



December 6, 2018

Special Counsel Henry Kerner
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Washington, DC 20036

Dear Special Counsel Kerner:

I am writing in response to a guidance document issued by the Office of Special Counsel (OSC) on November 27, 2018, titled “Guidance regarding political activity.”¹ This guidance attempts to clarify what type of perceived political speech by federal employees when on-duty and/or in the federal workplace would potentially violate the Hatch Act.

Specifically, the guidance addresses whether certain kinds of on-duty employee speech are considered prohibited political activity. The types of speech discussed are praise or criticism of an administration’s policies; advocacy for or against impeachment of a candidate for federal office; and discussions of or use of the terms “resistance” or “#resist.” OSC’s new guidance states that an employee could run afoul of the Hatch Act for these kinds of on-duty speech, even if there is no explicit advocacy for or opposition to a candidate or political party. OSC has traditionally required such explicit opposition to or advocacy for candidates or parties to find a person has engaged in prohibited “political activity” in violation of the Hatch Act rather than permitted political opinion.²

The Project On Government Oversight (POGO) believes that OSC has largely exercised its authority under the Hatch Act fairly and independently under your leadership. We understand that OSC has received requests for this guidance, and that this guidance tries to explain a vague law that was drafted mostly before the Internet age.

However, we fear that this guidance exceeds the intent of the law and what is expressly authorized by statute—indeed, it appears to violate the statutory language and the Office of Personnel Management’s regulation implementing the Hatch Act, thus also opening OSC to a potential Administrative Procedures Act challenge. Furthermore, it may have a detrimental chilling effect on First Amendment-protected speech by federal employees. We believe when there is doubt or room for interpretation, OSC should lean markedly in the direction of the First

¹ Email from the Office of Special Counsel to unknown recipients, “Guidance regarding political activity,” November 27, 2018. <https://int.nyt.com/data/documenthelper/500-osc-hatch-act-advisory-novembe/6255daba98ab1a42d079/optimized/full.pdf> (Downloaded November 30, 2018)

² 5 U.S. Code § 7323(c) “An employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates.”

Amendment and create narrowly tailored restrictions on employee speech in the workplace. Accordingly, we urge you to reconsider this guidance.

The Hatch Act and the First Amendment

According to OSC, the Hatch Act’s “purposes are to ensure that federal programs are administered in a nonpartisan fashion, to protect federal employees from political coercion in the workplace, and to ensure that federal employees are advanced based on merit and not based on political affiliation.”³

The Hatch Act states, “It is the policy of the Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation.”⁴

The Act limits the scope of this freedom, dictating that federal employees “may not engage in political activity” while on duty, while in federal buildings, in official government uniforms, or in government vehicles.⁵ The statute does not define “political activity.” Rather, in its regulations implementing the Hatch Act, the Office of Personnel Management (OPM) has defined political activity as “an activity directed towards the success or failure of a political party, candidate for partisan office, or partisan political group.”⁶

Still, the Hatch Act states that “An employee retains the right to vote as he chooses and to *express his opinion on political subjects* and candidates” [emphasis added],⁷ and does not state that this is the case only off-duty. In its regulations, OPM has stated that most employees may “Express his or her opinion privately and publicly on political subjects.”⁸ For a limited set of federal employees—mostly senior career officials and employees of law enforcement and intelligence agencies—each employee can “Express his or her opinion as an individual privately and publicly on political subjects and candidates” as long as they do not do so “in concert with a political party, partisan political group, or a candidate for partisan political office.”⁹ Similarly to the statute, OPM does not expressly restrict employees’ rights to express themselves regarding political subjects to only off-duty hours.

