

United States Senate

WASHINGTON, DC 20510

June 19, 2017

Stefan C. Passantino
Deputy Counsel to the President
and Designated Agency Ethics Official
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear Mr. Passantino,

Earlier this month, we received new information from the Office of Government Ethics indicating that Stephen Bannon may have violated President Trump's Executive Order on Ethics and other ethics rules via his communications with Breitbart News Network (Breitbart), and that the ethics waivers provided to Mr. Bannon and others may not appropriately address these matters. Based on this new information, we are writing to you — again — to seek clarification on and understand Mr. Bannon's compliance with Executive Order 13770.

Mr. Bannon's Communications with Breitbart News Network

On April 20, 2017, we sent you a letter requesting additional information on news reports that Mr. Bannon communicated with Breitbart while serving as a senior advisor to President Trump. We sent a similar letter to Mr. Bannon.¹

Mr. Bannon served as Breitbart's Executive Chairman from 2012 to 2016, and currently serves as a Chief Strategist and Senior Counselor to the President.² On February 14, 2017, Breitbart published what has been described as "an extensive attack" on Reince Priebus, President Trump's Chief of Staff.³ Mr. Bannon told news outlets that he "went ballistic" on a phone call with Breitbart's Washington political editor, Matthew Boyle, to protest this article.⁴ Later that week, Mr. Bannon reportedly "instructed [Boyle] not to publish additional articles

¹ Senator Elizabeth Warren, "Senators Question Steve Bannon, White House Ethics Official on Violations of Trump Ethics Pledge" (April 20, 2017) (online at https://www.warren.senate.gov/?p=press_release&id=1560).

² David Folkenflik, "Ex-Breitbart Executive Brings Alt-Right Ties To The White House," *NPR* (November 15, 2016) (online at <http://www.npr.org/2016/11/15/502165973/ex-breitbart-executive-brings-alt-right-ties-to-the-white-house>); Hadas Gold, "Breitbart's bid for congressional pass put off," *Politico* (March 27, 2017) (online at <http://www.politico.com/story/2017/03/breitbart-capitol-hill-credentials-merciers-236547>); Stee Bannon, OGE Form 278e (updated March 31, 2017) (available online at https://drive.google.com/drive/folders/0BwDYM_Qm5fLWVXgzMVZMLVA0Ync).

³ Jonathan Swan, "Steve Bannon privately unloaded on Breitbart reporter," *Axios* (February 15, 2017) (online at <https://www.axios.com/steve-bannon-privately-unloads-on-breitbart-2263308411.html>).

⁴ Lloyd Grove, "Steve Bannon: I Didn't Order Breitbart Hit on Reince Priebus," *The Daily Beast* (February 15, 2017) (online at <http://www.thedailybeast.com/articles/2017/02/15/steve-bannon-i-didn-t-order-breitbart-hit-on-reince-priebus.html>).

critical of Priebus,” an act that spurred the White House to offer Boyle “access to key staffers,” including Press Secretary Sean Spicer, Deputy Chief of Staff Katie Walsh, and President Trump himself, in an attempt to “placate” Breitbart after “tension between [Bannon and Breitbart] reached a fever pitch.”⁵ In March, Breitbart’s Editor in Chief, Alex Marlow, when asked whether Mr. Bannon “reach[es] out” to him, replied to reporters that Mr. Bannon does “every so often.”⁶

Mr. Bannon’s Communications with Breitbart Raise Ethics Concerns

In our April 20th letters to you and Mr. Bannon, we expressed our concern that Mr. Bannon’s communications with Breitbart may have run afoul of federal ethics requirements — specifically, Executive Order 13770 and 5 C.F.R. Part 2635, the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct).

