

TRUMP ADMINISTRATION ACCOUNTABILITY PROJECT



Report on Potential Violations of the Hatch Act by Trump
Administration Senior Officials

Possible Violation of the Law

Did various members of the Trump Administration violate the Hatch Act by using their “official authority or influence” to affect the result of an election?

Introduction

Throughout President Donald Trump’s first term, concerns have been raised over violations of a 20th century statute called the Hatch Act. The Hatch Act was passed in July of 1939 in response to newspaper reports that President Franklin D. Roosevelt’s administration was promising jobs and promotions in the WPA in exchange for votes in the Kentucky Senate election.¹ One of the Act’s primary goals was to ensure that the machinery of the Federal Government was not utilized for partisan campaigning. Symbols like the White House and Seal of the President belong to the American people, and not to a political party. The Hatch Act attempted to ensure Federal employees did not weaponize their positions to promote or hinder partisan campaigns.

The Law

The Hatch Act prohibits federal employees from using their official authority or influence or the purpose of interfering with or affecting the result of an election.² For the purposes of the Act, a federal employee is any individual that works in an Executive agency or the competitive service.³ The statute does not consider members of the uniformed services, employees of the Washington, D.C. government, and the President and Vice-President federal employees for the purposes of the Act.⁴ 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.”⁵ In short, a federal employee can’t use their position or power to get involved in campaigns or elections.

In 1993, Congress added a criminal prohibition to the Hatch Act that made it unlawful for “any person to intimidate, threaten, command, or coerce” any federal employee to engage in political activity.⁶ Importantly, this statute is not hinged on being a federal employee. This means the portions of the Hatch Act that exempt the President and Vice President do not apply to the criminal prohibition.

The Hatch Act, unlike other federal laws, is not enforced by the Department of Justice. The Office of Special Counsel (“OSC”) is the independent federal agency charged with investigating violations of the Hatch Act.⁷ The Merit Systems Protection Board (“MSPB”) is the federal agency with jurisdiction over Hatch Act complaints that the OSC files against civil servants.⁸ MSPB can assess civil penalties of up to \$1,093 per violation.⁹ They can also demote, debar from federal employment, suspend, reprimand, and remove federal employees who are found to have violated the Hatch Act.¹⁰ For political appointees, however, decisions about their punishments are left to the President.

The Office of Personnel Management (“OPM”) prescribes regulations to help implement the Hatch Act and provide further guidance.¹¹ OPM provided examples of conduct that would amount to using official authority or influence to interfere with an election. An employee cannot use an official title while participating in political activity.¹² They also cannot engage in political activity while they are on duty,¹³ wearing a uniform, badge, or insignia,¹⁴ in any room or building occupied in the discharge of official duties by a Federal employee or agency,¹⁵ or while using a government used or owned vehicle.¹⁶ However, employees are allowed to address a convention or a rally in support of or opposition to a partisan political candidate¹⁷ and even take an active part in managing role in a political campaign,¹⁸ provided that they follow the other restrictions to ensure their political activities are not pursued through their official authority.¹⁹

Trump Administration Officials’ Potential Misconduct

There have been numerous allegations of Hatch Act violations leveled against members of the Trump Administration. I will summarize two of the most egregious examples with an eye towards answering whether they are in violation of the Hatch Act.

A. The Naturalization Ceremony at The Republican National Convention

During the 2020 Republican National Convention, a number of events occurred that implicate potential violations of the Hatch Act. Secretary of State Mike Pompeo’s speech given while on an official State Department trip to Israel raises questions of whether he was speaking in his official capacity or in the course of his duties. President Trump’s performance of a pardon in the Oval Office raises questions of liability for any federal employees who were involved in filming or preparing the stunt. President Trump’s acceptance speech from the grounds of the White House raises similar questions.

The performance of the naturalization ceremony, however, provides the most compelling questions of Hatch Act liability, primarily due to the utter brazen nature of the violation. Filmed within the White House, Acting Secretary of Homeland Security Chad Wolf performed a

naturalization ceremony for five new American citizens. Standing at a podium marked with the Seal of the President, Wolf legally naturalized these five citizens.

In answering whether this violated the Hatch Act, let's take guidance from an internal Department of Homeland Security email sent within days of the Acting Secretary's stunt. The email reminded DHS employees the Hatch Act prohibited them from "conducting any political activity while on duty or while in a government room [or] building."²⁰ The email went on to also remind employees that "political appointees in the Department are also considered further restricted. . . [and] are prohibited from actively participating in partisan related political activities at any time and must seek the Office of the Secretary's approval to passively attend partisan political events."²¹

Was political activity conducted? Acting Secretary Wolf performed and spoke at the Republican National Convention in support of a partisan candidate. Check

Was Acting Secretary Wolf on duty or in a government building? He was performing his official duties by performing the ceremony and, more importantly, did it from within the White House with the Seal of the President prominently displayed on his podium. Check.

The naturalization ceremony was a clear and egregious violation of the Hatch Act. The fact he is also a political appointee only worsens his conduct according to his own Department's instructions. This would be enough for most normal DHS employees to be reprimanded or fired by the MSPB.

