

April 2, 2020

The Honorable Henry J. Kerner  
Special Counsel  
U.S. Office of Special Counsel  
1730 M Street, NW, Suite 218  
Washington, DC 20036-4505

Re: Violation of the Hatch Act by Jared Kushner

Dear Special Counsel Kerner:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Office of Special Counsel (“OSC”) investigate whether Senior Advisor and Assistant to the President Jared Kushner violated the Hatch Act prohibition against engaging in political activity while on government property or on duty.

Recent news reports indicate that Mr. Kushner has engaged in extensive political activity in the White House, effectively running President Donald J. Trump’s 2020 reelection campaign from the West Wing. The Hatch Act prohibits most executive branch employees from engaging in political activity while on government property or on duty, and it is highly likely Mr. Kushner’s conduct violates the prohibition. A narrow exception to the statute allows employees paid from an appropriation for the Executive Office of the President (“EOP”) to engage in some political activity while on government property or on duty. Due to his pay status, however, Mr. Kushner is ineligible for the exception. He chose not to be paid at all and, thus, is not paid from an EOP appropriation. Just as his pay status puts him beyond the reach of an important conflict of interest law, 18 U.S.C. § 209, it also puts him beyond the reach of the Hatch Act exception. Even if Mr. Kushner had chosen to be paid, OSC has indicated that the exception was not intended to permit extensive political activity during normal business hours. According to OSC, the exception was intended to provide relief from what would otherwise be round-the-clock coverage by the Hatch Act for senior political appointees on duty 24 hours a day, not license to turn federal property into a political boiler room.

I. Background

The *New York Times* reported in January that “Mr. Kushner is positioning himself now as the person officially overseeing the entire [Trump] campaign from his office in the West Wing, organizing campaign meetings and making decisions about staffing and spending.”<sup>1</sup> That month, *Time* likewise reported that he “is in charge of the President’s 2020 re-election campaign, overseeing fundraising, strategy and advertising.”<sup>2</sup> Reflecting Mr. Kushner’s work at the White House on President Trump’s campaign, news broke in February that former presidential aide

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<sup>1</sup> Annie Karni and Maggie Haberman, Kushner’s Global Role Shrinks as He Tackles Another: The 2020 Election, *New York Times*, Jan. 9, 2020, <https://nyti.ms/36BlxnK>.

<sup>2</sup> Brian Bennett, Inside Jared Kushner’s Unusual White House Role, *Time*, Jan. 16, 2020, <https://bit.ly/2S0sWcj>.

Hope Hicks has been rehired to help him oversee the campaign and other projects: “A senior administration official said that Ms. Hicks would work on projects that Mr. Kushner oversees, including the re-election campaign.”<sup>3</sup> In March, the *New York Times* reported that, “[w]hile his White House portfolio has variously encompassed everything from immigration to the Middle East, his most consistent assignment has been informal campaign chairman, overseeing the most vital arm of the new family business: politics.”<sup>4</sup> As recently as March 11, 2020, Mr. Kushner, Ms. Hicks and President Trump met in the White House for a presentation by campaign officials on polling numbers.<sup>5</sup> Though the coronavirus crisis derailed the meeting before the presentation began, Mr. Kushner’s inclusion in the meeting indicates his role in the campaign is ongoing.<sup>6</sup>

Mr. Kushner’s political activity is not a recent development. In September 2019, for example, *Politico* described an Oval Office meeting in which he joined President Trump and campaign officials to discuss campaign strategy.<sup>7</sup> A December 2019 article in *Vanity Fair* similarly suggested he was doing campaign work in the White House: “Today, [John] Kelly is gone and [Rudy] Giuliani’s fate is uncertain, while Kushner is exerting influence over virtually every significant White House decision, from negotiating trade deals to 2020 campaign strategy to overseeing Trump’s impeachment defense.”<sup>8</sup> Last summer, the *Washington Post* was already calling him the “hidden hand of Trump’s 2020 campaign” who is “signing off behind the scenes on everything from spending to digital initiatives to top-level hires.”<sup>9</sup> As far back as 2018, *Politico* described a daily White House staff meeting at which Mr. Kushner “launched into a discussion about Trump’s 2020 reelection bid, according to an administration official.”<sup>10</sup>

