

August 23, 2019

The Honorable Henry Kerner
Special Counsel
Office of Special Counsel
1730 M Street, N.W.
Suite 218
Washington, D.C. 20036-4505

Re: Enforcement of the Hatch Act Against Presidential Appointees

Dear Mr. Kerner:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Office of Special Counsel (“OSC”) take additional steps to ensure compliance with and enforcement of the Hatch Act, particularly regarding presidential appointees who impermissibly use their government titles and authority to engage in political activity. Following OSC’s unprecedented decision recommending that President Trump remove Counselor to the President Kellyanne Conway from federal service based on her repeated violations of the Hatch Act, and President Trump’s subsequent refusal to do so, several administration officials, including Ms. Conway, appear to have violated the Hatch Act again. While we deeply appreciate the important and courageous position OSC took to defend the rule of law in its recommendation regarding Ms. Conway, these continued flagrant abuses demonstrate the need for OSC to use all available legal tools to ensure that members of the Trump administration follow the law. These tools include filing complaints in the Merit Systems Protection Board (“MSPB”) against non-Senate-confirmed presidential appointees whose actions, like Ms. Conway’s, OSC has found violated the Hatch Act and warrant disciplinary action.

Factual Background

As you know, the Hatch Act prohibits any executive branch employee from “us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election.”¹ Activities covered by this prohibition include the official “[u]sing his or her official title while participating in political activity.”² “Political activity” is defined as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”³

Since January 2017, OSC has found that at least a dozen Trump administration officials have violated the Hatch Act. These officials include: (1) White House Director of Social Media, Dan Scavino; (2) former U.S. Ambassador to the United Nations, Nikki Haley; (3) Counselor to the President, Kellyanne Conway; (4) former Deputy Assistant to the President and Communications Director for the Office of the First Lady, Stephanie Grisham; (5) Federal Communications Commissioner, Michael O’Reilly; (6) Press Secretary for Vice President Mike

¹ 5 U.S.C. § 7323(a)(1).

² 5 C.F.R. § 734.302(b)(1).

³ 5 C.F.R. § 734.101.

Pence, Alyssa Farah; (7) former Special Assistant to the President and Director of Media Affairs, Helen Aguirre Ferré; (8) Deputy Communications Director for the White House Office of Management and Budget, Jacob Wood; (9) Deputy Assistant to the President and Deputy Director of Communications, Jessica Ditto; (10) Special Assistant to the President and Executive Assistant to the President, Madeleine Westerhout; (11) former Deputy Assistant to the President and Principal Deputy Press Secretary, Raj Shah; and (12) former Secretary of the Interior, Ryan Zinke.⁴ None of these individuals appear to have been disciplined and at least one of them, Ms. Grisham, has been promoted, becoming White House Press Secretary and Director of Communications in June.⁵ Despite growing public attention to and concern about these ethics abuses, including a congressional hearing on “Violations of the Hatch Act Under the Trump Administration,” the President’s political appointees apparently continue to engage in prohibited political activity.⁶

OSC’s Second Report to the President Regarding Ms. Conway

On June 13, 2019, OSC issued a second investigative report to the President detailing numerous violations of the Hatch Act committed by Ms. Conway following its 2018 report documenting violations committed in late 2017.⁷ OSC found that “[s]ince at least February 1, 2019, Ms. Conway has repeatedly violated the Hatch Act during her official media appearances by making statements directed at the success of [Trump’s] reelection campaign or at the failure of candidates for the Democratic Party’s nomination for President.”⁸ OSC also found that Ms. Conway’s advocacy against Democratic candidates and open endorsement of the President’s reelection effort on the Twitter account she uses to execute her official duties constituted prohibited political activity.⁹ In total, OSC documented more than 30 separate violations of the statute, including at least 22 tweets from her “@KellyannePolls” Twitter account, and at least 10 television interviews, where she violated the Hatch Act.¹⁰ Noting that any other federal employee would be fired for such repeated misconduct, you recommended that

⁴ Citizens for Responsibility and Ethics in Washington, The Hatch Act: Mixing Partisan Goals with Official Positions in the Trump Administration, available at <https://www.citizensforethics.org/hatch-act-mixing-partisan-goals-official-positions-trump-administration/>; see also John Hendel, FCC’s O’Reilly Broke Federal Law at CPAC, *Politico*, May 1, 2018, available at <https://www.politico.com/story/2018/05/01/fcc-orielly-special-counsel-ethics-563696>; and Tal Axelrod, Federal investigators concluded Ryan Zinke’s MAGA socks violated Hatch Act, *The Hill*, June 6, 2019, available at <https://thehill.com/homenews/administration/447302-federal-investigators-concluded-ryan-zinkes-maga-socks-violated-law>.

