



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 218

Washington, D.C. 20036-4505

202-254-3600

## Wearing or Displaying Presidential Candidate Items after the Election

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The Hatch Act (5 U.S.C. §§ 7321-7326) governs the political activity of federal executive branch employees. The Act permits most covered employees to actively participate in partisan political management and partisan political campaigns. However, an employee covered by the Act may not, among other things, engage in political activity while on duty, in a government building, while wearing an official uniform, or using a government vehicle. 5 U.S.C. § 7324. To illustrate, this restriction prohibits employees from, for example, wearing partisan political buttons; displaying partisan political pictures, posters or signs; e-mailing partisan political material; or leafleting campaign materials while on duty or at their place of work. See 5 C.F.R. § 734.306, Example 16. Political activity has been defined as activity directed toward the success or failure of a political party, candidate for a partisan political office or partisan political group. 5 C.F.R. § 734.101.

The Hatch Act regulations define candidate as “an individual who seeks nomination or election to any elective office whether or not the person is elected.” 5 C.F.R. § 734.101. Typically, a candidate is thought to seek election to an office up until the point at which his or her election to that office is determined. For the office of President and Vice President, the actual election of the candidate takes place through the Electoral College. See U.S. Const. art. II, § 1 & amend. XII. After the state electors cast their votes, the outcome of the election is declared by the President of the Senate, who, in the presence of the entire Congress, counts the votes. U.S. Const. amend. XII; 3 U.S.C. § 15 (after President of the Senate counts the votes, his announcement will be deemed a sufficient declaration of the persons elected to President and Vice President). Until the votes for the electors have been tallied and certified, all candidates for President and Vice President retain their status as candidates. Neither the President nor the Vice President is elected until the conclusion of that procedure. See U.S. Const. art. II, § 1 & amend. XII. That procedure takes place on the sixth day of January. 3 U.S.C. § 15. Therefore, an individual ceases being a Presidential candidate for purposes of the Hatch Act on the sixth of January following Election Day.

Even though Senators McCain and Obama will still be Presidential candidates until January 6, 2009, we do not believe that wearing their campaign t-shirts or displaying their pictures after Election Day is activity directed at the success of their candidacies. Accordingly, the Hatch Act does not prohibit a federal employee from doing so, even while on duty or in the federal workplace.