

Note

Yes We Can . . . Fire You for Sending Political E-mails: A Proposal to Update the Hatch Act for the Twenty-First Century

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Introduction

Imagine yourself in the following situation:¹ The date is October 26, 2008, and the country is in the midst of a heated election between John McCain and Barack Obama. You are sitting in your office at the Department of Labor writing a press release. While you are working, a new e-mail pops up in your inbox. You open it and, not surprisingly, the e-mail is from Bill, a friend and coworker of yours with whom you frequently discuss politics. Bill, an unabashed Democrat, prefaced the message by writing, “some things to ponder,” and inserted a statement by Colin Powell expressing support for Obama. You find this amusing because earlier that day you told Bill that “no self-respecting Republican would ever support Obama.” You proceed to send an e-mail of your own to Bill and a few other coworkers, attaching a picture of John McCain with the words “COUNTRY FIRST” inscribed on it.

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¹ This hypothetical is based on the facts of *Special Counsel v. Sims*, 102 M.S.P.R. 288 (2006).

A few weeks later, you and Bill find yourselves embroiled in an investigation being conducted by the Office of Special Counsel (“OSC”). Unbeknownst to both of you, your seemingly innocuous e-mail exchange is actually considered prohibited political activity under the Hatch Act. You are informed that the OSC intends to prosecute both of you, and that the default punishment for violating the Act is removal. At this point you ask yourself: What kind of law is this?

The Hatch Act is a federal law that restricts the political activities of public employees.² Specifically, it prohibits employees from engaging in political activity while they are on duty or in a government building.³ Although it was originally enacted in 1939 to prevent serious abuses of authority within the government workforce, in modern application, it has been strictly enforced against employees who engage in political discussion via e-mail.⁴ This strict enforcement is due in part to the relatively recent advent of the Internet, which has broadened the application of the statute in a way that Congress could not have anticipated when it last amended the Act in 1993.⁵ The problem is further exacerbated by ambiguous language within the statute itself.⁶ Consequently, many employees who have engaged in trivial or isolated instances of on-duty political expression have been prosecuted under the Act.⁷ Thereafter, these employees are either removed pursuant to the default penalty for violating the Act or suspended without pay for a substantial period of time.⁸

The current enforcement of the Hatch Act is problematic for two primary reasons. First, it chills the protected First Amendment speech of public employees. To be sure, the combination of harsh penalties, vague and conflicting standards, and overzealous prosecutorial efforts has undoubtedly deterred government employees from exercising their rights. Second, it does not meaningfully further, and in some ways is inconsistent with, the policy goals Congress sought to achieve by enacting the law.

² The Hatch Act, 5 U.S.C. §§ 7321–7326 (2006). For the purposes of this Note, the term “public employee” will refer to all government employees—both federal and state—who are covered by the Act.

³ *Id.* § 7324.

⁴ See *infra* Part II.B; see also *Sims*, 102 M.S.P.R. at 290; *Special Counsel v. Wilkinson*, 104 M.S.P.R. 253, 255 (2006).

⁵ Hatch Act Reform Amendments, Pub. L. No. 103-94, 107 Stat. 1001 (1993).

⁶ See *infra* Part I.C (discussing how the Act permits the expression of political opinions, but prohibits on-duty political activity, without explaining how to differentiate between these two types of conduct).

⁷ See *infra* Part I.C; see also *Sims*, 102 M.S.P.R. at 290; *Wilkinson*, 104 M.S.P.R. at 255.

⁸ See 5 U.S.C. § 7326.

The recent transition to the new presidential administration presents an ideal opportunity to implement new policies and legislative initiatives. Regrettably, the previous Administration's enforcement of the Hatch Act has proven to be demonstrably inconsistent with both the spirit and the letter of the law. With these considerations in mind, this Note proposes that the Hatch Act be amended to (1) permit casual political discourse, either verbal or electronic, in the workplace, and (2) reform the default removal penalty provision.

Part I of this Note discusses the pertinent history of the Hatch Act, its current provisions, and the agencies that enforce and adjudicate Hatch Act violations. Additionally, Part I examines three different approaches taken in response to the widespread use of the Internet and e-mail in the government workplace. Part II identifies the problems with the current enforcement of the Hatch Act. First, it explains how the Internet has fundamentally changed the modern workplace. Second, it discusses the implications of the Act's current enforcement, such as the chilling of protected speech and the failure to meaningfully further congressional objectives. Finally, it argues that the realities of the government workplace make an absolute ban on political discussion unworkable. Part III proposes that Congress amend the Hatch Act by permitting on-duty political discussion and reforming the Act's penalty provision. And in order to illustrate the scope of this proposal, Part III applies the proposed amendments to the facts of two cases explored in Part I of the Note.

I. Overview of the Hatch Act

The Hatch Act was enacted during a time when corruption and political coercion were pervasive problems in the American civil service.⁹ Since that time, although the Act's restrictions on public employees' on-duty political activity have essentially remained the same, the Internet and technology have fundamentally changed the government workplace.¹⁰ As a result, the agencies that enforce the Hatch Act have had difficulty reconciling the law's blanket restrictions on political activity with the nuances of Internet use and have, accordingly, adopted varying approaches to address this modern problem.¹¹

⁹ Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 231 (2005).

¹⁰ See *infra* Part II.A.

¹¹ See *infra* Part I.C.

A. *Origins of the Act*

The Hatch Act has historical roots that can be traced back to the Founding Fathers. Indeed, George Washington was wary of the politicization of the civil service.¹² Thomas Jefferson, who is credited for having first articulated the doctrine of political neutrality in the federal workforce,¹³ shared Washington's concerns and was opposed to government officers being involved in partisan political activities.¹⁴ He condemned such conduct as being "inconsistent with the spirit of the Constitution and [government officers'] duties to it."¹⁵ Shortly after his inauguration, Jefferson had his department heads instruct their employees not to "attempt to influence the votes of others nor take any part in the business of electioneering."¹⁶

The Founders' worries became an unfortunate reality in the mid-twentieth century, when politically infused coercion and corruption became a systematic problem in the government workforce.¹⁷ Congressional investigations revealed that federal funds appropriated for New Deal programs were being improperly diverted by state and local branches of the major political parties.¹⁸ Additionally, federal employees were using their authority to extort political contributions from their subordinates.¹⁹

It was against this backdrop that Congress enacted the Hatch Act in 1939.²⁰ The Act, named after longtime civil service reform advocate Senator Carl Hatch, originally prohibited federal employees²¹ from engaging in the following activities: using official authority for the pur-

¹² Bloch, *supra* note 9, at 229.

¹³ Robert G. Vaughn, *Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond*, 44 GEO. WASH. L. REV. 516, 517 (1976).

¹⁴ See 10 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 98–99 (1897).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See, e.g., *Bauers v. Cornett*, 865 F.2d 1517, 1520–21 (8th Cir. 1989) (explaining that the Hatch Act was passed to address widespread "political party corruption and coercion perpetrated by . . . state and local government employees"); 84 CONG. REC. H9602–03 (daily ed. July 20, 1939) (statement of Rep. Rees) (criticizing the misuse of federal funds intended for relief).

¹⁸ *Bauers*, 865 F.2d at 1521.

¹⁹ See 84 CONG. REC. H9598–99 (daily ed. July 20, 1939) (statement of Rep. Taylor) (discussing Works Progress Administration superintendent who demanded political contributions from his workers, "[e]ven destitute women on sewing projects").

²⁰ Bloch, *supra* note 9, at 231.

²¹ In 1940, the Hatch Act was extended to state and local employees who receive significant federal funding. *Id.* at 233.

pose of interfering with an election,²² coercing votes,²³ and “promis[ing] any employment, position, work, compensation, or other benefit . . . to any person as consideration, favor or reward for any political activity.”²⁴ Even though the Hatch Act has been amended numerous times since 1939,²⁵ these core restrictions have essentially remained unaltered.²⁶

B. *Current Provisions and Agencies Responsible for Enforcing the Act*

Under § 7234(a) of the Hatch Act, public employees are prohibited from engaging in political activity while they are on duty or in a government building.²⁷ Although the term “political activity” is not defined in the Act, the Office of Personnel Management (“OPM”) has defined it by administrative regulation as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”²⁸ Advocacy for a political *issue* (e.g., antiwar discussion) that is not directed toward the success or failure of a political party, candidate, or group is not considered “political activity.”²⁹

Importantly, the Act does not broadly forbid public employees from engaging in *all* political discourse. To the contrary, § 7323(c) explicitly states: “An employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates.”³⁰ The Act further provides at § 7321 that “it is the policy of the Congress

²² An Act to Prevent Pernicious Political Activities (Hatch Act), Pub. L. No. 76-252, § 2, 53 Stat. 1147, 1147 (1939).

²³ *Id.* § 1.

²⁴ *Id.* § 3.

²⁵ *See, e.g.*, Act of July 19, 1940, ch. 640, Pub. L. No. 76-753, 54 Stat. 767 (1940); Act of Aug. 25, 1950, ch. 784, Pub. L. No. 81-732, 64 Stat. 475 (1950) (codified as amended at 5 U.S.C. § 7326); Act of Oct. 5, 1962, Pub. L. No. 87-753, 76 Stat. 750 (1962); Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (1993) (codified at 5 U.S.C. §§ 7321–7326).

²⁶ *See* Bloch, *supra* note 9, at 231–36 (observing that many of the original provisions of the Hatch Act have remained intact).

²⁷ The Act in pertinent part provides: “An employee may not engage in political activity— (1) while the employee is on duty; [or] (2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof.” 5 U.S.C. § 7324(a)(1)–(2).

²⁸ 5 C.F.R. § 734.101 (2004).

