
**HATCH ACT ASSESSMENT AND ADVISORY:
PARTISAN AGENCY COMMUNICATIONS
DURING THE 2025 LAPSE IN APPROPRIATIONS**



U.S. Office of Special Counsel
September 25, 2026

I. INTRODUCTION

Beginning in September 2025, the U.S. Office of Special Counsel (OSC) received over 1,000 complaints alleging that employees at 37 federal agencies and the White House violated the Hatch Act by using government resources to issue partisan communications about the October and November 2025 lapse in federal appropriations, commonly referred to as the “government shutdown.”¹ Those complaints arose from agency website banners, mass emails, out-of-office auto-replies, videos, and other official communications that explicitly blamed “Democrats” or “Democrat-led” actors for causing or prolonging the shutdown.²

The allegations potentially implicated two provisions of the Hatch Act: (1) 5 U.S.C. § 7323(a)(1), which prohibits employees from using their official authority or influence to interfere with or affect the result of an election, including by engaging in political activity while acting in an official capacity; and (2) 5 U.S.C. § 7324(a)(1)-(2), which prohibits employees from engaging in political activity while on duty or in the federal workplace. “Political activity” is defined as activity directed toward the success or failure of a political party, partisan political group, or candidate for partisan political office.³ Thus, OSC’s investigation focused on whether any employee engaged in political activity by making the shutdown-related communications.

OSC’s initial investigation revealed that agencies relied on a September 5, 2024 OSC advisory opinion (the “2024 Advisory”) when reviewing shutdown communications for Hatch Act compliance. OSC then concluded that there was an ambiguity in the 2024 Advisory that, combined with OSC’s inability to provide contemporaneous guidance while OSC employees were furloughed during the shutdown, meant agencies had a reasonable basis for believing their shutdown communications complied with the Hatch Act. Because of agencies’ reasonable reliance on the 2024 Advisory, OSC has determined that disciplinary action is neither warranted nor appropriate in the shutdown messaging cases. Further investigation to determine facts like how the communications were developed and the roles of individual employees would tax OSC’s limited resources and not materially change the outcome. Therefore, OSC is closing these cases with issuance of this combined assessment and advisory, which contains OSC’s factual findings, analysis, and guidance regarding official communications that name a political party.

II. STATEMENT OF FACTS

The 2024 Advisory⁴ is central to OSC’s resolution of the shutdown messaging cases, so this section begins with a summary of that advisory. OSC issued the 2024 Advisory in response

¹ For comparison, in years without a federal election OSC typically receives fewer than 300 complaints alleging violations of the Hatch Act.

² Since 2025 OSC has received similar complaints about agency communications that were not related to the 2025 government shutdown but also named a political party. The legal analysis and conclusions herein also apply to those complaints.

³ 5 C.F.R. § 734.101.

⁴ U.S. Off. of Special Couns., Hatch Act Advisory Opinion Regarding Official Agency Communications (Sept. 5, 2024) (attached as an appendix).

to an email from the then-Secretary of Education to federal student loan borrowers that blamed court-ordered changes to federal student loan programs on lawsuits brought by “Republican elected officials.” In that advisory, OSC stated that it had “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.”⁵ The 2024 Advisory further explained that when assessing such cases, OSC has considered, among other things, whether the focus of the communication was on a particular policy matter and whether the communication made express references to candidates, elections, or voting. The advisory included examples where OSC had determined that agency communications were permissible—including another agency reference to “Republican elected officials” and an instance of a senior agency official linking a policy matter to a particular political party—and when such communications were prohibited, including a proposal to circulate postcards describing legislators from a political party as extremists.

The communications at issue here relate to the government shutdown that began on October 1, 2025, due to the lack of an enacted appropriations bill for Fiscal Year 2026. On October 1 unfunded agencies ceased most operations, and many executive branch employees were furloughed, though some employees continued performing certain “excepted activities” necessary to protect life or property.

