

**NOMINATIONS OF CATHY A. HARRIS,
TRISTIAN L. LEAVITT, AND RAYMOND A. LIMON**

HEARING

BEFORE THE

**COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
ONE HUNDRED SEVENTEENTH CONGRESS**

FIRST SESSION

NOMINATION OF CATHY A. HARRIS TO BE A MEMBER AND CHAIR,
MERIT SYSTEMS PROTECTION BOARD, TRISTIAN L. LEAVITT AND
RAYMOND A. LIMON TO BE MEMBERS, MERIT SYSTEMS PROTECTION
BOARD

SEPTEMBER 22, 2021

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**NOMINATIONS OF
CATHY A. HARRIS, TRISTIAN L. LEAVITT,
AND RAYMOND A. LIMON**

WEDNESDAY, SEPTEMBER 22, 2021

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:32 a.m., via Webex and in room 342, Dirksen Senate Office Building, Hon. Gary C. Peters, Chairman of the Committee, presiding.

Present: Senators Peters, Carper, Hassan, Sinema, Ossoff, Portman, Johnson, Lankford, Scott, and Hawley.

Chairman PETERS. Good morning. The Committee will come to order. Today, we are considering three nominations to the Merit Systems Protection Board (MSPB): Cathy Harris, to be a member and Board Chair; Raymond Limon, to be a member and Vice Chair; and Tristan Leavitt, to be a member.

To respect my colleagues' very busy schedules, I am going to defer my opening remarks and turn it over to Ranking Member Portman followed by an introduction from Senator Grassley.

OPENING STATEMENT OF SENATOR PORTMAN¹

Senator PORTMAN. Thank you, Chairman Peters. I have to go give another opening in another hearing, and then I am going to come back for additional questions.

I see Senator Grassley is here, the distinguished President Pro Tem Emeritus of the U.S. Senate, so I am going to be even more brief. First of all, to Ms. Harris, Mr. Leavitt, and Mr. Limon, congratulations on your nomination. I appreciate your being here today.

This Merit Systems Protection Board is really important, and I talked to all three of you already by telephone, and we talked about the role it plays in safeguarding the integrity of efficiency of the Federal Government. It is a quasi-judicial agency that is charged with protecting the Federal Merit System against partisan, political, or other prohibited personnel practices.

One of the things that concerns us here in this Committee is the fact that there has not been a quorum forever. In fact, it is the longest the Agency has been without a quorum in its history. There is now a backlog of 3,000 cases. I have talked to all three of the nominees about how they would deal with that. We thank all the

¹The prepared statement of Senator Portman appears in the Appendix on page 26.

employees and administrative judges who have tried over the last 3 years to keep the Agency's mission alive, but it is tough to do it without a quorum on the Board to make decisions.

So along with its adjudication function, MSPB has the power and responsibility to study and report on critical Federal workforce issues, also an important issue. This oversight is crucial at a time when the Federal workforce faces unprecedented challenges due to Coronavirus Disease 2019 (COVID-19). A lot of folks have stayed home, work from home, creating a new and challenging dynamic between the agency management and their employees. Many agencies continue to do that. Many have dramatically changed their work from home policies. The effects of mass telework in the Federal Government on employees, the public, and overall satisfaction and productivity are still largely unknown, and that is something MSPB ought to be playing a big role in.

They also play a role in whistleblower protection, and that is one reason Senator Grassley is here probably. Because he feels strongly about that. Not only does the Board adjudicate retaliation claims under the Whistleblower Protection Act (WPA), but the Board also has the power to study and report to Congress on existing whistleblower protection issues and ways to improve those protections through law.

I look forward to hearing the perspective that each of you would bring to the Board, how you would promptly address MSPB's case backlog, and your views on the critical Federal workforce issues facing our government.

Thank you, Mr. Chairman.

Chairman PETERS. Thank you, Ranking Member Portman.

Next, I would like to welcome our colleague, Senator Grassley, who is joining us today to introduce Tristan Leavitt.

Senator Grassley, thank you for being here, and you are recognized for your introduction.

OPENING STATEMENT OF THE HONORABLE CHARLES GRASSLEY, A UNITED STATES SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Chairman Peters and Ranking Member Portman, and thank you for this opportunity to introduce to the Committee, Tristan Leavitt, an individual I think and believe is a perfect choice and a perfect fit to serve on the Merit Systems Protection Board. I am here to introduce him, his wife, Brittany, and their two eldest children. Tristan, I know, wishes his whole family could be here today and that they are proud of what Tristan has done through his life and the culmination that comes to this appointment.

The Merit Systems Protection Board is a guardian of the Merit System, a set of principles designed to ensure that we have a qualified, effective, civil service that truly serves "We, the People." The Board adjudicates appeals of Federal employees' claims of prohibited personnel practices and whistleblower retaliation.

I have known Tristan since 2011, when he began working for me on my oversight team. All of my staff know my views on the key role that whistleblowers play in upholding our government's accountability to the taxpayers, and there are few who have worked

harder to protect whistleblowers than Tristan Leavitt. When he worked for me, Tristan helped me put together the first ever congressional resolution recognizing National Whistleblower Appreciation Day.

I think ever since then, in late July, to honor the first whistleblowers that go back to 1778, I believe, under some act of the Continental Congress, I give a speech that we call National Whistleblower Protection Day honoring those first people and the first act of the Continental Congress, that people have a responsibility. When something is wrong in government, you have a responsibility to promote it, or to tell people about it I guess is the best way to say it.

Now Tristan worked for me to propose the creation of the Senate Whistleblower Protection Caucus, and some of you, I am happy to say, are now members. The “Department of Homeland Security (DHS) v. MacLean,” the first ever case before the Supreme Court to consider the Whistleblower Protection Act, Tristan helped me put together a bicameral, bipartisan amicus brief that helped secure the rights of whistleblowers to provide information to the Congress.

When I last served as Ranking Member on the Judiciary Committee in the 112th Congress, Tristan was instrumental in my efforts to oversee Federal law enforcement and improve protection for the Federal Bureau of Investigation (FBI) employees. Indeed, Tristan’s efforts contributed greatly to the further strengthening of whistleblower protection laws for employees across the Federal Government.

You will be hard pressed to find someone with more experience working for good government and accountability. Perhaps most important, Tristan has spent thousands of hours working with hundreds of whistleblowers who risked their livelihoods to try to make the government work the way it is supposed to. Most whistleblowers are nothing but patriotic Americans. He listened to their stories. He has worked hard to make sure that their claims were investigated fairly.

Through it all, Tristan has shown tremendous patience, compassion, and wisdom. I have no doubt that, if confirmed, Tristan will serve on this Board with skill and, most importantly, with integrity. I wholeheartedly recommend him to the Committee for this position.

Thank you, Mr. Chairman.

OPENING STATEMENT OF CHAIRMAN PETERS¹

Chairman PETERS. Thank you, Senator Grassley, for your comments. Thank you for being here.

I now will invite the nominees who are with us to be seated at the witness table, and I would like to welcome each of the nominees and to your family members who are joining us today. Thank you for all of your previous public service and your willingness to serve in these new and very important roles.

The Merit System Protection Board is an independent agency that is critical to ensuring an effective and accountable Federal

¹The prepared statement of Senator Peters appears in the Appendix on page 25.

Government. The MSPB protects the Merit System principles and promotes a highly qualified, diverse Federal workforce that is fairly and effectively managed and that provides excellent service to the American people. The bipartisan three-member board adjudicates cases involving whistleblower retaliation and violations of civil service laws. The Board also promotes an effective Federal workforce through oversight of the Office of Personnel Management (OPM) and the civil service.

Prolonged vacancies on the board slow the administration of justice, and for years, vacancies on the MSPB have prevented Federal employees from obtaining relief from prohibited personnel practices. If the three nominees before us today are confirmed, the MSPB will have a quorum for the first time in nearly 5 years, a crucial step toward preserving the rights of Federal employees and protecting whistleblowers from retaliation. I am very pleased that we are moving one step closer to a fully functioning Merit Systems Protection Board, and I look forward to hearing from each of the nominees here today.

It is the practice of this Committee to swear in witnesses, so if you would all please rise, stand and raise your right hand. Do you swear that the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. HARRIS. I do.

Mr. LEAVITT. I do.

Mr. LIMON. I do.

Chairman PETERS. You may be seated.

Our first nominee is Cathy Harris. Ms. Harris is currently a co-manager in the firm of Kator, Parks, Weiser and Harris, P.L.L.C., in Washington, D.C., where she serves as the chair of the firm's sexual harassment and lesbian, gay, bisexual, and transgender (LGBT) practice sections. She has over two decades of experience in employment law and has extensive experience in the litigation and settlement of Federal sector employment class actions.

Senator Van Hollen has also provided a written statement in support of Ms. Harris's nomination, which I will enter into the record,¹ without objection.

Welcome, Ms. Harris. You may now proceed with your opening remarks.

**TESTIMONY OF CATHY A. HARRIS,² NOMINATED TO BE A
MEMBER AND CHAIR, MERIT SYSTEMS PROTECTION BOARD**

Ms. HARRIS. Thank you. Good morning, Chairman Peters, Ranking Member Portman, and Members of the Committee. I am very thankful for this opportunity to appear before you today as you consider my nomination as Chair of the U.S. Merit Systems Protection Board. I am deeply honored by President Biden's nomination of me to this position as it is one that I consider essential to maintaining a fair, equitable, and merit-based Federal workforce. I am a firm supporter of the Board's statutory missions to protect the

¹ The prepared statement of Senator Van Hollen appears in the Appendix on page 28.

² The prepared statement of Ms. Harris appears in the Appendix on page 29.

Merit System principles and promote an effective civil service free of prohibited personnel practices.

I want to introduce my family who are here with me today: my wife, Cheryl; my daughter, Rosie; and my father, Jack. My family who are not here with me today I want to give my appreciation for their support, particularly to my mother who passed away some time ago and my grandmother who is 97 and living in Florida. I am very grateful for their support throughout this process.

I also want to thank the MSPB staff who helped prepare us for this hearing and my co-nominees, Raymond Limon and Tristan Leavitt, who have really been a pleasure to work with and with whom I look forward to working closely, if confirmed. I am particularly appreciative that we each bring different experiences to the table, and I am confident we would be a great team together.

For more than 20 years, I have litigated on behalf of both Federal employees and Federal agencies before the MSPB, the Equal Employment Opportunity Commission (EEOC), and in the Federal courts. My cases have covered nearly all of the substantive issues considered by the Board. I have extensive experience also in litigating complex class actions before the EEOC on behalf of Federal employees and large consolidated cases before the MSPB, one of which culminated in one of the lengthiest hearings in the Board's history, with over 100 appellants.

Through this experience, I have gained a deep understanding of Federal sector employment law and the great importance of our Merit System in enhancing and improving the Federal workforce. Having an experience of representing a wide range of employees and management, from both small and large agencies, I have developed a balanced view of the issues facing the civil service. Employees and agencies rely upon the MSPB for prompt, fair adjudications. The MSPB is one of the pillars of good government, helping us keep the civil service free from discrimination, political coercion, and corruption. I look forward to being able to apply my knowledge in impartially adjudicating matters before the Board.

After many years in private practice, I am also looking forward to returning to public service. I started my legal career as an assistant district attorney in the New York County Manhattan District Attorney's Office, where I gained invaluable courtroom experience and a deep appreciation for public service.

As you have mentioned, because the Board has lacked a quorum for the past several years, it has been unable to fulfill its statutory duties. Despite this challenge, I understand the staff at the MSPB has been working tirelessly to prepare for a new Board, and I am so thankful for their dedicated service. A large backlog of cases has amassed—over, I believe, 3,400 now because decisions could not be issued without board members. If confirmed, I will make it my utmost priority to reduce the backlog so the employees and agencies may finally receive decisions.

The stakes involved in the cases are quite serious for the litigants. From the employees' side, it may be due to a termination that has caused a loss of income for the employee for several years, the denial of disability retirement benefits to a worker, or the non-selection of a veteran who claimed violations of veterans' preference laws. Whistleblowers have been without recourse in some instances

as they await adjudication of their matters at the Board level. From the agencies' perspective, agencies await determination for years now that will affect their staffing, retention, and disciplinary matters. Both employees and agencies deserve finality, and thus, I commit to work with my fellow board members to develop an effective triage plan to adjudicate the cases swiftly and fairly.

The Board also has a statutory duty to conduct and report objective studies regarding the Merit System. During the lack of quorum, studies have been conducted but have not been able to be approved. As these studies are important to Congress, other Federal agencies, and the public, in understanding and improving the Merit System, I will work to review and release the studies to Congress as soon as possible, if confirmed.

Thank you again for considering my nomination. I look forward to answering any questions the Committee may have.

Chairman PETERS. Thank you, Ms. Harris, for your comments.

Our next nominee is Tristan Leavitt, who was introduced earlier by Senator Grassley. Mr. Leavitt is currently the General Counsel of the U.S. Merit Systems Protection Board and has served as the Acting Chief Executive Administrative Officer since March 2019.

Mr. Leavitt, welcome. You may proceed with your opening comments.

TESTIMONY OF TRISTAN L. LEAVITT,¹ NOMINATED TO BE A MEMBER, MERIT SYSTEMS PROTECTION BOARD

Mr. LEAVITT. Thank you so much, Chairman Peters, and thank you for the opportunity to appear before the Committee today.

I am joined, as Senator Grassley said, by my wife, Brittany, today as well as my son, Benson, and my daughter, Regan [phonetic], the two oldest of our five children.

I am thankful to the President for the honor and privilege of this nomination and to Leader Mitch McConnell for his recommendation to the President. I also want to express my gratitude and great respect for the dedicated career professionals at the Merit Systems Protection Board and the Office of Special Counsel (OSC), who I have had the privilege of serving alongside the past 4 years.

I would not have had these opportunities were it not for bosses who gave me a chance, including Senator Chuck Grassley, who has been incredibly gracious with his time and kind words today, Chairman Jason Chaffetz, Special Counsel Henry Kerner, and former MSPB Vice Chair Mark Robbins. Their support for me being nominated, as well as the support of many former Capitol Hill colleagues on both sides of the aisle and of the advocates I have worked with in the Title V community, has been incredibly humbling. I am very grateful for each of these relationships from my career.

Finally, I want to express my eternal gratitude to my wife, Brittany, without whose support for me and selfless sacrifice for our five children, none of these opportunities would have been possible. She could just as easily have gone to law school but instead raised our two children while I went to law school. She then delivered our third child 1 month after I graduated, when I was already working

¹ The prepared statement of Mr. Leavitt appears in the Appendix on page 90.

full-time on the Hill and preparing to take the bar exam in one more month. Given all of that, my J.D. by all rights ought to be a joint degree with her. She has the hardest work ethic of anyone I know, and her organization and tireless dedication provide the clear center of gravity in our home.

With an estimated nine million service members, civil servants, contractors, postal workers, and more, the Federal Government is the largest employer in the United States. Furthermore, its approximately 2.1 million workforce of career civilian employees is tasked with enormous responsibility. As we have seen during this global pandemic, the stakes are high. We owe it to ourselves as a country to draw on the most qualified employees who will serve the taxpayers most effectively. That is why the Merit System first embraced by our government over 140 years ago remains so imperative today.

Having grown up as the oldest of seven children in a family on a tight budget and spent my teenage summers doing drywall with my father, I believe firmly in the principles of responsibility, hard work, and accountability. I recognize that our government is funded by tax dollars earned by hardworking Americans, including single parents, small business owners like my dad, and more. I take extremely seriously the responsibility we all have to exercise careful stewardship over those resources.

To me, the Merit System is a critical component of that kind of careful stewardship. It ensures the American public gets the best bang for their buck, if you will. A good portion of my career was spent investigating misconduct in the Federal Government, including by line-level employees, by managers, and even by senior leaders. Holding such employees accountable is key to upholding the morale of the rest of the Federal workforce.

Anyone who knows me probably knows me best for being passionate about the importance of protecting whistleblowers. Since first working with Special Agent John Dodson, who felt compelled by the death of Border Patrol Agent Brian Terry to blow the whistle on gunwalking by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), I have worked with hundreds of patriotic women and men who saw problems in the Federal Government and spoke up about them. Their concerns have run the gamut, from cost overruns in Federal agencies to widespread employee misconduct to security vulnerabilities at the White House.

To me, protecting whistleblowers is, without question, the best way to root out waste, fraud, and abuse in the Federal Government and to identify other problems that pose a risk to the health and safety of the American public. Given the prospective risks faced by anyone considering speaking out, I consider whistleblowing an act of conscience. I have the utmost respect for those whose personal convictions impel them to courageously stand up for the truth. I believe we owe it to them to do all we can to ensure that they receive the benefit of the laws that are intended to protect them.

Even if the Federal Government was not the largest employer in the country, it is one that we all have a stake in. Our country was founded on national ideals, principles that our nation aspires to abide by. In light of those ideals, I believe the Federal Government should also strive to be a model employer, doing our best to treat

Federal employees fairly and holding managers to a high standard. The vast majority of Federal workers demonstrate great commitment and dedication, and I am grateful for the public service they render.

If confirmed to the Merit Systems Protection Board, I commit that I will do everything within my power to work hard and to exercise fairness in applying the law to Federal employee appeals, recognizing, in turn, that all of us are serving the American taxpayer.

Thank you again so much for the opportunity to appear before you today and to answer questions you may have.

Chairman PETERS. Thank you, Mr. Leavitt.

Our final nominee is Raymond Limon. Mr. Limon currently serves as the Deputy Assistant Secretary for Human Capital and Diversity and Chief Human Capital Officer (CHCO) at the Department of Interior (DOI). He is responsible for providing strategic human capital and safety, health, and training policies for 70,000 employees. Prior to joining the Interior Department, he led the State Department's Civil Service H.R. (human resources) Management Office and chaired the Small Agency Human Resources Council, representing nearly 100 Federal agencies and organizations. He was also an attorney at the U.S. Office of Personnel Management Office of General Counsel, where he specialized in employment litigation and policy review.

Mr. Limon, welcome. You are recognized for your opening comments.

TESTIMONY OF RAYMOND A. LIMON,¹ NOMINATED TO BE A MEMBER AND VICE CHAIR, MERIT SYSTEMS PROTECTION BOARD

Mr. LIMON. Thank you. Chairman Peters, Ranking Member Portman, and Members of the Committee, thank you for the opportunity and the honor to be here today.

I want to thank President Biden for my nomination to the position of Vice Chair of the Merit Systems Protection Board.

My personal journey and how I arrived here today begins with my parents. They inspired my passion for service, education, and hard work. They raised 10 children, with 2 sets of twins, and I am the oldest of those 10 children. My immigrant grandparents' work ethic and dedication to their children inspired the next generations and infused us with passion to be lifelong learners and to be active members in our communities. As a first-generation college graduate, I honor my family's sacrifices that have made it possible for me to be here today.

From a young age, I knew I wanted to study the law and become a lawyer. Though we did not have lawyers in my family or in the neighborhood where I grew up, my parents always supported my dream. At the age of 17, I moved away from home and worked my way through college. It was at the University of Nevada-Reno where I obtained my degree in political science and pre-law.

However, with limited means, I tempered my law school dreams and sought a new dream, to represent my country as a Peace Corps

¹ The prepared statement of Mr. Limon appears in the Appendix on page 144.

volunteer. I proudly served for 2 years in Honduras. It was there that I met my wife, Susana, another Peace Corps volunteer, who joins me today.

After the Peace Corps, we both attended Indiana University in Bloomington, where I received my law degree. We were active students at Indiana, where we both worked at internships at Bloomington City Hall. We volunteered on the local Habitat for Humanity chapter Board of Directors and organized various home builds.

I led fundraisers for the local Boys and Girls Club by organizing the annual law students versus faculty basketball games. Those games were far more intimidating than moot court. My love for basketball blossomed in Indiana, where I became a certified high school basketball referee. Today, I organize weekly basketball pick-up games in Hyattsville, Maryland.

These are just a few examples that show why service is so important to me. Serving in my community, whether it is Central America or in America's heartland, has opened opportunities for me in ways that otherwise would not have happened.

Shortly after law school, I joined the Federal workforce as a civil servant. I worked at the Office of Personnel Management, the Corporation for National Community Service (AmeriCorps), the State Department, and now the Department of the Interior. My experiences working internationally and nationally are what grounds me and what informs my deep commitment to protecting our country and our workforce.

This commitment to the love of service and learning, which I was born into and which I have been surrounded throughout my entire career, continues to evolve. This commitment is to what my wife and I have hopefully shared with the joys of our life, my two sons, Drew and Sean. As you can see, family is extremely important to me. It is for this reason that I feel called to this position, to do my part and to apply my expertise to serve the Federal family.

The common thread running through my career has been my wholehearted commitment to public service. Although each of us has a different story, who brought us here today, these stories all contribute to making government better. If confirmed, it will be a privilege for me to serve as the MSPB's Vice Chair.

Finally, I want to thank all the public servants and volunteers who have helped me along the way, from members of the Armed Services, my colleagues in the civil and foreign services, Peace Corps, VISTA, AmeriCorps volunteers, to the State and local government officials and the various good government groups that have supported and mentored me over the years.

In looking back on my career, I want to keep the call to public service stronger than ever. Thus, this is why I am committed to promoting and protecting the Merit System principles. To that end, I would also like to acknowledge my niece, Kalie, who recently became the Washoe County Recorder in Reno, Nevada, and my nephew, Ian, who started his career with the U.S. Coast Guard (USCG). I am excited about the new generation of Americans who are ready to serve, and I am prepared to do my part to make that happen.

Thank you so much for the opportunity to be here today and answer any questions that you may have. Thank you.

Chairman PETERS. Thank you, Mr. Limon.

There are three questions that the Committee asks of every nominee, and I am going to ask each of you to respond briefly with just a "yes" or "no." We will start with Ms. Harris and then work down the table.

First, is there anything you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated?

Ms. HARRIS. No.

Mr. LEAVITT. No.

Mr. LIMON. No.

Chairman PETERS. Second, do you know of anything personal or otherwise that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Ms. HARRIS. No.

Mr. LEAVITT. No.

Mr. LIMON. No.

Chairman PETERS. Last, do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Ms. HARRIS. Yes.

Mr. LEAVITT. Absolutely.

Mr. LIMON. Yes.

Chairman PETERS. Thank you for those answers.

Now the first question is going to go to all three of you. I will start with you again, Ms. Harris, but if confirmed, all three of you are going to face an unprecedented backlog of 3,300 cases that are pending, and in many instances, Federal employees have been waiting literally for years for decisions that impact their livelihood and access to retirement and healthcare benefits. Ms. Harris, if you are confirmed as Chair, you are going to lead the Board in tackling this immense backlog. What will be your strategy for effectively working through these cases without sacrificing the quality of these decisions?

Ms. HARRIS. Thank you, Senator. I have thought about this quite a bit. I would first meet with the staff, who I know have come up with several ideas and plans for adjudicating the backlog. After I hear their ideas, my plan is to get a triage system in place. There are different factors that we can look at as to how to most effectively adjudicate the backlog. The most obvious one is age of the case; let us do the oldest ones first.

But there are also other factors that I think are important, for example, relative importance of the case to the appellant and the agency. For example, terminations may be on the higher end of the triage system than suspensions, right, because those are more important in adjudicating. Also, whistleblower retaliation cases that have been pending, stay requests that the Office of Special Counsel has not been able to bring to the Board on personnel matters, those are obviously important.

After we figure out a triage system that my fellow board members agree with, I would also recommend bringing back what, in my practice, we knew as the board short form decision. The short form decision is similar to when a Federal appeals court affirms or denies or remands the underlying decision without a lengthy expla-

nation of the reasons for the decision. There are many cases for which that would be perfectly appropriate, for example, if they are clearly untimely or there is a lack of jurisdiction, or the administrative judge's opinion is well reasoned and well stated and there is nothing more to add. I think for those cases it will really expedite the process.

The good news, I should say, is that we are not starting from scratch. The Office of Appeals Counsel has already worked up draft decisions and memos regarding the decisions. So it is really the work of the board members—we are going to have to do the work to review it. But they have not been sitting around doing nothing. They have been really working very hard to prepare for the Board.

The last thing I would recommend, and this is just something that I am a real fan of in my practice, is to increase efforts regarding alternative dispute resolution (ADR). These parties have been waiting around for four, sometimes five, years to get decisions, and circumstances have changed. Maybe appellants have moved on to other jobs or they have left the agency; the management has changed. We always think of that as a good opportunity to discuss settlement again. The Board has an excellent settlement program with, I believe I have read, over 50 percent success rate in resolving cases. If we can put attention and time into ADR for these cases, perhaps we can reduce the backlog by as much as 50 percent.

I am really looking forward to it. I think the other thing is we have to roll up our sleeves and get to work, and I am good at doing that. Thank you.

Chairman PETERS. Thank you.

Mr. Leavitt.

Mr. LEAVITT. Thank you. I really agree with what Ms. Harris said. Fundamentally, in the past, the Board has decided about 1,000 cases a year, but that is all there were to decide. It is really not entirely clear what a sustainable pace will be, but you know, no matter what it is, I think putting in the work and working our hardest, putting in the time really will make a difference.

I completely agree on the short order. Those short form orders have not been used for about the last 10 years or so, but they were for the 30 years of MSPB's history before that, and I think that will be very helpful.

On top of that, the only other thing that I would add is that MSPB has not historically had a really robust practice of the board members actually meeting together to talk through cases, and I really think there is an opportunity there to make a lot of headway and save a lot of time in deciding cases that way.

Chairman PETERS. OK. Thank you.

Mr. Limon.

Mr. LIMON. Chairman Peters, thank you for that question. I am in agreement with my colleagues on how to address this backlog, and it is our mission first, but it is also people always. There are tremendous professionals working at the MSPB today, like Tristan, and they will have a lot of wonderful ideas as well to share with us when in fact we are able to be confirmed, if we are confirmed.

The one thing that I have a lot of experience in working with multiple administrations over the years is working with my civil

service colleagues in preparing new leadership. We do this through briefing books. We do this through a whole range of issues that are coming down for a new leadership team. I am very confident that the current team within the MSPB is preparing for this eventuality.

But in addition to that, there are going to be other stakeholders who are just committed to understanding how we get through this backlog. Whether it is with good government groups, some of our sister agencies, and the litigants, as Ms. Harris noted earlier. To that end, I think when we do get together and we come back and work as a team to identify the planning efforts related on how we plan and identify resources to deal with this backlog, there should be heightened transparency so everybody understands their role and their responsibility, both internally to the MSPB and to our critical stakeholders.

To that end, I do think that there is a great opportunity for us to come together and address this backlog and also identify some of the things that Ms. Harris and Mr. Leavitt have also identified as far as the short form order and some of the other triage issues that we have identified to help whittle down that backlog. Thank you.

Chairman PETERS. Thank you. Certainly, thanks again for your willingness to serve in this capacity. It is clear you are going to have a big job ahead of you, if confirmed. So thank you for your willingness to tackle this challenge.

Ranking Member Portman, you are recognized for your questions.

Senator PORTMAN. Great. Thank you, Mr. Chairman.

Again to the nominees, congratulations. We obviously need a quorum, and we need to move forward with these cases that have been languishing for years. We have a lot of experience between Mr. Leavitt having been General Counsel and both of you having had experience dealing with the issues that would come before the Board.

My first question was going to be on the backlog because I wanted you to say what you told me in our phone call, and you pretty much said it now. I do support the notion of the short form orders and the alternative dispute resolutions, and I would hope that that would help to resolve some of these 3,000 plus pending cases quickly. I would say that I would support what you are saying today and what you told me on the phone.

On whistleblower protections, we have a strong interest, as you know, in making sure people feel comfortable coming forward and ensuring that there are adequate protections for them. The MSPB has a role to play in this. The last time there was a study on the barriers to Federal employees making disclosures and being whistleblowers was 2011. My question for you would be: Do you think it is time to reexamine the barriers to Federal employees making disclosures? What recommendations do you have?

I am going to start with Mr. Leavitt because you have a lot of experience with whistleblower protection laws and in your testimony you talked about this quite a bit and your passion for it. What is the most common reason people do not step up, and you know, is it time to do another study on the barriers? In general,

what is the role that you see as a member of the Board in dealing with whistleblowers?

Mr. LEAVITT. Thank you, Ranking Member Portman. I want to make sure I get kind of all three parts of the question, but I think first off I absolutely think that it would be a great time for another study. MSPB has actually just been in the process of developing a new research agenda for its research arm, and so that is one of the things that will be presented to an incoming Board is just a list of all those ideas, and so that is absolutely one that, to me, is always relevant.

In terms of barriers generally, this is an area of the law where there have been a number of legal updates. A really big one was in 2012 with the Whistleblower Protection Enhancement Act, but there have been pretty regular updates since then.

From my perspective, one of the biggest barriers is not necessarily the law, but it is just the culture that exists in many agencies. If agencies do not take even little disclosures seriously, I think it makes it really hard to tell someone else if they see their co-worker railroaded to say, yes, there is really something important that you need to bring to the public's attention, but you know, you are going to be safe doing it. It is just that is not credible in some places. I think really, again, promoting that culture that is one of the things that was one of the purposes in the Senate Whistleblower Protection Caucus being created.

But I think anybody that cares about these things, just really actively, regularly touting the importance of whistleblowers is really key to helping Federal employees and Federal managers know, OK, people are serious about this. They really care about respecting these things and creating these kinds of open environments.

In terms of the role for the members on the Board, there certainly is, I think, an important one and just as cases come through, making sure that the law is applied evenly and fairly. Again, there is pretty robust law in this area, but Congress has had as one of its main purposes in passing so many updates to the law over the years, clarifying, because there was some sense that maybe administrative judges or even in the Federal courts were not fully understanding the intent behind the laws or what they fully were trying to accomplish. Certainly as a member and for any member of the Board that, taking those laws, applying them fairly, and just making sure that the tools that are there to protect whistleblowers are used fairly I think is really an important role that the Board can fulfill to help send that message across government and help create that culture.

Senator PORTMAN. Thank you. You answered all three questions thoroughly.

Any other comments on whistleblowers, Ms. Harris or Mr. Limon?

Ms. HARRIS. Yes, if I may, Senator Portman. Thank you. I think I agree with everything that Tristan has said. He is exactly right. One of the studies I read said that the biggest barrier for whistleblowers coming forward is that they think that nothing will happen, nothing will change. I think promoting a culture and training managers and senior staff to understand what they need to do when complaints come in is really important.

The only thing I would add to what Tristan said is that I think getting the Board back in business, getting a quorum back is going to be a really important tool in protecting whistleblowers. We will be able to adjudicate the cases. We will be able to get requests for disciplinary and corrective action from the Office of Special Counsel in whistleblower matters. We will be able to grant stays of personnel actions when the Office of Special Counsel seeks them when whistleblowers are under attack for eminent personnel adverse actions against them. Thank you.

Senator PORTMAN. OK. Thank you.

Mr. LIMON. Ranking Member Portman, nothing too much to add to that, but I do acknowledge the shifting landscape around whistleblowers, as you identified. Since the last study did not happen since 2011, a lot has happened. So doing a study on this to help educate managers, employees, human resource (HR) professionals I think would be highly valuable for the Board to consider and to do.

Mr. Leavitt's kind of cautionary tale about culture, a lot of it is about culture. Where can people go? Where can people feel safe to highlight these concerns? Where in the organization is best to do that? And that is where, I think, the training and reestablishing and improving our culture can help. Thank you.

Senator PORTMAN. OK. I said it in my opening statement that this is a quasi-judicial agency charged with protecting the Federal Merit Systems against partisan, political, or other prohibited personnel practices.

So this question, Ms. Harris, is for you, and I know you are expecting this question since we talked about it quite a bit. But given that role of the Board, particularly with regard to protecting people against partisan, political practices in hiring and personnel matters, I am concerned about your background as a partisan.

Particularly, looking at some of your Tweets, they are often hostile and very critical of Republicans and conservative viewpoints. You accuse Republicans of suppressing votes. You express strong opposition to not just the appointment of Amy Coney Barrett but attacking the Girl Scouts for sharing post highlighting the five women appointed to the Supreme Court simply because the post included Amy Coney Barrett. You called Republican Governor Larry Hogan, cynical and cowardly for his vote in the 2020 election.

My question to you is: In light of those partisan statements and the approach that you have taken in the past, I would like to know how can people in the Federal system feel comfortable that they are going to be fairly heard and fairly treated?

Ms. HARRIS. Thank you, Senator. I agree with you. It is absolutely important that all coming before the Board understand they will get a fair, objective determination on the merits. I do not see myself as particularly partisan. I respect your opinion on that, but that is not how I see myself in a professional capacity or really a personal capacity.

Senator PORTMAN. Let me just say, it is not my opinion. I am just reading from the Tweets.

Ms. HARRIS. Yes. No. I—

Senator PORTMAN. I can read from more.

Ms. HARRIS. No. I understand. I understand completely, and that is what I would like to address. The tone I took in a few instances on Twitter, what I am trying to say is it does not reflect the day-to-day me, who I am as a professional and in my personal capacity. I believe in respect. I try to teach my daughter to be respectful, and I try to do so myself.

I have represented Democrats, Republicans, people who have no idea what their party is. I represented Federal agencies under, I think, every administration for the past 20 years. My personal opinions, I am very well practiced at putting them aside and advocating for my clients in the most zealous manner that I can, for their benefit. If you asked my clients, the MSPB Administrative Judges (AJs) before whom I practiced, Federal court judges, my opposing counsel, they would tell you that I am fair, I am objective, and I do my best.

I want to commit to you, you will not hear that kind of language from me in my job going forward, and it is not something that I would do. I commit to working with the Senate and my fellow board members in a bipartisan spirit of cooperation.

I have spent my career opposing discrimination, and it is just simply repugnant to me that I would discriminate against anyone based on political affiliation. It is not something that comes before the Board. The Board does not ask parties what their political affiliation is, and in fact, it is one of the prohibited personnel practices. Political coercion or deciding personnel matters based on political partisanship is not allowed.

I believe that as I have put my personal opinions aside as an advocate I can do the same as an adjudicator. We are trained as lawyers to do that, and I really do not see that I will have a problem in doing so.

With respect to the specific Tweets, I think two that you mentioned were re-Tweets of others' words. I did it, so I do not want to back away from re-tweeting them. But I have learned a valuable lesson about re-tweeting others who have used words that I would not have personally chosen, and I think I am never going to re-tweet anybody ever again.

So that said, I think the comments that you referred to I think they were overbroad in their characterization of those particular issues, and that is not how I feel.

I do regret not having been more respectful and nuanced in my own Tweets and in my poor judgment of re-tweeting others, and I certainly want to do better going forward, and I will do better forward. I mean, as I said, I probably will never use Twitter again anyway, but I will not be tweeting personal opinions like that going forward.

I hope that reassures you, Senator. I am really committed to doing this job well, and I believe doing it well means to do it according to the rule of law and not according to personal opinion. Thank you.

Senator PORTMAN. Thank you. My time is way expired, but I wanted to hear your response. It is about people being treated fairly. That is what the focus is. So thank you.

Chairman PETERS. Thank you, Ranking Member Portman. Senator Lankford, you are recognized for your questions.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Thank you, Mr. Chairman.

If I can just close the loop on this, Ms. Harris, one of the things that you tweeted was Amy Coney Barrett was reflexively responding to substantive questions with an evasive answer, which should disqualify her. If you have an evasive answer on anything in this conversation, should we disqualify you, hold you to the same standard that you tweeted out, not a re-Tweet, but that you tweeted out for Amy Coney Barrett?

Ms. HARRIS. I am not an evasive person. I like to answer questions directly. I am a New Yorker. That is what we do. I hope if you feel that I am being evasive, please tell me, and I will try to be more direct.

Senator LANKFORD. That is great. Let me talk through something that has come up and that will come up before all of you, and it is the issue about vaccine mandates and Federal workers. There are quite a few Federal workers that joined the Federal workforce 10, 12, or 15 years ago. They had a labor agreement. They had an understanding of what it would mean to be able to work for the Federal workforce, and they have suddenly learned that they now have to be vaccinated.

Now somewhere around 80-plus percent of our Federal workforce is vaccinated depending on the agency already, but there are 20 some odd percent, and some higher in some agencies, some lower in some agencies, that they are not vaccinated for multiple reasons. Some of them may not be vaccinated because they have already had COVID and they have recovered from it. The science shows they have natural immunity, so they do not want to also be vaccinated. Some have health issues where they may be cancer patients, other issues. Some may be pregnant and trying to get pregnant. Some of them may be in a situation where they have a religious issue on being vaccinated, and they do not want to do that.

On top of that, currently, we do not know what the policy is going to be, but the U.S Department of Agriculture (USDA) is talking about a policy saying that if you are in USDA and you are not vaccinated you can wear a mask and do social distancing, and other agencies are saying, no, you are going to have to all be vaccinated.

What I am trying to figure out is if I am a Federal employee and I have a complaint because I am about to be fired or disciplined or not promoted or not allowed to travel based on a new requirement that was not there, that was not done with collective bargaining in any of my agreements, that is now being imposed on me, against the science of the issue of I have already had COVID and recovered from it, why am I being required on this vaccine? What authority does the Federal Government have to be able to discipline those individuals? How will you handle a case like that?

Mr. Limon, let me start with you. I want each of you to answer it, though.

Mr. LIMON. Yes. Thank you, Senator Lankford. I think that is one of the considerations that as a chief human capital officer myself, who has responsibility over safety and security of our employees, looking at this new—the future of work. Now we are dealing

with a mandate. There are a lot of concerns as a policymaker within my Federal agency that I am very concerned about.

In this role as the MSPB Vice Chair, we would not necessarily be working on policy setting as much as maybe dealing with adjudications—

Senator LANKFORD. Right.

Mr. LIMON [continuing]. That could come out of the result of this new requirement that is coming out.

In my day-to-day work, I have been in some meetings with the Office of Personnel Management and the Office of Management and Budget (OMB) that are working exactly through these issues as you are highlighting right now. There was an Executive Order (EO) mandating this for Federal employees and for contractors. There are citations to U.S. Code about setting qualifications for these positions. How that ends up being meted out I believe is still being worked through.

We are currently in a maximum telework environment for many of our Federal agencies. There are mask requirements based on local jurisdictions. But at the same time, when it comes to this potential for discipline for failure to being vaccinated, that is something that I am very concerned about today. I will be honest. Right now, we do not have an answer to that because that guidance is being discussed with this administration and working through the general counsels of the Federal agencies.

