

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**BROWNING-FERRIS INDUSTRIES OF
CALIFORNIA, INC. d/b/a BFI NEWBY ISLAND
RECYCLERY AND FPR-II, LLC d/b/a
LEADPOINT BUSINESS SERVICES,
A JOINT EMPLOYER**

and

Case 32-CA-160759

**SANITARY TRUCK DRIVERS AND
HELPERS LOCAL 350, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC.'S
RESPONSE TO CHARGING PARTY MOTION TO RECUSE MEMBER EMANUEL**

Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (“Browning-Ferris”) hereby responds to the Charging Party’s Motion to Recuse Member Emanuel.

Browning-Ferris’ interest is in proper application of the standards regarding recusal of a Board Member. We note the following with respect to the Charging Party’s motion:

1. The particular matter before the Board following remand from the District of Columbia Circuit involves Browning-Ferris’ petition for review of the Board’s order in Case No. 32-CA-160759 and the underlying representation decision. Leadpoint Business Services (“Leadpoint”) was not a party to Browning-Ferris’ petition, nor did Member Emanuel’s former law firm, Littler Mendelson P.C. (“Littler”), appear before the Court in that case. The Board’s further proceedings following remand relates to Browning-Ferris’ alleged joint employer status, not Leadpoint’s.

2. Member Emanuel has not appeared on behalf of Leadpoint in this particular matter.

3. To Browning-Ferris' knowledge, the last filing by Littler on behalf of Leadpoint in Case No. 32-CA-160759 was an Answer to the Board's Complaint on November 6, 2015.

4. Given the foregoing, including that Littler has not actively participated in the case in over three (3) years, it is unclear whether Member Emanuel's "former employer" currently "represents a party." *See* Ex. Order 13770, 2 Fed. Reg. 9333 (January 2, 2017). *See also* 5 C.F.R. §§ 2635.502(a), (b)(1)(iv) (delineating case participation restrictions where government employee "knows that a person with whom he has a covered relationship is or represents a party," and defining "covered relationship" as occurring "within the last year") ("Code").

5. As Member Emanuel became a Board Member on September 26, 2017, the pertinent 1-year Code provisions -- including 5 C.F.R. § 2635.101(b)(14), cited by the Charging Party (Motion, p. 2 n. 1) -- no longer apply to him. His 2-year recusal period consistent with Executive Order 13770 expires on September 26, 2019. Thus, even if Littler is determined to presently "represent[] a party," after September 26, 2019, Member Emanuel may participate in this particular matter should it then be unresolved. *See Hy-Brand (III)*, 366 NLRB No. 93, slip op. 3 n. 1 (2018) (Chairman Ring and Member Kaplan concurring) ("The ethics pledge taken by Board members requires that each member be recused *for 2 years from any particular matter* in which his or her former law firm represents a party and *for 2 years from any matter* involving a client for which the member performed work.") (emphasis supplied).

6. There is no basis for the Charging Party's contention (Motion, p. 2 n. 1) that the explicit 2-year recusal period in Executive Order 13770 and the 1-year period in the Code continue beyond those specific boundaries. The Charging Party cites no supporting authority. Rather, the bright lines of the Code and Executive Order 13770 establish reasonable "cooling off" periods to avoid conflicts and their appearance resulting from pre-service relationships. *See* Jacob R. Straus,

Ethics Pledges and Other Executive Branch Appointee Restrictions Since 1993: Historical Perspective, Current Practices, and Options for Change (Congressional Research Service, September 29, 2017) (attached). There is no suggestion that Member Emanuel was involved in litigating this particular matter while at Littler, nor has a personal financial interest in its outcome.

7. Just as Executive Order 13770's and the Code's recusal standards serve important ethical interests, it also is essential to the appropriate functioning of the Board that recusals unwarranted under applicable standards not occur. *See generally* Philip A. Miscimarra and Lauren M. Emery, NLRB Recusal Issues - The Importance of Fairness, Transparency, and Stability (American Bar Association, Section of Labor & Employment Law, Committee on Practice and Procedure Under The Labor Relations Act, March 1, 2019) (attached). Were a Board Member to be barred indefinitely from a particular matter due to the involvement of others at a prior employer, presumably Executive Order 13770 and the Code would not instead have established clear, expiring time periods for nonparticipation.

Respectfully submitted,

/s/ Joshua L. Ditelberg

Joshua L. Ditelberg

Stuart Newman

Seyfarth Shaw LLP

233 S. Wacker Drive - Suite 8000

Chicago, Illinois 60606-6448

(312) 460-5000

jditelberg@seyfarth.com

snewman@seyfarth.com

May 23, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 23, 2019, a copy of the foregoing BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC.'S RESPONSE TO CHARGING PARTY MOTION TO RECUSE MEMBER EMANUEL in Case 32-CA-160759 was served by electronic mail on the following persons:

Susan K. Garea
Beeson Tayer & Bodine, APC
483 9th Street, Second Floor
Oakland, CA 94607
Email: sgarea@beesontayer.com

Valerie Hardy-Mahoney, Regional Director
National Labor Relations Board
Oakland Federal Building
1301 Clay Street, Room 300-N
Oakland, CA 94612-5211
Email: Valerie.Hardy-Mahoney@nlrb.gov

Eric C. Marx, Counsel for the General Counsel
Division of Advice
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
Email: Eric.Marx@nlrb.gov

Michael G. Pedhirney
Littler Mendelson, P.C.
333 Bush Street
34th Floor
San Francisco, CA 94104
Email: mpedhirney@littler.com

/s/ Joshua L. Ditelberg _____



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Ethics Pledges and Other Executive Branch Appointee Restrictions Since 1993: Historical Perspective, Current Practices, and Options for Change

Jacob R. Straus
Specialist on the Congress

September 29, 2017

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Summary

On January 28, 2017, President Donald Trump issued Executive Order (E.O.) 13770 on ethics and lobbying. E.O. 13770 created an ethics pledge for executive branch appointees, provided for the administration and enforcement of the pledge, and revoked President Barack Obama's executive order ethics pledge that covered his Administration (E.O. 13490). President Trump's executive order shares some features with President Obama's executive order and a previous executive order issued by President Bill Clinton.

Executive order ethics pledges are one of several tools, along with laws and administrative guidance, available to influence the interactions and relationships between the public and the executive branch. The ability of private citizens to contact government officials is protected by the Constitution. As such, the restrictions placed by executive order ethics pledges, laws, and administrative guidance are designed to provide transparency and address enforcement of existing "revolving door" (when federal employees leave government for employment in the private sector) and lobbying laws.

The report begins with an overview of the relationship between the public and the executive branch, including the use of laws, executive orders, and other guidance and Administration policy to regulate interactions. A brief summary of recent executive orders is then provided, including a side-by-side analysis of ethics pledges from the Clinton, Obama, and Trump Administrations. This analysis is followed by observations about the similarities and differences among the three pledges. These observations focus on

- the revolving door restrictions (18 U.S.C. §207),
- the definition of lobbying used in ethics pledges, and
- the representation of foreign principals by former executive branch officials.

In the context of observations drawn from the ethics pledges, Congress has many options available to potentially address the relationship and contact between the private sector and government employees. These include options to

- amend revolving door restrictions,
- amend the Lobbying Disclosure Act of 1995, and
- codify the ethics pledge to make executive order additions to existing laws permanent.

Additionally, Congress could take no immediate action and maintain current standards.

Contents

Introduction	1
Public and Executive Branch Interactions.....	1
Laws	3
Lobbying.....	3
Ethics in Government	4
The Revolving Door	5
Executive Orders	5
Other Guidance and Policy	7
Executive Branch Ethics Pledges	8
Clinton Administration Ethics Pledge	8
Obama Administration Ethics Pledge	9
Trump Administration Ethics Pledge	9
Observations.....	10
The “Revolving Door”	10
Definition of Lobbying: Lobbying Contact v. Lobbying Activities.....	12
Representing Foreign Principals	15
Options for Change	15
Codify Ethics Pledge Provisions	15
Amend Revolving-Door Statutes	15
Amend the Lobbying Disclosure Act.....	16
Take No Immediate Action	16

Figures

Figure 1. Ethics Pledge Restrictions on Appointees Entering and Exiting Government Since 1993	11
Figure 2. Ethics Pledge Components that Apply to Appointees	12

Tables

Table 1. Side-By-Side Analysis of Ethics Pledge Executive Orders (E.O.)	18
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Appendixes

Appendix. Side-by-Side Analysis of Executive Order Ethics Pledges.....	18
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Contacts

Author Contact Information	25
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Introduction

During the 2016 presidential campaign, then-candidate Donald Trump proposed a series of ethics measures. These included

- extending “cooling off” periods on lobbying the government after government service;
- “instituting a five-year ban on lobbying by former Members of Congress and their staffs”;
- expanding the definition of a lobbyist to cover former government officials who engage in strategic consulting; and
- issuing a “lifetime ban against senior executive branch officials lobbying on behalf of a foreign government.”¹

On January 28, 2017, President Trump issued Executive Order (E.O.) 13770 addressing aspects of his campaign proposal on ethics and lobbying.² E.O. 13770 created an ethics pledge for executive branch appointees, provided for the administration and enforcement of the pledge, and revoked President Barack Obama’s executive order ethics pledge that covered his Administration (E.O. 13490).³ President Trump’s executive order shares some features with President Obama’s executive order and a previous executive order issued by President Bill Clinton.⁴

Since the basis of the ethics pledges is to regulate public and executive branch interactions, this report focuses on the main features of the ethics pledges—lobbying, ethics in government, and the “revolving door”—to explore the basis and current practices for these interactions.

The report begins with an overview of the relationship between the public and the executive branch, including the use of laws, executive orders, and other guidance and Administration policy to regulate interactions. A brief summary of executive orders is then provided, including a side-by-side analysis of ethics pledges from the Clinton, Obama, and Trump Administrations. This analysis is followed by observations of the similarities and differences among the three ethics pledges. Finally, options for change are evaluated.

Public and Executive Branch Interactions

The right of citizens to petition the government has long been considered a protected and fundamental aspect of the citizen-government dynamic.⁵ Today, interactions between the private

¹ Donald J. Trump for President, Inc., “Donald J. Trump’s Five-Point Plan for Ethics Reform,” October 17, 2016, at <https://web.archive.org/web/20170409210153/https://www.donaldjtrump.com/press-releases/donald-j.-trumps-five-point-plan-for-ethics-reform>.

² Executive Order 13770, “Ethics Commitments by Executive Branch Appointees,” 82 *Federal Register* 9333, January 28, 2017.

³ Executive Order 13490, “Ethics Commitments by Executive Branch Personnel,” 74 *Federal Register* 4673, January 21, 2009.

⁴ Executive Order 12834, “Ethics Commitments by Executive Branch Personnel,” 58 *Federal Register* 5911, January 22, 1993.

⁵ For more information on the right to petition, see Alexander Hamilton, “Federalist 84: Certain General and Miscellaneous Objections to the Constitution Considered and Answered,” *The Federalist Papers*, at <https://www.congress.gov/resources/display/content/The+Federalist+Papers>; Stephen A. Higginson, “A Short History of the Right to Petition Government for the Redress of Grievances,” *The Yale Law Journal*, vol. 96, no. 1 (November (continued...))

citizens and the executive branch take many forms. Some interactions fit the traditional petition model, in which private citizens or lobbyists contact and request information or action from Congress or the executive branch.⁶

Other interactions are more complicated and can involve private citizens becoming government employees or government employees leaving the government to take private sector jobs in the area they covered for the government. Also called the “revolving door,”⁷ these movements can take on many forms, including former federal employees lobbying for a domestic or foreign client or engaging in policy work, or individuals entering government to engage in regulatory activity. Some have argued that the revolving door can lead to undue influence by the private sector over governmental activities or vice-versa.⁸ Others have argued that government employees need to be restricted with regard to such activities to ensure their “neutral competence” and that they represent the interests of the government above all else.⁹

Proponents of the revolving door, however, observe that the promise of future private-sector employment could potentially improve the quality of candidates applying for government jobs.¹⁰ They argue that direct connections to government officials are important, but a close relationship is not necessarily what drives lobbying. Some believe that government employees contemplating a move to the private sector will be friendly to industry interests at the expense of the public interest. On the other hand, studies have shown that regulators instead may engage in more aggressive actions against industry and do not favor industry, regardless of their job prospects.¹¹ Another factor observers raise is that the flow of personnel between the public and private sectors may increase the knowledge base of both sectors.

Regulating interactions between the public and the government may be carried out through law, executive order, Administration policy—including regulations issued by the Office of Government Ethics (OGE)¹²—or a combination of all three. Administration policy has generally sought to require disclosure of activities or place restrictions on current or former government

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1986), pp. 142-166; and Norman B. Smith, “‘Shall Make No Law Abridging ...’: An Analysis of the Neglected, But Nearly Absolute, Right of Petition,” *University of Cincinnati Law Review*, vol. 54, no. 4 (1986), pp. 1153-1197.

⁶ For an overview of lobbying, see CRS Report R44292, *The Lobbying Disclosure Act at 20: Analysis and Issues for Congress*, by Jacob R. Straus; and CRS Report R42728, *Post-Employment, “Revolving Door,” Laws for Federal Personnel*, coordinated by Cynthia Brown.

⁷ For more information on the revolving door, see CRS Report R42728, *Post-Employment, “Revolving Door,” Laws for Federal Personnel*, coordinated by Cynthia Brown.

⁸ Several recent academic studies have focused on the revolving door and its potential effect on governance. For example, see Todd Maske, “A Very Particular Set of Skills: Former Legislator Traits and Revolving Door Lobbying in Congress,” *American Politics Research*, November 7, 2016, 10.1177/1532673X16677274; Jordi Blanes I Vidal, Mirko Draca, and Christian Fons-Rosen, “Revolving Door Lobbyists,” *American Economic Review*, vol. 102, no. 7 (2012), pp. 3731-3748; and Timothy M. LaPira and Hershell F. Thomas, III, “Revolving Door Lobbyists and Interest Representation,” *Interest Groups & Advocacy*, vol. 3, no. 1 (2014), pp. 4-29.

⁹ For example, see Paul Douglas Foote and James Clinger, “The First Amendment and the Off-Duty Conduct of Public Employees: Tradeoffs Among Civil Liberties, Agency Mission, and Public Trust,” *Public Integrity* (2017), at <http://dx.doi.org/10.1080/10999922.2017.1300976>; and Karam Kang, “Policy Influence and Private Returns from Lobbying the Energy Sector,” *Review of Economic Studies*, vol. 83, no. 1 (2016), pp. 269-305.

¹⁰ David Zaring, “Against Being Against the Revolving Door,” *University of Illinois Law Review*, vol. 2013, no. 2 (2013), pp. 507-550.

¹¹ David Zaring, “Against Being Against the Revolving Door,” and Wentong Zheng, “The Revolving Door,” *Notre Dame Law Review*, vol. 90, no. 3 (2015), pp. 1265-1308.

¹² For more information on the Office of Government Ethics (OGE), see CRS In Focus IF10634, *Office of Government Ethics: A Primer*, by Jacob R. Straus.

employees rather than ban certain activities or contacts. For example, in 2009 the Obama Administration issued a memorandum outlining rules for executive branch employees' contact with lobbyists about American Recovery and Reinvestment Act of 2009 (ARRA) funds.¹³ This guidance did not restrict a lobbyist's ability to contact the government, but it did require agency employees to log conversations with lobbyists and the agencies to post those logs on an agency website.¹⁴ In most cases, laws, executive orders, and other Administration guidance generally aim to regulate the relationship between governmental and nongovernmental actors.

Laws

Several laws address the relationship between governmental and nongovernmental actors. These include lobbying laws, ethics laws, and revolving door laws. This section provides a brief overview of these three sets of laws and how they generally apply to executive branch officials.

