



November 29, 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:

Last week, on November 22, 2017, the Campaign Legal Center (CLC) filed a Hatch Act complaint by electronic mail with the U.S. Office of Special Counsel (OSC) against Senior Counselor to the President Kellyanne Conway. That same day, OSC acknowledged receipt and indicated that it would open a file on this matter. This letter is to provide you with a formal version of the complaint on CLC letterhead. This updated version includes minor revisions and new information not contained in the original complaint.

On Monday, November 20, 2017, Ms. Conway appeared on “Fox and Friends” for an interview in her official capacity. During the interview, she was introduced with her official government title and she stood in front of the White House while unlawfully advocating against a candidate who is running in a partisan election for political office. Specifically, Ms. Conway advocated against the election of Doug Jones, who is running as a major party candidate for U.S. Senate in Alabama. These actions violate the Hatch Act.

The facts of this matter are not in dispute, for Ms. Conway’s advocacy was recorded and distributed publicly to a broad television audience. The following is an excerpt from Conway’s interview with “Fox & Friends” hosts Brian Kilmeade, Ainsley Earhardt, and Steve Doocy:¹

¹ This transcript represents only a good faith effort by CLC to reduce the discussion to writing based solely on watching the video and hearing the audio. In making its determination OSC should rely on the actual video. *Video available at Fox & Friends, “Conway on Roy Moore: A Vote for Doug Jones in Alabama Is a Vote Against*

KILMEADE: Kellyanne Conway, she's the **Counselor to the President of the United States**. She joins us from our nation's capital on this Monday of Thanksgiving week. Kellyanne, good morning.

EARHARDT: Good morning.

CONWAY: Good morning.

KILMEADE: All right. So the President tweeted out yesterday, "Hey Congress, don't disappoint the American people, on tax reform. How close are we to finally getting a tax cut?"

CONWAY: We feel very confident but it is up to those legislators, who for years if not decades, have been promising their constituents they're going to get meaningful tax cuts and tax overhaul. And we're very happy that the House and Senate have come up with what I call Trump speed, not swamp speed in getting their bills to the floor fairly quickly. We feel really great that both bills adhere to the President's four core principles for tax cuts and tax relief: repatriation, simplification, middle class tax cut and reducing that corporate tax rate so that we're below the average for developed countries instead of the highest in the entire OECD. So we feel great. My colleagues and I have been traveling around the country, as has the President, and up on Capitol Hill constantly. This one feels like everybody's oriented in the same direction. And to your point about the Democrats, the President has said from day one, he wants tax cuts to be bipartisan. That's a question for the Democrats. Surely there are business owners and taxpayers, and property owners, moms and dads, and moms and pops in every state in this country who feel they deserve a tax cut—

KILMEADE: But Kellyanne, the Democrats—

Tax Cuts," FOX NEWS (Nov. 20, 2017), <http://insider.foxnews.com/2017/11/20/kellyanne-conway-roy-moore-vote-doug-jones-alabama-vote-against-tax-cuts>.

CONWAY: Petty partisan politics will not get in the way.

KILMEADE: But partisan politics is getting in the way.
And Democrats don't want to give the President a win.

CONWAY: That's too bad because it's a win for the American people. This is not about a win for the President. This is about giving the forgotten man and forgotten woman who put this man in office because they've been forgotten for decades through regulation and taxation and just the overbearance of a government that's too intrusive, invasive, expensive and expansive. This is for them. And this is not about giving the President a win, that's silly. He's the President. He won its—tell Hillary Clinton by the way, p.s.—but this is about people winning and I really, I do hope in the legacy of Presidents John Kennedy, Ronald Reagan, George W. Bush even, who achieved a much smaller tax cut, that we have bipartisan support. I think the Democrats are in big trouble because they have to defend twenty-five Senate seats next year. Ten in states the President won, five he won by massive double digits. They're going to go home and say when I had a chance to give you more of your hard earned money, give you a childcare tax credit, an adult dependent—double your personal exemptions so your first twenty-four thousand dollars is completely tax free at zero percent, they're going to say, but I didn't do it because of X, Y, Z when we know is for petty partisan political reasons. **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.**

KILMEADE: So vote Roy Moore?

CONWAY: **And Doug Jones is a doctrinaire liberal, which is why he's not saying anything and why the media are trying to boost him.**

KILMEADE: So vote Roy Moore?