²⁹ *The Perils of Politics in Government: A Review of the Scope and Enforcement of the Hatch Act: Hearing Before the Subcomm. on Oversight of Government Management, the Fed. Workforce, and the District of Columbia of the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. 7 (2007) [hereinafter *Hearing*] (testimony of Ana Galindo-Marrone, Chief, Hatch Act Unit, U.S. Office of Special Counsel).

³⁰ 5 U.S.C. § 7323(c).

that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation.”³¹ But, as this Note discusses below, it is unclear whether §§ 7323(c) and 7321 apply to on-duty conduct as well as off-duty conduct.³² Furthermore, assuming the provisions do apply to on-duty conduct, the distinction between the permissible expression of a political opinion under § 7323(c) and prohibited on-duty political activity under § 7324(a) is a blurry line that has never been drawn with precision.³³

There are two agencies responsible for the enforcement of the Hatch Act and the adjudication of alleged violations. The Office of Special Counsel (“OSC”) “provides advisory opinions on the Hatch Act in response to inquiries, investigates allegations of violations, and presents complaints of violations of the Hatch Act to the Board.”³⁴ The Merit Systems Protection Board (“MSPB”) hears complaints of Hatch Act violations brought by the OSC and determines the penalties for violations of the Act.³⁵

With regard to the procedural requirements for Hatch Act adjudications, complaints are initially heard by an administrative law judge (“ALJ”), and the ALJ’s decision can be appealed to the full MSPB.³⁶ The respondent-employee “has a right to answer the complaint, to be represented, to a hearing, and to a written decision.”³⁷ The Federal Circuit has jurisdiction to hear federal employees’ appeals from MSPB decisions,³⁸ and an appropriate U.S. District Court reviews MSPB decisions involving state and local employees.³⁹

Under the Act’s penalty provision, found at § 7326, the default punishment for a Hatch Act violation is termination of employment.⁴⁰ And because the law has no warning mechanism, one violation is technically enough to justify removal.⁴¹ The MSPB does, however, have

³¹ *Id.* § 7321.

³² *See infra* Part I.C.

³³ *See infra* Part I.C.

³⁴ Bloch, *supra* note 9, at 236–37.

³⁵ *Id.* The MSPB consists of three members appointed by the president. *Id.*

³⁶ *Hearing, supra* note 29, at 33–34 (statement of B. Chad Bungard, General Counsel, U.S. Merit Systems Protection Board).

³⁷ *Id.*

³⁸ 5 U.S.C. § 7703(b)(1) (2006).

³⁹ *Hearing, supra* note 29, at 35 (statement of B. Chad Bungard, General Counsel, U.S. Merit Systems Protection Board).

⁴⁰ 5 U.S.C. § 7326.

⁴¹ *See id.*

some discretion in determining an appropriate punishment.⁴² If the MSPB “finds by *unanimous* vote that the violation does not warrant removal,” the employee instead will be suspended without pay for no less than thirty days.⁴³ When deciding whether to mitigate the default removal penalty, the MSPB considers the following six factors:

[1] the nature of the offense and the extent of the employee’s participation; [2] the employee’s motive and intent; [3] whether the employee received the advice of counsel regarding the activity that violated the Hatch Act; [4] whether the employee ceased the activities in question; [5] the employee’s past employment record; and [6] the “political coloring” of the employee’s activities.⁴⁴

C. *Restrictions on Internet Activity*

The Hatch Act’s restrictions on Internet activity have never been clearly articulated. This is the case for three reasons. First and foremost, because the law was last amended in 1993,⁴⁵ before the Internet and e-mail came into common use,⁴⁶ there is no provision of the Act specifically addressing Internet use in the workplace.⁴⁷ Second, while § 7323(c) of the Act *permits* the expression of political opinions, § 7324(a) *prohibits* on-duty political activity, and the law provides no method to differentiate between these two types of conduct.⁴⁸ Third, it is unclear whether the right to express political opinions is limited exclusively to off-duty expressions, or whether it applies to on-duty expressions as well.⁴⁹ Even former Special Counsel Scott Bloch⁵⁰—who was sharply criticized for aggressively pursuing e-mail Hatch Act violations⁵¹—has acknowledged that the Act’s restrictions on Internet

⁴² *Id.*

⁴³ *Id.* (emphasis added).

⁴⁴ Special Counsel v. Collier, 101 M.S.P.R. 391, 393 (2006).

⁴⁵ Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (1993); see also Bloch, *supra* note 9, at 234–36.

⁴⁶ See *infra* Part II.A.

⁴⁷ See 5 U.S.C. §§ 7321–7326; see also *infra* note 101 and accompanying text.

⁴⁸ See *id.*

⁴⁹ See *id.* §§ 7323–7324.

⁵⁰ Bloch resigned from his role as Special Counsel on October 23, 2008, under intense pressure from White House officials. Carrie Johnson, *Special Counsel Bloch Resigns Under Pressure*, WASH. POST, Oct. 24, 2008, at A17. Bloch was accused of, among other things, exhibiting improper political bias, *id.*, and retaliating against OSC employee-whistleblowers who opposed his refusal to prosecute cases of alleged discrimination against homosexuals. Dan Friedman, *OSC Chief Announces He Will Resign On Jan. 5*, GOV’T EXECUTIVE, Oct. 20, 2008, available at http://www.govexec.com/story_page.cfm?filepath/dailyfed/1008/102008cdpm3.htm.

⁵¹ See Daniel Pulliam, *The Perils of Political E-Mails*, GOV’T EXECUTIVE, Jan. 20, 2006,

use can create confusion.⁵² Because of this lack of clear statutory guidance, both the OSC and the MSPB have adopted varying interpretations of the Act's restrictions on Internet activity.

1. *The OSC's Two Standards*

In May of 2002, the OSC released an advisory opinion addressing Internet use in the workplace, promulgating what is now known as the "water-cooler rule."⁵³ Under this rule, "[e]-mail directed at the success or failure of a partisan candidate or party is permitted in the same manner that 'water-cooler' discussions are permitted under the Act."⁵⁴ In other words, if the message expresses the sender's personal opinion about a political candidate and the audience for the message is a small group of colleagues with whom the sender might otherwise engage in casual conversation, "an e-mail message could be considered [a] substitute for a permissible face-to-face expression of a personal opinion."⁵⁵ When the OSC operated under this view, "[o]nly messages used for formal campaign activities—akin to leafleting—[were] prosecutable."⁵⁶ With the adoption of the water-cooler rule, the OSC implicitly acknowledged that § 7323(c) of the Act protects on- and off-duty expressions of political opinions.

In March of 2007, the OSC rescinded the water-cooler advisory opinion⁵⁷ and adopted an absolutist approach to Internet political activity.⁵⁸ Former Special Counsel Scott Bloch succinctly described this bright line standard, stating that "no political activity means no politi-

available at <http://www.govexec.com/dailyfed/0106/0120061b.htm> (statement of former Special Counsel Elaine Kaplan criticizing Special Counsel Scott Bloch for creating "an atmosphere of fear of expressing political views" by targeting employees for doing no more than "exchanging dopey e-mails with their colleagues").

⁵² Bloch, *supra* note 9, at 244 (observing that "[t]he use of e-mail to campaign in support of or in opposition to a partisan candidate or group can *blur the line* between protected expression of an individual's opinion and prohibited on-duty political activity" (emphasis added)).

⁵³ William E. Reukauf, Associate Special Counsel, U.S. Office of Special Counsel, Federal Hatch Act Advisory: Use of Electronic Messaging Devices to Engage in Political Activity (May 30, 2002), <http://www.osc.gov/documents/hatchact/federal/fha-29.htm> [hereinafter Water Cooler Advisory Opinion].

⁵⁴ Bloch, *supra* note 9, at 245.

⁵⁵ *Hearing*, *supra* note 29, at 12 (testimony of Colleen M. Kelley, National President, National Treasury Employees Union).

⁵⁶ Pulliam, *supra* note 51 (statement of former Special Counsel, and Scott Bloch's predecessor, Elaine Kaplan).

⁵⁷ *Hearing*, *supra* note 29, at 4.

⁵⁸ Press Release, Office of Special Counsel, OSC Removes Hatch Act Advisory For 'Water Cooler' Political Email (Mar. 14, 2007), available at http://www.osc.gov/documents/press/2007/pr07_06.htm [hereinafter Press Release].

cal activity, regardless of the specific technology used.”⁵⁹ The OSC further implied that § 7323(c) only authorizes employees to express opinions on political subjects and candidates while off-duty.⁶⁰ Notably, this view is not limited to former Special Counsel Bloch, as the OSC’s Deputy Special Counsel has maintained that no water-cooler exception “for engaging in political activity via e-mail has ever existed under the Hatch Act.”⁶¹ The OSC, therefore, has jettisoned the water-cooler rule in favor of a new absolutist approach, which it claims finds support in recent decisions of the MSPB.⁶²

2. *The MSPB Cases*

In 2006, the MSPB issued a number of decisions finding that employees who had sent politically oriented e-mails to coworkers had engaged in political activity in violation of the Hatch Act. Contrary to the OSC’s assertions, however, the MSPB has never held that § 7323(c) only authorizes employees to express opinions on political subjects and candidates while off-duty, or that the water-cooler rule is invalid.⁶³ Rather, the issue in these cases was “whether the employees’ communications *exceeded* the mere exchange of opinions and urged others to take specific action in support of or against specific partisan candidates.”⁶⁴

Although the MSPB has not adopted the OSC’s absolutist interpretation of the Hatch Act, the 2006 cases illustrate the broad spec-

⁵⁹ Jessica Brady, *Political E-mails Trigger Surge in Hatch Act Complaints*, GOV’T EXECUTIVE, Apr. 11, 2007, available at <http://www.govexec.com/dailyfed/0407/041107cdam1.htm>.

