

WRITTEN TESTIMONY OF DONALD K. SHERMAN, DEPUTY DIRECTOR
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON (CREW)

SUBMITTED TO THE HOUSE COMMITTEE ON APPROPRIATIONS SUBCOMMITTEE
ON FINANCIAL SERVICES AND GENERAL GOVERNMENT CONCERNING THE FY
2021 APPROPRIATIONS BILL

March 26, 2020

Chairman Quigley, Ranking Member Graves, and members of the Subcommittee, thank you for the opportunity to submit testimony regarding the FY 2021 Financial Services and General Government Appropriations Bill. The subcommittee plays a critical role in overseeing government wide appropriations, including numerous agencies that oversee government ethics laws (i.e., the Office of Special Counsel, the Office of Government Ethics, and some offices of Inspectors General).¹ My organization, Citizens for Responsibility and Ethics in Washington (CREW), is a non-partisan, non-profit organization committed to ensuring the integrity of our government institutions and promoting ethical governance. I write on behalf of CREW today to request that the Committee direct the Government Accountability Office (GAO) to study and produce a report regarding the use of appropriated funds to support or oppose partisan political candidates in potential violation of the Hatch Act, the Purpose Statute, appropriations laws, and other statutes. We are further requesting that the Committee direct GAO to calculate what amount of congressionally appropriated funds should be reimbursed to the taxpayers and what amount of these misused funds are attributed to conduct by the President and his or her political appointees.

Since 2017, we have watched with concern as the Trump Administration officials have flagrantly disregarded federal laws designed to prevent government officials from using appropriated funds and their official authority for partisan political purposes. For example, during the first three years of the Trump presidency, the Office of Special Counsel (OSC) has found more than a dozen administration officials in violation of the Hatch Act,² which creates civil and administrative penalties for federal employees who use government funds or their government positions to support political candidates or parties.³ The most notable case is Counselor to the President Kellyanne Conway, whose numerous violations were so “egregious”

¹ House Committee on Appropriations, Financial Services and General Government, *available at* <https://appropriations.house.gov/subcommittees/financial-services-and-general-government-116th-congress>.

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

³ 5 U.S.C. § 7326.

that the Special Counsel recommended her removal from federal service.⁴ Despite this fact, the President declined to discipline Ms. Conway, and the White House dismissed OSC findings regarding her misconduct.⁵ The Trump Administration has also been under investigation by OSC for more than a year after senior White House aides admitted that several official government events in which President Trump and administration officials took part were part of a coordinated effort to help Republican candidates in the 2018 midterm elections.⁶

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, following 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.⁷ Secretary Sebelius was speaking at a Human Rights Campaign gala in North Carolina and went off script to endorse a candidate in the upcoming gubernatorial election as well as President Obama’s reelection effort.⁸ Even though Secretary Sebelius’s partisan political remarks were off-script and 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.”⁹

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 partisan candidates or political parties. For example, 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.¹⁰ GAO has

⁴ Office of Special Counsel, Report of Prohibited Political Activity under the Hatch Act OSC File Nos. HA-19- 0631 & HA-19-3395 (Kellyanne Conway), June 13, 2019, *available at* [https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity,%20Kellyanne%20Conway%20\(HA-19-0631%20&%20HA-19-3395\).pdf](https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity,%20Kellyanne%20Conway%20(HA-19-0631%20&%20HA-19-3395).pdf)

⁵ Maegan Vazquez, *Trump Won’t Fire Conway Despite Federal Agency Recommendation*, *CNN*, June 14, 2019, *available at* <https://cnn.it/2HRSmE4>.

⁶ Letter from Noah Bookbinder, Executive Director, Citizens for Responsibility and Ethics in Washington to the Honorable Henry J. Kerner, Special Counsel, Sept. 5, 2018, *available at* <https://go.aws/2VaOxIw>. OSC confirmed via email on March 19, 2020 that its investigation remains ongoing.

⁷ See Letter from Carolyn Lerner, Special Counsel, OSC to President Barack H. Obama Regarding OSC File No. HA-12-1989 (Sept. 12, 2012), *available at* <https://bit.ly/2UOKffs>.

