

Separation of Politics and State in the Aftermath of Donald Trump

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**Ohio Northern University
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Carhart Lecture Series

**Separation of Politics and State in the Aftermath of Donald
Trump**

BY RICHARD W. PAINTER*

INTRODUCTION

I thank Northern Ohio University for inviting me to give this lecture and the editors of the Law Review for inviting me to publish this essay.

My lecture in the fall of 2020 was a broad discussion on conflicts of interest and other ethics problems for the President, cabinet officials, and Members of Congress.¹ The topics addressed at this lecture included the foreign and domestic emoluments clauses of the Constitution, Russian interference in the 2016 election, and obstruction of justice in the Russia investigation, financial conflicts of interest for federal officials, and the ethical cesspool of campaign finance.²

Rather than regurgitate all of those points here, I will focus on one particular problem that I believe lies at the root of many of the controversies that came out of the Trump Administration that threaten to create similar problems in future administrations.³ The law, as currently construed, is

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1. *Carhart Lecture – Richard W. Painter*, OHIO N.U., <https://law.onu.edu/event/carhart-lecture-richard-painter> (last visited Aug. 19, 2021).

2. *Id.*

3. *See infra* Part III.A.

unable to separate the official capacity of the President and his senior appointees from their partisan political activity.⁴ The law of which I speak is the Hatch Act, which permits federal officials to engage in most forms of political activity other than fundraising and running for office themselves, while prohibiting use of federal office to influence the outcome of an election.⁵ The distinction between personal capacity political activity, which is permitted, and the use of public office to influence an election, a prohibited activity, for many high ranking officials may be unworkable.⁶

After serving two and a half years as the chief White House ethics lawyer for President Bush, I was so concerned about the White House Office of Political Affairs led by Karl Rove that I devoted a chapter of my 2009 book to the hybrid operations of this office – half official capacity advice to the President and half unofficial capacity partisan politics.⁷ I observed that the excessive partisan political activity, much of which was orchestrated inside the White House, was a serious impediment to the ethical administration of the executive branch under several presidents from both political parties, some of the most serious abuses of public office for partisan purposes having occurred under President Richard Nixon.⁸

Then, worried about partisan politics creeping into the Obama White House, I wrote a 2010 op-ed for the New York Times titled *Separation of Politics and State*.⁹ I urged White House staff and presidential appointees in the agencies be required to separate themselves from partisan political activity during their time in office.¹⁰ These are the most powerful people in the executive branch, and during their time in office their undivided loyalty should be to the United States not to a political party.¹¹

An exception to my proposed ban on partisan political activity of course would be made for the President and Vice President who are elected officials and are rightly expected to participate in partisan politics throughout their terms in office. Nonetheless, my view in 2010, and even more so today, is that the President and Vice President should turn to political advisors and supporters outside the executive branch, such as their campaign and political party or to other elected officials, for support in partisan political activity.¹²

4. *See infra* Part IV.

5. *See generally* 5 U.S.C. § 7323 (2021).

6. *Id.*

7. *See generally* RICHARD W. PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES (2009) [hereinafter “Getting the Government”].

8. *Id.*

9. Richard W. Painter, *The Separation of Politics and State*, N.Y. TIMES (Jun. 13, 2010), <https://www.nytimes.com/2010/06/14/opinion/14painter.html> [hereinafter “The Separation”].

10. *Id.*

11. *Id.*

12. *Id.*

White House staff, cabinet officers and other executive branch presidential appointees should focus instead on supporting the success of the President's policies.¹³ The appointees can best accomplish this by spending 100 percent of their time on doing their jobs and avoiding partisan politics.¹⁴

In 2010, I also testified before the House Oversight Committee to make the same argument—senior executive branch officials would adhere far more closely to their fiduciary duties to the government if they were required to focus only on their official duties during their relatively short but influential terms in office, leaving the partisan political activities to others.¹⁵ Such separation of politics from appointee job responsibilities could indeed be better for the electoral success of the President to the extent that the undivided loyalty of senior officials could lead to the success of the administration's policies and enhance the President's image with voters.¹⁶ I recommended amendments to the federal law regulating partisan political activity by government officials, the Hatch Act, that would impose stricter prohibitions on presidential appointees in the executive branch than the restrictions on career civil servants, most of whom are allowed in their "personal capacity" to engage in most partisan political activity provided they do so without using their official position.¹⁷

Congress declined to include these changes when it amended the Hatch Act to address unrelated issues.¹⁸ President Obama responded to some of the criticisms of White House political activity by moving his political operations out to Chicago ahead of his re-election campaign, along with releasing White House chief of staff Rahm Emanuel who ran those political operations and then himself successfully ran for Mayor of Chicago.¹⁹ But, partisan politics soon crept back into the White House, and senior levels of the Administration with a few presidential appointees, including one cabinet official, even violated the relatively lenient rules in the Hatch Act.²⁰

13. *Id.*

14. The Separation, *supra* note 9.

15. *The Hatch Act: The Challenges of Separating Politics from Policy Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. 4 (2011) (oral statements by Richard W. Painter [hereinafter "Hatch Act Hearing"]).

16. *Id.* at 4-7.

17. *Id.* at 5.

18. Josh Gerstein, *Hatch Act Reforms Head to President Barack Obama's Desk*, POLITICO: POLITICO44 (Dec. 19, 2012, 5:39 PM), <https://www.politico.com/blogs/politico44/2012/12/hatch-act-reforms-head-to-president-barack-obamas-desk-152463>.

19. Josh Gerstein, *President's Peeps Punting to Chicago*, POLITICO: UNDER THE RADAR (Jan. 25, 2021, 5:14 PM), <https://www.politico.com/blogs/under-the-radar/2012/01/presidents-peeps-punting-to-chicago-112312>.

20. Jennifer Haberkorn, *Report: Kathleen Sebelius Violated the Hatch Act*, POLITICO (Sept. 12, 2012 3:13 PM), <https://www.politico.com/story/2012/09/osc-report-sebelius-violated-hatch-act-081122>.

Then came the 2016 election. Less than two weeks before the election, F.B.I. Director James Comey sent Congress a letter regarding Hillary Clinton's email that created the impression that the F.B.I.'s investigation of Clinton was being reopened after being closed the previous summer.²¹ Comey had been appointed in 2013 by President Obama, but he previously identified as a Republican and had served in President Bush's Department of Justice.²² It was unclear where his political allegiances resided and why he sent the letter.²³ What is clear is that the letter may have influenced the outcome of the election in 2016.²⁴ I strongly condemned Comey's actions in another op-ed in the New York Times²⁵ and I filed a complaint with the Office of Special Counsel (OSC) which investigates violations of the Hatch Act²⁶. The OSC began an investigation, but ended the investigation after Comey was dismissed from his post at the F.B.I. the following spring.²⁷

The Trump Administration brought the most extreme politicization of executive branch agencies since the Nixon presidency.²⁸ There were several obvious Hatch Act violations called out by the OSC—White House Counselor Kellyanne Conway being the most frequent offender²⁹—but there were other far more impactful instances of official capacity partisan political activity that have been more difficult to analyze under the admittedly ambiguous language of the Hatch Act³⁰. Specifically some of the most egregious abuses were in the Department of Justice and the State Department, but abuses occurred in other agencies as well.³¹ Arguably, the entire executive branch was being turned into an arm of the President's reelection campaign.³² Any wall separating partisan politics from Administration

21. Nate Cohn, *Did Comey Cost Clinton the Election? Why We'll Never Know*, N.Y. TIMES (Jun. 14, 2018), <https://www.nytimes.com/2018/06/14/upshot/did-comey-cost-clinton-the-election-why-well-never-know.html>.

22. Mark Memmott, *FBI Pick is Republican with Deep Roots in Law Enforcement*, NPR: THE TWO-WAY (May 30, 2013, 7:00 AM), <https://www.npr.org/sections/thetwo-way/2013/05/30/187231498/fbi-pick-is-a-republican-with-deep-roots-in-law-enforcement>.

23. Cohn, *supra* note 21.

24. *Id.*

25. Richard W. Painter, *On Clinton Emails, Did the F.B.I. Director Abuse His Power?*, N.Y. TIMES (Oct. 30, 2016), <https://www.politico.com/story/2012/09/osc-report-sebelius-violated-hatch-act-081122>.

26. Micah Rosenberg, *Uproar Over Whether FBI Chief Broke Law by Raising New Clinton Emails*, REUTERS (Oct. 31, 2016, 6:02 PM), <https://www.reuters.com/article/us-usa-election-hatch-act/uproar-over-whether-fbi-chief-broke-law-by-raising-new-clinton-emails-idUSKBN12V2HQ>.

27. Stephen Dinan, *James Comey was Being Investigated for Political Interference at Time of Firing*, WASH. TIMES (Apr. 20, 2018), <https://www.washingtontimes.com/news/2018/apr/20/comey-was-investigated-political-interference/>.

28. *See infra* Part III.B-D.

29. *OSC Finds Kellyanne Conway Repeatedly Violated the Hatch Act, Recommends Removal from Federal Service*, U.S.O.S.C.: NEWS (Jun. 13, 2019), <https://osc.gov/News/Pages/19-10-Kellyanne-Conway-Hatch-Act.aspx>.

30. *See infra* Part III.B-D.

31. *Id.*

32. *See infra* Part III.D.

officials had been eviscerated.³³ The impact on United States government policy in critically important areas, including criminal justice and foreign policy, was devastating.³⁴

Finally, Congress needs to amend the Hatch Act or enact another law prohibiting White House staff, cabinet officials, and other presidential appointees from engaging in partisan political activity while in office.³⁵ Additionally, the law needs to more precisely define when “official capacity” actions by presidential appointees are deemed to be so partisan that they are prohibited – I recommend the legal test be that an official capacity action should be prohibited if there is no reasonable policy justification for that action and the action is motivated by an intent to influence the outcome of an election.³⁶ The Department of Justice cracking down on illegal immigration to fulfill a president’s campaign pledge to tighten immigration enforcement would not violate the Hatch Act under my proposed test even though it may in some circumstances violate other laws.³⁷ But, the Attorney General intervening in criminal proceedings against a senior campaign operative of the President probably should be a violation of the Hatch Act.³⁸ The State Department inducing a foreign power to begin an investigation of the President’s likely opponent in an election also would be a violation because there should be no reasonable policy justification for the State Department to request the investigation other than advancing the President’s electoral prospects.³⁹

THE HATCH ACT

Article II of the Constitution states, “[t]he executive Power shall be vested in a President of the United States of America”⁴⁰ but also requires the President “take care that the laws be faithfully executed.”⁴¹ If the law were to allow a President or his subordinates unfettered discretion to use the executive power to influence elections, a President would be permitted to use his vested Article II powers to keep himself in office indefinitely and to support the re-election only of Members of Congress who supported him.⁴² Such a blending of the executive branch with the President’s political

33. The Separation, *supra* note 9.

34. *See infra* Part IV.

35. Hatch Act Hearing, *supra* note 15, at 4-5.

36. *See infra* Part V.

37. *See infra* Part IV.

38. *See infra* Part III.B.