Immediately prior to the shutdown, at the direction of the Office of Management and Budget (OMB), agencies sent a message to employees that read, in part:

President Trump opposes a government shutdown, and strongly supports the enactment of H.R. 5371, which is a clean Continuing Resolution to fund the government through November 21, and already passed the U.S. House of Representatives. Unfortunately, Democrats are blocking this Continuing Resolution in the U.S. Senate due to unrelated policy demands. If Congressional Democrats maintain their current posture and refuse to pass a clean Continuing Resolution to keep the government funded before midnight on September 30, 2025, federal appropriated funding will lapse.

Once the shutdown began, numerous government agencies issued public statements and engaged in messaging critical of the Democratic Party using inflammatory partisan language, *e.g.*, calling the Democratic Party and/or its members “radical” and its policy proposals “insane.” In some cases, all individuals accessing government websites were met with partisan banners blaming the shutdown on “Radical Left Democrats.” In others, agencies sent emails and newsletters claiming that Democrats were blocking a continuing resolution and that, as a result, agency programs were affected. Examples of partisan agency messaging included:

⁵ *Id.* at 2.

- the Departments of State, Justice, Health and Human Services, and others placed banners on their public websites with some variation of, “Democrats have shut down the government;”
- the Department of Veterans Affairs sent a public newsletter describing impacts to its services that included, “Democrats are blocking this [funding bill] in the U.S. Senate due to unrelated policy demands;”
- the Department of the Interior and the National Institute of Standards and Technology directed employees to email agency contractors and state that “Democrat Senators are blocking [a funding bill] in the Senate due to Democrats’ insane policy demands;”
- the Department of Homeland Security issued a press release titled, “Democrats’ Government Shutdown Will Not Slow ICE Down from Arresting the Worst of the Worst Including Pedophiles, Murderers and Human Traffickers;”
- the Director of Public Affairs for the Cybersecurity and Infrastructure Security Agency said to the media, “Democrats’ refusal to act is forcing many of our frontline cybersecurity experts to work without pay even as nation-states intensify efforts to exploit Americans and critical systems;”
- the Department of Education changed some employees’ out-of-office email messages—without those employees’ knowledge or consent—to include, “Unfortunately, Democrat Senators are blocking passage of [a funding bill] in the Senate which has led to a lapse in appropriations;”
- the Director of U.S. Citizenship and Immigration Services posted on his official X account a statement about the shutdown reading, “Once again, Democrats are demonstrating that while they claim to care about aliens and efficient processing, their actions show they prioritize their radical agenda over the implementation of the laws passed by Congress;”
- The Department of Agriculture posted on its website, “Due to the Radical Left Democrat shutdown, this government website will not be updated during the funding lapse. President Trump has made it clear he wants to keep the government open and support those who feed, fuel, and clothe the American people,” and “Senate Democrats have voted 14 times against reopening the government. . . . Senate Democrats are withholding services to the American people in exchange for healthcare for illegals, gender mutilation, and other unknown ‘leverage’ points;”
- the Department of State posted on its official Facebook page, “By shutting down the government, Congressional Democrats are jeopardizing America’s national security and the safety of our fellow citizens;” and
- a video from the Secretary of Homeland Security played at Transportation Security Administration airport checkpoints around the country in which the Secretary said to potentially millions of travelers, “Democrats in Congress refuse to fund the federal government, and because of this, many of our operations are impacted and most of our TSA employees are working without pay. . . . Our hope is that Democrats will soon recognize the importance of opening the government.”

The White House also engaged in partisan messaging, including: a “shutdown clock” on the White House website alongside a banner reading, “Democrats Have Shut Down the Government;” a press release titled “Thank a Democrat for Five-Hour TSA Lines, Mass Flight Delays;” a post on the official White House x.com account reading, “Ah, sorry, Dems are booked all day tomorrow” alongside a picture showing an all-day calendar entry labeled, “keep the government shut down to give criminal illegals healthcare;” an email from a White House account that asked readers to “Call your Senator, call your U.S. Representative and express support for an END to this Democrat-led shutdown;” and a voicemail greeting on the White House comment line in which the White House Press Secretary says, “Democrats in Congress have shut down the federal government because they care more about funding health care for illegal immigrants than they care about serving you, the American people.”