⁵ Kate Bennett, Trump taps Melania Trump’s spokeswoman as next White House press secretary, *CNN*, June 25, 2019, available at <https://www.cnn.com/2019/06/25/politics/stephanie-grisham-press-secretary/index.html>.

⁶ House Committee on Oversight and Reform, Violations of the Hatch Act Under the Trump Administration, June 26, 2019, available at <https://oversight.house.gov/legislation/hearings/violations-of-the-hatch-act-under-the-trump-administration>.

⁷ Letter from Hon. Henry J. Kerner, Special Counsel, to the President, June 13, 2019, available at <https://osc.gov/Resources/Report%20to%20the%20President%20re%20Kellyanne%20Conway%20Hatch%20Act.pdf>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

President Trump take the “appropriate disciplinary action” of removing Ms. Conway from federal service.¹¹

Despite Ms. Conway’s violations and OSC’s unprecedented report and recommendation, President Trump rejected your call to remove Ms. Conway from federal service. One day after OSC’s report was released, President Trump indicated that he would not fire Ms. Conway, instead stating, “[I]t looks to me like they’re trying to take away their right of free speech. And that’s just not fair.”¹² The White House also released a letter from the White House Counsel claiming that OSC’s report was “based on numerous grave legal, factual, and procedural errors” and likely violated Ms. Conway’s First Amendment rights.¹³ The White House argued that OSC’s investigation and conclusions were “tainted by [a] lack of due process” and attacked OSC’s credibility, claiming that the agency “abused its discretion by issuing a Report tainted by inappropriate external influences.”¹⁴ At the direction of the White House, Ms. Conway also failed to appear for a congressional hearing convened by the House Oversight Committee examining the administration’s repeated violations of the Hatch Act.¹⁵

Several Apparent Hatch Act Violations Following President Trump’s Inaction

The apparent Hatch Act violations committed by several Trump Administration officials following OSC’s June 13, 2019 decision regarding Ms. Conway confirm your concerns that her repeated misconduct undermines the rule of law, concerns which have been exacerbated by President Trump’s refusal to hold her accountable.

1. Assistant to the President Ivanka Trump

On June 16, 2019, just three days after OSC’s report, Assistant to the President Ivanka Trump tweeted a message from the Twitter account she uses for official government business, @IvankaTrump, to promote the Trump campaign. Ms. Trump’s tweet included an image of a Trump campaign sign featuring the slogan, “Make America Great Again” and her message stated in part:

Four years ago today, I introduced my father @realDonaldTrump when he launched a Campaign that would forever change America. Because of his courage, Americans are safer and more prosperous...and the best is yet to come!¹⁶

¹¹ *Id.*

¹² Maegan Vazquez, Trump Won’t Fire Conway Despite Federal Agency Recommendation, *CNN*, June 14, 2019, available at <https://www.cnn.com/2019/06/14/politics/kellyanne-conway-trump-hatch-act/index.html>.

¹³ Letter from Pat A. Cipollone, Counsel to the President, to Hon. Henry J. Kerner, Special Counsel, June 11, 2019, available at <https://docs.house.gov/meetings/GO/GO00/20190626/109706/HHRG-116-GO00-20190626-SD008.pdf>.

¹⁴ *Id.*

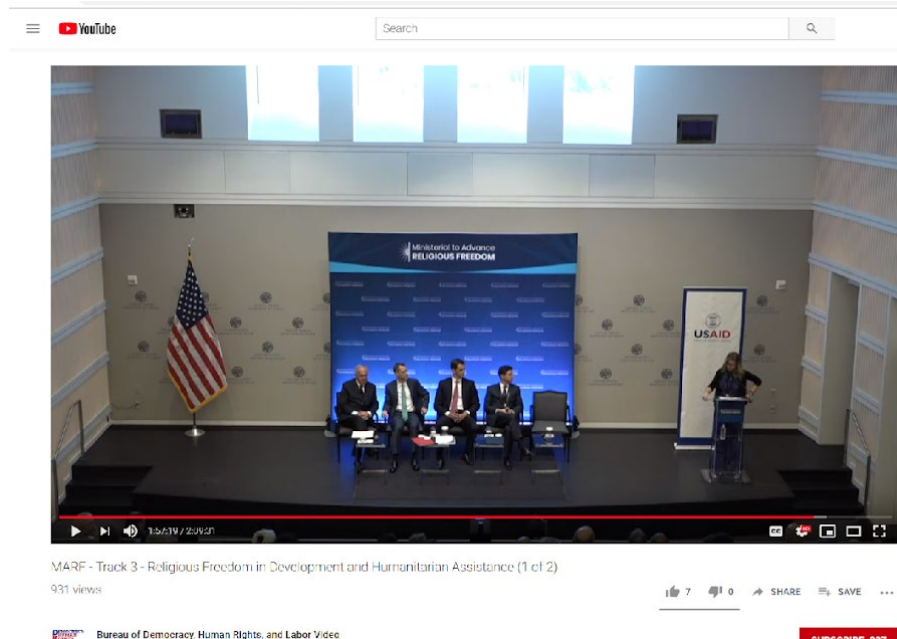
¹⁵ Andrew Desiderio, Kellyanne Conway Defies Subpoena, Skips Oversight Hearing, *Politico*, July 15, 2019, available at <https://www.politico.com/story/2019/07/15/kellyanne-conway-subpoena-oversight-hearing-1416132>.

