



December 7, 2017

Ms. Ana Galindo-Marrone
Chief, Hatch Act Unit
U.S. Office of Special Counsel
1730 M Street, NW, Suite 218
Washington, DC, 20036-4505

Dear Ms. Galindo-Marrone:

The Campaign Legal Center (“CLC”) is filing a second Hatch Act complaint with the U.S. Office of Special Counsel (“OSC”) against Senior Counselor to the President Kellyanne Conway.

CLC’s first complaint arose from Ms. Conway’s November 20 interview with *Fox & Friends* in which she was introduced with her official government title and stood in front of the White House while unlawfully advocating against the election of Doug Jones, who is running as a major party candidate for U.S. Senate in Alabama. CLC sent that first complaint on November 22, 2017 and filed an amended complaint with new information on November 29, 2017.¹ OSC acknowledged receipt and indicated that it would open a file on this matter.

On December 6, 2017, Ms. Conway again violated the Hatch Act during an interview with CNN’s *New Day* program, co-hosted by Chris Cuomo.² As was the case with her previous *Fox & Friends* interview, Ms. Conway was introduced with her official title and stood in front of the White House during the entirety of the appearance. Approximately fifteen minutes of the twenty-one minute appearance were consumed by Ms. Conway advocating against the election of Democrat Doug Jones and, in contrast with the *Fox & Friends* appearance, additionally advocating for the election of Jones’ Republican opponent, Roy Moore.

¹ Available at <https://goo.gl/jwxS8K>.

² See *CNN New Day*, Kellyanne Conway Full Interview With Chris Cuomo (Dec. 6, 2017), <https://www.youtube.com/watch?v=KeHj6UOIRPo>.

CNN has posted a full transcript of the interview online.³ Highlights of the interview include:

CONWAY: When the president endorsed Luther Strange, Luther Strange shot up in the polls tremendously by double digits.

When the president endorsed Roy Moore -- when he started to talk about Doug Jones, the opponent here which you still don't want to talk about but the president does, Roy Moore took a lead in the polls again.

Why is that? Because the president, himself, came out and said he doesn't want a liberal in the Senate. He doesn't want a liberal Democrat in the Senate. He wants a reliable vote for taxes, for life --

CUOMO: You'd rather have an accused child molester --

CONWAY: -- for borders, for crime, for --

CUOMO: -- than a Democrat?

CONWAY: This president also said something else that you don't seem to ever want to reflect, which is the president said Roy Moore has denied those allegations and the president said you have to take that into account, too.

....

CUOMO: If you want to leave it up to the voters of Alabama, then stay out of it. You don't vote in Alabama.

CONWAY: Oh, OK, and does that mean that Chuck Schumer and Nancy Pelosi don't want Doug Jones to win?

The president has been so explicitly clear on this so let me repeat it again for everyone who wants this to be as it's not and everyone who's really disappointed that they couldn't tilt this race the other way by having people living in Alabama instead of covering what's going on in the rest of the country.

....

³ *CNN New Day*, Rush Transcript (Dec. 6, 2017), <https://goo.gl/s8pzuj>.

CONWAY: You people have reporters living in Alabama but somehow, the president shouldn't get involved.

The president has said he wants a vote. He's also said he doesn't want a liberal Democrat in the Senate. Nobody was even talking about Doug Jones until the president started talking about him. And the president's endorsed him –

....

CONWAY: So, the president -- the only endorsement that matters in this race is President Trump's and when he came out questioning the ideology and the vote of Doug Jones, he'll be a reliable for tax hikes. He'll be a reliable vote against border security. He'll be a reliable against national security and keeping ISIS, and he'll be a reliable vote against the Second Amendment, against life, every --

He's out of step for Alabama voters according to the president. The president has said this. You have to reflect that.

And here's something else that's very important.

....

CONWAY: So, the president has said the allegations are troubling. They're also 40 years old. Nobody came forward before. The guy's been on the ballot many times.

