

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,
1101 K Street N.W., Suite 201,
Washington, D.C. 20005,

Plaintiff,

v.

U.S. OFFICE OF SPECIAL COUNSEL,
1730 M Street, N.W., Suite 218,
Washington, D.C. 20036, and

HENRY KERNER, in his official capacity
as Special Counsel,
1730 M Street, N.W., Suite 218,
Washington, D.C. 20036,

Defendants.

Civil Action No. _____

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) brings this action against Defendants U.S. Office of Special Counsel and Henry Kerner, in his official capacity as Special Counsel (collectively, “OSC”), alleging as follows:

INTRODUCTION

1. This is an action for injunctive and declaratory relief under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* CREW seeks to compel OSC to comply with its non-discretionary statutory duty to file a complaint in the Merit Systems Protection Board (“MSPB”) against Counselor to the President Kellyanne Conway based on OSC’s determination that Conway committed multiple violations of the Hatch Act that warrant her removal from federal service.

2. The Hatch Act prohibits federal employees from engaging in certain political activities. OSC is an independent investigative and prosecutorial agency charged with enforcing the Hatch Act. MSPB is an independent quasi-judicial agency with original jurisdiction over Hatch Act complaints filed by OSC. MSPB is authorized to discipline, fine, and even remove employees found to have violated the Hatch Act.

3. 5 U.S.C. § 1215 establishes conditions under which OSC must file an MSPB complaint against a covered employee. It provides that if OSC “determines that disciplinary action should be taken against any employee for having . . . violated” the Hatch Act, the agency “shall prepare a written complaint against the employee” and “present” it to MSPB. 5 U.S.C. § 1215(a)(1) (emphasis added). Under the statute’s plain terms, OSC’s duty to file an MSPB complaint is mandatory, not discretionary, if the triggering conditions are met. The statute carves out a limited exception for *Senate-confirmed* presidential appointees: for those appointees, “the complaint . . . shall be presented to the President for appropriate action in lieu of being presented” to MSPB. 5 U.S.C. § 1215(b).

4. Section 1215’s conditions for filing an MSPB complaint are indisputably met in Conway’s case. OSC issued reports in March 2018 and June 2019 finding that Conway violated the Hatch Act multiple times. And in the June 2019 report—which OSC issued in response to complaints by CREW—the agency deemed Conway’s violations so egregious that they warranted the disciplinary action of her removal from federal service. Because Conway is not Senate confirmed, she does not qualify for the exemption set forth in § 1215(b).

5. Even though OSC found, in response to CREW’s complaints, repeated Hatch Act violations by Conway that warranted disciplinary action, the agency did not file an MSPB

complaint against her as required by § 1215. It instead referred Conway's violations to the President for him to take disciplinary action pursuant to 5 U.S.C. § 1215(b), notwithstanding that Conway is not a Senate-confirmed appointee and thus falls outside of the § 1215(b) exemption. At the same time, OSC stressed the need for corrective action, stating that "[a]s a highly visible member of the Administration, Conway's violations, if left unpunished, send a message to all federal employees that they need not abide by the Hatch Act's restrictions. Her actions erode the principal foundation of our democratic system—the rule of law."

6. The President swiftly rejected OSC's recommendation, telling the press in a June 2019 interview that he is "not going to fire" Conway. For her part, Conway has publicly mocked both OSC and the Hatch Act, stating in a May 2019 interview, "I don't really care," "blah, blah, blah . . . let me know when the jail sentence starts," and "if you're trying to silence me through the Hatch Act, it's not going to work."

7. Following OSC's June 2019 non-enforcement decision, Conway has continued to violate the Hatch Act with impunity, emboldened by the lack of meaningful consequences for those violations. To date, she has violated the Hatch Act no less than 60 times (and counting).

8. Moreover, it has become clear that OSC's non-enforcement decision was made pursuant to an internal policy of categorically not filing MSPB complaints against non-Senate-confirmed presidential appointees in accordance with § 1215. That policy is based, on information and belief, on OSC's erroneous view that MSPB lacks authority to take any form of disciplinary action against such appointees.