⁶⁰ *Hearing*, *supra* note 29, at 6 (testimony of B. Chad Bungard, General Counsel, U.S. Merit Systems Protections Board).

⁶¹ *Id.* at 31 (testimony of James Byrne, Deputy Special Counsel, Office of Special Counsel).

⁶² Press Release, Office of Special Counsel, *supra* note 58.

⁶³ *Hearing*, *supra* note 29, at 6 (testimony of B. Chad Bungard, General Counsel, U.S. Merit Systems Protections Board) (“[T]he Board certainly has not addressed whether it is permissible for one to express his political opinion either through e-mail or otherwise. That issue has not been before the Board.”). Although the Second Circuit in *Burrus v. Vegliante*, 336 F.3d 82, 90–91 (2d Cir. 2003), indicated that the right to express political opinions granted by § 7323(c) only applies to off-duty conduct and that § 7324 is an absolute prohibition of *any* type of on-duty political activity, the MSPB has expressly declined to decide this issue. See *Special Counsel v. Sims*, 102 M.S.P.R. 288, 292–93 (2006); *Special Counsel v. Wilkinson*, 104 M.S.P.R. 253, 262 n.4 (2006). In any event, it is probable that the portion of the *Burrus* decision at issue is dictum, as it was immaterial to the Court’s holding. *Special Counsel v. Sims*, No. CB-1216-05-0013-T-1; CB-1216-05-0012-T-1, slip op. at 11 (M.S.P.B. Apr. 14, 2005), available at <http://www.govexec.com/pdfs/aclusuit.pdf>.

⁶⁴ *Hearing*, *supra* note 29, at 6 (testimony of B. Chad Bungard, General Counsel, U.S. Merit Systems Protections Board) (emphasis added); see also *Sims*, 102 M.S.P.R. 288; *Wilkinson*, 104 M.S.P.R. 253; *Special Counsel v. Eisinger*, 103 M.S.P.R. 252 (2006).

trum of conduct that the MSPB does view as prohibited political activity under the Act. Additionally, in at least two cases, the MSPB reversed the ALJ's determination that isolated exchanges of politically oriented e-mails constituted permissible expression of a political opinion, instead holding that the conduct did—or potentially could—amount to prohibited political activity.⁶⁵ These reversals indicate the ambiguity of the Hatch Act's restrictions on electronic communications and the difficulty in differentiating between protected political opinions and prohibited political activity.

The factual circumstances of *Special Counsel v. Sims* illustrate the complexity in drawing the line between permissible and prohibited activity under the Act. *Sims* is a consolidated case involving two Social Security Administration employees: Leslye Sims and Michael Davis.⁶⁶ On October 25, 2004, Sims sent out an e-mail to roughly 20 coworkers with a subject line stating, "FW: Fwd: Fw: Why I am Supporting John Kerry for President?"⁶⁷ She prefaced the body of the message with the statement, "Some things to ponder"⁶⁸ The e-mail included a letter, written by the son of President Dwight D. Eisenhower, which supported the Kerry candidacy.⁶⁹ Davis, one of the recipients of Sims's message, proceeded to send out a politically oriented e-mail of his own.⁷⁰ The subject line of Davis's message read, "Your Vote," and the body of the message contained a photograph of George W. Bush inscribed with the words, "I VOTE THE BIBLE."⁷¹

The OSC chose to prosecute the two employees before the MSPB, seeking their removal for violating the Act by engaging in political activity while they were on duty and in a government office.⁷² The MSPB ALJ held that the e-mails constituted protected expression of an opinion, rather than prohibited political activity, and consequently dismissed the OSC's complaint.⁷³ The ALJ reasoned that the Act clearly permits employees to express their opinions on political subjects and candidates while they are on duty and that "nothing in

⁶⁵ See *Sims*, 102 M.S.P.R. at 294; *Wilkinson*, 104 M.S.P.R. at 262.

⁶⁶ *Sims*, 102 M.S.P.R. at 290–91.

⁶⁷ *Id.* at 290.

⁶⁸ *Id.*

⁶⁹ *Id.* at 295 app. A.

⁷⁰ *Id.* at 290–91.

⁷¹ *Id.* at 291, 297 app. B.

⁷² Daniel Pulliam, *Drink Your Fill*, GOV'T EXECUTIVE, Apr. 29, 2005, available at <http://www.govexec.com/dailyfed/0405/042905lb.htm>.

⁷³ *Special Counsel v. Sims*, No. CB-1216-05-0013-T-1; CB-1216-05-0012-T-1, slip op. at 10-12 (M.S.P.B. Apr. 14, 2005), available at <http://www.govexec.com/pdfs/aclusuit.pdf>.

the Complaint indicat[es] that either Sims or Davis did anything other than express their personal opinions.”⁷⁴ Moreover, the ALJ noted that the e-mails were “the functional equivalent of the ‘water-cooler’ type discussions . . . that the Special Counsel found in its [water-cooler advisory opinion] did not constitute prohibited political activity.”⁷⁵ The OSC proceeded to appeal the decision to the full MSPB.⁷⁶

The MSPB held that the OSC’s complaint against Sims and Davis was sufficient to state a claim for a Hatch Act violation, and therefore reversed the ALJ’s ruling.⁷⁷ The MSPB then remanded the case to the ALJ for further factual findings.⁷⁸ But after nearly three years of protracted administrative procedures, the employees decided to reach settlement agreements and leave their government jobs.⁷⁹ Thus, in *Sims*, the MSPB did not conclusively decide whether the type of communications at issue in the case constituted prohibited political activity.

Another MSPB decision from 2006, *Special Counsel v. Wilkinson*,⁸⁰ addressed the question left open by *Sims*. In *Wilkinson*, the respondent, an Environmental Protection Agency employee, sent an e-mail to thirty-one coworkers advocating for 2004 presidential candidate John Kerry.⁸¹ The e-mail forwarded a letter from the Democratic National Committee (“DNC”) that urged readers to take action immediately following a presidential debate.⁸² Specifically, the DNC letter provided instructions to “vote in online polls, write letters to the editor, and call into talk radio programs,” and implored that “[y]our actions immediately after the debate tonight can help John Kerry win on November 2.”⁸³

Just as in *Sims*, the ALJ ruled in favor of the respondent-employee in *Wilkinson*, holding that the e-mail was a protected expression of political opinion under 5 U.S.C. § 7323(c).⁸⁴ The ALJ reasoned that the message was permitted by the plain language of § 7321 of the Act, which states “that an employee may participate in

⁷⁴ *Id.* at 9.

⁷⁵ *Id.* at 10.

⁷⁶ *Sims*, 102 M.S.P.R. at 289.

⁷⁷ *Id.* at 292.

⁷⁸ *Id.* at 295.

⁷⁹ Ralph Smith, *Feeling the Heat of Your Political Passions? Have Another Latte Before Hitting the Send Button*, FEDSMITH, Jan. 9, 2007, <http://www.fedsmith.com/article/1125/>.

⁸⁰ *Special Counsel v. Wilkinson*, 104 M.S.P.R. 253, 253 (2006).

⁸¹ *Id.* at 255.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 257.

the political process of the Nation to the extent not expressly prohibited” by law.⁸⁵ After determining that there was no statute or regulation which *expressly* prohibited Wilkinson’s conduct, the ALJ granted respondent’s motion for summary judgment.⁸⁶

The MSPB disagreed and reversed the ALJ’s decision, holding that the Hatch Act’s prohibition of on-duty political activity, found at § 7324(a), placed certain limitations on circumstances otherwise authorized by § 7323(c) of the Act.⁸⁷ The MSPB further found that the distribution of official campaign literature, such as a letter from the DNC, constituted prohibited political activity.⁸⁸ The MSPB concluded that the e-mail could not have been construed as a permissible expression of a political opinion under § 7323(c) because Wilkinson did not explicitly indicate in the e-mail that the DNC letter was representative of his personal opinion.⁸⁹

On remand, the ALJ noted that under the MSPB’s interpretation of the Act, an employee could be “terminated for wearing a partisan political campaign button to work on a single occasion [or] passing out a single piece of campaign literature.”⁹⁰ This interpretation, according to the ALJ, is inconsistent with the scope and purposes of the Act, and he found it “hard to believe that [Congress] intended to exact the penalty of termination or a substantial suspension without pay for conduct as trivial as that for which Mr. Wilkinson is being punished.”⁹¹ Accordingly, the ALJ urged Congress to “revisit its 1993 amendments and make clear exactly what sort of conduct it intended to prohibit and what sort of penalties it intended to exact.”⁹²

In contrast to *Sims* and *Wilkinson*, there have been cases where the demarcation between the permissible expression of a political opinion and prohibited political activity is clear. For instance, in *Special Counsel v. Eisinger*,⁹³ petitioner Jeffrey Eisinger, a staff attorney for the Small Business Administration, was found to have sent over 100 e-mails from his government e-mail account directed towards the

⁸⁵ *Id.*

⁸⁶ *Id.* at 256.

⁸⁷ *Id.* at 260.

⁸⁸ *Id.*

⁸⁹ *Id.* at 261.

⁹⁰ *Special Counsel v. Wilkinson*, No. CB-1216-06-0006-B-1, slip op. at 9 (M.S.P.B. Aug. 8, 2007).

⁹¹ *Id.* at 10.

