



October 30, 2019

Special Counsel Henry Kerner
U.S. Office of Special Counsel
1730 M Street NW, Suite 218
Washington, DC 20036

Dear Special Counsel Kerner:

The Project On Government Oversight (POGO) requests an investigation into potential violations of the Hatch Act by John Michael “Mick” Mulvaney—the director of the Office of Management and Budget and acting White House chief of staff—as well as by Ambassador Gordon Sondland for engaging in prohibited political activity. Mr. Mulvaney and Ambassador Sondland appear to have used their official authority to attempt to sway an upcoming election. The Hatch Act prohibits executive branch officials when they are on duty or in the federal workplace from engaging in political activity, which the act defines as “activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”¹ The Hatch Act exists “to ensure that federal programs are administered in a nonpartisan fashion” and “to protect federal employees from political coercion in the workplace,” according to the Office of Special Counsel’s website.²

Under a little-known criminal provision that applies to “any person,” Mr. Mulvaney’s and Ambassador Sondland’s acts may also criminally implicate President Donald Trump if the evidence establishes that President Trump directed federal officials to take actions that constitute Hatch Act violations.

As has been widely covered in the press, a whistleblower alleged that U.S. military aid to Ukraine was withheld at the direction of the White House in order to secure an agreement from Ukraine’s president that he would revive and publicly announce investigations into activity involving Joe Biden, a presidential candidate.³ As the whistleblower disclosure states, “the President of the United States is using the power of his office to solicit interference in the 2020

¹ 5 C.F.R. § 734.101. <https://www.law.cornell.edu/cfr/text/5/734.101>

² “Hatch Act Overview,” U.S. Office of Special Counsel. <https://osc.gov/Services/Pages/HatchAct.aspx> (accessed October 30, 2019)

³ While Mr. Biden has not secured the Democratic Party’s nomination, OSC has written that “an initial ‘campaign’ to secure a nomination or election to office would be viewed as candidacy for purposes of the Hatch Act.” Letter from Carolyn S. Martorana, Attorney, Hatch Act Unit, to (name redacted), June 17, 2009, 3. <https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/When%20Candidacy%20Begins.pdf>

U.S. election. This interference includes, among other things, pressuring a foreign country to investigate one of the President’s main domestic political rivals.”⁴

While the president and vice president are not covered by the Hatch Act’s restrictions under Title 5 of the U.S. Code, all other federal executive branch officials are. Mr. Mulvaney appears to have played a key role in the affair. A congressional letter sent recently, citing “evidence obtained as part of the [House impeachment] inquiry, as well as multiple press reports,” states that Mr. Mulvaney was directed by the president to halt aid to Ukraine.⁵

Several government officials allege an improper motive behind the withholding of the federal funds.

While the matter overlaps with the focus of the House’s ongoing impeachment inquiry, that does not absolve the Office of Special Counsel of its obligation to examine the matter and independently enforce the law. There are also numerous examples of parallel investigations by Congress and executive branch entities.⁶ Indeed, the White House reportedly has its own ongoing parallel internal review.⁷ Furthermore, an Office of Special Counsel examination is warranted because it is the only federal office empowered to investigate potential Hatch Act violations, as it has previously done when there has been alleged wrongdoing by White House officials.⁸

Text messages made public involving Ambassador Sondland show he was in extensive contact with President Trump while he was deeply involved in pushing the Ukrainian government to investigate Burisma, a company on whose board Joe Biden’s son served. “Do we still want Ze to give us an unequivocal draft with 2016 and Boresma?” Ambassador Sondland wrote in one August text exchange. (“Ze” is a reference to Ukrainian President Volodymyr Zelenskiy and “Boresma” is an apparent misspelling of “Burisma.”)⁹

⁴ Whistleblower “urgent concern” disclosure letter to Senate Select Committee on Intelligence Chairman Richard Burr and House Permanent Select Committee on Intelligence Chairman Adam Schiff, August 12, 2019, 1. https://intelligence.house.gov/uploadedfiles/20190812_-_whistleblower_complaint_unclass.pdf

