

THE WHITE HOUSE

WASHINGTON

June 11, 2019

The Honorable Henry Kerner
United States Office of Special Counsel
1730 M Street, NW, Suite 218
Washington, DC 20036

Dear Special Counsel Kerner:

I write to submit an initial response to the draft Office of Special Counsel Report concerning Assistant to the President and Counselor to the President Kellyanne Conway, OSC File Nos. HA-19-0631 & HA-19-3395, dated May 30, 2019 (“Report”). OSC’s draft Report is based on multiple fundamental legal and factual errors, makes unfair and unsupported claims against a close adviser to the President, is the product of a blatantly unfair process that ignored statutory notice requirements, and has been influenced by various inappropriate considerations. As a result, the current Report would serve only to undermine public confidence in OSC and its procedures. At 5:00 pm on May 29, 2019, OSC provided the White House with a 17-page report raising numerous unsubstantiated allegations spanning many months, many of which had never been raised by OSC through the appropriate procedure. OSC then demanded a response by 9:00 a.m. the following morning. As you later acknowledged, OSC’s actions were prompted by your desire to respond to press questions concerning a media report that day about comments that Ms. Conway had allegedly made and by the purported personal “offense” that you took to those comments—even though you made no effort to investigate before rushing to judgment. OSC’s patently unreasonable demand for an overnight response, standing alone, shows that the Report was the product of a fatally flawed process.

Indeed, the Report is based on numerous grave legal, factual, and procedural errors. First, even assuming that the Hatch Act applies to the most senior advisers to the President in the White House, OSC has violated its statutory obligation to provide Ms. Conway a reasonable opportunity to respond, violated Ms. Conway’s due process rights, and abused its discretion by issuing a Report tainted by inappropriate external influences. Second, OSC’s overbroad and unsupported interpretation of the Hatch Act risks violating Ms. Conway’s First Amendment rights and chills the free speech of all government employees. In fact, OSC has no legal authority to promulgate guidance on social media use that it treats effectively as binding rules in order to enforce its overbroad interpretation of the Act. Third, contrary to your letter, Ms. Conway’s Twitter account and her media appearances do not violate even the standards used by OSC itself. Worst of all, OSC’s “call” upon the President “to remove Ms. Conway from her federal position immediately” is as outrageous as it is unprecedented. OSC’s overreaching recommendation is wholly unsupported by any statute or the Constitution. Additionally, it appears that OSC has not been applying its vague standards evenhandedly across Democratic and Republican administrations.

The White House takes seriously the principles codified in the Hatch Act and has continued to take affirmative steps to ensure compliance. At the same time, the White House must ensure that OSC exercises its significant authority in an appropriate and neutral manner. We also have a duty to safeguard the fundamental constitutional rights of not only White House employees, but all employees within the Executive Branch. Based on the numerous errors in the Report and the flawed process under which it was issued, we ask that you withdraw and retract the Report and continue the dialogue with this office that should have taken place and that could have avoided many of the errors in the current draft.

If you choose not to withdraw the Report, we will need additional information to prepare our full response. We ask that you provide this information, detailed below, by June 21, 2019. At a minimum, in fairness to Ms. Conway, release of the draft Report should wait until we have had the opportunity to provide a final response and OSC has had an opportunity to fully consider that response. You have assured us several times that you will review our response and incorporate it, provide whatever additional process is necessary, meet with us to discuss these matters, and refrain from a further rush to judgment.

Please contact us after you have reviewed this letter to discuss next steps, including whether you will withdraw the Report and, if not, when you will provide the information we request. I also ask that we meet as soon as possible and no later than June 26, 2019, to discuss the concerns raised in this letter.

