

April 4, 2017

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

Dear Ms. Lerner:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Office of Special Counsel (“OSC”) investigate whether White House Director of Social Media Dan Scavino Jr. violated the Hatch Act by posting a tweet calling for followers of President Donald J. Trump to defeat Rep. Justin Amash (R-MI) in a primary election. By posting the tweet on an account that, at the time, referred to his official position, Mr. Scavino likely engaged in political activity prohibited by the law.

Factual Background

On March 24, 2017, House Speaker Paul Ryan (R-WI) withdrew the American Health Care Act (“AHCA”), proposed legislation to replace the Affordable Care Act, from a planned floor vote due to insufficient support.¹ After that defeat, President Trump turned to Twitter to rail against the House Freedom Caucus and its members,² tweeting: “The Republican House Freedom Caucus was able to snatch defeat from the jaws of victory. After so many bad years they were ready for a win!”³ and “Democrats are smiling in D.C. that the Freedom Caucus, with the help of Club For Growth and Heritage, have saved Planned Parenthood & Ocare!”⁴

Rep. Amash is a member of the House Freedom Caucus, and has been a vocal critic of the AHCA.⁵ In a series of tweets starting on March 30, 2017, Mr. Scavino attacked Rep. Amash for opposing the legislation. After Rep. Amash tweeted that “it didn’t take long for

¹ Robert Pear, Thomas Kaplan, and Maggie Haberman, *In Major Defeat For Trump, Push to Repeal Health Law Fails*, *New York Times*, Mar. 24, 2017, available at <https://www.nytimes.com/2017/03/24/us/politics/health-care-affordable-care-act.html>.

² Lauren Fox, Jeremy Diamond, and Phil Mattingly, *Trump Calls Out Freedom Caucus Members in Tweetstorm*, *CNN*, Mar., 31, 2017, available at <http://www.cnn.com/2017/03/30/politics/freedom-caucus-trump-tweet/index.html>; Deborah Barfield Berry, *Trump Takes Aim at Freedom Caucus Over Defeat of GOP Health Care Plan*, *USA Today*, Mar. 26, 2017, available at <https://www.usatoday.com/story/news/politics/2017/03/26/trump-takes-aim-freedom-caucus-over-defeat-gop-health-care-plan/99662428/>.

³ See <https://twitter.com/realDonaldTrump/status/846537639167713281>.

⁴ See <https://twitter.com/realDonaldTrump/status/845974102619906048>.

⁵ Tom LoBianco, *House Freedom Caucus Member Justin Amash Breaks Vote Streak After Blasting Ryan, Health Care Bill*, *CNN*, Mar. 10, 2017, available at <http://www.cnn.com/2017/03/10/politics/justin-amash-voting-streak-broken/>.

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the swamp to drain” President Trump,⁶ Mr. Scavino responded by calling Rep. Amash a “Freedom Caucus Troll” and alleging that he “[d]idn’t vote for #AHCA b/c he puts politics before MI.”⁷ Mr. Scavino then encouraged Rep. Amash’s ouster through a primary challenge, tweeting on April 1, 2017: “.@realDonaldTrump is bringing auto plants & jobs back to Michigan. @justinamash is a big liability.#TrumpTrain, defeat him in primary.”⁸

Mr. Scavino posted the tweet from his @DanScavino Twitter account.⁹ At the time of the tweet, Mr. Scavino’s profile photograph on the account showed him standing in the Oval Office next to the official presidential flag, and the header photograph showed President Trump giving a speech behind a lectern showing the official presidential seal.¹⁰ On the account’s profile, Mr. Scavino represented it and himself as: “Personal Twitter Handle. 6/2015-11/2016, Director of #SocialMedia & Senior Advisor @realDonaldTrump. Official White House Twitter Handle: @Scavino45.”¹¹

After questions about the legality of the tweet were raised on April 1, Mr. Scavino quickly changed some of the information on the account, removing the photograph showing the official seal and changing the description to: “Personal Twitter Handle. 6/2015-11/2016 was Director of #SocialMedia @realDonaldTrump [sic] for President, Inc.”¹²

Potential Violation

The Hatch Act - 5 U.S.C. §§ 7321-26

The Hatch Act prohibits any executive branch employee from “us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election.”¹³ Activities covered by this prohibition include the official “[u]sing his or her official title while participating in political activity.”¹⁴ “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.”¹⁵

⁶ See <https://twitter.com/justinamash/status/847448570081005568>.

