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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
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December 1, 2017

VIA ELECTRONIC TRANSMISSION

The Honorable Rod J. Rosenstein
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Deputy Attorney General Rosenstein:

E-mail communications recently released by the FBI in response to a Freedom of Information Act (FOIA) request show that Deputy Director Andrew McCabe may have violated the Hatch Act and corresponding Department regulations prohibiting political activity during his wife's 2015 campaign for the Virginia Senate.

According to guidance from the DOJ's Departmental Ethics Office, under 5 C.F.R. § 734.101-702, FBI employees are forbidden from "engag[ing] in political activity while on duty, in a federal facility, wearing a uniform or official insignia, or using a federally-owned or leased vehicle..."¹ The guidance also states that "further restricted" employees such as those at the FBI:

...may not use any e-mail account or social media to distribute, send or forward content that advocates for or against a partisan political party, candidate for partisan political office or partisan political group (* *at all times, further restricted employees may not post links to web sites created by or leading to information created by a political party, partisan candidate or campaign*)²

However, the e-mail communications released by the FBI show that Mr. McCabe did precisely that during his wife's Virginia Senate campaign. For instance, in an August 19, 2015, e-mail from his FBI e-mail account to an undisclosed recipient, he wrote: "Jill has been busy as hell since she decided to run for VA state senate (long story). Check her out on Facebook as Dr. Jill McCabe for Senate."³ In a November 1, 2015, e-mail from his same FBI email account to an

¹ Department of Justice "Political Activities" Available at <https://www.justice.gov/jmd/political-activities>

² *Id.*

³ FBI Records: The Vault "Deputy Director McCabe Communications Regarding Spouses Virginia State Senate Campaign Part 01 of 01" p. 20.

FBI employee, Mr. McCabe wrote: “I am so proud of her. She will do a great job for VA if she gets elected.”⁴

Departmental guidelines concerning social media sites such as Facebook are especially stringent. Employees who fall into the “further restricted” category of the Hatch Act, such as Mr. McCabe, are even directed to “adjust [social media] privacy settings so that lists of ‘friends,’ ‘likes,’ ‘interests’ and ‘pages’ with links are visible only to the employee...”⁵ The use of an FBI e-mail account to direct others to a candidate’s Facebook page appears to be precisely the type of political activity the Hatch Act and related Departmental guidance aim to prevent. Communications of this type are also especially problematic when directed toward subordinates, who can feel pressure to respond favorably to requests for support from their superiors.

For the purposes of public release in association with the FOIA request, the documents produced by the FBI are heavily redacted. For the Committee’s investigative purposes, it is necessary to see underneath the redactions to determine the individuals with whom Mr. McCabe was communicating about his wife’s Senate campaign and whether he engaged in additional political activity on official government e-mail or in other ways.

As you know, FOIA exemptions are discretionary. FOIA *requires* public disclosure unless an exemption provides the agency with discretion to withhold information. Those exemptions do not require the agency to withhold information from the public. Separately, and more importantly, FOIA exemptions do not authorize an agency to withhold information from Congress. Disclosure to Congress is not disclosure to the public and FOIA exemptions are not a basis to shield information from Congressional oversight. Therefore, please produce to the Committee un-redacted copies of all of the e-mail communications included in the FOIA request entitled: “Deputy Director McCabe Communications Regarding Spouses Virginia State Senate Campaign Part 01 of 01.” In addition, please respond to the following no later than December 15, 2017:

1. Please produce all records related to communications sent or received from Andrew McCabe, including text messages and emails, between February 25, 2015, when Jill McCabe was reportedly first contacted by the Virginia Lieutenant Governor about running for office, and December 1, 2015, that pertain to Jill McCabe’s Virginia Senate campaign.
2. What steps has the Department taken to hold Andrew McCabe accountable, and if none, please explain why not?
3. According to a March 10, 2016, memorandum from Deputy Attorney General Sally Yates to Department of Justice Career Employees: “There have... been several instances of employees sending politically-charged e-mails to colleagues while on duty, also a

⁴ *Id.* at 22.

⁵ Department of Justice “Political Activities” Available at <https://www.justice.gov/jmd/political-activities>

violation of the Hatch Act. OSC has imposed suspensions up to 180 days for recent violations.”⁶

- a. Please describe the procedural steps for determining and issuing a suspension from duty when a DOJ employee is found to have violated the Hatch Act or Department regulations by sending one or more politically charged e-mails. Please describe any rules or other standards that are applied.
 - b. Please provide the number of cases in which DOJ employees have been suspended for sending “politically-charged e-mails to colleagues while on duty.” Please list the agency affiliation and length of suspension for each case.
 - c. Please describe what, if any, suspension has been administered to Andrew McCabe for politically charged e-mails sent in reference to his wife’s Senate campaign. If no suspension has been issued, please explain how his case differs from others where suspensions have been issued.
4. In a June 28, 2017 letter to you, the Committee requested an un-redacted copy of the ethics and recusal protocol applied to Mr. McCabe regarding his potential conflicts of interest in ongoing and future FBI investigations. On July 11, 2017, the Justice Department refused to provide an un-redacted copy and responded that names of FBI agents and attorneys assigned to duties cannot be made public unless they have been “identified through documents filed with a court.” That is not a valid basis to withhold information from Congress, especially during the course of a congressional investigation. Please provide all written guidance the Department has used to justify withholding the requested information from the Committee.

I anticipate that your written reply and any responsive documents will be unclassified. Please send all unclassified material directly to the Committee. In keeping with the requirements of Executive Order 13526, if any of the responsive documents do contain classified information, please segregate all unclassified material within the classified documents, provide all unclassified information directly to the Committee, and provide a classified addendum to the Office of Senate Security. Although the Committee complies with all laws and regulations governing the handling of classified information, it is not bound, absent its prior agreement, by any handling restrictions.

⁶ Sally Q. Yates, Deputy Attorney General “Memorandum for all Department of Justice Career Employees” (March 10, 2016), p. 4. Available at <https://www.justice.gov/jmd/file/834486/download>

Should you have any questions, please contact Josh Flynn-Brown of my Judiciary Committee staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary

cc: The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary

The Honorable Henry Kerner
Special Counsel
U.S. Office of Special Counsel