

October 5, 2020

The Honorable Henry Kerner
Special Counsel
Office of Special Counsel
1730 M Street, N.W.
Suite 218
Washington, D.C. 20036-4505

Peter Navarro
Assistant to the President and Director of Trade and Manufacturing Policy
The White House
1600 Pennsylvania Ave, N.W.
Washington, D.C. 20500

Re: Violations of the Hatch Act by Peter Navarro

Dear Messrs. Kerner and Navarro:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Office of Special Counsel (“OSC”) find that Assistant to the President and Director of Trade and Manufacturing Policy Peter Navarro repeatedly and egregiously violated the Hatch Act by advocating for the re-election of President Donald J. Trump and the defeat of his opponent, former Vice President Joseph Biden, in media interviews conducted in his official capacity and on the Twitter account he uses for official government business. By mixing official government business with political activity, Mr. Navarro impermissibly used his official authority or influence for the purpose of interfering with or affecting the result of an election.

Mr. Navarro’s conduct further shows his disregard for the law and signals that he will not comply with it. Despite his almost certain knowledge of Hatch Act restrictions through training, guidance, and OSC’s public actions against other White House officials, Mr. Navarro repeatedly violated the law and appears to be escalating his partisan activities as Election Day approaches. In light of Mr. Navarro’s egregious, notorious, and ongoing violations of the Hatch Act, he should immediately resign his post. If he does not, OSC should recommend to the President that Mr. Navarro be removed from federal service, and the President should do so.

Factual Background

Peter Navarro “joined the White House staff on Inauguration Day” and has served as Assistant to the President and Director of the White House Office of Trade and Manufacturing Policy since 2017.¹ Prior to joining the Trump administration, Mr. Navarro was an economic

¹ White House, Peter Navarro Assistant to the President and Director of the Office of Trade and Manufacturing Policy, <https://www.whitehouse.gov/people/peter-navarro/>; Nancy Cook and Andrew Restuccia, *Trump’s Trade Warrior Prowls the West Wing*, *Politico*, July 17, 2017, <https://www.politico.com/story/2017/07/17/peter-navarro-trump-trade-240611>.

advisor on the Trump presidential campaign.² Since then, Mr. Navarro regularly has appeared in interviews on behalf of the White House to promote President Trump's economic and trade agenda.³

Guidance for White House Employees Related to the Hatch Act

Throughout Mr. Navarro's tenure in government, White House officials have received and had access to substantial guidance related to compliance with the Hatch Act. As you confirmed in 2019 testimony before the House Committee on Oversight and Reform, all White House employees received Hatch Act training. There was a "senior staff ethics training that discussed the Hatch Act" on January 24, 2017, immediately following President Trump's inauguration.⁴ In December 2017, the White House counsel emailed all White House employees with guidance on the use of official resources and official media accounts, stating "You may not use your official position to effect the results of an election."⁵

In February 2018, OSC provided all federal employees updated guidance on applying the Hatch Act's provisions to social media.⁶ 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."⁷ One example of prohibited conduct provides:

*Example 1: While accessing the Twitter account you use for official purposes, you see that a political party tweeted its support for a candidate in a partisan race. You **may not** retweet or like that post from the account used for official purposes (or from your personal social media account if you are on duty or in the workplace).⁸*

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."⁹ The document acknowledged that President Trump became a "candidate for partisan political office" as described in the Hatch Act in February 2018 when he publicly announced his candidacy.¹⁰ In addition to reminding federal employees regarding the specific

² *Id.*

³ *Id.*

⁴ House Committee on Oversight and Reform, Hearing on Violations of the Hatch Act Under the Trump Administration, June 26, 2019, <https://docs.house.gov/meetings/GO/GO00/20190626/109706/HHRG-116-GO00-Transcript-20190626.pdf>.

⁵ *Id.*

⁶ Office of Special Counsel, Hatch Act Guidance on Social Media, revised Feb. 2018, <http://bit.ly/2J60680>.

⁷ *Id.* at 7.

⁸ *Id.*

⁹ 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, <https://osc.gov/Resources/Candidate%20Trump%20Hatch%20Act%20Guidance%203-5-2018.pdf>.

