

From: [Schools, Scott \(ODAG\)](#)
To: [Shaw, Cynthia K. \(JMD\)](#)
Subject: Re: Francisco authorization/Jennings v Rodriguez
Date: Sunday, February 19, 2017 12:34:57 PM

Thanks, Cindy. I grant the waiver.

On Feb 19, 2017, at 10:49 AM, Shaw, Cynthia K. (JMD) <cshaw@jmd.usdoj.gov> wrote:

Hi Scott,

Here is another authorization for Noel; a different immigration case but one involving some of the same issues as those in the immigration order and, again, needed due to a Jones Day amicus brief being filed. I recommend authorization. [REDACTED]

Thanks,
Cindy

I recommend that you authorize Noel Francisco to participate in *Jennings v. Rodriguez*, which is pending before the U.S. Supreme Court. Petitioners are federal employees in their official capacity, including the Attorney General; Respondents are a class of noncitizens who have been incarcerated while awaiting removal proceedings. At issue is whether aliens have a right to a bond hearing when they are subject to detention that lasts six months; arguments for the United States include the proposition that the case is governed by the plenary power doctrine of immigration law, which immunizes immigration laws from judicial review. Oral argument was held November 30, 2016. Subsequently, the Court directed the parties to file supplemental briefs on the constitutional issues, which they did on January 31, 2017. Reply briefs are due February 21, 2017. There is a possibility that the Court will order a re-argument in April 2017.

Mr. Francisco was, until January 20, 2017, a partner at Jones Day. Jones Day filed an amicus brief in the case in support of Respondents on October 24, 2016. Mr. Francisco did not participate in writing the amicus brief, and in fact did not know of the brief, while at the law firm.

Under the Standards of Conduct addressing impartiality in the performance of duties (5 CFR 2635.501 et seq.), an employee who knows that a person with whom he has a covered relationship is or represents a party to a matter may not participate in the matter. An employee has a covered relationship with a former employer and with former clients for one year after such service ends. An amicus is not a party; therefore Mr. Francisco does not have a covered relationship with Jones Day under Sec. 2635.501(a) since Jones Day does not represent a party. The long-standing practice of the Departmental Ethics Office, however, has been to analyze participation in a matter in which a former employer represents an amicus under the impartiality regulation's "catch-all" provision at 2635.502(a) (2). That provision states that an employee who is concerned that "circumstances

other than those specifically described in this section” would cause a reasonable person to question his impartiality may determine whether he should participate. The regulations provide that even if recusal is appropriate, an employee may seek an authorization to participate. 5 CFR 2635.502(d).

An authorization to participate in a matter that would otherwise require recusal may be given if the agency designee determines that the government’s interest in the employee’s participation in a particular matter involving specific parties outweighs the concern that a reasonable person would question the integrity of the agency’s programs and operations. 5 CFR 2635.502(d). Assuming that a reasonable person could question Mr. Francisco’s impartiality in cases in which his former employer represents amici, I believe that an authorization is appropriate.

The relationship that gives rise to the apparent conflict of interest is that of a former partner to a former law firm. However, Jones Day’s only role in *Jennings v. Rodriguez* is representing 11 non-profit organizations that represent immigrant detainees (“detained legal services providers”). While the amicus brief offers individual examples of the hardships experienced by the amici’s clients caused by extended detention, the amici do not represent parties in the litigation, nor do they appeal to have a financial interest in the resolution of the litigation. Neither does Mr. Francisco have a financial interest in Jones Day, and therefore no financial interest in its representation in this case. The effect that resolution of the cases will have on Jones Day’s financial interests is unclear but appears negligible. Resolution of the case will most likely not have a financial impact on the legal service providers, although it will have personal impact on their clients. The legal services providers’ argument, however, is not that any identified individual be granted a bond hearing, but that the Constitution requires bond hearings for certain aliens, specifically, lawful permanent residents. While the financial interest of Mr. Francisco’s former law firm and its clients in resolution of the case is low, the nature and importance of Mr. Francisco’s role in the matter is high. As the Acting Solicitor General, he is leading the Department’s legal strategy in its immigration cases. It benefits the government to have Mr. Francisco provide oversight and continuity in the many immigration cases that are coming before this Court and the appellate courts, many of which include the plenary power doctrine. Moreover, to require recusal when the source of the conflict is an academic amicus brief in a case in which the former firm or its client has no direct financial interest seems disproportional to the source of the conflict.