⁵ Letter from Chairmen Elijah E. Cummings, Eliot L. Engel, and Adam B. Schiff to Vice President Mike Pence, October 4, 2019, 2, <https://eshoo.house.gov/wp-content/uploads/2019/10/2019-10-04.EEC-Engel-Schiff-re-Request-to-VP-10-04-19-Letter-and-Schedule.pdf>, citing Maggie Haberman et al., “Trump Said to Have Frozen Aid to Ukraine Before Call With Its Leader,” *New York Times*, September 23, 2019. <https://www.nytimes.com/2019/09/23/us/politics/trump-un-biden-ukraine.html>

⁶ Hearing before the Senate Committee on the Judiciary, Subcommittee on Crime and Terrorism: “Concurrent Congressional and Criminal Investigations: Lessons from History,” 115th Cong. (July 10, 2017) (testimony of Danielle Brian, Executive Director, Project On Government Oversight). <https://www.pogo.org/testimony/2017/07/written-testimony-of-pogos-danielle-brian-on-concurrent-congressional-and-criminal-investigations-lessons-from-history/>

⁷ Julian E. Barnes et al., “White House Is Said to Open Internal Review of Ukraine Call,” *New York Times*, October 15, 2019. <https://www.nytimes.com/2019/10/15/us/politics/white-house-review-ukraine.html>

⁸ U.S. Office of Special Counsel, *Investigation of Political Activities by White House and Federal Agency Officials During the 2006 Midterm Elections*, January 2011. http://www.judicialwatch.org/wp-content/uploads/2013/07/F_D_2011_2006MidTermElectionWHPolActivities.pdf

⁹ Charlie Savage and Josh Williams, “Read the Text Messages Between U.S. and Ukrainian Officials,” *New York Times*, October 4, 2019. <https://www.nytimes.com/interactive/2019/10/04/us/politics/ukraine-text-messages-volker.html>

Mr. Mulvaney has himself indicated that politics played a role in the Ukraine affair. In a televised press conference about the issue, he said, “There’s going to be political influence in foreign policy.” He also said that, “the deliverable was a statement by the Ukraine about how they were going to deal with corruption.”¹⁰

While he walked back some of his comments in subsequent statements, there is a key difference between an administration seeking policy goals in its exercise of foreign affairs—a constitutional power granted to the presidency—and using taxpayer-funded foreign aid as leverage to coerce actions that could harm a domestic political opponent. A public announcement that the government of Ukraine was investigating alleged corruption involving both Joe Biden and his son Hunter would likely hurt Biden’s viability in the 2020 election.¹¹

An Office of Special Counsel investigation would likely focus heavily on the motivations of the actions—even evidence of a partial political motivation could be grounds for finding a violation of the Hatch Act under the preponderance of the evidence standard that applies.¹² Mr. Mulvaney’s statements to the press have been contradicted by statements made under oath by numerous federal officials.

In particular, other officials close to the affair have undermined Mr. Mulvaney’s explanation that the aid was withheld partly to determine “whether or not they [Ukraine] were cooperating in an ongoing investigation with our Department of Justice.”¹³

One witness says the motivation was political. William B. Taylor Jr., the U.S.’s ambassador to Ukraine, testified to Congress that the military aid was held up “for domestic political reasons.”¹⁴

¹⁰ “Press Briefing by Acting Chief of Staff Mick Mulvaney,” [whitehouse.gov](https://www.whitehouse.gov/briefings-statements/press-briefing-acting-chief-staff-mick-mulvaney/), October 17, 2019.

<https://www.whitehouse.gov/briefings-statements/press-briefing-acting-chief-staff-mick-mulvaney/>

¹¹ A *New Yorker* article published a week and a half before a key July 10 White House meeting makes this argument. Adam Entous, “Will Hunter Biden Jeopardize His Father’s Campaign?” *New Yorker*, July 1, 2019.

