

October 28, 2020

The Honorable Henry Kerner
Special Counsel
Office of Special Counsel
1730 M Street, N.W.
Suite 218
Washington, D.C. 20036-4505

Re: Guidance Regarding Post-Election Day Political Activity by Federal Employees

Dear Mr. Kerner:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Office of Special Counsel (“OSC”) issue public guidance on Hatch Act compliance to the White House and relevant agencies in the event of contested elections after November 3, 2020. President Trump has openly courted interference in the election, and senior members of his administration have routinely used federal resources and authority to support his candidacy in violation of federal law. OSC needs to provide clear, public guidance to ensure that the President and other senior government officials do not use taxpayer funds or resources to support or oppose any candidate in a partisan election if the results of the contests remain in doubt even after Americans have cast their votes.

Factual Background

As you are aware, the use of federal resources for partisan and campaign related activities by senior political appointees has become epidemic in the Trump administration. President Trump has routinely used official White House resources for campaign-style events and, under his leadership, senior administration officials have violated the Hatch Act with alarming frequency.¹ To date, OSC has found at least 14 senior Trump administration aides in violation of the Hatch Act.² Several more are currently under investigation, and the President, on multiple occasions, has attacked and dismissed concerns about compliance with this law.³ Last year, the President declined to discipline Counselor to the President Kellyanne Conway despite your finding that she committed dozens of Hatch Act violations and your recommendation that she be removed from federal service.⁴ Moreover, in the months leading up to the upcoming election, the

¹ See, e.g., Melissa Gomez, Trump is ‘Hijacking’ White House Events for ‘Partisan, Political’ Gain, Experts Say, *Los Angeles Times*, July 23, 2020, <https://lat.ms/3kzHhtG>.

² Citizens for Responsibility and Ethics in Washington, The Hatch Act: Mixing Partisan Goals with Official Positions in the Trump Administration, Oct. 2, 2018, <https://bit.ly/37HhWKS>; see also John Hendel, FCC’s O’Rielly Broke Federal Law at CPAC, *Politico*, May 1, 2018, <https://politi.co/2VfHWGz>; Tal Axelrod, Federal Investigators Concluded Ryan Zinke’s MAGA Socks Violated Hatch Act, *The Hill*, June 6, 2019, <https://bit.ly/2vUg7Jh>; Citizens for Responsibility and Ethics in Washington, Sonny Perdue Reprimanded for Hatch Act Violation Following CREW Complaint, Oct. 8, 2020, <https://bit.ly/2TqeTha>.

³ See e.g., Citizens for Responsibility and Ethics in Washington, Congress Must Stop White House Officials from Illegally Trying to Influence the Election, July 1, 2020, <https://bit.ly/3itFmot>.

⁴ Maegan Vazquez, Trump Won’t Fire Conway Despite Federal Agency Recommendation, *CNN*, June 14, 2019, available at <https://cnn.it/2HRSmE4>.

number of apparent Hatch Act violations committed by senior administration officials, including White House Chief of Staff Mark Meadows, White House Press Secretary Kayleigh McEnany, White House Senior Policy Advisor Stephen Miller, and White House Director of the Office of Trade and Manufacturing Policy Peter Navarro, among others, have increased dramatically.⁵ Just three weeks ago, OSC reprimanded Agriculture Secretary Sonny Perdue and demanded that he ensure the government was reimbursed for costs associated with his travel to an official event in August where he violated the Hatch Act.⁶