Lobbying

The first lobbying law was the Legislative Reorganization Act of 1946 (Title III, the Federal Regulation of Lobbying Act [RLA]). The RLA applied to "any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States."¹⁵ The RLA was silent on lobbying efforts aimed toward the executive branch.¹⁶

Over time, the RLA was repealed and replaced by the Lobbying Disclosure Act of 1995 (LDA), as amended by the Honest Leadership and Open Government Act of 2007 (HLOGA).¹⁷ Under the LDA as amended, individuals register with the Clerk of the House of Representatives and the Secretary of the Senate and disclose their activities,¹⁸ if they are

- (1) employed or retained by a client for financial or other compensation, (2) for services that include more than one lobbying contact[;]¹⁹ and his or her lobbying activities for that

¹³ U.S. President (Obama), "Memorandum of March 20, 2009: Ensuring Responsible Spending of Recovery Act Funds," 74 *Federal Register* 12531, March 25, 2009. The American Recovery and Reinvestment Act of 2009 was enacted as P.L. 111-5, 123 Stat. 115, February 17, 2009.

¹⁴ Office of Management and Budget, Peter R. Orszag, Director, "Updated Guidance Regarding Communications with Registered Lobbyists About Recovery Act Funds," M-09-24, Washington, DC, July 31, 2009, p. 1, at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-24.pdf. Each agency was required to have a Recovery Act website. For example, the Department of Energy website can be found at <http://www.energy.gov/recovery-act/>. The website contains reports on various Recovery Act activities.

¹⁵ P.L. 79-601, §308(a), 60 Stat. 841, August 2, 1946.

¹⁶ Robert C. Byrd, "Lobbyists," *The Senate, 1789-1989: Addresses on the History of the United States Senate*, edited by Wendy Wolff, 100th Cong., 1st sess., S.Doc. 100-20 (Washington: GPO, 1991), p. 505 (fn 35). See also, *United States v. Harriss*, 347 U.S. 612 (1954).

¹⁷ P.L. 104-65, 109 Stat. 691, December 19, 1995; and P.L. 110-81, 121 Stat. 735, September 14, 2007. Additionally, the LDA was amended in 1998 to make technical corrections, including altering the definition of executive branch officials covered by the act (P.L. 105-166, 112 Stat. 38, April 8, 1998). For more information on the Regulation of Lobbying Act of 1946, see CRS Report R44292, *The Lobbying Disclosure Act at 20: Analysis and Issues for Congress*, by Jacob R. Straus.

¹⁸ For more information on the implementation of the LDA and the role of the Clerk of the House and Secretary of the Senate, see CRS Report RL34377, *Lobbying Registration and Disclosure: The Role of the Clerk of the House and the Secretary of the Senate*, by Jacob R. Straus.

¹⁹ Pursuant to 2 U.S.C. §1602(8), a *lobbying contact* means "any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to the formulation, modification, or adoption of Federal legislation, ... federal rule, (continued...)"

client must amount to 20 percent or more of the time that the individual expends on services to that client over a six-month period.²⁰

Additionally, the LDA refined thresholds and definitions of lobbying activities, changed the frequency of reporting for registered lobbyists and lobbying firms, required additional disclosures, created new semiannual reports on campaign contributions, and added disclosure requirements for coalitions and associations.²¹

Ethics in Government

Starting in at least 1961, standards of ethical conduct for executive branch employees were set by a series of executive orders.²² Following the Watergate scandal and President Nixon's resignation, interest in a government-wide ethics law increased.²³ These efforts culminated with the enactment of the Ethics in Government Act in 1978.²⁴ Drafted to "preserve and promote the accountability and integrity of public officials and of the institutions of the Federal Government,"²⁵ the act codified many of the provisions included in past executive orders. The Ethics in Government Act

- required financial disclosure by high-ranking government officials, including Members of Congress and senior judicial branch officials;
- amended Title 18 *United States Code* to set restrictions on postemployment activities of certain executive branch officers and employees; and
- created the Office of Government Ethics to provide standardized regulations, review and monitor financial disclosure statements, and educate and inform executive branch employees of ethics laws and regulations.²⁶

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regulation, executive order, the administration or execution of a Federal program or policy ...; or the nomination or confirmation of a person for a position subject to confirmation by the Senate."

²⁰ William V. Luneburg and A.L. (Lorry) Spitzer, "The Lobbying Disclosure Act of 1995: Scope of Coverage," in *The Lobbying Manual: A Complete Guide to Federal Law Governing Lawyers and Lobbyists*, ed. William V. Luneburg and Thomas M. Susman, 3rd ed. (Chicago: ABA Publishing, 2005), p. 37. Pursuant to 2 U.S.C. §1602(7), "the term 'lobbying activities' means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others."

²¹ For further analysis of HLOGA's lobbying provision changes see CRS Report R44292, *The Lobbying Disclosure Act at 20: Analysis and Issues for Congress*, by Jacob R. Straus.

²² Executive Order 10939, "To Provide a Guide on Ethical Standards to Government Officials," 26 *Federal Register* 3951, May 6, 1961. See also, Executive Order 11590, "Applicability of Executive Order No. 11222 and Executive Order No. 11478 to the United States Postal Service and of Executive Order No. 11478 to the Postal Rate Commission," 36 *Federal Register* 7831, April 23, 1971; and U.S. Government Accountability Office, *Action Needed to Make the Executive Branch Financial Disclosure System Effective*, FPCD-77-23, February 28, 1977, p. 1, at <http://www.gao.gov/assets/120/117726.pdf#page=10>.

²³ U.S. Congress, Senate Committee on the Judiciary, To Establish Certain Federal Agencies, Effect Certain Reorganizations of the Federal Government, To Implement Certain Reforms in the Operation of the Federal Government and to Preserve and Promote the Integrity of Public Officials and Institutions, and for Other Purposes, report to accompany S. 555, 95th Cong., 1st sess., June 15, 1977, S.Rept. 95-273 (Washington: GPO, 1977), p. 2.

²⁴ P.L. 95-521, 92 Stat. 1824, October 26, 1978; 5 U.S.C. Appendix, §§101-505.

²⁵ U.S. Congress, Senate, Committee on Governmental Affairs, *Public Officials Integrity Act of 1977*, report to accompany S. 555, 95th Cong., 1st sess., May 16, 1977, S.Rept. 95-170 (Washington: GPO, 1977), p. 1.

²⁶ U.S. President (Carter), "Ethics in Government Act of 1978," *Weekly Compilation of Presidential Documents*, vol. 14, no. 43 (October 26, 1978), pp. 1854-1856; and U.S. Congress, Senate, Committee on Governmental Affairs, *Public Officials Integrity Act of 1977*, report to accompany S. 555, 95th Cong., 1st sess., May 16, 1977, S.Rept. 95-170 (Washington: GPO, 1977), pp. 1, 30-31.

In 1989, amendments to the Ethics in Government Act were enacted.²⁷ The Ethics Reform Act of 1989 included “the extension of post-employment ‘revolving door’ restrictions to the legislative branch; ... limitations on outside earned income for higher-salaried, noncareer employees in all branches; increased financial disclosure; ... and limitation on gifts and travel.”²⁸

The Revolving Door

Several laws govern the movement of federal employees from the government to the private sector and vice versa. Most prominently, 18 U.S.C. §207 provides a series of postemployment restrictions on “representational” activities for executive branch personnel when they leave government service, including

- a lifetime ban on “switching sides” on a matter involving specific parties on which any executive branch employee had worked personally and substantially while with the government;
- a two-year ban on “switching sides” on a somewhat broader range of matters which were under the employee’s official responsibility;
- a one-year restriction on assisting others on certain trade or treaty negotiations;
- a one-year “cooling off” period for certain “senior” officials, barring representational communications before their former departments or agencies;
- a two-year “cooling off” period for “very senior” officials, barring representational communications to and attempts to influence certain other high-ranking officials in the entire executive branch of government; and
- a one-year ban on certain officials in performing some representational or advisory activities for foreign governments or foreign political parties.²⁹

Executive Orders

Historically, Presidents have used a variety of written mechanisms to direct executive branch agencies and implement policy. The most widely known written statements are executive orders.³⁰ While no formal definition of executive order exists, a widely accepted description was offered in a 1957 House Government Operations Committee report. It stated,

Executive orders ... are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law. There is no law or even Executive order which attempts to define the term “Executive order”.... Executive orders are generally directed to, and govern actions by, Government officials and agencies.³¹

²⁷ P.L. 101-194, 103 Stat. 1716, November 30, 1989.

²⁸ U.S. President (George H. W. Bush), “Statement on Signing the Ethics Reform Act of 1989,” *Weekly Compilation of Presidential Documents*, vol. 25, no. 48 (November 30, 1989), p. 1855. The Ethics in Government Act of 1978, as amended, is codified in the appendix of Title 5 United States Code. Conflict of interest and revolving door provisions are codified at 18 U.S.C. §207 and financial disclosure requirements for the Executive Branch are codified at 18 U.S.C. §208.

²⁹ For more information on postemployment laws for federal personnel, see CRS Report R42728, *Post-Employment, “Revolving Door,” Laws for Federal Personnel*, coordinated by Cynthia Brown.

³⁰ For more information on executive orders see CRS Report RS20846, *Executive Orders: Issuance, Modification, and Revocation*, by Todd Garvey.

³¹ U.S. Congress, House Committee on Government Operations, *Executive Orders and Proclamations: A Study of a* (continued...)

Historically, executive orders have been used for both major matters (e.g., the Louisiana Purchase, emancipation of the slaves during the Civil War, the annexation of Texas)³² and minor changes to administrative policy (e.g., mold policies, instructions on agency decisionmaking).³³

Since the 1960s, several Presidents have issued executive orders to outline ethical requirements and provide implementation guidance to executive branch employees. The initial issuance of an ethics executive order by President John F. Kennedy in 1961³⁴ roughly mirrors increased congressional interest in ethics, including the adoption of a general Code of Ethics for Government Service in the 85th Congress (1957-1958);³⁵ investigations of alleged misconduct by Bobby Baker, secretary to the Senate majority, and by Representative Adam Clayton Powell Jr. in the 1960s;³⁶ and the creation of the Senate Select Committee on Standards and Conduct (now the Select Committee on Ethics) in 1964, and the House Committee on Standards of Official Conduct (now the House Ethics Committee) in 1967.³⁷

As the first ethics executive order, President Kennedy's 1961 executive order (E.O. 10939) included provisions for behavior by government employees that would be included in other ethics executive orders and ultimately be reflected in the Ethics in Government Act of 1978.³⁸ In the years after President Kennedy's Administration, other Presidents also issued executive ethics orders. These executive orders were issued by President Lyndon Johnson,³⁹ President Richard

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Use of Presidential Powers, committee print, 85th Cong., 1st sess., December 1957 (Washington: GPO, 1957), p. 1.

³² Andrew Rudalevige, "The Presidency and Unilateral Power: A Taxonomy," in *The Presidency and the Political System*, ed. Michael Nelson, 10th ed. (Washington, DC: CQ Press, 2014), pp. 483-484; and Megan Covington, "Executive Legislation and the Expansion of Presidential Power," *Vanderbilt University Board of Trust: Humanities and Social Sciences*, vol. 8 (Spring 2012), p. 1, at <http://ejournals.library.vanderbilt.edu/index.php/vurj/article/download/3556/1738>.

³³ Louis Fisher, *Constitutional Conflict Between Congress and the President*, 4th edition (Lawrence, KS: University of Kansas Press, 1997), pp. 110-114. Fisher's book discusses both major and minor uses of executive orders.

³⁴ U.S. President (Kennedy), Executive Order 10939, "To Provide A Guide on Ethical Standards to Government Officials," 61 *Federal Register* 3951, May 5, 1961; and U.S. Congress, House, Committee on the Judiciary, *Ethical Conduct in Government*, Message from the President of the United States, 87th Cong., 1st sess., April 27, 1961, H.Doc. 87-145 (Washington: GPO, 1961).

³⁵ 72 Stat. B12, H.Con.Res. 175. The standards included in the Code of Ethics for Government Service are still recognized as continuing ethical guidance in the House and Senate. They are, however, not legally binding because the code was adopted by congressional resolution, not by public law. The Code of Ethics for Government Service is cited by many House and Senate investigations. For example, see U.S. Congress, House Committee on Standards of Official Conduct, *Investigation of Certain Allegations Related to Voting on the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, report, 108th Cong., 2nd sess., H.Rept. 108-722 (Washington: GPO, 2004), p. 38.

³⁶ "Ethics and Criminal Prosecutions," in *Guide to Congress*, 5th ed., vol. II (Washington: CQ Press, 2000), pp. 943-988. For more information on the enforcement of congressional rules of conduct, see CRS Report RL30764, *Enforcement of Congressional Rules of Conduct: A Historical Overview*, by Jacob R. Straus.

³⁷ "Proposed Amendment of Rule XXV of the Standing Rules of the Senate Relative to the Jurisdiction of the Committee on Rules and Administration," *Congressional Record*, vol. 110, part 13 (July 24, 1964), pp. 16929-16940; and "Committee on Standards of Official Conduct," *Congressional Record*, vol. 113, part 7 (April 13, 1967), pp. 9426-9448. For more information on the Senate Select Committee on Ethics, see CRS Report RL30650, *Senate Select Committee on Ethics: A Brief History of Its Evolution and Jurisdiction*, by Jacob R. Straus. For more information on the House Committee on Standards of Official Conduct, see CRS Report 98-15, *House Committee on Ethics: A Brief History of Its Evolution and Jurisdiction*, by Jacob R. Straus.

³⁸ 5 U.S.C. Appendix. President Kennedy's executive order included prohibitions on outside employment, use of public office for private gain, receiving compensation from the private sector for government work, and receiving compensation for consulting, lectures, or written material. U.S. President (Kennedy), "Executive Order 10939: To Provide A Guide on Ethical Standards to Government Officials," 26 *Federal Register* 3951, May 5, 1961.

³⁹ U.S. President (Lyndon B. Johnson), Executive Order 11222, "Prescribing Standards of Ethical Conduct for (continued...)

Nixon,⁴⁰ President Ronald Reagan,⁴¹ and President George H. W. Bush.⁴² None, however, contained a pledge that executive branch appointees were required to sign.

Since the enactment of the Ethics in Government Act of 1989, three Presidents have issued ethics executive orders, each containing an “ethics pledge” that appointees were required to sign upon taking office. Those orders, discussed in detail below under “Executive Branch Ethics Pledges,” were issued by Presidents Clinton, Obama, and Trump.⁴³

Other Guidance and Policy

In addition to executive orders, the President can direct executive branch action by issuing a memorandum or guidance. Often issued through the Office of Management and Budget (OMB), this guidance can provide additional direction to executive branch employees on a wide range of subjects. In the context of ethics and lobbying, guidance has been utilized to regulate contact between lobbyists and executive branch employees for certain programs.⁴⁴

For example, President George W. Bush issued a memorandum on January 20, 2001, his first day in office, instructing the heads of executive agencies and departments to “ensure that all personnel within your departments and agencies are familiar with, and faithfully observe, applicable ethics law and regulations....”⁴⁵ The memorandum also included a restatement of provisions from the Standards of Ethical Conduct for Employees of the Executive Branch, a publication issued by the Office of Government Ethics and codified at 5 C.F.R. Part 2635.⁴⁶

(...continued)

Government Officers and Employees,” 30 *Federal Register* 6469, May 11, 1965.

⁴⁰ U.S. President (Nixon), Executive Order 11590, “Applicability of Executive Order No. 11222 and Executive Order No. 11478 to the United States Postal Service and of Executive Order No. 11478 to the Post Rate Commission,” 36 *Federal Register* 7831, April 23, 1971.

⁴¹ U.S. President (Reagan), Executive Order 12565, “Prescribing a Comprehensive System of Financial Reporting for Officers and Employees in the Executive Branch,” 51 *Federal Register* 34437, September 25, 1986.

⁴² U.S. President (George H. W. Bush), Executive Order 12674, “Principles of Ethical Conduct for Government Officers and Employees,” 54 *Federal Register* 15159, April 12, 1989; and U.S. President (George H. W. Bush), Executive Order 12731, “Principles of Ethical Conduct for Government Officers and Employees,” 55 *Federal Register* 42547, October 17, 1990.

