



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

March 6, 2018

The President
The White House
Washington, D.C. 20500

Re: OSC File No. HA-18-0966

Dear Mr. President:

Pursuant to 5 U.S.C. § 1215(b), I am forwarding to you the investigative findings of the U.S. Office of Special Counsel (OSC) regarding complaints alleging prohibited political activity by Counselor to the President Kellyanne Conway.

As explained in the accompanying report, OSC concluded that Ms. Conway violated the Hatch Act on two occasions by advocating for and against candidates in the December 2017 Alabama special election for United States Senate. Ms. Conway gave media interviews in her official capacity on November 20 and December 6, 2017. During both interviews, she impermissibly mixed official government business with political views about candidates in the Alabama special election. The Hatch Act prohibits federal employees from using their official authority or influence for the purpose of interfering with or affecting the outcome of an election. While federal employees may express their views about candidates as private citizens, the Hatch Act restricts employees from using their official government positions for partisan political purposes, including by influencing elections. Ms. Conway was aware of the Hatch Act's prohibitions when she chose during both interviews to repeatedly identify reasons why voters should support one candidate over another in the Alabama special election. Thus, I refer her violations for your consideration of appropriate disciplinary action.

Respectfully,

A handwritten signature in black ink, appearing to read "Henry J. Kerner".

Henry J. Kerner
Special Counsel

Enclosures



U.S. OFFICE OF SPECIAL COUNSEL

Report of Prohibited Political Activity under the Hatch Act
OSC File No. HA-18-0966 (Kellyanne Conway)

March 6, 2018

This report represents the deliberative attorney work product of the U.S. Office of Special Counsel (OSC) and is considered privileged and confidential. Any release of information beyond persons specifically designated by OSC to have access to its contents is prohibited. All Freedom of Information Act (FOIA) inquiries regarding this report should be referred to OSC's FOIA Officer at (202) 804-7000.

I. INTRODUCTION

The U.S. Office of Special Counsel (OSC) received complaints in November and December 2017 alleging that Counselor to the President Kellyanne Conway violated the Hatch Act by engaging in political activity while participating in official interviews with Fox News's *Fox & Friends* and CNN's *New Day*. Specifically, the complaints alleged that during these interviews—which Ms. Conway conducted in her official capacity—she improperly advocated for the defeat of Democrat Doug Jones or expressed support for Republican Roy Moore, both of whom were candidates in the December 2017 Alabama special election for U.S. Senate. OSC consolidated the complaints, opened OSC File No. HA-18-0966, and investigated the allegations. This report contains the investigative findings in this matter. In summary, OSC finds that Ms. Conway violated the Hatch Act on two separate occasions and refers the violations to the President for the imposition of appropriate discipline.

II. FACTUAL FINDINGS

Ms. Conway is a commissioned officer in the White House Office serving as Counselor to the President. She has held this position since January 20, 2017.

A. **On November 20, 2017, Ms. Conway appeared in her official capacity on Fox News's *Fox & Friends* and discussed why voters should not support Democrat Doug Jones in the Alabama special election for U.S. Senate.**

On November 19, 2017, *Fox & Friends* requested an interview of Ms. Conway to discuss four topics: tax reform, media coverage of the President's accomplishments, comments by a college basketball player's father, and statements by former Presidential candidate Hillary Clinton. Later that day, the White House Communications Office prepared and provided to Ms. Conway a written official communications briefing. The document included, among other things, talking points about Roy Moore, Al Franken, and sexual misconduct. Specifically, the talking points on Roy Moore were: (1) "Let the people of Alabama decide. I know the people of Alabama they are great - and will do the right thing;" (2) "The President believes these allegations are troubling and if these allegations are true, Judge Moore should step aside;" and (3) "The people of the state of Alabama will make this decision." The communications briefing did not include any reference to Moore's opponent, Doug Jones.

