & Allison, *supra* note 8.

speech it imposes on executive branch employees while they are on duty.[64] Employees are considered extensions of the government and the Hatch Act functions by imposing restrictions on individual federal employees.[65] A fair number of these restrictions prevent colleagues or superiors from intimidating, coercing, or otherwise pressuring their colleagues or subordinates into participating in political activities.[66] Consequentially, this means the Hatch Act cannot functionally exist without some sort of limitation on speech.[67] Although this limitation is crucial to the Hatch Act's existence, it has remained the most controversial consequence of the Act.[68]

Such controversy has resulted in occasional Constitutional challenges over whether the Act violates the First Amendment.[69] Such challenges have argued that the speech limitation violates the employees' First Amendment rights by not allowing them to voice their personal opinions on politics while at work.[70] In the face of this argument, however, the United States Supreme Court has repeatedly upheld the Hatch Act and its limitations on the free speech rights of federal employees.[71] The Supreme Court has found that the Hatch Act maintains an acceptable balance between respecting the First Amendment rights of federal employees and fulfilling the Act's objective of keeping the

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64 *See Nat'l Ass'n of Letter Carriers*, 413 U.S. at 556; *Nat'l Treasury Employees Union*, 513 U.S. at 465 (finding that people who work for the government do not relinquish their first amendment rights, but affirming that Congress may impose speech-related limitations on federal employees while on the job); *United Pub. Workers of Am.*, 330 U.S. at 93; *see also* Waters v. Churchill, 511 U.S. 661, 672 (1994); Briggs v. Merit Systems Protection Bd., 331 F.3d 1307, 1313 (Fed. Cir. 2003).

65 *See Nat'l Ass'n of Letter Carriers*, 413 U.S. at 556; *Nat'l Treasury Employees Union*, 513 U.S. at 465-66; *United Pub. Workers of Am.*, 330 U.S. at 93.

66 *See* 5 U.S.C. § 7323 ("[A]n employee may not knowingly solicit, accept, or receive a political contribution from any person, unless such person is – *not a subordinate employee*.") (emphasis added).

67 *See Nat'l Ass'n of Letter Carriers*, 413 U.S. at 556-57; *Nat'l Treasury Employees Union*, 513 U.S. at 454.

68 *See* Letter from White House to Special Counsel Henry J. Kerner (Jun. 11, 2019).

69 *See Nat'l Ass'n of Letter Carriers*, 413 U.S. at 548; *Nat'l Treasury Employees Union*, 513 U.S. at 454; *see also* Haddon v. Exec. Residence at White House, 313 F.3d 1352, 1360 (Fed. Cir. 2002).

70 *See Nat'l Treasury Employees Union*, 513 U.S. at 454.

71 *See id.*; *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 548.

federal workforce and partisan elections distinct and separate.[72] As a result, the constitutionality of the Hatch Act and its restrictions on free speech is settled.[73]

The Supreme Court's findings have not entirely halted First Amendment criticisms of the Hatch Act. To the contrary, OSC's July 2019 Report was largely dismissed by President Trump and White House counsel on free speech grounds.[74] While the White House's legal argument raised in Ms. Conway's case is directly contradicted by Supreme Court precedent, the fact remains that First Amendment considerations are tied to the Hatch Act.[75] Moreover, they continue to persist 81 years after the Act's inception.

D. How the Hatch Act Functions

The Hatch Act operates by prohibiting federal employees from conducting and participating in certain political activities while on duty.[76] The Hatch Act is laid out in 5 U.S.C. §§ 7321-7326, which detail the specifics of the Hatch Act's coverage and stipulate what activities are in violation.[77] Understanding how the Hatch Act applies to PANS employees requires understanding how the Hatch Act applies to PAS and NP employees. The Hatch Act's application truncates into three factors: who is covered, what activities are covered, and what counts as "on duty."[78]

E. Who Does the Hatch Act Apply to

The Hatch Act does not apply to all federal employees.[79] Instead, the Hatch Act only applies to federal *executive* branch employees.[80] As such, the

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72 *See Nat'l Ass'n of Letter Carriers*, 413 U.S. at 564 ("'The problem in any case is to arrive at a balance between the interests of the (employee), as a citizen, in commenting upon matters of public concern and the interest of the (government), as an employer, in promoting the efficiency of the public services it performs through its employees.' Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act.").

73 *Id.* at 580-81 ("The remainder of the statute, as we have said, covers a whole range of easily identifiable and constitutionally proscribable partisan conduct on the part of federal employees").

74 *See* Gallu & Allison, *supra* note 8.

75 *Id.*

76 5 U.S.C. § 7324(a); 5 U.S.C. § 7323(a)(1); 5 C.F.R. § 734.302(a). *See generally* 5 U.S.C. §§ 7321-7326.

77 *See* 5 U.S.C. §§ 7321-7326.

78 *Id.*

79 *See* 5 U.S.C. § 7322(1).

80 *Id.*

Hatch Act does not cover anyone employed outside of the federal executive branch (i.e., federal judicial and legislative branch employees).[81] The Hatch Act also generally does not apply to state or local government employees, nor private citizens for that matter.[82] Additionally, the Hatch Act does not apply to Uniformed Servicemen or Servicewomen. [83]

The Hatch Act applies to all federal executive branch employees with two exceptions.[84] It does not cover employees of the Government Accountability Office and it does not cover the President or Vice President.[85] Every other federal executive branch employee is subject to its requirements.[86] Thus, the Hatch Act covers all agency employees, including, but not limited to: ambassadors, department heads, secretaries, and postal workers.[87]

This application extends to individuals employed by the White House and EOP.[88] The Hatch Act states:

"Subject to the provisions of subsection (b), an employee may take an active part in political management or in political campaigns, except an employee may not . . . use his official authority . . . for the purpose of interfering with or affecting the result of an election . . . [or] knowingly solicit, accept, or receive a political contribution from any person".[89]

The 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 Government Accountability Office; or … a position within the competitive service which is not in an Executive agency."[90]

From this language, it is clear that all employees who work for the White House and EOP, including presidentially-appointed White House officials, are covered by the act along with all other federal executive branch employees, without exception.[91] This broad coverage is clear for two reasons. First, the breadth of coverage is made evident where the section states, "*any* individual,"