39. *See infra* Part III.C.

40. U.S. CONST. art. II, § 1.

41. U.S. CONST. art. II, § 3.

42. Anthony T. Kovalchick, *Ending the Suppression: Why the Hatch Act Cannot Withstand Meaningful Constitutional Scrutiny*, 30 W. New Eng. L. Rev. 419, 467-68 (2008).

campaign would be inconsistent with the constitutional design, including enumerated procedures whereby the President and Members of Congress are chosen in free and fair elections.⁴³

As the executive branch grew in power during the 20th century and was empowered to impose income taxes and bestow economic benefits throughout the country with government spending, this President's power, and the risk of abuse, became even more acute.⁴⁴

A new high-water mark of presidential power came with the F.D.R. Administration, the New Deal, and the concerns of Republicans in Congress that the F.D.R. Administration was promising jobs in the Works Progress Administration in exchange for partisan political activity.⁴⁵ Harry Hopkins, one of FDR's closest advisors and head of the Works Progress Administration, once said, "[w]e shall tax and tax, and spend and spend, and elect and elect," which infuriated Republicans.⁴⁶ F.D.R. was extraordinarily successful in this regard, winning four presidential elections and maintaining Democratic Party majorities in Congress for most of his term.⁴⁷

The language of the 1939 Hatch Act established the outer boundaries to what was permissible with the new vastly enlarged federal bureaucracy, but the language is in some respects ambiguous.⁴⁸ The most important provision of the Hatch Act, as amended, states that:

(a) Subject to the provisions of subsection (b), an employee may take an active part in political management or in political campaigns, except an employee may not—

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election;

(2) knowingly solicit, accept, or receive a political contribution from any person, unless [the Act includes an exception for some solicitations on behalf of federal labor organizations]; or

43. *Id.* at 468.

44. John Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 205, 217-21 (2018). As I explain below, I strongly disagree with Yoo's expansive vision of presidential power.

45. *Id.* at 226-28.

46. While there are several slightly different renditions of Hopkins's quote in the media at the time, they all reflect the same message. Harry Lloyd Hopkins, *Respectfully Quoted: A Dictionary of Quotations*, 1989., BARTLEBY, <https://www.bartleby.com/73/1793.html> (last visited Aug. 18, 2021).

47. William E. Leuchtenberg, *Franklin D. Roosevelt: Campaigns and Elections*, MILLER CTR, <https://millercenter.org/president/fdroosevelt/campaigns-and-elections> (last visited Aug. 19, 2021).

48. *Hatch Act Overview*, U.S.O.C., <https://osc.gov/Services/Pages/HatchAct.aspx> (last visited Aug. 19, 2021).

(3) run for the nomination or as a candidate for election to a partisan political office; or

(4) knowingly solicit or discourage the participation in any political activity of any person who—

(A) has an application for any compensation, grant, contract, ruling, license, permit, or certificate pending before the employing office of such employee; or (B) is the subject of or a participant in an ongoing audit, investigation, or enforcement action being carried out by the employing office of such employee.⁴⁹

Of these Hatch Act provisions, I focus on the first one, prohibiting the use of “official authority or influence for the purpose of interfering with or affecting the result of an election.”⁵⁰ This provision has been interpreted to prohibit such actions as official capacity speeches and other communications endorsing candidates, conducting campaign events on government property, and using government resources to support candidates.⁵¹ Official government policies that help candidates win elections, however, are not prohibited, at least if those policies serve some other legitimate government purpose.⁵² Interpreting the Hatch Act more strictly, to prohibit any government policy that favors the electoral chances of one candidate over another, would essentially shut down the business of government.⁵³ Such an interpretation would also undermine the purpose of elections, which is to hold government officials accountable for official government policies and the success of their implementation.⁵⁴

Going back to examples from the 1930’s that motivated the Hatch Act, it is quite clear that under subparagraph (a)(1) F.D.R.’s administration did not violate the Hatch Act if it taxed the rich, borrowed money, and created jobs for Americans in an economy with an unemployment rate over 20 percent.⁵⁵ That is presumably why FDR was elected—and then reelected again three times.⁵⁶ At the same time it would be far more problematic for the Administration to focus most of its spending on states the President needed

49. Title 5, § 7323.

50. *See infra* Part II.

51. Citizens for Responsibility & Ethics in Wash. v. U.S. Off. of Special Couns., 480 F. Supp. 3d 118, 122-23 (D.D.C. 2020).

52. Hatch Act Hearing, *supra* note 15, at 6-7.

53. § 7323(a).

54. *Id.*

55. Yoo, *supra* note 44, at 208-34.

56. Leuchtenberg, *supra* note 47.

to win reelection or where the President wanted to support a candidate for Congress.⁵⁷ Still, in these circumstances one would be hard-pressed to find a violation as there would be a legitimate governmental purpose to the spending, even if the motives were political.⁵⁸ A more problematic scenario would be a decision to have an administrative official go to a state weeks before the election to give an official speech announcing yet more spending.⁵⁹ Even more problematic, would be to announce weeks before an election a new government spending project to create jobs when at the time of the announcement there was no actual intent to follow through with the project, the announcement being solely for the purpose of influencing elections.⁶⁰ Where does the Hatch Act draw the line? The answer is unclear.

In the eighty years since the passage of the Hatch Act there have been few investigations of violations along these or similar parameters. The language of the Act is too vague to support a definitive finding of a violation when nonpolitical explanations can be concocted for why government officials do what they do.⁶¹

Instead, Hatch Act enforcement has focused on the more obvious violations – the violations that are easier to prove by objective standards and do not require delving into the subjective intent of the violator.⁶² These violations include using one’s official title in a campaign speech, organizing a partisan event on government property, supporting or attacking candidates in press interviews on government property, political fundraising on government property or using one’s official title, and using government equipment, vehicles and other resources to support partisan political activity.⁶³ The irony is that these Hatch Act violations, while serious, may not have as much impact on elections as major “policy” decisions and other actions by government officials – for example criminal investigations in the Department of Justice – that are motivated exclusively by partisan politics.⁶⁴

This question of interpreting the statutory language is the first problem I address in this lecture. Can the Hatch Act be interpreted to prohibit at least

57. § 7323(a).

58. Hatch Act Hearing, *supra* note 15, at 6-7.

59. § 7323(a).

60. *See id.*

61. Jeremy Roebuck, *Some Say Hatch Act is Too Vague, Want to See it Changed*, PHILA. INQUIRER (Jul. 4, 2011), https://www.inquirer.com/philly/insights/20110704_Some_say_Hatch_Act_is_too_vague_want_to_see_it_changed.html.

62. 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), <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/>.

63. Todd Willens, *Prohibited Partisan Political Activity Reminder as Required by the Hatch Act*, U.S. DEP’T INTERIOR (Mar. 31, 2020), <https://www.doi.gov/ethics/prohibited-partisan-political-activity-reminder-required-hatch-act>.

64. *Id.*

some uses of executive power to influence elections in circumstances where there is an arguable—but extraordinarily weak—case that there is also an official policy justification for the action in question? If not, should the Act be amended to prohibit the most abusive actions driven by partisan motives, or should other controls be established, perhaps in agency specific statutes, that isolate key governmental functions—for example law enforcement, defense and intelligence—from partisan politics? These questions are important because the Hatch Act fails to accomplish its intended purpose if it merely prohibits conduct that while wrong, is unlikely to change the result in elections, for example a cabinet official wearing a campaign button at an official meeting, while permitting conduct very likely to influence an election, such as the F.B.I director announcing the opening, or reopening, of a criminal investigation of a candidate days before the election.⁶⁵ Going back to the Constitution’s vesting in the President of the power to run the executive branch, the risk that this power can be abused is acute.⁶⁶

The second problem I address is the interface between the prohibitions of the Hatch Act and the powers of the President. Can the President himself ever be subject to the Hatch Act? In 1993 Congress amended the Hatch Act to add a criminal provision stating that it is a felony for “any person to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government . . . to engage in . . . any political activity.”⁶⁷ This provision applies to anybody, including nongovernment employees.⁶⁸ Unlike the rest of the Hatch Act, this provision also applies to Members of Congress and the President.⁶⁹ But, if the President orders something—including a violation of the Hatch Act—can that presidential order be illegal? Some constitutional law scholars,⁷⁰ and a few Presidents, have made clear their view that nothing the president does or orders can be illegal because all federal statutes are subordinate to Article II of the Constitution, which vests in the President the authority to head the executive branch.⁷¹

This is a radical approach to interpreting Article II of the constitution sometimes called the “Unitary Executive Theory,” although more reasonable iterations of unitary executive theory only focus on the President’s power to remove his own appointees in the executive branch when he does so without

65. See § 7323(a).

66. See U.S. CONST. art. II, § 1.

67. 18 U.S.C. § 610 (2021).

68. See § 7323(a).

69. *Id.*

70. See, e.g., JOHN YOO, DEFENDER IN CHIEF 7 (2020).

71. Vicki Divoll, *Transcript: Eight Things I Hate About the Unitary Executive Theory*, 38 VT. L. REV. 147, 148 (2013).

criminal purpose.⁷² Professor Claire Finkelstein and I have criticized interpretations of Article II of the Constitution that would allow a President to do anything he likes, including violate the law.⁷³ To distinguish such interpretations of Article II, we call them the “strong” or “extreme” version of the Unitary Executive Theory, which contrasts with the more conventional version of the theory that only safeguards the President’s power to remove federal officers appointed by the President.⁷⁴ To make a long story short, the most extreme version of the Unitary Executive Theory was summed up by President Nixon when responding to a question in which David Frost asked Nixon about the legality of the President’s actions, Nixon replied that “[w]ell, when the President does it, that means that it is not illegal.”⁷⁵

Turning back to the Hatch Act the fundamental question is whether, if the President orders his subordinates to engage in partisan political activity, violating the express language of the criminal provision of the Hatch Act, does the President commit a crime? Or does the strongest version of the “unitary executive theory” prevail, allowing the President to order his subordinates to engage in partisan political activity, and if so can his subordinates plead a defense to prosecution if they comply?

I do not analyze these questions here as a matter of constitutional law, except to raise the obvious point that if Article II of the Constitution allows the President to violate the law – any law including the criminal provisions of the Hatch Act—the President in the performance of his official duties is

72. See, e.g., *Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183, 2211 (2020) (striking down a statutory provision constraining the President’s power to remove the director of the Consumer Financial Protection Bureau).

73. Claire O. Finklestein & Richard W. Painter, *INSIGHT: Trump’s Unitary Executive Theory Meets Cyrus Vance on Fifth Avenue*, BLOOMBERG LAW: US LAW WEEK (July 17, 2020, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-trumps-unitary-executive-theory-meets-cyrus-vance-on-fifth-avenue>.

74. *Id.*

75. David Frost’s interview with Richard Nixon concerned the Huston plan, a plan of White House aide Tom Charles Huston for the government to engage in domestic burglary, illegal electronic surveillance and opening mail of “radicals” inside the United States in response to violent protests and bombings in the late 1960’s and early 1970’s.