Mr. Kushner’s involvement in the campaign is reportedly extensive. The *Washington Post* indicates that “[s]ome allies liken Kushner to a de facto campaign manager, saying his role in Trump’s reelection bid is akin to Karl Rove for President George W. Bush or James Baker for President George H.W. Bush.”<sup>11</sup> Mr. Kushner has rejected this comparison, but admits to working “to set goals and objectives” for the campaign. He reportedly “describes his role as largely a top-line and management one” similar to what he did for President Trump in 2016 before he entered government service. The *Washington Post* has described this role as a “central” one in the campaign, noting that the Trump 2020 campaign is “intentionally siloed, with Kushner and Parscale among a handful of officials with full visibility of its inner workings.” Most

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<sup>3</sup> Maggie Haberman, Hope Hicks to Return to the White House After a Nearly Two-Year Absence, *New York Times*, Feb. 13, 2020, <https://nyti.ms/2VIw3ZK>.

<sup>4</sup> Danny Hakim and Glenn Thrush, How the Trump Campaign Took Over the G.O.P., *New York Times*, Mar. 9, 2020, <https://nyti.ms/2TQzFX1>.

<sup>5</sup> Alex Isenstadt and Natasha Korecki, Coronavirus consumes Trump’s reelection bid, *Politico*, Mar. 13, 2020, <https://politi.co/2WZINwL>.

<sup>6</sup> *Id.*

<sup>7</sup> Gabby Orr and Daniel Lippman, Trump snubs Jared Kushner’s signature accomplishment, *Politico*, Sept. 24, 2019, <https://politi.co/2wp6P8b>.

<sup>8</sup> Gabriel Sherman, “Jared Treats Mick Like the Help”: It’s Jared’s White House Now (Trump’s Just Living in It), *Vanity Fair*, Dec. 17, 2019, <https://bit.ly/3aq7eG4>.

<sup>9</sup> Ashley Parker and Josh Dawsey, Adviser, son-in-law and hidden campaign hand: How Kushner is trying to help Trump win in 2020, *Washington Post*, July 26, 2019, <https://wapo.st/2vxjWUB>.

<sup>10</sup> Nancy Cook and Andrew Restuccia, Kushner shifts to 2020 campaign talk amid clearance downgrade, *Politico*, Feb. 28, 2020, <https://politi.co/2PJd1hY>.

<sup>11</sup> Parker and Dawsey, *Washington Post*, July 26, 2019.

tellingly, Mr. Kushner has said that “[t]he last campaign was actually really a family-run campaign” and that the 2020 campaign “is very similar to the last one, in that we’re all working together very closely.”<sup>12</sup>

As for his White House job, Mr. Kushner has chosen not to receive a salary.<sup>13</sup> It is not clear why Mr. Kushner made this choice, but the *New York Times* reported in January 2017 that he would “not accept a salary.”<sup>14</sup> Unlike most other White House officials, Mr. Kushner is not paid for his government work but receives millions of dollars annually from outside investments—a circumstance that has led to concerns about potential conflicts of interest and outside influence.<sup>15</sup>

## II. Applicable Law

The Hatch Act, at 5 U.S.C. § 7324, prohibits executive branch employees from engaging in political activity while on duty, on government property, wearing an official uniform or insignia, or using a government vehicle.<sup>16</sup> This prohibition has historically been understood to include behind-the-scenes activity and assistance, even when that work does not include public communication.<sup>17</sup> Office of Personnel Management (“OPM”) Hatch Act regulations define “political activity” broadly to mean “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”<sup>18</sup>

A narrow exception to this prohibition, at section 7324(b), excludes certain employees whose duties and responsibilities continue outside normal duty hours and while away from their normal duty stations.<sup>19</sup> To be eligible, the employee must be either (1) “paid from an appropriation for the Executive Office of the President” or (2) appointed by the president and confirmed by the Senate to a position located within the United States in which the employee “determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws.”<sup>20</sup> Because Mr. Kushner is not a Senate-confirmed presidential appointee (“PAS appointee”), the second prong of this exception is inapplicable.

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<sup>12</sup> *Id.*

<sup>13</sup> Annual Report to Congress on White House Office Personnel, Executive Office of the President, White House Office, June 28, 2019, <https://bit.ly/2Qdz80o>; Abigail Hess, These are the 22 highest-paid staffers in the Trump White House, *CNBC*, Jul. 1, 2019, <https://cnb.cx/39no6gu>.

<sup>14</sup> Michael Schmidt, Jared Kushner, Trump’s Son-in-Law, Is Cleared to Serve as Adviser, *New York Times*, Jan. 21, 2017, <https://nyti.ms/2whHfIL>.