¹⁰ *Id.*

prohibitions of the Hatch Act on political activity, the updated guidance offered additional clarification regarding the use of the social media accounts.¹¹ 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."¹²

In March 2019, all White House Office employees again were trained on Hatch Act compliance as part of "mandatory annual ethics training."¹³ In May 2019, the office of White House Counsel "distributed updated written guidance on employee political activities to all White House Office employees."¹⁴ The office also offers "ongoing specialized training on Hatch Act obligations."¹⁵

Mr. Navarro's Repeated Use of White House Office and Title for Partisan Political Purposes

A. Official Media Interviews

In the last several months, Mr. Navarro has participated in numerous interviews while in his official capacity in which he both discussed government business and made statements that can only be interpreted as supporting President Trump's re-election or advocating for the defeat of his opponent, Mr. Biden, in the presidential campaign.

On September 6, 2020, Mr. Navarro participated in an interview on Fox News in which he discussed administration trade policy and then, turning to politics, denigrated a potential Biden presidency, criticized Mr. Biden's trade policy, promoted President Trump, and directly compared the candidates.¹⁶ Less than three months before Election Day, Mr. Navarro stated that a Biden presidency:

would mean ... devastation in the midwest, blue collar workers, just getting hammered. We lost over 70,000 factories, Maria, over 5 million manufacturing jobs. And it was because Joe Biden likes "Made in China." Donald Trump came along in many ways because he said, "Hey, that's not good. That's not right. I'm gonna fix that."

Mr. Navarro later added: "Beijing Biden vs. Made in America Donald J. Trump. I think that's one of the stark differences between the two sides."

¹¹ *Id.*

¹² *Id.*

¹³ Letter from Pat A. Cipollone, Counsel to the President to the Honorable Henry J. Kerner, Special Counsel, June 11, 2019, <https://assets.documentcloud.org/documents/6152241/PAC-OSC-06-11-2019-Letter-1.pdf>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Peter Navarro Comments on China Backing Biden, Coronavirus Pandemic, *Fox News*, Sep. 6, 2020, available at <https://video.foxnews.com/v/6188248199001#sp=show-clips>.

On September 30, 2020, Mr. Navarro participated in an interview on MSNBC in which he both discussed administration policy related to COVID-19 and denigrated a potential Biden presidency, attacked Mr. Biden's candidacy for President, criticized his response to the H1N1 crisis as Vice President, and directly compared the candidates.¹⁷ Mr. Navarro stated:

If you listen to the signal and avoid the noise of that debate I think that there was actually pretty clear differences drawn between the candidates. And one of the points President Trump made last night – which is exactly right – is when the president pulled down the China flights on January 31, Joe Biden opposed that and the fact that he opposed that would suggest that if he had been president we would have gone months with those flights coming in and instead of having 200,000 Americans being dead there'd be a million or more. I think that's an important point to recognize. The second point that the president made with respect to COVID, just quickly, was how Joe Biden handled the H1N1, swine flu, in 2009. His own chief of staff, Ron McKlain [sic] said that they made every single mistake in the book and there but for god, they would have had the worst mass casualty event in history. So I think that was a good exchange. I think that if people are going to vote for Biden cause they think he might do better on the China virus, I think they're dead wrong on that. And the president underscored that.

Mr. Navarro later added, "What the president also made clear, and I think it's a good distinction between Joe Biden and the president, and is the president is for law and order." During the interview, Mr. Navarro spoke from the grounds of the White House, and the host introduced him by his official title, saying: "joining me now from the White House is Peter Navarro, Assistant to the President and Director of the Office of Trade and Manufacturing Policy."

Mr. Navarro made similar statements disparaging a potential Biden presidency in an August 28 Fox News interview. Again, Mr. Navarro both spoke in his official capacity about administration policy and attacked Mr. Biden. Addressing President Trump's comments that "China would own this country if there was a Joe Biden Presidency," Mr. Navarro said they were "exactly right" when asked by the host.¹⁸ "The problem with Joe Biden is that he has a record. A 44-year-old record," Mr. Navarro added, then criticized Mr. Biden's record on China. Mr. Navarro went on to further attack Mr. Biden, claiming that "Joe's dangerous when it comes to off-shoring jobs" and raising allegations against Mr. Biden's son Hunter.

On May 26, Mr. Navarro also attacked Mr. Biden in an interview on Fox News conducted in his official capacity and "from the White House."¹⁹ While the interview began with

¹⁷ Peter Navarro: 'Second Debater' Wallace Responsible for Trump Missteps, *MSNBC*, Sep. 30, 2020, available at [msnbc.com/hallie-jackson/watch/peter-navarro-second-debater-wallace-responsible-for-trump-missteps-92856389790](https://www.msnbc.com/hallie-jackson/watch/peter-navarro-second-debater-wallace-responsible-for-trump-missteps-92856389790).

