

THE WHITE HOUSE

Washington

December 30, 2009

MEMORANDUM FOR JOHN BRENNAN

FROM: NORMAN EISEN
Special Counsel to the President and Designated Agency Ethics Official

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

The purpose of this memorandum is to authorize your participation, pursuant to 5 C.F.R. § 2635.502, in the aviation screening technology review and watchlisting system review ordered by the President in the aftermath of the December 25, 2009, attempt to detonate an explosive device aboard Northwest flight 253. This memorandum also provides a partial waiver of the restrictions in Executive Order 13490, with respect to your participation in these reviews, to the extent that the reviews specifically address services provided by your former employer, The Analysis Corporation (TAC), or any of its employees.

This authorization and waiver are limited, however, in that you will recuse yourself from any communications with TAC and, should these reviews at any point include specific attention to services provided by TAC or any of its employees, you will recuse yourself from any participation in that aspect of the review.

I. 5 C.F.R. § 2635.502 – Impartiality in Performing Official Duties

The standard of conduct at 5 C.F.R. § 2635.502 requires an employee to take appropriate steps to avoid an appearance of any lack of impartiality in the performance of his official duties. Under Section 502, when 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.

The aviation screening technology review and watchlisting system review may be “specific party” matters to the extent they eventually include specific attention to government contracts with, or services provided by TAC, with whom you have a covered relationship having been employed by TAC within the past year. *See* 5 C.F.R. § 2635.502(b)(1)(iv).

Section 2635.502(d) directs that an agency designee may authorize an employee to participate in a particular matter involving specific parties, which would otherwise be subject to the recusal requirements of that section, if the designee makes a determination, in light of all relevant circumstances, that the interest of the Government in the employee’s participation outweighs any concern that a reasonable person may question the integrity of the Government’s programs and operations.

As the Designated Agency Ethics Official, I serve as the agency designee pursuant to guidance from the U.S. Office of Government Ethics.

You have asked for guidance on how best to proceed in light of your former employment by TAC. After weighing the factors articulated in Section 502(d), I have determined that it is appropriate to authorize your participation in these reviews. Of central importance to this conclusion is that you no longer have financial interests in TAC, and therefore the resolution of these reviews will not impact your financial interests. Moreover, to the extent that the reviews address, among other issues, the services provided by TAC or its employees, you will recuse yourself to the extent necessary to avoid participation in any such aspect of the reviews.

Equally significant is the highly sensitive nature of this matter involving national security. As the Assistant to the President for Homeland Security and Counterterrorism, you are the White House official with direct responsibility for advising the President on Administration-wide counterterrorism and homeland security programs. The reviews in question were ordered by the President in the wake of a potentially catastrophic attempted terrorist attack. The importance of these reviews to national security interests weighs against reassignment to others of this senior supervisory role. In light of these factors and the requirement that you abide by the aforementioned recusal, I hereby determine that the governmental interest in your participation outweighs any countervailing appearance concerns and authorize your participation in these reviews.

II. E.O. 13490 – Ethics Commitments by Employees in the Executive Branch

Executive Order 13490 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. *See* E.O. 13490, Sec. 1, para. 2. Section 3 of the E.O. provides for waiver of the recusal provisions and as the DAEO here, I exercise that waiver authority. *See* Office of Government Ethics Memorandum Re: Authorizations Pursuant to Section 3 of Executive Order 13490, DO-09-008 (Feb. 23, 2009). The standard for waiving the restriction in the Executive Order is that it be in the public interest. *See* E.O. 13490, Sec. 3(a). The Executive Order states that "the public interest shall include, but not be limited to, exigent circumstances relating to national security or to the economy." *Id.*, Sec. 3(b).

I hereby determine that it directly serves the public interest that the President have the benefit of your participation in these reviews, given the magnitude of the national security interests at stake, your central role in advising him on homeland security and counterterrorism programs, and the importance of your participation in coordinating these reviews with executive level officials at other federal agencies. Given your extensive background in intelligence and counterterrorism matters, you are the most qualified Administration official to lead these reviews, which go directly to the security of the American people and present the types of exigent circumstances relating to national security that the waiver provision was designed to permit.

Accordingly, I hereby certify that it is in the public interest for you as Assistant to the President for Homeland Security and Counterterrorism to participate in these reviews, and, pursuant to E.O. 13490 Sec. 3(a), I waive the restriction in Section 1 of E.O. 13490, on participation in any specific party matter that is directly and substantially related to your former employer, TAC, except that you will recuse yourself from any communications with TAC or from direct evaluation of, or decisions regarding, TAC's or its employees' performance of services under its contract with the government. I have consulted with the Counsel to the President concerning this waiver.