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**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 218  
Washington, DC 20036-4505  
(202) 804-7000

December 16, 2020

Re: Freedom of Information Act Request (#FOIA-2020-087)

Please be advised that this is a final response to your request dated May 23, 2020, in which you asked the U.S. Office of Special Counsel (OSC) to provide you with a copy of the Questions For the Record (QFR) and agency QFR responses to Congress responding to QFRs during calendar years 2017, 2018, 2019 and 2020 to date. Your request has been processed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and the Privacy Act, 5 U.S.C. § 552a.

OSC identified seven (7) responsive pages. We are releasing five (5) pages to you in full and (two) 2 pages in part pursuant to FOIA Exemptions (b)(6). FOIA Exemption 6 protects information if disclosure would constitute a clearly unwarranted invasion of personal privacy. *See* 5 U.S.C. § 552(b)(6).

You have the right to appeal this determination under the FOIA. An appeal must be made in writing and sent to OSC's General Counsel at the address shown at the top of this letter or by email to [FOIAappeal@osc.gov](mailto:FOIAappeal@osc.gov). The appeal must be received by the Office of General Counsel within ninety (90) days of the date of this letter.

If you have any questions or you require dispute resolution services, please feel free to contact Mahala Dar, OSC's Chief FOIA Officer and acting FOIA Public Liaison, at [mdar@osc.gov](mailto:mdar@osc.gov) or (202) 804-7000. Please reference the above tracking number when you call or write. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer.<sup>1</sup>

Thank you,

/s/

Mahala Dar, Esq.  
Clerk

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<sup>1</sup> Office of Governmental Information Services (OGIS), National Archives and Records Administration 8601 Adelphi Road, Room 2510, College Park, MD 20740-6001; [ogis@nara.gov](mailto:ogis@nara.gov) (Email) 202-741-5770 (Office) 1-877-684-6448 (Toll Free) 202-741-5769 (Fax)

## **QFR Response**

The U.S. Office of Special Counsel (OSC) determined that Ms. Kellyanne Conway's conduct during official media interviews and on her Twitter account violated 5 U.S.C. § 7323(a)(1) (the Hatch Act's "use of official authority prohibition").<sup>1</sup> OSC did not conclude that Ms. Conway violated 5 U.S.C. § 7324(a) (the "political activity on duty prohibition") because Ms. Conway is exempt from that restriction.<sup>2</sup> As explained below, the 5 U.S.C. § 7324(b) exemption from the political activity on duty prohibition is a limited exemption. The provision is not a blanket exemption from the Hatch Act more generally and does not release an individual such as Ms. Conway from the duty to comply with all other remaining Hatch Act restrictions found at 5 U.S.C. § 7323,<sup>3</sup> including the use of official authority prohibition.

The use of official authority prohibition, as defined in 5 U.S.C. § 7323(a)(1), restricts all federal employees from using their official authority or influence to affect the result of an election.<sup>4</sup> The legislative history reflects the importance of this prohibition and the sentiment that "when a public official uses his official authority, he is using the power that is vested in him by the law of the land for the service of all the people, and that power should never be [misused] for any partisan purpose."<sup>5</sup> When upholding the Hatch Act's constitutionality, the Supreme Court wrote that "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."<sup>6</sup>

Although the statute does not specifically define the scope of the use of official authority prohibition, the regulations promulgated by the Office of Personnel Management (OPM) illustrate prohibited activities.<sup>7</sup> For example, employees may not use their official title while participating in political activity.<sup>8</sup>

On the other hand, the Hatch Act's political activity on duty prohibition restricts most, but not all, federal employees from engaging in political activity while on duty, in a government building, wearing an official uniform or insignia, or using an official vehicle. The statute exempts certain high-level employees.<sup>9</sup> Pursuant to 5 U.S.C. § 7324(b) ("7324(b) exemption"), a

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<sup>1</sup> An employee is prohibited from using his official authority or influence for the purpose of interfering with or affecting the result of an election. 5 U.S.C. § 7323(a)(1).

<sup>2</sup> An employee described in paragraph (2) of this subsection may engage in political activity otherwise prohibited by subsection (a) if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States. 5 U.S.C. § 7324(b)(1).