¹⁸ Peter Navarro: CCP is Bullying US into Submission, Invading our Capital Markets, *Fox News*, Aug. 28, 2020, <https://video.foxnews.com/v/6185451314001#sp=show-clips>.

¹⁹ Charles Creitz, Navarro Blasts Biden, Accuses Ex-VP of Spending Obama Years 'Toadying Up and Kowtowing' to China, *Fox News*, May 26, 2020, <https://www.foxnews.com/media/navarro-biden-toadying-up-kowtowing-china-obama>.

questions related to the administration's trade policy, the conversation turned to the campaign, and Mr. Navarro promoted the Trump re-election slogan "Transition to Greatness." Then, regarding comments from the Biden campaign, he said: "To Brother Joe, I guess he forgot the eight years he was toadying up and kowtowing to the Chinese ... and of course he is not going to basically hold China accountable for this pandemic." Mr. Navarro added, "Have at it, Joe. We're coming at you on China if you're going to pull that kind of stuff."

On September 22, Mr. Navarro participated in an interview on a local Ohio ABC affiliate and discussed administration economic policy, as well as contrasted President Trump with Mr. Biden ahead of Trump's rally in the state.²⁰ Mr. Navarro said:

Ohio really has been ground zero in communist China's economic war against the American and the message the president is going to be talking about today is a study in contrasts. You have on the one hand, Joe Biden, 47 years of voting for things like NAFTA and China's entry in to the WTO in 2001, two of the worst trade deals that really did tremendous damage to the state of Ohio. And you have President Trump who promised as a candidate that he would fix all that, and he has stood tall on China with his tariffs and his sanctions and the Phase 1 trade deal. So that's, that's the contrast.

Mr. Navarro added: "What the difference between Donald Trump and Joe Biden is that President Trump understands that as well, and he's defending that manufacturing base in Ohio and the rest of the country." During the interview Mr. Navarro was identified in the chyron as "Peter Navarro White House Trade Advisor" and conducted it from what appears to be a government office.

On September 23, Mr. Navarro participated in an interview on a local Erie, Pennsylvania television station where he promoted President Trump's re-election.²¹ After the host prefaced Mr. Navarro's comments by noting "[h]e believes the voters have a clear choice come November," Mr. Navarro stated: "It's a difficult line to walk, but ultimately, this country and Pennsylvania is best off with a president who will deliver you the strongest and fastest possible growth, and I think that choice is crystal clear." During the interview, Mr. Navarro was identified on the chyron as "Peter Navarro Advisor to President Trump", and he conducted it from what appears to be a government office.

On August 23, Mr. Navarro participated in another Fox News interview in which he criticized Mr. Biden's trade record and referenced the election. He first disparaged Mr. Biden, saying that China supported Mr. Biden because "They know he can be bought. They know he's compromised."²² Mr. Navarro then again compared President Trump and Mr. Biden, saying that

²⁰ Stacia Naquin, *White House Trade Advisor Talks Jobs, Innovation in Ohio in One-on-One Interview*, ABC 6, Sept. 22, 2020, <https://abc6onyourside.com/news/local/white-house-trade-advisor-talks-jobs-innovation-in-ohio-in-one-on-one-interview/>.

²¹ *Trump Aide Speaks about Securing Jobs Here in Erie and the Country*, *YourErie.com*, Sept. 23, 2020, <https://www.yourerie.com/health/coronavirus/trump-aide-speaks-about-securing-jobs-here-in-erie-and-the-country/>.

²² Rep. Kevin McCarthy, Sen. Tim Scott on House 'Emergency' USPS Bill, Goals for Republican National Convention, *Fox News*, Aug. 23, 2020, <https://www.foxnews.com/transcript/rep-kevin-mccarthy-sen-tim-scott-on-house-emergency-usps-bill-goals-for-republican-national-convention>.

the election is posing a choice between “a nice guy and a tough guy. And we like that matchup, because I think the people of America will always choose a tough guy in the White House over a nice guy, because they know the world’s a dangerous place.”

