

STATEMENT FOR THE RECORD OF WALTER M. SHAUB, JR.

for the Subcommittee on Oversight and Investigations
U.S. House of Representatives Natural Resources Committee
Hearing titled "*Examining the Influence of Extreme Environmental
Activist Groups in the Department of the Interior*"
April 30, 2024

Chairman Gosar and Ranking Member Stansbury, I offer the following statement for the record to aid the subcommittee in its consideration of legal issues pertaining to government ethics requirements for federal executive branch employees. I served in the U.S. Office of Government Ethics (OGE) for nearly 14 years, as a staff attorney, program manager, Deputy General Counsel, and the office's Senate-confirmed Director. Based on this background and my continuing advocacy for government ethics and accountability, I can offer insights into issues you are considering in the above-captioned hearing.

The subcommittee's hearing notice expresses concerns about the applicability of government ethics requirements to what it characterizes as the "relationships" of officials in the U.S. Department of the Interior with nonprofit organizations.¹ The notice, however, reveals a misunderstanding of the applicable legal authorities.

To address the subcommittee's apparent misunderstanding, this statement discusses requirements of the primary conflict of interest statute applicable to executive branch employees, 18 U.S.C. § 208; OGE's impartiality regulation, 5 C.F.R. § 2635.502; the Ethics Pledge that President Joe Biden has required his appointees to sign under an executive order pertaining to "Ethics Commitments by Executive Branch Personnel," Executive Order 13989, Section 1; and OGE's general appearance standard 5 C.F.R. 2635.101(b)(14). This statement then applies these legal authorities to 12 case studies raised in, or suggested by, the hearing notice and correspondence that members of the committee have sent the Department of the Interior.²

THE CONFLICT OF INTEREST LAW

As a starting point, it is important to understand a few key points about the primary conflict of interest law applicable to the executive branch, 18 U.S.C. § 208. That law is explicit regarding its coverage and applicability.

Basic Restriction

The conflict of interest law prohibits an executive branch employee from participating personally and substantially in a "particular matter" if the employee knows that the

¹ Memorandum from Michelle Lane and Lucas Drill to Subcomm. on Oversight & Investigations Republican Members, H. Comm. on Natural Res. (Apr. 30, 2024), <https://tinyurl.com/mtcv9cd9>.

² To avoid confusion, I have numbered these 12 case studies serially.

particular matter will directly and predictably affect the employee's financial interests or those of any person whose financial interests are imputed to the employee, unless the employee first obtains a waiver.³

The phrase "particular matter" is a legal term of art. Restating the longstanding consensus as to the term's meaning, OGE has provided the following definition in its regulations:

The term "particular matter" includes only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons. It does not, however, cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons. The particular matters covered by this part include a judicial or other proceeding, application or request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.⁴

Not everything a government official does involves a particular matter. If a matter does not focus on the interests of a discrete and identifiable class of persons or parties, it is not a particular matter. For instance, a decision pertaining to government land that focuses broadly on the interests of the general public, native American tribes, mining companies, universities, scientific researchers and others may not be a particular matter.⁵ A decision focused specifically on the financial interests of mining companies as a class or the financial interests of a specific mining company may be a particular matter.

There are two kinds of particular matters. "Particular matters of general applicability" are matters that focus on the interests of a discrete and identifiable class of persons (e.g., a specific industry).⁶ "Particular matters involving specific parties" are matters that focus on the interests of identified parties (e.g., consideration of individual permit applications).⁷ A

³ 18 U.S.C. § 208(a). The language "directly and predictably" does not appear in the statute but has been understood to be inherent in the language "particular matter in which ... he ... has a financial interest" since the law was enacted over six decades ago. 5 C.F.R. § 2635.402. Supreme Court Justice Samuel Alito provided the Interior Department with guidance explaining this language when he was serving in the Department of Justice's Office of Legal Counsel. Memorandum from Samuel Alito, Dep'ty Asst. Atty. Gen., Off. of Legal Counsel, Dep't of Justice, to Solicitor of the Interior, *Scope of the Term "Particular Matter" Under 18 U.S.C. 208* (Jan. 12, 1987), <https://tinyurl.com/2p8xftum>.

⁴ 5 C.F.R. § 2640.103(a)(1).

⁵ OGE's regulations offer this example: "A change by the Department of Labor to health and safety regulations applicable to all employers in the United States is not a particular matter." 5 C.F.R. § 2640.103(a)(1), example 4.

⁶ 5 C.F.R. § 2640.102(m) ("*Particular matter of general applicability* means a particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties.>").

⁷ 5 C.F.R. § 2640.102(l) ("*Particular matter involving specific parties* includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties. The term typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties.>").

decision focused narrowly on the interests of the oil extraction industry is a particular matter of general applicability,⁸ while a decision to grant or revoke an individual permit for a company is a particular matter involving specific parties.⁹ OGE's regulations explain that a particular matter involving specific parties "typically involves 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 contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case."¹⁰ The term "party matter" is often used as shorthand for a particular matter involving specific parties.

Imputed Financial Interests

The conflict of interest law imputes only certain specified financial interests to an executive branch employee. Imputed financial interests are the financial interests of the following persons:

- a spouse;
- a *minor* child;
- the employee's general partner;
- an organization in which the employee is currently serving as officer, director, trustee, general partner or employee; or
- any person or organization with whom the employee is negotiating or has any arrangement concerning prospective employment.¹¹

Absent from this list are the financial interests of a spouse's *employer*, an *adult* child, an *adult child's employer*, or a *former* employer of an official. The conflict of interest law does not impute the interests of these persons to an executive branch employee.