¹⁶ Ivanka Trump (@IvankaTrump), Twitter (July 16, 2019), <https://twitter.com/IvankaTrump/status/1140285841039855617>.

Ms. Trump tweeted the message two days before President Trump held a launch event for his re-election campaign on June 18, 2019.¹⁷ As documented in CREW's complaint to OSC regarding Ms. Trump, there is ample evidence that she uses the @IvankaTrump account "as a communication tool for official matters" and that the "public has looked to [her] account for news and announcements."¹⁸ On June 24, 2019, OSC confirmed to CREW that it opened an investigation into Ms. Trump's conduct.¹⁹

2. U.S. Agency for International Development Special Adviser Samah Norquist

On July 17, 2019, Samah Norquist, Special Adviser on Religious Pluralism in the Middle East at the U.S. Agency for International Development ("USAID"), told a crowd of several hundred people that "hopefully [President Trump] will be reelected," according to reporting from *ProPublica* and video of the event.²⁰ The comment came during a conference on religious freedom hosted by the State Department where Ms. Norquist appeared in her official capacity.²¹



¹⁷ Jacob Pramuk, [Trump to Launch his 2020 White House Bid in Florida as Polls Show him Trailing his Democratic Rivals](https://www.cnn.com/2019/06/18/trump-launches-2020-election-campaign-with-orlando-florida-rally.html), *CNN*, June 18, 2019, available at <https://www.cnn.com/2019/06/18/trump-launches-2020-election-campaign-with-orlando-florida-rally.html>.

¹⁸ Letter from Noah Bookbinder, Citizens for Responsibility and Ethics in Washington, to Hon. Henry Kerner, Special Counsel, June 20, 2019, available at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/06/19211625/OSC-Ivanka-Trump-6-20-19-FINAL.pdf>.

¹⁹ Email from Office of Special Counsel staff to CREW staff (June 24, 2019).

²⁰ Yeganeh Torbati, [It's Illegal for Federal Officials to Campaign at Work. A Trump Official Just Did So](https://www.propublica.org/article/its-illegal-for-federal-officials-to-campaign-at-work-a-trump-official-just-did-so), *ProPublica*, July 18, 2019, available at <https://www.propublica.org/article/its-illegal-for-federal-officials-to-campaign-at-work-a-trump-official-just-did-so>; U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, [MARF - Track 3 - Religious Freedom in Development and Humanitarian Assistance \(1 of 2\)](https://www.youtube.com/watch?v=F-71cNG8iGg&feature=youtu.be&t=7029), July 17, 2019 ("State Dep't video"), available at <https://www.youtube.com/watch?v=F-71cNG8iGg&feature=youtu.be&t=7029>.

²¹ *Id.*

Based on public reporting and video of the event, while moderating a panel on “First Year of the Genocide Recovery and Persecution Response Program: Partner Perspective from the Field,” Ms. Norquist responded to a question from an audience member about what would happen to U.S. involvement in Iraq if President Trump loses his re-election bid.²² One USAID employee on the panel, Max Primorac stated, “President Trump will win again, but I’m very confident that this is now an American project.”²³ After the panelists addressed the question, Ms. Norquist responded by addressing concerns regarding religious minorities in Iraq before veering into politics. She said, “And we all hope whether it’s Trump – and hopefully he will be reelected – or not, that it continues to be a priority for our government.”²⁴ This conduct appears to be clearly directed toward the success of a political candidate while using an official government position.