“Frost: So, what in a sense you’re saying is that there are certain situations and the Huston plan or that part of it was one of them where the president can decide that it’s in the best interest of the nation or something and do something illegal.

Nixon: Well, when the president does it . . . that means that it is not illegal.

Frost: By definition –

Nixon: Exactly . . . exactly . . . if the president . . . if, for example, the president approves something . . . approves an action, ah . . . because of the national security or in this case because of a threat to internal peace and order of, ah . . . ah . . . significant magnitude . . . then . . . the president’s decision in that instance is one, ah . . . that enables those who carry it out to carry it out without violating a law. Otherwise they’re in an impossible position.”

Transcript of David Frost’s Interview with Richard Nixon, TEACHING AM. HIST., <https://teachingamericanhistory.org/library/document/transcript-of-david-frosts-interview-with-richard-nixon/> (last visited Aug. 19, 2021).

above the law.⁷⁶ This goes directly against the broad principle stated by the Supreme Court in *Trump v. Vance* in 2020 that “no citizen, not even the President, is categorically above the law.”⁷⁷ I also do not describe here all of the possible situations in which presidential actions – or the official actions of others in the executive branch with or without authorization from the President—could violate the civil or criminal provisions of the Hatch Act. Rather, I introduce here three Hatch Act complaints that I myself have filed with the Office of Special Counsel—one against former F.B.I Director James Comey, one against former Attorney General William Barr, and a third complaint (filed with Professor Finkelstein) against former Secretary of State Michael Pompeo.⁷⁸ I also describe OSC’s disposition of two of these complaints—the complaint against Comey was declared moot after he was removed from office by President Trump and the complaint against Barr ended with a determination by OSC that Barr had not violated the Hatch Act, a decision I strongly disagree with.⁷⁹ As of this writing, the complaint against Secretary Pompeo is still pending, with the likelihood that the complaint, like the Comey complaint, could be determined to be moot because he too has left office.⁸⁰ I also describe here a fourth complaint that I filed with Professor Finkelstein accusing President Trump of violating the criminal provision of the Hatch Act by pressuring his subordinates to engage in partisan political activity.⁸¹ This complaint is still pending with the Department of Justice.

FOUR HATCH ACT COMPLAINTS

A. James Comey

In this essay, I do not discuss the broader problem of politicization at the DOJ, which I have addressed in a separate book chapter published in 2021.⁸² Rather, I focus on the Hatch Act in particular and whether the actions of two individuals, F.B.I. Director James Comey in 2016 and Attorney General William Barr in 2020, violated the Hatch Act.⁸³ These incidents are a subset of the broader problem of partisan politics infiltrating DOJ and the rest of the executive branch, but these specifics are a helpful illustration of the depth of

76. See U.S. CONST. art. II.

77. *Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020) (emphasis added).

78. See *infra* Part III.A-C.

79. See *infra* Part III.A-B.

80. Lara Jakes, *Pompeo, Who Led Trump’s Mission at State Dept., Leaves with a Dubious Legacy*, N.Y. TIMES (Jan. 18, 2021), <https://www.nytimes.com/2021/01/18/us/politics/mike-pompeo-secretary-of-state.html>.

81. See *infra* Part III.D.

82. For a discussion on the issues surrounding the politicization of the Department of Justice, see Claire Finkelstein & Richard Painter, *Restoring the Rule of Law in the Department of Justice*, in IF IT’S BROKE, FIX IT 25 (Norman Eisen ed., 2021) [hereinafter “*Restoring the Rule of Law*”].

83. See *infra* Part III.A-B.

the problem as well as the complexities involved with applying the current language of the Hatch Act as a constraint.⁸⁴

I begin with James Comey and the F.B.I.

During the summer of July 2016 when it was certain that Hillary Clinton would be the Democratic Party nominee for President, the F.B.I finally finished its months long investigation of Clinton's use of a private server for her State Department email.⁸⁵ F.B.I Director James Comey announced that the F.B.I. was closing its criminal investigation of Clinton's use of the private email server without filing any criminal charges against her or anyone else.⁸⁶ But, Comey then made a series of highly unusual statements commenting on his own personal assessment of Clinton's conduct.⁸⁷ Comey stated, "although we did not find clear evidence that Secretary Clinton or her colleagues intended to violate laws governing the handling of classified information, there is evidence that they were extremely careless in their handling of very sensitive, highly classified information."⁸⁸ Comey also went to great lengths to emphasize the risk of foreign intrusion into the email system even though there was no evidence that intrusion into these particular emails had in fact occurred.⁸⁹ Finally, Comey commented that although the F.B.I was recommending that criminal sanctions not be sought, such handling of classified information should not be without consequences," "to be clear, this is not to suggest that in similar circumstances, a person who engaged in this activity would face no consequences. To the contrary, such individuals are often subject to security or administrative sanctions."⁹⁰ All of these comments went well beyond the comments the prosecutors ordinarily make about the actions of anyone whom the prosecutors decided not to charge with a crime; such comments by federal prosecutors are unprecedented in the context of a person who has not been charged and is a candidate in a federal

84. *Id.*

85. *Statement by FBI Director James B. Comey on the Investigation of Secretary Hilary Clinton's Use of a Personal E-Mail System*, FBI (July 5, 2016), <https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2016s-use-of-a-personal-e-mail-system> [hereinafter "FBI Director Statement"].

86. *Id.*

87. *Id.*

88. *Id.*

89. "[G]iven the nature of the system and of the actors potentially involved, we assess that we would be unlikely to see such direct evidence. We do assess that hostile actors gained access to the private commercial e-mail accounts of people with whom Secretary Clinton was in regular contact from her personal account. We also assess that Secretary Clinton's use of a personal e-mail domain was both known by a large number of people and readily apparent. She also used her personal e-mail extensively while outside the United States, including sending and receiving work-related e-mails in the territory of sophisticated adversaries. Given that combination of factors, we assess it is possible that hostile actors gained access to Secretary Clinton's personal e-mail account." *Id.*

90. FBI Director Statement, *supra* note 85.

election scheduled to be held only a few months later.⁹¹ Thus, it is hard to find a legitimate reason for these comments that is related to the law enforcement mission of the F.B.I.⁹² Comey also must have known full well that these same highly unusual comments were directed at a candidate in a federal election and might very well influence the outcome of that election.⁹³ Indeed, these comments were far more likely to impact the outcome of the election than the ordinary more clear cut Hatch Act violation, for example if the F.B.I. Director had given an official speech while wearing a campaign button for a candidate for federal office.⁹⁴

It got worse from there.⁹⁵

On October 28, 2016, FBI Director James Comey sent to the chairmen and ranking members of the House and Senate committee investigating Clinton's email server a letter disclosing that the FBI was reviewing additional emails.⁹⁶ Comey's letter was sent days before the 2016 election while voting was already underway.⁹⁷ The letter stated in full:

In previous congressional testimony, I referred to the fact that the Federal Bureau of Investigation (FBI) had completed its investigation of former Secretary Clinton's personal email server. Due to recent developments, I am writing to supplement my previous testimony.

In connection with an unrelated case, the FBI has learned of the existence of emails that appear to be pertinent to the investigation. I am writing to inform you that the investigative team briefed me on this yesterday, and I agreed that the FBI should take appropriate investigative steps designed to allow investigators to review these emails to determine whether they contain classified information, as well as to assess their importance to our investigation.

Although the FBI cannot yet assess whether or not this material may be significant, and I cannot predict how long it will take us to

91. Isaac Arnsdorf, *Comey Takes Heat for 'Unprecedented' Rebuke*, POLITICO (July 5, 2016, 7:01 PM), <https://www.politico.com/story/2016/07/james-comey-clinton-emails-225124>.

92. *Id.*

93. *Id.*

94. Cohn, *supra* note 21.

95. *Id.*

96. Letter from James B. Comey, FBI Dir., to Congress (Oct. 28, 2016).

97. See Sean McElwee et al., *4 Pieces of Evidence Showing FBI Director James Comey Cost Clinton the Election*, VOX (Jan. 11, 2017, 9:40 AM), <https://www.vox.com/the-big-idea/2017/1/11/14215930/comey-email-election-clinton-campaign>.

complete this additional work, I believe it is important to update your Committees about our efforts in light of my previous testimony.⁹⁸

In late October 2016 I filed with the Office of Special Counsel a complaint alleging apparent violations of the Hatch Act by Director Comey, and perhaps other officials in the FBI, in connection with the October 2016 letter and the highly unusual public statements by Comey about Secretary Clinton.⁹⁹ I also requested that the Office of Government Ethics (OGE) ask the FBI to conduct an internal investigation of whether this letter and the public statements about Clinton was a misuse of official position in violation of OGE rules promulgated under the Ethics in Government Act of 1978.¹⁰⁰

Violations of the Hatch Act and of the OGE rule prohibiting use of public office for private gain are not permissible in any circumstances, including an executive branch official acting under pressure from persons such as the President and politically motivated members of Congress.¹⁰¹ As I stated in my letter, violations are of even greater concern when the executive branch agency is the FBI.¹⁰²

It was not clear—and still is not clear—whether Comey personally wanted to influence the outcome of an election; indeed, his falling out with President Trump only a few months later suggest that whatever favor Comey had done for Trump in the election was not appreciated. Indeed, Comey’s actions in October 2016 may have sent the wrong message to Trump that Comey was willing to embroil the FBI in partisan politics, which for Trump in 2017 meant terminating the investigation of Russian interference in the 2016 election.¹⁰³ This, however, Comey refused to do, and in May 2017 he was fired.¹⁰⁴

Regardless of Comey’s intentions in October 2016, the content and wording of his letter was of concern.¹⁰⁵ He also made the highly unusual summer 2016 public statements expressing his personal opinion about Secretary Clinton’s actions when he announced that the FBI was concluding

98. Letter from James B. Comey, *supra* note 96.

99. Letter from Richard W. Painter, Univ. of Minnesota Law School, to Office of the Special Counsel & Office of Government Ethics (Oct. 29, 2016).

100. *Id.*

101. See 5 U.S.C. § 7323 (2012); 5 C.F.R. § 2635.702 (2013).

102. Letter from Richard W. Painter, *supra* note 99.

103. See Jerome Socolovsky et al., *Mueller Report: Trump Tried to Stop Investigation Fearing His Presidency Was Over*, NPR (Apr. 18, 2019, 9:02 AM), <https://www.npr.org/2019/04/18/709051040/watch-live-attorney-general-barr-briefs-reporters-about-the-mueller-report>.

104. See Tucker Higgins, *President Trump Contradicts Himself by Claiming He Didn’t Fire James Comey Over the Russia Probe*, CNBC (May 31, 2018, 8:54 AM), <https://www.cnbc.com/2018/05/31/president-trump-contradicts-himself-by-claiming-he-didnt-fire-james-comey-over-the-russia-probe.html>.

