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LEGAL MEMORANDUM

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National Labor Relations Board Inspector General and Ethics Officer Employ Erroneous Ethics Standard

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Abstract

As with other institutions of government, the work of the National Labor Relations Board must be perceived as legitimate and free from inappropriate influence or manipulation. It is, therefore, a serious matter when a Board decision is questioned because a Board member participating in that decision should have been recused. The NLRB's Inspector General and Designated Agency Ethics Official recently came to this conclusion by applying a novel standard for recusal. This Legal Memorandum *will explain the controversy and evaluate the validity of their recusal standard.*

On November 14, 2016, a National Labor Relations Board (NLRB, or Board) administrative law judge (ALJ) issued a decision in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*[1] He found that two companies accused of unfair labor practices under the National Labor Relations Act "are single and joint employers, and are jointly and severally liable for the violations found herein."[2] The ALJ reached this conclusion by applying the joint-employer standard established by the Board in *Browning-Ferris Industries of California, Inc. and LeadPoint Business Services*.[3]

The Board had a 3–2 Democratic majority when it decided *Browning-Ferris* in August 2015. With one Democratic and one Republican departure over the next two years, President Donald Trump's appointment of Marvin Kaplan in August 2017 and William Emanuel one month later created a 3–2 Republican majority.

On December 14, 2017, the Board affirmed the ALJ's conclusion in *Hy-Brand* that the two companies are joint employers[4] but stated that "we disagree with the legal standard the judge applied to reach

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Key Points

- Executive branch appointees pledge to recuse themselves for two years from participating in "particular matters involving specific parties" that are related directly to their former employer or clients.
- National Labor Relations Board member William Emanuel participated in a case titled *Hy-Brand Industrial Contractors* that overruled a previous decision titled *Browning-Ferris Industries*. His former law firm—but not Emanuel himself—represented a party in *Browning-Ferris*.
- The Inspector General and Designated Agency Ethics Officer said the cases became "consolidated" into one matter because the majority opinion in *Hy-Brand* utilized, almost verbatim, much of the dissenting opinion in *Browning-Ferris*. This, in effect, retroactively created Emanuel's duty to recuse.
- This consolidation-by-wholesale-incorporation standard for recusal has no precedent, no legal basis, is both undefined and subjective, and creates an impossible catch-22 for NLRB members, like Emanuel, to whom it is applied.

that finding."[5] The Board "overrule[d] *Browning-Ferris* and restore[d] the joint-employer standard that existed prior to the *Browning-Ferris* decision."[6] The next day, the Board voted to direct the NLRB's general counsel to seek remand of several decisions, including *Browning-Ferris*, which were then on appeal to the U.S. Court of Appeals for the D.C. Circuit. On December 19, 2017, the Board unanimously voted to rescind this directive, recognizing that the general counsel was already required to notify the courts of Board decisions that bear on pending cases.

Following this, issues were raised in two different ways regarding the propriety of Emanuel's participation in the *Hy-Brand* matter. First, on January 11, 2018, the parties originally charging unfair labor practices in the *Hy-Brand* matter filed a motion for "Reconsideration, Recusal, and to Strike."[7] Second, a complaint submitted to the NLRB's hotline triggered an investigation by the Office of Inspector General into whether Emanuel had a conflict of interest in the decision to seek a remand of the *Browning-Ferris* case because his former law firm had represented a party in that case.[8] That investigation, in turn, caused NLRB Inspector General David P. Berry to investigate whether Emanuel's participation in the *Hy-Brand* case itself was appropriate.

In a memorandum dated February 9, 2018,[9] Berry concluded that Emanuel should have recused himself from the Board's consideration of *Hy-Brand*. Failing to do so, Berry said, violated the ethics pledge Emanuel took upon his appointment pursuant to Executive Order 13770.[10] According to Berry, this constituted a "serious and flagrant problem" that required notification to the Board and the relevant congressional oversight committees.[11] Berry's determination was echoed in a memorandum[12] dated February 21, 2018, by Lori Ketcham, the Board's Designated Agency Ethics Official. Five days later, citing these determinations, the Board, without Emanuel's participation, granted a motion for reconsideration and vacated its *Hy-Brand* decision.[13]

As with other institutions of government, it is crucial that decisions by the NLRB's members and, therefore, the NLRB itself be perceived as legitimate and free from inappropriate influence or manipulation. If the Berry/Ketcham recusal standard is valid, their conclusion suggests that an NLRB member acted improperly. If that standard is invalid, however, it suggests inappropriate interference in the important work of the Board. This *Legal Memorandum*, therefore, will explain the controversy over Emanuel's participation in *Hy-Brand* and evaluate the validity of the Berry/Ketcham recusal standard.