CONWAY: **I'm telling you that we want the votes in**

the Senate to get this tax, this tax bill through. And the media—if the media were really concerned about all these allegations and that was what this was truly about with the Democrats, Al Franken would be on the ash heap of bygone, half-funny comedians. He wouldn't be here on Capitol Hill. He still has his job. What's Bob Menendez doing back here? That's the best my state of New Jersey can do? Huh, Doocy? You live there.

DOOCY: But but I'm just saying—

CONWAY: Let me tell you something, Doug Jones is a doctrinaire liberal.

DOOCY: —the RNC has withdrawn support for Roy Moore.

CONWAY: Excuse me?

DOOCY: But the RNC has withdrawn support for Roy Moore. Mitch McConnell has withdrawing support. So has the Young Republicans, withdrawn support for Roy Moore.

EARHARDT: And a lot of women.

CONWAY: (pause) **Right. And you know what? The—I just went over the no to Doug Jones. Nobody ever says his name. And they pretend he's some kind of conservative Democrat in Alabama, and he's not.**

Conway spent the next seven minutes of the eleven-minute interview discussing matters relevant to White House positions and initiatives.

Ms. Conway's remarks were an obvious attempt to influence the election by convincing the public that voting for Doug Jones would jeopardize passage of the tax plan the President endorsed. The unmistakable message of her remarks was: Don't vote for Doug Jones. Indeed, this message is specifically highlighted in the

Fox News headline summarizing Conway's remarks: "Conway on Roy Moore: A Vote for Doug Jones in Alabama Is a Vote Against Tax Cuts."²

As the U.S. Office of Special Counsel explained in a report finding that Secretary Julian Castro had violated the Hatch Act,³ 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). The attendant Hatch Act regulation gives examples of the type of activity this prohibition encompasses. For example, 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.

While the Hatch Act allows federal employees, including cabinet secretaries and White House appointees, to express their personal views about candidates and political issues as private citizens, it restricts employees from using their official government positions for partisan political purposes. In passing this law, 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. In a letter to the President, OSC provided the following summary of its findings with regard to Secretary Castro:

As explained in the accompanying report, OSC concluded that Secretary Castro violated the Hatch Act 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.⁴

The salient facts of the matter involving Secretary Castro mirror those of the matter involving Ms. Conway. Factors relevant to OSC's analysis were the fact that Secretary Castro was introduced with his official title, the official seal of the Department of Housing and Urban Development appeared behind him, and he spent seven minutes of the interview speaking about official programs and

² Fox & Friends, "Conway on Roy Moore: A Vote for Doug Jones in Alabama Is a Vote Against Tax Cuts," Fox News (Nov. 20, 2017), *supra* note 1.

³ 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).

⁴ *Id.* at 1.

initiatives.⁵ Ms. Conway's actions are indistinguishable from Secretary Castro's. Ms. Conway was introduced with her official title, the White House appeared behind her, and she spent seven minutes talking about official programs and initiatives.

The one distinction is that Secretary Castro at least attempted to clarify that he was speaking in his personal capacity while Ms. Conway offered no such clarification.⁶ In this regard, Ms. Conway's actions were worse than Secretary Castro's actions. OSC held Secretary Castro accountable for violating the Hatch Act, and should similarly hold Ms. Conway accountable.

Subsequent to the filing of CLC's response, the White House reportedly issued a public statement concerning the matter. CNN published the following report regarding that statement:

White House spokesman Raj Shah responded with a statement, saying, "Ms. Conway did not advocate for or against the election of a candidate, and specifically declined to encourage Alabamans to vote a certain way. She was speaking about issues and her support for the President's agenda. This election is for the people of Alabama to decide."⁷

Notwithstanding this attempt to undo Ms. Conway's violation of the law by suggesting the White House wants to leave the decision to the people of Alabama, the statement reads more like an admission than a defense. Doug Jones is not a sitting U.S. Senator. The only relevance Doug Jones has to the President's agenda is that he is running for the Senate, and that if he were to win, he could impact the success of the President's agenda. The discussion excerpted above between Ms. Conway and the hosts of *Fox and Friends* focused precisely on the question of whether the President has enough votes in the Senate to get his tax bill through Congress. OSC should consider the fact that, if Jones loses his bid for Senate, he will have no continuing relevance to the "President's agenda" cited by Shah.