3. White House Social Media Director Dan Scavino

On or about August 5, 2019, White House Social Media Director retweeted a message promoting the Trump campaign slogan, “#KAG2020” (Keep America Great) from the @Scavino45 Twitter account that he uses for official business.²⁵ The tweet reads in full:



There is no doubt that Mr. Scavino’s @Scavino45 account is used for official government business as it includes images of his work on behalf of the White House and the description, “Assistant to President @realDonaldTrump, Director of Social Media @WhiteHouse Personal Twitter: @DanScavino.”²⁶ OSC has previously acknowledged that the Hatch Act does not provide an exemption for executive branch employees speaking on behalf of

²² See U.S. Dep’t of State, Ministerial to Advance Religious Freedom Schedule of Events, available at <https://www.state.gov/ministerial-to-advance-religious-freedom-schedule-of-events/>; see also Torbati, *ProPublica*, July 18, 2019; State Dep’t video.

²³ Torbati, *ProPublica*, July 18, 2019; State Dep’t video.

²⁴ Torbati, *ProPublica*, July 18, 2019; State Dep’t video.

²⁵ Dan Scavino Jr. (@Scavino), Twitter (Aug. 5, 2019), citing Donald J. Trump (@realDonaldTrump), Twitter (Aug. 5, 2019), <https://twitter.com/realDonaldTrump/status/1158551525817536512>.

²⁶ Dan Scavino (@Scavino45), Twitter, <https://twitter.com/Scavino45>.

a principal who is in fact exempt.²⁷ There is also no doubt that the term “#KAG2020” is directed at the success of President Trump’s campaign. On several occasions, President Trump has used some iteration of the hashtag “KAG” to promote his reelection effort.²⁸ The Trump campaign store also has a “2020” page dedicated to apparel emblazoned with “KEEP AMERICA GREAT.”²⁹

Mr. Scavino’s tweet follows OSC’s decision on June 5, 2017 finding that he violated the Hatch Act by posting a tweet calling for the defeat of Congressman Justin Amash in a Republican primary election.³⁰ OSC issued a warning letter to Mr. Scavino and advised him that “if in the future he engages in prohibited political activity while employed in a position covered by the Hatch Act, [OSC] will consider such activity to be a willing and knowing violation of the law.”³¹

4. Counselor to the President Kellyanne Conway

Finally, despite repeated admonitions by OSC, training by the White House, and public criticism following your recommendation of her removal from federal service, Ms. Conway continues to engage in conduct that runs afoul of the Hatch Act. For example, on August 2, 2019, Ms. Conway tweeted from her @KellyannePolls Twitter account a message promoting the President’s reelection, stating “Trump-PENCE2020.”³² The tweet reads in full:

²⁷ See Office of Special Counsel, Report of Prohibited Political Activity under the Hatch Act OSC File No. HA-18-0966 (Kellyanne Conway), Mar. 6, 2018, available at <https://osc.gov/Resources/Conway%20HA-18-0966%20Final%20Report.pdf>.

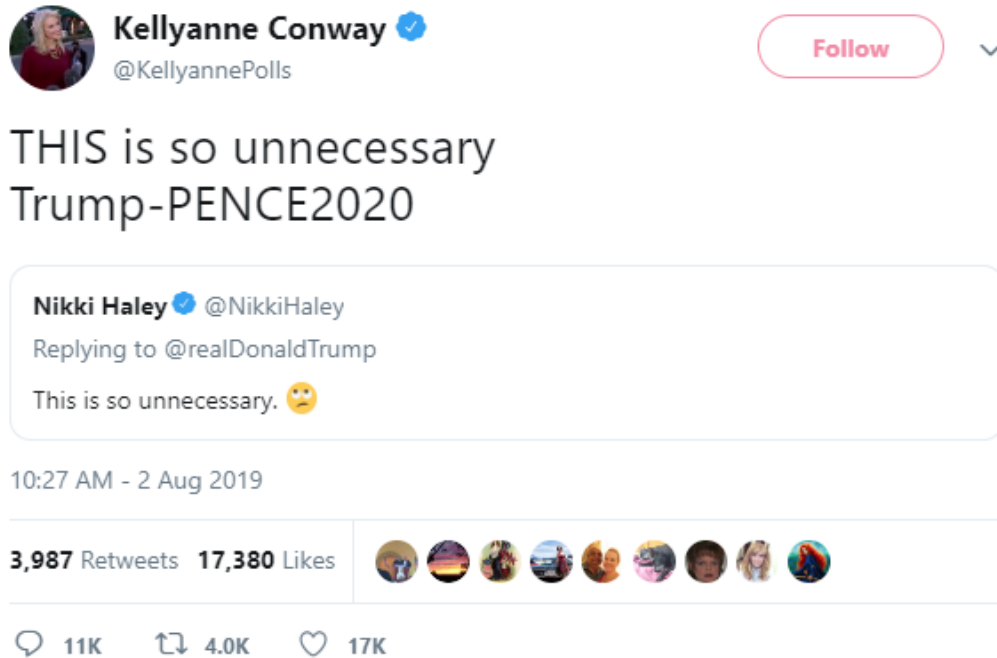
²⁸ See e.g., Donald J. Trump (@realDonaldTrump), Twitter (Aug. 1, 2019), <https://twitter.com/realDonaldTrump/status/1157119972415438849>; see also Donald J. Trump (@realDonaldTrump), Twitter (Aug. 1, 2019), <https://twitter.com/realDonaldTrump/status/1157098258721837058>; Donald J. Trump (@realDonaldTrump), Twitter (July 30, 2019), <https://twitter.com/realDonaldTrump/status/1156152107893960705>.

