

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 Employees in the Office of the First Lady

Dear Mr. Kerner:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Office of Special Counsel (“OSC”) investigate whether, on Election Day 2018, federal employees in the Office of the First Lady of the United States violated the Hatch Act by using the official government Twitter account, @FLOTUS, to disseminate a message encouraging citizens to vote for Republican candidates and including President Trump’s campaign slogan “MAGA” (Make America Great Again). This tweet was directed toward the success or failure of a political party and Donald J. Trump, a candidate in a partisan race. By drafting and publishing this tweet using official White House resources on the official @FLOTUS account, these unknown employees likely engaged in political activity prohibited by law. As part of its investigation, OSC should determine which White House employees participated in this conduct and recommend appropriate disciplinary action against them.

Factual Background

Melania Trump became First Lady of the United States on January 20, 2017, when her husband, Donald J. Trump took the oath of office as the 45th President of the United States. The Office of the First Lady includes White House staff tasked with helping to build out the First Lady’s agenda and to promote Mrs. Trump’s initiatives as First Lady.¹ In March 2017, Stephanie Grisham was appointed as Communications Director for the Office of the First Lady.² Since the beginning of the Trump Administration, Mrs. Trump’s staff has used the official Twitter handle @FLOTUS. The term “FLOTUS” is widely recognized, and routinely used by the White House, to refer to the “First Lady of the United States.”³

@FLOTUS Twitter Account

¹ See 3 U.S.C. § 105(e).

² Betsy Klein and Noah Gray, Melania Trump hires communications director, CNN, Mar. 27, 2017, available at <https://cnn.it/2Pea76Q>.

³ See e.g., The White House, Statement from the FLOTUS Communications Director, June 21, 2018, available at <https://www.whitehouse.gov/briefings-statements/statement-flotus-communications-director/>.

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There is little doubt that the @FLOTUS Twitter account is used by Office of the First Lady staff for official government purposes. According to the Twitter page, this @FLOTUS account was created in January 2017.⁴ The account profile states that the @FLOTUS account is “run by the Office of First Lady Melania Trump.”⁵ The @FLOTUS profile also states, “Tweets may be archived. More at wh.gov/privacy”⁶ Furthermore, the account’s profile picture appears to be of Mrs. Trump standing in the White House and links to the website of one of her official initiatives, BeBest.gov, which redirects to a White House webpage.⁷ The Office of the First Lady uses the @FLOTUS Twitter account to post about official White House activities and often links to the official @Whitehouse and @POTUS Twitter accounts.⁸ The @FLOTUS account has been verified by Twitter.

Mrs. Trump appears to maintain a personal Twitter account, @MELANIATRUMP, that was created in January 2010.⁹ Since becoming First Lady, Mrs. Trump has used this account to post about the official business of the Office of the First Lady.¹⁰ However, prior to January 2017, Mrs. Trump frequently used this account to post about personal matters.¹¹ This account has also been verified by Twitter.

Staff Use of the @FLOTUS Twitter Account for Partisan Political Purposes

On November 6, 2018, Election Day, staff in the Office of the First Lady appear to have used the official @FLOTUS Twitter account to tweet a partisan political post.¹² As detailed below, this action likely violates the Hatch Act. On this date, the @FLOTUS account tweeted:

⁴ Melania Trump (@FLOTUS), Twitter, <https://twitter.com/FLOTUS>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See generally *id.*

⁹ Melania Trump (@MELANIATRUMP), Twitter, <https://twitter.com/MELANIATRUMP>.

¹⁰ See generally *id.*

¹¹ Melania Trump (@MELANIATRUMP), Twitter (May 29, 2015), <https://twitter.com/MELANIATRUMP/status/604355010969915393>.

¹² Melania Trump (@FLOTUS), Twitter (Nov. 6, 2018), <https://twitter.com/FLOTUS/status/1059775130551902209>.