The following morning, *Fox & Friends* remotely interviewed Ms. Conway for approximately 11 minutes.¹ During the interview, Ms. Conway stood on the White House grounds, and the White House was visible in the background. Host Steve Doocy introduced Ms. Conway by stating, "[l]et's talk to Kellyanne Conway. She's Counselor to the President of the United States." The chyron at the bottom of the interview periodically identified Ms. Conway as "Counselor to President Trump."

¹ Video of the November 20, 2017, *Fox & Friends* interview may be found at the following link: <http://insider.foxnews.com/2017/11/20/kellyanne-conway-roy-moore-vote-doug-jones-alabama-vote-against-tax-cuts>.

The interview began with a conversation on tax reform. Ms. Conway discussed, among other things, the President's four core principles for tax cuts and tax relief. When discussing the Administration's tax reform efforts, Mr. Doocy remarked that "[p]artisan politics is getting in the way, and Democrats do not want to give the President a win." In response, Ms. Conway argued that the Administration's tax plan was "a win for the American people," contended that Democrats in opposition were "in big trouble," and then volunteered a comment about Doug Jones and the Alabama special election:

And Doug Jones in Alabama. Folks don't be fooled. He'll be a vote against tax cuts. He's weak on crime, weak on borders. He's strong on raising your taxes. He's terrible for property owners And Doug Jones is a doctrinaire liberal, which is why he's not saying anything and why the media are trying to boost him.

As Ms. Conway was speaking, host Brian Kilmeade asked several times, "[s]o vote Roy Moore?" Ms. Conway responded saying, "I'm telling you that we want the votes in-- in-- in the Senate to get this tax-- this tax bill through Let me tell you something this guy Doug Jones is a doctrinaire liberal." The *Fox & Friends* hosts then asked about the Republican organizations and individuals withdrawing support for Roy Moore. Ms. Conway replied, "[r]ight, and, you know what-- the-- I just want everybody to know Doug Jones, nobody ever says his name and they pretend that he's some kind of conservative Democrat in Alabama and he's not." After a final question about the President's support of Roy Moore, the interview returned to tax reform and other issues.

B. On December 6, 2017, Ms. Conway appeared in her official capacity on CNN's *New Day* and discussed why voters should support Republican Roy Moore, and not support Democrat Doug Jones, in the Alabama special election for U.S. Senate.

On December 5, 2017, *New Day* requested an interview of Ms. Conway to discuss the following topics: tax reform, the Special Counsel investigation, the President's and the Republican National Committee's support for Roy Moore, and a potential government shutdown. Later that day, the White House Communications Office prepared and provided to Ms. Conway a written official communications briefing. The document included a talking point about a telephone conversation between the President and Roy Moore, "during which they discussed the state of the Alabama Senate race and the President endorsed Judge Moore's campaign."

The following day, *New Day* remotely interviewed Ms. Conway for approximately 20 minutes.² During the interview, Ms. Conway stood on the White House grounds, and the White House was visible in the background. Host Christopher Cuomo introduced Ms. Conway by stating, "[t]he White House is defending President Trump's endorsement of controversial Senate candidate Roy Moore Joining us now with her take on that and other news items, Counselor

² Video of the December 6, 2017, *New Day* interview may be found at the following link: <https://www.youtube.com/watch?v=DvXBQZqhTaU>.

to President Trump Kellyanne Conway.” The chyron at the bottom of the interview periodically identified Ms. Conway as “Counselor to President Trump.”

Mr. Cuomo first asked Ms. Conway about the President’s endorsement of Roy Moore. In response, Ms. Conway discussed the President’s initial endorsement of former candidate Luther Strange and then stated:

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--

Ms. Conway then introduced into the discussion Al Franken’s sexual misconduct and the hypocrisy that she sees among commentators and indicated that the people of each state should decide. The following exchange occurred:

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, oh, OK, and, 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. Do you know everything that’s going on in this country? The historic tax cuts for individuals and businesses, but we have people planted in Alabama on one single Senate race. You’re telling the President of the United States not to get involved in a race and the media--

Ms. Conway followed these remarks by stating, “[t]he 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.”