²⁹ Trump Make America Great Again Committee, 2020, available at <https://shop.donaldjtrump.com/collections/2020>, accessed Aug. 9, 2019.

³⁰ Letter from Ana Galindo-Marrone, Chief, Hatch Act Unit, U.S. Office of Special Counsel, to Citizens for Responsibility and Ethics in Washington, June 5, 2017, available at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/06/09153036/DOC060817-06082017170020.pdf>.

³¹ *Id.*

³² Kellyanne Conway (@KellyannePolls), Twitter (Aug. 2, 2019), <https://twitter.com/KellyannePolls/status/1157342285236862977>.



On August 9, 2019, Ms. Conway also retweeted a message attacking Democratic presidential candidate Joe Biden.³³ The tweet reads in full:



There is no doubt that Ms. Conway used her official authority to promote the success or failure of political candidates. Although she has made some changes to her Twitter profile, Ms. Conway's @KellyannePolls account still mentions her title as "Counselor" to the President, still

³³ Kellyanne Conway (@KellyannePolls), Twitter (Aug. 9, 2019), citing Allahpundit (@Allahpundit), Twitter (Aug. 9, 2019), <https://twitter.com/allahpundit/status/1159809458480058368>.

includes images of her on the White House grounds, and Ms. Conway still uses the account for official business, including promoting her appearances on behalf of the Trump administration.³⁴

Ms. Conway also appears to have violated the Hatch Act in interviews conducted on behalf of the White House since the issuance of OSC's June 13, 2019 report. For example, on August 7, 2019, Ms. Conway conducted an interview on the White House lawn where she discussed the President's trips to Dayton and El Paso following mass shootings but also made unprompted, critical statements of Democratic presidential candidates, including Beto O'Rourke.³⁵ Appearing on *Fox News* with a chyron that included her official title, "Counselor to the President," Ms. Conway said:

I mean, I cannot believe that the Quinnipiac poll came out yesterday of the thousand Democrats running for president, twenty are below the margin of error. ... And they're using this tragedy to try to gain leverage. How do I know that because the other two cable stations said that this is Beto's moment. He can get momentum. That's a disgrace.³⁶

Ms. Conway continues to appear to be acting as a spokesperson for President Trump's reelection campaign. In a recent *Washington Post* article in which she was identified by her official title, Ms. Conway dismissed President Trump's challenger and potential challengers for the Republican nomination, stating: "None of them even has risen to the level of a nickname."³⁷

Continued Violations Undermine Rule of Law

The Office of Special Counsel has acknowledged that repeated violations of the Hatch Act, if unchecked, undermine democratic principles. OSC's June 13, 2019 report to the President stated unequivocally that Ms. Conway's pattern and practice of misconduct "erode[s] the principal foundation of our democratic system—the rule of law."³⁸ In recent testimony before the House Oversight Committee, you wrote that the Hatch Act is "critically important" because "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."³⁹ Unfortunately, public reports suggest that the President's decision to ignore your recommendation to remove Ms. Conway has emboldened other executive branch employees to ignore the law. As *ProPublica* noted in reporting about Ms. Norquist's apparent violation, "[a]

³⁴ See generally Kellyanne Conway (@KellyannePolls), Twitter, <https://twitter.com/KellyannePolls>.

³⁵ Fox News, [Kellyanne Conway: The President is Calling for Unity and Healing](https://video.foxnews.com/v/6069107344001/#sp=show-clips), Aug. 7, 2019, available at <https://video.foxnews.com/v/6069107344001/#sp=show-clips>.

³⁶ *Id.*

³⁷ Robert Costa and Philip Rucker, [Trump critics eye GOP primary race, even if defeating him seems 'preposterous'](https://wapo.st/2NITmo4), *Washington Post*, Aug. 21, 2019, available at <https://wapo.st/2NITmo4>.

³⁸ Letter from Hon. Henry J. Kerner, Special Counsel, to the President, June 13, 2019.