On April 22, Mr. Navarro participated in an interview on Fox News while in his official capacity and from the grounds of the White House in which he discussed government business and made unprompted remarks disparaging Mr. Biden and other Democrats.²³ The interview began with questions about China and the coronavirus, but Mr. Navarro veered into a partisan attack. He referenced a poll regarding whether Americans view China as a threat and added:

I can’t help but think that of the 9% that who don’t see China as a threat, they are the commentariat over at the fake news media and national Democrats like Nancy Pelosi and Joe Biden who basically don’t want to blame anyone but Donald Trump for this Wuhan virus. There, I said it.

Mr. Navarro also voiced other political opinions in televised interviews conducted in his official capacity. On August 25, Mr. Navarro participated in an interview on MSNBC in which he both discussed the Trump administration’s response to the coronavirus and provided his views about the Republican National Convention (“RNC”).²⁴ He praised speeches by Nikki Haley, Senator Tim Scott and others, stating in part, “There was really fine balance last night.” Mr. Navarro also addressed First Lady Melania Trump’s speech on the White House grounds and Secretary of State Mike Pompeo’s RNC speech, adding:

I think it’s a beautiful thing having Melania Trump speak from the Rose Garden and Secretary Pompeo speaking from the Middle East to celebrate an achievement that really keeps America not only safe but allows us to end those endless wars that the American people really are so tired of — going back to the Bush administration through the Obama administration ... So, you know, I think it’s going to be a great night. You will see — you will see some strong messages about the strength of this presidency.

Mr. Navarro further commented during the interview on the significant Hatch Act concerns raised by these speeches. Asked specifically about the “inappropriateness” of Secretary Pompeo mixing official government business with his speech, Mr. Navarro stated, “We do different things here in this administration. Look, one of the things that’s remarkable about this president is he keeps his promises.”

B. Use of Official Twitter Account “@PeterNavarro45”

²³ *Trump’s Trade Warrior Prowls the West Wing*, *Fox News*, Apr. 22, 2020, https://video.foxnews.com/v/6151196663001?playlist_id=930909813001#sp=show-clips.

²⁴ Mike Brest, ‘A Beautiful Thing’: Peter Navarro Celebrates White House Breaking Norms for RNC, *Washington Examiner*, Aug. 25, 2020, <https://www.washingtonexaminer.com/news/a-beautiful-thing-peter-navarro-celebrates-white-house-breaking-norms-for-rnc>.

Mr. Navarro uses his @PeterNavarro45 Twitter account for official government purposes. The account profile states that Mr. Navarro is “Assistant to the President for Trade & Manufacturing Policy” and said that “Tweets may be archived: <http://wh.gov/privacy>” before he apparently changed it.²⁵ Mr. Navarro regularly uses the @PeterNavarro45 account to post about official White House activities, and the profile links to the official “WhiteHouse.gov” website.²⁶ In addition, the account’s photo appears to be his official government portrait.²⁷

According to his Twitter page, Mr. Navarro began using the @PeterNavarro45 handle in early 2020, amid the presidential primary season.²⁸ Since launching this account, Mr. Navarro has primarily used it to promote official government business related to trade policy as well as to attack President Trump’s political rivals and promote the Trump re-election effort. These political messages have only increased as Election Day approaches.

Several of Mr. Navarro’s tweets explicitly call for President Trump’s re-election or attack Mr. Biden in the context of the election. On August 27, Mr. Navarro tweeted from his @PeterNavarro45 account: “Urgently need @potus 2nd term to defeat deadly China Virus, hold China accountable for massive costs to America.”²⁹

²⁵ Peter Navarro @PeterNavarro45, Twitter, <https://twitter.com/peternavarro45>; compare with Internet Archive WayBack Machine available at <https://web.archive.org/web/20200923004900/https://twitter.com/peternavarro45>

²⁶ See generally Peter Navarro @PeterNavarro45, Twitter, <https://twitter.com/peternavarro45>.

²⁷ *Id*; see also, White House, Peter Navarro Assistant to the President and Director of the Office of Trade and Manufacturing Policy, <https://www.whitehouse.gov/people/peter-navarro/>.

²⁸ Peter Navarro @PeterNavarro45, Twitter, <https://twitter.com/peternavarro45>.

²⁹ Peter Navarro (@PeterNavarro45), Twitter (Aug. 27, 2020), <https://twitter.com/PeterNavarro45/status/1299067688577368066>.



