

The Intersection between the Hatch Act and Appropriations Laws

Federal statutes, appropriations riders, Office of Special Counsel (OSC) decisions, and Government Accountability Office (GAO) decisions suggest that congressionally appropriated federal funds may not be used for political purposes. The relevant federal statutes are the Hatch Act, which governs permissible and impermissible political activity by executive branch employees¹, and the Purpose Statute which addresses permissible and impermissible uses of federal appropriations.² While GAO has not historically weighed in on what constitutes “political activity,” GAO can and should consider an OSC finding of a violation of the Hatch Act as confirmation of “political activity” in violation of the Purpose Statute.

I. Prohibitions on Political Activity Under the Hatch Act

The Hatch Act prohibits nearly all federal employees from engaging in political activity while operating within the scope of their government work.³ Specifically, the statute prohibits a federal employee from using her “official authority or influence” to affect elections.⁴

Enforcement of the Hatch Act falls to the Office of Special Counsel, which has found that at least 12 senior Trump Administration officials violated the Hatch Act during their tenure in government. Most notable among them is Counselor the President Kellyanne Conway. On June 13, 2019, Special Counsel, Henry Kerner transmitted a report to President Trump finding that Ms. Conway violated the Hatch Act on at least 30 occasions since October 2018 and recommending that she be removed from her position within the federal government.⁵ A second prominent example is OSC’s finding that on June 19, 2017, then-U.S. Ambassador to the United Nations Nikki Haley violated the Hatch Act when she retweeted a political message endorsing Republican congressional candidate Ralph Norman.⁶ Following Haley’s Hatch Act violation, OSC sent her a warning about her conduct and advised her how to avoid future Hatch Act violations. OSC also informed Haley that should she engage in future prohibited political activity, it would consider such activity to be a “willful and knowing violation of the law.”⁷

¹ 5 U.S.C. §§ 7321–7326; 5 C.F.R. § 734.

² 31 U.S.C. § 1301.

³ 5 U.S.C. §§ 7321–7326; 5 C.F.R. § 734.

⁴ 5 U.S.C. § 7323(1). The statute also prohibits soliciting political contributions, becoming a candidate for a partisan political office, or “knowingly solicit[ing] or discourag[ing] the participation in a political activity” of someone involved with the employee’s office. *Id.* at §§ 7323(2)–(4).

⁵ CREW, OSC Determines Kellyanne Conway Should Be Fired Following CREW Complaints (Jun. 13, 2019), available at <https://www.citizensforethics.org/press-release/kellyanne-conway-hatch-act-violation-fired/>.

⁶ CREW, Haley Reprimanded for Hatch Violation (Oct. 3, 2017), available at <https://www.citizensforethics.org/press-release/haley-reprimanded-hatch-act-violation/>.

⁷ Letter from OSC to CREW Regarding OSC File No. HA-17-4341 (Sept. 28, 2017), available at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/10/03161101/DOC100217-10022017112049-1.pdf>.

II. Requirements Under the Purpose Statute and Appropriations Riders

Two common mechanisms for regulating the use of congressionally appropriated funds are the Purpose Statute and appropriations riders.⁸ The Purpose Statute prohibits the use of federally appropriated funds for anything other than the “object” (or issue) for which they were appointed, except as otherwise provided by law, with few exceptions.⁹ GAO has found that this prohibition extends to “political activities.”¹⁰ Similarly, appropriations riders are routinely used to restrict the manner in which appropriated funds are used for certain conduct. Attached to annual appropriations acts, these riders typically prohibit the use of appropriated funds for “publicity or propaganda purposes” that are either “not authorized by the Congress,”¹¹ or “designed to support or defeat legislation pending before Congress.”¹²

GAO’s Appropriations Law department is responsible for answering appropriations law questions and has issued numerous decisions based on inquiries related to the Purpose Statute and appropriations riders. It has repeatedly found that the Purpose Statute prohibits the use of appropriations for political activities.¹³ GAO has also issued decisions related to interpretation and application of appropriations riders, and how they relate to the purpose statute. For example, in 2018 GAO issued a decision related to the Financial Services and General Government Appropriations Act, 2017¹⁴ as applied to the Department of Health and Human Services (HHS).¹⁵ In 2017, President Trump issued an Executive Order requiring the HHS Secretary to begin cost-saving measures related to the Affordable Care Act (ACA), and to “ease burdens” on states so as to offer them greater flexibility with how they chose to implement their respective statewide health care policies.¹⁶

Following this Executive Order, HHS issued a series of tweets concerning the ACA that became subject to GAO review based on concerns that the messages violated the provision of its