<https://www.newyorker.com/magazine/2019/07/08/will-hunter-biden-jeopardize-his-fathers-campaign>

¹² As a 2007 Congressional Research Service memo states, “gleaning the intent of an activity (that is, if the activity ‘is directed at the success or failure’ of partisan candidates or parties) might often be central to the determination of whether any given activity is ‘political activity’ under the Hatch Act.” The CRS memo notes that OSC would likely examine whether there is a “nexus” between the activity and “political objectives” and that even “seemingly ‘nonpartisan’ activity, may be considered as ‘political activity’ in the federal workplace because of various factors surrounding the conduct and sponsorship of such activities that might indicate a political intent or a partisan ‘agenda.’” Memorandum from Jack Maskell, Legislative Attorney, American Law Division, Congressional Research Service, to the House Committee on Oversight and Government Reform, subject: “Meetings, Conferences as ‘Political Activities’ in a Federal Office, and ‘Hatch Act’ Considerations,” March 26, 2007, 9-10.

<https://oversight.house.gov/sites/democrats.oversight.house.gov/files/migrated/20070328154603-20874.pdf>;

5 C.F.R. § 1201.56(a)(1)(ii); 5 C.F.R. § 1201.56(c)(2) (defining “preponderance of the evidence”); *Special Counsel v. Perkins*, 2006 MSPB 344, 2006 WL 3613437 (M.S.P.B. 2006). Cited in *Political Activity, Lobbying Laws and Gift Rules Guide*, 3d, (Thomson Reuters/West LegalWorks, 2008), 338.

<https://www.zuckerman.com/sites/default/files/2018-01/Political-patronage.pdf>

¹³ “Press Briefing by Acting Chief of Staff Mick Mulvaney,” [whitehouse.gov](https://www.whitehouse.gov/briefings-statements/press-briefing-acting-chief-staff-mick-mulvaney/), October 17, 2019.

<https://www.whitehouse.gov/briefings-statements/press-briefing-acting-chief-staff-mick-mulvaney/>

¹⁴ Opening Statement of Ambassador William B. Taylor Before the House Permanent Select Committee on Intelligence, the House Committee on Foreign Affairs, and the House Committee on Oversight and Reform, October 22, 2019, 1. <https://www.nytimes.com/interactive/2019/10/22/us/politics/william-taylor-ukraine-testimony.html>

A second witness said he and another person registered their concerns about the efforts with attorneys in the White House. In the opening statement of Lieutenant Colonel Alexander S. Vindman—a staffer with the White House’s National Security Council and a Ukraine expert who was a firsthand witness to the July 25 call at the center of the whistleblower’s complaint and privy to the details of a related meeting earlier in July—he told several House committees that:

Following this meeting [on July 10, 2019], there was a scheduled debriefing during which Amb. Sondland emphasized the importance that Ukraine deliver the investigations into the 2016 election, the Bidens, and Burisma. I stated to Amb. Sondland that his statements were inappropriate, that the request to investigate Biden and his son had nothing to do with national security, and that such investigations were not something the NSC [National Security Council] was going to get involved in or push. Dr. [Fiona] Hill then entered the room and asserted to Amb. Sondland that his statements were inappropriate. Following the debriefing meeting, I reported my concerns to the NSC’s lead counsel. Dr. Hill also reported the incident to the NSC’s lead counsel.¹⁵

Fiona Hill is President Trump’s former top Russia adviser. Ms. Hill also testified to Congress about the efforts of Ambassador Sondland and Mr. Mulvaney, taken in concert with Rudy Giuliani, at the direction of President Trump. Ms. Hill’s boss, then-National Security Adviser John Bolton, also registered his concerns about the pressure being put on Ukraine for what appeared to be a domestic political reason.¹⁶

In terms of using ignorance of the Hatch Act’s restrictions as a defense, your office has found his White House colleague Kellyanne Conway in violation of that law multiple times—violations that have generated high-profile media coverage and a congressional hearing.¹⁷ The Office of Special Counsel’s first report in 2018 on Ms. Conway’s violations describes extensive educational outreach on the Hatch Act by the White House counsel’s office to White House staffers.¹⁸