President Trump signed Executive Order 13770 on January 28, 2017.⁷ The order requires “[e]very appointee in every executive agency appointed on or after January 20, 2017” to sign and “contractually commit[] to” an “Ethics Pledge.” Among other provisions, the Ethics Pledge prevents appointees from “participat[ing] in any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients” for the first two years after their appointment.⁸ The Executive Order states that a “particular matter involving specific parties” includes “any meeting or other communication relating to the performance of one’s official duties with a former employer or former client.”⁹ As an employee of the Executive Office of the President, Mr. Bannon is subject to the requirements outlined in Executive Order 13770.¹⁰

Additionally, the Standards of Conduct require Mr. Bannon to “avoid an appearance of loss of impartiality in the performance of...official duties.”¹¹ To maintain the appearance of

⁵ Oliver Darcy, “‘There are no sacred cows’: Breitbart’s honeymoon with establishment win of Trump White House may be over,” *Business Insider* (March 8, 2017) (online at <http://www.businessinsider.com/breitbart-establishment-trump-this-is-war-obamacare-2017-3>).

⁶ Lachlan Markay, “Bannon May Have Violated Ethics Pledge by Communicating with Breitbart,” *Daily Beast* (March 30, 2017) (online at <http://www.thedailybeast.com/articles/2017/03/30/bannon-may-have-violated-ethics-pledge-by-communicating-with-breitbart.html>); Breitbart TV, “Watch: Breitbart Editor-in-Chief Alex Marlow Interviewed by NBC’s ‘Today,’” *Breitbart* (March 17, 2017) (online at <http://www.breitbart.com/video/2017/03/17/watch-breitbart-editor-chief-alex-marlow-interviewed-nbcs-today/>).

⁷ President Donald J. Trump, “Executive Order 13770,” *WhiteHouse.gov* (January 28, 2017) (online at <https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>).

⁸ *Id.*

⁹ 5 U.S.C. § 2641.201 (h) defines a “particular matter involving a specific party or parties” as “a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case” (online at <https://www.law.cornell.edu/cfr/text/5/2641.201>); President Donald J. Trump, “Executive Order 13770,” *WhiteHouse.gov* (January 28, 2017) (online at <https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>).

¹⁰ Trump Transition Team, “President-Elect Donald J. Trump Announces Senior White House Leadership Team” (November 13, 2016) (online at <https://greatagain.gov/president-elect-donald-j-trump-announces-senior-white-house-leadership-team-3dcbe0a37b8>).

¹¹ 5 C.F.R. § 2635.501 (online at <https://www.law.cornell.edu/cfr/text/5/2635.501>).

impartiality, 5 C.F.R. § 2635.502 prohibits executive branch employees from “participat[ing] in...a particular matter” if they “know that a person with whom [they have] a covered relationship is or represents a party to such a matter,” and “where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.” Executive branch employees are considered to be in a “covered relationship” with individuals “for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent attorney, consultant, contractor or employee.”¹²

Given the clear restrictions on communicating with former employers outlined in Executive Order 13770, as well as regulatory requirements that executive branch employees “maintain the appearance of impartiality” regarding their former employers, it appeared that Mr. Bannon’s communications with Breitbart may have violated ethics rules. Because Mr. Bannon’s conversations relate to news coverage of the Trump Administration, they appear to qualify as “communication[s] relating to the performance of [his] official duties with a former employer.” Additionally, because Mr. Bannon left his position at Breitbart less than one year ago, these communications appear to violate both the pledge and the Standards of Conduct.

White House Issues a “Retroactive” Waiver

Neither you nor Mr. Bannon responded to our April 20th letter. However, on May 31, 2017, the White House issued a waiver that appeared to be carefully tailored to address Mr. Bannon’s interactions with Breitbart. The waiver, covering “all appointees in the Executive Office of the President” (EOP), “allows appointees to participate in communications and meetings with news organizations on matters of broad policy and particular matters of general applicability, notwithstanding the limitations found in paragraph 6 of the Ethics Pledge.”¹³ In other words, the waiver permits EOP appointees to involve themselves with some “particular matter[s]” involving former employers and clients, when those employers and clients are news organizations.