<sup>15</sup> Justin Rohrlich, Ivanka Trump and Jared Kushner made up to \$135 million while working for free, *Quartz*, June 15, 2019, <https://bit.ly/3as4S9A>; Anne Applebaum, Want to secretly, legally send money to Jared Kushner? Here’s how to do it., *Washington Post*, June 13, 2019, <https://wapo.st/32SlvsQ>; Shane Harris, Carol D. Leonnig, Greg Jaffe, and Josh Dawsey, Kushner’s overseas contacts raise concerns as foreign officials seek leverage, *Washington Post*, Feb. 27, 2018, <https://wapo.st/39qqPpz>.

<sup>16</sup> 5 U.S.C. § 7324(a).

<sup>17</sup> Congressional Research Service, “*Hatch Act*” and Other Restrictions in Federal Law on Political Activities of Government Employees, Report No. 98-885 A, at 11-12, Oct. 23, 1998, <https://bit.ly/2tUg5R2>.

<sup>18</sup> 5 C.F.R. § 734.101.

<sup>19</sup> 5 U.S.C. § 7324(b)(1).

<sup>20</sup> 5 U.S.C. § 7324(b)(2), 5 C.F.R. § 734.502.

At issue is only whether Mr. Kushner qualifies for the Hatch Act exception under its first prong. As we discuss below, the plain language and structure of the statute and every interpretation of it make clear that, under the first prong, the exception's applicability turns solely on an employee's pay status.

Foremost, construction of the exception's first prong begins with its plain statutory language.<sup>21</sup> That language is clear and unambiguous—it applies only to an employee “paid” from an EOP appropriation. Therefore, the analysis is straightforward: an employee who is not paid at all cannot satisfy this requirement of being “paid” from an EOP appropriation.

Analysis of the exception's structure confirms this conclusion. The exception has two prongs, and they establish different eligibility requirements. The difference is significant. Under the second prong, it is necessary to consider the nature of the role performed by a PAS appointee. Specifically, that prong applies only to a U.S.-based PAS appointee whose role entails either conducting foreign relations or formulating nationwide policies to administer federal laws.<sup>22</sup> Under the first prong, however, the nature of an employee's role is irrelevant to determining the exception's applicability. For an employee who is not a PAS appointee, the exception's applicability depends entirely on the employee's pay status.<sup>23</sup> To qualify, the employee must be paid, and the payment must be drawn from an EOP appropriation.<sup>24</sup>

Accordingly, the Justice Department's Office of Legal Counsel (“OLC”) has construed the exception to be narrowly applicable. OLC issued an opinion in 1977 construing the predecessor to this exception as applicable to only a limited set of officials.<sup>25</sup> In its opinion, OLC found pay status determinative for different groups of non-PAS appointees working side-by-side in the White House.<sup>26</sup> OLC emphasized that, unlike White House employees, White House detailees paid from other agencies' appropriations were not covered by the exception: “It should be noted that persons detailed from other agencies to the White House are ordinarily subject to the Hatch Act because they are not paid out of the White House Office appropriation.”<sup>27</sup>

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<sup>21</sup> *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132–33 (2002) (“[R]eference to legislative history is inappropriate when the text of the statute is unambiguous.”).

<sup>22</sup> 5 U.S.C. § 7324(b)(2)(B)(ii).

<sup>23</sup> 5 U.S.C. § 7324(b)(2)(B)(i).

<sup>24</sup> *Id.* This focus on the appointee's pay status traces back to the language originally enacted in 1939. *An Act to prevent pernicious political activities*, Pub. Law 73-252, 53 Stat. 1147, 1148, § 9(a), Aug. 2, 1939, <https://go.aws/3bdevu0>. If Congress had wanted the exception to cover all top presidential advisors, regardless of pay status, it could have amended its language. For example, Congress could have used the approach of two conflict of interest provisions applicable to White House officials who, like Mr. Kushner, were “appointed by the President to a position under section 105(a)(2)(A) of title 3” or “section 105(a)(2)(B) of title 3.” 18 U.S.C. § 207(c)(2)(A)(iii), (d)(1)(c). Congress added those provisions in 1989, but it chose not to add similar language to the Hatch Act when it amended that law in 1993 and again in 2012. *Hatch Act Modernization Act of 2012*, Pub. L. 112-230, 126 Stat. 1616, Dec. 28, 2012; *Hatch Act Reform Amendments of 1993*, Pub. L. 103-94, 107 Stat. 1001 (Oct. 6, 1993); *Ethics Reform Act of 1989*, Pub. L. 101-194, 103 Stat. 1716, § 101(a), Nov. 30, 1989 (amending 18 U.S.C. § 207).