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The tweet directs the reader to “Vote Red” and includes the slogan “MAGA”.¹³ The tweet also includes a link to Vote.GOP, a website that indicates it is “[p]aid for by the Republican National Committee” (“RNC”) that states, “Thanks for visiting. With your help, we will win this election” in front of a large red background.¹⁴ The tweet also includes an image of the word “VOTE” in large red lettering and is time stamped at 3:50 AM.¹⁵

The RNC is registered with the Federal Election Commission as a national party committee of the Republican Party and describes itself as the management arm of the Republican Party.¹⁶ The RNC’s website is www.gop.com.¹⁷ Public reports have noted that since the 2000 election, the assignation of red for the Republican Party and blue for the Democratic Party has been a generally standard practice.¹⁸ For example, the RNC recently published a blog post entitled “Red Wave Alert!” discussing the prospect of a Republican candidate winning his election in November.¹⁹

Potential Violation

¹³ *Id.*

¹⁴ Vote.Gop, available at <https://vote.gop/> (accessed Nov. 6, 2018).

¹⁵ Melania Trump (@FLOTUS), Twitter (Nov. 6, 2018), <https://bit.ly/2yUSVZK>.

¹⁶ Republican National Committee, FEC Form 1, Statement of Organization, Amended, Feb. 22, 2018, available at <https://bit.ly/2D35WUD>; see also Republican National Committee, Rules of the Republican Party, Rule 1(a), available at <https://bit.ly/1p9jSBY>.

¹⁷ Republican National Committee, FEC Form 1, Statement of Organization, Amended, Feb. 22, 2018.

¹⁸ Philip Bump, Red vs. Blue: A history of how we use political colors, *The Washington Post*, Nov. 8, 2016, available at <https://wapo.st/2QoZYK8>.

¹⁹ Republican National Committee, Preya Samsundar, Red Wave Alert!, Sept. 10, 2018, available at <https://www.gop.com/red-wave-alert>.

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.”²⁰ Activities covered by this prohibition include the official “[u]sing his or her official title while participating in political activity.”²¹ “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.”²²

OSC has provided recent guidance on applying this prohibition to social media.²³ 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.”²⁴

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.”²⁵ 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.²⁶ 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.”²⁷ 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.²⁸

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

²⁰ 5 U.S.C. § 7323(a)(1).

²¹ 5 C.F.R. § 734.302(b)(1).

²² 5 C.F.R. § 734.101.

²³ Office of Special Counsel, Hatch Act Guidance on Social Media, revised Feb. 2018, available at <http://bit.ly/2J60680>.

²⁴ *Id.* at 7.

²⁵ 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://bit.ly/2quR1up>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

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President for “appropriate disciplinary action.”²⁹ In concluding that Ms. Conway broke the law, OSC found 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.³⁰ The report 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.³¹

On March 7, 2018, the White House counsel’s office sent a memo to White House staff highlighting OSC’s new Hatch Act guidance.³² According to public reports, the memo advised White House personnel that under the Hatch Act, they are “restricted from using the campaign slogan, ‘Make America Great Again’ or ‘MAGA,’ in official White House communications or posting it to their personal social media accounts while they’re working.”³³

On September 20, 2018, OSC found that Deputy Assistant to the President and Communications Director for the Office of the First Lady Stephanie Grisham violated the Hatch Act by using her official White House Twitter account, @StephGrisham45, to engage in partisan political activity.³⁴ OSC found that Ms. Grisham broke the law when she used that Twitter account to tweet a message that included President Trump’s campaign slogan “#MAGA” and a picture from a 2015 Trump campaign rally.³⁵ OSC issued Ms. Grisham a warning letter noting that any future engagement in prohibited political activity will be considered “a willful and knowing violation of the law, which could result in further action.”³⁶

Staff’s Use of the @FLOTUS Twitter Account Violated the Hatch Act

As an initial matter, there is no question that the @FLOTUS Twitter account is “a social media account designated for official purposes.” The account is “run by the Office of First Lady Melania Trump” and “Tweets may be archived” in order to comply with federal law and the

²⁹ 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>.