Congress made a decision not cover the financial interests of these persons. If there is dissatisfaction with this law, Congress could expand its coverage to include former employers. Doing so, however, would limit the ability of anyone who has worked in a particular industry regulated or affected by an agency to serve in that agency. Trump's first Secretary of State, Rex Tillerson, was able to perform the full range of his duties as Secretary of State because he had resigned his position Exxon, which had interests affected by the Department of State's work, and he had divested his financial interests in that company.¹² If the interests of former employers had been imputed to executive branch employees, Secretary Tillerson would have needed to recuse from all matters affecting Exxon during his entire time in office, even after completing his divestitures.

⁸ OGE's regulations offer this example: "A regulation published by the Department of Agriculture applicable only to companies that operate meat packing plants is a particular matter." 5 C.F.R. § 2640.103(a)(1) (example 3).

⁹ See 5 C.F.R. § 2641.201(h)(1), example 1 (referring to approval of a specific city's application for Federal assistance for a renewal project).

¹⁰ 5 C.F.R. § 2641.201(h)(1). This regulation interprets the term as used in 18 U.S.C. § 207, but OGE applies the same concept to its impartiality regulation at 5 C.F.R. § 2635.502.

¹¹ 18 U.S.C. § 208(a).

¹² See Ethics Agreement of Rex Tillerson (Jan. 3, 2017), <https://tinyurl.com/4bz hv8m7>.

Likewise, the financial interests of Secretary David Bernhardt's former lobbying firm employer were not imputed to him under the conflict of interest law because he had resigned from the firm.¹³ Even without having his former employer's financial interests imputed to him, Secretary Bernhardt had to recuse from matters affecting his own former lobbying clients. The *Washington Post* contemporaneously reported: "Having worked for years as a lobbyist representing many of the very businesses he now regulates, he walked into the No. 2 job at Interior with so many potential conflicts of interest he has to carry a small card listing them all."¹⁴ If his former employer's interests had been imputed to him, his conflicts of interests would have multiplied exponentially. That employer describes itself as "the nation's No. 1 federal lobbying firm based on revenue," and Open Secrets indicates that the firm had 323 known clients in 2023 — including energy and mining companies.¹⁵ Secretary Bernhardt would have had to carry around not a card but a tome listing all of the firm's lobbying clients, and he would have need to update it daily.

Types of Interests Covered

The conflict of interest law is applicable only to *financial* interests.¹⁶ It is not applicable to the views, hopes, aspirations, ideologies, or policy objectives of executive branch employees. For example, the conflict of interest law covers an Assistant to the President's financial interests in real estate companies and investment funds, but it does not cover that official's views on peace in the Middle East, relations with foreign allies, or federal criminal sentencing guidelines. The conflict of interest law is inapplicable even to policy objectives that an executive branch employees happens to share with others, such as a former employer. If this were not true, former Interior Secretaries like Ryan Zinke and David Bernhardt would have been unable to serve based on their real or perceived sympathy with industries whose work the Interior Department affects.¹⁷

¹³ See Ethics Agreement of David Bernhardt (May 1, 2017), <https://tinyurl.com/289us5jk>.

¹⁴ Juliet Eilperin, *Zinke's #2 has so many potential conflicts of interest he has to carry a list of them all*, WASH. POST (Nov. 19, 2018), <https://tinyurl.com/2m42n4zf>.

¹⁵ Open Secrets, *Lobbying Firm Profile: Brownstein, Hyatt et al*, <https://tinyurl.com/2ebkxask> (last viewed Apr. 29, 2024).

¹⁶ 18 U.S.C. § 208(a).

¹⁷ See, e.g., Devan Cole, *New York Times: Acting interior secretary worked to block report on endangered species*, CNN (Mar. 26, 2019) ("The [*New York Times*] reported that the new approach from Bernhardt, a former fossil fuels lobbyist who currently serves as the department's acting secretary, was 'one that pesticide makers and users had lobbied intensively to promote.'"), <https://tinyurl.com/39ba6fmu>; Ben LeFebvre, *Trump Interior secretary crossed lines in land dealings with Halliburton executive, watchdog finds*, POLITICO (Feb. 16, 2022) ("The report from the department's inspector general confirms a series of issues POLITICO brought to light in 2018 during Zinke's tenure as former President Donald Trump's Interior Secretary. These issues include Zinke's attempts to aid Halliburton's then-chair David Lesar and other developers in creating a commercial development known as 95 Karrow on land adjacent to a vacant lot in Montana that Zinke controlled through a family-run nonprofit foundation, a deal that would have led to Zinke potentially running a microbrewery on the site. ... The inspector general concluded Zinke did not comply with obligations in his ethics agreement, recusal memorandum and accompanying documents. ... But the investigation did not find evidence that Zinke violated formal conflicts of interest laws or that Interior granted Halliburton any specific favors."), <https://tinyurl.com/5n87ca6p>; Jimmy Tobias, *The Zinke effect: how the US interior department became a*

