



March 5, 2020

The Honorable Henry Kerner
Special Counsel
Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
Also filed online at: <https://osc.gov/Pages/File-Complaint.aspx>

Re: Threatened Prohibited Personnel Practices by White House Staff

Dear Mr. Kerner:

Public Employees for Environmental Responsibility (PEER) respectfully requests that the Office of Special Counsel (“OSC”) investigate whether recent televised statements by Special Assistant to the President and Deputy Press Secretary Hogan Gidley constitute actual or threatened violations of 5 U.S.C. §2302(b), governing prohibited personnel practices.

Factual Background

While serving in his White House position Mr. Gidley threatened that the Administration will take personnel actions against civil servants deemed insufficiently supportive of President Trump’s positions. On Monday, Feb. 24, 2020, he was interviewed on Fox News television remotely from the White House. He stated:

*“It’s not a secret that we want people in positions that work with this president, not against him, and too often we have people in this government—I mean the federal government is massive, with millions of people—and there are a lot people out there taking action against this president and **when we find them we will take appropriate action.**” (emphasis added)¹*

Mr. Gidley went on to reiterate what amounts to a loyalty “litmus test” as a condition for federal civil service.

These statements follow press reports that the administration maintains “deep state” hit lists of employees to fire and that the President has tasked the head of the Presidential Personnel Office, Johnny McEntee, to purge “bad people” who are not loyal to him.²

¹ Fox News interview linked at <https://twitter.com/justinbaragona/status/1231968930144624646>

² Exclusive: Trump's "Deep State" hit list, Feb. 23, 2020, at <https://www.axios.com/trump-memos-deep-state-white-house-ce5be95f-2418-433d-b036-2bf41c9700c3.html>

In addition, federal employees who testified in House hearings related to impeachment have been removed from their previous positions.

PEER has represented a number of whistleblowers in the environment-connected bureaus and we have relationships with many other current federal employees who are not Trump loyalists.³ Several have suffered retaliatory personnel actions already for expressing their scientific findings and related opinions contrary to the current Administration's preferred view of the facts.

Further, demands of political fealty generally are having a chilling effect on employees. They are afraid of political retribution. Measures of staff morale in key environmental agencies have plummeted.⁴

Analysis

The whole of Mr. Gidley's interview, and in particular the emphasized phrase above, were a threat to take non-merit based personnel actions against potentially "millions" [his word] of civil servants. He stated that the Administration "will take appropriate actions," which in plain parlance means removal, demotion, transfer, suspension, or other personnel actions against those found to not support the President's agenda.

Civil servants of course must follow the law as written in statutes and regulations, as well as the Constitution, not merely the President's agenda. Further, scientific integrity laws and policies protect Federal scientists when they express their findings and their related opinions even when such expressions do not forward the President's agenda.⁵

Mr. Hogan articulated the Administration's intent to violate these three subsections of 5 U.S.C. §2302(b), which prohibits actions that:

- (3) *coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;*
- (10) *discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; and*
- (12) *take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title;*

³ See PEER whistleblower information, <https://www.peer.org/areas-of-work/protecting-public-employees/>

⁴ See PEER press release of Oct. 31, 2019, <https://www.peer.org/horrid-time-to-work-inside-interior-department/>

⁵ See PEER scientific integrity information, <https://www.peer.org/resource-center/scientific-integrity-policies/>

In addition, Mr. Gidley's statements appear to clash with merit system principles laid out in 5 U.S.C. §2301, in particular:

(8) Employees should be— (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes,

Mr. Gidley's statements appear as thinly-veiled coercion that federal employees should not express any opposition to Mr. Trump or his candidacy for re-election

The essence of the merit protection system is that federal officials cannot take the type of actions Mr. Gidley has threatened, that is, to judge employees based on their adherence to the President's agenda rather than on conduct that affects the actual performance of their duties. It should be plain that many federal employees are effectively performing their duties at the same time they are not in support of the President, his agenda, or his re-election.

Further, Mr. Gidley stated that employees may be subject to favoritism based on their support for the President, which amounts also to coercion for political purposes, rather than on the allowed performance basis.

Finally, the mere threat of imposing political litmus tests casts a wholly improper chilling effect across the entire competitive service. To the extent that OSC finds that the intent is to promote Mr. Trump's re-election it may also find that a Hatch Action violation has occurred.

Requests

PEER respectfully requests that your Office review these statements and –

- Recommend disciplinary action against any White House staff found to have acted contrary to merit system principles and/or the Hatch Act;
- Seek a public statement by the White House that it will not subject federal civil servants to non-merit-based discrimination, including threats thereof; and
- Provide for Mr. Gidley and White House Office of Personnel staff undergoing training in how to protect basic merit principles in federal service.

Thank you in advance for your attention to this request. If you have any questions or desire additional information, please do not hesitate to contact me.

Sincerely,

Tim Whitehouse
Executive Director