



PROTECT the PUBLIC'S TRUST

June 30, 2021

Henry J. Kerner
Special Counsel
Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, DC 20036

Christi A. Grimm
Principal Deputy Inspector General
Office of the Inspector General, Department of Health and Human Services
330 Independence Avenue SW
Washington, DC 20201

Re: Hatch Act violation by NIAID Director Dr. Anthony Fauci

Dear Mr. Kerner and Ms. Grimm,

Protect the Public's Trust (PPT) is a non-profit organization dedicated to promoting compliance in government and restoring the public's trust in government officials. PPT respectfully requests that you investigate whether National Institute of Allergy and Infectious Diseases (NIAID) Director Anthony Fauci violated the Hatch Act¹ in the course of conducting an interview with *The Washington Post* just days before the General Presidential Election in November 2020.

When the totality of circumstances is taken into account, it becomes clear that Dr. Fauci exceeded the mere exchange of opinions and in fact, participated in impermissible political activity. Despite personally categorizing similar statements as "political" just days before, Dr. Fauci nevertheless offered his evaluation of the Biden campaign's approach to the COVID-19 pandemic relative to the approach taken by President Trump and connected differences in the nation's likely health outcomes to the different approaches.

¹ 5 U.S.C. § 7323 et al.



PROTECT the PUBLIC'S TRUST

Background

Since the onset of the COVID-19 pandemic, Dr. Anthony Fauci has become a household name as one of the nation's top public health officials with expertise on pandemic response and COVID-19 specifically. He is a frequent guest on weekly news shows, has testified at numerous congressional hearings, and his pronouncements on COVID-19 are widely covered by a range of media outlets across the country.

The COVID-19 issue was of paramount concern for voters entering the 2020 general election. In August 2020, Pew Research [cited](#) “62% of voters say[ing] the outbreak will be a very important factor in their decision about who to support in the fall.” *The Washington Post* reported that “Some voters said the coronavirus pandemic was their top concern as President Trump and Democratic presidential nominee Joe Biden made final 2020 campaign stops. (Reuters).”

On October 30, 2020, Dr. Anthony Fauci conducted an interview with *The Washington Post* where he elaborated on a wide range of issues, including his assessment of the ongoing COVID-19 global pandemic and the Trump Administration's handling of it relative to the Biden campaign. There was little doubt about the main takeaway from his comments – he supported the Biden campaign's approach while opposing the approach of President Trump. Further, Dr. Fauci intimated that the state of the nation's public health outlook could be directly linked to the two candidates' diverse approaches. The interview was widely picked up by major media outlets and highlighted in a story the following day in an article titled, “A whole lot of hurt: Fauci warns of Covid-19 surge, offers blunt assessment of Trump's response.”

For more context, here are some notable [excerpts](#) from the interview [emphases added]:

“We're in for a whole lot of hurt. It's not a good situation,” Anthony S. Fauci, the country's leading infectious-disease expert, said in a wide-ranging interview late Friday. “All the stars are aligned in the wrong place as you go into the fall and winter season, with people congregating at home indoors. You could not possibly be positioned more poorly.”



PROTECT the PUBLIC'S TRUST

Fauci, a leading member of the government's coronavirus response, said the United States needed to make an "abrupt change" in public health practices and behaviors.

Asked about the difference between their approaches, Fauci said Biden's campaign "is taking it seriously from a public health perspective." Trump is "looking at it from a different perspective."

"Right now, the public health aspect of the task force has diminished greatly," he said. Fauci said he and Deborah Birx, coronavirus task force coordinator, no longer have regular access to the president and he has not spoken to Trump since early October.

He also lamented that Scott Atlas, a neuro radiologist and Trump's favored pandemic adviser...is the only medical adviser the president regularly meets with.

"I have real problems with that guy [Scott Atlas]," Fauci said of Atlas. "He's a smart guy who's talking about things that I believe he doesn't have any real insight or knowledge or experience in. He keeps talking about things that when you dissect it out and parse it out, it doesn't make any sense."

Legal Standard

The Hatch Act prohibits a government employee from "us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election."² Intent is a key factor in the analysis. While off-duty, certain "less restricted employees" may campaign for or against candidates in partisan elections, make campaign speeches or distribute campaign literature, and hold office in partisan groups. As a member of the career Senior Executive Service, Dr. Fauci is classified among the "further restricted employees" and is barred from campaigning for or against a candidate in a partisan election, making campaign speeches or distributing campaign material even while off-duty.

² 5 U.S. Code § 7323(a)(1).