National Labor Relations Board

The National Labor Relations Act established the NLRB in 1935, and the Labor Management Relations Act of 1947 expanded its membership from three to five. Members serve for five-year terms, with one expiring each year, and sit in three-member panels to adjudicate cases. Today, the five members and the general counsel of the NLRB are nominated by the President and must be confirmed by the Senate.

Berry's memo, dated March 20, 2018, describes the NLRB's process for handling cases. The Executive Secretary's office assigns a case to an individual member.[14] That member's staff, called the originating staff, meets with each member assigned to the case to determine his or her vote. Once a majority is reached, the originating staff drafts an opinion and circulates it to the other participating members. After a series of modifications are made (and any dissents are drafted and circulated), a "conformed copy" of the final draft is circulated and approved by the participating members.

The parties and issues that come before the NLRB often represent significant, and sometimes divisive, economic and political interests. As a result, nominations to the Board have sometimes been controversial. For example, in 1980, the first five Senate votes to end debate, and the first two filibusters, of an executive branch nomination were of President Jimmy Carter's choices to be general counsel and a member of the NLRB. The Senate has taken 11 roll call votes on confirmation of these two NLRB positions, with each vote receiving an average of 42 negative votes.[15]

Another example occurred in January 2012, when President Barack Obama used recess appointments[16] to create a Democratic NLRB majority. The Senate met on January 3 to convene the second session of the 112th Congress and, 40 seconds later, adjourned until January 6.[17] While no President had ever made a recess appointment during such a short break, Obama recess-appointed three NLRB members on January 4. The Justice Department's defense of those appointments, offered after they were made, was that short "pro forma" sessions during which no business is conducted are not real sessions that create new recesses, but breaks that merely "punctuated" a single, much longer recess.[18]

The Supreme Court unanimously found those recess appointments unconstitutional.[19]

The Ethics Pledge

On January 28, 2017, President Donald Trump issued Executive Order 13770, titled "Ethics Commitments by Executive Branch Appointees." It requires every executive branch agency appointee to sign a pledge (Ethics Pledge) relating to conflicts of interest during and after his or her service.[20] The sixth obligation reads: "I 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."[21] This pledge is directed at eliminating any "lingering affinity and mixed loyalties" that an appointee might have.[22]

Executive Order 13770 defines the key terms in this obligation as follows:

- "[P]articular matter involving specific parties"[23] means "a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific...enforcement action, administrative adjudication, or court case."

- "[D]irectly and substantially related to my former employer or former clients" means "[m]atters in which the appointee's former employer or a former client is a party or represents a party."[24]

- "[F]ormer client" means "any person for whom the appointee served personally as agent, attorney, or consultant" but does "not include clients of the appointee's former employer to whom the appointee did not personally provide services."[25]

The Joint-Employer Issue

Under the National Labor Relations Act, business entities deemed to be employers are subject to collective-bargaining obligations, liability for unfair labor practices, and other matters under the NLRB's jurisdiction. The NLRB recently explained:

> The Act's bargaining obligations are formidable—as they should be—and violations can result in significant liability. When it comes to the duty to bargain, resort to strikes or picketing, and even the basic question of "who is bound by this collective-bargaining agreement," there is no more important issue than correctly identifying who is the employer. Changing the test for identifying the employer, therefore, has dramatic implications for labor relations policy and its effect on the economy.[26]

Pre-2015. The National Labor Relations Act does not define "employer." Predictably, businesses prefer a narrow definition and labor unions a broad one of not only a single employer but also when multiple businesses are "joint employers" of a worker. The Supreme Court held in 1964 that determining joint-employer status is a fact-specific inquiry about whether an employer "possessed sufficient control over the work of the employees."[27] Refining that standard in 1982, the U.S. Court of Appeals for the Third Circuit held that "the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment."[28] The NLRB embraced the Third Circuit's standard, holding that "there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[29]