9. OSC's failure to comply with § 1215 in response to CREW's complaints perceptibly impairs CREW's ability to fulfill its mission by depriving it of a critical avenue of

redress for Hatch Act violations by non-Senate-confirmed presidential appointees, including but not limited to Conway. To counteract OSC's inaction, CREW has been forced to resort to alternative avenues of redress separate and apart from its normal practice of filing Hatch Act complaints with OSC, including efforts directed to Congress, the public, and private companies. In undertaking these efforts, CREW has expended time and resources from its Communications, Research, and Legal departments, and will continue to expend such resources until OSC complies with § 1215.

10. Accordingly, CREW respectfully requests that the Court (1) declare OSC's failure to file an MSPB complaint against Conway to be "unlawfully withheld" agency action, and "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA, 5 U.S.C. § 706, and 5 U.S.C. § 1215; (2) order OSC to file an MSPB complaint against Conway in accordance with its mandatory duty under 5 U.S.C. § 1215; (3) declare the agency's policy of categorically not filing MSPB complaints against non-Senate-confirmed presidential appointees to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA, 5 U.S.C. § 706, and 5 U.S.C. § 1215; and (4) enjoin OSC from invoking that unlawful policy in response to CREW's future Hatch Act complaints.

JURISDICTION AND VENUE

11. This action arises under the APA, 5 U.S.C. § 701, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* This Court has personal and subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States).

12. Venue lies in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

13. Plaintiff CREW is a non-profit, non-partisan organization organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the rights of citizens to be informed about the activities of government officials and agencies, and to ensuring the integrity and accountability of government officials and agencies. To further its mission of promoting governmental integrity and accountability, CREW routinely files complaints with government agencies identifying potential legal violations by public officials, and requesting that the agency investigate or take other appropriate action against the official.

14. Defendant OSC is an agency within the meaning of the APA, 5 U.S.C. § 701. OSC operates under the supervision and direction of the Special Counsel.

15. Defendant Henry Kerner is the Special Counsel and is sued in his official capacity only.

LEGAL FRAMEWORK

The Hatch Act

16. The Hatch Act reflects “the judgment of Congress, the Executive, and the country . . . that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences.” *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 564 (1973). It likewise reflects Congress’s view that the “Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine,” and that “it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also

critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.” *Id.* at 565.

17. To these ends, the Hatch Act restricts the political activity of “any individual, other than the President and the Vice President, employed or holding office in ... an Executive agency other than the Government Accountability Office,” including presidential appointees employed in the White House Office. 5 U.S.C. § 7322(1).

18. The Act prohibits covered employees from using their “official authority or influence for the purpose of interfering with or affecting the result of an election,” 5 U.S.C. § 7323(a)(1), which includes using one’s “official title while participating in political activity,” 5 C.F.R. § 734.302(b)(1). “Political activity” is defined as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.” 5 C.F.R. § 734.101. The Act thus bars covered employees, in their official capacities, from promoting the election or defeat of candidates for partisan political office.

19. OSC is an independent federal investigative and prosecutorial agency, charged with enforcing the Hatch Act. *See* 5 U.S.C. §§ 1211-19. OSC prosecutes cases before MSPB.

20. MSPB is an independent quasi-judicial agency in the Executive branch that serves as the guardian of federal merit systems. It has original jurisdiction over Hatch Act complaints filed by OSC. *See* 5 U.S.C. § 1204(a)(1). MSPB is authorized to take a range of disciplinary actions for Hatch Act violations, including “an assessment of a civil penalty” of \$1,000 or more per violation,¹ “removal, reduction in grade, debarment from Federal employment for a period

¹ Per a regulation that went into effect on February 22, 2019, the maximum civil penalty is now \$1,093. 5 C.F.R. § 1201.126(a).

not to exceed 5 years, suspension, . . . reprimand,” or “any combination of [these] penalties.” 5 U.S.C. § 7326. The MSPB is also empowered to “order any . . . employee to comply with any order or decision issued by the Board . . . and enforce compliance with any such order,” and “order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with.” 5 U.S.C. §§ 1204(a), (e)(2)(A).

