

Richard W. Painter  
University of Minnesota Law School

Ex. 6 contact info

Minneapolis MN 55455

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To the Office of Special Counsel and the Office of Government Ethics:

I write to request investigation of apparent violations of the Hatch Act by the Director and perhaps other officials in the Federal Bureau of Investigation (FBI) in connection with highly unusual public statements while voting is underway about the status of an investigation concerning a political candidate, former Secretary of State Hillary Clinton. I also request that the Office of Government Ethics ask the FBI to conduct an internal investigation of whether there has been misuse of official position, 5 CFR 2635.702. Violations of the Hatch Act and of this ethics rule are not permissible in any circumstances, including an executive branch official acting under pressure from persons such as the president and politically motivated members of Congress. Such violations are of even greater concern when the executive branch agency is the FBI.

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Some facts are public with respect to the FBI communication this week with certain members of Congress concerning the investigation of emails sent and received by Secretary Clinton and certain of her aides. Those facts will not be recited here, and I am not personally familiar with any nonpublic facts concerning this matter.

I do not know whether the Director of the FBI personally wanted to influence the outcome of an election, although the content and wording of this week's letter is of concern. I am also concerned about the highly unusual public statements he made expressing his personal opinion about Secretary Clinton's actions, when he announced this past summer that the FBI was concluding its investigation of her email. But even absent a specific intent – or desire – of an official to influence an election, I believe that the Hatch Act and ethics rule are violated if it is obvious that the official's actions could influence the election, there is not another good reason for taking those actions, and the official is acting under pressure from persons who obviously do want to influence the election. To this last point, the fact that such other persons exerting pressure on the official, including members of Congress or the president or political operatives, are not subject to the Hatch Act or the OGE ethics rule, is irrelevant. The official still can violate the Hatch Act and the ethics rule in this situation.

Absent extraordinary circumstances justifying it, a public communication about a pending FBI investigation involving a

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candidate for public office that is made on the eve of an election or, as in this case, while voting is in progress, is very likely to be a violation of the Hatch Act. It is also a misuse of official position. The fact that politically motivated members of Congress want the communication to be made publicly only enhances the seriousness of the violation; it is not an excuse.

This is clearly distinguishable from politically motivated policy decisions in particular matters, such as decisions to spend government money to create jobs in an election year. Such decisions, even if they influence elections, are not generally violations of the Hatch Act. Official actions specifically intended to communicate publicly a connection between policy decisions and a candidate – such as a Department of Transportation announcement of a major project in a Congressman’s district on the eve of an election, at a ceremony attended by the Congressman and Department officials – would be highly problematic and border on violations of the Act depending upon proximity to the election. Decisions about particular party matters including investigations and litigation, in which candidates are the particular parties, are even more problematic. These particular party matters must be handled with considerable care in order not to violate the Hatch Act or the ethics rule. That clearly was not done here.

Director Comey’s actions in communicating about the investigation the way he did, appear to put him and others at the FBI in a position of violating the Hatch Act. Various

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members of Congress may be complicit in these actions, but the actions are still those of officials at the FBI. Unless remedial action is taken, there is likely to be a continuing violation of the Hatch Act up through Tuesday November 8.

The same is true with respect to the OGE ethics rule prohibiting misuse of official position. The misuse of position might be at the behest of or because of pressure exerted by members of Congress who are using their office for partisan political gain, but it is still a misuse of position at the FBI.

This is no trivial matter -- the Department of Justice reports to the President. Both the Attorney General and the FBI Director are appointed by the President. They also report to Congress in its oversight function. We cannot allow these officials, absent a compelling reason, to publicize pending investigations concerning candidates of either party while an election is underway. That is an abuse of power. Although there is no evidence of abuse of presidential power here, this precedent will invite such abuse in the future. Your offices should take appropriate action without delay.

Very truly yours,

/s/

Richard W. Painter

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