

MARIA CANTWELL, WASHINGTON, CHAIR
TED CRUZ, TEXAS, RANKING MEMBER

AMY KLOBUCHAR, MINNESOTA
BRIAN SCHATZ, HAWAII
EDWARD J. MARKEY, MASSACHUSETTS
GARY C. PETERS, MICHIGAN
TAMMY BALDWIN, WISCONSIN
TAMMY DUCKWORTH, ILLINOIS
JON TESTER, MONTANA
KYRSTEN SINEMA, ARIZONA
JACKY ROSEN, NEVADA
BEN RAY LUJÁN, NEW MEXICO
JOHN W. HICKENLOOPER, COLORADO
RAPHAEL G. WARNOCK, GEORGIA
PETER WELCH, VERMONT

JOHN THUNE, SOUTH DAKOTA
ROGER F. WICKER, MISSISSIPPI
DEB FISCHER, NEBRASKA
JERRY MORAN, KANSAS
DAN SULLIVAN, ALASKA
MARSHA BLACKBURN, TENNESSEE
TODD YOUNG, INDIANA
TED BUDD, NORTH CAROLINA
ERIC SCHMITT, MISSOURI
J.D. VANCE, OHIO
SHELLEY MOORE CAPITO, WEST VIRGINIA
CYNTHIA M. LUMMIS, WYOMING

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEBSITE: <https://commerce.senate.gov>

LILA HARPER HELMS, MAJORITY STAFF DIRECTOR
BRAD GRANTZ, REPUBLICAN STAFF DIRECTOR

June 20, 2024

The Honorable Hampton Y. Dellinger
Special Counsel
U.S. Office of Special Counsel
1730 M Street NW, Suite 218
Washington, D.C. 20036-4505

Dear Mr. Dellinger:

Since the passage of the Infrastructure Investment and Jobs Act (IIJA)—which the White House has unilaterally rebranded “President Biden’s Bipartisan Infrastructure Law”^[1]—signs touting President Biden’s role in “Building a Better America” and “Investing in America” have popped up around the country. These displays are nothing more than campaign yard signs courtesy of the American taxpayer. I write to refer this to you for investigation as a possible violation of the Hatch Act, federal law that broadly prohibits using taxpayer dollars for campaign activity. Congress, not President Biden, wrote IIJA, and it did not do so to aid the President’s reelection campaign.



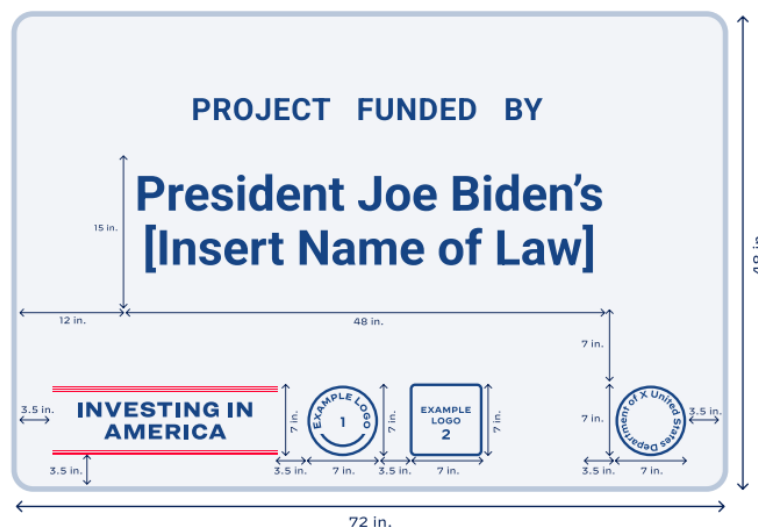
While past infrastructure signage has often listed both the legal authorization for a project and some of the relevant public officials, the Biden administration has highly politicized such signage by “strongly encourag[ing]” federal agencies to *condition the receipt of federal project funding on giving the President credit for the project*.^[2] A February 24, 2023, Office of

^[1] *Investing in America*, WHITE HOUSE, <https://www.whitehouse.gov/build/> (last visited June 3, 2024).