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

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

* * *

(B) violated the provisions of any law, rule, or regulation, or engaged in any other conduct within the jurisdiction of the Special Counsel as described in section 1216 [which includes the Hatch Act],

* * *

the Special Counsel *shall* prepare a written complaint against the employee containing the Special Counsel’s determination, together with a statement of supporting facts, *and* present the complaint and statement to the employee and the Board, in accordance with this subsection.

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

22. Section 1215 further provides that OSC’s “present[ation]” of a complaint to MSPB commences adversarial proceedings against the employee, in which the employee is entitled to, among other things, “a reasonable time to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer”; “be represented by an

attorney or other representative”; “a hearing before the [MSPB] or an administrative law judge appointed under section 3105 and designated by the Board”; and “written decision and reasons therefor at the earliest practicable date, including a copy of any final order imposing disciplinary action.” 5 U.S.C. § 1215(a)(2).

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

(b) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, ***by and with the advice and consent of the Senate*** (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in subsection (a)(1), together with any response of the employee, shall be presented to the President for appropriate action in lieu of being presented under subsection (a).

5 U.S.C. § 1215(b) (emphasis added).

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

25. OSC’s statute and its implementing regulations mandate a role for private parties in Hatch Act enforcement. The statute instructs that “the Special Counsel *shall* . . . conduct an investigation of any allegation concerning . . . political activity prohibited under” the Hatch Act. 5 U.S.C. § 1216(a)(1) (emphasis added). OSC’s regulations, in turn, outline detailed procedures for private parties to file complaints with the agency alleging Hatch Act violations. *See* 5 C.F.R.

§ 1800.1(d). OSC has also issued a standard form, OSC Form-14, for filing Hatch Act complaints. *See id.* § 1800.1(d)(2).

The Administrative Procedure Act

26. The APA provides that a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

27. The term “agency action” includes “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13).

28. A court reviewing a claim under 5 U.S.C. § 702 “shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706. The reviewing court shall “compel agency action unlawfully withheld or unreasonably delayed” and “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* §§ 706(1), (2)(A).

FACTS

29. Conway was appointed Counselor to the President on January 20, 2017. Since her appointment, she has openly violated the Hatch Act no fewer than 60 times (and counting). She has done so by using her official White House position to influence a 2017 special election, the 2018 midterm elections, and the 2020 presidential election through press appearances and social media.

30. In response to complaints received in November and December 2017 regarding Conway’s conduct, OSC conducted an investigation and issued a report in March 2018 finding

that “Conway violated the Hatch Act on two separate occasions”—namely, two media appearances where she discussed why voters should not support Democrat Doug Jones and should support Republican Roy Moore in the Alabama special election for U.S. Senate. Ex. 1 at 1. OSC’s report noted that the White House Counsel’s Office had provided Conway “substantial Hatch Act guidance” prior to these violations. *Id.* at 5-6, 10.

31. Rather than filing an MSPB complaint against Conway, OSC submitted its report “to the President for appropriate disciplinary action” pursuant to “5 U.S.C. § 1215(b),” Ex. 1 at 10, even though Conway is not Senate confirmed and thus § 1215(b), by its terms, does not apply to her. OSC explained its decision as follows: “The U.S. Constitution confers on the President authority to appoint senior officers of the United States, such as Ms. Conway. Considering the President’s constitutional authority, the proper course of action, in the case of violations of the Hatch Act by such officers, is to refer the violations to the President.” *Id.*

32. On information and belief, the President ignored OSC’s report and took no disciplinary action against Conway. Instead, the White House publicly defended Conway’s conduct and disputed that she violated the Hatch Act. *See* Alexander Mallin, [Kellyanne Conway says she discussed Hatch Act violations with President Trump](https://abcn.ws/33JT0w3), *ABC News*, Mar. 8, 2018, available at <https://abcn.ws/33JT0w3>.