As the interview continued, Ms. Conway repeated the President’s position on the Alabama special election. For instance, Ms. Conway stated that “the only endorsement that matters in this race is President Trump’s” And when referring to the President’s position, she stated that Doug Jones will be a reliable vote “for tax hikes,” “against border security,” “against national security,” “against the Second Amendment,” and “against life.” Further, she stated that Doug Jones is “out of step for Alabama voters, according to the President” and “a liberal Democrat, the President has said ... and he doesn’t want a liberal Democrat representing Alabama in the United States Senate.” The conversation transitioned into the President’s relationship with Mitt Romney and then returned to the Alabama special election. Ms. Conway

again reiterated that the President “is against Doug Jones,” “[d]oes not want a liberal Democrat to represent Alabama,” and “has said that he wants Roy Moore in the United States Senate.”

Mr. Cuomo then asked Ms. Conway, “[a]nd you feel good with that? You feel good with Roy Moore as a reflection of your party?” After Ms. Conway responded that her “feelings don’t matter,” Mr. Cuomo said “[o]h yes they do. You are Counselor to the President of the United States.” Ms. Conway then remarked “[a]nytime 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.” Speaking over Ms. Conway’s statement, Mr. Cuomo stated that she has “got to be careful about the Hatch Act.” Ms. Conway continued, stating: “They’re going to have to find something ... relevant and important to do today to make themselves feel better.” Mr. Cuomo then stated, “[y]ou have to be careful about observing the rules of ethics there” And Ms. Conway said, “[l]et me tell you what I feel good about That Donald Trump’s the President of the United States. That Mike Pence is the Vice President of the United States.”

The interview returned to a discussion on tax reform and transitioned to the President’s relationships with both Mitt Romney and Steve Bannon. After discussing Steve Bannon’s initial endorsement of Roy Moore, Ms. Conway said the following:

[T]he only endorsement that’s mattered in the Alabama race ... is the President’s because after he came out against Doug Jones-- and none of you seem to want to say those nine letters, Doug Jones, that God forbid people find out who he is and who he would be in the Senate, so the President had to go out and do it for you. Thank you, Mr. President

Mr. Cuomo and Ms. Conway then reviewed various actions taken by the Democratic and Republican parties in 2017. Ms. Conway also discussed President Trump’s position on moving the U.S. Embassy in Israel from Tel Aviv to Jerusalem before concluding the interview.

C. Ms. Conway has significant knowledge of the Hatch Act.

The Office of White House Counsel provided Hatch Act guidance to Ms. Conway in a formal ethics training session, during individual conversations, and in multiple written communications. More specifically, on January 24, 2017, Ms. Conway attended a senior staff ethics training led by White House Counsel Donald McGahn and Deputy Counsel to the President Stefan Passantino. The training included a discussion of the Hatch Act’s definition of political activity as “[a]ny activity directed toward the success or failure or [sic] a political party, candidate for partisan political office, or partisan political organization.”

Subsequently, on March 1, 2017, Mr. Passantino met individually with Ms. Conway to provide specialized Hatch Act training and review a PowerPoint presentation about the Hatch Act provided by OSC earlier in February 2017. One of the topics discussed was the Hatch Act’s prohibition against using one’s official authority or influence for the purpose of interfering with or affecting the result of an election.

On April 20, 2017, the Office of White House Counsel sent by email to Ms. Conway and other White House Office employees a memorandum entitled “Political Activities and Interactions with Partisan Political Organizations,” which discussed the Hatch Act and identified the use of official authority prohibition as a “certain important restriction[.]” The next day, Mr. Passantino and Senior Associate Counsel to the President Scott Gast met individually with Ms. Conway to provide specialized Hatch Act training and again reviewed the above-referenced PowerPoint presentation provided by OSC.

On June 28, 2017, Ms. Conway received a copy of the White House Staff Manual, which included a section entitled “Political Activities” that discussed the Hatch Act. Also, the Office of White House Counsel often provided Hatch Act guidance to Ms. Conway when she received requests to appear at political events. This guidance again warned against the use of one’s official title or position when participating in political events.

