

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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March 9, 2017

Donald F. McGahn II
White House Counsel
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear Mr. McGahn:

I am writing regarding a troubling statement made by your deputy, Stefan Passantino, claiming that many regulations promulgated by the Office of Government Ethics (OGE) do not apply to employees who work in the Executive Office of the President.

On February 13, 2017, OGE Director Walter Shaub, Jr. sent a letter to Mr. Passantino relating to Kellyanne Conway's comments on national television promoting Ivanka Trump's line of products. In his letter, Director Shaub cited a regulation issued by OGE entitled, "Use of Public Office for Private Gain," which is set forth at 5 C.F.R. § 2635.702. He concluded that Ms. Conway's actions were "a clear violation of the prohibition against misuse of position" and that "disciplinary action is warranted."¹

Director Shaub added:

I note that OGE's regulation on misuse of position offers as an example the hypothetical case of a Presidential appointee appearing in a television commercial to promote a product. Ms. Conway's actions track that example almost exactly. Therefore, I recommend that the White House investigate Ms. Conway's actions and consider taking disciplinary action.²

The next day, on February 14, 2017, an attorney working for the Cause of Action Institute, a conservative group funded by the Koch brothers, wrote to Director Shaub arguing that this regulation does not apply to Ms. Conway. He wrote:

[W]e believe that OGE regulations may not extend to cover Ms. Conway's conduct given

¹ Letter from Walter M. Shaub, Jr., Director, Office of Government Ethics, to Stefan C. Passantino, Deputy Counsel to the President (Feb. 13, 2017) (online at <https://oge.app.box.com/v/USOGE/1/19093334337/135398308853/1>).

² *Id.*

her employment in the White House. In light of this, OGE needs to analyze its existing regulations and conduct a rulemaking to correct or clarify them.³

On February 17, 2017, Director Shaub responded to the claim by the Cause of Action Institute that OGE regulations do not apply to White House employees. He wrote:

I am in receipt of your February 14, 2017, letter expressing concern that employees of the White House Office may not be covered by 5 C.F.R. part 2635. This letter is to reassure you that their coverage is well settled. In addition, regulations applicable to the White House Office provide that, "Employees of the Executive Office of the President are subject to the executive branch-wide standards of ethical conduct at 5 CFR part 2635...." 3 C.F.R. § 100.1.⁴

On February 28, 2017, Mr. Passantino sent a letter to Director Shaub conceding that Ms. Conway's comments "implicated the prohibition on using one's official position to endorse any product or service," but asserting that the White House would impose no disciplinary action because she was "attempting to stand up for a person she believed had been unfairly treated."⁵

Strangely, Mr. Passantino then seemed to adopt the argument put forth by the Cause of Action Institute a week earlier and debunked by Director Shaub. Mr. Passantino asserted in his letter to Director Shaub that "many regulations promulgated by the Office of Government Ethics (OGE) do not apply to the employees of the Executive Office of the President."⁶ He did not provide any further explanation or support for his claim. This perplexing argument is particularly concerning because the President's transition team cancelled a contract that would have provided ethics compliance training for White House staff and political appointees.⁷

Today, in response to Mr. Passantino, Mr. Shaub again refuted his unsubstantiated claim:

I am more concerned about the extraordinary assertion that "many" of OGE's regulations are inapplicable to employees of the Executive Office of the President. The assertion is incorrect, and the letter cites no legal basis for it. Presidential administrations have not considered it appropriate to challenge the applicability of ethics rules to the entire executive branch. It is critical to the public's faith in the integrity of government that White House employees be held to the same standard of ethical accountability as other

³ Letter from Eric R. Bolinder, Counsel, Cause of Action Institute, to Walter M. Shaub, Jr., Director, Office of Government Ethics (Feb. 14, 2017).

⁴ Letter from Walter M. Shaub, Jr., Director, Office of Government Ethics, to Eric R. Bolinder, Counsel, Cause of Action Institute (Feb. 17, 2017). Director Shaub also cited 64 Fed. Reg. 12,881 acknowledging that 5 C.F.R. part 263 "established uniform standards of ethical conduct that apply to all executive branch personnel."

⁵ Letter from Stefan C. Passantino, Deputy Counsel to the President, to Walter M. Shaub, Jr., Director, Office of Government Ethics (Feb. 28, 2017) (online at <http://i2.cdn.turner.com/cnn/2017/images/03/01/white-house-letter-office-of-government-ethics-feb28.pdf?iid=EL>).

⁶ *Id.*

⁷ *Trump Transition Team Cancelled Ethics Training Session*, CNN.com (March 2, 2017) (online at www.cnn.com/2017/03/02/politics/white-house-ethics-training/).

executive branch employees.⁸

Mr. Shaub pointedly disagreed with Mr. Passantino's contention that White House employees are outside of OGE's jurisdiction:

OGE also disagrees with the separate assertion in a footnote to your letter that White House employees are outside OGE's purview. The underlying theory that the White House Office is not an "executive agency" for certain limited purposes under 5 U.S.C. § 105 has never been applied in the context of government ethics, nor should it be.⁹

Mr. Shaub also expressed OGE's views on why the White House's failure to discipline Ms. Conway, a senior member of the administration, for her blatant promotion of Ivanka Trump's product line could threaten the viability of the ethics program:

I remain concerned about Ms. Conway's misuse of position. Your letter concedes that her televised statements from the White House press briefing room implicated the prohibition on using one's official position to endorse any product or service. When an employee's conduct violates 5 C.F.R. § 2635.702, disciplinary action serves to deter future misconduct. Not taking disciplinary action against a senior official under such circumstances risks undermining the ethics program.¹⁰

The President's staff need to follow ethics rules—not flout them. When they violate these rules, the President must impose discipline, not invent a legal fiction that these rules do not apply. For these reasons, I ask that you provide answers to the following questions:

- (1) Do you believe that OGE has the legal authority to oversee the ethics program for the entire executive branch? If no, please provide the Committee with your reasoning and all legal authority upon which you rely for this position.
- (2) What specific OGE regulations do you consider inapplicable to employees of the Executive Office of the President?
- (3) Does your position differ depending on the regulation and the roles or duties of different employees of the Executive Office of the President?
- (4) What is your justification for considering employees of the Executive Office of

⁸ Letter from Walter M. Shaub, Jr., Director, Office of Government Ethics, to Stefan C. Passantino, Deputy Counsel to the President (Mar. 9, 2017) (online at <https://oge.app.box.com/s/r2t4v8ftjmkx4cfgfolqzievuhcvrj2>).

⁹ *Id.* Separately, in a letter to the Committee today, Mr. Shaub again left little doubt about his concerns with the White House's position on the applicability of ethics rules to the executive branch: "Of greater concern, the White House's response includes assertions challenging the applicability of ethics rules and OGE's authority to oversee the ethics program for the entire executive branch. OGE disagrees with these assertions." Letter from Walter M. Shaub, Jr., Director, Office of Government Ethics, to Chairman Jason E. Chaffetz and Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Mar. 9, 2017) (online at <https://oge.app.box.com/s/r2t4v8ftjmkx4cfgfolqzievuhcvrj2>).

¹⁰ *Id.*

the President exempt from specific OGE regulations?

- (5) Have you issued any written guidance to any employees of the Executive Office of the President indicating that any OGE regulations do not apply to them? If so, please provide copies of that guidance.

I request a response to this request by March 24, 2017. Thank you for your consideration of this request.

Sincerely,

A handwritten signature in blue ink, appearing to read "Elijah E. Cummings", with a large, stylized flourish at the end.

Elijah E. Cummings
Ranking Member