U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 18, 2010

The Honorable Chuck Grassley
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

This responds to your letter, dated November 24, 2009, which requested information about political appointees at the Department who previously represented detainees or worked for organizations advocating on behalf of detainees, detainee policy, or terrorism policy. We are sending identical responses to the other Senators who joined in your letter to us.

At the outset, we want to assure you that all Department appointees understand that their client is the United States. In addition to their professional obligation to abide by ethics rules designed to protect against actual or perceived conflicts of interest, each appointee has taken an oath to support and defend the Constitution of the United States against all enemies, foreign and domestic. No appointee in this Administration would permit or has permitted any prior affiliation to interfere with the vital task of protecting national security, and any suggestion to the contrary is absolutely false.

In order to address your request, we must first correct an apparent misapprehension regarding the conflict of interest standards that apply to Government lawyers. It is quite common for lawyers who enter Government service, whether at the Department of Justice or elsewhere, to work in issue areas that overlap with their prior practice. For example, lawyers in the Antitrust and Tax Divisions often come to the Department with prior experience representing corporations and/or individuals in antitrust or tax litigation against the Government. Likewise, a prosecutor of white-collar fraud cases may have previously represented defendants in such cases. This familiarity with and experience in the relevant area of law redounds to the Government's benefit. Accordingly, the governing standards—as stated in statutes, regulations, rules of professional responsibility, and an Executive Order—do not preclude Government lawyers from working in areas of the law or on issues in which they have prior experience. Instead, these standards, which we describe below, are designed to prevent attorneys from participating in particular matters in which they have actual conflicts of interest, or in which their participation would give rise to the appearance of an actual conflict.

First, under Executive Order 13490, "Ethics Commitments by Executive Branch Personnel," issued by the President on January 21, 2009, all political appointees must sign an Ethics Pledge that, among other things, commits them for a period of two years from the date of their appointment not to participate in any particular matter involving specific parties in which a former employer or former client of the appointee (within two years prior to his or her appointment) is a party or represents a party. To the best of our knowledge, this Ethics Pledge is more stringent than that imposed by any prior Administration. The Ethics Pledge echoes—and strengthens—established Department guidance based upon the impartiality regulations contained in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. §§ 2635.501-03. The Ethics Pledge also restricts individuals who engaged in lobbying activity, as defined by the Lobbying Disclosure Act, 2 U.S.C. §§ 1601, *et seq.*, during the two-year period preceding their appointment.

Second, the federal financial conflict of interest statute, 18 U.S.C. § 208, generally prohibits participation in a matter that would have a direct and predictable effect on an employee's current personal or imputed financial interests. A specific waiver may be granted under 18 U.S.C. § 208(b)(1) based upon a determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services on behalf of the Government.

Third, Department attorneys, like attorneys in private practice, are guided by applicable rules of professional responsibility, including those that prescribe the duties lawyers owe to their former clients. *See, e.g.*, American Bar Association Model Rule 1.9. In the absence of the former client's consent, the extent to which these rules prevent a lawyer from participating in a particular matter depends on the particular facts and circumstances of the former and current representations, including the extent of the client confidences the lawyer obtained from the former client. *See id.* The rules generally do not, however, prohibit lawyers who once represented plaintiffs in a particular area of law from now representing defendants in that same area of law, or vice versa. Indeed, it is common for Government lawyers to make legal arguments on behalf of the United States that are contrary to legal arguments they made previously on behalf of a prior client in private practice.

As a practical matter, these standards have meant that all political appointees are recused from particular matters involving specific parties in which they actually participated in their previous employment, as well as from particular matters in which their prior employers (within two years prior to their appointment) represent specific parties, including individual detainees. (Their recusals need not be written and, in some instances, employees simply do not work on matters that would trigger the need for recusals.) No waivers regarding work on detainee-related matters have been granted regarding any of the restrictions contained in the Ethics Pledge.