Financial Interests of Nonprofits

Of relevance to the discussion of issues raised in this hearing is an understanding of the inapplicability of the conflict of interest law to the policy objectives of nonprofit organizations. During the administration of President George W. Bush, the Justice Department's Office of Legal Counsel (OLC) issued an opinion on the degree to which the law implicated the advocacy work of nonprofits. At the time, the head of OLC was Steven G. Bradbury, who clerked for Supreme Court Justice Clarence Thomas and is currently listed as a Distinguished Fellow at the conservative Heritage Foundation.¹⁸

Under Mr. Bradbury's leadership, OLC rejected the notion that, for purposes of the conflict of interest law, nonprofits have financial interests in their lobbying activities. "We conclude that a nonprofit organization does not have ... a 'financial interest' merely because it spends money on advocacy."¹⁹ OLC explained that nonprofits advocate on various matters because they "care about these matters, and spend money to advocate in favor of their preferred outcome, because they support or oppose certain policies, not because the policies at issue will have a financial or pecuniary impact on [them] as organizations."²⁰ For this reason, the conflict of interest law is inapplicable to the interests of nonprofits in their advocacy work.

Native American Birth Rights

At 18 U.S.C. § 208(b)(4), the conflict of interest law exempts the following financial interests from its coverage:

(4) if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights—

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

tool of big business, GUARDIAN (Nov. 12, 2018) ("Zinke rapidly installed a slew of conservative operatives and industry sympathizers in key positions throughout the agency."), <https://tinyurl.com/y4e64zxf>.

¹⁸ Heritage Foundation, Steven G. Bradbury, <https://www.heritage.org/staff/steven-g-bradbury> (last viewed Apr. 29, 2024).

¹⁹ Off. of Legal Couns., Dep't of Justice, Memorandum Opinion for the General Counsel, Office of Government Ethics, *Financial Interests of Nonprofit Organizations for Purposes of 18 U.S.C. § 208*, 30 O.L.C. 64 (2006), <https://www.justice.gov/file/494541/dl>.

²⁰ *Id.*, at 67. OLC found irrelevant any claim that nonprofits might have to spend more or less on their advocacy efforts depending on the government's actions: "Any other financial consequences for [nonprofits] that may flow from these matters are speculative." *Id.*, at 69.

(C) in an Indian claims fund held in trust or administered by the United States, if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

Therefore, it would be inappropriate for members or witnesses in the hearing to attribute a conflict of interest to any financial interests flowing from a covered birthright in a Native American tribe.

Case Studies

The subcommittee's hearing notice, as well as the correspondence of members of the subcommittee with the Interior Department, suggest that it would be helpful to discuss how the primarily conflict of interest law, 18 U.S.C. § 208, applies in the context of the following case studies.

1. Secretary Debra Haaland's adult child or the adult child's employer

Under the conflict of interest law, Secretary Haaland does not have a conflict of interest with the financial interests of either her adult child or her adult child's employer because the law does not impute those interests to Secretary Haaland.

2. Secretary Haaland's spouse or the spouse's employer

Secretary Haaland's 2023 financial disclosure indicates that her spouse has consulted for Laguna Development Corporation. Under the conflict of interest law, the financial interests of this company are not imputed to Secretary Haaland. Only her *spouse's* financial interests in his compensation are imputed to her, not the financial interests of her spouse's employer. The report indicates he was paid "consulting fees" and has deferred compensation in the form of cash.²¹ There is no indication that this compensation is a variable financial interest based on the company's future profitability, so there is no indication that any particular matter would be likely to have a direct and predictable effect on his compensation.

3. Acting Deputy Secretary Laura Daniel-Davis' former employer

Acting Deputy Secretary Daniel-Davis does not have a conflict of interest with her former employer, the National Wildlife Federation, under the conflict of interest law because its financial interests are not imputed to her.²²

²¹ Public Financial Disclosure Report of Debra Anne Haaland (OGE Form 278e), 3 (May 9, 2023), <https://tinyurl.com/38vccv6u>.

²² 18 U.S.C. § 208(a).

4. Bureau of Land Management (BLM) Principal Deputy Director Nada Wolff Culver's former employer

Principal Deputy Director Culver does not have a conflict of interest with her former employer because its interests are not imputed to her.²³

THE IMPARTIALITY REGULATION

It is also important to understand some key aspects of OGE's impartiality regulation, 5 C.F.R. § 2635.502, which imposes an appearance-based recusal obligation.

Basic Restriction

OGE's impartiality regulation establishes the following basic restriction:

(a) *Consideration of appearances by the employee.* Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.²⁴

For purposes of this hearing, several phrases in this language are important to note, due to their operative effect on the regulation's applicability. These phrases are "particular matter involving specific parties," "covered relationship," "is or represents a party," "employee determines" and "reasonable person with knowledge of the relevant facts."

"particular matter involving specific parties"

The recusal obligation under OGE's impartiality regulation applies only to particular matters involving specific parties.²⁵ As discussed in the preceding section, the term particular matter involving specific parties covers only a matter focused on the interests of identified parties.²⁶ "The term typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties."²⁷ This type of recusal obligation is sometimes called a "party-matter recusal" as a useful, albeit imprecise, shorthand.

²³ 18 U.S.C. § 208(a).

²⁴ 5 C.F.R. § 2635.502(a).

²⁵ *Id.*

²⁶ Off. Of Gov't Ethics, "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter", Legal Advisory 06x09 (2006), <https://tinyurl.com/26r7siym>.

²⁷ 5 C.F.R. § 2640.102(l); see also 5 C.F.R. § 201(h)(1) (using the same language).

