



U.S. OFFICE OF SPECIAL COUNSEL

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Washington, D.C. 20036-4505

The Special Counsel

September 12, 2012

The President
The White House
Washington, DC 20500

Re: OSC File No. HA-12-1989

Dear Mr. President,

I am forwarding to you the findings from the U.S. Office of Special Counsel's investigation of complaints of prohibited political activity by Secretary of Health and Human Services Kathleen Sebelius. As explained in the accompanying report, OSC concluded that Secretary Sebelius violated the Hatch Act by making extemporaneous political remarks in a speech delivered in her official capacity on February 25, 2012.

The Hatch Act prohibits federal employees from using their official authority or influence to affect the outcome of an election. A federal employee is permitted to make partisan remarks when speaking in their personal capacity, but not when using an official title or when speaking about agency business.

Secretary Sebelius and the Department of Health and Human Services (HHS) reimbursed the U.S. Government for all costs and expenses associated with her travel to the February 25, 2012 event. HHS subsequently reclassified the trip from official to political and issued a statement to that effect. OSC found no evidence that Secretary Sebelius made any other political statements in her official capacity.

As the upcoming elections approach, this report offers an opportunity to remind federal employees of the complex Hatch Act restrictions. Accordingly, I submit to you the enclosed report, together with Secretary Sebelius' response.

Sincerely,

A handwritten signature in blue ink that reads "Carolyn Lerner". The signature is written in a cursive, flowing style.

Carolyn N. Lerner
Special Counsel

Enclosures



U.S. OFFICE OF SPECIAL COUNSEL

Memorandum

U.S. Office of Special Counsel

Report of Prohibited Political Activity under the Hatch Act
OSC File No. HA-12-1989 (Kathleen G. Sebelius)

August 23, 2012

This report represents the deliberative attorney work product of the Office of Special Counsel and is considered privileged and confidential. Any release of information beyond persons specifically designated by the Office of Special Counsel to have access to its contents is prohibited. All FOIA inquiries regarding this report should be referred to Kenneth Hendricks, at (202) 254-3600.

INTRODUCTION

This report contains the investigative findings in OSC File Number HA-12-1989, two complaints of prohibited political activity received by the U.S. Office of Special Counsel (OSC). The complainants alleged that the Secretary of the Department of Health and Human Services (HHS), Ms. Kathleen G. Sebelius, violated the Hatch Act by using her official authority or influence to affect the outcome of an election when she delivered the keynote speech at the Human Rights Campaign Gala in North Carolina on February 25, 2012. Upon receipt of the complaints, OSC investigated whether Secretary Sebelius engaged in the alleged activity in violation of 5 U.S.C. § 7323(a)(1).

In addition, this case presented the issue of whether the U.S. Treasury paid for the costs of her political activity, which would have been a violation of 5 U.S.C. § 7324(b). While the Hatch Act prohibits most employees from engaging in political activity while on duty, the Act does not prohibit certain employees appointed by the President, by and with the advice and consent of the Senate, such as Secretary Sebelius, from doing so. 5 U.S.C. § 7324(b). However, they must do so in their personal capacities and the costs associated with their political activity must not be paid with money derived from the United States Treasury. 5 U.S.C. § 7324(b). As discussed below, HHS sought and received reimbursement from the appropriate political entities for the travel-related costs of the Secretary's appearance at the Human Rights Campaign Gala. Accordingly, that issue has been resolved and will not be analyzed in this report.

I. INVESTIGATION BACKGROUND

On March 7, 2012, OSC received a complaint concerning Secretary Sebelius and a possible violation of the Hatch Act. OSC received a second complaint on March 15, 2012, alleging the same violation. After receiving the complaints, OSC conducted an investigation into the allegations that Secretary Sebelius engaged in prohibited political activity. OSC interviewed five individuals as well as Secretary Sebelius and reviewed documentary evidence, including a DVD recording of the Secretary delivering her speech at the February 25, 2012, Human Rights Campaign Gala.

II. FACTUAL FINDINGS

Kathleen G. Sebelius (the "Secretary") is the Secretary of HHS, a federal agency within the executive branch. She was appointed by the President, confirmed by the Senate, and sworn into office on April 8, 2009.

A. Secretary Sebelius was Invited, in her Official Capacity as HHS Secretary, to be the Guest of Honor and Keynote Speaker at the February 25, 2012, Human Rights Campaign Gala

The Human Rights Campaign (HRC) is a private, nonprofit civil rights organization that works to achieve equality for lesbian, gay, bisexual, and transgender (LGBT) Americans.¹ Every year HRC holds several gala events. This year, HRC invited Secretary Sebelius to speak at its gala in Charlotte, North Carolina. HHS considered the Secretary's appearance at the HRC gala to be in her official capacity. Secretary Sebelius' calendar and a briefing memo prepared by her staff identified the event as official. In addition, online invitations to the event referred to her as "Secretary Kathleen Sebelius" and "Secretary of DHHS Kathleen Sebelius."

