



March 3, 2022

The Honorable Henry J. Kerner
Special Counsel
Office of the Special Counsel
1730 M Street, NW, Suite 218
Washington, DC 20036

Re: Potential Hatch Act Violations

Dear Mr. Kerner:

America First Legal Foundation (“AFL”) respectfully requests that the Office of Special Counsel investigate whether Biden Administration officials from the White House, the Department of Justice, and the Department of Education violated the Hatch Act in an attempt to influence the outcome of the 2021 Virginia state elections—most notably, the gubernatorial race.

The Office of Special Counsel (“OSC”) is tasked with administration and enforcement of the Hatch Act, which restricts certain political activities of Federal employees to ensure that government resources are not used to advance partisan campaigns. To this end, OSC can conduct investigations of alleged violations of the Hatch Act.¹

As described below, it appears as though Biden Administration officials concocted and executed a scheme designed to influence the outcome of the election, which culminated in the issuance of an unfounded memorandum from Attorney General Merrick Garland that threatened to chill the free speech rights of parents in Virginia and across the United States.

I. Background

CRT Becomes a Central Issue in Virginia State Elections

Throughout the summer of 2021, parents nationwide protested public school policies and practices associated with, among other things, the teaching of certain principles

¹ 5 U.S.C. § 1216 (a)(1)(2).

of critical race theory (“CRT”) to K-12 students. Virginia became an epicenter for many of the parental protests, with Loudon County garnering national attention.²

The issue became a central focus in the Virginia gubernatorial race. By May 2021, Republican candidate Glenn Youngkin and other Republican candidates had signed a pledge to oppose the teaching of CRT in schools.³ In June 2021, Democratic candidate Terry McAuliffe described concerns about CRT being taught in school as a “right-wing conspiracy.”⁴ Media outlets noted how the CRT/school curriculum issue had become a central issue in the Virginia elections.⁵

In this context, Biden Administration officials at the White House, the Department of Justice, and the Department of Education coordinated with political allies including the National School Boards Association (“NSBA”) and others, likely including persons connected to, affiliated with, or funded by the National Education Association (“NEA”) and the American Federation of Teachers (“AFT”), to insert themselves into the debate in defense of CRT, in an attempt to benefit Democratic candidate McAuliffe.

According to our information, in early September 2021, Biden Administration officials discussed with key Administration allies avenues for potential federal action against parents who opposed the teaching of CRT in schools. Senior Department of Justice officials, including at least one political appointee in the Department’s Civil Rights Division, discussed potential federal action with these allies. Notably, officials in the White House are said to have separately expressed concern regarding the potential partisan political impact of parent mobilization and organization around school issues in the upcoming midterm elections.

Our information shows further that at the express direction of the White House, or with its express consent, Biden Administration officials developed a plan to use a

² Leandra Bernstein, *Protests Erupt Over Teaching of Critical Race Theory in Schools*, ABC4NEWS (June 23, 2021), <https://abcnews4.com/news/nation-world/protests-erupt-over-teaching-of-critical-race-theory-in-schools>.

³ Sam Dorman, *Virginia Election Timeline: How Education Became Crucial to Republican’s Victory*, FOX NEWS (Nov. 3, 2021), <https://www.foxnews.com/politics/education-issue-virginia-governor-youngkin-victory>.

⁴ Cameron Cawthorne & Sam Dorman, *Terry McAuliffe Calls Critical Race Theory Concerns a “Right-Wing Conspiracy,”* FOX NEWS (June 14, 2021), <https://www.foxnews.com/us/mcauliffe-critical-race-theory-right-wing-conspiracy>.