105. Letter from James B. Comey, *supra* note 96.

its investigation of her emails.¹⁰⁶ Even absent a specific intent, or desire, of an official to influence an election, the Hatch Act and an ethics rule probably are violated if it is obvious that the official's actions could influence the election, there is not another good reason for taking those actions, and the official is acting under pressure from persons who obviously do want the official to take action that will influence the election. The fact that such other persons exerting pressure on the official—including members of Congress, the President, candidates for office, or political operatives—are not subject to much of the Hatch Act or the OGE ethics rule, does not absolve the official who is subject to the Hatch Act from using his office to influence the outcome of a partisan election.¹⁰⁷ Furthermore, at a certain point the pressure applied on the official by others can become coercive; and if so, itself violates the only criminal provision of the Hatch Act which applies to everybody—inside and outside the government—that it is a felony “to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government” to engage in political activity.¹⁰⁸

Absent extraordinary circumstances justifying it, a public communication about a pending FBI investigation involving a candidate for public office that is made on the eve of an election—or, as in this case, while voting is in progress—is very likely to be a violation of the Hatch Act.¹⁰⁹ It is also a misuse of official position in violation of the OGE rule.¹¹⁰ The fact that politically motivated members of Congress want the communication to be made publicly only enhances the seriousness of the violation; it is not an excuse.

As I pointed out in my 2016 letter to the Office of Special Counsel:

This is clearly distinguishable from politically motivated policy decisions in particular matters, such as decisions to spend government money to create jobs in an election year. Such decisions, even if they influence elections, are not generally violations of the Hatch Act. Official actions specifically intended to communicate publicly a connection between policy decisions and a candidate – such as a Department of Transportation announcement of a major project in a Congressman's district on the eve of an election, at a ceremony attended by the Congressman and Department officials –

106. See Press Release, FBI, Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System (July 5, 2016).

107. See generally 5 U.S.C. § 7323 (2012); 5 C.F.R. § 2635.702 (2013).

108. 18 U.S.C. § 610 (2012).

109. See Sean McElwee et al., *4 Pieces of Evidence Showing FBI Director James Comey Cost Clinton the Election*, VOX (Jan 11, 2017, 9:40 AM), <https://www.vox.com/the-big-idea/2017/1/11/14215930/comey-email-election-clinton-campaign>.

110. See 5 C.F.R. § 2635.702 (2013).

would be highly problematic and border on violations of the Act depending upon proximity to the election. Decisions about particular party matters including investigations and litigation, in which candidates are the particular parties, are even more problematic. These particular party matters must be handled with considerable care in order not to violate the Hatch Act or the ethics rule. That clearly was not done here.

Director Comey's actions in communicating about the investigation the way he did, appear to put him and others at the FBI in a position of violating the Hatch Act. Various members of Congress may be complicit in these actions, but the actions are still those of officials at the FBI. Unless remedial action is taken, there is likely to be a continuing violation of the Hatch Act up through Tuesday November 8.¹¹¹

I argued in this Hatch Act complaint and in an op-ed in the New York Times that Comey had abused his power, particularly by sending the October letter to members of Congress whom he knew would publicize it before the election and use it for only one purpose: to help Donald Trump win the election.¹¹² The OSC notified me that it had begun an investigation shortly after I filed this complaint, but then the OSC dropped the investigation when Comey left federal employment after being fired by Trump the next year.¹¹³ The issues I raised in the complaint were never addressed.

The implications for giving Comey's conduct a free pass were ominous indeed. The Department of Justice (DOJ) reports to the President; both the Attorney General and the FBI Director are appointed by the President; and they all report to Congress in its oversight function.¹¹⁴ Although there is no evidence of abuse of presidential power in this instance, and indeed President Obama supported Hillary Clinton rather than Donald Trump in the election, the precedent set by failing to scrutinize Comey's actions would invite abuse in the future when a president's political objectives were more closely aligned with official actions of his subordinates that implicated the Hatch Act by interfering in a partisan election.¹¹⁵ As I pointed out in my 2016 letter to the

111. Letter from Richard W. Painter, *supra* note 99.

112. Richard W. Painter, *On Clinton Emails: Did the F.B.I. Director Abuse His Power?*, N.Y. TIMES (Oct. 30, 2016), <https://www.nytimes.com/2016/10/30/opinion/on-clinton-emails-did-the-fbi-director-abuse-his-power.html>.

113. See Dinan, *supra* note 27.

114. See, e.g., *The Executive Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-executive-branch/> (last visited Aug. 15, 2021); *Who Monitors or Oversees the FBI?*, FBI, <https://www.fbi.gov/about/faqs/who-monitors-or-oversees-the-fbi> (last visited Aug. 15, 2021).

115. See 5 U.S.C. § 7323 (2012).

OSC, “[w]e cannot allow these officials, absent a compelling reason, to publicize pending investigations concerning candidates of either party while an election is underway. That is an abuse of power.”¹¹⁶

The OSC never ruled on this complaint.¹¹⁷ After opening an investigation in late 2016, the OSC in 2017 determined that this complaint was moot after Director Comey was fired by President Trump and left federal service.¹¹⁸

B. Attorney General Barr

Politicization of the DOJ has been a serious concern at least since the Administration of Richard Nixon, where there were allegations of misuse of the FBI, among other parts of the federal law enforcement apparatus.¹¹⁹ Then came the efforts of Attorney General Edward Levi and Griffin Bell to restore the independence of the DOJ in the 1970s,¹²⁰ followed by the resurgence of a politicized DOJ under Reagan and subsequent Presidents, reaching a high-water mark under President Trump¹²¹.

I will not recite here the many abuses that I perceived to have taken place during 2019 and 2020 at the DOJ under Attorney General Barr. These are addressed in a two-hundred-plus page report released by the Center for Ethics and the Rule of Law (CERL) at the University of Pennsylvania and Citizens for Responsibility and Ethics in Washington (CREW).¹²² I will focus here on what I perceived to be violations of the Hatch Act, as well as misuse of official position by the Attorney General and other officials in the Department of Justice in two instances.¹²³

The first was President Trump’s presidential campaign photo opportunity that took place outside St. John’s Church adjacent to Lafayette Park on June 1, 2020.¹²⁴ The incident involved what appeared to be a premediated plan coordinated with the DOJ to remove demonstrators sympathetic to Black Lives Matter (BLM) from Lafayette Park in front of the White House so

116. Letter from Richard W. Painter, *supra* note 99.

117. See Dinan, *supra* note 27.

118. *Id.*

119. This included Nixon ordering the FBI to stay out of the Watergate investigation six days after the Watergate break in. See, e.g., John M. Crewdson, *Nixon Order That the F.B.I. Be Told: ‘Don’t Go Any Further Into This Case’*, N.Y. TIMES (Aug. 6, 1974), <https://www.nytimes.com/1974/08/06/archives/nixon-ordered-that-the-fbi-be-told-dont-go-any-further-into-this.html>.

120. See CLAIRE O. FINKELSTEIN ET AL., CENTER FOR ETHICS AND THE RULE OF LAW-CITIZENS FOR RESPONSIBILITY & ETHICS IN WASHINGTON, REPORT ON THE DEPARTMENT OF JUSTICE AND THE RULE OF LAW UNDER THE TENURE OF ATTORNEY GENERAL WILLIAM BARR 20 (Oct. 12, 2020).

121. See *Restoring the Rule of Law*, *supra* note 82, at 25.

122. See FINKELSTEIN ET AL., *supra* note 120, at 25.

123. See *infra* Part III.B.

124. Peter Baker, et al., *How Trump’s Idea for a Photo Op Led to Havoc in a Park*, N.Y. TIMES (June 2, 2020), <https://archive.ph/20200606045227/https://www.nytimes.com/2020/06/02/us/politics/trump-walk-lafayette-square.html>.

President Trump could walk across the street for the campaign photo.¹²⁵ In this instance an aggravating factor was that the Hatch Act and ethics violations included, among other things, Attorney General Barr giving orders for use of force by federal officers to remove peaceful unarmed civilians exercising their First Amendment right to political speech to facilitate the hastily planned political event.¹²⁶ Indeed, violently removing the demonstrators may have been part of the event itself giving it particular appeal to some of Trump's supporters.

Attorney General Barr apparently participated in planning for this political event and, according to news sources, personally ordered use of force by federal officers to remove peaceful protestors from Lafayette Park, which included the use of pepper spray and rubber bullets.¹²⁷ He did so in order to enable the President to walk across the park for a political photo opportunity in front of St. John's Church.¹²⁸ The photo was later used by the Trump campaign in social media.¹²⁹

As I noted in my June 2020 complaint to the OSC about Attorney General Barr's apparent Hatch Act violation:

“The White House Counsel's office generally considers presidential photo opportunities for a political campaign to be strictly political. . . . This means that White House staff participating in planning or preparation for the photo opportunities did so strictly in a personal capacity. Only Secret Service personnel protecting the president had an official role in preparing for or attending the event, and only to the extent necessary to protect the president.”¹³⁰

This leaves little wiggle room for the Attorney General to participate in an official capacity in preparations for a presidential political photo opportunity. Indeed, in an official capacity the Attorney General should not even be there.

When the Attorney General ordered or authorized the use of force against the protestors to clear Lafayette Park, the President clearly wanted this done so he could make a political appearance and take a photo for use by his campaign. Ivanka Trump, Jared Kushner, Chief of Staff Mark Meadows, and Counselor to the President Hope Hicks were involved in planning this campaign event and the official government actions in support of the event.¹³¹

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. See Baker et al., *supra* note 124.

130. See Letter from Richard W. Painter, *supra* note 99.

131. Baker et al., *supra* note 124.

All of these people not only hold White House positions but were active in the President's campaign for reelection.¹³² All are subject to the Hatch Act as is the Attorney General.¹³³ The OGE ethics rules also prohibit the use of an official position for private gain or to endorse a nongovernmental enterprise, including a political campaign.¹³⁴

Again, as I pointed out in my June 2020 letter to OSC:

The facts clearly demonstrated that this was a political appearance by the president, not an act in any way connected to his official duties. The Bible used as a prop and held by President Trump in his hand is one indicator that this was not an official appearance. Bibles are rarely used at official government events other than swearing in ceremonies. It is difficult to imagine an official photo of a president holding a Bible outside of a church. The fact that Trump said very little but simply stood for photographs, live television and video taping is another indicator of political motivation. The Trump campaign's use of the St. John's Church photos and video stream on the Internet that same day almost immediately after the event is further evidence of the political objective. Also, the way the event was orchestrated was for maximum political effect: protestors were given very little notice of the change in plan and were quickly ordered to depart from space that they had occupied for days around St. John's, half an hour prior to the officially announced curfew of 7:00 PM. Quickly thereafter the protestors were attacked by federal officers. This orchestrated sequence of events conformed to President Trump's campaign script in his repeated calls for violent measures to be used against protestors at his campaign rallies. Sadly, the violence against protestors beforehand—not just the photo opportunity—was part of the Trump campaign's June 1 event at St. John's Church.¹³⁵

132. See, e.g., Andrea Bernstein, *It's Illegal for Federal Officials to Campaign on the Job. Trump Staffers Keep Doing It Anyway*, PROPUBLICA (Aug. 12, 2020, 4:00 AM), <https://www.propublica.org/article/its-illegal-for-federal-officials-to-campaign-on-the-job-trump-staffers-keep-doing-it-anyways>.

