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SUBMITTED TO THE HOUSE COMMITTEE ON OVERSIGHT AND REFORM
HEARING ON “VIOLATIONS OF THE HATCH ACT UNDER THE TRUMP
ADMINISTRATION”

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Chairman Cummings, Ranking Member Jordan, and members of the Committee, thank you for the opportunity to submit testimony regarding the Trump Administration’s numerous, repeated and flagrant violations of the Hatch Act. This hearing is a critical step in ensuring that this Administration takes its responsibility to abide by the law seriously, and that bad actors are held accountable for their actions. It is also crucial that Congress ensure that the Office of Special Counsel (OSC) has the tools it needs to issue clear guidance and for consistent, robust enforcement of the law, especially as we approach the 2020 election cycle.

Citizens for Responsibility and Ethics in Washington (CREW) is a non-partisan non-profit organization committed to ensuring the integrity of our government institutions and promoting ethical governance. I write on behalf of CREW today to express our deep concern with the Trump Administration’s flagrant disregard for this federal law designed to prevent government officials from using taxpayer funds for partisan purposes and to protect the rights of federal workers to engage in personal political activity. Since 2017, at least twelve senior administration officials have been found in violation of the Hatch Act including cabinet members Nikki Haley and Ryan Zinke as well as, most recently, Counselor to the President Kellyanne Conway. These violations are even more troubling given the President’s failure to discipline even a repeat offender like Ms. Conway, and the White House’s numerous statements affirmatively dismissing accountability for violations of our ethics laws.

For more than a century, executive branch employees have been subject to limitations on their engagement in partisan political activities in the course of their official duties. As the Congressional Research Service has noted, “[a]lthough they have always retained their right to vote and privately express political opinions, for most of the last century, they were prohibited from being actively involved in political management or political campaigns.” In 1939, Congress codified the disparate laws governing political activity by federal employees into what is now known as the Hatch Act. The Hatch Act protects the right of federal employees to engage in private political expression but also ensures that Americans can access government services and officials regardless of their political affiliation. The law bars federal employees from using government resources including their official titles or positions for partisan political purposes. The Hatch Act also vests power in the Office of Special Counsel to provide federal employees with guidance on how to comply with the law and the authority to enforce it.

Congressional oversight of compliance with and enforcement of the Hatch Act is of critical importance now. Over the past two and a half years of the Trump Administration, presidential appointees have violated the law at a dizzying rate. In an administration that has already set a

low bar for ethical compliance, impermissibly mixing partisan activity with official conduct in violation of the Hatch Act has been perhaps the most frequent lapse. On April 1, 2017, the White House Director of Social Media violated the Hatch Act by posting a tweet calling for the defeat of Republican Congressman Justin Amash in a primary election. Since then, more than ten other administration officials have also violated the statute including former Ambassador Haley, former Secretary Zinke, former White House Principal Deputy Press Secretary Raj Shah, and Federal Communications Commissioner Mike O'Reilly.

The most egregious offender, however, has been Counselor to the President Kellyanne Conway, who has repeatedly and flagrantly violated the Act, despite what OSC described as her “significant knowledge of the Hatch Act.” Ms. Conway’s contempt for the rule of law was so flagrant that the Trump Administration’s appointed Special Counsel Henry Kerner took the “unprecedented” step of requesting a White House staffer’s removal from government. Her actions, OSC wrote, “erode the principal foundation of our democratic system—the rule of law.”¹ Were Conway any other federal employee she would have been removed from her position. That she remains as Counselor to the President is a searing indictment of the Trump Administration’s attitude towards the rule of law and the most basic norms of ethical governance.

