

March 30, 2011

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Dear Mike:

For convenience, and because we seem to be focused on the Federal ethics rules, rather than the Bar rules (as to which I defer to Richard), following are my comments in response to your sur-reply, dated March 15, 2011, to our rebuttal, dated March 9, 2011, to your February 22, 2011 comments on our *Engage* article entitled “*DOJ’s Ex-Detainee Lawyers: The Ethics Issue*”. I think Richard basically agrees with my comments. He may write separately on the Bar Rule 1.9 issues that we raised.

At the base of our disagreement, I believe, is a disagreement over the fundamental question as to what is the “specific party particular matter” (“SPPM”) in which ex-detainee lawyers may be, or may have been, participating while at DOJ. I suggest that we see if we can reach some agreement on a possible SPPM and then, using publicly available facts, see how the Federal “inward” revolving door rules (specifically, paragraph 2 of President Obama’s Executive Order 13490 of January 21, 2009 entitled “*Ethics Commitments by Executive Branch Personnel*” (the “Ethics EO”) and, although we only made a passing reference to it in our article, the provision in the “Standards of Ethical Conduct for Employees of the Executive Branch”, 5 CFR Part 2635, that requires impartiality in the performance of executive branch duties – 5 CFR §2635.502 (“§502”)) apply to those facts.

I start with Executive Order 13492 of January 22, 2009: “*Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities*” (the “Detainee EO”), in which President Obama ordered:

- A review of the status of each individual currently detained at Guantánamo.

- A determination of the possibility of a transfer or release of any of such individuals “consistent with the national security and foreign policy interests of the United States” and how any such release would be effected.
- In the cases of individuals not approved for release or transfer, an evaluation to determine whether they should be prosecuted for any offenses they may have committed.
- With respect to any individuals whose disposition is not achieved under either of the two preceding bullets, a selection of “lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals”.

Next, I look at the Ethics EO, which sends me to 5 CFR §2641.201(h) of the Federal “outward” revolving door rules (5 CFR Part 2641) for a definition of SPPM. It is clear to me that the foregoing four tasks constitute a “particular matter”, as defined in 18 USC §207(i)(3), and that those four tasks involve “a specific proceeding affecting the legal rights of the parties or an isolated transaction or related set of transactions [i.e., they were all initially detained under the authority of the AUMF, as informed by the laws of war (“law of war detention”)] between identified parties” [i.e., the “individuals currently detained at Guantánamo”]. From this, it is quite clear that the tasks assigned by the Detainee EO – the review and disposition of the detainees at Guantanamo – constitute an SPPM. I think this conclusion is bolstered by Executive Order 13567 of March 7, 2011: “*Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*” (the “Second Detention EO”), which narrows the Detention EO SPPM to those detainees “(i) designated for continued law of war detention; or (ii) referred for prosecution, except for those detainees against whom charges are pending or a judgment of conviction has been entered”.

The Detention EO SPPM is actually a rather narrow SPPM, compared to the SPPM found by the DC Court of Appeals in *Sofaer* – “why and how Pan Am 103 blew up over Lockerbie”. To understand the breadth of the SPPM in *Sofaer*, one needs to take into account that the DC Court of Appeals (and the DC Board on Professional Responsibility) implicitly rejected as possible SPPMs both the criminal investigation and a related civil case that had been brought against Pan Am. Thus, the SPPM was something bigger and broader than these two classic SPPMs. Furthermore, at the time Abe Sofaer was supposedly participating in the SPPM of “why and how Pan Am 103 blew up over Lockerbie”, Libya was not the primary suspect and the actual perpetrators were far from being identified. (As we indicate in the article, we do not agree with the DC Court of Appeals’ SPPM definition in *Sofaer*. The SPPM that I find in the Detainee EO is quite narrow and well defined, compared to the SPPM in *Sofaer*. I do not see how one can agree with the DC Court of Appeals’ SPPM definition in *Sofaer* and not agree with my formulation of the Detainee EO SPPM.)

You quote the DC Court of Appeals statement in *Sofaer*: “The ‘matter’ [was] not terrorism, or even Libyan terrorism.” Were you implying that my formulation of the Detainee EO has a similar breadth? If so, I can only say that that is certainly not the case. To put it another way, the Detainee EO SPPM does not deal with terrorism generally. It does not even deal with all detainees in the Afghan and Iraqi wars. It deals with the rights and status of a specific group of detainees, all of whom are currently detained at Guantanamo (as opposed to, e.g., Bagram) and were, or were initially, detained under the authority of the AUMF as informed by the laws of war.