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81 *Id.*
82 *Id.* State and local governments who receive a substantial amount of federal funding might also be covered by the Hatch Act. Non-profit employees whose salaries are paid by certain federal grants might also similarly be covered.
83 *Id.*
84 *Id.*
85 *See* 5 U.S.C. § 7322(1)(a).
86 *See* 5 U.S.C. § 7322(1).
87 *See* 5 U.S.C. § 7324(a); 5 U.S.C. § 7323(a)(1); 5 C.F.R. § 734.302(a).
88 S*ee* 19 U.S. Op. Off. Legal Counsel 103 (May 5, 1995), 1995 WL 1767065 (finding that the White House Office is an executive agency for purposes related to the Hatch Act); 27 U.S. Op. Off. Legal Counsel 118 (May 23, 2003), 2003 WL 25728359 (reaffirming that the Hatch Act applies to White House Office employees). *See generally* 5 U.S.C. § 7322(1).
89 5 U.S.C. § 7323.
90 5 U.S.C. § 7322(1).
91 *See generally id.*

which clearly carries the intent to include any and all individuals "employed or holding office" in the executive branch of the government.[92] Second, it should be assumed that the listed exceptions should be interpreted as being exhaustive, not illustrative or suggestive, since the list is both concise and particular in singling out the President, Vice President and the employees of the Government Accountability Office.[93] Together, these two factors make it extremely difficult to characterize the Hatch Act as not applying to every federal executive branch employee outside of the small, finite list of exceptions.[94] Thus, all EOP employees, PANS or otherwise, are subject to the Hatch Act's restrictions.[95]

F. What Activity Does the Hatch Act Cover

All employees covered under the Hatch Act are subject to the same basic set of restrictions.[96] This core set of restrictions covers activities like using an official title while participating in political activity, using a position to coerce people into carrying out political activity, and soliciting contributions from subordinates.[97] Activities covered under the Hatch Act include everything from postal workers putting party bumper stickers on their United States Postal Service delivery trucks, to individuals creating a shrine at work dedicated to active presidential candidates.[98] More egregious violations include actively running for office while still employed at a federal agency and pressuring subordinates to support a certain political party in upcoming elections.[99]

Some employees are also subject to another layer of Hatch Act restrictions.[100] OSC refers to these employees as "further restricted" employees.[101] "Non-further restricted" employees are only subject to the aforementioned core set of restrictions, while "further restricted" employees are

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[92] *See id.* (emphasis added).
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *See* 5 U.S.C. § 7323(a).
[97] *See* 5 CFR § 734.302(b)(1)-(3).
[98] *See* U.S. OFF. OF SPECIAL COUNSEL, A GUIDE TO THE HATCH ACT FOR FEDERAL EMPLOYEES (2014), https://osc.gov/Documents/Outreach%20and%20Training/Handouts/A%20Guide%20to%20the%20Hatch%20Act%20for%20Federal%20Employees.pdf.
[99] *Id. See generally How to File a Hatch Act Complaint*, U.S. OFF. OF SPECIAL COUNSEL, https://osc.gov/Services/Pages/HatchAct-FileComplaint.aspx (last visited on Mar. 1, 2021) ("After investigating an alleged Hatch Act violation, OSC may seek disciplinary action against an employee before the Merit Systems Protection Board. When violations are not sufficiently egregious to warrant prosecution, OSC may issue a warning letter to the employee involved.").
[100] 5 U.S.C. § 7323(b)(2)(A).
[101] U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2019).

subject to additional regulations.[102] These further restricted activities include "taking an active part in political management or political campaigns" and actively managing a local political party.[103] Some of the agencies whose employees are considered "further restricted" include, but are not limited to, the FBI, the CIA, MSPB, IRS, and more.[104] The intent behind this additional set of restrictions is to prevent a set of influential employees from possessing too large a role in partisan elections.[105] This further restricted designation is directly designed to further the purpose of the Hatch Act in preventing employees from using their positions within the United States government from influencing political elections, and agencies.[106]

G. When and Where Does the Hatch Act Apply

The Hatch Act applies anytime and anywhere when an employee is on duty.[107] When off duty, the Hatch Act still applies when an employee is in government buildings connected to their job, wearing a government uniform or insignia, or using a government-owned vehicle. The Hatch Act states:

An employee may not engage in political activity… while the employee is on duty; . . . 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; . . . while wearing a uniform or official insignia identifying the office or position of the employee; or …using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.[108]

This is straightforward for most federal employees: employees should refrain from carrying out political activities while on duty.[109] However, the Hatch Act is not so rigid as to ignore the fact that certain federal employees work irregular hours in discharging their duties.[110] As noted above, the Hatch Act includes a level of accommodation for a set of employees whose "duties

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[102] 5 U.S.C. § 7323(b)(2)(A).

[103] *See* 5 U.S.C. § 7323(b)(2)(A); U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2019).

[104] *See Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNSEL, https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup53|tabGroup13|tabGroup31 (last visited Feb. 28, 2021).

[105] *See id.* ("Further restricted federal executive branch employees are prohibited from engaging in partisan political management or partisan political campaigns. Generally, Further Restricted employees are those employed in intelligence and enforcement-type agencies (except employees appointed by the President, by and with the advice and consent of the Senate).").

[106] *See* 5 U.S.C. § 7323(b)(2)(A).

[107] *See* 5 U.S.C. § 7324(a).

[108] 5 U.S.C. § 7324(a). *See* 5 U.S.C. § 7322(1).

[109] *See* 5 U.S.C. § 7324(a)(1).

[110] *See* 5 U.S.C. § 7324(b)(2)(A-B).

and responsibilities of whose position continue outside normal duty hours and while away from the normal duty post."[111] This set of employees is limited to those "paid from an appropriation for the Executive Office of the President" or "appointed by the President, by and with the advice and consent of the Senate."[112] In essence, certain PAS and EOP employees are permitted to carry out political activity on the clock in a limited set of circumstances.[113]

This accommodation demonstrates two core principles of the Hatch Act. First, this accommodation ostensibly reflects the intent to balance the objectives of the Hatch Act while respecting the First Amendment rights of these employees.[114] Without an accommodation, working unset hours with an unpredictable work schedule might otherwise constrain an employee's ability to exercise their constitutional rights.[115] The second aspect pertains to the requirement that costs associated with political activity are not to not be paid for by "money derived from the Treasury of the United States."[116] In other words, taxpayer money is to be spent on the objectives of the federal government, not on partisan politics.[117]

