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‘Unfollowing’ Undue Influence: The Inadequacy of The Hatch Act in the Age of Twitter and Congressional Solutions for Reform

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I.	INTRODUCTION.....	1
II.	THE HATCH ACT DECONSTRUCTED	4
	<i>A. The History and Application of the Hatch Act.....</i>	4
	<i>B. The Hatch Act in Practice.....</i>	10
	<i>C. State-Level Hatch Act Equivalents.....</i>	17
III.	THE CONFLICT IN HATCH ACT ENFORCEMENT	19
IV.	RECOMMENDATIONS FOR REFORM OF THE HATCH ACT	22
	<i>A. Congressional Textual Reform.....</i>	23
	<i>B. Social Media Companies’ Support</i>	25
V.	CONCLUSION.....	26

I. INTRODUCTION

Imagine this: you are an elementary school teacher scrolling through Twitter during your lunch break on an otherwise normal

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October afternoon during the height of the 2020 election season. You, like most other Americans, have been captivated by the news while watching each campaign unfold. As you scroll, you see posts from friends and local businesses, an assortment of funny videos, and, of course, campaign advertisements emphasizing who you should vote for in the upcoming election. A recently posted video catches your eye, and you click play to watch and see what your old high school friend has been up to lately. Your friend now works as a letter carrier for the local branch of the United States Postal Service (USPS) in the same hometown where both of you still reside. Your friend is frustrated with the ongoing political strife in this country and takes to social media to express his views. You watch your friend's video expressing his support for his preferred candidates, filmed in what appears to be his USPS truck and uniform. You think nothing of it, internally wishing him well, and continue to scroll.

Next, you stumble upon a post that one of your teacher colleagues retweeted from the official account for the U.S. Secretary of Education, Betsy DeVos. The post includes a video linked to the U.S. Department of Education's (DOE) YouTube page in which Secretary DeVos is seen being interviewed and criticizing then-Presidential-candidate Joe Biden's platform on education reform.¹ Secretary DeVos proceeds to praise the Trump Administration for its efforts and policies that ensure America's children are getting the quality education they deserve.² Given how important education is to you, both in principle and with regard to your career, you decide to take this information into consideration when deciding who you are going to vote for in November. You reason that if the DOE is promoting a candidate, they must know what they are talking about, right?

Unfortunately, neither of these posts should have reached your feed or the feeds of the millions of others they actually influenced in the first place.³ This is because the USPS and the DOE are federal agencies that fall under the authority of the executive branch. Under the

1. See Laura Meckler, *DeVos Appears to be Under Investigation for Violating Hatch Act*, WASH. POST (Sept. 22, 2020, 10:09 AM), https://www.washingtonpost.com/education/devos-hatch-act-investigation/2020/09/21/65e3618e-fc6f-11ea-b555-4d71a9254f4b_story.html.

2. Secretary Betsy DeVos (@BetsyDeVosED), TWITTER (Sept. 2, 2020, 10:36 AM), <https://twitter.com/BetsyDeVosED/status/1301182325468860416?s=20> [https://perma.cc/N3TY-5XQA].

3. These two scenarios are based on real violations of the Hatch Act. See *supra* notes 1-2 and accompanying text.

Hatch Act of 1939, federal executive branch employees are prohibited from engaging in certain political activities in their capacity as government workers, including certain political acts expressed on personal or official government social media accounts.⁴ Although both your high school friend and Secretary DeVos have violated the Hatch Act in the same way, only your high school friend will face punishment for their actions. This is due to a loophole that exists within the current enforcement procedure of the Hatch Act, which allows for any and all alleged Hatch Act violations by appointed members of the President's cabinet to be referred to the President for disciplinary action rather than to an independent investigatory board.⁵ To date, no President has initiated disciplinary proceedings for a violation of the Hatch Act against one of their cabinet members or staff.⁶ Therefore, Secretary DeVos will likely get off scot-free, despite her massive Twitter following and status as a trusted political official, while your high school friend, whose following consists of old friends and family in his small hometown, will likely face suspension from their USPS position without pay, at the very least.⁷

At a time in history when political polarization and interconnectedness through technology are at an all-time high, there are extraordinary stakes associated with letting our highest-ranking executive branch officials blatantly flout the law without fear of repercussions.⁸ Part II of this paper discusses the Hatch Act's statutory history as well as its current application. Part III focuses on the disparity in the Act's current enforcement procedures and addresses the consequences of allowing it to continue. Part IV recommends amending the Hatch Act to be more reflective of certain state-level Hatch Act equivalents and for Congress to work with social media companies to enact regulation procedures to go into effect when federal employees violate the Hatch Act on their platforms. Finally, Part V emphasizes why this issue is ripe for reform.

4. See *infra* notes 9, 72 and accompanying text.

5. See 5 U.S.C. § 1215(b).

6. See Nicole Ogrysko, *Many Feds Do Care About the Hatch Act. But the Law Allows Others to Shrug it Off*, FED. NEWS NETWORK (Aug. 31, 2020, 1:29 AM), <https://federalnewsnetwork.com/mike-causey-federal-report/2020/08/many-feds-do-care-about-the-hatch-act-but-the-law-allows-others-to-shrug-it-off/> [https://perma.cc/F6EG-4AJK].

7. See *supra* note 1 and accompanying text; see, e.g., *Don't Do This: Hatch Act Education Campaign Begins*, USPS (Mar. 30, 2018, 10:49 AM), <https://link.usps.com/2018/03/30/dont-do-this/> [https://perma.cc/232A-LN6C].

8. See GORDON HELTZEL & KRISTEN LAURIN, POLARIZATION IN AMERICA: TWO POSSIBLE FUTURES 179 (John T. Jost et al. eds., 2020).

II. THE HATCH ACT DECONSTRUCTED

A. *The History and Application of the Hatch Act*

First known as the “Act to Prevent Pernicious Political Activities,” the Hatch Act was enacted into law in 1939 with the overarching goal of limiting select political activities of federal executive branch employees.⁹ The enactment occurred in direct response to a New Deal-era scandal in which President Franklin D. Roosevelt’s administration was accused of having pressured federal Works Progress Administration (WPA) employees into working on political campaigns for pro-Roosevelt candidates, as well as using federal funds to achieve the same ends.¹⁰ The then-director of the WPA, Harry Hopkins, allegedly promised jobs and promotions in exchange for votes and actively voiced his opinion on the caliber of federal political candidates.¹¹ This behavior was seen as an inappropriate overstep because federal employees in this realm were designed to serve all Americans, regardless of their political affiliation.¹² The ability of top officials to intimidate and influence employees was decidedly counter to Congress’s goal that “employment and advancement in government service” in certain federal agencies should not be based on political favors or pressures.¹³ The removal of partisan politics from public service was expected to better the agencies themselves, so their exclusive focus could remain on advancing their agendas of helping the American people.¹⁴

9. Olivia B. Waxman, *Why Federal Employees Can Thank FDR for Some Restrictions on Their Tweets*, TIME (Apr. 3, 2017, 5:35 PM), <https://time.com/4723411/hatch-act-history/> [<https://perma.cc/58CL-HGL4>]; *Hatch Act Overview*, U.S. OFF. OF SPECIAL COUNSEL, <https://osc.gov/Services/Pages/HatchAct.aspx> [<https://perma.cc/3JTA-3TYK>] (last visited June 21, 2022). The Hatch Act is currently codified at 5 U.S.C. §§ 7321-7326.

10. Lesley Kennedy, *What Is the Hatch Act and Why Was [sic] Established in 1939?*, HISTORY (Sept. 20, 2020), <https://www.history.com/news/hatch-act-fdr-politics> [<https://perma.cc/BW58-6FDZ>]; David Asp, *Hatch Act of 1939 (1939)*, FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1046/hatch-act-of-1939> [<https://perma.cc/7D3D-UXH6>] (last visited June 21, 2022); see *Bauers v. Cornett*, 865 F.2d 1517, 1520-21 (8th Cir. 1989).

11. Waxman, *supra* note 9.

12. *Id.*; Kennedy, *supra* note 10.