⁸ Another statute that occasionally overlaps with GAO’s findings related to appropriations riders is the Antideficiency Act, 31 U.S.C. 1341(a). This statute prohibits federal agencies from obligations or expending federal funds in advance or in excess of an appropriation, and from accepting voluntary services. *Id.* GAO has found the Antideficiency Act to overlap with other appropriations requirements where an agency’s use of appropriated funds in violation of publicity or propaganda prohibitions *also* constitutes a violation of the Antideficiency Act. *See, e.g.*, B-303495 (Jan. 4, 2005), available at <https://www.gao.gov/decisions/appro/303495.pdf>. If an agency is found to have violated the Antideficiency Act, it must report its violation to the President and Congress. 31 U.S.C. §§ 1351, 1517(b).

⁹ 31 U.S.C. § 1301(a).

¹⁰ *See* B-304228 (Sept. 30, 2005), available at <https://www.gao.gov/decisions/appro/304228.pdf> (citing B-303170 (Apr. 22, 2005), available at <https://www.gao.gov/assets/380/374261.pdf>).

¹¹ *See, e.g.*, Consolidated Appropriations Act, 2017, H.R. 244, 115th Cong. (2017); Consolidated Appropriations Act, 2018, H.R. 1625, 115th Cong. (2018); Consolidated Appropriations Act, 2019, H.R.J. Res. 31, 116th Cong. (2019).

¹² *See, e.g.*, Section 607(a), Pub. L. No. 96-74, 93 Stat. 559, 575 (1979) (“No part of any appropriation contained in this or any other Act . . . shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress.”). This is an older phrasing that is not as commonly used in recent iterations of appropriations laws.

¹³ *See, e.g.*, B-304228 (Sept. 30, 2005), available at <https://www.gao.gov/decisions/appro/304228.pdf> (citing B-303170 (Apr. 22, 2005), available at <https://www.gao.gov/assets/380/374261.pdf>).

¹⁴ Pub. L. No. 115–31, div. E, title VII, § 718, 131 Stat. 135, 381 (May 5, 2017).

¹⁵ B-329199 (Sept. 25, 2018), available at <https://www.gao.gov/assets/700/694700.pdf>.

¹⁶ *Id.*

appropriations rider that prohibits “publicity and propaganda” including partisan activity.¹⁷ GAO was asked to assess whether these tweets were consistent with the appropriations restrictions by which HHS was bound. The appropriations rider, found in section 718 of the statute, bars the use of appropriated funds “for publicity or propaganda purposes . . . not heretofore authorized by Congress.”¹⁸ As GAO notes, “[t]his provision prohibits three forms of communications: those that are purely partisan, self-aggrandizing, or covert.”¹⁹ GAO has defined a “purely partisan” communication as one that has “no connection to an agency’s official duties and [is] completely political in nature.”²⁰ After analyzing the agency’s communications in the context of section 718 of the relevant appropriations law, GAO found that “none of the communications at issue were self-aggrandizing, purely partisan, or covert,” and that the communications therefore “did not violate the prohibition against the use of appropriations for publicity or propaganda.”²¹ Although GAO did not find that HHS broke the law in this case, it’s decision affirms that tweets from a federal agency or employee that are “purely partisan” could violate federal appropriations statutes.

III. Using the Hatch Act and Appropriations Laws in Tandem

GAO has not historically weighed in on what constitutes “political activity,” in an appropriations decision or otherwise, but there is evidence to suggest that GAO would consider an OSC finding of a Hatch Act violation confirmation of “political activity” in violation of the Purpose Statute.²² GAO has periodically cited to OSC complaints and findings to provide support for its decisions.²³ In one such decision, GAO relied on an OSC finding as part of the set of facts leading to the inquiry. On December 6, 1982, GAO issued a decision regarding a claim for backpay from a federal employee within the Department of Housing and Urban Development (HUD) who was laid off after his position was abolished during a departmental restructure.²⁴ HUD later reinstated the employee after an investigator from OSC reviewed HUD personnel records and determined that the department had not accorded the employee his reemployment priority rights when it hired someone else for a position for which he was qualified.²⁵ Following the investigator’s finding and discussions between HUD and OSC, the employee took a different job within the department.²⁶ Relying in part on the OSC investigator’s finding and OSC’s role in

¹⁷ *Id.*

¹⁸ Pub. L. No. 115–31, div. E, title VII, § 718, 131 Stat. 135, 381 (May 5, 2017).