33. In the ensuing months, Conway continued to flagrantly violate the Hatch Act.

34. In October 2018, CREW filed a complaint against Conway with OSC, alleging that she appeared to violate the Hatch Act by (1) “using her social media account, in connection with the upcoming midterm elections in November, to promote the Republican Party and to post an image of President Trump’s campaign slogan ‘Make America Great Again’ among other

political activity”; (2) “participat[ing] in a media interview in her official capacity” where she “expressed her political views about partisan candidates who are running in the upcoming November elections.” Ex. 2 at 1. Upon receiving this complaint, OSC opened a new matter designated OSC File No. HA-19-0631.

35. In December 2018, OSC sent Conway a letter that the agency specified was “in response to” CREW’s October 2018 complaint. Ex. 3 at 1. The letter stated that “OSC has concluded that you violated the Hatch Act” and that “you must take corrective action with respect to your social media use in order to come into compliance” with the law. *Id.* at 1. It added that “should you choose not to take steps to come into compliance with the Hatch Act, OSC will pursue further action under 5 U.S.C. § 1215.” *Id.* at 3.

36. In May 2019, CREW filed another complaint against Conway with OSC, alleging that she appeared to violate the Hatch Act “by participating in media interviews given in her official capacity and in which she discussed government business, but in which she also expressed her political views about candidates in upcoming partisan elections,” which “were directed specifically toward the success or failure of a political party and candidates in partisan races, including Joe Biden, Bernie Sanders, Seth Moulton, Cory Booker, and Donald J. Trump.” Ex. 4 at 1. Upon receiving this complaint, OSC opened a new matter designated OSC File No. HA-19-3395.

37. In response to CREW’s October 2018 and May 2019 complaints, OSC issued a report to President Trump in June 2019 “detailing numerous violations of the Hatch Act committed by . . . Conway” during various media appearances, and recommending that the President “remove Ms. Conway from her federal position immediately.” Ex. 5 at 1, 3. OSC’s

report deemed many of the allegations in CREW's complaints meritorious. OSC also stressed that Conway's case was unprecedented: "Never has OSC had to issue multiple reports to the President concerning Hatch Act violations by the same individual." *Id.* It added that if Conway "were any other federal employee, her multiple violations of the law would almost certainly result in removal from her federal position by the Merit Systems Protection Board." *Id.* OSC emphasized the pressing need for disciplinary action, stating that "[a]s a highly visible member of the Administration, Conway's violations, if left unpunished, send a message to all federal employees that they need not abide by the Hatch Act's restrictions. Her actions erode the principal foundation of our democratic system—the rule of law." *Id.*

38. The day it issued this report, OSC sent CREW an email with the subject line "OSC File Nos. HA-193395 and HA-19-0631," stating "[t]his email is in response to the Hatch Act complaint CREW filed with the U.S. Office of Special Counsel (OSC) concerning Kellyanne Conway. OSC investigated these allegations and, as a result, sent a report to the President detailing Ms. Conway's Hatch Act violations. A copy of the report is attached to this email. OSC will now close its file in this matter." Ex. 6.

39. Neither OSC's June 2019 report nor its email to CREW explains why OSC "close[d] its file in this matter" without filing an MSPB complaint against Conway in accordance with 5 U.S.C. § 1215. Rather, OSC's report summarily states that OSC was referring "these more recent violations to the President and requests [Conway's] removal from federal employment," citing § 1215(b) in a footnote, Ex. 5 at 5 & n.5, even though the § 1215(b) exemption only applies to Senate-confirmed presidential appointees.

40. The President and White House swiftly rejected OSC's removal recommendation.

In a June 2019 interview on *Fox & Friends*, President Trump stated “No, I’m not going to fire [Conway]. I think she’s a terrific person. . . . She’s been loyal.” Susan Heavey, Trump defends adviser Conway, won't fire her over political comments, *Reuters*, June 14, 2019, available at <https://reut.rs/2Obn9yD>.

41. In a June 2019 letter, the White House Counsel claimed OSC’s June 2019 report is “based on multiple fundamental legal and factual errors, makes unfair and unsupported claims against a close adviser to the President, is the product of a blatantly unfair process that ignored statutory notice requirements, and has been influenced by various inappropriate considerations.” June 11, 2019 Letter from P. Cipollone to H. Kerner, available at <https://bit.ly/33OShKT>.