⁸ *Id.*

⁹ *Id.*

¹⁰ 31 U.S.C. § 1301(a).

found that this prohibition extends to “political activities.”¹¹ 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.”¹²

Despite these prohibitions, President Trump has frequently made partisan political remarks about candidates for public office during official government events, turning them into political-style rallies. For example, in August 2019, during official remarks on “American Energy and Manufacturing” in Pennsylvania, Trump touted his re-election effort and attacked Democratic presidential candidates.¹³ He said, “In 2020, we’re running, so you better get out there and make sure we win” before mocking political rivals Senator Elizabeth Warren and former Vice President Joe Biden.¹⁴ According to the *New York Times*, this occurrence is just the tip of the iceberg, with the President “turn[ing] presidential speeches into political ones, and official trips around the country into campaign opportunities, complete with taunts of his rivals, riffs about his enemies, pleas for votes and fear-mongering about what will happen if he loses.”¹⁵ While President Trump has repeatedly used official events to lob partisan attacks, a campaign spokesman indicated that the campaign “has never been asked to reimburse the federal government for official travel that turned into an overtly political event.”¹⁶

GAO’s Appropriations Law department is responsible for investigating potential violations of appropriations law and has issued numerous decisions based on inquiries related to the Purpose Statute and appropriations riders.¹⁷ It has repeatedly found that the Purpose Statute

¹¹ See B-304228 (Sept. 30, 2005), available at <https://www.gao.gov/decisions/appro/304228.pdf> (citing B-302504 (Mar. 10, 2004), available at <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.”

¹² 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).

¹³ The White House, Remarks by President Trump on American Energy and Manufacturing | Monaca, PA, Aug. 13, 2019, available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-american-energy-manufacturing-monaco-pa/>.

¹⁴ *Id.*

¹⁵ Annie Karni and Maggie Haberman, As Campaign Season Heats Up, Trump Has Turned the Official Into the Political, *New York Times*, Nov. 25, 2019, available at <https://nyti.ms/2VfZYbq>.

¹⁶ *Id.*

¹⁷ Government Accountability Office, Appropriations Law, available at <https://www.gao.gov/legal/appropriations-law-decisions>, accessed Mar. 17, 2020.

prohibits the use of appropriations for partisan political purposes.¹⁸ GAO has also issued decisions related to interpretation and application of appropriations riders, and how they relate to the Purpose Statute. For example, in 2018 GAO issued a decision related to the Financial Services and General Government Appropriations Act of 2017 as applied to HHS.¹⁹ GAO found that federal appropriations riders prohibit “three forms of communications: those that are purely partisan, self-aggrandizing, or covert.”²⁰ Although ultimately GAO did not find that HHS broke the law in this case, its decision affirms that when an executive branch entity or employee engages in partisan political activity in the federal workplace, such conduct can violate appropriations law.

Several legal regimes could potentially be relevant to a GAO inquiry into the amount of appropriated funds that should be reimbursed to the Treasury because they were impermissibly used for partisan politics. For example, GAO has periodically cited to OSC complaints and findings to provide support for its decisions.²¹ However, the Department of Justice’s Office of Legal Counsel (OLC) has also advised the executive branch on how to reimburse the Treasury because “appropriated funds should not be used to pay for political events.”²² FEC regulations and opinions offer a separate approach to calculating costs when a candidate conducts any campaign-related activity while engaged in travel with an additional or alternate purpose, which could be applied here.²³

As an investigative body authorized by and working on behalf of Congress, GAO is uniquely situated to review how the legal standards applied by different federal agencies might apply to the reimbursement of appropriated funds used for partisan politics. Accordingly, I write to respectfully request that the Committee consider the following bill text for its FY 2021 Appropriations Bill:

The Committee directs the Government Accountability Office (GAO) to study and produce a report every two years to determine how much congressionally appropriated funds are being used to support or oppose partisan political candidates in potential violation of the Hatch Act, Purpose Statute, appropriations laws and other statutes. As part of this study, GAO also should

¹⁸ See, e.g., B-304228 (Sept. 30, 2005) (citing B-302504 (Mar. 10, 2004)).

¹⁹ See Pub. L. No. 115–31, div. E, title VII, § 718, 131 Stat. 135, 381 (May 5, 2017); see also B-329199 (Sept. 25, 2018), available at <https://www.gao.gov/assets/700/694700.pdf>.

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²¹ See, e.g., B-204124.OM (Oct. 5, 1981), available at <https://www.gao.gov/products/484144#mt=e-report>; B-206445 (Dec. 6, 1982), available at <https://www.gao.gov/products/423726#mt=e-report>.

²² Office of Legal Counsel, Payment of Expenses Associated With Travel by the President and Vice President, Mar. 24, 1982, at 215-16, available at <https://www.justice.gov/file/22996/download>.

²³ 11 C.F.R. § 106.3(b)(3).

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calculate what amount of congressionally appropriated funds should be reimbursed to the taxpayers and how much of these misused funds are attributable to conduct by the President and his or her political appointees. The first of these reports should be provided to the Committee within 270 days of enactment.

The American people deserve to understand and be made whole for the impermissible expenditure of federal funds to promote partisan political activity. These abuses need to be identified and compensated on an ongoing basis. By directing GAO to study and report how much appropriated funds are used to support or oppose partisan political candidates, the Committee will ensure transparency and accountability in this area.

Thank you for the opportunity to address the subcommittee.