This tweet further linked to and promoted an opinion piece Mr. Navarro wrote for Fox Business entitled: “We need Trump for 4 more years, the greatest job president, trade negotiator in US history”.³⁰

Mr. Navarro similarly used his @PeterNavarro45 Twitter account on September 18 to promote President Trump’s re-election effort and attack Mr. Biden, this time stating, “Troupers for Trump. ... @USMCACoalition Trump=Jobs, Biden gave Michigan NAFTA. Never forget MI!”³¹

³⁰ Peter Navarro, *We need Trump for 4 more years, the greatest job president, trade negotiator in US history*, *Fox Business*, Aug. 26, 2020, <https://www.foxbusiness.com/politics/trump-4-more-years-jobs-trade-president-peter-navarro>.

³¹ Peter Navarro (@PeterNavarro45), Twitter (Sep. 18, 2020), <https://twitter.com/PeterNavarro45/status/1306993112397557766>.



On August 18, Mr. Navarro used his @PeterNavarro45 Twitter account to attack the Democratic Party and Mr. Biden in the context of the presidential campaign, claiming that “election of Joe Biden” was the “shared dream of Democratic party and Chinese Communist party.”³²

³² Peter Navarro (@PeterNavarro45), Twitter (Aug. 18, 2020), <https://twitter.com/PeterNavarro45/status/1295800256643432452> .



In many other tweets, Mr. Navarro disparaged and attacked Mr. Biden, often comparing him to President Trump. In July and August, for example, Mr. Navarro repeatedly used his @PeterNavarro45 account to accuse Mr. Biden of plagiarism. On July 10, Mr. Navarro tweeted that Mr. Biden had plagiarized President Trump, and accused him of “Bad ethics” and “poor judgment.”³³

³³ Peter Navarro (@PeterNavarro45), Twitter (July 10, 2020), <https://twitter.com/PeterNavarro45/status/1281616252360851456>.



On September 30, Mr. Navarro again promoted the President’s re-election bid and attacked Mr. Biden, stating: Trump Si, Biden No. @CortesSteve sees it clear. The Latino community knows who will deliver prosperity and security to the American land.”³⁴

³⁴ Peter Navarro (@PeterNavarro45), Twitter (Sep. 30, 2020), <https://twitter.com/PeterNavarro45/status/1311288313878380545>.



On July 11, Mr. Navarro again attacked Mr. Biden as a “Poll-driven plagiarist . . . stealing pages right out of President Trump’s . . . playbook.”³⁵



³⁵ Peter Navarro (@PeterNavarro45), Twitter (July 11, 2020), <https://twitter.com/PeterNavarro45/status/1282037578867384326>.

On August 22, Mr. Navarro used his @PeterNavarro45 Twitter account to allege: “More Biden plagiarism.”³⁶



On September 25, Mr. Navarro used his @PeterNavarro45 Twitter account to share and tweet from an article stating, “Joe Biden should have known better. Obama was a novice on trade policy. But Joe Biden had 40 years of history of off-shoring American jobs. Biden sent Delphi's jobs to China and Mexico and then stiffed Delphi Salaried Employees on their pension.”³⁷

³⁶ Peter Navarro (@PeterNavarro45), Twitter (Aug. 22, 2020), <https://twitter.com/PeterNavarro45/status/1297242273344901120>.

³⁷ Peter Navarro (@PeterNavarro45), Twitter (Sept. 25, 2020), <https://twitter.com/PeterNavarro45/status/1309529917240025090>.



On August 20, Mr. Navarro used his @PeterNavarro45 Twitter account to assert that “China Apologists Sherrod Brown/Joe Biden stood by while China stole millions of jobs from Ohio factories.”³⁸

³⁸ Peter Navarro (@PeterNavarro45), Twitter (Aug. 20, 2020), <https://twitter.com/PeterNavarro45/status/1296558781510430725>.



