

August 2, 2018

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

Re: Violation of the Hatch Act by Mick Mulvaney

Dear Mr. Kerner:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Office of Special Counsel (“OSC”) investigate whether Director of the White House Office of Management and Budget (“OMB”), Mick Mulvaney, violated the Hatch Act by writing, publishing, and disseminating via his official Twitter account an op-ed promoting President Trump’s campaign slogan “MAGA” (Make America Great Again), and by using his official Twitter account to promote the same slogan in both another tweet and a video. These actions were directed toward the success or failure of Donald J. Trump, a candidate in a partisan race. By writing and sharing this op-ed using his official position, Mr. Mulvaney likely engaged in political activity prohibited by law.

Factual Background

Mr. Mulvaney was nominated by the President to serve as Director of OMB and confirmed by the Senate in February 2017.¹ Mr. Mulvaney previously served as a member of the U.S. House of Representatives from South Carolina. Shortly after joining the Trump Administration, Mr. Mulvaney began using the official Twitter handle @MickMulvaneyOMB.²

Mr. Mulvaney’s “MAGAnomics” Op-Ed

On April 5, 2018, Mr. Mulvaney authored an op-ed published by CNBC regarding the Trump Administration’s economic policy entitled “‘MAGAnomics’ is working and defying critics.”³ The op-ed was also published on the White House website noting that the op-ed appeared in CNBC.⁴ On several occasions in the op-ed, Mr. Mulvaney used the term

¹ Alan Rappeport, Mick Mulvaney, Trump’s Pick for Budget Director, Is Confirmed, *New York Times*, Feb. 18, 2017, available at <https://www.nytimes.com/2017/02/16/us/politics/mick-mulvaney-omb-confirmed.html>.

² Mick Mulvaney @MickMulvaneyOMB, Twitter, <https://twitter.com/MickMulvaneyOMB>.

³ Mick Mulvaney, “MAGAnomics” is Working and Defying Critics, *CNBC*, Apr. 5, 2018, available at <https://www.cnb.com/2018/04/05/trump-budget-director-mulvaney-maganomics-is-working-and-defying-critics.html>.

⁴ Mick Mulvaney, “MAGAnomics” is Working and Defying Critics, Apr. 4, 2018, available at <https://www.whitehouse.gov/articles/maganomics-working-defying-critics/>.

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“MAGAnomics” when discussing the administration’s economic policy. For example, Mr. Mulvaney wrote:

While many are predicting GDP growth for the first three months of this year may not be as high, we should weigh that possibility against this certainty: the Left, and many in the media, will pounce on any report to throw doubt on not only the health of the American economy, but on the efficacy of President Donald Trump’s *MAGAnomics (Make America Great Again)* agenda of tax reform, deregulation, trade renegotiation and domestic energy independence.⁵

Mr. Mulvaney added:

One of the biggest undercurrents is that things never really change that much. But under President Trump and his MAGAnomics agenda, we've been able to restore the fundamental dynamism of the American economy.⁶

Mr. Mulvaney ended the op-ed by stating:

MAGAnomics is a simple formula, you just have to believe in capitalism and work and our people. You have to believe in America. And in Americans. This administration certainly does.⁷

The byline for the *CNBC* op-ed reads “Commentary by Mick Mulvaney, director of the Office of Management and Budget.”⁸

@MickMulvaneyOMB Twitter Account

There is little doubt that the @MickMulvaneyOMB Twitter account is used by Mr. Mulvaney for official government purposes. According to his Twitter page, the handle was created in July 2017 a few months after his confirmation as OMB Director.⁹ The account profile states that Mr. Mulvaney is the “Director of Office of Management and Budget.”¹⁰ Furthermore, the account’s profile picture is an image of Mr. Mulvaney on what appears to be the White House grounds and the header features an image of the OMB logo.¹¹ Mr. Mulvaney also uses the @MickMulvaneyOMB Twitter account to post about official OMB activities and also links to the official website of the White House Office of Management and Budget, www.omb.gov.¹²

⁵ Mulvaney, *CNBC*, Apr. 5, 2018.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Mick Mulvaney (@MickMulvaneyOMB), Twitter, <https://twitter.com/MickMulvaneyOMB>.

¹⁰ *Id.*

¹¹ *Id.*

¹² See generally Mick Mulvaney (@MickMulvaneyOMB), Twitter, <https://twitter.com/MickMulvaneyOMB>.

Use of @MickMulvaneyOMB for Partisan Political Purposes

Since March 2018, Mr. Mulvaney appears to have used his official @MickMulvaneyOMB Twitter account to tweet partisan political posts on at least two occasions. As detailed below, such actions likely violate the Hatch Act.