13. Asp, *supra* note 10; see Nikhel Sus, *Yes We Can . . . Fire You For Sending Political E-mails: A Proposal to Update the Hatch Act for the Twenty-First Century*, 78 GEO. WASH. L. REV. 171, 174 (2009); KEVIN E. MCCARTHY, CONN. GEN. ASSEMBLY OFF. OF LAB. RELS., REPORT ON PUBLIC SECTOR EMPLOYEES SERVING AS PUBLIC OFFICIALS, 2004-R-0910 (2004), <https://www.cga.ct.gov/2004/rpt/2004-R-0910.htm> [<https://perma.cc/29UN-WV4V>].

14. See McCarthy, *supra* note 13.

Named after the sponsor of the bill, former New Mexico Senator Carl A. Hatch, the noted purpose of the Hatch Act is to certify that federal agendas “are administered in a nonpartisan fashion, to protect federal employees from political coercion in the workplace, and to ensure that federal employees are advanced based on merit and not based on political affiliation.”¹⁵ While “political activity” is not explicitly defined in the Act, the Office of Personnel Management (OPM) defines this concept as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”¹⁶ Generally, Congress designed the Hatch Act to balance the interests that the government has as an employer in promoting nonpartisanship within its agencies against an individual’s First Amendment right to engage in partisan activity.¹⁷ As such, the Hatch Act faced constitutional challenges at an early stage because of the role that the Act plays in regulating speech of federal employees.¹⁸ When addressing this issue, the United States Supreme Court was primarily concerned with “what interest the federal government has over its own employees and state employees, and whether this interest interfere[d] with an employee’s First Amendment rights.”¹⁹ Through the judgments of two primary cases, the Court upheld the Act and relied on a deferential standard of review to emphasize the roles of both Congress and the President in the supervision of civil service employees.²⁰

The Hatch Act is fairly broad in terms of its scope of application. The Act applies to all federal civilian executive branch employees, as well as to certain state and local employees who are employed in positions that receive federal funding.²¹ Federal executive branch

15. *Id.*; Kennedy, *supra* note 10.

16. 5 C.F.R. § 734.101 (2004); *see Sus*, *supra* note 13, at 175; *see also Our Agency*, U.S. OFF. OF PERS. MGMT., <https://www.opm.gov/about-us/> [<https://perma.cc/9ZRB-3X7R>] (last visited June 21, 2022) (noting that the U.S. Office of Personnel Management “serves as the chief human resources agency and personnel policy manager for the Federal Government.”).

17. Rafael Gely & Timothy D. Chandler, *Restricting Public Employees’ Political Activities: Good Government or Partisan Politics?*, 37 HOUS. L. REV. 775, 784 (2000).

18. *See Shannon D. Azzaro, The Hatch Act Modernization Act: Putting the Government Back in Politics*, 42 FORDHAM URB. L.J. 781, 798-99 (2015).

19. *Id.* at 798.

20. *Id.* at 799-800; *see United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 102-03 (1947); *U.S. Civ. Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 550-51, 556 (1973).

21. For the purposes of this analysis, the focus is the application of the Hatch Act at the federal level. *See Hatch Act Overview*, *supra* note 9; *Federal Employee Hatch Act*

employees are grouped into either the “Less Restricted” or “Further Restricted” categories in terms of the Act’s application; however, the following four pillars of the Act apply to all federal executive branch employees equally in that they may *not*:

- “Use [their] official authority or influence for the purpose of interfering with or affecting the result of an election”;
- “Knowingly solicit, accept, or receive a political contribution from any person”;
- Be a candidate for public office in a partisan election; or
- Knowingly solicit or discourage the political activity of any person who has business before the employee’s employing office.²²

Additionally, the Act prohibits all subjected employees from running for “partisan political office;” however, the Act also allows all employees to retain their rights to vote and to express their own political views, so long as they are not under the guise of their official capacity while expressing their views—which is an increasingly difficult state to determine.²³

As noted, the specific category that a federal executive branch employee falls under determines the extent of the applicability of the Hatch Act to that employee.²⁴ All federal executive branch agencies that are not specifically assigned to the “Further Restricted” category are considered “Less Restricted,” and their employees have the ability to participate in various political activities.²⁵ These activities include,

Information, U.S. OFF. OF SPECIAL COUNS., <https://osc.gov/Services/Pages/HatchAct-Federal.aspx> [<https://perma.cc/54X7-F9YU>] (last visited June 21, 2022) (noting that the Hatch Act does not apply to either the President or the Vice President, as those positions are inherently political in nature); 5 U.S.C. § 7322(1).

22. 5 U.S.C. § 7323(a)(1)-(4) (emphasis added); see *Federal Employee Hatch Act Information*, *supra* note 21. In addition to these provisions, the Hatch Act prohibits subjected employees from soliciting political contributions from any person, unless that person is “a member of the same Federal labor organization . . . not a subordinate employee[,] . . . and the solicitation is for a contribution to the multicandidate political committee.” 5 U.S.C. § 7323(a)(2)(A)-(C).

23. 5 U.S.C. §§ 7323(a)(3), 7323(b), 7323(c), 7324; see Amelia Gruber, *What Feds Teleworking During the Pandemic Need to Know About Complying With the Hatch Act*, GOV’T EXEC. (May 1, 2020), <https://www.govexec.com/workforce/2020/05/what-feds-teleworking-during-pandemic-need-know-about-complying-hatch-act/165075/> [<https://perma.cc/294K-JDBR>].

24. *Federal Employee Hatch Act Information*, *supra* note 21.

25. *Id.*

but are not limited to: assisting with voter registration, attending political meetings, holding office in political organizations, campaigning for or against candidates, as well as voicing opinions about political candidates and issues.²⁶ As a result, most federal executive branch employees fall under the Less Restricted category, which includes, for example, employees of the USPS, National Park Service, and Transportation Security Administration, among others.²⁷ The primary advantage of the Less Restricted category is that these employees retain their right to participate in partisan political management and campaigns.²⁸ However, these activities are not permitted when “the employee is on duty[,] in any [federal] room or building[,] . . . wearing a uniform or official insignia[,] . . . or [] using any [federally] owned or leased [vehicle.]”²⁹ These restrictions additionally apply to any use of the Internet, e-mail, social media, or the like, with regard to pursuing political activity while on duty.³⁰

On the other hand, Further Restricted employees primarily encompass those who work for intelligence and law enforcement agencies.³¹ Notable agencies among this group include the Federal Bureau of Investigation, Central Intelligence Agency, Federal Election Commission, Office of Special Counsel, and National Security Agency, among others.³² Further Restricted employees differ in that they are forbidden from engaging in partisan political management or campaigns.³³ These employees “may not campaign for or against candidates or otherwise engage in political activity in concert with a political party, a candidate for partisan political office, or a partisan political group.”³⁴ Additionally, they are excluded from participating in any of the prohibited activities under the Hatch Act, such as participating in political activity while in their capacity as a federal executive branch employee.³⁵

26. *Id.*

27. *Id.*

28. 5 U.S.C. § 7323(a).

29. *Id.* § 7324(a).

30. *Federal Employee Hatch Act Information*, *supra* note 21.

31. *See* 5 U.S.C. § 7323(b)(2)(B).

32. *Id.*

33. *Id.* § 7323(b)(2)(A)-(B).

34. *Federal Employee Hatch Act Information*, *supra* note 21.