The party-matter recusal does not apply to a “particular matter of general applicability.” An employee subject to a party-matter recusal with respect to a former corporate employer could choose to participate in the issuance of an industry-wide regulation affecting the former employer along with all other members of the employer’s industry. This is true, for instance, when a former mining company executive chooses to participate as a government official in a regulation affecting *all* mining companies.²⁸ The official could always choose to recuse from the industry-wide regulation, but OGE’s impartiality regulation would not make recusal mandatory.

The concept of a party-matter recusal is narrow in scope compared to an obligation to recuse from all particular matters, including particular matters of general applicability. “When this language is used,” OGE has explained, “it reflects ‘a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate.’”²⁹

“covered relationship”

OGE’s impartiality regulation defines the term “covered relationship.” Only the portions of that definition relevant to this hearing are discussed here, but the full definition can be found at 5 C.F.R. § 2635.502(b)(1).

The regulation establishes a covered relationship with an individual “who is a relative with whom the employee has a close personal relationship.”³⁰ This could be presumed to include an adult child in most instances. The regulation does *not*, however, establish a covered relationship with the employer of an independent adult child of an executive branch employee.³¹

Also of relevance is the regulation’s coverage of the former employer or client of an executive branch employee. The regulation imposes a recusal obligation, in the case of an employer, for a period of one year from the date on which the executive branch

²⁸ The conflict of interest law, however, would impose a separate recusal obligation if that official held stock in any such company.

²⁹ U.S. Off. of Gov’t Ethics, Legal Advisory 06x09 (2006) (quoting Bayless Manning, Federal Conflict of Interest Law 204 (1964)), <https://tinyurl.com/26r7sjym>.

³⁰ 5 C.F.R. § 2635.502(b)(1)(ii).

³¹ See 5 C.F.R. §2635.502(b)(1)(iii)-(iv). The regulation establishes a covered relationship with the employer of only a “dependent child.” In 2023, OGE implicitly acknowledged that the impartiality regulation does not currently apply to the employer of an independent adult child by proposing to expand the coverage to cover all children of an executive branch official. Specifically, OGE proposed to remove the word “dependent” in the phrase “dependent child” in 5 C.F.R. § 2635.502(b)(iii). To date, however, OGE has not issued a final regulation, and, because at least one federal agency has objected to this change, it is not clear what OGE plans to do. Comment of National Aeronautics and Space Administration on RIN 3209-AA43, <https://tinyurl.com/ms4nc2dm>. Unless and until OGE decides to adopt this proposed change when it issues a final regulation, the impartiality regulation remains inapplicable to an adult child’s employer. If OGE does make this change, it will not have retroactive effect.³¹ U.S. Off. of Gov’t Ethics, *Modernization Updates to Standards of Ethical Conduct for Employees of the Executive Branch*, 88 Fed. Reg. 10774, 10781 (Feb. 21, 2023) (referring to the “first year in which the regulations become effective”), <https://tinyurl.com/3ydk9n7b>.

employee resigned from the former employer or, in the case of a client, ceased to provide services to the client.³²

Finally, the regulation establishes a covered relationship with an organization or individual “for whom the employee’s spouse ... is, to the employee’s knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.”³³ Unlike the covered relationship with an employee’s own former client, the covered relationship with a spouse’s former client ceases when the spouse is no longer performing services or seeking to perform services for the former client.³⁴

“employee determines” and “reasonable person with knowledge of the relevant facts”

By its very terms, OGE’s impartiality regulation applies when the *employee* has determined that recusal is necessary. Although the phrase “reasonable person” is usually understood to require the application of what is known in law as an objective standard, OGE’s regulation applies a hybrid subjective-objective standard. It is the employee who must consider whether a reasonable person would be concerned about the employee’s participation in a matter. If the employee has considered the appearance of participating in a particular matter involving specific parties and has determined that a reasonable person would not be concerned, the employee may participate in the matter.

The government is not powerless to mandate recusal when the employee has determined that a reasonable person would not be concerned about the employee’s participation. The government can take the “reasonable person” inquiry out of the employee’s hands by having an ethics official make the determination.³⁵ For the recusal obligation to apply in that case, the ethics official must make the determination and must communicate that determination to the employee before the employee participates in a matter. If the ethics official has not communicated this determination to the employee, the employee’s participation in the matter will not violate OGE’s impartiality regulation.

Case Studies

The subcommittee’s hearing notice, as well as the correspondence of members of the subcommittee with the Interior Department, suggest that it would be helpful to discuss how OGE’s impartiality regulation, 5 C.F.R. § 2635.502, applies in the context of the following case studies.

³² 5 C.F.R. § 2635.502(b)(1)(iv).

³³ 5 C.F.R. § 2635.502(b)(1)(iii).

³⁴ Compare 5 C.F.R. § 2635.502(b)(iii) (“serving or seeking to serve”) with 5 C.F.R. § 2635.502(b)(iv) (“has, within the last year, served”).

³⁵ 5 C.F.R. § 2635.502(c).

5. *Secretary Debra Haaland's adult child or the adult child's employer*

Under OGE's impartiality regulation, Secretary Haaland has a covered relationship as to her adult child; however, the regulation does not establish a covered relationship with her adult child's employer.³⁶ Therefore, the impartiality regulation does impose a recusal obligation on Secretary Haaland with respect to her adult child's employer.

