



NEW YORK
CITY BAR

**TASK FORCE ON THE
RULE OF LAW**

STEPHEN L. KASS
CHAIR
kass@clm.com

September 3, 2020

Sent via Facsimile & E-Mail

Ms. Diana Shaw
Acting Inspector General
United States Department of State
1700 North Moore St.
Arlington, VA 22209

Re: Request for Prompt Investigation of Potential Hatch Act and State Department Policy Violations by Secretary of State Mike Pompeo

Dear Ms. Shaw:

We write on behalf of the New York City Bar Association, a voluntary association of some 25,000 lawyers from all parts of our nation that is committed to improving the administration of justice and the rule of law. Over the past several months we have called attention to actions by the Trump administration that have undermined public confidence in the integrity of our government and its commitment to the rule of law. Unfortunately, recent actions by the Secretary of State, Mike Pompeo, amplify this danger and send the unacceptable message that Mr. Pompeo views his primary loyalty to Mr. Trump rather than to the Constitution and laws of the United States and to the American people, whom he represents in our nation's dealings with other countries.

In particular, we are deeply concerned about Mr. Pompeo's recent speech from Jerusalem as part of the Republican National Convention and its apparent violation not only of State Department policy against political activity by Department officials but also of the Hatch Act, which makes such political participation by government officials a crime. We call upon you, as Acting Inspector General of the Department of State, to open a formal investigation into Mr. Pompeo's conduct and to promptly report your findings to Congress and the public so that appropriate action can be taken and any appropriate referrals made.¹

¹ While Hatch Act violations are typically investigated by the Office of Special Counsel (OSC) pursuant to the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111, Secretary Pompeo's actions also appear to have violated Department of State policy, as explained below. Accordingly, a full investigation into these events should be conducted by the Office of Inspector General in order to determine whether they constitute a violation of departmental policy, even if it is determined that the Hatch Act complaint should be referred to OSC.

On August 25, 2020, a recorded speech by Secretary of State Pompeo was played as part of the Republican National Convention. The speech had been recorded in Jerusalem, with a backdrop of Jerusalem's Old City, with the clear purpose and intent that it be shown at the Convention. During the speech, Mr. Pompeo used his presence in Israel to highlight his praise of the President for moving the U.S. embassy to Jerusalem and to assert that the President had recently brokered a "historic" peace agreement between Israel and the United Arab Emirates.²

All convention speeches are inherently political, as Mr. Pompeo, an experienced politician, clearly knew. For this reason, Mr. Pompeo's predecessors, of both parties, traditionally have refrained from appearing at their party's political convention in election years, recognizing that, as the nation's senior diplomat, the Secretary's role is to represent the nation as whole, not any particular President, party, or political faction within our country.

Mr. Pompeo's speech has been condemned by government watchdogs,³ ethics professionals,⁴ and diplomats and former diplomats from across the political spectrum.⁵ The House Foreign Affairs Committee has commenced an investigation into the potential breach of State Department guidelines and applicable law.⁶

In response to the outcry, a State Department spokesperson asserted that the speech was given in Secretary Pompeo's personal capacity, and that no governmental resources were used in the producing or recording of the speech.⁷ This answer is wholly inadequate (and highly unlikely to be accurate) and should be carefully probed in your investigation. As a threshold matter, it is really not possible for the Secretary of State to speak only in an individual capacity when he appears in public in a foreign country on matters relating to U.S. policy or actions. Moreover, in this case Mr. Pompeo traveled to Israel on government business, where he was presumably supported, transported, and protected around the clock by government officials and was introduced as the U.S. Secretary of State before making his speech. Your office should investigate, among other things, whether any government resources or personnel were used in any way in writing the

² Lara Jakes, "Pompeo Delivers R.N.C. Speech From Israel, With Eye Toward 2024," N.Y. Times, Aug. 25, 2020, <https://www.nytimes.com/2020/08/25/us/politics/pompeo-trump-jerusalem-republican-convention.html> (all websites last visited Sept. 3, 2020).

³ Brian Slodysko, "Watchdog groups say convention appearances broke Hatch Act," Federal News Network, Aug. 27, 2020, <https://federalnewsnetwork.com/government-news/2020/08/pompeos-jerusalem-speech-violated-hatch-act-complaint-says/>.

⁴ Lara Jakes, "Bush's ethics lawyer calls for an investigation of Pompeo's R.N.C. speech." N.Y. Times, Aug. 27, 2020, <https://www.nytimes.com/2020/08/27/us/elections/bushs-ethics-lawyer-calls-for-an-investigation-of-pompeos-rnc-speech.html>.

⁵ Carol Morello, "Pompeo stirs up outrage among some diplomats over speech to RNC," The Washington Post, Aug. 25, 2020, https://www.washingtonpost.com/national-security/pompeo-stirs-up-outrage-among-some-diplomats-over-speech-to-rnc/2020/08/25/66ddd66-e6cf-11ea-a414-8422fa3e4116_story.html.

⁶ Letter from Rep. Joaquin Castro, Chairman, Subcommittee on Oversight and Investigations House Foreign Affairs Committee, to Stephen E. Biegun, Deputy Secretary, Department of State, Aug. 25, 2020, <https://castro.house.gov/imo/media/doc/8.25.20%20Castro%20Letter%20to%20Biegen%20.pdf>.