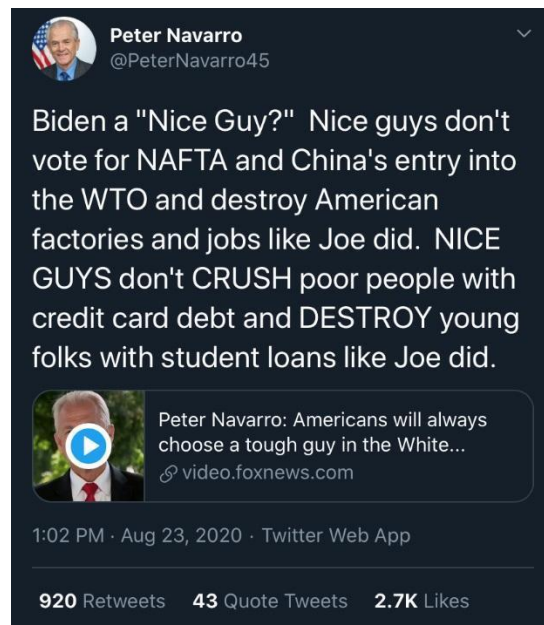
On September 21, Mr. Navarro similarly used his @PeterNavarro45 Twitter account to post a video attacking Mr. Biden, with a message stating, “Joe Biden tore the heart out of the heartland by voting for NAFTA and China into the WTO.”³⁹

³⁹ Peter Navarro (@PeterNavarro45), Twitter (Aug. 23, 2020), <https://twitter.com/PeterNavarro45/status/1297580010518327296>.



On August 23, Mr. Navarro used his @PeterNavarro45 Twitter account to attack Mr. Biden, stating, “Biden a ‘Nice Guy?’ Nice guys don’t vote for NAFTA and China’s entry into the WTO and destroy American factories and jobs like Joe did.”⁴⁰

⁴⁰ Peter Navarro (@PeterNavarro45), Twitter (Aug. 23, 2020), <https://twitter.com/PeterNavarro45/status/1297580010518327296>.



On April 22, Mr. Navarro used his @PeterNavarro45 Twitter account to promote a video conducted in his official capacity and on White House grounds in which he attacked the Democratic Party and Joe Biden.⁴¹



⁴¹ Peter Navarro (@PeterNavarro45), Twitter (Apr. 22, 2020), <https://twitter.com/PeterNavarro45/status/1252996399605723144>.

Potential Violations

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.”⁴² Activities covered by this prohibition include a federal employee’s use of their official authority or position while participating in political activity.⁴³ “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.”⁴⁴ OSC has 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.”⁴⁵

In its March 2018 report regarding Hatch Act violations by Counselor to the President Kellyanne Conway, OSC acknowledged 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.⁴⁶ OSC 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.⁴⁷

Penalties for Violating the Hatch Act

Penalties under the Hatch Act are generally administrative in nature, but can include reduction in grade, debarment from federal employment for up to five years, suspension, reprimand, a civil fine, or removal from government service.⁴⁸ In its 2019 report regarding Hatch Act violations by Ms. Conway, OSC recommended her removal from federal service.⁴⁹ In doing so, OSC identified several aggravating factors that warranted this penalty. OSC explained that “[t]he Merit Systems Protection Board (MSPB), which adjudicates Hatch Act violations,

⁴² 5 U.S.C. § 7323(a)(1).

⁴³ 5 C.F.R. § 734.302(b)(1).

⁴⁴ 5 C.F.R. § 734.101.

⁴⁵ 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> (“Second Conway Report”).

⁴⁶ 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/33fDagi>.

⁴⁷ *Id.*

⁴⁸ 5 U.S.C. § 7326.

⁴⁹ Second Conway Report (citing *Special Counsel v. Lewis*, 121 M.S.P.R. 109 (2014); *Special Counsel v. Ware*, 114 M.S.P.R. 128 (2010); *Special Counsel v. Briggs*, 110 M.S.P.R. 1 (2008); *Special Counsel v. Acconcia*, 107 M.S.P.R. 60 (2007); *Special Counsel v. Eisinger*, 103 M.S.P.R. 252 (2006); *Special Counsel v. Simmons*, 90 M.S.P.R. 83 (2001)).

repeatedly has held that removal is the appropriate discipline when employees were warned and/or had substantial knowledge before engaging in prohibited political activity.”⁵⁰ With regard to Ms. Conway, OSC explained:

Numerous aggravating factors support OSC’s recommendation that the President remove Ms. Conway from her federal position. First, Ms. Conway has substantial knowledge of the Hatch Act and was previously found to have violated the law by engaging in very similar conduct. Indeed, in March 2018, she was the subject of another disciplinary action referral from OSC to the President for engaging in political activity during official media interviews. Second, OSC repeatedly requested that Ms. Conway comply with the law. OSC sent a letter to Ms. Conway about her impermissible Twitter use in December 2018, warned the Office of White House Counsel in two March 2019 meetings about her political activity during official media appearances, and sent another letter to the Office of White House Counsel in April 2019 concerning her Twitter account. Lastly, Ms. Conway failed to comply with OSC’s requests and, in fact, escalated her partisan critiques of candidates after OSC had communicated to the White House that her conduct violated the law. In sum, Ms. Conway continues to violate the Hatch Act and signals that she will not comply with the law.⁵¹