<sup>25</sup> Office of Legal Counsel, U.S. Dep't of Justice, *Application of the Hatch Act to the Vice President's Staff*, 1 Op. O.L.C. 54 (1977), <https://bit.ly/36sYSLC> (“OLC 1977 Op.”).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, at 56.

The White House Counsel's office has expressed a similar view on more than one occasion. Two years before OLC issued its opinion, White House officials expressed a similar view. During the Ford administration, Associate Counsel to the President Ken Lazarus concluded that "the sole test in determining the applicability of the [Hatch] Act is which appropriation is used to pay the employee's salary."<sup>28</sup> Thereafter, Counsel to the President Philip Buchen issued guidance explaining that payment from a particular appropriation was dispositive.<sup>29</sup> He emphasized that the nature of a non-PAS appointee's role was irrelevant: "Schedule C employees and [other political appointees], in the departments and agencies and in the Executive Office of the President who are not paid from the appropriations for the Office of the President, are also subject to this prohibition, *despite the policy-making nature of their duties*."<sup>30</sup>

While serving as an Associate Counsel to President Reagan, now-Supreme Court Chief Justice John Roberts similarly understood that the exception's applicability was determined by a non-PAS appointee's pay status. Justice Roberts articulated this view in a memorandum he wrote for the Counsel to the President regarding a White House detailee, James Coyne.<sup>31</sup> Because Mr. Coyne was a political appointee paid from an appropriation for the Commerce Department, Justice Roberts opined that he needed to limit his involvement in an outside activity to comply with the Hatch Act.<sup>32</sup> But Justice Roberts proposed a solution: "Alternatively, any Hatch Act problems could be avoided by transferring Coyne to the White House payroll."<sup>33</sup> Thereafter, the White House transferred Mr. Coyne to its payroll so the exception would permit him to fully engage in the outside activity.<sup>34</sup> Before the transfer, Mr. Coyne served in the White House;<sup>35</sup> after the transfer, he continued to serve in the White House.<sup>36</sup> Only his pay status changed.<sup>37</sup>

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<sup>28</sup> Gerald R. Ford Presidential Library, James M. Cannon Files, box 16, folder "Hatch Act" (item: initialed mem. from K. Lazarus to J. Cannon, Mar. 11, 1975), <https://bit.ly/3b0Svi3> ("Cannon Files").

<sup>29</sup> Cannon Files (item: mem. from P. McKee to Domestic Council Staff, Oct. 1, 1975, and attachment from P. Buchen, *Restrictions on Political Participation by Executive Branch Officials and Employees*, at 2).

<sup>30</sup> *Id.* (emphasis added). The exception's language at the time referred to an "appropriation for the office of the President." 5 U.S.C. § 7324(d) (1976 Code ed.), <https://bit.ly/33veRsE>. OLC explained that this language referred only to the White House Office. OLC 1977 Op., at 56. The exception now refers broadly to the "Executive Office of the President," but it continues to apply only to an employee paid from the named office. 5 U.S.C. § 7324(b) (2018).

<sup>31</sup> Ronald Reagan Presidential Library, Digital Library Collections, John Roberts Files, box 6, folder "JGR/Campaign Debts (2 of 2)," (item: mem. from J. Roberts to F. Fielding, Apr. 5, 1983), <https://bit.ly/314hC2Q>. ("Roberts Files, Part 2").

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Roberts Files, Part 2 (items: (1) mem. from F. Fielding to J. Baker III, Apr. 7, 1983; and (2) mem. from J. Roberts to F. Fielding, Apr. 21, 1983 ("John Rogers has advised me that Jim Coyne is now on the White House payroll. This removes any Hatch Act problems....").

<sup>35</sup> Ronald Reagan Presidential Library, Digital Library Collections, John Roberts Files, box 6, folder "JGR/Campaign Debts (1 of 2)," (item: mem. from J. Roberts to F. Fielding, Feb. 28, 1983 ("Coyne is already on board as a Special Assistant to the President")), <https://bit.ly/38LhXtO> ("Roberts Files, Part 1").