The Supreme Court found in 1947 and again in 1973 that the Hatch Act’s policy goals are constitutional.¹⁰ But that does not mean every OSC enforcement action that restricts speech would pass muster, especially actions that contradict the statutory language of the Hatch Act and

³ Office of Special Counsel, “Hatch Act.” <https://osc.gov/Pages/HatchAct.aspx> (Downloaded December 3, 2018)

⁴ 5 U.S.C. § 7321

⁵ 5 U.S.C. § 7324

⁶ 5 C.F.R. § 734.101

⁷ 5 U.S.C. § 7323(c)

⁸ 5 U.S.C. § 734.203

⁹ 5 U.S.C. § 734.402

¹⁰ *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947)

OPM regulations implementing the law.¹¹ And, as a 2009 law review article noted, “the Court has not directly applied modern First Amendment scrutiny to the Act,” which that remains true today.¹²

Importantly, in 1995, the Supreme Court commented that “the Hatch Act aimed to *protect* employees’ rights, notably their right to free expression, rather than to restrict those rights.”¹³ In explaining the limited scope of the 1947 and 1973 cases from a broader question of free speech restriction, the Court wrote in 1995:

In *Civil Service Comm’n v. Letter Carriers*, 413 U.S. 548, 564 (1973), we established that the Government must be able to satisfy a balancing test of the *Pickering* form to maintain a statutory restriction on employee speech. Because the discussion in that case essentially restated in balancing terms our approval of the Hatch Act in *Public Workers v. Mitchell*, 330 U.S. 75 (1947), we did not determine how the components of the *Pickering* balance should be analyzed in the context of a sweeping statutory impediment to speech.

Under modern First Amendment jurisprudence, the federal government as an employer can—to some degree—regulate employee speech if the public-policy interest is sufficiently compelling, but it must be careful to balance competing interests of public concern because employees have First Amendment rights, even when on duty. (This balancing is referred to above as the *Pickering* test.)

The Court has held that “speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”¹⁴ The issues raised in this guidance are clearly matters of great public concern: speech regarding the federal government’s policies, high-level policymakers, and constitutional accountability functions such as impeachment. Surely, the broadened definition of political activity that OSC describes in this guidance would implicate the *Pickering* balancing test.

Summarizing its 1987 *Rankin* decision, the Supreme Court wrote in 1995 that when on-duty speech involves “a matter of public concern, the Government bears the burden of justifying its adverse employment action.”¹⁵ In *Rankin*, the Court found that a public employee could not be fired by the county sheriff’s office for expressing, while on-duty, her dislike of President Reagan and his policies. The Court found that the employee’s remarks, even if inappropriate, were protected partly because they were made only to a coworker. The Court noted, “. . .the danger to

¹¹ It appears that OSC’s guidance is at odds with OPM’s regulations. While OPM has authority over personnel management, OSC’s advisory opinions have no binding effect on the Merit Systems Protection Board. See *American Fed’n of Gov’t Employees*, 747 F.2d at 752-55.

¹² Nikhel Sus, “Yes We Can . . . Fire You for Sending Political E-mails: A Proposal to Update the Hatch Act for the Twenty-First Century,” *The George Washington Law Review*, Vol. 78, Issue 1, November 2009, p. 187. <http://www.gwlr.org/wp-content/uploads/2012/08/78-1-Sus.pdf> (Downloaded December 3, 2018)

¹³ *United States v. National Treasury Employees Union*, 513 U.S. 454, 476 (1995)

¹⁴ *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980))

¹⁵ *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)

the agency's successful functioning from that employee's private speech is minimal...At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee."¹⁶

Given this highly relevant case law and how OSC's guidance also appears to be at odds with OPM's binding regulation interpreting the Hatch Act, OSC should strongly reconsider its positions.

OSC's New Hatch Act Guidance Regarding On-Duty Policy-Related Speech

On-duty speech pairing any discussion of policies, impeachment, or the "resistance" with explicit electoral advocacy for or opposition to candidates for partisan political office, or political parties, is a violation of the Hatch Act (this same speech is allowed off-duty under the Hatch Act). This is in line with OSC's traditional stance on when discussion of policy can veer into potential Hatch Act violations. A telling example of this is outlined on OSC's website: "while at work employees may not express their views about healthcare reform tied to a candidate for partisan political office, e.g., 'If you disagree with healthcare reform you should support candidate X.'"¹⁷

Contrary to its past guidance and OPM's current regulation implementing the Hatch Act, however, OSC is now stating that expressions to coworkers of a policy view alone can be deemed a prohibited "political activity" under the Hatch Act depending on the "facts and circumstances," such as if they are discussing it "in the run-up" to a political election. "In the run-up" is not defined; this turn of phrase is unacceptably vague, considering the extended, ongoing nature of electoral campaigns, and the sheer number of campaigns that could be at issue. Through use of this term, OSC is committing itself to investigating countless claims of Hatch Act violations, an undertaking that would strain its resources.