^[2] OFF. OF MGMT. & BUDGET, CA-23-6, *Enhancing Transparency Through Use of the Investing in America Emblem on Signs* [hereinafter, *OMB Controller Alert*], https://www.cfo.gov/assets/files/CA-23-06_Enhancing%20Transparen%20Through%20Use%20of%20the%20Investing%20in%20America%20Emblem%20on%20Signs.pdf.

Management and Budget Controller Alert—issued by then-Acting Controller Deirdre Harrison, who was serving illegally at the time^[3]—instructs agencies’ chief financial officers to impose “signage and public acknowledgement *requirements* . . . in the terms and conditions of award agreements.”^[4] The Controller Alert claims that this propagandizing will promote “transparency and accountability to the American public.”^[5] Not so. Rather, the administration designed these signs to endorse a political campaign: the reelection of President Biden.

The administration’s strict guidelines require every sign to contain two key features that make this endorsement clear. First, the signs must identify—in large, bold, centered text—the relevant law that Congress authored as “President Joe Biden’s” law.^[6] The Controller Alert explains how the signs should rename the Infrastructure Investment and Jobs Act: “[A] project award funded by the Bipartisan Infrastructure Law should include an acknowledgement that it is ‘funded by President Biden’s Bipartisan Infrastructure Law.’”^[7] Last I checked, Congress writes the laws, not the President.



Second, the signs must also include special marks that were purposefully designed to look like the Biden-Harris campaign logo; both were designed by the same firm.^[8] According to the

^[3] GOV’T ACCOUNTABILITY OFF., B-334690, VIOLATION OF THE TIME LIMIT IMPOSED BY THE FED. VACANCIES REFORM ACT OF 1998: CONTROLLER, OFF. OF FED. FIN. MGMT., OFF. OF MGMT. & BUDGET (Feb. 8, 2023), <https://www.gao.gov/assets/820/817369.pdf>.

^[4] *OMB Controller Alert*, *supra* note 2 (emphasis added).

^[5] *Id.*

^[6] *Id.*; Meena Yi & Abbey Pitzer, *Investing in America Signage Guidelines*, WHITE HOUSE OFF. OF DIGITAL STRATEGY (Mar. 2, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/02/Investing-in-America-Brand-Guide.pdf>; compare *The Bipartisan Infrastructure Law: Project Funding Source Sign Assembly*, WHITE HOUSE (Aug. 2022), <https://web.archive.org/web/20231002083043/https://www.whitehouse.gov/wp-content/uploads/2022/08/Building-A-Better-America-Brand-Guide.pdf>.

^[7] *OMB Controller Alert*, *supra* note 2.

^[8] *Cf.* Yi & Pitzer, *supra* note 6 at 3 (“Altering, distorting, or recreating the ‘marks’ in any way weakens the power of the image and what it represents.”).

founder of Studio Mosaic, which designed the Biden-Harris 2020 logo,^[9] the *White House* selected the firm to design the “Building a Better America” branding, likely to ensure consistency between the taxpayer-funded signs and the campaign’s signs.^[10] In fact, Studio Mosaic acknowledged deliberately designing the “Building a Better America” mark—which the Biden administration later updated to “Investing in America”^[11]—to remind viewers of the Biden-Harris campaign, explaining that it “flourishes with strong typography, featuring a subtle reference to the three lines folks know and love from the original Biden-Harris campaign logo.”^[12] Studio Mosaic is also working on the Biden-Harris 2024 campaign, which features an almost identical logo.^[13]



“Building a Better America” mark



“Investing in America” mark



Biden-Harris 2020 campaign logo

^[9] *Biden for America*, STUDIO MOSAIC, <https://studiomosaic.co/biden-for-america/> (last visited June 20, 2024); Robyn Kanner, LINKEDIN, <https://www.linkedin.com/in/robynkanner/> (“She even made the logo.”).

^[10] *The White House*, ROBYN KANNER, <https://robynkanner.com/The-White-House> (last visited June 20, 2024); *Building a Better America*, STUDIO MOSAIC, <https://studiomosaic.co/building-a-better-america/> (last visited June 20, 2024). Studio Mosaic was known as Studio Gradients at the time.