B. The Secretary's Remarks at the HRC Gala Advocated the Reelection of President Obama and the Election of Lt. Governor Dalton

Prior to the HRC gala, the Secretary received a briefing memo. The briefing memo provided background on the event. The memo recommended ways to respond to certain questions and suggested that if asked about her personal views, she respond by stating, "I'm here to represent the President and the Obama Administration, not in my personal capacity." The briefing memo also contained eight pages of a speech outline, which was later displayed on multiple teleprompter screens while the Secretary delivered her speech.

The Secretary began her speech by acknowledging several individuals in attendance, including the president of HRC and Senator Kay Hagan. She recognized Mayor Anthony Foxx and noted that he is the host mayor of this year's Democratic National Convention. In addition, she recognized North Carolina Lieutenant Governor Walter Dalton. She said he "needs to be the next Governor of North Carolina."

Secretary Sebelius then presented her prepared remarks, which focused on the administration's policies. She referred to the President's then-recent State of the Union address and his framework for the economy. The Secretary highlighted advances made by the Obama Administration that benefitted LGBT Americans. For example, the Secretary spoke about job growth, the repeal of Don't Ask Don't Tell, support for the Respect for Marriage Act, and the Administration's decision to no longer support the Defense of Marriage Act.

The Secretary spoke specifically about her work at HHS. She discussed the passage of the Affordable Care Act and emphasized its gains for LGBT Americans. She also noted what HHS and the Administration had accomplished for the LGBT community through administrative actions, such as changes to hospital visitation rules. The Secretary told attendees that these actions were just a glimpse of what was happening across cabinet agencies.

¹ See www.hrc.org/the-hrc-story/about-us.

The Secretary's description of the Administration's work was permissible under the Hatch Act. However, in addition to delivering these comments, the Secretary departed from her prepared outline when she said the following:

This Administration is committed to keep working with you but I have to tell you, we have just begun, and a lot of what I have just explained could be wiped out in a heartbeat. So as Joe² just said, *one of the imperatives is to make sure that we not only come together here in Charlotte to present the nomination to the President, but we make sure that in November he continues to be President for another four years* because this effort has just begun. I know there is an important election in early May here in North Carolina and I think that it's a great template to do what needs to be done to organize people and turn out people for November. North Carolina is hugely important in this next election, it's hugely important to defeat Amendment One on the ballot in May and *it's hugely important to make sure that we reelect the President and elect a Democratic governor here in North Carolina* (emphasis added). See Exhibit 1.

C. After the Secretary Made Partisan Remarks During Her Keynote Speech, HHS Reclassified the HRC Event as Political

Two days after Secretary Sebelius' keynote speech at the HRC gala, HHS started receiving media inquiries about the Secretary's comments and her attendance at the event. For example, reporters wanted to know if the Secretary intended to endorse Lt. Governor Dalton in the North Carolina Democratic primary and who paid for the Secretary's travel expenses to the gala. Because of the political nature of the Secretary's comments at the HRC gala, HHS retroactively reclassified the event as political and issued the following statement:

The Secretary attended the Human Rights Campaign dinner in Charlotte to highlight the work of the U.S. Department of Health & Human Services on LGBT issues. The trip included political components, and so the federal government will not be paying for it.

In addition, HHS sought reimbursement from the Obama for America campaign and the Democratic National Committee (DNC) for the costs of the Secretary's travel to Charlotte for the HRC event. The DNC reimbursed HHS for those costs. Further, on July 18, 2012, OSC advised HHS that there were some additional costs associated with Secretary Sebelius' attendance at the HRC gala that needed to be reimbursed to the U.S. Treasury. HHS sought and received reimbursement for those costs.

² Joe Solmonese was the president of HRC and introduced Secretary Sebelius at the gala.

D. Secretary Sebelius' Testimony About Her Remarks at the HRC Event

On July 9, 2012, OSC interviewed Secretary Sebelius about the HRC gala. The Secretary told OSC that she was invited to the event to speak about the efforts of the Administration and HHS to advance LGBT issues. The Secretary explained that she did not know Mr. Dalton and did not intend to endorse his candidacy. She intended to recognize his presence, as she usually attempts to acknowledge key attendees when she is at events. The Secretary had been told that Mr. Dalton was in attendance, and he had declared his candidacy for Governor. Secretary Sebelius explained that her "shout out" came across "as an endorsement." She expressed regret for the statements, particularly since there were "other primary opponents who were close by." She further stated that she rescinded the endorsement.

With respect to her statements advocating the reelection of President Obama, Secretary Sebelius explained that this was another instance in which she "went off script." She attributed her references to President Obama's reelection to "a mistake." She stated that she "got a little caught up in the notion that the gains which had been made would clearly not continue without the President's reelection." The Secretary stated:

I've been a candidate a number of times, but I have had a number of discussions with people about how to talk about health reform and if I'm talking about our work . . . If I'm at an official event, without saying that we need to continue on . . . how to do that without violating the Hatch Act and I think I have a lot greater clarity now about what can be. I can talk about the work continuing, but not necessarily about the Administration continuing. I can talk about the law being implemented but not about the person, but I would say that this was not a great way to express what I had intended to do which is that the work needed to go on.

