



U.S. Department of Justice

Washington, D.C. 20530

MEMORANDUM FOR THE SOLICITOR GENERAL

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

Lee Lofthus Date: 2021.11.18
10:21:31 -05'00'

SUBJECT: Limited Waiver of Executive Order 13989 for Elizabeth Prelogar,
Solicitor General, Department of Justice

Pursuant to Section 3 of Executive Order 13989 (January 20, 2021) (“Executive Order”), and for the reasons stated below, I hereby grant a limited waiver you of the requirements of Section 1, Part 2, of the Executive Order in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199, currently before the Supreme Court. I have determined that it is in the public interest to grant this limited waiver of the Executive Order to enable you to effectively carry out the duties of Solicitor General of the United States in this case. The White House approves of the waiver. You have already obtained an authorization under 5 C.F.R. §2635.502 in which the Department determined that the need for your services in this matter outweighed the concern that a reasonable person may question the Department’s integrity.

Background

Until December 2020 you were employed by Harvard University as a lecturer at Harvard Law School. At no point did you work on this case or consult on admissions policy or issues at Harvard.

Under the Ethics Pledge’s definition, Harvard University is a “former employer.” Executive Order, Section 2(k). You may not for a period two years from the date of your appointment, January 20, 2021, participate in a particular matter involving specific parties that is directly and substantially related to your former employer. Executive Order, Section 1, Paragraph 2. Under the Executive Order, therefore, you may not participate in a matter in which Harvard University is a party, unless you obtain a waiver pursuant to Executive Order, Section 3. A waiver may be granted if it is in the public interest to do so.

Analysis

It is in the public interest to grant you a limited waiver of the requirements of Executive Order, Section 1, Paragraph 2, in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* in order to enable you to effectively carry out your duties as Solicitor General.

In making this assessment, I have considered the factors set forth in Section 3(c) of the Executive Order, which include:

- (i) the government's need for the individual's services, including the existence of special circumstances related to national security, the economy, public health, or the environment;
- (ii) the uniqueness of the individual's qualifications to meet the government's needs; and
- (iii) the extent to which the purposes of the restriction may be satisfied through other limitations on the individual's services.

In this matter, the government has need of your participation. The case is high profile and of considerable importance to the Department and the Administration. It raises a constitutional question that may have far-reaching and long-lasting effects on universities across the nation. As the Solicitor General, you represent the views of the current Administration as well as of the United States in general. The importance of this potentially precedent-making case increases the importance of your participation to the government.

You have unique qualifications to meet the government's need in this particular matter. First, your title is itself a qualification that no other person possesses. Moreover, you have considerable experience in Supreme Court litigation. You served as a career employee with the Office of Solicitor General from September 2014 until November 2019. After a period in private practice you came back to the Department as Principal Deputy Solicitor General and served as Acting Solicitor General when you were appointed in January 2021. You have served as the Presidentially appointed, Senate-confirmed Solicitor General since October 28, 2021. This combination of experience gives you unique qualifications for participating in this matter.

There are limitations on the scope of this waiver. It applies only to your participation in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*. It does not cover other matters in which Harvard is a party. Participation in future cases in which Harvard is a party will need to be obtained on an individual basis.

Conclusion

In conclusion, enforcement of the Executive Order's prohibition on participating in matters in which a former employer is a party would not, in this case, serve the public interest. Rather, it would restrain your ability to meet the needs and goals of the Administration and the Department.

For the foregoing reasons, I grant you a limited waiver of the restriction in of Section 1, Paragraph 2, of the Executive Order to enable you to effectively carry out the duties of Solicitor General at the Department of Justice.

The waiver does not otherwise affect your obligation to comply with all other applicable government ethics rules and provisions of the Executive Order.

CC: Dana A. Remus, Counsel to the President