42. For her part, Conway has publicly mocked both OSC and the Hatch Act, stating in a May 29, 2019 interview, “I don’t really care,” “blah, blah, blah . . . let me know when the jail sentence starts,” and “if you’re trying to silence me through the Hatch Act, it’s not going to work.” Aaron Blake, ‘Blah, blah, blah’: This 2-week-old Kellyanne Conway clip looks a lot worse today, *Washington Post*, June 13, 2019, available at <https://wapo.st/33La2e0>.

43. In August 2019, CREW sent OSC a letter urging the agency to “take additional steps to ensure compliance with and enforcement of the Hatch Act” against “presidential appointees.” Ex. 7 at 1. The letter added that “[f]ollowing OSC’s unprecedented decision recommending that President Trump remove . . . Conway from federal service based on her repeated violations of the Hatch Act, and President Trump’s subsequent refusal to do so, several administration officials . . . appear to have violated the Hatch Act again.” *Id.* The letter details such apparent violations by Conway and other non-Senate-confirmed White House employees, including Assistant to the President Ivanka Trump and White House Social Media Director Dan

Scavino. *Id.* at 3-8. CREW explained that “these continued flagrant abuses demonstrate the need for OSC to use all available legal tools to ensure that members of the Trump administration follow the law,” including “filing complaints in the [MSPB] against non-Senate-confirmed presidential appointees whose actions, like Ms. Conway’s, OSC has found violated the Hatch Act and warrant disciplinary action.” *Id.* at 1. The letter also noted that OSC had not adequately explained its reasoning for not filing an MSPB complaint against Conway. *Id.* at 11-12.

44. OSC still has not provided a public explanation for its failure to file an MSPB complaint against Conway. As former MSPB Executive Director James Eisenmann observed, it appears that “OSC just chose to disregard the plain language of the statute” without explaining the basis for its decision to the public. Rebecca Rainey, How Kellyanne Conway saved her White House job, *Politico*, Aug. 12, 2019, available at <https://politi.co/2qsegJd>.

45. Despite this lack of a public explanation, it has become clear that OSC has an internal policy, whether official or unofficial, of categorically not filing MSPB complaints against non-Senate-confirmed presidential appointees even though such appointees fall outside the exemption set forth in § 1215(b), and that it followed this policy in Conway’s case. On information and belief, the basis for this policy is OSC’s erroneous view that MSPB lacks authority to take any form of disciplinary action against such appointees.

46. Emboldened by OSC’s non-enforcement policy, Conway has continued to violate the Hatch Act in plain sight. In an October 2019 report, CREW found that Conway has “used her Twitter account to commit more than 30 apparent Hatch Act violations since the release of OSC’s June 2019 report, bringing her total number of violations using the platform to more than 50.” CREW Report, Kellyanne Conway Eclipses 50 Hatch Act Violations on Twitter, Oct. 18,

2019, available at <https://bit.ly/2Qju3V2>.

47. OSC, meanwhile, continues to pursue enforcement proceedings in MSPB against career civil servants for Hatch Act violations far less rampant than Conway's, even though § 1215 makes clear that Conway, as a non-Senate-confirmed official, is subject to the same enforcement provisions as those employees. *See, e.g.*, OSC Press Release, Immigration Judge Who Violated the Hatch Act Fined \$1K with 30-Month Debarment from Federal Service, Sept. 17, 2019, available at <https://bit.ly/37kJI2c> (employee assessed a \$1,000 fine and 30-month debarment from federal service based on politically-charged statements made at a single hearing).