Doug Jones is a liberal Democrat, the president has said, and he doesn't want a liberal Democrat representing Alabama in the United States Senate.

....

CONWAY: The only endorsement that matters in Alabama is the president's because he came forward for Luther Strange in the primary and Strange shot up in the polls.

He came forward -- again, the president is against Doug Jones. Does not want a liberal Democrat to represent Alabama --

CUOMO: Right.

CONWAY: -- is leaving it to the Alabama voters and has said that he wants Roy Moore in the United States Senate.

CUOMO: And you feel good with that? You feel good with Roy Moore as a reflection of your party?

CONWAY: My feelings don't matter.

CUOMO: Oh yes, they do.

CONWAY: And you know what? No, I said -- here's what I feel good about.

CUOMO: You are counselor to the President of the United States.

CONWAY: Yes. Well, anytime I -- anytime I express a feeling --

CUOMO: Roy Moore is a guy who talks about gay marriage as if it were bestiality.

CONWAY: Anytime I express a feeling about a candidate, people who want to make themselves relevant get air time and Twitter time, so I won't go there. They're going to have to find something --

CUOMO: Well, you've got to be careful about the Hatch Act. You know, you --

CONWAY: They're going to have to find something relevant and important to do today to make themselves feel better.

But, Chris, let me -- let me tell you --

CUOMO: You have to be careful about observing the rules of ethics there but, you know --

CONWAY: Let me tell you what I -- let me tell you what I feel good about. Let me tell you what I feel good about.

CUOMO: Yes?

CONWAY: That Donald Trump's the President of the United States. That Mike Pence is the Vice President of the United States...

Ms. Conway spent of the rest of the twenty-one minute interview discussing official White House matters, such as tax reform and the location of the United States' embassy in Israel.

Ms. Conway's extended remarks, delivered in her official capacity while standing in front of the White House, were an obvious attempt to influence the election by convincing the public to vote for Moore and against Jones. This is a violation of the Hatch Act.

The Hatch Act prohibits a federal employee from using official authority or influence to interfere with or affect the result of an election. *See* 5 U.S.C. § 7323(a)(1). Hatch Act regulations give examples of the type of activity this prohibition encompasses, and make clear that it is a use of official authority or influence to affect an election when an employee uses the employee's official title while participating in political activity. *See* 5 C.F.R. § 734.302(b)(1). Political activity is defined as activity directed at *the success or the failure* of a political party, candidate for partisan political office, or partisan political group. *See* 5 C.F.R. § 734.101.

As noted in CLC's earlier complaint against Ms. Conway, OSC previously found that Secretary Julian Castro had violated the Hatch Act:⁴

by advocating for and against Presidential candidates while giving a media interview in his official capacity on April 4, 2016. Secretary Castro's statements during the interview impermissibly mixed his personal political views with official agency business despite his efforts to clarify that some answers were being given in his personal capacity.⁵

Factors relevant to OSC's analysis were the facts that Secretary Castro was introduced with his official title, that the official HUD seal appeared behind him, and that he spent seven minutes of the interview speaking about official programs and initiatives.⁶

⁴ Letter from Carolyn Lerner, Special Counsel, U.S. Office of the Special Counsel, to the President of the United States (July 18, 2016) and *Report of Prohibited Political Activity Under the Hatch Act*, OSC File No. HA-16-3113 (Julián Castro) (June 24, 2016), [https://osc.gov/Resources/HA-16-3113%20\(Julian%20Castro\)%20FINAL.pdf](https://osc.gov/Resources/HA-16-3113%20(Julian%20Castro)%20FINAL.pdf).

⁵ *Id.* at 1.

⁶ *Id.* at 5-6.

As was the case with her November 20, 2017 *Fox & Friends* interview, Ms. Conway's actions in the December 6, 2017 CNN interview were indistinguishable from Secretary Castro's. Ms. Conway was introduced with her official title, the White House appeared behind her, and she spent several minutes talking about official programs and initiative.