While the prohibitions relating to particular matters involving specific parties do not apply to policy issues, the Department's ethics officials also have considered the impartiality regulations in the context of the legal and policy decisions necessary to fulfill the Department's broader responsibilities pertaining to detainee matters. As you know, on January 22, 2009, the President issued three separate Executive Orders (Review of Detention Policy Options; Ensuring Lawful Interrogations; and Review and Disposition of Individuals Detained at Guantanamo Bay Naval Base and Closure of Detention Facilities), and one Presidential Memorandum (Review of the Detention of Ali Saleh Kahlah al-Marri). The review processes contemplated in each Order and the Memorandum were either led or coordinated by the Attorney General and involved numerous interagency participants and various steps, which imposed significant responsibilities on the Department, and were a top priority.

In the past, the Department has considered whether recusal was necessary or appropriate in circumstances such as these, where the participation by an official in decisions about policies and other matters could conceivably affect particular matters involving specific parties from which the official is recused. The general standard provided in the impartiality regulations for assessing such considerations is whether a reasonable person with knowledge of the relevant facts would question the official's impartiality in performing his or her official duties. *See* 5 C.F.R. § 2635.502.

In this instance, career ethics officials noted that any concern regarding undue influence on a federal official from a former employer is substantially ameliorated where, as here, a broad range of policy and legal issues are being addressed that ideally, perhaps even necessarily, must be considered as a whole. The scope and importance of these matters required participation by the Attorney General, other senior officials, and their staffs, none of whom sought authorization to contact their former law firms. The ethics officials concluded that, under these circumstances, a reasonable person with knowledge of the relevant facts would not question the impartiality of these appointees in performing their official duties. Based upon that guidance, Department appointees have been authorized to participate in policy and legal decisions regarding detainee matters and decisions relating to the disposition of detainees, except in those particular matters involving specific parties from which they are recused.

With regard to the specific requests in your letter, the Department does not maintain comprehensive records of such information about individual Department employees. We have, however, obtained information responsive to your interests from the Office of the Attorney General, the Office of the Deputy Attorney General, the Office of the Associate Attorney General, the Office of Legal Counsel, the Office of the Solicitor General, the National Security Division, the Civil Division, and the Criminal Division. To the best of our knowledge, during their employment prior to joining the government, only five of the lawyers who serve as political appointees in those components represented detainees, and four others either contributed to

amicus briefs in detainee-related cases or were otherwise involved in advocacy on behalf of detainees. None, as far as we are aware, did so as registered lobbyists. Others had no involvement in representing detainees or other entities in detainee cases, but came to the Department from law firms where other lawyers represented detainees, often on a pro bono basis. (It is not surprising that this should be the case: as best as we can determine, of the 50 largest U.S. law firms, at least 34 have either represented detainees or filed amicus briefs in support of detainees.) Among senior Department leadership, the last category includes the Attorney General, the Acting Deputy Attorney General, the Associate Attorney General, and the Assistant Attorney General for the Criminal Division. In addition, the Assistant Attorney General for the Civil Division previously represented one Afghanistan detainee, and his former employer represents other detainees.

Accordingly, the senior Department officials referenced above, like other political appointees who are similarly situated, have recused from particular matters regarding specific detainees in which their former firms represent the detainee or another party and from decisions relating specifically to the dispositions of particular detainees represented by their former firms. These recusals pertain to decisions relating to particular matters involving specific parties who are or have been represented by their former law firms within the relevant time period. However, as noted above, these senior officials have been authorized to participate in policy and legal decisions regarding detainee matters, in particular matters regarding specific detainees whom their prior employer did not represent, and in decisions relating to the disposition of such detainees.

As your letter notes, Principal Deputy Solicitor General Neal Katyal previously represented one Guantanamo detainee. At the Department, he has not worked on any Guantanamo detainee matters, but has participated in litigation involving detainees who continue to be detained at Bagram Airfield, Afghanistan and in litigation involving al-Marri, who was detained on U.S. soil. His participation in such litigation is fully consistent with advice he received from career Department officials regarding his obligations under the Rules of Professional Conduct and other applicable rules. National Security Division Attorney Jennifer Daskal, also referenced in your letter, previously worked for Human Rights Watch, which advocates on behalf of detainees and on detainee policy. At the Department, she has generally worked on policy issues related to detainees. Her detainee-related work has been fully consistent with advice she received from career Department officials regarding her obligations.

We hope that this information is helpful. Please do not hesitate to contact this office if you would like additional assistance.

Sincerely,

Ronald Weich
Assistant Attorney General