It’s worth noting that, in response to your 2019 report on Ms. Conway’s violations,¹⁹ the White House Counsel protested your office’s interpretation of the law by embracing a First Amendment

¹⁵ Opening Statement of Lieutenant Colonel Alexander S. Vindman Before the House Permanent Select Committee on Intelligence, the House Committee on Foreign Affairs, and the House Committee on Oversight and Reform, October 29, 2019, 5. <https://static.politico.com/69/13/cdff8a4420a8a4d8a65439570f2/vindman-statement-final.pdf>

¹⁶ Peter Baker and Nicholas Fandos, “Bolton Objected to Ukraine Pressure Campaign, Calling Giuliani ‘a Hand Grenade,’” *New York Times*, October 14, 2019. <https://www.nytimes.com/2019/10/14/us/politics/bolton-giuliani-fiona-hill-testimony.html>

¹⁷ Peter Baker, “Trump Is Urged to Fire Kellyanne Conway for Hatch Act Violations,” *New York Times*, June 13, 2019. <https://www.nytimes.com/2019/06/13/us/politics/kellyanne-conway-hatch-act.html>; *Violations of the Hatch Act Under the Trump Administration: Hearing before the House Committee on Oversight and Reform*, 116th Cong. (June 26, 2019). <https://oversight.house.gov/legislation/hearings/violations-of-the-hatch-act-under-the-trump-administration>

¹⁸ Letter from Special Counsel Henry J. Kerner to President Donald J. Trump about Kellyanne Conway violating the Hatch Act, March 6, 2018, 5-6. [https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity,%20Kellyanne%20Conway%20\(HA-18-0966\).pdf](https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity,%20Kellyanne%20Conway%20(HA-18-0966).pdf)

¹⁹ Letter from Special Counsel Henry J. Kerner to President Donald J. Trump about Hatch Act violations of Kellyanne Conway, June 13, 2019.

defense and arguing that “the Hatch Act’s prohibition on using official authority or influence to affect the result of an election is not violated by simply commenting on an individual who is running for office.”²⁰ Such a defense would not apply in the Ukraine matter here, a much more egregious use of official authority if the allegations of a political motive by the whistleblower and numerous witnesses are confirmed.²¹

Furthermore, recent reporting indicates that Mr. Mulvaney appears to have personal knowledge of the Hatch Act’s restrictions.²²

As you know, certain White House employees whose salaries are paid through the Executive Office of the President appropriation account as well as Senate-confirmed political appointees can engage in some limited political activities while on duty and in the federal workplace, provided that those normally prohibited political activities are not funded by taxpayers or that the costs are *de minimis*. An example would be making some fundraising calls while in the White House.²³ That defense cannot be used here, as Mr. Mulvaney was operating in his official capacity, directing the blockage of hundreds of millions of taxpayer dollars to a country fighting a war against Russia.

On a related note, while President Trump is explicitly not subject to the Hatch Act’s restrictions under Title 5—the part of the U.S. Code governing the federal workforce—that carve-out does

[https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity.%20Kellyanne%20Conway%20\(HA-19-0631%20&%20HA-19-3395\).pdf](https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity.%20Kellyanne%20Conway%20(HA-19-0631%20&%20HA-19-3395).pdf)

²⁰ Letter from Counsel to the President Pat A. Cipollone to Special Counsel Henry Kerner about the OSC draft report concerning Kellyanne Conway, June 11, 2019, 8. <https://int.nyt.com/data/documenthelper/1168-pac-osc-06-11-2019-letter/11f2a2d73d1e14d197f3/optimized/full.pdf>

²¹ While one legal critic of the Hatch Act—a former federal appeals court clerk—argues that much of the Hatch Act might not survive modern Supreme Court scrutiny under contemporary First Amendment jurisprudence, that attorney does not criticize “the Hatch Act’s original focus on preventing coercion and the misuse of funds,” and he writes that “the use of state time and resources with the power of incumbency can guarantee one-party perpetual domination. Restrictions on the political activities of government employees and on the use of federal funds are necessary to protect a republican form of government.” Jason C. Miller, “The Unwise and Unconstitutional Hatch Act: Why State and Local Government Employees Should be Free to Run for Public Office,” *Southern Illinois University Law Journal*, vol. 34 (2010), 1-49. <http://wcfgoldmine.com/Jason%20Miller%20Brief.pdf>

