

March 24, 2021

The Honorable Henry Kerner
Special Counsel
Office of Special Counsel
1730 M Street, N.W.
Suite 218
Washington, D.C. 20036-4505

Dear Mr. Kerner,

Americans for Public Trust respectfully requests that the Office of the Special Counsel (“OSC”) investigate whether the political statements Secretary of Housing and Urban Development Marcia L. Fudge made, while acting in her official capacity during a White House press briefing, have violated the Hatch Act.

I. Background

Secretary Marcia L. Fudge was confirmed as the Biden administration’s Secretary of Housing and Urban Development (“HUD”) by the Senate on March 10th. Previously, she had represented the 11th Congressional District of Ohio.¹

On March 18th, in her first public appearance, Secretary Fudge participated in a press briefing in the White House briefing room, with the White House press secretary, to discuss the American Rescue Plan relief package.²

During the briefing, Secretary Fudge responded to a comment regarding the 2022 Ohio Senate race, “I have two friends that are thinking about it,” she stated. “Tim Ryan of course is thinking about. I understand Nan Whaley is thinking about. I mean I think we’re going to put a good person in that race no matter who we choose, but they’re both friends. I think we have a good shot at it. I know people have written off Ohio. I haven’t written off Ohio. I believe we can win the Senate race.”³

In response to backlash from her comments during the official briefing, Secretary Fudge then acknowledged that she should not have commented on the race. “When I was discussing getting relief to the American People and the American Rescue Plan from the briefing room on Thursday, I answered a question from a reporter related to Ohio politics,” she said in a statement. “I acknowledge that I should have stuck with my first instinct and not answered the question. I take

¹ Tyler Pager, HUD secretary may have violated ethics law by championing Democrats in Ohio Senate race at White House, [The Washington Post](#) (March 20, 2021); Clerk of the U.S. House of Representatives, 117th Congress, 1st Session, [Press Release](#).

² Pager, *supra* note 1.

³ *Id.*

these things seriously and I want to assure the American people that I am focused on meeting the needs of our country.”⁴

In August 2020, then-Representative Fudge joined other members in condemning Secretary Perdue’s Hatch Act violation stating, “Government officials in appointed, cabinet-level positions...should know better than to abuse their official capacity at the expense of American taxpayers.”⁵

II. Law

Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.⁶

The Hatch Act governs permissible activities for federal employees. An employee may not engage in political activity—

- (1) while the employee is on duty;
- (2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof.⁷

An employee is defined to include any individual holding office in an Executive agency.⁸

Political activity is defined as an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.⁹

On duty time is when an employee is representing any agency or instrumentality of the United States Government in an official capacity.¹⁰

Those found in violation of the Hatch Act are subject to disciplinary action, including removal, reduction in grade, debarment from Federal employment up to 5 years, suspension, reprimand, a civil penalty up to \$1,000, or any combination thereof.¹¹

III. Analysis

Federal employees must uphold the Constitution and the laws of the United States, including laws prohibiting political conduct during official activity. Secretary Fudge is not only restricted from political activity in her official capacity, but there are restrictions from political activity occurring in federal buildings.¹² In her official capacity in a federal building, the White House press room,

⁴ *Id.*

⁵ Ryan McCrimmon, Sonny Perdue fuels ethics scrutiny as Trump’s rural envoy, [Politico](#) (Oct. 5, 2020); [Letter from Members of Congress to Director Stuart Bender](#) (Aug. 28, 2020); Representative Marcia Fudge, “Fudge, DeLauro, Lee, McGovern, Bustos, Adams Slam Ag Secretary Perdue Following Confirmed Hatch Act Violation,” [Press Statements](#) (Oct. 8, 2020).

⁶ 5 C.F.R. § 2635.101(b)(1).

⁷ 5 U.S.C. § 7324(a)(1) and (2).

⁸ 5 U.S.C. § 7322(1)(A).

⁹ 5 C.F.R. § 734.101.

¹⁰ *Id.*

¹¹ 5 U.S.C. § 7326.

¹² 5 U.S.C. § 7324(a)(1) and (2); 5 C.F.R. § 734.101.

Secretary Fudge openly discussed and expressly advocated for a Democrat victory in the upcoming Ohio Senate race.¹³ This behavior falls squarely within the prohibited activity of the Hatch Act.

Following the event at the White House, Secretary Fudge released a statement admitting the inappropriateness of her conduct.¹⁴ This highlights that her discussion of the Senate race violated the Hatch Act, and the appearance of impartiality was destroyed by her original comments. The Hatch Act exists to support the premise that citizens may have confidence in their government.¹⁵ Given that Secretary Fudge has overtly criticized past cabinet secretaries for violating the Hatch Act, it is clear that her own conduct falls short of her own standards for compliance with the law.¹⁶

In addition to the express prohibitions under the Hatch Act, federal law establishes a code of conduct for its employees, requiring that employees not only adhere to the laws and the Constitution but maintain the public trust in doing so.¹⁷ It is not only reasonable for the American people to expect that government employees avoid intermingling political activities and official duties, but it is required. Taxpayers should also have every expectation that public servants solely focus on official duties on tax funded time. Secretary Fudge's political activities fail to uphold public trust.

IV. Request for Action

Given the highly partisan nature of the American Relief Bill, this was an opportunity for Secretary Fudge to demonstrate to the American people that all individuals are respected, regardless of political leanings. Instead, Secretary Fudge used her first public appearance to express support for her political party's chances in an upcoming Senate race. The American people are entitled to trust in their government, knowing that political opining has no place during the performance of official business duties. Therefore, we respectfully urge OSC to investigate this matter and any potential violations of the Hatch Act and standards of government employees.

Sincerely,



Caitlin Sutherland
Executive Director
Americans for Public Trust

¹³ Pager, *supra* note 1.

¹⁴ *Id.*

¹⁵ 5 C.F.R. § 2635.101(b)(1).

¹⁶ [Letter from Members of Congress to Director Stuart Bender](#), *supra* note 5; Representative Marcia Fudge, "Fudge, DeLauro, Lee, McGovern, Bustos, Adams Slam Ag Secretary Perdue Following Confirmed Hatch Act Violation," [Press Statements](#) (Oct. 8, 2020).

¹⁷ 5 C.F.R. § 2635.101(b).