I. OSC's Investigation And Conclusions Are Tainted By Lack of Due Process and Inappropriate External Influence.

The lack of due process that OSC provided in preparing this Report indicates a complete disregard for the fundamental rights of individuals serving in the Executive Branch and raises serious concerns regarding OSC's current investigatory practices. On May 29, 2019, at 5:03 pm, Ms. Ana Galindo-Marrone, Chief of the OSC Hatch Act Unit, sent the Report to the White House's Designated Ethics Official. After providing the Report, Ms. Galindo-Marrone requested any comments by 9:00 am the following morning (May 30), providing less than 16 hours overnight to respond to a 17-page report containing over a dozen allegations, spanning across more than 8 months. OSC had never before informed the White House or Ms. Conway that it was investigating many of the specific allegations in the Report. Moreover, when the White House first received the Report on May 29, OSC had already post-dated the Report to May 30, 2019—the date by which OSC had requested comments from the White House—indicating that OSC had no actual interest in conducting further investigation or analysis, regardless of any comments received from the White House or Ms. Conway. OSC's patently unreasonable demand for an overnight response to a report that had been months in the making failed to provide basic due process and also conflicted with the express statutory command that OSC is generally required to provide employees "a reasonable time to answer orally and in writing." 5 U.S.C. § 1215(a)(2)(A); *see also Schroder v. City of New York*, 371 U.S. 208, 211 (1962) (describing "notice" as "[a]n elementary and fundamental requirement of due process").

The White House had been actively engaging with OSC in a productive dialogue when OSC unilaterally, without notice, terminated those discussions by sending the Report to the White House, making the draconian and patently ridiculous recommendation that the President remove one of his closest advisers. OSC's position appears to be that this unilateral termination was justifiable because OSC had provided notice of each allegation contained in the Report. This is false. Not only did OSC fail to provide notice of each allegation, it also abruptly terminated, without explanation, a good faith dialogue with our office.

Officials from this office met with officials from your office on March 19 and then again on March 28, 2019. During these meetings, your issues relating to Ms. Conway focused on her use of Twitter, and we responded at the time by raising our legal and factual objections to your initial concerns. Your April 9, 2019 letter in response failed adequately to address our primary legal objection—that OSC has no authority to issue any regulation or binding guidance relating to social media use. *See* Letter from Ana Galindo-Marrone, Chief of Hatch Act Unit, to Michael M. Purpura, Deputy Counsel to the President (April 9, 2019) (discussing only OSC's authority to issue "advisory opinions"). Merely stating that OSC issued its social media guidance "[p]ursuant to our statutory authority"—without citing any statutory provision—is not a meaningful response. *Id.* at 1. As to her media appearances, although you raised questions about some of Ms. Conway's television appearances generally, you did not provide precise information about the specific media appearances addressed in the draft Report and stated that OSC had not received any formal complaints about media appearances. Notably, OSC's April 9 letter makes no mention of any media appearances by Ms. Conway. *Id.*

Faced with the stubborn truth that OSC failed to provide notice as to each allegation in the Report, OSC appears to suggest that, because it had previously contacted Ms. Conway and opined on potential Hatch Act violations in other contexts, she has been put on notice as to any and all allegations of Hatch Act violations that might arise. Of course, due process demands far more. If OSC received a formal complaint about each of the allegations in the Report, then the appropriate next step would have been to notify White House ethics officials, with whom OSC works on a regular basis, as well as Ms. Conway, regarding the full scope of these complaints in order to continue our ongoing dialogue. Rather than seeking a productive dialogue with the aim of achieving a resolution, however, OSC sent the post-dated Report, asking for comment overnight, with the clear implication that it was not genuinely interested in receiving or considering any response. This is certainly not due process and it is not a fair opportunity to respond.

