

**Congress of the United States**  
Washington, DC 20510

March 11, 2020

The Honorable John Ring  
Chairman  
National Labor Relations Board  
1015 Half St., S.E.  
Washington, D.C. 20570

Dear Chairman Ring:

We are writing to express alarm about the National Labor Relations Board's (NLRB or the Board) new ethics guidance that effectively allows NLRB Members to unilaterally decide to avoid recusal and take part in cases in which they have a conflict of interest. This new guidance, and the misleading report used to justify it, is based on a twisted legal analysis that ignores basic tenets of ethics law and public integrity. The Office of Government Ethics (OGE) has already issued a letter expressing concern that the report that forms the basis for your new guidance "characterize[s] ethics requirements and processes in ways that could be misconstrued," and requested revisions to the guidance.<sup>1</sup> Your new guidance allows a Member to simply "[reach] his or her own decision" on recusal and puts NLRB members and staff at risk of discipline for violating ethics rules or criminal conflicts of interest laws.

This guidance appears to be a legally tenuous, politically-based roadmap allowing NLRB members with demonstrated conflicts of interest and long records of representing anti-worker companies and industries to flout ethics laws. Just today you testified before the House Appropriations Subcommittee on Labor, Health and Human Services, and Education, chaired by Chair Rosa DeLauro, and doubled down on your agency's alarming ethics practices.<sup>2</sup> I urge you to (1) immediately rescind the guidance, (2) establish new guidance consistent with the law and relevant precedent to prevent members with conflicts of interest from taking part in agency decisions where they cannot be impartial; and (3) provide a list of any officials who have overruled an NLRB Designated Agency Ethics Official's (DAEO) recusal determination in order to participate in a matter before the Board.<sup>3</sup>

**Background**

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<sup>1</sup> Letter from OGE Director Emory A. Rounds, III to NLRB Chairman John Ring, December 19, 2019, [https://www.oge.gov/web/OGE.nsf/0/43485A2A24C0CCDB852584D60062B3A5/\\$FILE/Letter%20to%20NLRB%20Chair.pdf](https://www.oge.gov/web/OGE.nsf/0/43485A2A24C0CCDB852584D60062B3A5/$FILE/Letter%20to%20NLRB%20Chair.pdf).

<sup>2</sup> House Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, "National Labor Relations Board Budget Request for FY 2021," March 11, 2020, <https://appropriations.house.gov/events/hearings/national-labor-relations-board-budget-request-for-fy-2021>.

<sup>3</sup> National Labor Relations Board, "NLRB Board Member Recusal Process: E.S. Memo 19-1," Memorandum, November 18, 2019, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7831/nlr-ethics-recusal-report-november-19-2019.pdf>.



In December 2017, the NLRB issued a decision and order via a 3-2 vote in the *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co. (Hy-Brand)* case that narrowed the joint employer legal standard.<sup>4</sup> Two months later, following Congressional oversight and a report from the NLRB Inspector General (IG) finding that Member William Emanuel should have recused himself due to a conflict of interest involving his former employer, the Board vacated the decision.<sup>5</sup>

The NLRB IG report identified a “serious and flagrant problem and/or deficiency in the Board’s administration of its deliberative process and the National Labor Relations Act with respect to the deliberation of a particular matter,” and reported that the failure of Member Emanuel to recuse himself in the *Hy-Brand* decision “demonstrates that the Board’s current practice of highlighting and addressing recusal issues should be reviewed to determine if it is adequate to protect the Board’s deliberative process from actual conflicts of interest and the appearance of such.”<sup>6</sup>

The NLRB opened that review and on November 19, 2019, published a report on the matter and new ethics guidance.<sup>7</sup> But this new guidance has significant flaws. In particular, it allows Board members to, at their sole discretion, circumvent those rules altogether. Instead of strengthening the agency’s ethics procedures to ensure that, in a future similar situation, board members would not participate in any matter in which they had a conflict of interest, the agency’s report created procedures that explicitly allow such conflicts.<sup>8</sup> This effort to skirt ethics regulations is so brazen that President George W. Bush’s chief ethics lawyer, Richard Painter, called the new process “a great big middle finger to the Office of Government Ethics.”<sup>9</sup>

Your actions erode public confidence in and compromise the integrity of the Board’s decision-making because they ignore two basic tenants of Federal ethics law: an interested party should not adjudicate their own conflicts of interest, and the opinions of neutral ethics experts should be binding.

