

August 7, 2020

The Honorable Henry Kerner
Special Counsel
Office of Special Counsel
1730 M Street, NW, Suite 218
Washington, DC 20036-4505

Re: Violation of the Hatch Act by Mark Morgan

Dear Mr. Kerner:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Office of Special Counsel (“OSC”) investigate whether acting Commissioner of Customs and Border Protection (“CBP”) Mark Morgan violated the Hatch Act when he advocated against the election of President Donald Trump’s rival, former Vice President Joe Biden, while appearing in his official capacity in a Fox News interview on August 7, 2020. CREW further requests that OSC investigate whether Mr. Morgan violated the Hatch Act on August 6, 2020, by posting a message on his official government Twitter account that contained remarks similar to those he made in the interview.

Factual Background

Mr. Morgan has served as acting CBP Commissioner since June 2019.¹ On Friday, August 7, 2020, Mr. Morgan participated in an interview on Fox News in his official capacity.² Fox News host Pete Hegseth introduced him at the beginning of the interview as “Mark Morgan, acting CBP Commissioner.”³ Mr. Hegseth concluded the interview by identifying him as “Mark Morgan, CBP Commissioner.”⁴ During the interview, Mr. Morgan discussed several official matters with the hosts, including the federal government’s reaction to nationwide protests for racial justice.

The hosts then asked Mr. Morgan about the presumptive Democratic nominee for President, former Vice President Joe Biden.⁵ Mr. Morgan used the hosts’ questions as an opportunity to attack Mr. Biden and compare President Trump favorably to him, specifically referencing the upcoming election:

Morgan: Look Brian, [Mr. Biden] also made a comment that if he’s elected, that he would stop building the wall. I tell you what, this is

¹ Statement from Acting Secretary McAleenan on ICE Leadership, Department of Homeland Security, June 27, 2019, <https://bit.ly/2EYN9w9>.

² Mark Morgan on Portland mayor blaming Trump for violence, Biden’s immigration, *Fox News*, Aug. 7, 2020, <https://bit.ly/2ERYk9R>.

³ *Id.* (video beginning at approximately 0:24).

⁴ *Id.* (video beginning at approximately 4:58).

⁵ *Id.* (video beginning at approximately 2:22).

dangerous, and the American people need to pay close attention to what's being said because right now what we need is an administration and a President that understands the importance of border security and that border security is national security. Like I said, I've been doing this for a long time. We need to have the tools and the ability to know who and what is coming into our borders and have the ability to stop the bad things, the drugs, the criminals, and right now, for example, it affects disease. This President and this administration gets the importance of border security. This is a very important time in our history right now.⁶

Later in the interview, Mr. Morgan continued:

. . . [W]ith that rhetoric that's being stated right now [by Mr. Biden], you are sending a missile—message right now to the cartels and smugglers who are going to exploit that. You're going to send a message to all these individuals that are looking for economic—a better way of life. It's olly olly income free. And we've seen it before and we're going to see it again. I can promise the American people that that's what's going to happen. We're going to be in crisis 2.0.⁷

Ironically, before Mr. Morgan misused his position to influence the election in this manner, Mr. Kilmeade had begun the interview with a video clip of Portland Mayor Ted Wheeler cautioning federal officials that they are being used as “a prop for the reelection campaign of Donald Trump.”⁸ Mr. Morgan responded directly to the clip: “I have a couple reactions. First of all, I guess on the good side, the Mayor there has been following my Twitter account because he's saying the exact same thing that I've been saying with respect to the federal building that these thugs, these criminals, these anarchists were doing to the federal courthouse.”⁹

The day before his Fox News interview, Mr. Morgan posted a message on his official government Twitter account containing similar remarks. Less than three months before the presidential election, Mr. Morgan wrote: “There is no greater time than this very moment that we have an administration that believes and fully understands the importance of border security. President @realDonaldTrump gets it!”¹⁰

⁶ *Id.* (video beginning at approximately 3:19).

⁷ *Id.* (video beginning at approximately 4:18).

⁸ *Id.* (video beginning at approximately 0:10).

⁹ *Id.* (video beginning at approximately 0:32).

¹⁰ Mark Morgan (@CBPMarkMorgan), Twitter, Aug. 6, 2018, <https://bit.ly/3fzobjL>.