133. See 5 U.S.C. § 7323 (2012) (providing that “a) Subject to the provisions of subsection (b), an employee may take an active part in political management or in political campaigns, except an employee may not . . . use his official authority or influence for the purpose of interfering with or affecting the result of an election.”).

134. See 5 C.F.R. § 2635.702 (2013) (providing that “An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise . . .”).

135. Letter from Richard W. Painter, Univ. of Minnesota Law School, to Henry J. Kerner, Special Counsel, Office of the Special Counsel, & Emory A. Rounds III, Director, Office of Government Ethics (June 15, 2020) [hereinafter “Painter Letter to Kerner & Rounds”]. Although legal questions pertaining to private property and trespass are probably tangential to enforcement of the Hatch Act and OGE ethics

Even more shocking, President Trump had induced some top military leaders to accompany him on this political appearance.¹³⁶ General Mark Milley, the Chairman of the Joint Chiefs of Staff, later apologized for wearing his uniform while walking with President Trump across Lafayette Park for the political photographs, stating:

“I should not have been there. My presence in that moment and in that environment created a perception of the military involved in domestic politics. As a commissioned uniformed officer, it was a mistake that I have learned from, and I sincerely hope we all can learn from it.”¹³⁷

Attorney General Barr ordering or authorizing the forcible removal from land in front of a church of peaceful protestors, including priests, in order to make way for a hastily arranged campaign photo op, was not a rational reason for deployment of federal officers. There was simply no United States government interest that could conceivably be furthered by what happened in Lafayette Park on June 1st.

In Lafayette Park, Attorney General Barr and other DOJ officials ordering deployment of armed federal officers as an advance team for a political photo opportunity was not just a Hatch Act violation, it was an abuse of power.¹³⁸ Ironically this was an abuse of power under the same President who later, after he lost the election, incited a mob of supporters by repeatedly alleging “election fraud,” and then delaying deployment of federal forces to protect the Capitol building as his supporters attacked Capitol police, threatened to hang the Vice President, and forced the evacuation of members of Congress who were in the process of counting electoral votes for the presidential election.¹³⁹ The DOJ—and indeed armed federal officers—apparently were to be deployed for one purpose only: to further the partisan political ambitions of the President.

Nonetheless, the OSC, in late 2020, found that there had not been a Hatch Act violation by Attorney General Barr.¹⁴⁰ OSC’s determination was largely

rules, it is worth noting that this Trump campaign event probably took place not just on public property but in part on Church property without permission from the Church.

136. Baker et al., *supra* note 124.

137. Ryan Browne et al., *Top General Apologizes for Appearing in Photo-Op with Trump After Forceful Removal of Protestors*, CNN (June 11, 2020, 3:58 PM), <https://www.cnn.com/2020/06/11/politics/milley-trump-appearance-mistake/index.html>.

138. Baker et al., *supra* note 124.

139. Eric Tucker & Mary Clare Jalonick, *General: Pentagon Hesitated on Sending Guard to Capitol Riot*, AP NEWS (Mar. 3, 2021), <https://apnews.com/article/general-testimony-dc-national-guard-request-pentagon-delayed-946be1248dad2b2763bcdd0def6c2a1a>.

140. Letter from Ana Galiando-Marrone, Chief of Hatch Act Div., Office of the Special Counsel, to author (Dec. 22, 2020) (on file with author).

based on their understanding of the facts which, relying in part on testimony from Attorney General Barr, did not find a motive for clearing the protestors or for President Trump's trip across Lafayette Park that was sufficiently connected with Trump's campaign to justify finding a Hatch Act violation, stating:

It was publicly reported that Mr. Barr, who was tasked with managing the federal response to protests in Washington, D.C., expanded the security area around the White House due to security concerns related to the protests in the area. In fact, Mr. Barr testified to Congress that he instructed that the security perimeter be moved farther from the White House before learning of the President's plan to visit the church.

The circumstances described above indicate that Mr. Barr's participation in the St. John's Church photograph opportunity was not for electoral purposes. First, Lafayette Park and St. John's Church had already been the sites of protests and arson. And reports indicate that the expansion of the perimeter around the White House, to include the park, was for security reasons. Furthermore, despite the Trump campaign's dissemination of the photographs taken in front of St. John's Church, the evidence does not suggest that the photograph opportunity was staged for campaign purposes. For example, OSC does not have evidence suggesting the event was organized or requested by the Trump campaign or that the participants had knowledge that the campaign planned to use the resulting photographs. Additionally, the church visit was preceded by an official speech on White House grounds about violent protests, and during that speech, the President did not discuss his campaign or the upcoming November election. The President then visited a site related to the topic of his Rose Garden speech, and while there, neither the President nor his advisors discussed his campaign for reelection or the November 2020 election.¹⁴¹

I disagreed with the OSC's understanding of the facts. As discussed above, the photo opportunity, with the President holding a Bible outside a church and giving no official speech, was purely political.¹⁴² General Milley had already publicly said he should not have been there.¹⁴³ The greatest

141. *Id.*

142. See Ryan Browne et al., *Top General Apologizes for Appearing in Photo-Op with Trump After Forceful Removal of Protestors*, CNN (June 11, 2020, 3:58 PM), <https://www.cnn.com/2020/06/11/politics/milley-trump-appearance-mistake/index.html>.

143. Baker et al., *supra* note 124.

shortcoming of my exchange with the OSC, however, was that their interpretation of the facts in the light most favorable to Attorney General Barr avoided the difficult question of law. If OSC had found that the entire event had been motivated by President Trump's desire to stage the event and get a photo for his political campaign, would the OSC have found a Hatch Act violation when the Attorney General ordered federal officers to clear the park? One would hope so, but the OSC's letter leaves this point unaddressed.¹⁴⁴ Little by way of Hatch Act interpretation can be gleaned from OSC's response to my complaint about Attorney General Barr's actions that day.¹⁴⁵

This was not the first time Attorney General Barr was accused of allowing the DOJ to be involved in partisan politics.¹⁴⁶ President Trump was impeached for the first time in 2020 because on a phone call in summer of 2019,¹⁴⁷ he had asked the president of Ukraine to contact Attorney General Barr and Rudy Giuliani, then acting as a lawyer for the Trump campaign, about an investigation of Joe Biden and Hunter Biden, and also to investigate Ukrainian involvement in accusations that Russia had interfered in the 2016 election.¹⁴⁸ Hundreds of millions of dollars in military aid for Ukraine was held up in order to induce Ukraine to comply with this request.¹⁴⁹

It is not known what, if anything, Attorney General Barr did to coordinate with Rudy Giuliani in any of these investigations, or whether there was any contact between the DOJ and anyone in Ukraine.¹⁵⁰ If there had been, this too likely would have been a Hatch Act violation. There was no legitimate federal interest in the DOJ coordinating with Rudy Giuliani to investigate the President's political opponents. There was also no legitimate federal interest in coordinating with Rudy Giuliani to investigate the 2016 election.

Later, this pattern of conduct at the DOJ continued with Attorney General Barr interfering in the prosecutions of both Roger Stone and Michael Flynn.¹⁵¹ Although interference of the Attorney General in DOJ prosecutions of political allies of the President is not per se a Hatch Act violation, it is troubling in instances such as this in which the defendants worked for the

144. Letter from Ana Galiando-Marrone, *supra* note 140.

145. *Id.*

146. See, e.g., Kristine Phillips & Kevin Johnson, *1600 Former Justice Department Lawyers Accuse Barr of Using DOJ to Help Trump in Election*, USA TODAY (Oct. 1, 2020, 5:03 PM), <https://www.usatoday.com/story/news/politics/elections/2020/10/01/william-barr-accused-1-600-lawyers-using-doj-help-trump-win/5881731002/>.

147. See H.R. REP. NO. 116-346, at 86 (2019).

148. *Id.*

149. See FINKELSTEIN ET AL., *supra* note 120, at 33.

150. See Tobias Hoonhout, *DOJ Denies Coordination Between Barr and Giuliani in Letter Detailing Ukraine 'Intake Process'*, NAT'L REV. (Feb. 18, 2020, 4:17 PM), <https://www.nationalreview.com/news/doj-denies-coordination-between-barr-and-giuliani-in-letter-detailing-ukraine-intake-process/>.

151. See FINKELSTEIN ET AL., *supra* note 120, at 10-11.

President's first political campaign and allegations against that campaign were very much a reelection issue in the second campaign.¹⁵²

I have written elsewhere about these and other abuses in the DOJ and proposals for reform.¹⁵³ One thing, however, is clear: the Hatch Act as currently enforced by the OSC is not an effective tool for preventing the near complete politicization of the official functions of the DOJ.

C. Secretary of State Pompeo

In August 2020, Professor Claire Finkelstein and I wrote the OSC to request an investigation of potential violations of the Hatch Act by Secretary of State Mike Pompeo in connection with the taped speech given by the Secretary from Jerusalem on Tuesday, August 25th for the Republican National Convention.¹⁵⁴ We also asked the OSC to investigate whether, in connection with a 2020 arms sale to the United Arab Emirates (UAE) and the peace arrangement between the UAE and Israel, any request was made to any foreign government for assistance with the Trump reelection campaign.¹⁵⁵

Professor Finkelstein and I noted in our letter to the OSC:

On August 24, 2020, Secretary of State Mike Pompeo delivered a previously taped speech of approximately four minutes defending President Trump's foreign policy. To the best of our knowledge, no other sitting secretary of state has ever delivered a speech of this sort at his/her political party's convention, whether inside the United States or from outside the country while on a foreign diplomatic mission.

His opening line in the speech was "I'm speaking to you from beautiful Jerusalem, looking out over the Old City." Later in the speech he said, "The president too moved the U.S. embassy to this very city of God, Jerusalem, the rightful capital of the Jewish homeland, and just two weeks ago, the president brokered a historic peace deal between Israel and the United Arab Emirates. This is a deal that our grandchildren will read about in their history books."

Secretary Pompeo could easily have taped his RNC speech in the United States before he departed, but he chose to tape it instead while

152. *See id.* at 78.

153. *See Restoring the Rule of Law, supra* note 82.

154. Letter from Claire O. Finkelstein, Univ. of Pennsylvania Carey Law School, & Richard W. Painter, Univ. of Minnesota Law School, to Office of the Special Counsel & Inspector General, Dep't of State (Aug. 26, 2020) [hereinafter "Letter to the Office of Special Counsel from Claire O. Finkelstein & Richard W. Painter"].

155. *See id.*

he was on a diplomatic mission in Israel. The background for the taped speech was not a neutral background but rather the Old City of Jerusalem, a place of great cultural, religious, and political significance.

In our view, Secretary Pompeo's choice of location for his speech, reinforced by the content of portions of the speech, make his purpose very clear: his remarks are designed to elicit the support of registered voters who are Jewish or who support Israel for Donald Trump's re-election campaign. While history is rife with examples of political campaigns seeking to elicit the support of different segments of the voting public based on race, ethnicity or religion, such conduct is unprecedented for a sitting secretary of state who is at the same time on a diplomatic mission overseas.

