DEPARTMENT OF JUSTICE

Washington

May 6, 2009

CERTIFICATION OF PUBLIC INTEREST WAIVER FOR DAVID OGDEN

FROM: Lee J. Lofthus
Designated Agency Ethics Official, Department of Justice

SUBJECT: Waiver from Restrictions Related to Wilmer Cutler Pickering Hale and Dorr, LLP in Investigation of Government Attorney Conduct in United States v. Theodore F. Stevens, Crim. No. 08-231 (D.D.C.).

Pursuant to the authority delegated under Section 3 of Executive Order 13490 and for the reasons stated in the attached memorandum and after consultation with the Counsel to the President, I hereby certify that a limited waiver of the restrictions of paragraph 2 of the Ethics Pledge is in the public interest for appointee David W. Ogden in the position of Deputy Attorney General in the Department of Justice. Mr. Ogden shall not be restricted from participating in the investigation into the conduct of government attorneys in United States v. Theodore F. Stevens, Crim. No. 08-231 (D.D.C.), subject to the limitations set forth in the attached memorandum and without waiving the limitation on Mr. Ogden's participation in regulations and contracts as provided in paragraph 2 of the Ethics Pledge. This waiver does not otherwise affect Mr. Ogden's obligation to comply with other provisions of the Ethics Pledge or with all other pre-existing government ethics rules.

Signed _____ Date 5-6-09

Lee J. Lofthus
Designated Agency Ethics Official
Department of Justice

U.S. Department of Justice

Justice Management Division

MAY - 6 2009

Washington, D.C. 20530

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: Lee J. Lofthus
Assistant Attorney General for Administration and
Designated Agency Ethics Official

SUBJECT: Waiver under E.O. 13490 and 18 U.S.C. § 208

The purpose of this memorandum is to waive the restriction in Executive Order 13490 of January 21, 2009, Ethics Commitments by Employees in the Executive Branch, and further to make a determination under the standard of conduct on impartiality, that you may participate in a particular matter in which your former firm, which also is your spouse's firm, represents a party, relating to *U.S. v. Stevens,* Criminal No. 08-231 (EGS), the prosecution of former United States Senator Ted Stevens.

On April 1, 2009, the Department asked the U.S. District Court for the District of Columbia, Judge Emmet Sullivan, to grant the defendant's motion to dismiss the charges in *U.S. v. Stevens*, the prosecution of former Alaska Senator Ted Stevens. On April 7, 2009, the Court announced that it was appointing a special counsel, Henry Schuelke III, to "investigate and prosecute such criminal contempt proceedings as may be appropriate" against six Department of Justice attorneys who handled the case. The Department's Office of Professional Responsibility (OPR) initiated an investigation into the conduct of the prosecutors when they self-reported the Court's findings of a Brady violation on October 2, 2008. Publicly available documents were gathered but a full investigation was held in abeyance based on OPR's general policy of not proceeding with an investigation during the pendency of active litigation. In addition, on February 13, 2009, the Judge held four DOJ attorneys in contempt. OPR has initiated an investigation in connection with this holding. There are eight DOJ attorneys who are the subject of the court's orders and investigations by OPR.

You are generally recused from participation in particular matters with parties in which your former firm is or represents a party, under the standards of conduct for employees in the executive branch, 5 C.F.R.§ 2635.502, and under E.O. 13490. Under the financial conflict of interest statute, 18 U.S.C. § 208, you are generally recused from participation in particular matters that could affect the financial interest of certain persons, including your spouse. [redacted]

[redacted] one of the DOJ attorneys held in contempt on February13, 2009, and under investigation by OPR, is represented by your former firm and your spouse's current firm, WilmerHale. Therefore, absent a waiver from the restrictions in the Executive Order and the criminal conflict of interest statute, and a determination under the standards of conduct, you are recused from participating in the investigation of [redacted].[1]

In most OPR investigations, counsel for a DOJ attorney would communicate with OPR, but generally not with other DOJ officials. It also usually would not be necessary for the leadership of the Department to be involved in the early stages of an investigation. However, the particular circumstances surrounding these investigations are unusual, and present important issues even at this early stage of the process. As noted, the Court appointed a special counsel to conduct an investigation of six Department attorneys at the same time the Department's investigation, by OPR, is underway. Further, the status of the Court's contempt holding on February 13, 2009, which covered four Department attorneys including two who were not subject to the Court's April 7, 2009, order, is unclear. It is highly unusual to have an investigation by the court concurrent with an OPR investigation, and it raises jurisdictional issues, and questions concerning the authority of the special counsel and the proper relationship between OPR's investigation and that of the special counsel. These are important questions that affect the Department's institutional interests, are sensitive determinations, and may include questions of first impression. Such issues will require resolution by the leadership of the Department, including the Attorney General, yourself, and the Assistant Attorney General for the Criminal Division.