In conclusion, the interest of the government in Mr. Francisco’s participation outweighs the concern that a reasonable person would question the Department’s integrity in this instance. We recommend that you authorize his participation.

Your approval for this authorization may be given in a reply email.

Cynthia K. Shaw
Director
Departmental Ethics Office

U.S. Department of Justice
145 N Street, NE
Washington, DC 20530
(202) 514-8196

From: [Francisco, Noel \(OSG\)](#)
To: [Shaw, Cynthia K. \(JMD\)](#)
Subject: RE: authorization for Noel
Date: Thursday, February 09, 2017 7:58:58 PM

Thank you.

From: Shaw, Cynthia K. (JMD)
Sent: Thursday, February 9, 2017 6:23 PM
To: Francisco, Noel (OSG) <nfrancisco@jmd.usdoj.gov>
Subject: FW: authorization for Noel

You are authorized to proceed.

From: Schools, Scott (ODAG)
Sent: Thursday, February 09, 2017 6:17 PM
To: Shaw, Cynthia K. (JMD) <cshaw@jmd.usdoj.gov>
Subject: RE: authorization for Noel

Thanks, Cindy. I agree with your analysis and grant the waiver.

Scott

From: Shaw, Cynthia K. (JMD)
Sent: Thursday, February 9, 2017 6:07 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Subject: authorization for Noel

Scott,
Below is another authorization for Noel. Happy to discuss. 514-8196.
Another one will follow for [REDACTED] and Chad Readler.
Cindy

I recommend that you authorize Noel Francisco to continue to work on *Washington and Minnesota v. Trump* and related immigration litigation. The case is now pending before the U.S. Court of Appeals for the Ninth Circuit. The case is a challenge to implementation of the President's January 27, 2017, Executive Order, Protecting the Nation from Foreign Terrorist Entry into the United States ("immigration order"). Other immigration cases nationwide also challenge the immigration order. On February 6, 2017, you authorized participation in the Washington case based on the exigencies of the circumstances. I believe, even without the existing exigencies, that a continued authorization is appropriate.

Jones Day filed an amicus brief in the *Washington* case on behalf of law professors on February 6, 2017. Jones Day will submit a more detailed briefing February 13, 2017, in a related case, *Darweesh v. Trump*, which is another challenge to the order, also on behalf of the law professors. Responding to the expedited hearing before the Ninth Circuit on February 7,

2017, in *Washington*, the amici urged the court, based on constitutional concerns, to deny the Government's motion for a stay of the Temporary Restraining Order preventing implementation of the immigration order. Our understanding is that the law professors do not have a personal financial or other interest in the outcome of the cases, but rather are submitting their expert academic views to the courts.

Mr. Francisco was, until January 20, 2017, a partner at Jones Day. Under the Standards of Conduct addressing impartiality in the performance of duties (5 CFR 2635.502), an employee who knows that a person with whom he has a covered relationship is or represents a party to a matter may not participate in the matter. An employee has a covered relationship with a former employer and with former clients for one year after such service ends.

An amicus is not a party, therefore Mr. Francisco does not have a covered relationship with Jones Day under sec. 2635.501(a) since Jones Day does not represent a party. The long-standing practice of the Departmental Ethics Office has been to analyze participation in a matter in which a former employer represents an amicus under the impartiality regulation's "catch-all" provision at 2635.502(a)(2). That provision states that an employee who is concerned that "circumstances other than those specifically described in this section [for example, the existence of a covered relationship]" would cause a reasonable person to question his impartiality may determine whether he should participate. The regulations provide that even if recusal is appropriate, an employee may seek an authorization to participate. 5 CFR 2635.502(d).

An authorization to participate in a matter that otherwise would require recusal may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person would question the integrity of the agency's programs and operations. 5 CFR 2635.502(d). Assuming that a reasonable person could question Mr. Francisco's impartiality in cases in which his former employer represents amici, we believe that an authorization is appropriate.