⁵ See, e.g., James Oliphant, Gabriella Borter, & Joseph Ax, *Culture War on Education Rages in Virginia Governor’s Race*, REUTERS (July 22, 2021), <https://www.reuters.com/world/us/culture-war-education-rages-virginia-governors-race-2021-07-22/>; Joshua Jamerson & Aaron Zitner, *Critical Race Theory Becomes Key to GOP Campaign Strategy in Virginia*, WALL STREET JOURNAL (July 26, 2021), <https://www.wsj.com/articles/virginia-campaign-will-test-whether-critical-race-theory-moves-voters-11627304401>; Trip Gabriel & Dana Goldstein, *Disputing Racism’s Reach, Republicans Rattle American Schools*, NY TIMES (June 2, 2021), <https://www.nytimes.com/2021/06/01/us/politics/critical-race-theory.html>.

letter from an outside group (with a preference for “not the usual suspects”) as pretext for federal action to chill, deter, and discourage parents from exercising their constitutional rights and privileges.

While this effort was underway in Washington D.C., there was a gubernatorial debate between candidates Youngkin and McAuliffe in Virginia on September 28, 2021. The issue of parental involvement in school curriculum was hotly contested by the two candidates, with Youngkin asserting, “I believe parents should be in charge of their kids’ education.”⁶ McAuliffe responded, “I don’t think parents should be telling schools what they should teach.”⁷

In media reports following the debate, it became clear that McAuliffe’s statement dismissing parents’ concerns was a major liability for his election prospects. The Washington Examiner noted that “[f]ormer Virginia Gov. Terry McAuliffe handed his Republican gubernatorial opponent Glenn Youngkin a campaign ad on a silver platter during a Tuesday debate by stating that he would not allow parents to tell schools what to teach their children.”⁸ Another report characterized McAuliffe’s comment as “an apparent rebuke of ongoing parental concerns in Loudoun County, Va,” where the education battle burned hottest throughout 2021.⁹

Indeed, those concerns about McAuliffe’s statement would prove to be valid, as throughout the month of October, and even after the election, political observers would point to that moment as the reason for his sinking prospects and, ultimately, his defeat on November 2, 2021.¹⁰

The Attorney General’s October 4, 2021, Memorandum

On September 29, 2021, the very day after McAuliffe’s campaign-changing debate disaster, the National School Boards Association, citing legal authorities including the Patriot Act, sent a letter to President Biden demanding federal action to confront

⁶ John Clark, *McAuliffe: ‘I don’t think parents should be telling schools what they should teach,’* WTVO CHANNEL 17 (Sept. 29, 2021), <https://www.mystateline.com/news/politics/mcauliffe-i-dont-think-parents-should-be-telling-schools-what-they-should-teach/>.

⁷ *Id.*

⁸ Emily Brooks, *McAuliffe Says Parents Shouldn’t Tell Schools What to Teach, Handing Youngkin a Campaign Ad*, WASHINGTON EXAMINER (September 29, 2021), <https://www.yahoo.com/video/mcauliffe-says-parents-shouldn-t-173500644.html>.

⁹ Alec Schemmel, *Va. Gubernatorial Candidate Says Parents Should Not Control What Schools Teach Their Kids*, THE NATIONAL DESK (September 29, 2021), <https://nbcmontana.com/news/nation-world/va-gubernatorial-candidate-says-parents-should-not-control-what-schools-teach-their-kids>.

¹⁰ Brandon Gillespie, *CNN Sounds Alarm on Terry McAuliffe’s Campaign Blunders: He ‘Lets the Tongue Get Out Ahead of the Brain’*, FOX NEWS (October 12, 2021) <https://www.foxnews.com/media/cnn-alarm-terry-mcauliffe-campaign-blunders-tongue-brain>; Joe Concha, *Education Blunder Igniting Suburban Parents Driving McAuliffe Panic in Virginia*, THE HILL (October 28, 2021), <https://thehill.com/opinion/campaign/578885-education-blunder-igniting-suburban-parents-driving-mcauliffe-panic-in>.