As an HR practitioner myself, I am kind of anticipating what that guidance will be so we could ensure—to your point about USDA and other agencies doing something different, that does not help. Having consistent guidance and understanding of how we are supposed to implement this new Executive Order is going to be key. And could it have an impact down the road to the MSPB as far as additional adjudications? Absolutely.

Senator LANKFORD. Yes. Thank you.

Mr. Leavitt.

Mr. LEAVITT. This is clearly a hot-button issue, and there are some very difficult questions there. To be totally honest, I am a little bit nervous on this one because there is—it seems like there is a really good chance we may well have to adjudicate it. So when you have all heard this before, right? But the consideration here is we want to make sure that anyone who does end up with a case in front of us feels like we have not made up our mind in advance, that they are getting a fair judgment.

So you know, that said, to be fair on the other side, I really do not know much about the law in this area in terms of where it is being used. I know there are a lot of contexts where job requirements are imposed, right? Generally, in a lot of instances, if there is a kind of nexus to someone's work my general impression is that they tend to be frequently upheld.

But again, this is a unique issue. It is clearly unprecedented in the history of the Federal Government and just as the pandemic really has been unprecedented in scope and scale, so . . .

Senator LANKFORD. When I speak to folks that are in American Federation of Government Employees (AFGE) and others, they are pretty furious about this. They feel like they were left out in the conversation, that it was not part of the collective bargaining

agreements, that individuals there that have personal exceptions, medical exceptions, religious exceptions, or are already having had COVID and recovered from it are being disproportionately discriminated against, when they worked for the last year through telework and then now they walk into this buzz saw of a new mandate for them, when they have had a long successful career with the Federal Government.

Tere are multiple individuals in my State that are saying, I am gone. I am going to leave, and I am being pushed out on something that I did not have an opportunity to be able to speak into.

Ms. HARRIS, do you want to speak into this?

Ms. HARRIS. Yes. Thank you, Senator. I wanted to address directly how the board members would be able to deal with such issues if they were to come before the Board. I agree with Mr. Leavitt. I do not want to prejudge any case. I would not do that.

But you know, there are two ways that the Board would be able to address these issues. One is the Board has the authority to review OPM rules and regulations to ensure conformance with—that they do not commit a prohibited personnel practice. That would be one way the Board would—OPM presumably will develop rules and regulations regarding this issue. I am sure that is something the Board would review at that time and be able to see, look down the list of prohibited personnel practices. Is it a problem, and if so, we take action.

The other way, if disciplinary cases come before the Board, if someone was eventually disciplined for not complying with whatever rules and regulations are eventually promulgated, the way the Board looks at it—in addition to seeing whether the person committed misconduct, we get to look at what is well known as the Douglas Factors. Are there mitigating or aggravating factors that require the penalty to be imposed or the penalty to be mitigated?

When you went through your list of items, to me, that sounds like a brief that I would write regarding someone, who was coming up with mitigating factors for why they have been disciplined. So you know, I would expect appellants to bring those kinds of arguments before, if they were, by the time it got to the Board, they would have already been disciplined, and hopefully, they would bring those kinds of considerations up during the disciplinary process before it got to the Board.

Senator LANKFORD. I would hope so. I would hope that we do not have agencies that say, “I am going to fire you, remove you, refuse to promote you” when, for instance, USDA can say, “You are a valuable employee. Just wear a mask” and other agencies would say, “I am sorry. You are out.”

It becomes nonsensical, especially when you have individuals that have had COVID, the vaccine itself, and they still have breakthrough cases and are still contagious. It does not seem to follow the science on it, and it certainly does not follow the agreements that have been made by AFGE and multiple other unions that are across the Federal workforce. Thank you.

Senator PORTMAN [presiding]. Thank you, Senator Lankford.
Senator Hawley.

OPENING STATEMENT OF SENATOR HAWLEY

Senator HAWLEY. Thank you, Mr. Chairman.

Congratulations to the nominees. Thank you all for being here.

Ms. Harris, let me start with you if I could. My understanding is the Merit Systems Protection Board is charged with upholding the Merit System principles. That is a defined term in our statutory law. One of the standards that the statute defines in relationship to Merit System principles is this: "All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management"—here is the key part—"without regard to political affiliation." I heard you speaking about that earlier.

I want to raise that because I have to say that prior to this nomination you have made some incredibly political comments. Very political. I am concerned about them, and I would like to hear you respond to some of them. Let us start with some of the comments about Supreme Court justices that I think Senator Portman was asking you about earlier, but I would like to hear your specific response.

On September 27, 2018, you said: "Kavanaugh," referring to now Justice Kavanaugh, "is doing a great impression of an angry drunk person. Not my idea of a Supreme Court justice."

With regard to Justice Amy Coney Barrett, when the Girl Scouts congratulated her on her nomination, you replied and said, "It was not that your post was political. It is that Amy Coney Barrett is hostile to LGBT and women's rights, and your essentialist position makes no sense if you are really trying to uplift the rights of young women. Do better, Girl Scouts."

Let me just stop right there. Can you help me understand your point about Amy Coney Barrett? Your view is that she should not—women's groups should not congratulate her on being nominated because her positions disqualify her from being considered an advancement for women? I mean, help me understand what you meant there.

Ms. HARRIS. First, can I go back to the first Tweet you read?

Senator HAWLEY. Sure.

Ms. HARRIS. I regret using those words. They are not as respectful and certainly nuanced as I would like to be, and I regret it.

With respect to the Girl Scouts Tweet, I am sorry I do not recall it exactly, but thank you for refreshing my recollection about it. I think my best guess as to what I meant at the time is that just because someone is a member of a particular group does not mean that they are advancing the rights of that group. I think I could have said that definitely in a more respectful way at that time as well.

Senator HAWLEY. Fair enough. I thought that is what you meant, but I just wanted to be clear when you say that the Girl Scouts' position congratulating Justice Barrett is an essentialist position, makes no sense if you are trying to uplift the rights of young women. So it was your position that Amy Coney Barrett was actually—that her nomination was a step backward for the rights of women; she would harm the rights of women?

Ms. HARRIS. That was not my position at the time. I think my concern was just congratulating somebody on a nomination because

they are a member of a certain group, a woman or a member of a particular minority, does not mean that that person is necessarily advancing the rights of that group.

Senator HAWLEY. You clearly thought Justice Barrett was not because you say it makes no sense to congratulate her if you really are trying to uplift the rights of young women. I take it that you think that Justice Barrett was not trying to uplift the rights of young women.

Ms. HARRIS. I think what I said in that Tweet was my concern about some of her prior rulings on LGBT issues, which is a concern to me and my family. It is personal to me. It is you know, I do not think of it as political. It is a concern to me, and that was my concern at the time, as best I can recall.

Senator HAWLEY. So you do not think that this is a—you would not say that this is a political Tweet? You do not think this is a political position?

Ms. HARRIS. No. I am just saying that—it was my Tweet. I do not know how to categorize it exactly, but I am just telling you that is my personal opinion about LGBT rights.

Senator HAWLEY. Right. The fact that praising Amy Barrett is an essentialist position, so she should not be praised as a woman. I guess, women face, as you know, a lot of barriers. Justice Barrett was criticized for her faith. She was criticized for various positions she took as a woman. I am always disturbed when I see people saying, basically, you do not—you should not be able to speak as a woman. You do not have—you should not be counted as a woman because you do not have the right positions, whatever they are.

Now you are entitled to take those positions, and that is a very political position. You are entitled to take those positions. I disagree with that. I mean, I think shutting down her voice and criticizing her in that way is actually very disturbing, but you are certainly entitled to take it. My concern is that you are being nominated for a position in which you are supposed to be politically neutral and people who come before you have to have confidence that you can give them judgment without regard to political affiliation.

Let me ask you about some other comments that you have made. You have been especially critical of the last administration's actions regarding critical race theory. You wrote that those actions white-washed our history, and you also said, when our government orders a ban on certain ideologies, theories, and education, which just happen to deal with anti-racism, we should be screaming about it. Do you stand by those comments, and can you explain those to me?

Ms. HARRIS. I think that was around the time that the administration was directing Federal agencies to cancel diversity trainings for Federal employees.

Senator HAWLEY. This is October 1, 2020.

Ms. HARRIS. Yes, I think that is?

Senator HAWLEY. That is when your Tweet was?

Ms. HARRIS. Yes, I think that is what was happening at that time. I thought that was a bad idea for several reasons. One, I think diversity training is a good idea. I think it is good for employees to learn about each other, learn about getting along together. I think it is really important to be—and I think it is part of the

law to be able to inform employees about their rights and responsibilities in filing complaints of discrimination.

My concern in that particular matter was the elimination. I thought it was overbroad, right? Maybe there were a few trainings that the administration did not like, but I thought eliminating all of them was a real problem. I had expressed that at the time I thought it would eliminate the Faragher Ellerth defense for employers, for the agencies. They would not be able to show that they trained employees on their rights and responsibilities in reporting harassment, whistleblowing, and all these other matters. So that was a major concern I had. I thought it was a really bad idea.

I also do agree that—and I want to come back to what you said before.

Senator HAWLEY. OK. Can I just—before we leave this topic—

Ms. HARRIS. Yes.

Senator HAWLEY. My time is technically expired, but I will be fast here, Mr. Chairman, in finishing this.

Critical race theory, which is what we are talking about. It was critical race theory banned that the administration implemented. I realize this is a very divisive topic. This is something that a lot of people disagree on. You clearly have your views on it. You use language like white-washing, which is typically language associated with critical race theory. Again, that is fine.

Here is my concern: If a Federal worker refuses to attend a CRT training and they get reprimanded, they may end up in front of you.

My question is: Can they be sure that you will assess their case impartially, according to these standards that we talked about earlier? That is what I am driving toward here.

Ms. HARRIS. Sure. First of all, I do not believe in silencing anyone. So if somebody has an opinion, I believe they should be able to express it. I want to come back to what you said before. I do not believe that somebody should not be able to express their opinion.

I do not also know that—I mean, critical race theory trainings, I am not really aware of any in Federal agencies. Just none have ever come to my attention in my cases.

Senator HAWLEY. We would be happy to provide you a list.

Ms. HARRIS. But I think the answer to your question is if an employee was disciplined for refusing to attend a training of any kind that is what I would be looking at. I would not be looking at the type of training. OK? In terms of evaluating whether the disciplinary was correct.

In terms of the Douglas Factors and looking about mitigating or aggravating circumstances, if the employee had a strongly held belief, right, about the training and why they did not want to go. Like you know, I had a client, a Catholic chaplain at the National Institutes of Health (NIH), who was actually fired for refusing to attend certain continuing pastoral education programs because he felt they did not adhere to his religious faith. He thought they were for other faiths, and he refused. I represented him, and we won. Because that is wrong. If someone has a firmly held religious belief, for example, that is something that needs to be taken into consideration.

Senator HAWLEY. I appreciate that.

Senator CARPER. Mr. Chairman, regular order, please. We have a vote underway. I have not had a chance to ask any questions, please.

Chairman PETERS [presiding]. If you could wrap it up.

Senator HAWLEY. Oh, I am done. I am just waiting. If you would like to interrupt the witness, Senator Carper, go ahead. I was just letting her finish.

Senator CARPER. Thank you. I am ready to ask questions.

Senator HAWLEY. I concluded my questions before the time expired.

Senator CARPER. Thank you very much.

Senator HAWLEY. I was going to thank them. Is it OK if I thank them?

Senator CARPER. Please thank them.

Senator HAWLEY. All right. Thank you so much for your responses. I will have some additional questions for the record.

Senator CARPER. Thank you. Thank you, Senator.

Chairman PETERS. Thank you, Senator Hawley.

OPENING STATEMENT OF SENATOR CARPER

Senator Carper, you are recognized for your questions.

Senator CARPER. Thanks very much. I think my colleagues heard me say, welcome, everyone. We have a lot going on in hearings and votes. I apologize for being here so late.

I always like to say the leadership is most important in creating the success of any organization I have ever been privileged to be a part of and for almost any organization to succeed they need leadership, principles of leadership.

The mission of the Merit Systems Protection Board is to protect the Merit System principles and promote an effective Federal workforce that is highly qualified, diverse, and managed fairly. Reflecting on your experience in Federal personnel matters, can each of you please take a moment, maybe a minute, to discuss the importance of having well-qualified Senate-confirmed leadership at the MSPB? Further, how have longstanding vacancies in all three board seats restricted the Board's ability to execute its mission?

If you would take about a minute, please start with Ms. Harris, please.

Ms. HARRIS. Sure. I lost a little bit of your question at the end, but I think it was you were asking how has the vacancies affected the Board's ability to operate. It has been, I think, very difficult for employees and agencies and the employees at the Board. So getting a Board restored, getting that system back in full operation, enabling it to do its statutory mission is vital to protecting the Merit System and ensuring that prohibited personnel practices do not occur in Federal Government. It is one of the pillars of good government, the MSPB. We need it in order to enforce the laws, in order to protect Federal employees from retaliation, political coercion, corruption, all those things. It is essential.

I am really looking forward to getting down to work, getting the backlog reduced, as I discussed before some ideas I had for doing so, and ensuring that employees know that the Merit Systems Protection Board is there to protect them, protect the Merit System—

Senator CARPER. OK. I am going to ask you to stop right there.

Ms. HARRIS. Yes, sir. Thank you.

Senator CARPER. Thanks very much. I am going to ask you to complete your response to the question for the record.

Mr. Leavitt, please, same question. What I am interested in is how have longstanding vacancies in all three board seats restricted the Boards ability to execute its mission. Just very briefly, one minute.

Mr. LEAVITT. Absolutely. I think it has clearly had a significant impact. I do want to make sure everyone is aware, of course, the Agency has still been operating, right? All of the offices have still been fully busy. Former Acting Chair Mark Robbins used to joke, it is not that he was just sitting there by himself, eating bonbons all day. The offices have all been very busy, but it is clear that there are parts of MSPB's mission that just cannot be completed without board members.

So that includes hearing petitions for review. So that backlog that has been growing is because there are no board members to hear those. Individuals can still receive an initial decision from an administrative judge and appeal straight to Federal courts. But for those that want to go to the Board, they have just been waiting, and that is why we have that 3,400 case backlog.

A second area where it has really had an impact is that MSPB has a really important studies function of looking at the operations of the Federal Government and making sure that they are in compliance with the merit principles, and that has really been impeded. So MSPB, although it has released some kind of watered down or some slimmer products during this time, it has not made big recommendations, which are part of its mission.

Then, of course, one that is very important to me is issuing whistleblower stays. If there is no sitting board member at all, there is no one to issue stays. In the Office of Special Counsel's interactions with agencies, they are really missing an important tool to help encourage agencies to do the right thing.

Senator CARPER. Yes. The last one is—thank you for that.

Do you pronounce your last name Limon?

Mr. LIMON. Limon, yes.

Senator CARPER. Limon, all right. Has anyone ever mispronounced your name?

Mr. LIMON. I am used to it.

Senator CARPER. All right. I will try not to do it. Same question, please.

Mr. LIMON. OK. Thank you for that question. Again, similar to my colleagues' statement, but as you know, the MSPB is part of the civil service commission, that history of protecting employees and letting the public know that the work that is being done by the Federal employees is being done in a nonpartisan way, that kind of four-legged stool between MSPB, the Office of Special Counsel, OPM, and the Federal Labor Relations Authority (FLRA). Without a fully functioning MSPB, it is not going to be centered. We are not going to be able to have that expectation and that appearance that there are institutions there to protect them and to protect applicants to our Federal positions.

So, yes, there are wonderful employees currently working very hard at the MSPB, but not having the quorum, not having that leadership, people are going to think we are not at full strength. And truth be told, it is not at full strength. And so having an ability to come together and work with our sister agencies, to bring back and remind everybody how important Merit System principles are, we need to do that as soon as possible.

Senator CARPER. All right. Thank you.

I have a couple of questions I am going to ask for the record. I would ask that you respond to these questions, if you will, please. One of those is: Could each of you please take some time in the week to come to explain what you view is the biggest threat to maintaining an apolitical civil workforce. All right. That would be No. 1.

My next question is: Are there actions that we in Congress may want to consider in order to ensure the political independence and integrity of the merit civil service system? So those are my questions.

Again, thank you all for being here today.

Chairman, thank you for giving me an opportunity to ask those questions of our witnesses. Thanks.

Chairman PETERS. Thank you, Senator Carper.

All three nominees have made financial disclosures and provided responses to biographical and prehearing questions submitted by this Committee.¹ Without objection, this information will be made part of the hearing record with the exception of the financial data,² which are on file and available for public inspection in the Committee offices.³

The hearing record will remain open till 12 p.m. tomorrow, September 23rd, for the submission of statements and questions for the record.

This hearing is now adjourned.

[Whereupon, at 11:43 a.m., the Committee was adjourned.]

¹ The information of Ms. Harris appears in the Appendix on page 31.

² The information of Mr. Leavitt appears in the Appendix on page 92.

³ The information of Mr. Limon appears in the Appendix on page 146.

A P P E N D I X

**Chairman Peters Opening Statement As Prepared for Delivery
Full Committee Hearing: Nominations of Cathy A. Harris to be a Member and Chair, and
Tristan L. Leavitt and Raymond A. Limon to be Members, Merit Systems Protection
Board
September 22, 2021**

Today we are considering three nominations to the Merit Systems Protection Board, or "MSPB" Cathy Harris to be a Member and Board Chair, Raymond Limon to be a Member and Vice Chair, and Tristan Leavitt to be a Member.

Welcome to each of the nominees and to your family members who are joining us today. Thank you all for your previous public service, and your willingness to serve in these new and important roles.

The Merit Systems Protection Board is an independent agency that is critical to ensuring an effective and accountable federal government.

The MSPB protects the merit system principles and promotes a highly qualified, diverse federal workforce that is fairly and effectively managed and that provides excellent service to the American people.

The bipartisan three-member board adjudicates cases involving whistleblower retaliation and violations of civil service laws.

The Board also promotes an effective federal workforce through oversight of the Office of Personnel Management and the civil service.

Prolonged vacancies on the Board slow the administration of justice, and for years, vacancies on the MSPB have prevented federal employees from obtaining relief from prohibited personnel practices.

If the three nominees before us today are confirmed, the MSPB will have a quorum for the first time in nearly five years, a crucial step towards preserving the rights of federal employees and protecting whistleblowers from retaliation.

I am very pleased that we are moving one step closer to a fully functioning Merit Systems Protection Board, and I look forward to hearing from each of the nominees.

Opening Statement – As Prepared
Ranking Member Rob Portman

HSGAC Nomination Hearing

*Nominations of Cathy A. Harris to be a Member and Chair,
and Tristan L. Leavitt and Raymond A. Limon to be Members,*

Merit Systems Protection Board

September 22, 2021 at 10:30 am.

Thank you, Chairman Peters.

Welcome, Ms. Harris, Mr. Leavitt, and Mr. Limon. I appreciate you being here today.

You three have been nominated to the Merit Systems Protection Board, and, if confirmed, will play an important role in safeguarding the integrity and efficiency of the federal government. The MSPB was established to protect the federal merit system principles and to promote an effective federal workforce free of prohibited personnel practices.

However, the Board has lacked a quorum since 2017, the longest the agency has been without a quorum in its history, resulting in a backlog of over 3,000 cases. The Committee thanks the MSPB employees and administrative judges who have worked hard over these past three years to keep the agency's mission alive despite the lack of sitting Board members.

Along with its adjudication function, the MSPB has the power and responsibility to study and report on critical federal workforce issues. This oversight is crucial in a time where the federal workforce faces unprecedented challenges due to COVID-19. The pandemic forced government employees to

work from home, creating a new and challenging dynamic between agency management and their employees. Many agencies continue to work from home, and many have dramatically changed their work from home policies. The effects of mass telework in the federal government on employees, the public, and overall satisfaction and productivity are still largely unknown.

The MSPB also plays a role in the whistleblower protection process. Not only does the Board adjudicate retaliation claims under the Whistleblower Protection Act, but the Board also has the power to study and report to Congress on existing whistleblower protection issues and ways to improve these protections through law.

I look forward to hearing the perspective you would bring to the Board, how you would promptly address the MSPB's case backlog, and your views on the critical federal workforce issues facing our government.

Thank you.

Van Hollen Statement on the Nomination of Cathy Harris

I am proud to support the nomination of Cathy Harris to serve as chair of the Merit Systems Protection Board. Ms. Harris is an exceptional choice for this role – not only because she hails from my great State of Maryland, but because she has been a longtime advocate for federal employees and has the experience, character, and knowledge to serve ably at the helm of the MSPB.

The merit-based civil service system is the backbone of our government. Federal employees work day in and day out to provide crucial services to the American people, and in the darkest hours of the COVID-19 pandemic, they stepped up by carrying out vital programs that help Americans put food on the table and keep a roof over their heads. Moving expeditiously to confirm Cathy Harris's nomination is especially urgent since the MSPB is without any Board members to make final rulings on cases that come before the Board.

We must strengthen the institutions that uphold the rules and principles at the heart of our civil service system and protect our federal employees – and I am confident that, if confirmed as chair of the MSPB, Cathy Harris would do just that. She brings to this position over two decades of experience practicing employment law, including before the Merit Systems Protection Board. She currently serves as Chair of the Sexual Harassment and Sexual Orientation, Transgender, and LGBT Practice sections at the firm Kator, Parks, Weiser, and Harris – where she also serves as co-manager of the firm. And she has been recognized with numerous honors including being named “attorney of the year” in 2010 by the Metropolitan Washington Employment Lawyers Association.

At this urgent moment in which we must work together to restore the core tenets of our merit-based civil service, there's no doubt in my mind that Cathy Harris is the right person to lead MSPB. I urge my colleagues to join me in supporting her nomination.

MSPB NOMINATION HEARING TESTIMONY
CATHY ANN HARRIS
CHAIR, U.S. MERIT SYSTEMS PROTECTION BOARD
SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL
AFFAIRS

September 22, 2021

Good morning Chairman Peters, Ranking Member Portman, and members of the committee. I am very thankful for this opportunity to appear before you today as you consider my nomination as Chair of the U.S. Merit Systems Protection Board. I am deeply honored by President Biden's nomination of me to this position, as it is one that I consider essential to maintaining a fair, equitable, and merit-based Federal workforce. I am a firm supporter of the Board's statutory missions to protect the merit system principles and promote an effective civil service free of prohibited personnel practices.

I want to introduce my family who are with me here today: my wife, Cheryl, my daughter Rosie, and my father, Jack. I am very grateful for their support throughout this process. I also want to thank the MSPB staff who helped prepare us for this hearing and my co-nominees, Raymond Limon and Tristan Leavitt, who have been a pleasure to work with and with whom I look forward to working closely if confirmed. I am particularly appreciative that we each bring different experiences to the table, and am confident that we would be a great team together.

For more than twenty years, I have litigated on behalf of both federal employees and agencies before the MSPB, the Equal Employment Opportunity Commission and in the federal courts. My cases have covered most of the substantive issues considered by the Board. I have extensive experience in litigating complex class actions before the EEOC on behalf of federal employees, and consolidated cases before the MSPB, one of which culminated in one of the lengthiest hearings in the Board's history with over 100 appellants.

Through this experience, I have gained a deep understanding of federal-sector employment law and the great importance of our merit system in enhancing and improving the Federal workforce. Having the experience of representing a wide range of employees and management from large and small agencies, I have developed a balanced view of the issues facing the civil service. Employees and agencies rely upon the MSPB for prompt, fair adjudications. The MSPB is one of the pillars of good government, helping us keep the civil service free from discrimination, political coercion, and corruption. I look forward to being able to apply my knowledge in impartially adjudicating matters that come before the Board. After many years in private practice, I am also looking forward to returning to public service. I started my legal career as an Assistant District Attorney in the New York County District Attorney's Office, where I gained invaluable courtroom experience and a deep appreciation for public service.

As you are aware, because the Board has lacked a quorum for the past four years, it has been unable to fulfill its statutory duties. Despite this challenge, I understand that the staff at the MSPB has been working tirelessly to prepare for a new Board and I am so thankful for their

dedicated service. A large backlog of cases has amassed because decisions could not be issued without Board members. If confirmed, I will make it my utmost priority to reduce the backlog so that the employees and agencies may finally receive decisions. The stakes involved in the cases are quite serious for the litigants. From the employee-side, it may be due to a termination that has caused a loss of income for the employee for several years, the denial of disability retirement benefits to a worker, or a non-selection of a veteran who claimed violations of veterans preference rules. So, too, whistleblowers have been without recourse in some instances as they await adjudication of their matters at the Board level. From the agencies' perspective, agencies await determinations that will affect staffing, retention, and disciplinary matters. Both employees and agencies deserve finality, and thus, I commit to work with my fellow Board members to develop an effective triage plan to adjudicate the cases swiftly and fairly.

The Board also has a statutory duty to conduct and report objective studies regarding the merit system. During the lack of a quorum, studies have been conducted but have not been able to be approved. As these studies are important to Congress, other federal agencies, and the public in understanding and improving the merit system, I will work to review and release the studies as soon as possible, if confirmed.

Thank you again for considering my nomination. I look forward to answering any questions the committee may have.

**HSGAC BIOGRAPHICAL QUESTIONS FOR
EXECUTIVE NOMINEES**

REDACTED

1. Basic Biographical Information

Please provide the following information.

<i>Position to Which You Have Been Nominated</i>	
<u>Name of Position</u>	<u>Date of Nomination</u>
Chair, Merit Systems Protection Board	

<i>Current Legal Name</i>			
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>
Cathy	Ann	Harris	

<i>Addresses</i>					
<u>Residential Address</u> (do not include street address)			<u>Office Address</u> (include street address)		
			Street: 1200 18 th Street NW Suite 1000		
<u>City:</u> Silver Spring	<u>State:</u> MD	<u>Zip:</u> 20903	<u>City:</u> Washington	<u>State:</u> DC	<u>Zip:</u> 20036

<i>Other Names Used</i>						
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>	<u>Check if Maiden Name</u>	<u>Name Used From</u> (Month/Year) (Check box if estimate)	<u>Name Used To</u> (Month/Year) (Check box if estimate)
					Est ☐	Est ☐

<i>Birth Year and Place</i>	
Year of Birth (Do not include month and day.)	Place of Birth
1971	New York, NY

<i>Marital Status</i>					
Check All That Describe Your Current Situation:					
Never Married	Married	Separated	Annulled	Divorced	Widowed
☐	☒	☐	☐	☐	☐

<i>Spouse's Name (current spouse only)</i>			
<u>Spouse's First Name</u>	<u>Spouse's Middle Name</u>	<u>Spouse's Last Name</u>	<u>Spouse's Suffix</u>
Cheryl	Ann	Terwilliger	

<i>Spouse's Other Names Used (current spouse only)</i>						
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>	Check if Maiden Name	<u>Name Used From</u> (Month/Year) (Check box if estimate)	<u>Name Used To</u> (Month/Year) (Check box if estimate)
					Est ☐	Est ☐

<i>Children's Names (if over 18)</i>			
First Name	Middle Name	Last Name	Suffix

2. Education

List all post-secondary schools attended.

<u>Name of School</u>	<u>Type of School</u> (vocational/technical/trade school, college/university/military college, correspondence/distance/extension/online school)	<u>Date Began School</u> (month/year) (check box if estimate)	<u>Date Ended School</u> (month/year) (check box if estimate) (check "present" box if still in school)	<u>Degree</u>	<u>Date Awarded</u>
Brown University	University	09/90 ☐ Est	05/94 ☐ Est ☐ Present	A.B.	May 1994
George Washington University Law School	University	09/94 ☐ Est	05/97 ☐ Est ☐ Present	J.D.	May 1997
University of Maryland Extension	Extension (Master Gardener Program)	02/18 ☐ Est	06/18 ☐ Est ☐ Present	No	
University of Maryland Extension	Extension (Forestry Program)	09/20 ☐ Est	01/21 ☐ Est ☐ Present	No	

3. Employment

(A) List all of your employment activities, including unemployment and self-employment. If the employment activity was military duty, list separate employment activity periods to show each change of military duty station. Do not list employment before your 18th birthday unless to provide a minimum of two years of employment history.

Type of Employment (Active Military Duty Station, National Guard/Reserve, USPHS Commissioned Corps, Other Federal employment, State Government (Non-Federal Employment), Self-employment, Unemployment, Federal Contractor, Non-Government Employment (excluding self-employment), Other)	Name of Your Employer/Assigned Duty Station	Most Recent Position Title/Rank	Location (City and State only)	Date Employment Began (month/year) (check box if estimate)	Date Employment Ended (month/year) (check box if estimate) (check "present" box if still employed)
Non-Government Employment	Kator, Parks, Weiser & Harris, PLLC	Co-Manager	Washington, DC	4/99 ☐ Est ☐	present ☐ Est ☐
Non-Government Employment	George Washington University Law School	Adjunct Professor	Washington, DC	8/01 ☐ Est ☐	5/04 ☐ Est ☐
State Government (Non-federal employment)	New York County District Attorney's Office	Assistant District Attorney	New York, NY	8/97 ☐ Est ☐	4/99 ☐ Est ☐
Non-government employment	Center for National Security Studies	Law clerk	Washington, DC	9/96 ☒ Est ☐	4/97 ☒ Est ☐
Non-government employment	Trial Lawyers for Public Justice	Law clerk	Washington, DC	6/95 ☒ Est ☐	8/96 ☒ Est ☐
Non-government employment	Ben & Jerry's	Scooper	Washington, DC	Summer '97 ☒ Est ☐	Summer '97 ☒ Est ☐
Government employment	Equal Employment Opportunity Commission	Intern	Washington, DC	1/95 ☒ Est ☐	5/95 ☒ Est ☐
Non-government employment	Government Accountability Project	Law Clerk	Washington, DC	6/94 ☒ Est ☐	11/95 ☒ Est ☐
Non-government employment	Law Offices of Lawrence Fabian	Clerk	New York, NY	6/94 ☐ Est ☐	8/94 ☐ Est ☐

Non-government employment	Wilderness Ventures,	Guide	Jackson, WY	Summer 1993	Est x ☐	Summer 1993	Est x ☐
Non-government employment	Brown University, Office of Student Life	Student Coordinator	Providence, RI	1992, 1993-1994	Est x ☐	1992, 1993-1994	Est x ☐
Non-government employment	Brown University Sarah Doyle Women's Center	Assistant	Providence, RI	6/92	Est x ☐	8/92	Est x ☐
Non-government employment	Retail Store (I cannot recall the name of the store)	Cash Register	Providence, RI	Summer 1992	Est x ☐	Summer 1992	Est x ☐
Non-government employment	Camp Robin Hood	Camp Counselor	New Hampshire	Summer 1991	Est x ☐	Summer 1991	Est x ☐

(B) List any advisory, consultative, honorary or other part-time service or positions with federal, state, or local governments, not listed elsewhere.

<u>Name of Government Entity</u>	<u>Name of Position</u>	<u>Date Service Began</u> (month/year) (check box if estimate)	<u>Date Service Ended</u> (month/year) (check box if estimate) (check "present" box if still serving)
		Est ☐	Est ☐ Present ☐

4. Potential Conflict of Interest

(A) Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

I have represented federal employees and some federal agencies before the MSPB. I will follow the rules regarding recusals and I see no conflict of interest that would arise.

(B) Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.

I wrote to Will Jawando, Montgomery County, MD county council member, suggesting legislation to change the standard for sexual harassment cases under county law. See attached. I spoke with Mr. Jawando's staff several times. I met once with Mr. Jawando when he informed me that he intended to introduce a bill based upon the information I provided.

5. Honors and Awards

List all scholarships, fellowships, honorary degrees, civilian service citations, military medals, academic or professional honors, honorary society memberships and any other special recognition for outstanding service or achievement.

- 2017 "Lawyer of the Year" in practice area of Employment Law-Individuals in Washington DC by Best Lawyers
- 2010 "Attorney of the Year," Metropolitan Washington Employment Lawyers Association
- 1997, Michael D. Cooley Memorial Prize for maintaining vitality, humanity and compassion, The George Washington University Law School
- 1997, Graduated with honors from George Washington University Law School
- 1996, George Washington Law School and Murray Snyder Summer Fellowship
- 1995, Recipient, Public Interest Summer Grant, Equal Justice Foundation
- 1990, Hunter College High School, Scholar Athlete award

6. Memberships

List all memberships that you have held in professional, social, business, fraternal, scholarly, civic, or charitable organizations in the last 10 years.

Unless relevant to your nomination, you do NOT need to include memberships in charitable organizations available to the public as a result of a tax deductible donation of \$1,000 or less, Parent-Teacher Associations or other organizations connected to schools attended by your children, athletic clubs or teams, automobile support organizations (such as AAA), discounts clubs (such as Groupon or Sam's Club), or affinity memberships/consumer clubs (such as frequent flyer memberships).

<u>Name of Organization</u>	<u>Dates of Your Membership</u> (You may approximate.)	<u>Position(s) Held</u>
National Employment Lawyers Association	1999-present	member
Metropolitan Washington Lawyers Association	1999-present	Member Treasurer, 2005 Board Member 2005-2018?
Federal Circuit Bar Association	2000-2015 (approx.)	Member Co-chair of Government Personnel Pro Bono Committee (2014)
New York State Bar Association	1998-present (approx.)	
District of Columbia Bar	2000-present	
Maryland State Bar Association	2015-present	
Prince George's County Master Gardeners	2018-2019	Master Gardener Intern

7. Political Activity

(A) Have you ever been a candidate for or been elected or appointed to a political office?

No.

<u>Name of Office</u>	<u>Elected/Appointed/ Candidate Only</u>	<u>Year(s) Election Held or Appointment Made</u>	<u>Term of Service (if applicable)</u>

(C) List any offices held in or services rendered to a political party or election committee during the last ten years that you have not listed elsewhere.

None.

<u>Name of Party/Election Committee</u>	<u>Office/Services Rendered</u>	<u>Responsibilities</u>	<u>Dates of Service</u>

(D) Itemize all individual political contributions of \$200 or more that you have made in the past five years to any individual, campaign organization, political party, political action committee, or similar entity. Please list each individual contribution and not the total amount contributed to the person or entity during the year.

I have not made individual political contributions of \$200 or more in the past five years. However, I did contribute \$50 (fifty dollars) to Ashley Lunkenheimer for Congress, on March 20, 2018, however the transaction went through erroneously as \$500 (five hundred dollars); I contacted the campaign immediately, and they refunded the \$500 (five hundred dollars), and instead charged the intended \$50 (fifty dollars) amount; the year to date amount reflected in FEC records includes the erroneous amount of \$550 (five hundred and fifty dollars), however, that is incorrect.

<u>Name of Recipient</u>	<u>Amount</u>	<u>Year of Contribution</u>

8. Publications and Speeches

(A) List the titles, publishers and dates of books, articles, reports or other published materials that you have written, including articles published on the Internet. Please provide the Committee with copies of all listed publications. In lieu of hard copies, electronic copies can be provided via e-mail or other digital format.

<u>Title</u>	<u>Publisher</u>	<u>Date(s) of Publication</u>
Sex Without Consent: Peer Education Training for Secondary Schools, Colleges and Universities	Learning Publications	1993
Case Note, Unfair Labor Practices - Pension Plans and the Postmodern Employee	George Washington Law Review	1996
Note, Outing Privacy Litigation: A Contextual Approach to Lesbian and Gay Civil Rights	George Washington Law Review	1997
Representing Federal Employees Before the MSPB	National Employment Lawyers Association	2010
The ABC's of Alternative Dispute Resolution in Employment Cases	National Employment Lawyers Association	March 2012
Various columns	Federal Employee News Digest	Unknown; for several years, our firm authored columns in this publication, but I do not have copies of the articles.
Recent Developments in Representing Federal Employees: EEOC'S Management Directive 110	National Employment Lawyers Association	2016
Guiding Federal Employees Through A Complex Landscape	National Employment Lawyers Association	June 2018
Letter to the Editor	The New York Times	February 23, 2019
The Current Administration's Impact on the Federal Workplace: Executive Order 13839	American Bar Association Labor and Employment Section Conference	November 7, 2019
Changing Currents: Safe for Work? The New Landscape in LGBTQ Law	DC Bar	October 27, 2020
LGBT Litigation Update Post- <i>Bostock v. Clayton County, Georgia</i>	Metropolitan Washington Employment Lawyers Association	March 2021

(B) List any formal speeches you have delivered during the last five years and provide the Committee with copies of those speeches relevant to the position for which you have been nominated. Include any testimony to Congress or any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.

<u>Title/Topic</u>	<u>Place/Audience</u>	<u>Date(s) of Speech</u>

(E) List all speeches and testimony you have delivered in the past ten years, except for those the text of which you are providing to the Committee.

The following are not speeches or testimony but were presentations delivered during various conferences. I am including them nonetheless.

<u>Title</u>	<u>Place/Audience</u>	<u>Date(s) of Speech</u>
The ABC's of Alternative Dispute Resolution in Employment Cases	National Employment Lawyers Association Conference	March 2012
Processes for filing federal employee claims – EEO and FMLA	National Employment Lawyers Association Conference	June 24, 2015
Developments On LGBT Rights In The Workplace	National Employment Lawyers Association Conference	June 24, 2015
Save Time and Money - Settle Early	EEOC Excel Conference	August 2015
Class is in Session	EEOC Excel Conference	August 2015
When, Where, and How Do I File? and Other Select Administrative Agency Filing Issues	Metropolitan Washington Employment Lawyers Association Conference, Washington DC	March 4, 2016
Recent Developments in Representing Federal Employees: EEOC'S Management Directive 110	National Employment Lawyers Association Spring Conference, Boston	April 9, 2016
Guiding Federal Employees Through A Complex Landscape	National Employment Lawyers Association Conference	June 2018
Settlement Strategies in EEOC Cases or the Early Bird Gets the Worm	EEOC Excel Conference	June 2018
Litigating Class Actions Before the EEOC	EEOC Excel Conference	July 11, 2018

<u>Title</u>	<u>Place/Audience</u>	<u>Date(s) of Speech</u>
Negotiating and Drafting Effective Settlement Agreements	American Bar Association, Federal Sector Labor and Employment Committee Midwinter Meeting, Washington, DC	March 11, 2019
Changes to Reaching Resolutions Under Executive Order 13839	Federal Circuit Bar Association MSPB Conference	May 15, 2019
The Current Administration's Impact on the Federal Workforce	American Bar Association, Labor and Employment Section Conference, New Orleans	November 2019
Changing currents: Safe for Work? The New Landscape in LGBTQ Law	DC Bar CLE Presentation (virtual)	October 27, 2020
MWELA Brown Bag: New Montgomery County Harassment Law	Metropolitan Washington Employment Lawyers Association (webinar)	November 18, 2020
LGBT Litigation Update Post- <i>Bostock v. Clayton County, Georgia</i>	Metropolitan Washington Employment Lawyers Association Conference, Washington DC (virtual)	March 4, 2021
Montgomery County's Updated Human Rights Law: New Workplace Provisions, Enforcement Priorities, and Best Practices for Trial	Metropolitan Washington Employment Lawyers Association (webinar)	April 15, 2021

9. Criminal History

Since (and including) your 18th birthday, has any of the following happened?

- Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Exclude citations involving traffic infractions where the fine was less than \$300 and did not include alcohol or drugs.)
No.
- Have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official?
No.
- Have you been charged, convicted, or sentenced of a crime in any court?
No.
- Have you been or are you currently on probation or parole?
No.
- Are you currently on trial or awaiting a trial on criminal charges?
No.
- To your knowledge, have you ever been the subject or target of a federal, state or local criminal investigation?
No.

If the answer to any of the questions above is yes, please answer the questions below for each criminal event (citation, arrest, investigation, etc.). If the event was an investigation, where the question below asks for information about the offense, please offer information about the offense under investigation (if known).

A) Date of offense:

- a. Is this an estimate (Yes/No):

B) Description of the specific nature of the offense:

C) Did the offense involve any of the following?

- 1) Domestic violence or a crime of violence (such as battery or assault) against your child, dependent, cohabitant, spouse, former spouse, or someone with whom you share a child in common: **Yes / No**
- 2) Firearms or explosives: **Yes / No**
- 3) Alcohol or drugs: **Yes / No**

D) Location where the offense occurred (city, county, state, zip code, country):

E) Were you arrested, summoned, cited or did you receive a ticket to appear as a result of this offense by any police officer, sheriff, marshal or any other type of law enforcement official: **Yes / No**

- 1) Name of the law enforcement agency that arrested/cited/summoned you:

- 2) Location of the law enforcement agency (city, county, state, zip code, country):
- F) As a result of this offense were you charged, convicted, currently awaiting trial, and/or ordered to appear in court in a criminal proceeding against you: **Yes / No**
- 1) If yes, provide the name of the court and the location of the court (city, county, state, zip code, country):
 - 2) If yes, provide all the charges brought against you for this offense, and the outcome of each charged offense (such as found guilty, found not-guilty, charge dropped or "nolle pros," etc). If you were found guilty of or pleaded guilty to a lesser offense, list separately both the original charge and the lesser offense:
 - 3) If no, provide explanation:
- G) Were you sentenced as a result of this offense: **Yes / No**
- H) Provide a description of the sentence:
- I) Were you sentenced to imprisonment for a term exceeding one year: **Yes / No**
- J) Were you incarcerated as a result of that sentence for not less than one year: **Yes / No**
- K) If the conviction resulted in imprisonment, provide the dates that you actually were incarcerated:
- L) If conviction resulted in probation or parole, provide the dates of probation or parole:
- M) Are you currently on trial, awaiting a trial, or awaiting sentencing on criminal charges for this offense: **Yes / No**
- N) Provide explanation:

10. Civil Litigation and Administrative or Legislative Proceedings

(A) Since (and including) your 18th birthday, have you been a party to any public record civil court action or administrative or legislative proceeding of any kind that resulted in (1) a finding of wrongdoing against you, or (2) a settlement agreement for you, or some other person or entity, to make a payment to settle allegations against you, or for you to take, or refrain from taking, some action. Do NOT include small claims proceedings.

No.

<u>Date Claim/Suit Was Filed or Legislative Proceedings Began</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>

(B) In addition to those listed above, have you or any business of which you were an officer, director or owner ever been involved as a party of interest in any administrative agency proceeding or civil litigation? Please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

<u>Date Claim/Suit Was Filed</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>
9/7/2007	United States District Court for the District of Columbia	Iris Croft Wood (P) Irving Kator, Michael Kator, Cathy Harris, Kator Parks & Weiser (Ds)	Tort/Malpractice	Voluntary Dismissal by Plaintiff, no settlement, no findings.

(C) For responses to the previous question, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

Please see attached.

11. Breach of Professional Ethics

- (A) Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, professional association, disciplinary committee, or other professional group? Exclude cases and proceedings already listed.

No.

<u>Name of Agency/Association/ Committee/Group</u>	<u>Date Citation/Disciplinary Action/Complaint Issued/Initiated</u>	<u>Describe Citation/Disciplinary Action/Complaint</u>	<u>Results of Disciplinary Action/Complaint</u>

- (B) Have you ever been fired from a job, quit a job after being told you would be fired, left a job by mutual agreement following charges or allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?

No.

12. Tax Compliance

(This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

REDACTED

13. Lobbying

In the past ten years, have you registered as a lobbyist? If so, please indicate the state, federal, or local bodies with which you have registered (e.g., House, Senate, California Secretary of State).

No.

14.

Outside Positions

√ See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

For the preceding ten calendar years and the current calendar year, report any positions held, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

<u>Name of Organization</u>	<u>Address of Organization</u>	<u>Type of Organization</u> (corporation, firm, partnership, other business enterprise, other non-profit organization, educational institution)	<u>Position Held</u>	<u>Position Held From</u> (month/year)	<u>Position Held To</u> (month/year)
Kator, Parks, Weiser & Harris, PLLC	1200 18 th Street NW Suite 1000 Washington DC 20036	PLLC	Co-Manager/Member	2005	present

15.

Agreements or Arrangements

√ See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

As of the date of filing your OGE Form 278, report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment.

Provide information regarding any agreements or arrangements you have concerning (1) future employment; (2) a leave of absence during your period of Government service; (3) continuation of payments by a former employer other than the United States Government; and (4) continuing participation in an employee welfare or benefit plan maintained by a former employer other than United States Government retirement benefits.

<u>Status and Terms of Any Agreement or Arrangement</u>	<u>Parties</u>	<u>Date</u> (month/year)

16. Additional Financial Data

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

REDACTED

SIGNATURE AND DATE

I hereby state that I have read the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.



This 29th day of June 2021

REDACTED

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

July 2, 2021

The Honorable Gary C. Peters
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Cathy Harris, who has been nominated by President Biden for the positions of Member and Chair, Merit Systems Protection Board.

We have reviewed the report and have obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

DAVID APOL

Digitally signed by DAVID
APOL
Date: 2021.07.02 11:03:44
-0400

David J. Apol
General Counsel

Enclosures

REDACTED

April 27, 2021

Tristan L. Leavitt
Designated Agency Ethics Official
U.S. Merit Systems Protection Board
1615 M Street, N.W.
Washington, DC 20419

Dear Mr. Leavitt:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Member and Chair of the Merit Systems Protection Board. It is my responsibility to understand and comply with commitments outlined in this agreement.

SECTION 1 – GENERAL COMMITMENTS

As required by the criminal conflicts of interest law at 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the particular matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me:

- Any spouse or minor child of mine;
- Any general partner of a partnership in which I am a limited or general partner;
- Any organization in which I serve as an officer, director, trustee, general partner, or employee; and
- Any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

In the event that an actual or potential conflict of interest arises during my appointment, I will consult with an agency ethics official and take the measures necessary to resolve the conflict, such as recusal from the particular matter or divestiture of an asset.

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the regulatory exemption for diversified mutual funds and unit investment trusts at 5 C.F.R. § 2640.201(a), obligations of the United States, or municipal bonds.

I will receive a live ethics briefing from a member of the ethics office after my confirmation but not later than 15 days after my appointment pursuant to the ethics program.

regulation at 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will submit my Certification of Ethics Agreement Compliance which documents my compliance with this ethics agreement.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order No. 13989) and that I will be bound by it. Among other obligations, I will be required to recuse from particular matters involving specific parties involving my former employer or former clients for a period of two years after I am appointed, with the exception of federal, state and local government.

I will not modify this ethics agreement without your approval and the approval of the U.S. Office of Government Ethics pursuant to the ethics agreement requirements contained in the financial disclosure regulation at 5 C.F.R. § 2634.803(a)(4).

SECTION 2 – KATOR, PARKS, WEISER & HARRIS, PLLC

I am a co-manager of and equity participant in the law firm of Kator, Parks, Weiser & Harris, PLLC. Upon confirmation, I will withdraw from the firm, and the firm will change its name to “Kator, Parks, Weiser & Wright, PLLC.” I currently have an interest in several contingency and lodestar fee cases. The firm has agreed to purchase my interest in these cases in exchange for a lump sum payment. The firm will make a second lump sum payment to purchase my equity interest in the firm and to liquidate my claims to a share of the firm’s profits for services performed through the date of my withdrawal. I will receive these payments before I assume the duties of Member and Chair. After receiving these payments, I will be owed no further payments from the firm.

Pursuant to the impartiality regulation at 5 C.F.R. § 2635.502, for a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know the firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

SECTION 3 – SPOUSE EMPLOYMENT

My spouse is employed by Bullis School in a position for which my spouse receives a fixed annual salary and a bonus tied to my spouse’s performance. Pursuant to the impartiality regulation at 5 C.F.R. § 2635.502, for as long as my spouse continues to work for Bullis School, I will not participate personally and substantially in any particular matter involving specific parties in which I know Bullis School is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

SECTION 4 – PUBLIC POSTING

I have been advised that this ethics agreement and the Certification of Ethics Agreement Compliance will be posted publicly, consistent with the public information law at 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,



Cathy Harris

**U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-hearing Questionnaire
For the Nomination of Cathy Ann Harris to be
Chair, Merit Systems Protection Board**

I. Nomination Process and Conflicts of Interest

1. Did the President give you specific reasons why he nominated you to serve as Chair of the Merit Systems Protection Board (MSPB)?

No.
2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

No.
3. Have you made any commitments with respect to the policies and principles you will attempt to implement as Chair of the MSPB? If so, what are they, and to whom were the commitments made?

No.
4. Has the President or his staff asked you to sign a confidentiality or non-disclosure agreement?

No.
5. Has the President or his staff asked you to pledge loyalty to the President or the Administration?

No.
6. Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.

As I have represented federal employees before the MSPB, I have cooperated with the MSPB's Ethics Attorney and the Office of Government Ethics in providing information regarding those matters. I will follow the MSPB's existing procedures to ensure I am recused from such matters. The recusal of one Board member from a particular matter does not prevent the matter from being adjudicated by the other

two members of the Board. In addition, consistent with the Ethics Agreement I signed, I will be recused from matters involving my law firm for a set period.

7. Have you ever represented a party in a matter before or involving the MSPB? If so, please describe the matter(s) and the nature of the representation.

Yes. I have represented many federal employees before the MSPB over the past 22 years in both Initial Appeals before MSPB Administrative Judges in most, if not all, of the regional offices, and in Petitions for Review before the full Board. I have more fully described the range of matters in my responses below. I have also represented several federal agencies before the MSPB as outside counsel. On one occasion, I represented the MSPB as outside counsel in a matter that was pending before the EEOC.

8. Please provide the name of any individual, law firm, consulting firm, lobbying firm, public relations firm, or other entity you have formally retained or contracted with regarding this nomination, including any amounts paid in fees or otherwise.

None.

9. During your tenure as a co-manager and equity participant in the law firm of *Kator, Parks, Weiser & Harris, PLLC*, have you or the firm, ever represented a company headquartered outside the United States? If so, please provide the name of the client, along with a description of the matter(s) and the nature of the representation.

No.

10. Are you aware of any MSPB matters brought against one or more of your current partners at *Kator, Parks, Weiser & Harris, PLLC*?

No.

II. Background of the Nominee

11. What specific background and experience affirmatively qualify you to be Chair of MSPB?

Over the past 22 years, I have focused my legal practice on employment and civil rights law, principally in the federal sector. I have litigated cases before the MSPB, EEOC and in the federal courts. I represented federal employees with whistleblowing complaints, and other complaints of prohibited personnel practices before the United States Office of Special Counsel. Additionally, I have represented many federal employees in pre-disciplinary actions, including written and oral replies, and have negotiated many pre-disciplinary settlements. I have also represented employees in investigations conducted by Offices of Inspector General,

the Council of the Inspectors General on Integrity and Efficiency (CIGIE), the U.S. Office of Special Counsel and in internal agency investigations. I have also represented federal employees in matters before the U.S. Court of Federal Claims, including Equal Pay Act and other pay claims.

Through my practice, I have gained extensive knowledge of the substantive legal issues that are considered by the MSPB. I have litigated, for example, adverse actions, including removals, suspensions, demotions, reductions in pay, and constructive actions; actions against Administrative Law Judges, performance actions under both Chapters 43 and 75 of Title 5, U.S. Code, whistleblower cases both as affirmative defenses to adverse actions and in Individual Rights of Action; reductions in force; suitability; USERRA and VEOA cases; annuity cases including disability retirement, spousal annuities, same-sex spousal annuities, and annuity miscalculations; mixed-cases involving allegations of discrimination, including race, sex, sexual orientation, religion, age, disability, marital status, harassment and reprisal; and law enforcement officer retirement cases. I have also handled Special Panel cases, which occur when the MSPB and the EEOC disagree upon a decision in a mixed case. I have engaged in mediation at the Board before Administrative Judges and with the Board's mediators at Headquarters and in the Regional Offices. In addition, I have litigated enforcement actions for breaches of settlement agreements and Board decisions.

I have also represented numerous large and small federal agencies as outside counsel before the MSPB and EEOC. I have also been hired as outside counsel by agencies to conduct investigations regarding sexual harassment and other matters.

I am well-versed in Board procedures, including the filing of appeals, discovery, motion practice, dismissals without prejudice, hearings, appeals, settlements and enforcement proceedings. I have litigated complex actions before the MSPB in consolidated matters with over 100 appellants, culminating in probably one of the lengthiest hearings in MSPB history. I represented employees in novel legal issues involving LGBT discrimination and same-sex spousal annuities, including one matter that was part of the underlying legal effort regarding the Defense of Marriage Act, culminating in the Supreme Court's decision in *United States v. Windsor*.

My practice before the EEOC is quite varied, including representation of federal employees in discrimination matters involving race, sex, disability, religion, age, sexual orientation, and reprisal. I also have extensive experience in litigating and resolving federal sector class actions on behalf of federal employees before the EEOC. These matters are complex, involve hundreds to thousands of employees, and take many years of effort. I have been certified as class counsel by the EEOC in at least five class actions. I am particularly proud of my efforts in resolving several class actions, including crafting settlements that were then approved by the EEOC as fair to the class as a whole. In addition, I litigated and won a class-wide finding of discrimination in what I understand is the longest-standing class action before the

EEOC. In that case, I represented a class of female Special Agents who were found to have been discriminated against by the DEA in the early 1990s with respect to foreign assignments. I have been litigating that case since I started at my firm in 1999 and continue to work on the relief portion of the case to this day. I have also litigated cases under the Freedom of Information Act and the Privacy Act on behalf of federal employees. I also have experience in security clearance and suitability matters.

I have engaged in extensive appellate practice before the MSPB, EEOC's Office of Federal Operations, and in various federal courts of appeals, including the United States Court of Appeals for the Federal Circuit.

In representing scores of federal employees, and at times, agencies, I have gained not only expertise in personnel law, but also a broad understanding of the functions and operations of our federal workforce. I have represented, among others, air traffic controllers, meteorologists, doctors, scientists, nurses, chaplains, mail carriers, addiction therapists, budget analysts, accountants, engineers, teachers, diplomats, those in the intelligence community, prison guards, law enforcement officers, and administrative judges. In doing so, I have come to appreciate the dedication and commitment of our civil service, and I truly believe that career civil servants are the backbone of our government.

In addition to my practice in the federal sector, I have represented employees and employers in private-sector employment matters, including discrimination, terminations, and contract negotiations. I have extensive experience in resolving private-sector cases through alternative dispute resolution. I have also conducted lengthy independent investigations on sexual harassment and other issues for both private sector employers and federal agencies.

I have presented at numerous national and regional employment law conferences over the years, which are detailed in my prior submissions. Of note, the Metropolitan Washington Employment Lawyer's Association named me as "Attorney of the Year" in 2010, and I have received other accolades from organizations such as Best Lawyers and Super Lawyers. As co-chair of the Federal Circuit Bar Association's MSPB Committee, I pioneered a pro bono program to assist federal employees in need of counsel in Federal Circuit appeals and before the MSPB. In doing so, we were able to pair pro bono counsel with MSPB appellants who were otherwise unable to secure counsel.

In law school, I gained formative federal-sector employment law experience in working at the Government Accountability Project, which represents federal employee whistleblowers, and in interning for an Administrative Judge at the EEOC. Last, as an Assistant District Attorney in New York County early in my legal career, I gained experience as a criminal prosecutor under District Attorney Morgenthau. That experience was invaluable in terms of courtroom exposure and

education, case evaluation and litigation, management of a large docket of cases and in employment disciplinary cases.

12. What experience, if any, do you have in deciding cases, resolving disputes, or performing the other duties required in serving as Chair of the MSPB?

I do not have experience in personally deciding cases, but have litigated many cases to decision, including before juries, judges and administrative judges. At times, Administrative Judges ask the parties to draft proposed orders or findings of fact and conclusions of law, and I have done so on many occasions. As such, I am quite familiar with the difference in writing persuasive briefs versus adjudicative decisions.

I have extensive experience in resolving disputes as an advocate on behalf of my clients, both in mediation with public and private mediators, and in settlement conferences. As mentioned above, I have taken the lead in crafting complex class action settlement agreements that have been approved by the EEOC. Last, as an intern at the EEOC for an Administrative Judge, I assisted in drafting decisions and participated in EEOC hearings.

13. Please describe:

- a. Your leadership and management style.

I am a collaborative leader who values the opinions and ideas of my colleagues. At the same time, I am decisive and practical. I am energetic and positive, and genuinely enjoy the practice of federal-sector employment law. I try to capitalize on the strengths of my colleagues and will also work with them in a constructive manner to improve performance when necessary. I am a stickler for well-written and thoroughly researched legal briefs. I am mission-driven and encourage those who work for me to share a common vision toward achieving justice. I believe in kindness and collegiality in the legal profession. I abhor discrimination, harassment, and retaliation, and will not tolerate it in the workplace.

- b. Your experience managing personnel.

As the co-manager of a law firm, I manage and supervise the associate attorneys, law clerks, and staff. I manage attorneys in litigation, including as lead counsel in complex class actions. I also have responsibility for managing matters including billing, benefits, performance, intake, and the various tasks necessary for a law firm to operate. During the pandemic, I coordinated and managed the remote working operations of our firm, ensuring that our lawyers had the necessary resources to continue effective operations.

c. What is the largest number of people that have worked under your supervision?

Approximately nine people at one time. In addition, in litigating class actions, I have represented thousands of employees, which required skills akin to personnel management.

14. Why do you want to serve as Chair of MSPB?

Having dedicated my career to federal-sector employment law, I am a firm believer and supporter of the merit system in the Federal government. I wholeheartedly believe that the merit system principles make our civil service better, more efficient, more qualified, and accountable to the taxpayers. Due to my practice, I have the substantive legal knowledge to render fair and equitable decisions. Because of the unique opportunities I have had to represent both federal employees and federal agencies, I am able to see both sides and render impartial, just decisions.

I have been distressed by the lack of quorum at the Board for the past four years as I know how burdensome it has been on federal employees and agencies seeking adjudication and justice. Employment is an essential aspect of not only economic stability but also, in virtually all instances, one's personal identity. Federal employees and managers have relied for many decades on having a reliable, independent, and efficient Board to adjudicate disputes and protect the merit system. The lack of certainty as to when the Board would regain a quorum and the growing backlog have unfortunately eroded morale and faith in the merit system. I am motivated to restore that trust in a manner that enhances the functionality of the federal service and provides justice to all—the employees and the agencies—who depend upon the MSPB.

I keep thinking about the employees who won removal cases at the Initial Appeal level four or more years ago, were denied interim relief, and have been forced to wait for decision when the Agency petitioned for review. I think about the retirees who sought and were denied disability retirement who may have meritorious appeals pending before the MSPB who are being denied their rightful benefits, including health insurance. I think about the whistleblowers who have experienced retaliation and would have been able to have formal stays sought by the Office of Special Counsel but for the lack of quorum at the Board. Although certainly not every appeal will be meritorious, my heart goes out to those who will ultimately be successful on appeal and who have had to wait so long. All parties before the MSPB deserve answers so that they may move on with their lives and, in some cases, obtain the relief that has been long overdue.

15. What would you consider your greatest successes as a leader?

I have had the good fortune to be able to mentor and train associates and see them develop into successful, brilliant, and formidable advocates.

16. What would you consider your greatest failure as a leader? What lessons did you take away from that experience?

In litigation as lead counsel, I have not won all my cases. As I am very dedicated to my clients and the pursuit of justice, those losses felt like failures. My mentor at my firm, the late Irving Kator, once told me after a particularly bruising loss, that lawyers who win all their cases are likely not taking difficult cases, and therefore, are not doing their full service to the community. That had a marked impression on me and led me to take more difficult and challenging cases. I have also seen over the years that some of my unsuccessful legal arguments made ten years prior have later become successful as time has passed and the law has evolved.

17. Please give examples of times in your career when you disagreed with your superiors and advocated your position. Were you ever successful?

As an associate at my firm, there were many times when I disagreed on legal strategy with the partners. We would debate and respectfully discuss our differences and ultimately come up with a good solution. Sometimes I convinced my colleagues, and other times my colleagues convinced me. I believe that healthy and respectful disagreement can lead to better outcomes in litigation.

18. Do you seek out dissenting views and encourage constructive critical dialogue with subordinates? Please provide examples of times in your career when you have done so.

Yes. Because I was appreciative of the ability to have open and frank conversations with my superiors when I was an associate, I have employed the same practice with my associates. It is important as a litigator to be able to anticipate dissenting views so that one can most effectively advocate for one's client.

19. Please list and describe examples of when you made politically difficult choices that you thought were in the best interest of the country or your organization.

When federal employees were required to work without pay during the government shutdown in 2018, I convinced my law partners to file a civil action seeking injunctive relief for our clients. We knew that the case was a challenge and that we were unlikely to be renumerated for our work. We also knew it would take countless hours of attorney time to even get the matter filed. Yet, because we believed the matter was so important, we chose to take the matter to Federal Court to do our best to bring attention to the plight of so many being forced to work with no pay. I thought it was in the best interest of our country to advocate for immediate compensation for the civil servants who were so selflessly serving our country.

20. Please describe how you build credibility and trust among staff as a leader.

I strive to always listen to my staff and hear their concerns and ideas. I believe in transparency and have always had an open-door policy. I consider my staff's perspective even when I think I will disagree. I try to lead by example. In taking pride in my work and that of my firm, I encourage others to do the same.

21. During your career, has your conduct as a government employee ever been subject to an investigation or audit by the Office of Special Counsel, Department of Justice, agency Equal Opportunity office or investigator, agency Inspector General, or any other similar federal, state, or local investigative entity? If so, please describe the nature of the allegations/conduct and the outcome(s) of the investigation(s) or audit(s).

No.

22. Have you ever represented a whistleblower or other employee in an adversarial dispute against the federal government?

Yes. As discussed above, I have represented many federal employees in adversarial disputes before the MSPB, EEOC, Office of Special Counsel, before various Offices of Inspector General, and in the federal courts.

23. Do you have experience addressing instances of prohibited personnel practices (PPPs)? If so, please generally describe your experience.

Yes. As an advocate for federal employees, I have represented many federal employees in cases in which there were allegations of prohibited personnel practices. Most frequently, my cases involve allegations of violations of 5 U.S.C. 2302(b)(1)—discrimination. In addition, most of my whistleblower retaliation cases involve violations of 2302(b)(8), (9) and (12). I have also handled matters involving violations of 2302(b)(14). I am sure that other PPPs have come up in my cases.

24. Please describe any previous experience—in the public or private sector—with handling whistleblower complaints, and what steps you took to ensure those individuals did not face retaliation and that their claims were thoroughly investigated?

I have handled dozens of whistleblower cases on behalf of federal employees before OSC and the MSPB. It was my job to advocate against retaliation and to work with OSC to ensure their cases were thoroughly investigated. I have been successful in getting OSC to investigate many matters and have enjoyed working with OSC's staff toward resolution. I am familiar with the practice of seeking stays from OSC and have been successful in doing so on numerous occasions. I advise my clients as to the avenues to report reprisal, and I have supported them in doing so. OSC has used my initial complaint in one matter as a model for other attorneys as to what assists OSC in accepting a claim for investigation.

25. Do you have any experience adjudicating matters? Please explain.

I have not personally served as an adjudicator, having been an advocate for over two decades.

26. MSPB functions as an independent, third-party adjudicatory authority for employee adverse actions (e.g., removals, suspensions for more than 14 days, and furloughs) and retirement decisions. Please describe your experience in developing adjudicatory processes and procedures, issuing subpoenas, calling witnesses, and enforcing decisions.

In my litigation practice, I have taken hundreds of depositions and called hundreds of witnesses at various hearings and trials before the MSPB, EEOC and in the federal courts. As an attorney, I have issued subpoenas for federal court matters consistent with the Federal Rules of Civil Procedure. I have also sought and received approval for subpoenas, in accordance with MSPB procedure, for MSPB hearings, depositions and for subpoenas duces tecum. I have developed adjudicatory processes in coordination with opposing counsel in many matters, as judges typically require joint prehearing statements with agreements on presentation of witnesses, scheduling, and other trial matters. I have also developed adjudicatory processes in structuring class action settlements, as referenced above. I have litigated many matters seeking enforcement of settlement agreements or of decisions, both in complex litigation and individual matters.

27. Through your experience, what practices would you consider vital to managing a federal workforce?

Consistent with the mission of the MSPB, I believe that adherence and enforcement of the merit system principles are vital to managing a federal workforce. From personal experience, I believe that equity and transparency are vital management skills for all organizations.

28. How will your experience help MSPB maintain MSPB's Merit Systems Principles (MSPs)?

As an advocate who has litigated strenuously over the years in support of the merit system principles, I believe my experience will help the MSPB maintain those principles for both its own staff as well as the federal workforce.

III. Role of Chair, MSPB

29. The Civil Service Reform Act requires that individuals appointed to the MSPB "demonstrate[] [the] ability, background, training, or experience" necessary to "carry out functions of the Board."¹ Please describe how your abilities, background, training, and experience qualify you for the position of Chair of the MSPB.

¹ 5 U.S.C. § 1201.

As described above, I have developed expertise in the substantive and procedural legal issues considered by the Board. Having represented both federal employees and agencies before the Board, I have gained experience in understanding the issues faced by both employees and managers. My extensive trial, administrative hearing, and appellate experience also prepares me to properly adjudicate appeals at the Board level. I am well-versed in both simple and complex federal-sector litigation. I am one of the few attorneys in the country to have been approved to serve as class counsel in federal-sector class actions before the EEOC. I am a confident and experienced public speaker, and I have conducted many presentations for bar associations. I have also trained administrative judges at the EEOC on class action matters. I am enthusiastic and committed to restoring the functionality of the Board. I will do everything I can to resolve the backlog of cases that have amassed over the past four years.

30. In your opinion, what is the role of the MSPB? What is the role of Chair in carrying out the statutory objectives of the MSPB?

The role of the MSPB is set by statute, including to adjudicate all matters within the jurisdiction of the Board, to conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected. The Board also has the authority to review the rules and regulations of the Office of Personnel Management. The mission of the Board is, ultimately, to protect the merit system, and all its myriad duties are to promote that mission.

The statute provides that the Chair is the chief executive and administrative officer of the Board. 5 U.S.C. 1203(a). The Chair is also responsible for appointing such personnel as may be necessary to perform the functions of the Board. 5 U.S.C. 1204(j). As such, the Chair is ultimately responsible for ensuring that the statutory objectives are carried out efficiently, properly, and effectively.

31. MSPB's mission is to "protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." How do you envision fulfilling MSPB's mission both day-to-day, and long-term?

The Board can best fulfil the mission of the MSPB by effectively and efficiently adjudicating cases within the Board's jurisdiction, as well as continuing to conduct studies regarding the federal workforce. As discussed elsewhere in this questionnaire, there is an immediate need of a plan to deal with the considerable backlog caused by the lack of quorum, and I will make it my utmost priority to do so if I am confirmed. In addition, the Board must resolve the Constitutional issues regarding the proper appointment of the Administrative Judges so that initial

appeal case processing may resume. Vacant positions should be filled expeditiously so that the Board may function at full force.

32. What do you anticipate being the greatest challenge you would face as Chair of the MSPB, and how do you plan to address those challenges if confirmed?

I anticipate that the greatest challenge is the backlog of cases at the Board level due to the lack of quorum for the past four years. There are more than 3000 cases that need to be adjudicated by the Board members. If confirmed, I will make it my paramount priority to execute a plan to adjudicate the backlog of cases.

Obviously, modifications will need to be made so that the cases can be processed at a faster pace than is typical in the absence of a backlog. At the same time, the quality of decisions should not be compromised. To achieve a reasonable balance of these competing objectives, I plan to consult with the staff of the MSPB, including those in the Office of Appeals Counsel, to hear their ideas and proposed plans for prompt adjudication of cases. My strong belief is that the existing staff at the Board will have the best ideas as to how to promptly issue quality decisions. If confirmed, I would review the data regarding the outstanding cases and, in conjunction with MSPB staff and the other Board members, develop a triage plan to sort cases for adjudication. Likely factors will include the age of the case, the relative importance of the matter (for example, removals; cases alleging discrimination; whistleblower retaliation cases; disability retirement cases; and those alleging Constitutional due process violations), cases that may have precedential value, and cases that are relatively simple to resolve (timeliness issues, lack of jurisdiction).

In addition, I would explore the efficacy of utilizing the “short-form” decision, similar to those utilized in federal court when an appellate body simply affirms or reverses the underlying decision. Not every appellate decision at the MSPB requires extensive analysis, and if the Board members can simply agree on an up or down vote on some cases, it should allow some of the back log to be processed more swiftly.

Last, if confirmed, I would employ a robust effort to ascertain whether the pending cases are appropriate for ADR. As time has passed and circumstances may have changed, it would be a good use of the Board’s resources to contact the parties in which cases are pending and encourage use of the Board’s mediation procedures.

33. Do you believe you will review and adjudicate cases that come before you with good judgment and impartiality? Please explain, citing examples of prior work or experience that could bear on your abilities, if applicable.

Yes. Having had the experience of representing both federal employees and federal agencies, I have developed a balanced approach to my evaluation of cases. In addition, I have had the good fortune to be very selective in the cases I take. In doing so, I have developed expertise in analyzing cases from an impartial

perspective. In addition, because I believe very firmly in the principles of our legal system, I understand the difference between being an advocate and an adjudicator. Agencies and employees deserve to have Board members who can adjudicate cases with objective impartiality and will apply the law properly.

34. The MSPB is an independent executive branch agency. What role should Board Members, including the Chair, play in safeguarding MSPB's independence?

The Board members should ensure that they each safeguard MSPB's independence by exercising independent judgment in all matters being adjudicated and regarding approval of the studies issued by the Board.

In particular, the Chair, as the chief executive and executive officer of the Agency, must ensure that the Agency retains its independence in all its functions. In particular, the prompt resolution of the *Lucia* issues regarding the appointment of the Administrative Judges will enable the Agency to retain its independent adjudicative authority. Generally, I would ensure that the federal workforce understands that the Board is and will remain independent to ensure that those employees who seek relief from the MSPB will have confidence that the Board will render a true, just, and expeditious decision in their cases.

35. If confirmed as Chair, you could delegate certain responsibilities. Please describe how your experience will assist you in delegating authority in an efficient manner. What responsibilities would you maintain for yourself?

As the co-manager of a law firm, I value and understand the benefit of effective delegation. It would have been impossible for our firm to be successful in our cases without delegating responsibilities. As Chair of the Board, I would, of course, maintain the independent responsibility of adjudicating decisions. In addition, although I may delegate some of the work necessary to maintain the Board's statutory obligations, I would retain ultimate responsibility over those decisions as the chief executive of the Board.

36. Do you believe it is important for the Chair to act as a consensus builder among the Board? Do you believe unanimous rulings are better than non-unanimous rulings? If so, what will you do to build bridges with your colleagues from different ideological positions?

Yes, the Chair should act as a consensus builder, whenever possible. Unanimous decisions are preferable because they provide more certainty in terms of establishing precedent, but unanimous decisions are not always possible. Dissent is a respected and important tradition in our legal system and serves an important and valuable purpose. In short, I would respect the individual opinions of the other Board members but do my best to find areas of consensus. Because I am sure that the Board members will share a common interest in protecting the merit system and opposing prohibited personnel practices, I believe that consensus should be

achievable in all but the most controversial cases. I will encourage collegiality and collaboration, consistent with the Government in the Sunshine Act, to achieve consensus when possible.

IV. Policy Questions

Management & MSPB Workforce

37. How do you view the role of information technology at MSPB as it relates to both day-to-day business and the overall mission objectives to uphold merit systems principles?

Information technology is vital to the functioning of the Board with respect to both day-to-day business and the overall mission of the Board. In my opinion as a practitioner, the MSPB has an excellent e-filing system that is useful and efficient for litigation. However, I know that some pro se appellants may have more difficulty in utilizing the system and such concerns will need to be addressed. The Board has recently revamped its website, which went live in July 2021. Providing accessible and up-to-date information to the public through this new website will assist in both day-to-day operations and overall mission objectives.

I am interested in getting familiar with the Board's business application modernization effort, which began in 2018, which will consolidate case processing, document management, document assembly, media management and public facing applications into a single application. As piloting of this application will be occurring this year, I am looking forward to learning more about this effort.

38. According to MSPB's Fiscal Year 2021 annual report, over 31 percent of MSPB employees, including almost 45 percent of adjudication managers, are eligible to retire between now and the end of 2022.² What steps will you take to ensure that MSPB conducts its own succession planning, so that you are able to execute your statutory duties?

I would first consult with the Board's staff to learn about the current succession planning efforts. Of course, an employee's retirement eligibility does not necessarily translate to an intention to retire, and my firm belief is that retention of experienced employees is beneficial to the operations of an agency. I will do everything I can to improve the morale of the Agency and encourage the productive and experienced employees to continue to advance the mission of the Agency. In addition, I will ensure that strong recruitment efforts are made, in accordance with the law, to ensure that vacant positions are filled expeditiously and with qualified candidates.

² Merit Systems Protection Board, Annual Report for FY 2021 (May, 2021) at 9, *available at* <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1835904&version=1842212&application=ACR> OBAT

39. If an accusation of discrimination were to arise within an office under your management, what actions would you take to address such an accusation?

I would encourage the use of the Board's existing processes, required by statute, to address claims of discrimination. I would ensure that the entire staff is informed and trained regarding the existing procedures, emphasize the importance of anti-retaliation, ensure anonymity to the extent possible to allow those who fear reprisal to come forward, and encourage and expand, as necessary, early dispute resolution options. In cases of harassment and hostile work environment, whether sexual or on other prohibited bases, I would ensure that investigations are conducted competently and thoroughly and would instruct the managers to take appropriate prompt and remedial action to meet the Agency's legal obligations toward its staff. Last, if confirmed, it is my intention to conduct a review of the Board's Office of Equal Employment Opportunity to ensure that it meets the EEOC's criteria for a model EEO program under Management Directive 715 and the relevant statutes.

40. Do you believe MSPB has the resources it needs to meet current challenges? Please explain.

I do not currently have access to the information I would need to answer this question.

OPM & Federal Workforce Policy

41. What do you believe to be the top challenges facing the federal workforce today? What steps do you plan to take to address these challenges, if confirmed as Chair? Please explain.

With respect to the intersection between the federal workforce and MSPB, one of the most significant challenges has been the inability of the MSPB to adjudicate cases at the Board level and execute its other statutory duties due to the lack of quorum over the past four years. The federal workforce needs to be reassured that the MSPB is actively and independently protecting the merit system to ensure that prohibited personnel practices do not occur. As discussed above, if confirmed, I will make it my mission to restore the functionality of the Board. I will also ensure that it is widely known that the MSPB is a stalwart defender of the merit system. The lodestar will be that decisions will be made fairly, with the utmost integrity, and with concern for the public interest.

42. MSPB was given the authority and responsibility to review the rules, regulations, and significant actions of the Office of Personnel Management (OPM). Do you have any concerns about OPM's current rules, regulations or recent actions? If so, please describe those concerns.

Although I do not wish to opine about matters that are not yet before me, I have previously expressed concerns about the OPM regulations on settlement that were issued in October 2020. Please note that I have not analyzed whether these regulations impact merit system principles or encourage prohibited personnel practices. Rather, I have observed how these regulations impede settlement of MSPB cases. This, of course, is relevant to the backlog and the general processing of MSPB matters. Specifically, these regulations serve to prohibit “clean record” settlements in certain circumstances. The regulations emanated from an Executive Order from the previous administration. Due to the ensuing confusion amongst agencies regarding the implementation of the prior EO, OPM attempted to clarify the order in several subsequent memoranda. Eventually, in October 2020, OPM codified the Executive Order at 5 C.F.R. § 432.108 and 5 C.F.R. § 752.203(h). Although President Biden subsequently issued an Executive Order rescinding the prior Executive Order, the regulations are on the books until formally revoked.

From personal experience, I have seen how these regulations have impeded the settlement of many cases. This not only contributes to the already formidable backlog but is an impediment to fair resolution of cases. Clean record resignations are not appropriate in every case, but by taking away agencies’ ability to utilize this fact, many cases are unnecessarily and inappropriately forced into litigation.

Moreover, there are many instances when there are valid reasons for a penalty to be reduced or eliminated, but a federal agency does not feel comfortable with doing so under the limited exceptions enumerated in the regulations. Specifically, it would be unlikely for an Agency to admit that “persuasive evidence [has] come to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action.” 5 C.F.R. § 432.108(c). Agencies and employees must be provided the flexibility to resolve matters to avoid unnecessary litigation in accordance with the new Executive Order.