Possibly in an attempt to insulate herself from liability for this second Hatch Act offense, Ms. Conway sought to attribute her remarks to the President. There is no escaping, however, the fact that she, as a senior administration appointee appearing in her official capacity, consumed nearly a quarter of an hour on a nationally televised program in an effort to influence a partisan election.

Notably, OSC has previously rejected the notion that the utterance of "magic words" can insulate an official from liability for a Hatch Act offense. For example, in the last administration, OSC found that Secretary Castro violated the Hatch Act despite his claim that he was speaking in his personal capacity while discussing partisan political matters.⁷ Ms. Conway's claim that she was merely relaying the views of the president about the Alabama Senate race is similarly unavailing. To find otherwise would allow any executive branch employee to immunize himself or herself from the Hatch Act by claiming that they are merely expressing the views of the President or Vice President.

The unmistakable message of Ms. Conway's lengthy campaign pitch—in an interview where she appeared in her official capacity against the backdrop of the White House—was that Alabamians should vote for Roy Moore. Indeed, in several instances it appears Conway went out of her way to steer the conversation away from broader policy discussions and towards discussing the qualifications of the candidates in the Alabama race.⁸ For example, even if parts of the conversation could have pertained to the more general issue of sexual harassment or misconduct,

⁷ Secretary Castro said that he was "taking off my HUD hat for a second and just speaking individually" before making the political comments. *See id.* at 3, 6.

⁸ From the transcript:

CUOMO: If you want to leave it up to the voters of Alabama, then stay out of it. You don't vote in Alabama.

CONWAY: Oh, OK, and does that mean that Chuck Schumer and Nancy Pelosi don't want Doug Jones to win?

...

The president has said he wants a vote. He's also said he doesn't want a liberal Democrat in the Senate. Nobody was even talking about Doug Jones until the president started talking about him.

Ms. Conway redirected the conversation back toward influencing the Alabama election by criticizing Jones and his qualifications for office.⁹

Neither Roy Moore nor Doug Jones is a sitting U.S. Senator, and they have no direct relevance to Ms. Conway's official duties or the White House's agenda besides the fact that they are running for U.S. Senate and that the victor could impact the success of the President's agenda. The fact that Ms. Conway and the President want (in Ms. Conway's words) "a reliable vote" in the U.S. Senate might be *why* Ms. Conway sought to influence the Alabama election, but this does not change the fact that her doing so in an official capacity violates the Hatch Act.

Moreover, it appears that this second Hatch Act violation was knowing and willful. Following CLC's filing of its complaint against Ms. Conway last month, Ms. Conway was already on notice that using her official position to influence an election violates the Hatch Act.¹⁰ In this CNN interview she initially appeared to acknowledge the Hatch Act issues her conduct implicated, but she then dismissed and even went so far as to mock efforts to hold her accountable for violations of these basic ethical standards.¹¹

In passing the Hatch Act, Congress intended to promote public confidence in the executive branch by ensuring that the federal government is working for all Americans without regard to their political views. As Special Counsel Henry Kerner

⁹ From the transcript:

CONWAY: So, the president has said the allegations are troubling. They're also 40 years old. Nobody came forward before. [Moore's] been on the ballot many times.

Doug Jones is a liberal Democrat, the president has said, and he doesn't want a liberal Democrat representing Alabama in the United States Senate.

¹⁰ See, e.g., Miranda Green, *Former Ethics Director: Kellyanne Conway Violated Hatch Act with Roy Moore Comments*, CNN (Nov. 24, 2017), <http://www.cnn.com/2017/11/22/politics/kellyanne-conway-hatch-act/index.html>.

¹¹ From the transcript:

CONWAY: Anytime I express a feeling about a candidate, people who want to make themselves relevant get air time and Twitter time, so I won't go there. They're going to have to find something --

CUOMO: Well, you've got to be careful about the Hatch Act. You know, you --

CONWAY: They're going to have to find something relevant and important to do today to make themselves feel better.

has previously noted: “The law is clear: public officials paid by taxpayers cannot use their position to engage in political activities.”¹²

Violations of the Hatch Act may result in removal from federal service, suspension, reprimand, or civil penalties. *See* 5 U.S.C. § 7326. OSC has repeatedly sought removal of, or lengthy suspensions for, executive branch employees who violate the Hatch Act.¹³ Such penalties are warranted here.