“the growing number of threats of violence and acts of intimidation” to local school board members arising out of “policies for masks to protect the health and safety of students and school employees” and “propaganda purporting the false inclusion of critical race theory within classroom instruction and curricula.”¹¹

Media reports indicate that Education Secretary Miguel Cardona solicited this letter from the NSBA.¹² According to an October 5, 2021, email obtained by Parents Defending Education via a Freedom of Information Act request, the NSBA Secretary-Treasurer recalled that the organization’s interim CEO “told the officers he was writing a letter to provide information to the White House, from a request by Secretary Cardona.”¹³

Meanwhile, on September 30, 2021, Loudoun County School Board Member Atoosa Reaser announced via Twitter that she would be campaigning with Vice-President Kamala Harris’s husband and Terry McAuliffe that weekend.¹⁴ The next day, on October 1, 2021, Reaser tweeted, “School Boards Ask @JoeBiden to Review Threats and Violence as Possible ‘Domestic Terrorism’” and linked to an Education Week article about the NSBA letter.¹⁵ A fellow school board member responded “Funny, our school board did NOT vote on this. I do not think it appropriate for an elected official on her official social media feed to make such a misleading statement without input from her full school board.”¹⁶

On October 2, 2021, Reaser tweeted, “Kicking off a weekend of action w/ @DouglasEmhoff @TerryMcAuliffe @JenniferWexton @MarkHerringVA @WendyGooditisVA @ShuasforVA @kmurphyva @biberajbb @SylviaBroadRun @MarkKeam @AtoosaReaser @JenniferBoysko” and included pictures from the campaign event with several of the Virginia Democrats running for election.¹⁷

Just two days later, and five days after the NSBA letter, on October 4, 2021 Attorney General Merrick Garland released a memorandum to the FBI Director, DOJ officials,

¹¹ Nat’l School Board Ass’n, *Letter to Joseph R. Biden Re: Federal Assistance to Stop Threats and Acts of Violence Against Public Schoolchildren, Public School Board Members, and Other Public School District Officials and Educators* (sic) at 5 (Sept. 29, 2021) <https://nsba.org/-/media/NSBA/File/nsbaletter-to-president-biden-concerning-threats-to-public-schools-and-school-board-members-92921.pdf>.

¹² Peter Hasson, *Education Secretary Cardona solicited NSBA letter comparing protesting parents to domestic terrorists: email*, FOX NEWS, Jan. 11, 2022, <https://www.foxnews.com/politics/education-secretary-cardona-solicited-nsba-letter-comparing-parents-domestic-terrorists-email>.

¹³ *Id.*

¹⁴ @AtoosaReaser, TWITTER, (Sep. 30, 2021, 2:32 PM), <https://twitter.com/AtoosaReaser/status/1443649952907935744?s=20&t=CpICL5XX2az8SCyk1WNIdw>.

¹⁵ @AtoosaReaser, TWITTER, (Oct. 1, 2021, 10:25 AM), <https://twitter.com/AtoosaReaser/status/1443945107695222804?s=20&t=CpICL5XX2az8SCyk1WNIdw>.

¹⁶ @JeffreyMorse3, TWITTER, (Oct 2, 2021, 4:12 PM), https://twitter.com/JeffreyMorse3/status/1444394834421293056?s=20&t=_mrnpZxmIfE0Ji_f9Dtgow.

¹⁷ @AtoosaReaser, TWITTER, (Oct. 2, 2021, 2:11 PM), https://twitter.com/AtoosaReaser/status/1444364451986165767?s=20&t=_mrnpZxmIfE0Ji_f9Dtgow.

and U.S. Attorneys on the subject of “Partnership Among Federal, State, Local, Tribal, and Territorial Law Enforcement to Address Threats Against School Administrators, Board Members, Teachers, and Staff.”¹⁸ Using language strikingly similar to that of the NSBA’s letter, the Memorandum cited “a disturbing spike in harassment, intimidation, and threats of violence against school administrators, board members, teachers, and staff,” before directing the FBI and U.S. Attorneys to “convene meetings with federal, state, local, Tribal, and territorial leaders ... to facilitate the discussion of strategies for addressing threats against school administrators, board members, teaches, and staff.”