***Browning-Ferris Industries of California, Inc.* (2015).** Three decades later, in *Browning-Ferris*,[30] the Board addressed whether Browning-Ferris and a company called LeadPoint were joint employers. Emanuel's former employer, Littler Mendelson PC, represented LeadPoint. On August 27, 2015, the NLRB took the opportunity to "revisit and to revise the Board's joint-employer standard."[31] By a 3–2 vote along party lines, the Board expanded the definition of joint employers to include those who could, but never did, exercise control over the essential terms and conditions of employment or had done so only indirectly. Applying its new rule retroactively, the Board found that a joint-employer relationship existed.[32] Browning-Ferris appealed this decision to the U.S. Court of Appeals for the DC Circuit.

In dissent, the two Republican members of the Board called this "the most sweeping of recent major decisions" and predicted that "no bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority's new standards."[33] Rather than its recognized authority to determine facts, they wrote, this decision asserted "authority to modify the agency standard itself. This

type of change is clearly within the province of Congress, not the Board."[34] In sum, "we believe the majority impermissibly exceeds our statutory authority, misreads and departs from prior case law, and subverts traditional common-law agency principles. The result is a new test that confuses the definition of a joint employer and will predictably produce broad-based instability in bargaining relationships."[35]

***Hy-Brand Industrial Contractors, Ltd.* (2017).** Two years later, the *Hy-Brand Industrial Contractors, Ltd.* case was assigned to Emanuel on October 16, 2017.[36] Given the important policy implications of the case, however, all five members of the Board participated in the adjudication of the case. On December 14, 2017, the Board issued its decision, once again re-visiting the joint-employer definition. The Republican majority held:

> [T]he *Browning-Ferris* standard is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations. Accordingly, we overrule *Browning-Ferris* and return to the principles governing joint-employer status that existed prior to that decision.[37]

The Charging Parties' Argument for Recusal

As noted above, the parties originally charging unfair labor practices filed a motion for "Reconsideration, Recusal, and to Strike." They argued that Emanuel should have recused himself in *Hy-Brand* because of its result, that is, because it overturned the *Browning-Ferris* decision.[38] Had Emanuel been on the NLRB in 2015, they argued, he would have had to recuse himself in *Browning-Ferris* because his former law firm represented one of the parties. Because *Hy-Brand* overruled a "case in which Member Emanuel is ineligible to participate,"[39] they argued, he should also have recused himself from any reconsideration of that precedent.[40]

The Inspector General's Conclusion on Recusal

Berry found that, by participating in the *Hy-Brand* case, Emanuel had violated the sixth obligation in the Ethics Pledge because it was a "particular matter involving specific parties that is directly and substantially related to [his] former employer." This is an unusual conclusion because none of the *Hy-Brand* parties or counsel were connected in any way to the earlier *Browning-Ferris* case. In addition, neither Emanuel nor his employer, Littler Mendelson, ever represented any of the parties in *Hy-Brand*. The basis for Berry's conclusion, however, was even more unusual.

While the charging parties argued that the result in *Hy-Brand*[41] showed that Emanuel should have recused himself, Berry focused instead on the Board's process for reaching that result. He concluded that "the *Hy-Brand* deliberation was a continuation of the *Browning-Ferris* deliberative proceedings."[42] In other words, Berry stated that the two cases themselves were, in effect, the same matter. In fact, Berry actually referred to a single "*Hy-Brand/Browning-Ferris* matter."[43]

Berry acknowledged that *Browning-Ferris* and *Hy-Brand* "started out as two distinct and separate matters"[44] but insisted that "it is now impossible to separate the two."[45] Berry stated that the "wholesale incorporation of the dissent in *Browning-Ferris* into the *Hy-Brand* decision consolidated the two cases into the same 'particular matter involving specific parties.'"[46] This "level of consolidation,"[47] according to Berry, meant that "*Hy-Brand* was merely the vehicle to continue the deliberations of *Browning-Ferris*."[48] He stated that the NLRB "was in fact not deciding *Hy-Brand* on the merits of that case, but was continuing the deliberative proceedings of the *Browning-Ferris* decision."[49] In short, according to Berry, wholesale incorporation of the *Browning-Ferris* dissent resulted in consolidation of the two cases into one. For these reasons, since Emanuel would have had to recuse himself in *Browning-Ferris*, he should also have recused himself in *Hy-Brand*.