6. *Secretary Haaland's alleged involvement with the adult child's employer*

A complaint filed by an outside complainant alleged that Secretary Haaland has been involved directly with the adult child's employer with respect to an interview she gave that employer during the Trump administration.³⁷ The complainant, however, concedes that Secretary Haaland recorded the video as a member of Congress before she was appointed to the executive branch.³⁸ This concession is dispositive of the issue with respect to the video because, as this subcommittee is well aware, neither OGE's impartiality regulation nor its separate misuse of position regulation apply to Members of Congress.³⁹

The complainant tries to link Secretary Haaland's appearance in the interview to her executive branch position by pointing out that the group later added footage of her to the video after the Senate confirmed her appointment as Secretary.⁴⁰ The problem with this attempt to establish a linkage is that OGE's regulations restrict only the activities of executive branch employees. OGE has no authority, and does not purport to, regulate the activities of private citizens or the nonprofit organizations they form. Any attempt by the executive branch to control the content of the video produced by the employer of the Secretary's adult child would implicate First Amendment concerns.

In any event, absent a covered relationship with the adult child's employer, Secretary Haaland had no recusal obligation as to that organization under OGE's impartiality regulation. To the extent that the complainant and subcommittee members may contend that Secretary Haaland shares views with that organization, the impartiality regulation is inapplicable. This situation is no different than an Interior Secretary holding views that an energy company also happens to hold. The ethics rules do not regulate thought.

7. *Secretary Haaland's spouse and the spouse's employer*

OGE's impartiality regulation establishes a covered relationship with Secretary Haaland's spouse. It also establishes a covered relationship with Laguna Development Corporation

³⁶ 5 C.F.R. § 2635.502(b)(ii), (iii).

³⁷ Letter from Michael Chamberlain, Director, Protect the Public's Trust to Mark Greenblatt, Inspector General, U.S. Dep't of the Interior (Aug. 17, 2023), <https://tinyurl.com/yv462ecb> (hereinafter "*Chamberlain I*").

³⁸ *Id.* at 2-3.

³⁹ 5 C.F.R. §§ 2635.502, 2635.702.

⁴⁰ *Chamberlain I*, at 3.

(LDC), but only during the period when her spouse was serving or seeking to serve as a contractor or consultant of that firm.⁴¹

The subcommittee must be mindful of the narrow scope of the recusal obligation as to LDC. During the period in which the spouse was providing services or seeking to provide services to LDC, Secretary Haaland had an obligation to recusal from particular matters involving specific parties in which LDC was a party or represented a party. This recusal obligation under the impartiality regulation did *not* apply to:

- broad policy matters,
- particular matters of general applicability,
- particular matters involving specific parties in which LDC was not a party and did not represent a party, or
- particular matters affecting LDC's interests that did not directly and predictably affect the spouse's compensation and in which LDC was not a party or the representative of a party.⁴²

There seems to be no allegation that Secretary Haaland participated in a covered particular matter involving specific parties in which LDC was a party or represented a party while her spouse was providing services or seeking to provide services to LDC.

8. allegation pertaining to Acting Deputy Secretary Laura Daniel-Davis' alleged participation in the development of an order issued by Secretary Haaland

Acting Deputy Secretary Laura Daniel-Davis had a covered relationship with her former employer, National Wildlife Federation (NWF) for a period of one year from the date of her resignation. A complaint filed by an outside complainant suggested that she violated OGE's impartiality regulation with respect to NWF, but the complaint does not support even a reasonable suspicion of a violation much less a finding that a violation occurred.⁴³ That is because the complaint does not allege facts establishing her participation in a particular matter involving specific parties in which NWF was a party or represented a party.

The complaint suggests that Acting Deputy Secretary Daniel-Davis may have influenced an order that Secretary Haaland issued in May 2021, which temporarily halted all activities related to the Coastal Plain of the Arctic National Wildlife Refuge ("Arctic Refuge") and required the department to conduct a new study of affected programs based on deficiencies in a prior administration's study. The complaint seeks to link development of the Secretary's order to litigation filed by NWF based on a perceived relatedness of the two distinct matters. NWF is one of several parties to a lawsuit challenging the prior administration's environmental analysis and decision pertaining to oil and gas leases in

⁴¹ 5 C.F.R. § 2635.502(b)(iii).

⁴² 5 C.F.R. § 2635.502(a).

⁴³ Letter from Michael Chamberlain, Director, Protect the Public's Trust to Mark Greenblatt, Inspector General, U.S. Dep't of the Interior (Sep. 13, 2023), <https://tinyurl.com/3pb3rpmj> (hereinafter "Chamberlain II").

the Artic Refuge. The complaint alleges that deficiencies identified in the order are “very similar” to deficiencies identified by the plaintiffs in the litigation.⁴⁴

The complaint also alleges that “Ms. Daniel-Davis participated personally and substantially in decisions relating to the suspension of activities related to the Coastal Plain Oil and Gas Lease Program,” specially that she issued letters canceling several leases on the day the Secretary issued the order.⁴⁵ The complaint seeks to link the issuance of these letters to the litigation by arguing that “[s]everal legal arguments” articulated in the letters were “similar” to arguments raised by the plaintiffs in the litigation.⁴⁶

There are several problems with this complaint.

