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**Civics 101**

**Episode 110: The Hatch Act**

**Virginia Prescott:** [00:00:24] I'm Virginia Prescott and this is Civics 101, the podcast refresher course on the basics of how our democracy works. American law makes a distinction inside the government between elected officials and federal employees. The Hatch Act was created to keep employees charged with keeping the government functioning from engaging in the kinds of political calculations and preferences that elected and appointed officials make their careers on. You may have heard of it in the news recently, since presidential adviser Kellyanne Conway was accused of violating it. One of our listeners did:.

**Stacy:** [00:00:58] Hi this is Stacy calling from Laguna Beach, California. I would be interested in more information on the Hatch Act. For example, is it a criminal or civil offense? And who prosecutes any wrongdoers? What is the potential punishment? Thanks. I really enjoy listening to your show.

**Virginia Prescott:** [00:01:18] Liz Hempowicz is Director of Public Policy for the Project on Government Oversight, or POGO. And she's back with us. Liz, great to have you.

**Liz Hempowicz:** [00:01:25] Thanks for having me back.

**Virginia Prescott:** [00:01:26] What is the Hatch Act?

**Liz Hempowicz:** [00:01:28] It's a law that restricts certain speech and actions by federal employees and then some state and local employees as well. And and the purpose of it and by the type of activity and speech I'm talking about is political speech.

[00:01:43] And the reason why is because you know the government is meant to work for all the people, the American people, all the taxpayers, not the people of a particular party. And so the optics of having federal employees, especially career employees, who you know are at the government for a long time not depending on who's whose party is in the White House or in Congress. You know, you don't want to have the appearance that those employees are pushing one party over the other.

**Virginia Prescott:** [00:02:09] It was originally called An Act to Prevent Pernicious Political Activities, which I guess kind of belies its 1939 origins. But what does it specifically forbid?

**Virginia Prescott:** [00:02:20] So there are two types of restrictions under the Hatch Act, and so that most federal employees fall under the like less restricted category. And then there are some that fall under the more restricted category, so less restricted employees can't run for a for a in a partisan political election. And so my question was when I first read that a while ago was, what is a nonpartisan political action? And that basically is when you're running as a representative of a party. And so there are elections where you're running as an individual and not as a Republican a Democrat or an independent. But it also restricts the use of resources like federal resources to solicit or discourage political activity or contributions and it allows for less less restricted employs a lot of it depends on where you are and what time it is when you're when you're engaging in some of these activities. So so there's a real distinction between when you're at work or using your government computer versus when you're off the clock.

[00:03:24] Now, more restricted employees are further restricted employees can't campaign for candidates regardless of whether they're out work or not at work. Whereas less restricted employees can campaign for for partisan political candidates outside of the office and off off government time.

**Virginia Prescott:** [00:03:41] How are those not violations of free speech? That you cannot as a citizen, even though you are and you're employed by the federal government, can't say who you want to vote for or can or put a yard sign up or put something up on your Facebook page for example?

**Liz Hempowicz:** [00:03:56] Yes, so there actually have been two challenges that may be against the constitutionality of the Hatch Act that made their way to the Supreme Court. And in both instances the Supreme Court ruled that there is a significant enough interest in maintaining that impartiality of the federal government and that interest overrides the small limit on on the types of speech and activity that this seeks to regulate. They did look at kind of the rules and regulations, and said that they're not overbroad or vague and that they're easy to understand, that they you know go towards the actual purpose of this and so it was ruled constitutional in both cases.

**Virginia Prescott:** [00:04:35] It was originally designed to block federal employees in the executive branch. Is it all federal employees now that are under this Hatch Act either in the first or second category?

**Liz Hempowicz:** [00:04:47] Yeah it is most federal employees that actually also covers some state and local employees. If they're if their salaries are are are paid by by federal funds.