43. The MSPB has the statutory responsibility to conduct objective, non-partisan studies that assess and evaluate Federal merit systems policies, operations, and practices. These studies are typically government-wide in scope and ensure that the workforce is managed in accordance with MSPs and is free from PPPs. What role do you believe MSPB’s data collection should play in supporting personnel policy?

The data collected by the MSPB enables it to conduct proper analyses, statistical and otherwise, of policies and practices to ensure statutory compliance. In litigating class action cases, which also often requires collection of data, I am well aware of the importance of collecting “good” data, meaning, data that is accurate, complete, and reliable. I also understand the imperative to conduct proper analyses of such data, to ensure that the conclusions are correct. Last, and perhaps most important, I understand the importance of clear reporting of such data so that it may be understood and utilized by the President, Congress, and stakeholders to improve our merit system.

44. What role do you think merit systems studies, published by MSPB, play in ensuring a competent and efficient federal workforce?

MSPB's studies focus on matters affecting the merit system principles and concerning prohibited personnel practices, from a bi-partisan, objective perspective. The workforce is better equipped to meet its mission without the interference of illegal discrimination, partisan political interference, and other prohibited personnel practices. Adjudication alone cannot adequately address such issues. Such studies, which allow a deeper dive into broader issues, may help reveal systemic problems that are not ascertainable through the adjudicative process. Comprehensive studies can better assist Congress and the Administration in ensuring that federal personnel policy is merit-based and free from prohibited personnel practices.

- a. What steps would you take to ensure that MSPB's external reports address critical federal workforce issues?

If confirmed, I would first examine the studies and reports that have been in process during the lack of quorum and work with the other Board members to consider approval for release. I would also review the research agenda proposed by the MSPB's Office of Policy and Evaluation and ensure that the planned studies are pertinent to critical federal workforce issues. I would also consider the opinions of stakeholders as to what areas they would consider worthy of study. At heart, however, I would ensure that the studies are focused on the MSPB's mission to ensure the workforce is managed in accordance with Merit System Principles and is free from PPPs.

- b. What, if any, coordination do you believe should occur between MSPB and OPM to address federal workforce issues raised by MSPB studies?

As mentioned above, I believe that stakeholders, including OPM, should be consulted as to their ideas for future studies. I also believe that coordination should occur between MSPB and OPM once issues are identified and reported in MSPB's studies. My understanding is that the Board will communicate results of studies with stakeholders, including OPM, through formal and informal presentations in addition to the formal reporting channels. In addition, as mentioned in response to Question 45, the Board also coordinates with OPM in conjunction with its statutory mission to oversee OPM's significant actions. So long as MSPB retains its independence in accordance with its statutory mission, I see no reason why the two agencies should not be able to have productive communication regarding MSPB study results.

45. MSPB is statutorily responsible for conducting oversight of OPM's significant actions. How will you coordinate with OPM to ensure any significant actions conform to the merit systems principles outlined in 5 U.S.C. § 2301?

In continuing MSPB's current practices, I plan to work with the MSPB's Office of Policy and Evaluations in ensuring consistent and continual oversight of OPM's significant actions. My understanding from the Board is that OPE currently (1) monitors OPM policies and initiatives continually to identify potentially significant actions; (2) obtains additional information from OPM when needed; and (3) prepares an annual digest that describes OPM's actions and their possible implications for the civil service. That digest is incorporated into MSPB's Annual Report. In some cases, MSPB may review OPM actions through a formal merit systems study. If any of the MSPB's existing processes for coordination with OPM need to be improved, I will work with OPE to do so.

46. Precedents, findings, recommendations and reviews of OPM rules by the MSPB have potential to directly affect how employees are managed and how their appeals are decided. What role do you believe the MSPB should play in developing personnel policy?

The MSPB's influence on personnel policy through adjudication, review, and study should be limited to its statutory mission of ensuring adherence to the merit system principles and the eradication of prohibited personnel practices. In doing so, the MSPB will assist in ensuring a more productive, efficient, and equitable workforce.

47. In March 2018, MSPB published an updated survey on sexual harassment in the federal workforce.³ In this survey, 20.9 percent of women in the federal workforce and 8.7 percent of men experienced a type of sexual harassment in the two years preceding the survey.⁴ Only eight percent of these employees believed corrective action was taken against the individual who committed the harassment, possibly resulting in employees not using agency procedures to report the harassment.⁵ What do you believe is the role of MSPB in ensuring accountability against harassers in the federal workplace and in ensuring employees can report harassment without reprisal?

The Board's role in ensuring accountability against harassers is primarily through its adjudicative function. When Agencies take disciplinary action against alleged harassers, the employee may appeal to the MSPB for review. In my experience in representing victims of sexual harassment, I have found that in many circumstances the action taken by agencies in response is lacking. In my experience, many agencies fail to separate the harasser from the victim, causing unnecessary risk for reoccurrence and retaliation. So, too, agencies often fail to take appropriate remedial action to restore a victim to the status quo ante, such as restoring leave taken due to the harassment, and examining whether any personnel actions were taken against the victim if the harasser was in a supervisory position. Similarly, agencies do not always take measures to monitor a harasser to ensure that the

³ Merit Systems Protection Board, Update on Sexual Harassment in the Federal Workforce (Mar. 2018), available at <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT>.

⁴ *Id.* at 4.

⁵ *Id.* at 8.

behavior is not repeated. Although the MSPB cannot increase a penalty against a perpetrator as it would violate Constitutional due process protections, the MSPB should be very reticent in disturbing an agency-imposed penalty in sexual harassment cases.

So, too, when victims of harassment suffer from adverse personnel actions and then raise affirmative defenses of discrimination, i.e., “mixed cases,” the Board should take special effort to examine such matters and ensure that justice is done in the adjudicatory process. In examining such cases, the MSPB should consider the quality of the agency’s internal sexual harassment investigation. The quality of such investigations varies considerably amongst agencies. Some agencies, such as the Army, conduct mini-trials, including calling witnesses, recording testimony, and allowing for cross-examination. In other cases, agencies hire outside contractors who are paid by the investigation—not by the hour—and who thus may be incentivized to conduct quick and typically inadequate investigations. In other instances, agencies fail to conduct any internal investigation, resulting in a loss of evidence and lack of prompt corrective action. When presented with such in mixed cases, the MSPB should take special care to examine the quality of such investigations in determining the merits of the claims. The MSPB, in considering remedies, can order agencies to improve their investigative efforts and order other corrective action to ensure effective investigation of sexual harassment.

The MSPB also has a role in corrective action for sexual harassment in considering disciplinary actions brought by the Office of Special Counsel. Because discrimination is a prohibited personnel practice, OSC is authorized to investigate and seek corrective and disciplinary actions against sexual harassers. However, OSC has long maintained that because procedures have been established within agencies and the EEOC for investigation of discrimination complaints, it follows a general policy of deferring complaints involving discrimination to those other agencies’ procedures. But given the conflicts of interest described below and the overwhelming interest in eradicating sexual harassment in the federal workforce, OSC should be encouraged to use its authority to bring such actions against harassers, particularly in cases when agencies have obviously failed to take any action.

It is a common perception of practitioners before the MSPB that it is very difficult to prove affirmative defenses of discrimination, and that agencies win in the vast majority of cases. While it is my experience that many cases, including mixed cases with strong evidence of discrimination, settle prior to adjudication, it is worth analyzing to ascertain whether the perception is correct. I intend to carefully review all mixed cases at the appellate level to ensure that proper analysis of the affirmative defenses has been conducted. In addition, I will encourage supplemental training on mixed cases for the MSPB’s adjudicatory staff to ensure that proper legal analysis is being conducted at the initial appeal level.

Last, I may recommend additional areas of study to attempt to more closely analyze the issues I have identified above. For example, one of the more troubling practices is when agencies, in engaging in the disciplinary process in cases of harassment, tend to undercharge, meaning they label the misconduct as something less severe than sexual harassment. That is, rather than charging a harasser with “sexual harassment,” the agency will charge the individual with “inappropriate conduct.” Agencies will claim that they do so because it is easier to prove the less severe charge, but this does a grave disservice to the victim and to the agency. By selecting a lesser charge, the agency will avoid the reporting requirements under the No Fear Act. In addition, by refusing to label the behavior as sexual harassment, agencies will at times avoid routing the matter through their accountability boards which were created precisely to assist agencies in taking appropriate corrective action. In addition, it violates the agencies’ legal obligation to take effective corrective action. This would be an area ripe for examination if not covered by the Board’s current pending studies.

Another area of consideration for analysis is the conflict of interest that arises between an agency and a victim of harassment when allegations of harassment are made. Typically, the agency will take a defensive posture to attempt to avoid liability, and thus may take the position that the victim is not credible. When discrimination is ultimately found by an independent tribunal, the agency is put in a bind as taking disciplinary action against the harasser may mean reliance upon the testimony of a person who the agency previously labeled as not credible and proceeding against a manager it had previously gone to lengths to defend. Analysis through studies could be conducted to examine the prevalence of this issue, as well as methods that agencies have utilized to lessen the impact of such conflicts. For example, institutionally, agencies can lessen this conflict by reframing their approach so that investigations of harassment are done by neutral, independent, competent investigators. Agencies can also act internally to ensure that victims of harassment are not reflexively disbelieved and to encourage agencies to admit liability when warranted. In addition, agencies can reduce the likelihood of a conflict of interest by creating independent internal review boards to ensure that agencies are not shying away from disciplining employees for sexual harassment rather than utilizing a watered-down charge.

With respect to ensuring employees can report harassment without reprisal, the Board has an important role in adjudicating retaliation cases that come within its jurisdiction in mixed cases and IRAs. So, too, the Board may conduct studies regarding the reasons that employees avoid reporting harassment. For example, I would be interested to know what percentage of individuals in the cited study, who believed that corrective action was not taken against the harasser, reported the harassment. If not, it would be helpful to analyze the reporting barriers that might exist at that particular agency.

48. What steps can MSPB take to improve federal supervisors' knowledge and intra-agency support regarding disciplinary and removal processes?

The MSPB can provide clear guidance through its decisions when an agency has failed to follow proper procedures in the disciplinary process. The Board can also make precedential decisions regarding such issues. The Board can further continue to publicize these decisions and issues through presentations, its publications and on its website. In all circumstances, the Board's guidance should continue to be independent and objective.

49. In your opinion, is the underutilization of probationary periods a critical issue? If confirmed as Chair of MSPB, what steps would you take to ensure that managers better utilize probationary periods?

In my experience, managers know quite well that they may terminate an employee during the probationary period, and they are not afraid to do so. However, I am exposed to only a select group—usually where there are disputes—and as such, I am not able to analyze fully as to whether managers are effectively monitoring employee performance during probationary periods.

The Board, in some limited circumstances, is authorized to consider appeals of employees terminated during probationary periods. The Board's jurisdiction over such probationary termination appeals is limited to those situations where an employee alleges that the termination was due to discrimination based on marital status or partisan political reasons; or the agency action was based (in whole or part) on pre-appointment reasons and the agency did not follow the proper regulatory procedures. An appellant would also have jurisdiction before the Board in an Individual Right of Action that alleges that a termination during the probationary period was in retaliation for whistleblowing. It is crucial for the Board to carefully consider such appeals within its jurisdiction as the probationary period is also subject to abuse.

Simply put, it is not the role of the MSPB to encourage managers at other agencies to remove unproductive employees during their probationary period. The MSPB is charged, in limited circumstances, with reviewing appeals of termination during probationary periods, and must adjudicate those matters independently and objectively.

Adjudication & Enforcement

50. What role do you think alternative dispute resolution options, including the Mediation Appeals Program, should play in the MSPB adjudication and enforcement process?

Alternative dispute resolution should play a very important role in the MSPB adjudication and enforcement processes. ADR is an extremely productive and efficient way to achieve resolution. Settlement provides the benefit of a certain

resolution, saves money and resources, and eliminates the inherent risks of litigation. Settlement also provides employees and agencies the chance to craft an outcome that may not be within the realm of relief that the Board may grant. For example, in settlement, the parties may resolve a case through a reassignment, detail or Intergovernmental Personnel Assignment. In settlement, parties can be creative, which ultimately can lead to more satisfying results.

In my experience, the Board has long provided parties with excellent ADR services and has an experienced cadre of skilled mediators. The Administrative Judges often act as mediators. Because of the Administrative Judges' deep understanding of the law, the mediation process can be extremely effective in assisting the parties in coming to resolution. In addition, the Board has skilled staff mediators in its headquarters who have assisted parties in resolving matters at the appellate level. Given the passage of time and the interest in resolving the backlog of cases, the Board should make efforts to engage parties with pending appeals at the appellate level to ascertain whether mediation would be productive once a quorum is restored, and parties know that a decision may be impending. Similarly, due to the large number of cases that have been dismissed without prejudice at the Initial Appeal level due to concerns arising under the *Lucia* case, mediation efforts at the regional office level should be actively engaged.

51. MSPB has been without a quorum of Board members since January 8, 2017 with the last member retiring in February 2019. The lack of a quorum contributes to delays in issuing final decisions in petitions for review (PFRs) and other cases filed at headquarters (HQ) and releasing reports of merit systems studies.
 - a. The MSPB currently estimates that it will take months or longer to process the inventory of cases at HQ and to publish merit systems studies reports once new Board members are nominated and confirmed. Please describe how you will effectively and promptly address MSPB's current backlog.

As discussed above, I will consult with MSPB staff to come up with a reasonable and efficient triage plan to clear the backlog. Factors may include the age of the case, relative importance of the case to the Appellant (i.e., terminations are likely more important than suspensions, particularly for those Appellants who won their termination case at the AJ level and are awaiting review by the Board due to the Agency's decision to appeal), issues that may set precedent, and cases that may be disposed of summarily in short form due to clear issues of law, such as lack of jurisdiction or timeliness. In addition, as discussed above, I will encourage and expand ADR efforts for those cases that have been subject to the backlog.

- b. Please describe how your previous work experience has prepared you to address the challenges in resolving MSPB's backlog.

I understand the importance of prompt and quality decisions for employees and agencies. It is simply not right that parties have had to wait so long for adjudication of their cases. I firmly believe that justice delayed is justice denied.

I have been a litigation attorney for more than two decades and I know how to put my nose to the grindstone and get things done. I have always carried a large caseload and have learned to be efficient and decisive. Having a deep understanding of the substantive law should help me in efficiently deciding cases. I am open to suggestions and will be willing to try creative approaches to expeditiously resolving the backlog. Consistent with maintaining the independence of each Board member, and the dictates of the Government in the Sunshine Act, I will work tirelessly with my colleagues to find ways to achieve consensus and efficiency in processing the cases.

- c. According to their annual report for FY21, MSPB had approximately 2,942 cases pending at HQ at the end of FY 2020. If confirmed, please describe how you will work with your colleagues to consider cases awaiting decisions.

Please see above responses.

In addition, I am aware of the restrictions imposed by the Government in the Sunshine Act, which requires that meetings of agencies headed by a collegial body composed of two or more individual members who are appointed by the President with the advice and consent of the Senate must be open to public observation, unless otherwise provided for in the Act. As such, I will consult with the Office of General Counsel to ensure that my work with my fellow Board member colleagues fully and completely complies with the law.

- d. Do you have experience with resolving backlogs such as the one faced by MSPB? If so, please describe your experience.

No. However, as a litigator, I must get my work done according to the deadlines set by the tribunals before I practice. I am familiar with pushing to have cases adjudicated as quickly as possible without prejudicing the rights of my clients. Out of necessity, I understand very well how to prioritize and triage my work and that of my staff. As mentioned above, I am also a firm believer and practitioner in mediation and early dispute resolution which can help more swiftly resolve cases.

- e. Timeliness is one measure of performance. Quality of decisions is another measure. How can the competing goals of quality and timeliness be balanced? What are the appropriate indicators that could be used to measure the quality of MSPB decisions?

I agree that the quality of decisions is an important and essential aspect of the Agency's mission. The Administrative Judges have long been held to the statutory standard that initial appeals must be decided within 120 days, so the

measure of timeliness is already set by statute. Of course, the backlog at the Board level is of another concern, which I have addressed in response to other questions herein.

In terms of quality, there are really two sub-measures—correctness and clarity. The best way to gauge correctness is to track statistics on remands and reversals. Clarity is more of an intangible measure. Although internal review of the quality of decisions would be a useful task, it is important to do so in a manner that maintains the independence and objectivity of Board decisions.

- f. Have you sought advice from any current or former MSPB employees about how to best address the current backlog? If so, please describe your consultations.

I have consulted with various individuals regarding their ideas and to gain background knowledge regarding this pressing issue. I have spoken with my former law partner and former Vice Chair of the MSPB, Jessica Parks, regarding her experience with adjudicating cases and ideas regarding the backlog. I have also consulted with former Board chairs Susan Tsui Grundmann and Mark Robbins, former board Executive Director James Eisenmann, and former Chief Counsel Daniel Turbitt, as well as some of the current MSPB staff in preparation for this hearing. Although each has provided me with valuable insight, my decisions regarding such matters will be made with my own independent judgment if I am confirmed.

52. What would you consider to be an appropriate penalty for a violation of the Hatch Act by a senior administration official?

Violations of the Hatch Act carry a statutory presumption of removal. However, lesser penalties are permitted to be imposed upon consideration of the relevant mitigating and aggravating factors. In adjudication of disciplinary actions brought by the Special Counsel for cases involving violations of the Hatch Act, the Board would consider whether the penalty was appropriate. Factors include: (1) the nature of the offense and the extent of the employee's participation; (2) the employee's motive and intent; (3) whether the employee had received advice of counsel regarding the activity at issue; (4) whether the employee ceased the activities; (5) the employee's past employment record; and (6) the political coloring of the employee's activities. Removal must be imposed for an employee's violation of 5 U.S.C. § 7323 or § 7324 unless the members of the Merit Systems Protection Board find by unanimous vote that a lesser penalty is warranted. Lesser penalties can include reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand, an assessment of a civil penalty not to exceed \$1,000; or a combination thereof. Therefore, I would consider the appropriate aggravating and mitigating factors under the legal standard in determining the appropriate penalty in the particular case.

53. In some cases, complainants who may be better served by other government agencies such as the EEO or OSC seek assistance from the MSPB.

- a. How will you work to ensure that your staff effectively guides these complaints to the appropriate resources?

The MSPB should provide public guidance, as it has for many years, to the federal workforce regarding the MSPB's jurisdiction and other complaint venues so that employees can select the most appropriate forum for their complaints. The processes are understandably confusing to employees—and sometimes agencies—and the MSPB must continue to provide clear guidance when possible. The mixed case processes are particularly confounding to many. Indeed, matters concerning the proper processing of mixed cases have gone to the Supreme Court twice regarding the proper forum for judicial review of mixed cases (*Perry v. Merit Systems Protection Board* (2017) and *Kloeckner v. Solis* (2012)). I will work to review, update, and help improve such public guidance to try to make a complicated system more navigable for employees who are often in crisis when entering the complaint process. As many complainants are pro se, the guidance should be written in lay terms and avoid overly legalistic verbiage.

Although it is not the function of the Board to encourage employees to pursue claims before any forum, proper and clear information regarding the Board's jurisdiction will assist complainants.

- b. Will you collaborate with other government agencies to minimize duplication? If so, please describe how you will work to achieve this objective.

Regarding studies, I would encourage collaboration with OSC, OPM, and GAO to ensure non-duplication of areas of study. In terms of clarity to appellants seeking relief before EEOC, MSPB, or OSC, I would work with the other agencies to aim for clear and consistent guidance on the agencies' websites.

Whistleblower Protections

54. MSPB previously highlighted the need to examine the prevalence and forms of reprisal for protected activity, particularly for whistleblowing.⁶ Do you view reprisal for whistleblowing as a significant challenge facing the federal workforce? Why or why not?

Yes. Reprisal for whistleblowing is illegal and yet it persists in the federal government. Recent news reports have highlighted instances at certain agencies

⁶ Merit Systems Protection Board, MSPB Research Agenda 2015-2018 (Feb. 2015), *available at* <https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1140540&version=1145045&application=ACROBAT>.

where complaint after complaint was made regarding retaliation for whistleblowing and yet nothing was done. Some reports have found certain agencies to encourage a “culture” of retaliation, which is totally inappropriate and must be corrected. The MSPB should be at the forefront in protecting such rights.

55. Do you believe that the motive of the whistleblower should be considered when examining retaliation claims? Please explain.

No. An employee is protected from retaliation when he or she has made a protected disclosure under the WPA. A disclosure is protected when the employee has an objectively reasonable belief that the disclosed conduct constitutes a violation of any federal law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. See 5 U.S.C. § 2302. Therefore, an employee could be motivated by disgust, altruism, personal gain, or interest in career advancement in disclosing unlawful conduct. But the motive is irrelevant so long as the employee held a reasonable belief that the conduct occurred and was prohibited as specified in the statute.

56. If confirmed, how will you ensure that whistleblower complaints are properly investigated?

With respect to whistleblower complaints made by employees about actions at the MSPB, I will ensure that the existing policies and procedures at the Board result in prompt, thorough investigations, and that remedial action is taken as appropriate. With respect to whistleblower complaints that come before the Board for adjudication, I will analyze the cases according to the statutory provisions and in line with precedential legal authority.

57. Protecting whistleblower confidentiality is of the utmost importance to this Committee.
- a. How do you plan to implement policies within the MSPB to encourage employees to bring constructive suggestions forward without the fear of reprisal?

I plan to make myself available to all employees and will have an open-door policy. Having been an attorney for over 20 years, it is second nature for me to protect the confidentiality of those who seek my counsel. I have represented anonymous whistleblowers in very sensitive matters and fully understand the reasons why employees would want to keep their disclosures confidential. I would also examine the current policies at the MSPB, and to the extent that they are lacking in any respect regarding whistleblower investigations and protections, I would strengthen them. Most importantly, I would strive to create an environment that encourages a culture of accountability and equity, rather than reprisal.

- b. Do you commit without reservation to work to ensure that any whistleblower within MSPB does not face retaliation?

Yes.

- c. If confirmed, what steps will you take to ensure that whistleblowers at MSPB do not face retaliation, that whistleblower identifiers are protected, and that complaints of retaliation are handled appropriately?

See above response to a.

V. Relations with Congress

58. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Yes.

59. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed?

Yes.

60. Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed?

Yes.

61. If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?

I will work with the MSPB staff to ensure that we have effective protocols for timely responses to Member requests. In my view, it is important for the Agency to have clear, organized protocols to track requests, ensure that the proper Agency officials are consulted promptly to develop a clear and thorough response, and draft and approve responses expeditiously.

62. If confirmed, will you direct your staff to adopt a presumption of openness where practical, including identifying documents that can and should be proactively released to the public, without requiring a Freedom of Information Act request?

Yes. In my own practice of making FOIA requests on behalf of clients, I am always appreciative when agencies have adopted a presumption of openness when practical. It is so much more efficient and ultimately good for government. Unnecessary FOIA litigation is a waste of resources and detracts from the Agency's mission.

63. If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Government Accountability Office (GAO) and the Congressional Research Service?

Yes.

64. If confirmed, will you agree to work with representatives from this Committee and the GAO to promptly implement recommendations for improving MSPB's operations and effectiveness?

I agree to work with representatives from this Committee and GAO, and will gladly and promptly implement recommendations if they will improve MSPB's operations and effectiveness.

VI. Assistance

65. Are these answers completely your own? If not, who has provided you with assistance?

These answers are completely my own. As stated below, I consulted with the below individuals and the MSPB staff, but I take full responsibility for my responses herein.

66. Have you consulted with MSPB, or any other interested parties? If so, please indicate which entities.

Yes, the MSPB has provided me with information for my use in answering these questions. As mentioned above, I consulted with Jessica Parks, Susan Tsui Grundmann and Mark Robbins, James Eisenmann, and Daniel Turbitt regarding some of the issues raised in this questionnaire. I also consulted with Michael Kator and Jeremy Wright, my law partners, regarding the questions relevant to our practice and for proof-reading. Notwithstanding these consultations, these answers are completely my own.

I, Cathy Harris, hereby state that I have read the foregoing Pre-Hearing Questionnaire and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Cathy Harris
(Signature)

This 26th day of August, 2021

**Senator Thomas R. Carper
Post-Hearing Questions for the Record
Submitted to Cathy A. Harris**

**Nominations of Cathy A. Harris to be a Member and Chair, and Tristan L. Leavitt and
Raymond A. Limon to be Members, Merit Systems Protection Board
Wednesday, September 22, 2021**

Congressional Whistleblower Protection Act of 2021

I cosponsor legislation in the Senate called the “Congressional Whistleblower Protection Act of 2021.”

This legislation would allow whistleblowers to pursue a lawsuit in federal court if the MSPB fails to issue a decision within six months of filing an administrative complaint. Currently, the only remedy for whistleblowers is to petition the MSPB, which has lacked a quorum for over four years.

Ms. Harris, do you believe it is necessary to create a private right of action for federal whistleblowers when the existing process falls short?

I recognize that this is an important issue and that Congress is considering additional legislation to provide whistleblowers with additional avenues to adjudicate administrative complaints. If confirmed, I look forward to working with Congress to understand any additional authorities that the MSPB may need and provide technical assistance as appropriate.

Additionally, how important is it for Congress to ensure that whistleblower-reporting channels adequately protect individuals who report agency wrongdoing from retaliation?

It is crucial for whistleblowers to be protected from retaliation. Employees need to know that they will not suffer retaliation for reporting fraud, waste, abuse, dangers to public health and safety, and other violations of law. I welcome Congress to consider additional measures to protect individuals who report agency wrongdoing.

Improving the Merit Civil Service System

When it comes to finding solutions for tough problems, I often say that we should find out what works and do more of that.

Congress established the merit-based civil service system in 1883, replacing the political patronage system known as “the Spoils System.”

Having said that, I understand our current competitive civil service model is not perfect.

Ms. Harris, what are some areas within the merit civil service system where things are working well, and other areas where we need to go back to the drawing board?

Generally, the principles of the merit system have stood the test of time. Our federal workforce is a better, safer place to work because of the protections in place prohibiting discrimination, political coercion, and retaliation. The enhancements to the Whistleblower Protection Act have helped close loopholes in the law that did not serve whistleblowers. It may be that those laws need additional adjustments as we discover additional areas of concern.

In terms of improvements, it is my view that agency investigations into harassment and retaliation should be standardized and upgraded. It is my experience through my practice that the quality of agency investigations of sexual harassment varies wildly and leads to inconsistent results.

Protecting the Merit Civil Service System from Politicization

Ms. Harris, I remain concerned that the last administration's executive actions with regard to personnel management have caused many people to question the role of apolitical career public servants and the benefits of having a federal workforce that is free from political influence.

Could you please explain what you view as the biggest threat to maintaining an apolitical civil workforce?

Currently, the biggest threat to the merit system is the lack of a quorum at the Merit Systems Protection Board. Without a quorum, the Board has not been able to render its appellate-level decisions, issue stays of personnel actions when sought by the U.S. Office of Special Counsel (OSC) to protect whistleblowers, and consider corrective and disciplinary actions sought by OSC. Without a fully functioning Board, the statutory protections to protect employees and agencies from political influence are seriously threatened.

Additionally, are there actions that we in Congress may want to consider to ensure the political independence and integrity of the merit civil service system?

It would benefit the merit system to ensure that the agencies charged with enforcing the merit system principles, such as OSC, EEOC and MSPB, have adequate budgets to do so. Valid investigations, hearings and enforcement actions should not be truncated because of lack of budget.

**Senator James Lankford
Post-Hearing Questions for the Record
Submitted to Cathy A. Harris**

**Nominations of Cathy A. Harris to be a Member and Chair, and Tristan L. Leavitt and
Raymond A. Limon to be Members, Merit Systems Protection Board
Wednesday, September 22, 2021**

- 1) The Biden Administration recently published an FAQ clarifying that if a Federal employee refuses to be fully vaccinated by November 22, “the agency should pursue disciplinary measures, up to and including removal from Federal service.” However, many agencies have not provided employees further guidance. Unless the Administration reverses its policy, disciplined employees will file actions which will come before the MSPB challenging disciplinary actions, including removal, for not being vaccinated.

What authority does the Federal government have to discipline and remove Federal employees for refusing to comply with Executive Orders and agency guidance?

Under 5 U.S.C. § 7513 and regulations promulgated by the Office of Personnel Management, agencies have the authority to discipline and remove Federal employees, but “only for such cause as will promote the efficiency of the service,” and through the specific procedures outlined in the statute and regulations. Whether such cause exists in a particular circumstance or whether exceptions apply, such as under the Follow the Rules Act, will depend upon the facts of that case. Prior to this Act, the general rule was that an employee must follow the order and grieve it later, except for certain limited circumstances, such as when obedience would cause the person irreparable harm or would require the violation of law. The Follow the Rules Act, enacted in 2017, provides that an employee may also refuse to obey an order that would require the employee to violate a law, rule or regulation. One common disciplinary charge, for example, is a failure to follow supervisory instructions. Whether that charge may extend to an agency guidance (as opposed to a policy or order) is a matter that would need to be addressed in the particular context of the case.

What is the standard an agency should use when deciding whether to grant a religious accommodation under Title VII?

An agency should grant an accommodation, once on notice, sought due to an employee’s sincerely held religious beliefs or practices unless the accommodation would impose an undue hardship upon the agency. In the context of religious accommodations, an undue hardship is one that is more than a *de minimus* cost or burden on the operation of the agency. See *TWA v. Hardison*, 432 U.S. 63 (1977). A religious practice may be sincerely held by an individual even if newly adopted, not

consistently observed, or different from the commonly followed tenets of the individual's religion.

- 2) As of August 31, 2021, the MSPB reported 3,421 pending petitions for review. If confirmed, what actions will you take and what processes will you put in place to manage the backlog of cases?

If confirmed, I intend to first meet with the MSPB's staff to hear their ideas and proposed plans for managing the backlog. After that, I expect to work with my fellow Board members to develop a triage system that may include factors such as age of the case, relative importance of the case to the parties (i.e., removals (which cause loss of a job and income) vs. suspensions (which cause loss of pay for a defined length of time)), whistleblower retaliation cases, cases involving affirmative defenses of discrimination, and stays sought by the Office of Special Counsel. In addition, I intend to explore the possibility of bringing back the "short form" decision in appropriate circumstances, which renders a Board-level decision without a lengthy explanation. Such decisions may be appropriate when the issue is very clear—such as obvious lack of jurisdiction or untimeliness, or where the Administrative Judge has already adequately described the basis for the initial decision. Last, I intend to increase alternative dispute resolution efforts for the cases that have been awaiting decision by the Board. The Board has a very good settlement program, which should be utilized robustly in these cases to determine whether circumstances have changed for the parties over time that may make a particular case able to be resolved through settlement.

If you are able to act and implement processes to manage the backlog of cases as described, how long do you believe it will take the Board to reach a "steady state" of cases?

Because I have not yet been able to consult with MSPB staff as to their ideas and estimated time projections, I do not yet know how long it would take to reach a steady state of cases. I would like to do so as quickly as possible as I understand fully how the delays have affected the parties. But of course, we do not want to compromise the quality of the decisions as that would not be fair to the parties. If confirmed, I commit to reporting to Congress, employees and agencies as to our estimated time frame as soon as we have a plan in place.

Senator Jacky Rosen
Post-Hearing Questions for the Record
Submitted to Cathy A. Harris

**Nominations of Cathy A. Harris to be a Member and Chair, and Tristan L. Leavitt
and Raymond A. Limon to be Members, Merit Systems Protection Board**

Wednesday, September 22, 2021

- 1) According to the Office of Personnel Management, Nevada is home to over 12,000 federal employees. About 80 percent of our state is also owned or managed by the federal government – most of it by the Bureau of Land Management – meaning that the federal government and federal workers have a major role in our state. The Merit Systems Protection Board has lacked a quorum over the past four years – negatively impacting my constituents. We’ve had whistleblowers fired in apparent retaliation for speaking up, but unable to get relief from the MSPB. How do you plan to address the backlog of cases that has piled up since the Board last had a quorum? How will you ensure that those who have already waited for too long for relief are able to obtain it in a timely manner?

If confirmed, I intend to first meet with the MSPB’s staff to hear their ideas and proposed plans for managing the backlog. After that, I expect to work with my fellow Board members to develop a triage system that may include factors such as age of the case, relative importance of the case to the parties (i.e. removals being more important than suspensions), whistleblower retaliation cases and cases involving affirmative defenses of discrimination, and stays sought by the Office of Special Counsel. In addition, I intend to explore the possibility of bringing back the “short form” decision in appropriate circumstances, which renders a decision without a lengthy explanation. Such decisions may be appropriate when the issue is very clear—such as obvious lack of jurisdiction or untimeliness, or where the Administrative Judge has already adequately described the basis for the initial decision. Last, I intend to increase alternative dispute resolution efforts for the cases that have been awaiting decision by the Board. The Board has a very good settlement program, which should be utilized robustly in these cases to determine whether circumstances have changed for the parties over time that may make a particular case able to be resolved through settlement.

- 2) What proactive steps do you plan to take to address systemic abuses in agencies that might have come about in the time that the Board has lacked a quorum? Do you plan to conduct any studies of certain parts of the civil service in key areas like sexual harassment or whistleblower protection?

First, prompt adjudication of the pending cases should help correct any particular abuses that have occurred during the lack of a quorum. In addition, I would consider conducting studies as to how the lack of quorum affected adverse actions, performance actions, and the commission of prohibited personnel practices over the past few years in the absence of a quorum. I am aware that the Board's Office of Policy and Evaluation has been working on an update to a prior sexual harassment study, and I am looking forward to reviewing and releasing that study as appropriate. I am also interested in studying how the Whistleblower Protection Enhancement Act and more recent amendments have impacted whistleblower protection efforts.

- 3) As the Board reaches a quorum, what steps will you take to further ensure that federal government workers living outside of DC, like in the West, who may not necessarily live in communities where the majority of people are federal workers, know their rights and know how to appeal agency decisions to the Board?

During my practice before the MSPB over the past two decades, I have represented federal employees all over the country. It is my experience that federal employees who are outside of the Washington DC area are less likely to understand their rights and the mechanisms to appeal agency decisions. It is vital that agencies effectively train and provide the correct information to all employees. In the cases that come before me, I will carefully examine the procedural history to ensure that due process was followed. In addition, I believe it is important to consider, as the Board has done in the past, to consider whether untimely filings should be excused due to lack of proper notice. I will also ensure that the Board's publicly available information, such as that is contained on the Board's recently revamped website, is accessible and informative for all audiences.

Senator Kyrsten Sinema
Post-Hearing Questions for the Record
Submitted to Cathy A. Harris

Nominations of Cathy A. Harris to be a Member and Chair, and Tristan L. Leavitt and Raymond A. Limon to be Members, Merit Systems Protection Board
Wednesday, September 22, 2021

1. You discussed several ideas during the hearing on how you intend to address the backlog, including issuing shorter upholding decisions and collaborating with the other Board members. As this is your first position with the Executive Branch and you are a small business owner, what business practices from your private sector experience would help to address the backlog and further enhance the operations of the Board?

As I have been practicing before the MSPB for over 20 years, I have developed a deep understanding of federal-sector employment law and the issues that the MSPB considers. This should enable me to quickly identify the issues on appeal and adjudicate cases more swiftly. In addition, as a manager of a small law firm, I am used to delegating efficiently and effectively. Our firm handles cases representing both individual employees, large classes of employees, and agencies, with tight deadlines, and I am well-versed at triaging matters and still delivering very high-quality work.

2. It is important that the Board fulfill its role to review Office of Personnel Management regulations. How will you ensure the Board does this and how will you approach situations when the Board disagrees with an OPM regulation?

The Board is empowered by statute, 5 U.S.C. §1204(f), to review OPM rules and regulations on its own motion; on the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board; or on the filing of a written complaint by requesting such review. Upon such review, the Board shall declare such provision invalid if the Board determines that such provision would, if implemented by any agency, require any employee to commit a prohibited personnel practice, as defined by the statute. The Board may also declare that the rule or regulation has been invalidly implemented by any agency if any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has required any employee to commit a PPP. The Board further has the authority to require an agency to cease compliance with any provisions of any rule or regulation which the Board declares to be invalid on its face; and to correct any invalid implementation by the agency.

If confirmed, I would ensure that the Board's Office of Policy and Evaluation continues to monitor OPM policies and initiatives, identify potentially significant actions, and communicate with OPM and agencies to request additional information, if needed. I would also ensure that the Board fulfills its statutory mission, as described above. I would also endeavor to work with OPM to find practical and efficient ways to bring such rules and regulations into statutory compliance.

MSPB NOMINATION HEARING TESTIMONY

TRISTAN L. LEAVITT
MEMBER
U.S. MERIT SYSTEMS PROTECTION BOARD

SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
SEPTEMBER 22, 2021

Chairman Peters, Ranking Member Portman, and members of the Committee,

Thank you for the opportunity to appear before you today.

I'm grateful to the President for the honor and privilege of this nomination, and to Leader Mitch McConnell for his recommendation to the President. I also want to express my gratitude and respect for the dedicated career professionals at the Merit Systems Protection Board and the Office of Special Counsel, who I've had the privilege of serving alongside the past four years. I would not have had those opportunities were it not for bosses who gave me a chance, including Senator Chuck Grassley, Chairman Jason Chaffetz, Special Counsel Henry Kerner, and former MSPB Vice Chair Mark Robbins. Their support for me being nominated, as well as the support of many former Capitol Hill colleagues on both sides of the aisle and of advocates I've worked with in the Title 5 community, has been incredibly humbling. I'm thankful for each of these relationships from my career.

Finally, I want to express my eternal gratitude to my wife, Brittany, without whose support for me and selfless sacrifice for our five children none of these opportunities would have been possible. She could just as easily have gone to law school, but instead raised our two children while I went to law school. She then delivered our third child one month after I graduated, when I was already working full-time on the Hill and preparing to take the bar exam in one more month. Given all of that, my J.D. by all rights ought to be a joint degree with her. She has the hardest work ethic of anyone I know, and her organization and tireless dedication provide the center of gravity in our home.

With an estimated 9 million servicemembers, civil servants, contractors, postal workers and more, the federal government is the largest employer in the United States. Furthermore, its approximately 2.1 million workforce of career civilian employees is tasked with enormous responsibility. As we've seen during this global pandemic, the stakes are high. We owe it to ourselves as a country to draw on the most qualified employees who will serve the taxpayers most effectively. This is why the merit system, first embraced by our government nearly 140 years ago, remains so imperative today.

