

THE OFFICE OF SPECIAL COUNSEL REPORT ON TRUMPSTERS' CRIMES: TOOTHLESS, BUT USEFUL?

The Office of Special Counsel (the organization meant to protect whistleblowers, not Robert Mueller or John Durham) just released a report finding that 13 senior Trump officials – including Hatch Act recidivist Kellyanne Conway – violated prohibitions on engaging in electoral politics while acting in an official capacity during the 2020 election.

The most important parts of the report describe the many reasons why the Official of Special Counsel is utterly powerless to prevent the kind of gleeful flouting of norms that Trump practiced. Several of these amount to admitting that if the President encourages Hatch Act violations, there's nothing you can do about it.

1. OSC's enforcement tools are limited with respect to Senate-confirmed presidential appointees (PAS) and White House commissioned officers. Potential fix: A statutory amendment that (1) allows OSC to pursue substantial monetary penalties against PAS and commissioned officers before the MSPB, and (2) grants the MSPB jurisdiction over former employees for Hatch Act violations committed during their period of federal employment.

2. OSC did not receive from the Trump administration the good faith cooperation necessary to ensure full compliance with the Hatch Act. Potential fix: A statutory amendment granting the MSPB greater authority to enforce OSC's subpoenas and other investigative

requests.

That said, *this report* and some of the people it names as having broken the law, including Kayleigh McEnany, Mark Meadows, and Chad Wolf, may be of some use going forward.

That's because DOJ has laid the ground work not to treat politicians' actions leading up to and during January 6 with the protections accorded their political office based on the precedents holding that the scope of federal office excludes campaign activity.

The record indicates that the January 6 rally was an electioneering or campaign activity that Brooks would ordinarily be presumed to have undertaken in an unofficial capacity. Activities specifically directed toward the success of a candidate for a partisan political office in a campaign context—electioneering or campaign activities—are not within the scope of the office or employment of a Member of the House of Representatives. **Like other elected officials**, Members run for reelection themselves and routinely campaign for other political candidates. But they do so in their private, rather than official, capacities.

This understanding that **the scope of federal office excludes campaign activity** is broadly reflected in numerous authorities. This Court, for example, emphasized “the basic principle that government funds should not be spent to help incumbents gain reelection” in holding that House or Senate mailings aimed at that purpose are “unofficial communication[s].” *Common Cause v. Bolger*, 574 F. Supp. 672, 683 (D.D.C. 1982) (upholding statute that provided franking privileges for official communications but not unofficial communications).

DOJ did that even as it declined to invoke Executive Privilege for Trump's own communications with some of these people (explicitly so with McEnany and Meadows).

Whatever else this report lays out, it amounts to the neutral independent body entrusted with such investigations finding that Trump exploited the timing of the election to encourage such politicization of the White House.

OSC received complaints alleging that the 13 senior Trump administration officials listed in Part III violated the Hatch Act in one of two ways: by making statements supporting or opposing a candidate for partisan political office while speaking in an official capacity, or by using their official authority in connection with, and in furtherance of, the RNC. Section 7323(a)(1) of Title 5 of the U.S. Code prohibits federal executive branch employees from using their official authority or influence to interfere with or affect the results of an election. Under that prohibition, it is illegal for an employee to support or oppose a candidate for partisan political office while acting in an official capacity. Yet Trump administration officials did precisely that. And while the specific facts of each case are different, they share this fundamental commonality—senior Trump administration officials chose to use their official authority not for the legitimate functions of the government, but to promote the reelection of President Trump in violation of the law.

The administration's willful disregard for the law was especially pernicious considering the timing of when many of these violations took place. OSC cannot, in most cases, stop violations from happening in real time. Even apparently

straightforward violations of the Hatch Act may not turn out to actually be violations upon further investigation. Therefore, investigating alleged violations is the only way to ensure a fair result. Accordingly, OSC affords appropriate due process to the subject of a complaint and gathers the relevant facts before reaching a conclusion. As a result, OSC's investigations can often stretch out for weeks or even months. **This reality creates a window for an administration that is so inclined to ignore the Hatch Act in the final months of an election cycle, knowing full well that any public report or disciplinary action would not likely occur until well after the election.** However, the benefit to the administration and resultant harm—the use of official authority or influence to interfere with or affect an election—would accrue on or before election day. As described in Part III, OSC has concluded that the Trump administration tacitly or expressly approved myriad Hatch Act violations committed within that critical period immediately prior to the 2020 election during which OSC was unable to both investigate and resolve the violations before election day. [my emphasis]

This is what Trump spent the two months after he lost: turning the White House into a full-time election-stealing headquarters.

So while the OSC may be totally useless in policing the politicization of someone who refuses to be bound by any norms, *this report* may be useful in the days ahead for the way that it documents how thoroughly Trump did that.