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IN FOCUS

Partisan Messaging in Official Agency Communications

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Several federal laws constrain the degree to which official agency communications may contain messages that could be interpreted as partisan. The Hatch Act regulates the partisan political activities of most executive branch employees and prohibits, among other things, covered employees from engaging in political activities while on duty or using their official authority to influence or affect the result of an election. Provisions included in annual appropriations acts also prohibit agencies from using covered funds on publicity or propaganda, which includes purely partisan materials.

The Hatch Act

The Hatch Act, first enacted in 1939, was designed to address concerns regarding political patronage in the civil service. The underlying rationale for the law is that "efficiency in Government service requires a lack of partisanship in administration." In its current form, the law regulates the partisan political activities of covered employees, which includes nearly all federal civilian executive branch employees, but exempts from its coverage the President and Vice President. The U.S. Office of Special Counsel (OSC) issues advisory opinions concerning the Hatch Act and is authorized to investigate and prosecute alleged violations of the law.

More information about the Hatch Act and its coverage is available in another In Focus. With respect to official agency communications, two key provisions are relevant. First, the Hatch Act prohibits a covered employee from engaging in political activity while the employee is on duty, in a federal building, wearing an official uniform, or using any government vehicle. *Political activity* is defined in regulation as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group." OSC has advised that political activity, as interpreted by courts and administrative adjudicators, may encompass more than just "express advocacy for the electoral success or failure of a candidate." Certain high-level officials who are deemed to be on duty at all times are exempted from this prohibition.

Second, the Hatch Act prohibits all covered employees from using their "official authority or influence for the purpose of interfering with or affecting the result of an election." Issues regarding the official-authority prohibition may arise when covered employees mix political activities with official work, such as by using an official title when participating in political activity. OSC has explained that while it can be challenging to distinguish permissible official activity from prohibited political activity, there are some examples of statements that employees are "unquestionably" prohibited from making while engaged in official duties. These include

- attacking the campaign of a candidate for partisan political office,
- explaining why voters should support a particular candidate,
- comparing campaign proposals, or
- forecasting what would happen if certain candidates were elected.

Official Agency Communications

Although many Hatch Act inquiries involve instances of individual employee conduct, questions regarding the Hatch Act's applicability may arise when a federal agency publicly communicates an official message, either under the agency's name or from a high-level official like a Cabinet Secretary.

As discussed above, covered employees are prohibited from engaging in political activities while on duty and may not use their official authority or influence to interfere with or affect the result of an election. Covered employees may violate the Hatch Act if, while on duty or using official authority, they communicate or assist with the development or communication of official agency messages that are directed toward the success or failure of a partisan candidate, political party, or partisan political group. High-level officials, such as Cabinet Secretaries, are also prohibited from using their official title while participating in political activity.

Official agency communications that discuss, promote, or defend an administration's policy positions generally do not implicate the Hatch Act because those policy positions "relate to the official work of the government rather than the campaign of a candidate for partisan political office." OSC has described the type of political activity that can give rise to a Hatch Act violation as "campaign-related activity" as opposed to an administration's "political work," which involves an administration "persuading sitting members of Congress to support necessary legislation, persuading the American public of the importance of the administration's proposed policies, and arguing against policies and legislation with which it disagrees." Under this understanding of "political activity," all covered employees retain discretion to speak about and promote an administration's policies in their official capacities and while on duty but may not do so in connection with "campaign-related activity."

The line between permissible communication about an administration's policies and impermissible political activity may sometimes be unclear. Agency communications that broadly relate to administration policies may also be designed for political purposes, such as promoting a political party or incumbent candidate's reelection. Determining whether an agency communication contains impermissible partisan messaging may require a fact-intensive inquiry. OSC has considered certain factors when evaluating official agency communications, such as

- 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 the communication and its proximity to a relevant election;
- the tone of the communication, including whether it used inflammatory or insulting language;
- the context of dissemination, including the intended audience and scale of distribution.