In the last month, President Trump has expressed a desire for several federal agencies to take explicit actions that would benefit his electoral fortunes in November. On October 21, 2020, the Associated Press reported that President Trump called for Attorney General William Barr to “immediately launch an investigation into unverified claims about Democrat Joe Biden and his son Hunter, effectively demanding that the Justice Department muddy his political opponent and abandon its historic resistance to getting involved in elections.”⁷ Although Attorney General Barr has resisted calls to open or expedite investigations into the President’s political rivals, Mr. Barr has served President Trump’s political interests by echoing his attacks on voting by mail.⁸ The Department of Justice (“DOJ”) also recently eased constraints on federal prosecutors opening election fraud inquiries right before Election Day and issued an “unusual news release announcing the investigation of nine mail-in military ballots that were allegedly discarded” in the battleground state of Pennsylvania.⁹ Press reports also indicate that President Trump and his allies have repeatedly discussed firing FBI Director Chris Wray, three years into his ten-year term, because he has “not done what Trump had hoped — indicate that Democratic presidential candidate Joe Biden, his son Hunter Biden or other Biden associates are under investigation” before Election Day.¹⁰ President Trump’s demands did elicit compliance from Secretary of State Mike Pompeo, who pledged to release emails from Trump’s 2016 opponent Hillary Clinton before Election Day.¹¹ Secretary Pompeo’s acquiescence has now landed him under investigation by OSC for potential violations of the Hatch Act.¹² As a result of this and other conduct,

⁵ Citizens for Responsibility and Ethics in Washington, [Congress Must Stop White House Officials from Illegally Trying to Influence the Election](#), July 1, 2020; Citizens for Responsibility and Ethics in Washington, [CREW Files Hatch Act Complaint Against Mark Meadows](#), July 15, 2020, <https://bit.ly/30Me0nR>; Citizens for Responsibility and Ethics in Washington, [CREW Files Hatch Act Complaint Against Stephen Miller](#), July 31, 2020, <https://bit.ly/3afRJSg>; Citizens for Responsibility and Ethics in Washington, [CREW Complaint: Navarro should be terminated for Hatch Act violations](#), Oct. 5, 2020, <https://bit.ly/3kwZLug>.

⁶ Citizens for Responsibility and Ethics in Washington, [Sonny Perdue Reprimanded for Hatch Act Violation Following CREW Complaint](#), Oct. 8, 2020, <https://bit.ly/2TqeTha>.

⁷ Aamer Madhani and Colleen Long, [Trump Ups Pressure on Barr to Probe Bidens as Election Nears](#), *Associated Press*, Oct. 21, 2020, <https://bit.ly/37F3r9L>.

⁸ *Id.*; see also Jane Timm, [Fact Check: Echoing Trump, Barr Misleads on Voter Fraud to Attack Expanded Vote-by-Mail](#), *NBC News*, Sept. 19, 2020, <https://nbcnews.to/3mjH4uI>.

⁹ Michael S. Schmidt and Katie Benner, [Justice Dept. Eases Election Fraud Inquiry Constraints as Trump Promotes False Narrative](#), *New York Times*, Oct. 7, 2020, <https://nyti.ms/2ToDt23>; Christina Carrega, Evan Perez, Kara Scannell, and Marshall Cohen, [DOJ Lets Prosecutors Announce Voter Fraud Investigations Close to Election Day](#), *CNN*, Oct. 7, 2020, <https://cnn.it/3otuAIU>.

¹⁰ Devlin Barrett and Josh Dawsey, [Trump Weighs Firing FBI Director after Election as Frustration with Wray, Barr Grows](#), *Washington Post*, Oct. 21, 2020, <https://wapo.st/3jtWIC3>.

¹¹ Conor Finnegan, [Pompeo Defends Trump Push to Release Hillary Clinton Emails Weeks before Election](#), *ABC News*, Oct. 14, 2020, <https://abcn.ws/3kuLqPd>.