CREW'S INJURIES

48. Because the Hatch Act embodies the enduring "judgment of Congress, the Executive, and the country . . . that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly," *U. S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973), violations of the statute strike at the core of CREW's mission of ensuring integrity in government. Thus, in furtherance of its mission, CREW closely monitors and scrutinizes government officials' conduct to identify potential Hatch Act violations and, where appropriate, files complaints with OSC requesting that it take legally-mandated disciplinary action against such officials, including instituting MSPB proceedings. CREW submits these complaints in accordance with statutory and regulatory provisions that expressly provide for the submission of Hatch Act complaints by private parties. *See* 5 U.S.C. § 1216(a)(1); 5 C.F.R. § 1800.1(d). Members of CREW's Communications, Research, and Legal Departments routinely contribute to CREW's Hatch Act work by, among

other things, monitoring public officials' social media feeds and statements to the press, investigating tips provided by members of the public, and evaluating whether any conduct identified through these efforts potentially violate the Hatch Act. CREW publicly disseminates its Hatch Act complaints and related documentation through its website, social media, and other means.

49. Since 2017, CREW has filed 32 Hatch Act complaints with OSC, several of which remain pending. Many of those complaints were against non-Senate-confirmed presidential appointees, including the two complaints against Conway.

50. OSC's policy of categorically not filing MSPB complaints in accordance with § 1215 against non-Senate-confirmed presidential appointees, and its application of that non-enforcement policy in response to CREW's complaints, perceptibly impairs CREW's ability to fulfill its mission by depriving it of an essential avenue of redress for Hatch Act violations by non-Senate-confirmed presidential appointees, including but not limited to Conway.

51. As a general matter, the effectiveness of CREW's Hatch Act complaints depends on OSC following legally-mandated procedures for investigating and pursuing disciplinary action against employees who violate the law, including instituting MSPB proceedings in accordance with § 1215. When OSC fails to follow those procedures, CREW's complaints are rendered ineffective and CREW is, in turn, deprived of a critical avenue of redress.

52. That harm is particularly palpable in Conway's case. As noted, CREW submitted two Hatch Act complaints against Conway to OSC, and, in its June 2019 report, OSC deemed many of CREW's allegations meritorious. Yet, OSC has refused to take legally-mandated enforcement action in response to CREW's meritorious complaints, based on the agency's policy

of not filing MSPB complaints against non-Senate-confirmed presidential appointees. Confirming the gravity of its inaction, OSC itself recognized that “[i]f Ms. Conway were any other federal employee, her multiple violations of the law would almost certainly result in removal from her federal position by the [MSPB].” Ex. 5 at 1. Instead of pursuing enforcement action against Conway, OSC referred her violations to the President for him to take disciplinary action. And he swiftly rejected the agency’s findings, just as he had done before. The upshot is that OSC’s inaction will, absent judicial relief, preclude the Hatch Act allegations that were the subject of CREW’s complaints (and deemed meritorious by OSC) from *ever* being brought to the attention of MSPB, the body statutorily charged with adjudicating Hatch Act violations and taking appropriate disciplinary action. Moreover, so long as OSC continues to follow its non-enforcement policy, CREW cannot rely on the agency to institute legally-mandated MSPB proceedings in response to future CREW Hatch Act complaints against non-Senate-confirmed presidential appointees, including Conway.

53. To counteract OSC’s non-compliance with § 1215, CREW has been forced to resort to alternative avenues of redress separate and apart from its normal practice of submitting Hatch Act complaints to OSC, including efforts directed to Congress, the public, and private companies. In undertaking those efforts, CREW has expended significant time and resources from its Communications, Research, and Legal departments, and will continue to expend such resources until OSC complies with the law and institutes an MSPB proceeding against Conway as required by § 1215. Among other things, CREW’s efforts have included the following:

- a. Shortly after OSC’s June 2019 non-enforcement decision, CREW launched a multi-faceted public campaign calling for Conway’s resignation through hundreds

of social media posts, mass emails to supporters, and a petition that has collected over 37,600 signatures to date. *See* CREW Petition, Kellyanne Conway must resign!, available at <https://bit.ly/35bo3SA>. That campaign remains ongoing.