Ms. Conway’s indifferent response to OSC’s repeated attempts to urge her to comply with the law is a perfect illustration of the Administration’s attitude towards ethics more generally. The repeated violations of the Hatch Act are highly problematic, but perhaps even more troubling has been the Trump Administration’s movement from indifference to outright hostility to any accountability for this misconduct. For example, on March 7, 2018, one day after OSC sent a report to the President documenting Ms. Conway’s Hatch Act violations for “consideration of appropriate disciplinary action,” the White House defended Ms. Conway’s conduct, stating that she did not violate the Hatch Act, and no disciplinary action was taken in response to OSC’s findings.² The *Washington Post* has reported that President Trump has “privately dismissed concerns about the Hatch Act, sympathizing with aides found to have violated it.”³ More recently, the White House responded to OSC’s recommendation that Conway be removed by falsely labeling the decision as “biased” and “influenced by media pressure and liberal

¹ Letter from Henry Kerner, Special Counsel, OSC to President Donald J. Trump Regarding OSC File Nos. HA-19-0631 & HA-19-3395 (June 13, 2019), available at <https://osc.gov/Resources/Report%20to%20the%20President%20re%20Kellyanne%20Conway%20Hatch%20Act.pdf>.

² Alexander Mallin, *Kellyanne Conway says she discussed Hatch Act violations with President Trump*, *ABC News*, Mar. 8, 2018, available at <https://abcnews.go.com/Politics/kellyanne-conway-discussed-hatch-act-violations-president-trump/story?id=53609559>.

³ Michelle Ye Hee Lee, Lisa Rein, and Josh Dawsey, *Federal watchdog agency recommends removal of Kellyanne Conway from federal office for violating Hatch Act*, *Washington Post*, June 13, 2019, available at https://www.washingtonpost.com/politics/office-of-special-counsel-recommends-removal-of-kellyanne-conway-from-federal-office-for-violating-the-hatch-act/2019/06/13/0786ae2e-8df4-11e9-8f69-a2795fca3343_story.html?utm_term=.6097c0c965e9.

organizations.”⁴ Perhaps most damningly, the White House issued a chilling demand that OSC provide them with documents surrounding the report’s creation—a clearly unacceptable attack on the rule of law.

The disgraceful nature of the White House’s actions towards OSC in response to the Conway removal recommendation is further underscored by OSC’s findings during another official interview where she made political statements, and Ms. Conway’s own public comments about the Hatch Act. Earlier this year when reporters referenced OSC’s findings, Ms. Conway was “dismissive,” responding “Blah, blah, blah,” as one reporter recounted the agency’s findings. “If you’re trying to silence me through the Hatch Act, it’s not going to work,” Conway said, adding, “Let me know when the jail sentence starts.”⁵ Other Administration officials have made similarly dismissive public comments. For example, Lynn Patton, a political appointee at the Department of Housing and Urban Development, recently posted a message on Facebook supporting HUD Secretary Ben Carson, and critical of Committee Member Rep. Alexandria Ocasio-Cortez, stating, “It may be a Hatch Act violation. It may not be.”⁶

The Trump Administration’s attitude towards ethics was similarly demonstrated in its response to recommendations from the Office of Government Ethics (OGE), which, like OSC, is led by a Trump appointee. President Trump previously declined to discipline Ms. Conway following OGE’s pronouncement that she violated regulations governing “misuse of position” by endorsing Ivanka Trump’s fashion products. If the Trump Administration is allowed to openly ignore guidance from and accountability recommended by federal ethics agencies like OSC and OGE, our government’s ethics infrastructure will cease to function. As OSC wrote in its report regarding Ms. Conway, these abuses “erode” our democracy.

The Trump Administration’s inability or unwillingness to stand up for the rule of law means that Congress must act. This hearing is a significant first step in ensuring accountability for the rampant abuses of the Hatch Act that have occurred since January 2017. If the Trump Administration continues to fail in its basic responsibility to hold wrongdoers accountable, Congress has numerous mechanisms at its disposal to force them to. In particular, Congress should examine how to use the federal appropriations process, including riders and the Purpose Statute, to compel compliance. The Purpose Statute prohibits the use of federally appropriated funds for anything other than the “object” (or issue) for which they were appointed, except as otherwise provided by law, with few exceptions.⁷ The Government Accountability Office (GAO)

⁴ Josh Kovensky, WH Counsel Lashes Out Over ‘Outrageous’ Demand for Conway Ouster, *The Daily Beast*, June 13, 2019, available at

<https://talkingpointsmemo.com/muckraker/white-house-counsel-response-hatch-act-kellyanne-conway>.