In evaluating whether an employee’s removal from federal service is warranted for a Hatch Act violation, MSPB considers the seriousness of the violation, considering all aggravating and mitigating factors that bear upon the seriousness of the violation.⁵² These relevant factors include:

(1) the nature of the offense and the extent of the employee’s participation; (2) the employee’s motive and intent; (3) whether the employee had received advice of counsel regarding the activity at issue; (4) whether the employee ceased the activities; (5) the employee’s past employment record; and (6) the political coloring of the employee’s activities.⁵³

None of these factors alone appears to be determinative, but instead MSPB has applied a totality of the circumstances test to determine whether to impose the removal penalty. In *Ware*, for example, MSPB ordered removal in response to a federal employee “sending multiple partisan political e-mails from her government computer and e-mail account while on duty and occupying her government office.”⁵⁴ In another case, MSPB recommended removal where during the relevant time period, the government employee used his government e-mail account to send numerous messages, held telephone conversations, and used his government computer to

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Special Counsel v. Mark*, 114 M.S.P.R. 516 (2010) (citing *Special Counsel v. Ware*, 114 M.S.P.R. 128, ¶ 20 (2010); *Special Counsel v. Acconcia*, 107 M.S.P.R. 60, ¶ 4 (2007); *Special Counsel v. Purnell*, 37 M.S.P.R. 184, 200 (1988), *aff’d sub nom. Fela v. Merit Systems Protection Board*, 730 F. Supp. 779 (N.D. Ohio 1989)).

⁵³ *Id.*

⁵⁴ *Ware*, 114 M.S.P.R. 128, ¶ 20.

draft documents that were “directed toward the success of the Green Party.”⁵⁵ MSPB has held that a Hatch Act violation generally “warrants removal if it occurred under circumstances demonstrating a deliberate disregard of the Act.”⁵⁶

Mr. Navarro Committed Repeated Violations of the Hatch Act in His Interviews and on Twitter

Mr. Navarro violated the Hatch Act in numerous television interviews and on the Twitter account he uses for official government business by impermissibly mixing government business with advocating for President Trump’s re-election and for the defeat of his political opponent, Mr. Biden.

There is no doubt that Mr. Navarro was acting in his official capacity. His appearances are similar to those by Ms. Conway and others that OSC has previously found to be a use of their official authority or position. Mr. Navarro engaged in interviews about official government business including the administration policy related to trade, China, and the coronavirus. During these interviews, Mr. Navarro usually was standing on the White House grounds and was identified by his name and official title. Likewise, there is no question that the @PeterNavarro45 Twitter account is “a social media account designated for official purposes.” The account lists his official White House position, links to the official White House website and stated that his tweets may be archived there, and features a picture that appears to an official government portrait with the American flag. The @PeterNavarro45 handle also features the number “45” to signify the 45th President of the United States, consistent with the practice of many other Trump administration officials. In addition, Mr. Navarro regularly uses his Twitter account to post about Trump administration policy and links to other official websites for the White House. Given these facts, Mr. Navarro used his official position, authority, and title during the interviews in question and while posting from his Twitter account.

There also is no doubt that Mr. Navarro’s statements in interviews and on Twitter were aimed at influencing the success or failure of a candidate in a partisan election by explicitly and impliedly advocating for President’s Trump’s re-election or Mr. Biden’s defeat. His August 27 tweet, for example, explicitly stated that we “Urgently need @potus 2nd term to defeat deadly China Virus” and linked to his opinion piece calling for “4 more years” of President Trump. Mr. Navarro’s September 6 Fox News interview, in which he denigrated a potential Biden presidency, criticized Mr. Biden’s trade policy, promoted President Trump, and directly compared the candidates, similarly can only be interpreted as political activity. In numerous other posts and interviews, Mr. Navarro claimed that Mr. Biden spent his time as Vice President “kowtowing to the Chinese,” stated that the “election of Joe Biden” was the “shared dream of Democratic party and Chinese Communist party,” accused Mr. Biden of plagiarism, and asserted that he destroyed factory jobs in America. These statements all constituted political activity under the Hatch Act.