²² Michael C. Bender, “Trump’s Rallies Aren’t a Sideshow. They Are the Campaign,” *Wall Street Journal*, October 22, 2019. <https://www.wsj.com/articles/trumps-rallies-arent-just-part-of-his-campaign-they-are-the-campaign-11571753199>

Ahead of June’s Orlando rally, Mr. Trump pushed to bring cabinet members along, but acting chief of staff Mick Mulvaney rebuffed him, said people present during the conversation. Mr. Mulvaney cautioned the president about potential violations of the Hatch Act, which prohibits federal workers from participating in partisan activities.

“I’m in charge of the Hatch Act,” Mr. Trump told him in a room full of other top aides, adding that his top staffer was “weak” for making the suggestion. Mr. Trump later backed off the idea.

²³ OSC has advised that *de minimis* expenses do not have to be reimbursed. Letter from Associate Special Counsel for Prosecution William E. Reukauf about whether the Hatch Act requires PAS employee to provide reimbursement for the use of government telecommunications equipment in connection with political activity, February 25, 2000. (PAS stands for Presidential Appointment needing Senate confirmation.) <https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/PAS%20Employees%20and%20Reimbursement%20of%20de%20minimis%20Political%20Expenses.pdf>

not exist in Title 18, section 610, a criminal provision of the Hatch Act.²⁴ That section prohibits “any person” from commanding a federal official to take actions that would violate the Hatch Act.²⁵ The provision became law in 1993 to provide “additional protections against political manipulation of the federal workforce,” according to the Justice Department, noting that “the statute thus encompasses intimidation directed at inducing any form of political action.”²⁶

As a recent congressional letter states, “President Trump ordered Acting Chief of Staff and Office of Management and Budget (OMB) Director Mick Mulvaney to freeze the military aid to Ukraine.”²⁷

If indeed Mr. Mulvaney violated the Hatch Act by withholding aid as part of an effort to attack a candidate for election, and did so at the direction of President Trump, then the president may have violated 18 U.S.C. § 610.²⁸

If the facts warrant it, we understand that the Office of Special Counsel would have to refer such a potential criminal matter to the Justice Department as it did in another case that occurred during the Obama administration involving former Labor Secretary Hilda Solis.²⁹ While the Justice Department follows controversial Office of Legal Counsel guidance that the president

²⁴ “It shall be unlawful *for any person* to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government as defined in section 7322(1) of title 5, United States Code, to engage in, or not to engage in, any political activity.” [Emphasis added]
18 USC § 610 (2019) <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title18-section610&num=0&edition=prelim>

²⁵ An op-ed published by a former federal prosecutor who served in the U.S. Attorney’s Office for the Southern District of New York made a similar point this week. Gary Stein, “President Trump may have violated criminal provisions of the Hatch Act,” *Washington Post*, October 29, 2019. <https://www.washingtonpost.com/outlook/2019/10/29/president-trump-may-have-violated-criminal-provisions-hatch-act/>. In short, the president and his aides cannot commandeer the federal bureaucracy in service of the president’s purely partisan political objectives as a candidate for office. Notably, Section 610 does not require a “quid pro quo,” nor does it require that the object of the political activity constitute a “thing of value”—conditions required to demonstrate the existence of extortion, bribery and violating campaign finance law.