The Designated Agency Ethics Official's Conclusion on Recusal

In a letter dated April 6, 2018, to the chairmen and ranking members of the relevant congressional committees, Emanuel's counsel asserted that Ketcham advised Emanuel that he had no duty to recuse himself in either the *Browning-Ferris* remand directive or the *Hy-Brand* case. The letter also claims that Berry told Ketcham not to provide that advice in writing.[50] Neither Berry nor Ketcham deny these assertions—rendering her subsequent two memoranda supporting Berry's conclusion baffling.

Nevertheless, Ketcham explained that on October 18, 2017, two days after *Hy-Brand* was assigned to Emanuel, then-Chairman Philip Miscimarra sent an e-mail to Emanuel and Kaplan, the other Republican Board member. "Miscimarra's email included an attached proposed majority opinion for Hy-Brand."[51] Ketcham noted that the Board's *Hy-Brand* opinion, issued on December 14, included pages "21–48 from the dissent in *Browning-Ferris* [sic]...almost word-for-word, with minor non-substantive modifications."[52] The "wholesale adoption of that opinion" covered not only the joint-employer standard but also how it applied to the *Browning-Ferris* parties.[53] She concluded that the two cases thereby became "intertwined,"[54] creating a "commonality and overlap in the way that the two cases were adjudicated."[55]

Why the Inspector General and Ethics Official Are Wrong

Berry and Ketcham concluded that Emanuel had a duty to recuse himself from *Hy-Brand,* not because the two cases involved the same joint-employer issue or because *Hy-Brand* changed that standard. Their narrower conclusion was "limited to very specific facts as to what actually occurred in the deliberative process of *Hy-Brand*."[56] In other words, Berry and Ketcham concluded that Emanuel had a duty to recuse himself in *Hy-Brand* not because of *what* the NLRB did in *Hy-Brand* but because of *how* the NLRB did it.

Berry and Ketcham stated that incorporating "wholesale...the dissent in *Browning-Ferris*...consolidated the two cases into the same 'particular matter involving specific parties.'"[57] This standard has at least three fundamental flaws. First, neither Berry nor Ketcham identified any authority, precedent, source, or other support for their wholesale-incorporation-equals-consolidation theory. Why is incorporating wording from a decision (or a dissent) in a different case inappropriate in any manner? This theory was not tangential, secondary, or minor. It was the *sole* basis for concluding that a member of the NLRB violated the Ethics Pledge—and resulted in the Board vacating one of its decisions. A feature so central to such a significant decision should have some kind of foundation or authority to back it up.

The second flaw compounds the first. The Berry/Ketcham standard is both undefined and inherently subjective. While Ketcham identified the number of pages of the *Browning-Ferris* dissent that appear to have been incorporated into the *Hy-Brand* majority opinion, neither she nor Berry suggested why this number supported their conclusion. They did not explain how much incorporation is necessary to be considered "wholesale." What if the *Hy-Brand* majority had incorporated only 20 pages? How about 10 pages or three pages? They also did not explain why "almost word-for-word" was close enough or why "non-substantive modifications" did not count.[58]

Another indication that this standard is inherently subjective is the repeated use of phrases such as "the practical effect,"[59] "essentially,"[60] and "for all intents and purposes."[61] Especially in the absence of any precedent or other authority for this "wholesale incorporation" standard, these informal phrases indicate that the conclusion is based more on impressions or casual observations than on application of an objective, reliable standard.

The third flaw in the Berry/Ketcham standard is that it creates a disturbing catch-22. Berry acknowledged that *Browning-Ferris* and *Hy-Brand* "started out as two distinct and separate matters."[62] Since neither Emanuel nor Littler Mendelson ever represented the parties in *Hy-Brand,* this means that he had no duty to recuse himself when *Hy-Brand* was assigned to him. At that point, the NLRB members' votes had not yet been sought and the majority opinion had not even been circulated in draft form. No incorporation, wholesale or otherwise, had occurred and, therefore, these two matters had not yet become consolidated. Since consolidation by wholesale incorporation is, according to Berry and Ketcham, the basis for Emanuel's duty to recuse, that duty did not exist when the deliberative process in *Hy-Brand* began.