⁴³ Executive Order 12834, “Ethics Commitments by Executive Branch Appointees,” 58 *Federal Register* 5911, January 22, 1993; Executive Order 13490, “Ethics Commitments by Executive Branch Personnel,” 74 *Federal Register* 4673, January 21, 2009; and Executive Order 13770, “Ethics Commitments by Executive Branch Appointees,” 82 *Federal Register* 9333, January 28, 2017.

⁴⁴ Since a ban on communication between lobbyists and government employees might be a violation of First Amendment rights to speech and petition the government. Daniel T. Ostas, “The Law and Ethics of K Street: Lobbying, the First Amendment, and the Duty to Create Just Laws,” *Business Ethics Quarterly*, vol. 17, no. 1 (January 2007), pp. 35-37; and Vincent R. Johnson, “Regulating Lobbying: Law, Ethics, and Public Policy,” *Cornell Journal of Law and Public Policy*, vol. 16, no. 1 (Fall 2006), pp. 5-10, at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1103&context=cjlp>. For example, see Office of Management and Budget, Peter R. Orszag, Director, Updated Guidance Regarding Communications with Registered Lobbyists About Recovery Act Funds, M-09-24, Washington, DC, July 24, 2009, p. 1, at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-24.pdf. [Hereinafter, *Orszag Guidance*].

⁴⁵ U.S. President (George W. Bush), “Memorandum on Standards of Official Conduct,” *Public Papers of the Presidents of the United States: George W. Bush, Book 1* (Washington: GPO, 2003), pp. 211-212.

⁴⁶ For the most recent version of the Standards of Ethical Conduct for Employees of the Executive Branch, see Office of Government Ethics, “Standards of Ethical Conduct for Employees of the Executive Branch,” January 1, 2017, at <https://www.oge.gov/Web/oge.nsf/Resources/Standards+of+Ethical+Conduct+for+Employees+of+the+Executive+Branch>.

Similarly, during the Obama Administration, Treasury Department and OMB guidance provided instructions to federal employees about their interactions with lobbyists on two acts: the Emergency Economic Stabilization Act of 2008 (EESA)⁴⁷ and the American Recovery and Reinvestment Act of 2009 (ARRA).⁴⁸ For EESA, guidance was designed to combat potential lobbyist influence on the disbursement of EESA funds, to remove politics from funding decisions, to offer certification to Congress that each investment decision was based “only on investment criteria and the facts of the case,” and to provide transparency to the investment process.⁴⁹ For the ARRA, all communications between nongovernmental entities and government officials about ARRA funds were required to be documented and posted to an agency-specific ARRA website.⁵⁰

Memoranda and guidance such as these are not discussed further in this report, which focuses on executive order ethics pledges.

Executive Branch Ethics Pledges

Since the Ethics in Government Act of 1978 was enacted,⁵¹ three Presidents have issued an executive order creating an ethics pledge for Administration appointees.⁵² They are President Clinton (1993), President Obama (2009), and President Trump (2017). This section provides a brief summary of each ethics pledge.

Clinton Administration Ethics Pledge

On January 22, 1993, President Clinton issued Executive Order 12834, “Ethics Commitments by Executive Branch Appointees.”⁵³ Contemporary news reports of the ethics pledge cited campaign promises “to curb influence peddling by former government officials.”⁵⁴ The ethics pledge included a five-year ban for former federal officials on lobbying any officer or employee of the

⁴⁷ P.L. 110-343, 122 Stat. 3765, October 3, 2008.

⁴⁸ P.L. 111-5, 123 Stat. 115, February 17, 2009.

⁴⁹ U.S. Department of the Treasury, Communications with Registered Lobbyists and Other Persons About Emergency Economic Stabilization Act Funds, Washington, DC, 2009; U.S. Department of the Treasury, “Treasury Secretary Opens Term Opens [sic] With New Rules To Bolster Transparency, Limit Lobbyist Influence in Federal Investment Decisions,” press release, January 27, 2009.

⁵⁰ *Orszag Guidance*, p. 1.

⁵¹ P.L. 95-521, 92 Stat. 1824, October 26, 1978; U.S.C. Appendix §§101-505.

⁵² President Jimmy Carter likely required certain presidential appointments to sign “a statement of personal affiliations and a letter of commitment to the President.” This included commitments to “avoid employment for 2 years following government service that would result in financial gain because of that service.” U.S. President (Carter), “Personal Statements of Cabinet and Cabinet-Level Officers,” *Weekly Compilation of Presidential Documents*, vol. 13, no. 9 (February 25, 1977), pp. 262-263. Additionally, President Carter reported to Congress that he “obtained a commitment from these officials to adhere to tighter restrictions after leaving government, in order to curb the ‘revolving door’ practice that has too often permitted former officials to exploit their government contacts for private gain.” U.S. President (Carter), “Ethics in Government: The President’s Message to the Congress Urging Enactment of the Proposed Ethics in Government Act of 1977 and Special Prosecutor Legislation,” *Weekly Compilation of Presidential Documents*, vol. 13, no. 19 (May 3, 1977), pp. 647-650. Research into the ethics code in coordination with the Carter Library could not locate any signed ethics agreements.

⁵³ Executive Order 12834, “Ethics Commitments by Executive Branch Appointees,” 58 *Federal Register* 5911, January 22, 1993.

⁵⁴ “Clinton Announces New Ethics Standards,” *CQ Almanac 1992*, at <https://library.cqpress.com/cqalmanac/document.php?id=cqal92-1106991>. See also, Mitchell Locin, “Clinton Lays Down the Law on Ethics Rules,” *Chicago Tribune*, December 10, 1992, at http://articles.chicagotribune.com/1992-12-10/news/9204220361_1_lobbying-special-interests-appointees.

agency in which they served, a five-year ban on lobbying the Executive Office of the President (EOP) by former EOP employees, a lifetime ban on representing a foreign agent under the Foreign Agents Registration Act (FARA), and a five-year ban for former government officials who participated in a trade negotiation to advise or represent a foreign government.⁵⁵ On December 28, 2000, President Clinton revoked this executive order.⁵⁶

Obama Administration Ethics Pledge

On January 21, 2009, President Obama issued Executive Order 13490, “Ethics Commitments by Executive Branch Personnel.”⁵⁷ The executive order created an ethics pledge for all executive branch appointments made on or after January 20, 2009, including a ban on accepting gifts from registered lobbyists, a two-year ban on working on particular issues involving a former employer, and a ban on lobbying the Administration after leaving government service. Additionally, the E.O. defined terms included in the pledge; allowed the Director of OMB, in consultation with the counsel to the President, to issue ethics pledge waivers; instructed the heads of executive agencies to consult with the Director of the Office of Government Ethics to establish rules of procedure for the administration of the ethics pledge; and authorized the Attorney General to enforce the executive order. In a press release summarizing the executive order, the Obama White House explained the ethics pledge and the importance of following ethics and lobbying rules:

The American people ... deserve more than simply an assurance that those coming to Washington will serve their interests. They deserve to know that there are rules on the books to keep it that way. In the Executive Order on Ethics Commitments by Executive Branch Personnel, the President, first, prohibits executive branch employees from accepting gifts from lobbyists. Second, he closes the revolving door that allows government officials to move to and from private sector jobs in ways that give that sector undue influence over government. Third, he requires that government hiring be based upon qualifications, competence and experience, not political connections. He has ordered every one of his appointees to sign a pledge abiding by these tough new rules as a downpayment on the change he has promised to bring to Washington.⁵⁸

Trump Administration Ethics Pledge

On January 28, 2017, President Donald J. Trump issued Executive Order 13770, “Ethics Commitments by Executive Branch Appointees.”⁵⁹ The executive order revoked President

⁵⁵ Executive Order 12834, §1(a)(1)-(4).

⁵⁶ Executive Order 13184, “Revocation of Executive Order 12834,” 66 *Federal Register* 697, December 28, 2000. See also, Cheryl K. Chumley, “Clinton Revokes Ethics Order He Authored in 1993,” *CNSNews.com*, July 7, 2008, at <http://www.cnsnews.com/news/article/clinton-revokes-ethics-order-he-authored-1993>. The revocation of the executive order could have allowed Clinton Administration officials covered by the five-year ban in the ethics pledge to lobby the incoming Administration following the statutory ban imposed by the Ethics in Government Act of 1978, as amended (18 U.S.C. §207). See also, John Mintz, “Clinton Reverses 5-Year Ban on Lobbying by Appointees,” *The Washington Post*, December 29, 2000, at https://www.washingtonpost.com/archive/politics/2000/12/29/clinton-reverses-5-year-ban-on-lobbying-by-appointees/e5a0571f-5c54-4988-adc6-5571a7557e83/?utm_term=.e8416ec1204c.

⁵⁷ Executive Order 13490, “Ethics Commitments by Executive Branch Personnel,” 74 *Federal Register* 4673, January 21, 2009.

⁵⁸ The White House, “Statement from the Press Secretary on the President’s signing of two Executive Orders and three Memoranda,” press release, January 21, 2009. “Revolving door” regulations refer to restrictions placed on the types of jobs current federal employees may take when they leave federal service. For more information on the revolving door, see CRS Report R42728, *Post-Employment, “Revolving Door,” Laws for Federal Personnel*, coordinated by Cynthia Brown.

⁵⁹ Executive Order 13770, “Ethics Commitments by Executive Branch Appointees,” 82 *Federal Register* 9333, January (continued...)

Obama's executive order (E.O. 13490) and created a new ethics pledge that shared many features to those previously issued by President Clinton and President Obama. The E.O. required all appointees to observe a two-year ban on "particular matters" related to former employers, a two-year ban for former lobbyists on involvement on matters on which he or she had lobbied, and a five-year ban on lobbying the government for appointees who leave government service. Additionally, the ethics pledge defined relevant terms, provided for a waiver process,⁶⁰ and outlined the pledge's administration and enforcement.

Observations

In many ways, President Trump's ethics pledge shares features with those issued by President Clinton and President Obama. For example, all three provided for restrictions, in addition to those imposed by law, on the activities of certain appointees as they enter and exit government service. The three ethics pledges, however, also have many differences. President Clinton's ethics pledge contained provisions prohibiting pledge signers from becoming foreign agents or engaging in trade negotiations following government employment. President Obama's ethics pledge contained a lobbyist gift ban, and President Clinton's and President Trump's contain a five-year lobbying ban. A full side-by-side comparison of President Clinton's, President Obama's, and President Trump's executive order ethics pledges can be found in the **Appendix**.

Even though some provisions of the ethics pledges are similar, each pledge also provides the Administration's interpretation of the relationship between government employees and lobbyists, and how employees entering and exiting government service should behave vis-a-vis the Administration. The following section provides observations about the major similarities and differences between President Clinton's, President Obama's, and President Trump's ethics pledges in three areas: the "revolving door" (i.e., employees entering and exiting government service), definition of lobbying, and representation of foreign principals.

The "Revolving Door"

Each ethics pledge puts additional restrictions on appointees entering and exiting government service.⁶¹ These include general restrictions for all appointees and specific restrictions for lobbyists. **Figure 1** summarizes the executive order restrictions for appointees entering and exiting government service.

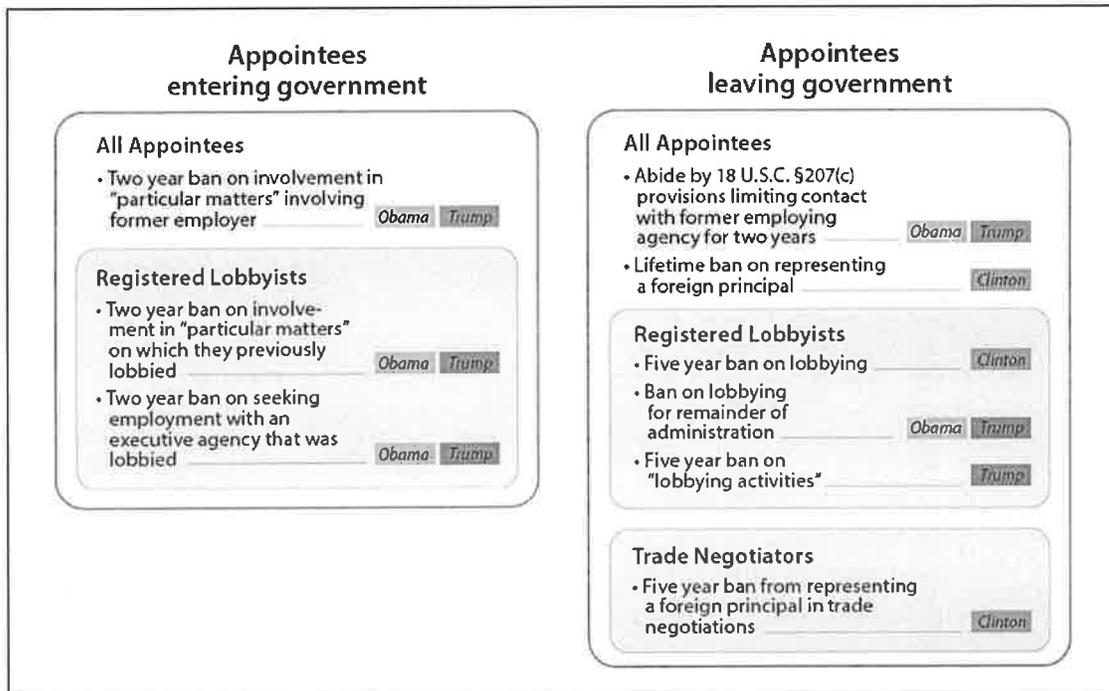
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⁶⁰ For a discussion of ethics waivers, see CRS Insight IN10721, *Office of Government Ethics: Role in Collecting and Making Ethics Waivers Public*, by Jacob R. Straus.

⁶¹ Each ethics pledge defines "appointee" in a slightly different manner, but generally refers to full-time, non-career Presidential or Vice-Presidential appointees, non-career appointees in the Senior Executive Service, and appointees to positions that have been excepted from the competitive service by reason of being confidential or policymaking in character. See E.O. 12834 §2(a), E.O. 13490 §2(b), and E.O. 13770 §2(b) for each pledge's specific definition.

Figure 1. Ethics Pledge Restrictions on Appointees Entering and Exiting Government Since 1993



Source: CRS analysis of E.O. 12834, E.O. 13490, and E.O. 13770.

As **Figure 1** shows, two of the three ethics pledges include provisions for appointees entering government service and all three address employees exiting the government. For appointees entering government service, the Obama and Trump Administrations' ethics pledges include a two-year ban for appointees entering government from being involved with their previous employer on "any particular matter involving specific parties that is directly and substantially related to" former employers or clients.⁶² Additionally, President Obama and President Trump both included additional restrictions on lobbyists entering government service. Both ethics pledges provided that registered lobbyists be prohibited from being involved in "any particular matter on which ..." he or she lobbied in the two years prior to appointment.⁶³ President Clinton's ethics pledge did not contain a provision on appointees entering government service.

For appointees exiting government service, all three ethics pledges contained provisions restricting future activities. President Clinton's ethics pledge included a lifetime ban on representing a foreign principal, as defined by the Foreign Agents Registration Act (FARA);⁶⁴ and

⁶² E.O. 13490 §1(2); E.O. 13770 §1(6).

⁶³ E.O. 13490 §1(3); E.O. 13770 §1(7). President Obama's ethics pledge also contained a provision that prohibited a registered lobbyist from seeking or accepting "employment with any executive agency" that he or she "lobbied within the 2 years before the date ..." of appointment. E.O. 13490, §3(c).