35. However, Further Restricted employees similarly retain their rights to vote, “[a]ttend political fundraising functions . . . rallies[,] and meetings,” as well as the ability to “sign nominating petitions,” and “[c]ontribute money to political campaigns, political parties, or partisan political groups.” *Id.*

A third category of restricted federal executive branch employees who fall outside the scope of the Less Restricted and Further Restricted classifications also exists. These employees consist of: (1) those who are nominated by the President and subsequently confirmed by the Senate to serve in an administration's innermost circle; and (2) employees that are "paid from an appropriation for the Executive Office of the President[,]" otherwise known as White House Staffers.³⁶ The former group is often referred to as "PASs," as they are "appointed by the President, by and with the advice and consent of the Senate," and the group encompasses members of the President's cabinet.³⁷ PASs and White House Staffers are exempt, in certain circumstances, from the Hatch Act's prohibition against participating in political activity while on duty, in a federal room or building, wearing an official uniform or insignia, or while using a government vehicle.³⁸ In order to qualify for this exemption, the duties of that employee's position must extend outside the normal hours and location of the position, the role must be based in the United States, and the role must involve foreign policy or the "nationwide administration of [f]ederal laws."³⁹ Therefore, PASs and White House Staffers are typically not prohibited from engaging in political activity while on duty.⁴⁰ However, along with all other federal executive branch employees, exempt PASs and Staffers remain subject to the four primary pillars of the Act.⁴¹ Therefore, while there is defined flexibility in some provisions of the Act's application to certain individuals within the federal executive branch, it is decidedly clear that no position subject to the Act may use their official capacity as an avenue to influence the result of an election.⁴²

The process associated with adjudicating alleged Hatch Act violations varies based on the specific restriction category of the individual accused of violating the Act.⁴³ All Hatch Act complaints are

36. See 5 U.S.C. § 7324(b)(1)-(2).

37. *Id.*

38. See *Hatch Act FAQs*, U.S. OFF. OF SPECIAL COUNS., <https://osc.gov/Services/Pages/HatchAct-FAQ.aspx#tabGroup27> [<https://perma.cc/D3CM-TPQF>] (last visited June 21, 2022); 5 U.S.C. § 7324(a).

39. See 5 U.S.C. § 7324(b)(1)-(2).

40. *Hatch Act FAQs*, *supra* note 38.

41. See *supra* note 22 and accompanying text.

42. See *Hatch Act FAQs*, *supra* note 38; 5 U.S.C. § 7323(a)(1).

43. See *Violations of the Hatch Act Under the Trump Administration: Hearing Before the H. Comm. on Oversight and Reform*, 116th Cong. 1 (2019) (noting the different adjudication process for violations by political appointees).

initially reported to and investigated by the Office of Special Counsel (OSC), an entity that currently does not proactively seek out violations but instead relies on the public and government watchdog groups to report violators.⁴⁴ Once a complaint has been submitted, the OSC completes an investigation and report regarding the alleged violation and determines whether the matter should be subject to disciplinary action.⁴⁵ If either a Less Restricted or Further Restricted employee allegedly violated the Act and the OSC determines disciplinary action should be brought, the matter is referred to the Merit Systems Protection Board (MSPB) for adjudication.⁴⁶ The Board will then assess the validity of the allegation, determine the applicable disciplinary action, and inform the employee and their associated agency employer of the Board's determination.⁴⁷

There is a different path, however, for the third category of employees—which consists of members of the President's closest circle—with regard to adjudication of alleged Hatch Act violations.⁴⁸ Under the Civil Service Reform Act, if the employee in question is appointed by the President, by and with the advice and consent of the Senate, or is a White House Staffer, and the individual is serving “in a confidential, policy-making, policy-determining, or policy-advocating position[,]” it is up to the discretion of the President whether

44. See 5 U.S.C. § 1216(a)(1)-(2); *How to File A Hatch Act Complaint*, U.S. OFF. OF SPECIAL COUNS., <https://osc.gov/Services/Pages/HatchAct-FileComplaint.aspx> [<https://perma.cc/T8R3-993P>] (last visited June 21, 2022); Andrew Solender, *Here's Why Trump Officials Rarely Face Penalties for Hatch Act Violations*, FORBES (Aug. 26, 2020, 4:59 PM), <https://www.forbes.com/sites/andrewsolender/2020/08/26/heres-why-trump-officials-rarely-face-penalties-for-hatch-act-violations/?sh=28dc1440a2d2>.

45. See *How to File a Hatch Act Complaint*, *supra* note 44; see also U.S. OFF. OF SPECIAL COUNS., FISCAL YEAR 2021 CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE BUDGET GOALS 36 (2021) (noting that the years 2018 and 2019 achieved record numbers of total Hatch Act complaints received).

46. See 5 U.S.C. § 1504; *How to File A Hatch Act Complaint*, *supra* note 44 (“When [the] violations are not sufficiently egregious to warrant prosecution, OSC may issue a warning letter to the employee involved.”).

47. See 5 U.S.C. §§ 1505, 7326; *Federal Employee Hatch Act Information*, *supra* note 21 (noting that potential consequences for violation of the Hatch Act include “removal from federal service, reduction in grade, debarment from federal employment for a period not to exceed 5 years, suspension, reprimand, or a civil penalty not to exceed \$1,000”). The violator retains the opportunity to then appeal the MSPB's decision to the United States Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(a)-(b); see also Azzaro, *supra* note 18, at 792 (explaining how employees and applicants for employment may obtain judicial review after a final order or decision by the MSPB).

48. See *Violations of the Hatch Act Under the Trump Administration*, *supra* note 43; 5 U.S.C. § 1215(b).

disciplinary action for a Hatch Act violation is enforced.⁴⁹ When a complaint is submitted to the OSC regarding an individual who falls under this category, the OSC conducts an investigation and compiles a report regarding its assessment of the situation and its recommendations for disciplinary action.⁵⁰ Instead of submitting this report to the MSPB for adjudication, however, the report is sent to the President for further action.⁵¹ It is then ultimately up to the President to pursue disciplinary action for the employee in question.⁵² As noted, no Presidential administration has yet pursued disciplinary action for a Hatch Act violation by one of their own cabinet members or advisors.⁵³

B. *The Hatch Act in Practice*

Although Hatch Act enforcement procedure has remained relatively consistent over time, the provisions of the Act itself have been subject to both attempted and successful change. Pushback questioning the constitutionality of the federal government's ability to limit political speech has led to various attempts to revise the Hatch Act.⁵⁴ Beginning in 1976, Congress proposed amending the Hatch Act to allow federal employees "to seek elective office or support partisan candida[tes]."⁵⁵ Although the bill passed both the House of Representatives and the Senate, President Ford vetoed the bill and declared that "[t]he public business of our Government must be conducted without the taint of partisan politics[.]"⁵⁶ Another significant attempt at weakening the Act was made with the introduction of the Hatch Act Reform Amendments of 1990.⁵⁷ This bill would have allowed federal workers covered by the Hatch Act to "hold office in political groups, to endorse candidates publicly, to organize fundraising events and political meetings, and to distribute campaign

49. 5 U.S.C. § 1215(b); *Citizens for Resp. & Ethics in Wash. v. U.S. Off. of Special Couns.*, 480 F. Supp. 3d 118, 122-23 (D.C. Cir. 2020); Byron Tau, *Top Government Officials Rarely Punished Under Hatch Act*, WALL ST. J. (Aug. 26, 2020, 3:46 PM), <https://www.wsj.com/articles/top-government-officials-rarely-punished-under-hatch-act-11598471184>.

50. *Violations of the Hatch Act Under the Trump Administration*, *supra* note 43.

51. *Id.*

52. *See* Tau, *supra* note 49.

53. *See* Kennedy, *supra* note 10; Ogrysko, *supra* note 6.

54. *See* Kennedy, *supra* note 10.

55. James M. Naughton, *Ford Vetoes Bill to Ease Hatch Act*, N.Y. TIMES (Apr. 13, 1976), <https://www.nytimes.com/1976/04/13/archives/ford-vetoes-bill-to-ease-hatch-act.html>.

56. *Id.*; *see* Azzaro, *supra* note 18, at 803.