### **The New Ethics Guidance Allows Interested Parties to Act as Neutral Arbiters**

The NLRB report that forms the basis for your new guidance inexplicably suggests that it is not only permissible, but preferable for a potentially-conflicted board member, rather than a

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<sup>4</sup> *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017).

<sup>5</sup> National Labor Relations Board, “Board Vacates Hy-Brand Decision,” press release, February 26, 2018, <https://www.nlr.gov/news-outreach/news-story/board-vacates-hy-brand-decision>.

<sup>6</sup> National Labor Relations Board, Office of Inspector General, “Notification of a Serious and Flagrant Problem and/or Deficiency in the Board’s Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter,” memorandum, February 9, 2018, pp. 5, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-5976/OIG%20Report%20Regarding%20Hy%20Brand%20Deliberations.pdf>.

<sup>7</sup> National Labor Relations Board, “National Labor Relations Board’s Ethics Recusal Report,” November 19, 2019, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7831/nlr-ethics-recusal-report-november-19-2019.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> Politico, “Trump labor agencies ease up on recusals,” Ian Kullgreen and Rebecca Rainey, January 15, 2020, <https://www.politico.com/news/2020/01/15/trump-labor-agencies-ease-up-on-recusals-099310>.



third party, to make the final determination of whether they should recuse. This belies common sense and decades of relevant legal precedent.

In 1955, the Supreme Court (the Court) ruled that “no man can be a judge in his own case, and no man is permitted to try cases where he has an interest in the outcome.”<sup>10</sup> To determine whether a judge has a conflict of interest and should recuse themselves, the Court does not try to read their mind, but instead “asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”<sup>11</sup> The Court has recently reiterated these decisions in a ruling that determined a judge must recuse where they had previously been a party in the case.<sup>12</sup>

Federal ethics law reflects a similar understanding of the importance of a neutral decision-maker. As the NLRB report acknowledges, there are three major sources of ethics law that bind officials at the NLRB and throughout the federal government: 18 U.S.C. § 208, the Criminal Conflict of Interest statute, which prohibits “an employee ... from participating personally and substantially in an official capacity in any matter” in which the employee has a financial interest “if the particular matter will have a direct and predictable effect on that interest;”<sup>13</sup> Executive Order 13770, known as the “Trump Ethics Pledge,” which requires recusal from matters concerning a former employer or client for two years;<sup>14</sup> and the *Ethics in Government Act*, passed in the wake of Watergate, which describes in detail standards of conduct for Federal employees.<sup>15</sup>

The plain text of each of these sources suggest that compliance with all three regimes involve third party decision-making in questions about recusal. The criminal statute excludes from liability only people who are (1) exempted by regulation by OGE or (2) who fully disclose their conflict to their hiring manager, and that manager determines in advance that their conflict “is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee.”<sup>16</sup> Similarly, the Trump Ethics Pledge vests authority for issuing waivers to “the President or his designee,” and entrusts OGE in writing rules and assisting DAEOs in counseling employees.<sup>17</sup> The Executive Order also provides additional tools to enforce the ethics pledge.<sup>18</sup>

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<sup>10</sup> *In re Murchison*, 349 U.S. 133, 136 (1955).

<sup>11</sup> *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009).

<sup>12</sup> *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016).

<sup>13</sup> 5 CFR § 2635.402.

<sup>14</sup> White House, Executive Order 13770, “Executive Order: Ethics Commitments by Executive Branch Appointees,” January 28, 2017, <https://www.whitehouse.gov/presidential-actions/executive-order-ethics-commitments-executive-branch-appointees/>.

<sup>15</sup> National Labor Relations Board, “National Labor Relations Board’s Ethics Recusal Report,” November 19, 2019, pp. 4-5, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7831/nlr-ethics-recusal-report-november-19-2019.pdf>.

<sup>16</sup> 18 U.S.C.A. § 208. Other exceptions not relevant to the present case apply to Special Government employees or individuals who have financial interests due to affiliations with Native American tribes.

<sup>17</sup> White House, Executive Order 13770, “Executive Order: Ethics Commitments by Executive Branch Appointees,” January 28, 2017, <https://www.whitehouse.gov/presidential-actions/executive-order-ethics-commitments-executive-branch-appointees/>.

