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The Special Counsel

July 15, 2019

The Honorable Elijah Cummings, Chairman
House Oversight and Reform Committee
United States House of Representatives
2257 Rayburn House Office Building
Washington, D.C. 20002

Dear Chairman Cummings:

Enclosed please find a copy of my response to your Question for the Record regarding the Hatch Act's exemption under 5 U.S.C. § 7324. As stated in the enclosure, the provision exempts only a few individuals and only applies to the prohibition against on-duty political activity. It does not affect any other Hatch Act restriction. Should you have any questions, please contact Patrick Hartobey, Deputy Special Counsel for Legislative Affairs, at phartobey@osc.gov.

Thank you,

A handwritten signature in blue ink, appearing to read "H. J. Kerner".

Henry J. Kerner
Special Counsel

Enclosure

cc: The Honorable Jim Jordan, Ranking Member

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").¹ 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.² 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. § 7323,³ 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.⁴ 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."⁵ 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."⁶

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.⁷ For example, employees may not use their official title while participating in political activity.⁸

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.

¹ 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).

² 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).

³ 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).

⁴ 5 U.S.C. § 7323(a).

⁵ 86 Cong. Rec. 2703 (1940) (statement of Sen. O'Mahoney).

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

⁷ See 5 C.F.R. § 734.302.

⁸ 5 C.F.R. § 734.302(b)(1).

The statute exempts certain high-level employees.⁹ Pursuant to 5 U.S.C. § 7324(b) (“7324(b) exemption”), a 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.¹⁰ 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,¹¹ 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).*”¹² 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.¹³

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.”¹⁴

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

⁹ 5 U.S.C. § 7324(b).

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

¹¹ Ms. Conway is a commissioned officer who works in the White House Office.

¹² 5 U.S.C. § 7324(b)(1) (emphasis added).

¹³ 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).

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

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.

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.”¹⁵ 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.

¹⁵ H.R. Rep. No. 103-16 at 22 (1993).