⁹² *Id.*

⁹³ *Special Counsel v. Eisinger*, 103 M.S.P.R. 252 (2006), *aff’d sub nom. Eisinger v. MSPB*, 236 F. App’x 628 (Fed. Cir. 2007).

success of the Green Party.⁹⁴ Eisinger, who was an elected Green Party official, consistently engaged in this conduct over a three year period.⁹⁵ The e-mails concerned issues such as “the Green Party’s platform, fund-raising activities, outreach and recruitment strategies, and planning of a statewide convention.”⁹⁶ Both the MSPB⁹⁷ and the Federal Circuit⁹⁸ agreed with the ALJ’s determination that Eisinger violated the Hatch Act by engaging in on-duty political activity and that, given the flagrant nature of the violation, removal was the appropriate punishment.

To be sure, the Hatch Act’s restrictions on political activity reflect a firmly rooted historical judgment against the politicization of the government workforce.⁹⁹ But, due to the statute’s imprecise language, the agencies that enforce and adjudicate the Act have adopted varying and sometimes inconsistent interpretations of the law in recent years, which has resulted in a broad prohibition of any sort of electronic political discourse. It seems necessary, then, to consider in detail the particular problems that are raised by the modern enforcement of the Act.

II. Problems with the Current Provisions and Enforcement of the Hatch Act

The current enforcement of the Hatch Act significantly burdens the constitutional rights of public employees.¹⁰⁰ At the outset, it should be noted that these problems have been exacerbated by the statute’s silence on the subject of the Internet. Indeed, modern technology has blurred the line between permissible political opinions and prohibited political activity, thereby making it more likely for the OSC to prosecute employees for relatively harmless intra-office banter. As a result, enforcement of the Act has a chilling effect on the protected political speech of public employees and has failed to meaningfully achieve the policy goals that drove Congress to enact the law.

⁹⁴ Daniel Pulliam, *Hatch Catch*, GOV’T EXECUTIVE, Dec. 2, 2005, available at http://www.govexec.com/story_page.cfm?filepath=/dailyfed/1205/1202051b.htm.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Eisinger*, 103 M.S.P.R. at 253.

⁹⁸ *Eisinger*, 236 F. App’x at 630–31.

⁹⁹ *See supra* Part I.A.

¹⁰⁰ For another discussion of the problems posed by the current enforcement of the Hatch Act, see Carolyn M. Abbate, Note, *It’s Time to “Hatch” a New Act: How the OSC’s Interpretation of the Hatch Act Chills Protected Speech*, 18 FED. CIR. B.J. 139 (2009). The solutions proposed in Abbate’s Note are considered and critiqued *infra* note 195.

Furthermore, although some may argue that there is no harm in prohibiting all political discourse in the government workplace, such an approach is unworkable because it ignores the realities of public employment.

A. *The Internet: An Unanticipated Social Phenomenon*

Congress could not have reasonably contemplated widespread Internet usage in the workplace when it last amended the Hatch Act in 1993.¹⁰¹ Since that time, “the Internet, e-mail and YouTube videos began transforming how Americans communicate and go about their work. It’s not uncommon these days for employees to swap e-mails that lampoon politicians and political parties.”¹⁰² According to a recent study conducted by the Pew Internet and American Life Project, sixty-two percent of American workers regularly use the Internet and e-mail at work.¹⁰³ Moreover, during the particularly contentious 2008 election season, nearly forty-six percent of *all* Americans engaged in political discourse via the Internet and e-mail; this is a fifteen percent increase since the 2004 election.¹⁰⁴

With the continual rise in Internet use, there has been a drastic increase in Hatch Act complaints. In 2006, the OSC recorded 299 complaints related to politically oriented e-mails, which was, at that point, an all time high for the agency.¹⁰⁵ This record was broken in 2008, however, when the OSC reported an unprecedented 445 complaints as of October of that year.¹⁰⁶

The social phenomenon of the Internet has, therefore, created problems that the Hatch Act is not currently designed to address. John Gage, the National President of the American Federation of Government Employees, AFL-CIO, succinctly explained why interpreting and enforcing the Hatch Act in modern times has proven to be problematic:

The drafters of the Hatch Act and its 1993 amendments never anticipated the extent to which technology would

¹⁰¹ See Stephen Barr, *The Hatch Act Meets the Digital Age*, WASH. POST, Oct. 19, 2007, at D4.

¹⁰² *Id.*

¹⁰³ MARY MADDEN, PEW INTERNET AND AMERICAN LIFE PROJECT, NETWORKED WORKERS 3 (2008), http://www.pewinternet.org/pdfs/PIP_Networked_Workers_FINAL.pdf.

¹⁰⁴ AARON SMITH, PEW INTERNET AND AMERICAN LIFE PROJECT, THE INTERNET AND THE 2008 ELECTION i-ii (2008), http://www.pewinternet.org/pdfs/PIP_2008_election.pdf.

¹⁰⁵ Brady, *supra* note 59.

¹⁰⁶ Joe Davidson, *In Hot Political Year, Hatch Act Complaints Surge*, WASH. POST, Oct. 29, 2008, at D3.

change how workers communicate with each other. Wide access to e-mail, the pervasiveness of information available via the Internet, and instant and text messaging have profoundly broadened the ability of one worker to communicate with many individuals with a few strokes of the keypad. . . . [T]he scope and quantity of information readily available was almost beyond comprehension only a few years ago. Simply put, people, including federal employees, have much more to talk about than in 1939 or 1993, and a lot more people with whom they can share their thoughts.¹⁰⁷

Based on these upward trends, one can anticipate that the numbers will continue to rise as more Americans begin to view the Internet as a valuable forum for political expression.¹⁰⁸ Likewise, it is probable that, under the OSC's current interpretation of the Act, increasing numbers of public employees will be reprimanded and subject to prosecution for sending political e-mails while they are on duty.¹⁰⁹ Increased Hatch Act enforcement raises particular concerns relating to the rights of public employees as well as the effectiveness of the law in achieving congressional objectives.

B. *Chilling Effect on Protected First Amendment Speech*

Strict enforcement of the Hatch Act against all politically oriented communications threatens to chill public employees' freedom of speech. The Supreme Court has recognized that the Hatch Act represents a careful balance between the "guarantees of freedom" and the "supposed evil of political partisanship."¹¹⁰ Modern enforcement of the Act, however, disrupts this careful balance to the detriment of public employees.¹¹¹

¹⁰⁷ *Hearing, supra* note 29, at 48 (statement of John Gage, National President, American Federation of Government Employees, AFL-CIO).

¹⁰⁸ *See* Brady, *supra* note 59 (statement of OSC attorney) ("As people become more comfortable with e-mail use, we see a spike in Hatch Act complaints. . . . I expect to see a continued intersect between federal employees, the Internet and the Hatch Act.").

¹⁰⁹ *See id.*

¹¹⁰ *United Pub. Workers v. Mitchell*, 330 U.S. 75, 96 (1947).

¹¹¹ The purpose of this Note is not to argue that the Hatch Act is facially unconstitutional under the First Amendment. While many have questioned the constitutionality of the Act's restrictions on speech and expression, the Supreme Court has consistently upheld the law against First Amendment challenges. *See* *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 581 (1973); *Mitchell*, 330 U.S. at 103. As such, instead of discussing the *facial* validity of the law, this Note argues that strict *enforcement* of the Act, coupled with the threat of job removal, threatens to impermissibly chill the speech rights of public employees. For a persuasive argument that the Hatch Act cannot survive modern First Amendment scrutiny, see generally

1. *Public Employees, the First Amendment, and the Hatch Act*

Public employees “do not relinquish all of their First Amendment rights merely because they enter into an employment relationship with the government.”¹¹² Nevertheless, while public employees are entitled to some First Amendment protection, the government has broader authority to impose restrictions on the speech of its employees than it does to impose restrictions on the speech of members of the general public.¹¹³ This is because “[g]overnment employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.”¹¹⁴ As such, under modern First Amendment analysis, a public employee’s right to speak as a citizen addressing matters of public concern is balanced against the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees.¹¹⁵

Since its inception in 1939, the Hatch Act’s restrictions on the freedom of expression of public employees have been the subject of vigorous debate.¹¹⁶ One Congressman criticized the Act by stating that public employees “should not be compelled to surrender their constitutional rights of liberty and free speech.”¹¹⁷ Another Congressman viewed the law as an attempt to “gag . . . and handcuff [public employees] in the exercise of their political rights.”¹¹⁸ Thus, in order to alleviate these concerns, Congress amended the Act in 1940 to grant employees the right to express opinions on political subjects and candidates.¹¹⁹ The Court subsequently upheld the Act against numerous First Amendment challenges, recognizing that the Act carefully balances public employees’ constitutional rights and the government’s

Anthony T. Kovalchick, *Ending the Suppression: Why the Hatch Act Cannot Withstand Meaningful Constitutional Scrutiny*, 30 W. NEW ENG. L. REV. 419 (2008).

¹¹² *Garcetti v. Ceballos*, 547 U.S. 410, 418–19 (2006).

¹¹³ See *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (“[T]he government as employer indeed has far broader powers than does the government as sovereign.”).

¹¹⁴ *Garcetti*, 547 U.S. at 418.

¹¹⁵ *Id.* at 417 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). The *Garcetti* Court added another layer to the public employee speech analysis by holding that statements made pursuant to an employee’s official duties are not protected by the First Amendment. *Id.* at 421.

¹¹⁶ See e.g., H.R. REP. NO. 103-16, at 8 (1993); Bloch, *supra* note 9, at 231–32.

¹¹⁷ 84 CONG. REC. 9602 (1939) (statement of Rep. Hobbs).

¹¹⁸ *Id.* at 9599 (statement of Rep. Creal).

