U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

July 28, 2010

Xxxx XXXXX
Xxxxx Xxxxxx
Xxxx XXXXXXX

Re: OSC File No. AD-10-xxxx

Dear Xx Xxxxxxx:

OSC has received your e-mail to the Hatch Act inbox dated June 16, 2010, in which you raised several questions about the Hatch Act's application to social networking sites such as Facebook and Twitter. We understand that you work for the Xxxxx Xxxxxx, and as such, you are "further restricted" under the Hatch Act. Further restricted employees are prohibited from taking an active part in partisan political campaigns, which encompasses acting "in concert with" a partisan campaign or partisan political group to distribute campaign literature. You received guidance from your agency stating that further restricted employees may not "friend" or "like" partisan political campaigns or candidates on Facebook, or "follow" them on Twitter, because OSC would view such activity as being akin to distributing campaign literature. You then asked OSC to explain the reasoning and legal authority underlying its position on this subject in light of certain features of Facebook, which, you argue, indicate that OSC's guidance is flawed. We address each of your points below.

First, you point out that if a Facebook user were to "friend" or "like" a candidate or campaign, any information transmitted from the candidate or campaign would appear in the user's feed, but could not be transmitted to the user's other "friends" unless the user takes affirmative steps to do so. Thus, you conclude, the act of merely "friending" or "liking" a candidate or campaign, without more, is not tantamount to distributing the candidate or campaign's literature. Instead, you contend that this activity is no different from telling one's friends in conversation which candidate or party one supports.

While we understand that merely "liking" a candidate or campaign or adding them as "friends" does not automatically result in their information being posted on the user's friends' Facebook pages, that fact does not alter our initial conclusion that the Hatch Act prohibits further restricted employees from "friending" or liking" partisan candidates or campaigns. Indeed, the user need not affirmatively share with his other "friends" the candidate or campaign's posts to distribute campaign literature for purposes of the Hatch Act. Rather, the issue arises when the user "friends" or "likes" a candidate or campaign because that action establishes a hyperlink from the user's Facebook page to the page of the campaign or candidate. In effect, the user's page becomes a source of campaign literature for his other "friends" because they need only click on the hyperlink to access the candidate or campaign's Facebook page.

This scenario is similar to one in which a further restricted employee places a basket filled with brochures that he has acquired from a partisan campaign on his doorstep for his neighbors to find. Even if the employee does not mail the brochure to each of his neighbors, he still has made the literature available to anyone wishing to read it. Such conduct has long been considered taking an active part in a political campaign for purposes of the Hatch Act. See e.g., In re Brooks, 1 P.A.R. 901 (1966) (employee violated the Hatch Act when he left campaign literature on a table and then on a bookcase in his office). A critical fact leading to this conclusion is the source of the material, *i.e.*, the campaign itself, because passing out literature created by the campaign constitutes acting "in concert with" the campaign.

By contrast, expressing one's political preferences in conversation would not violate the Hatch Act, as you suggested in your e-mail. Indeed, you are correct that even further restricted employees retain the right to participate in the nation's political processes and express their opinions to the extent not expressly prohibited by law. See 5 U.S.C. §§ 7321, 7323(c). Thus, a further restricted employee may identify his candidate or party of choice in his Facebook "status" or even post a comment to that effect on a "friend's" Facebook "wall." Such activities are analogous to other permitted activities such as holding a homemade sign outside of a political convention or passing out homemade fliers at a mall. See 5 C.F.R. § 734.402. What OSC's guidance attempts to address is the dissemination of a candidate's official campaign website – the modern day leaflet – by way of a further restricted employee's Facebook page. As you point out, neither Congress nor the Office of Personnel Management contemplated Facebook when passing the 1993 Amendments and promulgating their attendant regulations. However, the principles underlying the Hatch Act and the risks addressed by its prohibitions still exist; thus, as new technology develops and changes how people interact, those principles must be applied to corresponding advances in the way people engage in political activity. Congress charged OSC with this responsibility. See 5 U.S.C. § 1212(f) (authorizing OSC to issue advisory opinions interpreting the Hatch Act).

You also intimate that prohibiting further restricted employees from "friending" or "liking" a candidate or campaign on Facebook or "following" them on Twitter infringes on First Amendment right to peaceful assembly. The Supreme Court long ago upheld the constitutionality of the Hatch Act, stating that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring [the activities prohibited by the Hatch Act] by federal employees." U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973) (affirming United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), the decision in which the Court initially upheld rules restricting the political activity of government employees). We also note that as a further restricted employee, you are not prohibited from attending political rallies, conventions, or fundraisers as a spectator, 5 C.F.R. § 734.404(a)(3); however, you are prohibited from making available, *i.e.*, distributing, campaign literature on your Facebook page.

With that said, we now address your second point. In your June 16, 2010, e-mail, and in a subsequent e-mail dated July 11, 2010, you suggest that activating certain privacy settings on your Facebook page would ameliorate the risk of violating the Hatch Act by

"friending" or "liking" a partisan campaign or candidate. Specifically, you ask whether blocking the candidate or campaign's information from being viewed by your other "friends" would sufficiently prevent the dissemination of campaign literature such that "friending" or "liking" the campaign or candidate would not violate the Hatch Act. OSC has concluded that making the candidate or campaign's information, including the hyperlink that appears on the "Likes" and "Pages" sections of your profile, invisible to anyone but you would prevent a Hatch Act violation. Thus, a further restricted employee may be "friends" with or "like," a political party, partisan group, or partisan candidate on Facebook in order to receive updates from them, but must take measures to prevent others from accessing such material through his Facebook page. The same guidance applies to Twitter; *i.e.*, a further restricted employee may "follow" a partisan candidate or campaign if the candidate or campaign does not appear on the list of Twitter accounts that he "follows."

We hope we have sufficiently addressed your concerns. Please contact me at (202) 254-3642 if you have any additional questions.

Sincerely,

/s/

Carolyn S. Martorana
Attorney, Hatch Act Unit