The willfulness of this violation and Ms. Conway’s openly expressed disdain for attempts to hold her accountable now make clear that any disciplinary action short of removal from the federal service or a lengthy unpaid suspension will not deter future misconduct by this senior official.¹⁴ Anything less with regard to a repeat offender serving as one of the top advisers to the President will send a clear message to the rest of the federal workforce either that the rules do not matter or that OSC has one standard for the federal workforce generally and a lower standard for those who are close to this President.

If OSC is to hold this administration’s Presidential appointees to the high standard to which it held the last administration’s appointees, OSC must open an

¹² Media Release: *Is Sec. Perez Campaigning on the Taxpayer’s Dime?*, CAUSE OF ACTION INSTITUTE (Dec. 15, 2016), <https://causeofaction.org/sec-perez-campaigning-taxpayers-dime/>.

¹³ For example, earlier this year OSC sought removal of a National Oceanic and Atmospheric Administration (NOAA) employee for repeated Hatch Act violations. *Judge Orders Removal of NOAA Employee for Hatch Act Violations*, U.S. Office of Special Counsel (Jan. 31, 2017), <https://osc.gov/News/pr17-04.pdf>. In 2015, OSC secured a 112-day suspension for a Federal Emergency Management Agency (FEMA) employee who engaged in partisan political activity in the workplace and solicited political contributions. *MSPB Orders Removal of Employee for Hatch Act Violations*, U.S. Office of Special Counsel (June 18, 2015), <https://osc.gov/News/pr15-13.pdf>. In 2014, OSC secured the resignation of a Federal Election Commission (FEC) attorney who had posted partisan political tweets and participated in an online media interview from an FEC facility where she criticized the Republican Party and its presidential candidate. *OSC Obtains Disciplinary Action in Two Hatch Act Cases*, U.S. Office of Special Counsel (Apr. 29, 2014), <https://osc.gov/News/pr14-09.pdf>. That same year, OSC entered into a settlement agreement with an Internal Revenue Service (IRS) employee who agreed to a 100-day unpaid suspension for urging callers to an IRS help line to reelect President Obama. *OSC Obtains Disciplinary Action in Two Hatch Act Cases*, U.S. Office of Special Counsel (July 10, 2014), <https://osc.gov/News/pr14-13.pdf>. OSC also secured a 14-day suspension of an IRS employee who criticized Republicans in her conversations with a taxpayer, despite the employee stating “I’m not supposed to voice my opinion, so you didn’t hear me saying that.” *OSC Enforces Hatch Act in a Series of IRS Cases*, U.S. Office of Special Counsel (Apr. 9, 2014), <https://osc.gov/News/pr14-06.pdf>.

¹⁴ We note in this regard that the U.S. Office of Government Ethics similarly found that Ms. Conway violated the Standards of Ethical Conduct for Employees of the Executive Branch, and the White House’s refusal to take corrective action appears to have emboldened her disrespect for legal authorities applicable to executive branch employees. *See, e.g.,* Jill Disis, *Ethics Office Rebukes White House Over Kellyanne Conway’s Ivanka Trump Plug*, CNN (Mar. 9, 2017), <http://money.cnn.com/2017/03/09/news/ethics-office-kellyanne-conway/index.html>.

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Chief, Hatch Act Unit
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investigation and find that Ms. Conway has violated the Hatch Act. In addition, based on Ms. Conway's repeated violations of ethics rules, including the Standards of Conduct and the Hatch Act, OSC should recommend that the President remove her from federal service or, at least, impose a lengthy unpaid suspension.

Sincerely,

/s/
Walter M. Shaub, Jr.
Senior Director, Ethics

/s/
Brendan M. Fischer
Director, Federal and FEC Reform

Enclosure