The abbreviated period between the NSBA’s Wednesday, September 29th letter to President Biden and the Attorney General’s Monday, October 4th Memorandum strongly suggests coordination between the parties. It is extraordinarily rare for a letter to even be routed from the White House to an executive agency or department in such an abbreviated period—much less result in the issuance of a memorandum of the head of a cabinet department.

Notably, the Attorney General’s Memorandum does not appear to have been generated because of information collected by the FBI. Indeed, in response to a Freedom of Information request submitted to the FBI by AFL seeking, among other things, all records showing the “disturbing spike in harassment, intimidation, and threats of violence” referenced in the Attorney General’s Memorandum, as well as all records “relied upon to support that finding, the FBI denied having *any* responsive records whatsoever. This curious lack of records documenting a need for the Attorney General’s aggressive actions suggests that the Memorandum may have been spurred because of other—perhaps political—interests.

On October 14, 2021, during the White House Press Briefing, Press Secretary Jen Psaki admitted, “President [Biden], of course, wants former Governor McAuliffe to be the future governor of Virginia,” and that, “we’re going to do everything we can to help former Governor McAuliffe.” Later in the same press conference, Psaki assured that she expected President Biden would “do more to help his friend, Governor Terry McAuliffe.”¹⁹

¹⁸ U.S. Dep’t of Justice, ATTORNEY. GEN. MEM. RE PARTNERSHIP AMONG FEDERAL, STATE, LOCAL, TRIBAL, AND TERRITORIAL LAW ENFORCEMENT TO ADDRESS THREATS AGAINST SCHOOL ADMINISTRATORS, BOARD MEMBERS, TEACHERS, AND STAFF (Oct. 4, 2021) (the “Attorney General’s Memorandum”) <https://www.justice.gov/ag/page/file/1438986/download>.

¹⁹ Jen Psaki, Press Sec’y, White House, Press Briefing by Press Secretary Jen Psaki (Oct. 14, 2021), (transcript available at <https://www.whitehouse.gov/briefing-room/press-briefings/2021/10/14/press-briefing-by-press-secretary-jen-psaki-october-14-2021/>); see also, *CREW Files Hatch Act Complaint Against Psaki* (Oct. 15, 2021), <https://www.citizensforethics.org/legal-action/legal-complaints/crew-files-hatch-act-complaint-against-psaki/>.

II. Analysis

The Hatch Act prohibits any executive branch official or employee from “us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election.” 5 U.S.C. § 7323(a)(1). Certain federal employees, including employees of law enforcement agencies, are “further restricted,” meaning they are also prohibited from “tak[ing] an active part in political management or political campaigns.” *Id.* at § 7323

The chronology of events leading up to the release of the Attorney General’s October 4th Memorandum at a minimum creates the appearance of federal government intervention in several closely contested partisan state elections by taking official action on the central issue in those campaigns, for the purpose of influencing those elections. The close coordination and planning between government officials and non-government allies, the FBI’s own representation that the agency lacked any record of violence or threats of violence at the FBI, and the curious timing of the Attorney General’s actions, together suggest that the motivations behind these actions were impermissibly intended to reflect favorably on Democrat candidates, in violation of the Hatch Act.

III. Conclusion

For the foregoing reasons, AFL respectfully requests that OSC investigate whether officials from the White House, the Department of Justice, the Department of Education, or others violated the Hatch Act.

Sincerely,

s/ Gene P. Hamilton
Gene P. Hamilton
Vice-President and General Counsel
America First Legal Foundation

Cc: The Hon. Sen. Dick Durbin, Chairman, Committee on the Judiciary
The Hon. Chuck Grassley, Ranking Member, Committee on the Judiciary
The Hon. Rep. Jerrold Nadler, Chairman, House Committee on the Judiciary
The Hon. Rep. Jim Jordan, Ranking Member, House Committee on the Judiciary