First, it is not clear that the complaint focuses on particular matters involving specific parties, which raises a question as to the applicability of OGE’s impartiality regulation.⁴⁷ There are three possibilities with respect to development of Secretary Haaland’s order:

- *Matter*— The order was merely a “matter” and not a “particular matter” if it focused broadly on a variety of interests. In that case, § 2635.502 did *not* apply to development of the order.
- *Particular Matter*— The order was a “particular matter of general applicability” if it focused on the interests of both existing and prospective lessees (i.e., the oil and gas industry, which is a discrete and identifiable class) or even all lessees (i.e., the parties to *several* different particular matters involving specific parties, namely the leases). In that case, § 2635.502 did *not* apply to development of the order.
- *Particular Matter Involving Specific Parties*— The order was a “particular matter involving specific parties” if it focused narrowly on an existing lease. In that case, § 2635.502 would apply to development of the order.

The order’s focus was clearly broader than that just one lease. It ordered the cessation of “all activities of the Federal Government relating to the implementation of the Coastal Plain Oil and Gas Leasing Program.”⁴⁸ This program-wide order involved all existing leases. It may also have involved all prospective leases by ceasing activities of an entire program under which a lease application could be filed. This makes the order a “particular matter of general applicability” if it focused narrowly on the interest of all existing lessees or on the interests of existing and prospective lessees. It makes the order a mere “matter” if the order is focused on the interests of more classes of persons than only existing and

⁴⁴ *Chamberlain II*, at 3.

⁴⁵ *Id.*, at 1-2.

⁴⁶ *Id.*, at 3-4.

⁴⁷ Secretary of Interior Debra Haaland, *Comprehensive Analysis and Temporary Halt on all Activities in the Arctic National Wildlife Refuge Relating to the Coastal Plain Oil and Gas Leasing Program*, Order No. 3401 (June 1, 2021), <https://tinyurl.com/4zbxrywn>.

⁴⁸ *Id.*, at 1.

prospective lessees. In either case, the order is not a particular matter involving specific parties and the impartiality regulation did not apply to development of the order.

Implementation of the order through the cancellation of leases might have been part of the same “particular matter of general applicability” or “matter” as the order itself. The order expressly provided that “[t]he Assistant Secretary for Land and Minerals Management and the Director of the BLM shall, as appropriate and consistent with applicable law, take appropriate action with respect to existing leases in light of the direction provided herein.”⁴⁹ The cancellation of some leases on the same day that the order was issued suggests that this action was specifically provided for in the order. In that case, the cancellation of leases also may not have been a particular matter involving specific parties, in which case the impartiality regulation did not apply.

On the other hand, the department appears to have canceled other leases on a later date, suggesting that the cancellation of leases might have been subject to Acting Deputy Secretary Daniel-Davis’ review and discretion on a case-by-case basis.⁵⁰ If so, the cancellation of each lease would be a separate particular matter involving specific parties.

Second, if each lease cancellation was a separate particular matter involving specific parties, the impartiality regulation would have applied only if NWF was a party to the lease at issue or represented a lessee. NWF, of course, was not a party to any of the leases and did not represent any lessee. There is no allegation that Acting Deputy Secretary Daniel-Davis had a covered relationship any of the companies that were lessees or with their representatives. Therefore, the impartiality regulation would not have restricted her participation in any of the lease cancellations.

The impartiality regulation does not require recusal when a person with whom an employee has a covered relationship is neither a party nor the representative of a party. NWF’s litigation was a separate particular matter involving specific parties distinct from the leases themselves; cancellation of a lease was one particular matter involving specific parties, and the litigation was a another particular matter involving specific parties.⁵¹ Acting Deputy Secretary Daniel-Davis’s obligation was to recuse from the litigation. The regulation restricted her from appearing in court on behalf of the Interior Department and from making recommendations or decisions as to who should be called as witnesses, what motions should be filed, or whether to enter into a settlement agreement. There appears to be no allegation that she did any of these things.

Third, the flaw in the complainant’s analysis is obvious. The complaint alleges that “Ms. Daniel-Davis’ actions suspending leases and lease operations pursuant to the Coastal Plains ROD had a direct and predictable effect on litigation concerning the

⁴⁹ *Id.*

⁵⁰ See Becky Bohrer and Matthew Daly, *Biden administration cancels remaining oil and gas leases in Alaska’s Arctic Refuge*, ASSOC. PRESS (Sep. 7, 2023), <https://tinyurl.com/mvk2a26m>.

⁵¹ See 5 C.F.R. § 2641.201(h)(1) (explaining that “a specific proceeding affecting the legal rights of the parties” is one particular matter involving specific parties).

Coastal Plains ROD.”⁵² But the applicable standard under the impartiality regulation does not ask whether her actions had “direct and predictable effect” on NWF’s litigation. The applicable standard asks whether NWF was a party to a lease or the representative of a party to the lease.⁵³

The complainant has mistakenly cited the standard for the conflict of interest law, which addresses the direct and predictable effect of a particular matter on an executive branch employee’s financial interests or those of a person whose financial interests are imputed to the employee.⁵⁴ This conflation of the impartiality regulation with the conflict of interest law distorts both of these authorities. As discussed in the previous section on the conflict of interest law, NWF’s financial interests are not imputed to Acting Deputy Director Daniel-Davis — if NWF even has any financial interests in the litigation, a question not addressed in the complaint.⁵⁵ The conflict of interest law does not impute the financial interests of a former employer to an executive branch employee, and the impartiality regulation is not concerned with the financial interests of NWF.⁵⁶ The impartiality regulation is focused only on the identities of the parties to the particular matter involving specific parties in which the executive branch employee is alleged to have participated. In this instance, Acting Deputy Secretary Daniel-Davis participated in the cancellation of leases to which NWF was not a party and with respect to which NWF did not represent a party. The impartiality regulation did not apply.

