REDLINED INTERLINEATIONS ARE WILLIAMSON'S AND PAINTER'S MARCH 9, 2011 REBUTTAL TO COOPER'S FEBRUARY 22, 2011 COMMENTS ON THEIR *ENGAGE* ARTICLE.

February 22, 2011

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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.

Let us open by suggesting we make sure we are consistently using various terms. Your letter switches back and forth between our comments on Obama's Ethics Executive Order, which we also refer to as the "inward" revolving door rule, and the Bar's client loyalty rules, mainly Rule 1.9. We also refer, in the context of the "inward" revolving door rule, to the "outward" revolving door rules found in the Federal governments ethics rules (i.e., 18 USC §207(a)(1) and 5 CFR Part 2641) and in the Bar Rules (i.e., Rule 1.11). We generally did not, and here will not, use "inward" or "outward" revolving door rules to refer to the Bar client loyalty rules. 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. What you quote is a conclusion under President Obama's Ethics Executive Order. Our comparable conclusion under the Bar client loyalty rules is somewhat different. While we take it that you do not agree with that statement either, we assume that you will agree that you have different reasons for disagreeing with the two statements. So, at the risk of being a little pedantic and tedious, it would help us if you addressed the two conclusions separately.

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. We admit to a bit of short-hand here. We were simply trying to make the point that under the "outward" revolving door rules, the former government official who personally and substantially participated in a specific party particular matter (SPPM), such as investigating Exxon in connection with an antitrust conspiracy case, cannot go out into private practice and represent Chevron in the investigation. The substantive question is whether you disagree with our conclusion in the following paragraph -- i.e., that the implementation of the Detainee Executive Order is the same SPPM as the representation of a detainee. While we don't agree with the breadth with which the DC Court of Appeals defined the SPPM in the *Sofaer* case, the DC Court of Appeals' logic would compel the conclusion that the review and disposition of Guantanamo detainees is an SPPM. Consistent with this conclusion is our understanding that DOJ took the position that the lawyers who worked on the detainee cases and issues in the Bush 43 administration could not be involved in any Guantanamo detainee cases while in private practice. In addition, we understand that former Bush 43 administration lawyers who were involved in the detainee issues, even some who were not in DOJ, are screened out by their firms from detainee cases in accordance with Rule 1.11.

Furthermore, the outward and inward revolving door bans have entirely different ["Entirely different" may be a little strong, but we agree that there are differences. See below.] 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. Here are our understandings of the rationales for the various rules:

- The Federal "outward" revolving door ban is, according to OGE, intended to prevent a former government official from "switching sides" on a matter in which the USG has an interest "with the intent to influence" a government official. We don't think it is correct to say that it is intended to prohibit the former official from profiting from his government service, because (a) it does not ban "behind the scenes" activities, (b) it only applies to SPPMs (in other words, a former government official can participate in non-SPPM rulemaking while in government and then go out and advise clients on how to comply) and (c) it does not ban participation in an SPPM when the USG no longer has an interest. We agree that the ban does not require that the USG interest be adverse, but it does not apply when the USG interest has waned and, in any event, we cannot imagine an enforcement of the ban against someone who was acting in, or consistent with, the USG's interest.

- We believe the rationale for the Ethics Executive Order (the "inward" revolving door ban) is not that different from the rationale for the Federal "outward" revolving door ban – to prevent "switching sides" and using the government position to influence USG to take a position in favor of a former client or a former employer's client. Both involve "switching sides" and using a former (for the "outward" ban) or present (for the "inward" ban) government position to influence a decision in favor of a present (for the "outward" ban) or former (for the "inward" ban) private sector client or employer. In other words, they both protect the USG from influence in favor of a private sector person.

- As we state in our article, "The purpose of the Bar rules [i.e., Rule 1.9] 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." Thus, its rationale is not that different from the Federal "outward" revolving door ban, in that it is designed to protect the former client from the use of information gained in its representation. (We are, incidentally, struck by the silence of those who have been active in the defense of the detainees on the issue whether the detainees might be adversely affected by their ex-lawyers' switching sides. Shouldn't those lawyers have gotten waivers from their ex-clients before participating in the detainee SPPM at DOJ?)

- We could spend an eternity on the rationale for the Bar "outward" revolving door ban. Different reasons are given for the need to have it. The DC Court of Appeals has described the following as "the concerns addressed" by Rule 1.11: "The lawyer: (1) may disclose confidential information to the prejudice of the government client; (2) may use information obtained through the exercise of government power to the prejudice of opposing private litigants; and (3) while in government, may have initiated, structured, or neglected a matter in the hope of using it later for private gain." We do not see the difference between (1) and Rule 1.9. (2) may be a purpose, but we do not have a similar ban with respect to non-SP particular matters. We find (3) to be a make-weight argument dreamed up by someone who has an odd view of public servants. The ABA Model Rule 1.11 seems to boil down pretty

much to a repeat of Rule 1.9, but tailored to meet the peculiar circumstances where the former client is the USG. The ABA comments do refer to the intention of preventing the former government lawyer from having an advantage attributable to her former government service, but again, we do not see that as a particularly urgent purpose, in view of the failure to attempt the same thing with respect to non-SP particular matters.