⁶⁴ E.O. 12834 §1(a)(3). For more information on the Foreign Agents Registration Act, see CRS In Focus IF10499, *Foreign Agents Registration Act: An Overview*, by Jacob R. Straus, and CRS Report R44292, *The Lobbying Disclosure Act at 20: Analysis and Issues for Congress*, by Jacob R. Straus. Foreign principals include (1) a government of a foreign country and a foreign political party; (2) a person outside of the United States, unless "it is established that such person is an individual and a citizen of and domiciled within the United States," or "is not an individual and is organized under or created by the law of the United States ... and has its principal place of business within the United (continued...)

a five-year ban on lobbying executive agencies that the appointee had a “personal and substantial responsibility” over.⁶⁵ Additionally, President Clinton’s ethics pledge also restricted former executive branch trade negotiators from representing a foreign principal for five years after the end of his or her government service.⁶⁶

President Obama’s and President Trump’s ethics pledges both included language to extend statutory “cooling off” periods from one year to two years for those exiting the executive branch.⁶⁷ Additionally, both the Obama and Trump ethics pledges included Administration-long bans on leaving the government to lobby certain executive branch officials.⁶⁸ President Trump’s ethics pledge also included a five-year ban for senior appointees from lobbying any executive agency in which the appointee served,⁶⁹ and an agreement not to “engage in any activity on behalf of any foreign government or foreign political party that would require registration under FARA.”⁷⁰

As **Figure 2** shows, several components are shared across the three ethics pledges. For example, all three ethics pledges included a ban on leaving the Administration to become a lobbyist. President Clinton and President Trump included a ban on former appointees becoming a foreign agent, and President Clinton included a ban on participating in trade negotiations after leaving government service.

Figure 2. Ethics Pledge Components that Apply to Appointees

Ban on leaving administration to become a lobbyist	Clinton Obama Trump
Ban on becoming a foreign agent	Clinton Trump
Ban on trade negotiations after leaving administration	Clinton

Source: CRS Analysis of E.O. 12834, E.O. 13490, and E.O. 13770.

Definition of Lobbying: Lobbying Contact v. Lobbying Activities

All three executive order ethics pledges include additional restrictions on lobbyists. While the concept behind the additional restrictions appears to be similar—prohibiting individuals from lobbying on particular matters they worked on in the public or private sector—the language used to define the types of behavior is different. The Lobbying Disclosure Act (LDA) defines a lobbyist as

(...continued)

States”; or (3) “a partnership, association, corporation, organization, or other combination of persons organized under the law or having its principal place of business in a foreign country.”

⁶⁵ E.O. 12834 §1(a).

⁶⁶ E.O. 12834 §1(a)(4) and E.O. 12834 §1(b)(1).

⁶⁷ E.O. 13490 §1(4) and E.O. 13770 §1(2). Statutory “cooling off” periods are codified at 18 U.S.C. §207. For more information on the revolving door and cooling-off provisions, see CRS Report R42728, *Post-Employment, “Revolving Door,” Laws for Federal Personnel*, coordinated by Cynthia Brown, and CRS Insight IN10625, *Restrictions on Lobbying the Government: Current Policy and Proposed Changes*, by Jacob R. Straus.

⁶⁸ E.O. 13490 §1(5) and E.O. 13770 §1(3).

⁶⁹ E.O. 13770 §1(1).

⁷⁰ E.O. 13770 §1(4).

any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.⁷¹

Additionally, the LDA further defines lobbying contacts and lobbying activities. A lobbying contact is

any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to-

- (i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);
- (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
- (iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or
- (iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.⁷²

Lobbying activity

means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.⁷³

For the purpose of their ethics pledges, President Clinton and President Obama both defined lobbying as “knowingly communicat[ing] to or appear[ing] before any officer or employee of any executive agency on behalf of another with the intent to influence official action...”⁷⁴ This definition of lobbying approximates the overall LDA definition of lobbying and lobbying contact.⁷⁵ Thus, former appointees were restricted from making contacts with covered officials after their governmental service.

President Trump’s ethics pledge arguably uses a broader definition of lobbying. President Trump’s lobbying ban prohibits former appointees from engaging “in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.”⁷⁶ President Trump’s executive order defines lobbying activities using LDA’s definition, but provides exemptions for communication or appearances in

⁷¹ 2 U.S.C. §1602(10).

⁷² 2 U.S.C. §1602(8).

⁷³ 2 U.S.C. §1602(7).

⁷⁴ E.O. 12834 §2(c).

⁷⁵ President Clinton’s ethics pledge predates the Lobbying Disclosure Act (LDA), which was enacted in 1995. The definition that President Clinton used in the ethics pledge is similar to the definition ultimately included in the LDA. For more information on the LDA, see CRS Report R44292, *The Lobbying Disclosure Act at 20: Analysis and Issues for Congress*, by Jacob R. Straus.

⁷⁶ E.O. 13770 §1(3).

regard to “a judicial proceeding; a criminal or civil law enforcement inquiry, investigation, or proceeding; or any agency process for rulemaking, adjudication, or licensing....”⁷⁷

The difference between lobbying contacts and lobbying activities is nuanced. Generally, lobbying contacts require an individual to engage in oral or written communication with a covered official.⁷⁸ While there are exemptions to these communications (e.g., communications made by a media organization representative in gathering and disseminating news), in order to be considered a registered lobbyist, contact must occur between an individual being paid to represent others and a covered official.

Lobbying activities, on the other hand, include both lobbying contacts *and* the support of those contacts by people who do not communicate directly with a covered official. Therefore, using lobbying activities to define lobbying is arguably more expansive than using lobbying contacts because individuals who never call or meet with covered officials (but assist federally registered lobbyists in preparing for those communications) would likely fall under President Trump’s ethics pledge lobbying ban. Individuals supporting registered lobbyists, but not making contact with covered officials, were not included in President Clinton’s or President Obama’s ethics pledge.

The shift between lobbying contact and lobbying activities to define lobbying now potentially includes the activities of a group of individuals often referred to as “shadow lobbyists.” A “shadow lobbyist” is an individual who engages in some lobbying activities but does not necessarily strictly meet all of the requirements for registration as a lobbyist: makes more than one lobbying contact per quarter, is compensated for making contacts with covered officials, and spends more than 20% of his or her time on lobbying activities. As described by political scientist Timothy LaPira, a shadow lobbyist is

... any professional who is paid to challenge or defend the policy status quo, to subsidize [sic] policymakers with information, or to closely monitor intricate policy and political developments that are not readily available to the public—or those who offer expertise, knowledge, and access in support of these activities—yet who do not register as lobbyists.⁷⁹

Restricting former appointees from engaging in certain types of lobbying activities potentially would extend to individuals who provide “strategic consulting” to lobbying firms or take postgovernment employment in a position that might support registered lobbyists. Traditionally, individuals who support registered lobbyists have not been included in registration and disclosure requirements because they do not make lobbying contacts. Using lobbying activities as the threshold for postemployment restrictions under the ethics pledge could include those individuals who are not directly attempting to influence government decisionmaking.

⁷⁷ E.O. 13770 §2(n).

⁷⁸ Covered executive branch officials includes “the President; the Vice President; any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President; any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order; any member of the uniformed services whose pay grade is at or above O–7 under section 201 of title 37; and any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5.” 2 U.S.C. §1602(3).

⁷⁹ Timothy M. LaPira, “Lobbying in the Shadows: How Private Interests Hide from Public Scrutiny and Why That Matters,” in *Interest Group Politics*, ed. Allan J. Cigler, Burdett A. Loomis, and Anthony J. Nownes, 9th ed. (Washington, DC: CQ Press, 2015), p. 225.

Representing Foreign Principals

President Clinton's and President Trump's ethics pledges both contained restrictions on former appointees leaving government to represent a foreign principal. For both ethics pledges, the restriction was a prohibition on engaging in activity that would require registration under the Foreign Agents Registration Act (FARA).⁸⁰ President Clinton's ethics pledge contained a lifetime ban on "activity on behalf of any foreign government or foreign political party" that would require registration under FARA.⁸¹ President Trump's ethics pledge contains an agreement not to "engage in any activity on behalf of any foreign government or foreign political party which ... would require registration under FARA."⁸² President Obama's ethics pledge did not address foreign agents.

Options for Change

Should Congress wish to consider writing into law elements included in the pledges, several options are potentially available. These include codifying ethics pledge provisions; amending revolving door restrictions; amending the Lobbying Disclosure Act (LDA), the Foreign Agents Registration Act (FARA), or both; or taking no immediate action. These options each have advantages and disadvantages for the future relationships between lobbyists and governmental decisionmakers. CRS takes no position on any of the options identified in this report.

Codify Ethics Pledge Provisions

Should Congress want to make all or part of the executive branch ethics pledges permanent, it could choose to codify the additional restrictions placed on executive branch appointees by President Clinton's, President Obama's, or President Trump's ethics pledges. This might include codifying additional revolving door restrictions as discussed above; incorporating individual provisions (e.g., a lobbying gift ban or restrictions on trade negotiations by former appointees); or adding specific definitions, waivers, or disclosure concepts to federal law. Codifying either the entire ethics pledge(s) or individual sections would have the effect of making those changes permanent, and not subject to being revoked by a future executive order. This could allow for permanent changes to existing ethics and conflict-of-interest provisions.⁸³

Amend Revolving-Door Statutes

Should action to incorporate ethics-pledge revolving-door restrictions be desired, several options might exist. These could include extending the "cooling-off" period to two years or more, placing a blanket ban on taking certain positions for compensation, and placing a ban on taking certain types of nongovernmental positions.

⁸⁰ For more information on the Foreign Agents Registration Act, see 22 U.S.C. §§611-621); and CRS In Focus IF10499, *Foreign Agents Registration Act: An Overview*, by Jacob R. Straus.

⁸¹ E.O. 12834 §1(a)(3).

⁸² E.O. 13770 §1(4).

⁸³ At least one measure has been introduced in recent years to codify elements of the ethics pledge. H.R. 2500 (115th Congress) would permanently extend ethics pledge postemployment, revolving-door restrictions; institute a lifetime ban on reorientation of foreign principals for certain former federal employees; and create new restrictions on involvement by federal officials in particular matters relating to previous employment.

As mentioned above under “The Revolving Door,” current statutory “cooling off” periods for executive branch officials range from a lifetime ban on “switching sides”; to a two-year period for “very senior” officials, and a one-year period for “senior” officials, for certain activities; and a one-year restriction on all “senior” or “very senior” employees representing a foreign government or political party.⁸⁴ One option might be to extend the cooling-off period to two years or more. This would match language in all three ethics pledges. Extending the cooling-off period for former appointees to two years, however, could possibly be seen as an unreasonable restriction on postemployment. Alternatively, Congress could reduce or eliminate the cooling-off period. Having a shorter cooling-off period, or eliminating it altogether, might arguably increase the talent pool available both inside and outside the government.

Instead of, or in addition to, addressing cooling-off periods, Congress could enact a blanket restriction on the acceptance of certain types of outside employment for the length of an Administration. For example, an individual appointed by the President might be prohibited from accepting certain outside employment until the end of the President’s Administration or until the next intervening election (i.e., the President’s bid for reelection). Such a policy might encourage executive branch appointees to serve for the length of the President’s term before seeking outside employment.

Several disadvantages to creating such postemployment restrictions on appointees potentially exist. First, if the restriction covered only the acceptance of private compensation, fees, or other remuneration, it is possible that an appointee could leave the Administration to take an uncompensated position with any private entity. These positions might be advisory in nature and could carry the promise of future compensation after the end of the former appointee’s restricted time.

Amend the Lobbying Disclosure Act

If the goal of Congress is to restrict former appointees from becoming registered lobbyists under the LDA or FARA, Congress could amend the LDA or FARA to institute provisions similar to executive branch lobbying restrictions found in President Obama’s and President Trump’s ethics pledges. Under the LDA, lobbyists must file quarterly disclosure reports with information on their activities and covered officials contacted. Similar requirements exist under FARA for individuals who are representing a foreign principal.⁸⁵ Additionally, the LDA, as amended by the Honest Leadership and Open Government Act of 2007, requires federally registered lobbyists to file semiannual reports on certain campaign and presidential library contributions.⁸⁶ The disclosure requirements might be further amended to cover program-specific disbursement information.

Take No Immediate Action

Congress might determine that the current lobbying registration and disclosure provisions, and executive orders, are adequate. Instead of amending the LDA or FARA, or issuing additional or amending existing executive orders, Congress or the President could continue to utilize existing law, or the President could issue executive orders to restrict the activities of current or former

⁸⁴ 18 U.S.C. §207. For more information on the revolving door, see CRS Report R42728, *Post-Employment, “Revolving Door,” Laws for Federal Personnel*, coordinated by Cynthia Brown.

⁸⁵ For more information on FARA, see CRS In Focus IF10499, *Foreign Agents Registration Act: An Overview*, by Jacob R. Straus.

⁸⁶ 2 U.S.C. §1604.

Administration officials. Changes within the statutory mission of the implementing officials might be made on an as-needed basis through changes to LDA guidance documents issued by the Clerk of the House and Secretary of the Senate,⁸⁷ FARA guidance issued by the Department of Justice,⁸⁸ through executive order, or through the issuance of memoranda by the Administration.

⁸⁷ For more information on the role of the Clerk of the House and the Secretary of the Senate in administering the lobbying registration and disclosure system, see CRS Report RL34377, *Lobbying Registration and Disclosure: The Role of the Clerk of the House and the Secretary of the Senate*, by Jacob R. Straus.

⁸⁸ U.S. Department of Justice, National Security Divisions, Foreign Agents Registration Act Unit, "Frequently Asked Questions," Foreign Agents Registration Act, at <https://www.fara.gov/faq.html>; and U.S. Department of Justice, National Security Divisions, Foreign Agents Registration Act Unit, "Advisory Opinion Summaries," at <https://www.fara.gov/advisory.html>.

Appendix. Side-by-Side Analysis of Executive Order Ethics Pledges

To provide a comparison of the executive order ethics pledges signed by President Clinton, President Obama, and President Trump, **Table A-1** provides a side-by-side analysis of the three ethics pledges, including who was covered, the restrictions placed on covered employees, and the administration and enforcement provisions. In evaluating the three ethics pledges, similar categories were observed. These serve as the main headers of **Table A-1**. These include who is covered by the ethics pledge; definitions; wavier provisions; administration; enforcement; and other general provisions, if any.

Table A-1. Side-By-Side Analysis of Ethics Pledge Executive Orders (E.O.)