¹¹⁹ Amendment to Act to Prevent Pernicious Political Activities, Pub. L. No. 76-753, § 2, 54 Stat. 767, 767 (1940).

interest in protecting “democratic society against the supposed evil of political partisanship by classified employees of Government.”¹²⁰

2. *Chilling Effect of Current Provisions and Enforcement of the Act*

As discussed above, the Hatch Act treads a narrow constitutional line. The Act should, accordingly, operate in a way that achieves legitimate governmental interests, while preserving the rights guaranteed to workers by the First Amendment and by the Act itself. Yet, in modern application, the Act has had a chilling effect on protected speech. This effect is attributable to three factors: (1) the default penalty provision, (2) overzealous prosecution, and (3) vague standards. These factors are considered in turn below.

The Hatch Act’s unusually harsh penalty provision¹²¹ deters public employees from engaging in political discussion. The default penalty for violating the Hatch Act is termination,¹²² and OSC policy does not require a warning to workers or an opportunity to cease and desist from a violation before the OSC seeks the harshest penalties.¹²³ Consequently, as Senator Daniel K. Akaka noted in a recent congressional hearing concerning the Hatch Act, public employees are discouraged from engaging in political discourse out of “fear of putting their jobs on the line.”¹²⁴ For example, John Gage recounted sev-

¹²⁰ *Mitchell*, 330 U.S. at 96; *see also* U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 548 (1973). Because *Mitchell* was decided in 1947, the Court did not apply the current First Amendment balancing test for public employee speech. As a result, the *Mitchell* decision has been criticized as being inconsistent with the Court’s current jurisprudence. Kovalchick, *supra* note 111, at 422. Although the Court has not directly applied modern First Amendment scrutiny to the Act, it has essentially reaffirmed the *Mitchell* rationale by observing that the Hatch Act’s restrictions on political expression are justified by legitimate congressional objectives. *See* United States v. Nat’l Treasury Employees Union, 513 U.S. 454, 476 n.21 (1995).

¹²¹ *See* *Hearing, supra* note 29, at 103 (statement of B. Chad Bungard, General Counsel, MSPB) (observing that “[t]he Hatch Act penalty provisions, both in their scope and their specificity of the resulting penalties seem to be unique” in comparison to other penalty provisions found in the Labor Management and Employee Relations section of Title 5).

¹²² 5 U.S.C. § 7326.

¹²³ Alyssa Rosenberg, *Employee Advocates Cite Disparities in Hatch Act Enforcement*, GOV’T EXECUTIVE, Oct. 18, 2007, available at <http://www.govexec.com/dailyfed/1007/101807ar1.htm> (statement of John Gage, President, American Federation of Government Employees); *see also* Special Counsel v. Wilkinson, No. CB-1216-06-0006-B-1, slip op. at 8 (M.S.P.B. Aug. 8, 2007) (criticizing the Special Counsel for initiating the proceeding “without first warning Mr. Wilkinson that it believed that his conduct violated the Hatch Act and without giving him an opportunity to cease such conduct. This is unfair because, unlike the numerous cases in which government employees have run for partisan political office, nothing in the statute *specifically prohibits* Mr. Wilkinson’s conduct.”) (emphasis added).

¹²⁴ *Hearing, supra* note 29, at 2 (statement of Sen. Daniel K. Akaka, Chairman, Subcomm.

eral instances where his organization conducted meetings with “employees to talk about legislative issues, and people [were] afraid to come to the meeting because they saw a very severe Hatch Act warning . . . that talked about . . . huge penalties for any type of misstep.”¹²⁵ This demonstrates that the effect of the penalty provision is so severe that employees even fear engaging in conduct that is clearly permissible under the Act, such as discussing political issues while *off duty*.¹²⁶

Although the MSPB may lower the penalty for a Hatch Act violation to a thirty day suspension without pay, this decision must be *unanimous*.¹²⁷ As such, the mere possibility of a lowered penalty does little to mitigate the chilling effect of a presumptive punishment of removal.

Additionally, the OSC’s aggressive and unprecedented prosecution of e-mail Hatch Act violations sends an implicit message to all employees that *any* on-duty political expression, whether verbal or electronic, could cost you your job. As a result, many have criticized the OSC for losing any sense of proportionality in exercising prosecutorial discretion under the Act.¹²⁸ These critiques are substantiated by a close look at the facts of the cases brought before the MSPB in 2006. In *Special Counsel v. Eisinger*, the OSC sought the removal of an employee who sent over 100 political e-mails over a three year period.¹²⁹ Meanwhile, in *Special Counsel v. Sims*, the OSC

on Oversight of Government Management, the Fed. Workforce, and the District of Columbia); *see also id.* at 18 (statement of Colleen M. Kelley, National President, National Treasury Employees Union) (observing that if employees “believe for a minute that a manager could zero in on them and make them a test case for OSC, they back off and . . . the interest they had in exercising their rights has been squelched”); *cf. Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (noting that “the threat of dismissal from public employment is . . . a potent means of inhibiting speech”).

¹²⁵ *Hearing*, *supra* note 29, at 23 (statement of John Gage, National President, American Federation of Government Employees).

¹²⁶ Although there is some debate over whether the right to express political opinions under § 7323(c) applies to on-duty expressions, it is uncontested that employees are free to engage in political discussion while off duty. *See supra* Part I.B.

¹²⁷ 5 U.S.C. § 7326.

¹²⁸ *See, e.g., Pulliam, supra* note 51 (statement of former Special Counsel Elaine Kaplan); Rosenberg, *supra* note 123 (statement of Colleen Kelley, President, National Treasury Employees Union) (noting that the OSC consistently seeks the removal of “relatively low-ranking career employees for what are at most technical violations of the prohibition against on-duty political activity, such as sending an e-mail with political content to a small group of friends and work colleagues”); *cf. Brady, supra* note 59 (statement of Ward Morrow, Assistant General Counsel, American Federation of Government Employees) (observing that “the Hatch Act was designed for serious violations of bringing partisanship into the workplace” and that “the law was never intended to punish a more minor offense like forwarding a video clip or campaign Web site”).

¹²⁹ *Special Counsel v. Eisinger*, 103 M.S.P.R. 252, 253 (2006).

also sought the removal of two employees for sending e-mails on a single occasion.¹³⁰ Despite considerable differences in the employees' conduct in these cases, the OSC indiscriminately sought the same punishment for all of the employees.

Irrespective of the legitimacy of the OSC's prosecutorial decisions, however, its pursuit of e-mail Hatch Act violations has undoubtedly created an "atmosphere of fear of expressing political views."¹³¹ Even if an employee is not removed or punished by the MSPB, the prospect of a lengthy and invasive OSC investigation and prosecution can, by itself, chill protected speech.

Finally, the Act's restrictions on political expression, both verbal and electronic, are decidedly ambiguous and fail to adequately put employees on notice as to what the law actually prohibits.¹³² While the OSC seemingly classifies most on-duty political discussion as "prohibited political activity," the law itself explicitly *permits* the expression of political opinions.¹³³ And the language of the statute provides no method to distinguish between permissible political opinions and prohibited activity. Meanwhile, the MSPB has neither adopted the OSC's absolutist approach, nor has it articulated any guiding standards of its own.¹³⁴ The employee, as Justice Douglas noted while dissenting from a decision upholding the Hatch Act, is thus put in a difficult position:

Is a letter a permissible "expression" of views or a prohibited "solicitation?" The Solicitor General says it is a "permissible" expression; but the Commission ruled otherwise. For an employee . . . great consequences flow from an innocent decision. He may lose his job. Therefore the most prudent thing is to do nothing. Thus is self-imposed censorship im-

¹³⁰ Special Counsel v. Sims, 102 M.S.P.R. 288, 290 (2006).

¹³¹ Pulliam, *supra* note 51.

¹³² See *supra* Part I.B (discussing the varying interpretations of the Act's restrictions on Internet activity, which is rooted in the ambiguity between prohibited political activity under § 7324 and the permissible expression of political opinion under § 7323(c)); cf. Special Counsel v. Wilkinson, No. CB-1216-06-0006-B-1, slip op. at 10 (M.S.P.B. Aug. 8, 2007) (noting that the OSC's rescission of the water cooler advisory opinion indicates that "in the email context, even the Special Counsel is not sure of where the line is to be drawn between conduct which violates the Act and conduct which does not do so").

¹³³ 5 U.S.C. § 7323(c) ("An employee retains the right to . . . express his opinion on political subjects and candidates.").

¹³⁴ See *supra* Part I.C.2.

posed on many nervous people who live on narrow economic margins.¹³⁵

In short, vague standards create confusion over the law, and when confusion is coupled with the specter of job removal, employees err on the side of caution and choose not to exercise the First Amendment rights that Congress intended to preserve for them.¹³⁶

3. *The Realities of Political Speech in the Government Workplace*

One might argue that there is no harm in prohibiting public employees from talking about politics while they are on duty. People are prohibited from doing lots of things at work. Public employees are still free to discuss politics while they are off duty and outside of a government building.

While this argument may have a degree of common sense appeal, it ignores the very nature of government employment.¹³⁷ After all, it is normal for any employee to talk about the “nature and circumstances” of his or her employment.¹³⁸ When one’s employer is the government, as Senator Daniel Akaka notes, it is “natural that employees will talk amongst themselves about Presidential and congressional elections because these elections can greatly affect the conditions of their employment.”¹³⁹ There have, for example, been instances where the OSC has reprimanded employees for discussing “real conditions that are facing their agency coming from Congress,” such as budgetary issues and closings.¹⁴⁰ Yet this discussion is not the type of coercive political activity that the Hatch Act was originally intended to prohibit.¹⁴¹ It is therefore essential to ensure that the Hatch Act is enforced against only those few employees who intentionally seek to use their civil service positions for partisan political purposes.¹⁴²

¹³⁵ U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 600 (1973) (Douglas, J., dissenting).