^[11] Notably, Abbey Pitzer, a White House designer who worked on the derivative “Investing in America” mark, previously worked at Biden for President with Kanner and other members of the Studio Mosaic creative team.

^[12] *Supra* note 10.

^[13] *Biden-Harris 2024*, STUDIO MOSAIC, <https://studiomosaic.co/biden-harris-2024/> (last visited June 20, 2024).

These instructions apply to projects funded in whole or in part by the Infrastructure Investment and Jobs Act, the American Rescue Plan Act, the CHIPS and Science Act, the Inflation Reduction Act, “and other appropriations as appropriate.”^[14] While all of these laws include specific requirements and conditions for receipt of federal funds, none of them require grant recipients to advertise for the President’s reelection campaign.

Nevertheless, the Department of Commerce, Department of Transportation, and other federal departments and agencies readily complied with the administration’s instructions. In the last several weeks, for instance, the Office of the Secretary of Transportation,^[15] Federal Railroad Administration,^[16] and Federal Highway Administration^[17] have issued notices of IJIA funding opportunities with Biden campaign public signage and acknowledgment requirements. Each notice states that “recipients employing project signage are required to use the official Investing in America emblem in accordance with the Official Investing in America Emblem Style Guide.”^[18] They also make clear that the cost of the signs is to be paid with federal grant dollars.

It is wrong to misuse taxpayer money to pay for what amount to campaign signs. Moreover, conditioning federal grant money on recipients’ willingness to showcase a political sign endorsing President Biden raises serious ethical and First Amendment concerns. In *Agency for International Development v. Alliance for Open Society International, Inc.*, the Supreme Court held that a requirement, which “compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program . . . violates the First Amendment.”^[19] While the distinction between “conditions that define the federal program and those that reach outside it . . . is not always self-evident,” the Court made clear that a condition requiring “funding recipients [to] adopt—as their own—the Government’s view on an issue of public concern . . . **by its very nature** affects ‘protected conduct outside the scope of the federally funded program.’”^[20] Here, because the Biden administration is requiring funding recipients to adopt, as their own, the administration’s view that President Biden deserves another term, the signage funding condition necessarily affects

^[14] OMB Controller Alert, *supra* note 2.

^[15] Notice of Funding Opportunity for FY24 Stage 1 SMART Grants, DEP’T OF TRANSPORTATION, <https://www.grants.gov/search-results-detail/354130>.

^[16] Notice of Funding Opportunity for Projects Located on the Northeast Corridor for the Fiscal Year 2024 Federal-State Partnership for Intercity Passenger Rail Program, FED. RAILROAD ADMIN., <https://www.federalregister.gov/documents/2024/05/15/2024-10656/notice-of-funding-opportunity-for-projects-located-on-the-northeast-corridor-for-the-fiscal-year>.

^[17] Notice of Funding Opportunity for Fiscal Years (FY) 2024-2026 Wildlife Crossings Pilot Program (WCPP), FED. HIGHWAY ADMIN., <https://www.grants.gov/search-results-detail/354738>; Notice of Funding Opportunity for the U.S. Department of Transportation’s Charging and Fueling Infrastructure Discretionary Grant Opportunity, FED. HIGHWAY ADMIN., <https://www.grants.gov/search-results-detail/354602>.

^[18] See, e.g., *Intercity Passenger Rail Program*, *supra* note 16, at 42594.

^[19] 570 U.S. 205, 221 (2013).

^[20] *Id.* at 217, 219 (emphasis added).

protected conduct outside of the scope of the various funding programs. The administration's signage scheme therefore runs afoul of the First Amendment.^[21]

In addition, the administration's signage requirements appear to violate the Hatch Act, which ensures that "federal programs are administered in a nonpartisan fashion."^[22] As you know, the law prohibits executive branch employees, defined broadly,^[23] from conditioning public funds on political activity. Specifically, an employee may not "knowingly solicit or discourage the participation in any political activity of any person who has an application for any compensation, grant, contract, ruling, license, permit, or certificate pending before the employing office of such employee."^[24] Furthermore, it is illegal for an employee to use "his official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate for the office of President" in connection with any activity financed by federal grants.^[25]