If the Detainee EO had called for a review of the USG detention policy, what the AUMF did and did not authorize, the adequacy of the breadth of the AUMF, etc., I think one would conclude that its subject is a particular matter and not an SPPM. But when the Detainee EO calls for a “review of the status of each individual currently detained at Guantánamo”, a determination of “whether it is possible to transfer or release [such] individuals”, “whether the Federal Government should seek to prosecute the detained individuals” and the “lawful means . . . for the disposition of such individuals” (emphasis added), I do not see how one could argue that it does not establish an SPPM.

You state that you do not believe “that all Guantanamo detainees are ‘substantially related’ unless there is a specific factual connection between them beyond the mere assertion that they were members or supporters of Al Qaida or otherwise subject to capture under the AUMF.” I think this would be the “relatedness” issue under Bar Rule 1.9, and I will let Richard address that. Under the Ethics EO, there are two “relatedness” issues:

- The first issue is whether the Detainee EO spawns a single SPPM – the review and disposition of all of the Guantanamo detainees – or multiple SPPMs – each review and each disposition of each detainee being a separate SPPM. I think it is clearly the former. The facts that all of the detainees are held at Guantanamo and that the basis for their detention and the alternatives for their disposition turn on a common set of legal issues (whether their law of war detention should be continued or whether they should be referred for prosecution) mean that their review and disposition are part of a “related set of transactions”.
- The second “relatedness” issue is whether participation in the Detainee EO SPPM, even by a DOJ lawyer dealing with only Detainee X, is “directly and substantially related” to his former employer or former client. That turns on the issue whether “the former employer or . . . former client is a party or represents a party” to the SPPM – i.e., whether the former employer is representing, or the former client is, a detainee being reviewed. It does not make any difference if such detainee is Detainee Y and not Detainee X. This is because the review and disposition of Detainee Y is going to involve the same legal considerations as the review and disposition of Detainee X.

Part of your disagreement with this last conclusion is based on the assertion that “[i]n the absence of . . . a specific *factual* connection”, it is based on a presumption “that a lawyer who represents one detainee will [I would say “could”] be partial to the cause of every other detainee.” You go on to state: “That is not a sustainable presumption. Lawyers take opposing positions on issues in separate matters all the time without having their ethicality or impartiality challenged.” (Emphasis added.) I would simply point out that: (a) these are not separate matters and (b) that presumption underlies the Ethics EO “inward” revolving door ban (as well as §502).

Rather than address the five “specific factual variants in constructing a scenario in which a lawyer now at DOJ . . . or his former firm had represented Detainee X in filing a habeas corpus petition and related efforts to end X’s detention” posited in your letter, let’s address the real, concrete example of Jennifer Daskal. Let me say at the outset that I do not know Ms. Daskal, and my use of her as an example is not meant in any way to criticize her for her past role in detainee representation – in other words, there is nothing personal in using her as an example.

Instead, I choose Ms. Daskal because I understand that she is counsel to the Assistant Attorney General for National Security, where she has played a major role in the implementation of the Detainee EO – i.e., she has been involved in the review of the status and the disposition of several Guantanamo detainees, and that prior to joining the Obama Justice Department she was the program advocacy director for detainee matters at Human Rights Watch, where she met with, strategized with and actively advocated for detainees who are still at Guantanamo. I also understand that HRW continues to represent detainees who are still at Guantanamo. If the SPPM in *Sofaer* was the investigation into “why and how Pan Am 103 blew up over Lockerbie” and if, despite the fact that Judge Sofaer played no role in the investigation and made no recommendations on the basis of confidential briefings, he nevertheless “substantially” participated in the SPPM, then the review of the status and disposition of the detainees is certainly an SPPM and Daskal’s activities at DOJ certainly constitute participation in the SPPM. Since the specific parties to the SPPM include detainees formerly represented by Daskal or currently represented by HRW, that SPPM is, by definition, “substantially related” to her former clients and her former employer.

In closing, let me repeat two things:

- As Richard and I stated in our *Engage* article and our rebuttal to your comments, the purpose of the article was to center the whole ex-detainee lawyer debate on two questions: (a) whether those DOJ ex-detainee lawyers that were the subject of a lot of discussion in the media were complying with applicable ethics rules and (b) whether those rules are applied evenly. Given what I believe is a deep mutual professional respect between us, we should be able to convince each other one way or the other on the correct answer to the first question.

- One of our pleas in the *Engage* article was for more facts, so that we can address those issues. To get those facts, we need answers to questions such as: what did these former detainee lawyers do before joining the USG? What have they been doing since? Did they meet the safe harbor suggested by the DC Court of Appeals in *Sofaer*? If so, how? If not, why are there no consequences? What did DOJ ethics lawyers advise? Does the DC Bar Counsel have a view? The DC Bar Ethics Committee? We would be delighted to have you and the Ethics Bar join us in seeking answers to these questions.

Sincerely,

Edwin D. Williamson

cc: Richard W. Painter