On Thursday, April 5, 2018, Mr. Mulvaney used his official @MickMulvaneyOMB account to tweet a link to his April 5, 2018 op-ed published by CNBC.¹³ The tweet included his commentary: “#MAGAnomics is a simple formula, you just have to believe in capitalism, hard work and our people. You must believe in America. We certainly do.”¹⁴ The language is similar to Mr. Mulvaney’s CNBC op-ed. The tweet reads in full:



¹³ Mick Mulvaney (@MickMulvaneyOMB), Twitter (Apr. 5, 2018), <https://twitter.com/MickMulvaneyOMB/status/981954374133075968>.

¹⁴ *Id.*

On Friday, July 27, 2018, Mr. Mulvaney used his official @MickMulvaneyOMB Twitter account to tweet a video discussing the Trump Administration economic policy.¹⁵ The tweet included his commentary: “#MAGAnomics is working!”¹⁶ In addition, the video appears to be of Mr. Mulvaney in his office and as part of his discussion of Trump Administration economic policy, he states: “Things are working. MAGAnomics – we’ve talked about it here before – Make America Great Again economics – the MAGAnomics plan of Donald Trump is working.”¹⁷ The video ends with a screen shot of the OMB logo, and an image of the OMB website, www.omb.gov. The tweet reads in full:



¹⁵ Mick Mulvaney (@MickMulvaneyOMB), Twitter (July 27, 2018), <https://twitter.com/MickMulvaneyOMB/status/1022858675667361794>.

¹⁶ *Id.*

¹⁷ *Id.*

March 2018 OSC and White House Hatch Act Guidance

On February 27, 2018, Donald J. Trump announced his candidacy for re-election to the Office of President of the United States.¹⁸ On March 5, 2018, OSC published a document entitled, “Updated Guidance Regarding the Hatch Act and President Donald Trump Now That He Is Officially a Candidate for Reelection.”¹⁹ The document acknowledged that President Trump became a “candidate for partisan political office” as described in the Hatch Act in February when he publicly announced his candidacy.²⁰ In addition to reminding federal employees regarding the specific prohibitions of the Hatch Act on political activity, the updated guidance offered additional clarification regarding the use of the social media accounts.²¹ OSC’s updated guidance stated that the Hatch Act’s prohibition related to political activity “is broad and encompasses more than displays or communications (including in-person and via email or social media) that expressly advocate for or against President Trump’s reelection.”²² Notably, the OSC guidance included the following example:

[W]hile on duty or in the workplace, employees may not: wear, display, or distribute items with the slogan “Make America Great Again” or any other materials from President Trump’s 2016 or 2020 campaigns; use hashtags such as #MAGA or #ResistTrump in social media posts or other forums; or display non-official pictures of President Trump.²³

On March 6, 2018, just one day after OSC’s updated Hatch Act guidance was published, OSC concluded its Hatch Act investigation of Counselor to the President Kellyanne Conway, finding that she violated the law in two television interviews and referring a report to the President for “appropriate disciplinary action.”²⁴ The White House defended Ms. Conway’s conduct stating that she did not violate the Hatch Act, and no disciplinary action appears to have been taken in response to OSC’s findings.²⁵

¹⁸ Katie Rogers and Maggie Haberman, Trump’s 2020 Campaign Announcement Had a Very Trumpian Rollout, *New York Times*, Feb. 27, 2018, available at <https://www.nytimes.com/2018/02/27/us/politics/trump-2020-brad-parscale.html>.

¹⁹ Office of Special Counsel, Updated Guidance Regarding the Hatch Act and President Donald Trump Now That He Is Officially a Candidate for Reelection, Mar. 5, 2018, available at <https://osc.gov/Resources/Candidate%20Trump%20Hatch%20Act%20Guidance%203-5-2018.pdf>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Office of Special Counsel, OSC Concludes Hatch Act Investigation of Kellyanne Conway, Finds Two Violations, and Refers Findings to President for Appropriate Disciplinary Action, Mar. 6, 2018, available at <https://osc.gov/News/pr-18-24.pdf>.

²⁵ Alexander Mallin, Kellyanne Conway says she discussed Hatch Act violations with President Trump, *ABCNews*, Mar. 8, 2018, available at <https://abcnews.go.com/Politics/kellyanne-conway-discussed-hatch-act-violations-president-trump/story?id=53609559>.

