

November 16, 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 Department of Homeland Security Employees

Dear Mr. Kerner:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Office of Special Counsel (“OSC”) investigate whether Department of Homeland Security (“DHS”) employees violated the Hatch Act by drafting, publishing, and disseminating a press release that promotes President Donald J. Trump’s political candidacy by using a version of his campaign slogan “Make America Great Again.” This action was directed toward the success or failure of President Trump, a candidate in a partisan race. By drafting, publishing, and disseminating this press release using official DHS resources, unknown agency employees likely engaged in political activity prohibited by law. As part of its investigation, OSC should determine which DHS employees authorized and executed this conduct in order to hold them accountable.

**Factual Background**

The Department of Homeland Security is an executive branch agency whose stated mission is to “safeguard the American people, our homeland, and our values.”<sup>1</sup> DHS is led by Secretary Kirstjen Nielsen who was sworn in on December 6, 2017 following her nomination by President Trump and confirmation by the Senate.<sup>2</sup> Jonathan Hoffman, the DHS Assistant Secretary for Public Affairs, was appointed by President Trump in February 2017 to oversee the agency’s public outreach and media relations efforts.<sup>3</sup> In this role, he also “directs the Department’s strategic, incident, and internal communications, and serves as the principal communications advisor to the Secretary.”<sup>4</sup>

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<sup>1</sup> Department of Homeland Security, Mission, available at <https://www.dhs.gov/mission>.

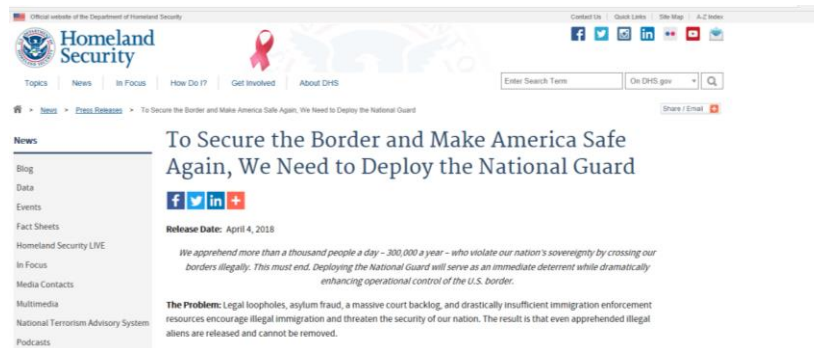
<sup>2</sup> Department of Homeland Security, Kirstjen M. Nielsen, available at <https://www.dhs.gov/person/kirstjen-m-nielsen>.

<sup>3</sup> Jonathan Hoffman, Public Financial Disclosure Report (OGE Form 278e), Nov. 2017, available at <https://www.documentcloud.org/documents/4387681-Jonathan-Hoffman-Financial-Disclosure.html>.

<sup>4</sup> Department of Homeland Security, Jonathan Rath Hoffman, available at <https://www.dhs.gov/person/jonathan-rath-hoffman>.

DHS Press Release Used for Partisan Political Purposes

On April 4, 2018, the Department of Homeland Security issued a press release entitled, “To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard.”<sup>5</sup> DHS’s announcement stated that “[i]n coordination with governors, National Guard units will be deployed to our southern border” in order to help mitigate illegal immigration.<sup>6</sup>



The press release was posted on the DHS website and a link to the press release was also included in the DHS Office for Civil Rights and Civil Liberties Newsletter released in April 2018.<sup>7</sup>

This was not the first time DHS has invoked the term “Make America Safe Again” in a press release. On February 15, 2018, DHS issued two press releases using the phrase. One was entitled “We Must Secure The Border And Build The Wall To Make America Safe Again” – a message consistent with President Trump’s campaign promise to build a wall on America’s southern border.<sup>8</sup> The second was entitled “To Make America Safe Again, We Must End Sanctuary Cities and Remove Criminal Aliens.”<sup>9</sup>

The Trump Campaign’s Slogan and Its Many Iterations

<sup>5</sup> Department of Homeland Security, To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard, Apr. 4, 2018, available at <https://www.dhs.gov/news/2018/04/04/secure-border-and-make-america-safe-again-we-need-deploy-national-guard>.

