

WAIVER OF EXECUTIVE ORDER 13770 FOR
SECRETARY JOHN F. KELLY

In accordance with Section 3 of Executive Order 13770 (January 28, 2017) (the “Executive Order”) and after consultation with the Office of the Counsel to the President, and for the reasons stated below, I hereby submit that it is in the public interest to grant to John F. Kelly, Secretary, United States Department of Homeland Security (“DHS”), a waiver of the Ethics Pledge restriction set forth in Section 1, paragraph 6, of the Executive Order to enable him to effectively carry out his duties as Secretary of DHS. Absent this waiver, Secretary Kelly would be restricted for two years, beginning with his appointment date, from participating in any particular matter involving specific parties in which his former client, the Government of Australia, (“Australia”), is a party or represents a party.

Secretary Kelly was sworn in as Secretary of DHS on January 20, 2017. At that time, Secretary Kelly was advised of his recusal obligations under the U.S. Office of Government Ethics Standards of Conduct for Executive Branch Employees, 5 C.F.R. § 2635.502 and he has complied with the restrictions on participating in particular matters involving specific parties, including the restrictions on communications with the Government of Australia. Subsequent to his appointment, however, the President issued Executive Order 13770. This Executive Order included a restriction on official interactions with former employers and former clients, which now affects the Secretary’s ability to effectively carry out the responsibilities of his position in accordance with the foregoing ethical obligations.

Managing an ongoing recusal for Secretary Kelly involving the Government of Australia will result in serious limitations and inefficiencies in the Department’s ability to respond quickly and effectively to crisis situations, engage in ongoing mission activities, and exercise leadership in national and international forums. In particular, the communication restriction has prevented the Secretary from engaging with the Government of Australia on homeland security, immigration matters of national importance which relate to the President’s agenda and Administration policy. It is anticipated that it will be essential for the Secretary to participate in operational activities and represent DHS in forums where representatives of the Government of Australia would be expected to be present, obtain Australia’s views directly from Australian officials, and act on government matters that involve the Government of Australia. Without this waiver, the adjustments that would be necessary to maintain the Secretary’s recusal are anticipated to have a serious impact on DHS’s international relations and interfere with rapid, clear and streamlined communications and response times.

Pursuant to this waiver, Secretary Kelly will be permitted to interact directly with the Government of Australia, interact with the President, the international community, DHS officials, and Federal government leadership on a variety of matters involving the Government of Australia for the purposes of ensuring DHS support and leadership related to homeland and national security, immigration, cybersecurity, aviation security, emergencies, risk management, and information exchange in order to facilitate DHS operations.

Background

Prior to his confirmation, and following his retirement from the United States Marine Corps, Secretary Kelly filled the role of a Senior Fellow to the Department of Defense, National Defense University (“NDU”).¹ In this position, Secretary Kelly, along with other general officer counterparts, were important contributors to ensuring the continued excellence in military leadership through their coaching and mentoring of succeeding generations of United States military leaders and future leaders.² Through one of these courses, at the recommendation of Australian military officers in attendance, the Government of Australia invited Secretary Kelly to participate as a mentor in the Australian Defense Joint Task Force Commanders course as a residential Senior Course Mentor. Secretary Kelly was asked to “facilitate learning by leading discussions, analyzing coursework material, and offering insights based on [his] professional military experience.” His duties as a Senior Course Mentor included offering his “insights on command challenges and contemporary operations, in order to develop selected officers using a variety of theories, case studies and practical advice.”³ The Departments of the Navy and State, and the United States Marine Corps authorized Secretary Kelly to accept travel benefits and an honorarium from the Government of Australia. The United States Government approval recognized that Secretary Kelly would not owe any duties to the Government of Australia and that he did not have any ongoing commitments to the Government of Australia. No post-government employment ethics restrictions were identified in connection with this activity.⁴

Analysis

The nature of his relationship with the Government of Australia during this one-time, short-term instruction is one that technically falls within the definition of a “former client” under the Executive Order, but does not equate to the type and nature of prior business relationships envisioned in the establishment of the two-year revolving door provision found in section 1, paragraph 6 of the Executive Order.

¹ Secretary Kelly was employed by Flatter and Associates (“Flatter”), pursuant to Flatter’s contract with the NDU, to provide services as a Senior Fellow to NDU. With regard to his ethics obligations regarding his past employment with Flatter, Secretary Kelly has committed in his Ethics Agreement, signed January 5, 2017, and the supplement to his Ethics Agreement, signed February 2, 2017, to abide by the standards of conduct and ethics pledge restrictions, as stated in those agreements.

² In considering the underlying teaching activity that is the subject of this waiver, it is important to recognize that Secretary Kelly’s forty-five years of military service makes him uniquely qualified to fill this academic role.

³ Memorandum from Special Security Officer, Headquarters U.S. Marine Corps, Intelligence Department, Washington D.C. to DC, M&RA, Washington DC, dated July 14, 2016.