<sup>18</sup> *Id.*

OGE has promulgated regulations implementing the *Ethics in Government Act* and is quite specific about roles that are to be played by various parties in ensuring compliance. The rules requires that employees “must refrain from participating in particular matters in which they have financial interests and ... should notify their supervisors or ethics officials when their official duties create the substantial likelihood of such conflicts of interest.”<sup>19</sup> Under these circumstances, employees have no decision-making authority over their own conflicts of interest. In contrast, DAEOs are charged with “[p]roviding advice and counseling” to individual employees, and “[t]aking appropriate action to resolve conflicts of interest and the appearance of conflicts of interest, through recusals, directed divestitures, waivers, authorizations, reassignments, and other appropriate means.”<sup>20</sup>

Relevant to the NLRB, the agency head is chiefly responsible for designating the agency ethics official, ensuring they have sufficient resources including technological resources, “requiring other agency officials to provide the DAEO with the information, support, and cooperation necessary,” making referrals to law enforcement agencies as appropriate, ensuring that agency officials report travel by the required deadlines, and assisting in a presidential transition.<sup>21</sup>

Notably, the authorization to make decisions or waivers in individual cases is assigned to DAEOs, not agency heads. For example, OGE ethics regulations give the DAEO the authority to make decisions “where he has information concerning a potential appearance problem arising from the financial interest of a member of the employee’s household in a particular matter involving specific parties, or from the role in such matter of a person with whom the employee has a covered relationship” and to issue waivers when he or she determines in light of all relevant circumstances “that the interest of the Government in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the agency’s programs and operations.”<sup>22</sup>

Similarly, OGE regulations provide that when an “employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee.”<sup>23</sup> In the limited circumstances in which they retain decision or approval authority, the agency head is required to consult with the DAEO or OGE in making the decision.<sup>24</sup>

The NLRB’s analysis in its report ignores the law and OGE rules on implementation, inexplicably asserting that members with conflicts of interest are best equipped to assess the ethics issues at stake. The report claims that “vesting the decision to recuse with the member

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<sup>19</sup> 5 C.F.R. § 2638.102.

<sup>20</sup> 5 C.F.R. § 2638.104.

<sup>21</sup> 5 C.F.R. § 2638.107.

<sup>22</sup> 5 C.F.R. § 2635.502(c), (d).

<sup>23</sup> 5 C.F.R. § 2635.502(a).

<sup>24</sup> 5 C.F.R. § 2635.102(b); 5 C.F.R. § 2640.303. In some cases, agency heads may choose to retain authority as the appointing official to issue a waiver under 18 U.S.C. § 208(b)(1) rather than delegate it to an agency ethics official. 5 C.F.R. § 2640.301(a).



ensures that the decision is made by the person ... in the best position to evaluate the complex factors that go into a recusal decision,”<sup>25</sup> and later doubles down by saying an “affected colleague has superior, firsthand knowledge of why the recusal merits a challenge.”<sup>26</sup> This is a truly confounding claim, which mocks the existence of government ethics laws.

The report tries to buttress this claim by claiming that vesting final recusal authority in a potentially-conflicted board member is “consistent with the practices of other federal agencies” and “[T]he Securities and Exchange Commission has adopted a specific regulation referring motions to recuse to individual Commissioners for decision.”<sup>27</sup> Yet, the report fails to acknowledge that SEC Commissioners are expressly cautioned about participating in matters involving former business associates or clients and to disqualify themselves when they have “obtained knowledge prior to becoming a member of the facts at issue ... in any matter involving parties in whom he has any interest or relationship directly or indirectly.”<sup>28</sup> The report also fails to consider other ethics considerations, such as perceptions of bias or prejudice that arise in adjudicative proceedings, which can nullify government actions based on due process considerations.<sup>29</sup>

The report also admits that “agency ethics officials consistently reported that presidential appointees worked directly with their ethics offices to resolve issues related to conflicts of interest”<sup>30</sup> and “not a single agency with which Board staff benchmarked recalled a situation in which a presidential appointee, after consulting with the DAEO and engaging in interactive discussions, ultimately disagreed with a DAEO’s determination.”<sup>31</sup> In other words, in every single other case that the NLRB examined across the entire Federal government, the presidential appointee either agreed with the DAEO or deferred to them. This finding reveals that there is no evidence in favor of overturning long-time NLRB precedent and permitting board members to decide on their own waivers.