Berry concluded that Emanuel "should have been recused from participation in deliberations leading to the decision to overturn *Browning-Ferris*."[63] At the same time, he emphasized that his determination was "limited to very specific facts as to what actually occurred in the deliberative process of *Hy-Brand*."[64] How can the conclusion that Emanuel should not have participated in the *Hy-Brand* deliberations be based on what happened during those deliberations?

The retroactive application of this standard—and its resulting catch-22 for Emanuel—exposes another flaw. Courts or other bodies, such as the NLRB, that explain adjudication decisions in written opinions can do so in many different ways. The *Hy-Brand* opinion could have been written differently. It could have referred to, rather than copied, sections of the *Browning-Ferris* dissent. It could have addressed the

same points as that dissent but in a different order or from a different perspective. It could have incorporated only select portions of the *Browning-Ferris* dissent rather than doing so "wholesale."

In this case, two days after *Hy-Brand* was assigned to Emanuel in October 2017, then-Chairman Philip Miscimarra provided a draft majority opinion. In an e-mail, he acknowledged that the "draft includes the 'verbatim' language in the joint dissent in *Browning-Ferris*."[65] Miscimarra was one-half of that joint dissent. Suppose that Miscimarra had, instead of that draft, sent to Emanuel a memo merely suggesting that he consult the *Browning-Ferris* dissent for arguments, ideas, or analysis that might be helpful in drafting his majority opinion. Suppose further that Emanuel had done so, accomplishing the same results in a shorter opinion that echoed or generally paralleled, but did not literally incorporate, the *Browning-Ferris* dissent. Finally, suppose that the decision in *Hy-Brand* did not, under any rational definition, evidence wholesale incorporation of the *Browning-Ferris* dissent.

Suppose that, in *Hy-Brand*, the Board sought to duplicate, as closely as possible, the *Browning-Ferris* dissent. They agreed on this objective and discussed different ways of implementing it. Suppose that the *Hy-Brand* majority opinion followed that plan, converting the *Browning-Ferris* dissent into the *Hy-Brand* majority. But suppose that the Board did this in *substance* but not in form. The majority accomplished this result without obvious or extensive duplication of text. The *Hy-Brand* judgment would be the same, and its effect on *Browning-Ferris* and future cases involving the joint-employer issue would be the same. It appears, however, that in those circumstances, *Browning-Ferris* and *Hy-Brand* would have remained "distinct and separate matters," Emanuel would have had no duty to recuse himself, and the *Hy-Brand* decision would not have been vacated.

That wholesale incorporation/consolidation did not occur, at least in any final or official way, until the end of the process, when the Board's judgment and decision became final. Berry and Ketcham, therefore, are saying that Emanuel should have recused himself at a time when he had no duty to do so because of a future condition that he could not then have known would happen, based on a previously unknown and unsupported standard.[66]

Conclusion

The Ethics Pledge is a guide for those appointed to lead agencies in the performance of their duties. The pledge is straight-forward. It requires recusal in "a particular matter involving specific parties that is directly and substantially related to my former employer or former clients." In this case, neither William Emanuel nor his former employer, Littler Mendelson, had ever represented the parties in *Hy-Brand v. Industrial Contractors, Ltd.* and, therefore, Emanuel had no obligation to recuse himself.

That conclusion is not affected by the fact that, in *Hy-Brand*, the NLRB reconsidered the definition of "joint employers" established in a previous case, even though Emanuel's former law firm represented one of the parties in that case. Nor is it affected by the Board's conclusion that the *Browning-Ferris* decision, or the joint-employer standard on which it was based, should be overruled. Nor is it affected by how the Board reached or expressed that result, by issuing an opinion drafted in a particular way.

The standard employed by the NLRB Inspector General and Designated Agency Ethics Official to find otherwise is without any known legal basis and has no identified precedent. It is inherently subjective, undefined, and retroactive, creating an untenable catch-22 for officials to whom it is applied. In effect, they concluded that Emanuel should have recused himself at the start of the *Hy-Brand* case because of the way that the Board's decision would be explained at the end of the case.

The Ethics Pledge is focused on discreet cases and specific parties, not issues that might surface in subsequent cases or by agency decisions made in other cases. Emanuel did not violate the Ethics Pledge by participating in *Hy-Brand* and, by applying their novel and flawed recusal standard, Berry and Ketcham unnecessarily cast Emanuel in a negative light. Nothing in the Ethics Pledge, the facts of this case, or basic logic compels or even justifies this result.