Then, on November 20, 2017, after the *Fox & Friends* interview, the Office of White House Counsel contacted Ms. Conway due to the Hatch Act concerns raised by her interview and again provided her with Hatch Act guidance. And lastly, on December 4, 2017, the Office of White House Counsel sent by email to Ms. Conway and other White House Office employees a Hatch Act reminder regarding the “Use of Official Resources and Official Social Media Accounts,” which included the following information about the Hatch Act’s use of official authority prohibition:

You may not use your official position to affect the result of an election. You may not, for example, use your official title when participating in any political activities, nor may you use your official authority to encourage or coerce anyone (including subordinates) to engage in or refrain from engaging in political activity. This includes through use of official social media accounts. [emphasis in original]

D. Ms. Conway had an opportunity to respond to the Hatch Act allegations during OSC’s investigation.

On January 25, 2018, OSC propounded interrogatories to Ms. Conway and requested her response by February 1, 2018. Having received no response, OSC emailed Mr. Passantino on February 7, 2018, stating that it would assume Ms. Conway did not intend to respond if it received no communication by February 12, 2018. On February 12, 2018, Mr. Passantino confirmed that Ms. Conway intended to respond and would do so in the “near future.” OSC granted Ms. Conway an extension until February 16, 2018. As of the date of this report, OSC has not received Ms. Conway’s response. In addition, OSC provided Ms. Conway an opportunity to respond to the completed report, but has received no such response to date.

Notwithstanding Ms. Conway’s silence, in a response to OSC’s request for information, the Office of White House Counsel provided brief explanations for Ms. Conway’s statements during the interviews on *Fox & Friends* and *New Day*. Specifically, it contended that Ms. Conway’s words “must be viewed through the prism of one whose job function was to provide

commentary concerning the President’s newsworthy reasoning for his position with respect to a nominee within his party, as well as the impact of the special election on his agenda.” With respect to the *Fox & Friends* interview, the Office of White House Counsel asserted that Ms. Conway “intended these remarks to serve as policy commentary in the context of a broader discussion of the prospects of the President’s agenda in Congress, not as advocacy for or against a candidate.” And it stated that during the *New Day* interview, “Ms. Conway sought to articulate, without engaging in any advocacy, why the President’s posture with respect to [Roy Moore] had changed.”

III. LEGAL ANALYSIS

A. Ms. Conway is subject to the Hatch Act.

The Hatch Act restricts the political activity of “any individual, other than the President and the Vice President, employed or holding office in ... an Executive agency other than the Government Accountability Office.” 5 U.S.C. § 7322(1). The White House Office is a component of the Executive Office of the President, which is considered an Executive agency for purposes of the Hatch Act.³ Therefore, Ms. Conway, a presidential appointee employed by the White House Office, is subject to the Hatch Act.

B. Ms. Conway violated the Hatch Act’s prohibition against using one’s official authority or influence for the purpose of interfering with or affecting the result of an election.

The Hatch Act prohibits federal employees from using their official authority or influence for the purpose of interfering with or affecting the result of an election. 5 U.S.C. § 7323(a)(1). The attendant Hatch Act regulation gives examples of the type of activity this prohibition encompasses. For example, it is a prohibited use of official authority for employees to use their official title or position 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 failure of a political party, partisan political group, or candidate for partisan political office. 5 C.F.R. § 734.101. Thus, federal employees in their official capacity are prohibited from, among other things, promoting the election or defeat of candidates for partisan political office.