¹² Steve Bannen, [Office of Special Counsel to Examine Pompeo's Election Antics](#), *MSNBC*, Oct. 20, 2020,

President Trump is now the subject of a complaint alleging violations under the criminal provision of the Hatch Act, 18 U.S.C. § 610, which prohibits coercion of federal employees to engage in political activity.¹³

While President Trump and his administration's most recent efforts to abuse the Hatch Act have focused on Election Day, there are many reasons why this misconduct might persist even after people have cast their votes. First, while Americans have become accustomed to presidential election results being announced on Election Day or the day after, due to the coronavirus pandemic and an increase in absentee ballots and voting by mail, the Brookings Institution warns that "we may have to prepare for election week, or even election month."¹⁴ In addition to the potential delays, President Trump has not committed to accepting the results of the election and has suggested that he plans to pursue litigation in federal court if he is not declared the winner.¹⁵ At a campaign rally last weekend, President Trump said regarding Pennsylvania, "We have a situation where they have the ballots, and they have a long time to count the ballots. A lot of bad things will happen during that period, terrible things will happen, crooked dishonest things."¹⁶ He added, "We shouldn't let it happen."¹⁷

These reports are disturbing on their own, but given the administration's prior conduct, it also raises the prospect that President Trump will enlist government officials to intervene on his behalf to help secure his desired electoral result even after Election Day. For example, Postmaster General Louis DeJoy, who is currently under investigation by OSC for potential Hatch Act violations, was criticized in a United States Postal Service Inspectoral General report for providing "incomplete" information to Congress regarding operational changes that adversely impacted delivery times and voting by mail.¹⁸ DOJ has also come under intense criticism for trying to take over Trump's defense in E. Jean Carroll's civil defamation suit against him by claiming that the President was acting in his official when he denied rape allegations she made against him.¹⁹ If Attorney General Barr can justify DOJ interceding into this personal matter involving the President, it's hard to imagine that discussions have not already begun within DOJ

<https://on.msnbc.com/2Tozjaj>.

¹³ Letter from Claire Finkelstein, Algernon Biddle Professor of Law and Professor of Philosophy, University of Pennsylvania, *et. al.*, to Corey R. Amundson, Chief, Public Integrity Section, United States Department of Justice, Oct. 26, 2020, available at <https://www.law.upenn.edu/live/files/10951-trump-criminal-hatch-act-complaint>.

¹⁴ Brookings Institution, Election night? Think Again—Election Month Might be More Like It, Aug. 4, 2020, <https://brook.gs/3dYOXTa>.

¹⁵ Colby Itkowitz, Felicia Sonmez, John Wagner, and Emily Guskin, Trump Says He'll 'See What Happens' on Election Results; Biden Makes Appeal to Black Voters in N.C., *Washington Post*, Sep. 23, 2020, <https://wapo.st/3ougtgy>; see also Griffin Connolly, Trump Confirms He Plans to Take Election Results to the Supreme Court, *The Independent*, Sept. 23, 2020, <https://bit.ly/2TCi0Tz>.

¹⁶ James Pindell and Victoria McGrane, Trump Appears at Rally in Londonderry, N.H., Riffing on 'Fake Ballots,' 2016, and Air Force One, *Boston Globe*, Oct. 25, 2020, <https://bit.ly/37GHl6M>; see also, Donald Trump Manchester, New Hampshire Rally Transcript October 25, *Rev.com*, Oct. 25, 2020, available at <https://www.rev.com/blog/transcripts/donald-trump-manchester-new-hampshire-rally-transcript-october-25>.

¹⁷ *Id.*

¹⁸ Project on Government Oversight, POGO Files Hatch Act Complaint Against Postmaster General Louis DeJoy, Aug. 20, 2020, <https://bit.ly/3kviYMW>; see, United States Postal Service Office of Inspector General, Operational Changes to Mail Delivery, Oct. 19, 2020, <https://bit.ly/34qYHm8>.

¹⁹ Alan Feuer, Justice Dept. Intervenes to Help Trump in E. Jean Carroll Defamation Lawsuit, *New York Times*, Sept. 8, 2020, <https://nyti.ms/3juIUHo>.

and other federal agencies regarding their potential roles if President Trump contests the results of November's election.