⁵ Brett Samuels, Kellyanne Conway dismisses Hatch Act violation: ‘Let me know when the jail sentence starts.’, *The Hill*, May 29, 2019 available at

<https://thehill.com/homenews/administration/445914-kellyanne-conway-dismisses-hatch-act-violation-let-me-know-when-the>.

⁶ Ibn Safir, Lynne Patton Doesn’t Care If She Violated the Hatch Act Again, *The Root*, May 27, 2019, available at <https://www.theroot.com/lynne-patton-doesnt-care-if-she-violated-the-hatch-act-1835048946>.

⁷ 31 U.S.C. § 1301(a).

has found that this prohibition extends to “political activities.”⁸ Similarly, appropriations riders are routinely used to restrict the manner in which appropriated funds are used for certain conduct. Attached to annual appropriations acts, these riders typically prohibit the use of appropriated funds for “publicity or propaganda purposes” that are “not authorized by the Congress” including political activity.⁹

In OSC’s recent report recommending Ms. Conway’s removal, the Special Counsel found at least 30 separate violations of the statute, including at least 22 tweets from her “@KellyannePolls” Twitter account.¹⁰ OSC also cited Ms. Conway for participating in at least 10 television interviews, totaling more than 2 hours, where she violated the Hatch Act.¹¹ This is precisely the type of conduct that would run afoul of the Purpose Statute—and Congress could add language to further appropriations bills in the form of riders that would explicitly reference the Hatch Act.¹²

These are just a few avenues that are open to Congress to uphold the rule of law in the face of relentless executive malpractice. There are other mechanisms Congress could pursue, including adding larger civil penalties to the Hatch Act for presidential appointees and repeat offenders, or ensuring that OSC is actually referring violations by presidential appointees like Ms. Conway to the Merit Systems Protection Board for discipline rather than to a complicit White House. We look forward to discussing these and other alternatives with the Committee should you so choose.

Ultimately, however, the problem facing the Hatch Act is not with the law, but with President Trump and his administration’s open hostility to the rule of law more broadly. Regardless of the mechanisms Congress explores to bolster executive branch compliance with the Hatch Act, it will, at base, serve as an indictment of the Trump Administration’s unwillingness to protect and defend the Constitution. The foundational principle of any democracy is that everyone is equal under the law—that a staffer in the White House Executive Clerk’s office is treated the same as a Counselor to the President. The President cannot pick and choose which federal laws to enforce simply because it inconveniences him on a personal level. And when the President fails to act in

⁸ See B-304228 (Sept. 30, 2005), available at <https://www.gao.gov/decisions/appro/304228.pdf> (citing B-303170 (Apr. 22, 2005), available at <https://www.gao.gov/assets/380/374261.pdf>).

⁹ See, e.g., Consolidated Appropriations Act, 2017, H.R. 244, 115th Cong. (2017); Consolidated Appropriations Act, 2018, H.R. 1625, 115th Cong. (2018); Consolidated Appropriations Act, 2019, H.R.J. Res. 31, 116th Cong. (2019).

¹⁰ Letter from Henry Kerner, Special Counsel, OSC to President Donald J. Trump Regarding OSC File Nos. HA-19-0631 & HA-19-3395 (June 13, 2019), available at <https://osc.gov/Resources/Report%20to%20the%20President%20re%20Kellyanne%20Conway%20Hatch%20Act.pdf>.

¹¹ See *id.* and Letter from Henry Kerner, Special Counsel, OSC to President Donald J. Trump Regarding OSC File No. HA-18-0966 (Mar. 6, 2018), available at <https://osc.gov/Resources/Conway%20HA-18-0966%20Final%20Report.pdf>.

¹² Another statute that occasionally overlaps with GAO’s findings related to appropriations riders is the Antideficiency Act. 31 U.S.C. § 1341(a). GAO has found the Antideficiency Act to overlap with other appropriations requirements where an agency’s use of appropriated funds in violation of publicity or propaganda prohibitions *also* constitutes a violation of the Antideficiency Act. See, e.g., B-303495 (Jan. 4, 2005), available at <https://www.gao.gov/decisions/appro/303495.pdf>.

the face of repeated ethical abuses, the burden of upholding the rule of law must fall on Congress.

Unfortunately, that moment is long overdue.