57. Azzaro, *supra* note 18, at 803-04.

literature.”⁵⁸ This bill also passed both the House and the Senate but was successfully vetoed by President George H.W. Bush, who again noted that the bill “incorrectly politicized the civil service.”⁵⁹

Change finally came to fruition in 1993 when Congress successfully passed the Hatch Act Reform Amendments of 1993 (HARA).⁶⁰ Signed by President Clinton, HARA allowed certain federal employees to “manage campaigns, fundraise, and hold positions within political parties on their own time.”⁶¹ Despite this change, dissatisfaction remained regarding the Act’s prohibitions on state and local employees subject to the Hatch Act, as well as the Act’s strict penalties for violation.⁶² This frustration instigated the passage of the most recent amendment to the Act under the Obama Administration, the Hatch Act Modernization Act of 2012 (HAMA).⁶³ Key aspects of HAMA include removing restrictions on certain executive branch state and local level officials from running for office, as well as expanding the available penalties associated with disciplinary action for violation of the Act.⁶⁴

After the expansion of exemptions for certain types of electioneering conduct by federal employees, the opposite pushback has occurred regarding the Hatch Act’s scope and practicality in operation. During the past few years, several bills have been introduced regarding the expansion of the enforcement mechanisms for federal ethics laws and for the Hatch Act in particular.⁶⁵ For example, Senator Richard Blumenthal proposed a bill that would have established the

58. Richard L. Berke, *Senate Upholds Veto of Bill On U.S. Workers in Politics*, N.Y. TIMES (June 22, 1990), <https://www.nytimes.com/1990/06/22/us/senate-upholds-veto-of-bill-on-us-workers-in-politics.html>.

59. *Id.*

60. *See* Azzaro, *supra* note 18, at 805.

61. *Id.*; *see* Kennedy, *supra* note 10; H.R. 20, 103d Cong. (1993).

62. Azzaro, *supra* note 18, at 805-07; *see* Josh Gerstein, *Hatch Act Enforcer Seeks Reform*, POLITICO (Oct. 6, 2011, 7:04 PM), <https://www.politico.com/story/2011/10/hatch-act-enforcer-seeks-reforms-065374> [<https://perma.cc/S5TM-6WWC>] (noting that former Special Counsel Carolyn Lerner advocated for limiting the application of the Hatch Act at the state and local level and reducing the penalties associated with violations of the Act).

63. Azzaro, *supra* note 18, at 805-07.

64. *See id.* at 807-08; Debra Roth, *Understanding New Hatch Act Rules*, FED. TIMES (Sept. 15, 2013), <http://askthelawyer.federaltimes.com/2013/09/15/understanding-new-hatch-act-rules/> [<https://perma.cc/8D2S-UGJD>]; 5 U.S.C. §§ 7321-26; S. 2179, 112th Cong. (2012).

65. *See House Democrats Introduce Landmark Reforms Package, the Protecting Our Democracy Act*, HOUSE COMM. ON OVERSIGHT & REFORM (Sept. 23, 2020), <https://oversight.house.gov/news/press-releases/house-democrats-introduce-landmark-reforms-package-the-protecting-our-democracy> [<https://perma.cc/9ZKF-HTRM>]; S. 1990, 116th Cong. (2019); H.R. 8111, 116th Cong. (2020); Exec. Order No. 13989, 86 Fed. Reg. 7029 (Jan. 20, 2021).

Presidential Appointee Accountability Act of 2019 in order to allow the OSC to recommend that a fine be imposed for PAS violators.⁶⁶ This proposal, however, still left open the possibility for the President to reject the recommendation and pursue no disciplinary action.⁶⁷ The proposed Act never received a vote in the Senate chamber.⁶⁸ Additionally, on the first day of his Administration, President Biden signed the Executive Order on Ethics Commitments by Executive Branch Personnel, which emphasized his dedication to upholding the various ethics laws that govern the executive branch.⁶⁹ While this Order served as a recommitment to upholding the rule of law, it was essentially symbolic because it did not address the inherent flaws embedded in some of the laws themselves.⁷⁰ For instance, there has not been a noted effort to account for the need for reform of the Hatch Act to strengthen its enforcement mechanisms in light of the newfound threat that social media imposes.

Given the original sponsors of the Act's understandable failure to anticipate the creation of the Internet and the influx of social media, the application of Hatch Act provisions prohibiting the use of a person's "official capacity" to engage in political activity has become increasingly hard to define.⁷¹ While not explicitly mentioned in the Act itself, the OSC has taken to issuing guidelines regarding social media use and its alignment in abiding with Hatch Act provisions.⁷² Generally, an employee's identification of political party affiliation on their social media is not a matter of concern.⁷³ Instead, it is the use of social media as an avenue to advance partisan politics from the platform of a federal executive branch employee that necessitates attention.⁷⁴ For example, an employee subject to the Hatch Act is permitted to "post, like, share, tweet, [and] retweet" their opinions about a particular partisan candidate or group, as well as "friend, like, or follow" individuals of

66. S. 1990, 116th Cong. § 2 (2019).

67. *Id.*

68. S. 1990—*Presidential Appointee Accountability Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/1990/actions> [<https://perma.cc/2K7D-KUGE>] (last visited June 21, 2022).

69. Exec. Order No. 13989, 86 Fed. Reg. 7029 (Jan. 20, 2021).

70. *Id.*

71. See Josie Cassano Rizzuit, *Social Media: Are the Lines Between Professional and Personal Use Blurring?*, 12 MCMaster J. COMM. 79, 79 (2020).

72. See *Hatch Act FAQs*, *supra* note 38; *Hatch Act Guidance on Social Media*, U.S. DEP'T. OF INTERIOR, https://www.doi.gov/sites/doi.gov/files/uploads/hatch_act_guidance_on_social_media_2018.pdf [<https://perma.cc/MD93-8X4G>] (last updated Feb. 2018).

73. *Hatch Act FAQs*, *supra* note 38.

74. *Id.*

the same nature.⁷⁵ These employees, however, are subject to limitations regarding when they may post and the nature of the post.⁷⁶ This applies to Less Restricted, Further Restricted, PAS employees, and White House Staffers alike; however, Further Restricted employees are subject to additional limitations.⁷⁷ Overall, while these guidelines may be helpful in establishing what constitutes permitted conduct, the fact that employees have access to their personal social media while on duty illustrates the difficulties involved in establishing whether they are using their official capacity to influence the masses.

Despite required training programs and posted reminders regarding social media restrictions, many lower-level executive branch employees face severe consequences for their often unintentional violations of the Hatch Act.⁷⁸ Members of the USPS have been the subject of many Hatch Act violations, especially since the influx of various social media platforms.⁷⁹ “Michaela,” a retail associate for the USPS, is a prime example.⁸⁰ Michaela was suspended for more than a month without pay after posting over one-hundred politically-oriented social media posts on her personal account while on the job.⁸¹ Additionally, similar conduct and consequences occurred with an employee of the Federal Aviation Administration, who was suspended for thirty days without pay for Facebook posts in favor of a certain political candidate.⁸² The transition to remote work for many of these employees due to the COVID-19 pandemic has only complicated

75. *Id.* (internal quotations omitted).

76. More specifically, employees subject to the Hatch Act may not (1) engage in this conduct while on duty, (2) reference their official position or title while engaging in such conduct, and (3) solicit contributions to partisan causes at any time. A biography on one’s profile listing their official position, however, is allowed. *Id.*; see 5 C.F.R. § 734.302(b)(1) (2019).

77. Further Restricted employees may not (1) post links to campaign or partisan material, (2) share the social media pages of partisan entities, and (3) retweet “posts from these entities’ Twitter accounts.” *Hatch Act FAQs*, *supra* note 38. Additionally, an employee subject to the Hatch Act may never use the U.S. Government official social media account of their position to express partisan opinions, and may not “friend, like, follow, tweet, or retweet about a partisan group or candidate” on any official government account. *Id.* (internal quotations omitted).

78. See *Don’t Do This: Hatch Act Education Campaign Begins*, *supra* note 7; *Bad Behavior: Hatch Act Education Campaign Continues*, USPS (Apr. 27, 2018), <https://link.usps.com/2018/04/27/bad-behavior/> [<https://perma.cc/V5DG-ZNMV>].

79. *Don’t Do This: Hatch Act Education Campaign Begins*, *supra* note 7.

80. *Bad Behavior: Hatch Act Education Campaign Continues*, *supra* note 78.