Legal Background

The Hatch Act prohibits executive branch employees from engaging in political activity while on duty, on government property, wearing an official uniform or insignia, or using a government vehicle.²⁰ This prohibition has historically been understood to include behind-the-scenes activity and assistance, even when that work does not include public communication.²¹ The Hatch Act further bars an executive branch employee from “us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election.”²² Activities covered by this prohibition include federal employees’ use of their official authority or position while participating in political activity.²³ “Political activity” is defined as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”²⁴ OSC precedent suggests that this prohibition is not limited to pre-Election Day activity, but existing guidance is dated and lacks sufficient clarity to fully address likely scenarios in 2020.²⁵ Penalties for violating the statute can include removal from government service, reduction in grade, debarment from federal employment for up to five years, suspension, reprimand, or a civil fine.²⁶ While the President and the Vice President are exempt from the civil provisions of the Hatch Act, OSC has also acknowledged that the Hatch Act does not provide an exemption for executive branch employees acting on behalf of a principal who is exempt from the law’s restrictions.²⁷

Federal law is clear that Trump administration officials cannot engage in conduct in the course of their government jobs “for the purpose of interfering with or affecting the result of an election.”²⁸ However, given this administration’s track record of non-compliance with the Hatch Act and the unprecedented nature of November’s election, it is incumbent upon OSC to explain further what those restrictions might mean in a post-Election Day context. President Trump has already demanded, and in some cases received, assistance from senior political appointees to use the tools of the government to support his re-election effort. These abuses have escalated and likely will continue to escalate as we approach and move beyond Election Day, especially if the results remain in doubt for days and weeks. As such, OSC must be vigilant and transparent in

²⁰ 5 U.S.C. § 7324.

²¹ Congressional Research Service, “Hatch Act” and Other Restrictions in Federal Law on Political Activities of Government Employees, Report No. 98-885 A, at 11-12, Oct. 23, 1998, <https://bit.ly/3ahIbGu>.

²² 5 U.S.C. § 7323(a)(1).

²³ 5 C.F.R. § 734.302(b)(1).

²⁴ 5 C.F.R. § 734.101.

²⁵ Office of Special Counsel, Wearing or Displaying Presidential Candidate Items after the Election, Nov. 5, 2008, <https://web.archive.org/web/20090118035321/http://www.osc.gov/documents/hatchact/federal/Hatchact08.pdf> (noting that until the Electoral College votes are counted and a winner is declared by the president of the Senate, all candidates for president retain their status as candidates, but permitting employees to wear and display Obama and McCain t-shirts and pictures after Election Day presumably because election was settled).

²⁶ 5 U.S.C. § 7326.

²⁷ Office of Special Counsel, Report of Prohibited Political Activity under the Hatch Act OSC File No. HA-18-0966 (Kellyanne Conway), Mar. 6, 2018, <https://bit.ly/33fDagi>.

²⁸ 5 U.S.C. § 7323(a)(1).

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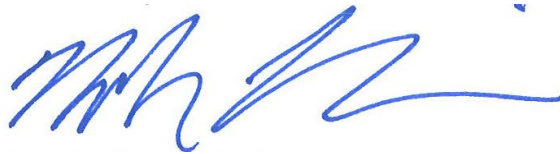
ensuring that Trump administration officials receive clear guidance for how to comply with the law and face swift enforcement if they run afoul of it.

Conclusion

The Hatch Act is intended to prevent federal employees from engaging in partisan political activity in their official capacity. The statute prohibits an employee from undertaking any activity directed toward the success or failure of a political candidate or a political party while on duty or on federal property, or while using her official title or position. President Trump's repeated attempts to use government resources to support his campaign and Trump administration officials' numerous violations of the Hatch Act are a gross abuse of power that threatens to undermine our democracy.

As the independent federal agency responsible for enforcement of the Hatch Act, OSC needs to provide the White House with clear, public guidance to ensure that Trump administration officials follow the law in the period immediately following Election Day, and especially if the 2020 presidential election results are contested.

Sincerely,

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

Noah Bookbinder
Executive Director