¹³⁶ See *Hearing, supra* note 29, at 42 (statement of Colleen M. Kelley, National President, National Treasury Employees Union).

¹³⁷ *Id.* at 50 (statement of John Gage, National President, American Federation of Government Employees).

¹³⁸ *Id.*

¹³⁹ *Id.* at 21 (statement of Sen. Daniel K. Akaka, Chairman, Subcomm. on Oversight of Government Management, the Fed. Workforce, and the District of Columbia).

¹⁴⁰ *Id.* at 20 (statement of John Gage).

¹⁴¹ See *supra* Part I.A (discussing the original concerns that brought about the enactment of the Hatch Act).

¹⁴² *Hearing, supra* note 29, at 20–21 (statement of John Gage).

C. *Failure to Meaningfully Further Congressional Policy*

In addition to raising First Amendment concerns, the current enforcement of the Hatch Act against electronic communications does not meaningfully further Congress's objectives in enacting the law. As noted above, the constitutionality of the Act has been challenged on numerous occasions, but the Supreme Court has consistently upheld the law, reasoning that it furthers important governmental objectives.¹⁴³ These objectives include: protecting employees' freedom of expression, preventing the creation of a political machine, and avoiding the appearance of politically driven justice. Notably, however, the aims of the Hatch Act are not achieved—and in some instances are undermined—by strict enforcement against employees engaging in any political discourse via the Internet. Instead, the Act's prohibition of on-duty political coercion more directly furthers the governmental interests underlying the law.

1. *Protecting Employees' Freedom of Expression*

One of the most important policy goals of the Hatch Act is the protection of the freedom of expression of public employees.¹⁴⁴ This objective is achieved by ensuring that "advancement in the Government service [does] not depend on political performance."¹⁴⁵ Eliminating internal partisanship protects employees because they are "free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs."¹⁴⁶ In essence, this policy is rooted in one of the original congressional motives behind the law, which was to keep the government workforce free from political coercion.¹⁴⁷

The employee-protection policy is most readily implicated when an employee in a supervisory position attempts to politically influence his or her subordinates.¹⁴⁸ For example, during the early twentieth-

¹⁴³ See *supra* Part II.B.1.

¹⁴⁴ See *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 476 n.21 (1995) (noting that the Act's "employee protective rationale" provides its strongest justification).

¹⁴⁵ *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 566 (1973).

¹⁴⁶ *Id.*

¹⁴⁷ See *supra* Part I.A; see also H.R. REP. NO. 103-16, at 5 (stating that, in passing the Act, Congress wanted to prevent federal employees from using "the power and authority of their positions to force others to vote for, work for, and contribute to the incumbent").

¹⁴⁸ See Lydia Segal, *Can We Fight the New Tammany Hall?: Difficulties of Prosecuting Political Patronage and Suggestions for Reform*, 50 RUTGERS L. REV. 507, 508-09 (1998) (describing the "political activity ban approach" to combating political patronage in the civil service).

century, “political bosses” regularly urged large numbers of their employees to vote for the particular political candidate that appointed them or that they supported.¹⁴⁹ In the modern employment context, the policy is implicated when superiors send mass politically oriented e-mails to subordinates. Even if the superior is merely expressing an opinion on a political subject, there is a risk that such a message would impose subtle pressures on employees to adopt the ideological viewpoint of their superiors. Importantly, though, this sort of conduct is expressly prohibited by another provision of the Hatch Act, § 7323(a)(1), which forbids employees from using their “official authority or influence for the purpose of interfering with or affecting the result of an election.”¹⁵⁰ The OPM, the agency that issues administrative regulations concerning the Hatch Act, interprets this provision to be a direct prohibition of political coercion in the workplace.¹⁵¹

The policy of employee protection is only minimally implicated, however, when government employees engage in casual political banter amongst a small group of coworkers (i.e., “water-cooler” discussion) via e-mail.¹⁵² This is true in the same way that *actual* water-cooler discussion does not pose a substantial risk of creating a coercive political environment of the type that Congress was concerned with when it passed the Hatch Act. Indeed, as the OSC once noted, “[t]he fact that a ‘water-cooler’ type discussion takes place through the use of E-mail does not, in and of itself, transform the discussion from a protected exchange of personal opinion into prohibited political activity for purposes of the Hatch Act.”¹⁵³ Thus, because the purpose of the employee-protection policy is to prevent abuses of authority and political coercion, broadly banning *all* political discourse conducted via the Internet is an unnecessarily over-inclusive approach to achieving congressional objectives.¹⁵⁴

¹⁴⁹ *Id.*

¹⁵⁰ 5 U.S.C. § 7323(a)(1).

¹⁵¹ *See* 5 C.F.R. § 734.302.

¹⁵² *See supra* Part I.B.1.

¹⁵³ Water Cooler Advisory Opinion, *supra* note 53; *see also* Special Counsel v. Sims, No. CB-1216-05-0013-T-1; CB-1216-05-0012-T-1, slip op. at 10–12 (M.S.P.B. Apr. 14, 2005), available at <http://www.govexec.com/pdfs/aclusuit.pdf> (“[A]n expression of personal opinion does not constitute ‘political activity’ merely because it is disseminated to two dozen people with one or several computer keystrokes.”).

¹⁵⁴ *Cf.* Kovalchick, *supra* note 111, at 432 (“Suppressing the political speech of federal employees for the sake of *protecting* the First Amendment rights of these employees is like banning women from the workplace in order to prevent sexual harassment. The object of the prohibition is subsumed by the prohibition itself.”).

2. *Preventing the Creation of a Political Machine*

Another objective of the Hatch Act was Congress's desire to prevent political leaders from transforming the government workforce into a "powerful, invincible, and perhaps corrupt political machine."¹⁵⁵ This concern originally arose during the New Deal era, when political parties were misappropriating funds and internally controlling agencies such as the Works Progress Administration.¹⁵⁶ In response, Congress intended to erect "substantial barriers . . . against the party in power—or the party out of power . . . —[from] using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its political structure and political campaigns."¹⁵⁷

But in amending the Act in 1993, Congress questioned the continued validity of the political-machine rationale, noting that it was an example of how the Hatch Act of 1939 was a "congressional overreaction" to the "growing influence of President Franklin D. Roosevelt," and the "rapid growth of the Federal bureaucracy."¹⁵⁸ Changed social conditions, as well as the development of a well-entrenched merit system,¹⁵⁹ moved Congress to loosen the Hatch Act's restrictions on public employees in 1993.¹⁶⁰

The objective of preventing the creation of a political machine is compromised when superiors attempt to impose views on subordinates in conformance with an overarching political agenda.¹⁶¹ For instance, in Congress's view, the policy would have been implicated if President Roosevelt, through political appointees, would have been able to use the massive government workforce to aid in his campaign efforts.¹⁶² In modern application, if superiors repeatedly send out e-

¹⁵⁵ U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973); *see also* United Pub. Workers v. Mitchell, 330 U.S. 75, 101 (1947).

¹⁵⁶ *See supra* Part I.A (discussing the abuses of power within federal agencies that led to the enactment of the Hatch Act in 1939).

¹⁵⁷ *Letter Carriers*, 413 U.S. at 565–66.

¹⁵⁸ H.R. REP. NO. 103-16, at 8–9 (testimony of Rep. William Clay).

¹⁵⁹ The classified merit system, which is overseen by the MSPB, is a set of rules and procedures that ensures career advancement in the public sector and is based purely on merit rather than political patronage or affiliation. *Id.* at 9–10. ("[The] federal workforce has approximately 3 million employees of which 78.6% are covered by the merit system. Today, we have a well-entrenched merit system that protects both employees and the public from political influence and abuse.").

¹⁶⁰ *Id.* at 5 (noting that the "supposed evil of political partisanship by classified employees of Government is neither so imminent nor so apparent as to justify an intrusion into individual rights and democratic values as profound as the Hatch Act imposes") (quotations omitted).

¹⁶¹ *See id.* at 8–9.

¹⁶² *Id.*

mails to employees in an effort to secure the reelection of a political candidate, and encourage employees to do the same, the policy would be implicated. As noted above, though, the Act's prohibition on political coercion in the workplace sufficiently addresses this problem.¹⁶³

When small groups of coworkers engage in political discourse via the Internet there is no significant risk of transforming the government workforce into a political machine. As Congress noted in 1993, we currently have an established merit system, and employee advancement is not based on political affiliation.¹⁶⁴ Moreover, political discourse amongst coworkers is far removed from the type of conduct that led Congress to enact the law in 1939, such as government employees working directly in concert with political parties.¹⁶⁵

Still some may argue that when employees use government computers for their own, non-work related political purposes, they are engaging in partisan politics at the public's expense, thereby implicating the political machine policy. While this argument has some merit, the Hatch Act is not the appropriate means by which to address this misuse of government property. Rather, as John Gage has suggested, preventing the use of government computers for non-work related and other inappropriate purposes is, "better addressed through the [government] agency's computer usage policy than an OSC official investigation."¹⁶⁶ By way of example, Gage observes that "the Department of Veterans Affairs' Automated Information Systems Security Policy . . . states that '[e-mail] users must exercise common sense, judgment, and propriety in the use of this government resource.' The . . . Policy includes a table of offenses and progressive discipline depending on the nature, scope, and occurrence of the offense."¹⁶⁷

In this particular context, a computer usage policy is a wise alternative to the Hatch Act¹⁶⁸ because the chilling effect of an OSC investigation and prosecution, as well as the Hatch Act's default removal penalty, is eliminated. Moreover, in addition to enforcing the Hatch Act, the OSC is responsible for enforcing important federal whistleblower protection laws.¹⁶⁹ As such, the agency's resources

¹⁶³ See 5 U.S.C. § 7323(a)(1); *supra* Part II.C.1.