The Office of White House Counsel issued the waiver on May 21, 2017. The waiver stated that it was “retroactive to January 20, 2017.”¹⁴ No signature or date appears on the waiver. Thus, the unsigned, undated waiver purports to retroactively cover the time period during which Mr. Bannon communicated with Breitbart.

Office of Government Ethics Calls the White House Waiver “Problematic,” Raises Further Concerns about Mr. Bannon’s Communications with Breitbart

In the absence of a response from you or Mr. Bannon, we contacted the Office of Government Ethics (OGE) to gather additional information on the ethics rules that cover Mr.

¹² 5 C.F.R. § 2635.502 (online <https://www.law.cornell.edu/cfr/text/5/2635.502>).

¹³ Counsel to the President, “Memorandum for Appointees in the Executive Office of the President: Waiver Certification Under Section 3 of Executive Order 13770 for Communications and Meetings with News Organizations” (online at <https://www.whitehouse.gov/sites/whitehouse.gov/files/ALL%20EOP.PDF>).

¹⁴ *Ibid.*

Bannon's interactions with Breitbart.¹⁵ On June 13, 2017, OGE responded, raising further concerns about Mr. Bannon's conduct and the White House waiver. OGE's response makes clear that the White House's May 31st waiver:

“is only a partial waiver. As to Mr. Bannon, it authorizes him to communicate with Breitbart and to participate in meetings with his former employer, but only if the subjects of discussions are limited to “matters of broad policy and particular matters of general applicability.” Given the limited scope of this waiver, **Mr. Bannon remains barred, under both Executive Order 13770 and the Standards of Conduct, from participating in any “particular matter involving specific parties’ in which Breitbart is a party or represents a party.”** [Emphasis added]¹⁶

Furthermore, according to OGE, Mr. Bannon cannot participate “in any meeting, event, or other communication with Breitbart when the subject of discussion is a particular matter involving specific parties, whether or not Breitbart is a party or represents a party.”¹⁷

OGE also describes the waiver as “problematic” because “it is unsigned and undated.” Additionally, according to OGE, the “putative retroactivity” of the waiver “is inconsistent with the very concept of a waiver.” OGE notes that EOP appointees (including Mr. Bannon), by “engaging in a prohibited matter at a time when the appointee does not possess a waiver...violates the rule,” and that “the subsequent issuance of a waiver would not change the fact that a violation occurred.”¹⁸

In other words, regardless of the issuance of the May 31st waiver, Mr. Bannon's communications with Breitbart between January 20, 2017 and May 31, 2017 may have violated Executive Order 13770.

Questions

Given our continued concern over Mr. Bannon's conduct, as well as the information provided to us by OGE, we request that you send us answers to the following questions no later than July 3, 2017:

1. OGE's response notes that Executive Order 13770 “provides that a waiver ‘shall take effect’ after it is signed, which precludes the possibility of a waiver having retroactive effect.”¹⁹ On May 31, 2017, the White House released waivers for “all EOP [Executive

¹⁵ Senator Elizabeth Warren, “Senators Ask Office of Government Ethics to Review Bannon's Compliance with Federal Ethics Requirements” (May 17, 2017) (online at https://www.warren.senate.gov/?p=press_release&id=1607).

¹⁶ Letter from Director Walter Shaub, Office of Government Ethics, to Senators Warren, Markey, Whitehouse, and Hirono (June 13, 2017) (online at [https://oge.gov/web/OGEnsf/All%20Documents/4CC6A36259C2DF878525813F0051F98D/\\$FILE/Letter%20from%20OGE%20Director%20W%20Shaub%206-13-17.pdf](https://oge.gov/web/OGEnsf/All%20Documents/4CC6A36259C2DF878525813F0051F98D/$FILE/Letter%20from%20OGE%20Director%20W%20Shaub%206-13-17.pdf)).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

Office of the President] appointees” exempting EOP appointees from some recusal requirements under the Executive Order, “retroactive to January 20, 2017.” As OGE noted in its response, this waiver is not dated or signed.