<sup>36</sup> *Id.*

<sup>37</sup> The conduct at issue was fundraising to retire Mr. Coyne's campaign debts, an activity section 7324 prohibited in 1983 by incorporating historical prohibitions. *Id.*; 5 U.S.C. § 7324(a) (1982 Code ed.), <https://bit.ly/38Vs3Zv>. Congress later moved the fundraising prohibition to section 7323, placing it outside the coverage of the exception to section 7324. *Hatch Act Reform Amendments of 1993*, Pub. L. 103-94, § 2, 107 Stat 1001, Oct. 6, 1993. But, while the exception no longer permits fundraising, Justice Robert's analysis remains valid for other types of political activity. 5 U.S.C. § 7324 (2018).

OSC has similarly observed that the exception applies only if a non-PAS appointee is paid from an EOP appropriation. In 2011, OSC issued a report on employees in the White House Office of Political Affairs (“OPA”) who engaged in political activity while on duty or on government property.<sup>38</sup> To qualify for the exception, OSC explained that an employee needed to be “either a PAS or an employee paid from an EOP appropriation.”<sup>39</sup> Therefore, OSC applied a bright-line pay status test to these non-PAS appointees: “None of these employees were PAS. OPA employees and the Surrogate Scheduler were paid from the EOP appropriation; therefore, those employees met one criterion of the § 7324(b) exemption.”<sup>40</sup>

OSC’s 2011 report also demonstrates that it is not enough to be a high-level appointee. OSC explained that the requirement that an employee’s responsibilities continue outside normal working hours narrowed the exception’s coverage to high-level officials. But OSC observed that this “threshold criterion” was only the first of two tests.<sup>41</sup> Congress chose to require that the employee also either be a qualifying PAS appointee or meet the bright-line pay status test.<sup>42</sup>

More recently, OLC issued an opinion regarding Mr. Kushner’s own appointment to the White House in 2017, reversing its longstanding view that the anti-nepotism statute covered top presidential advisors.<sup>43</sup> In a note to the opinion, OLC observed that White House employees like Mr. Kushner are covered by Hatch Act’s prohibition against political activity, as modified by the Hatch Act Reform Amendments of 1993 (“HARA”), unless they qualify for the exception: “the exception to HARA’s substantive prohibition on partisan political activity in 5 U.S.C. §7324(b)(2)(B)(i) applies to ‘employee[s] paid from an appropriation for the Executive Office of the President,’ further reflecting HARA’s assumption that such employees are otherwise covered.”<sup>44</sup> Beyond the exception’s clear language and the prior interpretations of the exception by OLC, the White House counsel’s office, and OSC, this note seemingly placed Mr. Kushner on notice that the Hatch Act’s political activity prohibition would apply to him unless he qualified for the exception by being “paid from an appropriation for the Executive Office of the President.”

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<sup>38</sup> U.S. Office of Special Counsel, *Investigation of Political Activities by White House and Federal Agency Officials During the 2006 Midterm Elections*, Jan. 2011, <https://go.aws/2wHv5CN> (“OSC Midterm Report”).

<sup>39</sup> *Id.*, at 33. OSC clarified elsewhere that not all PAS appointees qualify. *Id.* at 34, n.65.

<sup>40</sup> OSC Midterm Report, at 34 (footnotes omitted).

<sup>41</sup> *Id.* at 33-34.

<sup>42</sup> 5 U.S.C. § 7324(b); *see also* H.R. Rep. 103-16, at 27 (1993) (“The high level political appointees covered by this exception must meet two tests.”).

<sup>43</sup> Department of Justice, Office of Legal Counsel, *Application of the Anti-Nepotism Statute to A Presidential Appointment in the White House Office*, 2017 WL 5653623, at 9, n.4, Jan. 20, 2017, <https://bit.ly/2Gzi6EK>. (“OLC Kushner Op.”).

<sup>44</sup> *Id.*, at 9, n.4 (Jan. 20, 2017) (emphasis added).

### III. Application of the Political Activity Prohibition to Mr. Kushner

Media reports appear to indicate that Mr. Kushner is conducting extensive campaign work from the West Wing.<sup>45</sup> There is no doubt such work constitutes political activity subject to the Hatch Act prohibition.<sup>46</sup> At issue is only whether he qualifies for the exception to that prohibition at section 7324(b). For non-PAS appointees like Mr. Kushner, the exception is applicable only if they are “paid” from an EOP appropriation.<sup>47</sup> But Mr. Kushner is not paid from an EOP appropriation; he is not paid at all.<sup>48</sup> Therefore, he does not qualify for the exception.