Thus, while there are technical differences that "may lead to different outcomes under similar or analogous facts" (e.g., the Bar "outward" revolving door ban applies to "behind the scene activities", while the Federal ban does not; the Bar "outward" revolving door ban does not restrict the former government official's firm's activities if she is properly screened, while the activities of the new government official's former firm may be what triggers the "inward" ban on his government activities), the revolving door bans all have one thing in common that militates toward reaching the same outcome under similar or analogous facts – they all use the same term to define the subject matter – SPPM -- mainly to prevent the rules from being unworkably broad and restrictive. Therefore, we believe that in analyzing what is an SPPM under one revolving door rule, it is appropriate to use interpretations arising under other revolving door rules. These interpretations are also appropriate in determining what is the "same or substantially related matter" under Rule 1.9, because an SPPM is a sub-category of a "matter". Hence, the requirement that the former government lawyer have participated "personally and substantially" in the matter. The "personal and substantial" participation requirement is simply the drafting device to separate out real involvement from remote or tangential involvement in an SPPM, to avoid attributing an entire agency's work to a particular official. It does not have anything to do with profiting. Contrast 18 USC §207(a)(1) with (a)(2). Hence also, the absence of any requirement that the subsequent representation have been materially adverse to the lawyer's former government client. As the foregoing indicates, we question the accuracy of this statement as a matter of substance. And besides, all representations which are adverse to the former client are banned by all of the rules. Where the representation is not adverse, they all provide for a waiver (except, mysteriously, the DC Bar "outward" revolving door ban), either formally or as a matter of practice (i.e., non-prosecution under the Federal "outward" revolving door ban). In any event, in the current context, we are raising the issue of whether the "switching sides" is adverse to the former 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. We do not understand the basis for this statement. We admit that we tend to focus on legal issues. DOJ lawyers are by definition more likely to raise Bar rules issues, because they are lawyers and because almost everything a lawyer does in the private sector or at the Justice Department constitutes participating in SPPMs. There are other issues out there besides the detainee issue as to which we would be likely to criticize the Obama administration on policy grounds, but they may or not implicate these particular rules. We would raise the same questions arising out of the detainee issue with respect to DOD General Counsel Jeh Johnson, given the role that his former firm has played in detainee representations. Likewise, we would criticize ex-detainee lawyers working in the White House if they worked on the Detainee Executive Order or the disposition of any of the detainees. (White House personnel who worked on the tobacco litigation in the private sector were, we understand, recused during the Bush 43 administration from all tobacco decisions.) On the other hand, Edwin has expressed concerns about the appropriateness of Harold Koh's appointment as State Department Legal Adviser (not publicly other than to refuse to sign a letter urging his confirmation), given positions he has taken (e.g., strong support for joining the ICC), but it is not clear that his involvement on these issues either inside or outside of government constituted participation in an SPPM. 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.) You raise some pretty complicated questions here, and perhaps our keeping our article at magazine-length has led to some confusion. We hope the following will clear up some of your concerns:

- First, the purpose of our use of "ferocity" was not pejorative. Based on reports of activities and strategies used by detainee lawyers that significantly exceed the "zeal" required by the Bar Rules of a lawyer in representing a client, we thought this stronger term was appropriate. In particular, we had in mind the antics of Julia Tarver Mason. Granted, Ms. Mason has not joined the Justice Department, but we think it is reasonable to assume that she had some help from others who could include some of those now in government service. In addition, we

understand that the activities of Jen Daskal, as part of her paid job, went beyond mere zealous representation of a detainee, and she does hold an important position in DOJ dealing with the implementation of the Detainee Executive Order. We recognize, on the other hand, the possibility that there are ex-detainee lawyers whose behavior would not be appropriately described as "ferocious". This leads to our next point.

- Second, the primary purpose of our article was to pull the public debate about the role of the ex-detainee lawyers back from irresponsible squabbles over the patriotism of these lawyers and whether lawyers may represent truly "bad" people and to focus, as we say in the introduction to our article, on whether these ex-detainee lawyers are complying with applicable ethics rules and whether those rules are being applied evenly. One of our pleas is 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?

- In addition to expressing concerns and raising questions related to these pretty technical ethics rules, we thought it appropriate to refer to the basic requirement that USG employees are expected to be impartial in their government service -- 5 CFR §502, part of the Standards of Ethical Conduct for Employees of the Executive Branch, promulgated under Bush 41. It was in this context that we used "ferocity". This standard is unusual among the Federal ethics rules, because it really attempts to address an appearance, rather than establishing an objective standard of behavior (in other words, it is unlike the ethics rules derived from, say, 18 USC §207 and 208 in that respect, and, thus, its violation does not carry any civil or criminal penalties). Despite not having any "bite", a lot of action is based on this rule (e.g., the recusal of the ex-tobacco lawyers referred to above). We would expect it to be followed where a government lawyer's representation of a client prior to joining the USG would compromise the public's expectation of impartial government service. The problem is exacerbated when that government lawyer is part of a group some members of which have taken extreme positions on policies with which the lawyer will be dealing with expected impartiality.

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." Well, we can only ask: who made those awful decisions? The question is even more intriguing now that the Obama administration's position on the issue has been reversed. Certainly one can ask what is going on here and who was responsible for the initial errors without being accused of being passionate and partial. 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. We are not sure we understand what you mean by "a policy choice . . . [being] influenced by ethical factors". We were raising the question whether that policy choice was influenced by those who, because of the ethics rules, should not have been involved in the first place. If they were involved in the policy choice in violation of these rules, then we would question their integrity. But we thought we were being careful to raise this as a possibility, not as an assertion of fact.

Sincerely,

Michael A. Cooper