²⁶ The statutory language does not require intimidation, and encompasses commanding a subordinate to take an action. That said, the *Wall Street Journal* account above suggests President Trump attempted to intimidate Mr. Mulvaney after Mr. Mulvaney raised Hatch Act concerns regarding another proposal in June. The Justice Department also wrote that “the statute also prohibits attempts” at directing an action that would violate the Hatch Act. Craig C. Donsanto et al., *Federal Prosecution of Election Offenses Seventh Edition (Revised August 2007)*, 112-113. <https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-rvs0807.pdf>

²⁷ Letter from Chairmen Elijah E. Cummings, Eliot L. Engel, and Adam B. Schiff to Vice President Mike Pence, October 4, 2019, 2. <https://eshoo.house.gov/wp-content/uploads/2019/10/2019-10-04.EEC-Engel-Schiff-re-Request-to-VP-10-04-19-Letter-and-Schedule.pdf>

²⁸ This criminal provision is known to Daniel Epstein, who is currently a Special Assistant and Senior Associate Counsel to President Trump. In a 2015 letter written when he worked at a nonprofit, Mr. Epstein requested that the Justice Department’s Public Integrity Section investigate then-Senator Harry Reid (D-NV) and then-Virginia Governor Terry McAuliffe for potential violations of this section even though they, like the president, are not covered by the non-criminal provisions of the Hatch Act. Letter from Cause of Action to the Department of Justice’s Public Integrity Section about potentially illegal acts related to the EB-5 visa program, March 25, 2015. <http://causeofaction.org/wp-content/uploads/2015/03/EB5-Letter.pdf>

²⁹ Paul Pringle and Abby Sewell, “Complaint over Obama Fundraiser Triggered Solis Probe,” *Los Angeles Times*, May 9, 2014. <https://www.latimes.com/local/la-me-solis-investigation-20140510-story.html>

should not face a trial while in office—a stance that courts have not addressed³⁰—that guidance does not prohibit an investigation.³¹

POGO strongly believes in fair enforcement of the Hatch Act and expressed concerns last December that Office of Special Counsel guidance could inappropriately chill legitimate White House speech in defense of the administration and its policies.³² The matter in question, however, is far from that. It involves the alleged misuse of federal funds for political objectives. It is the very type of activity that prompted Congress to pass the Hatch Act into law in 1939.³³

The Office of Special Counsel has enforced the Hatch Act with commendable independence during your tenure, even in the face of considerable White House antipathy.³⁴ Such resistance will likely be heightened in this matter, but we urge your office to remain independent from that pressure and initiate an investigation.

Please let us know if you have any questions or if we can be of assistance.

Sincerely,



Danielle Brian
Executive Director

³⁰ Danielle Brian and Sarah Turberville, “Not the Final Word,” Project On Government Oversight, June 15, 2018. <https://www.pogo.org/analysis/2018/06/not-final-word/>

³¹ According to a former head of the Office of Legal Counsel, it also does not bar a grand jury indictment. Walter Dellinger, “Yes, You Can Indict the President,” *New York Times*, March 26, 2018. <https://www.nytimes.com/2018/03/26/opinion/indict-president-trial.html>

³² Letter from the Project On Government Oversight to Special Counsel Henry Kerner about revisions of Hatch Act guidance, December 6, 2018. <https://www.pogo.org/letter/2018/12/pogo-sends-letter-to-osc-seeking-revision-of-hatch-act-guidance/>

³³ “Though the Senate rejected Hatch’s original proposal, a version passed in July 1939, after a Senate Committee on Campaign Expenditures found that Works Progress Administration funds and manpower had been used for political purposes in 1938 in three states ‘sometimes under pressure,’ as John W. Jeffries writes in his new book *A Third Term for FDR: The Election of 1940*.” Olivia B. Waxman, “Why Federal Employees Can Thank FDR for Some Restrictions on Their Tweets,” *Time*, April 3, 2017. <https://time.com/4723411/hatch-act-history/>

³⁴ As former White House Counsel Bob Bauer has written, “What is striking is the Trump administration’s choice to undermine the capacity of the OSC to address apparent Hatch Act violations in the future or even to clarify the law’s requirements. . . . Trump, by contrast, seems intent on defending pervasive partisanship in the operation of the executive branch.” Bob Bauer, “Donald Trump and the Politically Weaponized Executive Branch,” *Lawfare*, June 24, 2019. <https://www.lawfareblog.com/donald-trump-and-politically-weaponized-executive-branch>