Having grown up as the oldest of seven children in a family on a tight budget and spent my teenage summers doing drywall with my father, I believe firmly in the principles of responsibility, hard work, and accountability. I recognize that our government is funded by tax dollars earned by hard-working Americans, including single parents, small business owners like

my dad, and more. I take extremely seriously the responsibility we all have to exercise careful stewardship over those resources. To me, the merit system is a critical component of that kind of careful stewardship; it ensures the American public gets the “best bang for their buck.” A good portion of my career was spent investigating misconduct in the federal government, including by line-level employees, by managers, and even by senior leaders. Holding such employees accountable is key to upholding the morale of the rest of the federal workforce.

Anyone who knows me might perhaps know me best for being passionate about the importance of protecting whistleblowers. Since first working with Special Agent John Dodson, who felt compelled by the death of Border Patrol Agent Brian Terry to blow the whistle on gunwalking by the Bureau of Alcohol, Tobacco, Firearms and Explosives, I’ve worked with hundreds of patriotic women and men who saw problems in the federal government and spoke up about them. Their concerns have run the gamut from cost overruns in federal agencies to widespread employee misconduct to security vulnerabilities at the White House. To me, protecting whistleblowers is without question the best way to root out waste, fraud, and abuse in the federal government, or identify other problems that pose a risk to the health and safety of the American public. Given the prospective risks faced by anyone considering speaking out, I consider whistleblowing an act of conscience. I have the utmost respect for those whose personal convictions impel them to courageously stand up for the truth. I believe we owe it to them to do all we can to ensure they receive the benefit of the laws intended to protect them.

Even if the federal government wasn’t the largest employer in the country, it’s one we all have a stake in. Our country was founded on national ideals—principles that our nation aspires to abide by. In light of those ideals, I believe the federal government should also strive to be a model employer, doing our best to treat federal employees fairly and holding federal managers to a high standard. The vast majority of federal workers demonstrate great commitment and dedication, and I’m grateful for the public service they render.

If confirmed to the Merit Systems Protection Board, I commit that I will do everything within my power to work hard and to exercise fairness in applying the law to federal employee appeals, recognizing in turn that all of us are serving the American taxpayer. Thank you so much for the opportunity to appear before you today and to answer questions you may have.

**HSGAC BIOGRAPHICAL QUESTIONS FOR
EXECUTIVE NOMINEES**

REDACTED

1. Basic Biographical Information

Please provide the following information.

<i>Position to Which You Have Been Nominated</i>	
<u>Name of Position</u>	<u>Date of Nomination</u>
Member, U.S. Merit Systems Protection Board	

<i>Current Legal Name</i>			
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>
Tristan	Lynn	Leavitt	

<i>Addresses</i>					
<u>Residential Address</u> (do not include street address)			<u>Office Address</u> (include street address)		
			Street: 1615 M Street NW		
City: Springfield	State: VA	Zip: 22153	City: Washington	State: DC	Zip: 20419

<i>Other Names Used</i>						
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>	Check if Maiden Name	<u>Name Used From</u> (Month/Year) (Check box if estimate)	<u>Name Used To</u> (Month/Year) (Check box if estimate)
N/A					Est ☐	Est ☐

<i>Birth Year and Place</i>	
Year of Birth (Do not include month and day.)	Place of Birth
1983	Idaho Falls, Idaho

<i>Marital Status</i>					
Check All That Describe Your Current Situation:					
Never Married	Married	Separated	Annulled	Divorced	Widowed
☐	☒	☐	☐	☐	☐

<i>Spouse's Name</i> (current spouse only)			
Spouse's First Name	Spouse's Middle Name	Spouse's Last Name	Spouse's Suffix
Brittany	Atkinson	Leavitt	

<i>Spouse's Other Names Used</i> (current spouse only)						
First Name	Middle Name	Last Name	Suffix	Check if Maiden Name	Name Used From (Month/Year) (Check box if estimate)	Name Used To (Month/Year) (Check box if estimate)
Brittany	Miller	Atkinson		☒	11/1982 Est ☐	7/2006 Est ☐

<i>Children's Names (if over 18)</i>			
First Name	Middle Name	Last Name	Suffix
N/A			

2. Education

List all post-secondary schools attended.

<u>Name of School</u>	<u>Type of School</u> (vocational/technical/trade school, college/university/military college, correspondence/distance/extension/online school)	<u>Date Began School</u> (month/year) (check box if estimate)	<u>Date Ended School</u> (month/year) (check box if estimate) (check "present" box if still in school)	<u>Degree</u>	<u>Date Awarded</u>
Brigham Young University	College/University	1/2001 Est ☐	8/2007 Est ☐ Present ☐	BA	8/2007
William & Mary School of Law	Law School	8/2008 Est ☐	5/2009 Est ☐ Present ☐		
Georgetown University Law Center	Law School	8/2009 Est ☐	5/2011 Est ☐ Present ☐	JD	5/2011

3. Employment

(A) List all of your employment activities, including unemployment and self-employment. If the employment activity was military duty, list separate employment activity periods to show each change of military duty station. Do not list employment before your 18th birthday unless to provide a minimum of two years of employment history.

<u>Type of Employment</u> (Active Military Duty Station, National Guard/Reserve, USPHS Commissioned Corps, Other Federal employment, State Government (Non-Federal Employment), Self-employment, Unemployment, Federal Contractor, Non-Government Employment (excluding self-employment), Other)	<u>Name of Your Employer/Assigned Duty Station</u>	<u>Most Recent Position Title/Rank</u>	<u>Location</u> (City and State only)	<u>Date Employment Began</u> (month/year) (check box if estimate)	<u>Date Employment Ended</u> (month/year) (check box if estimate) (check "present" box if still employed)
Other Federal employment	U.S. Merit Systems Protection Board	General Counsel/Acting Chief Executive and Administrative Officer	Washington, D.C.	10/2018 Est ☐	Est ☐ Present ☒
Other Federal employment	U.S. Office of Special Counsel	Principal Deputy Special Counsel	Washington, D.C.	6/2017 Est ☐	10/2018 Est ☐

Other Federal employment	House Committee on Oversight and Government Reform	Senior Counsel	Washington, D.C.	1/2015	Est □	6/2017	Est □
Other Federal employment	Senate Committee on the Judiciary	Investigative Counsel	Washington, D.C.	2/2011	Est □	12/2014	Est □
Unemployment				11/2010	Est □	2/2013	Est □
Non-Government Employment	Republican National Committee	Law Clerk	Washington, D.C.	8/2010	Est □	11/2010	Est □
Non-Government Employment	Stepoe and Johnson PLLC	Summer Associate	Charleston, WV	5/2010	Est □	7/2010	Est □
Non-Government Employment	Georgetown University Law Center	Research Assistant	Washington, D.C.	10/2009	Est x	5/2010	Est □
Unemployment				7/2009	Est □	10/2009	Est x
Non-Government Employment	Human Rights Without Frontiers International	Legal Intern	Brussels, Belgium	5/2009	Est □	7/2009	Est □
Unemployment				4/2009	Est □	5/2009	Est □
State Government (Non-Federal Employment)	Office of Virginia State Senator Ryan McDougle	Legal Fellow	Richmond, VA	2/2009	Est □	3/2009	Est □
Unemployment				8/2008	Est □	1/2009	Est □
Other Federal employment	Office of Representative Bill Sali	Legislative Correspondent	Washington, D.C.	5/2007	Est □	8/2008	Est □
Unemployment				8/2006	Est □	4/2007	Est □
Non-Government Employment	Missionary Training Center	Teacher	Provo, UT	1/2005	Est □	8/2006	Est □
Non-Government Employment	NutraFit LLC	Sales Associate	Idaho Falls, ID	11/2004	Est □	12/2004	Est □
Non-Government Employment	Walls & Ceilings Drywall	Drywall Worker	Idaho Falls, ID	10/2004	Est □	11/2004	Est □
Non-Government Employment	The Church of Jesus Christ of Latter-day Saints	Full-Time Volunteer Missionary	London, England, UK	10/2002	Est □	10/2004	Est □

Non-Government Employment	RSB Construction	Construction Worker	Idaho Falls, ID	5/2002	Est ☐	10/2002	Est ☐
Non-Government Employment	Brigham Young University	Custodial Worker	Provo, UT	10/2001	Est ☐	5/2002	Est ☐

(B) List any advisory, consultative, honorary or other part-time service or positions with federal, state, or local governments, not listed elsewhere.

None.

4. Potential Conflict of Interest

(A) Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

None.

(B) Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.

None.

5. Honors and Awards

List all scholarships, fellowships, honorary degrees, civilian service citations, military medals, academic or professional honors, honorary society memberships and any other special recognition for outstanding service or achievement.

Idaho Top Scholar (2001); National Merit Finalist (2001); Brigham Young University full-tuition National Merit scholarship (2001); Georgetown University Law Center Dean's List (2009-2010); Georgetown University Law Center CALI Award for best paper in English Legal History (2010)

6. Memberships

List all memberships that you have held in professional, social, business, fraternal, scholarly, civic, or charitable organizations in the last 10 years.

Unless relevant to your nomination, you do NOT need to include memberships in charitable organizations available to the public as a result of a tax deductible donation of \$1,000 or less, Parent-Teacher Associations or other organizations connected to schools attended by your children, athletic clubs or teams, automobile support organizations (such as AAA), discounts clubs (such as Groupon or Sam's Club), or affinity memberships/consumer clubs (such as frequent flyer memberships).

<u>Name of Organization</u>	<u>Dates of Your Membership</u> (You may approximate.)	<u>Position(s) Held</u>
The Church of Jesus Christ of Latter-day Saints	1991-present	Men's ministry volunteer (2011-2012), Ward Clerk (2012-2014), Bishop (2014-2019), children's volunteer (2019-2020), youth volunteer (2020-present)
Boy Scouts of America	Intermittently 1991-present	Chartered Organization Representative (2014-2019)
J. Reuben Clark Law Society	2008-present	Georgetown Chapter Secretary (2009-2010); Georgetown Chapter President (2010-2011)
Federalist Society	Intermittently 2008-present	None
BYU Political Affairs Society	2009-present	National Membership Vice President (2009-2011); National President (2011-2013); Immediate Past President (Board of Directors) (2013-2015)
Republican National Lawyers Association	Intermittently 2009-present	None
LDS International Society	2010-2014	None
Idaho State Society	Intermittently 2010-2014	None
Idaho State Bar	2012-present	None
Administrative Conference of the United States	2019-present	Government Member (2019-present)

Federal Circuit Bar Association	2020-present	None
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7. Political Activity

(A) Have you ever been a candidate for or been elected or appointed to a political office?

No.

(B) List any offices held in or services rendered to a political party or election committee during the last ten years that you have not listed elsewhere.

<u>Name of Party/Election Committee</u>	<u>Office/Services Rendered</u>	<u>Responsibilities</u>	<u>Dates of Service</u>
Republican National Committee	Volunteer	Traveled to Ohio to campaign for candidates	November 2012

(C) Itemize all individual political contributions of \$200 or more that you have made in the past five years to any individual, campaign organization, political party, political action committee, or similar entity. Please list each individual contribution and not the total amount contributed to the person or entity during the year.

None.

8. Publications and Speeches

(A) List the titles, publishers and dates of books, articles, reports or other published materials that you have written, including articles published on the Internet. Please provide the Committee with copies of all listed publications. In lieu of hard copies, electronic copies can be provided via e-mail or other digital format.

<u>Title</u>	<u>Publisher</u>	<u>Date(s) of Publication</u>
Seventh Day Adventists growing in China	Human Rights Without Frontiers International	6/4/09
Zimbabwe democratic panel in Brussels: Civic leaders request immediate international assistance while noting progress	Human Rights Without Frontiers International	6/17/09

(B) List any formal speeches you have delivered during the last five years and provide the Committee with copies of those speeches relevant to the position for which you have been nominated. Include any testimony to Congress or any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.

<u>Title/Topic</u>	<u>Place/Audience</u>	<u>Date(s) of Speech</u>
National Whistleblower Summit luncheon	Dirksen Senate Office Building/National Whistleblower Center guests at National Whistleblower Summit	7/30/18
Learning from Whistleblowers at the Department of Veterans Affairs	House Committee on Veterans' Affairs	7/23/19
Federal Civil Service: Confronting Challenges and Searching for Solutions	Virtual/ABA Administrative Law and Regulatory Practice Section	5/27/21

(C) List all speeches and testimony you have delivered in the past ten years, except for those the text of which you are providing to the Committee.

<u>Title</u>	<u>Place/Audience</u>	<u>Date(s) of Speech</u>
Working with Intelligence Community Whistleblowers (panel)	Capitol Visitor Center/Project on Government Oversight's Congressional Oversight Training Series participants (congressional staff)	7/25/14
From Firings to Criminal Referrals: The Changing Face of Whistleblower Retaliation (panel)	Cannon House Office Building/Government Accountability Project guests at National Whistleblower Summit	7/30/14
Working with Whistleblowers (panel)	Capitol Visitor Center/Project on Government Oversight's Congressional Oversight Training Series participants (congressional staff)	6/30/17
The Office of Special Counsel and Merit Systems Protection Board: Past, Present, and Future Analysis (panel)	Washington, D.C./Government Accountability Project guests at National Whistleblower Summit	7/28/17
Whistleblowers: What's New in Policy and Practice (panel)	Washington, D.C./Federal Deposit Insurance Corporation Office of Inspector General employees	11/9/17
Latest Developments at the Office of Special Counsel	Washington, D.C./ABA Section of Administrative Law and Regulatory Practice guests	12/5/17
Meet the New Title 5 Leadership (panel)	Washington, D.C./ABA Federal Sector Labor & Employment Law Committee Midwinter Meeting attendees	2/6/18
Protecting the Best Source of Information in Oversight	Department of Defense Office of Inspector General/National Whistleblower Appreciation Day conference participants (federal employees)	7/26/18
Working with the Office of Special Counsel (panel)	Russell Senate Office Building/Government Accountability Project guests at	7/31/18

	National Whistleblower Summit	
Importance of the Whistleblower Protection Act	National Intelligence University, Washington, D.C./graduate certificate students in Leadership & Management in the Intelligence Community program	3/15/19
Merit Systems Protection Board: Policy/Initiatives	Joint Base Andrews, MD/Air Force Judge Advocate General School's Advanced Labor and Employment Law Course	4/16/19
MSPB Update	Washington, D.C./Federal Circuit Bar Association's MSPB Summit participants	5/5/19
A Conversation with the MSPB	Philadelphia, PA/Federal Dispute Resolution Conference attendees	8/14/19
The Federal Workplace at the Midpoint of the Trump Administration (panel)	Chicago, IL/Kent College Federal Sector Labor Relations & Labor Law Conference attendees	9/19/19
The Current Administration's Impact on the Federal Workplace (panel)	New Orleans, LA/American Bar Association Labor and Employment Law Conference attendees	11/7/19
Administrative Law in the Circuit Community (panel)	Virtual/Federal Circuit Bar Association Bench & Bar participants	6/19/20
A Conversation with the MSPB	Virtual/Federal Dispute Resolution Conference participants	8/18/20
Issues That the New Merit Systems Protection Board Will Encounter (panel)	Virtual/Federal Circuit Bar Association Bench & Bar participants	6/25/21
A Conversation with the MSPB	Virtual/Federal Dispute Resolution Conference participants	8/19/21

9. Criminal History

Since (and including) your 18th birthday, has any of the following happened?

- Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Exclude citations involving traffic infractions where the fine was less than \$300 and did not include alcohol or drugs.)
- Have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official?
- Have you been charged, convicted, or sentenced of a crime in any court?
- Have you been or are you currently on probation or parole?
- Are you currently on trial or awaiting a trial on criminal charges?

- To your knowledge, have you ever been the subject or target of a federal, state or local criminal investigation?

No.

10. Civil Litigation and Administrative or Legislative Proceedings

(A) Since (and including) your 18th birthday, have you been a party to any public record civil court action or administrative or legislative proceeding of any kind that resulted in (1) a finding of wrongdoing against you, or (2) a settlement agreement for you, or some other person or entity, to make a payment to settle allegations against you, or for you to take, or refrain from taking, some action. Do NOT include small claims proceedings.

No.

(B) In addition to those listed above, have you or any business of which you were an officer, director or owner ever been involved as a party of interest in any administrative agency proceeding or civil litigation? Please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

<u>Date Claim/Suit Was Filed</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>
June 14, 2019	U.S. Court of Appeals for the D.C. Circuit	Damian Nastri v. MSPB and Tristan Leavitt	Judicial appeal of MSPB adjudication of federal employee's whistleblower and discrimination claims	Dismissed in part on October 30, 2019; discrimination claims transferred to U.S. District Court for the Eastern District of Virginia, where they were dismissed on July 22, 2020

(C) For responses to the previous question, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

The complainant, a former employee of the Department of Defense Office of Inspector General, made a wide variety of allegations regarding officials at his agency, as well as officials at OSC and MSPB. Specific to me, he alleged that while working as a congressional staffer I failed to protect his rights; failed while at OSC to protect his rights; retaliated while at OSC against him

and/or his wife; disregarded conflicts of interest and committed legal malpractice as MSPB General Counsel; abused my authority while at MSPB and illegally presented myself as MSPB's Acting Chief Executive and Administrative Officer; and failed while at MSPB to protect his rights.

11. Breach of Professional Ethics

(A) Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, professional association, disciplinary committee, or other professional group? Exclude cases and proceedings already listed.

No.

(B) Have you ever been fired from a job, quit a job after being told you would be fired, left a job by mutual agreement following charges or allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?

No.

12. Tax Compliance

(This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

REDACTED

13. Lobbying

In the past ten years, have you registered as a lobbyist? If so, please indicate the state, federal, or local bodies with which you have registered (e.g., House, Senate, California Secretary of State).

No.

14. Outside Positions

x See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

For the preceding ten calendar years and the current calendar year, report any positions held, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

15. Agreements or Arrangements

x See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

As of the date of filing your OGE Form 278, report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment.

Provide information regarding any agreements or arrangements you have concerning (1) future employment; (2) a leave of absence during your period of Government service; (3) continuation of payments by a former employer other than the United States Government; and (4) continuing participation in an employee welfare or benefit plan maintained by a former employer other than United States Government retirement benefits.

16. Additional Financial Data

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

SIGNATURE AND DATE

I hereby state that I have read the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

/s/ Tristan Leavitt

This 7th day of September, 2021

REDACTEDUNITED STATES OFFICE OF
GOVERNMENT ETHICS

September 14, 2021

The Honorable Gary C. Peters
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Tristan L. Leavitt, who has been nominated by President Biden for the position of Member, Merit Systems Protection Board.

We have reviewed the report and have obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

DAVID APOL

Digitally signed by DAVID
APOL
Date: 2021.09.14 18:27:51
-04'00'

David J. Apol
General Counsel

Enclosures

REDACTED

August 5, 2021

Katherine Smith
 Alternate Designated Agency Ethics Official
 U.S. Merit Systems Protection Board
 1615 M Street, N.W.
 Washington, DC 20419

Dear Ms. Smith:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Member of the Merit Systems Protection Board. It is my responsibility to understand and comply with commitments outlined in this agreement.

SECTION 1 – GENERAL COMMITMENTS

As required by the criminal conflicts of interest law at 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the particular matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me:

- Any spouse or minor child of mine;
- Any general partner of a partnership in which I am a limited or general partner;
- Any organization in which I serve as an officer, director, trustee, general partner, or employee; and
- Any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

In the event that an actual or potential conflict of interest arises during my appointment, I will consult with an agency ethics official and take the measures necessary to resolve the conflict, such as recusal from the particular matter or divestiture of an asset.

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the regulatory exemption for diversified mutual funds and unit investment trusts at 5 C.F.R. § 2640.201(a), obligations of the United States, or municipal bonds.

I will receive a live ethics briefing from a member of the ethics office after my confirmation but not later than 15 days after my appointment pursuant to the ethics program regulation at 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will submit my

Certification of Ethics Agreement Compliance which documents my compliance with this ethics agreement.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order No. 13989) and that I will be bound by it. Among other obligations, I will be required to recuse from particular matters involving specific parties involving my former employer or former clients for a period of two years after I am appointed, with the exception of federal, state and local government.

I will not modify this ethics agreement without your approval and the approval of the U.S. Office of Government Ethics pursuant to the ethics agreement requirements contained in the financial disclosure regulation at 5 C.F.R. § 2634.803(a)(4).

SECTION 2 – SPOUSE’S BUSINESS

My spouse is the owner and operator of Nellie’s Cookie Jar, LLC. I currently perform certain limited administrative tasks for the LLC on an uncompensated basis. Upon confirmation, I will resign from my position with the LLC and will cease providing services to it. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Nellie’s Cookie Jar, LLC, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

SECTION 3 – PUBLIC POSTING

I have been advised that this ethics agreement and the Certification of Ethics Agreement Compliance will be posted publicly, consistent with the public information law at 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

 Tristan L. Leavitt

**U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-hearing Questionnaire
For the Nomination of Tristan Leavitt to be
Member, Merit Systems Protection Board**

I. Nomination Process and Conflicts of Interest

1. **Did the President give you specific reasons why he nominated you to serve as a Member of the Merit Systems Protection Board (MSPB)?**

No.
2. **Were any conditions, expressed or implied, attached to your nomination? If so, please explain.**

No.
3. **Have you made any commitments with respect to the policies and principles you will attempt to implement as Member of the MSPB? If so, what are they, and to whom were the commitments made?**

No.
4. **Has the President or his staff asked you to sign a confidentiality or non-disclosure agreement?**

No.
5. **Has the President or his staff asked you to pledge loyalty to the President or the Administration?**

No.
6. **Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.**

No.
7. **Have you ever represented a party in a matter before or involving the MSPB? If so, please describe the matter(s) and the nature of the representation.**

While I was at the Office of Special Counsel (OSC) I participated in editing several

documents filed before MSPB, including amicus curiae briefs in several whistleblower cases and a brief in a case involving attorney's fees potentially being assessed against OSC, which I believe is currently on appeal to the Board. Clearly if confirmed I would be required to recuse myself from all matters I worked on or supervised while at OSC.

8. **Please provide the name of any individual, law firm, consulting firm, lobbying firm, public relations firm, or other entity you have formally retained or contracted with regarding this nomination, including any amounts paid in fees or otherwise.**

None.

II. Background of the Nominee

9. **What specific background and experience affirmatively qualify you to be a Member of the MSPB?**

I have been the acting head of MSPB since March 1, 2019 and served as the agency's General Counsel since October 2018. I have also worked on federal workforce issues for the past decade, including at the Office of Special Counsel, where I served as Principal Deputy Special Counsel and for a time as Acting Special Counsel.

My first experience in this area came I began working in early 2011 for Senator Chuck Grassley's Senate Committee on the Judiciary staff. I routinely conducted investigations into federal employee misconduct, and as part of those investigations performed dozens of transcribed interviews of federal employees. I also frequently conducted oversight of how federal agencies responded to misconduct or poor performance. In addition, I managed Senator Grassley's whistleblower intake hotline, speaking with hundreds of whistleblowers and, in a number of cases, communicated with their agencies to help ensure their protection. In a related capacity, I handled whistleblower protection legislation and other federal personnel policy issues for Senator Grassley, and worked closely with MSPB and OSC as we considered potential changes to their processes. I also led the development and submission of a bipartisan, bicameral congressional amicus brief in the first Supreme Court case to consider the whistleblower protection provisions of the Civil Service Reform Act of 1978.

I continued the vast majority of this work when I joined the staff of the House Committee on Oversight and Government Reform at the beginning of 2015, serving as its expert on both whistleblower relations and whistleblower policy. I took over the Committee's responsibility for conducting oversight of MSPB and OSC, and in late 2015 I led the Committee's efforts to consider the reauthorization of both agencies. Since the committee has jurisdiction over workforce policy legislation, I also shepherded the passage of and drafted the committee reports for multiple bills amending MSPB's jurisdiction and processes.

As Principal Deputy Special Counsel at OSC from June 2017 to October 2018, I edited and approved all complaints, briefs (including amicus briefs), and stay requests OSC filed

with MSPB. I also edited and approved all prohibited personnel practice reports, which OSC issues to the Board, the agency involved, and the Office of Personnel Management. I helped organize meetings between OSC and MSPB to ensure MSPB was aware of how OSC's process works, and oversaw a large-scale adjustment to OSC's intake and investigative processes to more effectively investigate and prosecute prohibited personnel practices.

Since coming to MSPB nearly three years ago my relevant experience has included reviewing hundreds of cases, analyzing their compliance with the relevant statutes, MSPB caselaw, and federal court precedent. As part of that, I've reviewed and approved over a hundred motions and briefs filed in federal appeals courts on behalf of the agency. In the absence of Board members, I've been the final decisionmaker on these matters. I've also reviewed and approved dozens of draft decisions for the Board to consider on its arrival. Throughout my time at the agency I've spearheaded efforts to prepare for the confirmation and arrival of Board members, including identifying necessary adjustments to Board processes and overseeing a review of MSPB's regulations for proposed amendment. Finally, I've provided technical assistance to Congress regarding a number of pieces of legislation that would further amend MSPB's processes and jurisdiction.

Taken together, I believe this experience qualifies me to serve as a Member on the Board and would provide me with unique insights into exercising the duties and jurisdiction Congress intended for it.

10. What experience, if any, do you have in deciding cases, resolving disputes, or performing the other duties required in serving on the MSPB?

Compliance orders, involving instances where an appellant alleges that their agency has failed to comply with a ruling from MSPB, are drafted for the Board by MSPB's Office of General Counsel (OGC). Thus, as general counsel, I have made decisions on dozens of compliance cases, preparing them for decisions by Board members.

Additionally, just as Board members' main adjudicative duty is deciding whether administrative judges (AJs) at MSPB properly applied the law in initial decisions, I also regularly make decisions of this nature. If an appellant chooses to file a petition for review (PFR) of an initial decision, it currently becomes part of the backlog awaiting Board consideration. (Unlike draft compliance orders, draft opinions on PFRs are written by MSPB's Office of Appeals Counsel.) Yet if an appellant does not file a PFR within 30 days of an initial decision, it becomes the final decision of MSPB and can be appealed in federal court. Because OGC represents MSPB in court, we conduct our own review of each appealed decision and its underlying pleadings. Where that review reveals that an AJ may have misapplied the law, I have to decide whether the ruling constitutes harmless error (which we would still confess in our briefs) or whether to petition the court to remand the case to the AJ to correctly address the issues. (This has usually occurred where a jurisdictional deficiency stopped the AJ from proceeding to further stages of adjudication, such as a hearing.)

11. Please describe:

a. Your leadership and management style.

I'm personally most motivated when I'm inspired in a cause, so as a leader I do my best to inspire others about the work at hand. I believe employee engagement is a key factor in the success of any organization, and that treating employees with dignity is crucial to fostering engagement. I also believe kindness is vastly underemphasized in discussions of what we should strive for in the workplace setting.

Just as I spent most of my congressional staff career advocating for transparency in government, I aspire in both leadership and management to be as transparent as possible wherever possible. In my opinion I've worked best in my career when I was entrusted by leaders with as much information as they could share, which empowered me to proactively identify how I could best serve the goals of my organization. I do my best to grant the same courtesy to others, both as a matter of respect and in the interest of cultivating employees who understand the needs of the agency and the challenges it faces. By being candid about my own questions and challenges on a personal level, I strive to foster an environment where employees feel comfortable raising their own questions or dissenting from the conventional view.

Along similar lines, I strive as a manager to teach correct principles with appropriate training, give employees the leeway to govern themselves, and then hold them accountable with appropriate oversight and verification. I try to be a collaborative manager, offering my insights where they may be useful while supporting employees in areas I may have less knowledge of or where their experience may give them a unique perspective. I strive to be as fair and evenhanded as possible, mentally formulating rules along the way to guide my response if a similar situation comes up again in the future.

Finally, I believe that stewardship in any role requires taking responsibility. Difficult decisions are often left to managers or leaders, especially in the federal government, and avoiding hard choices usually results in negative consequences and even more difficult decisions down the line. Having observed that hazard in practice hundreds of times, I aspire to do what—to the best of my understanding at a given moment—is best for the organization even if it's difficult for me personally. Where I judge incorrectly or otherwise err, I strive to acknowledge that. In keeping with the themes above, by being open with subordinates about my failures as well as my successes, I strive to create an environment where employees will also not be afraid to do what seems right out of fear that it might fail or have negative repercussions.

b. Your experience managing personnel.

I have managed personnel in both professional and volunteer capacities. As a full-time volunteer missionary in London for my church from 2002-2004, I managed first eight other volunteer missionaries, then 30. As student body vice president at

Brigham Young University from 2006-2007, I managed a team of seven individuals who each oversaw their own teams administering various programs and volunteers. As the leader from 2007-2008 of my church congregation's program for young men, I managed three individuals, and each of us led groups of young men in service projects, Scouting activities, and ecclesiastical instruction. From 2012-2014 I served as the clerk of my church congregation, managing three to four individuals who administered the finances and records of the approximately 400-person congregation. As the overall leader of the congregation from 2014-2019, I was responsible for making all personnel decisions for the congregation's extensive volunteer system. I directly managed approximately 15 individuals, whose responsibilities ranged from organizing social activities to caring for the poor and needy to managing all finances of the congregation. As Principal Deputy Special Counsel at OSC, I managed the agency's four Senior Executive Service officials (three Associate Special Counsels and the Chief Operating Officer). Finally, at MSPB I manage both the agency's Acting Executive Director and the 14 attorneys and paralegals in OGC.

c. What is the largest number of people that have worked under your supervision?

Approximately 220 at MSPB.

12. Why do you want to serve as a Member of the MSPB?

I believe firmly in the importance of the merit system, and MSPB plays a key role in that system. MSPB faces unprecedented challenges given its lack of a quorum over the past four and a half years, and I believe my experience at the agency will be useful in facing those challenges.

13. What would you consider your greatest successes as a leader?

When I arrived at MSPB in October 2018, the agency faced challenges both from the legal ramifications of the Supreme Court decision *Lucia v. Securities and Exchange Commission* and from a view in some quarters of the Department of Justice that MSPB ought to shut down if it came to a point without sitting Board members. To me, simply keeping the agency open over the past three years has been a significant success.

During what could have been a catastrophic time for agency morale, I'm also very happy that from the 2018 Federal Employee Viewpoint Survey to the 2020 survey, employee engagement actually went up, from unweighted scores of 66% to 80%. Positive responses to "Senior leaders generate high levels of motivation and commitment in the workforce" rose from 37% in 2018 to 69% in 2020.

14. What would you consider your greatest failure as a leader? What lessons did you take away from that experience?

As an ecclesiastical leader for five years my counsel was regularly sought by members of my congregation regarding marital disputes, addictions, and other extremely difficult

matters. Particularly after working so closely with individuals, usually in a one-on-one setting, it was very difficult for me on occasions when they would nevertheless pursue a destructive path that resulted in harm for themselves or for others. Given the benefit of hindsight, I wish I would have approached some of the situations quite differently—sometimes to do more, and sometimes to actually do less. Some of the examples helped teach me that while leaders can try to help establish the conditions for individuals to succeed, the choice is ultimately the individual's. Since then this experience has been invaluable to me as a manager, particularly when confronting performance or misconduct issues.

15. Please give examples of times in your career when you disagreed with your superiors and advocated your position. Were you ever successful?

When I started with the majority staff of the House Oversight and Government Reform Committee at the beginning of 2015, I was assigned to help conduct a large investigation into the U.S. Secret Service. Committee leadership was looking for ways to show progress in the investigation, and relatively early on requested that we begin producing a staff report. I pushed to continue our investigation, explaining the complexity of the issues the agency faced, which resulted in discussions about whether to potentially write several different reports. Given the interrelatedness of the issues, I continued to push to extend our investigation and produce a more comprehensive report. By the end of the year, we ultimately negotiated with the Committee's minority staff a 200-page report addressing security failures, personnel misconduct, staffing impediments, and agency management and leadership challenges. Rather than just releasing it as a staff report, Committee members voted unanimously to adopt it as a Committee report, and it became the first such report approved by the Committee in multiple years.

At OSC there were times in the front office when we disagreed on investigative or administrative matters. Sometimes I was successful in persuading others and sometimes not. I strove to offer my frank advice, explain my reasoning as thoroughly as possible, and then abide by the ultimate decision.

16. Do you seek out dissenting views and encourage constructive critical dialogue with subordinates? Please provide examples of times in your career when you have done so.

I strive to do this regularly. I have rarely hesitated in my career to share my own candid views, and as a leader I have tried to create a climate where employees can feel confidence in doing the same. I firmly believe this creates the best condition for success in any organization. In senior staff meetings at OSC and MSPB and in my own OGC staff meetings at MSPB, I usually open the floor for any unscheduled discussion items or questions. When difficult issues are discussed, I try to ask open-ended questions designed to elicit honest feedback. I explicitly ask for differing views and also watch carefully for signs of dissenting opinions. If someone seems reluctant to share in the meeting, I speak to them afterwards to seek to understand their concerns.

For example, when I arrived at OSC in June 2017 the agency was working with a contractor who was approximately two years overdue on a fixed-cost contract to build a new electronic case processing system. Staff recommended delaying adoption of the incomplete system during my first month, but by the fall it was clear a different tack was needed. The contractor insisted it had performed its obligations under the contract, but the product was clearly not complete, and it became clear we would have to pursue a breach claim with the contractor. The unanimous recommendation from the OSC staff with responsibility for the project, including OSC's information technology (IT) staff, was that OSC should simply abandon the product and start from scratch on a new system. None of the other senior staff with non-IT responsibilities objected to this plan when given the opportunity, yet when I probed deeper, I got the subtle sense not everyone had full confidence in OSC's IT staff. When I subsequently met with various employees to try to understand more, it became clear OSC's IT staff didn't have the specific technical expertise necessary to know what steps would actually be required to bring the current project to successful completion. Thus, we decided to hire a second contractor to assess the work of the first contractor, determining what work remained and whether it would be more cost-effective to finish the existing product or start a new system altogether.

Outside of my immediate circle of supervision, in every opportunity to introduce myself to employees at OSC and MSPB I've conveyed that I have an open-door policy and welcome constructive criticism. When I arrived at OSC I sent multiple all-employee emails requesting ideas on anything that could improve the agency. I also attended staff meetings of each of the headquarters offices to introduce myself, answer questions, and reiterate my request for reform recommendations, and was able to travel to one of OSC's three field offices to meet with the staff in that office and the three field supervisors. Out of those interactions, I received a number of responses with detailed written suggestions and met individually with over a dozen employees at their request. As a result of those suggestions, when Henry Kerner was confirmed as the new Special Counsel we immediately established an Efficiency & Effectiveness Working Group, which after further study recommended a restructuring of the agency's intake and investigative process. During the entirety of my time OSC, employees from throughout the agency continued to request to meet with me one-on-one when they had concerns or ideas for improvement.

Similarly, I've attended the staff meetings of each of our headquarters offices at MSPB. When I became MSPB's Acting Chief Executive and Administrative Officer in the spring of 2019, I also traveled in person to each of our eight regional and field offices to meet all the employees and conduct open question-and-answer sessions, giving them the opportunity to ask about whatever was on their mind. Just like at OSC, employees in the regions have significantly less contact with agency leadership than employees at headquarters, so the question-and-answer sessions usually lasted multiple hours. I did my best to provide previews of the directions I anticipated the agency might go on various issues, explained the reasoning as best as I understood it behind agency actions or policies, and committed to further research and report back on questions I didn't know the answer to. During the pandemic, I've sent out a weekly all-employee email with the

same approach. In response, a number of employees have emailed me back with ideas or questions. I've continued to join virtual staff meetings for question-and-answer sessions through the pandemic, and also held a similar agency-wide session during the summer of 2020 after I proposed and we prepared to organize a Diversity and Inclusion Council at MSPB.

17. Please list and describe examples of when you made politically difficult choices that you thought were in the best interest of the country or your organization.

As independent agencies, both OSC and MSPB walk a line that can be politically fraught at times. In November and December 2017, OSC received complaints that Kellyanne Conway had advocated on behalf of a candidate in two news interviews where she was acting in her official capacity. Viewing the news interviews, it was fairly clear Conway had violated the Hatch Act on both occasions. Yet OSC's longstanding process for investigating Hatch Act complaints involves seeking information from an individual's employer about what training the individual may have had on the law, as well as sending interrogatories to give the individual an opportunity to respond to the allegations. Outside groups put significant pressure on OSC to confirm Ms. Conway's violations prior to the completion of the investigation. Since we agreed with the substance of the outside groups' view that Conway had violated the Hatch Act, it was tempting to simply acknowledge the fact. However, OSC's experienced career Hatch Act staff make clear that doing so would have deviated from the agency's long-established procedures, and also potentially been unfair to Ms. Conway herself. Subsequently, as outside groups continued to challenge OSC's independence and credibility while the process was nearing completion, Ms. Conway failed to respond to OSC's interrogatories. The White House indicated she would do so in the near future, but OSC was finally forced to release its report without Ms. Conway's response, knowing that both its findings and process would also displease others.

As indicated above, near the beginning of my time at MSPB, individuals within the Department of Justice indicated that they had questions about MSPB's ability to operate once Vice Chair Mark Robbins's term ended on February 28, 2019. Even without a Board to issue decisions on PFRs, halting the adjudication of MSPB's AJs would have eliminated the only process for the approximately 5,000 federal employees a year whose cases the AJs hear, who in turn still had the option to bypass the Board and appeal the AJ's decision directly to federal court. We felt it was important to avoid this catastrophic outcome if at all legally possible, and brought attention to the issue in Congress. Since then, I have done everything within my power to keep the agency operating.

18. Please describe how you build credibility and trust among staff as a leader.

As described above, I believe transparency and candor go a long way toward this. I have also attempted to build credibility and trust by treating my staff with dignity and respect, not expecting special privileges as a leader, showing my willingness to work just as hard as I ask them to and even help with their work when necessary, and highlighting to others the accomplishments of my subordinates, including giving them credit when their

work has reflected positively on me.