¹⁹ B-329199 (Sept. 25, 2018), available at <https://www.gao.gov/assets/700/694700.pdf> (citing B-320482 (Oct. 19, 2010), available at <https://www.gao.gov/assets/400/390290.pdf>). “Self-aggrandizing” communications have “obvious purpose or puffery” and usually “emphasize the importance of the agency or activity in question.” *Id.* at 13. Finally, “covert propaganda” refers to “the agency’s concealment from the target audience of its role in creating the material.” *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *See, e.g.*, B-144323 (Nov. 4, 1960), available at <https://www.gao.gov/products/403672#mt=e-report> (noting the extreme difficulty in determining “the lines separating the nonpolitical from the political” as they “cannot be precisely drawn.”).

²³ *See, e.g.*, B-204124.OM (Oct. 5, 1981), available at <https://www.gao.gov/products/B-204124.OM#mt=e-report>; B-206445 (Dec. 6, 1982), available at <https://www.gao.gov/assets/450/444098.pdf>.

²⁴ B-206445 (Dec. 6, 1982), available at <https://www.gao.gov/assets/450/444098.pdf>.

²⁵ *Id.*

²⁶ *Id.*

getting HUD to offer the employee a new job, GAO held that the employee was not entitled to backpay after being re-hired.²⁷

While it appears that GAO has not previously relied on a Hatch Act determination from OSC as the basis for its analysis of appropriations law, considering recent events, it could and should. GAO could rely on an OSC finding of a Hatch Act violation due to inappropriate political activity to demonstrate that an agency misused federal funds during a specific instance when said employee engaged in political activity. For example, in OSC's June 13, 2019, report regarding Kellyanne Conway, the special counsel found at least 30 separate violations of the statute, including 21 tweets from her "@KellyannePolls" Twitter account.²⁸ In its March 2018 and June 2019 reports, OSC has also cited Ms. Conway for participating in at least 10 television interviews, totaling more than 2 hours, where she violated the Hatch Act.²⁹

Federal agencies have sought reimbursement to cure violations of the Hatch Act and GAO has also required agencies to seek reimbursement from federal employees for violations of appropriations law.³⁰ In 2012, following a violation by then-HHS Secretary Kathleen Sebelius for making extemporaneous political remarks in a speech delivered in her official capacity, Sebelius and HHS "reimbursed the U.S. Government for all costs and expenses associated with her travel" to the event.³¹ In 2016, GAO found that under section 713 of the Financial Services and General Government Appropriations Act, 2012, "HUD's appropriation was not available to pay the salary of a federal officer or employee who prevents another federal officer or employee from communicating directly with any member, committee, or subcommittee of Congress." Based on this decision, GAO concluded that HUD's appropriation was not available to pay the salaries of two employees "while they prevented or attempted to prevent" a HUD regional director from being interviewed by two congressional committees.³² GAO directed HUD to "consider these salary payments improper and seek to recover the payments as required by 31 U.S.C. § 3711."³³ A decision by GAO on the basis of appropriations law that incorporates an OSC finding of a Hatch Act violation—especially a decision mandating the returning of misused funds—is consistent with GAO's prior decisions and would provide additional incentive for federal employees to comply with the Hatch Act.

²⁷ *Id.*

²⁸ Letter from Henry Kerner, Special Counsel, OSC to President Donald J. Trump Regarding OSC File Nos. HA-19-0631 & HA-19-3395 (June 13, 2019), available at <https://osc.gov/Resources/Report%20to%20the%20President%20re%20Kellyanne%20Conway%20Hatch%20Act.pdf>

²⁹ See *id.*; and Letter from Henry Kerner, Special Counsel, OSC to President Donald J. Trump Regarding OSC File No. HA-18-0966 (Mar. 6, 2018), available at <https://osc.gov/Resources/Conway%20HA-18-0966%20Final%20Report.pdf>.

³⁰ See Letter from Carolyn Lerner, Special Counsel, OSC to President Barack H. Obama Regarding OSC File No. HA-12-1989 (Sep. 12, 2012), available at <https://osc.gov/Resources/Hatch%20Act%20Report%20on%20HHS%20Secretary%20Kathleen%20Sebelius.pdf>.

³¹ See Letter from Susan Poling, General Counsel, GAO to Senator Charles E. Grassley, *et al.* Regarding "Department of Housing and Urban Development—Application of Section 713 of the Financial Services and General Government Appropriations Act, 2012 (Reconsideration)" (Apr. 5, 2016), available at <https://www.gao.gov/products/D13038#mt=e-report>.

³² *Id.*

³³ *Id.*