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Henry J. Kerner
Special Counsel
Office of the Special Counsel
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Emory A. Rounds III
Director
United States Office of Government Ethics
1201 New York Avenue, N.W., Suite 500
Washington, DC 20005

June 15, 2020

Dear Special Counsel Kerner and Director Rounds:

I have taught lawyers' ethics and government ethics for over twenty-five years and am a reporter for the ALI's Principles of Government Ethics. From 2005 to 2007 I worked with one of you, Mr. Rounds, in the ethics office of the White House Counsel's Office.

In October 2016 I submitted to the Office of Special Counsel (OSC) a Hatch Act complaint concerning FBI Director James Comey's letter to Congress about Hillary Clinton's email. That investigation was taken seriously by OSC but was terminated when Mr. Comey left federal service in 2017. It is my unfortunate responsibility now to write again about violations of the Hatch Act and federal ethics rules, this time by Attorney General William Barr and other senior officials in the Administration.

I request that you investigate violations of the Hatch Act, as well as misuse of official position, 5 CFR 2635.702, by the Attorney General and other officials in the Department of Justice in connection with President Trump's presidential campaign photo opportunity that took place outside St. John's Church adjacent to Lafayette Park from approximately 7:01 PM to 7:06 PM on June 1, 2020. I also

request that you investigate violations of the Hatch Act as well as misuse of official position by White House officials who were involved in preparation for this campaign event. Finally, I request that you determine whether the Attorney General and other Department of Justice employees violated the Hatch Act and misused their official positions in violation of 5 CFR 2635.702 in the Ukraine matter. I reference President Trump's request in his telephone call with the President of Ukraine that Ukrainian officials contact both Attorney General Barr and Trump's campaign lawyer Rudy Giuliani about investigating Joe Biden and his son Hunter, as well as origins of the truthful accusation that Russia interfered in the 2016 election. There are matters principally of interest to Trump's 2020 re-election campaign.

Violations of the Hatch Act and of OGE ethics rules are not permissible, including by an executive branch official acting under orders from elected officials such as the president who are exempt from parts of the Hatch Act and OGE ethics rules. Hatch Act violations and ethics violations are of particular concern in the Department of Justice which is responsible for upholding and enforcing federal law. An aggravating factor in the Lafayette Park incident is that the Hatch Act and ethics violations included, among other things, giving orders for use of force by federal officers to remove peaceful unarmed civilians exercising their First Amendment right to political speech in space adjacent to a hastily planned political event. An aggravating factor in the Ukraine incident is that the Hatch Act and ethics violations included not only collaboration between Attorney General Barr and Mr. Giuliani, but also proposed collaboration with a foreign government.

Lafayette Park

Attorney General Barr apparently participated in planning for this political event and, according to news sources, personally ordered use of force by federal officers to remove peaceful protestors from Lafayette Park, which included the use of pepper spray and rubber bullets. He did so in order to enable the president to walk across the Park for a political photo opportunity in front of St. John's Church. Photos and videos from the event were subsequently used by the Trump Campaign on social media.

The White House Counsel's office generally considers presidential photo opportunities for a political campaign to be strictly political, as we instructed White House staff when I was the chief White House ethics lawyer under President Bush. This means that White House staff participating in planning or preparation for the photo opportunities do so strictly in a personal capacity. Only Secret

Service personnel protecting the president have an official role in preparing for or attending the event, and only to the extent necessary to protect the president.

When the Attorney General ordered or authorized the use of force against the protestors to clear Lafayette Park, it was clear that the president wanted this done so he could make a political appearance and take a photo for use by his campaign. Upon information and belief, Ivanka Trump, Jared Kushner, Chief of Staff Mark Meadows and Counselor to the President Hope Hicks were involved in planning this campaign event and the official government actions in support of the event. All of these people not only hold White House positions but are active in the President's campaign for reelection. All are subject to the Hatch Act even if the President himself is not. Even though the Hatch Act allows federal employees to participate in political campaigns in a personal capacity, which conceivably could include planning a campaign photo opportunity outside St. John's Church, the Hatch Act expressly forbids federal employees from using their official positions to assist a political campaign or to influence an election.¹ OGE ethics rules also prohibit use of official position for private gain or to endorse a nongovernmental enterprise, including a political campaign.²

The facts clearly demonstrate that this was a political appearance by the president, not an act in any way connected to his official duties. The Bible used as a prop and held by President Trump in his hand is one indicator that this was not an official appearance. Bibles are rarely used at official government events other than swearing in ceremonies. It is difficult to imagine an official photo of a president holding a Bible outside of a church. The fact that Trump said very little but simply stood for photographs, live television and video taping is another indicator of political motivation. The Trump campaign's use of the St. John's Church photos and video stream on the Internet that same day almost immediately after the event is further evidence of the political objective.³ Also, the way the event was orchestrated was for maximum political effect: protestors were given very little notice of the change in plan and were quickly ordered to depart from space that

¹ See 5 U.S. Code § 7323, providing that “a) Subject to the provisions of subsection (b), an employee may take an active part in political management or in political campaigns, except an employee may not ... use his official authority or influence for the purpose of interfering with or affecting the result of an election.”