- b. On the same day OSC issued its June 2019 report, and following indications that the White House would not remove Conway, CREW wrote an op-ed published by *NBC News* calling on Conway to resign. *See* Virginia Canter and Donald K. Sherman, If Trump won't fire Kellyanne Conway over her ethics violations, she should resign for his sake, *NBC News*, June 13, 2019, available at <https://nbcnews.to/2LqNckW>.
- c. CREW increased efforts to monitor Conway's public activity in order to identify potential Hatch Act violations, including by closely scrutinizing her social media accounts and public appearances, manually transcribing those appearances, and compiling relevant links, screenshots, and other documentation of potential violations.
- d. Utilizing information compiled through the above-mentioned efforts, CREW issued a detailed report in October 2019 outlining over 50 Hatch Act violations by Conway through her Twitter account. *See* CREW Report, Kellyanne Conway Eclipses 50 Hatch Act Violations on Twitter, Oct. 18, 2019, available at <https://bit.ly/2Qju3V2>. Because CREW recognized that directing the report to OSC would be futile in light of its June 2019 report and non-enforcement policy, CREW instead directed the report to Twitter, explaining that Conway's conduct "appear to violate Twitter's Terms of Service and rules requiring users to use the

platform in compliance with all applicable laws,” and thus the “company could sanction Conway including by suspending her use of their platform.” *Id.*

- e. CREW submitted written testimony to Congress in connection with a June 26, 2019 hearing on Hatch Act violations under the Trump Administration. *See* Written Testimony of Virginia Canter, Chief Ethics Counsel at CREW, Submitted to House Committee on Oversight and Reform, Hearing on “Violations of the Hatch Act under the Trump Administration,” June 26, 2019, *available at* <https://bit.ly/2pfy166>. That testimony highlighted Conway’s “repeated[] and flagrant[]” Hatch Act violations, and urged Congress to take action to address these violations, including by “ensuring that OSC is actually referring violations by presidential appointees like Ms. Conway to the Merit Systems Protection Board for discipline” in accordance with § 1215. *Id.* at 2, 4.
- f. As noted, in August 2019, CREW sent OSC a letter highlighting the need for meaningful Hatch Act enforcement action against non-Senate-confirmed presidential appointees, and urging it to file an MSPB complaint against Conway as required by § 1215. Ex. 7.
- g. CREW regularly receives and responds to media inquiries for the purpose of conveying to the public the importance of Conway facing consequences for her rampant Hatch Act violations in the absence of MSPB enforcement.²

² *See, e.g.*, Tom Boggioni, Kellyanne Conway accused of “50 violations of the Hatch Act on Twitter alone” this year, *Salon*, Oct. 18, 2019, *available at* <https://bit.ly/2rWdPas> (quoting CREW Executive Director Noah Bookbinder); Bart Jansen, ‘Egregious, notorious and ongoing’: Watchdog agency urges firing of Kellyanne Conway over political remarks, *USA Today*, June 13, 2019, *available at* <https://bit.ly/2QtG8Y0> (same); Rebecca Rainey, How Kellyanne Conway

54. In total, CREW estimates that 18 of its employees have spent at least 175 hours to date, if not many more, on the efforts described above. CREW expended these resources directly in response to, and to counteract, OSC's failure to institute MSPB proceedings against Conway as required by § 1215, rather than in anticipation of litigation.

55. OSC's failure to institute MSPB proceedings against Conway has also emboldened her to continue violating the Hatch Act, as the agency's inaction has sent the message that there are no consequences for violating the Act. As noted, CREW has identified dozens of potential Hatch Act violations by Conway post-dating OSC's June 2019 report. *See* Ex. 7 at 6-8; CREW Report, Kellyanne Conway Eclipses 50 Hatch Act Violations on Twitter, Oct. 18, 2019, *available at* <https://bit.ly/2Qju3V2>. Insofar as OSC's failure to enforce against Conway has resulted in further Hatch Act violations by her, it has caused, and will cause, a corresponding drain in the resources CREW expends to monitor, identify, and document potential violations.