"Investing in America" projects are funded with taxpayer dollars doled out through federal grants. While the Executive Office of the President developed the branding requirements and pushed them out via an OMB Controller Alert, federal departments and agencies independently incorporated the requirements into issued grants. In so doing, employees at these departments and agencies "knowingly solicited" grant applicants' participation in political activity,^[26] and, more seriously, used their official authority in connection with those grants to interfere with or affect the presidential election. Forcing funding recipients to display emblems based on the 2020 Biden-Harris campaign logo—and closely resembling the 2024 logo—propagates Biden's campaign in violation of the Hatch Act, and perhaps other statutes.^[27]

This is not the first time the Hatch Act has come up in the context of President Biden's infrastructure signage; your office previously issued a Hatch Act advisory opinion concerning the "Build Back Better" slogan, the precursor to "Building a Better America" and, by extension,

^[21] Democrats cried foul when President Trump personally signed Covid checks. But here, President Biden is going further, not just reappropriating federal dollars but conscripting *others* to deliver his political message. The administration is essentially saying that it, if you want federal money, you must support the President's cause.

^[22] *Hatch Act Overview*, OFFICE OF SPECIAL COUNSEL, <https://osc.gov/Services/Pages/HatchAct.aspx> (last visited June 20, 2024).

^[23] 5 U.S.C. § 7322(1)(A).

^[24] 5 U.S.C. § 7323(a)(4).

^[25] 18 U.S.C. § 595; *see also* 5 U.S.C. § 7323(a)(1), an even broader provision imposing civil penalties ("[A]n employee may not—use his official authority or influence for the purpose of interfering with or affecting the result of an election.").

^[26] *See* 5 C.F.R. § 734.101 (defining "political activity" broadly as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group."); *Burrus v. Vegliante*, 336 F.3d 82, 87–91 (2d Cir. 2003) (confirming that the display of signage, such as a poster, falls within the statute's definition of "political activity").

^[27] In *U.S. v. Pintar*, 630 F.2d 1270, 1275, 1277–79 (8th Cir. 1980), the Eighth Circuit upheld a conspiracy charge for defrauding the United States where individuals used federal program money to hire political operatives, i.e. "to accomplish political objectives ... unrelated to legitimate Commission business." Here, IJA money is similarly being diverted to pay for political signage under the dishonest guise of "transparency."

“Investing in America.”^[28] The opinion explains that because “President Biden is now running for reelection, the use of the campaign slogan ‘Build Back Better’ should not be used to brand any new initiatives or programs. And aside from the limited exception described above, official speeches, agency communications, and government resources should not include, display, or make use of this slogan until after the conclusion of the 2024 presidential election.” This logic should apply to the new branding, which is largely derivative and—by the graphic designer’s own admission—designed to support the Biden reelection campaign.

The Biden administration should not be using taxpayer dollars for campaign signs or coercing recipients of federal money into displaying them. I ask that you investigate the administration’s use of this branding. I trust you will coordinate appropriately with the Department of Justice to preserve the ability to prosecute any criminal Hatch Act violations. I also request that if during your investigation you encounter evidence of misconduct beyond your agency’s remit, you promptly refer it to the appropriate authority and notify me.

As we are now in the midst of the presidential election season, I would appreciate your prompt attention to this matter, as well as interim updates on the status of your investigation.

Sincerely,



Ted Cruz
Ranking Member

^[28] *Hatch Act Advisory Opinion Regarding the Use of Presidential Campaign Slogans*, OFF. OF SPECIAL COUNSEL (June 7, 2023), <https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/Hatch%20Act%20Advisory%20Opinion%20Regarding%20the%20Use%20of%20Presidential%20Campaign%20Slogans.pdf>; Lisa Hagen, *Biden Reframes Economic Agenda to ‘Building a Better America’*, U.S. NEWS & WORLD REPORT (Mar. 1, 2022), <https://www.usnews.com/news/politics/articles/2022-03-01/biden-reframes-economic-agenda-to-building-a-better-america>.