The NLRB report, in Orwellian fashion, argues that individuals with conflicts of interest can make decisions, but that those who do not cannot function as neutral decision-makers. The NLRB report describes DAEOs as highly susceptible to public pressure and potentially incapable of making neutral decisions. The report accuses the NLRB DAEO of succumbing to political influence in the *Hy-Brand* decision, writing: “The DAEO’s decision ... was made in a pressured environment filled with competing political interests.”<sup>32</sup> The job of career agency ethics officials—as well as the talented career staff at OGE—is to make ethics decisions in pressured

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<sup>25</sup> National Labor Relations Board, “National Labor Relations Board’s Ethics Recusal Report,” November 19, 2019, pp. 30, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7831/nlr-ethics-recusal-report-november-19-2019.pdf>.

<sup>26</sup> *Id.*, pp. 38.

<sup>27</sup> *Id.*, pp. 29-30.

<sup>28</sup> 17 C.F.R. § 200.60.

<sup>29</sup> See e.g., *Adrian Antoniu v. Securities and Exchange Commission*, 877 F.2d 721 (1989).

<sup>30</sup> National Labor Relations Board, “National Labor Relations Board’s Ethics Recusal Report,” November 19, 2019, pp. 29-30, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7831/nlr-ethics-recusal-report-november-19-2019.pdf>.

<sup>31</sup> *Id.*, pp. 19.

<sup>32</sup> *Id.*, pp. 46.



and politically sensitive environments. This attack on these dedicated officials is unwarranted and shameful.

### **The New Guidance Allows Agency Officials to Explicitly Ignore Agency Ethics Officers' Decisions**

As the NLRB's report acknowledges, "[f]or a financial conflict of interest and 'covered relationship' recusals, the DAEO has authority to make a *sua sponte* [of their own accord] decision to recuse and disqualify a Board member."<sup>33</sup> According to the report, "the Board initially understood that the DAEO's determination was binding on the disqualified member as well as on the fellow Board members," and "permitting the recused member to participate in a matter in which s/he had been recused would result in an ethics violation by the other members."<sup>34</sup> The report concludes that prior to their review "[n]early all guidance received from the DAEO and OGE suggested . . . [that] the DAEO could require a Board member subject to a recusal disqualification determination to not participate in a matter."<sup>35</sup>

Rather than end the inquiry there at the long-time practice of the agency based on "nearly all guidance received from the DAEO and OGE," which the report concedes is "generally consistent with the OGE regulations, and most pertinently, with 5 C.F.R. Section 2635.502 and the Trump Ethics Pledge,"<sup>36</sup> the NLRB instead engages in a tortured reading of the underlying statute and an outright misleading reading of precedent to eliminate this part of the DAEO's authority.

The NLRB cites that the underlying statute, the *Ethics in Government Act*, establishes "notice requirements and procedural steps . . . to undertake in the event a government officer or employee challenges a DAEO determination," and "provides a Board member who disagrees . . . the opportunity to request an investigation and hearing."<sup>37</sup> The report reasons that the presence of an appeal process and enforcement procedures means that the DAEO's decision is not "self-enforcing," even if it's "binding," meaning that the board member can "ultimately insist on participating in the matter."<sup>38</sup> That is akin to concluding that a trial judge's ruling is not enforceable because the losing party has the opportunity to appeal their decision and because the judge can hold a party in violation of their order in contempt. That analysis holds no water.

The guidance based on this report finding endangers ethics and puts officials at risk of violating the law. Failure to comply with a DAEO disqualification mandated by law or regulation will likely result in a referral to the agency Inspector General who retains "authority to conduct investigations of suspected violations of conflict of interest laws and other government

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<sup>33</sup> National Labor Relations Board, "National Labor Relations Board's Ethics Recusal Report," November 19, 2019, pp. 31, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7831/nlr-ethics-recusal-report-november-19-2019.pdf>.

<sup>34</sup> *Id.*, pp. 32.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*, pp. 32-33.

<sup>38</sup> *Id.*, pp. 34.



ethics laws and regulations.”<sup>39</sup> As the former director of OGE has noted, the report cites the very regulations that authorizes OGE to “intervene when an agency head refuses to take corrective action against an official” and “far from allowing officials to challenge the ethics program, they reinforce its authority.”<sup>40</sup> OGE’s authority includes referral of possible criminal violations to the agency Inspector General or to the Department of Justice and possible non-criminal violations to the agency Inspector General for investigation or for further proceedings by OGE when deemed necessary by the Director.<sup>41</sup>