On March 7, 2018, the White House counsel's office sent a memo to White House staff highlighting OSC's new Hatch Act guidance.²⁶

Potential Violations

The Hatch Act - 5 U.S.C. §§ 7321 - 26

The Hatch Act prohibits any executive branch employee from “us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election.”²⁷ Activities covered by this prohibition include the official “[u]sing his or her official title while participating in political activity.”²⁸ “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.”²⁹

OSC has provided recent guidance on applying this prohibition to social media.³⁰ In its guidance, OSC sets forth a rule prohibiting employees from using a “social media account designated for official purposes to post or share messages directed at the success or failure of a political party, candidate in a partisan race, or partisan political group. All such official social media accounts should remain politically neutral.”³¹

OSC's March 2018 updated Hatch Act guidance clarifies that since President Trump officially became a candidate for reelection on February 27, 2018, federal employees are prohibited from using the campaign slogan “Make America Great Again” or “MAGA” on official social media accounts.³²

OSC has already acknowledged that the Hatch Act does not provide an exemption for executive branch employees speaking on behalf of a principal who is in fact exempt from the Hatch Act's restrictions. In its report regarding Hatch Act violations by Ms. Conway, OSC stated:

While the President is exempt from the Hatch Act, his exemption does not extend to any other employee, including those employed in the White House Office. OSC understands that [an employee's] job duties may include publicly reinforcing the Administration's positions on a host of policy issues. And the Hatch Act does not

²⁶ Veronica Stracqualursi and Cristina Alesci, Trump's legal team: No #MAGA at the White House, *CNN*, Mar. 8, 2018, available at <https://www.cnn.com/2018/03/08/politics/white-house-counsel-memo-hatch-act/index.html>.

²⁷ 5 U.S.C. § 7323(a)(1).

²⁸ 5 C.F.R. § 734.302(b)(1).

²⁹ 5 C.F.R. § 734.101.

³⁰ Office of Special Counsel, Hatch Act Guidance on Social Media, revised Feb. 2018, available at <http://bit.ly/2J60680>.

³¹ *Id.* at 7.

³² Office of Special Counsel, Updated Guidance Regarding the Hatch Act and President Donald Trump Now That He Is Officially a Candidate for Reelection, Mar. 5, 2018, available at <https://osc.gov/Resources/Candidate%20Trump%20Hatch%20Act%20Guidance%203-5-2018.pdf>.

prohibit [an employee] from doing so, provided she carries out her job duties in a manner that complies with the law.³³

As an initial matter, there is no question that Mr. Mulvaney's op-ed was written in his official capacity as the byline for the op-ed identifies Mr. Mulvaney as Director of OMB. Similarly, there is no question that the @MickMulvaneyOMB Twitter account is "a social media account designated for official purposes." Mr. Mulvaney's Twitter page describes him as the "Director of Office of Management and Budget" and the profile features a picture of the OMB logo. In addition, Mr. Mulvaney regularly uses the @MickMulvaneyOMB account to post about official White House Office of Management and Budget activities and links to other official government Twitter accounts. Thus, the @MickMulvaneyOMB account clearly is an official account and Mr. Mulvaney's use of it falls squarely within the jurisdiction of the Hatch Act.

Nor is there any doubt that Mr. Mulvaney's op-ed or his use of the @MickMulvaneyOMB Twitter account to post tweets featuring the Trump campaign slogan constitutes political activity under the Hatch Act. Both OSC and the White House have provided White House staff with legal guidance concluding that tweeting President Trump's campaign slogan "#MAGA" or using it in other forums constitutes political activity. While Mr. Mulvaney could have used any number of terms to describe the Trump Administration's economic policy, the term "MAGAnomics" and the explicit reference in the op-ed and the video to what it stands for ("Make America Great Again") specifically invoke the president's campaign slogans. The term is used several times in the text of the op-ed authored by Mr. Mulvaney and in his tweet to promote the op-ed following its publication, as well as in his later tweet and video discussing the Trump Administration economic policy. The use of the term in Mr. Mulvaney's op-ed and video unmistakably ties his work on behalf of the federal government to the president's campaign for office. Accordingly, this conduct was directed at the success or failure of a political party or candidate in a partisan race.³⁴

By publishing this op-ed and using his official Twitter account to transmit this message, Mr. Mulvaney ran afoul of the Hatch Act, which requires him to remain politically neutral when engaging in official government conduct. This violation is even more egregious given the specific guidance provided by OSC in March and by White House following Hatch Act violations by another White House employee.

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 using his or her official position, including through an official social media account. By

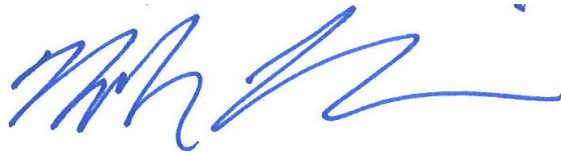
³³ Office of Special Counsel, Report of Prohibited Political Activity under the Hatch Act OSC File No. HA-18-0966 (Kellyanne Conway), Mar. 6, 2018, available at <https://osc.gov/Resources/Conway%20HA-18-0966%20Final%20Report.pdf>.

³⁴ Office of Special Counsel, Hatch Act Guidance on Social Media, at 7.

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publishing the op-ed, video, and tweets at issue, which advocates the election or defeat of a partisan political candidate, Mr. Mulvaney appears to have violated the Hatch Act. OSC should commence an immediate investigation and take or recommend appropriate disciplinary action against Mr. Mulvaney.

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