

DEPARTMENT OF JUSTICE

Washington, DC

August 17, 2016

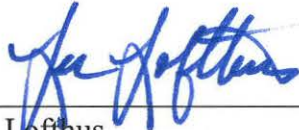
CERTIFICATION OF PUBLIC INTEREST WAIVER FOR BRIAN BOYNTON

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

SUBJECT: Waiver from Restrictions Related to *United States v. State of North Carolina et al.*,
No. 1:16-cv-425 (M.D. N.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 Brian Boynton in the position of Counselor to the Attorney General of the Department of Justice. Mr. Boynton shall not be restricted from participating in *United States v. State of North Carolina et al. (State of North Carolina)*, No. 1:16-cv-425 (M.D. N.C.), subject to the limitations set forth in the attached memorandum and without waiving the limitation on Mr. Boynton's participation in regulations and contracts as provided in paragraph 2 of the Ethics Pledge. This waiver does not otherwise affect Mr. Boynton's obligation to comply with other provisions of the Ethics Pledge or with all other pre-existing government ethics rules.

Signed _____



Lee J. Lofthus
Designated Agency Ethics Official
Department of Justice

Date _____

8/19/2016

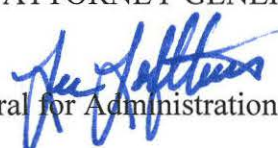


U.S. Department of Justice

Justice Management Division

Washington, D.C. 20530

MEMORANDUM FOR: BRIAN BOYNTON
COUNSELOR TO THE ATTORNEY GENERAL

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

SUBJECT: Waiver under E.O. 13490 and Determination under 5 C.F.R. §
2635.502

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 standards of conduct on impartiality, 5 C.F.R. § 2635.502, that you may participate in a particular matter in which your former employer represents a party.

The Department of Justice (DOJ or Department) is involved in a number of lawsuits regarding the civil rights of transgender individuals. Among these lawsuits is *United States v. State of North Carolina et al. (State of North Carolina)*, No. 1:16-cv-425 (M.D. N.C.), in which the United States has brought suit against North Carolina, the University of North Carolina (UNC), and other North Carolina agencies and officials. The United States seeks a declaration that a recently enacted North Carolina law, H.B. 2, a statute restricting transgender people from using the public restrooms that match their gender identity, violates federal civil rights laws. H.B.2 was passed in March 2016, and the United States' lawsuit was filed in May 2016. Additionally, the United States has been sued by a number of parties, including states, parents and others, in a number of other cases which the Department, Civil Division, is defending. These cases were all filed during or after May 2016. These other federal cases involving transgender rights include: *Berger v. United States*, No. 1:16-cv-00844 (M.D. N.C.); *North Carolinians for Privacy v. United States*, No. 1:16-cv-00845 (M.D. N.C.); *McCrorry v. United States*, No. 5:16-cv-00238 (E.D. N.C.); *Texas v. United States*, No. 7:16-cv-00054 (N.D. Tex.); and *Nebraska et al. v. United States*, No. 4:16-cv-03117 (D. Neb.).

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The law firm WilmerHale represents the University of North Carolina in *State of North Carolina*. WilmerHale has not made an appearance in the litigation, but has contacted the Department regarding the litigation seeking dismissal of UNC from the suit. UNC has filed a motion to have claims against it dismissed on the grounds that the University is not enforcing the North Carolina law that the United States contends violates the civil rights laws. See Dkt. Nos. 46, 98 & 99; see also Dkt. No. 118 (opposing U.S. preliminary injunction motion). The United States has opposed dismissal of UNC, arguing that UNC is a proper defendant in the case. See Dkt. No. 48 at 10-11 n.3. The United States' brief in opposition to UNC's motion to dismiss was filed August 11, 2016.

Until October 14, 2014, you were a partner at WilmerHale. Consequently, you are generally recused from participation in particular matters with parties in which WilmerHale is a party or represents a party, under E.O. 13490. Therefore, absent a waiver from the restrictions in the Executive Order, you must recuse yourself from participating in these cases on behalf of the Office of the Attorney General.

The Department of Justice has an important and vital role in protecting the civil rights of individuals, including transgender individuals. The United States is now involved in a constellation of cases addressing the rights of transgender individuals, all involving precedent-setting issues. *State of North Carolina* is affirmative litigation filed by the Civil Rights Division. Most other litigation is defensive and is being handled by the Civil Division. Among your responsibilities as Counselor to the Attorney General is to oversee and report to the Attorney General regarding litigation handled by the Civil Division. The cases against the United States are thus under your oversight responsibilities. While your former law firm represents a party in only one of the cases involving the civil rights of transgender individuals, the cases are intertwined and related in subject matter and legal analysis. They involve a rapidly developing area of law that requires consistency of litigation decisions across the Department. The cases are thus closely connected, with litigation decisions involving one having the likelihood of affecting decisions in the other cases. It is not possible to be recused in one of the cases and participate meaningfully in the other cases. Recusal in *State of North Carolina* will thus prevent you from being able to provide coordinated oversight to the Attorney General on the group of cases addressing transgender rights.