**Virginia Prescott:** [00:04:57] Then who's exempt from the Hatch Act?

**Liz Hempowicz:** [00:05:00] The President and the vice president.

**Virginia Prescott:** [00:05:01] That's it?

**Liz Hempowicz:** [00:05:02] That's about it.

**Virginia Prescott:** [00:05:03] So, how about when there is a campaign event for example, you could not have your secretary of state or somebody else who was in your cabinet with you on stage supporting you?

**Liz Hempowicz:** [00:05:15] So there are certain, there are certain exemptions. But but overall yes, Cabinet officials are subject to the Hatch Act. There are some exemptions there, like very specific instances, but for the most part it's really you know you don't want these people in their official capacities, you know so the secretary of state going out there and saying, you know, "You need to vote for this president again in this upcoming presidential election." And I think we've seen over the last few decades we have seen some cabinet level secretaries, you know findings that they have violated the Hatch Act.

**Virginia Prescott:** [00:05:47] Well that, that's kind of a thing. I mean, help me understand how big of a deal this is when someone violates it. Is it the kind of thing that happens in every administration, or is it rare? So it's actually not that rare, but but one way of understanding kind of the seriousness of the Hatch Act is, and kind of the variation in seriousness of it, is looking at the penalties. And so a penalty for a Hatch Act violation can be anything from a fine, from a reprimand, to suspension, removal. A downgrade in your grade level as a federal employee. And that actually was updated in 2012. And so this is relatively new. Previously the only two options for penalties were a 30 day suspension, or removal from your position.

[00:06:33] And so I think that update to the law kind of shows that there are that there are really, there's a huge variation in violations of the Hatch Act, and so it could be something like you know, accidentally leaving on a political pin. And when you come into work and it's on your coat. That's technically a violation of the Hatch Act. It's also a violation of the Hatch Act to go on national TV as a representative of the administration and push one political candidate over another. And so if you look at those two instances it wouldn't make sense for the penalties to be exactly the same. And so it's largely up to the Office of Special Counsel who investigates these complaints against individuals and issues findings, and also maybe recommends what penalty they think would make sense.

**Virginia Prescott:** [00:07:18] You are pointing to what sounds like a recent case of Kellyanne Conway, senior adviser to President Trump. She did work on his campaign. She was on television a great deal. Here's the clip that pushed her over the boundaries of the Hatch Act, according to the Office of Special Counsel:

**Kellyanne Conway:** [00:07:33] "Doug Jones in Alabama. Folks don't be fooled. He'll be a vote against tax cuts. He's weak on crime, weak on borders, strong on raising your taxes, he's terrible for property owners. So it's doctrinaire liberal which is, why he's not saying anything, and why the media are trying to boost him."

**TV Host:** [00:07:51] "So vote for Roy Moore?"

**Kellyanne Conway:** [00:07:52] "I'm telling you that we want the votes in the Senate to get this tax bill..."

**Virginia Prescott:** [00:07:58] So Liz, where did Kellyanne Conway go over the line there?

**Liz Hempowicz:** [00:08:02] So the Office of Special Counsel found that there were two two instances in which Kellyanne Conway violated the Hatch Act, in this complaint. One was an implied endorsement of then Senate candidate Roy Moore and then the other was the other violation, was her explicitly advocating for a Senate candidate again, Senate candidate Roy Moore.

**Virginia Prescott:** [00:08:23] Are there officials that are charged with monitoring for Hatch Act violations, or would this charges more likely come from you know say an opposition party, or maybe an outside watchdog group like yours, Pogo?

**Liz Hempowicz:** [00:08:34] Yes, so many of them much of the work of the Office of Special Counsel in terms of enforcing the Hatch Act is done based on outside complaints and that could come from you know other federal employees who are witnessing things in their office or not out outside watchdog like the Project on Government Oversight. They are, the Office of Special Counsel, they are allowed to issue their own investigations and launch them on their own. But if you think about the size of the federal workforce versus the size of the Office of Special Counsel, it doesn't really make sense to have them, to hold them to be the sole arbiters of policing this bill.