Section 7324 presents an excellent demonstration of the multiple layers employed by the Hatch Act. Whereas the Hatch Act is otherwise designed to be absolutely rigid in its application to all federal employees, the Act allows for flexibility in § 7324. Certain employees are permitted to carry out political activities while on duty, so long as the money is not derived from the Treasury.[118] This provision makes sense, because positions like cabinet level positions or senior advisors within EOP are political by design. As such, Congress sets aside a clear exception that allows such employees to participate in political activities, so long as the cost of the activity is not shouldered by the American people.[119] It should be noted that this accommodation still preserves the effect of keeping politics out of the workplace, while also recognizing that

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111 5 U.S.C. § 7324(b)(2)(A).
112 5 U.S.C. § 7324(b)(2)(B).
113 5 U.S.C. § 7324(b).
114 *See Nat'l Ass'n of Letter Carriers*, 413 U.S. at 556; *Nat'l Treasury Employees Union*, 513 U.S. at 465-66 (finding that people who work for the government do not relinquish their first amendment rights but affirming that Congress may impose speech-related limitations on federal employees while on the job); *see also Waters*, 511 U.S. at 674.
115 *See Nat'l Treasury Emps. Union*, 513 U.S. at 471.
116 5 U.S.C. § 7324(b)(1).
117 *See generally id.*
118 *See Haddon*, 313 F.3d 1352; *see also* 5 U.S.C. § 7324(b)(1). In practice this often involves reimbursing the treasury. *See generally* 5 U.S.C. § 7324(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.").
119 *See generally* 5 U.S.C. § 7324(b)(1).

the concept of a "workplace" can sometimes vary for certain individuals.[120] It also requires a level of accountability, because the affected PAS and EOP employees are required to keep track of costs so that they may accurately reimburse the taxpayers.[121]

When read in its entirety, § 7324(b) demonstrates an element of flexibility and nuance, reflecting dual intentions by Congress: to balance keeping politics out of the federal workplace with an employee's First Amendment rights, and to ensure taxpayer money is not used for partisan political activities.[122] By creating special provisions under § 7324(b) for on-duty employees paid under appropriations for EOP, the Hatch Act creates some accommodation for these employees while still ultimately extending coverage over this influential class. Thus, § 7324 demonstrates both the executive-wide application of the Hatch Act as well as some of the Act's limitations.

II. ENFORCEMENT: A CLOSER LOOK AT THE RELATION BETWEEN THE HATCH ACT AND OSC'S ENFORCEMENT STATUTES

Once a violation is found, OSC's enforcement statute, 5 U.S.C. §§1215-1216, takes over and prescribes the Hatch Act's enforcement.[123] OSC's enforcement statute provides two mechanisms for disciplining Hatch Act violations: the presidential enforcement mechanism and the MSPB enforcement mechanism.[124] Determining which mechanism is to be implemented can result in major ramifications, as it can result in drastically different discipline following a Hatch Act violation.[125]

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120 Particularly concerning travel and employees who are essentially on duty 24/7.

121 *See* 5 U.S.C. § 7324(b)(1). If reimbursement is required, then it follows that applicable employees would have to keep track of such costs to comply with the requirement.

122 5 U.S.C. § 7324(b)(1); *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 556; 5 U.S.C. § 7324(b)(1).

123 *See* 5 U.S.C. §§ 1215-1216. It should be noted that the OSC's enforcement statutes are designed to cover enforcement of all areas that fall under OSC's jurisdiction, not just the Hatch Act. OSC's larger mission is to protect the federal workforce. While the Hatch Act constitutes an important part of this mission, OSC is also responsible for enforcing federal whistleblower protection laws. This entails helping federal employees when they face retaliation after making disclosures. As a result, OSC's enforcement of the Hatch Act and whistleblower protection law occurs through the same set of statutes.

124 *Id.*

125 *See* Kellyanne Conway Report, *supra* note 1.

A. The Two Enforcement Mechanisms

Section 1215(a) lays out the MSPB enforcement mechanism, requiring OSC to bring a written Hatch Act claim against NP employees to the MSPB. These procedures require OSC to bring a written claim against an employee to the MSPB.[126] Section 1215(a) states:

> (1) Except as provided in subsection (b), if the Special Counsel determines that disciplinary action should be taken against any employee for having—
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> > (A) committed a prohibited personnel practice,
> > (B) violated the provisions of any law, rule, or regulation, or engaged in any other conduct within the jurisdiction of the Special Counsel as described in section 1216, or
> > (C) knowingly and willfully refused or failed to comply with an order of the Merit Systems Protection Board,
> > the Special Counsel shall prepare a written complaint against the employee containing the Special Counsel's determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Board, in accordance with this subsection.[127]

This can be seen in the language reflected in § 1215(a)(1)(B), which states "for [violating] the provisions of any law, rule, or regulation, or engaged within the jurisdiction of the Special Counsel as described in section 1216." Section 1216(1)(a) provides, "[i]n addition to the authority otherwise provided in this chapter, the Special Counsel shall, except as provided in subsection (b), conduct an investigation of any allegation concerning… political activity prohibited under subchapter III of chapter 73 [the Hatch Act], relating to political activities by Federal employees."

The second enforcement mechanism provided by OSC's enforcement statute is the presidential enforcement mechanism, which is contained in § 1215(b). While the MSPB enforcement mechanism applies to NP employees, and therefore is the applicable enforcement method for most federal employees, the presidential mechanism applies exclusively to PAS employees.[128] The presidential mechanism differs from the MSPB mechanism in that it vests ultimate discretion in the President rather than the MSPB for a Hatch Act violation.[129] In essence, the President steps in and assumes the role that the

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[126] *See* 5 U.S.C. § 1215(a)(1)(C).
[127] 5 U.S.C. § 1215(a).
[128] *Id.*
[129] *Id.*

MSPB would otherwise exercise. This means that when a PAS employee violates the Hatch Act, OSC is to present its investigatory findings to the President in lieu of bringing the case before the MSPB.[130] Section 1215(b) states:

(b) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in subsection (a)(1), together with any response of the employee, shall be presented to the President for appropriate action in lieu of being presented under subsection (a).[131]

Ultimately, OSC's enforcement statutes incorporate two distinct mechanisms for enforcing the Hatch Act, depending on whether the employee is PAS or non-PAS.[132]

B. Implementing the Enforcement Mechanisms

Enforcement of the Hatch Act involves implementing one of its two enforcement mechanisms.[133] Each mechanism entails a different process and ultimately a different decision-maker of the disciplinary ramifications.[134] As a result, determining which mechanism is chosen can result in tangibly different outcomes.[135]