- a. When did the White House Counsel’s office issue the waiver, if it was prior to May 31, 2017?
 - b. Who in the White House Counsel’s office approved its release?
 - c. What was the rationale for applying this waiver to all “all EOP appointees”? What specific process did the White House Counsel’s office use to determine that the waiver was needed and appropriate for “all EOP appointees”?
 - d. What was the rationale for applying this waiver retroactively? Did the White House Counsel’s Office possess information indicating that EOP appointees had violated the Executive Order or other ethics laws at some point between January 20, 2017 and May 31, 2017? If so, who were the appointees who violated the Executive Order or other laws, and how and when did they do so?
 - e. OGE states that “putative retroactivity is inconsistent with the very concept of a waiver.” Did the White House Counsel’s office discuss the retroactivity of the waiver with OGE prior to its release?
2. According to OGE, the waiver issued by the White House for EOP appointees, including Mr. Bannon, is only a “partial wavier”: “it authorizes [Mr. Bannon] to communicate with Breitbart and to participate in meetings with his former employer, but only if the subjects of discussion are limited to ‘matters of broad policy and particular matters of general applicability.’” Mr. Bannon is still “barred...from participating in any ‘particular matter involving specific parties’ in which Breitbart is a party or represents a party,” as well as from participating in meetings and events with Breitbart “when the subject of discussion is a particular matter involving specific parties.” However, according to press reports, Mr. Bannon had detailed discussions with Breitbart editors about the content of their news reports, and occasionally “reach[es] out” to Breitbart’s Editor in Chief.
- a. How has the White House Counsel’s office defined “matters of broad policy and particular matters of general applicability” with regard to Mr. Bannon and Breitbart News? How has it defined “a particular matter involving specific parties”?
 - b. Please provide a detailed description of Mr. Bannon’s communications with Breitbart News since January 20, 2017.
 - i. Are press reports that Mr. Bannon “went ballistic” in February 2017 on a phone call with Breitbart’s Washington political editor accurate? If so, what steps has the White House Counsel’s office taken to address this potential violation of Executive Order 13770?

- ii. Is the press report that Mr. Bannon communicates with Breitbart's Editor in Chief "every so often" accurate? If so, what steps has the White House Counsel's office taken to address this potential violation of Executive Order 13770?
 - c. Has Mr. Bannon recused himself from any interactions with Breitbart News, in order to avoid violating Executive Order 13770? If so, please describe the nature of those recusals.
3. OGE makes clear that the Standards of Conduct "require [Mr. Bannon] to recuse from any such matter whenever a reasonable person with knowledge of the relevant facts would question his impartiality with regard to his former employer, unless he first receives an authorization pursuant to 5 C.F.R. § 2635.502(d)." ²⁰ As the former Executive Chairman of Breitbart News, Mr. Bannon's involvement with Breitbart unquestionably could lead a "reasonable person" to question his impartiality. However, to date, the White House has not released such an authorization for Mr. Bannon regarding his communications with Breitbart.
- a. Has Mr. Bannon recused himself from any interactions with Breitbart News, in order to avoid violating the Standards of Conduct? If so, please describe the nature of those recusals.
 - b. If Mr. Bannon has not recused himself, and has communicated with Breitbart, please explain how Mr. Bannon's interactions comply with the Standards of Conduct.

Please do not hesitate to reach out to our staff with any questions about this letter.

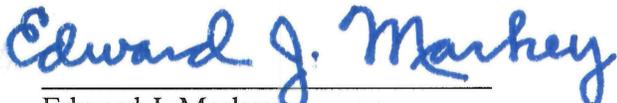
Sincerely,



Elizabeth Warren
United States Senator



Sheldon Whitehouse
United States Senator



Edward J. Markey
United States Senator



Mazie Hirono
United States Senator

²⁰ *Ibid.*