Issue	President Clinton (E.O. 12834)	President Obama (E.O. 13490)	President Trump (E.O. 13770)
Who	"Every senior appointee in every executive agency appointed on or after January 20, 1993" [§1(a)]	"Every appointee in every executive agency appointed on or after January 20, 2009" [§1]	"Every appointee in every executive branch agency appointed on or after January 20, 2017" [§1]
Prohibitions			
Gift Ban	—	"Will not accept gifts from registered lobbyists or lobbying organizations for the duration of ... service as an appointee" [§1(1)]	"Will not accept gifts from registered lobbyists or lobbying organizations for the duration of ... service as an appointee" [§1(5)]
Revolving Door			
All Appointees Entering Government	—	"Will not for a period of 2 years from the date of ... appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts" [§1(2)]	"Will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts" [§1(6)]

Issue	President Clinton (E.O. 12834)	President Obama (E.O. 13490)	President Trump (E.O. 13770)
Lobbyists Entering Government	—	“If [appointee] was a registered lobbyist within the 2 years before the date of ... appointment ... will not for a period of 2 years after the date of ... appointment (a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment; (b) participate in the specific issue area in which that particular matter falls; or (c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment” [§1(3)]	“If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6 [restrictions for all appointees], I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls” [§1(7)]
Appointees Leaving Government	—	“If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period 2 years following the end of my appointment” [§1(4)]	“If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions” [§1(2)]
Leaving Government to Lobby	“Will not, within five years after the termination of my employment as a senior appointee in any executive agency in which I am appointed to serve, lobby any officer or employee of that agency” [§1(a)(1)] For senior appointees in the EOP, “will not, within five years after ... cease to be a senior appointee in the EOP, lobby any officer or employee of any other executive agency with respect to which ... personal and substantial responsibility as a senior appointee in the EOP” existed [§1(a)(2)]	“Agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration” [§1(5)]	“I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency” [§1(1)] “I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration” [§1(3)]

Issue	President Clinton (E.O. 12834)	President Obama (E.O. 13490)	President Trump (E.O. 13770)
Hiring on Qualifications	—	“Any hiring or other employment decision I make will be based on the candidate’s qualifications, competence, and experience” [§1(6)]	“Any hiring or other employment decisions I make will be based on the candidate’s qualifications, competence, and experience” [§1(8)]
Foreign Representation and Trade			
Foreign Principal	“Will not, at any time after the termination of my employment in the United States Government, engage in any activity on behalf of any foreign government or foreign political party which ... would require ... [registration] under the Foreign Agents Registration Act of 1938, as amended” [§1(a)(3)]	—	“Will not, at any time after the termination of my employment in the United States Government, engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2017, would require ... [registration] under the Foreign Agents Registration Act of 1938, as amended” [§1(4)]
Trade Negotiation	“Will not, within five years after termination of ... personal and substantial participation in a trade negotiation, represent, aid or advise any foreign government, foreign political party or foreign business entity with the intent to influence a decision of any officer or employee of any executive agency” [§1(a)(4)]	—	—
Non-Senior Appointee Trade Negotiators Pledge	Trade negotiators, who are not senior appointees, appointed on or after January 30, 1993 “As a condition of employment in the United States Government as a trade negotiator ... will not, within five years after termination of my personal and substantial participation in a trade negotiation, represent, aid or advise any foreign government, foreign political party or foreign business entity with the intent to influence a decision of any officer or employee of any executive agency....” [§1(b)(1)]	—	—

Issue	President Clinton (E.O. 12834)	President Obama (E.O. 13490)	President Trump (E.O. 13770)
Definitions			
	<p>Defined terms:</p> <ul style="list-style-type: none"> • senior appointee, • trade negotiator, • lobby, • on behalf of another, • administrative proceeding, • executive agency, • personal and substantial responsibility, • personal and substantial participation, • trade negotiation, • foreign government, foreign political party, and • foreign business entity [§2] 	<p>Defined terms:</p> <ul style="list-style-type: none"> • executive agency, • appointee, • gift, • registered lobbyist or lobbying organization, • lobby, • particular matter, • former employer, • former client, • participate, • postemployment restrictions, • administration, • government official, and • pledge [§2] 	<p>Defined terms:</p> <ul style="list-style-type: none"> • administration, • appointee, • covered executive branch official, • directly and substantially related, • executive agency, • foreign government, • foreign political party, • former client, • former employer, • gift, • lobbied, • lobbying activities, • Lobbying Disclosure Act, • Foreign Agent Registration Act, • lobbyist, • on behalf of another, • particular matter, • participate, • pledge, • postemployment restrictions, and • registered lobbyist or lobbying organization [§4]

Issue	President Clinton (E.O. 12834)	President Obama (E.O. 13490)	President Trump (E.O. 13770)
Waivers			
	<p>“President may grant to any person a waiver of any restrictions contained in the pledge signed by such person if, and to the extent that, the president certifies in writing that it is in the public interest to grant the waiver” [§3(a)];</p> <p>“A waiver shall take effect when the certification is signed by the President” [§3(b)]; and</p> <p>“The waiver certification shall be published in the <i>Federal Register</i>, identifying the name and executive agency position of the person covered by the waiver and the reasons for granting it” [§3(c)]</p>	<p>“The Director of the Office of Management and Budget [OMB], or his or her designee, in consultation with the Counsel to the President, or his or her designee, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee if, and to the extent that, the Director of [OMB], or his or her designee, certifies in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver. A waiver shall take effect when the certification is signed by the Director of the [OMB] or his or her designee” [§3(a)]</p>	<p>“President or his designee may grant to any person a waiver of any restrictions contained in the pledge signed by such person” [§3(a)]</p> <p>“A waiver shall take effect when the certification is signed by the President or his designee” [§3(b)]</p> <p>“A copy of the waiver certification shall be furnished to the person covered by the waiver and provided to the head of the agency in which that person is or was appointed to serve” [§3(c)]</p>
Administration			
General	<p>Attorney General shall publish within six months a “Statement of Covered Activities,” in the <i>Federal Register</i>” [§4(d)]</p> <p>“All pledges signed by senior appointees and trade negotiators, and all waiver certifications with respect thereto, shall be filed with the head of the appointee’s agency for permanent retention in the appointee’s official personnel folder or equivalent folder” [§4(g)]</p>	<p>“All pledges signed by appointees, and all waiver certifications with respect thereto, shall be filed with the head of the appointee’s agency for permanent retention in the appointee’s official personnel folder or equivalent folder” [§4(e)]</p>	<p>“All pledges signed by appointees, and all waiver certifications with respect thereto, shall be filed with the head of the appointee’s agency for permanent retention in the appointee’s official personnel folder or equivalent folder” [§4(e)]</p>
Agency Rules	<p>“The head of every executive agency shall establish for that agency such rules or procedures ... as are necessary or appropriate” [§4(a)]</p>	<p>“Head of every executive agency shall, in consultation with the Director of the Office of Government Ethics [OGE], establish such rules or procedures ... as are necessary or appropriate to ensure that every appointee in the agency signs the pledge upon assuming the appointed office or otherwise becoming an appointee” [§4(a)]</p>	<p>“The head of every executive agency shall establish for that agency such rules or procedures ... as are necessary or appropriate” [§4(a)]</p>

Issue	President Clinton (E.O. 12834)	President Obama (E.O. 13490)	President Trump (E.O. 13770)
White House Rules	"White House Counsel or such other official or officials with whom the President delegates those duties" sets rules or procedures for the Executive Office of the President [§4(b)]	Counsel to the President or his or her designee issues rules or procedures for the Executive Office of the President [§4(b)]	"Counsel to the President or other such official or officials to whom the President delegates those duties" issues rules or procedures for the Executive Office of the President [§4(b)]
Office of Government Ethics	<p>Director of the Office of Government Ethics shall:</p> <p>"subject to prior approval of the White House Counsel, develop a form of the pledges to be completed by senior appointees and trade negotiators and see that the pledges and a copy of this executive order are made available by agencies" [§4(c)(1)];</p> <p>"in consultation with the Attorney General or White House Counsel, when appropriate, assist designated agency ethics officers in providing advice to current or former senior appointees and trade negotiators regarding the application of the pledges" [§4(c)(2)]; and</p> <p>"subject to the prior approval of the White House Counsel, adopt such rules or procedures as are necessary or appropriate to carry out the foregoing responsibilities" [§4(c)(3)]</p>	<p>Director of the Office of Government Ethics shall:</p> <p>"ensure that the pledge and a copy of this order are made available for use by agencies in fulfilling their duties" [§4(c)(1)]</p> <p>"in consultation with the Attorney General or Counsel to the President or their designees ... assist designated agency ethics officers in providing advice to current or former appointees regarding the application of the pledge" [§4(c)(2)]</p> <p>"in consultation with the Attorney General and the Counsel to the President or their designees, adopt such rules or procedures as are necessary or appropriate" [§4(c)(3)]</p> <p>"in consultation with the Attorney General, the Counsel to the President, and the Director of the Office of Personnel Management, report to the President on steps the executive branch can take to expand to the fullest extent practicable the revolving door ban ... to all executive branch employees who are involved in the procurement process" [§4(d)]</p>	<p>Director of the Office of Government Ethics shall:</p> <p>"ensure that the pledge and a copy of this Executive Order are made available for use by agencies" [§4(c)(1)]</p> <p>"in consultation with the Attorney General or Counsel to the President, when appropriate, assist designated agency ethics officers in providing advice to current or former appointees regarding the application of the pledge" [§4(c)(2)]</p> <p>"adopt such rules or procedures ... as are necessary or appropriate" [§4(c)(3)]</p>

Issue	President Clinton (E.O. 12834)	President Obama (E.O. 13490)	President Trump (E.O. 13770)
Re-signing Requirements	“A senior appointee who has signed the senior appointee pledge is not required to sign the pledge again upon appointment to a different office, except that a person who has ceased to be a senior appointee, due to termination of employment in the executive branch or otherwise, shall sign the senior appointee pledge prior to thereafter assuming office as a senior appointee” [§4(e)]		“An appointee who has signed the pledge is not required to sign the pledge again upon appointment or detail to a different office, except that a person who has ceased to be an appointee, due to termination of employment in the executive branch or otherwise, shall sign the pledge prior to thereafter assuming office as an appointee” [§4(d)]
Trade Negotiators	Non-senior trade negotiators only re-sign if they leave and reenter government [§4(f)]		
Enforcement			
Instructions	Enforceable by “any legally available means, including any or all of the following: debarment proceedings within any affected executive agency or judicial civil proceedings for declaratory, injunctive or monetary relief” [§5(a)]	Enforceable by “any legally available means, including debarment proceedings within any affected executive agency or judicial civil proceedings for declaratory, injunctive, or monetary relief” [§5(a)]	Enforceable by “any legally available means, including debarment proceedings within any affected executive agency or judicial civil proceedings for declaratory, injunctive, or monetary relief” [§5(a)]

Issue	President Clinton (E.O. 12834)	President Obama (E.O. 13490)	President Trump (E.O. 13770)
Rules for Former Appointees	<p>“Any former senior appointee or trade negotiator who is determined, after notice and hearing ... to have violated his or her pledge not to lobby any officer or employee of that agency, or not to represent, aid or advise a foreign entity specified in the pledge with the intent to influence the official decision of that agency, may be barred from lobbying any officer or employee of that agency for up to five years in addition to the five-year time period covered by the pledge” [§5(b)]</p>	<p>Former appointee “who is determined, after notice and hearing, by the duly designated authority within any agency, to have violated his or her pledge may be barred from lobbying any officer or employee of that agency for up to 5 years in addition to the time period covered by the pledge” [§5(b)]</p> <p>“The Attorney General or his or her designee is authorized:</p> <p>(1) to request an investigation from “any appropriate Federal investigative authority” and</p> <p>(2) “to commence a civil action against the former employee in any United States District Court with jurisdiction to consider the matter” [§5(c)]</p> <p>“The Attorney General or his or her designee is authorized to request any and all relief authorized by law” [§5(d)]</p>	<p>Former appointee “who is determined, after notice and hearing by the duly designated authority within any agency, to have violated his or her pledge may be barred from engaging in lobbying activities with respect to that agency for up to 5 years in addition to the 5-year time period covered by the pledge” [§5(b)]</p> <p>“Head of every executive agency shall, in consultation with the Director of [OGE], establish procedure to implement” enforcement [§5(b)]</p> <p>“The Attorney General or his or her designee is authorized:</p> <p>(1) to request an investigation from “any appropriate Federal investigative authority” and</p> <p>(2) “to commence a civil action on behalf of the United States against the former officer or employee” if “there is a reasonable basis to believe that a breach of a commitment has occurred or will occur or continue [to occur]” [§5(c)]</p>
Other	<p>Repealed by E.O. 13184 (December 28, 2000), 66 FR 697</p>	<p>Repealed by E.O. 13770 (January 28, 2017), 82 FR 9333</p>	<p>Repealed E.O. 13490 [§6(a)]</p>

Source: CRS Analysis of E.O. 12834, E.O. 13490, and E.O. 13770.

Author Contact Information

Jacob R. Straus
 Specialist on the Congress
 jstraus@crs.loc.gov, 7-6438

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NLRB Recusal Issues – The Importance of Fairness, Transparency, and Stability

Philip A. Miscimarra
Lauren M. Emery
Morgan Lewis & Bockius LLP

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Morgan Lewis

NLRB Recusal Issues – The Importance of Fairness, Transparency, and Stability

Philip A. Miscimarra¹

Lauren M. Emery²

Morgan Lewis & Bockius LLP

“First they ignore you. Then they ridicule you. And then they attack you and want to burn you. And then they build monuments to you.”

– Nicholas Klein, from his famous 1918 address to the Biennial Convention of the Amalgamated Clothing Workers of America

The National Labor Relations Board (“NLRB” or “Board”) has long been the subject of controversy and legal challenges. The NLRB addresses important issues affecting most private sector employers, employees and unions in the United States, as to which parties, their advocates, politicians, and the public often have strong opinions and divergent views.

Not much has changed since Professor Clyde W. Summers made the following observation about the Board more than 60 years ago:

The labor lawyer’s world is not a secure one, for [the lawyer] walks on a thin crust of precedents. The body of Board decisions in many areas often gives an appearance of firmness only to have tremors beneath the surface open unexpected fissures or raise new ranges of decisions. In our primitiveness we may see these faults and upheavals in the crust of precedents as acts of God or Satan, crediting angels or devils incarnate in the bodies of Board members. With the appointment of new members the warning rumblings become more noticeable, and we spur our efforts to seek out the spirits and identify them as good or evil.³

The “rumblings” associated with the most recent changes in the NLRB’s composition have perhaps been no different from what has characterized the Board’s long history.

¹ Philip A. Miscimarra is a Partner in the labor and employment practice of Morgan Lewis & Bockius LLP, resident in Washington DC and Chicago. He is also the former Chairman of the National Labor Relations Board.

² Lauren M. Emery is an Associate with Morgan Lewis & Bockius, LLP. She also served as a staff attorney at the National Labor Relations Board in Washington DC from May 2015 through December 2018.

³ Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 Syracuse L. Rev. 93 (1955) (hereinafter “Summers”).

However, the treatment of Board member recusal issues in the past 18 months has been exceptional in several respects:

- In the *Hy-Brand* litigation – consisting of four successive Board decisions issued over a six-month period – a three-member Board panel rescinded a previously-issued full-Board decision, followed by a four-member decision in which the Board members appeared to be evenly divided as to the appropriateness of the recusal determination.⁴
- It appears that – for the first time in the Board’s history – the post-issuance decision about recusal in *Hy-Brand* was not made by the Board member; instead, the decision

⁴ See *Hy-Brand Industrial Contractors, Ltd.* (“*Hy-Brand I*”), 365 NLRB No. 156 (Dec. 14, 2017) (five-member Board decision finds that employer entities were “joint employers, but overrules *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015) (“*BFI*” or “*Browning-Ferris*”), affirmed in part and remanded in part, 911 F.3d 1195 (D.C. Cir. 2018)); *Hy-Brand Industrial Contractors, Ltd.* (“*Hy-Brand II*”), 366 NLRB No. 26 (Feb. 26, 2018) (three-member Board panel, excluding Member Emanuel, rescinds *Hy-Brand I* based on observation that “The Board’s Designated Agency Ethics Official has determined that Member Emanuel is, and should have been, disqualified from participating in this proceeding,” citing 5 C.F.R. § 2635.502(c), which reportedly “gives the Agency’s Designated Agency Ethics Official authority to “make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee’s impartiality in the matter”); *Hy-Brand Industrial Contractors, Ltd.* (“*Hy-Brand III*”), 366 NLRB No. 93 (June 6, 2018) (four-member Board panel, excluding Member Emanuel, denies motion for reconsideration, thereby leaving intact *Hy-Brand II*’s rescission of *Hy-Brand I*, but with the Board members seemingly evenly divided, reflected in two different concurring opinions, about the appropriateness of the recusal determination regarding Member Emanuel’s participation in *Hy-Brand I*); *Hy-Brand Industrial Contractors, Ltd.* (“*Hy-Brand IV*”), 366 NLRB No. 94 (June 6, 2018) (three-member Board panel, excluding Member Emanuel, redecides *Hy-Brand* on the merits, and finds that the employer entities were a “single employer,” and panel finds it is “unnecessary” to reach the joint-employer issue).

In the interest of full disclosure, one of this paper’s coauthors, Philip A. Miscimarra, participated in *Hy-Brand I*, which was decided while he was Chairman of the NLRB. Former Chairman Miscimarra notes that no party moved for Member Emanuel’s recusal when the Board decided *Hy-Brand I*, nor did either of the dissenting Board members in *Hy-Brand I* suggest that Board Member Emanuel had an obligation to recuse himself in the case (see *Hy-Brand I, supra*); and neither Member Emanuel nor his former law firm represented any party in the *Hy-Brand* litigation. Letter from Dwight P. Bostwick to David P. Berry (“Member Emanuel’s Response to Office of Inspector General Reports”), at 3 (March 22, 2018) (“Bostwick letter”). Although Member Emanuel’s law firm represented a party in the *BFI* litigation when it was before the Board, and *Hy-Brand* overruled the more expansive joint-employer standard adopted by a divided Board in *BFI*, the Board’s resolution of the *BFI* case (on Aug. 15, 2015) occurred more than two years before Member Emanuel was sworn in as a Board member (on Sept. 26, 2017). In fact, there is unanimity among everyone who has addressed this issue that Member Emanuel had no obligation to recuse himself in *Hy-Brand I* at the time that the Board commenced its consideration of *Hy-Brand*. See *Hy-Brand III*, slip op. at 3 n.1 (Chairman Ring and Member Kaplan, concurring) (“it is undisputed that Member Emanuel had no recusal obligation at the outset of the case”).

was made by the designated agency ethics official,⁵ seemingly over the objection of the recused Board member, and whose rationale was not made part of any opinion, and as to which the parties had no opportunity to provide input.