Both enforcement mechanisms start with a Hatch Act claim.[136] Typically, Hatch Act claims are initiated after a complaint is filed.[137] Most Hatch Act complaints alleging violations are either brought by the agency or by employees contacting OSC directly after recognizing the potential for a violation.[138] After receiving a complaint, OSC starts by looking at the actions alleged in a complaint to see whether the activity alleged in the claim is actually in violation of the Act.[139] If the alleged activity constitutes something that

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130 *Id.*
131 5 U.S.C. §§ 1215(b).
132 *Id.*
133 *See* 5 U.S.C. § 1215.
134 *Id.*
135 *See* Kellyanne Conway Report, *supra* note 1. The Conway case provides a good example of how a typical OSC investigation proceeds.
136 *See* 5 U.S.C. § 1212.
137 *Id.*
138 *Id.*
139 *See* Kellyanne Conway Report, *supra* note 1.

would be in violation of the act, then OSC proceeds to investigate.[140] When investigating the veracity of the claim and should the situation call for it, OSC often operates in conjunction with the employing agency.[141]

Found violations can result in corrective action, disciplinary action or a combination of the two.[142] Corrective measures often include halting whatever action was found to be in violation along with additional Hatch Act training for that individual (and perhaps the rest of the office or section as well).[143] Disciplinary measures depend on the severity of the infraction, and can range from taking a leave of absence to termination (usually for repeat offenders or particularly egregious violations).[144] Specifically, the Hatch Act authorizes a list of potential disciplinary consequences for a violation, including, "removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, … reprimand, … an assessment of a civil penalty not to exceed $1,000; or any combination of the penalties."[145] Ostensibly this is a well-designed amendment by Congress, as it reflects the reality that people make mistakes and that not all Hatch Act violations are of the same severity. This added flexibility makes the Hatch Act less heavy-handed and more effective in its enforcement.

Determining which entity enforces disciplinary measures depends on which of the two enforcement mechanisms is implemented. Determining which of the two mechanisms will be implemented hinges on whether the subject of the Hatch Act investigation is PAS or NP.[146] With NP employees, OSC has the

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[140] *See* U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2019) ("OSC investigated numerous allegations that White House employees violated the Hatch Act by engaging in political activity on their official social media accounts.").
[141] *Id.*
[142] *See* 5 U.S.C. § 7326.
[143] *See* 5 U.S.C. § 7326(1). In general, the statute gives OSC discretion to resolve Hatch Act violations. *See* 5 U.S.C. § 7326(1); *see also Hatch Act Policies and Procedures*, U.S. OFF. OF SPECIAL COUNSEL, https://osc.gov/Services/Pages/HatchAct-Policies.aspx (last visited on Mar. 1, 2021). *See generally How to File a Hatch Act Complaint*, *supra* note 99 ("After investigating an alleged Hatch Act violation, OSC may seek disciplinary action against an employee before the Merit Systems Protection Board. When violations are not sufficiently egregious to warrant prosecution, OSC may issue a warning letter to the employee involved.").
[144] *See* 5 U.S.C. § 7326.
[145] *Id.*
[146] *See* 5 U.S.C. § 1215(b). 1215(b) outlines separate procedures for employees who are presidentially appointed, Senate confirmed employees, and those who are not:
In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in subsection (a)(1), together with any

authority to enforce the disciplinary measures by implementing the MSPB enforcement method, which entails bringing a case before the MSPB.[147] Generally speaking, most investigations which reveal a Hatch Act violation are settled by OSC, the employee and the employing agency and therefore do not result in an MSPB decision, as most violations are resolved through settlement.[148] However, if a settlement is not reached, and the case is brought before the MSPB, then MSPB makes a determination.[149] MSPB can reject OSC's recommendation, alter it, or apply it in full.[150] Notably, this route incorporates a substantial level of oversight, because the MSPB provides a check on OSC. Further, all MSPB cases, including Hatch Act cases brought by OSC, may be appealed directly to the United States Court of Appeals for the Federal Circuit ("Federal Circuit").[151]

If the subject of the Hatch Act investigation is a PAS employee, then OSC implements the presidential enforcement mechanism.[152] In this scenario, OSC's next step is to send a report of the investigatory findings directly to the President, along with a letter specifying OSC's recommendation for corrective measures and/or discipline.[153] Any decision made by the President in this matter is unreviewable.[154]

OSC cannot pursue both methods, as the statute divides employees into PAS and everyone else (the NP).[155] This means that employees, at least under the auspices of the enforcement statute, will be subject to one mechanism or the other. This is problematic, because it is not clear which group PANS employees should be included in.[156] This either-or situation forces OSC into a difficult position. If OSC wants to seek enforcement for a PANS employee's Hatch Act violation, then it must determine which category PANS employees fit into.[157]

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response of the employee, shall be presented to the President for appropriate action in lieu of being presented under subsection (a).

Id.

147 5 U.S.C. § 1215(a).

148 *See* 5 U.S.C. § 1215(a)(2); U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2019).

149 *See* 5 U.S.C. § 1215(a).

150 *Id.*

151 *See* 5 U.S.C. § 1215(a)(4); 28 U.S.C. § 1295(a)(9) (granting appellate jurisdiction over MSPB cases to the United States Court of Appeals for the Federal Circuit).

152 5 U.S.C. § 1215(b).

153 *Id.*

154 *Id.* This finality is demonstrated by the language of § 1215(b), requiring OSC to bring the Hatch Act claim before the President.

155 *See* 5 U.S.C. § 1215(b).

156 *See id.* As noted, PANS employees are distinct from PAS employees by definition.

157 *Id.*

C. The Difference Between Enforcement Mechanisms

Ascertaining whether an employee is PAS or NP determines which mechanism will be implemented.[158] This fact is significant, because the mechanisms are distinct. The largest and most consequential difference is who will determine whether disciplinary measures shall be imposed, and what said measures should be.[159] As such, determining which enforcement mechanism is implemented can impact how the employee is disciplined for the violation.[160]

The MSPB routinely and reliably enforces OSC's investigatory findings in accordance with its procedures and mandate.[161] While the MSPB can and does deviate from OSC's recommended disciplinary measures, the fact remains that the MSPB regularly upholds the law and ensures the Hatch Act remains in effect.[162] In contrast, the President can simply decide to ignore the investigation report and recommendation.[163] Compounding this distinction is the difference of oversight between mechanisms. As mentioned previously, the presidential mechanism occurs in lieu of bringing the case to the MSPB, meaning that the President is the sole decider.[164] The President operates with complete and total discretion.[165] Whereas the MPSB mechanism provides an impartial judicial proceeding which occurs within a structured system of oversight, the presidential mechanism presents a potentially arbitrary and much less reliable

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[158] *See* 5 U.S.C. § 1215(a)-(b).