The unfortunate and unfair reality of this situation is that Acting Secretary Wolf will not face consequences for his actions, but others involved in the stunt do not have the same protection from enforcement of federal laws. The MSPB has jurisdiction to lay punishments and reprimands for violations of the Hatch Act on civil servants and other non-politically appointed federal employees. Every DHS employee who prepared things for the stunt, every cameraman who works for the White House, every soldier who appeared in uniform, and any other White House Employees who were told to assist in the ceremony risk punishment for engaging in political activity.

Wolf finished his statements at the ceremony by commending the President for his "dedication to the rule of law."²² A dubious proposition considering the President's own primary role in the violation. As stated above, if the President is found to have commanded or coerced any federal employees into performing the ceremony, he would be in clear violation of 18 U.S.C. § 610, the Hatch Act's criminal prohibition.

Due to the event's clear violation of the Hatch Act's prohibitions, one important question remains; who ordered the event to occur? Whoever gave the order likely violated the law and should see consequences for doing so.

B. Kellyanne Conway

Kellyanne Conway served as President Donald Trump's campaign manager beginning in August of 2016 and joined his administration as a counselor to the president after his election.

Importantly, Conway served as a spokeswoman for the Administration and frequently gave official interviews to promote the President's agenda. In most of these interviews, Conway is introduced as the Counselor to the President. Conway has been accused of violating the Hatch Act on several occasions both by the media and the Office of Special Counsel.²³

Conway's Hatch Act violations reached such a severe level that the Office of Special Counsel recommended her removal from her position in a Memorandum to President Trump in June of 2019.²⁴ They point to a list of 11 interviews on various television shows where Conway appeared in her official capacity either by doing the interview from the White House, or being introduced with her official title. In these interviews, Conway engaged "a well-established pattern of using her official authority as a platform to engage in blatantly partisan attacks."²⁵ This was also not the first memo they sent the President about her violations.²⁶

For example, in a February 1, 2019 interview with *Fox and Friends*, Conway was introduced with her title and stood inside the White House.²⁷ During the interview, Conway was asked about Senator Cory Booker's candidacy for president and she proceeded to say Booker would be called a "sexist" if he ran as a Republican and then attacked his record as mayor of Newark, New Jersey.²⁸

Ten days later, Conway returned to *Fox and Friends* and was introduced with her official title.²⁹ Conway attacked the Democratic Party candidates for president by saying "Great. Keep it coming. Just remember anything times zero still equals zero," after the host noted the list of Democratic candidates could grow.³⁰ Conway went on to attack Senator Amy Klobuchar over her treatment of her staff, Senator Elizabeth Warren over appropriating someone else's ethnicity, and Senator Kirsten Gillibrand's eating of fried chicken while on the campaign.³¹ According to Conway, the Democratic candidates lacked "Presidential timber" as they were just "a bunch of presidential woodchips."³²

On April 30, 2019, Conway attacked the Democratic electorate as "sexist" and "racist" while standing in the White House driveway.³³ She suggested Senator Bernie Sanders and former Vice-President Joe Biden were leading the polls because the electorate has "a problem with the rest of the field."³⁴

In addition to her sustained and often unprompted political attacks in television interviews, OSC also pointed to Conway's use of her Twitter account as violating the Hatch Act.³⁵ It is OSC policy that political activity on a private social media account violates the Hatch Act if the account is designated for official purposes.¹ Conway has one Twitter account (@KellyannePolls) which she directed viewers to look at for more official information in a *Fox and Friends* interview.² OSC determined the majority of her tweets were about official Administration business and her role in addressing the opioid crisis.³ In addition to the official business, Conway engaged in "at least 15 messages" in support of Republican candidates between October 31 and November 6, 2018.⁴

In addition to her support of Republican candidates, Conway continued her attacks on Democratic Presidential candidates. She tweeted, "I think Cory Booker sounds like a Hallmark Card and not necessarily a person who's there to tell you everything he's accomplished." She also continued her attacks on Elizabeth Warren over the Native American controversy and retweeted a *Fox News Sunday* tweet quoting her as saying, "If anybody just types in 'Creepy Uncle Joe Videos' you come up with a treasure trove."

The OSC Memorandum also points to Conway's dismissive attitude towards enforcement of the Hatch Act as an aggravating factor. She had already been warned in December of 2018 of previous violations, but took no steps to bring the use of her Twitter account into compliance. On May 29, 2019, Conway dismissed the 2018 warning from OSC by saying, "Let me know when the jail sentence starts."⁵

When asked about the allegations against Conway, President Trump responded by saying, "No, I'm not going to fire her. I think she's a terrific person... She's been loyal."⁶

¹ See "Hatch Act Guidance on Social Media", Office of Special Counsel at 7, (February 2018) (<https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/Social%20Media%20Guidance.pdf>) ("Employees may not use a social media account designated for official purposes to post or share messages directed at the success or failure of a political party, candidate in a partisan race, or partisan political group. All such official social media accounts should remain politically neutral.").

² "Kellyanne Conway previews President's Trump's 'uplifting' State of the Union address", *Fox and Friends* (February 5, 2019) (<https://video.foxnews.com/v/5998668431001/#sp=show-clips>).