<sup>3</sup> The Hatch Act prohibits employees from: using their official authority or influence for the purpose of affecting the result of an election; knowingly soliciting, accepting, or receiving political contributions from any person; being candidates for partisan political office; and knowingly soliciting or discouraging the political activity of any individual with business before their employing office. 5 U.S.C. § 7323(a)(1)-(4).

<sup>4</sup> 5 U.S.C. § 7323(a).

<sup>5</sup> 86 Cong. Rec. 2703 (1940) (statement of Sen. O'Mahoney).

<sup>6</sup> *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973).

<sup>7</sup> See 5 C.F.R. § 734.302.

<sup>8</sup> 5 C.F.R. § 734.302(b)(1).

<sup>9</sup> 5 U.S.C. § 7324(b).

federal employee whose duties and responsibilities continue outside normal duty hours and while away from the normal duty post, and who is paid from an appropriation for the Executive Office of the President (EOP), may engage in political activity on the job or while in the federal workplace, provided the costs are not paid for by U.S. Treasury funds.<sup>10</sup> Because Ms. Conway has responsibilities that continue outside of normal duty hours and away from her duty post, and is paid from the EOP appropriation,<sup>11</sup> she is exempt from the political activity on duty prohibition.

The 7324(b) exemption on its face applies only to the political activity on duty prohibition. The exemption does not relieve employees of their responsibility to abide by the Hatch Act's remaining prohibitions found at 5 U.S.C. § 7323, including the use of official authority prohibition. 5 U.S.C. § 7324(b) provides that exempt employees may "engage in political activity *otherwise prohibited by [7324] subsection (a).*"<sup>12</sup> Because the 7324(b) exemption refers only to 5 U.S.C. § 7324(a), which is the political activity on duty prohibition, and not to the other Hatch Act prohibitions at 5 U.S.C. § 7323, the exemption is limited in application only to activity described in 7324(a). Therefore, the statute's plain language authoritatively establishes that the 7324(b) exemption applies only to the political activity on duty restriction.<sup>13</sup>

When drafting the implementing regulations for the 7324(b) exemption, OPM made clear in a description of the proposed regulations that those individuals who are provided for in the exemption are still bound by the prohibition on use of official authority. In that statement on the proposed 5 C.F.R. Part 734 Subpart E, OPM stated, "Under the Hatch Act, these employees were covered by the prohibition against misusing their official authority to interfere with or affect the result of an election . . . Under the [1993 Reform] Amendments, these employees continue to be covered under the prohibition against misuse of official authority."<sup>14</sup>

Furthermore, 5 C.F.R. § 734.502, which describes the nature of the exemption found in 7324(b), tracks the statutory language in making clear that the exemption applies only for prohibition of political activity while on duty. Even assuming, *arguendo*, that 5 C.F.R. Subpart E was not clear that individuals such as Ms. Conway were provided an exemption only for the prohibition of political activity on duty, Ms. Conway would still be bound by the plain language of the statute. As explained above, the statute makes clear that individuals subject to the Hatch Act are provided an exemption only from the prohibition on political activity conducted while on duty. The statute plainly mandates that individuals such as Ms. Conway continue to be bound by the prohibition against using their official authority to affect an election.

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<sup>10</sup> The 7324(b) exemption also applies to some employees appointed by the President by and with the advice and consent of the Senate.

<sup>11</sup> Ms. Conway is a commissioned officer who works in the White House Office.

<sup>12</sup> 5 U.S.C. § 7324(b)(1) (emphasis added).

<sup>13</sup> See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (If Congress has directly spoken to the precise question at issue, then the agency must give effect to the unambiguously expressed intent of Congress).

<sup>14</sup> Political Activities of Federal Employees, 59 Fed. Reg. 48765, 48769 (proposed Sept. 23, 1994) (to be codified at 5 C.F.R. pt. 734).

The rationale for the 7324(b) exemption also supports its application to the political activity on duty prohibition only. Congress created the 7324(b) exemption because, arguably, the political activity on duty prohibition could be read to restrict employees, like Ms. Conway, who are always on duty and on call by the President, from ever engaging in political activity. Therefore, the exemption was developed as a concession to these employees who could not take advantage of the right afforded to other federal employees to engage in political activity on their own time. For example, while on duty, employees exempted by 7324(b) such as Ms. Conway may write a political speech, advise the President of campaign polling numbers, and speak to officials from a campaign or political party. Notwithstanding this concession, Congress intended for the 7324(b) exemption to be limited in its application and explained, “Despite the exception . . . the committee expects that most of the political activity that these officials engage in will be conducted off Government property and not during regular duty hours.”<sup>15</sup> In conclusion, it is clear that the statute and related C.F.R. sections exempt Ms. Conway and similarly situated employees only from the political activity on duty prohibition and not from any of the other Hatch Act provisions, including the use of official authority prohibition.