- Unsurprisingly, other parties have filed many subsequent recusal motions in other cases, including one motion seeking that all Republican Board members “immediately cease deciding *any* Board cases. . . .”⁶
- The Board’s current joint employer rulemaking involves recusal arguments raised by parties and, possibly, by one dissenting Board member based on contentions that the rulemaking constitutes an improper effort to bypass case-related recusal standards.⁷

In this paper, we resist the temptation to address the merits of the recusal issues presented above. Instead, we deal with the overriding importance – for employees, unions, employers and labor law policy on the whole – of having recusal issues addressed by the Board in a manner that fosters fairness, transparency and stability in the Board’s decision-making.

In Part A, we describe reasons that uncertainty about the treatment of recusal issues may be extremely damaging to the Board as an institution: great controversy has always

⁵ In this paper, apart from questioning the interpretation and application of regulations promulgated by the Office of Government Ethics (“OGE”) and the recusal determinations made in the *Hy-Brand* litigation, we do not criticize the Board’s designated agency ethics official and her staff, who have the extremely difficult job of addressing important issues and providing near-constant guidance to Board members and others throughout the Agency.

⁶ Motion for Recusal of Chairman and Certain Members of the NLRB, filed by Int’l Union of Painters Dist. Council 15, Local 159, in *The Boeing Co.*, 19-CA-090932 et al., at 1-2 (April 24, 2018) (emphasis added), which stated that an NLRB press release “makes it clear that the Board is now completely biased in favor of employers and against unions . . .,” and stating that “Chairman Ring and Members Emanuel and Kaplan should immediately cease deciding any Board cases including this case,” and stating that the recusal motion was not filed against Members Pearce or McFerran “because we believe they will not put up with this self-expressed prejudice.” The Board denied this motion in *The Boeing Co.*, 366 NLRB No. 128, slip op. at 1 n.1, ¶3 (July 17, 2018).

⁷ See description of comments submitted during the NLRB’s pending joint-employer rulemaking, contained in the paper written by Nancy Schiffer, *Board Member Conflicts of Interest and Recusal Determinations*, at 11-12 (ABA Committee on Practice and Procedure Under the NLRA, March 1, 2019) (hereinafter “Schiffer paper”). See also NLRB, Notice of Proposed Rulemaking, *The Standard for Determining Joint-Employer Status*, 83 FED. REG. 46,681, 46,687 (Sept. 14, 2018) (“Proposed Joint-Employer Rule”), where Member McFerran’s dissenting views, after referencing the *Hy-Brand* recusal controversy, state that “[r]easonable minds might question why the majority is pursuing rulemaking here and now,” and cites a “concern” expressed by Senators Elizabeth Warren, Kirsten Gillibrand and Bernie Sanders “that the rulemaking effort could be an attempt ‘to evade the ethical restrictions that apply to adjudications.’”

characterized the Board's functioning, which is inherent in the Board's resolution of important issues as to which parties, and often Board members, may have strong, divergent views.

In Part B, we describe the traditional manner in which the Board, and the courts, have generally treated recusal issues, which appears to have never garnered the type of controversy over recusal issues that has emerged in the past 18 months. This differs greatly from the manner in which recusal issues were addressed in the *Hy-Brand* litigation.

Finally, in Part C, we identify standards that, in our view, would facilitate the even-handed resolution of recusal issues which, if adopted by the NLRB, would promote greater fairness to the parties, enhance efficiency and stability within the Agency, and provide transparency that is important to employees, unions and employers throughout the country, which are so dependent on the Board for the resolution of representation and unfair labor practice cases.

A. Prologue: Controversy is No Stranger to the NLRB

The job of an NLRB member requires neutrality, and amendments to the National Labor Relations Act ("NLRA" or "Act") reflected a view that Congress "intended the Board to function like a court."⁸ Nonetheless, as illustrated by Professor Summer's observations back in the 1950s – which were quoted in this paper's introduction – the Board and Board members have long been the object of scrutiny, speculation, and criticism.⁹ One example is recounted by Professor Matthew M. Bodah:

Not long after passage of the [NLRA] . . . a congressional committee attacked the Board for the presence of communists in its staff and its allegedly pro-CIO leanings. . . . Again, in 1953, both the House and Senate labor committees held hearings critical of the Truman Board. And in 1961, the Pucinski committee criticized the work of the Eisenhower Board, while in 1968 the Ervin committee did the same for the Kennedy/Johnson Board. . . .¹⁰

⁸ S. Rep. 80-105, 80th Cong. at 9, reprinted in 1 Legislative History of the Labor Management Relations Act, 1947 (hereinafter "LMRA Hist.") at 415.

⁹ Material in this section was derived in part from a paper previously presented at an ABA Practice & Procedure Committee's 2012 midwinter meeting. See Philip A. Miscimarra, *Angels, Demons and the NLRB – Perspectives on Congressional Oversight* (ABA Committee on Practice and Procedure Under the NLRA, Feb. 2012).

¹⁰ Matthew M. Bodah, *Congress and the National Labor Relations Board: A Review of the Recent Past*, 22 J. Lab. Res. 699 (Fall 2001) (hereinafter "Bodah, *Congress and the NLRB*"), citing James A. Gross, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD* (1981); James A. Gross, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994* (1995); and Seymour Scher, *Congressional Committee Members As Independent Agency Overseers: A Case Study*, 54 AM. POL. SCIENCE REV. at 911-920 (Fall 1960).

Ironically, even *before* the NLRA's enactment, Senator Wagner was among the first legislators in Congress to comment critically on the NLRB, which was created pursuant to a joint resolution (Public Resolution 44),¹¹ and Senator Wagner's criticisms focused on the pre-Wagner Act NLRB's deficiencies under then-existing law.¹²

Subsequently, there have been occasional periods of relative tranquility,¹³ but equally common have been criticisms like those that occurred when Republican Donald Dotson was

¹¹ The NLRB was created pursuant to Public Resolution 44, which was adopted by the 73d Congress in 1934, after it became clear the broader Wagner Act legislation would require further consideration (by the 74th Congress) in 1935. See Pub. Res. 44 (H.R.J. Res. 375), 73d Cong. (1934, as passed and signed by the President), captioned "To effectuate further the policy of the National Industrial Recovery Act" ("NIRA"), which authorized the President "to establish a board or boards authorized and directed to investigate issues, facts, practices, or activities of employers or employees arising under NIRA section 7a" and which would be "empowered . . . to order and conduct an election by a secret ballot of . . . any of the employees of any employer, to determine by what person or persons or organization they desire to be represented. . . ." *Id.* §§ 1, 2. reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (hereinafter "NLRA Hist.") at 1255B (1949). See also 78 Cong. Rec. 12016-17 (June 16, 1934), reprinted in 1 NLRA Hist. 1177-79 (explanation by Senator Robinson of purpose underlying joint resolution).

¹² Regarding the pre-Wagner Act NLRB (created by President Roosevelt based on authority conferred in Public Resolution 44, *supra* note 11), Senator Wagner stated:

The Board . . . was handicapped from the beginning, and it is gradually but surely losing its effectiveness, because of the practical inability to enforce its decisions. . . . [T]he Board may refer a case to the Department of Justice. But since the Board has no power to subpoena [sic] records or witnesses, its hearings are largely *ex parte* and its records so infirm that the Department of Justice is usually unable to act.

79 Cong. Rec. 2371 (Feb. 21, 1935), reprinted in 1 NLRA Hist. 1311-12 (Senator Wagner's statement regarding National Labor Relations Bill).

¹³ See, e.g., Terry Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 ANN. REV. POL. SCIENCE 1094-1116 (1985), quoted in Bodah, *Congress and the NLRB*, *supra* note 10, at 699, which described the following state of affairs as of 1985:

The political controversy and passionate disputes that surrounded the NLRB in its early years have subsided dramatically, and for the last two decades it has rarely been the focus of partisan politics. Indeed it has come to be regarded by both sides of the political fence as one of the most professional, efficient, and successful government agencies, processing with fairness and dispatch untold thousands of cases every year.

In 2000, current Republican House Speaker John Boehner (then Chairman of the House Subcommittee on Employer-Employee Relations) commented on the "improved 'tone' at the NLRB since the arrival of Chairman Truesdale and General Counsel Page." U.S. House of Rep., *The National Labor Relations Board: Recent Trends and Their Implications*, Hearing before the Subcommittee on Employer-Employee Relations, Education and the Workforce Committee (Sept. 19, 2000), quoted in Bodah, *Congress and the NLRB*, *supra* note 10, at 709.

Board Chairman (in 1983-87) and when Democrat William B. Gould IV was Board Chairman (in 1994-98). As described by Professor Bodah:

During the Dotson years, Democratic members of Congress and a steady stream of witnesses representing unions and workers aggrieved by employer actions accused the Board of being a tool of big business. During the Gould years, congressional Republicans, business owners, and workers aggrieved by union actions slammed the Board as pro-labor.¹⁴

Nor has there been any shortage of sharp rhetoric regarding NLRB members. Board Member Dennis Devaney stated in 1993 that "overheated rhetoric has become part and parcel of the nomination process for the NLRB."¹⁵ The Board under Chairman Dotson was referred to as consisting of "anti-labor ideologues" and advocates of "the most narrow, retrograde employer interests," who had "no intention of enforcing the national labor policy with an even hand," and who espoused a "legal theory . . . that employers . . . should be able to do whatever they want whenever they want. . . ."¹⁶ The academic work of Chairman Gould was described as a "battle cry" for organized labor – "institutional unionism's *Mein Kampf*."¹⁷ Along similar lines, other Board members – and the Board generally – have faced sharp criticism at different times from Congressional Democrats and Republicans alike:

- A 1947 Senate report regarding the Taft-Hartley amendments stated: "The need for such legislation is urgent. . . . [T]he administration of the National Labor Relations Act itself has tended to destroy the equality of bargaining power necessary to maintain industrial peace. . . . Moreover, as a result of certain administrative practices . . . the Board has acquired a reputation for partisanship, which the committee bill seeks to overcome, by insisting on certain procedural reforms."¹⁸
- A 1984 report of the House Labor and Education Committee's Subcommittee on Labor-Management Relations, entitled "The Failure of American Labor Law – A Betrayal of American Workers," quoted a statement (by United Electrical Workers President James Kane) that the Board was "dominated by anti-labor zealots," and the report indicated there was a "collapse of confidence in the objectivity of the current

¹⁴ Bodah, *Congress and the NLRB*, *supra* note 10, at 709 (citations omitted).

¹⁵ Dennis Devaney, *The Times They Are A-Changin': The NLRB in Transition*, 44 LAB. L. J. 723-26 (1993).

¹⁶ BNA, *Criticism of Labor Department*, 115 LAB. REL. REP. (BNA) 195 (Mar. 5, 1984) (statement of AFL-CIO President Lane Kirkland), *quoted in* David P. Gregory, *The NLRB and the Politics of Labor Law*, 27 BOSTON COLLEGE L. REV. 39, 47 (1985) (hereinafter "Gregory, *NLRB and Politics*"); BNA, *AFL-CIO Views on NLRB Actions*, 116 LAB. REL. REP. (BNA) 46 (May 21, 1984) (statement released by AFL-CIO Executive Council), *quoted in* Gregory, *NLRB and Politics*, at 47.

¹⁷ Mike Weiss, *The Prey*, MOTHER JONES at 50-58 (July/August 1994), *quoted in* Bodah, *Congress and the NLRB*, *supra* note 10, at 702.

¹⁸ S. Rep. 80-105 (1947), *reprinted in* 1 LMRA Hist. 408.

Board," because the Board "altered the substance of the law in a manner contrary to the objectives of the Act."¹⁹

- In 1998, House Republicans conducted an appropriations hearing in which then General Counsel Fred Feinstein was called "the most biased General Counsel in history," who was questioned regarding "the frequency of [his] contact with union attorneys," and accused of extravagance relating to "private showers for Board Members, chauffeur-driven limousines, private libraries for Board members, and a kitchen and cooks at Board headquarters."²⁰
- In 2007, a joint hearing was conducted by the House and Senate labor committees regarding the NLRB in which Democratic House Labor Committee Chairman George Miller stated that "brick by brick, the NLRB has worked to dismantle the foundation of workers' rights in this country."²¹ Democratic Senate Labor Committee Chairman Edward Kennedy likewise stated: "This board has undermined collective bargaining at every turn, putting the power of the law on the side of lawbreakers, not victims, on the side of a minority of workers who want to get rid of a union, not the majority who want one and on the side of employers who refuse to hire union supporters, not the hard-working union members who want to exercise their democratic rights."²²
- In 2011, the House Education and Workforce's Subcommittee on Health, Employment, Labor and Pensions held a hearing, entitled "Emerging Trends at the National Labor Relations Board," where Republican Subcommittee Chairman Phil Roe stated the Board "the Board has abandoned its traditional sense of fairness and neutrality and instead embraced a far more activist approach," and that "[n]umerous actions by the Board suggest it is eager to tilt the playing field in favor of powerful special interests against the interests of rank and file workers."²³

In short, in the 83-year history of the NLRB, the Agency has always dealt with controversy, and parties – whose cases depend on the Board for resolution – have always had

¹⁹ H.R. Rep., 98th Cong., Committee on Education and Labor, Subcommittee on Labor-Management Relations 14-16 (Oct. 1984) (citations omitted).

²⁰ U.S. House of Representatives. Hearings of the House Appropriations Committee, Appropriations for the Departments of Health and Human Services, Labor and Related Agencies, Fiscal Year 1998, at 725, 730 (1997), *quoted in* Bodah, *Congress and the NLRB*, *supra* note 10, at 706.

²¹ Joint Hearing, House Committee on Education and Labor, Subcommittee on Labor-Management Relations, and Senate Committee on Health, Education, Labor and Pensions, Subcommittee on Health, Employment, Labor and Pensions, 110th Cong. 2-3 (Dec. 13, 2007) (hereinafter "JOINT HEARING, 110th Cong.") (prepared statement of House Committee Chairman Miller).

²² JOINT HEARING, 110th Cong., *supra* note 21, at 15.

²³ HEARING, HOUSE COMMITTEE ON EDUCATION AND LABOR, SUBCOMMITTEE ON LABOR-MANAGEMENT RELATIONS, 112th Cong., at 2, 3 (Feb. 11, 2011).

an incentive to influence the adjudication process in whatever way might make a favorable outcome more likely. To this effect, former Board Chairman John Fanning, who served on the Board for nearly 25 years, made the following observation:

Labor relations has always been a field that arouses strong emotions – sometimes more emotion than reason. . . . As someone who has participated in some 25,000 decisions of the Board, I can assure you that the *one factor every case has in common . . . is the presence of at least two people who see things completely different.*²⁴

B. Recusal Issues – How They Have Been Handled, and What Changed in Hy-Brand?

Prior to the *Hy-Brand* cases, the Board's handling of recusal issues was relatively routine, and the two most widely applied recusal rules (in recent years reflected in an "ethics pledge" entered into by Board members as part of the appointment process) were understood throughout and outside the NLRB. These rules were described in *Hy-Brand III* as follows:

The ethics pledge taken by Board members requires that each member be recused for 2 years from any particular matter in which his or her former law firm represents a party and for 2 years from any matter involving a client for which the member performed work.²⁵

The Board's traditional application of recusal issues in recent years has been relatively unexceptional. For example, prior to his appointment to the NLRB, former Board Member Craig Becker served as Associate General Counsel to the Service Employees International Union ("SEIU"). In *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, 238-246 (2010) (Member Becker, ruling on motions) – and in twelve other cases – motions to recuse Member Becker were filed where either (i) one or more parties were a local union affiliated with the SEIU, (ii) Member Becker had previously filed one or more briefs on behalf of a party or amicus curiae, (iii) it was argued that his prior publication(s) meant he had "effectively pre-judged the law," (iv) it was argued that Member Becker in two cases "had a close association with the union party's counsel," and (v) it was argued that Member Becker had previously litigated cases in which the opposing counsel was a lawyer on the staff of the National Right to Work Legal Defense Foundation ("NRW Foundation"), which was one of the moving parties seeking Member Becker's recusal.