Mr. Kushner’s failure to satisfy this bright-line pay status test is dispositive. If he were a PAS appointee, the nature of his role would be relevant because the exception applies to a PAS appointee “who determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws.”<sup>49</sup> But Mr. Kushner is not a PAS appointee, and Congress chose to cover only those non-PAS appointees who are “paid” from an EOP appropriation.<sup>50</sup> The inquiry begins and ends with this plain statutory language, which is clear and unambiguous.<sup>51</sup>

Ignoring Mr. Kushner’s pay status and focusing on the nature of his role would depart not only from the plain statutory language but also from the executive branch’s guidance and practice. As discussed above, OLC found that pay status is the sole determinant of eligibility for the exemption for non-PAS appointees, and the White House counsel’s office reached the same conclusion on two occasions. OSC similarly determined the applicability of the exception to EOP officials by identifying the appropriation from which they were paid.

In addition, executive branch agencies lack the authority to add exceptions beyond those expressly stated in the statute. As OPM emphasized in a final rulemaking action implementing the 1993 amendments, “[i]f Congress had intended to exempt other employees from the prohibition, Congress clearly would have provided for such exemptions in the statute itself.”<sup>52</sup> OSC and OLC are likewise without authority to expand the coverage of section 7324(b) to an individual who is neither a PAS appointee nor “paid” from an appropriation for the EOP.<sup>53</sup> Nor may they focus on the White House’s unexercised authority to pay Mr. Kushner from such an

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<sup>45</sup> Bennett, *Time*, Jan. 16, 2020; Karni and Haberman, *New York Times*, Jan. 9, 2020; Parker and Dawsey, *Washington Post*, July 26, 2019.

<sup>46</sup> 5 U.S.C. § 7324(a); 5 C.F.R. § 734.101.

<sup>47</sup> 5 U.S.C. § 7324(b)(2)(i).

<sup>48</sup> Nolan McCaskill, *White House releases salary info for Trump’s aides*, *Politico*, June 30, 2017, <https://politi.co/2U3uiWn>.

<sup>49</sup> 5 U.S.C. § 7324(b)(2)(B)(ii).

<sup>50</sup> 5 U.S.C. § 7324(b)(2)(B)(i).

<sup>51</sup> *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132–33 (2002) (“[R]eference to legislative history is inappropriate when the text of the statute is unambiguous.”).

<sup>52</sup> U.S. Office of Personnel Management, Final Rule, *Political Activities of Federal Employees*, 61 Fed. Reg. 35,088, 35,090, July 5, 1996, <https://bit.ly/2Oe8seV>.

<sup>53</sup> 5 U.S.C. § 7324(b)(2).

appropriation. Congress did not cover employees “who could be paid” from an EOP appropriation; it covered employees who are “paid” from one.<sup>54</sup>

In this context, it bears emphasizing that Mr. Kushner’s pay status is no mere technicality. His lack of compensation exempts him from an important ethics law, 18 U.S.C. § 209, which prohibits executive branch employees from being paid by anyone other than the United States for their government service. That law, however, exempts any employee who, like Mr. Kushner, is “serving without compensation.”<sup>55</sup> OSC has had first-hand experience considering the applicability of section 209 to its own staff. When OSC considered temporarily hiring private sector attorneys in 1979, OLC assured OSC that, “even if the private employees were hired for more than 130 days and thus could not qualify [for the exception for] special Government employees, if they serve without compensation, they nevertheless will not be subject to § 209.”<sup>56</sup> In other words, OSC had the authority to pay the attorneys, but a decision not to exercise that authority would render section 209 inapplicable. Mr. Kushner’s situation is no different with respect to both that law and the Hatch Act. Even though the appointment authority used for his hiring would allow the White House to pay him, the fact that he serves without compensation places him beyond the reach of section 209. It likewise places him beyond the reach of the Hatch Act exception. To hold otherwise would be inconsistent. He cannot have it both ways.

Even if Mr. Kushner had chosen to be paid and, thus, covered by the exception, OSC has suggested that the exception permits only limited political activity, not Mr. Kushner’s reportedly extensive political work at the White House. In a recent Hatch Act presentation, OSC stated:

The other thing I want to emphasize here is that this exception . . . was really carved into the statute with the concern that these individuals that we’re talking about—whether it’s the White House commissioned officers or the agency principals, the PAS—they’re considered on duty 24/7, and so the concern here was that arguably then the statute would prohibit these individuals from engaging in political activity at any time because they’re 24/7 employees. . . . [B]ut it’s even clear from the legislative history that the idea would be that the political activity that these individuals would be engaged in, if on duty, would be incidental to their official duties, *basically de minimis activity in that the majority of the political activity would occur outside what’s normally considered the official core hours.*<sup>57</sup>

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<sup>54</sup> 5 U.S.C. § 7324(b)(2)(B)(i).