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<sup>15</sup> H.R. Rep. No. 103-16 at 22 (1993).

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

Mail room: (202) 225-5051

Mr. Jordan: (202) 225-5074

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July 8, 2019

The Honorable Henry J. Kerner  
Special Counsel  
Office of Special Counsel  
1730 M Street N.W., Suite 218  
Washington, D.C. 20036

Dear Mr. Kerner:

Enclosed are post-hearing questions that have been directed to you and submitted to the official record for the hearing that was held on Wednesday, June 26, 2019, "Violations of the Hatch Act Under the Trump Administration."

In order to ensure a complete hearing record, please return your written response to the Committee by Monday, July 22, 2019, including each question in full. Your response should be addressed to the Committee office at 2157 Rayburn House Office Building, Washington, D.C. 20515. Please also send an electronic version of your response by email to Elisa LaNier, Chief Clerk, at (b)(6)@mail.house.gov.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Ms. LaNier at (202) 225-(b)(6)

Sincerely,

  
Elijah E. Cummings  
Chairman

Enclosure

cc: The Honorable Jim Jordan, Ranking Member

**Questions for Special Counsel Henry Kerner  
Office of Special Counsel**

June 26, 2019, Hearing: "Violations of the Hatch Act Under the Trump Administration"

**Questions from Chairman Elijah E. Cummings**

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1. The Office of Special Counsel (OSC), in a report released on June 13, 2019, found Ms. Conway to be in violation of 5 U.S.C. § 7323(a), which prohibits executive branch employees from using their "official authority or influence for the purpose of interfering with or affecting the result of an election." Some Republican members of the Committee, however, argued that Ms. Kellyanne Conway was permitted to use her official media interviews and Twitter account to engage in partisan political activity because 5 C.F.R. § 734.502 allows her to engage in political activity while on duty. Does 5 C.F.R. § 734.502 provide an exception to the "official authority" prohibition in 5 U.S.C. § 7323(a)? Please explain the difference between the prohibitions in 5 U.S.C. § 7323 and § 7324 and why OSC did not consider 5 C.F.R. § 734.502 to permit Ms. Conway's behavior.

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND REFORM

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July 15, 2019

The Honorable Henry J. Kerner  
Special Counsel  
Office of Special Counsel  
1730 M Street N.W., Suite 218  
Washington, D.C. 20036

Dear Mr. Kerner:

Enclosed are questions that have been directed to you and submitted for the official record for the hearing on Wednesday, June 26, 2019, titled, "Violations of the Hatch Act Under the Trump Administration."

Please return your written responses to these questions by Monday, July 29, 2019, including each question in full as well as the name of the Member. Your response should be addressed to the Committee office at 2157 Rayburn House Office Building, Washington, D.C. 20515. Please also send an electronic version of your response by email to Elisa LaNier, Chief Clerk, at (b)(6)@mail.house.gov.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Elisa LaNier at (202) 225-(b)(6)

Sincerely,



\_\_\_\_\_  
Elijah E. Cummings  
Chairman

Enclosure

cc: The Honorable Jim Jordan, Ranking Member



## **Questions for Special Counsel Henry Kerner**

### **Office of Special Counsel**

June 26, 2019, Hearing: "Violations of the Hatch Act Under the Trump Administration"

#### **Questions from Rep. Wm. Lacy Clay**

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1. The Office of Special Counsel has maintained that it lacks authority to file MSPB complaints against non-Senate confirmed presidential appointees. What, if any, legal authority is the basis of this opinion? If OSC is relying on OSC opinions or other legal opinions, please list and describe them.
2. In the fall of 2018, OSC launched an investigation into whether political appointees impermissibly mixed official events and travel with campaign events ahead of the 2018 midterm elections. Will OSC complete this investigation by the end of the year? If not, when does OSC estimate that it will complete the investigation?
3. How many agencies are currently under investigation for travel practices that potentially violate the Hatch Act?