[159] *Id.*

[160] *See* Kellyanne Conway Report, *supra* note 1 (where OSC's recommendation for termination was not heeded by President Trump). It is worth noting that PAS violations occur less frequently than non-PAS violations. This most likely has more to do with the fact that non-PAS employees outnumber their PAS counterparts by an overwhelming margin. However, given the heightened visibility and responsibility that often comes with being a PAS employee, there is an argument to be made that their violations tend to be more serious.

[161] *See* Special Counsel v. Brondyk, No. HQ12068910019, 1989 WL 149277 (M.S.P.B. Nov. 15, 1989) (affirming removal following a Hatch Act violation).

[162] *See* Special Counsel v. Collier, No. CV-1216-05-0026-T-1, 2006 WL 948144 (M.S.P.B. Apr. 3, 2006) (accepting OSC's findings of a Hatch Act violation but imposing a suspension instead of termination).

[163] *See* Letter from White House to Special Counsel Henry J. Kerner (Jun. 11, 2019); 5 U.S.C. § 1215(b).

[164] *See* 5 U.S.C. § 1215(b).

[165] *Id.*

method for enforcing the Hatch Act.[166] Additionally, the MPSB's determinations are appealable to the Federal Circuit.[167]

Ostensibly, the existence of multiple enforcement methods for Hatch Act violations makes sense. It is evident that Congress, to some extent at least, sought to avoid intruding on the President's discretion in making their own personnel decisions as it relates to discipline or termination.[168] By setting aside a different enforcement mechanism for PAS employees, Congress preserves the President's authority in this area.[169] A similar line of reasoning explains the accommodations created for certain PAS and EOP employees under the Hatch Act.[170] At the same time, the presidential enforcement mechanism is still an enforcement mechanism. It still preserves the effectiveness and applicability of the Hatch Act, provided that the President in office respects the purpose of the Hatch Act.

Under President Obama's eight-year administration, several high-ranking members of the Administration were found to have violated the Hatch Act. Most notable among them were Secretary of Housing and Urban Development Julian Castro and Secretary of Health and Human Services Kathleen Sebelius.[171] Both cases serve as good examples of the presidential enforcement mechanism functioning as intended: upholding the purpose of the Hatch Act while giving deference to the President in disciplining senior levels of the Administration. Both Secretaries reimbursed the treasury, apologized for their actions, and refrained from violating the Act for the rest of their time employed as a federal employee under the Administration.[172] The outcome in

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[166] *Compare* Special Counsel v. Eisinger , 103 M.S.P.R. 252, 253 (M.S.P.B. August 9, 2006) (affirming OSC's termination recommendation following a Hatch Act violation), *aff'd sub nom.* Eisinger v. Merit Sys. Prot. Bd., 236 F. App'x 628, 631 (Fed. Cir. 2007), *with* Letter from White House to Special Counsel Henry J. Kerner (Jun. 11, 2019) (the White House refusing to enforce the Hatch Act).

[167] *See* 5 U.S.C. § 1215(b).

[168] *See id.* Consider how the presidential mechanism is introduced in § 1215(b) by stating "[i]n the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate." *Id.*

[169] *See* 5 U.S.C. § 1215(b).

[170] *See* 5 U.S.C. § 7324(b).

[171] *See* Jennifer Haberkorn, *Report: Sebelius Violated Hatch Act*, POLITICO (Sep. 12 2012, 3:13 PM), https://www.politico.com/story/2012/09/osc-report-sebelius-violated-hatch-act-081122; Josh Gerstein, *Ethics Agency Says HUD Chief Castro Violated Hatch Act*, POLITICO (Jul. 18 2016, 5.24 PM), https://www.politico.com/story/2016/07/julian-castro-ethics-hud-hatch-225732.

[172] Jennifer Haberkorn, *Report: Sebelius Violated Hatch Act*, POLITICO (Sep. 12 2012, 3:13 PM), https://www.politico.com/story/2012/09/osc-report-sebelius-violated-hatch-act-081122; Josh Gerstein, *Ethics Agency Says HUD Chief Castro Violated Hatch Act*, POLITICO (Jul. 18 2016, 5.24 PM), https://www.politico.com/story/2016/07/julian-castro-ethics-hud-hatch-225732.

both cases can be characterized as being definitive "wins" for the Hatch Act and the presidential mechanism. These cases reflect a presidential respect for the purpose of the Hatch Act and demonstrate that the presidential mechanism can be effective. Simply having some sort of discipline demonstrates that no employee is above the law and sets an example at the top of an administration.

On the other hand, the Kellyanne Conway Hatch Act case is a good example of what happens when the Hatch Act is not afforded the necessary degree of presidential respect.[173] Assuming for a moment that PANS employees ought to be treated as PAS employees for the purposes of Hatch Act enforcement, the outcome in the 2019 Kellyanne Conway case reflects an inherent consequence that arises out of the creation of the presidential enforcement mechanism in the first place.[174] As is evident by the mere creation of the presidential mechanism, Congress designed the mechanism with the intent to uphold the purpose of the Hatch Act. The presidential mechanism is designed around the premise that the President should control the type and extent of discipline imposed on his appointees.[175] The presidential mechanism is a recognition of the role played by a president, not a permit that the President can use to decide whether or not the Hatch Act applies.[176] The fact that the President would refuse to enforce any discipline, even in the form a superficial slap on the wrist, in the face of such a blatant series of Hatch Act violations is directly at odds with the purpose of the Hatch Act. The consequent outcome of the Kellyanne Conway case reinforces the notion that a serious weakness of the Hatch Act is its dependency on presidential involvement.

D. Why Two?

Ostensibly, having two enforcement mechanisms derives directly from the matter of removal.[177] One of the core disciplinary tools available to OSC and the Hatch Act is termination of employees for egregious violations.[178] Moreover, merely having termination as an option serves as a solemn reminder of just how serious Hatch Act violations are and might provide some level of

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173 *See* Gallu & Allison, *supra* note 8.
174 *See* 5 U.S.C. § 1215(b).
175 *See id.*
176 *See id.*
177 A number of Supreme Court cases have established precedent linking removal of employees to their status as a presidential appointee. *See* Myers v. United States, 272 U.S. 52, 119, 135 (1926); Humphrey's Executor v. United States, 295 U.S. 602, 631-32 (1935).
178 *See* 5 U.S.C. § 7326.

deterrence.[179] Having such a drastic tool at the ready is part of what makes the Hatch Act so effective in achieving its purpose.

