



April 29, 2021

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Demand Letter RE: Hanke and Yoo Appointments to NBES

Dear Secretary Cardona:

I am writing to you on behalf of Professors Steve Hanke and John Yoo, who were both appointed to the Board of Directors of the National Board for Education Sciences (NBES) by President Trump last December, along with a number of other board members who constitute a quorum of the NBES.

This letter is to demand the prompt delivery of Hanke's and Yoo's signed presidential commissions, which we have reason to believe have been in the Department of Education's (DOE) possession for almost three months. We are also elevating their request to schedule a meeting of the NBES so that they are not impeded by Department staff any longer in the performance of their statutory duties, including a reporting deadline to Congress and you by July 1 of this year.

The Presidential Appointments of Professors Hanke and Yoo

On Dec. 3, 2020, President Trump announced his intent to appoint Johns Hopkins University applied economics professor Steve Hanke to the NBES. On Dec. 17, 2020, President Trump signed the commission for Professor Hanke. Two DOE officials were notified of Hanke's appointment by email on Dec. 18, 2020 and instructed to expedite his onboarding.

Professor Hanke returned his written oath of office for his NBES appointment to the White House on Jan. 4, 2020. Marcella Goodridge, Assistant General Counsel at DOE, emailed Hanke that day requesting that he complete the Confidential Financial Disclosure Report (OGE Form 450). On Jan. 18, Hanke provided the completed OGE Form 450 to Ms. Goodridge, Mr. Leon Wong, and Ms. Taronda Wallace, all employees in the ethics division of the DOE's Office of General Counsel. Mr. Wong wrote to

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Professor Hanke on Feb. 18 and informed him that he was in the process of reviewing his OGE Form 450.

President Trump announced his intent to appoint University of California, Berkeley law professor John Yoo to the NBES on Dec. 10, 2020. On Dec. 30, 2020, President Trump signed the commission for Professor Yoo, appointing him to the NBES. The White House notified two DOE officials of Professor Yoo's appointment on Jan. 4, 2021. On Jan. 5, Yoo returned his written oath of office.

According to emails sent between State Department and White House Office of Personnel officials, it appears that the NBES members' commissions were processed by the State Department and packaged for delivery shortly after they were signed. A White House personnel official picked up the NBES commission for another appointee, Lisa Cutone Bacon, which was personally delivered. In response to a later inquiry concerning delivery of the remaining NBES commissions, the State Department official indicated that DOE staff received them on Feb. 5, 2021. DOE staffer Karen Akins was identified as the person responsible for delivering the commissions, but she has not done so despite subsequent inquiries about them.

The delivery of these commissions is legally required, as Chief Justice John Marshall explained in his seminal decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). As every student of history knows, President John Adams signed William Marbury's commission as Justice of the Peace, but it was not delivered before President Jefferson and his Secretary of State James Madison entered office. Madison argued that the appointment was void without delivery. Chief Justice Marshall wrote for the unanimous Court that Adams's signature on the commission was the final act of appointment. Delivery of the commission was not necessary to effectuate the appointment, but withholding it was "violative of a vested legal right."

Though Chief Justice Marshall also ruled in *Marbury* that the Court then lacked jurisdiction to order the delivery of a commission, that is certainly no longer true. Professors Hanke and Yoo should not have to file suit for the delivery of their commissions, but they would likely name you as the lead defendant if they had to do so. Accordingly, we are requesting that you personally ensure the prompt delivery of Professor Hanke's and Yoo's commissions to the address listed below. Alternatively, we are happy to send a courier to pick up the commissions if you provide us with a contact to arrange that transfer.

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We are also requesting a formal acknowledgement of the validity of Professors Hanke's and Yoo's appointments to the NBES. In a phone conversation with Professor Hanke on or about Feb. 5, 2021, Institute for Education Sciences (IES) Director Michael Schneider stated that Mr. Hanke's appointment was not complete. That position is clearly in error. Professor Hanke's and Yoo's appointment were final and complete upon the signing of their commissions by President Trump, which the White House informed them occurred on Dec. 17, 2020 and Dec. 30, 2020, respectively. If DOE takes a different position, please promptly explain the factual and legal basis for its position.

Request to Convene a NBES Meeting

Beginning in late January, Professor Hanke has repeatedly requested a meeting of the NBES so that the Board may commence its statutory duties. On Jan. 27, 2021, Hanke emailed Ms. Ellie Pelaez, in the Office of the Deputy for Administration and Policy at IES, to request a virtual NBES meeting on Feb. 11, 2021 and that notice of the meeting be published in the Federal Register immediately. The meeting was requested, among other things, to select a Board chair and to hire a NBES Executive Director. Hanke emailed Ms. Pelaez again the next day, Jan. 28, about scheduling a board meeting. Hanke copied the other appointed members of NBES and added some suggestions regarding pressing topics the NBES should consider.

On Feb. 3, 2021, Professor Hanke emailed Ms. Pelaez and IES Director Schneider once again requesting that they schedule a meeting of the NBES. In this email, Hanke wrote:

A quorum of the Board has been appointed by the President, and they have submitted their Confidential Financial Disclosure Report (OGE Form 450). It is my understanding that, in accordance with the Code of Federal Regulations Section 5 CFR § 2634.903(b)(3), the OGE Form 450 is the only form required to be submitted (and just submitted) by a Board member before they can participate in their first Board meeting. If there is some other provision in the regulations that requires further approval prior to a Board member's first meeting, kindly let me know. If not, schedule a meeting, as I requested, and without further delay.

We are aware of no efforts by any DOE official to schedule a NBES meeting, and Director Schneider has made other statements that indicate that he is unwilling or unable to schedule such a meeting.

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DOE must respond appropriately to NBES meeting requests, which we understand have come from others on the Board as well. Any further delay in scheduling a meeting will materially frustrate the Board in the performance of its statutory duties. In addition to the election of a Board Chair, appointment of an Executive Director, and possible formation of Board committees, the NBES is statutorily required to issue an annual report on the IES to the Director, the Education Secretary, and Congress by July 1. Unless requests to schedule a NBES meeting are acted upon soon, it will be difficult, if not impossible, for the NBES to meet the July 1 deadline to produce an annual report.

Summary of Formal Requests

We seek the prompt delivery of Professors Hanke's and Yoo's duly signed commissions and an acknowledgement by DOE of their completed appointment to serve on the NBES. In addition, we ask that DOE officials promptly respond to NBES member requests to schedule a virtual meeting so that they may begin their statutorily prescribed work.

Given the NBES statute requires at least three Board meetings per year and the issuance of a statutory report by July 1 of each year, we kindly request full compliance or a written response and agreement to do so by Thursday, May 29, 2021. Failure to do so may leave our clients little choice but to commence litigation in an appropriate federal court to compel compliance.

Please contact me to discuss any of these issues further and kindly acknowledge receipt of this letter as soon as possible by email, at JLThompson@pacificlegal.org, or phone, 916-503-9066.

Sincerely,



Jessica Thompson
Pacific Legal Foundation
3100 Clarendon Blvd., Ste. 610
Arlington, VA 22201

cc: DOE Acting General Counsel, Ms. Emma Leheny