PROTECT the PUBLIC'S TRUST

Political activity is defined as “activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”³ While many Hatch Act violations involve express advocacy or solicitation of funds in order to advocate for or oppose a partisan candidate, each case must be analyzed independently to determine whether a violation has occurred. In 2007, Deputy Special Counsel James Byrne and Ana Galindo-Marrone, Chief, Hatch Unit, Office of Special Counsel testified before Congress about issues surrounding Hatch Act enforcement, including the issue of a potential “water cooler exception.”⁴ Here is the relevant exchange:

Senator Akaka: Thank you very much. Mr. Byrne, you testified that the Special Counsel recently clarified that there is no “water cooler” exception for engaging in political activity via e-mail. Does a more traditional “water cooler” exception exist if a group of employees casually chat in the break room about their views on an upcoming election? Does that violate the Hatch Act?

Mr. Byrne: Mr. Chairman, thank you for that question. The opinion that our office put out several years ago had no mention to any exception to the Hatch Act. We look at situations or examples like you are discussing in **the totality of the circumstances to determine whether that activity rises to the level of a political activity designed to influence an election.** And so there is no such animal as the “water cooler” exception. Each case is looked at under that microscope.

Senator Akaka: ...To either one of you, have you found that these differences make it more likely that Federal employees will accidentally cross the line into political action when they meant to engage in casual banter?...

Ms. Galindo-Marrone: I guess I would like to add that just from our experience since the 2000 election, we continued to see a rise in terms of the use of e-mail to engage in political activity. And I think earlier

³ 5 C.F.R. §734.101.

⁴ The Perils of Politics in Government: A Review of the Scope and Enforcement of the Hatch Act, Committee on Homeland Security and Governmental Affairs, U.S. Senate (Oct. 18, 2007), available at: <http://www.access.gpo.gov/congress/senate>.



PROTECT the PUBLIC'S TRUST

you had asked about a bright line and the line between casual and impermissible. We take it seriously in the Hatch Act Unit when we receive these complaints and to look at each case on its own. **We have to look at all the facts surrounding the communication--the number of recipients, the content, when it was sent, who it was sent to, etc.**

In several Hatch Act cases, the analysis has boiled down to whether the employees' communications exceeded the mere exchange of opinions and crossed into urging others to take specific action in support of or against specific partisan candidates. The present case involving Dr. Fauci requires looking at the totality of the circumstances to determine whether he crossed this line.

Emails of federal employees have proven to be a ripe area for understanding how these various factors can be relevant when determining whether a violation has occurred.⁵ In an advisory opinion, OSC examined an email sent by a federal employee entitled "Who is Barack Obama?," which included a number of opinions about then-presidential candidate Obama that OSC found to be in violation of the Hatch Act.⁶ OSC noted that the email included "very negative statements about Senator Barack Obama, specifically warn[ed] recipients to 'stay alert' about his candidacy, and stat[ed] that it has information recipients should consider in their 'choice.'"⁷ The opinion appears to indicate that the source of the content is at least a consideration in the analysis, highlighting that the "e-mail was not created by a federal employee. Rather, a federal employee received it and then forwarded it to others without adding any content."⁸

Thus, in this case, we must look at the totality of the circumstances to determine whether Dr. Fauci's statements during *The Washington Post* interview on October 30, 2020, rise to the level of a political activity. Relevant to this analysis is the timing of the communication, the reach and prominence of the media outlet, any standard practices established to avoid political statements, and indicators of a partisan intent or potential benefit from making a statement meant to interfere with the upcoming

⁵ Hatch Act Restrictions on Federal Employees' Political Activities in the Digital Age, Cynthia Brown & Jack Maskell, Congressional Research Service (April 13, 2016) ("CRS Report).

⁶ U.S. Office of Special Counsel, Advisory Opinion, Example of E-mail that Constitutes Prohibited Political Activity (March 18, 2008), available at <https://osc.gov/Pages/Advisory-Opinions.aspx>.

⁷ *Id.*

⁸ *Id.* See also, CRS Report.



PROTECT the PUBLIC'S TRUST

election. Upon doing so, each factor points toward the conclusion that Dr. Fauci violated the law.

Analysis

Fauci spoke in his official capacity as a senior government official

Employees are considered “on duty” when they are ... [r]epresenting any agency or instrumentality of the United States Government in an official capacity.”⁹ While conducting the interview with *The Washington Post*, Dr. Fauci was speaking as a government employee in his official capacity as Director of NIAID and on matters directly related to his professional duties. At no time does there appear any reference to Fauci’s comments being provided in his personal capacity or as anything other than a prominent government official. While prohibited from such partisan activity even while off-duty, Fauci’s statements on duty make the violation even more egregious. By speaking as a senior government official, Dr. Fauci was given the platform to discuss issues of extreme significance with a national media outlet expressly [invested](#) in the outcome of the upcoming national election.