The State Department said that Secretary Pompeo delivered the speech "in his personal capacity" and that no Department resources or staff were involved in the speech even though diplomatic security agents and other staff usually accompany him all of the time when he is overseas. The State Department said that the speech was cleared by four separate groups of lawyers from the White House, the State Department, the RNC, and Secretary Pompeo's personal lawyers.¹⁵⁶

Secretary Pompeo's speech was also contrary to the rules that the State Department had made for other employees.¹⁵⁷ In a December 2019 memo, the Legal Advisor for the Department of State told political appointees that they were prohibited from "engag[ing] in political activity in concert with a partisan candidate, political party, or partisan political group," and that "Senate-confirmed presidential appointees *may not even attend* a political party convention or convention-related event."¹⁵⁸ Secretary Pompeo, in July 2020, also sent a cable to all U.S. missions overseas saying, "It is important that the department's employees do not improperly engage the Department of State in the political process, and that they adhere to the Hatch Act and

156. *Id.*; see also *Mike Pompeo RNC Speech Transcript*, REV (Aug. 25, 2020), <https://www.rev.com/blog/transcripts/mike-pompeo-2020-rnc-speech-transcript>.

157. See Memorandum from Department of State, Office of Legal Advisor, to All Presidential Appointees and All Political Appointees (Dec. 3, 2019).

158. *Id.*; see also Conor Finnegan, *Pompeo Defies His Own Policy by Praising Trump in Unprecedented Convention Speech*, ABC NEWS (Aug. 25, 2020, 10:45 PM), <https://abcnews.go.com/Politics/pompeo-breaks-rule-praising-trump-unprecedented-convention-speech/story?id=72605047>.

Department policies in their own political activities.”¹⁵⁹ Apparently Secretary Pompeo felt free in his own case to do differently.¹⁶⁰

Secretary Pompeo used his official authority or influence for the purpose of interfering with or affecting the result of an election.¹⁶¹ As Professor Finkelstein and I noted in our letter to OSC:

The role of the Secretary of State is such that it is simply not possible for the Secretary to separate his official, public, and governmental function from his personal actions, at least with regard to a public speech. Delivering a speech, particularly overseas, is by its very nature a diplomatic and political activity, one that could have profound repercussions on U.S. relations in the region. The Secretary cannot remove the governmental imprimatur from his appearance and his words by a mere formalistic declaration that he is speaking in his private capacity. Some roles are simply not optional when one assumes the mantle of a significant governmental office. The Secretary has a duty to carry himself at all times in a manner that reflects respect for the duties and responsibilities of his office and to act in the best interests of the country, particularly when he is representing the United States overseas.

....

[Secretary Pompeo] consciously chose to tape the speech in Israel although the speech was almost certainly written before he departed in time to be cleared by the lawyers. Secretary Pompeo—if he was going to violate State Department policy and give the speech—could easily have taped the speech before he departed. He also could have done so using a neutral background. He did precisely the opposite, choosing as his backdrop one of the most religiously, culturally, and political locations in the world. He also referred to the subject matter of his diplomatic missions. In sum, the Secretary of State, at the same time as he was on a diplomatic mission to Israel gave a partisan political speech for a RNC campaign video in which he referred to the United States embassy in Israel, said that a candidate in a partisan election—Donald Trump—should get credit for the relocation of that embassy in Israel as well as credit for specific international

159. *Id.*

160. See also Conor Finnegan, *supra* note 158. “The Hatch Act forbids federal employees from engaging in political activities unless they’re off duty, outside a federal facility and not using federal property—something Pompeo chose to disregard when he made his speech.”

161. Finnegan, *supra* note 158 (noting that “Pompeo filmed the speech on an official overseas trip . . .”).

agreements that are part of the Secretary's diplomatic missions to Israel, and then he twice referred to the City of Jerusalem which he used as a backdrop for his RNC campaign video. This video is an egregious violation of the Hatch Act.

Secretary Pompeo's use of this site in Israel for his appearance at the RNC dovetails with statements made by President Trump himself who last week told a crowd of supporters at a campaign event that he had moved the U.S. embassy to Jerusalem "for the evangelicals."¹⁶² "It's amazing with that," Trump said, "The evangelicals are more excited about that than Jewish people."¹⁶³ Such campaign rhetoric, as distasteful as it is and implying that a U.S. embassy overseas was moved to appeal to a particular religious group inside the United States, is within the First Amendment rights of the president. The president is not personally constrained by the Hatch Act. But it is impermissible for the Secretary of State to continue delivering this partisan political message while on a diplomatic mission overseas. That is a violation of the Hatch Act.¹⁶⁴

To date the OSC has not responded to this request for an investigation of Secretary Pompeo's speech to the RNC.¹⁶⁵

D. President Trump

Most of the Hatch Act does not apply to the President.¹⁶⁶ One provision, however, the criminal provision of the Hatch Act, does apply to the President.¹⁶⁷ As previously noted 18 U.S.C. Section 610 provides that:

It shall be unlawful for any person to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government as defined in section 7322(1) of title 5, United States Code, to engage in, or not to engage in, any political activity, including, but not limited to, voting or refusing to

162. See Letter to the Office of Special Counsel from Claire O. Finkelstein & Richard W. Painter, *supra* note 154, at 2-3 (Aug. 26, 2020) (quoting Finnegan, *supra* note 158).

163. *Id.*

164. *Id.* at 3.

165. See also *OSC Opens Case File in Response to American Oversight's Pompeo Hatch Act Complaint*, AM. OVERSIGHT (Oct. 16, 2020), <https://www.americanoversight.org/american-oversight-call-s-for-urgent-investigation-into-whether-pompeo-is-ordering-state-department-employees-to-violate-the-law>. As of October 19, 2020, the OSC responded to a separate complaint and addressed that an investigation

166. *Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., <https://osc.gov/Services/Pages/HatchAct-Federal.aspx>.

167. See also 18 U.S.C.A. § 610 (1996). The scope of the statute applies to "any person."

vote for any candidate or measure in any election, making or refusing to make any political contribution, or working or refusing to work on behalf of any candidate. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.¹⁶⁸

I, again with Professor Finkelstein, filed a Hatch Act complaint against President Trump in October 2020.¹⁶⁹ This letter we sent to the public integrity unit of the Department of Justice requesting an investigation under 18 U.S.C. § 610.¹⁷⁰ This is a criminal statute and the investigation could be pursued—and if there was a violation by Trump or anyone else—an indictment could issue at any time within the statute of limitations.¹⁷¹

In our letter to DOJ we noted that:

The public record alone contains overwhelming evidence of instances in which President Trump has intimidated, threatened, commanded or coerced his subordinates in the executive branch to engage in partisan political activity on behalf of his reelection campaign, as well as other instances in which he has pressured federal employees to render assistance with his campaign. Nonpublic records likely contain further evidence that either personally or through his subordinates President Trump has applied such illegal pressure to employees of the executive branch who are covered by this provision of the Hatch Act.¹⁷²

With respect to pressure put on the Department of Justice we quoted news stories suggesting that the Attorney General is “weaponizing” the DOJ to assist with the President’s reelection campaign.¹⁷³ President Trump pressured Mr. Barr to investigate and prosecute his political opponents in both the 2016 election and the 2020 election, a point made clear in President Trump’s remarks on Fox Business with Maria Bartiromo on October 8, 2020.¹⁷⁴ The articles we cited included the following:

According to the *New York Times* in October 2020,

168. *Id.*

169. Letter from Claire O. Finkelstein and Richard W. Painter to DOJ 1 (Oct. 26, 2020).

170. *Id.*

171. 18 U.S.C.A. § 610 (1996).

172. Letter from Claire O. Finkelstein & Richard W. Painter to DOJ, *supra* note 169, at 1-2 [hereinafter “Finkelstein & Painter letter to DOJ”].

173. Peter Stone, *How William Barr is Weaponizing the Justice Department to Help Trump Win*, THE INTERCEPT (Aug. 29, 2020, 6:00 AM), <https://theintercept.com/2020/08/29/william-barr-trump-justice-department/>.

174. Factba.se, *Interview: Maria Bartiromo Interviews Donald Trump on Fox Business- October 8, 2020*, VIMEO (Oct. 8, 2020, 10:29 PM), <https://vimeo.com/466413086>.

President Trump forced the State Department on Friday to commit to releasing at least some of Hillary Clinton's emails before next month's election, resurrecting a four-year-old issue in hopes that it would prove as helpful to his political prospects as it was when he defeated her in 2016.

Trailing badly in the polls and eager to change the subject from the coronavirus, Mr. Trump succeeded in compelling Secretary of State Mike Pompeo to announce that he would make public the emails even as Attorney General William P. Barr resisted pressure from the president to prosecute Democrats like former Vice President Joseph R. Biden Jr., this year's Democratic nominee.¹⁷⁵

The Washington Post reported:

President Trump publicly pressured the Justice Department on Friday to move against his political adversaries and complained that Attorney General William P. Barr is not doing enough to deliver results of a probe into how the Obama administration investigated possible collusion between Russia and the 2016 Trump campaign.

The delayed report is 'a disgrace,' and Trump's 2016 Democratic opponent, Hillary Clinton, should be jailed, Trump said in a rambling radio interview, one day after he argued on Twitter that his current Democratic opponent, Joe Biden, is a criminal who should be barred from running.¹⁷⁶

The Hill reported:

The president complained at length about the lack of consequences for Hillary Clinton and other members of the Obama administration for the former's use of a private email server and the latter's involvement in launching an investigation into Russian interference in the 2016 election. . . . Trump turned his frustration toward Secretary of State Mike Pompeo and Attorney General William Barr, lamenting that they had not done enough to speed the process of implicating his political opponents.

175. Peter Baker et al., *Election Less Than a Month Away, Trump Leans on Barr and Pompeo for a Lift*, N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/10/09/us/politics/trump-clinton-emails-state-department.html?>

176. Anne Gearan et al., *Trump, Lagging in Polls, Pressures Justice Dept. to Target Democrats and Criticizes Barr*, WASH. POST (Oct. 9, 2020, 6:57 PM), https://www.washingtonpost.com/politics/trump-barr-durham-russia/2020/10/09/05ed9842-0a40-11eb-a166-dc429b380d10_story.html

‘To be honest, Bill Barr is going to go down as either the greatest attorney general in the history of the country or he’s going to go down as, you know, a very sad situation,’ Trump said. ‘I’ll be honest with you. He’s got all the information he needs. They want to get more, more, more. They keep getting more. I said, you don’t need any more.’¹⁷⁷

Even more worrisome was President Trump’s effort to turn the DOJ on federal employees who had been involved in the Russia investigation. As Professor Finkelstein and I noted in our letter to DOJ:

President Trump, has pressured Mr. Barr to investigate and prosecute individuals in the Obama Administration who began the investigation of Russian interference in the 2016 campaign and possible connections between his campaign and the Russians. President Trump’s pressure campaign on Mr. Barr appears to be visible from public remarks made by Mr. Barr on a number of occasions. Recent public disagreements between Mr. Trump and Mr. Barr with regard to the investigation of John Durham have made clear that the President tried to force the Attorney General’s hand to produce a report that would implicate individuals in the Obama intelligence community responsible for launching an investigation into Mr. Trump’s ties with Russia during the 2016 campaign. Mr. Trump has publicly pressured Mr. Barr to reach findings that would enable the Department of Justice to seek indictments against Obama-era intelligence officials. On the Rush Limbaugh show, for example, Trump said: “Unless Bill Barr indicts these people for crimes – the greatest political crimes in the history of our country – then we’re going to get little satisfaction unless I win. . . . But these people should be indicted, this was the greatest political crime in the history of our country. And that includes Obama and it includes Biden.”¹⁷⁸

Lastly, we mentioned the efforts of President Trump asking Mr. Barr to assist in his efforts to coerce the Ukrainian government into investigating Joe Biden and his son Hunter.¹⁷⁹ We also saw evidence that this same pattern has

177. Brett Samuels, *Trump Swipes at Barr, Pompeo, Wray in Return to Russia Investigation, Clinton Emails*, THE HILL (Oct. 8, 2020, 9:12 AM), <https://thehill.com/homenews/administration/520160-trump-swipes-at-barr-pompeo-wray-in-fox-business-interview>.