The relationship that gives rise to the apparent conflict of interest is that of a former partner to a former law firm. However, the only role that Jones Day now plays in the immigration cases is representing a group of law professors in an amicus brief. The representation began after Mr. Francisco left the firm. Mr. Francisco does not have a financial interest in the firm, and therefore no financial interest in its representation in this case. The effect that resolution of the cases will have on Jones Day's financial interests is unclear but appears negligible. Resolution of the cases will most likely have no effect at all on the financial or personal interests of the law professors. At issue in their brief is not financial harm to themselves or harm to their families, but rather constitutional concerns. The nature and importance of Mr. Francisco's role in the matter is high. As the Acting Solicitor General, he is leading the Department's legal strategy in these extremely high profile cases. In addition, these cases are proceeding at a rapid pace, requiring the government to have a point person ready to lead the government's defense. It benefits the government to have Mr. Francisco provide oversight and continuity in the highly fluid legal environment surrounding the immigration order. Recusing him from these matters would be very disruptive to the government, and reassignment is not a realistic alternative. Moreover, to require recusal when the source of the conflict is an academic amicus brief, in a case where many other entities have filed briefs arguing a variety of harms, seems disproportional to the source of the conflict.

In conclusion, the interest of the government in Mr. Francisco's participation outweighs the concern that a reasonable person would question the Department's integrity in this instance.

We recommend that you authorize his participation, so long as the source of the conflict is Jones Day's filing of amicus briefs on behalf of amici who will not be directly affected, financially or personally, by resolution of the matter.
Your approval for this authorization may be given in a reply email.

Cynthia K. Shaw

Director

Departmental Ethics Office

U.S. Department of Justice

145 N Street, NE

Washington, DC 20530

(202) 514-8196

From: [Schools, Scott \(ODAG\)](#)
To: [Shaw, Cynthia K. \(JMD\)](#)
Subject: RE: 502 authorization for Noel Francisco
Date: Monday, February 06, 2017 4:30:06 PM

I approve Mr. Francisco's participation in the brief due at 6 pm today for the reasons you stated. In particular, the exigencies of the matter and his prior extensive work on the matter make it impractical to reassign the matter at this point. For these reasons, and the other reasons stated in your email, I approve his continued work on the brief.

Scott

From: Shaw, Cynthia K. (JMD)
Sent: Monday, February 6, 2017 4:11 PM
To: Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>
Subject: 502 authorization for Noel Francisco

I recommend that you authorize Noel Francisco to work on the brief for *Washington and Minnesota v. Trump* to be submitted at 6:00 p.m. today in the U.S. Court of Appeals for the Ninth Circuit.

The Department has just learned that Jones Day has filed an amicus brief in the case. Mr. Francisco has a covered relationship with Jones Day; he was an attorney in that law firm in the last year. Under 5 CFR 2635.502, an employee who knows that a person with whom he has a covered relationship is or represents a party to a matter may not participate in the matter. A filer of an amicus brief is not a party to a matter, but does create an appearance of loss of impartiality that is covered by the regulation's "catch-all" provision at 2635.502(a)(2).

An authorization to participate in a matter that otherwise would require recusal may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. 5 CFR 2635.502(d).

I evaluate the regulation's factors as follows:

1. The nature of the relationship is a former partner to a former law firm.
2. The effect of the resolution of the matter on Jones Day's financial interests is unclear. The amicus is being filed on behalf of law professors, whose interests may be more academic than financial.
3. The nature and importance of Mr. Francisco's role in the matter is extremely high, given that he has been working on the matter for the past 12 hours and the work product is due within an hour and a half. To take him off this matter at this time is extremely disruptive to the government.
4. The sensitivity of the matter is extremely high given the national attention given to the case.
5. The difficulty of reassigning the matter is high, given that Mr. Francisco has led the development of this brief during the tight timeframe given for its submission.
6. Adjustments that may be made in the employee's duties to eliminate the likelihood that a reasonable person would question his impartiality are being made in conformity

with the January 28, 2017 Executive Order, which disallows communications with former employers. Mr. Francisco has been instructed not to communicate with Jones Day or sign the brief, which would constitute making an appearance or communication.

In sum, the exigencies of the moment compel a conclusion that Mr. Francisco continue working on the brief due today. Those exigencies outweigh the concern that a reasonable person may question the Department's integrity in this instance.

Your approval for this authorization may be given in a reply email.

Cindy

Cynthia K. Shaw
Director
Departmental Ethics Office
U.S. Department of Justice
145 N Street, NE
Washington, DC 20530
(202) 514-8196