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Endnotes

1. Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., 365 N.L.R.B. No. 156, 48–53 (Dec. 14, 2017) [hereinafter Hy-Brand Industrial Contractors], https://www.laborrelationsupdate.com/files/2017/12/Board-Decision-38.pdf.
2. *Id*. at 51.
3. 362 N.L.R.B. No. 186 (Aug. 27, 2015) [hereinafter Browning-Ferris Indus].
4. The Board did not address the ALJ's conclusion that the two companies constitute a single employer. Hy-Brand Industrial Contractors, *supra* note 1, at 2.
5. *Id*. at 1.
6. *Id*. at 35.
7. Motion for Reconsideration, Recusal, and to Strike, Hy-Brand Industrial Contractors, 365 N.L.R.B. No. 156 (Jan. 11, 2018), https://www.nlrb.gov/case/25-CA-163189.
8. *Report of Investigation—OIG–I–541*, at 1, Memorandum from David Berry, N.L.R.B Insp. Gen., to N.L.R.B. (Mar. 20, 2018) [hereinafter *Berry II*], http://thf-legal.s3.amazonaws.com/Berry%202.pdf.
9. *Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter*, Memorandum from David Berry, N.L.R.B. Insp. Gen., to N.L.R.B. Chairman Marvin E. Kaplan, Member Lauren McFerran & Member Mark Gaston Pearce (Feb. 9, 2018) [hereinafter *Berry I*], https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1535/OIG%20Report%20Regarding%20Hy_Brand%20Deliberations.pdf.
10. Exec. Order No. 13770, 82 Fed. Reg. 22, 9333 (Feb. 3, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02450.pdf.
11. *Berry I*, *supra* note 9, at 1.
12. *Recommended Action Plan Respecting the Board's Adjudication of Hy-Brand Industrial Contractors, Ltd., 365 N.L.R.B. No. 156 (2017)*, Memorandum from Lori Ketcham, Associate Gen. Counsel, Ethics, to N.L.R.B. Chairman Kaplan, Member Pearce & Member McFerran (Feb. 21, 2018) [hereinafter *Ketcham I*], http://thf-legal.s3.amazonaws.com/Ketcham%201.pdf. She repeated her conclusion in a subsequent memorandum. *See Finding of Trump Ethics Pledge Violation Respecting the Board's Adjudication of Hy-Brand Industrial Contractors, Ltd., 365 N.L.R.B. No. 156 (2017)*, Memorandum from Lori Ketcham, Associate Gen. Counsel, Ethics, to Dwight Bostwich, Zuckerman Spaeder LLP, Attorney for Board Member Bill Emanuel (Mar. 27, 2018) [hereinafter *Ketcham II*], http://thf-legal.s3.amazonaws.com/Ketcham%202.pdf.
13. Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., 366 N.L.R.B. No. 26 (Feb. 26, 2018). Emanuel was excluded from participating in this reconsideration. On June 6, 2018, a three-member panel of the Board affirmed a previous decision by an ALJ that the two employers in this case "are a single employer and jointly and severally liable for the violations found herein." Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., 366 N.L.R.B. No. 94, 1 (June 6, 2018). The Board did not address the joint employer issue. *Id.* at 1, n. 6. Emanuel did not participate in that decision.
14. Although the Board may delegate a case to a three-member panel, all five members participated in the *Hy-Brand* case.
15. In September 2017, the Senate voted 49–44 to end debate on Emanuel's nomination and 49–47 to confirm him.
16. The Constitution allows a president to "fill up all Vacancies that may happen during the Recess of the Senate" without Senate confirmation, but those appointments "expire at the End of [the Senate's] next Session." U.S. Const., art. II, § 2.
17. 158 Cong. Rec. S1 (Jan. 3, 2012), https://www.gpo.gov/fdsys/pkg/CREC-2012-01-03/pdf/CREC-2012-01-03.pdf.
18. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C., 4, 21 (Jan. 6, 2012), https://www.justice.gov/file/18326/download.
19. *Nat'l Labor Relations Bd. v. Canning*, 134 S. Ct. 2550 (2014).
20. The pledge required by Executive Order 13770 is identical to the pledge required during the Obama Administration and similar to those required during earlier administrations.
21. *Compare* Exec. Order No. 13770, *supra* note 10, *with* Exec. Order No. 13490, 74 Fed. Reg. 15, 4673 (Jan. 21, 2009), https://oge.gov/web/oge.nsf/Executive%20Orders/A70F962587DAC28F85257E96006A90F2/$FILE/23a5e4eeaffd4e14b4387b40b0eae5963.pdf?open.
22. *Ethics Pledge: Revolving Door Ban—All Appointees Entering Government*, OGE Memorandum DO–09–11, 5 (Off. Gov't Ethics, Mar. 26, 2009). This guidance, issued at the beginning of the Obama Administration, is "applicable to Executive Order 13770, sec. 1, par. 6." Exec. Order No. 13770, *supra* note 10.
23. The Executive Order provides that this term has the same definition as 5 C.F.R. § 2641.201(h)(1) (2014). Exec. Order No. 13770, *supra* note 10, § 2(s).
24. *Id.*, § 2(d).
25. *Id.*, § 2(i).
26. Hy-Brand Industrial Contractors, *supra* note 1, at 2.
27. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