The White House also created a satirical social media page, “mysafespace,” purporting to show a profile for Congressional Democrats. That fake profile contained a biography section that included, “Hey we’re Democrats in the House and Senate. We love DEI, transgender for everyone, and handing out taxpayer benefits to illegal immigrants,” listed as heroes “anyone who identifies as a radical leftist[,] transnational gangs, [and] illegal immigrants,” and made multiple references to the shutdown.

Agency and White House communications varied in their verbiage. But their message was consistent: they attributed blame for the 2025 government shutdown to the Democratic Party.

OSC received over 1,000 complaints alleging that employees at the White House and the following 37 federal agencies⁶ violated the Hatch Act by blaming a political party for the shutdown:

- The Department of Housing and Urban Development (HUD);
- The Department of Health and Human Services;
- The National Labor Relations Board;
- The Nuclear Regulatory Commission;
- The Department of State;
- The Department of Defense/The Department of War (DoW);
- The National Institute of Standards and Technology;
- The Department of Commerce;
- The Department of the Interior;
- The National Credit Union Administration;
- The Securities and Exchange Commission;
- The Department of Veterans Affairs;
- The Small Business Administration;
- The Department of Justice;

⁶ OSC also received complaints alleging similar violations by employees of state and local government agencies. The legal analysis and conclusions herein also apply to those complaints.

- The Bureau of Alcohol, Tobacco, Firearms and Explosives;
- The Drug Enforcement Administration;
- The Consumer Financial Protection Bureau;
- The Department of Labor;
- The Department of Transportation;
- The Federal Labor Relations Authority;
- The General Services Administration (GSA);
- The Department of the Treasury;
- The Department of Education (ED);
- The Department of Agriculture;
- The Forest Service;
- The Farm Service Agency;
- The Office of Personnel Management;
- The Office of Management and Budget;
- The National Archives and Records Administration;
- The National Aeronautics and Space Administration;
- The Department of Homeland Security (DHS);
- The Cybersecurity & Infrastructure Security Agency;
- The Federal Emergency Management Agency;
- Citizenship and Immigration Services;
- The Transportation Security Administration;
- The Environmental Protection Agency; and
- The Social Security Administration.

OSC requested information from each agency regarding the purpose of the communication in question and the circumstances that led to its issuance. Most agencies responded to OSC's requests,⁷ and their responses can be broadly classified into two groups—agencies either (1) argued that the communications were permissible based upon the 2024 Advisory, or (2) with respect to the pre-shutdown message to employees, explained that they were merely forwarding a template notification provided by OMB.

A representative response from an agency in the first group is:

The communications in question would only have violated the Act if they had been “directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.” Although the two communications at issue refer to “Democrats,” OSC noted in 2024 that it “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” so long as the references were not made “for the purpose of interfering with or affecting the result of an election.” It is readily

⁷ The following agencies either did not respond or refused to provide the requested information: HUD; DoW; GSA; ED; and DHS and its constituent agencies.

apparent that [the agency] had no such purpose here. The statements at issue addressed the circumstances leading up to the lapses in appropriations in the Fall of 2025. Immediately prior to the lapse, the Senate had the opportunity to pass a clean continuing resolution that would have maintained funding at existing levels and averted a shutdown. The resolution failed despite receiving the support of every single Republican Senator but one. Democrat Senators supplied 44 of the 45 “nay” votes. In referring to “Democrats,” [the agency’s] communications were clearly referring to these Democrat Senators, whose refusal to support a continuing resolution led directly to the lapse. [The agency’s] communications thus addressed a critical policy matter: the ongoing shutdown, that was unfolding contemporaneously. They alerted the public to that situation and explained how [the agency] was responding to it. Although these communications recognized the role of officials with a particular party affiliation in creating that situation, they did not refer to candidates, elections, or voting.⁸

A representative response from an agency in the second group is:

On September 30, 2025, the Office of Management and Budget (OMB) issued an email directing agencies to do the following: “Per guidance in OMB Circular A-11, agencies should immediately notify employees of the status of funding using an OMB-provided employee notification. That communication template is attached.”