³ 2019 OSC Memorandum at 14.

⁴ *Id.*

⁵ *Id.* at 17.

⁶ Susan Hearvey, "Trump defends advisor Conway, won't fire her over political comments", REUTERS, June 14, 2019 (<https://www.reuters.com/article/us-usa-trump-conway/trump-defends-adviser-conway-wont-fire-her-over-political-comments-idUSKCN1TF1NY>).

Conclusion

In the larger picture of scandals and misconduct that have plagued the Trump administration, it is easy to overlook an almost century old statute and the tweets, activities, and interview statements that violate it as unimportant. In light of questions over collaboration with foreign states to meddle in American elections, the refusal to disclose tax returns, and the subject of his Impeachment, the inability to follow the commands of this obscure statute might appear unimportant. I urge you to view the Trump Administration's blatant rejection of complying with this law as emblematic of a larger pattern of a President and his advisors who believe they are above the law. The larger scandals and controversies often dominate the news to the point that we lose sight of the sustained unlawful behavior that has become second nature to this administration.

"Let me know when the jail sentence starts."

- Counselor to the President Kellyanne Conway

"Nobody outside of the Beltway really cares [about the Hatch Act]."

- Chief of Staff Mark Meadows

The Office of Special Counsel said it best when recommending the termination of Kellyanne Conway:

"As a highly visible member of the Administration, Ms. Conway's violations, if left unpunished, send a message to all federal employees that they need not abide by the Hatch Act's restrictions. Her actions erode the principal foundation of our democratic system -- the rule of law."

The refusal to punish high level officials sends another more foundational message for a president surrounded by scandals, investigations, and the looming threat of indictments. Loyalty will be rewarded. Not loyalty to the people. Nor to the law or to the institution of the President. But loyalty to Donald J. Trump will be valued and rewarded. Our elected officials should possess a loyalty to America and the people not to any one individual.

¹ Olivia Waxman, "Why Federal Employees Can Thank FDR for Some Restrictions on Their Tweets", TIME (April 3, 2017) (<https://time.com/4723411/hatch-act-history/>).

² 5 U.S.C. § 7323(a)(1) (2020).

³ 5 U.S.C. §§ 7322(a)(A),(B) (2020).

⁴ *Id.*

⁵ 5 CFR § 734.101 (2020).

⁶ 18 U.S.C. § 610 (2020).

⁷ 5 U.S.C. §§ 1211--19 (2020).

⁸ 5 U.S.C. § 1204(a)(1) (2020).

⁹ 5 CFR § 1201.126(a) (2020).

¹⁰ 5 U.S.C. § 7326 (2020).

¹¹ 5 U.S.C. § 7325 (2020).

¹² 5 CFR § 734.302 (2020).

¹³ 5 CFR § 734.306(a)(1) (2020).

¹⁴ 5 CFR § 734.306(a)(2) (2020).

¹⁵ 5 CFR § 734.306(a)(3) (2020).

¹⁶ 5 CFR § 734.306(a)(4) (2020).

¹⁷ 5 CFR § 734.205(e) (2020).

¹⁸ 5 CFR § 734.205(f) (2020).

¹⁹ See 5 CFR § 734.205 (noting the affirmative permissions to engage in political activity are subject to the other prohibitions of Section 734).

²⁰ Catherine Rampell, *Tweets on DHS Emails about Hatch Compliance*, (August 27, 2020) (<https://twitter.com/crampell/status/1298976266050207745>).

²¹ *Id.*

²² “WATCH: RNC airs Trump hosting naturalization ceremony”, *PBS News Hour*, (August 25, 2020) (<https://www.pbs.org/newshour/politics/watch-rnc-airs-trump-hosting-naturalization-ceremony>).

²³ See e.g., Alexandra Hutzler, “Kellyanne Conway Violated the Hatch Act 60 Times, Ethics Watchdog Claims in New Lawsuit”, *NEWSWEEK*, December 27, 2019; see “Report of Prohibited Political Activity under the Hatch Act OSC File No. HA 18-0966 (Kellyanne Conway)” Office of Special Counsel, (March 6, 2018).

²⁴ “Report of Prohibited Political Activity under the Hatch Act OSC File Nos. HA 19-0631 & HA-19-3395 (Kellyanne Conway)” Office of Special Counsel, (March 30, 2019) (<https://games-cdn.washingtonpost.com/notes/prod/default/documents/bad6e3c8-787b-42ed-9b30-54409d0fba60/note/9fa77f85-a46c-4487-a7b0-1f523933ee32.pdf#page=1>).

²⁵ *Id.* at 3

²⁶ “Report of Prohibited Political Activity under the Hatch Act OSC File No. HA 18-0966 (Kellyanne Conway)” Office of Special Counsel, (March 6, 2018) (<http://cdn.cnn.com/cnn/2018/images/03/06/conway.ha-18-0966.final.report.pdf>).

²⁷ 2019 OSC Memorandum at 6--7.

²⁸ *Id.* at 7.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 8.

³³ *Id.* at 12.

³⁴ *Id.*

³⁵ *Id.* at 13.