In the event that a PAS employee commits a serious Hatch Act violation, termination takes on constitutional considerations.[180] Removal of purely executive presidential appointees is considered to be a prerogative reserved to the President.[181] To be clear, this applies to all presidential appointees, not just those with Senate confirmations.[182] Congress did not adequately incorporate removal consideration into the design of OSC's enforcement mechanisms, as demonstrated by how categorization into the PAS and NP categories fails to address PANS employees.[183] As such, Congress's intent as to how PANS employees should be treated under the Hatch Act is unclear. This lack of clarity might very well place PANS employees under either category's enforcement mechanism.

By failing to address an important category of employees, the statute as it exists leaves open a significant gap in the Hatch Act's enforcement. This gap forces OSC to make an awkward choice between the MSPB and presidential enforcement methods.[184] Either choice raises significant questions concerning separation of powers and Congress's authority to cabin the President's discretion in removing and disciplining his or her staff.[185] This is not conducive to effective enforcement of the Hatch Act. After considering the differences in the consequences between enforcement mechanisms, the question remains: should PANS senior level executive branch employees, who serve in close proximity to the President, be entitled to the same treatment as PAS employees by leaving enforcement responsibility to the perhaps whimsical and arbitrary discretion of the President? Or should OSC be permitted to recommend discipline before the MSPB?

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179 *See* Special Counsel v. Brondyk , 42 M.S.P.R. 333, 337-339 (M.S.P.B. November 15, 1989).

180 *See Myers*, 272 U.S. at 52 (finding removal of presidential appointees derives from "reasonable implication" that removal is included under President's appointment powers); *see also Humphrey's Executor*, 295 U.S. at 602 (finding that the Court's decision in *Myers* stands for "the unrestrictable power of the President to remove purely executive officers").

181 *Id.*

182 *See* 5 U.S.C. § 1215.

183 *Id.*

184 *See* 5 U.S.C. § 1215(b).

185 *See generally id.*

III. The Gap: What Still Could Happen and How to Fix It

The gap exists because OSC's enforcement statute only addresses PAS and NP employees, and as such leaves out a crucial class of employees.[186] Any hope of resolving issues arising from this matter requires a solution that explicitly lays out a path for enforcing the Hatch Act for PANS employees. This could be achieved through the creation of a new enforcement mechanism or, more practically speaking, through assigning PANS employees to one of the existing enforcement mechanisms.[187] The latter option presents a more straightforward path to closing the gap, and as such is the most desirable solution.

There are three possible amendments that would effectively fill the gap between the Hatch Act and OSC's enforcement statutes by assigning PANS employees to the existing mechanisms. The first option is to place PANS employees explicitly under the NP category.[188] This would make PANS employees subject to the MSPB mechanism and would give the MSPB outright jurisdiction to enforce the Hatch Act against all PANS executive branch employees.[189] The MSPB might be able to enforce some of the lesser sanctions, but removal is likely out of the question because of constitutional limitations concerning the removal of presidential appointees.[190] The second option is to vest enforcement authority of all PANs employees with the President, making enforcement of the Hatch Act the same for PANS employees as it is for PAS employees. This would make the Hatch Act dependent on the President and could essentially render the Hatch Act inapplicable to a wide class of employees. The third and best option is to allocate shared enforcement authority between the MSPB and the President for PANS employees.[191] This amendment would allow OSC to pursue either enforcement mechanism or both.[192] It results in the President retaining full enforcement powers while also allowing the MSPB to carry out a limited form of enforcement. Doing so allows the President to exercise control over his immediate staff, but also allows for a level of Hatch Act enforcement if the President fails to act.

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[186] *See id.*
[187] *See generally* 5 U.S.C. § 1215(a)-(b).
[188] *See generally* 5 U.S.C. § 1215(a).
[189] *See id.*
[190] 5 U.S.C. § 1215(b).
[191] Essentially placing PANS employees under both mechanisms. *See* 5 U.S.C. § 1215(a)-(b).
[192] *See generally id.*

IV. ASSIGNING PANS EMPLOYEES TO THE MSPB MECHANISM: HOW THE KELLYANNE CONWAY CASE ALMOST BECAME THE WORST-CASE SCENARIO

Any outcome that results in OSC attempting to bring about a PANS employee's termination before the MSPB is an undesirable one. There are two routes that could yield this outcome. The first is leaving the enforcement gap as-is. The second is explicitly assigning MSPB jurisdiction over to PANS employees. The MSPB's unsuitability for sole Hatch Act enforcement over PANS employees is made even more apparent after considering how close the Kellyanne Conway case could have come to this outcome.[193]

Any situation involving OSC calling for a PANS employee's termination before the MSPB is unlikely to end favorably for OSC. First, there are practical limitations on MSPB's ability to enforce the Hatch Act against PANS employees.[194] Constitutional limitations restrict the removal of presidential appointees, which effectively bars the MSPB from enforcing any removal (and probably suspension as well).[195] If the MSPB erroneously attempted a removal, it would be overturned by the Federal Circuit.[196]

The MSPB would still be able to implement the remaining enforcement options under the Hatch Act.[197] However, these remaining enforcement options only include the lesser Hatch Act sanctions: a fine of up to $1,000.00 or a reprimand.[198] While some form of enforcement is better than no enforcement at all, removing the threat of termination or suspension greatly weakens the vitality and effectiveness of the Hatch Act.[199]

This is all assuming that the MSPB is not challenged on jurisdiction. A plain language reading of the statute likely allows for the inclusion of PANS employees under the enforcement mechanism for NP employees.[200] However, this is not necessarily a forgone conclusion. Arguments could be made against MSPB jurisdiction over PANS given the lack of Congressional preference on the matter.[201] A finding of MSPB jurisdiction could result in an appeal to the