III. ANALYSIS

1. *The operative legal framework*

The Hatch Act prohibits covered federal employees, including Senate-confirmed Presidential appointees, from using their “official authority or influence for the purpose of interfering with or affecting the result of an election.”⁹ Pursuant to this prohibition, an employee may not engage in political activity when acting in an official capacity.¹⁰ “Political activity” is defined broadly as any activity directed toward the success or failure of a political party, partisan political group, or candidate for partisan political office.¹¹ A communication need not contain express electoral advocacy for that communication to constitute “political activity.”¹²

The prohibition on using official authority or influence to interfere with or affect the result of an election dates to the original 1939 Hatch Act and was a key part of Congress’s

⁸ All quotations are from the 2024 Advisory.

⁹ 5 U.S.C. § 7323(a)(1). All federal executive branch employees except the President and Vice President are subject to the Hatch Act. See 5 U.S.C. § 7322(1).

¹⁰ 5 C.F.R. § 734.302(b)(1).

¹¹ 5 C.F.R. § 734.101.

¹² See *Burrus v. Vegliante*, 336 F.3d 82, 84 (2d Cir. 2003); see also *Special Couns. v. DePaolo*, U.S. Merit Systems Protection Board Docket No. CB-1216-18-0016-T-1, at 11, 21 (Sept. 13, 2019) (Initial Decision).

response to New Deal-era abuses of the federal workforce. The Hatch Act’s purpose—one the Supreme Court of the United States found compelling enough to overcome multiple First Amendment challenges—is to prevent the use of federal power and taxpayer resources to shape electoral outcomes and to preserve public confidence in the nonpartisan administration of the law. Indeed, in upholding the Hatch Act the Supreme Court wrote that “the impartial execution of the laws” is the “great end of Government.”¹³ In furtherance of that end, government employees “are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group”¹⁴ because “efficiency in Government service requires a lack of partisanship in administration.”¹⁵

Yet proponents of the Hatch Act also recognized that it should not be used to curtail legitimate government speech. When signing the Hatch Act into law President Roosevelt stated that all government employees, “from the highest to the lowest,” retained the right under the Hatch Act “to give to the public factual information relating to the conduct of Government affairs. To rule otherwise would make it impossible for the people of the United States to learn from those who serve the Government vital, necessary, and interesting facts relating to the manifold activities of the Federal Government.”¹⁶ These principles—that government agencies should not be used for electoral gain but also not be prohibited from educating the public about government operations—inform OSC’s application of the Hatch Act to official government communications.

The 2024 Advisory stated that 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.” The advisory focused on whether a communication centered on a policy matter and avoided express references to candidates, elections, or voting. Agencies interpreted the “without more” language and policy focus as shielding any agency communication with partisan blame so long as the communication is tied to a current event or a specific policy dispute and avoids explicit election references. OSC did not intend that outcome but finds agencies’ interpretation of the 2024 Advisory understandable, especially because agencies could not consult OSC for clarification during the shutdown because OSC’s Hatch Act Unit staff was furloughed.

Pursuant to 5 U.S.C. § 1215, OSC regularly exercises its discretion not to seek disciplinary action for Hatch Act violations where the circumstances indicate that discipline would be unwarranted. Agencies’ reasonable reliance on the 2024 Advisory presents such a circumstance. As the U.S. Court of Appeals for the Fourth Circuit explained, “federal employees who act in conformity with OSC’s advice effectively enjoy safe harbor from OSC prosecution.”¹⁷ The reason for this safe harbor is to avoid violating First Amendment rights: “To prevent the

¹³ *U.S. Civ. Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973).

¹⁴ *Id.*

¹⁵ S. Rep. No. 102-278, at 2 (1992).

¹⁶ Message from the President of the United States Relating to Senate Bill 1871, An Act to Prevent Pernicious Political Activities, at 3-4 (Aug. 2, 1939).

¹⁷ *Am. Fed’n of Gov’t Emps. v. Off. of Special Couns.*, 1 F.4th 180, 186 (4th Cir. 2021).

unnecessary chilling of speech, Congress has empowered OSC to issue advisory opinions on the Hatch Act[.]”¹⁸ The U.S. Court of Appeals for the D.C. Circuit made the same point many decades earlier: a key purpose of a Hatch Act advisory is to serve as “a preliminary opinion in advance of employee action” in order to “*alleviate* the Act’s potential to chill the exercise of [F]irst [A]mendment rights.”¹⁹ To pursue discipline in a case where agencies reasonably relied upon a prior OSC advisory would undermine that purpose and create a significant First Amendment concern.