- 19. During your career, has your conduct as a government employee ever been subject to an investigation or audit by the Office of Special Counsel, Department of Justice, agency Equal Opportunity office or investigator, agency Inspector General, or any other similar federal, state, or local investigative entity? If so, please describe the nature of the allegations/conduct and the outcome(s) of the investigation(s) or audit(s).**

During my time at MSPB, I understand that around March 2020 a manager at the agency filed a complaint with OSC alleging that I retaliated against them by sending them a letter of counseling. The circumstances behind the letter are more fully described in response to question #21. MSPB has had no further update from OSC regarding whether it opened an investigation to pursue the allegations.

- 20. Have you ever represented a whistleblower or other employee in an adversarial dispute against the federal government?**

No.

- 21. Do you have experience addressing instances of prohibited personnel practices (PPPs)? If so, please generally describe your experience.**

The vast majority of my career as a congressional staffer involved addressing instances of prohibited personnel practices that were brought to my attention. Additionally, OSC's chief mandate is to investigate and address instances of PPPs. My experience addressing PPPs as a manager at the agency involved has been significantly more limited.

When I arrived at OSC, there had been high-profile allegations of PPPs against agency leadership. The leaders in question had departed, but I heard out the employees who alleged the PPPs, worked to identify what issues remained, and attempted to address the issues and get the agency back on stable footing moving forward.

My only specific experience addressing an alleged PPP by an employee under my supervision took place at MSPB. In response to an all-agency email I sent to MSPB reminding employees of the importance of fostering an environment where employees can raise concerns without fear of retaliation, one MSPB employee contacted me directly to allege that they had been retaliated against by their manager. I initiated an investigation of the circumstances surrounding the conduct in question. While it was not clear whether the manager's conduct met the legal definition of a PPP, documentary evidence made evident that the manager had acted rashly and imprudently. In late February 2020 I sent a letter to the manager admonishing them of the need to avoid even the appearance of retaliation. As described above in #19, I was informed the manager subsequently filed a complaint with OSC alleging my letter was retaliatory.

22. **Please describe any previous experience—in the public or private sector—with handling whistleblower complaints, and what steps you took to ensure those individuals did not face retaliation and that their claims were thoroughly investigated?**

Since law school, my entire career has in one form or another involved working for the protection of whistleblowers.

One of my duties for both the Senate Judiciary Committee's minority staff and the House Oversight Committee's majority staff was to manage intake on their whistleblower email hotlines. My job was to either investigate promising submissions myself or ensure they were assigned to other staff to investigate. For submissions that seemed worthy of a follow-up phone call, I would often be the whistleblower's first congressional contact. I would carefully explain that although Congress took very seriously the right of individuals to communicate with it, communication with Congress was not an umbrella or shield that could prevent all potential harm. I explained that the best protection was often anonymity, and that if retaliation occurred, obtaining a formal remedy required first proving one's case through a legal process. In instances where whistleblowers faced pushback merely for communicating with Congress, I would immediately communicate to their supervisors that such conduct was unacceptable, that employees have a legal right to communicate with Congress, and that obstructing a congressional investigation is a crime. On both of those committees, I also conducted oversight of how OSC, various agencies, and offices of inspector general worked to protect whistleblowers. [Bureau of Prisons]

Although I received occasional briefings on individual cases at OSC and helped to strategize how best to resolve them, much of my work at OSC was more systemic. For instance, I recommended and oversaw a streamlined process for ensuring that more whistleblower allegations to OSC under 5 U.S.C. § 1213 were investigated by their department or agency. From the perspective of internal agency matters, I received a handful of what were arguably disclosures. The vast majority of these were made directly to me in confidence, so I investigated the underlying circumstances personally without ever implicating the individuals who made the disclosures.

Similarly, I've received disclosures at MSPB and done my best to ensure the investigation of the allegations and the anonymity, where possible, of the individuals making the disclosures. In at least one instance, that has involved ensuring the allegations were confidentiality transmitted to my deputy general counsel and our legislative counsel, who have handled the agency's inspector general function while I have been serving as head of agency and recused from the process.

23. **Do you have any experience adjudicating matters? Please explain.**

Since March 1, 2018, I have been responsible for adjudicating FOIA appeals as MSPB's head of agency. This involves assessing individual FOIA requests, MSPB's initial response, and the relevant FOIA statutory provision or caselaw.

Similarly, although OSC functions as an investigative and prosecutorial entity, it must also conduct its own internal analysis akin to adjudication to determine which matters merit further action, and what actions to take based on the evidence involved. I participated in several discussions of complex cases where the line attorney and their supervisor sought management guidance.

Finally, at OSC I served as a deciding official in a misconduct matter, making a final agency decision on the basis of the disciplinary proposal and the evidence and oral testimony furnished by the employee in response.

24. The MSPB functions as an independent, third-party adjudicatory authority for employee adverse actions (e.g., removals, suspensions for more than 14 days, and furloughs) and retirement decisions. Please describe your experience in developing adjudicatory processes and procedures, issuing subpoenas, calling witnesses, and enforcing decisions.

Working for Senator Grassley I participated in dozens of transcribed witness interviews, and participated in discussions with the House Oversight and Government Reform Committee regarding issuing and enforcing subpoenas in specific matters, including through both civil and criminal lawsuits. I conducted oversight of the Department of Justice's processes and procedures for investigating and adjudicating Federal Bureau of Investigation whistleblower complaints. I also led oversight of the Occupational Safety and Health Administration's procedures and processes for its Whistleblower Protection Program, which administers nearly 20 whistleblower protection statutes.

Working for the House Oversight Committee itself, I gained further experience calling hearing witnesses and calling and interviewing witnesses in depositions. I also made recommendations the chairman followed on issuing subpoenas, and for a period of time was responsible for the logistical process of issuing and serving both subpoenas ad testificandum and subpoena duces tecum for the Committee.

For both of these committees, I was our staff expert regarding the Lloyd-LaFollette anti-gag appropriations rider, which provides an enforcement mechanism for implementing 5 U.S.C. § 7211 (protecting the right of federal employees to furnish information to Congress). Where one witness asked to provide testimony to congressional staff was counseled by his agency not to do so, we sought evidence from the relevant inspector general regarding the agency's communications, and obtained from the Government Accountability Office a legal opinion finding that the agency's "appropriation was not available to pay the salaries of these employees" during the time the agency refused to schedule the witness interview.

Additionally, during my time with the House Oversight Committee OSC experienced significant obstacles to obtaining the information it needed to conduct its investigations. I organized a hearing regarding OSC's issues with obtaining necessary documents and testimony, and worked on a bipartisan bill to create a statutory access provision for OSC.

In November 2017, after I had moved to OSC, such a provision was passed as part of the OSC Reauthorization Act in the National Defense Authorization Act for Fiscal Year 2017. Thus, at OSC I oversaw the updating of the agency's information requests to reflect the statutory access provision and the development of a process for how to deal with noncompliance.

Finally, at MSPB I have participated in many discussions regarding new or updated processes and procedures for adjudication at the agency. I have also helped formulate potential new processes by which a Board might enforce compliance with its decisions. Additionally, as described in my response to #10, I have played in drafting recommended enforcement decisions and compliance rulings for a Board to review on its arrival.

25. Through your experience, what practices would you consider vital to managing a federal workforce?

My experience is that leadership is frankly easier than management, because to me leadership involves developing a vision and motivating employees to want to make it a reality, whereas management entails a much closer level of working with employees to help them accomplish the necessary goals. For managers, providing sufficient training to set expectations and then providing regular feedback are critical. Working with an employee closely enough to provide useful feedback, or to help teach necessary skills, can require patience and persistence. Empathy is necessary in order to put oneself in the employee's place and see from their perspective what else is needed. Humility can help one appreciate that there is often more than one way to accomplish a task, including sometimes better ways than one's own way. I indicated in my response to question #11a that I believe employee engagement is a key factor in the success of any organization. Engagement starts with connection, and at the end of the day, all managers must meet people where they are if they hope to successfully help them move forward.

Sometimes employees refuse to move forward despite the best management. I came to OSC and MSPB with a strong view from my congressional oversight experience that managers in the federal government should be more concerned with what's best for their agency and the taxpayers than what's personally convenient or advantageous. Many managers are afraid that if they hold employees accountable, they will themselves become the subject of complaints or litigation. I understand this fear (all the more now having worked at two agencies where employees are highly familiar with the process for filing complaints, and where allegations of mistreatment would receive particular public scrutiny given the important position both agencies occupy in defending the merit system principles). Nevertheless, government employees are there to serve the taxpayers' interests, not their own interests. I remain convinced that when managers and their agencies do the hard thing, as long as they fairly and objectively apply the law, the facts will ultimately speak for themselves.

26. How will your experience help the MSPB maintain the MSPB's Merit Systems Principles (MSPs)?

MSPB has three explicit statutory missions that help it maintain the MSPs. The first is adjudication, through which individual cases involving MSPs are decided and precedent is established to help guide agencies. My longstanding familiarity with the MSPs as well as my experience with MSPB caselaw would be key to fulfilling this duty if I were confirmed as a member of the Board.

MSPB's second mission is research, which MSPB's Office of Policy and Evaluations conducts in order to produce studies for the President, Congress, and the public regarding the health of the merit system. I believe my experience conducting oversight of the federal government from within both the legislative and executive branches has allowed me to play a useful advisory role to the Office of Policy and Evaluations during my time thus far at MSPB, and I anticipate it would continue to do so if I were confirmed to the Board.

MSPB's third mission might be generally characterized as performing oversight of the Office of Personnel Management (OPM). My experience at OSC and MSPB has given me significant insight into OPM's operations as well as the rules and regulations it promulgates, which would in turn aid me in ensuring they are in accord with the MSPs.

Finally, MSPB also has a broad implied mission, which is to educate the public and the federal workforce on the merit system and to advocate for the MSPs. This is another role where I believe my experience will prove valuable. Handling whistleblower and other federal workforce policy issues for Senator Chuck Grassley, I routinely advocated for the MSPs with other offices, and helped Senator Grassley introduce in 2013 the first congressional resolution recognizing National Whistleblower Day. I also proposed and spearheaded the organization of the Senate Whistleblower Protection Caucus in order to further educate other offices and build broader support for protecting whistleblowers. As the House Oversight Committee's expert on whistleblowers and whistleblower policy, I performed training for all Committee staff and was also routinely consulted by other offices on the significance of these issues. At OSC, I promoted the MSPs through speaking engagements, training events, and news interviews. The Special Counsel and I also met regularly with agency heads and general counsels of federal agencies to advocate on behalf of the MSPs. All of this experience has been useful thus far at MSPB in promoting the MSPs, and I anticipate it would continue to be so if I w

III. Role of Member, MSPB

27. **The Civil Service Reform Act requires that individuals appointed to the MSPB “demonstrate[] [the] ability, background, training, or experience” necessary to “carry out functions of the Board.”¹ Please describe how your abilities, background, training, and experience qualify you for the position of Member of the MSPB.**

As an attorney, I'm trained to apply the law to the facts of a given situation, which is the

¹ 5 U.S.C. § 1201.

primary duty of Board members. Additionally, I have a strong degree of familiarity with Title 5 and the types of questions Board members assess, since the bulk of my professional career has involved interacting with federal employees. As a congressional staffer I saw just about every permutation of personnel issues: whistleblower retaliation, poor performance, pre-selection, employee misconduct, mistakes of paperwork, and more. Because of this experience, I believe I know what types of facts to look for in a given case. My experience from the Hill to OSC to MSPB has given me a firm grasp of the statutory framework MSPB applies, and as a staffer for Senator Grassley and the House Oversight Committee I assisted in drafting various updates to the statute. Finally, having served at MSPB for almost three years, I believe I understand well the responsibilities of a Board member, what resources they will have at their disposal, and how best to accomplish their duties swiftly and effectively.

28. In your opinion, what is the role of the MSPB? What is the role of Members in carrying out the statutory objectives of the MSPB?

MSPB has specific statutory roles as well as a more general implied role. As detailed in my response to question #26, its specific roles include adjudicating various appeals of current and former federal employee; conducting research regarding the merit system; and reviewing the rules, regulations, and significant actions of OPM. A member of the Board has a fairly well-defined role with regard to these responsibilities, particularly in considering and voting cases or reviews of OPM's rules and regulations.

In addition to these statutory roles, I believe MSPB also plays an implied role of defending and promoting the MSPs. After nearly 100 years with no prevailing principles guiding hiring in the federal government, the United States turned to a merit system in the executive branch based on well-reasoned considerations. The codification of the MSPs and PPPs in 1978 further reflected those considerations. I believe a member of the Board can make significant contributions in helping explain these considerations and defending the merit system.

29. The MSPB's mission is to "protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." How do you envision fulfilling the MSPB's mission both day-to-day, and long-term?

Board members' chief role of adjudication plays a significant role in protecting the MSPs both on an individual and a systemic level. Each time they adjudicate an individual case involving MSPs or PPPs, Board members are applying those principles. Sometimes the decision vindicates the employee and sometimes it vindicates the agency, but every decision should vindicate the MSPs.

These adjudications also help protect the MSPs and promote an effective federal workforce on a broader, systemic level. Board precedents provide guidance to agencies regarding how the MSPs should be applied, and cues to employees about whether they've been treated improperly. If confirmed as a Board member, one goal of mine would be to strive to help the Board issues decisions that provide as clear guidance as

possible.

Finally, Board members are frequently called upon to speak or present in a variety of public settings. These are key opportunities to explain the MSPs and defend their importance, and I envision that doing so would be an important part of my service if confirmed to the Board.

30. What do you anticipate being the greatest challenge you would face as a Member of the MSPB, and how do you plan to address those challenges if confirmed?

The backlog of 3,300+ PFRs is the clear greatest challenge I would face if confirmed as a member of the Board. My plan to address the backlog is discussed below in question #49, but overall, I believe my existing familiarity with Board processes and case law would be an asset in tackling the backlog.

31. Do you believe you will review and adjudicate cases that come before you with good judgment and impartiality? Please explain, citing examples of prior work or experience that could bear on your abilities, if applicable.

Yes. As indicated above, I currently review MSPB cases regularly, both draft compliance opinions for the Board and initial decisions appealed in federal court. Nearly three years of feedback from the courts in the form of decisions have reinforced the good judgment exercised in those cases.

32. The MSPB is an independent executive branch agency. What role should Board Members play in safeguarding the MSPB's independence?

Not surprisingly, I am a big believer in independent agencies carefully guarding their independence. The Board itself has the ultimate responsibility for this at MSPB. Board members set the tone for this at the top, including in how they interact with any given Administration.

33. If confirmed, you could delegate certain responsibilities. Please describe how your experience will assist you in delegating authority in an efficient manner. What responsibilities would you maintain for yourself?

Board members have some administrative responsibilities, and my experience at MSPB has given me confidence that if confirmed, I would be able to delegate everything other than the most important responsibilities that demanded my attention. For instance, having presented at a number of conferences on behalf of MSPB, I feel confident that staff could assist in preparing speeches or other materials that would still be authentic for me.

On the adjudicative front, I also believe that if confirmed, my chief counsel would be able to spot issues where I might want to probe the facts deeper, such as cases involving whistleblower retaliation. What I would not be able to delegate to anyone is voting

cases. Ultimately, no one other than the three Board members holds responsibility for making the right decision in a case.

- 34. Do you believe it is important for individual MSPB Members to act as a consensus builder among the Board? Do you believe unanimous rulings are better than non-unanimous rulings? If so, what will you do to build bridges with your colleagues from different ideological positions?**

My overall philosophy in this as in anything else is that building bridges is always best when possible. It demonstrates respect for the viewpoints of others, and when dealing with a polarizing issue, finding consensus for a unanimous opinion provides reliable guidance to employers and employees. That said, achieving consensus can cut both ways: just as in crafting legislative compromises, sometimes accomplishing unanimity in a written decision would require obscuring important differences and leaving unanswered some of the practical questions that may arise. Additionally, unlike in a policymaking scenario, MSPB's ultimate responsibility is to apply to the law as enacted, with the potential consequence of being overturned by a reviewing court if the law is not properly applied. Fortunately, at MSPB the vast majority of cases are relatively straightforward to decide and thus result in unanimous rulings.

IV. Policy Questions

Management & MSPB Workforce

- 35. How do you view the role of information technology at the MSPB as it relates to both day-to-day business and the overall mission objectives to uphold merit systems principles?**

MSPB is in the midst of a multi-year modernization effort of its IT business applications, such as its legacy case management and document management systems. I believe this will significantly benefit day-to-day business at MSPB, allowing the agency's employees a much wider range of action with these tools and potentially speeding some aspects of adjudication. Wise use of IT can also benefit the stakeholders MSPB serves, helping MSPB further accomplish its mission. For instance, this summer MSPB updated its public-facing website. The new design is much cleaner, and hopefully helps those using the website (particularly unrepresented pro se appellants) find the resources they need to successfully navigate the appeals process.

- 36. According to the MSPB's Fiscal Year 2021 annual report, over 31 percent of MSPB employees, including almost 45 percent of adjudication managers, are eligible to retire between now and the end of 2022. What steps will you take to ensure that the MSPB conducts its own succession planning, so that you are able to execute your statutory duties?**

[REDACTED]

This is a potential liability MSPB has both had and highlighted for the past several years, although fortunately the actual numbers of retirements over those years have remained relatively stable. Like other agencies, MSPB is currently in the process of developing its Strategic Plan for FY 2022-2026. After that plan is complete, it will be used to inform a Strategic Human Capital Plan, which has been discussed over the last year and had groundwork laid. This plan can help inform such areas as how to ensure effective succession planning, what types of positions it would best serve MSPB to hire for in the future, etc.

37. If an accusation of discrimination were to arise within an office under your management, what actions would you take to address such an accusation?

First of all, if I personally observed any discrimination or if the allegation were of ongoing harassment, I would take immediate steps to intervene and halt the behavior. Otherwise, upon receiving an allegation of discrimination, I would first seek to understand the accusation in as much depth as possible, listening carefully to the individual making the allegation and asking follow-up questions as needed. I would also ensure the alleging employee was aware that if they were considering filing an equal employment opportunity (EEO) discrimination complaint, they should contact MSPB's Office of EEO within 45 days of the alleged discriminatory conduct. I would ensure MSPB conducted a thorough investigation of the allegations and took appropriate remedial steps as necessary, such as proposing discipline for anyone found to have discriminated.

38. Do you believe the MSPB has the resources it needs to meet current challenges? Please explain.

MSPB's budget has remained essentially static over the past several years. MSPB arguably avoided cuts when many other agencies sustained them because Congress has recognized that appropriations for MSPB are an investment in a satisfied workforce free of PPPs, and that this in turn helps prevent further costs that would be incurred in expensive litigation before the federal courts. However, I understand that pay raises and cost of living increases over the past several years have results in salaries and benefits taking a larger and larger share of MSPB's budget. While the agency has been able to sustain this while not funding the salaries of Board members and the associated staff a Board will require, maintaining a flat budget for the agency once a Board arrives will likely result in MSPB facing difficult resource choices at the same time it is finally positioned to begin addressing the backlog. Thus, MSPB is likely to request a budget increase for FY 2023.

OPM & Federal Workforce Policy

39. What do you believe to be the top challenges facing the federal workforce today? What steps do you plan to take to address these challenges, if confirmed? Please

explain.

I believe the lack of a Board quorum is the ultimate top challenge facing the federal workforce today, and of course members being confirmed to the Board would address this issue. I also believe support for the concept of a merit system has fragmented somewhat in recent years, as has the bipartisan support that previously existed supporting robust whistleblower protections. If confirmed, I would do all that I could to educate about and advocate for these ideas.

40. **The MSPB was given the authority and responsibility to review the rules, regulations, and significant actions of the Office of Personnel Management (OPM). Do you have any concerns about OPM's current rules, regulations or recent actions? If so, please describe those concerns.**

I have heard of significant confusion among federal agencies regarding of the status of the regulations OPM adopted to codify Executive Order 13839. The executive order itself has been revoked, yet OPM has not updated its regulations. I believe this ambiguity leaves agencies in limbo trying to determine which rules to apply.

41. **The MSPB has the statutory responsibility to conduct objective, non-partisan studies that assess and evaluate Federal merit systems policies, operations, and practices. These studies are typically government-wide in scope and ensure that the workforce is managed in accordance with MSPs and is free from PPPs. What role do you believe the MSPB's data collection should play in supporting personnel policy?**

Ideally, personnel policy would be as informed by data as possible, and MSPB's reports are an excellent resource for such data. I believe it is appropriate for MSPB's research agenda to take into account policy ideas under consideration and to seek to gather more data on those proposals.

42. **What role do you think merit systems studies, published by the MSPB, play in ensuring a competent and efficient federal workforce?**

- a. **What steps would you take to ensure that the MSPB's external reports address critical federal workforce issues?**

Over the past many months MSPB's Office of Policy and Evaluations has gathered ideas for an updated research agenda to propose to an incoming Board. Thus, the arrival of a Board would be a key time to suggest critical issues the research agenda should address. If confirmed, I would also continue to share new ideas with the Office of Policy and Evaluations as they arose.

- b. **What, if any, coordination do you believe should occur between the MSPB and OPM to address federal workforce issues raised by MSPB studies?**

Upon releasing its studies, I believe it's appropriate for MSPB to brief OPM officials in greater detail, if requested, on its findings and their implications. To me the most important consideration is that OPM not obstruct or seek to influence MSPB's work while it is ongoing. MSPB does not set federal workforce policy, but its statutory studies function can certainly inform OPM's work, and I believe MSPB should do all it can to serve as such a resource.

43. The MSPB is statutorily responsible for conducting oversight of OPM's significant actions. How will you coordinate with OPM to ensure any significant actions conform to the merit systems principles outlined in 5 U.S.C. § 2301?

5 U.S.C. § 1206 indicates that MSPB's review of OPM's significant actions should be included in MSPB's annual report. Were OPM to take significant actions that MSPB found to not conform to the MSPs, MSPB's annual report would likely be informed by information requests from MSPB to OPM, from which OPM might infer prior to the issuance of the annual report that MSPB believed the underlying actions might not comport with the MSPs. On issuance of an annual report finding that significant actions of OPM failed to conform with the MSPs, I would anticipate that MSPB would provide whatever assistance it could to OPM to aid the agency in regaining conformity with the MSPs.

By contrast, a review of an OPM rule or regulation under 5 U.S.C. § 1204(f) can be taken up at any time of the year, so long as it is "after the effective date" of the rule or regulation in question. This process provides for OPM participating in the review.

44. Precedents, findings, recommendations and reviews of OPM rules by the MSPB have potential to directly affect how employees are managed and how their appeals are decided. What role do you believe the MSPB should play in developing personnel policy?

To the best of my understanding, a chief reason the Civil Service Reform Act of 1978 broke the Civil Service Commission into MSPB, OPM, and the Federal Labor Relations Authority was because of concerns about policy being developed by the same entity that would adjudicate individual applications of the policy. Again, MSPB's studies function allows it to serve as a resource for OPM as that agency develops personnel policy, but my understanding is that MSPB should not set personnel policy.

45. In March 2018, the MSPB published an updated survey on sexual harassment in the federal workforce.³ In this survey, 20.9 percent of women in the federal workforce and 8.7 percent of men experienced a type of sexual harassment in the two years preceding the survey.⁴ Only eight percent of these employees believed corrective action was taken against the individual who committed the harassment,

³ Merit Systems Protection Board, Update on Sexual Harassment in the Federal Workforce (Mar. 2018), available at <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT>.

⁴ *Id.* at 4.

possibly resulting in employees not using agency procedures to report the harassment.⁵ What do you believe is the role of the MSPB in ensuring accountability against harassers in the federal workplace and in ensuring employees can report harassment without reprisal?

As I understand it, the chief avenue for reporting most harassment is through an EEO complaint, which ultimately would be appealed to the Equal Employment Opportunity Commission (EEOC), not MSPB. MSPB does hear and adjudicate so-called “mixed cases” where discrimination is raised as a defense against personnel action that otherwise qualifies for MSPB jurisdiction, and participating in the EEO process could be the basis for a retaliation complaint under 5 U.S.C. § 2302(b)(9)(A)(ii). When hearing disciplinary cases if a harasser receives a proposed suspension over 14 days or a proposed removal, I believe MSPB can support agencies sending a strong message on discipline, which deters other would-be harassers.

Through its research and studies function, MSPB can also play a significant role in helping draw attention to harassment in the federal workplace. Since 1980 MSPB has conducted regular studies on this issue, of which the March 2018 report was the latest, and the agency will undoubtedly continue to conduct such studies to monitor progress on the issue and provide recommendations for how to decrease its incidence in the federal government.

46. What steps can the MSPB take to improve federal supervisors’ knowledge and intra-agency support regarding disciplinary and removal processes?

According to MSPB’s 2016 Merit Principles Survey, approximately 60% of supervisors acknowledged that lack of understanding of the process was to at least some extent a challenge in removing employees for misconduct or poor performance. This can result in supervisors failing to take necessary actions, or in taking actions that are flawed by their failure to follow the correct processes. MSPB’s main two avenues for educating federal employees have historically been two-fold: First, it makes educational materials available on its website. MSPB has generated a host of materials over the years on the disciplinary and removal processes, and any supervisor looking for them will find a wealth of resources. MSPB should continue to generate high-quality products that reflect updates to the law as they are adopted. MSPB’s second main avenue for educating federal employees has been through the outreach events it hosts or participates in throughout the country. Many of those are requested by and provided to legal and human resources professionals and not supervisors though, and sometimes an impediment to successful action is supervisors failing to consult legal or human resources professionals when a need for their knowledge arises.

Ultimately, the responsibility is on each agency to educate its supervisors on (and support their use of) disciplinary and removal processes. One approach utilized in the whistleblower protection sphere has been to put the responsibility on the head of each agency to ensure their employees, including new employees, are “informed of the rights

⁵ *Id.* at 8.

and remedies available . . . including . . . whistleblower protections . . . [and] the role of [OSC] and [MSPB] with respect to whistleblower protections” (5 U.S.C. § 2302(c)). The law directs that the head of each agency is also responsible for “complying with and enforcing applicable civil service laws, rules, and regulations” (5 U.S.C. § 2302(c)(2)(B)), which would cover knowledge of the disciplinary and removal processes. Requiring that agency heads ensure supervisors receive regular trainings in these areas may be a further avenue for Congress to explore, and I have no doubt MSPB will always be willing to assist with this kind of training for agencies.

47. **In your opinion, is the underutilization of probationary periods a critical issue? If confirmed, what steps would you take to ensure that managers better utilize probationary periods?**

I believe the probationary period can be immensely helpful in ensuring a particular employee is the right fit for the job. MSPB research indicates that the most effective way to prevent unacceptable performance is to hire the right people in the first place. Thus, MSPB has recommended agencies robustly use probationary periods to thoroughly assess new employees. Yet data shows agencies regularly fail to use probationary periods for this opportunity, and my anecdotal experience is that some managers aren’t even aware their employees are in their probationary periods. If confirmed, I would encourage that MSPB continue to produce research on probationary periods and provide educational materials that can help agencies understand the proper use of probationary periods. I have seen some instances where probationary periods appeared to have been used to retaliate against new employees who blew the whistle, so I believe it’s important that educational materials help instruct agencies to be on guard for indications of this.

Adjudication & Enforcement

48. **What role do you think alternative dispute resolution options, including the Mediation Appeals Program, should play in the MSPB adjudication and enforcement process?**

Generally speaking, litigation occurs when two parties are unable to reach a mutually satisfactory resolution of their disagreements. I believe mediation can play an invaluable role in helping appellants and agencies reach agreement, preserving adjudicative resources for other cases. Although MSPB has a relatively robust mediation program already for cases at the AJ level and an employee dedicated to mediating cases awaiting action at the Board level, it is also possible that identifying additional candidates for mediation from among the cases waiting for Board action and dedicating mediating resources to them may help to reduce the overall PFR backlog.

49. **The MSPB has been without a quorum of Board members since January 8, 2017 with the last member retiring in February 2019. The lack of a quorum contributes to delays in issuing final decisions in petitions for review (PFRs) and other cases filed at headquarters (HQ) and releasing reports of merit systems studies.**

- a. **The MSPB currently estimates that it will take months or longer to process the inventory of cases at HQ and to publish merit systems studies reports once new Board members are nominated and confirmed. Please describe how you will effectively and promptly address the MSPB's current backlog.**

My top procedural recommendation to the Board for addressing the backlog is to return to some version of the so-called "short-form" non-precedential decisions utilized by MSPB for the first 30 years of its history. I understand these historically composed some 60% of the Board's decisions, and would significantly simplify the task of working through the 3,300+ PFR backlog.

An additional recommendation, though with some issues that would require careful consideration, would be to schedule regular meetings between the Board members that are closed following the requirements of the Government in the Sunshine Act. Given the requirements of the Sunshine Act the Board has historically only rarely met to discuss cases in this manner, but I believe it would be worth it to do so regularly under the circumstances.

Beyond these, addressing the backlog will likely just require Board members working overtime over a lengthy period to review cases as swiftly as they can. If confirmed I would be committed to giving this my very best efforts.

As it relates to merit systems studies, as far as I'm aware, I do not believe MSPB's Office of Policy and Evaluations has anything similar to a backlog. Although on the loss of a quorum I believe they initially held off on releasing some studies and their accompanying recommendations on the hope that a quorum would soon be restored, as time went on they have ultimately released all those products in slightly stripped down form (under the view that a Board quorum was necessary to publish recommendations, but they could at least release some of their underlying data and research).

- b. **Please describe how your previous work experience has prepared you to address the challenges in resolving the MSPB's backlog.**

For starters, having had a long time to work with employees in MSPB's Office of Appeals Counsel, which writes draft decisions for the Board, I've developed a high degree of confidence in their professionalism and work product. Because it is Board members who issue decisions and whose credibility is chiefly on the line, it usually takes any new Board member some time to reach that degree of confidence in staff attorneys.

I believe my experience at MSPB will prove procedurally useful in resolving the backlog. For the past two and a half years I've participated in meetings on how to prepare for the arrival of a Board, and I'm familiar with the types of cases in the backlog, how those cases are coded in MSPB's systems, how to access cases, how Board members have historically cast votes on cases, and what would generally be

necessary to change relevant procedures.

Finally, I believe my familiarity with Title 5 will enable me to swiftly identify the key issues in any draft Board decision and expeditiously but fairly adjudicate cases.

- c. According to their annual report for FY21, the MSPB had approximately 2,942 cases pending at HQ at the end of FY 2020. If confirmed, please describe how you will work with your colleagues to consider cases awaiting decisions.**

As described above in my response to subpart a, I believe that within the confines of the Sunshine Act, the Board could meet together to quickly address many pending cases. The majority of cases are straightforward and non-controversial. For those cases that are more complex or involve novel issues of law, I would work with both of my colleagues if confirmed to home in on any areas of disagreement and talk through the issues. I would keep an open mind and approach discussions understanding that my initial understanding may be incorrect. Where I believe either or both of my colleagues to be missing key issues, I would do my best to patiently walk them through the reasoning underlying my position.

- d. Do you have experience with resolving backlogs such as the one faced by the MSPB? If so, please describe your experience.**

The only comparable experience that comes to mind is when I first graduated from college and began in late spring as a House intern in a personal office. They had significantly struggled to keep up with the constituent mail since the Member took office in January of that year, resulting in a growing backlog. After observing for a couple of weeks the system for answering mail, I proposed to the legislative correspondent and the chief of staff an overhaul of the process to file the mail in a more organized fashion while also noting which letters raised similar issues and could be grouped together for response. Within a matter of weeks, during which time I was hired as the office's staff assistant and continued to help with the mail, the new system cut pending mail by 2/3 and significantly decreased response time.

- e. Timeliness is one measure of performance. Quality of decisions is another measure. How can the competing goals of quality and timeliness be balanced? What are the appropriate indicators that could be used to measure the quality of MSPB decisions?**

Throughout the absence of a quorum, MSPB's Office of Appeals Counsel has been consistently processing PFRs and writing draft opinions at the same pace it did while under a quorum. Thus, while new Board members will certainly feel the press of timeliness in voting cases in the backlog, they will have before them draft opinions of the same quality as Board members who didn't have to operate with a backlog. To me, this process alleviates concerns I might otherwise have about the Board seeking to balance quality and timeliness. One measure of the quality of its decisions MSPB

has historically used is the rate at which it is overturned by reviewing courts, and I believe this remains a sound measure.

f. Have you sought advice from any current or former MSPB employees about how to best address the current backlog? If so, please describe your consultations.

As described above, I've had extensive discussions with current employees, and have also consulted former Board members Mark Robbins and Anne Wagner as well as former executive director Jim Eisenmann. The views I've outlined above have benefited from their useful insights.

50. What would you consider to be an appropriate penalty for a violation of the Hatch Act by a senior administration official?

Evenhandedness is an important principle of fairness, and I believe it's extremely demoralizing to the federal workforce when senior officials receive lesser consequences than rank-and-file federal employees would for the same misconduct. Ideally, the law would penalize senior administration officials at least as much as career employees for violating the Hatch Act. (Senior administration officials arguably ought even to be held to a higher standard, with correspondingly higher penalties.) That said, I am aware there may be some separation of powers questions regarding some of the methods by which the legislative branch might impose penalties on certain White House officials.

51. In some cases, complainants who may be better served by other government agencies such as the EEO or OSC seek assistance from the MSPB.

a. How will you work to ensure that your staff effectively guides these complaints to the appropriate resources?

A federal employee who files a complaint that more properly belongs with OSC or the EEOC will be informed of this in a decision by an AJ. However, an AJ must first review the appellant's complaint, which sometimes are quite lengthy and take a fair amount of time to review. I would guess receiving a ruling like this is likely rather demoralizing for the appellant. Thus, it's clearly better if the appellant can go to the right place first, rather than being hung up in MSPB's process. MSPB has attempted to use its website to provide this kind of information, and while avoiding providing legal advice, MSPB staff do their best to help provide useful guidance when they receive phone or email inquiries. If confirmed, I would reinforce to MSPB staff the importance of this kind of education and of providing quality customer service.

b. Will you collaborate with other government agencies to minimize duplication? If so, please describe how you will work to achieve this objective.

My experience is that MSPB, OSC, and EEOC all recognize the confusion that overlapping jurisdiction can cause among federal employees, and all have sections of

their website answering questions on these issues. In theory, a shared website might be a central place federal employees could go to try and identify the proper recipient of their complaint. That said, the duplication federal employees encounter largely arises from the statutes the agencies are charged with administering, and the complexity of those statutes further complicates the task of providing accessible generalized advice on matters that may hinge on extremely detailed (or even legally ambiguous) factors. Nevertheless, I would support convening a task force of the three agencies to brainstorm further ideas and institutionalize this type of collaboration.

Whistleblower Protections

52. **The MSPB previously highlighted the need to examine the prevalence and forms of reprisal for protected activity, particularly for whistleblowing.⁶ Do you view reprisal for whistleblowing as a significant challenge facing the federal workforce? Why or why not?**

I view whistleblower retaliation as a challenge as old as time, as virtually all human beings instinctively react negatively when they are criticized. Concerns about reprisal have been present from the earliest days of the United States, as evidenced by the resolution the Second Continental Congress adopted on July 30, 1778 providing for the legal fees of certain individuals who had brought government misconduct to its attention and in response been sued by the defiant government official in question. As they understood even then, a better, safer, more responsible government results when employees are not discouraged from pointing out where the problems are.

Since 1978, the United States has codified protections for federal employee whistleblowers. Yet protections on paper are not always the same as protections in fact, and I have personally seen countless examples of reprisal in the federal government. A whistleblower can experience a fair amount of harm long before they would ever reach the stage of being vindicated by a legal process, and while trends ebb and flow at agencies over time, I've observed such significant cultures of retaliation at a couple of agencies that it had a significant impact on employee morale and retention. Even if reprisal isn't a widespread culture problem at a given agency, just watching one fellow employee experience retaliation can make the next employee who might be aware of significant problems and considering blowing the whistle that much less likely to do so.

To me, the best way across government to protect whistleblowers is to promote a culture that respects those who ask uncomfortable questions and recognizes the important role they can play. Promoting this kind of culture is one of the reasons I proposed and spearheaded the creation of the Senate Whistleblower Protection Caucus.

⁶ Merit Systems Protection Board, MSPB Research Agenda 2015-2018 (Feb. 2015), *available at* <https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1140540&version=1145045&application=ACROBAT>.

53. Do you believe that the motive of the whistleblower should be considered when examining retaliation claims? Please explain.

I see whistleblowing as an act of conscience that takes significant courage. Yet my practical experience is also that the motive of a whistleblower is much less important than what they're alleging and whether they "reasonably believe[]" it meets certain criteria (a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety). Government's public policy interest is simply in rooting out the problems, which requires protecting those who bring them forward. Additionally, whistleblowers may be motivated by a wide variety of considerations, and legal analysis may not be all that successful in parsing those motivations out. I believe these were some of the reasons that caused Congress to make clear in the Whistleblower Protection Enhancement Act of 2012 that a disclosure should not be excluded from protection because of a whistleblower's motive (5 U.S.C. § 2302(f)(1)(C)). That said, there may be times in adjudication where a lack of documentary evidence requires relying largely on the testimony of the whistleblower. In such circumstances, information about a whistleblower's motives may help inform an assessment of the whistleblower's credibility (i.e. whether the whistleblower would have an incentive to provide inaccurate testimony).

54. If confirmed, how will you ensure that whistleblower complaints are properly investigated?

Unlike OSC, MSPB doesn't have authority to investigate whistleblower complaints at other agencies, only weigh the information submitted during the adjudicative process. However, I believe fair MSPB adjudication of claims brought by federal employees or by OSC can help ensure that agencies take seriously the importance of investigating and preventing retaliation.

Within MSPB, I would continue to support both procedures and the maintenance of a culture that thoroughly investigates whistleblower complaints regarding MSPB or its employees.

55. Protecting whistleblower confidentiality is of the utmost importance to this Committee.

a. How do you plan to implement policies within the MSPB to encourage employees to bring constructive suggestions forward without the fear of reprisal?

If confirmed, I would encourage that the new Board visit each of the agency's offices as soon as possible (and as soon as it is safe, given the pandemic); hold open question-and-answer sessions with employees; actively solicit constructive suggestions for change; and treat those suggestions with respect, regardless of how critical they may be of practices or leaders (including myself) at the agency.

- b. Do you commit without reservation to work to ensure that any whistleblower within the MSPB does not face retaliation?**

Yes.