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193 *See* U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2019).
194 5 U.S.C. § 1215(b).
195 *See Myers*, 272 U.S. at 52; *Humphrey's Executor*, 295 U.S. at 602.
196 *See* 28 U.S.C. § 1295(a)(9) (granting appellate jurisdiction over MSPB cases to the United States Court of Appeals for the Federal Circuit).
197 5 U.S.C. § 7326.
198 *Id.*
199 Leaving only two minor sanctions as enforcement would severely limit OSC and the MSPB in their efforts to enforce the Hatch Act. *Id.*
200 This is likely because § 1215(b) limits the presidential mechanism for PAS employees only. *See* 5 U.S.C. § 1215(b).
201 One such potential argument for rejecting MSPB jurisdiction might find support in Justice Jackson's landmark concurrence in Youngstown. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-55 (1952) (Jackson, J. concurrence). An argument against the constitutionality of MSPB jurisdiction over PANS employees

United States Court of Appeals for the Federal Circuit, whose judges would then have to decide the jurisdiction question for themselves.[202] If the PANS employee in question is close to the President and is perhaps even paid through EOP appropriations (as occurred during the 2019 OSC investigation and report into Ms. Conway), then such an appeal would likely draw national attention.[203] This is an unlikely strategy to succeed, because the mechanisms very clearly distinguish between PAS employees and everyone else.[204] However, it is still important to identify a jurisdictional challenge as a possibility.

The fact that the MSPB is not a suitable option for enforcing PANS employee Hatch Act violations is made more disconcerting in light of the Kellyanne Conway case. Ms. Conway's case might represent an anomaly. One critical factor missing from the Kellyanne Conway case is that the MSPB enforcement mechanism was not available to OSC at the time of the 2019 Conway investigation and report.[205] At the time, the MSPB did not (and still does not at the time of writing) have quorum, meaning it did not have the minimum amount of board members necessary to officially hear cases.[206] Thus, any case brought before the MSPB by OSC would have been significantly delayed with no reasonably determinable timeline because of the board's inability to hear cases.[207] Moreover, OSC would have faced significant backlog

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would focus on two considerations: whether the court finds an absence of congressional preference or guidance, and if so whether such an absence results in Hatch Act enforcement discretion being left to the President. Per Jackson's opinion, executive powers are deemed to be at their fullest extent when such powers are authorized by Congress or the Constitution. *See id.* at 644. Powers are considered to be at their most constrained when Congress has expressly curtailed or limited presidential authority in a matter. *Id.* at 637. In the absence of any explicit congressional preference, the President's authority enters a "zone of twilight." *Id.* at 637. In a case like Kellyanne Conway's, the court might find that congressional intent is ambiguous, making the outcome much less predictable.

[202] The President's discretion in removing and managing his or her advisors might be a power necessary and proper for the President to do his or her job. Pushing back against this to some degree, successfully convincing the Federal Circuit that Congress has not provided any direction on the matter whatsoever would be a challenge, given the deliberate choice to place EOP employees under the scope of Hatch Act coverage. In favor of this interpretation is § 7324(b) of the Hatch Act. If Congress intentionally distinguished employees in the Executive Office from PAS in the language of the Hatch Act, then Congress could have done so with OSC's enforcement mechanisms as well.

[203] *See* Gallu & Allison, *supra* note 8.

[204] *See* 5 U.S.C. § 1215(b).

[205] *See* Eric Yoder, *Federal Employee Appeals Agency Could Restart Issuing Decisions Soon*, WASH. POST (June 19, 2019, 11:56 AM), https://www.washingtonpost.com/politics/2019/06/19/federal-employee-appeals-agency-could-restart-issuing-decisions-soon/.

[206] *Id.*

[207] *Id.*

once the MSPB had a full board.[208] The end result is that OSC could not have been reasonably expected to pursue the MSPB enforcement route in their attempts to address the Kellyanne Conway Hatch Act violations.

A future incident similar to the Kellyanne Conway case might have a different outcome. Although OSC made an intelligent evaluation of the situation and decided against implementing the MSPB enforcement mechanism, there is no guarantee that a future Special Counsel will do the same.[209] If another high-level PANS employee were to commit Hatch Act violations on the same scale as Ms. Conway, OSC might decide to implement the MSPB enforcement mechanism.[210]

Any Congressional legislation explicitly assigning the MSPB authority over PANS employees imposes many of the same issues as leaving the gap open. While leaving the gap in place does not necessarily guarantee that OSC would attempt to implement the MSPB mechanism (indeed OSC chose not to pursue this course in 2019), it does not remove it as an option.[211] This means that implementing the MSPB enforcement mechanism remains a possibility so long as the gap remains.[212] Moreover the lack of clarity creates issues in and of itself, because it means that a difficult choice has to be made in determining which mechanism to implement. However, explicitly assigning PANS employees to the MSPB enforcement mechanism is perhaps worse than leaving the gap as-is. Such a change avoids issues that arise from the lack of clarity attached to the gap's existence. However, it guarantees the occurrence of other issues, which otherwise would only remain a possibility and not a near-certainty if the gap is left in place.

A. Give the President Authority over All Presidential Appointees

The second way to close the gap is for Congress to include all PANS employees under the presidential enforcement mechanism.[213] This option avoids potential issues of constitutionality by giving the President discretion in deciding how to enforce the Hatch Act for all presidential appointees.[214] However, for reasons discussed below, this solution by itself is not optimal.

Not all PANS employees are the same. Some PANS employees, such as senior EOP employees like Ms. Conway, often perform functions more closely

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208 *Id.*
209 *See* 5 U.S.C. § 1215(a).
210 *See generally id.*
211 *See* U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2019).
212 *See* 5 U.S.C. § 1215(a).
213 *See* 5 U.S.C. § 1215(b).
214 *Id.*

associated with PAS employees.[215] Most PANS employees are chosen because of their party affiliation; indeed, presidential appointment by design contains an inherently political element.[216] Moreover, some PANS employees, especially those in the EOP, serve as close advisors to the President and assist in shaping and orchestrating presidential policy.[217] Evidence of their close link to the President is found in the fact that many of these employees only retain their federal employment for as long as the President remains in office.[218] Thus, it is clear that some PANS employees hold a status that puts them closer to PAS than non-PAS.[219] Enforcement of the Hatch Act should reflect this distinction. To remove Presidential discretion in choosing and managing his closest advisors may not be wise. For these reasons, the President still needs to be involved in enforcing the Hatch Act against his PANS employees.