OSC's hasty decision to finalize and send this Report is particularly troubling because, by OSC's own admission, it was prompted by inappropriate external influences that should have no bearing on the work of "an independent federal investigative and prosecutorial agency." Office of Special Counsel, "What We Do," available at <https://osc.gov/Pages/WhatWeDo.aspx>. OSC acknowledges that its practice in the past has been to provide notice concerning specific allegations and to engage in discussions to reconcile differences in our interpretation of the law and application of the law to the facts. Here, by contrast, OSC has acknowledged that its decision to rush the Report out the door without the usual process was a reaction to a media report on the morning of May 29 regarding a passing comment by Ms. Conway—a comment that is not itself alleged to be a Hatch Act violation. After admitting that OSC relied solely on the media report to assess Ms. Conway's comment, you specifically said that the Office had to act quickly because it had been

receiving press inquiries and had to be mindful of interest from politicians outside of the Office. This is deeply troubling. As an independent federal agency, OSC has a duty both to remain impartial and to maintain both the appearance and the reality of remaining impervious to external political and media influence. *D.C. Fed'n of Civic Assn's v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (reversing a decision of the Secretary of Transportation upon finding “extraneous pressure intruded into the calculus of considerations on which the Secretary’s decision was based”); *ATX, Inc. v. U.S. Dep’t of Transp.*, 41 F.3d 1522, 1528 (D.C. Cir. 1994) (“We are concerned when congressional influence shapes the agency’s determination of the merits.”); *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220 (D.C. Cir. 2011) (“[P]olitical pressure invalidates agency action only when it shapes, in whole or in part, the judgment of the ultimate agency decisionmaker.”).

The most alarming fact is that personal pique appears to have influenced the outcome of this investigation, including the decision to make the extraordinary recommendation that the President remove one of his closest advisors. The first paragraph of the Report focuses exclusively on Ms. Conway’s comment as reported earlier on the morning of May 29 and bases the decision to recommend termination on that comment. After OSC sent the Report to the White House, representatives of this office spoke with you on the phone regarding your unreasonable request to receive a response overnight. While explaining why OSC needed a response overnight, you explained that, not only did you feel a strong external pressure to release the Report, but that you also personally “took great offense” to Ms. Conway’s comment and repeatedly complained about the level of “disrespect” towards OSC that you perceived in that comment. OSC again made no effort to reach out to the White House to verify Ms. Conway’s reported comment or seek any clarifying or contextual information from Ms. Conway before sending the Report. Setting aside the reality that Ms. Conway’s comment was taken out of context, the fact that personal bias and the desire to respond to a media article apparently prompted the decision to release the Report seven hours later eviscerates the credibility of the Report, including its conclusions and unprecedented and unwarranted recommendation.

II. OSC’s Overbroad and Unsupported Interpretation of the Hatch Act Likely Violates First Amendment Rights.

A. Statutory text and implementing regulations are binding.

The text of the Hatch Act makes clear that any limitation on a federal government employee’s political speech should be narrowly construed and based on express prohibitions. The Hatch Act begins by declaring: “It is the policy of the Congress that employees should be encouraged to exercise fully, freely, and *without fear of penalty or reprisal*, and to the extent not *expressly* prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation.” 5 U.S.C. § 7321 (emphasis added). The Act also makes clear that “[a]n employee retains the right . . . to express his opinion on political subjects and candidates.” 5 U.S.C. § 7323(c). Consistent with the text of the statute, the Supreme Court has explained that “the Hatch Act aimed to protect employees’ rights, notably their right to free expression, rather than to restrict those rights.” *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 471 (1995).

Accordingly, the Hatch Act’s prohibitions are limited. The Act prohibits, among other things, a federal employee 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). Further, the Act prohibits an employee from engaging in “political activity” under specific circumstances. 5 U.S.C. § 7324(a). “Political activity,” as defined by regulation, is “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.” 5 C.F.R. § 734.101. Neither the statute nor any implementing regulations specifically addresses many of the allegations at issue here.