⁴ Memorandum from Headquarters, U.S. Marine Corps, Civil & Administrative Law Branch to Commandant of the Marine Corps, dated July 14, 2016.

Providing a waiver in relation to this single academic engagement does not contravene the intent or spirit of Executive Order 13770. The Executive Order and implementing Ethics Pledge reinforce to each Administration appointee the importance of carrying out their official responsibilities in a manner that protects the public trust and ensures that the integrity of government operations is not tainted by the actual or appearance of favoritism from personal business interests. The Secretary's engagement, during his retirement, for which he received a relatively small monetary honorarium⁵ and travel expenses was for the sole purpose of mentoring a class of military officers to enhance their professional, management, and leadership skills. He did not make any decisions relating to academic operations. Moreover, his general insights, sharing of military leadership experiences and mentoring were independent of any connection to a United States government program or policy nor did his participation support any commercial interest.

It is critical to homeland and national security for the Secretary to have regular engagements with national and international governments to effectively engage with stakeholders to develop and build consensus around DHS programs, strategy and capabilities. The scope of these efforts is both national and international in reach and his efforts will affect the operations of government and non-government entities, domestically and abroad.

During a significant national security, immigration, cybersecurity, or other incident or emergency, DHS's role could be undermined or could be detrimentally affected by significant inefficiencies if the Secretary is restricted from interacting with any national or international group or official solely due to the Government of Australia's involvement or participation. The President and all United States officials would be required to bypass the Secretary to enable necessary interaction with DHS, interfering with the organizational chain, information flow, fast response, and loss of efficiency for DHS, the nation, and the international community.

Conclusion

The significant public interest in the agility of DHS to support national security efforts, lead cybersecurity activities, carry out immigration operations, enhance aviation security, coordinate with allies, and respond to emergencies requires that the Secretary be able to fully exercise his leadership role in ongoing oversight and direction for United States government coordination and collaboration with foreign governments.

Due to the scope of Section 1, paragraph 6, of the Executive Order and the definition of "former client" in Section 2(i), a broad application of this prohibition would be detrimental to DHS, government, and national security operations. Without a waiver, the Secretary would be precluded from engaging with United States and Australian government officials, as well as the international community, on a broad range of matters involving both response activities and strategic planning. Barring such communication would have a negative impact on the government's ability to implement DHS programs, including programs established to manage immigration, cybersecurity risk, and aviation security and respond quickly and effectively to threats, emergencies and other incidents. The Secretary's recusal from these communications

⁵ The honorarium was 10,000 AUD or approximately \$7,500 USD. *Id.*

would also deprive the foregoing officials the opportunity to provide input and bring concerns to the attention of the Secretary. In light of his brief participation in a single academic course, focused on sharing his personal leadership experiences, Secretary Kelly's involvement with the Government of Australia in participating in this training program, is not the type of business-oriented prior client relationship that the Executive Order intended to reach in protecting the public trust.


For this reason, the Designated Agency Ethics Official for the Department of Homeland Security has determined that it is in the public interest to grant to Secretary Kelly a waiver of the Ethics Pledge restriction set forth in Section 1, paragraph 6, of the Executive Order to enable him to effectively carry out his duties as Secretary of DHS. Pursuant to Executive Order 13770, Section 3, the Department respectfully requests such a waiver from the President or his designee.

Office of White House Counsel Waiver Certification

Pursuant to Executive Order 13770, Section 3, and as the President's designee authorized to grant such waiver, it is in the public interest to grant a waiver of Section 1, paragraph 6 of the Executive Order to John F. Kelly, Secretary, United States Department of Homeland Security ("DHS") as pertains to the Government of Australia. I have determined that this waiver is required to enable him to effectively carry out his duties as Secretary of DHS. Absent this waiver, Secretary Kelly would be restricted for two years, beginning with his appointment date, from participating in any particular matter involving specific parties in which his former client, the Government of Australia, ("Australia"), is a party or represents a party. The role of the Secretary is at the center of the Department's important national security and related missions. The successful accomplishment of these DHS missions relies on extensive, open, and collaborative communications within the Department and between the Secretary and the President, United States Government officials and foreign government officials. In authorizing this waiver, I have considered the limited nature of Secretary Kelly's involvement with the Government of Australia, while he was a retired military officer, and the critical national interest served by authorizing Secretary Kelly to freely communicate with all members of the national and international community regarding all aspects of DHS's mission and operations. This waiver will significantly promote and protect the public interest by enabling Secretary Kelly to freely carry out the responsibilities of his office.

This waiver does not otherwise affect Secretary Kelly's obligation to comply with all other pre-existing government ethics rules, other provisions of the Executive Order and with the other commitments he made in his Ethics Agreement and amendments to his Ethics Agreement.

3/13/17
Date



Donald F. McGahn II
Counsel to the President