Secretary Sebelius admitted her error, stating "I . . . regret the fact that I clearly made a mistake. I was not intending to use an official capacity to do a political event. I think it veered into political space at an official event and I regret that it occurred."

OSC found no evidence that Secretary Sebelius had previously made political statements while promoting the work of the Administration in her official capacity and OSC is unaware of any subsequent political statements in an official setting.

E. Secretary Sebelius had Knowledge of the Hatch Act

Secretary Sebelius stated that she knew that the Hatch Act restricts political speech during official events. She was given written materials after her initial ethics briefing in 2009 (which included material on the Hatch Act), received trainings and updates at least once a year that included information about the Hatch Act, and received copies of Hatch Act reminders that HHS sent to employees via email. In addition, through her Chief of Staff, the Secretary received White House memoranda that discussed the Hatch Act. Secretary Sebelius stated that she knew

at the time of the HRC appearance that when speaking in her official capacity she could not encourage attendees to vote for particular candidates. Subsequent to the HRC speech, the Secretary stated that she sought additional guidance regarding her obligations under the Hatch Act.

III. ANALYSIS

A. *Secretary Sebelius is Subject to the Provisions of the Hatch Act*

The Hatch Act restricts the political activity of “any individual, other than the President and the Vice President, employed or holding office in ... an Executive agency other than the Government Accountability Office.” 5 U.S.C. § 7322(1). As Secretary of HHS, an executive department, Secretary Sebelius is subject to the Act’s restrictions. See 5 U.S.C. § 101 (identifying HHS as an executive department) and 5 U.S.C. § 105 (defining ‘executive agency’ as an executive department, government corporation, or independent establishment).

The Hatch Act prohibits federal employees from using their official authority or influence for the purpose of interfering with or affecting the result of an election. 5 U.S.C. § 7323(a)(1). In discussing the 7323(a)(1) prohibition, Senator Carl Hatch explained that official authority is “authority which the person is possessed of by virtue of his office ... power which he would not have were it not for his office.” 86 Cong. Rec. 2347 (March 5, 1940) (statement of Sen. Hatch). The attendant Hatch Act regulation gives examples of the type of activity the prohibition encompasses. For example, it is a use of official authority or influence to affect an election when an employee uses her “official title while participating in political activity.” 5 C.F.R. § 734.302(b)(1). Political activity is defined in the Hatch Act regulations as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.” 5 C.F.R. § 734.101.

B. *Secretary Sebelius Violated the Hatch Act When She Gave Her Keynote Speech at the February 25, 2012, HRC Gala*

Secretary Sebelius appeared at the HRC gala in her official capacity as HHS Secretary. As explained above, twice during the speech, Secretary Sebelius diverged from her prepared remarks. First, she endorsed the gubernatorial campaign of North Carolina Lieutenant Governor Walter Dalton and stated that it is “hugely important” to elect a Democratic Governor in North Carolina. Although Secretary Sebelius testified that she “had not intended to endorse him,” her words had that effect. Because she made this endorsement in her official capacity as HHS Secretary, she violated the Hatch Act.

In addition, Secretary Sebelius advocated for the reelection of President Obama in a series of extemporaneous remarks. Secretary Sebelius suggested that the effort to defeat Amendment One on the ballot in May could serve as a “great template to do what needs to be done to organize people and turn out people for November.” She noted that North Carolina is critical in the next election and emphasized that it is “hugely important to make sure we reelect the

President.” These statements were made in Secretary Sebelius’ official capacity and therefore violated the Hatch Act’s prohibition against using official authority or influence to affect the results of an election.

IV. CONCLUSION

As mentioned in the introduction to this report, an issue distinct from and unrelated to the Secretary’s violation of § 7323(a)(1) was whether the U.S. Treasury paid for the costs of her political activity, which would be a violation of 5 U.S.C. § 7324(b). HHS subsequently reclassified the HRC event as political and issued a statement to that effect. It also took appropriate and timely steps to ensure that the government received reimbursement for all travel-related costs and expenses. These efforts have cured any violation of § 7324(b).

Secretary Sebelius also stated that she rescinded her endorsement of Lt. Governor Dalton. As stated, OSC is not aware of any prior or subsequent political comments in an official setting by Secretary Sebelius. Finally, while a violation of the Hatch Act occurred, Secretary Sebelius’ statements would have been permissible if they had been made in her personal capacity.

The U.S. Constitution provides the President with authority to appoint officers of the United States, by and with the advice and consent of the Senate. In light of the President’s constitutional authority, Congress has determined that violations of the Hatch Act by such officers be referred to the President “for appropriate action.” See 5 U.S.C. § 1215(b). Accordingly, OSC hereby submits this Report of Prohibited Political Activity, together with a response from Secretary Sebelius, to the President.