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Dear Edwin and Richard:

A blog I read from time to time recently had a link to an article the two of you wrote entitled: "*DOJ's Ex-Detainee Lawyers: The Ethics Issue*," which first appeared in *The Weekly Standard* and was reprinted in The Federal Society's publication, *Engage*. The title caught my eye for three reasons: (i) I have been representing a Guantánamo detainee since 2005; (ii) I have long been interested in professional ethics (I was for many years the firm's inside "ethics counsel," and I chaired the New York City Bar's Committee on Professional and Judicial Ethics for two years); and (iii) I have been associated with both of you professionally at Sullivan & Cromwell LLP. With this background, I read your article with great interest and care.

I respectfully submit that your conclusion—that "any Obama appointee who represented, or whose former employer represents, a detainee (including in an amicus capacity) would be banned from being involved in the review or disposition of any Guantánamo detainee"—is neither compelled by nor consistent with the ethics authorities you cite.

As you know, D.C. Bar Rule 1.9 declares it to be unethical for a lawyer to represent a client materially adverse to a former client of the lawyer in "the same or a substantially related matter." This last phrase, which also limits the reach of Rule 1.11, the "outward" revolving door ban, has been interpreted over the years to require much more than "overlapping" facts, as you suggest.

Furthermore, the outward and inward revolving door bans have entirely different rationales, and it is not surprising that they may lead to different outcomes under similar or analogous facts. The inward ban is designed, as you rightly note, "to protect a former client from the use by a former lawyer of privileged or protected information in a manner that would adversely affect the former client." The outward ban is designed to prevent a former government lawyer from profiting from his prior government service. Hence, the requirement that the former government lawyer have participated "personally and substantially" in the matter. Hence also, the absence of any requirement that the subsequent representation have been materially adverse to the lawyer's former government client.

It is clear to me that you are arguing for a stricter ethics rule for Department of Justice lawyers who formerly represented detainees or submitted amicus briefs on their behalf than for other lawyers within or outside the Department. It is equally clear that you believe a stricter rule is justified because a former detainee lawyer cannot be considered impartial "[g]iven the ferocity with which the detainees' lawyers criticized the government's detention policies." You thus lump together and would subject to a stricter ethics rule scores of lawyers who have been making lawyerly arguments on behalf of individual clients whose only common denominator is the fact of their detention at Guantánamo. (Your choice of "ferocity" rather than "zeal" was presumably dictated by the fact that the former word has a less favorable connotation when applied to lawyers.)

Finally, any pretense to dispassionate, impartial reasoning is dispelled by the wholly unsupported speculation in your "epilogue" that the decision to try Ahmed Ghailani in federal court, rather than before a military commission, may have "reflect[ed] the influence of the ex-detainee lawyers." You have thus recast a policy choice between military commission and federal court trials as one that *may* ("We...wonder if....") have been influenced by ethical factors, and in the process have impugned the integrity of the lawyers who participated in the decision.

Sincerely,

Michael A. Cooper

Professional Responsibility & Legal Education

DOJ's Ex-Detainee Lawyers: The Ethics Issue

*By Edwin D. Williamson and Richard W. Painter**

One neglected issue in the controversy over the revelation that there are at least nine (or ten, if you count Attorney General Eric Holder) Justice Department lawyers who represented, or filed briefs in support of, Guantanamo detainees is whether those lawyers are complying with applicable ethics rules—and whether those rules are being applied evenly.

The two basic ethics rules are (a) the "inward" revolving door ban found in President Obama's executive order imposing ethics obligations on his administration's appointees and (b) the conflict of interest rules found in codes of professional conduct defining lawyers' duties to clients.

President Obama's Ethics Order. This bans an appointee from participating for two years in any "specific party particular matter" (includes litigation, investigations and rulemaking) in which the appointee's former client or former firm is a party or represents a party. The Justice Department, in a letter to Republican senators on the Judiciary Committee, takes the position that the ban does not apply to the DOJ lawyers as long as the appointee is not dealing with the same detainee that he represented or his former employer represents.

If this is a correct reading of the "inward" revolving door restriction, then it is substantially less strict than the "outward" revolving door ban found in the federal government's and the Bar's ethics rules. They would ban a former government official who had, while in government service, participated in the disposition of Guantanamo Detainee A from turning around and in private practice representing Guantanamo Detainee B where the facts overlapped. On the other hand, according to DOJ's interpretation, a political appointee who represented Detainee A when in the private sector could participate in the disposition of Detainee B, even if they were alleged co-conspirators.