Potential Violations

The Hatch Act - 5 U.S.C. § 7323(a)(1)

The Hatch Act provides that an executive branch employee may not “use his official authority or influence for the purpose of interfering with or affecting the result of an election.”¹¹ Activities covered by this prohibition include the official “[u]sing his or her official title while participating in political activity.”¹² “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.”¹³ In a report recommending the firing of Senior Counselor to the President Kellyanne Conway, OSC explained that “a federal employee violates the Hatch Act if she promotes the election or defeat of candidates for partisan political office while speaking in her official capacity.”¹⁴

Mr. Morgan violated 5 U.S.C. § 7323(a)(1) when he appeared on Fox News in his official capacity as a top Trump administration appointee and attacked Mr. Biden. He specifically raised what might happen “if he’s elected,” and directed his remarks to the voting public: “[T]he American people need to pay close attention to what’s being said [by Mr. Biden].” He advocated against Mr. Biden’s candidacy, including by stating that “we’re going to be back in crisis 2.0.” He indicated that Mr. Biden’s election would be “dangerous” because he would “stop building the border wall.” He said that “this is a very important time in our history now” and that, in contrast, he believes President Trump “and this administration gets importance of border security.” He added to the urgency of this plea for President Trump to remain President by adding incendiary language about “bad things,” “drugs,” “criminals,” “cartels,” “smugglers,” and “disease” flourishing in the event that Mr. Biden is elected. Mr. Morgan said, “what we need is an administration and a President that understands the importance of border security,” suggesting that President Trump was such a President and that Mr. Biden would not be one.

Mr. Morgan also violated the Hatch Act when he posted a tweet on his official government social media account regarding the need for a presidential administration like that of President Trump. His remark is plainly focused on the election because he wrote “[t]here is no greater time than this very moment” less than three months before the election. He stated that it was important to have “an administration” that subscribes to a particular viewpoint. Reading this in the context of the nation facing a choice between having one presidential administration or another, there is no other reasonable way to read Mr. Morgan’s tweet than as an endorsement of President Trump’s reelection. Mr. Morgan’s remark that “President @realDonaldTrump gets it” further appears to be an endorsement of President Trump’s reelection. In addition, the language of his August 6 tweet closely tracks the language of his remarks during the Fox News interview the next day, in which he stated “This President and this administration gets the importance of

¹¹ 5 U.S.C. § 7323(a)(1).

¹² 5 C.F.R. § 734.302(b)(1).

¹³ 5 C.F.R. § 734.101.

¹⁴ U.S. Office of Special Counsel, *Report of Prohibited Political Activity*, OSC File Nos. HA-19-0631 & HA-19-3395 (Kellyanne Conway), at 4, May 30, 2019, <https://go.aws/36TBeLu>.

border security. This is a very important time in our history right now.” The “time” to which he refers is obviously the election season.

This conduct parallels OSC’s description of Hatch Act violations that Ms. Conway committed during televised interviews. In a report on Ms. Conway’s misconduct, OSC found that “while speaking in her official capacity, Ms. Conway also engaged in campaign rhetoric, remarking on the strength of President Trump’s candidacy and/or the weaknesses of the Democratic Party candidates in the upcoming 2020 presidential election.”¹⁵ As in the case of Ms. Conway, Mr. Morgan’s apparent violation of the Hatch Act reached a nationwide television audience.

Mr. Morgan’s conduct was at least as troubling as any individual instance of Ms. Conway’s many Hatch Act violations because he serves as the acting head of an agency responsible for immigration and border issues and his attacks focused specifically on the immigration and border platform of Mr. Biden’s candidacy. CBP describes its mission as “border management and control, combining customs, immigration, border security, and agricultural protection into one coordinated and supportive activity.”¹⁶ The head of that agency speaking officially and disparagingly about the Biden campaign’s immigration and border platform leveraged the full weight of the federal government against President Trump’s electoral challenger.

Conclusion

The Hatch Act is intended to prevent federal employees from engaging in partisan political activity in their official capacity. Mr. Morgan’s remarks during a nationally televised interview violated the Hatch Act’s prohibition against using official authority or influence for the purpose of interfering with or affecting the result of an election. It was inappropriate for him to advocate against Mr. Biden during a television appearance as a top administration official to discuss official Trump administration policies, as well as in a message posted to his official social media account. Therefore, OSC should commence an immediate investigation of these apparent violations and take appropriate corrective action.

Sincerely,



Noah Bookbinder
Executive Director



Walter M. Shaub, Jr.
Senior Advisor

¹⁵ *Id.* at 6.

¹⁶ U.S. Customs and Border Protection website, “About CBP” page, <https://bit.ly/2DGppfG>.