9. allegation pertaining to Acting Deputy Secretary Laura Daniel-Davis’ alleged participation in a meeting at which litigation may have been discussed

As mentioned earlier, NWF is involved in litigation with the department. The complaint raised a second allegation, which was that Acting Deputy Secretary Daniel-Davis may have violated the impartiality regulation by participating in a meeting at which some unspecified litigation was discussed. The complaint says that she scheduled a meeting vaguely titled “Meeting re: Arctic Litigation Update.” The complaint acknowledges that the complainant does not know whether this meeting focused on the case in which NWF was a party. This meeting could have addressed a different case.

If the meeting did involve an update on NWF’s case, there is no indication that Acting Deputy Secretary Daniel-Davis participated in the case itself. The meeting is titled “update,” which suggests that she merely received information about the status of a case and possibly its effect on other activities. If there was no deliberation, recommendation or

⁵² *Chamberlain II*, at 6.

⁵³ 5 C.F.R. § 2635.502(a).

⁵⁴ 18 U.S.C. § 208(a).

⁵⁵ As explained above, OLC explained during the Bush administration that nonprofits like NWF have no financial interests in their advocacy work for purposes of the conflict of interest law. Off. of Legal Couns., Dep’t of Justice, Memorandum Opinion for the General Counsel, Office Of Government Ethics, *Financial Interests of Nonprofit Organizations for Purposes of 18 U.S.C. § 208*, 30 O.L.C. 64 (2006), <https://www.justice.gov/file/494541/dl>. Whether that opinion leaves room for a finding that a nonprofit plaintiff has a financial interest in litigation, when the nonprofit is not seeking damages, presents questions of law and fact not addressed in the complaint.

⁵⁶ 18 U.S.C. § 208(a); 5 C.F.R. § 2635.502(a).

decision made regarding the handling of the case, the impartiality regulation would not have applied because she did not participate in the case.⁵⁷

10. BLM Principal Deputy Director Nada Wolff Culver's former employer

The Inspector General found a violation by BLM Principal Deputy Director Nada Wolff Culver when she met with a former employer, but the violation pertained to the Ethics Pledge and not OGE's impartiality regulation.⁵⁸ There is no indication that she violated OGE's impartiality regulation by meeting with her former employer.⁵⁹

THE ETHICS PLEDGE

It is also important to understand some key aspects of the ethics pledge under President Biden's executive order titled "Ethics Commitments by Executive Branch Personnel."⁶⁰

Basic Restriction

Though the Ethics Pledge uses different language than OGE's impartiality regulation, the Ethics Pledge tracks that regulation with two differences: the Ethics Pledge covers a different period than the regulation, and it restricts participation in certain meetings regardless of the subjects of those meetings. Paragraph 2 of Section 1 of Executive Order 13989 requires political appointees to sign Ethics Pledges in which they commit to the following restriction:

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.⁶¹

The Executive Order supplies the following two definitions:

(j) "Particular matter involving specific parties" shall have the same meaning as set forth in section 2641.201(h) of title 5, Code of Federal Regulations, except that it shall also include any meeting or other communication relating

⁵⁷ If she had participated in the case — perhaps by deciding what witnesses to call or drafting a motion — the next step would have been for her to either consult an ethics official or assess whether the circumstances would cause a reasonable person with knowledge of the relevant facts to question her impartiality in the matter. 5 C.F.R. § 2635.502(a), (c).

⁵⁸ Off. of the Insp. Gen., *U.S. Dep't of the Interior, Bureau of Land Management Official Did Not Comply With the Federal Ethics Pledge*, Report No. 21-0728 (Aug. 18, 2022), <https://tinyurl.com/52u5cec8>.

⁵⁹ *Id.* at 4 ("We did not, however, substantiate the allegations that the BLM Official violated 5 C.F.R. § 2635.502 or the Ethics Pledge by participating in the PLOs or the Federal lawsuits; we drew this conclusion because the PLOs were not particular matters involving specific parties and because neither Former Employer 1 nor Former Employer 2").

⁶⁰ Exec. Order 13989 (Jan. 20, 2021), <https://tinyurl.com/43ry2dxk>.

⁶¹ Exec. Order 13989, § 1, ¶ 2.

to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties.

...

(m) "Directly and substantially related to my former employer or former clients" shall mean matters in which the appointee's former employer or a former client is a party or represents a party.⁶²

11. Case Study: Inspector General's finding regarding BLM Principal Deputy Director Nada Wolff Culver

The Inspector General (IG) found that BLM Principal Deputy Director Nada Wolff Culver violated the Ethics Pledge by meeting with a former employer in 2021. However, the IG also found "that there are facts mitigating the significance of our finding of an Ethics Pledge violation in this case."⁶³ The IG identified the following mitigating facts:

- The conduct was inadvertent. The IG found that the ethics official "provided the BLM Official with inaccurate interim ethics guidance that failed to identify Former Employer 1 as one of the BLM Official's former employers for purposes of the Ethics Pledge, and the BLM Official stated that they relied on this ethics advice before the meeting with Former Employer 1."⁶⁴
- Principal Deputy Director Culver turned herself in. The IG found that "the BLM Official self-disclosed the meeting with the former employer to the [ethics official] after receiving updated ethics guidance correctly identifying Former Employer 1 as a former employer for purposes of the Ethics Pledge."⁶⁵
- Principal Deputy Director Culver violated the rule once and did not violate it again. The IG "identified no other meetings the BLM Official attended with former employers that did not include a multiplicity of parties after receiving the updated and corrected ethics guidance from the [ethics officials]."⁶⁶ (The reference to a "multiplicity of parties" relates to the exception to the restriction on meetings in the definition of "particular matter involving specific parties" in the Executive Order for any "meeting or other event is open to all interested parties.")⁶⁷

⁶² Exec. Order 13989, § 2(j), (m).