In order for you to participate in these decisions, it will be necessary for you to understand and be familiar with the individual investigations of all the Department attorneys who participated in the prosecution, and for to you make decisions concerning the investigation of [redacted] as well as the other investigations. It is not feasible or practical for you to remain recused from one investigation. This would interfere with your ability to make necessary decisions for the Department in connection with the Department's investigations and the special counsel's investigation. In order for you to be fully advised on the issues and facts as they arise, to enable you to make the legal, policy and strategic decisions necessary for the Department, you must be able to participate and freely receive information and advice on any and all of the individual investigations. Based on the advice from the Principal Associate Deputy Attorney General, I conclude that it is not necessary at this time that you meet or communicate with your former firm, should they make such a request. If direct contact with Department officials other than OPR is determined to be in the Department's interest, other officials in the leadership offices would be available to meet with your former firm.

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[1] Decisions with respect to the approval of outside representation for [redacted] and the other Department employees are being made by the Civil Division through the standard procedure for these decisions.

Executive Order 13490, Ethics Commitments by Employees in the Executive Branch

The Executive Order provides that a political appointee will not, for a period of two years from the date of appointment, participate in any particular matter involving specific parties that is directly and substantially related to the appointee's former employer or former clients, including regulations and contracts. Sec. 1, paragraph 2. The Executive Order further provides that "particular matter involving specific parties" shall have the same meaning as set forth in the ethics regulations at 5 C.F.R. § 2641.201(h), except that it shall also include "any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties." E.O. 13490, Sec. 2(h).

E.O. 13490 references the following definition provided in the standards of conduct (however, the E.O. specifically includes regulations and contracts):

> 5 C.F.R. § 2641.201(h)(1): *Particular matter involving a specific party or parties* - (1) *Basic concept.* The prohibition applies only to communications or appearances made in connection with a "particular matter involving a specific party or parties." Although the statute defines "particular matter" broadly to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding," 18 U.S.C. 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product application, enforcement action, administrative adjudication, or court case.

The E.O. provides for waiver of the recusal provisions by the Director of the Office of Management and Budget (OMB) or his designee, in consultation with the Counsel to the President or his designee. E.O. 13490, Sec. 3(a). The Director, OMB, has designated the Designated Agency Ethics Official (DAEO) of each executive branch agency to exercise the Sec. 3 waiver authority, in writing, and in consultation with the Counsel to the President.

Specific Waiver Request

The *Stevens* prosecution has raised important issues concerning how the Department conducts its operations, including questions of the Department's ability to investigate allegations of misconduct by its own attorneys. These issues have been raised and are being debated in a very public way, and they go to the heart of the Department's ability to achieve its mission of evenhanded enforcement of the law. Given the significant public interest involved in these proceedings, it is vital that you be able to exercise your leadership role in this matter.

The standard for waiving the restriction in the E.O. is that it be in the public interest. E.O. 13490, Sec. 3. I believe that it directly serves the public interest that the Department have the benefit of your participation in this case, given the institutional interest of the Department, the important legal, policy and strategic considerations, and your knowledge of the case. I certify that it is in the public interest that you be able to participate in the investigation of [redacted] relating to the prosecution in *U.S. v. Stevens*.

18 U.S.C. § 208

The financial conflict of interest statute, 18 U.S.C. § 208 (a), prohibits an official from participating personally and substantially in a particular matter that will have a direct and predictable effect on his financial interests, or those financial interests that are imputed to him, including those of a spouse. Your spouse is a partner at WilmerHale, and therefore any matter that directly and predictably affects her ownership interest in the firm falls within the scope of the statutory prohibition. Your spouse does not represent [redacted] in this matter. However, as a partner she shares in the fees received by the firm for its representation of [redacted]. The firm has agreed to screen your spouse from sharing in fees received, which removes the financial interest.

In addition, you have an agreement with WilmerHale for the firm to make agreed-upon payments to you in the future, as part of your withdrawal from the firm. Given the firm's obligations to you, the statute requires that you not participate personally and substantially in any particular matter that would affect the firm's ability or willingness to meet its obligations to you under that agreement. The representation of [redacted] is not of such a nature or substantiality as to affect the ability or willingness of the firm to meet its obligations to you.

The standard of conduct on impartiality, 5 C.F.R. § 2635.502, requires an employee to take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under Section 502, where an employee knows that a person with whom he has a "covered relationship" is a party or represents a party to the matter, he should not participate in the matter without informing an agency official and receiving authorization to participate. Included in the definition of a "covered relationship" is any person for whom the employee served, within the preceding year, as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee. 5 C.F.R. § 2635.502(b)(1)(iv).

You have a covered relationship with your former firm, WilmerHale. However, the firm undertook this representation after you left, so you had no involvement during the time you were a partner with the firm. Under the standard, I conclude that a reasonable person would not question the integrity of the Department's programs and operations based on your participation in the investigation of a Department attorney represented by your former firm, and that should such questions arise, the Department's interest in your participation outweighs any possible concern.

WAIVER: I hereby certify that it is in the public interest for you as Deputy Attorney General to participate in the investigation of a Department attorney who is represented by your former firm, in connection with *U.S. v. Stevens*, as discussed above, and pursuant to E.O. 13490 Sec. 3(a), I waive the restriction in Section 1 of E.O. 13490, on participation in a specific party matter that is directly and substantially related to your former employer, WilmerHale, except that you will not have any direct contact with WilmerHale. We have consulted with the Office of the Counsel to the President concerning this waiver. Further, I hereby determine under 5 C.F.R. § 2635.502, that the interest of the Department in your participation in this case outweighs any possible concern that a reasonable person may question the Department's programs and operations.