² See 5 C.F.R. § 2635.702, providing that “An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise...”

³ The St. John's photos and video stream were picked up by the media and disseminated on the Internet by the Trump campaign that same day beginning almost immediately after the event, e.g.: <https://twitter.com/teamtrump/status/1267596277312864256?lang=en>

they had occupied for days around St. John's, half an hour prior to the officially announced curfew of 7:00 pm. Quickly thereafter the protestors were attacked by federal officers. This orchestrated sequence of events conformed to President Trump's campaign script in his repeated calls for violent measures to be used against protestors at his campaign rallies. Sadly, the violence against protestors beforehand – not just the photo opportunity -- was part of the Trump campaign's June 1 event at St. John's Church.⁴

At least one government official who appeared at the event, Gen. Mark Milley, the chairman of the Joint Chiefs of Staff, has already apologized for wearing his uniform while walking with President Trump across Lafayette Park for these political photographs:

"I should not have been there. My presence in that moment and in that environment created a perception of the military involved in domestic politics. As a commissioned uniformed officer, it was a mistake that I have learned from, and I sincerely hope we all can learn from it."⁵

If it is inappropriate for a general to wear a uniform for a political event it is also inappropriate and illegal for the Department of Justice to assist the president and his campaign, including use of violent force against peaceful protestors who voice a different political opinion in areas adjacent to the planned political event.

Even absent a specific intent – or desire – of a federal official to influence an election, the Hatch Act and ethics rules are violated if the official's action furthers specific interests of a political campaign and there is no other rational governmental purpose for taking that action. Attorney General Barr ordering or authorizing the forceable removal from land in front of a church of peaceful protestors, including priests, in order to make way for a hastily arranged campaign photo op, is not a rational reason for deployment of federal officers. There is

⁴ Although legal questions pertaining to private property and trespass are tangential to enforcement of the Hatch Act and OGE ethics rules, it is worth noting that this Trump campaign event probably took place not just on public property but in part on Church property without permission from the Church. The Episcopal Church at all levels up to the Most Rev. Michael Curry, Presiding Bishop, strongly objected afterwards. As noted on the sign behind President Trump in the photo, the Church welcomes all people to visit and make appropriate use of its properties, but partisan political events generally are not permitted, and furthermore the Church does not authorize use of violence to gain access to Church property.

⁵ General Milley's pre-recorded speech to graduates from the National Defense University is reported by CNN. <https://www.cnn.com/2020/06/11/politics/milley-trump-appearance-mistake/index.html>

simply no United States government interest that could conceivably be furthered by what happened in Lafayette Park on June 1.

Unless remedial action is taken, there are likely to be continuing violations of the Hatch Act by the Justice Department and other federal agencies up through November 3.

A similar investigation should be undertaken with respect to the OGE ethics rule prohibiting misuse of official position. 5 CFR 2635.702. Even if the president is not personally subject to the OGE rules, other federal officials are subject to the rules, and actions taken by them even upon the president's orders can still be misuse of official position. OGE should investigate the violations of this rule by the Attorney General and other federal employees in connection with the partisan political event on June 1 outside St. John's Church.

This is no trivial matter -- the Department of Justice reports to the President and the Attorney General is appointed by the President. We cannot allow these officials to deploy armed federal officers as an advance team for a political photo opportunity. That is an abuse of power.

I am aware that this is not a typical Hatch Act violation and OGE ethics rule violation. Still, this violation is more egregious than more routine cases – e.g. Kellyanne Conway promoting Ivanka Trump's clothing in official capacity television interviews or attacking Democratic candidates before T.V. cameras while standing on the White House lawn. The Lafayette Park incident is a situation where official government actions are used to support a political campaign and accomplish no legitimate federal purpose. In cases such as this Hatch Act violations can have a great impact on federal elections and OGE ethics rule violations can have a great impact on public confidence in our federal government.

Ukraine

The Lafayette Square incident is not the only Hatch Act and OGE ethics rule violation at the Department of Justice. In 2019 President Trump on a phone call asked the president of Ukraine to contact Attorney General Barr and Rudy Giuliani about an investigation of Joe Biden and Hunter Biden and also to investigate Ukrainian involvement in accusations that Russia had interfered in the 2016 election. Rudy Giuliani was a lawyer for the Trump campaign. There is no legitimate federal interest in the Department of Justice coordinating with Giuliani

to investigate the president's political opponents. There is also no legitimate federal interest in coordinating with Giuliani to investigate the 2016 election. Department of Justice coordination with Mr. Giuliani and other Trump campaign lawyers, if it occurred as the President suggested, would have violated the Hatch Act and OGE ethics rules. Involvement of a foreign government in this enterprise made it even worse.

Because the Ukraine matter has already been investigated and discussed in other proceedings, including the impeachment proceedings against the President, I will not go into further details here. Much of the focus has been on the President. But the involvement of the Attorney General and other Department of Justice officials is also a serious concern that should be investigated by OSC and OGE.

Your offices should take appropriate action on these matters without delay.

Respectfully,

/s/

Richard W. Painter

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* For identification purposes only