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The Hatch Act And Political Speech By Federal Employees

By **Alan Kabat** (March 21, 2018, 12:26 PM EDT)

Kellyanne Conway brought national attention to a little-appreciated federal law, the Hatch Act, which prohibits a wide range of political conduct by federal employees in the executive branch. The Hatch Act prohibits “political activity,” including using “official authority or influence for the purpose of interfering with or affecting the result of an election.”[1]



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The Hatch Act covers acts taken “while the employee is on duty” or “in any room or building occupied in the discharge of official duties” or “while wearing a uniform or official insignia” or while “using any [government] vehicle.”[2] The Hatch Act is enforced by the Office of Special Counsel, an independent federal agency that also handles whistleblower complaints by federal employees.

Let’s imagine two federal employees in November 2017. One is a park ranger at a national forest in Alabama, and the other is counsellor to the president. Both have worked for the federal government for nearly one year, and both have received multiple training sessions about ethical issues, including the Hatch Act. Both are interviewed at their workplace by cable television news shows during the days leading up to the special election to fill the U.S. Senate seat formerly held by Jeff Sessions. The interviews show their workplace in the background and they are identified by their job titles.

During the interview, the park ranger volunteers a comment about the pending Senate election between Roy Moore and Doug Jones: “And Roy Moore. Folks, don’t be fooled. He’ll be a vote in favor of cutting social services. He is opposed to immigrants and wants to build the wall on the Mexican border. And Roy Moore is a radical conservative, which is why he’s not saying anything and why the conservative media are trying to boost him.”

When the cable host asks, “So vote Doug Jones?” the park ranger responded, “I’m telling you that I want the votes in the Senate to oppose the tax bill that will cut social services.”

That same week, the counsellor to the president is also interviewed by the same cable news show. Conway was asked the same questions that were asked of the park ranger, and she responded to a question about tax reform by switching to the Alabama election:

And Doug Jones in Alabama. Folks, don’t be fooled. He’ll be a vote against tax cuts. He’s weak on crime, weak on borders. He’s strong on raising your taxes. He’s terrible for property owners. ... And Doug Jones is a doctrinaire liberal, which is why he’s not saying anything and why the media are trying to boost him.

The cable host asks, “So vote Roy Moore?” and Conway responded “I’m telling you that we want the votes in the Senate to get this tax bill through. ... Let me tell you something, this guy Doug Jones is a doctrinaire liberal.”

Here, Conway’s statements were made while she was standing on the White House lawn, and the hypothetical park ranger’s statements are the mirror image of Conway’s statements.

What will happen to these two federal employees, both of whom engaged in identical violations of the Hatch Act by openly advocating for a Senate candidate during a cable news interview conducted while they are in the workplace? For the vast majority of federal employees, the Office of Special Counsel has the authority to file a complaint against the offender in the Merit Systems Protection Board (MSPB), which then holds a hearing and issues a final order that can penalize the employee through ordering his "removal, reduction in grade, debarment from federal employment for a period not to exceed 5 years, suspension, reprimand or an assessment of a civil penalty not to exceed \$1,000." [3]

The hypothetical park ranger will face the full brunt of OSC's prosecutorial powers, as it is highly likely that the OSC will file a complaint with the MSPB, and the MSPB will likely order a suspension without pay (typically at least 30 days to several months), if not outright removal.

The MSPB and the courts look to whether the employee knew the conduct was prohibited, and the notoriety or extent of the conduct. A lengthy suspension without pay or removal is warranted where the employee knew of the Hatch Act. For example, a 120 day suspension of an IRS employee was imposed for forwarding a single campaign email:

The administrative law judge correctly found that the respondent admitted that he knew or should have known about the political activity restrictions of the Hatch Act; that when he started his employment, he was given information about the Hatch Act; that the annual ethics training he was required to complete included information on the Hatch Act; and that 4 days before he forwarded the e-mail, an agency electronic newsletter reminded employees about restrictions on their political activity and provided links to the petitioner's Hatch Act page and a Hatch Act PowerPoint presentation. [4]

A federal attorney was removed from employment for making statements while at work, by both email and telephone, in support of a state political party, since "[h]e admits that he 'was aware of the Hatch Act and knew that the Hatch Act prohibited federal employees from engaging in partisan political activity while at work.'" [5]

In contrast, if the employee lacked knowledge of the law, or "received incorrect legal advice from his supervisor regarding his responsibilities and liabilities under the Hatch Act," then that can reduce the penalty. [6]

But will high-level White House employees such as Conway receive the same treatment? Probably not, because the same statute that allows OSC to prosecute these complaints in the MSPB has a specific carveout: "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 ... the complaint ... shall be presented to the president for appropriate action in lieu of being presented [to the MSPB]." [7]

The OSC applied this carveout to its finding that Conway violated the Hatch Act through her statements on Fox News's Fox & Friends and CNN's New Day. The OSC merely referred its findings to the president. [8] It is safe to predict that the White House will not suspend or remove Conway, even though the OSC found that she had received not one but seven reminders of the Hatch Act, including a group ethics training session, three individual ethics training sessions and meetings and three emails and publications.

Thus, even though Conway is likely to receive only a slap on the wrist, she brought national attention to the Hatch Act, and made it more likely that other federal employees who were not appointed by the president will be reported to the OSC for Hatch Act investigations and referred to the MSPB, which will order a suspension or removal.

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[1] 5 U.S.C. § 7323(a)(1).

[2] 5 U.S.C. § 7324(a).

[3] 5 U.S.C. § 7326.

[4] *Special Counsel v. Mark*, 114 M.S.P.R. 516, 524 (M.S.P.B. 2010).

[5] *Eisinger v. MSPB*, 236 Fed. Appx. 628 (Fed. Cir. 2007).

[6] *Special Counsel v. Pierce*, 85 M.S.P.R. 281 (M.S.P.B. 2000) (30-day suspension).

[7] 5 U.S.C. § 1215(b).

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

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