**Virginia Prescott:** [00:09:13] It was however the Office of Special Counsel that wrote up the report saying that Kellyanne Conway did violate the Hatch Act, correct?

**Liz Hempowicz:** [00:09:21] Absolutely, and that was I believe based on an outside complaint.

**Virginia Prescott:** [00:09:30] So what does the President do now? Can he choose not to act on the OSC report?

**Liz Hempowicz:** [00:09:37] In one word answer, yes. It is, for employees at the White House, it is up to the president's discretion what form of punishment, if there is any punishment, they would like to see. I think, you know, earlier we saw a Hatch Act violation from Kellyanne Conway where she just received a reprimand, and that is one of the legal penalties under the law for a violation. And so that's that's well in line with it I think. I think it is, there's a growing discontent with civil society groups, and I think individual citizens as well, that that's, you know who view that as not being good enough. I think our organization is one of them. We think this is really this a serious law and it deserves serious enforcement.

**Virginia Prescott:** [00:10:23] Well you talk a little bit about punishment. I want to get to the other part of Stacey's question is this a criminal or civil offense?

**Virginia Prescott:** [00:10:30] It's a civil offense.

**Virginia Prescott:** [00:10:31] And who would prosecute it?

**Liz Hempowicz:** [00:10:33] So the Office of Special Counsel, for individuals who are outside of the White House right, because we've discussed how the president is in charge of how that is enforced, for most employees when the Office of Special Counsel issues a report and findings of a violation of the Hatch Act, they can file, they file with the Merit Systems Protection Board and then the individual has a right to respond there. And so there is a due process component to this as well.

**Virginia Prescott:** [00:10:58] I just want to go back to that point that we meant you mentioned about the cases challenging free speech. You know we living in the age where everybody, virtually everybody, spouts off their political opinions on social media. But for federal employees social media posts can be discovered and then suddenly maybe private action feels like a public statement. Do you think the Hatch Act has adequately addressed social media?

**Liz Hempowicz:** [00:11:27] Well the original law I think was written in like 1939 is when it was passed so, so social media was not was not a thing then. I do think the Office of Special Counsel has done a really good job of issuing guidance for all federal employees that interprets the law in the case of different social media activities. And they've put out you know, a short primer, a longer a deep dive, into you know what is restricted activity and what isn't. And so while the law maybe didn't didn't foresee social media I think the Office of Special Counsel is doing a really good job of making sure that federal employees aren't stuck in this gray area of what is or isn't allowed. And I just want to kind of highlight one thing about the Hatch Act. It's not meant to restrict political activity as, for private citizens. And I understand that federal employees are also private citizens and so a lot of it hinges on whether or not they're in their office using federal resources, in their federal uniforms. It's not a blanket restriction for most employees. So it is pretty narrowly tailored I think to the, to the government's interest in making sure that that it presents itself to the American people as a non partial arbiter of the laws. And of the federal resources.

**Virginia Prescott:** [00:12:45] I will say we've got a number of questions about the Hatch Act. While government employees may be well aware of these kinds of restrictions and they're given guidelines, about the rest of the American public? Do you think this is something they knew about?

**Liz Hempowicz:** [00:12:59] Probably not but I'm I'm sure they're probably learning more about it as it's in the news more and more you know. As I mentioned the Office of Special Counsel is put out put out social media guidance, but they also issue advisory opinions when individual federal employees reach out and ask, "is this is this activity restricted under the Hatch Act?" And then they post those proactively on their Web site. And so and that's open to you know everyday citizens, who aren't federal employees, to go in and I recommend that they do if they're interested in learning more about the Hatch Act. There are you know a lot lot of gray areas if you just look at the the bare bones language of the law itself, and the Office of Special Counsel has done a really good job of kind of breaking down and explaining it in a way that's very easily understandable.