81. *Id.*

82. *Two Federal Employees Agree to Suspensions Without Pay for Violating the Hatch Act*, U.S. OFF. OF SPECIAL COUNS. (June 24, 2020), <https://osc.gov/News/Pages/20-20-Employees-Agree-to-Suspensions-Hatch-Act.aspx> [<https://perma.cc/Z93F-GDAT>].

matters.⁸³ Since the Hatch Act applies regardless of the employee's physical work location, the potential opportunities for an unintentional violation of the Act are numerous, especially because employees may feel as they are "off the clock" when they are in their home environment.⁸⁴

On the other hand, members of the President's closest circle often face no consequences for repeated violations of the Hatch Act on social media. This is a loophole that has existed since the enactment of the Act.⁸⁵ However, the existence of the loophole has been made more apparent under the recent Trump Administration.⁸⁶ One of the most notable examples involved former Counselor to the President Kellyanne Conway who was accused of violating the Hatch Act more than fifty times, on Twitter alone, in the span of only a few years.⁸⁷ These violations ranged from "[a]ttacking or mocking Democratic presidential candidates" and "[e]ndorsing President Trump's reelection effort" to participating in "advocacy against the Democratic party[.]" and engaging in "[p]artisan attacks against President Trump's political adversaries."⁸⁸ In response to this conduct, the OSC took the unprecedented step of recommending Conway's removal from office

83. See *Hatch Act Applies While Working Remotely, OSC Stresses*, FEDWEEK (May 6, 2020), <https://www.fedweek.com/fedweek/hatch-act-applies-while-working-remotely-osc-stresses/> [<https://perma.cc/N54B-SBDF>].

84. *Hatch Act Advisory for Teleworking Employees*, U.S. OFF. OF SPECIAL COUNS. (Apr. 28, 2020), <https://osc.gov/Services/Pages/HatchAct-AdvisoryOpinion.aspx#tabGroup14> (choose "On Duty/In Workplace"; then choose "Hatch Act Advisory for Teleworking Employees" from dropdown) ("[A]lthough [employees] are working from home, they are still subject to the Hatch Act's on-duty restrictions."); see also U.S. OFF. OF SPECIAL COUNS., FISCAL YEAR 2021 CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE BUDGET GOALS 36 (2021) ("In FY 2018, OSC received 263 new Hatch Act complaints, and in FY 2019 received 281 complaints. Both years represent record levels of cases received since the passage of the Hatch Act Modernization Act of 2012. . . . OSC strongly expects this trend will continue in both FY 2020, a presidential election year, and in future fiscal years.").

85. See *supra* note 49.

86. See Donald K. Sherman & Linnaea Honl-Stuenkel, *Sixteen Trump Administration Officials Violated the Law to Boost Trump Campaign in October*, CREW (Nov. 2, 2020), <https://www.citizensforethics.org/reports-investigations/crew-reports/sixteen-trump-administration-officials-violated-the-law-to-boost-trump-campaign-in-october/> [<https://perma.cc/4N29-3MXD>].

87. Donald K. Sherman, *Kellyanne Conway Eclipses 50 Hatch Act Violations on Twitter*, CREW (Oct. 21, 2019), <https://www.citizensforethics.org/reports-investigations/crew-reports/kellyanne-conway-eclipses-50-hatch-act-violations-on-twitter/> [<https://perma.cc/UH-F5-7UA5>]. Kellyanne Conway falls under the third category of restricted executive branch employees because her position falls under the category of White House Staffer. See *supra* notes 48-49 and accompanying text.

88. Sherman, *supra* note 87.

in a formal report to the President.⁸⁹ President Trump ignored this recommendation, and Conway continued in her position for an additional year until resigning in August 2020, citing reasons unrelated to any potential wrongdoing.⁹⁰

Other recent examples of Hatch Act violations by prominent individuals include members of President Trump's cabinet.⁹¹ For example, former U.S. Secretary of the Interior, David Bernhardt, was accused of violating the Hatch Act when he posted a video praising President Trump for his environmental conservation efforts on the official U.S. Department of the Interior's (DOI) Twitter account and the DOI's official YouTube channel.⁹² Former U.S. Attorney General William Barr was also accused of violating the Act when, in an interview acting in his official capacity, he expressed his support for President Trump over then-Presidential-candidate Joe Biden.⁹³ During the interview, Barr also criticized the Democratic Party and equated the Party's values to those of socialism.⁹⁴ Finally, both former U.S. Secretary of State, Mike Pompeo, and former Secretary of the U.S. Department of Agriculture, Sonny Perdue, were accused of violating the Hatch Act by partaking in campaign events promoting President Trump's ultimately unsuccessful re-election campaign.⁹⁵

89. See U.S. OFF. OF SPECIAL COUNS., HA-19-0631 & HA-19-3395, REPORT OF PROHIBITED POLITICAL ACTIVITY UNDER THE HATCH ACT (KELLYANNE CONWAY) (2019).

90. Ashley Parker, *Kellyanne Conway to Leave the White House at the End of the Month, Citing the Need to Focus on Her Family*, WASH. POST (Aug. 23, 2020, 9:39 PM), https://www.washingtonpost.com/politics/kellyanne-conway-white-house/2020/08/23/6c26e18a-e5a7-11ea-bc79-834454439a44_story.html.

91. Sherman & Honl-Stuenkel, *supra* note 86.

92. See Timothy Bella, *The Interior Secretary Share a Video Hailing Trump's 'Historic Feats.' Critics Call it Propaganda*, WASH. POST (Oct. 28, 2020, 5:05 AM), <https://www.washingtonpost.com/nation/2020/10/28/trump-video-interior-department-bernhardt-election/>; U.S. Depart. of Interior, *Trump Administration Conservation Record*, YOUTUBE (Oct. 27, 2020), <https://www.youtube.com/watch?v=VLEcGKY7PSA> [https://perma.cc/D2N2-FX2T].

93. *CREW Complaint: Attorney General Barr Appears to Violate Hatch Act*, CREW (Oct. 15, 2020), <https://www.citizensforethics.org/legal-action/legal-complaints/crew-complaint-attorney-general-barr-appears-to-violate-hatch-act/> [https://perma.cc/V3NS-L8BP].

94. *Id.*

95. See STAFF REPORT PREPARED FOR SENATOR ELIZABETH WARREN, LAWLESSNESS AND DISORDER: THE CORRUPT TRUMP ADMINISTRATION HAS MADE A MOCKERY OF THE HATCH ACT 7-8 (Oct. 2020) (noting that Mike Pompeo allegedly violated the Hatch Act in "a videotaped speech filmed during an official trip to Israel with Jerusalem as the backdrop and aired at the Republican National Convention on August 25th, 2020, in which he praised President Trump's foreign policy and moving the U.S. embassy to Jerusalem" and that Sonny Perdue was found to have violated the Hatch Act "when he engaged in political activity advocating for the re-election of President Trump within his official capacity while on taxpayer-funded travel in North Carolina").

While there have been over thirty-six high-ranking members of the Trump Administration who have contributed to over one hundred and fifty alleged Hatch Act violations, the prevalence of violations without consequences is not a problem specific to this particular administration.⁹⁶ Under the Obama Administration, two prominent officials were accused of Hatch Act violations.⁹⁷ Former Secretary of Health and Human Services, Kathleen Sebelius, violated the Act in a speech given at an event where she appeared in her official capacity because she not only praised the Obama Administration's accomplishments but also expressed support for a North Carolina candidate for governor.⁹⁸ Former Secretary of Housing and Urban Development, Julián Castro, also violated the Act in "advocating for and against Presidential candidates" during a media interview given in his official capacity.⁹⁹ Additionally, under the George W. Bush Administration, the entire White House Office of Political Affairs was subject to an investigation by the OSC regarding an accusation of widespread violations of the Hatch Act.¹⁰⁰ Employees of the Office of Political Affairs, at the time, worked to promote Republican electoral success and also participated in activities definitively prohibited by the Act.¹⁰¹ Like those working under the Trump Administration, none of these individuals faced disciplinary consequences for their actions despite blatant violations of the Hatch Act.¹⁰²

96. *Id.* at 5.

97. See U.S. OFF. OF SPECIAL COUNS., HA-12-1989, REPORT OF PROHIBITED POLITICAL ACTIVITY UNDER THE HATCH ACT (KATHLEEN G. SEBELIUS) (2019) [hereinafter SEBELIUS REPORT]; U.S. OFF. OF SPECIAL COUNS., HA-16-3113, REPORT OF PROHIBITED POLITICAL ACTIVITY UNDER THE HATCH ACT (JULIÁN CASTRO) (2016) [hereinafter CASTRO REPORT].