⁵⁵ *Eisinger v. Merit Systems Protection Board*, C.A.F.C. No. 2006-3426 (2007).

⁵⁶ *Special Counsel v. Malone*, 84 M.S.P.R. 342, ¶ 39 (1999).

Mr. Navarro's Conduct Warrants His Removal

Mr. Navarro's egregious and escalating violations of the Hatch Act warrant his removal from federal service. As OSC found in Ms. Conway's matter, removal is warranted when a federal employee commits numerous violations of the Hatch Act and "willfully and openly disregard[s] the law in full public view." Likewise, MSPB has found removal is warranted "under circumstances demonstrating a deliberate disregard of the Act," and has repeatedly held that removal is the appropriate discipline when an employee "had substantial knowledge before engaging in prohibited political activity."

Mr. Navarro's actions and comments about Hatch Act compliance make that disregard quite clear. As a White House employee, Mr. Navarro almost certainly received numerous training sessions related to compliance with the Hatch Act. Senior White House employees received guidance on the Hatch Act as part of ethics training in late January 2017. In December 2017, the White House counsel emailed all White House staff with guidance on the use of official resources and official media accounts for partisan political purposes. OSC further circulated updated Hatch Act guidance in February 2018 related to how the Hatch Act's provisions apply to social media, and in March 2018 regarding the announcement of President Trump's candidacy for re-election. In March 2019, White House employees were trained again on Hatch Act compliance as part of "mandatory annual ethics training" and received updated written guidance in May 2019. In June 2019 OSC issued its public report regarding Ms. Conway's repeated Hatch Act violations and recommending her removal.

Despite this training and guidance, Mr. Navarro used and continues to use his media outreach to advocate for President Trump's re-election and for Mr. Biden's defeat. This conduct is, to quote OSC, "unacceptable." While OSC has yet to issue a public report regarding Mr. Navarro's actions, he is currently under investigation for potential violations of the Hatch Act. In July, OSC confirmed that it opened an investigative file into Mr. Navarro's potential violations of the Hatch Act following a report by CREW. Mr. Navarro's case file was updated based on additional reports from CREW. Furthermore, Mr. Navarro's flippant comment that "[w]e do different things here in this administration" is response to concerns about Secretary Pompeo's impermissible mixing of official activity and partisan politics suggests that Mr. Navarro is fully aware of his illegal conduct and signals that he won't comply with the law.

Mr. Navarro's use of his Twitter account for partisan politics despite OSC's well-publicized findings that such conduct violates the Hatch Act may have further consequences for him. This apparently continuous conduct also appears to violate Twitter's Terms of Service and rules requiring users to use the platform in compliance with all applicable laws.⁵⁷ As a result, based on Twitter's rules and past practices, the company could sanction Mr. Navarro including by suspending his use of their platform.⁵⁸

⁵⁷ See Twitter, Terms of Service, <https://twitter.com/en/tos>, accessed Sept. 23, 2020; see also Twitter, Rules, <https://help.twitter.com/en/rules-and-policies/twitter-rules>, accessed Sept. 23, 2020.

⁵⁸ See *id.* Both Twitter's Terms of Service and Rules prohibit users from using Twitter in a way that violates the law. While most Twitter suspensions and bans have been for using fake accounts or tweeting violent or harassing messages, Twitter's rules are clear: they do not allow users to "use our service for any unlawful service or in

Further demonstrating both Mr. Navarro's disregard for the law and the need for decisive action, some of Mr. Navarro's violations occurred as recently as last week and appear to be increasing as we get closer to Election Day. Despite the multiple White House trainings and public questions to Mr. Navarro about the "inappropriateness" of mixing official business with partisan politics, his violations continue unabated. If Mr. Navarro were a federal employee outside the White House, his multiple violations of the law would almost certainly result in removal from his federal position by the MSPB. In accordance with OSC and MSPB precedent involving similar aggravating factors, we respectfully request that OSC recommend Mr. Navarro's removal from federal service.

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 her official title or position. By using his official position, authority, and title to express political views about candidates in a partisan election amidst comments about official government business, Mr. Navarro has run afoul of the statute on numerous occasions. His violations have been "egregious, notorious, and ongoing." As such, Mr. Navarro should immediately resign from the government. If he does not resign his post, OSC should issue findings that Mr. Navarro's conduct warrants removal from federal service.

Sincerely,



Noah Bookbinder
Executive Director