



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-804-7000

September 5, 2024

Hatch Act Advisory Opinion Regarding Official Agency Communications

The U.S. Office of Special Counsel (OSC) recently received complaints, some of which were made public, alleging that Secretary of Education Miguel Cardona violated the Hatch Act by sending an email to federal student loan borrowers about court rulings affecting federal student loan programs as a result of lawsuits brought by “Republican elected officials.” OSC has concluded that Secretary Cardona did not violate the Hatch Act by sending that email. Because of the public interest regarding whether that email violated the Hatch Act, OSC is issuing this advisory opinion explaining its reasoning in the case and how we analyze similar issues involving official agency communications.¹

The Hatch Act imposes certain restrictions upon the political activity of federal civilian executive branch employees, including Senate-confirmed Presidential appointees such as Secretary Cardona.² As relevant here, the Hatch Act prohibits an employee from using his official authority or influence to interfere with or affect the results of an election.³ An employee violates this prohibition by, for example, using an official title when engaging in political activity or engaging in political activity while acting in an official capacity.⁴ “Political activity” is activity directed toward the success or failure of a political party, partisan political group, or candidate for partisan political office.⁵

On June 24, 2024, two separate U.S. District Courts issued orders enjoining the Department of Education from implementing certain loan forgiveness programs. The lawsuits were brought by 18 states, each represented by a Republican attorney general. In response, Secretary Cardona sent a mass email to federal student loan borrowers on or about July 11, 2024. The email primarily informs recipients about how the rulings affect various loan repayment programs, but at three points in the email Secretary Cardona refers to the lawsuits as having been brought by “Republican elected officials.”

Secretary Cardona sent his email to federal student loan borrowers shortly after the two court decisions impacting the status of their loans. Although he identified as “Republicans” the elected officials who brought the lawsuit challenging the Administration’s policy, the facts do

¹ OSC is authorized by 5 U.S.C. § 1212(f) to issue advisory opinions interpreting the Hatch Act.

² See generally 5 U.S.C. §§ 7321-7326.

³ See 5 U.S.C. § 7323(a)(1).

⁴ See 5 C.F.R. § 734.302(b)(1).

⁵ 5 C.F.R. § 734.101.

not support the conclusion that Secretary Cardona acted for the purpose of interfering with or affecting the result of an election. In particular, Secretary Cardona’s message concerning a policy matter informs borrowers about the effect of the court decisions upon their loans and steps that the Department of Education (ED) planned to take in response.⁶ Secretary Cardona does not refer to candidates, elections, or voting, and the references to “Republican elected officials” accurately acknowledge a fact of the judicial proceedings (namely that all 18 plaintiffs are in fact represented by Republican elected officials or, in one case, an appointee of a Republican elected official).

OSC has consistently advised that when discussing topics such as pending legislation or government policy, references to a political party, without more, typically do not constitute political activity under the Hatch Act. For example, in 2023 Secretary Cardona issued an official communication in response to a different court decision affecting federal student loan borrowers that, like the message that prompted the recent complaints, referred to “Republican elected officials.” OSC advised ED then that the reference to “Republican elected officials” was not prohibited under the Hatch Act because, among other reasons, the communication was released the same day as the court decision and focused on the policy at issue in the litigation. In accordance with those determinations and the governing law, we have concluded that Secretary Cardona did not violate the Hatch Act by sending the email at issue in the complaints we received.

We have made the same determination in similar cases during the last administration. For example, in one case a senior agency official co-wrote an op-ed that described negatively certain municipalities run by members of a named political party. The op-ed was published three months before an election. However, that op-ed was primarily focused on a policy matter about which the agency had recently taken official action. In another case, a senior agency official made a social media post a week before the election linking a policy matter to a particular political party. In both cases, OSC found that the references to a political party were, by themselves, insufficient to give rise to a Hatch Act violation.⁷

⁶ For example, the message said that ED would continue implementing the repayment plan at issue in the litigation to the fullest extent possible and that borrowers could still enroll in the plan. The message also advised borrowers about some being placed in a temporary forbearance and that those borrowers could expect their loan servicer to contact them directly about upcoming due dates.

⁷ OSC also recently reviewed a referral from the U.S. Department of Justice’s (DOJ) Office of Inspector General (OIG) regarding an election-related investigation arising during the 2020 general election during which the Justice Department under then Attorney General Barr publicly stated that the allegedly discarded ballots at issue were cast in favor of a specific Presidential candidate. OSC considered the DOJ OIG’s thorough investigation and concluded that the facts as stated in that report did not give rise to a Hatch Act violation even though, according to the report, the DOJ’s public statement arguably unnecessarily named a specific candidate for partisan political office. See U.S. Dep’t of Just., Off. of the Inspector Gen., 24-082, A Report of Investigation Into the Department’s Release of Public Statements Concerning a Luzerne County, Pennsylvania, Election Fraud Investigation in September 2020 (2004), available at <https://oig.justice.gov/sites/default/files/reports/24-082.pdf>.

While our determination in this and other cases is that some references to a political party or political candidate in official communications do not constitute political activity, there are circumstances where we could find that such references are political activity. This might include if, for example, the communication also references voting or an upcoming election and/or the communication contains advocacy in support of, or opposition to, the electoral prospects of a political party, partisan political group, or candidate for partisan political office.

OSC has concluded in recent years, in both Democratic and Republican administrations, that some official communications are political activity based upon the factors described above. For example, one agency posted purported “fact sheets” just weeks before a midterm election that described legislators from a political party as liars and radicals who would devastate or destroy America. In another case an agency proposed circulating postcards that appeared to be campaign mailers and referred to legislators from a political party as extremists. In both cases OSC found the official communications constituted political activity and, accordingly, that the Hatch Act prohibited the agencies from making those communications.

Each case involving official communications turns on the specific facts involved. We urge agency ethics officials or others charged with reviewing official communications for compliance with the Hatch Act to assess official communications carefully, consider the information presented in this advisory opinion, and contact OSC with any questions. Employees can reach the Hatch Act Unit by phone at 202-804-7002 or by email at HatchAct@osc.gov.