

August 12, 2020

The Honorable Henry Kerner  
Special Counsel  
Office of Special Counsel  
1730 M Street, N.W.  
Suite 218  
Washington, D.C. 20036-4505

Re: Guidance Regarding President Trump's Convention Speech on Federal Property

Dear Mr. Kerner:

Citizens for Responsibility and Ethics in Washington ("CREW") respectfully requests that the Office of Special Counsel ("OSC") issue public guidance on Hatch Act compliance to the White House and other relevant agencies related to President Trump's proposed use of federal property to deliver a political speech during the Republican National Convention. While President Trump is exempt from the Hatch Act, his acceptance of the Republican Party's nomination for president on federal property could have wide ranging implications for White House staff and other federal employees bound by the statute, as well as create significant financial liabilities for the Republican Party or the Trump campaign to reimburse taxpayer funds spent on the partisan event. OSC's public guidance is critical to ensuring that the President does not use taxpayer money to pay for a political speech and that Congress and the American public have the information necessary to hold him accountable if he does.

**Factual Background**

On August 10, 2020, President Trump announced that he would choose between two federal properties to deliver his speech accepting the Republican Party's nomination to serve as President of the United States.<sup>1</sup> He stated in a tweet:

We have narrowed the Presidential Nomination Acceptance Speech, to be delivered on the final night of the Convention (Thursday), to two locations - The Great Battlefield of Gettysburg, Pennsylvania, and the White House, Washington, D.C. We will announce the decision soon!<sup>2</sup>

The Gettysburg battlefield is a National Military Park which has been owned and maintained by the federal government since 1895.<sup>3</sup> Administration of the park was transferred to the Department of the Interior's National Park Service in 1933.<sup>4</sup> Prior to this announcement,

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<sup>1</sup> Caitlin Oprysko, Trump Says he will Deliver Nomination Speech from Either the White House or Gettysburg, *Politico*, Aug. 10, 2020, <https://politi.co/30LHTED>.

<sup>2</sup> Donald J. Trump (@realDonaldTrump), Twitter (Aug. 10, 2020), <https://twitter.com/realDonaldTrump/status/1292872318562205699>.

<sup>3</sup> National Park Service, Gettysburg, National Military Park Pennsylvania, History & Culture, <https://www.nps.gov/gett/learn/historyculture/index.htm>.

<sup>4</sup> *Id.*

President Trump suggested he was considering giving his nomination acceptance speech from the White House.<sup>5</sup> Those comments “drew sharp criticism from many Democrats and some Republicans due to the legal and ethical concerns of using federal property for a political event.”<sup>6</sup>

President Trump has routinely used official White House resources for campaign-style events and, under his leadership, senior administration officials have violated the Hatch Act with alarming frequency.<sup>7</sup> To date, OSC has found at least 13 senior Trump administration aides in violation of the Hatch Act.<sup>8</sup> Several more are currently under investigation, and the President has repeatedly attacked and dismissed concerns about compliance with this law.<sup>9</sup> Last year, the President declined to discipline Counselor to the President Kellyanne Conway despite your finding that she committed dozens of Hatch Act violations and your recommendations that she be removed from federal service.<sup>10</sup> In the months leading up to the November election, the number of apparent Hatch Act violations by committed senior White House staff, including White House Chief of Staff Mark Meadows, White House Press Secretary Kayleigh McEnany, White House Senior Policy Advisor Stephen Miller, and Counselor to the President Kellyanne Conway, among others, have increased dramatically.<sup>11</sup>

### **Legal Background**

The Hatch Act prohibits executive branch employees from engaging in political activity while on duty, on government property, wearing an official uniform or insignia, or using a government vehicle.<sup>12</sup> This prohibition has historically been understood to include behind-the-scenes activity and assistance, even when that work does not include public communication.<sup>13</sup> The Hatch Act further bars an executive branch employee from “us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election.”<sup>14</sup> Activities

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<sup>5</sup> See, e.g., Chandelis Duster and Fredreka Schouten, Trump said he may deliver convention speech from White House, *CNN*, Aug. 5, 2020, <https://cnn.it/3adujx3>.

<sup>6</sup> Tommy Beer, Trump Says He'll Deliver Acceptance Speech from Either Gettysburg Or White House, *Forbes*, Aug. 10, 2020, <https://bit.ly/3kzv88c>.