98. Jennifer Haberkorn, *Report: Sebelius Violated Hatch Act*, POLITICO (Sept. 13, 2012, 9:59 AM), <https://www.politico.com/story/2012/09/osc-report-sebelius-violated-hatch-act-081122> [<https://perma.cc/2QST-5MGM>]; SEBELIUS REPORT, *supra* note 97.

99. CASTRO REPORT, *supra* note 97.

100. Josh Gerstein, *Report: Bush Staff Violated Hatch Act*, POLITICO (Jan. 24, 2011, 3:46 PM), <https://www.politico.com/story/2011/01/report-bush-staff-violated-hatch-act-048072> [<https://perma.cc/UK9N-WS89>].

101. *Id.* (noting that Bush Administration cabinet members "traveled to White House-targeted Congressional districts" during the 2006 midterm elections to pursue politically-oriented activity, among other prohibited activities); see generally U.S. OFF. OF SPECIAL COUNS., INVESTIGATION OF POLITICAL ACTIVITIES BY WHITE HOUSE AND FEDERAL AGENCY OFFICIALS DURING THE 2006 MIDTERM ELECTIONS (2011) (noting that the White House Office of Political Affairs worked in tandem with the Republican National Committee on various occasions, and that high-level agency employees publicly supported Republican candidates, improperly classified political travel as official travel, and used taxpayer money to finance impermissible travel).

102. See *supra* note 53 and accompanying text.

C. *State-Level Hatch Act Equivalents*

In recognition of the importance of keeping certain executive branch positions apolitical, the majority of states have enacted their own version of executive branch ethics laws to protect against these very behaviors.¹⁰³ These provisions, often referred to as “Little Hatch” Acts, vary by state and often borrow various components from the federal statute, demonstrating that there are multiple routes for the enforcement of executive branch ethics laws.¹⁰⁴ Of the thirty-five states that have imposed ethics obligations on their executive branch employees, most have enacted provisions that are less restrictive than the Hatch Act.¹⁰⁵ Of the four primary prohibitions that the Hatch Act imposes, nine states have included at least three in their equivalent statute while fourteen states have included at least two, and eight states have adopted at least one prohibition.¹⁰⁶ More specifically, fourteen states have adopted a law similar to the first prohibition of the Hatch Act barring the use of one’s “official authority or influence for the purpose of interfering with . . . or affecting the result [of an election.]”¹⁰⁷

While some states’ Little Hatch Acts contain a loophole similar to that in the federal Act, there are notable exceptions in which a state’s Act applies to *all* state executive branch employees equally.¹⁰⁸ For example, the state of New York has a Little Hatch Act that encompasses two of the primary prohibitions found under the federal Act that are applicable to all employees of the state executive branch.¹⁰⁹ Specifically, New York prohibits *any* person in “said service” from using their “official authority or influences to coerce the political action of any person or body or to interfere with any election” and from using their “authority or official influence to compel or induce any other officer or employee of the state or any civil division thereof, to pay or promise to pay any political assessment, subscription, or contribution.”¹¹⁰ These provisions apply to *any* “statewide elected

103. See Gely & Chandler, *supra* note 17, at 791 (noting that thirty-five states have enacted some sort of restrictions governing executive branch employees’ ability to engage in political activity).

104. *Id.*

105. *Id.* at 794.

106. *Id.* at 795; see *supra* note 22 and accompanying text.

107. Gely & Chandler, *supra* note 17, at 792.

108. See N.Y. CIV. SERV. LAW § 107 (2021); MASS. GEN. LAWS CH. 56 § 36 (2021).

109. See Gely & Chandler, *supra* note 17, at 792.

110. N.Y. CIV. SERV. LAW § 107(1), (3) (2021).

official or a state officer or employee,” and violations of such are referred for adjudication to the New York State Joint Commission on Public Ethics (JCOPE).¹¹¹ In sum, the broad language used in these provisions has been interpreted to “apply to *everyone* holding an office in state government and its civil divisions[,]” and, consequently, does not provide an exception for certain officials appointed by the governor.¹¹²

In addition to varying in terms of its application, New York’s Little Hatch Act also differs from its federal equivalent in terms of adjudication.¹¹³ Unlike the OSC’s role in administering enforcement of the Hatch Act, JCOPE’s role in enforcing New York’s Little Hatch Act has a proactive investigatory component.¹¹⁴ The Commission has the authority to begin investigations on its own accord, as well as the ability to initiate investigations upon receiving complaints from both the public and government agencies alike.¹¹⁵ JCOPE additionally differs from the federal adjudication process in that all investigatory procedures occur within JCOPE itself, unlike at the federal level, where the OSC’s report is passed on to the MSPB for review.¹¹⁶ The review process within the MSPB and JCOPE, however, retain similarities in that allegations of violations of the respective Acts are adjudicated before independent panels, and in both realms, the alleged violator of the Act retains a right to an appeal.¹¹⁷ Overall, New York State’s equitable enforcement of ethical standards and proactive accountability procedure suggest promising avenues for deterring violations through improved policing.

111. N.Y. CIV. SERV. LAW § 107(5) (2021); *JCOPE Investigative Process: Overview*, N.Y. STATE JOINT COMM’N PUB. ETHICS, <https://jcope.ny.gov/jcope-investigative-process> [<https://perma.cc/WB9S-PW3S>] (last visited June 21, 2022).

112. BENNETT LIEBMAN, PROTECTING THE DEEP STATE: MAKING SENSE OF SECTION 107 OF NEW YORK’S CIVIL SERVICE LAW 19 (Andrew Ayers & Michele Monforte eds., 2018) (emphasis added).

113. See *JCOPE Investigative Process: Overview*, *supra* note 111.

114. *JCOPE Investigative Process: Initiating an Investigation*, N.Y. STATE JOINT COMM’N PUB. ETHICS, <https://jcope.ny.gov/jcope-investigative-process> (last visited June 21, 2022).

115. *Id.*

116. *Id.*; see *supra* note 46 and accompanying text.

117. See *supra* notes 46-47; *JCOPE Investigative Process: Initiating an Investigation*, *supra* note 114.

III. THE CONFLICT IN HATCH ACT ENFORCEMENT

The apparent loophole in Hatch Act enforcement for PAS employees and White House Staffers is exacerbated by the hyper-partisan and hyperconnected nature of the world we live in today.¹¹⁸ Through the increased popularity of social media websites such as Twitter, Facebook, and Instagram, as well as the mass mobilization of information to the electorate through the Internet, individuals and groups have access to methods for sharing their thoughts on a scale previously unavailable and unforeseen. This combination of factors has opened avenues for government figures to not only disseminate information but also to communicate biases and false impressions. Three facts help explain this phenomenon. First, government officials are, more often than not, posting on official U.S. government social media accounts. Second, they are likely to use their U.S. government position title in their personal profile's biography. Third, officials may choose to use an image of themselves with a partisan political figure in their profile. Thus, the distinction between the official's personal and official capacity when posting on social media is increasingly unclear and difficult to discern, which may result in personal-account posts creating official impressions and official-account posts creating partisan implications. Even so, the Hatch Act specifically prohibits any federal executive branch employee subject to the Act from using their official authority to influence or interfere with the results of an election, and imposes strict limits on the social media use of federal executive branch employees.¹¹⁹

Time after time, and across administrations, PAS employees and White House Staffers are using both official government, and personal but government affiliated, social media accounts to advance, support, and advocate for partisan goals and opinions on platforms that garner a large following.¹²⁰ It is clear that the primary reason for the increase in violations of the Hatch Act derives from the fact that the Act has no true means of effective enforcement for the highest level of federal executive branch officials. The President's discretion with regard to determining punishment for violations by PAS employees and White

118. See Carroll Doherty, *Key Takeaways on American's Growing Partisan Divide Over Political Values*, PEW RSCH. CTR. (Oct. 5, 2017), <https://www.pewresearch.org/fact-tank/2017/10/05/takeaways-on-americans-growing-partisan-divide-over-political-values/> [<https://perma.cc/U2Q2-WJ3Z>].