In the context of Shah's reference to the "President's agenda," OSC should also consider the fact that the President supports Jones's Republican opponent for

⁵ *Id.* at 5-6.

⁶ 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.

⁷ 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>.

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Chief, Hatch Act Unit
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Senate.⁸ Significantly, an article published today in *Politico* alleges a link between the President's support of Moore and Conway's advocacy against Jones:

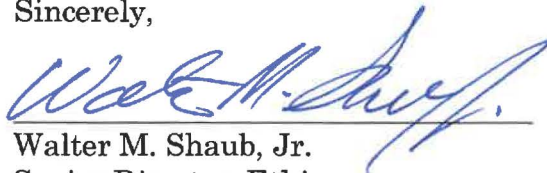
The president has also expressed frustration that more pressure isn't being put on Moore's Democratic opponent, former U.S. Attorney Doug Jones. With so much coverage being paid to the Moore accusations, Jones has gotten an easy ride, Trump has vented. Last week, he gave White House counselor Kellyanne Conway personal approval to criticize Jones during an interview on "Fox and Friends."⁹

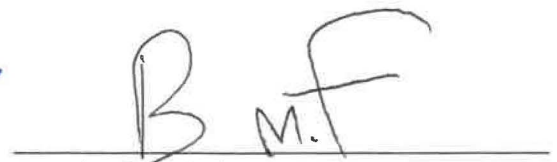
Though this new information was not needed to establish a violation of the Hatch Act, the *Politico* article reinforces the validity of CLC's complaint.

This letter supplements and amends CLC's original complaint, which I submitted in an informal format by email in order to accomplish filing prior to the Thanksgiving holiday. However, the message remains the same: 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 investigation and find that Ms. Conway has violated the Hatch Act.

I close with the words of Special Counsel Henry Kerner when challenged the previous administration for its handling of Hatch Act violations: "The law is clear: public officials paid by taxpayers cannot use their position to engage in political activities."¹⁰ This case presents as clear a violation by a senior administration appointee as OSC is likely to encounter in the next five years, and it is up to OSC to challenge that violation as vigorously as Special Counsel Kerner challenged violations in the previous administration.

Sincerely,


Walter M. Shaub, Jr.
Senior Director, Ethics


Brendan M. Fischer
Director, Federal and FEC Reform Program

Enclosure

⁸ Jake Novak, *Trump resurrects Moore and embarrasses McConnell again*, CNBC (Nov. 29, 2017), <https://www.cnbc.com/2017/11/29/trump-resurrects-moore-and-embarrasses-mcconnell-again-commentary.html>.

⁹ Alex Isenstadt, *Trump weighs 11th-hour boost for Roy Moore*, POLITICO (Nov. 29, 2017), <https://www.politico.com/story/2017/11/29/trump-roy-moore-alabama-senate-267825>.

¹⁰ 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/>.

TONIGHT, 9:00pm ET: Sean Hannity talks Trump's agenda, North Korea and more with Sean Spicer. (<http://insider.foxnews.com/2017/11/29/conyers-accusers-mike-rowe-sean-spicer-mitch-mcconnell-fox-news-channel-tonight>)

Conway on Roy Moore: A Vote for Doug Jones in Alabama Is a Vote Against Tax Cuts

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Nov 20, 2017 // 9:40am

As seen on Fox & Friends (<http://insider.foxnews.com/show/fox-and-friends>)

Herschel Walker on Marshawn Lynch Sitting for Anthem: You 'Never' Protest the Anthem (/2017/11/20/herschel-walker-marshawn-lynchs-anthem-protest-insulting)

Judge Pirro: I'm Tired of the Clintons & Powerful People Being Above the Law (/2017/11/19/judge-jeanine-pirro-tired-clintons-powerful-people-being-above-law)

Kellyanne Conway warned Alabama voters this morning that a vote for Democrat Doug Jones in the special U.S. Senate election would be a vote against tax cuts.

The White House counselor stopped short, however, of offering explicit support for Republican Roy Moore (/tag/roy-moore), who is facing several allegations (/2017/11/13/second-woman-accuses-roy-moore-sexual-assault-when-she-was-minor) of sexual misconduct, including pursuing a relationship with a 14-year-old girl when he was in his 30s.

Moore has denied the allegations and resisted calls for him to end his campaign.

"Folks, don't be fooled. [Doug Jones] will be a vote against tax cuts," said Conway in a "Fox & Friends" interview.

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