Fauci weighed in on an issue of national and electoral significance

The COVID-19 issue was of paramount concern for voters entering the 2020 general election. In August 2020, Pew Research [cited](#) “62% of voters say[ing] the outbreak will be a very important factor in their decision about who to support in the fall.” *The Washington Post* reported that “Some voters said the coronavirus pandemic was their top concern as President Trump and Democratic presidential nominee Joe Biden made final 2020 campaign stops. (Reuters).”

Fauci was one of the most influential government officials on COVID-19

Since the onset of the COVID-19 pandemic, Dr. Anthony Fauci has become a household name as one of the nation’s top public health officials with expertise on pandemic response and COVID-19 specifically. He is a frequent guest on weekly news shows, has testified at numerous congressional hearings, and his pronouncements on COVID-19 are widely covered by a range of media outlets across the country. The bottom line is that, heading into the 2020 election, Dr. Fauci was an

⁹ 5 C.F.R. §734.101.



PROTECT the PUBLIC'S TRUST

extremely influential voice in the media and among the public on all issues related to the COVID-19 pandemic, including the Trump Administration's handling of it.

Standard practice for Fauci was to avoid giving political opinions

By October 2020, Dr. Fauci was a prominent national figure with significant media experience. His understanding of the importance of sticking to public health statements is clear from an interview just days prior to his interview with *The Washington Post*. On October 28, 2020, Dr. Fauci conducted an interview on "CNBC News with Shepard Smith." Here is the relevant [excerpt](#) [emphasis added]:

SMITH: The National Disaster Preparedness Center just issued a report on the novel coronavirus and concluded that at very minimum 130,000 American lives could have been saved as many as 210,000 lives, had we had what that center calls more robust federal coordination and leadership. Are they wrong?

DR. FAUCI: I mean, obviously, we have had a disparate response. I have been saying that Shep for months now, that when we have a uniform response, where all the states do things in a uniform manner with regard to masks, distancing, avoiding congregate settings, it would have been different than if we get it the way we did it, which was we did it in a disparate way.

SMITH: That center goes on to say there's little evidence to suggest that science based policies will prevail going forward with Donald Trump as president giving his attacks on science and government scientists. Do you agree with that?

DR. FAUCI: **I'm not going to get into that, Shep. I'm not going to get into political statements. I'm going to stick with public health statements.**

As your office explores the intent of Dr. Fauci when he compared the two candidates for President on October 30, 2020, this recent exchange just days prior is extremely relevant. In sum, it supports the notion that Dr. Fauci disregarded his own standard for avoiding political statements and acted with intent to interfere in the upcoming general election by putting his thumb on the scales in the name of public health. In sum, it supports the notion that Dr. Fauci acted with intent to interfere in the



PROTECT the PUBLIC'S TRUST

upcoming general election by putting his thumb on the scales in the name of public health.¹⁰

The interview was given four days before a national election

The timing of a communication is a critical factor in any electioneering analysis. For federal employees, mandatory training and notices from relevant agency ethics officials are sent out in the months leading up to an election reminding officials of the need to avoid statements that could be interpreted as advocating for or against a particular candidate. The electorate's focus on important issues and the candidates' positions on those issues become sharpened as the election approaches. Arguably, this focus is at its zenith in the week leading up to an election.

In late October 2020, the COVID-19 pandemic was an important public health issue that Dr. Fauci felt compelled to discuss in media interviews. In the October 28, 2020 CNBC interview, he delivered many of the same messaging points about the state of the COVID-19 pandemic. This interview was widely picked up and led to numerous headlines highlighting Fauci's [statement](#) that the "US is in a bad position as daily [COVID-19] cases hit record highs."

Two days later, Dr. Fauci felt compelled to give almost the same interview with *The Washington Post*. However, while during the CNBC interview he considered delving into the President's approach to the pandemic to be a "political statement," he showed no reticence – four days before an election – about making a comparison of the two candidates' approaches to one of the election's most controversial issues.

Fauci presented Trump as a danger to public health relative to Biden

During Dr. Fauci's interview with *The Washington Post*, he made several statements that left a clear impression that the current Administration's approach was not prioritizing public health, relied on incompetent advisors, and if the country did not make an "abrupt change," the country would face dramatic health consequences. Again, these are precisely the types of statements Dr. Fauci himself categorized as "political" in a previous interview.