119. See 5 U.S.C. § 7323(a)(1); *Hatch Act Guidance on Social Media*, *supra* note 72.

120. See discussion *supra* subpart II(b).

House Staffers, as well as the retroactive nature of Hatch Act violation investigations, creates a conflict of interest with regard to enforcement of the law.¹²¹ If the Hatch Act is allowed to continue to exist in its current form, the conflict of interest apparent in the Act's enforcement mechanisms will erode the very foundations on which this country was founded and inflict harm both on individuals and the public. At its core, the Hatch Act is designed to keep the agencies that govern our daily lives from being controlled by the hand of partisan influence and political favors.¹²² Therefore, in order to protect this commitment, it is necessary to consider the undue harm that would result on the lower-level executive branch employees, the public as a whole, and the foundations of American standards for governance if restrictions on the speech of PAS and White House Staffers continue to go unenforced.

There are three primary groups that would face undue harm if the Hatch Act enforcement proceedings were left in their current state. First, the failure to enforce the Hatch Act at the highest level imposes significant harm on lower-level federal executive branch employees. Their subjection to disciplinary action from the MSPB inevitably leads to a disproportionate level of enforcement of the Hatch Act on these employees, as compared to higher-level officials. This disproportionate impact is ironic considering their limited influence upon public opinion. The lower-level employees, who likely have a minimal following at best, are being punished at a higher rate than higher-level officials who amass thousands and even millions of followers.¹²³ Given that the purpose of the Act is to limit certain political speech of those who hold specifically nonpartisan, public positions, prosecuting violators of the Act whose posts are likely to have the most impact—which are essentially those with the most followers—would be of the utmost priority and importance.¹²⁴ Therefore, this disparity in enforcement highlights that the Hatch Act is not effectively governing the people to which its purpose most closely aligns.¹²⁵

121. *See supra* notes 44, 52 and accompanying text.

122. *See supra* note 15 and accompanying text.

123. Lower-level employees are being punished at a higher rate in this context given that, as previously noted, no President has initiated disciplinary proceedings for a Hatch Act violation against one of their own. *See supra* note 53 and accompanying text.

124. *Id.*

125. Because of the loophole in enforcement for high-level federal executive branch employees, those in positions of leadership are, for all intents and purposes, exempt from the law. *See supra* notes 13-15 and accompanying text.

Second, additional harm to the public results from a lack of enforcement of the Hatch Act at the highest level. Failure to enforce the Hatch Act on PAS employees inevitably deteriorates the nonpartisan nature of independent, executive branch agencies within the United States. Independent agencies, which PAS employees often lead, were intentionally designed to be nonpartisan as to avoid any distraction while carrying out their service to the American people.¹²⁶ Seemingly permissive politicization of these officials' social media accounts and positions generally creates an avenue in which these leaders can easily focus on advancing partisan alliances and pleasing a political agenda, thus distracting from their job and what is in the best interest of the people they serve. Members of the public face additional harm when the Hatch Act is allowed to go unenforced, which is especially true in the realm of social media, as the public is unfairly influenced by high-level individuals in a partisan capacity. The associated stakes of this behavior are even more heightened when taken in connection with the mass social media following that the majority of these individuals have.¹²⁷

Finally, by not enforcing the Hatch Act at the highest level, there is an overall harm to the standards for governance established in the United States because the country risks jeopardizing deference to the doctrine of separation of powers. Given that the realm of the executive branch in question was designed to be apolitical in a sense,¹²⁸ the allowance of political ideology to creep into this arena—without any sort of consequences—creates leeway for the disregard of the law to be perceived as acceptable behavior in other realms of government. By ignoring aspects of the law, harm is done to the respect and deference to the rule of law on which the country was founded. There is a high risk of continued disregard of the law if violators, especially those in positions of power, are able to simply get away with it.

126. See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259-60 (1988).

127. See e.g., Kellyanne Conway (@KellyannePolls), TWITTER, https://twitter.com/KellyannePolls?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [<https://perma.cc/NQ5T-WZSZ>] (last visited June 21, 2022) (indicating that Kellyanne Conway has 3.3 million Twitter followers); U.S. Department of the Interior (@Interior), TWITTER, https://twitter.com/Interior?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [<https://perma.cc/6ET2-F5SU>] (last visited June 21, 2022) (indicating that the U.S. Department of the Interior's official Twitter account has 4.9 million followers).

128. See *supra* note 15 and accompanying text.

IV. RECOMMENDATIONS FOR REFORM OF THE HATCH ACT

Action must be taken with regard to the enforcement and regulation of the Hatch Act. In order to return focus to the Act's original purpose of keeping partisan influence out of this realm of the executive branch¹²⁹ and to ensure that federal executive branch employees at the highest level are not exempt from the Act's provisions, steps need to be taken to hold PAS employees and White House Staffers accountable. To effectively mitigate the adverse implications associated with the conflict in enforcement of the Hatch Act, however, it is clear that the support of both Congress and the public will be needed.

Due to President Biden's commitment to reforming executive branch ethics, along with the public's demand for accountability in the executive arena, the present climate is especially ripe for instituting needed reform.¹³⁰ As noted, on day one of his administration, President Biden signed into law the Executive Order on Ethics Commitments by Executive Branch Personnel.¹³¹ This executive order was designed to instill trust in the government from the eyes of the public by requiring all executive branch employees to sign a pledge to uphold the laws of the United States while in office.¹³² Given his dedication to ethics from the outset of his administration, it would be of interest to President Biden to bring the Hatch Act enforcement mechanisms up to par so that there may be tangible changes in policy that would reflect and uphold his ideals. Given that Democrats currently hold a majority in both the House of Representatives and the Senate,¹³³ President Biden will likely have the support needed to implement the proposed recommendations that follow.

Support for reform in the realm of executive branch ethics has also been voiced by the public and government watchdog groups alike. While the public has notably taken to the streets, news, and social media to demand accountability from officials at the highest level, the Citizens for Responsibility and Ethics in Washington (CREW), a Washington D.C. watchdog agency, has filed many lawsuits

129. *Id.*

130. *See* Exec. Order No. 13989, 86 Fed. Reg. 7029 (Jan. 20, 2021); Citizens for Resp. & Ethics in Wash. v. U.S. Off. of Special Couns., 480 F.Supp.3d 118, 122-23 (D.C. Cir. 2020).

131. *See supra* note 69 and accompanying text.

132. Exec. Order No. 13989, 86 Fed. Reg. 7029 (Jan. 20, 2021).

133. *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/8LTL-A6G9>] (last visited June 21, 2022); *Party Breakdown*, U.S. H.R. PRESS GALLERY, <https://pressgallery.house.gov/member-data/party-breakdown> [<https://perma.cc/C7DE-W43N>] (last visited June 21, 2022).

demanding change.¹³⁴ One case in particular, *Citizens for Responsibility and Ethics in Washington v. United States Office of Special Counsel*, involved CREW accusing the OSC of violating the Administrative Procedure Act for referring Hatch Act violations by White House Staffers to the President, rather than to the MSBP.¹³⁵ The United States District Court for the District of Columbia ultimately found that CREW did not have standing to assert a claim, but this case has made it clear that the public is aware of the loophole in the Act's enforcement and that legislative and judicial demand for change exists.¹³⁶ Overall, in order to achieve needed reform most effectively, Congress must take a twofold approach to amending the Hatch Act. First, the Act should be more reflective of New York's Little Hatch Act in order to broaden the Act's application and remove the PAS and White House Staffer loophole. Second, Congress should work with social media companies to enact regulatory procedures that would take effect when federal executive branch employees violate the Hatch Act on media platforms.

A. *Congressional Textual Reform*

Congress has yet to address how the impact of social media has warranted a need for further reform of the Hatch Act. Congress must consider the detrimental impact of the continued flouting of the Hatch Act by high-level federal executive branch employees in light of the existence of social media platforms that allow for mass distribution of information. If federal executive branch employees are able to disseminate partisan influence without fear of repercussion, the purpose of the Act itself is nullified. Due to these high stakes, Congress should amend the Hatch Act to no longer allow for presidential deference in the realm of adjudicating Hatch Act violations for PAS employees and White House Staffers. Instead, Congress should reform the Act to resemble New York's state-level Little Hatch Act.