For this reason, upon learning of the widespread reliance on an OSC advisory opinion, OSC determined that disciplinary action would not be appropriate, even if OSC concluded that some of the messaging violated the Hatch Act.²⁰ OSC further determined that agencies, employees, and the public would benefit from updated advice to prevent future communications that violate the Hatch Act. The analysis below is intended to help executive branch employees assess official communications for Hatch Act compliance before they are distributed.

2. Official communications by executive branch employees

OSC considers all relevant facts and circumstances when analyzing whether an official communication is political activity. While the 2024 Advisory’s “without more” language correctly describes OSC’s assessment of political party references, it leaves room for interpretation that OSC attempts to fill here. Regarding the 2025 shutdown communications, relevant facts that OSC considered include: whether the communication had a clear, contemporaneous non-electoral purpose, such as influencing a specific piece of legislation or notifying the public of operational impacts; the timing of each communication, and in particular its proximity to a relevant election; the tone of the communication, including whether it used inflammatory or insulting language; and the context of dissemination, including the intended audience and the scale of distribution.

References to a political party that are incidental to describing a live legislative or operational dispute, are temporally removed from any election, and are neutrally framed are unlikely to be political activity. Conversely, references that are gratuitous, made close to an election, and framed as an attack on a party are likely to be political activity. And any reference to a political party that includes express election-related terms—such as discussion of voting, campaigns, candidates, elections, or primaries—is likely to violate the Hatch Act.

Considering the relevant facts here, some of the shutdown messaging had the clear non-electoral purpose of influencing pending legislation—namely the pending appropriations bills that would have restored government funding—while others had the non-electoral purpose of

¹⁸ *Id.*

¹⁹ *Am. Fed’n of Gov’t Emps. v. O’Connor*, 747 F.2d 748, 754 (D.C. Cir. 1984) (emphasis in original).

²⁰ And while some of the messages, on their face, raise Hatch Act concerns, because OSC concluded that further investigation was not warranted, OSC makes no final determination about them.

conveying operational impacts. Neither is prohibited under the Hatch Act. But the derogatory tone and broad dissemination of some communications might weigh in favor of finding that their purpose went beyond influencing legislation to affecting the outcome of future elections, a purpose the Hatch Act prohibits.

An example of the former is the OMB message that agencies distributed to employees immediately prior to the shutdown stating that “Democrats are blocking this [funding bill] in the U.S. Senate due to unrelated policy demands. If Congressional Democrats maintain their current posture and refuse to pass a clean Continuing Resolution to keep the government funded before midnight on September 30, 2025, federal appropriated funding will lapse.” The message used a measured tone, was not distributed to the public, and notified employees of a potential furlough that would go into effect the following day.

Examples of the latter are the banners placed on agency websites reading, “Senate Democrats are withholding services to the American people in exchange for healthcare for illegals, gender mutilation, and other unknown ‘leverage’ points,” and “By shutting down the government, Congressional Democrats are jeopardizing America’s national security and the safety of our fellow citizens.” The White House’s mysafespace page is another example.²¹ These communications used inflammatory language and were disseminated broadly and publicly, all of which might weigh in favor of concluding that they violated the Hatch Act. However, as explained above, because OSC concluded that further investigation was not warranted, OSC makes no final determination about these communications.

IV. CONCLUSION

OSC concludes that agencies and employees relied on OSC’s 2024 Advisory when making shutdown-related communications. Therefore, even if some of the partisan messaging in the communications described in this assessment violated the Hatch Act, it would be inappropriate for OSC to pursue disciplinary action in these cases. To guide executive branch employees and the public in the future, this assessment and advisory explicates the 2024 Advisory by further articulating how OSC assesses references to political parties in official communications. As always, OSC encourages government officials to consult OSC with any questions regarding the Hatch Act implications of official communications that reference a political party.

²¹ In fact, OSC contacted the White House Counsel’s Office after the shutdown and expressed concerns about some of the content on the website. In response, that content was removed.

APPENDIX



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.