¹⁰ Records obtained from the National Institutes of Health further support the notion that Dr. Fauci acted with intent. His annual Hatch Act training, warning of the danger of making political statements close to the election, was completed just a month earlier, on September 28, 2020, making the concerns fresh in his mind.



PROTECT the PUBLIC'S TRUST

After laying out the dire trajectory of the current pandemic approach taken by President Trump, Fauci provides an alternative for those members of the public that are concerned about COVID-19. “Asked about the difference between their approaches, Fauci said Biden’s campaign ‘is taking it seriously from a public health perspective.’ Trump is ‘looking at it from a different perspective.’” The logical inference is that, according to the nation’s most influential government official on COVID-19, readers should support Joe Biden.

The situation is not unlike the one described in the OSC’s 2008 advisory opinion titled “Example of Email that Constitutes Political Activity.”¹¹ In that opinion, a federal employee forwarded an email with several negative statements about the personal background of then-candidate Obama and made some ominous predictions about the future of the country under a President Obama. While the distribution of the email was much smaller in scope than Dr. Fauci’s interview, the OSC determined they would find this action to be a violation of the Hatch Act. The totality of the circumstances in this case would argue for a similar conclusion.

Fauci’s professional and personal motivations indicate intent to influence election

As Dr. Fauci himself notes in the October 30th interview, he was irritated that his influence was waning with President Trump and decided he had to seek other channels to reach the public [emphasis added]:

“The thing we can do is to **try to get the message out**,” Fauci said. Earlier in the pandemic, Fauci said he and Birx would agree on a message that Birx, who works out of the White House and once met with the president almost every day, would deliver to Trump. “**All of a sudden, they didn’t like what the message was** because it wasn’t what they wanted to do anymore,” he said.

By contrast, Dr. Fauci had legitimate reason to believe that he would exert more influence in a Biden Administration. For example, earlier in the year candidate Biden had urged governors to “[listen to Dr. Fauci](#).” Fauci’s intent to advocate for the defeat of the candidate that he believed did not value his professional advice while expressing support for the candidate who did is evident. And in fact, this is exactly what happened less than a month later. On December 3, 2020, USA Today [reported](#) that President-elect Biden had named Dr. Fauci his Chief Medical Advisor. Dr.

¹¹ U.S. Office of Special Counsel, Advisory Opinion, Example of E-mail that Constitutes Prohibited Political Activity (March 18, 2008), available at <https://osc.gov/Pages/Advisory-Opinions.aspx>.



PROTECT the PUBLIC'S TRUST

Fauci's excitement about working for the new Administration was palpable, "'Oh, absolutely. I said yes right on the spot,' Fauci said when asked if he'd taken the role."

The express advocacy in Dr. Fauci's comparison between the Biden campaign and President Trump just days before the 2020 election raises the prospect that Dr. Fauci understood that political affiliation, rather than merit, could benefit his career. This is further evidence that he intended to violate the Hatch Act in his October 30, 2020 interview.

Conclusion

As is shown in this complaint, the facts are straightforward:

- 1) With a national election four days away, Dr. Fauci chose to conduct a high-profile interview where he was asked and chose to answer numerous questions about the two candidates running for President;
- 2) Speaking in his official capacity and deviating from his traditional practice of not offering political opinions, Dr. Fauci compared the two candidates' handling of a topic of national importance in which he was extremely influential;
- 3) Dr. Fauci's characterization of the situation left little room for interpretation – the nation's top infectious disease expert plainly communicated that voting for Donald Trump would likely lead to more hospitalizations and deaths and that he supported the Biden campaign's approach;
- 4) Dr. Fauci had a personal and professional motivation to publicly support Biden while opposing Trump, with a direct benefit materializing within weeks following the election.

Dr. Anthony Fauci's evaluation of the two candidates running for President during his interview with *The Washington Post* on October 30, 2020 demonstrated a clear intent to use his influence as one of the nation's leading COVID-19 experts to affect the outcome of the coming national election. When the totality of the circumstances is considered, it is clear his statements exceeded the mere exchange of opinions and in fact, urged the support of a specific candidate for President of the United States. This



PROTECT the PUBLIC'S TRUST

represents a clear violation of the letter and spirit of the Hatch Act, striking at the heart of why the law exists.

Based on the above information, and the fact that Americans deserve a government that will adhere to the laws without unlawful political favoritism or influence, Protect the Public's Trust requests that your office promptly investigate Dr. Fauci's conduct to determine if he has violated the Hatch Act.

Sincerely,

Michael Chamberlain
Director
Protect the Public's Trust
Michael@protectpublictrust.org