- c. If confirmed, what steps will you take to ensure that whistleblowers at the MSPB do not face retaliation, that whistleblower identifiers are protected, and that complaints of retaliation are handled appropriately?**

In my time at MSPB I've done my best to ensure this expectation is clearly communicated to both staff and supervisors, including through all-agency messages and senior staff meetings. Per 5 U.S.C. § 2302(c), we have provided annual training to supervisors regarding how to respond to disclosures appropriately. Although OPM has yet to issue guidance on this issue, I also personally spearheaded MSPB incorporating the December 2017 amendment to 5 U.S.C. § 4302 requiring that all supervisor performance plans include a critical element regarding responding to disclosures appropriately and fostering an environment where employees feel comfortable making disclosures.

Besides intervening if instances or allegations of retaliation arise, my view is that it's incumbent on senior agency leaders to work from the top to try to establish an open and non-retaliatory culture where questioning is welcomed. In addition to talking about the legal mechanics of whistleblower protections and prohibitions against retaliation, I think it's also important to acknowledge that on a human level, all individuals find it hard to be criticized (as I mentioned above in my response to #52). My view is that recognizing that tendency in ourselves, and then when the time comes checking ourselves to examine whether we're truly acting objectively and dispassionately, helps prevent blind spots that can develop in those who just assume the virtue of their own motives. I've attempted to use senior staff meetings as an opportunity to help foster this kind of open and self-aware culture, and I hope each of MSPB's managers are in turn doing the same for their employees.

V. Relations with Congress

- 56. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?**

Yes.

- 57. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed?**

Yes.

58. **Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed?**

Yes.

59. **If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?**

This is an issue of great personal importance to me, as I firmly believe Congress's Article I powers play a very significant part in ensuring the effective operation of the federal government. I believe MSPB has effective protocols to accomplish this, but will continue to do everything within my power to ensure that both I and the agency provide timely response to such requests.

60. **If confirmed, will you direct your staff to adopt a presumption of openness where practical, including identifying documents that can and should be proactively released to the public, without requiring a Freedom of Information Act request?**

Yes.

61. **If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Government Accountability Office (GAO) and the Congressional Research Service?**

Yes.

62. **If confirmed, will you agree to work with representatives from this Committee and the GAO to promptly implement recommendations for improving the MSPB's operations and effectiveness?**

Yes.

VI. Assistance

63. **Are these answers completely your own? If not, who has provided you with assistance?**

Yes.

64. **Have you consulted with the MSPB, or any other interested parties? If so, please indicate which entities.**

I have not consulted with anyone else at MSPB or with any other interested parties.

I, Tristan Leavitt, hereby state that I have read the foregoing Pre-Hearing Questionnaire and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

/s/ Tristan Leavitt
(Signature)

This 7th day of September, 2021

**Senator Thomas R. Carper
Post-Hearing Questions for the Record
Submitted to Tristan L. Leavitt**

**Nominations of Cathy A. Harris to be a Member and Chair, and Tristan L. Leavitt and
Raymond A. Limon to be Members, Merit Systems Protection Board
Wednesday, September 22, 2021**

Congressional Whistleblower Protection Act of 2021

I cosponsor legislation in the Senate called the “Congressional Whistleblower Protection Act of 2021.”

This legislation would allow whistleblowers to pursue a lawsuit in federal court if the MSPB fails to issue a decision within six months of filing an administrative complaint. Currently, the only remedy for whistleblowers is to petition the MSPB, which has lacked a quorum for over four years.

Mr. Leavitt, do you believe it is necessary to create a private right of action for federal whistleblowers when the existing process falls short?

Although the Board has lacked a quorum for the past four years, whistleblowers have continued during that time to have their cases heard before MSPB’s administrative judges (or, in instances where the Office of Special Counsel petitions for corrective action on a whistleblower’s behalf, before administrative law judges).

MSPB’s Judges Handbook articulates that “[t]he Board’s policy is to adjudicate all appeals within 120 days of receipt by the Regional Office except for good cause shown.”¹ Requests by either of the parties for continuance beyond 120 days are to be considered on the basis of “due process and fairness considerations.” According to MSPB data, approximately 15-16% of cases between fiscal year 2018 and fiscal year 2020 took longer than six months. That time frame includes any time parties spent in mediation. Otherwise, I understand cases receiving approval for continuances frequently tend to be particularly complex. Whether the more expensive federal court process could resolve the complex issues faster is unclear.

Once an MSPB administrative judge issues an initial decision, whistleblowers do have an existing right under the Whistleblower Protection Enhancement Act of 2012 and the subsequent All Circuit Review Act in 2017 to appeal that decision to any federal circuit court of appeals in the country.

Additionally, how important is it for Congress to ensure that whistleblower-reporting channels adequately protect individuals who report agency wrongdoing from retaliation?

¹ The Handbook is publicly available online at <https://www.mspb.gov/appeals/files/ALJHandbook.pdf>.

I believe it's critical that whistleblower reporting channels protect those they are created for. Failing to protect such whistleblowers discourages others from coming forward to blow the whistle on waste, fraud, and abuse.

Improving the Merit Civil Service System

When it comes to finding solutions for tough problems, I often say that we should find out what works and do more of that.

Congress established the merit-based civil service system in 1883, replacing the political patronage system known as “the Spoils System.”

Having said that, I understand our current competitive civil service model is not perfect.

Mr. Leavitt, what are some areas within the merit civil service system where things are working well, and other areas where we need to go back to the drawing board?

As I indicated in my testimony before the Committee, I see the merit system as key to ensuring the American public is served by the most qualified federal employees. I believe it has thoroughly demonstrated its usefulness over the past century and a half. The Civil Service Reform Act of 1978, the last major overhaul of the civil service system, further codified merit system principles and outlined prohibited personnel practices, establishing from my perspective an effective overall vision of what the merit system should look like. I also believe the decision to break out the Civil Service Commission's policy-making and adjudicative functions into two different agencies (MSPB and the Office of Personnel Management) was a wise one.

The areas that I think most call for reconsideration have less to do with the idea of a merit system than the mechanics of personnel administration—for example, the “General Service” grading and pay system, the rigid classification of positions within particular job series, the extent to which compensation is tied to performance, etc.

Protecting the Merit Civil Service System from Politicization

Mr. Leavitt, I remain concerned that the last administration's executive actions with regard to personnel management have caused many people to question the role of apolitical career public servants and the benefits of having a federal workforce that is free from political influence.

Could you please explain what you view as the biggest threat to maintaining an apolitical civil workforce?

Restrictions on Executive Branch employees participating in partisan political campaigning date back to some of the earliest years of the Republic. Although the gradual development of the patronage system politicized the federal workforce more and more over time, the so-called Pendleton Civil Service Act of 1883 imposed new restrictions on allowing campaigning to influence federal personnel actions. These were further strengthened by the Hatch Act of 1939, which prohibited federal employees from using public resources—money, time, or otherwise—for political campaigning. The American people have the right to expect that their hard-earned tax dollars are used to benefit the American public, not one political party over another. Thus, I

believe maintaining the Hatch Act and the principles behind it is crucial both to the effective operation of the federal government and to public perceptions of its impartiality.

Additionally, are there actions that we in Congress may want to consider to ensure the political independence and integrity of the merit civil service system?

The Eisenhower Administration in 1953 established Schedule C as an exception to merit-based hiring for "positions of a confidential or policy-determining character," reflecting an understanding dating back to the Pendleton Act. Congress in turn utilized that framework in the Civil Service Reform Act of 1978, exempting from its coverage any position "excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character" (5 U.S.C. § 2302(a)(2)(B)(i)). Should Congress see fit to exercise further control over these types of appointments, it could clarify the law in this area.

**Senator James Lankford
Post-Hearing Questions for the Record
Submitted to Tristan L. Leavitt**

**Nominations of Cathy A. Harris to be a Member and Chair, and Tristan L. Leavitt and
Raymond A. Limon to be Members, Merit Systems Protection Board
Wednesday, September 22, 2021**

- 1) The Biden Administration recently published an FAQ clarifying that if a Federal employee refuses to be fully vaccinated by November 22, “the agency should pursue disciplinary measures, up to and including removal from Federal service.” However, many agencies have not provided employees further guidance. Unless the Administration reverses its policy, disciplined employees will file actions which will come before the MSPB challenging disciplinary actions, including removal, for not being vaccinated.

What authority does the Federal government have to discipline and remove Federal employees for refusing to comply with Executive Orders and agency guidance?

Executive orders have the force of law for Executive Branch employees. In general, whether orders originate with the head of the Executive Branch or just with an employee’s own supervisor, federal employees have long been understood to have an obligation to obey them. (See, for example, Yates v. Manale, 377 F.2d 888 (5th Cir. 1967); Phillips v. General Services Administration, 878 F.2d 370 (Fed. Cir. 1989); Watson v. Department of Transportation, 983 F.2d 1088 (Fed. Cir. 1992).)

One exception to this is a law I helped pass in 2017 called the Follow the Rules Act, sponsored by then-Representative Sean Duffy. It expanded on a provision of the Whistleblower Protection Act of 1989, which made it a prohibited personnel practice to “take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of . . . refusing to obey an order that would require the individual to violate the law.” As I wrote in the Follow the Rules Act’s bill report, this “was an explicit rejection of the general policy for federal employees to ‘obey first, grieve later.’” The Follow the Rules Act expanded the exception to cover refusal to obey an order that would require an individual to violate an agency rule or regulation. Whether a particular order violates a law, rule, or regulation would depend on the facts and circumstances of the case.

What is the standard an agency should use when deciding whether to grant a religious accommodation under Title VII?

I am informed that the Equal Employment Opportunity Commission issued new guidance on this issue in a January 2021 update. It states that, in sum, Title VII requires employers to accommodate religious beliefs, practices and observances if the beliefs are “sincerely held” and the reasonable accommodation poses no undue hardship on the employer.

- 2) As of August 31, 2021, the MSPB reported 3,421 pending petitions for review. If confirmed, what actions will you take and what processes will you put in place to manage the backlog of cases?

I would encourage that the Board adopt "short form" orders for nonprecedential cases to speed the issuance of decisions. I would also identify which cases are most likely to require extensive discussion between the Board members, and encourage that the Board schedule meetings in compliance with the Sunshine in Government Act to discuss those cases.

If you are able to act and implement processes to manage the backlog of cases as described, how long do you believe it will take the Board to reach a "steady state" of cases?

Estimates among MSPB staff have ranged from two years to several years, but given the unprecedented nature of the backlog, it seems clear no one can say with certainty. We would undoubtedly be able to provide a more accurate assessment within a year, once we get up to speed in deciding cases and can take stock of what pace we've been able to accomplish.

**Senator Kyrsten Sinema
Post-Hearing Questions for the Record
Submitted to Tristan L. Leavitt**

**Nominations of Cathy A. Harris to be a Member and Chair, and Tristan L. Leavitt and Raymond
A. Limon to be Members, Merit Systems Protection Board
Wednesday, September 22, 2021**

1. Based on your experience at MSPB the past several years, are there improvements you hope to execute on if confirmed?

In the absence of a Board, MSPB has been unable to update its regulations. We assembled a working group in 2019 to consider necessary regulatory changes in anticipation of the restoration of a quorum, such as regulations implementing adjudication under the Veterans Affairs Accountability and Whistleblower Protection Act of 2017. One of the areas under consideration has been MSPB's enforcement regulations, and I would strongly encourage a new Board to take all necessary steps to ensure its orders are complied with in a timely manner.

I would also encourage that MSPB continue the trend toward electronic rather than paper-based processes, something which may be addressed in large part by MSPB's current vendor contracts to modernize its core business applications.

2. It is important that the Board fulfill its role to review Office of Personnel Management regulations. How will you ensure the Board does this and how will you approach situations when the Board disagrees with an OPM regulation?

Review of OPM rules and regulations follows a fairly standard process at MSPB, outlined in the Code of Federal Regulations in Part 1203 of Title 5. These regulations are based on the procedures outlined in 5 U.S.C. § 1204(f). If confirmed, I would bring a knowledge of this process and would ensure it was followed. When the Board finds that an OPM regulation would require committing a prohibited personnel practice, it issues an order directing remedial action just as it would in other cases, such as requiring an agency to stop complying with the regulation.

MSPB NOMINATION HEARING TESTIMONY

RAYMOND ANTHONY LIMON
VICE-CHAIR
U.S. MERIT SYSTEMS PROTECTION BOARD

SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
September 22, 2021

Chairman Peters, Ranking Member Portman, and members of the Committee,

Thank you for the opportunity and the honor to appear before you today.

I want to thank President Biden for my nomination to the position of Vice-Chair of the Merit Systems Protection Board.

My personal journey and how I arrived here today begins with my parents. They inspired my passion for service, education, and hard work. They raised ten children (with two sets of twins!) and I am the oldest of those 10 children. My immigrant grandparents' work ethic and dedication to their children inspired the next generations and infused us with passion to be life-long learners and to be active members in our communities. As a first-generation college graduate, I honor my family's sacrifices that have made it possible for me to be here today.

From a young age, I knew I wanted to study the law and become a lawyer. Though we did not have lawyers in my family or in the neighborhood where I grew up, my parents always supported my dream. At the age of seventeen, I moved away from home and worked my way through college. It was at the University of Nevada Reno where I obtained my degree in Political Science and Pre-Law. However, with limited means, I tempered my law school dreams and sought a new dream – to represent my country as a Peace Corps Volunteer.

I proudly served for two years in Honduras. It was there that I met my wife, Susana, another Peace Corps Volunteer, who joins me today. After the Peace Corps, we both attended Indiana University in Bloomington where I received my law degree. We were active students at Indiana, where we both took internships at Bloomington's City Hall. We volunteered on the local Habitat for Humanity Chapter—Board of Directors and organized various home builds. I led fundraisers for the local Boys & Girls Club by organizing the annual law students versus faculty basketball games. Those games were far more intimidating than moot court. My love for basketball blossomed in Indiana where I became a certified High School Basketball referee. Today, I organize weekly basketball pickup games in Hyattsville, Maryland.

These are a few examples that show why service is so important to me. Serving in my community, whether in Central America or in America's heartland, has opened opportunities for me in ways that otherwise would not have happened.

Shortly after law school, I joined the Federal workforce as a civil servant. I worked at the Office of Personnel Management; the Corporation for National and Community Service; the State Department;

and now at the Department of the Interior. My experiences working internationally and nationally are what grounds me and what informs my deep commitment to protecting our country and our workforce.

This commitment to the love of service and learning, which I was born into, and which I have been surrounded with throughout my entire career continues to evolve. This commitment is what my wife and I have hopefully shared with the “joys of our life,” our two sons, Drew and Sean. As you can see, family is extremely important to me. It is for this reason that I feel called to this position, to do my part, and to apply my expertise to serve the Federal family.

The common thread running through my career has been my whole-hearted commitment to public service. Although each of us has a different story of what brought us into public service, those stories all contribute to making our government better! If confirmed, it will be a privilege for me to serve as the MSPB’s Vice-Chair.

Finally, I’d like to thank all the public servants and volunteers who have helped me along the way. From members of the Armed services, my colleagues in the civil and foreign services, Peace Corps, VISTA, and AmeriCorps volunteers to the state and local government officials and various good government groups that have supported and mentored me over the years. In looking back at my career, I want to keep the call to public service stronger than ever, thus that is why I’m committed to promoting and protecting the merit system principles. To that end, I would also like to acknowledge my niece, Kalie who recently became the Washoe County Recorder in Reno, Nevada; and my nephew, Ian, who just started his career with the U.S. Coast Guard. I’m excited about the new generation of Americans who are ready to serve, and I am prepared to do my part to make that happen.

Thank you so much for the opportunity to appear before you today and to answer questions you may have.

**HSGAC BIOGRAPHICAL QUESTIONS FOR
EXECUTIVE NOMINEES**

REDACTED

1. Basic Biographical Information

Please provide the following information.

<i>Position to Which You Have Been Nominated</i>	
<u>Name of Position</u>	<u>Date of Nomination</u>
Vice Chair and Member, Merit Systems Protection Board	

<i>Current Legal Name</i>			
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>
Raymond	Anthony	Limon	

<i>Addresses</i>					
<u>Residential Address</u> (do not include street address)			<u>Office Address</u> (include street address)		
			Street: 1849 C Street NW		
City: University Park	State: MD	Zip: 20782	City: Washington	State: DC	Zip: 20240

<i>Other Names Used</i>						
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>	Check if Maiden Name	<u>Name Used From</u> (Month/Year) (Check box if estimate)	<u>Name Used To</u> (Month/Year) (Check box if estimate)
					Est ☐	Est ☐
					Est ☐	Est ☐

<i>Birth Year and Place</i>	
Year of Birth (Do not include month and day.)	Place of Birth
1963	Reno, Nevada

<i>Marital Status</i>					
Check All That Describe Your Current Situation:					
Never Married	Married	Separated	Annulled	Divorced	Widowed
☐	X ☐	☐	☐	☐	☐

<i>Spouse's Name (current spouse only)</i>			
Spouse's First Name	Spouse's Middle Name	Spouse's Last Name	Spouse's Suffix
Susana	Dinkins	Limon	

<i>Spouse's Other Names Used (current spouse only)</i>						
First Name	Middle Name	Last Name	Suffix	Check if Maiden Name	Name Used From (Month/Year) (Check box if estimate)	Name Used To (Month/Year) (Check box if estimate)
Susana	Elena	Dinkins		X	6/7/1963 Est ☐	6/7/1991 Est ☐
					Est ☐	Est ☐

<i>Children's Names (if over 18)</i>			
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>
Drew	Anthony	Limon	
Sean	Carson	Limon	

2. Education

List all post-secondary schools attended.

<u>Name of School</u>	<u>Type of School</u> (vocational/technical/trade school, college/university/military college, correspondence/distance/extension/online school)	<u>Date Began School</u> (month/year) (check box if estimate)	<u>Date Ended School</u> (month/year) (check box if estimate) (check "present" box if still in school)	<u>Degree</u>	<u>Date Awarded</u>
University of Nevada, Reno (UNR)	College	09/1981 ☐ Est	05/1986 ☐ Est ☐ Present	BA	05/1986
Indiana University (IU)	Law School	9/1992 ☐ Est	5/1995 ☐ Est ☐ Present	JD	05/1995
		☐ Est	☐ Est ☐ Present		
		☐ Est	☐ Est ☐ Present		

3. Employment

(A) List all of your employment activities, including unemployment and self-employment. If the employment activity was military duty, list separate employment activity periods to show each change of military duty station. Do not list employment before your 18th birthday unless to provide a minimum of two years of employment history.

<u>Type of Employment</u> (Active Military Duty Station, National Guard/Reserve, USPHS Commissioned Corps, Other Federal employment, State Government (Non-Federal Employment), Self-employment, Unemployment, Federal Contractor, Non-Government Employment (excluding self-employment), Other)	<u>Name of Your Employer/Assigned Duty Station</u>	<u>Most Recent Position Title/Rank</u>	<u>Location</u> (City and State only)	<u>Date Employment Began</u> (month/year) (check box if estimate)	<u>Date Employment Ended</u> (month/year) (check box if estimate) (check "present" box if still employed)
Federal Government	U.S. Department of the Interior	Deputy Assistant Secretary, Chief Human Capital Officer	Washington, DC	06/2018 Est ☐	Est Present
Federal Government	U.S. Department of the Interior	Deputy Chief Human Capital Officer	Washington, DC	08/2015	06/2018
Federal Government	U. S. Department of State	Director, Office of Civil Service Human Resources Management	Washington, DC	Est 10/2012 ☐	Est 08/2015
Federal Government	Corporation for National and Community Service	Chief Human Capital Officer	Washington, DC	04/2005 ☐	Est 10/2012 ☐
Federal Government	U. S. Office of Personnel Management	Director, ALJ Office, Compliance Manager, Attorney	Washington, DC	01/1997 ☐	Est 04/2005 ☐

(B) List any advisory, consultative, honorary or other part-time service or positions with federal, state, or local governments, not listed elsewhere.

<u>Name of Government Entity</u>	<u>Name of Position</u>	<u>Date Service Began</u> (month/year) (check box if estimate)	<u>Date Service Ended</u> (month/year) (check box if estimate) (check "present" box if still serving)
		Est ☐	Est Present ☐ ☐

		Est ☐	Est ☐	Present ☐
		Est ☐	Est ☐	Present ☐

4. Potential Conflict of Interest

(A) Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

(B) Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.

5. Honors and Awards

List all scholarships, fellowships, honorary degrees, civilian service citations, military medals, academic or professional honors, honorary society memberships and any other special recognition for outstanding service or achievement.

6. Memberships

List all memberships that you have held in professional, social, business, fraternal, scholarly, civic, or charitable organizations in the last 10 years.

Unless relevant to your nomination, you do NOT need to include memberships in charitable organizations available to the public as a result of a tax deductible donation of \$1,000 or less, Parent-Teacher Associations or other organizations connected to schools attended by your children, athletic clubs or teams, automobile support organizations (such as AAA), discounts clubs (such as Groupon or Sam's Club), or affinity memberships/consumer clubs (such as frequent flyer memberships).

<u>Name of Organization</u>	<u>Dates of Your Membership</u> (You may approximate.)	<u>Position(s) Held</u>
St. Mark the Evangelist Catholic Church	2015 - present	Chair, Finance Committee

7. Political Activity

(A) Have you ever been a candidate for or been elected or appointed to a political office?

<u>Name of Office</u>	<u>Elected/Appointed/ Candidate Only</u>	<u>Year(s) Election Held or Appointment Made</u>	<u>Term of Service (if applicable)</u>

(B) List any offices held in or services rendered to a political party or election committee during the last ten years that you have not listed elsewhere.

<u>Name of Party/Election Committee</u>	<u>Office/Services Rendered</u>	<u>Responsibilities</u>	<u>Dates of Service</u>
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(C) Itemize all individual political contributions of \$200 or more that you have made in the past five years to any individual, campaign organization, political party, political action committee, or similar entity. Please list each individual contribution and not the total amount contributed to the person or entity during the year.

<u>Name of Recipient</u>	<u>Amount</u>	<u>Year of Contribution</u>

8. Publications and Speeches

(A) List the titles, publishers and dates of books, articles, reports or other published materials that you have written, including articles published on the Internet. Please provide the Committee with copies of all listed publications. In lieu of hard copies, electronic copies can be provided via e-mail or other digital format.

<u>Title</u>	<u>Publisher</u>	<u>Date(s) of Publication</u>
The Federal Administrative Judiciary Then and Now – A Decade of Change 1992-2002	U.S. Office of Personnel Management	2003

(B) List any formal speeches you have delivered during the last five years and provide the Committee with copies of those speeches relevant to the position for which you have been nominated. Include any testimony to Congress or any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.

<u>Title/Topic</u>	<u>Place/Audience</u>	<u>Date(s) of Speech</u>

(C) List all speeches and testimony you have delivered in the past ten years, except for those the text of which you are providing to the Committee.

<u>Title</u>	<u>Place/Audience</u>	<u>Date(s) of Speech</u>

9. Criminal History

Since (and including) your 18th birthday, has any of the following happened?

- Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Exclude citations involving traffic infractions where the fine was less than \$300 and did not include alcohol or drugs.) **No**
- Have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official? **No**
- Have you been charged, convicted, or sentenced of a crime in any court? **No**
- Have you been or are you currently on probation or parole? **No**
- Are you currently on trial or awaiting a trial on criminal charges? **No**
- To your knowledge, have you ever been the subject or target of a federal, state or local criminal investigation? **No**

If the answer to any of the questions above is yes, please answer the questions below for each criminal event (citation, arrest, investigation, etc.). If the event was an investigation, where the question below asks for information about the offense, please offer information about the offense under investigation (if known).

A) Date of offense:

a. Is this an estimate (Yes/No):

B) Description of the specific nature of the offense:

C) Did the offense involve any of the following?

- 1) Domestic violence or a crime of violence (such as battery or assault) against your child, dependent, cohabitant, spouse, former spouse, or someone with whom you share a child in common: **Yes / No**
- 2) Firearms or explosives: **Yes / No**
- 3) Alcohol or drugs: **Yes / No**

D) Location where the offense occurred (city, county, state, zip code, country):

- E) Were you arrested, summoned, cited or did you receive a ticket to appear as a result of this offense by any police officer, sheriff, marshal or any other type of law enforcement official: **Yes / No**
- 1) Name of the law enforcement agency that arrested/cited/summoned you:
 - 2) Location of the law enforcement agency (city, county, state, zip code, country):
- F) As a result of this offense were you charged, convicted, currently awaiting trial, and/or ordered to appear in court in a criminal proceeding against you: **Yes / No**
- 1) If yes, provide the name of the court and the location of the court (city, county, state, zip code, country):
 - 2) If yes, provide all the charges brought against you for this offense, and the outcome of each charged offense (such as found guilty, found not-guilty, charge dropped or "nolle pros," etc). If you were found guilty of or pleaded guilty to a lesser offense, list separately both the original charge and the lesser offense:
 - 3) If no, provide explanation:
- G) Were you sentenced as a result of this offense: **Yes / No**
- H) Provide a description of the sentence:
- I) Were you sentenced to imprisonment for a term exceeding one year: **Yes / No**
- J) Were you incarcerated as a result of that sentence for not less than one year: **Yes / No**
- K) If the conviction resulted in imprisonment, provide the dates that you actually were incarcerated:
- L) If conviction resulted in probation or parole, provide the dates of probation or parole:
- M) Are you currently on trial, awaiting a trial, or awaiting sentencing on criminal charges for this offense: **Yes / No**
- N) Provide explanation:

10. Civil Litigation and Administrative or Legislative Proceedings

(A) Since (and including) your 18th birthday, have you been a party to any public record civil court action or administrative or legislative proceeding of any kind that resulted in (1) a finding of wrongdoing against you, or (2) a settlement agreement for you, or some other person or entity, to make a payment to settle allegations against you, or for you to take, or refrain from taking, some action. Do NOT include small claims proceedings.

<u>Date Claim/Suit Was Filed or Legislative Proceedings Began</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>

(B) In addition to those listed above, have you or any business of which you were an officer, director or owner ever been involved as a party of interest in any administrative agency proceeding or civil litigation? Please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

<u>Date Claim/Suit Was Filed</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>

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(C) For responses to the previous question, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

11. Breach of Professional Ethics

(A) Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, professional association, disciplinary committee, or other professional group? Exclude cases and proceedings already listed.

<u>Name of Agency/Association/Committee/Group</u>	<u>Date Citation/Disciplinary Action/Complaint Issued/Initiated</u>	<u>Describe Citation/Disciplinary Action/Complaint</u>	<u>Results of Disciplinary Action/Complaint</u>

(B) Have you ever been fired from a job, quit a job after being told you would be fired, left a job by mutual agreement following charges or allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?

12. Tax Compliance

(This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

REDACTED

13. Lobbying

In the past ten years, have you registered as a lobbyist? No. If so, please indicate the state, federal, or local bodies with which you have registered (e.g., House, Senate, California Secretary of State).

14. Outside Positions

☐ See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

For the preceding ten calendar years and the current calendar year, report any positions held, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

<u>Name of Organization</u>	<u>Address of Organization</u>	<u>Type of Organization</u> (corporation, firm, partnership, other business enterprise, other non-profit organization, educational institution)	<u>Position Held</u>	<u>Position Held From</u> (month/year)	<u>Position Held To</u> (month/year)

15. Agreements or Arrangements

☐ See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

As of the date of filing your OGE Form 278, report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment.

Provide information regarding any agreements or arrangements you have concerning (1) future employment; (2) a leave of absence during your period of Government service; (3) continuation of payments by a former employer other than the United States Government; and (4) continuing participation in an employee welfare or benefit plan maintained by a former employer other than United States Government retirement benefits.

<u>Status and Terms of Any Agreement or Arrangement</u>	<u>Parties</u>	<u>Date</u> (month/year)

16. Additional Financial Data

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

REDACTED

SIGNATURE AND DATE

I hereby state that I have read the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

RAYMOND LIMON Digitally signed by RAYMOND
LIMON
Date: 2021.09.02 15:16:32 -04'00'

This _____ day of _____, 20____

REDACTEDUNITED STATES OFFICE OF
GOVERNMENT ETHICS

July 2, 2021

The Honorable Gary C. Peters
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Raymond Limon, who has been nominated by President Biden for the position of Member, Merit Systems Protection Board.

We have reviewed the report and have obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

DAVID APOL

Digitally signed by DAVID
APOL
Date: 2021.07.02 11:08:05
-04'00'

David J. Apol
General Counsel

Enclosures

REDACTED

June 6, 2021

Tristan L. Leavitt
Designated Agency Ethics Official
U.S. Merit Systems Protection Board
1615 M Street, N.W.
Washington, DC 20419

Dear Mr. Leavitt:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Member of the Merit Systems Protection Board. It is my responsibility to understand and comply with commitments outlined in this agreement.

SECTION 1 – GENERAL COMMITMENTS

As required by the criminal conflicts of interest law at 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the particular matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me:

- Any spouse or minor child of mine;
- Any general partner of a partnership in which I am a limited or general partner;
- Any organization in which I serve as an officer, director, trustee, general partner, or employee; and
- Any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

In the event that an actual or potential conflict of interest arises during my appointment, I will consult with an agency ethics official and take the measures necessary to resolve the conflict, such as recusal from the particular matter or divestiture of an asset.

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the regulatory exemption for diversified mutual funds and unit investment trusts at 5 C.F.R. § 2640.201(a), obligations of the United States, or municipal bonds.

I will receive a live ethics briefing from a member of the ethics office after my confirmation but not later than 15 days after my appointment pursuant to the ethics program

regulation at 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will submit my Certification of Ethics Agreement Compliance which documents my compliance with this ethics agreement.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order No. 13989) and that I will be bound by it. Among other obligations, I will be required to recuse from particular matters involving specific parties involving my former employer or former clients for a period of two years after I am appointed, with the exception of federal, state and local government.

I will not modify this ethics agreement without your approval and the approval of the U.S. Office of Government Ethics pursuant to the ethics agreement requirements contained in the financial disclosure regulation at 5 C.F.R. § 2634.803(a)(4).

SECTION 2 – PRIOR PARTICIPATION IN PARTY MATTERS AS A FEDERAL EMPLOYEE

I am a career member of the Senior Executive Service and the Deputy Assistant Secretary for Human Capital and Diversity and the Chief Human Capital Officer of the Department of the Interior. Although the impartiality provisions of 5 C.F.R. § 2635.502 do not apply to other federal agencies, I have agreed that, for the duration of my appointment as Member, I will not participate personally and substantially in any particular matter involving specific parties in which I know I previously participated at the Department of the Interior, unless I am first authorized to participate, using the factors in 5 C.F.R. § 2635.502(d).

SECTION 3 – PUBLIC POSTING

I have been advised that this ethics agreement and the Certification of Ethics Agreement Compliance will be posted publicly, consistent with the public information law at 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

RAYMOND
LIMON
Raymond Limon

Digitally signed by
RAYMOND LIMON
Date: 2021.06.07
08:40:03 -0400

**U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-hearing Questionnaire
For the Nomination of Raymond Limon to be
Vice Chairman, Merit Systems Protection Board**

I. Nomination Process and Conflicts of Interest

1. Did the President give you specific reasons why he nominated you to serve as Vice Chairman of the Merit Systems Protection Board (MSPB)?

• No.
2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

• No.
3. Have you made any commitments with respect to the policies and principles you will attempt to implement as Vice Chairman of the MSPB? If so, what are they, and to whom were the commitments made?

• No.
4. Has the President or his staff asked you to sign a confidentiality or non-disclosure agreement?

• No.
5. Has the President or his staff asked you to pledge loyalty to the President or the Administration?

• No.
6. Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.

• No.
7. Have you ever represented a party in a matter before or involving the MSPB? If so, please describe the matter(s) and the nature of the representation.

- **Yes, while working as a Staff Attorney at OPM from 1997 – 2000, I represented OPM before the MSPB.**

8. Please provide the name of any individual, law firm, consulting firm, lobbying firm, public relations firm, or other entity you have formally retained or contracted with regarding this nomination, including any amounts paid in fees or otherwise.

- **None.**

II. Background of the Nominee

9. What specific background and experience affirmatively qualify you to be Vice Chairman of the MSPB?

- **I have over 24 years as a Federal career civil servant and 20 years as an executive promoting and defending the merit system principles through my management, policy and legal experiences at various title 5 and non-title 5 Executive branch agencies. I had almost nine years of experience at the U.S. Office of Personnel Management (OPM) serving as either a litigator, leading the Office of Administrative Law Judges (OALJ) or leading OPM's compliance division conducting merit system reviews of other agencies. I became the Corporation for National and Community Service's (CNCS) first-ever Chief Human Capital Officer (CHCO) and led the 100+ Small Agency HR Council. I led the State Department's Civil Service HR programs. And in my current role, I serve as Deputy Assistant Secretary for Human Capital and Diversity and CHCO at the Department of the Interior (DOI or Interior). I bring a wide variety of strategic and tactical experiences and executive leadership perspectives that will support me well as MSPB's Vice Chair. I have a deep appreciation for the MSPB and while serving in OPM's Office of General Counsel I litigated numerous cases before the Board. I also participated in a wide variety of partnership functions with the Board, whether sitting on training or conference panels with Board representatives, participating in MSPB surveys, or providing feedback on future Board studies.**

10. What experience, if any, do you have in deciding cases, resolving disputes, or performing the other duties required in serving as Vice Chairman of the MSPB?

- **As a former litigator and current senior executive, I have been part of various settlement and alternative dispute resolution actions to find effective and equitable resolutions of complaints at the either formal or informal stages. As CHCO, I staffed previous bipartisan leadership structures, Board of Directors – Corporation for National and Community Service; while at State Department I coordinated dispute resolution between the Civil and Foreign Services, and currently at DOI,**

I serve on Interior Ethics Review Board to review potential financial conflicts of interest cases among its employees. I worked and represented interests across the Federal government and have coordinated with the Department of Justice of both legal and policy matters. For over 15 years, I have served on OPM's Chief Human Capital Officer Council and for eight of those years, I represented the Small Agency Human Resource Council. In that role, I was representing over 100 small Federal agencies, including the MSPB, to ensure those equities were addressed before OPM, OMB and the 24 CFO Act agencies and decisions and information communicated back to the 100+ small agencies. Finally, I engaged with numerous OIG or GAO representatives over audit actions to bring resolution and close outs to various reports and investigations.

11. Please describe:

- a. Your leadership and management style.
 - **My leadership style is inclusive and collaborative. I seek to find common ground on both the direction we need to go in and how we get there, including understanding the equities of how our decisions will impact others (in and outside of the organization).**
- b. Your experience managing personnel.
 - **Like above, I strive to have everyone contribute and have their voices represented to inform our decisions.**
- c. What is the largest number of people that have worked under your supervision?
 - **Today, I have approximately 150 employees and contractors working under the offices that I supervise and whose policies, guidance and products directly impact the approximately 1,500 HR, Safety and Training professionals working within Interior's bureaus; the 13,000+ supervisors; and the overall 70,000 employee strong workforce serving in over 2,400 locations and in over 350 occupations and 24 pay systems.**

12. Why do you want to serve as Vice Chairman of the MSPB?

- **I am passionate about public service. It is my calling. I feel the experiences that have come my way over the last 25 years have all led to this potential opportunity – to help lead a small but powerful Federal agency that helps to ensure that the Federal government will have the best possible workforce to address the needs of our nation.**

13. What would you consider your greatest successes as a leader?

- My greatest successes as a leader are motivating and helping employees to be the best they can be. Additionally, my successes as a leader can be attributed to giving employees the resources and information for them to contribute to their success while meeting the agency's mission success. I want the Federal workforce to develop a deeper appreciation for public service than when they first started in their position.

14. What would you consider your greatest failure as a leader? What lessons did you take away from that experience?

- One of the failures of any leader is the inability to secure funding to support new positions, investments in employee development or secure technology systems to improve workplace collaboration. The Federal budget process is highly complex, and scarcity of resources exist at all levels (in most agencies). In several situations, prior to the pandemic, I had advocated for long term investments into workforce collaborative tools to foster employee-driven results but due to short term programmatic needs or competing priorities, leadership did not approve my requests. I believe this institutionalizes organizational silos and reduces the efficacy of a high performing workforce. Thus, if approved for this position, I will look to seek support from Congress and the Administration to identify funding streams that can be aligned to invest in its workforce to improve workforce collaborative tools and make investments to improve employee engagement, succession planning and productivity.

15. Please give examples of times in your career when you disagreed with your superiors and advocated your position. Were you ever successful?

- While at OPM, I moved from a staff attorney position to the Director, Office of Administrative Law Judges and while assessing the short-term needs of the office I learned of a challenging relationship between OPM, the agencies OPM serviced with ALJs, and the broader ALJ community itself. In reviewing ALJ compensation data, it showed that over a ten-year period, the ALJ pay system and annual increases remained flat and created pay compression at the top of the ALJ pay band. The data showed that over that 10-year period, the vast majority of ALJs, who were former GS-15 attorneys would have been paid more had they stayed as GS-15s. In short, I asked for a meeting with the OPM Director and her staff. OPM's senior executives who were charged with setting compensation policies also attended. As I presented the evidence and recommended a modest annual salary increase to help level-set the ALJ pay compression issue, I knew I was the junior leader in the room and the senior compensation experts were all in agreement to keep the *status quo* (zero increase). At the end of the meeting, the OPM Director agreed with my recommendation, and of all the 24 pay systems under the Executive Branch, only the ALJ pay system (as approved by the

President) was increased from the year before. In her decision, the OPM Director agreed with me when she said, "it was the right thing to do."

16. Do you seek out dissenting views and encourage constructive critical dialogue with subordinates? Please provide examples of times in your career when you have done so.

- **Yes. I constantly seek options and guidance from staff and peers on all management matters before me. Though I may have suggested course of action at first, I strongly believe that diversity of thought, experiences and perspectives will always make an initial decision better. I also seek out a wide variety of views from different stakeholders or ask seasoned leaders if I missed something in my analysis or what would be the weaknesses in these positions. I also use this decision-making technique as a tool for succession planning to share with others so they can benefit from it themselves when they move to more senior positions in their careers.**

17. Please list and describe examples of when you made politically difficult choices that you thought were in the best interest of the country or your organization.