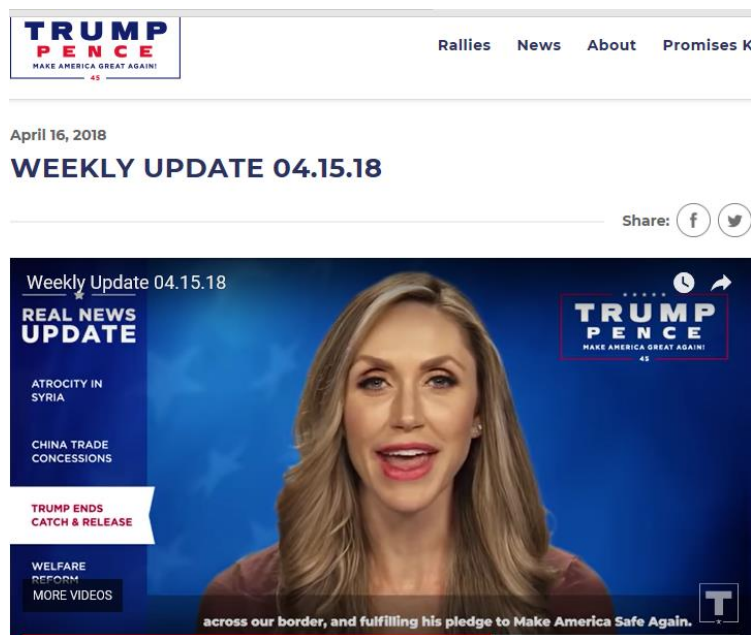
<sup>6</sup> *Id.*

<sup>7</sup> Department of Homeland Security, Office of Civil Rights and Civil Liberties, Newsletter Vol. 8, #8, Apr. 2018, available at <https://www.dhs.gov/sites/default/files/publications/crcl-newsletter-april-2018.pdf>.

<sup>8</sup> Department of Homeland Security, We Must Secure The Border And Build The Wall To Make America Safe Again, Feb. 15, 2018, available at <https://www.dhs.gov/news/2018/02/15/we-must-secure-border-and-build-wall-make-america-safe-again>. See Kevin Liptak, Dan Merica and Tal Kopan, Trump stands by campaign pledge of building wall, blames Democrats for stalled immigration debate, Feb. 23, 2018, available at <https://www.cnn.com/2018/02/23/politics/trump-immigration-cpac-speech-wall/index.html/>.

<sup>9</sup> Department of Homeland Security, To Make America Safe Again, We Must End Sanctuary Cities and Remove Criminal Aliens, Feb. 15, 2018, available at <https://www.dhs.gov/news/2018/02/15/make-america-safe-again-we-must-end-sanctuary-cities-and-remove-criminal-aliens>.

In addition to the terms “Make America Great Again” and “MAGA President Trump, his campaign, and the Republican Party have used the phrase “Make America Safe Again” during both the 2016 campaign and since. For example, on July 8, 2016, President Trump vowed “we will Make America Safe Again” in a campaign video.<sup>10</sup> In addition, the theme of the first night of the 2016 Republican National Convention during which President Trump was nominated as the Republican Party candidate for president was “Make America Safe Again.”<sup>11</sup> For example, Trump campaign surrogate Rudy Giuliani addressed the 2016 Republican National Convention stating, “It’s time to make America safe again. It’s time to make America one again.”<sup>12</sup> More recently, just days after the April 4, 2018 DHS press release regarding the deployment of the National Guard to America’s southern border to “Make America Safe Again,” the Trump campaign released a video to supporters invoking the same language.<sup>13</sup> In the Trump campaign’s “Weekly Update 04.15.18” to supporters, campaign aide Lara Trump described the new DHS policy in a segment called “Trump Ends Catch & Release” and ends the segment by stating that his policies are “fulfilling his pledge to Make America Safe Again.” The phrase “Make America Safe Again” appears in the video.<sup>14</sup>



<sup>10</sup> Associated Press YouTube page, [Trump Vows to ‘Make America Safe Again’](https://www.youtube.com/watch?v=OkIKoCpJZ7c), July 8, 2016, available at <https://www.youtube.com/watch?v=OkIKoCpJZ7c>.

<sup>11</sup> Team GOP, [RNC Day 1: Make America Safe Again in Photos](https://www.gop.com/rnc-day-1-make-america-safe-again-in-photos/), July 20, 2016, available at <https://www.gop.com/rnc-day-1-make-america-safe-again-in-photos/>.

<sup>12</sup> Will Drabold, Watch Rudy Giuliani's Energetic Speech at the Republican Convention, *Time Magazine*, July 19, 2016, available at <http://time.com/4412059/repUBLICan-convention-rudy-giuliani-transcript-video/>.

<sup>13</sup> Donald J. Trump for President, Inc., [WEEKLY UPDATE 04.15.18](https://www.donaldjtrump.com/media/weekly-update-041518/), Apr. 16, 2018, available at <https://www.donaldjtrump.com/media/weekly-update-041518/>.

<sup>14</sup> *Id.*

President Trump himself tweeted a variant of the phrase used in the DHS press releases following a June 27, 2018 political rally in North Dakota, saying: “Thank you North Dakota. Together, we are MAKING AMERICA SAFE AND GREAT AGAIN! #MAGA.”<sup>15</sup> And the Trump campaign appears to be distributing signs with the slogan “Make America Safe Again” at political rallies for President Trump and elsewhere.<sup>16</sup>

President Trump and his campaign also continue to use other iterations of “Make America Great Again.” For instance, on July 31, 2018, the Trump campaign announced “President Trump’s support for American farmers has a new symbol: the Trump Campaign’s new limited edition, green and yellow, ‘Make Our Farmers Great Again’ hat.”<sup>17</sup>

### March 2018 OSC 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.<sup>18</sup> 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.”<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

It is unclear if this guidance was distributed to DHS employees, though it remains applicable to them.