<sup>55</sup> 18 U.S.C. § 209(c).

<sup>56</sup> Office of Legal Counsel, U.S. Dep’t of Justice, *Employment of Temporary or Intermittent Attorneys & Investigators—5 U.S.C. § 3109; 31 U.S.C. §§ 665(b), 686(a)—Office of the Special Counsel, Merit Systems Protection Board*, 3 Op. O.L.C. 78, 82 (1979) (citing 18 U.S.C. § 209(c)), <https://bit.ly/3b7sHEf>.

<sup>57</sup> U.S. Office of Special Counsel, *The 2020 Election Season: What Every Federal Employee Needs to Know about the Hatch Act*, Mar. 10, 2020, (video presentation by Hatch Act Unit Chief Ana Galindo-Marrone, beginning at 38:43 and ending at 40:01) (emphasis added), <https://bit.ly/3aNpzgH>.

In its 2011 report, OSC similarly asserted: “Congress expected that on-the-job political activity by § 7324(b) employees would be kept to a minimum. . . . [A]lthough the plan language of the Hatch Act and its regulations place no limitations on the extent to which § 7324(b) employees can engage in political activity on duty and in the federal workplace as long as the costs are reimbursed, OSC maintains that imposing no restraints at all goes beyond what Congress intended.”<sup>58</sup>

Because Mr. Kushner does not qualify for the exception, he is subject to the same restriction on political activity that applies to most executive branch employees.<sup>59</sup> If the reports about his campaign work in the West Wing are true, he has engaged in political activity while on duty or on government property—and that activity appears to have been extensive.<sup>60</sup> Therefore, a thorough and searching investigation of this possible violation is warranted.<sup>61</sup>

#### IV. Appropriate Penalty

A finding that Mr. Kushner violated the Hatch Act would warrant corrective action, up to and including instituting enforcement proceedings before the Merit Systems Protection Board (“MSPB”).<sup>62</sup> Penalties for Hatch Act violations include reprimand, suspension, removal, debarment from Federal employment for up to 5 years, and the imposition of civil penalties up to \$1,093 per violation.<sup>63</sup> To determine the appropriate penalty to seek, OSC should consider its own precedents.

Federal employees have faced severe penalties for political activity far less extensive than Mr. Kushner’s political activity is reported to have been. In January 2020, for example, a Department of Energy employee was forced to resign and debarred from federal employment for three years for providing a single “guided tour of a radioactive waste treatment plant” to a congressional candidate whose requests for a tour the department denied.<sup>64</sup> In October 2019, two federal employees received lengthy suspensions after one of them wrote a single political statement in a workplace PowerPoint presentation and the other wrote partisan political

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<sup>58</sup> OSC Midterm Report, at 74.

<sup>59</sup> 5 U.S.C. § 7324(a).

<sup>60</sup> Hakim and Thrush, *New York Times*, Mar. 9, 2020.

<sup>61</sup> Given that news reports indicate Mr. Kushner frequently travels on Air Force One, the investigation should also focus on whether he violated the prohibition against engaging in political activity while using a government vehicle. 5 U.S.C. § 7324(a)(4); Bess Levin, Report: Jared and Ivanka Think of Air Force One as Their Own Private Ride, *Vanity Fair*, Mar. 12, 2019, <https://bit.ly/2uMrUsA>.

<sup>62</sup> See 5 U.S.C. § 1215(a)(1) (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).

<sup>63</sup> 5 U.S.C. § 7326; 5 C.F.R. § 1201.126(a) (increasing the civil penalty above the statutory amount of \$1,000, as required by the *Federal Civil Penalties Inflation Adjustment Act of 1990*, Public Law 101-410 (1990)). Note that the option of merely reimbursing the government for any costs incurred, under 5 C.F.R. § 734.503, is not available to Mr. Kushner because that option is available only to employees who qualify for the section 7324(b) exception. 5 U.S.C. § 7324(b)(1); 5 C.F.R. § 734.503.