OSC's previous guidance appropriately distinguished between prohibited political activity and permitted political opinion on policies.

The example OSC gives in its new guidance finds a potential Hatch Act violation where an employee criticizes or praises to a colleague the relocation of the U.S. embassy in Israel "in the run-up to the next presidential election," but would not find a violation if the embassy was discussed closer to when the news broke. This seems over-inclusive, as the discussion is not tied to a political candidate or election, but is merely an expression of disagreement on a policy. Proximity to an election does not change this fact, and given that political candidates often announce their candidacy years in advance, using a litmus test of any policy praise or criticism in the run-up to the election would prohibit too much speech.

Further, under this guidance, White House staff, who are equally subject to the Hatch Act, would be severely limited in their ability to speak publicly about the administration's policies. For

¹⁶ *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

¹⁷ Office of Special Counsel, "May federal employees express their views about current events, policy issues, and matters of public interest at work or on duty?" <https://osc.gov/Pages/FAQ-View.aspx?ID=212> (Downloaded December 4, 2018)

example, the prohibition on praising or criticizing the relocation of the U.S. embassy in Israel preceding an election could apply to White House aide Jared Kushner, despite his role as a Middle East policy advisor in the current administration. If Mr. Kushner is exempt from the “on duty” political activity restriction by virtue of his rank, under OSC’s guidance, he would nevertheless be in violation of the Hatch Act if he discussed the embassy relocation with any subordinate or State Department personnel, or, for example, if he asked a lower-level White House official to develop talking points on the subject. Again, that’s inconsistent with prior OSC guidance. For instance, OSC has generally trained political appointees to pivot to talking about the administration’s policy positions, instead of talking about candidates and political parties, when asked about upcoming elections by reporters.¹⁸

In practice, this new guidance is unworkable. It is difficult to understand how, under this guidance, any administration official, working in a career or political position, could defend any White House policy position (whether it’s the current administration or future ones) in close proximity to an election.¹⁹ Agency employees may need to discuss implications of a candidate’s policy positions on their agency’s future, which may include expressions of opinion (e.g., “I believe this candidate wants to abolish our agency” or “I think this candidate would support for more funding for us”). As long as they do not engage in explicit advocacy or opposition to candidates or parties, employees should never have to second-guess whether that speech could violate the Hatch Act.

Employees on lunch breaks and in casual conversations at work surely express personal opinions to coworkers—including opinions that may be associated with political parties (e.g., on abortion, immigration, etc.). Prohibiting such speech does not serve the public policy goals of the Hatch Act, and thus this restriction on speech would fare poorly under a First Amendment analysis.

If employees are not doing their work—for example, browsing social media all day—agencies have ample administrative tools to manage them without triggering the Hatch Act.

This new guidance puts OSC in the position of having to create a subjective, impossible-to-defend test to decide when policy issues are sufficiently partisan—a role the Hatch Act does not create for OSC. Indeed, the statute says an employee “retains the right... to express his opinion on political subjects.”²⁰ But under this guidance, federal employees will be left guessing as to

¹⁸ See, for example, U.S. Office of Special Counsel, Report of Prohibited Political Activity under the Hatch Act OSC (File No. HA-18-0966 (Kellyanne Conway)), March 6, 2018, p. 11.

<https://osc.gov/Resources/Conway%20HA-18-0966%20Final%20Report.pdf> (Downloaded December 5, 2018)

In any event, Ms. Conway’s statements, made in her official capacity, went beyond providing “commentary” on the Administration’s policies, and thus constituted political activity. ... **OSC understands that Ms. Conway’s job duties may include publicly reinforcing the Administration’s positions on a host of policy issues. And the Hatch Act does not prohibit Ms. Conway from doing so, provided she carries out her job duties in a manner that complies with the law. Here, after receiving substantial Hatch Act guidance, Ms. Conway, in her official capacity, attempted to influence the Alabama special election by advocating for the success and failure of candidates in that race.**

[Emphasis added]

¹⁹ If OSC carved out a Hatch Act exception for policy positions that are in line with the administration’s positions, that would be viewpoint discrimination.