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<sup>15</sup> Donald J. Trump (@realDonaldTrump), Twitter (June 27, 2017),

<https://twitter.com/realdonaldtrump/status/1012169482272460800?lang=en>.

<sup>16</sup> CBS News YouTube page, President Trump holds ‘MAGA’ rally tonight, live stream, Oct. 10, 2018, at 14:20-14:55 (showing multiple rally signs with the phrase “Make America Safe Again”), available at

[https://www.youtube.com/watch?time\\_continue=872&v=gSqw1vplPY0](https://www.youtube.com/watch?time_continue=872&v=gSqw1vplPY0); Donald J. Trump for President, Inc., Rally (photograph of person holding sign), available at <https://shop.donaldjtrump.com/collections/rally>.

<sup>17</sup> Donald J. Trump for President, Inc., Trump Campaign: new “Make Our Farmers Great Again” hat sold out, July 31, 2018, available at <https://www.donaldjtrump.com/media/trump-campaign-new-make-our-farmers-great-again-hat-sold-out/>.

<sup>18</sup> 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>.

<sup>19</sup> 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>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

## **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.”<sup>22</sup> Activities covered by this prohibition include the official “[u]sing his or her official title while participating in political activity.”<sup>23</sup> “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.”<sup>24</sup> Unless excepted by the Hatch Act, employees may not participate in political activities while on duty or in the federal workplace.<sup>25</sup>

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 displaying or promoting the campaign slogan “Make America Great Again” or any other materials from President Trump’s 2016 or 2020 campaigns while on duty or in the workplace.<sup>26</sup>

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 Counselor to the President Kellyanne 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 prohibit [an employee] from doing so, provided she carries out her job duties in a manner that complies with the law.<sup>27</sup>

As an initial matter, there is no question that the April 4, 2018 DHS press release regarding deploying the National Guard to America’s southern border constitutes the use of the government’s official authority and resources. The press release appeared on the DHS official

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<sup>22</sup> 5 U.S.C. § 7323(a)(1).

<sup>23</sup> 5 C.F.R. § 734.302(b)(1).

<sup>24</sup> 5 C.F.R. § 734.101.

<sup>25</sup> 5 C.F.R. § 734.306.

<sup>26</sup> 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.

<sup>27</sup> 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>.

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website as well as in a DHS newsletter and was likely carried out on official time and in the federal workplace. Thus, the DHS press release falls squarely within the jurisdiction of the Hatch Act.

Nor is there any doubt that publishing a press release using the phrase “Make America Safe Again” in the title constitutes political activity under the Hatch Act. OSC’s legal guidance concludes that disseminating or promoting President Trump’s campaign slogan “Make America Great Again” or using other materials from President Trump’s 2016 or 2020 campaigns constitutes political activity. While OSC’s guidance does not specifically include “Make America Safe Again” in its list of slogans, there is no indication that OSC’s list was meant to be exhaustive. In fact, many other iterations of the phrase have been used by President Trump and his campaign in their communications with supporters, including using the term “Make America Safe Again” just days after the DHS press release was issued and on signs apparently distributed at campaign rallies. DHS could have used any number of terms in a press release, yet the agency chose to use a phrase invoking the president’s campaign slogan. The language unmistakably ties the agency’s work on behalf of the federal government to President Trump’s campaign and suggests that he had fulfilled his campaign pledge.

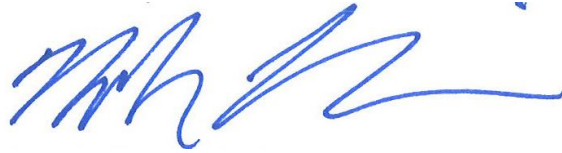
While this usage might have been permissible under the Hatch Act prior to February 27, 2018, OSC’s updated guidance issued on March 5, 2018 indicates that it constitutes political activity now that Donald Trump is officially a candidate for reelection. Accordingly, this conduct was directed at the election or defeat of a candidate in a partisan race. By using staff time, the DHS website and other official DHS resources to draft, publish and transmit this press release, DHS employees ran afoul of the Hatch Act, which requires them to remain politically neutral when engaging in official government conduct. This violation is even more egregious given the updated Hatch Act guidance provided by OSC in March.

### **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 press release. By publishing the press release at issue, which advocates the election or defeat of a partisan political candidate, DHS employees appear to have violated the Hatch Act. OSC should commence an immediate investigation to determine which DHS employees were involved in the creation and dissemination of this press release and take or recommend appropriate disciplinary action against them.

Sincerely,

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

Noah Bookbinder  
Executive Director