

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
MINORITY (202) 225-5051

<http://oversight.house.gov>

December 7, 2018

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

Dear Mr. Kerner:

I am writing to urge you to rescind the guidance the Office of Special Counsel (OSC) sent agency ethics officers last week regarding whether certain speech is prohibited under the Hatch Act.¹ OSC's new guidance on the Hatch Act is a radical departure from past guidance, may be unconstitutional, and is certain to have a chilling impact on federal employees. The new guidance is so out of step with OSC's past interpretations of the law that it raises concerns about whether OSC itself is engaging in inappropriate political activity.

The Hatch Act prohibits employees from engaging in political activity while on duty.²

The first portion of OSC's new guidance is consistent with previous OSC guidance:

Criticism or praise that is directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group is political activity. Absent evidence that the criticism or praise is so directed, criticism or praise of an administration's policies and actions is not considered political activity.

The new guidance went on to say, however, that criticizing a policy position before an election makes the same speech that would be allowed any other time suddenly become prohibited political speech. The example provided in the guidance is the Trump Administration's decision to move the U.S. Embassy in Israel to Jerusalem. The guidance stated:

¹ Office of Special Counsel, *Guidance on Hatch Act, "Criticism, Impeachment, Resistance"* (Nov. 27, 2018) (online at <https://osc.gov/Resources/OSC%20November%2027%202018%20Guidance%20Extension%20and%20Clarification.pdf>).

² 5 U.S.C. § 7324.

Consider, for example, the administration's recent decision to move the U.S. embassy in Israel to Jerusalem. An employee who strongly criticizes or praises that decision during a workplace discussion with a colleague in the days immediately following the decision is less likely to be engaging in political activity than one making those same statements in the run-up to the next presidential election—when the decision will likely have been out of the news for several years—to a colleague that the employee knows has strong feelings about the subject.³

OSC's guidance is wrong. There is no time that criticizing a policy of the sitting President or any other politician is a violation of the Hatch Act. It is only when an employee advocates for or against the success or failure of a candidate or political party that it implicates the Hatch Act.

OSC's own guidance on its website states:

Generally, all federal employees may discuss current events, policy issues, and matters of public interest at work or on duty. The Hatch Act does not prohibit employees at any time, including when they are at work or on duty, from expressing their personal opinions about events, issues, or matters, such as healthcare reform, gun control, abortion, immigration, federal hiring freeze, etc. For example, while at work employees may express their views about healthcare reform, e.g., "I agree with healthcare reform."

However, the Hatch Act prohibits federal employees at work or on duty from engaging in political activity. Political activity is activity that is directed at the success or failure of a political party, partisan political group, or candidate for partisan political office. Thus, employees may not express their personal opinions on such events, issues, and matters if such views also are political activity. For example, 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."⁴

OSC also has a poster on its website with a list of permitted and prohibited activities that says employees "May express opinions about political issues."⁵ There is no caveat for the timing of the speech.

OSC also provided a training on the Hatch Act during a 2012 ethics conference during which it provided examples of speech that is always permitted, including "NRA, Repeal

³ Office of Special Counsel, *Guidance on Hatch Act, "Criticism, Impeachment, Resistance"* (Nov. 27, 2018) (online at <https://osc.gov/Resources/OSC%20November%2027%202018%20Guidance%20Extension%20and%20Clarification.pdf>).

⁴ Office of Special Counsel, *Federal FAQs* (online at <https://osc.gov/Pages/HatchAct-FAQs.aspx>) (accessed Dec. 3, 2018).

⁵ Office of Special Counsel, *Permitted and Prohibited Activities for Most Federal Employees* (Feb. 2016) (online at <https://osc.gov/Resources/HA%20Poster%20Lesser%20Restricted%202016.pdf>).

healthcare bill, Right-to-life, Pro-choice, I support the war, Peace not war.”⁶ The guidance OSC issued last week blurs what has always been a bright line.