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

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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 or 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): *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

These cases chart the course for the development of law on the civil rights of transgender individuals. This is a critical civil rights issue for the Department and requires the direct involvement of the Attorney General. Given the significant public interest involved in these cases, it is vital that you be able to assist the Attorney General in overseeing these matters.

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. You have significant

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experience in litigation involving federal constitutional and statutory interpretation, including civil rights litigation; your previous experience in the Office of Legal Counsel gives you particular and specialized insight into the Department's interests in such litigation; you are now the designated Counselor in the Attorney General's Office overseeing civil litigation, including the transgender rights cases; and the matter of transgender rights is a high-profile issue requiring experienced counsel and oversight. I certify that it is in the public interest that you be able to participate in the *State of North Carolina*.

5 C.F.R. § 2635.502

The Standards of Conduct, 5 C.F.R. § 2635.501 *et seq.*, prohibit participation in matters that raise a question of an actual loss of impartiality or the appearance of loss of impartiality. Specifically, whenever an employee knows that a person with whom the employee has a "covered relationship" (which includes a former employer or former client) is a party, or represents a party in a specific matter, and where the circumstances would cause a reasonable person to question the employee's impartiality under the appearance standard, the employee should not participate in the matter unless authorized to do so. 5 C.F.R. § 2635.502(a). An employee may participate in a specific party matter where it is determined that the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations. 5 C.F.R. § 2635.502(d).

An official has a covered relationship with a former employer for one year after employment terminates. You left WilmerHale in October 2014, almost two years ago. You no longer have a covered relationship with WilmerHale as defined by the regulation. The regulation also provides that, in other circumstances that would raise a question regarding an official's impartiality, participation may be considered using the process in the regulation. In circumstances such as these, where a senior official who is subject to recusal under the provisions of the Ethics Pledge seeks to participate in a particular matter with specific parties, the Department has also made a determination whether to authorize participation using the criteria provided in the impartiality regulation.

The process for determining whether an employee should participate in a particular matter involving the appearance of a loss in impartiality is laid out at 5 C.F.R. § 2635.502(d). Under that process, I, as the agency designee, with the recommendation of an ethics official, must make a determination that the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations. In making this determination, I may consider such factors as: (1) the nature of the relationship involved; (2) the effect the resolution of the matter will have on the financial interest

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of the person involved in the matter; (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter; (4) the sensitivity of the matter; (5) the difficulty of reassigning the matter; and (6) adjustments, if any, that are viable to reduce or eliminate the likelihood that a reasonable person will question the employee's impartiality.

Using the above criteria, I conclude that you are authorized to participate as Counselor to the Attorney General in *State of North Carolina*. (1) You did not participate in this matter, which did not exist, while you served as a partner at WilmerHale and you have no client confidences regarding this case. While at WilmerHale you did not represent the University of North Carolina in any other matters. (2) The remedy being sought in this case is injunctive, not a financial settlement. Further, (3 & 4) this case raises critically important issues related to the rights of transgender individuals and to the proper interpretation of federal law, and it is important that you, as Counselor to the Attorney General, be able to participate fully in internal Department discussions and deliberations concerning these issues. Given your particular experience and expertise, you bring a valuable perspective and provide necessary counsel to the Attorney General in these cases. However, other Department equities have an impact on the Department's ongoing participation in this case, and therefore, on behalf of the Attorney General, you would be one important voice among Department leadership considering the appropriate action to take in this and related matters. (5) You possess specialized experience that is important to the Department's ability to maintain consistency in its litigation positions in these cases. (6) In order to reduce the likelihood that a reasonable person would question your impartiality, you are not authorized to have direct contact with WilmerHale attorneys and another Counselor in the Attorney General's Office will be designated to contact WilmerHale attorneys if such contact is necessary. It is not expected that the Office of the Attorney General would have contact with counsel for the parties in this matter.

Accordingly, I conclude that the Department's interest in your participation in *State of North Carolina* outweighs the possible concern that a reasonable person may question the integrity of the Department's programs and operations.

WAIVER: I hereby certify that it is in the public interest for you as Counselor to the Attorney General to participate in *United States v. State of North Carolina et al. (State of North Carolina)*, No. 1:16-cv-425 (M.D. N.C.). 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 law firm, 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, pursuant to 5 C.F.R. § 2635.502, that the interest of the Department in your participation in these cases outweighs any possible concern that a

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reasonable person may question the integrity of the Department's programs and operations.