¹⁶⁴ H.R. REP. NO. 103-16, at 9.

¹⁶⁵ See *id.* at 8-9.

¹⁶⁶ *Hearing, supra* note 29, at 49.

¹⁶⁷ *Id.*

¹⁶⁸ Although the purpose of this Note is not to suggest the adoption of uniform computer usage policies for public employers, it is a worthwhile alternative that warrants brief consideration.

¹⁶⁹ Bloch, *supra* note 9, at 236.

would be better expended on investigating allegations more severe than e-mail Hatch Act violations.

3. *Avoiding the Appearance of Politically Driven Justice*

Another driving purpose behind the Act was retaining the government workforce's institutional integrity in the eyes of the public.¹⁷⁰ Indeed, "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."¹⁷¹ The rationale for this policy is that "[a] bureaucracy bent on partisan advantage rather than impartial application of laws and policies can diminish the government's accountability and respectability in the eyes of voters."¹⁷²

The goal of maintaining a politically neutral image is compromised when government employees make overtly partisan representations to the general public.¹⁷³ For instance, the Hatch Act bans employees from wearing or displaying political paraphernalia while they are on duty because of the politically partisan image it projects.¹⁷⁴ According to Congress, "[w]hile a Federal employee canvassing for a candidate in the evening raises no specter that the Government is supporting that candidate, if that same Federal employee wears a political button while working at a post office window, it does raise that specter."¹⁷⁵

E-mail poses difficult problems with regard to maintaining a politically neutral image. If an employee sends a politically oriented e-mail to members of the general public, similar to wearing a political button while working a post office window, it could give the impression that the employee's government employer also supports the views espoused in the message. Accordingly, it seems that this policy is directly implicated when an employee sends such messages to non-coworkers from his government e-mail account. There is, however, no risk of projecting the image of political partisanship to the general public if the e-mail is only directed to coworkers. In other words, as

¹⁷⁰ See U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973).

¹⁷¹ *Id.*

¹⁷² Bloch, *supra* note 9, at 273.

¹⁷³ See H.R. REP. NO. 103-16, at 19 (noting that it is important "to avoid the appearance that the Government is supporting a candidate").

¹⁷⁴ See *id.* at 20.

¹⁷⁵ *Id.* at 19.

long as the e-mail is internal and no outward representations are made that tie the employee to his or her employer, the policy is not implicated.

Strictly enforcing the Hatch Act against employees engaging in on-duty political discussion threatens to impermissibly chill the speech rights of public employees, and it also fails to meaningfully further governmental interests. Thus, because the burdens caused by the current enforcement of the Act outweigh the benefits, Congress should consider amending the law.

III. Proposed Hatch Act Amendments

In light of the problems that have arisen as a result of the emergence of the Internet in the workplace, the law's ambiguous language, the harsh penalty provision, and the OSC's enforcement of the Act, the Hatch Act should be updated for the twenty-first century. While the statute's ban on overt political activity ought to remain in place since it has proven beneficial in some respects, public employees must be allowed to engage in on-duty political discussion, either electronic or verbal, without the fear of losing their jobs.

With these concerns in mind, Congress should enact legislation to ensure that the Hatch Act's restrictions are narrowly drawn to achieve congressional goals, without unduly burdening the rights of public employees. Specifically, Congress should amend the Act by: (1) codifying the water-cooler rule, (2) providing clear guidelines to the OSC and the MSPB in determining whether conduct constitutes permissible expression of a political opinion or prohibited political activity, and (3) revising the penalty provision.

A. Codify the "Water-Cooler" Rule

As it is currently written, the Hatch Act's restrictions on on-duty political discussion are unclear. Although § 7323(c) grants employees the right to express political opinions, § 7324(a) prohibits on-duty political activity.¹⁷⁶ Consequently, both the OSC and the MSPB have had difficulty in determining the scope of permissible conduct under the Act, especially in the context of electronic communications.¹⁷⁷ To alleviate these problems, Congress should amend 5 U.S.C. § 7324 to include the following provisions:

¹⁷⁶ See 5 U.S.C. §§ 7323–7324 (2006).

¹⁷⁷ See *supra* Part I.C. (discussing the various interpretations of the Act by the OSC, the MSPB ALJ, and the full MSPB).

(c) An employee retains the right, whether on or off duty, to communicate his or her opinion on political subjects and candidates, either verbally or electronically, subject to the following limitation: Communications of political opinions between superiors and subordinates are prohibited while the employees are on duty or in a government building.

(d) In determining whether an electronic communication constitutes an expression of a political opinion under paragraph (c) of this subsection, or political activity under paragraph (a) of this subsection, the following factors shall be considered:

- (1) The number of recipients of the communication;
- (2) Whether the recipients of the communication included individuals who were not government employees;
- (3) The frequency of the communications;
- (4) The political coloring of the message;
- (5) Whether the original source of the content of the communication was a political candidate or party;
- (6) The relationship between the employees that exchanged the communication;
- (7) Whether the communication was sent from the employee's government e-mail account; and
- (8) The employee's motive and intent.

The purpose of paragraph (c) is to codify the water-cooler rule for both verbal and electronic communications, and to effectively further the policy goals underlying the Hatch Act.¹⁷⁸ Under this proposal, employees would be free to engage in water-cooler type discussions with coworkers on political topics and candidates without being in violation of the Act. Furthermore, in order to minimize the risk of political coercion in the workplace and to retain the appearance of political neutrality, political e-mails cannot be exchanged between subordinates and superiors.¹⁷⁹ Determining whether an employee is a “subordinate” or a “superior” should pose no difficulty to the OSC or MSPB, as both terms—or some variation thereof—are already present in the current provisions of the Hatch Act.¹⁸⁰

¹⁷⁸ See *supra* Part II.C (discussing the three major policy goals of the Hatch Act).

¹⁷⁹ Senator Daniel Akaka indicated a willingness to accept these two restrictions during a hearing conducted on the scope and enforcement of the Hatch Act. See *Hearing, supra* note 29, at 21.

¹⁸⁰ See 5 U.S.C. § 7323 (mentioning “subordinate” employees and employees with “official authority” over other employees); H.R. REP. NO. 103-16, at 17 (“Any official who has the power

Paragraph (d) is intended to create flexible standards to guide the OSC in determining whether a Hatch Act investigation is appropriate. It will focus the prosecutorial efforts of the OSC on serious conduct that actually implicates the interests furthered by the Act. Most importantly, it provides specific factors to help navigate the gray area between political activity and the expression of political opinions.

With regard to the application of the factors enumerated in paragraph (d), the OSC and the MSPB will be required to consider all the factors insofar as they are applicable to the specific facts of the case being decided. The ultimate decision of whether the conduct at issue constitutes prohibited or permissible activity will be determined by an analysis of the totality of the factors. So the relative strength or weakness of a single factor will not be dispositive, but a very strong showing of one factor can outweigh the presence or absence of another.¹⁸¹

In response to this proposal, one could argue that the codification of the “water-cooler” rule will lead to even more confusion over compliance with the Hatch Act. Instead, consistent with the OSC’s interpretation of the law, one might suggest amending the statute to ban any sort of political discussion. This standard would be easier to enforce and would provide clearer guidance to the OSC, the MSPB, and public employees.

What the absolutist approach ignores, though, is that the Hatch Act is not intended to prohibit all political dialogue by government employees. To the contrary, § 7323(c) specifically retains the employee’s right “to express his opinion on political subjects and candidates.”¹⁸² So even though it may seem desirable—as an administrative matter—to adopt a blanket ban on political discussion, this result is sanctioned by neither the text nor the spirit of the law. In any event, administrative convenience is not a sufficient justification for infringing First Amendment rights.¹⁸³ Indeed, any impracticality that is caused by permitting harmless political banter, while banning outright political activity, is outweighed by the suggested amendment’s prevention of the chilling effect that the law currently has on employees’ freedom of speech.¹⁸⁴

to hire or fire, control or direct, supervise or appraise the work of an employee is considered to be a superior for the purposes of [the Hatch] Act.”).

¹⁸¹ These principles shall also guide the application of the factors enumerated in proposed § 7326, discussed *infra* in Part III.C.

¹⁸² 5 U.S.C. § 7323(c).

¹⁸³ See *supra* Part II.B.

¹⁸⁴ See *id.*

B. *Define Political Activity*

The term political activity should be defined in the provisions of the Hatch Act. Currently it is defined by an Office of Personnel Management (“OPM”) administrative regulation as “an activity directed towards the success or failure of a political party, candidate for a partisan political office, or partisan political group.”¹⁸⁵ Because the OPM’s definition is sufficiently broad and is regularly relied on by the MSPB,¹⁸⁶ it should be inserted into the Act itself. Thus, Congress should amend 5 U.S.C. § 7322, or the “definitions” section of the Hatch Act, to include the following provision:

(4) “Political Activity” means any activity directed towards the success or failure of a political party, candidate for a partisan political office, or partisan political group, but does not include the expression of political opinions under § 7324(c) of this subchapter.

Importantly, in order to conform with proposed § 7324(c),¹⁸⁷ this amendment expressly limits the definition of political activity by excluding the expression of political opinions.

C. *Revise the Penalty Provision*

The unduly harsh penalty provision of the Hatch Act must be revised. As it currently stands, the default penalty for violating the Act is removal, which the MSPB can lower to a thirty day unpaid suspension by unanimous vote.¹⁸⁸ But the removal penalty, in tandem with other problems arising out of the enforcement of the Act, has adversely affected the speech rights of public employees. In light of these concerns, Congress should amend 5 U.S.C. § 7326 to state the following:

(a) An employee or individual who violates § 7323 or § 7324 of this title shall be disciplined appropriately in light of the violation committed. An employee or individual who violates § 7323 or § 7324 may be suspended without pay, removed from his position, or subject to any other penalty that the Board deems appropriate.