<sup>7</sup> See, e.g., Melissa Gomez, Trump is ‘Hijacking’ White House Events for ‘Partisan, Political’ Gain, Experts Say, *Los Angeles Times*, July 23, 2020, <https://lat.ms/3kzHhtG>.

<sup>8</sup> Citizens for Responsibility and Ethics in Washington, The Hatch Act: Mixing Partisan Goals with Official Positions in the Trump Administration, <https://bit.ly/2SSpEJR>; see also John Hendel, FCC’s O’Rielly Broke Federal Law at CPAC, *Politico*, May 1, 2018, <https://politi.co/2VfHWGz>; Tal Axelrod, Federal Investigators Concluded Ryan Zinke’s MAGA Socks Violated Hatch Act, *The Hill*, June 6, 2019, <https://bit.ly/2vUg7Jh>.

<sup>9</sup> Citizens for Responsibility and Ethics in Washington, Congress Must Stop White House Officials from Illegally Trying to Influence the Election, July 1, 2020, <https://bit.ly/3itFmot>.

<sup>10</sup> Maegan Vazquez, Trump Won’t Fire Conway Despite Federal Agency Recommendation, *CNN*, June 14, 2019, available at <https://cnn.it/2HRSmE4>.

<sup>11</sup> Citizens for Responsibility and Ethics in Washington, Congress Must Stop White House Officials from Illegally Trying to Influence the Election, July 1, 2020, <https://bit.ly/2ChKuNf>; Citizens for Responsibility and Ethics in Washington, CREW Files Hatch Act Complaint Against Mark Meadows, July 15, 2020, <https://bit.ly/30MeOnR>; Citizens for Responsibility and Ethics in Washington, CREW Files Hatch Act Complaint Against Stephen Miller, July 31, 2020, <https://bit.ly/3afRJSg>.

<sup>12</sup> 5 U.S.C. § 7324.

<sup>13</sup> Congressional Research Service, “Hatch Act” and Other Restrictions in Federal Law on Political Activities of Government Employees, Report No. 98-885 A, at 11-12, Oct. 23, 1998, <https://bit.ly/3ahIbGu>.

<sup>14</sup> 5 U.S.C. § 7323(a)(1).

covered by this prohibition include federal employees' use of their official authority or position while participating in political activity.<sup>15</sup> "Political activity" is defined as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group."<sup>16</sup> Penalties for violating the statute can include removal from government service, reduction in grade, debarment from federal employment for up to five years, suspension, reprimand, or a civil fine.<sup>17</sup>

While the President and the Vice President are exempt from the Hatch Act, OSC has acknowledged that the Hatch Act does not provide an exemption for executive branch employees acting on behalf of a principal who is in fact exempt from the law's restrictions.<sup>18</sup> In its March 2018 report regarding Hatch Act violations by Counselor to the President, Kellyanne Conway, OSC stated:

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 [an employee's] job duties may include publicly reinforcing the Administration's positions on a host of policy issues. And the Hatch Act does not prohibit [an employee] from doing so, provided she carries out her job duties in a manner that complies with the law.<sup>19</sup>

Generally, federal employees covered by the Hatch Act may not engage in political activity while on duty.<sup>20</sup> A narrow exception to this prohibition excludes certain political appointees whose duties and responsibilities continue outside normal duty hours and while away from their normal duty stations, as long as the costs for the political activity are not paid for using government funds.<sup>21</sup> OSC has advised that "[a]lthough non-exempt political appointees are generally free to actively participate in partisan political management and campaigns, doing so is not part of their official duties."<sup>22</sup> Therefore, to avoid violating the Hatch Act, these officials "must take care to segregate their political activities from their official agency duties."<sup>23</sup> For example, OSC has advised political appointees not to attend meetings, "while on duty or in the federal workplace, at which presenters discuss topics such as their party's electoral strategies in congressional and gubernatorial elections ... or campaign tactics."<sup>24</sup>

Although the President is not subject to discipline or penalties under the Hatch Act, there are additional mechanisms for regulating the use of congressionally appropriated funds to promote

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<sup>15</sup> 5 C.F.R. § 734.302(b)(1).

<sup>16</sup> 5 C.F.R. § 734.101.

<sup>17</sup> 5 U.S.C. § 7326.

<sup>18</sup> Office of Special Counsel, Report of Prohibited Political Activity under the Hatch Act OSC File No. HA-18-0966 (Kellyanne Conway), Mar. 6, 2018, <https://bit.ly/33fDagi>.