³⁹ Testimony of Henry J. Kerner, Special Counsel, before the House Committee on Oversight and Reform, *Hearing on "Violations of the Hatch Act Under the Trump Administration."* (June 26, 2019), available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2019.06.26%20Kerner%20Testimony.pdf>.

trend may be emerging after the Trump administration took no action against a ‘repeat offender,’ White House counselor Kellyanne Conway.”⁴⁰

OSC has also made clear that its mandate to ensure Hatch Act compliance and enforcement will become more acute in the coming year. In its Fiscal Year (FY) 2020 Congressional Budget Justification, OSC explained that by enforcing the Hatch Act, “OSC preserves the integrity of the civil service system, ensuring that federal employees are not coerced by their superiors into partisan political activity and that employees do not engage in partisan politics while on duty.”⁴¹ Given these concerns, OSC recently requested additional funding from Congress for FY 2020, noting that “Hatch Act complaints typically increase around election cycles” and that OSC expects this trend to continue in 2020.⁴² OSC has repeatedly documented the “pernicious effect” mixing political and official duties can have in the federal workforce and for the American public.⁴³ It remains to be seen what OSC will do to address the President’s and his administration’s recalcitrance in response to the agency’s independent findings that Trump appointees have violated the Hatch Act on dozens of occasions.

OSC Has Additional Legal Tools to Enforce the Hatch Act

The above discussion demonstrates the pressing need for OSC to use all available tools to ensure government-wide compliance with the Hatch Act. One of those tools, which OSC has not sufficiently utilized to date, is filing complaints with the MSPB. OSC not only has the authority but the statutory obligation to file an MSPB complaint against a non-Senate-confirmed presidential appointee whenever OSC finds both that the appointee violated the Hatch Act and that the violation warrants disciplinary action – as you did in your recent report on Ms. Conway.

The MSPB has original jurisdiction over Hatch Act complaints filed by OSC.⁴⁴ It is authorized to take a range of disciplinary actions for Hatch Act violations, including “an assessment of a civil penalty” of \$1,000 or more, “removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, . . . reprimand,” or “any combination of [these] penalties.”⁴⁵ The MSPB is also empowered to “order any . . . [covered] employee to comply with any order or decision issued by the Board . . . and enforce compliance with any such order,” and “order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the

⁴⁰ Torbati, *ProPublica*, July 18, 2019.

⁴¹ U.S. Office of Special Counsel, Fiscal Year 2020 Congressional Budget Justification and Performance Budget Goals, at 7, available at [https://osc.gov/Resources/FY%202020%20CJB%20\(Reports%20and%20Information\).pdf](https://osc.gov/Resources/FY%202020%20CJB%20(Reports%20and%20Information).pdf).

⁴² *Id.* at 9, 40-41.

⁴³ Testimony of Henry J. Kerner, Special Counsel, before the House Committee on Oversight and Reform, *Hearing on “Violations of the Hatch Act Under the Trump Administration.”* (June 26, 2019), available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2019.06.26%20Kerner%20Testimony.pdf>.

⁴⁴ 5 U.S.C. § 1204(a)(1); 5 C.F.R. §§ 1201.2, 1201.121.

⁴⁵ 5 U.S.C. § 7326. Per a regulation that went into effect on February 22, 2019, the civil penalty may be up to “\$1,093.” 5 C.F.R. § 1201.126(a).

Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with.”⁴⁶

OSC’s organic statute establishes conditions under which the agency “shall” file a complaint in MSPB. Section 1215 of the statute, titled “Disciplinary action,” provides:

(a)(1) Except as provided in subsection (b), if the Special Counsel determines that disciplinary action should be taken against any employee for having--

* * *

(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 [which includes the Hatch Act],

* * *

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.⁴⁷

Subsection (b) of § 1215 creates a limited exception to the MSPB complaint process, but this exception applies solely to *Senate-confirmed* presidential appointees:

(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).⁴⁸

Thus, under § 1215’s plain terms, OSC “shall” file a complaint in the MSPB against a federal employee if three conditions are met: (1) it has determined the employee violated the Hatch Act; (2) it has determined that the violation warrants disciplinary action; and (3) the employee is not a Senate-confirmed presidential appointee. Congress’s use of the term “shall” shows that OSC’s duty to file an MSPB complaint under § 1215(a)(1) is mandatory and non-discretionary when these conditions are met.

The statute’s legislative history reinforces that Congress intended the MSPB complaint process to apply to non-Senate-confirmed presidential appointees. A House committee print of a

⁴⁶ 5 U.S.C. §§ 1204(a), (e)(2)(A).

⁴⁷ 5 U.S.C. § 1215(a)(1) (emphasis added).