B. OSC’s guidance was issued without statutory authority and cannot be treated as binding.

In the absence of specific guidance on social media accounts in the statute or implementing regulations, OSC has attempted to unilaterally impose its overbroad social media guidance as binding authority. The Hatch Act does not specifically address activities on social media. Nor has the Office of Personnel Management (“OPM”)—the entity with the authority to issue “regulations describing the political activities which are permitted and prohibited under the Hatch Act”—specifically addressed social media use in its regulations. *See* 5 C.F.R. § 734.102. In the absence of statutory or regulatory language, OSC issued its own purported “rules” governing social media use in February 2018. *See* Office of Special Counsel, “Hatch Act Guidance on Social Media” (Feb. 2018) (containing nineteen separate “rules” that limit employees’ social media use).¹

OSC has no authority to issue binding rules that effectively function as Hatch Act regulations, particularly when those rules significantly restrict employees’ First Amendment rights. On March 28, 2019, the White House raised its concern about OSC’s lack of authority to promulgate such rules as well as the lack of transparency as to how it created these rules. None of the rules outlined in the social media guidance was subject to public notice and comment under the Administrative Procedure Act, 5 U.S.C. § 553. Instead, it appears that these rules were subject only to an internal process within OSC involving OSC’s own employees.

OSC acknowledged in its April 9, 2019, letter that it “has authority to issue advisory opinions,” but did not address the distinction between issuing advisory opinions concerning the applicability of 5 C.F.R. part 734 to particular facts (as OSC is authorized to do in 5 C.F.R. § 734.102(a)) and issuing “regulations describing the political activities which are permitted and prohibited under the Hatch Act,” which is the proper purview of OPM, as clearly stated in 5 C.F.R. § 734.102(c). OSC’s effort to promulgate so-called “rules” concerning social media exceeds OSC’s statutory authority and improperly usurped the authority of OPM.²

This issue was addressed by the Department of Justice’s Office of Legal Counsel (“OLC”) in a February 2, 1994 opinion for OSC’s Deputy Special Counsel. *Authority for Issuing Hatch Act Regulations*, 18 Op. O.L.C. 1 (1994). In that opinion, OLC examined whether OSC or OPM had the authority to promulgate regulations delimiting the scope of impermissible political activities under the Hatch Act Reform Amendments of 1993. After a review of precedent, the statutes outlining the responsibilities of OPM and OSC under the Hatch Act, and the text and legislative

¹ Available at <https://osc.gov/Resources/HA%20Social%20Media%20FINAL%20r.pdf>.

² OSC is empowered by statute to investigate Hatch Act violations. 5 U.S.C. § 1216(a). OSC may issue advisory opinions concerning the applicability of 5 C.F.R. part 735 pursuant to 5 U.S.C. § 1212(f) and 5 C.F.R. § 734.102(a).

history of the Hatch Act Amendments, OLC concluded that OPM, not OSC, possessed the authority to promulgate regulations explicating the Hatch Act as amended. OLC determined that the division of Hatch Act authority between OPM and OSC “flows from clear statutory pronouncements” and “[t]he legislative history of the Hatch Act Amendments fortifies the conclusion that Congress approved of OPM’s traditional obligation to issue Hatch Act regulations.” *Id.* at 3, 5. OLC further concluded that Congress clearly rejected the idea that OSC has rule-making authority. *Id.* at 5. Remarkably, even an OLC opinion clearly explaining that OSC lacks authority to issue additional rules beyond the statute and OPM regulations has not stopped OSC from attempting to impose its own set of “rules,” without authority or a transparent process, to the detriment of Executive Branch employees’ constitutional rights.

C. OSC’s guidance is overbroad and chills protected speech.

OSC’s unilateral and untested social media guidance is not only wholly unauthorized, it is also overbroad under existing law. According to OSC, “the Hatch Act prohibits an employee from engaging in political activity on a personal social media account if the employee also uses that account for official purposes.” Report at 13. OSC provides no citation to the statute or any regulation for this proposition, which appears to be consistent only with its own social media guidance. Office of Special Counsel, “Hatch Act Guidance on Social Media” (“OSC Social Media Guidance”), at 8.³ OSC asserts that, based on this alone, Ms. Conway violated the Hatch Act’s prohibition against using her “official authority or influence for the purpose of . . . affecting the result of an election” by allegedly using her Twitter account, “@KellyannePolls,” for both official and political purposes. Report at 13-15. OSC’s rationale appears to be that having one social media account in which some posts contain officially related activity and other posts contain political activity per se constitutes using “official authority or influence” to affect an election result.