⁷ See <https://twitter.com/DanScavino/status/847663548477997060>.

⁸ See <https://twitter.com/DanScavino/status/848211792916557824>.

⁹ *Id.*

¹⁰ Matea Gold, White House Social Media Director Misused Official Position By Going After GOP Lawmaker, Ethics Experts Say, *Washington Post*, Apr. 2, 2017, available at https://www.washingtonpost.com/news/post-politics/wp/2017/04/02/white-house-social-media-director-misused-official-position-by-going-after-gop-lawmaker-ethics-experts-say/?utm_term=.6e799bf16b75 (showing screenshot). See also <https://twitter.com/NormEisen/status/848347910425243648>.

¹¹ Gold, *Washington Post*, Apr. 2, 2017.

¹² *Id.* After the Washington Post noted the misspelled Twitter handle for President Trump, Mr. Scavino corrected it to “@realDonaldTrump”. *Id.* Since then, Mr. Scavino has further revised the description. See <https://twitter.com/DanScavino>.

¹³ 5 U.S.C. § 7323(a)(1).

¹⁴ 5 C.F.R. § 734.302(b)(1).

¹⁵ 5 C.F.R. § 734.101.

OSC has provided guidance on applying this prohibition to social media, including on an employee's "personal" accounts.¹⁶ In general, the guidance admonishes employees to "not engage in political activity in an official capacity at any time."¹⁷ More specifically, the guidance provides that "the Hatch Act prohibits employees from . . . referring to their official titles or positions while engaged in political activity at any time."¹⁸ The guidance notes, however, that "inclusion of an employee's official title or position on one's social media profile, without more, is not an improper use of official authority."¹⁹

Mr. Scavino's tweet about Rep. Amash clearly is political activity under the statute. It was posted for the purpose of affecting Rep. Amash's primary election, and was directed toward the failure of his candidacy by encouraging supporters of President Trump to defeat him in the Republican primary.

The White House asserted Mr. Scavino's tweet did not violate the Hatch Act because it came from his personal account and not his official White House account, and said Mr. Scavino has "taken the necessary steps to ensure there is a clear distinction between both Twitter accounts."²⁰ As the OSC's guidance makes clear, however, political activity on personal accounts can violate the Hatch Act. The prohibition applies instead to political activity such as Mr. Scavino's tweet undertaken when the employee refers to his official title or position. Here, Mr. Scavino referred to his official position by posting a photograph of himself in the Oval Office alongside the presidential flag, the only image that appears when the tweet is viewed. His official position was further reinforced by the photograph of President Trump speaking in front of the official seal. While simply listing his title or position in his profile without more might not have been improper, the photographs effectively invoked Mr. Scavino's White House position and imbued his tweet with official authority. The photograph of Mr. Scavino in the Oval Office alongside the presidential flag is particularly powerful because it appears next to the tweet and is seen each time it is viewed. As a result, the tweet violated the Hatch Act.

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 while using or referring to his official position. Mr. Scavino's tweet calling on Rep. Amash's defeat in a primary election, posted on an account that invoked Mr. Scavino's White House position, appears to

¹⁶ Office of Special Counsel, The Hatch Act: Frequently Asked Questions on Federal Employees and the Use of Social Media and Email, Dec. 18, 2015, available at <https://osc.gov/Pages/The-Hatch-Act-Frequently-Asked-Questions-on-Federal-Employees-and-the-Use-of-Social-Media-and-Email.aspx>.

¹⁷ *Id.* (emphasis in original).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Daniella Silva, Did Trump Aide Dan Scavino Violate the Hatch Act With Tweet Calling For 'Defeat' of GOP Congressman, *NBC News*, Apr. 2, 2017, available at <http://www.nbcnews.com/politics/politics-news/did-trump-aide-dan-scavino-violate-hatch-act-tweet-calling-n741746>.

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violate that rule. OSC should therefore commence an immediate investigation and take or recommend appropriate disciplinary action against Mr. Scavino.

Sincerely,



Noah Bookbinder
Executive Director
Citizens for Responsibility and Ethics in Washington