56. CREW would not need to expend (or expend to the same extent) the extensive resources detailed above absent OSC's failure to comply with § 1215. If CREW prevails in this action and OSC were ordered to comply with the law, CREW will no longer need to expend as many resources pursuing the alternative avenues of redress described above, and CREW could use those resources on other matters central to its mission.

saved her White House job, *Politico*, Aug. 12, 2019, *available at* <https://politi.co/2qsegJd> (quoting CREW Deputy Director Donald Sherman).

CREW'S CLAIMS FOR RELIEF

Count I

(Violation of APA and 5 U.S.C. § 1215 – OSC's Failure to File an MSPB Complaint Against Kellyanne Conway)

57. CREW re-alleges and incorporates by reference all preceding paragraphs.

58. Under 5 U.S.C. § 1215, OSC “shall” file a complaint in MSPB against a covered employee where OSC “determines that disciplinary action should be taken against [the] employee for having . . . violated” the Hatch Act. 5 U.S.C. § 1215(a)(1).

59. Section 1215(b) sets forth a limited exemption to this requirement, but it applies only to employees “appointed by the President, by and with the advice and consent of the Senate.” 5 U.S.C. § 1215(b).

60. OSC's duty to file an MSPB complaint in accordance with 5 U.S.C. § 1215 is mandatory and non-discretionary.

61. As a Counselor to the President in the White House Office, Conway is subject to the Hatch Act.

62. Because Conway is not Senate confirmed, she does not qualify for the exemption set forth in § 1215(b).

63. In its June 2019 report, OSC determined, in response to CREW's complaints, that Conway repeatedly violated the Hatch Act and that disciplinary action should be taken against her. Despite making this determination, OSC chose not to file an MSPB complaint against her, and instead referred her violations to the President for disciplinary action.

64. OSC's failure to file an MSPB complaint against Conway in accordance with 5 U.S.C. § 1215 is “unlawfully withheld” agency action. 5 U.S.C. § 706(1).

65. OSC's failure to file an MSPB complaint against Conway in accordance with 5 U.S.C. § 1215 was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Count II

(Violation of APA and 5 U.S.C. § 1215 – OSC's Policy of Categorically Not Filing MSPB Complaints Against Non-Senate-Confirmed Presidential Appointees)

66. CREW re-alleges and incorporates by reference all preceding paragraphs.

67. Under 5 U.S.C. § 1215, OSC "shall" file a complaint in MSPB against a covered employee where OSC "determines that disciplinary action should be taken against [the] employee for having . . . violated" the Hatch Act. 5 U.S.C. § 1215(a)(1).

68. Section 1215(b) sets forth a limited exemption to this requirement, but it applies only to employees "appointed by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 1215(b).

69. OSC's duty to file an MSPB complaint in accordance with 5 U.S.C. § 1215 is mandatory and non-discretionary.

70. Contrary to this mandatory duty, OSC has a policy of categorically not filing MSPB complaints against non-Senate-confirmed presidential appointees, even though such appointees do not fit the exemption for Senate-confirmed appointees set forth in § 1215(b). OSC invoked this policy in response to CREW's complaints against Conway.

71. OSC's policy is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA, 5 U.S.C. § 706, and 5 U.S.C. § 1215.

PRAYER FOR RELIEF

WHEREFORE, CREW respectfully requests that this Court:

1. Declare OSC's failure to file an MSPB complaint against Conway to be "unlawfully withheld" agency action, and "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA, 5 U.S.C. § 706, and 5 U.S.C. § 1215;
2. Order OSC to file a complaint against Conway in the MSPB in accordance with its mandatory duty under 5 U.S.C. § 1215;
3. Declare that OSC's policy of categorically not filing MSPB complaints against non-Senate-confirmed presidential appointees, which it applied in Conway's case, is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA, 5 U.S.C. § 706, and 5 U.S.C. § 1215;
4. Enjoin OSC from invoking its unlawful policy of not filing MSPB complaints against non-Senate-confirmed presidential appointees in accordance with 5 U.S.C. § 1215 in response to CREW's future Hatch Act complaints;
5. Award CREW its costs and reasonable attorneys' fees in this action; and
6. Grant such other and further relief as the Court may deem just and proper.

Date: December 17, 2019

/s/ Nikhel Sus
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