1. Ms. Conway violated the Hatch Act during her November 20, 2017, interview on Fox News’s *Fox & Friends*.

The White House Communications Office arranged Ms. Conway’s *Fox & Friends* interview and provided her with a written communications briefing containing official talking points. When *Fox & Friends* interviewed Ms. Conway, she was introduced as Counselor to the President, the White House appeared in the background, the chyron at the bottom of the

³ *See* 19 U.S. Op. Off. Legal Counsel 103 (May 5, 1995), 1995 WL 1767065 (concluding that for Hatch Act purposes, the White House Office is an Executive agency); 27 U.S. Op. Off. Legal Counsel 118 (May 23, 2003), 2003 WL 25728359 (reaffirming conclusion that the Hatch Act applies to employees of the White House Office).

interview periodically identified Ms. Conway as “Counselor to President Trump,” and she spoke for the first two and half minutes about tax reform and the Administration’s efforts on that issue. Given the official arrangement of the interview, the use of her official title, the discussion of official topics, and her standing in front of the White House during the interview, it is clear Ms. Conway gave the interview in her official capacity as Counselor to the President.

Prior to the *Fox & Friends* interview, Ms. Conway received regular and repeated Hatch Act training and guidance. As such, it is inexplicable why, when asked a question about tax reform and Democratic opposition, Ms. Conway chose to answer as follows:

And Doug Jones in Alabama. Folks don’t be fooled. He’ll be a vote against tax cuts. He’s weak on crime, weak on borders. He’s strong on raising your taxes. He’s terrible for property owners And Doug Jones is a doctrinaire liberal, which is why he’s not saying anything and why the media are trying to boost him.

Afterward when one of the *Fox & Friends* host asked, “[s]o vote Roy Moore?,” Ms. Conway responded, “I’m telling you that we want the votes in -- in -- in the Senate to get this tax bill through Let me tell you something this guy Doug Jones is a doctrinaire liberal.”

Ms. Conway’s introduction of Doug Jones into the interview was unprompted, unresponsive to the question asked by the *Fox & Friends* host, and surprising given that she knew the four identified interview topics did not include Doug Jones, Roy Moore, or the Alabama special election. Her intentional partisan jabs against Doug Jones were made in her official capacity and meant to persuade voters not to support him in the Alabama special election. By telling voters not to “be fooled” and contending that Doug Jones would be “terrible for property owners,” Ms. Conway advocated for the failure of his candidacy. She also implied that voters should support Roy Moore, so the President could get the votes in the Senate needed to pass tax reform. Her advocacy against one candidate and implied endorsement of another candidate constituted political activity under the Hatch Act. Because Ms. Conway engaged in political activity while acting in her official capacity as Counselor to the President, she violated the Hatch Act’s prohibition against using one’s official authority or influence for the purpose of interfering with or affecting the result of an election.

2. Ms. Conway violated the Hatch Act during her December 6, 2017, interview on CNN’s *New Day*.

As with the *Fox & Friends* interview, the White House Communications Office arranged Ms. Conway’s *New Day* interview and provided her with a written communications briefing containing official talking points. At the beginning of the interview, Ms. Conway was introduced as “Counselor to President Trump, Kellyanne Conway,” and the chyron at the bottom of the interview periodically identified her with this title. Throughout the interview, Ms. Conway stood on the White House grounds, and the White House appeared in the background. Given the official arrangement of the interview, the use of her official title, the discussion of official topics, and her standing in front of the White House during the interview, Ms. Conway gave the *New Day* interview in her official capacity as Counselor to the President.

Unlike the previous interview on *Fox & Friends*, *New Day* requested that Ms. Conway discuss Roy Moore, and the official communications briefing she received included a talking point that included the President's endorsement of Roy Moore. The communications briefing, however, did not mention Doug Jones or the reasons why voters should not support him. Nonetheless, during the *New Day* interview Ms. Conway repeatedly described Doug Jones as a liberal Democrat and gave reasons why voters should not support him in the Alabama special election.

In contrast with the previous interview on *Fox & Friends*, however, Ms. Conway attributed many of her comments on *New Day* about Doug Jones and Roy Moore to the President. For instance, while discussing why Roy Moore "took a lead in the polls," Ms. Conway stated: "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" Ms. Conway repeated the President's position later in the interview by stating that Doug Jones will be a reliable vote "for tax hikes," "against border security," "against national security," "against the Second Amendment," "against life," and that Doug Jones "is out of step for Alabama voters, according to the President." Later in the interview she reiterated that Doug Jones is "a liberal Democrat... and [the President] doesn't want a liberal Democrat representing Alabama in the United States Senate."