³⁰ 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://bit.ly/2HeoT5d>.

³¹ *Id.*

³² Veronica Stracqualursi and Cristina Alesci, Trump’s legal team: No #MAGA at the White House, CNN, Mar. 8, 2018, available at <https://cnn.it/2D8ST3I>.

³³ *Id.*

³⁴ Letter from Erica Hamrick, Office of Special Counsel to Noah Bookbinder, Citizens for Responsibility and Ethics in Washington, Re: OSC File No. HA-18-4852, Sept. 20, 2018, available at <https://bit.ly/2SNWZU6>.

³⁵ *Id.*

³⁶ *Id.*

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White House privacy policy. The profile also features a picture of what appears to be Mrs. Trump standing in the White House. In addition, employees in the Office of the First Lady are acting in an official capacity when they use the @FLOTUS account to post about official White House activities and link to other official government websites and Twitter accounts. White House employees in the Office of the First Lady are clearly federal employees and subject to the Hatch Act. Thus, the @FLOTUS account run by these employees clearly is an official account and their use of it falls squarely within the jurisdiction of the Hatch Act.

Nor is there any doubt that the use of the @FLOTUS Twitter account to post the November 6, 2018 tweet about voting constitutes political activity under the Hatch Act. The tweet at issue is a clear example of a political message. The Election Day tweet directs the reader to “Vote Red” which is the color commonly affiliated with the Republican Party. The tweet also includes a link to a website paid for by the Republican National Committee, designed to assist Republican voters and that makes specific reference to helping the GOP “win this election.” The tweet was sent on the morning of Election Day 2018, just hours before millions of Americans would begin casting their votes in partisan races across the country. Furthermore, the tweet includes President Trump’s campaign slogan “MAGA” which both OSC and the White House have advised White House staff constitutes a political slogan. OSC has made clear in its decisions involving Ms. Conway and Ms. Grisham that the Hatch Act does not provide any exception for employees who use their official authority to engage in prohibited political activity just because they are speaking on behalf of the President or First Lady. Indeed, if Mrs. Trump wanted to share a political message, she certainly could have used her personal @MELANIATRUMP Twitter account. The decision by employees in the Office of the First Lady to use their official positions and the imprimatur of the @FLOTUS account to send this message is in clear violation of the prohibitions under the Hatch Act.

By using their official positions and the official @FLOTUS Twitter account to transmit this political message, employees in the Office of the First Lady clearly ran afoul of the Hatch Act, which requires federal employees to remain politically neutral when using official social media accounts. In fact, employees in the Office of the First Lady engaged in the type of conduct expressly identified by OSC as an example of prohibited activity when they used the official @FLOTUS social media account to tweet a message directing readers to vote for Republican candidates on Election Day and President Trump’s campaign slogan. It is difficult to argue that this conduct was not directed at the success or failure of a political party or candidate in a partisan race. This violation is even more egregious given the recent guidance provided by OSC and the White House and the prior Hatch Act violation by an employee in the Office of the First Lady, Stephanie Grisham.

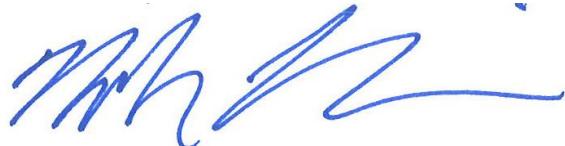
Conclusion

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. By tweeting the message and picture at issue, which

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advocates the success or failure of a political party and the election or defeat of a partisan political candidate, employees in the Office of the First Lady violated the Hatch Act. OSC should commence an immediate investigation to determine which White House employees were involved in the creation and dissemination of this message and take or recommend appropriate disciplinary action against them.

Sincerely,

A handwritten signature in blue ink, appearing to read "Noah Bookbinder".

Noah Bookbinder
Executive Director