OSC’s guidance on using the term “resist” also deviates from previous guidance. The guidance stated: “To the extent that the statement relates to resistance to President Donald J. Trump, usage of the terms ‘resistance’ ‘#resist,’ and derivatives thereof is political activity.” OSC issued a clarification of its new guidance on November 30, 2018, that stated:

In responding to questions from federal employees regarding “#resist” and ‘the Resistance’ OSC considered that “#resist” and ‘the Resistance’ have become slogans of political parties and partisan political groups, including in their efforts to oppose President Trump’s reelection.⁷

Resist is a term that can be used in many different contexts. OSC’s guidance assumes that using a generic term that is not used as an official campaign slogan for any current partisan political candidate is political activity. Just because the term is sometimes used to reference a political philosophy does not make it political activity.

In a training session on the Hatch Act, Erica Hamrick, Deputy Chief of the Hatch Act Unit for the OSC, advised federal employees that using the term “liberal” is not considered political activity for purposes of the Hatch Act. Ms. Hamrick stated:

Being liberal may generally be associated with one political party but you know liberal is a political philosophy, it’s not a political party. So displaying that or wearing that would not be political activity.⁸

OSC has interpreted the Hatch Act to prohibit use of the slogan “Make America Great Again” because it is political activity.⁹ Make America Great Again is easily distinguished from “resist” because it is a specific trademarked slogan of current presidential candidate Donald J. Trump. OSC recently found that Assistant to the President Madeleine Westerhout as well as other White House employees violated the Hatch Act when they tweeted “#MAGA” because

⁶ Office of Special Counsel, *Gearing Up for the 2012 Election Season: What Every Federal Employee Needs to Know* (online at [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)).

⁷ Office of Special Counsel, *Clarification of November 27, 2018 Email* (Nov. 30, 2018) (online at <https://osc.gov/Resources/OSC%20November%2027%202018%20Guidance%20Extension%20and%20Clarification.pdf>).

⁸ Office of Special Counsel, *The 2016 Election Season: What Every Employee Needs to Know About the Hatch Act* (Mar. 9, 2016) (online at www.youtube.com/watch?v=IOyxaJw9mX4&feature=youtu.be&t=4154).

⁹ Letter from Erica S. Hamrick, Deputy Chief, Hatch Act Unit, Office of Special Counsel, to Noah Bookbinder, Executive Director, Citizens for Responsibility and Ethics in Washington (Nov. 30, 2018) (online at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2018/11/30151422/CREW-ltr-re-10-complaints.pdf>).

“Under the Hatch Act, tweeting a campaign slogan of a current candidate for partisan political office constitutes political activity.”¹⁰

OSC did not identify any political party or current candidate who has trademarked or is currently using “resistance” as a campaign slogan. Sony Computer Entertainment Europe applied for a trademark to use Resistance for video games.¹¹ A Chinese company applied for a trademark with the Patent and Trademark Office to use the term “Resistance” in appliances for gymnastics, Christmas tree decorations, and yoga blocks.¹²

I believe that rescinding the guidance issued on November 27, 2018, and the clarification issued on November 30, 2018, would be the only remedy sufficient to cure the confusion and chilling affect those documents have caused and will continue to cause if they are left in effect.

I also request that you provide a briefing by December 14, 2018, and that you produce the following documents and information by December 21, 2018:

- (1) all documents and communications sent or received prior to November 27, 2018, between OSC and any outside entity or organization regarding the Hatch Act guidance issued on November 27, 2018;
- (2) all documents and communications related to the development of the Hatch Act guidance issued on November 27, 2018;
- (3) all drafts of the Hatch Act guidance issued on November 27, 2018;
- (4) information sufficient to show, without violating OSC’s confidential advice protections, how many inquiries OSC received from federal employees regarding the three questions raised in the November 27, 2018, Hatch Act guidance; and
- (5) guidance issued on whether the term “Tea Party” or derivatives thereof is considered political speech under the Hatch Act.

Sincerely,



Elijah E. Cummings
Ranking Member

¹⁰ *Id.*

¹¹ European Union Intellectual Property Office, *Resistance* (online at <https://euipo.europa.eu/eSearch/#details/trademarks/013679881>) (accessed Dec. 6, 2018).

¹² Patent and Trademark Office, Trademark Electronic Search System, *Resistance* (online at <http://tmsearch.uspto.gov/bin/gate.exe?f=tess&state=4805:mv7hnq.1.1>) (accessed Dec. 4, 2018).

The Honorable Henry Kerner
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cc: The Honorable Trey Gowdy, Chairman