In *Pomona Valley*, Member Becker addressed – in a lengthy opinion captioned "ruling on motions" – the recusal contentions raised in all thirteen cases. Member Becker determined that

²⁴ Fanning, John. "The National Labor Relations Act: Its Past and Its Future," in William Dolson and Kent Lollis, eds., *FIRST ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE* 59-70 (1954) (emphasis added), quoted in Bodah, *Congress and the NLRB*, supra note 10, at 713. Former Chairman Fanning became a Board member on December 20, 1957 and remained on the Board until December 16, 1982. See <http://www.nlr.gov/who-we-are/board/board-members-1935>.

²⁵ *Hy-Brand III*, supra n. 4, slip op. at 3 n.1 (Chairman Ring and Member Kaplan, concurring). Other sources of potential recusal obligations are summarized in the Schiffer paper, supra note 7.

his recusal was appropriate in one case, based on Member Becker's submission of a joint brief on behalf a party (the UAW International Union) and an *amicus curiae* (the AFL-CIO). *Id.* at 239. However, Member Becker determined that his recusal was not warranted in any of the other cases.

Yet, the recusal issues addressed by Member Becker in Pomona Valley had several things in common:

- each motion seeking Member Becker's recusal was raised *prior* to the time that the Board decided the case;
- Member Becker's opinion reveals that he had the *opportunity to consult with the Agency's designated agency ethics official ("DAEO")*,²⁶ but (i) *he alone made the determination* regarding whether recusal was appropriate, and (ii) *his determination was made part of the Board's decision on the merits*;²⁷ and
- Member Becker's decision not to recuse himself in 12 of the 13 cases in which his recusal had been sought – and his decision to recuse himself in the 13th case – was explained in a *detailed published opinion* setting out the *relevant standards* and his *detailed reasons* for determining that his recusal was unwarranted.

As explained in *Pomona Valley*, although Member Becker was employed by and served as counsel to the SEIU before he became an NLRB member, he determined that he could appropriately participate in cases where SEIU-affiliated *local unions* were parties. Member Becker reasoned that, although he was obligated to recuse himself for a two-year period from all cases in which the SEIU was a party, that "does not require me to recuse myself from all cases in which local unions affiliated with the SEIU are parties." *Id.* at 242. Member Becker reasoned that the SEIU was a "separate and distinct legal entity from the many local labor organizations affiliated with SEIU," "the Federal courts and the NLRB have recognized that the locals and the internationals 'are separate "labor organizations" within the meaning of . . . the National Labor Relations Act.'" *Id.*, quoting *U.S. v. Petroleum Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989). Member Becker also indicated: "over 150 local labor organizations are affiliated with SEIU. In the course of my service as Associate General Counsel to SEIU, I had no dealings whatsoever with all but a small handful of those local organizations." *Id.* He concluded that his recusal obligations would encompass "*some*" cases in which an SEIU local union was a party, but his recusal was not warranted in *all* such cases.

²⁶ *Id.* at 243 ("After I was nominated to serve as a Member of the NLRB, I consulted the designated agency ethics official pursuant to 5 CFR §2635.107(b) in order to determine what the scope of my recusal obligation would be in relation to local unions affiliated with SEIU, should I be confirmed or otherwise serve on the Board").

²⁷ *Id.* at 238 ("I have taken the occasion of the issuance of our Decision in this case to announce my ruling on all 13 motions").

Interestingly, in *Pomona Valley*, Member Becker's recusal decision implicated the issue of whether the Board should reverse a prior case – in which Member Becker himself participated personally – and Member Becker determined that his recusal was not warranted. Thus, *AT&T Mobility*, Case 19-RD-3854, was one of the cases in which Member Becker's recusal was sought, and a central question was whether the Board should overrule a prior case, *Dana/Metaldyne*, 351 NLRB 434 (2007), in which the Board overruled (in part) *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). However, before Member Becker became a Board member, he signed a brief in that prior case, *Dana/Metaldyne*,²⁸ arguing that *Keller Plastics* should *not* be overruled. Thus, in *AT&T Mobility*, the recusal question was whether Member Becker could appropriately evaluate *whether* the Board should overrule a prior case (*Dana/Metaldyne*), when (i) Member Becker *participated personally in the prior case* (representing the AFL-CIO as *amicus curiae*), and (ii) the Board in the prior case had *rejected the position argued by Member Becker*.

On these facts, Member Becker determined that his recusal in *AT&T Mobility* was not warranted, and he reasoned in part as follows:

[A]s counsel to *amicus curiae* AFL-CIO, I signed a brief filed in July 2004, in *Dana Corp.*, 351 NLRB 434 (2007), which argued that the Board should not overrule *Keller Plastics*. . . . The Supreme Court has clearly held, however, "Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"

* * *

Under our Constitution, the President has authority to appoint executive branch officials to positions, such as those on the NLRB, *whose views coincide with those of the President on matters of policy left open by controlling statutes*. . . .

Thus, under Federal labor law, the President is entitled to appoint individuals to be Members of the Board who share his or her views on the proper administration of the Act and on questions of labor law policy left open by Congress. *That process would be frustrated if the expression of views on such questions were considered disqualifying or grounds for recusal when cases raising those questions arose before the Board.*²⁹

Former Board Member Kent Hirozawa addressed a recusal motion in *New Vista Nursing and Rehabilitation, LLC*, Case 22-CA-029988 (Jan. 5, 2016),³⁰ where Chairman Pearce was recused, and the employer contended that Member Hirozawa's recusal was also warranted because,

²⁸ In *Dana/Metaldyne*, Member Becker was representing the AFL-CIO as *amicus curiae*.

²⁹ *Pomona Valley*, *supra*, 355 NLRB at 240, 241 (emphasis added), quoting *Hortonville Joint School District No. 1 v. Hortonville Ed. Assn.*, 426 U.S. 482, 493 (1976) (other citations omitted).

³⁰ Available at <https://apps.nlr.gov/link/document.aspx/09031d4581f65eae>.

among other things, “Member Hirozawa was partner in the law firm that represents the charging party in this matter prior to becoming chief counsel to then-Member Pearce in April 2010, and he should be recused for that reason and for ‘whatever considerations caused recusal of Member Pearce.’” *Id.*, slip op. at 3. Again, as part of the Board’s decision on the merits (which involved a motion for reconsideration), Member Hirozawa wrote a separate opinion addressing the recusal motion, and Member Hirozawa made his own determination that recusal was not warranted. Member Hirozawa describe the “relevant facts” as follows:

I was a member of the firm of Gladstein, Reif & Meginniss LLP, counsel for the charging party in this matter, for over twenty years. I withdrew from the firm in April 2010, prior to becoming chief counsel to then-Member Mark Gaston Pearce that month. I served as chief counsel to Member, and subsequently Chairman Pearce continuously until I was sworn in as a Board member in August 2013. During my time with the firm, I had no involvement with this matter or any other matter concerning the Respondent. During my service as chief counsel, I did not participate in the consideration of this matter at any time. My first involvement in the consideration of this matter concerned the Board’s vote to file the December 2, 2015, motion for limited remand of the administrative record to allow the current Board to address the Respondent’s second, third and fourth motions for reconsideration. That was more than five years after I had severed my relationship with my former firm.

In view of the foregoing, *I have determined not to recuse myself from participation in this matter.*³¹

In *McKenzie-Willamette Medical Center*, 361 NLRB 54, 57 (2014), Member Hirozawa determined it was not appropriate to recuse himself based on his participation in prior litigation involving one of the party’s attorneys – 17 years earlier – that was characterized as “acrimonious.” Here as well, Member Hirozawa wrote an *opinion* that set forth the relevant standards and facts, and Member Hirozawa *made his own determination* about the appropriateness of recusal. In support of his decision that recusal was not warranted, Member Hirozawa reasoned in part:

The Respondent . . . contends that 5 C.F.R. § 2635.101 requires recusal, in particular, the provisions stating that executive branch employees “shall act impartially and not give preferential treatment” to anyone and “shall endeavor to avoid actions creating the appearance that they are violating . . . the ethical standards set forth in this part.” The regulations provide that whether particular circumstances create such an appearance “shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.” *Id.*; see also 5 C.F.R. § 2635.501. In the present case, the Respondent baselessly speculates that I “would give preferential treatment to the General Counsel and/or the Union due to the prior litigation that featured the [Respondent’s counsel]

³¹ *Id.*, slip op. at 5 (emphasis added).

squaring off against Member Hirozawa." . . . I have no recollection of any acrimonious interactions with [the attorney], and any such events would have occurred approximately 17 years ago. Under these circumstances, no reasonable person would conclude that my participation in this case violated ethical guidelines

Id. at 57.

In *Somerset Valley Rehabilitation & Nursing Center*, 362 NLRB 961, 961 n.1 (2015), *affirmed*, 825 F.3d 128, 144 (3d Cir. 2016), the employer filed a motion that Chairman Pearce should recuse himself because his chief counsel participated in the case before the NLRB (up to the exceptions stage, and the motion was denied on the basis that the chief counsel "no part in the Board's consideration of [the] case." *Id.* Again, the rationale underlying the recusal determination was laid out in the decision on the merits, and this made the recusal issue available for court review on appeal.

Significantly, when the Court of Appeals for the Third Circuit considered the recusal issues in *Somerset Valley*, the court of appeals *afforded deference* to the "agency member's decision not to recuse himself."³² Thus, the court upheld then-Chairman Pearce's failure to be recused, and the court reasoned:

"We review an agency member's decision not to recuse himself from a proceeding under a deferential, abuse of discretion standard." *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164 (D.C. Cir. 1995); *see also Mayberry v. Maroney*, 558 F.2d 1159, 1162 (3d Cir. 1977) (applying the same standard to recusal of district judges). That standard is premised on the principle that "deferential review is used when the matter under review was decided by someone who is thought to have a better vantage point than we on the Court of Appeals to assess the matter." *United States v. Tomko*, 562 F.3d 558, 565 (3d Cir. 2009) (en banc) (quoting *United States v. Mitchell*, 365 F.3d 215, 234 (3d Cir. 2004)).

We therefore do not put ourselves in the position of Chairman Pearce or the Board and make the recusal decision anew; rather, we simply review whether the decision was arbitrary or unreasonable. *Id.* at 565. Given that there is no evidence that Dichner played any role in the consideration of this case, or that Chairman Pearce was less than diligent in screening her from the proceedings, and given further that the assertions about Dichner's indirect influence are based on speculation, we cannot say that the Board abused its discretion by maintaining the Chairman on the three-member panel.³³

In this paper, we do not address the merits of the recusal determinations reflected in the above cases. However, it is clear that Board members – making their own determinations about

³² 825 F.3d at 143.

³³ 825 F.3d at 143-144 (emphasis added).

recusal, in consultation with ethics advisors – have always addressed recusal issues, and have recused themselves in many cases. In making these determinations, Board members have received assistance from the Board’s Executive Secretary, from staff attorneys who assist in the Agency’s efforts to apply established recusal standards in a consistent, even-handed manner, and from the Agency’s hard-working ethics officials. See, e.g., *New Vista Nursing and Rehabilitation, LLC*, Case 22-CA-029988 (Jan. 5, 2016) (available in link reproduced in note 30 above) (noting recusal of Chairman Pearce); *Covenant Care California, LLC*, Case 21-CA-090894 (Oct. 15, 2014) (available at <https://apps.nlr.gov/link/document.aspx/09031d458192c516>) (“Member Miscimarra recused himself and took no part in the consideration of this case”); *Southcoast Hospitals Group, Inc.*, 365 NLRB No. 140 (Oct. 6, 2017) (noting recusal of Member Emanuel); *Columbia University*, 365 NLRB No. 136 (Dec. 16, 2017) (noting recusal of Member Kaplan); *Amex Card Services Co.*, Case 28-CA-123865 (“Member Miscimarra recused himself and took no part in the consideration of this case”); *ConAgra Foods, Inc.*, 361 NLRB No. 113 (Nov. 21, 2014) (noting recusal of Member Johnson); *Hacienda Resort Hotel & Casino*, 355 NLRB 742 (2010) (noting recusal of Member Becker).

The courts – including the Supreme Court – provide additional helpful guidance regarding the manner in which recusal issues can constructively be addressed. Courts obviously address important substantive rights, and they have also managed to handle recusal issues – with judges making their own determinations, based on established standards, with explanations set forth in written opinions – without the type of confusion, discord and disorder that has emerged at the NLRB. In *Cheney v. U.S. District Court for the District of Columbia*, 541 U.S. 913 (2004), Justice Scalia authored a lengthy opinion explaining his determination that recusal was unwarranted, notwithstanding a hunting trip in Louisiana where he accompanied Vice President Dick Cheney, a named party in the case. Indeed, even the Supreme Court does not have a perfect track record when it comes to recusal issues, which is reflected in numerous cases where recusal issues have reportedly escaped attention. See “Recent Times in Which a Justice Failed to Recuse Himself or Herself Despite a Conflict of Interest,” <https://fixthecourt.com/2018/05/recent-times-justice-failed-recuse-despite-clear-conflict-interest/> (May 4, 2018) (listing examples, with links to letters and other references, where recusal issues were detected after-the-fact).

Equally significant is the fact that the courts have placed weight on the importance of avoiding *unwarranted* recusals because they can do damage to orderly case adjudication, which operates to the detriment of all parties. In the *Cheney* case, Justice Scalia noted that recusing himself – based on a single social outing with no discussion of the litigation – would impede the Court’s ability to decide cases. Justice Scalia noted that needlessly recusing himself raised the possibility of a “tie vote” among remaining Justices, rendering the Court “unable to resolve the significant legal issue presented by the case.” Justice Scalia continued:

[A]s Justices stated in their 1993 Statement of Recusal Policy: “We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before

us or acted as a lawyer at an earlier stage. *Even one unnecessary recusal impairs the functioning of the Court.*" (Available in Clerk of Court's case file.) Moreover, *granting the motion is . . . effectively the same as casting a vote against the petitioner. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all.*³⁴

This same focus on the importance preserving orderly case-adjudication – by avoiding inappropriate recusal determinations – is reflected in other court cases regarding recusal motions. In *Owens v. American Cyanamid*, 2010 WL 597394 (E.D. Wis. Feb. 17, 2010), *affirmed sub nom. In re Sherwin-Williams Co.*, 607 F.3d 474 (7th Cir. 2010), the judge determined that recusal was unwarranted, and noted that "*needless recusals exact a significant toll*" and "[a]utomatic disqualification *allows the party to manipulate the identity of the decisionmaker and may be no more healthy for the judicial system than the denial of a borderline motion.*"³⁵

Likewise, in *White v. NFL*, 2008 WL 1827423, at *3 (D. Minn. April 22, 2008), *affirmed*, 585 F.3d 1129 (8th Cir. 2009), the judge denied a motion to vacate a previously issued decision, notwithstanding allegations of bias and prejudice related to public statements and some informal meetings in the judge's chambers (to which both parties were invited but only one party attended). The judge observed it was relevant to consider "the risk of injustice to the parties, the risk that denial of relief will cause injustice in other cases and the risk of undermining public confidence in the judicial process." *Id.*

Significantly, the judge's decision against recusal in *White v. NFL* was upheld by the Court of Appeals for the Eighth Circuit, which was especially troubled by the risk that granting a recusal motion, after-the-fact, would encourage manipulation by the parties. The court of appeals stated:

A motion to recuse . . . "is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice." . . . We have also held that a motion to recuse will be denied if it is not timely made. . . . "Timeliness requires a party to raise a claim at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim."³⁶

The court of appeals stated it was troubled by the "long delay" associated with the NFL's efforts to seek recusal only after it received an unfavorable decision on the merits. *Id.* at 1141. The

³⁴ 541 U.S. 915-16 (emphasis added).