⁷ Josh Lederman, "Under fire, Pompeo vouches for Trump's 'America First'," ABC News, Aug. 26, 2020, <https://www.nbcnews.com/politics/2020-election/under-fire-pompeo-vouches-trump-s-america-first-n1238150>.

speech, transporting people or equipment to the filming site, setting up and securing the filming area, and conducting the filming and other technical aspects of the speech.

Answering these questions is only part of the issue. The more fundamental problem is Mr. Pompeo's use of his position as Secretary of State, on official U.S. government business, to urge the President's re-election and to use his presence in Jerusalem to emphasize the President's supposed accomplishments to important constituents of the Republican party. Indeed, it appears that the Secretary wanted (perhaps with Mr. Trump's encouragement) to appear from Israel, with Jerusalem in the background, to use the gravitas provided by his role as America's representative around the world to make the case that the President should continue in office. That was, in our judgment, improper, and would have been equally improper if the background of Mr. Pompeo's speech had been Korea, South Africa, the United Kingdom, Brazil or any other foreign country.

As the Department of State's Acting Inspector General, you have the duty to investigate this matter and to determine whether, in your independent judgment, Mr. Pompeo and others in the State Department's employ violated relevant prohibitions on political activity. We note that your mandate includes both the authority and the obligation to investigate "instances of fraud, waste and mismanagement that may constitute either criminal wrongdoing or violations of Department . . . regulations."⁸

The Hatch Act, 5 U.S.C. Section 7321 et seq., which provides for both civil and criminal liability, prohibits, among other things, using one's official position for the purpose of affecting an election, using one's official position while engaged in political activity, and engaging in political activity while on duty. Secretary Pompeo's convention speech while on official Department of State business on foreign soil appears to fit the plain language of the statute and, at the very least, demands a thorough investigation by your office.⁹

State Department policy also appears to clearly prohibit Secretary Pompeo's partisan participation in the Republican National Convention by delivering his speech during an official overseas trip as Secretary of State. For example, a memo issued in December 2019 by the Department's Office of Legal Adviser explicitly stated that Presidential appointees — like Mr. Pompeo — "may not even attend a political party convention or convention-related event."¹⁰

Just last month, on July 24, 2020, Secretary Pompeo himself issued a memo to all State Department personnel reminding them of the 2019 memo and linking to the Department guidelines. He wrote "It is important that the Department's employees do not improperly engage the Department of State in the political process, and that they adhere to the Hatch Act and

⁸ "About OIG," Office of the Inspector General, U.S. Dept. of State, <https://www.stateoig.gov/about>.

⁹ The United States Supreme Court has endorsed the Hatch Act's limits on political activity, noting that "it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited." *CSC v. Letter Carriers*, 413 U.S. 548, 557 (1973).

¹⁰ U.S. Dept. of State Memorandum, "Rules on Political Activities," Sent to All Presidential Appointees and All Political Appointees, From the Office of the Legal Advisor, Dec. 3, 2019, https://foreignaffairs.house.gov/_cache/files/e/e/eed06418-12ee-496f-8476-8c266c53ddb6/8F33EFAA29B676D27832D35876407707.hatch-act.pdf.

Department policies in their own political activities. . . . Presidential . . . appointees . . . are subject to significant restrictions on their political activities; they may not engage in any partisan political activity in concert with a partisan campaign, political party, or partisan political group, even on personal time and outside of the federal workplace.”¹¹

The State Department’s Foreign Affairs Manual, in force for decades, also expressly prohibits Department employees from engaging in partisan political activities abroad.¹²

Accordingly, not only was the speech given by Mr. Pompeo expressly prohibited by existing Departmental rules, but it appears that any convention speech at all, even one on U.S. soil, also would have been forbidden under existing State Department guidance.

Given the above, we urge that the necessary Inspector General investigation be conducted promptly, independently, and in a manner that allows for informed public discussion of these important issues. Anything less risks irreparable damage to the non-partisan professionalism that has been the hallmark of the Department of State for many years (and, indeed, the similar commitment of hundreds of thousands of federal government employees across our nation). Mr. Pompeo’s aberrational conduct simply cannot be permitted to set a new and lower standard – both for our own citizens and for the world -- for compliance with law by our most senior cabinet officer.

Sincerely,



Stephen L. Kass, Chair
Task Force on the Rule of Law

Cc:

The Honorable Eliot Engel, Chair, U.S. House of Representatives Foreign Affairs Committee
The Honorable Joaquin Castro, Vice Chair, U.S. House of Representatives Foreign Affairs
Committee; Chair, Oversight and Investigations Subcommittee
The Honorable Michael McCaul, Ranking Member, U.S. House of Representatives Foreign
Relations Committee
The Honorable James Risch, Chair, U.S. Senate Foreign Relations Committee
The Honorable Robert Menendez, Ranking Member, U.S. Senate Foreign Relations Committee
Mr. Henry Kerner, Special Counsel, U.S. Office of Special Counsel

¹¹ Unclassified Correspondence, “2020 Hatch Act/Political Activities,” From Secretary of State Pompeo to All Diplomatic and All Consular Posts Collective, July 24, 2020, <https://foreignaffairs.house.gov/cache/files/8/0/805ea04a-93b3-46c0-8baf-8a2d37b16730/4265E7B626B880B793C28C23199903C2.20-state-71636eml.pdf>.

¹² 3 FAM 4120, “Employee Responsibilities Abroad,” Foreign Affairs Manual and Handbook, U.S. Department of State, <https://fam.state.gov/fam/03fam/03fam4120.html>.