Examining the facts of Ms. Conway’s personal Twitter account highlights the absurdity of OSC’s overbroad and unsupported social media guidance. Ms. Conway created her personal Twitter account in 2012, many years before she entered government service. Since establishing her account, and long before joining the Administration, she has been a prolific Twitter user, posting regularly on public policy and political issues. That Ms. Conway has continued to be a prolific Twitter user since joining the Administration, commenting on public policy and political issues as she did before, is unremarkable. In fact, she is constitutionally entitled to continue to comment in her personal capacity after entering public service. *See* U.S. Const. amend. 1; 5 U.S.C. § 7323(c). Therefore, even assuming *arguendo* that some posts on her Twitter account were for “official purposes,” which is not accurate, that alone cannot establish that she somehow uses her official authority when making separate and unrelated personal posts. Such a broad interpretation of the law would impermissibly prohibit Ms. Conway from continuing to make comments in her personal capacity through a personal media distribution channel she had established long before entering public service.

Moreover, OSC’s interpretation is particularly problematic here because Ms. Conway does *not*, in fact, use her Twitter account for any “official purpose.” She does not issue press releases,

³ Available at <https://osc.gov/Resources/HA%20Social%20Media%20FINAL%20r.pdf>.

press statements, or any other original White House content using her personal Twitter account. Neither does she currently use her official title or position. Despite this, OSC's position appears to be that Ms. Conway's personal Twitter account must be considered an official communications tool because she has used this personal account to post materials related to the Administration's official activities—precisely the type of public policy and political issues on which she commented long before she entered the Administration. Ms. Conway does not surrender her First Amendment right to comment on these same topics in her personal capacity, using her personal social media account, simply because she answered the call to serve in our federal government. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 572-73 (1968) (discussing importance of government employees' ability "to speak out freely on" public policy "without fear of retaliatory dismissal"). This is, however, precisely what OSC's current social media guidance demands. By making such an extraordinary determination, OSC has overreached in its interpretation of the Hatch Act. Such a construction has a chilling effect on all federal employees whose fundamental First Amendment right to engage in political and public policy discussions should not be compromised based solely on OSC's guidance.

III. Ms. Conway's Personal Twitter Account Does Not Violate OSC's Non-Binding Guidance.

Straining to find any "official activity" on Ms. Conway's Twitter account, OSC further stretches its "rules" in an attempt to unlawfully police federal employees' personal social media accounts. OSC's own guidance appears to prohibit using a personal social media account for political purposes if it creates even a perception that the account is "being used in ways that suggest it is an official social media account." OSC Social Media Guidance, at 8. The factors OSC considers in determining whether an account may be "perceived" as an official account include the following: (1) the account contains little to no personal content; (2) the account identifies the individual as a federal employee; (3) the account extensively uses photographs of the employee's official activities; (4) the account often references, retweets, likes, comments, or otherwise shares material related to official activities; or (5) the account is linked to an agency website or other official page.⁴ Even assuming the validity of considering these factors as a standard, Ms. Conway's personal Twitter account does not violate OSC's non-binding guidance.

First, Ms. Conway's Twitter account includes significant personal content, including many political posts. For example, from January 2018 until present, Ms. Conway has posted over 450 posts on her personal account. Over 200 posts are retweets of major media outlets. The subject matter of these retweets varies—including political matters, conservative issues, and media analysis of Administration policies. That is entirely consistent with Ms. Conway's previous use of her personal Twitter account from before she entered government service. In addition, there are a number of posts completely unrelated to political or government matters. For example, Ms.