New York's Little Hatch Act is an ideal standard on which reforms of the federal Hatch Act should be based because the Little Hatch Act's

134. See *Demand Transparency From Trump*, ACLU, <https://action.aclu.org/petition/TrumpFOIA> [<https://perma.cc/C6MJ-ZKPS>] (last visited June 21, 2022) (noting that over 300,000 individuals signed petition demanding ethical accountability); see generally *Legal Actions*, CREW, <https://www.citizensforethics.org> [<https://perma.cc/CWC4-VCZY>] (last visited June 21, 2022) (explaining various legal actions the organization has taken in order to hold government officials accountable to ethics standards).

135. 480 F. Supp. 3d. at 122-23.

136. *Id.*

adjudication proceedings apply to *all* executive branch employees equally.¹³⁷ The broad language used in Section 107(5) of the New York Civil Service Law provides that the prohibitions in Section 107 apply to all statewide elected officials, state officers, and state employees and that all violations are to be reported to the Commission of Public Integrity for assessment.¹³⁸ By sending all violations to one entity for review, New York removes any potential avenue for an exemption for high-level, governor-appointed officials,¹³⁹ which, therefore, avoids a disproportionate impact of the law on lower-level executive branch employees, where the stakes associated with violation of the Act are arguably the lowest.¹⁴⁰

Additionally, New York's Little Hatch Act is a model standard upon which to base reform due to its adjudication efficiencies. For instance, JCOPE, the agency that assesses alleged violations of New York's Little Hatch Act, has the ability to begin an inquiry on its own accord, rather than having to wait for a third party to report an allegation like the OSC must.¹⁴¹ The ability to proactively initiate investigations of potential Hatch Act violations would afford the OSC more credence as a law enforcement entity and strengthen the Act itself because there would be an increased likelihood that claims are prosecuted, which would deter potential offenders from violating the Act in the first place. Without this deterrence, violators of the current Hatch Act hope they are able to fly under the radar of a watchdog agency.¹⁴² Additionally, with JCOPE being the entity that handles both investigatory proceedings as well as adjudication of claims, efficiencies in the enforcement and administration of the law are possible.¹⁴³ The separation of enforcement responsibilities of the Hatch Act between the OSC and the MSPB likely leads to a longer, more complicated process by which enforcement of the Act is carried out, thus weakening the enforcement of the Act itself. Overall, amending the Hatch Act to incorporate the enforcement structure of New York's Little Hatch Act

137. See *supra* note 111 and accompanying text.

138. N.Y. CIV. SERV. LAW § 107(b) (2021); see N.Y. PUB. OFF. LAW § 73(h)-(i) (2021) (defining who constitutes as a statewide elected official, state officer, and state employee under New York law).

139. See CIV. SERV. § 107(b).

140. See discussion *supra* subpart IV(c)(i).

141. See *JCOPE Investigative Process: Initiating an Investigation*, *supra* note 114; *supra* note 44 and accompanying text.

142. See *supra* note 44 and accompanying text.

143. See *supra* note 116 and accompanying text.

would improve the administration of the Act, as well as contribute significantly to deterring violators altogether.

B. Social Media Companies' Support

Second, given the role that social media platforms play in amplifying the inadequacies of the Hatch Act's current enforcement mechanisms, Congress should work with social media companies to effect change especially given the negative impact that a Hatch Act violation on a social media platform can have on the public. Even if the enforcement mechanisms of the Hatch Act are updated to be more effective, significant damage may still occur from a violation apparent in any one social media post. Put another way, words have an impact as soon as they are spoken or written, an issue exacerbated by the viral nature of the Internet. If Congress is able to work with social media companies to codify procedures to be applied in the event of a Hatch Act violation, the damage caused by an illegal post could be significantly limited.

There are various policies that social media companies have already implemented in response to unwarranted posts on their platforms as a result of recent events.¹⁴⁴ For example, Twitter and Facebook have taken to including notices on posts that contain content that would otherwise violate the platform's rules or contain false information.¹⁴⁵ While the public is still allowed to see these posts, there is a warning label that identifies the issues with the post itself, thereby allowing the individual reading the post to come to a judgment about the accuracy of the information on their own terms.¹⁴⁶ If the platforms

144. See Domenico Montanaro, *Poll: Majority of Americans Blame Trump for Violence at Capitol*, NPR (Jan. 15, 2021, 12:00 PM), <https://www.npr.org/2021/01/15/956850131/poll-majority-of-americans-blame-trump-for-violence-at-capitol> [<https://perma.cc/K87S-KBHM>] (noting that a majority of Americans blame President Trump, and specifically his posts on Twitter and Facebook, for the violence at the U.S. Capitol on January 6, 2021 and that social media companies have instituted policies in response).

145. See *About Public-Interest Exceptions on Twitter*, TWITTER, <https://help.twitter.com/en/rules-and-policies/public-interest> [<https://perma.cc/8H5X-XTAM>] (last visited June 21, 2022); *How Our Fact-Checking Program Works*, FACEBOOK (Aug. 11, 2020), <https://www.facebook.com/journalismproject/programs/third-party-fact-checking/how-it-works> [<https://perma.cc/NH5W-WSCL>]; Guy Rosen et al., *Helping to Protect the 2020 US Elections*, FACEBOOK (Oct. 21, 2019), <https://about.fb.com/news/2019/10/update-on-election-integrity-efforts/> [<https://perma.cc/R9UL-3YMP>].

146. See *supra* note 145 (noting that Twitter uses the language “[t]his Tweet violated the Twitter Rules about [specific rule]. However, Twitter had determined that it may be in the public’s interest for the Tweet to remain accessible” to indicate a violation, while Facebook

were able to provide the same notice on posts that violate the Hatch Act, the public would be spared from inappropriately relying on the partisan information provided by a supposedly nonpartisan official, and therefore, the resulting harm caused by Hatch Act violations could diminish. Additionally, Twitter has taken steps to create a notice that applies to any official U.S. government account, as well as the posts that stem from those accounts.¹⁴⁷ This notice contains a flag, describes the source of information, and delineates which state entity is sponsoring the content.¹⁴⁸ These notice provisions, working in tandem with the proposal to flag any posts that violate the Hatch Act, would effectively capture and provide the context the public needs to prevent inappropriate political influence without censoring speech. Overall, codifying the above procedures would work as a positive step toward the incremental change that is necessary to put power back into the Hatch Act and reduce the resulting harm that stems from violations of the Act.

V. CONCLUSION

The Hatch Act was enacted as a direct response to the misuse of government resources and inappropriate missteps with regard to political influence.¹⁴⁹ The present environment, consisting of a hostile political climate and deviations from the rule of law, mirrors the discord apparent at the time of the Act's inception.¹⁵⁰ The present stakes associated with keeping politics out of certain sects of the executive branch, however, are now incredibly heightened by access to avenues for speech to be disseminated to millions at the touch of a button, as demonstrated by our hypothetical elementary school teacher. In a world that is only going to become further interconnected, it is imperative that the rule of law be updated to reflect the context in which it governs. Therefore, in order to protect the interests of the lower-level federal executive branch employees that facilitate the operation of this country, as well as the public for which the law is designed to protect, the Hatch

uses the label "Partly False Information. Checked by independent fact-checkers" to relay the same information).

147. *About Government and State-Affiliated Media Account Labels on Twitter*, TWITTER, <https://help.twitter.com/en/rules-and-policies/state-affiliated> [<https://perma.cc/S58D-LTXT>] (last visited June 21, 2022) (noting that Twitter uses the language "US government organization" or "US government official" to indicate a government affiliated account or post).

148. *Id.*

149. *See supra* notes 12-14 and accompanying text.

150. *See* discussion *supra* subpart II(b).

2022]

UNFOLLOWING UNDUE INFLUENCE

27

Act must be amended to allow for independent adjudication proceedings to apply to all federal executive branch employees, irrespective of level.