<sup>64</sup> U.S. Office of Special Counsel, *DOE Employee Debarred from Federal Employment for Violating the Hatch Act by Providing Tour to a Political Candidate*, Jan. 16, 2020, <https://bit.ly/2tRQJTR>.

statements in emails and social media posts.<sup>65</sup> In September 2019, an immigration judge was debarred from federal employment for 30 months and forced to pay a \$1,000 fine for commending a candidate’s immigration plan during one deportation hearing.<sup>66</sup>

These violations pale in comparison to Mr. Kushner’s apparent political activity. Before undertaking such reportedly extensive campaign activity in the West Wing, he should have sought guidance from OSC as to whether the political activities prohibition applied to him. The OLC opinion addressing his own appointment arguably placed him on notice of the risk that the prohibition could apply to him—as OLC noted, absent the exception, White House “employees are otherwise covered” by the prohibition.<sup>67</sup> The Counsel to the President has also conducted Hatch Act training for WHO staff, which should have put Mr. Kushner on further notice of the option to consult OSC for guidance.<sup>68</sup> OSC’s Hatch Act unit has a vibrant advisory function, which would have been available to Mr. Kushner.<sup>69</sup>

OSC should investigate this matter and, if it finds that a violation occurred, take appropriate corrective action against Mr. Kushner for engaging in political activity while on government property. The sheer magnitude of his reported political activity should, if verified, warrant significant disciplinary action and debarment from federal employment.<sup>70</sup> Moreover, if OSC “determines that disciplinary action should be taken against” Mr. Kushner “for having . . . violated” the Hatch Act, OSC would have a mandatory statutory duty to “prepare a written complaint against” him and “present” it to MSPB, where OSC should seek a \$1,093 fine for each instance of political activity committed while on government property or on duty, and all other available penalties.<sup>71</sup>

## V. Conclusion

Recent reporting indicates that Mr. Kushner—who appears to be the de facto head of the Trump 2020 presidential campaign—has conducted extensive political activity in the West Wing. Mr. Kushner’s pay status renders him ineligible for an exception to the Hatch Act prohibition against conducting political activity while on government property or on duty. As a result, he is subject to the same prohibition that applies to most other executive branch employees. The Trump administration must not be permitted to turn the West Wing into a

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<sup>65</sup> U.S. Office of Special Counsel, *OSC Announces Significant Discipline Imposed on Two Federal Employees for Hatch Act Violations*, Oct. 18, 2019 (30-day and 90-day suspension, respectively), <https://bit.ly/2O4Gkej>.

<sup>66</sup> Dan Mangan, Immigration judge violated Hatch Act with pro-Hillary Clinton comments, fined \$1K, barred from federal service for 30 months, *CNBC*, Sept. 17, 2019, <https://cnb.cx/38TtuaP>.

<sup>67</sup> OLC Kushner Op., at 9, n.4.

<sup>68</sup> Office of Special Counsel, Report of Prohibited Political Activity (Kelleyanne Conway), OSC File NO. HA-18-0966, at 5, Mar. 6, 2018, <https://bit.ly/38mCe9z>; Letter from Patrick Cipollone, Counsel to the President, to Henry Kerner, Office of Special Counsel, at 11, June 11, 2019, <https://bit.ly/2OPLtHm>.

<sup>69</sup> Office of Special Counsel, Annual Report for Fiscal Year 2018, at 32 (2019), <https://bit.ly/2UN8cb6> (“The Hatch Act Unit (HAU) has the unique responsibility of providing Hatch Act information and advice to the White House [and other interested parties]. The HAU advises individuals on whether they are covered by the Hatch Act and whether their political activities are permitted. In FY 2018, OSC responded to 1,155 requests for advisory opinions under the Hatch Act, including 46 formal written advisory opinions.”).

<sup>70</sup> Karni and Haberman, *New York Times*, Jan. 9, 2020; Bennett, *Time*, Jan. 16, 2020.

<sup>71</sup> 5 U.S.C. § 1215(a)(1).

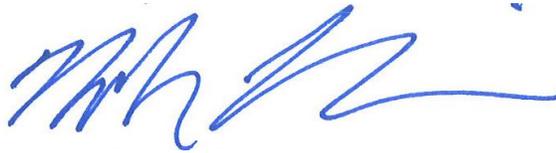
Special Counsel Henry J. Kerner

April 2, 2020

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political boiler room without complying strictly with all applicable requirements. OSC should investigate to determine whether Mr. Kushner is violating the Hatch Act and, if so, take appropriate corrective action.

Sincerely,

A handwritten signature in blue ink, appearing to read "Noah Bookbinder", with a long horizontal flourish extending to the right.

Noah Bookbinder  
Executive Director