⁴ OSC's guidance was reissued in February 2018 during the course of the current Administration. It added the "rule" on "Misusing Personal Social Media Accounts." *See Id.* OSC's previous guidance on social media accounts issued in 2015, which consisted of "Frequently Asked Questions" posted on its website, did not contain this "rule". *See Office of Special Counsel, "OSC Updates Hatch Act Guidance for Social Media," available at <https://osc.gov/News/pr15-23.pdf>.*

Conway has posts related to sports⁵ and birthday wishes.⁶ It therefore strains credulity to conclude, as OSC has done, that there is “little content that would be considered personal.” Letter from OSC to Ms. Conway, Counselor to the President, Re: OSC File No. HA-19-0631, at 2 (Dec. 20, 2018).

Second, Ms. Conway’s personal Twitter account does not identify her by her government title.⁷ Although her account did so in the past, it was blessed by other OSC guidance that specifically allowed employees to “include your official title or position and where you work in your social media profile” and to engage in political activity on a personal social media account. Office of Special Counsel, “Hatch Act Social Media Quick Guide” (Feb. 2018).⁸

Third, Ms. Conway’s account does not extensively use photographs or videos of her official activities. A review of the posts made by Ms. Conway in 2018 indicates that less than 10 percent include photographs or videos that may be related to her official duties. Additionally, the majority of posts that do include images related to her official duties are retweets of media interviews and articles rather than original official Administration content.

Fourth, Ms. Conway’s account does not often reference, retweet, like, comment, or otherwise share materials related to her official activities. Again, although there are some retweets of other Administration officials’ posts, these retweets do not constitute a large percentage of Ms. Conway’s overall Twitter posts. Of the more than 450 posts on @KellyannePolls from 2018, approximately fifty were retweets of other Administration officials’ posts. This constitutes approximately 11% of her posts for the year. And even these tweets concern policy topics that Ms. Conway has long believed to be important, including well before she became a federal employee.

In sum, Ms. Conway’s use of her personal Twitter account does not violate *any* of the factors OSC identifies as guideposts in its non-binding guidance documents.

IV. Ms. Conway’s Media Appearances Do Not Violate The Hatch Act.

OSC attempts to characterize Ms. Conway’s media appearances as violating the Hatch Act because, OSC alleges, she “repeatedly commented on 2020 presidential candidates during official media interviews.” Report at 6. As an initial matter, the Hatch Act’s prohibition on using official authority or influence to affect the result of an election is not violated by simply commenting on an individual who is running for office. Such an interpretation goes well beyond a reasonable construction of the statute and is at odds with the narrow construction typically given to restrictions on First Amendment-protected activities. After all, there are currently U.S. senators and representatives, as well as governors, all running for President. Several of these individuals have announced affirmative policy proposals that they are also supporting in their current positions. Unsurprisingly, these candidates almost uniformly oppose and criticize the President’s own policy initiatives. That is merely a feature of the way robust political debate operates in our country. It

⁵ A review of her Twitter account from January 2018 reveals at least 10 posts specific to the Philadelphia Eagles.

⁶ See, e.g. <https://twitter.com/KellyannePolls/status/1004862119991566336>.

⁷ See https://twitter.com/KellyannePolls?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor.

⁸ Available at <https://osc.gov/Resources/Social%20Media%20Quick%20Guide%20FINAL%20r.pdf>.

cannot supply a basis for prohibiting an adviser to the President from commenting on a competing policy proposal or the individual who offers it simply because that individual is also running for President.

Prior OSC guidance acknowledges this general principle. “Absent evidence that the criticism or praise is [directed at the success or failure of a political party, candidate for partisan political office, or partisan political group], criticism or praise of an administration’s policies and actions is not considered political activity.” Office of Special Counsel, “Guidance Regarding Political Activity” (Nov. 27, 2018). Therefore, political activity does not include merely criticizing policy proposals offered by aspiring candidates who hope to implement them in a future administration. Any other rule would not adequately allow the President’s advisers to defend his policy positions, to criticize conflicting policy proposals, and to engage in policy commentary.⁹ This includes comments that may concern matters on which opinion is politically divided or that may have collateral partisan consequences. *Cf. Payment of Expenses Associated with Travel by the President and Vice President*, 6 Op. O.L.C. 214, 217 (1982) (discussing mixed official/private nature of Presidential campaign trips).