This option has serious downsides. Adding PANS employees to the purview of the presidential mechanism closes the gap, but it overcorrects the issue. Such a change results in a large amount of latitude being explicitly afforded to the President, an amount that could harm the Hatch Act's purpose. The lack of constraints on the President's discretion means that the President could essentially render the Hatch Act optional or even inapplicable to PANS employees.[220] As with the Conway case, the President could decide not to enforce the Hatch Act at all.[221] Doing so would result in no legal repercussions.[222] Rendering the Hatch Act inapplicable to a potentially large class of employees cuts against the very purpose behind the Hatch Act.[223] Such a change might effectively reverse the decades-old effort to make the federal government more accountable by making a whole class of high-level, politically motivated employees less accountable.[224] This possible change threatens a backwards slide towards the very environment that Congress designed the Hatch Act to protect against.[225] Moreover, giving the President sole explicit authority over PANS employees adds a cumbersome obligation to the President's already considerably substantial workload. On average, presidents appoint roughly 4,000 positions over the course of a four-year

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215 *See Trump Names Kellyanne Conway as Presidential Counsellor*, BBC (Dec. 23, 2016), https://www.bbc.com/news/world-us-canada-38406250.
216 *See generally id.*
217 *See generally id.*
218 *See generally id.*
219 *See generally id.*
220 *See* 5 U.S.C. § 1215(b).
221 *See id.*
222 *See* 5 U.S.C. §1215.
223 *See generally id.*
224 *See generally id.*
225 *See* U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2019).

term.[226] Only an estimated 1,200 of the 4,000 presidential appointees are PAS.[227] Although Hatch Act violations are generally not habitual, it is not ideal to require the President to make a decision every time a PANS employee violates the act.

The solution is to assign PANS employees to the presidential mechanism, but not without safeguards to enforce some level of Hatch Act compliance with PANS employees.

B. Splitting the Difference: Two Heads Are Better than One

The best solution for closing the gap is to give both the President and the MSPB the ability to enforce against PANS employees.[228] This can be done by simply allowing OSC to bring all cases to the MSPB, so long as it is understood that OSC can only levy fines for violations committed by PANS employees. This would allow OSC the discretion to implement the presidential enforcement mechanism, the MSPB mechanism, or both.

Doing so installs consequences for Hatch Act violations, thereby closing the gap (at least to some extent) while removing the incredible potential for political abuse and a lack of accountability. OSC could still recommend dismissal or other disciplinary measures, while also preserving a back-up mechanism should an absence of any presidential action occur. In short, it allows OSC to show deference to the President, but also allows OSC to follow up with the MSPB if the President chooses not to act.[229] Note that this same solution could also be extended to PAS employees in addition to PANS employees, provided that OSC and the MSPB are limited to imposing fines.

This solution is not perfect. While it follows a middle course by preserving the best aspects of the first two options, this solution recognizes that there are severe limitations inherent in the Hatch Act enforcement system. While this option does not close the gap as completely as some may like, it does at least close the gap. It acknowledges the role of the President in removing presidential appointees, but also allows for the MSPB to provide some measure of Hatch Act enforcement. The simple act of maintaining consequences for illegal actions, even if said consequences are mostly symbolic in nature, demonstrates a respect for the rule of law and an acknowledgement that no person is above the system. Accountability is a cornerstone of American

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226 *See* Brad Plumer, *Does the Senate Really Need to Confirm 1,200 Executive Branch Jobs?*, WASH. POST. (Jul, 16, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/07/16/does-the-senate-really-need-to-confirm-1200-executive-branch-jobs/?arc404=true.

227 *Id.*

228 *See* 5 U.S.C. § 1215(a)-(b).

229 *See* 5 U.S.C. § 1215(a)-(b).

meritocracy and closing the gap is paramount, even if the method for closing the gap is largely symbolic.

In practice, this option adds a modicum of unofficial oversight to the presidential mechanism. By allowing OSC to use either mechanism, presidential decision is no longer the only option (although it still carries far more weight), which instills a level of flexibility in the Hatch Act enforcement system. Additionally, this option avoids the constitutional pitfalls attached to leaving the gap unfilled or assigning the enforcement authority to the MSPB. To be clear, the full disciplinary powers would still be under the discretion of the President.[230] Only the President could enforce all disciplinary measures under § 7326.[231] Moreover, it is also not unreasonable to expect that OSC would extend an amount of courtesy to the President by implementing the presidential mechanism first. This would allow the President to correct the Hatch Act violation, while still keeping the MSPB mechanism in reserve. If the President takes the issue seriously and resolves the matter, then OSC can close the file. However, if it becomes clear that the President does not intend to prescribe any discipline or corrections, then OSC can implement the MSPB mechanism.[232] Although MSPB is limited in what discipline it can enforce, some enforcement is better than no enforcement at all. Allowing for some enforcement, even if in the form of a fine or reprimand, demonstrates that no one is above the law.[233]

It is not an unthinkable proposition that other senior PANS officials might violate the Hatch Act again in the near future. If the Conway situation were to arise again, albeit this time with both mechanisms for PANS employees in place, then OSC would still be able to submit the report and its recommendation to the President.[234] If the President made clear, however, that no discipline would be imposed, then OSC would be able to alternatively bring the case before the MSPB.[235] Accordingly, the MSPB would be able to impose a fine on the high level PANS employee for violating the Hatch Act.[236] While

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230 *See* 5 U.S.C. § 7326.

231 *Id.*

232 *See* 5 U.S.C. § 1215(a).

233 It should be noted that the imposition of a fine parallels the Hatch Act's accommodation for EOP and PAS employees which allows them to participate in political activities while on duty so long as they are not paid from the Treasury. In practice this involves reimbursing the Treasury. It should also be noted that the dual coverage proposed for PANS employees could be extended to PAS employees as well. This option would provide comprehensive coverage of the Hatch Act to the largest extent possible under the law.

234 As occurred in the 2019 incident. *See* U.S. OFF. OF SPECIAL COUNSEL ANN. REP. (2019).

235 Thus implementing the MSPB mechanism, assuming that the MSPB has quorum. *See* 5 U.S.C. § 1215(a).

236 In accordance with 5 U.S.C. § 7326.

imposing a fine might fall short of the discipline warranted in the event of a severe breach, this solution would at the very least demonstrate that no federal employee is above the law.

Ultimately, the gap that arises between the Hatch Act and its enforcement statutes is a gap that can be filled. Although the President is a necessary part of Hatch Act enforcement for PANS and PAS employees, this does not mean the President has to be the only avenue for discipline. Filling the gap is necessary to best preserve the ideals behind the Hatch Act, so that it may continue to function well into the future.