<sup>19</sup> *Id.*

<sup>20</sup> 5 U.S.C. § 7324(a).

<sup>21</sup> 5 U.S.C. § 7324(b)(1).

<sup>22</sup> Office of Special Counsel, OSC Advisory Regarding Political Briefings in the Federal Workplace, Oct. 6, 2011, <https://bit.ly/3fr4avz>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

partisan candidates or political parties: federal statutes, appropriations riders, OSC decisions, and Government Accountability Office (“GAO”) decisions make clear that appropriated funds may not be used for political purposes. The Purpose Statute prohibits the use of federally appropriated funds for anything other than the “object[.]” (or issue) for which they were appropriated, except as otherwise provided by law, with few exceptions.<sup>25</sup> GAO has found that this prohibition extends to “political activities.”<sup>26</sup> Similarly, appropriations riders are routinely used to restrict the manner in which appropriated funds are used for certain conduct. Attached to annual appropriations acts, these riders typically prohibit the use of appropriated funds for “publicity or propaganda purposes” that are “not authorized by the Congress.”<sup>27</sup>

Federal agencies previously have sought and made reimbursement payments to the Treasury to ensure that taxpayer funds are not used for partisan politics in violation of federal law. For example, in 2012, after OSC found a Hatch Act violation by then-Health and Human Services (“HHS”) Secretary Kathleen Sebelius for making extemporaneous political remarks in a speech delivered in her official capacity, Secretary Sebelius and HHS “reimbursed the U.S. Government for all costs and expenses associated with her travel” to the event.<sup>28</sup> Even though Secretary Sebelius’s partisan political remarks were only a small part of a larger speech, “HHS sought and received reimbursement from the appropriate political entities for the travel-related costs of the Secretary’s appearance.”<sup>29</sup>

### **Conclusion**

The Hatch Act is intended to prevent federal employees from engaging in partisan political activity in their official capacity. The statute prohibits an employee from undertaking any activity directed toward the success or failure of a political candidate or a political party while on duty or on federal property, or while using her official title or position. While the President is exempt from the Hatch Act, President Trump’s proposal to deliver a speech accepting the Republican Party’s nomination for president on federal property is a gross deviation from the practices of prior administrations and has the potential for a staggering number of Hatch Act violations by any administration officials supporting or in attendance at Trump’s speech.

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<sup>25</sup> 31 U.S.C. § 1301(a).

<sup>26</sup> See B-304228 (Sept. 30, 2005), <https://www.gao.gov/decisions/appro/304228.pdf> (citing B-302504 (Mar. 10, 2004), <https://www.gao.gov/decisions/appro/302504.pdf>). “Under the Purpose Statute, 31 U.S.C. § 1301(a), appropriated funds may be used only for purposes for which they were appropriated and for any expenses that are reasonably necessary for the accomplishment of that purpose. B-303170, Apr. 22, 2005. Stated differently, Congress appropriates funds for official government functions, not for political activities of the administration, B-302504, Mar. 10, 2004, or personal obligations of federal employees, B-261720, Apr. 1, 1996. Appropriated funds are not available to gather information concerning the media’s perception of a political party.”

<sup>27</sup> See, e.g., Consolidated Appropriations Act, 2017, H.R. 244, 115th Cong. (2017); Consolidated Appropriations Act, 2018, H.R. 1625, 115th Cong. (2018); Consolidated Appropriations Act, 2019, H.J. Res. 31, 116th Cong. (2019).

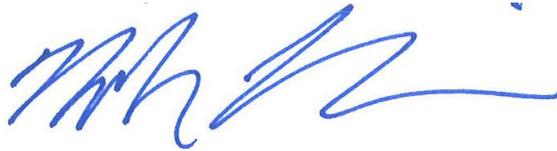
<sup>28</sup> See Letter from Carolyn Lerner, Special Counsel, OSC to President Barack H. Obama Regarding OSC File No. HA-12-1989 (Sept. 12, 2012), <https://bit.ly/2U0Kffs>.

<sup>29</sup> *Id.*

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As the independent federal agency responsible for enforcement of the Hatch Act, OSC needs to provide the White House with clear, public guidance to ensure that Trump administration officials follow the law if the President follows through on his stated plans. OSC also should work with its partners in the federal government to ensure clear, public guidance regarding how the American taxpayers should be reimbursed for taxpayer funds used to support this political event.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Noah Bookbinder', with a long horizontal flourish extending to the right.

Noah Bookbinder  
Executive Director