²⁰ 5 U.S.C § 7323(c)

when their own discussion of a policy may be deemed prohibited “political activity.” In a country of more than 300 million, amid an era of partisan polarization, this is an impossible mission that will chill speech; one person’s legitimate, fact-based policy assertion, upon investigation by OSC, could be found to be partisan and therefore in violation of the Hatch Act. Discussion of policy alone should clearly be deemed a permitted activity under the Hatch Act, even though at times the speech itself it may be controversial or ill-advised.

OSC’s New Guidance Regarding On-Duty Speech on Impeachment

OSC’s guidance states that advocacy for or against the impeachment of a current officeholder who is also a candidate violates the Hatch Act. Calling for the removal of an elected official from office, regardless of their status as a candidate, is not necessarily an attempt to influence the results of their election. Instead, these conversations might be about impeachment as a constitutionally granted tool of Congress as a check on the executive branch; such topics are a matter of significant public concern.

While OSC’s November 30 clarification²¹ on its guidance acknowledges this, POGO still has concerns. OSC should require a more explicit statement tying an employee’s policy speech with a candidate in an electoral capacity before that speech could be considered a Hatch Act violation. We believe that for such speech to be in violation of the Hatch Act, it must be paired with on-duty statements that OSC has traditionally viewed as prohibited political activity.

OSC should consider the implications of the fact that its new guidance affects not only regular government employees, but also White House staff who are likewise subject to the Hatch Act. Because White House staff are prohibited from using their official authority and influence to engage in political activity, OSC’s new guidance will likely have a significant impact on White House staff’s ability to make public statements in response to questions about possible efforts to impeach President Trump, should such questions arise during his current term. If questions about impeachment arise during a White House press briefing, the press secretary and her staff will now be prohibited from answering them. Based on OSC’s guidance, answering such questions would likely be viewed as political activity and advocacy in defense of President Trump—and therefore candidate Trump—in violation of the Hatch Act.

A discussion of this sort can and should be distinguished from calls to vote for or against a candidate in an upcoming election. In this area of statutory vagueness, OSC should err on the side of the First Amendment.

With its November 27 guidance, OSC creates a situation in which two million federal employees cannot speak freely about front-page issues during a substantial portion of their waking hours if a president is in their first term of office. This seems distant from the purpose of the Hatch Act.

OSC’s New Guidance Regarding On-Duty Speech Referencing “Resistance”

²¹ U.S. Office of Special Counsel, “Clarification of November 27, 2018 Email,” p. 1, November 30, 2018. <https://osc.gov/Resources/OSC%20November%2027%202018%20Guidance%20Extension%20and%20Clarification.pdf> (Downloaded December 1, 2018) (Hereinafter, “OSC Clarification”)

Finally, OSC says it will “presume” that using the word “resistance” or the “#resist” hashtag violates the Hatch Act “unless facts and circumstances prove otherwise.” Similar to the examples of prohibiting policy discussion “...in the run-up” to an election or speech for or against impeachment, this restriction is too far-reaching without some clear and obvious nexus to an attempt to affect the outcome of the re-election of President Trump or support or oppose other candidates or political parties. This example is particularly concerning, as it appears to outlaw use of a specific word due only to its perceived association with a political movement.

The prohibition of the words “resistance” or “#resist” is confusing in light of guidance OSC has previously given on speech related to the Tea Party. Specifically, in a training on the Hatch Act for the Office of Government Ethics, OSC presenters gave the example of an employee wearing T-shirt with a design that looked like the logo for Tide laundry detergent, bearing the slogan: “Vote: Get Stubborn Tea Stains Out.”²² According to OSC’s training, federal employees could wear this shirt at work without violating of the Hatch Act.²³ The rationale was that since the Tea Party was not an official political party, this was not an attempt to interfere with or affect the result of an election.