The report also incorrectly claims there is precedent for the new recusal process, making the misleading statement that, “in numerous instances, an individual Board member addressed potential recusal issues; in these cases, the Board member made the decision to either recuse himself or herself, or to decline to do so.”<sup>42</sup> It later states: “in past situations, Board members have been permitted to make their own recusal decisions, raising questions as to why this was not permitted in the *Hy-Brand* case.”<sup>43</sup>

The claim of “numerous instances” is backed up by a citation of only four cases—and two of these are cases in which a Member chose to recuse themselves.<sup>44</sup> The report asserts that, in the two instances of non-recusal, Board members got to “make their own recusal decisions,” suggesting a similarity with the proposed new guidelines. Yet the facts in the two examples are readily distinguishable from *Hy-Brand* and the legally dubious process the NLRB is implementing because in both of these cases, the members did not ignore a DAEO decision to recuse themselves.

The report claims that “Member [Craig] Becker declined to recuse himself” in the case *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*<sup>45</sup> when, in fact, Member Becker was cleared to participate in the case by both the DAEO and the NLRB IG.<sup>46</sup> The report’s sole other example is of Member Kent Hirozawa in the case *Regency Heritage Nursing & Rehabilitation Center*. In this case, Member Hirozawa did not ignore or violate a recusal determination by a DAEO, and a U.S. Court of Appeals found the Respondent’s request that Member Hirozawa recuse himself was unmerited.<sup>47</sup>

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<sup>39</sup> 5 C.F.R. § 2638.106.

<sup>40</sup> Tweet by Walter Shaub, January 2, 2020, <https://twitter.com/waltshaub/status/1212772725405687809>.

<sup>41</sup> 5 C.F.R. § 2638.501-504.

<sup>42</sup> National Labor Relations Board, “National Labor Relations Board’s Ethics Recusal Report,” November 19, 2019, pp. 5, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7831/nlr-ethics-recusal-report-november-19-2019.pdf>.

<sup>43</sup> *Id.*, pp. 46

<sup>44</sup> FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc., 361 NLRB 610, 610 fn. 9 (2014); Regency Heritage Nursing & Rehabilitation Center, 360 NLRB 794, 794 fn. 1 (2014); Service Employees Local 121RN (Pomona Valley Hospital Medical Center), 355 NLRB 234, 238 (2010); Southern Saddlery Co., 90 NLRB 1205, 1205 fn. 1 (1950).

<sup>45</sup> National Labor Relations Board, “National Labor Relations Board’s Ethics Recusal Report,” November 19, 2019, pp. 15, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7831/nlr-ethics-recusal-report-november-19-2019.pdf>.

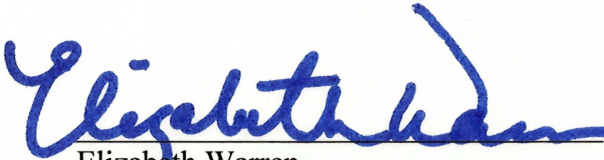
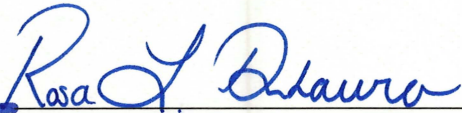
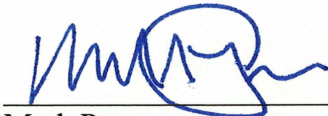
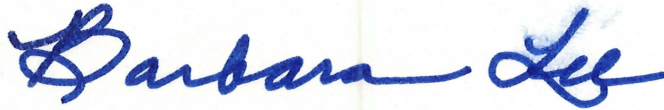
<sup>46</sup> Politico Pro, “Trump Labor Agencies Ease Up On Recusals,” Ian Kullgren and Rebecca Rainey, January 15, 2020, <https://www.politico.com/news/2020/01/15/trump-labor-agencies-ease-up-on-recusals-099310>.

<sup>47</sup> NLRB v. Regency Heritage Nursing and Rehabilitation Center, 353 N.L.R.B. No. 103 (2009).

### Conclusion

Americans must be confident that actions taken by public officials are intended to serve the public, and not those officials. The agency must abandon this dangerous, precedent-setting guidance that harms our federal ethics program and the integrity of the NLRB. We request a response regarding your intention to discard this guidance no later than March 25, 2020.

Sincerely,

  
Elizabeth Warren  
United States Senator  
Rosa DeLauro  
Chair  
Subcommittee on Labor, Health, and Human  
Services, Education, and Related Agencies  
House Committee on Appropriations  
Mark Pocan  
Member of Congress  
Barbara Lee  
Member of Congress