⁶³ Off. of the Insp. Gen., *U.S. Dep't of the Interior, Bureau of Land Management Official Did Not Comply With the Federal Ethics Pledge*, Report No. 21-0728, at 6 (Aug. 18, 2022), <https://tinyurl.com/52u5cec8>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Exec. Order 13989, § 2(j).

12. Case Study: Secretary Haaland and Acting Deputy Secretary Daniel-Davis

Paragraph 2 of the Ethics Pledge addresses only former employers and clients of the executive branch appointee. Therefore, this provision is not relevant to allegations concerning Secretary Haaland's adult child, her adult child's employer, her spouse, or her spouse's employer. The Ethics Pledge applies to Acting Deputy Secretary Daniel-Davis' former employer, but the analysis with respect to the Ethics Pledge is the same as the analysis with respect to the impartiality regulation discussed above.

The only differences are that the Ethics Pledge applied for a period after the impartiality regulation ceased to apply, and the Ethics Pledge covered some meetings that the impartiality regulation did not cover because they did not qualify as particular matters involving specific parties. If any allegations arising at the hearings pertain to meetings involving persons with whom these officials had covered relationships, OGE's guidance on the Ethics Pledge specifically addresses an exception to the obligation to recuse from meetings under the Ethics Pledge:

The expanded party matter definition has a two-part exception for communications with an appointee's former employer or client, if the communication is: (1) about a particular matter of general applicability and (2) is made at a meeting or other event at which participation is open to all interested parties. Although the exception refers to particular matters of general applicability, it also is intended to cover communications and meetings regarding policies that do not constitute particular matters. An appointee may participate in communications and meetings with a former employer or client about these particular or non-particular matters if the meeting or event is "open to all interested parties." Exec. Order No. 13490 sec. 2(h). Because meeting spaces are typically limited, and time and other practical considerations also may constrain the size of meetings, common sense demands that reasonable limits be placed on what it means to be "open to all interested parties." Such meetings do not have to be open to every comer, but should include a multiplicity of parties. For example, if an agency is holding a meeting with five or more stakeholders regarding a given policy or piece of legislation, an appointee could attend such a meeting even if one of the stakeholders is a former employer or former client; such circumstances do not raise the concerns about special access at which the Executive Order is directed. Additionally, the Pledge is not intended to preclude an appointee from participating in rulemaking under section 553 of the Administrative Procedure Act simply because a former employer or client may have submitted written comments in response to a public notice of proposed rulemaking. In any event, agency ethics officials will have to exercise judgment in determining whether a specific forum qualifies as a meeting or other event that is "open to all interested parties," and OGE is prepared to assist with this analysis.⁶⁸

⁶⁸ U.S. Off. of Gov't Ethics, Legal Advisory DO-09-011 (Mar. 26, 2009), <https://tinyurl.com/3vantf48>. Although this guidance originally addressed an earlier executive order, OGE

Based on this official guidance, the subcommittee cannot meaningfully consider the applicability of the Ethics Pledge to any meetings attended by these officials without first knowing whether there the requisite multiplicity of stakeholders participated in the meetings. That may be difficult at the hearing, given that no officials from the Department of the Interior have been called to testify. One option may be to defer discussion of any such meetings until after these officials have been consulted regarding the multiplicity question.

APPEARANCE OF IMPROPRIETY

Finally, it bears noting that OGE's regulations include a general appearance standard at 5 C.F.R. § 2635.101(b)(14). That standard provides that "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part."⁶⁹ With respect to impartiality concerns, however, OGE's impartiality regulation is the executive branch's specific implementation of this appearance standard.⁷⁰ When OGE proposed 5 C.F.R. § 2635.502 in 1991, it explained: "Proposed § 2635.502 is addressed to the troublesome area commonly referred to as appearance problems."⁷¹ An employee can elect to go beyond the requirements of § 2635.502, but an employee who has complied with that section cannot be said to have violated the principle articulated at § 2635.101(b)(14).

RESPECTFULLY SUBMITTED,

/s/

WALTER M. SHAUB, JR.

has added the following note at the top of the first page: "All substantive legal interpretations in this Legal Advisory are applicable to Executive Order 13989, sec. 1, par. 2. See LA-21-03, LA-21-05, and LA-21-07." *Id.* at 1.

⁶⁹ 5 C.F.R. § 2635.101(b)(14).

⁷⁰ 5 C.F.R. § 2635.502.

⁷¹ Off. of Gov't Ethics, Standards of Ethical Conduct for Employees of the Executive Branch, 57 Fed. Reg. 33778-85 (1991), <https://tinyurl.com/35fymjni>.