(b) In reaching an appropriate penalty, the following factors shall be considered:

¹⁸⁵ 5 C.F.R. § 734.101.

¹⁸⁶ *See, e.g.*, *Special Counsel v. Sims*, 102 M.S.P.R. 288, 291 (2006); *Special Counsel v. Wilkinson*, 104 M.S.P.R. 253, 259 n.4 (2006).

¹⁸⁷ *See supra* Part III.A.

¹⁸⁸ 5 U.S.C. § 7326.

- (1) The nature of the offense and the extent of the employee's participation;¹⁸⁹
- (2) The employee's motive and intent;¹⁹⁰
- (3) Whether the employee had previously been warned that the particular conduct giving rise to the offense was unlawful;
- (4) The employee's disciplinary record;¹⁹¹ and
- (5) The political coloring of the employee's activities.¹⁹²

The central purpose of these amendments is to uphold principles of fairness and proportionality. The default removal provision is deleted, thereby mitigating the chilling effect of the current penalty provision.¹⁹³ Additionally, the proposed amendments codify factors that the MSPB considers when determining punishments for violations of various federal laws.¹⁹⁴ Requiring the consideration of these factors will prevent the imposition of disproportionate punishments for trivial or isolated violations of the Act. And the fact that the MSPB already considers these factors in a variety of adjudications indicates that codifying them in the Act will not pose any undue administrative hardship.

Reforming the penalty provision is essential to ensure that public employees are not deterred from exercising their constitutional rights. As a practical matter, a degree of ambiguity inheres in any attempt to distinguish between permitted political opinions and prohibited political activities under the Act. And for the employee, the specter of being terminated would overshadow the technical guarantee of rights conferred under the proposed § 7324 (codification of the water-cooler rule). Accordingly, amending the penalty provision *and* codifying the water-cooler rule are both necessary steps in reaching a comprehensive solution to the problems caused by the current enforcement of the Act.¹⁹⁵

¹⁸⁹ *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 332 (1981).

¹⁹⁰ *Special Counsel v. Purnell*, 37 M.S.P.R. 184, 200 (1988).

¹⁹¹ *Douglas*, 5 M.S.P.R. at 332.

¹⁹² *Purnell*, 37 M.S.P.R. at 200.

¹⁹³ *See supra* Part II.B.1.

¹⁹⁴ The *Douglas* factors are considered by the MSPB in virtually all disciplinary proceedings for public employees. *See Hearing, supra* note 29, at 19 (testimony of Colleen M. Kelley, National President, National Treasury Employees Union). The MSPB considers the *Purnell* factors in Hatch Act adjudications when deciding whether to mitigate a penalty from removal to suspension. *Id.* at 73 (response of James Byrne, Deputy Special Counsel, U.S. Office of Special Counsel).

¹⁹⁵ While one commentator has proposed amending the Hatch Act to ameliorate the law's chilling effect on protected speech, the author does not propose deleting the default removal penalty. *See Abbate, supra* note 100, at 154. But the current penalty provision has proven to be

D. *Applying the Proposal to Practice*

In order to illustrate the scope of permissible activity under this proposal, the proposed provisions will be applied to the facts of two MSPB cases: *Special Counsel v. Sims*¹⁹⁶ and *Special Counsel v. Eisinger*.¹⁹⁷

1. *Special Counsel v. Sims*

Under this Note's proposal, the defendants in *Special Counsel v. Sims* probably would not have been found in violation of the Hatch Act. Under the proposed § 7324, both of the employees would have been entitled to express their opinions on political candidates.¹⁹⁸ Furthermore, based on the facts presented, there is no indication that either employee sent e-mails to their subordinates or superiors, so the communication would not have been prohibited by proposed § 7324(c).

In determining whether the content of the e-mails constituted an expression of political opinion, or prohibited political activity, the factors set forth in the proposed § 7324(d) must be considered.¹⁹⁹ In *Sims*, both Sims and Davis sent an e-mail to roughly twenty individuals,²⁰⁰ a relatively small number of recipients. The recipients of the e-mails, however, did include a few individuals who were not government employees.²⁰¹ With regard to the frequency of the communications, the employees sent out only one set of e-mails each.²⁰² In terms of the political coloring of the message, Sims's message seemed overtly political in that it was directed towards swaying Republicans

one of the primary factors contributing to the chilling of employee speech, and therefore it must be revised in order to adequately address the problem. *See supra* Part II.B.2.

¹⁹⁶ *Special Counsel v. Sims*, 102 M.S.P.R. 288, 291 (2006). For the facts of this case, *see supra* Part I.C.2.

¹⁹⁷ *Special Counsel v. Eisinger*, 103 M.S.P.R. 252 (2006). For the facts of this case, *see supra* Part I.C.2.

¹⁹⁸ *See supra* Part III.A.

¹⁹⁹ These factors include: (1) the number of recipients of the communication; (2) whether the recipients of the communication included individuals who were not government employees; (3) the frequency of the communications; (4) the political coloring of the message; (5) whether the original source of the content of the communication was a political candidate or party; (6) the relationship between the employees that exchanged the communication; (7) whether the communication was sent from the employee's government e-mail account; and (8) the motive and intent of the employee. *See supra* Part III.A.

²⁰⁰ *Sims*, 102 M.S.P.R. at 290–91.

²⁰¹ *See id.* (observing that some of the recipients of the e-mail messages were “fellow employees” at the Social Security Administration while others were “not SSA employees”).

²⁰² *Id.*

to vote for John Kerry.²⁰³ Davis's message, on the other hand, seemed more in line with a personal ideological belief but still was in support of the Bush candidacy.²⁰⁴ It is unclear whether the content of the e-mails originated with a political candidate or party, but both messages seemed to originate from independent sources.²⁰⁵ The messages were sent from the employees' government e-mail accounts.²⁰⁶ As for the relationship between the employees, Sims and Davis were friends and coworkers, and most of the recipients were also their coworkers at the SSA.²⁰⁷

Upon considering the totality of these factors, the employees' communicative exchange probably did not constitute political activity. Of the eight factors set forth in proposed § 7324(d), only three factors support a finding of prohibited political activity (the fact that some recipients were not government employees, the political coloring of the messages, and the fact that the messages were sent from the government e-mail accounts of the employees). Meanwhile, at least four factors weigh against finding the employees in violation of the Act, with strong weight given to the fact that the e-mails were only sent out on one occasion to a small number of recipients. Accordingly, under this Note's proposed amendments, the employees would not have been found to be in violation of the Hatch Act.

2. Special Counsel v. Eisinger

This proposal does not, however, permit all on-duty political communications. To the contrary, it is virtually certain that Eisinger's conduct would constitute a Hatch Act violation under the amended statute. There is no indication that Eisinger sent e-mails to his superiors or subordinates, so he would not be excluded under the limitation of proposed § 7324(c). However, upon considering the factors of proposed § 7324(d), it is clear that Eisinger's conduct exceeded the scope of permissible political expression under the suggested amendments. First, the sheer frequency of his communications—over 100 in a three-year period²⁰⁸—would weigh strongly in favor of a finding that he had engaged in prohibited political activity. Second, Eisinger's repeated e-

²⁰³ *Id.* at 290 (describing Sims's e-mail as containing a letter from John Eisenhower supporting Kerry's candidacy).

²⁰⁴ *Id.* at 297 app. B (describing Davis's e-mail as containing an attached a picture of George W. Bush inscribed with the words "I VOTE THE BIBLE").

²⁰⁵ *See id.* at 290.

²⁰⁶ *See id.* at 290–91.

²⁰⁷ *Id.*

²⁰⁸ *Eisinger v. MSPB*, 236 Fed. App'x 628, 629 (Fed. Cir. 2007).

mails to nonemployees of his federal agency would further bolster the conclusion that he had impermissibly engaged in political activity, and rightly so, as this persistent practice is fundamentally at odds with Congress's policy goal of avoiding the appearance of politically driven justice.²⁰⁹ Third, Eisinger was an elected official of the Green Party who was sending out materials related to the Party's platform and strategies.²¹⁰ This implies that there was a substantial degree of political coloring to his messages and that his intent was to further the aims of a political organization. As such, Eisinger's conduct would not constitute protected expression of a political opinion under proposed § 7324(c); rather, it would be considered prohibited political activity under § 7324(a).

Conclusion

The Hatch Act is intended to strike a careful balance between the rights of public employees and the government's interests in maintaining a politically neutral workplace. These governmental interests are undeniably important, as concerns over political partisanship in the government workplace have been present since our nation's founding. But in modern times, the Act has been applied to a broad range of conduct that is far removed from type of overt political coercion that originally drove Congress to enact the law in 1939. Consequently, public employees' freedom of speech is chilled because they fear being subjected to harsh punishments for a trivial or isolated misstep, and Congress's policy objectives are not meaningfully achieved.

The recent transition to the new presidential Administration presents an ideal opportunity to implement new legislative initiatives and to relinquish flawed existing policies. In light of this political transition, Congress should revisit the Hatch Act's restrictions on public employees' speech. Amending the Act as proposed would ensure that the law effectively achieves congressional objectives without being overinclusive. In other words, adopting this proposal would properly restore the Act's delicate balance between important governmental interests and the constitutional rights of public employees.

²⁰⁹ See *supra* Part II.C.3.

²¹⁰ See *supra* Part II.C.3.