Even applying OSC’s overbroad interpretation of the Hatch Act, the Report’s criticism fails on its own terms. OSC places significant weight on the fact that Ms. Conway discussed Democratic candidates by name in response to questions. Report at 6. But in most of the cases cited in the Report, Ms. Conway was prompted by news anchors to comment on Democratic politicians.¹⁰ And in every case, Ms. Conway actively pivoted the conversation back to the discussion of policy ideas ranging from combating the opioid crisis, to securing the border, to defeating ISIS. Even where Ms. Conway did comment on Democratic politicians, she spoke about Democrats in general terms as having no substantive policy proposals. For example, in her April 22 interview, Ms. Conway stated that it was irrelevant how many candidates entered the Democratic primary race, because they all had poor policy proposals: “I would just remind everyone simple math, whether it’s one, whether it’s 19, whether it’s 50, anything times zero equals zero, simple multiplication, so 50 Democrats can run, 19 are now running, but if your message is zero, it’s a big zero.”¹¹ And where she criticized anyone specifically by name, she did so by criticizing the poor policy proposals—or absence of policy proposals—associated with them. Again, in her April 24 interview, Ms. Conway again focused on policy proposals: “Bernie Sanders has a lot in common with Donald Trump, which is he doesn’t really care about what his party

⁹ In a related context, OSC has acknowledged that discussion of public policy matters is not political activity. See Office of Special Counsel, Federal FAQs, available at <https://osc.gov/Pages/HatchAct-FAQs.aspx> (“The Hatch Act does not prohibit employees at any time, including when they are at work or on duty, from expressing their personal opinions about events, issues, or matters.”); *id.* (“[E]mployees may express their opinions about current events and matters of public interest at work so long as their actions are not considered political activity. For example, employees are free to express their views and take action as individual citizens on such questions as referendum matters, changes in municipal ordinances, constitutional amendments, pending legislation or other matters of public interest, like issues involving highways, schools, housing, and taxes.”).

¹⁰ Even where reporters did not ask Ms. Conway to comment on specific Democratic politicians by name, they repeatedly did so by referencing topics that could only be reasonably interpreted as requests for comments on specific politicians.

¹¹ Anna Hopkins, *Kellyanne Conway: Trump Can’t be Impeached by an Investigation Democrats Started*, Fox News (Apr. 22, 2019), available at <https://www.foxnews.com/politics/kellyanne-conway-trump-impeachment-democrats>.

thinks about his candidacy at this point in the primaries. . . . The only difference between Bernie Sanders and Donald Trump is Bernie Sanders' ideas are terrible for America."¹²

But OSC did not contact Ms. Conway for comment on these or any other statements referenced in the Report. If it had, it would have seen that these interviews, taken as a whole, focused predominately on policy conversations and included marginal references to specific Democratic politicians—often at the very end of these interviews.

A case in point is OSC's blanket refusal to inquire into the context of Ms. Conway's alleged retort to a reporter, "Let me know when the jail sentence starts," which served as the transparent impetus for the hasty release of OSC's Report. Report at 1. In fact, this statement occurred at the end of a lengthy substantive exchange between Ms. Conway and a reporter regarding the mechanics of the Hatch Act.¹³ In a series of questions, Ms. Conway asked the reporter if he could "tell me what the Hatch Act is and how one violates it? You can look down at your notes." During this line of questioning, Ms. Conway explained how prior criticism of her media appearances failed to assess her statements in context. After further questions, Ms. Conway complained that the reporter's questions were a failed attempt to chill her protected speech, saying, "If you are trying to silence me for the Hatch Act, it is not going to work." It was in this context that she asked *the reporter* to identify "when the jail sentence starts," in an effort to highlight her view of the reporter's lack of knowledge about the Act. But she emphatically did not "scoff[] at her responsibilities under the Hatch Act and ridicule[] its enforcement." Report at 1.