In contrast, OSC’s recent clarification of its new guidance states that MoveOn.org and the Democratic National Committee have incorporated “resistance” language into their messaging. OSC states that that link with a political party makes employee use of such phrases a violation of the Hatch Act. However, this logic appears to be out of step with its earlier guidance on the Tea Party, given the Tea Party’s very close association with the Republican Party and many candidates.²⁴

OSC should lay out clear boundaries and reasonable restrictions that do not chill protected speech. OSC’s March 2018 guidance struck a much more defensible balance regarding slogans, such as “#ResistTrump,” that have an obvious connection to a candidate.²⁵ It is not clear that “resistance” or “#resistance” always refer to President Trump—in many cases, their usage may be in conjunction with a disagreement over policy, such as family separation at the border.

We believe OSC’s new guidance, even with its more recent clarification,²⁶ may cause confusion among the federal workforce as to what is and is not prohibited under the Hatch Act. Given OSC’s power to interpret the law, and its influence over two million federal employees—roughly

²² 2011 Presentation by the Office of Special Counsel to the Office of Government Ethics, “Gearing Up For The 2012 Election Season: What Every Federal Employee Needs To Know,” p. 22. [https://oge.gov/Web/oge.nsf/0/2DD329CFDAA8E72B85257F1E005D1CE0/\\$FILE/2011%20Conference%20Materials.pdf](https://oge.gov/Web/oge.nsf/0/2DD329CFDAA8E72B85257F1E005D1CE0/$FILE/2011%20Conference%20Materials.pdf) (Downloaded November 30, 2018)

²³ Patrick Howley, “Government Ethics Conference: It’s Okay For Federal Employees To Wear Anti-Tea Party T-Shirts,” *The Daily Caller*, January 8, 2014. <https://dailycaller.com/2014/01/08/government-ethics-conference-its-okay-for-federal-employees-to-wear-anti-tea-party-t-shirts/> (Downloaded December 6, 2018)

²⁴ OSC Clarification

²⁵ U.S. Office of Special Counsel, “Updated Guidance Regarding the Hatch Act and President Donald Trump Now That He Is Officially a Candidate for Reelection,” March 5, 2018. <https://osc.gov/Resources/Candidate%20Trump%20Hatch%20Act%20Guidance%203-5-2018.pdf> (Downloaded December 1, 2018)

²⁶ OSC Clarification

85 percent of whom live and work outside the DC area²⁷—it is imperative that any guidance it offers be clear and decisive. Without clear guidance, OSC risks inadvertently chilling the free speech of federal employees on whom the American people rely to report waste, corruption, and abuse of power by officials at all levels of the federal government.

Congress has repeatedly expressed its intent that the Hatch Act should minimally intrude upon federal employees' free speech rights and their ability to participate in the political process.²⁸ OSC must take heed of that, especially where there is substantial ambiguity in the statute.

OSC's expansive interpretation of the Hatch Act as applied in the examples in its new guidance is troubling. Though we applaud OSC's recent track record of independence under your leadership as Special Counsel, we fear that this recent guidance will not only unduly create problems for some employees and chill the speech of many more, but it will make OSC appear to be an arbitrary enforcement agency, undermining its sensitive mission to uphold the merit system.

I therefore urge you reconsider your November 27 guidance and encourage you to hold a meeting on the Hatch Act to further clarify OSC's position and to gather input from interested stakeholders.

Sincerely,



Danielle Brian
Executive Director

CC:

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²⁷ U.S. Office of Personnel Management, "Data, Analytics & Documentation – Federal Employment Reports." <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-civilian-employment/> (Downloaded December 5, 2018)

²⁸ 5 U.S.C. § 7321

Senator Ron Johnson
Chairman
U.S. Senate Committee on Homeland Security & Governmental Affairs

Senator Claire McCaskill
Ranking Member
U.S. Senate Committee on Homeland Security & Governmental Affairs

Representative Trey Gowdy
Chairman
House Committee on Oversight and Government Reform

Representative Elijah Cummings
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Senator Charles Grassley
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