178. Finkelstein & Painter letter to DOJ, *supra* note 169, at 4 (citing Kevin Breuninger & Dan Mangan, *Trump Gets Angry When Told That Findings from Durham Probe Might Not Come Out Before Election*, CNBC (Oct. 9, 2020, 2:47 PM), <https://www.cnbc.com/2020/10/09/trump-fumes-when-told-durham-probe-findings-might-not-come-out-before-election-day.html>).

179. *Id.* at 5.

been repeated with regard to other foreign governments, such as Australia and Italy.¹⁸⁰ We noted that “[i]n September, 2019, for example, Donald Trump had William Barr fly to Italy to help substantiate reports that the FBI had improperly targeted members of the Trump campaign in 2016.”¹⁸¹ Multiple news outlets reported this trip was organized “with help from Trump himself,”¹⁸² “who had introduced Barr to the Italian prime minister and other ‘appropriate officials,’ as was described by a DOJ spokeswoman.”¹⁸³ Professor Finkelstein and I noted that:

It is worthy of note that the meeting that took place between William Barr and senior Italian intelligence officials was also attended by John Durham, following a conversation between President Trump and Prime Minister Giuseppe Conte on September 5, 2019.¹⁸⁴ Although these events pertain to Mr. Trump’s 2016 presidential campaign, this advocacy on the Trump campaign’s behalf is political activity in 2020. President Trump is using much of the same campaign infrastructure he had in 2016 and most important, the entire point of the counter investigations is to put spin on what happened in 2016 as a way to message to voters in 2016. When President Trump puts pressure on federal employees to pursue these investigations on behalf of his own campaign he violates 18 U.S. Code § 610.¹⁸⁵

Next Professor Finkelstein and I turned to Secretary of State Mike Pompeo who was the subject of the Hatch Act complaint we had filed with OSC two months earlier in August of 2020.¹⁸⁶ Pompeo was apparently under similar pressure from Trump and said that he expected the State Department will release more of Hillary Clinton’s emails:¹⁸⁷

“We’ve got the emails, we’re getting them out. We’re going to get all this information out so the American people can see it. . . . We’re doing it as fast as we can. I certainly think there’ll be more to see

180. *Id.*; Mike Levine, *Why Has AG Barr Enlisted Italy and Australia to Review the Origins of the Russia Probe?*, ABC NEWS (Oct. 1, 2019, 5:01 PM), <https://abcnews.go.com/Politics/ag-barr-enlisted-italy-australia-review-origins-russia/story?id=65979014>.

181. Finkelstein & Painter letter to DOJ, *supra* note 169, at 5.

182. *Id.* (quoting Levine, *supra* note 180).

183. *Id.*

184. *Id.* (referencing Alexander Mallin & Jonathan Karl, *Barr Asked Trump for Introductions to Italy, Australia in Russia Probe Review*, ABC NEWS (Sept. 30, 2019, 8:45 PM)), <https://abcnews.go.com/Politics/barr-asked-trump-introductions-australia-italy-review-russia/story?id=65964849>.

185. *Id.*

186. Finkelstein & Painter letter to DOJ, *supra* note 169, at 7.

187. *Id.* at 8.

before the election, ’=’ Secretary Pompeo added when pressed about the timing in an interview with Fox News’ Dana Perino.¹⁸⁸

President Trump had publicly castigated Pompeo for not releasing the emails before the election:

They’re in the State Department, but Mike Pompeo has been unable to get them out, which is very sad, actually . . . I’m not happy about him for that reason. He was unable to get them out. I don’t know why. You’re running the State Department, you get them out.¹⁸⁹

Based on this evidence Professor Finkelstein and I concluded that “It is probable—indeed highly likely—that President Trump did command or coerce Secretary Pompeo into these violations of the Hatch Act.”¹⁹⁰

We next mentioned Postmaster General Louis DeJoy who also likely was pressured by Trump in connection with mail in voting.¹⁹¹ On September 14, 2020, I testified before the Operations subcommittee of the United States House of Representatives Oversight Committee on the conduct of Mr. DeJoy.¹⁹² Professor Finkelstein and I also submitted a detailed letter regarding the conduct of Mr. DeJoy,¹⁹³ including what we believed were Mr. DeJoy’s efforts to interfere with mail in voting by making fundamental changes at the United States Postal Service that degraded mail service in the months leading up to the election.¹⁹⁴ Even if delivery of most mail in ballots was not significantly delayed, DeJoy’s changes at the Postal Service months before the election may have been intended to discourage voters from using mail in voting.¹⁹⁵

Professor Finkelstein and I concluded in our letter to DOJ:

It is probable—indeed highly likely—that President Trump did command or coerce Postmaster General DeJoy into these violations of the Hatch Act. Your office should investigate these and any other

188. *Id.* (quoting Tal Axelrod, Pompeo Says He Expects More Clinton Emails to be Released Before Election, THE HILL (Oct. 9, 2020, 5:04 PM), <https://thehill.com/homenews/administration/520426-pompeo-says-he-expects-more-clinton-emails-to-be-released-before>).

189. Samuels, *supra* note 177. *See also* Letter from Claire Finkelstein & Richard Painter to DOJ, *supra* note 169, at 8.

190. *Id.*

191. *Id.* at 9.

192. *Hearing on the United States Postal Service under Postmaster Louis DeJoy Before the Subcomm. on Government Operations of the Comm. on Oversight and Reform*, 116th Cong. 16 (2020), (oral testimony and written statement of Richard W. Painter) September 14, 2020.

193. Letter from Claire Finkelstein and Richard Painter to the U.S. H. Rep. Comm. on Oversight and Government Reform, Subcomm. on Operations 1 (Sept. 13, 2020) [hereinafter “Finkelstein and Painter Letter to U.S. H. Rep.”].

194. *Id.* at 6.

195. *Id.*; Letter from Finkelstein & Painter to DOJ, *supra* note 169, at 8.

instances in which President Trump pressured Mr. DeJoy to engage in partisan political activity.¹⁹⁶

Finally, turning full circle back the F.B.I. which had been instrumental in securing Trump's 2016 electoral win, 2020 brought renewed pressure on the FBI.¹⁹⁷ This time, the pressure came, not as much from the Congressional Republicans who had pressured Director James Comey to update them on the Clinton email investigation, but from President Trump who in 2017 had already made use of his power to fire the Director of the FBI.¹⁹⁸ The new F.B.I. Director Chris Wray was attacked by Trump "for what they believe is slow-walking efforts to find wrongdoing in the Obama administration."¹⁹⁹ As Bloomberg reported:

FBI Director Christopher Wray has no plans to resign, a bureau official said, as President Donald Trump and his supporters step up demands for the release of sensitive files that they say will show "spying" on Trump's 2016 campaign. . . . With Trump falling behind Democrat Joe Biden in polls ahead of the Nov. 3 election, the president and his political allies have renewed criticism of the Federal Bureau of Investigation as being too slow to release information that they say will show anti-Trump bias in its investigation into whether Trump or any of his associates conspired with Russia to interfere in the 2016 election.²⁰⁰

According to CNN's reporting on an interview of President Trump by Fox Business host Maria Bartiromo:

Trump railed against Wray, who he said should provide more documents to John Durham, who was tapped by Barr to lead the review into the origins of the Russia investigation.

"So Christopher Wray was put there. We have an election coming up. I wish he was more forthcoming, he certainly hasn't been. There are documents that they want to get, and we have said we want to get. We're going to find out if he's going to give those documents. But

196. *Id.*

197. *See id.* at 9.

198. Letter from Finkelstein & Painter to DOJ, *supra* note 169, at 9 (noting that "[Wray] has no plans to resign his post despite the president's efforts.")

199. *Id.* (quoting Samuels, *supra* note 177).

200. Chris Strohm, *FBI's Wray Has No Plans to Quit as Trump Pressures the Bureau*, BLOOMBERG (Oct. 7, 2020, 10:40 AM), <https://www.bloomberg.com/news/articles/2020-10-07/fbi-s-wray-has-no-plans-to-quit-as-trump-pressures-the-bureau>.

certainly he’s been very, very protective,” the President said on Fox Business.²⁰¹

The *Washington Post* reported that President Trump and his advisors “have repeatedly discussed whether to fire FBI Director Christopher A. Wray after Election Day” because “federal law enforcement has not delivered his campaign the kind of last-minute boost that the FBI provided in 2016.”²⁰² According to the *Post*:

The conversations among the president and senior aides stem in part from their disappointment that Wray in particular but Barr as well have not done what Trump had hoped — indicate that Democratic presidential candidate Joe Biden, his son Hunter Biden or other Biden associates are under investigation, these people say . . .

In the campaign’s closing weeks, the president has intensified public calls for jailing his challenger, much as he did for Hillary Clinton, his opponent in 2016. Trump has called Biden a “criminal” without articulating what laws he believes the former vice president has broken. People familiar with the discussions say Trump wants official action similar to the announcement made 11 days before the last presidential election by then-FBI Director James B. Comey, who informed Congress he had reopened an investigation into Clinton’s use of a private email server while she was secretary of state after potential new evidence had been discovered.²⁰³

Again, based on these reports recited in our letter to DOJ Professor Finkelstein and I concluded that “It is probable—indeed highly likely—that President Trump has commanded or attempted to coerce Director Wray into violations of the Hatch Act.”²⁰⁴

The Department of Justice has not yet responded to our request for an investigation of these alleged violations of the criminal provisions of the Hatch Act. Lurking behind any such investigations is the strong version of the unitary executive theory which interprets Article II of the Constitution to preclude application of criminal laws to most if not all acts of a President in

201. Betsy Klein & Evan Perez, *Trump Goes After FBI Director Wray, Whom He Appointed, and Issues Warning to Barr*, CNN (Aug. 14, 2020, 6:33 AM), <https://www.cnn.com/2020/08/13/politics/trump-bill-barr-chris-wray/index.html>.