³⁵ *Id.* at *4 (emphasis added), quoting *In re United States*, 572 F.3d 301, 308 (7th Cir.2009); *New York City Dev. Corp. v. Hart*, 796 F.2d 976, 981 (7th Cir.1986) (quoting *Suson v. Zenith Radio Corp.*, 763 F.2d 304, 308–09 n. 2 (7th Cir. 1985)).

³⁶ 585 F.3d at 1138, quoting *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir.1993); *United States v. Denton*, 434 F.3d 1104, 1111 (8th Cir.2006); *Holloway v. United States*, 960 F.2d 1348, 1355 (8th Cir.1992); *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir.2003) (quotation omitted).

court reasoned: “the League voiced a complaint only after receiving an adverse decision with which it strongly disagrees. A motion to recuse should not be withheld as a fallback position to be asserted only after an adverse ruling.” *Id.* (emphasis added).

C. The Path Forward: The Need to Foster Fairness, Transparency, and Stability

The Board plays a critical role in deciding representation election and unfair labor practice cases. In fact, the Board’s role is indispensable: it is the only place where employees, unions and employers can have these disputes resolved. The great majority of NLRB decisions are unanimous, but the Board always addresses a significant number of controversial cases in which parties – and often Board members – will have divergent views. Regardless of how one views the merits of *Browning-Ferris Industries* and the various *Hy-Brand* cases, there can be little dispute about the instability, uncertainty and confusion that has resulted from the manner in which the *Hy-Brand* recusal issues have been raised and addressed. Indeed, there is still no definitive ruling about the correctness of incorrectness of the recusal determination that caused the invalidation of *Hy-Brand*, because the rationale is not part of any opinion, and – when a non-Board member makes a recusal determination that dictates the outcome of a case – it is unclear what path for potential appeal exists.

On June 8, 2018, the Board has announced plans to undertake a comprehensive review of its policies and procedures governing Board member ethics and recusal requirements.³⁷ According to the NLRB’s press release, this review

would examine every aspect of the Board’s current recusal practices in light of the statutory, regulatory, and presidential requirements governing those practices. Among other things, the Board would review and evaluate all existing procedures for determining when recusals are required, as well as the roles and responsibilities of Agency personnel in connection with making such determinations. To more fully inform its review, the Board would seek outside guidance, including gathering information regarding the recusal practices of other independent agencies with adjudicatory functions. Under the Chairman’s proposal, the review would culminate with the issuance of a report that sets forth the Board’s findings and establishes clear procedures to ensure compliance with all ethical and recusal obligations.³⁸

³⁷ See <https://www.nlr.gov/news-outreach/news-story/nlr-undertake-comprehensive-internal-ethics-and-recusal-review>.

³⁸ The ethics review reportedly has commenced with an evaluation of the Board’s existing policies and procedures, and the Board is also working with the Office of Government Ethics, as well as “agencies that support federal agencies on administrative issues.” Hassan A. Kanu, “NLRB Ethics Review to Remain Under Wraps for Now, Chairman Says,” *Bloomberg Law*, Oct. 25, 2018 (available at <https://news.bloomberglaw.com/daily-labor-report/labor-board-member-cleared-on-ethics-question>).

Consistent with the Board's relatively uneventful treatment of recusal issues in the past, and court cases that have addressed similar issues, the following guidelines would substantially improve the extent to which recusal issues could be addressed in a manner that promotes fairness, transparency and stability.

1. **Timeliness and Waiver.** Recusal questions should be addressed by the parties in a timely manner, and the Board should strongly disfavor or preclude any after-the-fact consideration of recusal issues, except in truly extraordinary and exceptional cases.

This principle is recognized in the courts, and it is consistent with standard practice regarding nearly all arguments and motions entertained by the Board. Regardless of whether one agrees or disagrees with the recusal determination in the *Hy-Brand* cases – or the merits of *Browning-Ferris Industries* (which was overruled by *Hy-Brand I*) – it has been extremely difficult to have an even-handed appraisal of the *Hy-Brand* recusal issues because (i) the *BFI* joint-employer issue was itself been extremely controversial since *BFI* was decided, and (ii) everyone knew the after-the-fact recusal of Member Emanuel meant, at least in the short run, that expanded joint-employer standard adopted in *Browning-Ferris Industries* would remain intact.

2. **Due Process and Party Participation.** Parties should receive notice and the opportunity to engage in briefing regarding Board member recusal questions, except for recusals initiated by the Board member based existing standards.

The importance of notice and the opportunity for briefing consistent with the Board's existing rules is standard practice at the Board and the courts. The Board has no obligation to provide the opportunity for supplemental briefing regarding matters not addressed by the parties (e.g., the Board has often issued decisions that modify or overrule precedent without supplemental briefing). However, disputed questions regarding Board member recusals are important enough to warrant notice to the parties and the opportunity for briefing *before* such an important issue is resolved. By comparison, in the *Hy-Brand* cases, parties were unaware of any recusal issues until after *Hy-Brand I* was decided, and the recusal issues were the subject of briefing only in motions for reconsideration.

3. **Recusal Determinations Should Be Made by Board Members.** All disputed issues in NLRB cases should be decided by Board members, based on authority that the NLRA confers on Board members, and each Board member's evaluation of applicable ethics rules and requirements.

We have not discovered a single case in the Board's 83-year history where questions regarding a Board member's recusal were determined by anyone other than the Board member himself or herself. In the NLRA, Congress obviously intended that Board members – and *only* Board members – would resolve all disputed issues in every case that is brought before the Agency. This exclusive authority accounts for the extensive selection, vetting, nomination and confirmation process associated with every Board member's appointment. Furthermore, Board

member (who are nearly always attorneys) are themselves subject to laws, regulations and rules of professional conduct, including those pertaining to recusal. These considerations make it incongruous to suggest that Board members lack sufficient judgment to resolve recusal issues. Indeed, as noted above, in *Somerset Valley Rehabilitation & Nursing Center*, 362 NLRB 961, 961 n.1 (2015), *affirmed*, 825 F.3d 128, 144 (3d Cir. 2016), the court of appeals *afforded deference* to the “agency member’s decision not to recuse himself.”³⁹

It also profoundly undermines the orderly functioning of the Board – and it risks great damage to collegiality among Board members – to permit the forced exclusion of a Board member on disputed recusal grounds in a pending case. This places participating Board members in the position of authoring opinions that may address the propriety of the absent member’s recusal, and the excluded member (based on his or her forced exclusion) is barred from participating in or responding to the recusal determination in the written decision issued by the Agency.

In short, it is difficult to justify a departure from the uniform practice that has characterized Board decision-making for the past 83 years, which has been to permit Board members themselves to determine recusal issues. One can reasonably expect that Board member determinations about their own recusals – which invariably include consultation with Agency ethics officials – will rarely be different from recusal decisions by ethics officials. In the infrequent case where a Board member and ethics official reach different conclusions about recusal, it is reasonable to question why the ethics official’s determination should supplant a Board member’s contrary view:

- If the Board member makes an incorrect recusal decision, this would be subject to review just like any other decided issue; the NLRA authorizes the Board member to decide issues brought before the Board (with no exclusion applicable to recusal determinations); the Board member is responsible for his or her own compliance with relevant ethics standards; and the Act even makes the Board member subject to removal (but only after “notice and hearing”) to the extent that his or her actions constitute “malfeasance in office.”⁴⁰
- Conversely, if the ethics official makes an incorrect recusal decision (imposed on the Board member over his or her objection), there appears to be no available recourse by the Board member or the parties; there is no obvious path by which the incorrect determination can be reviewed; and there appears to be no readily available remedy.
- Indeed, if a difference of opinion arises, it is possible that multiple Board members – or even *all* Board members – may uniformly disagree with an ethics official’s recusal determination affecting one or more Board members in a particular case. Here as

³⁹ 825 F.3d at 143 (emphasis added).

⁴⁰ NLRA § 3(a), 29 U.S.C. § 153(a).

well, it is hard to envision a path that would be more predictable and certain than permitting the Board members – consistent with their statutory authority – to address the recusal issue(s), which would be part of the decided case. One cannot imagine what alternative path would be available to deal with situations where, for example, the *entire* Board disagreed with an ethics officer's contrary determination about one or more member recusals in a particular case.

In *Hy-Brand II*, the Board relied on the recusal determination made by the designated agency ethics official which invoked a regulation (5 C.F.R. § 2635.502(c)) that ostensibly authorizes the ethics official to “make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee’s impartiality in the matter.”⁴¹ One can question the application of this regulation to an independent regulatory agency like the NLRB, where a federal statute – the National Labor Relations Act – exclusively vests in Board members the authority to decide the issues presented in cases that come before the Agency.⁴² Moreover, this regulation does not impose an absolute “disqualification” when it is determined that a reasonable person might question an employee’s impartiality. The regulation states that the designated ethics official may conclude 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.” 5 C.F.R. § 2635.502(c). Two of the factors to be considered as part of this determination are “[t]he nature and importance of the employee’s role in the matter” and the “difficulty of reassigning the matter to another employee.” *Id.*

⁴¹ *Hy-Brand II*, supra note 4, slip op. at 1 n.3.

⁴² The regulations included within 5 C.F.R. § 2635.502 make reference to an “employee” of a federal agency, and indicate that the designated agency ethics official may determine whether an employee must be “disqualified” from participating in particular business of the agency, and state the designated ethics official “may make this determination on his own initiative or when requested by the employee’s supervisor or any other person responsible for the employee’s assignment.” There are five examples set forth in 5 C.F.R. § 2635.502(b), which involve (1) an employee of the General Services Administration who might evaluate a developer’s lease proposal, (2) an employee of the Department of Labor who might provide “technical assistance” in the drafting of legislation relating to safety issues, (3) an employee of the Defense Logistics Agency involved in testing avionics produced by an Air Force contractor, (4) a new employee of the Federal Aviation Administration who might participate in administering a contract involving the employee’s prior firm, and (5) an employee of the Internal Revenue Service who might be involved in determining the tax-exempt status of an organization of which she was a member. Obviously, none of these examples bears any resemblance to an independent regulatory agency like the NLRB, where Board members are vested with exclusive authority to decide all issues in cases that come before the Agency.

4. **Published Decisions and Appeals.** All recusal determinations, with detailed opinions addressing disputed recusal issues, should be included or issued in published Board opinions, which would make them subject to review on appeal.

Consistent with the Board's traditional treatment of recusal issues, and the manner in which recusal determinations are made by courts, all Board recusals should be identified in published Board decisions, which would make those determinations subject to potential review on appeal. Among the most conspicuous features in the *Hy-Brand* litigation has been the absence of any concrete analysis regarding the recusal determination(s) in the published Board decisions. This is unsurprising because the actual recusal determination(s) – and the reasons, rationale and authorities relevant to that determination – were apparently made exclusively by the Agency's designated ethics official who is *precluded*, under the NLRA, from writing or contributing to Board decisions.⁴³

There can be no transparency regarding Board recusal determinations when recusal determinations are not fully explained in published Board decisions. At present, however, it remains unclear – to the extent future recusal determinations are made by the Agency's designated ethics official – how these determinations will be communicated and to whom, whether such determinations can be made part of a Board decision, and whether or how parties or Board members can obtain court review (or any review) of such determinations.

5. **Internal NLRB Procedures.** The Board's internal procedures regarding recusal issues must conform to whatever new or different standards and procedures are adopted regarding the future treatment of recusal issues.

As noted in Part A above, Board members have generally been vigilant regarding cases where recusal is appropriate, and Board member determinations – though sometimes considered controversial – have been subject to court review, since the Board's decisions have

⁴³ Based on a view that Congress "intended the Board to function like a court," S. Rep. 80-105, 80th Cong. at 9, *reprinted in* 1 LMRA Hist. at 415, language was added to Section 4(a) of the Act in 1947 which prohibits the Board from employing attorneys for the purpose of "reviewing transcripts of hearings or preparing drafts of opinions" except for the immediate "legal assistant[s] to any Board member." 29 U.S.C. § 154(a). This was considered consistent with the Board's "performance of quasi-judicial functions."⁴³ H.R. Rep. 80-510, 80th Cong. at 37-38 (1947), *reprinted in* 1 LMRA Hist. at 541-42. *See also* S. Rep. 80-105, 80th Cong. at 9 (1947), *reprinted in* 1 LMRA Hist. at 415 ("Since the Board's function is largely a judicial one, conformance with the practices of appellate courts [regarding personal review of the record and preparation of opinions] should make for decisions which will truly represent the considered opinions of the Board members"). Congress adopted these provisions to ensure that Board members "do their own deciding." H.R. Rep. No. 80-245, at 316 (1947), *reprinted in* 1 LMRA Hist. 316. *See also* S. Rep. No. 80-105, at 3 (1947), *reprinted in* 1 LMRA Hist. 409 (the amendments reorganize the Board's structure "by placing upon the members individual responsibility in performing their judicial functions").

included Board member opinions about disputed recusal issues. It is also clear that the Board's traditional approach to recusal determinations involved regular consultation between Board members, the Agency's designated ethics official, and the Agency's ethics staff on the whole. Therefore, it is premature to announce the demolition of preexisting Board standards and procedures regarding recusal issues, which appeared to work well for decades. In this regard, the views about the recusal issues in *Hy-Brand* appear to be closely aligned with whether particular parties and advocates favor or disfavor the merits of *Browning-Ferris Industries*, on the one hand, or *Hy-Brand I*, on the other (which, during its short-lived existence, overruled *BFI*).

Nonetheless, the Board's internal procedures regarding recusal issues warrant careful review, and they should reflect whatever new or different standards and procedures are adopted regarding the future treatment of recusal issues. The Board's Executive Secretary plays an extremely important role in the identification of recusal issues, in coordination with Board members and their staffs, along with the Agency's ethics officials. This important work should continue to be augmented – as it has in the past – by all other staff attorneys who work in the Board-side of the Agency. The Board's information systems can undoubtedly also make a significant contribution regarding these issues.

6. **Avoiding Instability and Manipulation.** The Board should pay equal attention to need to avoid needless recusals and to discourage efforts by parties to manipulate the Board member participation, which will undermine public confidence and undermine the Board's ability to decide cases as promptly as possible.

The Board's most important function is to decide cases, and advocates on all sides have long recognized the difficulty that has confronted the Board in getting cases decided as quickly as they need to be. As recognized by many courts in their consideration of recusal issues, needless recusals are as potentially damaging as recusals that should – and do not – occur. As the court of appeals recognized in *White v. NFL*, 585 F.3d 1129 (8th Cir. 2009), “[a] motion to recuse . . . ‘is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice,’” and it “should not be withheld as a fallback position to be asserted only after an adverse ruling.”⁴⁴

The Board must strike a balance that provides sufficient guidance that prompts Board members to avoid conflicts-of-interest and, when appropriate to recuse themselves from participating in cases where one can reasonably conclude that real or perceived conflicts exist, while permitting the Board to faithfully – and efficiently – to the most important business of the Agency, which is to enforce the National Labor Relations Act.

There is an equally important nonpartisan role for parties to play in this process. Whatever standards the Board adopts – and whatever tactics might be developed by parties in

⁴⁴ *Id.* at 1138 (emphasis added).

this area – are likely to have equal application regardless of the Board’s composition at a given time.

D. Concluding Remarks

It is helpful to remind everyone that the overwhelming majority of Board decisions are decided unanimously. Therefore, notwithstanding the prominence of cases that are considered controversial, the NLRB serves the interests of employees, unions and employers in countless other cases, where the extent of controversy – though no less important – is often limited to the parties themselves.

Other useful suggestions may undoubtedly assist the Board in doing the hard work of reviewing and reevaluating the Agency’s current recusal standards. Everyone who depends on the Agency will benefit from recusal procedures that foster fairness, transparency and stability.