We believe that the interpretations of "specific party particular matter" by the government's Office of Government Ethics and the D.C. Court of Appeals of their respective "outward" revolving door rules (some of which we happen to disagree with) compel the conclusion that the implementation of President Obama's January 2009 executive order (entitled "Review and Disposition of Individuals Detained at Guantanamo Bay Naval Base and Closure of Detention Facilities") involves the same specific party particular matter as the representation of any of the Guantanamo detainees. Thus, any Obama appointee who represented, or whose former employer represents, a detainee (including in an amicus capacity) would be banned from being involved in the review or disposition of any Guantanamo detainee.

This conclusion would be consistent with the purpose of President Obama's ethics order—to keep appointees from acting in a way that benefits their former clients. After all, one would be horrified to find a lawyer who had represented Exxon in a DOJ antitrust conspiracy investigation joining the antitrust division and formulating policies or litigation strategy concerning another colluding oil company.

The Bar's Client Loyalty Rules. These ban a lawyer who has represented a client in a matter from representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client's interests, unless the former client gives an "informed consent." Where a lawyer's former firm represents or represented a client in a matter and the lawyer acquired material confidential information, the lawyer cannot represent another person with adverse interests in the same or a substantially related matter without the former client's "informed consent."

Again, we believe that a government lawyer who had represented a Guantanamo detainee or who had acquired material confidential information about his former firm's detainee client would have serious problems in participating in the implementation of the Obama executive order mandating the review and disposition of the Guantanamo detainees.

The purpose of the Bar rules is to protect a former client from the use by a former lawyer of privileged or protected information in a manner that would adversely affect the former client. Given the clamor raised by the human rights lobby over the treatment of the Guantanamo detainees, we are stuck by the total absence of any expressions of concern whether the rules designed to protect the detainees are being followed.

Consistent Application of Ethics Rules. When Reagan-Bush State Department legal adviser Abraham Sofaer took on the representation of the Libyan Government in 1993 in an effort to settle the PanAm 103 bombing case, a high profile debate erupted over whether he was violating the "outward" revolving door rules. Senator Carl Levin asked the Office of Government Ethics for its opinion as to whether Sofaer was in violation of the federal revolving door ban. In response to an op-ed by *Washington Post* columnist Jim Hoagland suggesting that Sofaer would have undue influence on the Clinton administration's handling of the PanAm 103 bombing (!), the D.C. Bar Counsel initiated an action against Sofaer alleging violation of its revolving door ban.

Although he withdrew immediately from his Libyan representation, Sofaer eventually was issued an informal admonition by the D.C. Bar Counsel, the lightest form of ethics punishment, but it did constitute a finding that he had violated the ethics rules. The D.C. Court of Appeals, in upholding

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Sofaer's sanction, essentially adopted a safe harbor rule, in effect requiring a lawyer facing a close or difficult ethics issue to obtain the view of her employer's or her Bar's ethics expert.

The questions we are addressing are complicated, and the determination of whether these rules are being complied with depends very much on the facts of individual cases. At a minimum, therefore, we believe that the Justice Department should release their internal opinions as to why they believe that the president's ethics rules and the Bar rules have been complied with. Senate Judiciary Committee members should ask for the views of the director of the Office Government Ethics and the D.C. Bar Counsel or the D.C. Bar Ethics Committee.

Under existing federal ethics rules, the standard for deciding whether an executive branch official may participate in a particular matter is whether "a reasonable person with knowledge of the relevant facts would question his impartiality in the matter." Given the ferocity with which the detainees' lawyers criticized the government's detention policies, it is a fair question whether those who are now government officials meet this impartiality standard.

President Obama claims to have established high ethical standards for his appointees. His words should be implemented into action. The placing of former detainee lawyers in detainee-sensitive positions raises separate serious questions as to the attorney general's judgment.

Epilogue

We have not done any additional research since the original publication of this article. We do note, however, the nearly disastrous outcome of DOJ's decision to try detainee Ahmed Khalfan Ghailani in a civilian court and wonder if the poor judgment reflected in that decision and the conduct of his trial reflects the influence of the ex-detainee lawyers. If it does, it adds more heat to the controversy as to whether those lawyers should have been banned from participating in the disposition of the Guantanamo detainees.