During the investigation of this matter, OSC learned that Ms. Conway received Hatch Act guidance on two occasions between the *Fox & Friends* and *New Day* interviews. First, the Office of White House Counsel met with Ms. Conway after her *Fox & Friends* interview on November 20, 2017, to discuss specific concerns raised by the interview and provided Hatch Act guidance. Second, on December 4, 2017, the Office of White House Counsel sent by email to Ms. Conway and other White House Office employees a Hatch Act reminder, which expressly warned against the use of one's official position to interfere with an election and the use of one's official title while participating in any political activity.

Although Ms. Conway's statements about the candidates in the Alabama special election during her *New Day* interview were portrayed as the President's position, she was still providing voters with reasons to vote for Roy Moore and against Doug Jones. Indeed, framing her responses to reflect the President's position arguably served as an additional and more persuasive reason for voters to support Roy Moore and not Doug Jones. Therefore, her statements advocating for the defeat of Doug Jones and the election of Roy Moore constituted political activity under the Hatch Act. Because Ms. Conway engaged in political activity while acting in her official capacity as Counselor to the President, she violated the Hatch Act's prohibition against using one's official authority or influence for the purpose of interfering with or affecting the result of an election.

* * *

As previously mentioned, the Office of White House Counsel—in a response to OSC's request for information—provided brief explanations for Ms. Conway's statements during the

Fox & Friends and *New Day* interviews. It took the position that, during these interviews, Ms. Conway provided policy commentary about the “prospects of the President’s agenda in Congress” and “sought to articulate, without engaging in any advocacy, why the President’s posture with respect to [Roy Moore] had changed.” This position, however, lacks merit. Indeed, adopting it would render meaningless the Hatch Act’s prohibition against using one’s official authority or influence for the purpose of interfering with or affecting the result of an election. Federal employees in their official capacity would be free to express electoral preferences and claim immunity from the Hatch Act by hiding behind the President’s statements about candidates and declaring they were merely carrying out their official duties in support of the Administration’s agenda. In any event, Ms. Conway’s statements, made in her official capacity, went beyond providing “commentary” on the Administration’s policies, and thus constituted political activity.

While the President is exempt from the Hatch Act, his exemption does not extend to any other employee, including those employed in the White House Office. OSC understands that Ms. Conway’s job duties may include publicly reinforcing the Administration’s positions on a host of policy issues. And the Hatch Act does not prohibit Ms. Conway from doing so, provided she carries out her job duties in a manner that complies with the law. Here, after receiving substantial Hatch Act guidance, Ms. Conway, in her official capacity, attempted to influence the Alabama special election by advocating for the success and failure of candidates in that race. In doing so, Ms. Conway violated the Hatch Act on two separate occasions.

IV. CONCLUSION

While the Hatch Act allows federal employees to express their views about candidates and political issues as private citizens, it restricts employees from using their official government positions for partisan political purposes, including by trying to influence partisan elections. In passing this law, Congress intended to promote public confidence in the Executive branch by ensuring the federal government is working for all Americans without regard to their political views. Ms. Conway’s statements during the *Fox & Friends* and *New Day* interviews impermissibly mixed official government business with political views about candidates in the Alabama special election for U.S. Senate.

The U.S. Constitution confers on the President authority to appoint senior officers of the United States, such as Ms. Conway. Considering the President’s constitutional authority, the proper course of action, in the case of violations of the Hatch Act by such officers, is to refer the violations to the President. Pursuant to 5 U.S.C. § 1215(b), OSC offered Ms. Conway an opportunity to respond to this report but did not receive a response. OSC hereby submits this Report of Prohibited Political Activity to the President for appropriate disciplinary action. *See* 5 U.S.C. § 1215(b).