⁴⁸ 5 U.S.C. § 1215(b) (emphasis added).

companion bill, dated June 15, 1978, would have required OSC to refer complaints against *all* presidential appointees to the President, but that bill did not pass.⁴⁹ The Senate version that was ultimately enacted employs similar language, but, as reflected in 5 U.S.C. § 1215(b), expressly limits the exception to Senate-confirmed appointees.⁵⁰ This reflects a conscious legislative judgment *not* to exempt non-Senate-confirmed presidential appointees.⁵¹ Moreover, Congress has created a separate MSPB disciplinary scheme for state and local officials, further demonstrating that it knows how to create separate schemes for different categories of officials when it wishes to do so.⁵²

Despite § 1215's clear directives, in both of OSC's reports to the President regarding Ms. Conway's Hatch Act violations, OSC appeared to take the position that it lacks authority to file an MSPB complaint against her and that its only option was to recommend disciplinary action to the President. Specifically, OSC's March 2018 report explained that "[t]he U.S. Constitution confers on the President authority to appoint senior officers of the United States, such as Ms. Conway. Considering the President's constitutional authority, the proper course of action, in the case of violations of the Hatch Act by such officers, is to refer the violations to the President . . . [p]ursuant to 5 U.S.C. § 1215(b)."⁵³ The June 2019 report does not explain why OSC was not complying with the statutory requirement to file an MSPB complaint against Ms. Conway, but it does note that "[i]f Ms. Conway were any other federal employee, her multiple violations of the law would almost certainly result in removal from her federal position by the Merit Systems Protection Board."⁵⁴

While we commend OSC's efforts to notify the President and the public of Ms. Conway's repeated Hatch Act violations and the need for disciplinary action against her, § 1215 requires more. Because Ms. Conway was not confirmed by the Senate, she does not qualify for the exemption set forth in § 1215(b). Based on OSC's finding that Ms. Conway has committed repeated violations of the Hatch Act that warrant disciplinary action, the statute compels OSC to file a complaint against her in the MSPB. The filing of a complaint is not optional under § 1215; it is mandatory.

OSC has not fully explained its position regarding the purported constitutional limitations on its ability to file MSPB complaints against non-Senate-confirmed presidential appointees. As far as we are aware, no court has held that such appointees are exempt from the statutorily-required disciplinary process, nor do we believe the case law on the President's constitutional appointment power supports such a conclusion. Given the plain language of the statute, which exempts only Senate-confirmed appointees, OSC at minimum owes the public a detailed

⁴⁹ See Staff of H. Comm. on Post Office and Civil Service, 95th Cong., Civil Service Reform Act 33, § 1204(h)(2) (Comm. Print June 15, 1978).

⁵⁰ Civil Service Reform Act, 95th Cong., Pub. L. 95-454, 92 Stat. 1111 (Oct. 13, 1978).

⁵¹ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000) (rejecting interpretation of statute where "Congress considered and rejected bills" embodying that interpretation); *accord Doe v. Chao*, 540 U.S. 614, 622 (2004).

⁵² See *Special Counsel v. Perkins*, 104 M.S.P.R. 148, 157-58 (M.S.P.B. 2006).

⁵³ Letter from Hon. Henry J. Kerner, Special Counsel, to the President, Mar. 6, 2018, *available at* <https://osc.gov/Resources/Conway%20HA-18-0966%20Final%20Report.pdf>.

⁵⁴ Letter from Hon. Henry J. Kerner, Special Counsel, to the President, June 13, 2019.

explanation of the justification for its deviation from the statute's mandatory procedures in the case of Ms. Conway. As former MSPB Executive Director James Eisenmann recently stated, insofar as OSC is "disregard[ing] the plain language of the statute" in not filing such MSPB complaints, it at least "owe[s] the public a better explanation" for its inaction.⁵⁵

On that question, it bears emphasizing that the MSPB has the authority to take a range of disciplinary actions, some of which do not even arguably implicate the President's constitutional appointment power. This includes the authority to assess a civil penalty of \$1,000 or more, to issue a "reprimand," to "order any . . . [covered] employee to comply with any order or decision issued by the Board . . . and enforce compliance with any such order," and to "order that any employee charged with complying with such order" not "receive payment for service as an employee during any period that the order has not been complied with."⁵⁶ In Ms. Conway's case, she could face civil penalties exceeding \$30,000, based on OSC's findings of more than 30 separate Hatch Act violations.⁵⁷ OSC is free to seek these types of penalties, rather than others it may deem potentially constitutionally problematic, in MSPB proceedings against a non-Senate presidential appointee. Given these disciplinary options, there is no reasonable basis to conclude that the President's constitutional authority categorically bars OSC from filing an MSPB complaint against any non-Senate-confirmed presidential appointee.