28. *Nat'l Labor Relations Bd. v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1123 (3rd Cir. 1982).
29. Laerco Transportation and Warehouse et al., 269 N.L.R.B. No. 61, 325 (Mar. 21, 1984). *See also* TLI, Incorporated and Crown Zellerbach Corp., 271 N.L.R.B. No. 128, 798 (July 31, 1984); Celine McNicholas & Marni von Wilpert, *The Joint Employer Standard and the National Labor Relations Board*, Econ. Policy Inst. (May 31, 2017), https://www.epi.org/publication/the-joint-employer-standard-and-the-national-labor-relations-board-what-is-at-stake-for-workers/ (To be considered joint employers, businesses must "co-determine or share control over a worker's terms of employment (such as pay, schedules, and job duties.)").
30. 362 N.L.R.B. 1 (Aug. 27, 2015).
31. Browning-Ferris Industries, *supra* note 3, at 1–2.
32. *Id.* at 18.
33. *Id.* at 21.
34. *Id.* at 22.
35. *Id.* at 23–24.
36. *Berry II*, *supra* note 8, at 2.
37. *Id.*
38. *Id.* at 12 ("The Board's *Hy-Brand* decision purports to overturn [*Browning-Ferris*], a decision in a pending case in which Member Emanuel is ineligible to participate.").
39. *Id.*
40. *Id.* at 14.
41. In their motion, the charging parties distinguished between "simply alter[ing]" and "directly and expressly overrul[ing]" a prior decision. *Id.* at 12. The basis for this distinction, however, is unclear.
42. *Id.* at 4.
43. *Id.* at 5.
44. *Id.* at 2.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 4.
49. *Id.*
50. Letter from Dwight Bostwick of Zuckerman Spaeder LLP to members of Congress (April 6, 2018), http://thf-legal.s3.amazonaws.com/2018-04-06%20Letter%20to%20Congress%20Regarding%20NLRB%20Member%20William%20Emanuel.pdf.
51. *Ketcham I*, *supra* note 12 , at 5.
52. *Id.* at 6.
53. *Id.* at 8.
54. *Ketcham II*, *supra* note 12, at 7.
55. *Id.* at 8.
56. *Berry I*, *supra* note 8, at 4.
57. *Id.* at 3.
58. *Ketcham I*, *supra* note 12, at 6.
59. *See, e.g.*, *Berry I*, *supra* note 9, at 2.
60. *See, e.g.*, *Ketcham II*, *supra* note 12, at 7.
61. *See e.g.*, *Berry I*, *supra* note 9, at 3–4.
62. *Id.* at 2.
63. *Id.* at 4. *See also id.* at 5 (Emanuel "should have been recused" from "the *Hy-Brand/Browning-Ferris* matter.").
64. *Id.* at 4.
65. *Berry II*, *supra* note 8, at 3.
66. On March 9, 2018, the employer parties in *Hy-Brand* filed a motion to reconsider the Board's decision to vacate its original decision. In his response to that motion, the NLRB general counsel argued that Emanuel may have had an actual duty to participate in the case and stated, without elaboration: "The General Counsel notes, in any event, that he does not agree with the conclusions reached in the [Inspector General's] report."