202. Devlin Barrett & Josh Dawsey, *Trump Weighs Firing FBI Director after Election as Frustration with Wray, Barr Grows*, THE WASH. POST (Oct. 21, 2020, 7:34 PM), https://www.washingtonpost.com/national-security/trump-wray-biden-barr/2020/10/21/6ce69f02-13b0-11eb-ad6f-36c93e6e94fb_story.html.

203. *Id.*

204. Finkelstein & Painter letter to DOJ, *supra* note 169, at 11.

his official capacity.²⁰⁵ As Professor Finkelstein and I explain elsewhere, such an interpretation of Article II implies a constitutional intent to install a lawless, even a criminal, President who can, among other things, violate the Hatch Act or commit other crimes to assure his own reelection.²⁰⁶

THE SCOPE OF THE HATCH ACT

In view of the OSC's disposition of my June 2020 complaint against Attorney General Barr, there is a good chance that OSC will not seek to apply the Hatch Act broadly.²⁰⁷ OSC thus far has not applied the Hatch Act to a wide range of official capacity actions that could easily influence partisan elections but that also ostensibly have a governmental purpose.²⁰⁸ This could include the F.B.I. Director complying with a request from Congressional Republicans to update Congress promptly on an investigation of the Democratic candidate for president;²⁰⁹ an Attorney General ordering federal forces to beat up peaceful protesters who refuse to comply with his orders to clear a public park to allow the President to attend a political photo opportunity;²¹⁰ a Secretary of State combining an official diplomatic trip to the Middle East with a "personal capacity" campaign video for the political party convention where the President is nominated for a second term;²¹¹ or a President who uses the power of his office to order his subordinates to engage in partisan political activity including but not limited to all of the forgoing.²¹² Such is the subject matter of the Hatch Act complaints I have filed, two alone and two with Professor Finkelstein, from 2016 through 2020.²¹³ It remains to be seen whether OSC or DOJ in the case of the criminal provisions of the Hatch Act will seek to apply the Hatch Act's statutory language to any of these scenarios.

205. See Claire O. Finkelstein and Richard W. Painter, *Presidential Accountability and the Rule of Law: Can the President Claim Immunity If He Shoots Someone on Fifth Avenue?* (July 3, 2021), University of Pennsylvania Journal of Constitutional Law, Vol. 24, No. 1, 2021, Available at SSRN: <https://ssrn.com/abstract=3879702>.

206. See generally Finkelstein & Painter letter to DOJ, *supra* note 170, at 1.

207. See Ctr. for Ethics and the Rule of L., *Report on the Department of Justice and the Rule of Law Under the Tenure of Attorney General William Barr*, UNIV. OF PA. 146 (Oct. 12, 2020), <https://www.law.u-penn.edu/live/files/10900-report-on-the-doj-and-the-rule-of-law>.

208. See generally Finkelstein & Painter Letter to DOJ, *supra* note 169, at 11.

209. *Id.*

210. *Id.* at 2.

211. Finnegan, *supra* note 158.

212. Finkelstein & Painter letter to DOJ, *supra* note 169, at 12.

213. See also Painter Letter to Kerner & Rounds, *supra* note 135, at III (June 15, 2020); Finkelstein & Painter Letter to DOJ, *supra* note 169, at 12; Claire O. Finkelstein & Richard W. Painter, *Pompeo's Unlawful RNC Speech for Trump Should Alarm All Americans*, NEWSWEEK (Sept. 2, 2020, 2:20 PM), <https://www.newsweek.com/pompeos-unlawful-rnc-speech-trump-should-alarm-all-americans-opinion-1529264>.

As discussed earlier in this essay, application of the Hatch Act to these scenarios may run into additional difficulty if the actions are undertaken on the President's orders.²¹⁴ Here OSC and DOJ confront arguments that application of the statute conflicts with the President's executive authority set forth in Article II of the Constitution.²¹⁵ Such an interpretation of Article II is aligned only with the strongest and most extreme iterations of unitary executive theory, and I believe they are probably wrong. But there is always the risk that OSC and DOJ, both executive branch agencies that report to the President, might seek to avoid this constitutional question by not enforcing the Hatch Act in cases where presidential orders are involved.²¹⁶

Still, this result puts us back where we started. If the Hatch Act cannot be interpreted to prohibit any of these actions, has it served its intended purpose? Are we at risk of a President and persons working for a President injecting partisan politics into executive branch functions so aggressively that Article II power for practical purposes can be used to perpetuate a presidency for eight years and then extend the influence of the President's political party for a lengthy period thereafter?²¹⁷ Such was not the intent of the drafters of the Hatch Act in 1939,²¹⁸ and going back to the Founding, such perpetuation of presidential power probably was not the intent of the drafters of Article II of the Constitution.²¹⁹ I do not propose a remedy to this problem in this lecture, but I emphasize that it is a serious problem and one that could threaten the balance of power in our representative democracy.²²⁰

CONCLUSION

The three Hatch Act complaints I have filed with OSC since 2016, and the one that I have filed with the Department of Justice, share a common element—the blending of official capacity functions with partisan politics in situations where it is extremely difficult to find a legitimate federal policy objective for official actions that have the predictable or intended effect of influencing a partisan election.²²¹ OSC made its determination on the facts, about which I disagree, on one of these complaints against Attorney General

214. *See supra*.

215. *See generally* YOO, *supra* note 70. Yoo does not specifically juxtapose the Hatch Act to Article II, but his broad vision of presidential power is inconsistent with an interpretation of the Hatch Act that would constrain that power.

216. *Id.*

217. *See Pompeo's Unlawful RNC Speech for Trump*, *supra* note 215.

218. *Id.*

219. *See also Vance*, 140 S.Ct. at 2431.

220. *See supra*.

221. *See Painter Letter to Kerner & Rounds*, *supra* note 135, at III; *Finkelstein & Painter Letter to DOJ*, *supra* note 169, at 7; *Pompeo's Unlawful RNC Speech for Trump*, *supra* note 213.

Barr.²²² OSC dismissed the complaint against former F.B.I Director Comey as moot because he had left federal service,²²³ and OSC has not yet ruled on the complaint against Secretary Pompeo.²²⁴ DOJ has not yet made its determination about the criminal Hatch Act complaint against former President Trump.

It is difficult to discern how much of this problem is with enforcement of the Hatch Act—i.e. unwillingness of OSC to find a violation in circumstances where difficult determinations need to be made separating out official policy decisions from the political motivations that are behind them. When is a partisan political motivation a sufficiently dominant or even exclusive factor in an official action to find a violation of the Hatch Act? What conceivable nonpolitical reasons for official action can be advanced that will negate a Hatch Act violation? Rather than articulate a test for distinguishing the most extreme examples of official action motivated by partisan politics from most government actions that do not violate the Hatch Act, OSC may eschew enforcement in this context altogether. Alternatively, OSC could genuinely believe that the only correct interpretation of the Hatch Act is that no official action can violate the Hatch Act; that it is only the use of government office or resources for a purely political act that is a violation. The FBI Director endorsing a presidential candidate in an official speech violates the Hatch Act, because the endorsement is a purely political act and is not official, but the FBI Director sending to Congress an official letter announcing a criminal investigation of a presidential candidate a week before the election does not violate the Act, regardless of the motives for doing so and regardless of the anticipated impact on the election. If OSC so interprets the text of the Hatch Act, an extremely narrow interpretation of the seemingly broad text, OSC has yet to say so.

If the existing Hatch Act language cannot be applied to these situations, legislative revisions are in order. Congress needs to amend the Hatch Act or enact another law prohibiting White House staff, cabinet officials, and other presidential appointees from engaging in partisan political activity while in office even if they purport to do so in their “personal capacity.”²²⁵ This prohibition should distance these officials from campaign operatives who otherwise could encourage them to abuse their offices for partisan purposes.

222. Newsroom, *An Ethics Complaint Against Bill Barr Was Rejected, and It Has Lawyers Worried*, FORDHAM LAW NEWS (June 10, 2021), <https://news.law.fordham.edu/blog/2021/06/10/an-ethics-complaint-against-bill-barr-was-rejected-and-it-has-lawyers-worried/>.

223. See Dinan, *supra* note 27. “The OSC investigation was cut short by [Comey’s] firing, since the office doesn’t probe people once they’re out of government.”

224. See *OSC Opens Case File*, *supra* note 165.

225. Painter, *supra* note 9.

The law also needs to more precisely define when “official capacity” actions by presidential appointees are deemed to be so partisan that they are prohibited—the legal test I recommend is that an official capacity action should be prohibited if there is no reasonable policy justification for that action *and* the action also is closely connected to someone’s intent to influence the election.²²⁶ By “reasonable policy justification” I do not mean a justification that is correct or even a justification that most people believe to be a good one. A president who has promised in his campaign to build a wall on our southern border to stop illegal immigration can make good on that promise before the next campaign, even if most immigration experts believe the wall will do little to stop illegal immigration or is too expensive compared with other means. The test instead is whether any reasonable person could accept the justification for the official act on policy grounds. On the other hand, a policy decision that has no reasonable justification on policy grounds fails the test. I believe that the actions of Comey in 2016 and Barr in 2020 would fail this test (OSC and I disagree on the facts about the clearing of Lafayette Park and OSC did not address the other facts alleged in my letter concerning Barr’s decisions with respect to specific prosecutions).²²⁷ The second requirement is that the official act also be connected to someone’s intent to influence a partisan election. This intent can be that of the government official taking the action or the intent of another person. For example, even if FBI Director Comey did not care who won the 2016 election, if he acted under pressure from Members of Congress who did want to influence the election, and his letter to Congress about Clinton’s email had no reasonable policy justification, he violated the Act. Even if an Attorney General does not intend to influence an election in making a prosecutorial decision, if he engages in an official act with no reasonable policy justification under orders from a President who wants the Attorney General to do so in order to influence the election, the Attorney General violates the Act.

DOJ furthermore needs to clarify whether criminal provisions of the Hatch Act that prohibit coercing political activity from federal employees apply to everyone, including the President. The notion that Article II powers of the President include the power to order his subordinates to work for his political campaign should be rejected as incompatible with principles of representative democracy. Although I do not address the constitutional question here, I believe that vesting the President with the power to

226. *See supra*.

227. Secretary of State Pompeo’s speech in Jerusalem was a purely political act that should be subject to a more conventional Hatch Act analysis premised on how closely connected it was to Pompeo’s official capacity diplomatic mission.

commandeer the executive branch for service to his political campaign is also incompatible with the text and meaning of the Constitution.

Finally, as important as what the legal rules are is the question of whether legal rules, whatever they are, are enforced. OSC and DOJ need to make it clear that they are willing to enforce the Hatch Act. The White House should announce that administration officials found to have violated the Hatch Act in any substantial manner will be dismissed. The Biden Administration has an opportunity to set a different tone with regard to inappropriate and illegal mixture of politics and state, and to explain (publicly if possible) how they see the Hatch Act restrictions impacting public service in the Executive Branch. That would go a long way towards breathing new life into the Hatch Act, and the rule of law generally, at least in practice.