Insofar as OSC's position is informed, as recently reported in *Politico*, by the Department of Justice's Office of Legal Counsel ("OLC") Opinion 78-27 (May 17, 1978), we note that OLC's opinion was issued more than 40 years ago, before enactment of the relevant provisions of the Civil Service Reform Act and before several subsequent amendments of the Hatch Act. OLC's opinion concedes there were "no [legal] precedents controlling th[e] question" of whether "Congress may confer on the [MSPB] the authority to take disciplinary action against Presidential appointees."⁵⁸ To date, there still are no such precedents. Despite expressing doubts about Congress's power to enact such legislation, OLC noted, "we believe that Congress does have, and must have, some authority to prescribe sanctions against executive branch officials who act in violation of existing law."⁵⁹ In 2012, Congress amended the Hatch Act to "modif[y] penalties . . . to provide for a range of possible disciplinary actions in addition to removal for Federal employees."⁶⁰ At no point did Congress create an additional carve-out for non-Senate-confirmed presidential appointees like Ms. Conway.

⁵⁵ Rebecca Rainey, [How Kellyanne Conway saved her White House job](https://www.politico.com/story/2019/08/12/kellyanne-conway-white-house-1656901), *Politico*, Aug. 12, 2019, available at <https://www.politico.com/story/2019/08/12/kellyanne-conway-white-house-1656901>.

⁵⁶ See 5 U.S.C. § 7326; 5 U.S.C. §§ 1204(a), (e)(2)(A).

⁵⁷ Letter from Hon. Henry J. Kerner, Special Counsel, to the President, June 13, 2019; Letter from Hon. Henry J. Kerner, Special Counsel, to the President, Mar. 6, 2018.

⁵⁸ Presidential Appointees—Removal Power or Disciplinary Action—Constitutional Law (Art. II, § 2, cl. 2), 2 O.L.C. 107 (1978).

⁵⁹ *Id.*

⁶⁰ The White House, Office of the Press Secretary, [Statement by the Press Secretary on H.J. Res. 122, H.R. 3477, H.R. 3783, H.R. 3870, H.R. 3912, H.R. 5738, H.R. 5837, H.R. 5954, H.R. 6116, H.R. 6223, S. 285, S. 1379, S. 2170, S. 2367, S. 3193, S. 3311, S. 3315, S. 3564, and S. 3642](https://obamawhitehouse.archives.gov/the-press-office/2012/12/28/statement-press-secretary-hj-res-122-hr-3477-hr-3783-hr-3870-hr-3912-hr-5738-hr-5837-hr-5954-hr-6116-hr-6223-s-285-s-1379-s-2170-s-2367-s-3193-s-3311-s-3315-s-3564-and-s-3642), Dec. 28, 2012, available at <https://obamawhitehouse.archives.gov/the-press-office/2012/12/28/statement-press-secretary-hj-res-122-hr-3477-hr-3783-hr-3870-hr-3912-hr-5738-hr-5837-hr-5954-hr-6116-hr-6223-s-285-s-1379-s-2170-s-2367-s-3193-s-3311-s-3315-s-3564-and-s-3642>.

Finally, we note that the White House has insisted that OSC infringed Ms. Conway's due process rights in issuing its report to the President recommending her removal from federal service.⁶¹ Presumably that means the White House and Ms. Conway would welcome OSC commencing an MSPB case, as it would afford Ms. Conway an opportunity to probe and respond to OSC's findings in an adversarial proceeding.

Conclusion

The Hatch Act is intended to prevent federal employees from engaging in partisan political activity in their official capacity. The statute prohibits an employee from undertaking any activity directed toward the success or failure of a political candidate or a political party while using their official position. OSC's recent decisions, particularly the recommendation to discipline Counselor to the President Kellyanne Conway, have been strong and appropriate affirmations of the importance of this law in our democratic system. But since President Trump's decision to reject your recommendations to discipline Ms. Conway, several Trump appointees, including Ms. Conway, have committed apparent violations of the law. Given OSC's concerns regarding the impact of these violations on the rule of law as well as its expectation of an increased Hatch Act workload in the coming year, OSC must use every tool available to the agency in order to promote compliance and accountability. This includes MSPB complaints, which OSC is required by statute to file against any covered official, including non-Senate-confirmed presidential appointees who OSC has found violated the Hatch Act in a manner warranting disciplinary action. As such, OSC should file a complaint against Ms. Conway in the MSPB immediately and proceed in kind against any other administration official who has committed multiple violations of the Hatch Act despite clear warnings.

Sincerely,



Noah Bookbinder
Executive Director

⁶¹ Letter from Pat A. Cipollone, Counsel to the President, to Hon. Henry J. Kerner, Special Counsel, June 11, 2019.