V. OSC Has Politicized Its Role By Failing To Apply Its Standards In An Evenhanded Manner Across Administrations.

Vague standards invite abuse. The opaque manner in which OSC has drafted and applied its standards on political activity has led to the inevitable abuse of discretion. Unfortunately, OSC's overreaching in its efforts to target Ms. Conway, combined with its history of refusing to apply its policies evenhandedly to the prior Democratic administration, create the impression that OSC is attempting to tilt the political playing field and to inject itself into partisan politics.

For example, during the Obama Administration, Press Secretary Josh Earnest made a lengthy and vitriolic statement attacking then-candidate Trump during the Presidential campaign while speaking to reporters in his official capacity from the podium of the White House briefing room. When asked why OSC did not file a complaint or author a report on this incident, the Office merely stated that the public had not complained about his egregious behavior. But the whole point of vesting an independent agency with the authority to investigate and report on violations of the Hatch Act is to eliminate the bias that bears down on politically targeted individuals and to ensure that the law is applied evenhandedly. The disparate treatment of Mr. Earnest and Ms. Conway violates traditional notions of fairness.

¹² Talia Kaplan, *Kellyanne Conway to Democrats: 'Are you going to talk for the rest of 2019 into 2020 about impeachment or infrastructure?'*, Fox News Channel (Apr. 24, 2019), available at <https://www.foxnews.com/politics/kellyanne-conway-to-democrats-are-you-going-to-talk-for-the-rest-of-2019-into-2020-about-impeachment-or-infrastructure>.

¹³ See *Kellyanne Conway Remarks to Reports*, C-Span (May 29, 2019), available at <https://www.c-span.org/video/?461193-1/kellyanne-conway-defends-president-trumps-criticism-joe-biden>.

VI. Requests For Responses And Additional Information.


Again, in light of the many significant issues discussed in this initial response, I reiterate our request that OSC withdraw and retract its Report. If the OSC chooses not to do so, the White House will need additional information to consider fully and fairly each of the allegations and OSC's conclusions. Accordingly, we ask that you provide the following information by June 21, 2019.

1. OSC's entire investigation files relating to the Report;
2. All internal correspondence relating to the Report and any underlying investigation;
3. All external correspondence relating to the Report and any underlying investigation;
4. Internal policies and procedures relating to the Report and any underlying investigation, including policies and procedures on initiating an investigation generally, on investigating White House employees specifically, and on issuing social media guidance related to the Hatch Act; and
5. Copies of all OSC and other documents relied upon in drafting the Report.

* * *

We reiterate that the White House takes seriously the principles codified in the Hatch Act, which respects and protects the First Amendment rights of federal employees. 5 U.S.C. § 7323(a). We ask OSC to do the same. Just recently in March, all White House Office employees were trained on Hatch Act compliance as part of the Office's mandatory annual ethics training. In May, we distributed updated written guidance on employee political activities to all White House Office employees. We are also offering ongoing specialized training on Hatch Act obligations.

At the same time, the White House is also committed to ensuring that OSC exercises its significant authority in an appropriate and neutral manner and without infringing on the fundamental First Amendment rights of all federal government employees. OSC's apparent timing and motivation behind issuing the Report as well as the substance of the Report's analysis and recommendation raise serious questions about OSC's commitment to the principles codified in the Hatch Act. We look forward to reviewing the responses and documents requested above and to meeting in person as soon as possible to discuss our concerns.

Sincerely,

Pat A. Cipollone
Counsel to the President

cc: Ana Galindo-Marrone, Chief, Hatch Act Unit
Susan K. Ullman, General Counsel