As one example, OSC stated that references to political parties in official agency communications about pending legislation or policy, without more, do not constitute political activity under the Hatch Act. OSC further advised that "neutrally framed" references to political parties "that are incidental to describing a live legislative or operational dispute, temporally removed from an election," are unlikely to constitute political activity. If, however, references to a political party in official agency communications are "gratuitous, made close to an election, and framed as an attack on a party" they are more likely to be considered political activity. Discussions about voting, campaigns, candidates, or elections in conjunction with references to political parties are also likely to violate the Hatch Act.

OSC has also advised that official agency communications can implicate the Hatch Act if the "true purpose" of the communication is to promote a partisan candidate's campaign, even if the message does not include explicit campaign-related language. The timing of the agency communication is an important factor in OSC's analysis, and it considers suspect any official agency messages that are equivalent to a "closing argument" for a candidate's campaign. Examples of such statements include those that credit a candidate personally for agency accomplishments or that focus on the administration's past accomplishments rather than new or future programs and initiatives. As one example, an op-ed written in a Cabinet Secretary's official capacity and published the day before a presidential election raised Hatch Act concerns, according to OSC, because the op-ed focused almost entirely on the accomplishments of the incumbent presidential candidate rather than the agency's programs or policies.

Enforcement and Remedies

Multiple agencies are responsible for interpreting, implementing, and imposing penalties under the Hatch Act. As mentioned, OSC renders advisory opinions concerning the law and is authorized to investigate and prosecute alleged violations before the Merit Systems Protection Board (MSPB), a body that oversees disputes arising from the federal workforce. The MSPB then determines whether a violation has occurred and imposes available penalties, which, for federal employees, can include disciplinary action such as removal; a reduction in grade; debarment from federal employment for a period not to exceed five years; suspension; reprimand; or civil fines.

Allegations of partisan messaging in official agency communications may present unique enforcement challenges. For one, OSC has indicated it may be difficult to identify the specific employees responsible for assisting with the formulation and communication of the partisan message. This may be, in part, because OSC's investigative authorities are limited in that it "can neither enforce its own subpoenas nor compel agencies to respond to its investigative requests."

Further, as discussed in another In Focus, OSC does not have the authority to institute disciplinary proceedings against certain high-level administration officials. Thus, if an agency head was responsible for partisan messaging within official agency communications, OSC would be unable to pursue disciplinary action against that official.

Publicity or Propaganda Prohibition

Related, but outside the scope of the Hatch Act, are annual appropriations act provisions prohibiting agencies from using covered funds on "publicity or propaganda." The Government Accountability Office (GAO) has identified three activities that are prohibited by the publicity or propaganda provisions: self-aggrandizement, covert propaganda, and purely partisan materials. According to GAO, self-aggrandizement includes "publicity of a nature tending to emphasize the importance of the agency or activity in question." Covert propaganda refers to "communications that fail to disclose the agency's role as the source of information or that are misleading as to their origin." Purely partisan materials are those that have been "designed to aid a political party or candidate."

GAO has expressed the view that the publicity or propaganda provisions do not prohibit an agency's "legitimate informational activities," nor do they require agencies "to provide a balanced view of a particular activity." To violate the provisions, according to GAO, "the agency's justification for the communication must be 'so palpably erroneous as to be unreasonable.'" GAO has acknowledged difficulty in distinguishing between "disseminating information to explain or defend administration policies" and activities that are "designed for purely political or partisan purposes." When evaluating agency communications, GAO will determine the use of funds is improper only if "the activity is completely devoid of any connection with official functions."

GAO has advised that a violation can also be a violation of the Antideficiency Act, which prohibits authorizing an obligation or expenditure that exceeds available budget authority. The Antideficiency Act requires the violating agency to report an Antideficiency Act violation to the President and Congress, with a copy to the Comptroller General. Employees who violate the Antideficiency Act may face adverse personnel actions or criminal penalties for willful violations.

Beyond penalties available in appropriations law, at least one federal court has reviewed a claim brought against a federal agency under the Administrative Procedure Act for, among other things, violations of a publicity or propaganda provision. In that case, the court granted a temporary restraining order and ordered the agency to stop running advertisements that, according to the court, contained purely partisan messaging.

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