- **For over two decades, in all the agencies I've served, I either reported directly to political leaders, or worked closely with them. As a career civil servant and executive, on many occasions, I was asked to develop recommendations and provide strategies to overcome challenges. Notwithstanding the different Administrations that I have served (evenly split between Republican and Democratic Administrations), I've always focused on providing clear-cut options and solutions to my leadership regardless of the broader political outcomes. I believe that good governance is in the best interest of our country and the agencies I have served.**

18. Please describe how you build credibility and trust among staff as a leader.

- **I think one of my favorite words is equanimity. As a leader, whether you know it or not, people are assessing you 24 hours a day – when things go well and especially, or more importantly, when things go wrong. Whether it's a government shutdown, unexpected leadership change, or an IT threat, the ability to stay calm under pressure is something I've always valued and try to model. Clear thinking in times of panic takes practice. I believe that credibility and consistency are valued by employees when they see their leaders are dependable and with them during difficult times.**

19. During your career, has your conduct as a government employee ever been subject to an investigation or audit by the Office of Special Counsel, Department of Justice, agency Equal Opportunity office or investigator, agency Inspector General, or any other similar federal, state, or local investigative entity? If so, please describe the nature of the allegations/conduct and the outcome(s) of the investigation(s) or audit(s).

- No.

20. Have you ever represented a whistleblower or other employee in an adversarial dispute against the federal government?

- No.

21. Do you have experience addressing instances of prohibited personnel practices (PPPs)? If so, please generally describe your experience.

- **During my years at OPM, I served as its Compliance Manager overseeing OPM's government-wide audits, reports and evaluations, including at the time, its personnel security reviews of other agencies. When PPPs were potentially identified I coordinated with OSC where applicable and with the impacted agencies to meet OPM's oversight responsibilities. As an agency CHCO, I also have oversight responsibilities over the agency's servicing HR offices and my offices would conduct trainings for both hiring officials and HR professionals to ensure they knew about PPPs and how to avoid them. I also created performance management systems and policies to hold supervisors accountable under performance standards.**

22. Please describe any previous experience—in the public or private sector—with handling whistleblower complaints, and what steps you took to ensure those individuals did not face retaliation and that their claims were thoroughly investigated?

- **While an OPM litigator, I recall defending several allegations of whistleblowing, but no findings were found by the reviewing offices. Similar to above, as CHCO, my offices provide training on PPPs and whistleblowing issues, and I developed a new supervisory performance standard to hold all supervisors accountable on matters involving PPPs and whistleblowing.**

23. Do you have any experience adjudicating matters? Please explain.

- **As a senior executive for many years, I had multiple opportunities to adjudicate the resolution of settlements and/or alternative dispute resolution on behalf of the agencies I've served. While serving at OPM, I would assist in rulemaking and adjudicate comments from the public to finalize regulations.**

24. MSPB functions as an independent, third-party adjudicatory authority for employee adverse actions (e.g., removals, suspensions for more than 14 days, and furloughs) and retirement decisions. Please describe your experience in developing adjudicatory processes and procedures, issuing subpoenas, calling witnesses, and enforcing decisions.

- **As a former OPM litigator and currently, an executive with years of strategic HR planning and execution, I am extremely familiar with the adverse action**

procedures and accompanying management responsibilities. I have also created processes to ensure the appropriate recommending and deciding officials are identified to adjudicate agency decision-making processes. I also procured agency investigation third-party services to conduct fact-finding investigations and created procedures to ensure investigations were completed timely, complied with the statement of work, and were impartial. In my capacity as CHCO, I have also had responsibilities to adjudicate potential financial conflicts of interest (i.e., Ethics Review Panel) and review agency settlement agreements based on agency requirements.

25. Through your experience, what practices would you consider vital to managing a federal workforce?

- **Effective leadership communication is always a key driver to organizational success. Lack of clarity on mission or goals tends to create frustration, reduce impact and inefficiencies and invite bad morale. From proper strategic planning to resource allocation, it's critical for the workforce to be engaged in helping with decisions being made, and how they contribute to mission success. To reinforce this, I would ensure collaborative tools are available to help employees work both within and outside of their units, so they will understand the consistent approach being taken throughout the organization. I would ensure periodic communications to track metrics and milestones, so everyone is on the same page. To identify potential adverse trends, I would encourage workforce pulse surveys so employees will have a voice to address concerns and provide regular leadership updates to ensure consistency and clarity of next steps.**

26. How will your experience help MSPB maintain MSPB's Merit Systems Principles (MSPs)?

- **I have first-hand experience in promoting and protecting the Federal personnel system and with my working relationships with many Federal agencies, current and former government leaders, and other organizations (such as Partnership for Public Service, NAPA, Senior Executive Association, Academia, etc.) to all help me identify additional resources to promote and maintain the MSPs in and around the Federal workforce.**

III. Role of Vice Chairman, MSPB

27. The Civil Service Reform Act requires that individuals appointed to the MSPB "demonstrate the ability, background, training, or experience" necessary to "carry out functions of the Board."¹ Please describe how your abilities, background, training, and experience qualify you for the position of Vice Chairman of the MSPB.

¹ 5 U.S.C. § 1201.

- Over 24 years of public service, I developed strong leadership skills and business acumen by managing and developing people, programs and policies. I became a strategic human capital thought leader on behalf of the agencies I represented and within the broader Federal community. Before joining Interior, I worked at the State Department as the Director, Civil Service Human Resources, and I was the first-ever CHCO at the Corporation for National and Community Service (e.g., AmeriCorps, VISTA, Senior Corps, etc., pay-banded non-Title 5 agency). While there, I was selected by my peers (over 100 HR leaders) and chaired the Small Agency Human Resources Council and represented the interests of over 100 Federal agencies and organizations (including the MSPB). Prior to that, I worked in OPM's Office of General Counsel and specialized in employment litigation and personnel policy, and later moved to an executive role to become the Director of OPM's Office of Administrative Law Judges (ALJs) where I led and managed the government-wide personnel system for ALJs. While at OPM, I also led the Compliance oversight decision that had responsibility of merit system reviews over the entire Executive branch. As OPM's attorney, I represented the government before the EEOC, MSPB, FLRA, OSC and partnered with the Department of Justice and the Administration on a wide range of legal/policy issues and drafted Executive orders and Presidential memoranda and drafted OPM regulations. I am often invited to speak to national audiences, and I am a frequent contributor to Good Government groups, like the Partnership for Public Service and NAPA. I bring numerous experiences, insights and perspectives on how the Federal personnel system interacts at the policy, legal and operational levels within and outside of the Title 5 authorities.

28. In your opinion, what is the role of the MSPB? What is the role of Vice Chairman in carrying out the statutory objectives of the MSPB?

- Beyond the statutory duties, such as to adjudicate and enforce decisions, conduct studies and evaluations to promote a well-managed civil service free from prohibited personnel practices, the MSPB should champion what the first Commissioner of the Civil Service Commission, Theodore Roosevelt, noted when he was creating the civil service and that it should be based on three principles:
 1. Opportunities should be made equal for all citizens.
 2. Only those who have merit should be appointed to Federal jobs.
 3. Public servants should not suffer for their political beliefs.

As Vice Chair, the statutory objective is to perform the Chair's role during absence, disability, or vacancy. If confirmed, I would perform all necessary duties to promote and position the Board for success.

29. MSPB's mission is to "protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." How do you envision fulfilling MSPB's mission both day-to-day, and long-term?

- **I would bring years of experience in leading both large and small Federal agencies and believe I can be helpful in a variety of management-related needs to further the overall mission. For example, the Board has a role to communicate and champion to the public what the merit system principles are and how they contribute to securing this nation and meeting its collective needs. The MSPB can also partner with agencies through its evaluations and studies to find new and innovative solutions to improve their workforce effectiveness and outcomes. As a Civil Service thought-leader, the Board can also create platforms to foster dialogue and inspire a new generation of Americans to join the Federal workforce.**

30. What do you anticipate being the greatest challenge you would face as Vice Chairman of the MSPB, and how do you plan to address those challenges if confirmed?

- **The current backlog of appeals is clearly a priority. The hard-working mission-oriented staff are doing everything they can to mitigate the challenges associated with a four-year absence of a quorum and there is likely a perception across the Federal landscape that the Board has been shuttered for business. If confirmed, I would be excited to be part of communicating that the MSPB is back and looking to be stronger than ever.**

31. Do you believe you will review and adjudicate cases that come before you with good judgment and impartiality? Please explain, citing examples of prior work or experience that could bear on your abilities, if applicable.

- **Yes. As a former agency attorney and now management executive, I have worked on sensitive personnel matters for years and can appreciate the sensitivity and decorum necessary to resolve workplace disputes.**

32. The MSPB is an independent executive branch agency. What role should Board Members, including the Vice Chairman, play in safeguarding MSPB's independence?

- **The Board has a solid history of maintaining its independence and remains free from accusations of bias and political posturing. As a life-long civil servant, I plan to continue acting in conformance with that tradition.**

33. If confirmed as Vice Chairman, you could delegate certain responsibilities. Please describe how your experience will assist you in delegating authority in an efficient manner. What responsibilities would you maintain for yourself?

- **Delegation, when warranted, is necessary to mission success. Working in an agency and with the external stakeholders, no one person can do it alone. I**

believe, over the years, I have developed that situational awareness when and when not to delegate. Though I can delegate responsibilities, one cannot delegate accountability. My ability to delegate would be fact-based and if confirmed, I would be clear that I would be accountable for outcomes that are delegated by me.

34. Do you believe it is important for the Vice Chairman to act as a consensus builder among the Board? Do you believe unanimous rulings are better than non-unanimous rulings? If so, what will you do to build bridges with your colleagues from different ideological positions?

- **Absolutely. I believe that consensus-building is not always easy, and it takes work. As in any adjudicative setting, unanimous rulings can clarify and strengthen consistency in future rulings, but we shouldn't fear different ideological differences because it is possible that in those differences, we may learn a different path to success. As Vice Chair I welcome opportunities to build bridges and in that struggle of consensus building, I am confident the best possible decision would be come forward.**

IV. Policy Questions

Management & MSPB Workforce

35. How do you view the role of information technology at MSPB as it relates to both day-to-day business and the overall mission objectives to uphold merit systems principles?

- **Very significant. The future of work is dependent on having a secure, agile and accessible information ecosystem. Federal employees can use this ecosystem for their submission of appeals, and to learn more about the role of the MSPB. Similarly, MSPB employees need a secure platform to share information and coordinate on projects. The public must have the tools needed to protect their rights and employees must have the ability to optimize their skill sets and engage with one another to ensure they are successful and maximize their potential.**

36. According to MSPB's Fiscal Year 2021 annual report, over 31 percent of MSPB employees, including almost 45 percent of adjudication managers, are eligible to retire between now and the end of 2022.² What steps will you take to ensure that MSPB conducts its own succession planning, so that you are able to execute your statutory duties?

- **I have lengthy experience in developing agencies' strategic workforce plans. Included in those plans are reviewing critical skill gaps, projecting funding**

² Merit Systems Protection Board, Annual Report for FY 2021 (May, 2021) at 9, *available at* <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1835904&version=1842212&application=ACR> OBAT

levels, identifying FTE counts, reviewing accession and retention rates, and creating agency priorities and succession plans to ensure the workforce (present and future) will meet the agency's short- and long-term needs. With my experience, I would consult with MSPB leadership to review the data and emerging needs and provide feedback to the broader MSPB Strategic Human Capital Plan.

37. If an accusation of discrimination were to arise within an office under your management, what actions would you take to address such an accusation?

- Under that scenario, I would make sure the appropriate offices were contacted (i.e., management duty to act) to immediately investigate the matter(s) and if appropriate, recuse myself from any interactions, seek guidance from OGC to identify other potential conflicts, and advocate that any investigation be conducted outside my purview of influence.

38. Do you believe MSPB has the resources it needs to meet current challenges? Please explain.

- If confirmed, I would take an active role to determine availability of resources and how best to allocate.

OPM & Federal Workforce Policy

39. What do you believe to be the top challenges facing the federal workforce today? What steps do you plan to take to address these challenges, if confirmed as Vice Chairman? Please explain.

- I believe the speed, veracity and volume of data and information entering the Federal workforce and how we analyze that data (in real time) will be a significant challenge for the Federal workforce moving forward. To adequately identify future funding needs based on the data and information coming in today is extremely difficult. Thus, Federal government will need to have safe and secure information systems and a workforce that can engage with those systems and analyze that data in a redistributive workplace setting (i.e., future of work). Thus, reskilling the existing workforce and identifying talent pipelines under the current rubric of today's civil service system (last updated in 1978) is also challenging for agencies to meet this need. The MSPB's history itself, institutional knowledge and experience in commissioning studies and evaluating OPM's impact can be a significant driver to inform a wide variety of stakeholders on potential workforce flexibilities and solutions that we need today and tomorrow while preserving the merit system principles.

40. MSPB was given the authority and responsibility to review the rules, regulations, and significant actions of the Office of Personnel Management (OPM). Do you have any concerns about OPM's current rules, regulations or recent actions? If so, please describe those concerns.

- **Yes. With the caveat that I have nothing but the highest respect and appreciation of OPM's workforce and leadership. (I did work there for almost 10 years!) Since its creation in 1979, OPM has taken on significant responsibilities with modest, at best, investments in its critical infrastructure (such as retirement processing and job announcements, USAJOBS). With its expanding requirements, limited funding, leadership voids, and stifled innovation, the recent [NAPA Study](#) released in March, 2021, does a wonderful overview of OPM's challenges and advances numerous recommendations to improve its efficacy. If confirmed, I would engage with MSPB experts on how that report can influence the Board's current review of OPM and what it could do to help OPM move forward.**

41. The MSPB has the statutory responsibility to conduct objective, non-partisan studies that assess and evaluate Federal merit systems policies, operations, and practices. These studies are typically government-wide in scope and ensure that the workforce is managed in accordance with MSPs and is free from PPPs. What role do you believe MSPB's data collection should play in supporting personnel policy?

- **I believe effectively sourcing and sharing data strengthens the effectiveness of the Federal workforce. MSPB's experts and knowledgeable staff contribute to harvesting the appropriate data stream from agencies and other stakeholders to assist in identifying existing issues and identifying risk factors that could project where the challenges could occur. By identifying those trend lines, the Board can direct resources that could mitigate those trend lines.**

42. What role do you think merit systems studies, published by MSPB, play in ensuring a competent and efficient federal workforce?

a. What steps would you take to ensure that MSPB's external reports address critical federal workforce issues?

- **Reports that sit on a "shelf" help no one. The Federal government has over 100 separate hiring authorities and dozens of different personnel and compensation systems. The workforce is highly specialized and distributive. If confirmed, I would coordinate with a broad stakeholder group to ensure that the published studies would have maximum impact on the intended audience as possible.**

b. What, if any, coordination do you believe should occur between MSPB and OPM to address federal workforce issues raised by MPSB studies?

- **Whether from an evaluation or oversight posture, having strong and professional relationships between reviewer and subject will maximize the outcome. Thus, the MSPB and OPM should coordinate closely with the understanding that both parties share the ultimate goal – protecting and improving the Federal workforce.**

43. MSPB is statutorily responsible for conducting oversight of OPM's significant actions. How will you coordinate with OPM to ensure any significant actions conform to the merit systems principles outlined in 5 U.S.C. § 2301?

- **If confirmed, I would seek to have periodic and scheduled inter-agency meetings between MSPB, OSC, FLRA and OPM – the originating agencies from the Civil Service Reform Act of 1978, to share best practices and share information. Though not part of the CSRA, I would also ask the EEOC to join as well. These five agencies represent pillars of workforce empowerment and improvement, and protect the workforce from unfair political influence, discrimination, and retaliation.**

44. Precedents, findings, recommendations and reviews of OPM rules by the MSPB have potential to directly affect how employees are managed and how their appeals are decided. What role do you believe the MSPB should play in developing personnel policy?

- **As with any OPM rulemaking, public comment and OMB interagency reviews are critical to due process, transparency, credibility, and agency success. During the drafting of OPM's rules and regulations, I would foster a relationship with OPM (like OPM has with the CHCO Council) that they would seek early input, data, information, etc. from the MSPB to help inform OPM's rules and regulations.**

45. In March 2018, MSPB published an updated survey on sexual harassment in the federal workforce.³ In this survey, 20.9 percent of women in the federal workforce and 8.7 percent of men experienced a type of sexual harassment in the two years preceding the survey.⁴ Only eight percent of these employees believed corrective action was taken against the individual who committed the harassment, possibly resulting in employees not using agency procedures to report the harassment.⁵ What do you believe is the role of

³ Merit Systems Protection Board, Update on Sexual Harassment in the Federal Workforce (Mar. 2018), available at <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT>.

⁴ *Id.* at 4.

⁵ *Id.* at 8.

MSPB in ensuring accountability against harassers in the federal workplace and in ensuring employees can report harassment without reprisal?

- **I believe leadership credibility, accountability, and management's duty to act, are central to any organization's success. The MSPB's decisions, surveys and studies provide agencies and the broader oversight community with valuable information and tools to protect the workforce from harassing conduct. Thus, the MSPB should continue to publish this information and advocate for improvements when needed and also acknowledge successes and share best practices when warranted.**

46. What steps can MSPB take to improve federal supervisors' knowledge and intra-agency support regarding disciplinary and removal processes?

- **I do believe "employee relations" supervisory guidance and training continues to evolve, and supervisors must fully understand their roles as supervisors when they enter into that position. Although OPM regulations do require that all new supervisors receive supervisory training within the first year of their appointment, and existing supervisors receive periodic training, they must be held accountable for meeting their supervisory requirements. To avoid promoting subject matter experts into supervisory roles, agencies must do a better job to improve the competency development and selection procedures to ensure new supervisors will be successful based on their management responsibilities, and not just their technical expertise. Thus, the MSPB can review agencies' supervisor selection procedures and annual training requirements to identify agency challenges and best practices.**

47. In your opinion, is the underutilization of probationary periods a critical issue? If confirmed as Vice Chairman of MSPB, what steps would you take to ensure that managers better utilize probationary periods?

- **Probationary periods are linked to the initial qualifications or examination for the position they are selected for whether they are entering a staff position, supervisory position or entering the Senior Executive Service. As a long-time practitioner, for probationary employees, I strongly advocate that the first-line supervisors provide early and periodic reviews of the new employees to ensure employees fully understand the purpose of the probationary periods. Supervisors have access to trainings, employee relations HR experts and agency counsels to assist them on what is needed.**

Adjudication & Enforcement

48. What role do you think alternative dispute resolution options, including the Mediation Appeals Program, should play in the MSPB adjudication and enforcement process?

- Yes. It's been my experience that the genesis of some workplace disputes started off as communication challenges between the employee and first-line supervisor. If early intervention, such as Alternative Dispute Resolution or facilitated mediation, were successful it would mitigate the potential for costly litigation while strengthening workforce civility and productivity. Thus, the Mediation Appeals Program would serve a similar purpose to create win-win scenarios to help reduce the current backlog of appeals.

49. MSPB has been without a quorum of Board members since January 8, 2017 with the last member retiring in February 2019. The lack of a quorum contributes to delays in issuing final decisions in petitions for review (PFRs) and other cases filed at headquarters (HQ) and releasing reports of merit systems studies.

- a. The MSPB currently estimates that it will take months or longer to process the inventory of cases at HQ and to publish merit systems studies reports once new Board members are nominated and confirmed. Please describe how you will effectively and promptly address MSPB's current backlog.

- I will work tirelessly and collaboratively with my Board members, MSPB staff and stakeholders on suggestions and approaches to best address the backlog, including identifying a transparent project plan to identify resources, project leads, key milestones, and performance metrics that would be jointly designed and implemented (by managers and staff) to track progress and create joint accountability up and down the organization.

- b. Please describe how your previous work experience has prepared you to address the challenges in resolving MSPB's backlog.

- I created numerous agency-wide project plans that involved a wide grouping of internal and external stakeholders. Over the years, I have led on efforts related to, but not limited to, reducing multi-million-dollar funding shortages for OPM's Office of Administrative Law Judges. I also led a research team that counted and tracked a decade's worth of Executive Branch Administrative Hearings (titled: *The Federal Administrative Judiciary Then and Now – A Decade of Change 1992-2002*), which is widely cited in legal literature and cases. I created a new non-title 5 personnel system at the Corporation for National and Community Service and received OPM approval (and Labor Management Award) for an "Interchange

Agreement” that allowed CNCS’s excepted services employees to have competitive status at other Federal agencies. And at various agencies, I reduced all manual paper transactions related to performance management; time and attendance; and training requests by moving those operations to web-based automation systems that created millions of dollars in savings, while eliminating dozens and dozens of audit findings related to lax internal controls and poor accountability.

- c. According to their annual report for FY21, MSPB had approximately 2,942 cases pending at HQ at the end of FY 2020. If confirmed, please describe how you will work with your colleagues to consider cases awaiting decisions.
 - **With years of senior management experience with project and workforce planning efforts, I will work closely with MSPB’s experts to share my experiences and insights in order to add value and not to distract from the goal(s) at hand.**
- d. Do you have experience with resolving backlogs such as the one faced by MSPB? If so, please describe your experience.
 - **Yes, earlier I identified several high-level issues that garnered Congressional, OMB, GAO, OPM, OIG, media, etc. attention that I believe prepares me well to assist with the backlog currently facing the MSPB.**
- e. Timeliness is one measure of performance. Quality of decisions is another measure. How can the competing goals of quality and timeliness be balanced? What are the appropriate indicators that could be used to measure the quality of MSPB decisions?
 - **Yes, timeliness, quality and even quantity are appropriate measures that must be balanced, and more importantly, agreed upon by all the stakeholders involved in designing and implementing the goals to reduce the current backlog. As Vice Chair I will make it my goal that the stakeholders look to agree and appropriate balance the indicators. I believe Team MSPB are leaders in the field when it comes to evaluations, reports, studies and designing methodologies. Thus, I look forward to learning from the team as much as I’m excited about joining the team.**

f. Have you sought advice from any current or former MSPB employees about how to best address the current backlog? If so, please describe your consultations.

- **At this time, I believe it would be premature to actively engage in this activity. However, if confirmed I plan to seek as much guidance and as quickly as I can, and will work to contribute to the Board's success.**

50. What would you consider to be an appropriate penalty for a violation of the Hatch Act by a senior administration official?

- **I do not have a specific response to this hypothetical as my opinion would be influenced by the specific charges, facts (including aggravating or mitigating) and by the ultimate ruling by the Administrative Judge.**

51. In some cases, complainants who may be better served by other government agencies such as the EEO or OSC seek assistance from the MSPB.

a. How will you work to ensure that your staff effectively guides these complaints to the appropriate resources?

- **Training and education are life-long pursuits. For Federal employees, staying current with new or updated policies, decisions, guidance etc. from the three branches of government and from academia and industry leaders is an ongoing challenge. Access to training and resources are essential if we are to properly serve the American people. Thus, I will advocate and champion investment into the workforce so that the workforce has the skills and resources to be successful.**

b. Will you collaborate with other government agencies to minimize duplication? If so, please describe how you will work to achieve this objective.

- **Yes. Since 2006, as an active member on the governmentwide CHCO Council and former Chair of the 100+ Federal agencies' Small Agency Human Resources Council, I have developed a broad coalition of contacts that can be utilized to assist the Board with resources and suggestions to ensure that the MSPB is well understood by our Federal partners, and how the MSPB can assist them with their mission responsibilities.**

Whistleblower Protections

52. MSPB previously highlighted the need to examine the prevalence and forms of reprisal for protected activity, particularly for whistleblowing.⁶ Do you view reprisal for whistleblowing as a significant challenge facing the federal workforce? Why or why not?

- **Yes. All forms of retaliation for any protected activity are violations.**

53. Do you believe that the motive of the whistleblower should be considered when examining retaliation claims? Please explain.

- **If the complainant identifies a motive, I believe it is the role of the Administrative Judge to assess all the evidence in the case and identify the weight of such evidence and to identify the appropriate legal review standard(s) that supported the decision.**

54. If confirmed, how will you ensure that whistleblower complaints are properly investigated?

- **I will review data, studies, and reports to determine the legal sufficiency and efficacy of whistleblower investigations.**

55. Protecting whistleblower confidentiality is of the utmost importance to this Committee.

a. How do you plan to implement policies within the MSPB to encourage employees to bring constructive suggestions forward without the fear of reprisal?

- **I will model transparency and foster inclusivity and engagement in order to maintain an open dialogue with the workforce and ensure mission goals cascade into employee communications and performance plans.**

b. Do you commit without reservation to work to ensure that any whistleblower within MSPB does not face retaliation?

- **Yes.**

c. If confirmed, what steps will you take to ensure that whistleblowers at MSPB do not face retaliation, that whistleblower identifiers are protected, and that complaints of retaliation are handled appropriately?

⁶ Merit Systems Protection Board, MSPB Research Agenda 2015-2018 (Feb. 2015), *available at* <https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1140540&version=1145045&application=ACROBAT>.

- **I will model transparency and foster inclusivity and engagement in order to maintain an open dialogue with the MSPB management officials and ensure mission goals cascade into manager directed communications and their performance plans.**

V. Relations with Congress

56. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

- **Yes.**

57. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed?

- **Yes.**

58. Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed?

- **Yes.**

59. If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?

- **Yes.**

60. If confirmed, will you direct your staff to adopt a presumption of openness where practical, including identifying documents that can and should be proactively released to the public, without requiring a Freedom of Information Act request?

- **Yes.**

61. If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Government Accountability Office (GAO) and the Congressional Research Service?

- **Yes.**

62. If confirmed, will you agree to work with representatives from this Committee and the GAO to promptly implement recommendations for improving MSPB's operations and effectiveness?

- Yes.

VI. Assistance

63. Are these answers completely your own? If not, who has provided you with assistance?

- These answers are completely my own.

64. Have you consulted with MSPB, or any other interested parties? If so, please indicate which entities.

- Yes, I consulted with MSPB leadership after completing my responses.

I, Raymond A. Limon, hereby state that I have read the foregoing Pre-Hearing Questionnaire and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Raymond Limon
(Signature)

This 8th day of August, 2021

**Senator Thomas R. Carper
Post-Hearing Questions for the Record
Submitted to Raymond A. Limon**

**Nominations of Cathy A. Harris to be a Member and Chair, and Tristan L. Leavitt and
Raymond A. Limon to be Members, Merit Systems Protection Board
Wednesday, September 22, 2021**

Congressional Whistleblower Protection Act of 2021

I cosponsor legislation in the Senate called the “Congressional Whistleblower Protection Act of 2021.”

This legislation would allow whistleblowers to pursue a lawsuit in federal court if the MSPB fails to issue a decision within six months of filing an administrative complaint. Currently, the only remedy for whistleblowers is to petition the MSPB, which has lacked a quorum for over four years.

Mr. Limon, do you believe it is necessary to create a private right of action for federal whistleblowers when the existing process falls short?

Additionally, how important is it for Congress to ensure that whistleblower-reporting channels adequately protect individuals who report agency wrongdoing from retaliation?

Response

I believe protection from retaliation in whistleblowing cases is foundational to having a merit-based Federal workforce. Generally speaking, under the current framework, employees can go to the Office of Special Counsel and then to the Board for relief. At this time, I do not hold a viewpoint on a new private right of action to Federal court. However, if confirmed, I would like to review the internal MSPB adjudication performance data and seek information from OSC to determine which hurdles may exist and how best to address those concerns, which could in turn, include a recommendation to a private right of action as described in your proposal.

Improving the Merit Civil Service System

When it comes to finding solutions for tough problems, I often say that we should find out what works and do more of that.

Congress established the merit-based civil service system in 1883, replacing the political patronage system known as “the Spoils System.”

Having said that, I understand our current competitive civil service model is not perfect.

Mr. Limon, what are some areas within the merit civil service system where things are working well, and other areas where we need to go back to the drawing board?

Response

The public expects to be treated professionally and fairly by all civil servants, and to ensure that happens, the Federal personnel system must be based in the merit system principles. This starts with how applicants can apply, be selected, and if appointed, ultimately be treated in a workplace that is free from prohibited personnel practices and political bias. According to the annual Federal Employee Viewpoint Survey, most employees are engaged, feel connected to their agency missions, and have a high degree of satisfaction with their supervisors.

However, with the challenges facing the future of work, in an increased redistributive workforce along with emerging threats and challenges, there will be more associated risks related to staffing, employee engagement and workplace conduct. In particular, the Federal hiring system has not really changed since the end of World War II and rather than comprehensive reform, there have been a patchwork of competing and complex personnel systems (i.e., over 100 hiring authorities) and associated hiring practices that make it practically impossible for the average citizen to navigate job opportunities and realize their desire to join the Federal workforce. In addition to hiring, ensuring employees have the knowledge, support and training related to understanding their merit-based protections, and where they can seek help when needed, will be a challenge in this redistributive workforce. As we transition from brick-and-mortar facilities to leveraging technology as a means of work that can be done virtually, we should anticipate that some employees will feel more isolated and not be as connected to the workforce, which in turn could result in unfair treatment or create organizational stress that can result in higher workplace disputes. Thus, we all should be vigilant in making sure the public, applicants and our employees are made aware of the merit system principles and how we can become more effective in communicating these values.

Protecting the Merit Civil Service System from Politicization

Mr. Limon, I remain concerned that the last administration's executive actions with regard to personnel management have caused many people to question the role of apolitical career public servants and the benefits of having a federal workforce that is free from political influence.

Could you please explain what you view as the biggest threat to maintaining an apolitical civil workforce?

Additionally, are there actions that we in Congress may want to consider to ensure the political independence and integrity of the merit civil service system?

Response

I believe what helps to distinguish and make public service a calling is what all Federal employees do when they start their careers or move to new positions. On day one, they take the Oath of Office. As Federal employees, we all take an oath or affirm to support and defend the Constitution of the United States. That solemn vow is a constant reminder to us and the public we serve that we work for them regardless of political party, affiliation, or individual leader. Over the years, I do feel that civil servants (as a collective) have not always enjoyed broad public support due to various reasons, such as social media, negative political campaigning, or media attention on the small number of poor performing employees that tend to overshadow the vast majority of hard working and problem-solving professionals that make up today's Federal workforce. To challenge that negative narrative, there are other good government groups like the Partnership for Public Service, Volcker Alliance, National Academy for Public Administration, etc. that look to highlight the Federal workforce successes and supports a "call to service." Within the Executive branch, there are many wonderful agencies that reach out to varied constituents to highlight how they can serve and enter a workforce that is respectful, civil, and free from discrimination and retaliation. However, Congress may want to consider how agencies, from a more centralized agency or office, can better message the importance of workplace merit and independence to potential applicants and to the current workforce.

Senator James Lankford
Post-Hearing Questions for the Record
Submitted to Raymond A. Limon

**Nominations of Cathy A. Harris to be a Member and Chair, and Tristan L. Leavitt and
Raymond A. Limon to be Members, Merit Systems Protection Board
Wednesday, September 22, 2021**

- 1) The Biden Administration recently published an FAQ clarifying that if a Federal employee refuses to be fully vaccinated by November 22, “the agency should pursue disciplinary measures, up to and including removal from Federal service.” However, many agencies have not provided employees further guidance. Unless the Administration reverses its policy, disciplined employees will file actions which will come before the MSPB challenging disciplinary actions, including removal, for not being vaccinated.

What authority does the Federal government have to discipline and remove Federal employees for refusing to comply with Executive Orders and agency guidance?

What is the standard an agency should use when deciding whether to grant a religious accommodation under Title VII?

Response

Regarding the recent [Executive Order](#), dated September 9, 2021, requiring vaccinations for Federal employees, I have reviewed the updated FAQs issued by the Safer Federal Workforce Task Force. See [Task Force - What's New](#) issued on September 24, 2021.

The Executive order cites 5 USC 3301, 3302 and 7301 to the President’s authority to implement this new requirement. Though agencies are awaiting additional guidance from the Task Force and the U.S. Office of Personnel Management (OPM) related to employee discipline, the Task Force has shared with the community that the goal is not to remove employees but to impart to them the importance of vaccines and maintaining a safe working environment for the public and employees. The Task Force and OPM have reiterated that agencies must also take into consideration the employees’ requests for both reasonable and religious accommodations. With respect to potential discipline, the Task Force has also communicated that agencies must focus on education and counseling prior to taking progressive discipline. With respect to religious accommodations, I am aware of two EEOC products on point: 1) [What You Should Know: Workplace Religious Accommodation | U.S. Equal Employment Opportunity Commission \(eEOC.gov\)](#); and 2) [What You Should Know: Workplace Religious Accommodation | U.S. Equal Employment Opportunity Commission \(eEOC.gov\)](#). However, I do not consider myself an expert in religious accommodation case law, and if confirmed, I would ask the Board’s legal team to brief me on the required legal standards of review.

- 2) As of August 31, 2021, the MSPB reported 3,421 pending petitions for review. If confirmed, what actions will you take and what processes will you put in place to manage the backlog of cases?

If you are able to act and implement processes to manage the backlog of cases as described, how long do you believe it will take the Board to reach a “steady state” of cases?

Response

I believe this is the most significant challenge facing the MSPB, and I will work tirelessly and collaboratively with my Board members, MSPB staff and stakeholders on suggestions and approaches to eliminate the backlog as quickly as possible. Over my 25 years working as a civil servant and mostly in the executive ranks, I have extensive experience with leadership transitions and preparing a range of issue papers and recommendations on how best to deal with incoming challenges. To that end, I have a high degree of confidence the current professionals within the Board, including my fellow nominee, Mr. Tristan Leavitt, have a range of proposals and thoughtful suggestions for the new leadership to review on day one. During our collective testimonies, we have shared ideas on creating a triage of appeals (starting with the most consequential and precedent setting cases); identifying OSC requests for emergency stays; and using non-precedent short-form decisions that would inform the parties of the Board’s final decision without recapping and reanalyzing earlier arguments.

I also suggest the mitigation plan moving forward would be known to our stakeholders, so everyone understands their respective roles and how everyone would be contributing to the backlog elimination. The planning efforts should also include performance metrics and milestones with anticipated timeframes to track the progress. At this time, it is difficult to estimate that timeframe though I understand during normal operations (i.e., quorum present), the Board would process approximately 1,000 appeals annually. Under this triage approach, and support from our stakeholders, I would expect us to vastly improve upon that rate.

Senator Jacky Rosen

Post-Hearing Questions for the Record

Submitted to Raymond A. Limon

Nominations of Cathy A. Harris to be a Member and Chair, and Tristan L. Leavitt and Raymond A. Limon to be Members, Merit Systems Protection Board

Wednesday, September 22, 2021

1. As the Board reaches a quorum, what steps will you take to further ensure that federal government workers living outside of DC, like in the West, who may not necessarily live in communities where the majority of people are federal workers, know their rights and know how to appeal agency decisions to the Board?

Response:

As a second-generation Nevadan and spending many years on its lands, I am uniquely aware of the Federal government's impact on Nevada and the western States and tribal lands. Most of my family today resides in Nevada, and I also enjoy going home to my Silver State whenever I can. If confirmed as the Vice-Chair, I would take an active role in ensuring the Board communicates broadly and aggressively the positive impact that a merit-based workforce, that is free from retaliation based on political bias, has on the country. Though not a large agency, the Board has offices in Atlanta, New York, Philadelphia, Chicago, Denver, and Oakland, and I would take the opportunity to meet with staff in those areas and see how they communicate the role of the MSPB in their communities. I would also like to meet with representatives from the various Federal Executive Boards in the West and see how I can be helpful in communicating employee rights within their communities.

Similarly, I would seek out Federal installations that currently have large-western based workforces, such as DoD, Department of Energy, Social Security Administration, etc., to determine how the Board can assist them with sharing information, and how it can be part of their on-boarding and employee trainings. I would also ask we review employee survey data, such as the Federal Employee Viewpoint Survey (FEVS), to determine if there are geographically based workforce concerns, related to merit system principles and/or prohibited personnel practices, and how we can remedy those concerns.

**Senator Kyrsten Sinema
Post-Hearing Questions for the Record
Submitted to Raymond A. Limon**

**Nominations of Cathy A. Harris to be a Member and Chair, and Tristan L. Leavitt and Raymond A. Limon to be Members, Merit Systems Protection Board
Wednesday, September 22, 2021**

1. Chief Human Capital Officers have a unique sense of the challenges facing the Federal workforce. Considering your role as one of the longest serving members of this community, what relationship do you believe CHCOs should have with the MSPB?

Response:

As with other C-Suite executives, CHCOs have a unique responsibility to advise agency leaders on how best to manage their workforces and achieve results tied to their unique mission responsibilities while meeting the myriad of government-wide compliance requirements. Thus, CHCOs are particularly adept at both human capital strategic planning and implementing HR operational procedures within their agencies. To find that right balance, CHCOs must regularly engage with their internal and external stakeholders to optimize impact. Notwithstanding various personnel systems in place today, the foundational connections between those systems are anchored in the merit system principles.

Through agency head delegations, CHCOs are responsible for ensuring that both managers and the servicing HR professionals that report to them follow and are held accountable to the merit systems principles. To that end, I believe CHCOs and the MSPB should have a reciprocal relationship to discuss and collect data on emerging workforce challenges and opportunities and to share best practices to inform each other's research and workforce strategies. Based on that partnership, improvements could be identified to help both strategic human capital planning and HR operational implementation.

Similarly, the MSPB's efforts related to research evaluation and studies, and adjudication of workplace disputes can be informed by the experiences of CHCOs working in both large and small agencies and under title 5 and non-title 5 personnel systems. I would also suggest that the CHCO Council have periodic inter-agency sessions with representatives from the MSPB, OSC, EEOC, and FLRA to further the CHCOs understanding of emerging workforce requirements.

2. You have led human resources at small and large Agencies. If confirmed, how will this experience inform how you approach cases that come before the Board?

Response:

I believe those experiences will prove to be invaluable in several settings. First, in assisting to lead the MSPB itself. By helping to lead large, small, decentralized, title 5 and non-title 5 agencies, I'm uniquely qualified to assist in providing feedback to the MSPB leadership on its operational needs, whether it involves human capital planning, succession planning, budget formulation, IT enterprise planning, facilities, security, safety, or communications. Secondly, in reviewing petitions for review, I bring situational awareness and context of management's

responsibilities to better understand what is required by statute, regulation, or case-law, and how it applies to the various levels of review when decisions are appealed. Finally, I am very familiar with the Board's evaluations and studies and have contributed suggestions and data to inform those evaluations and studies. With my varied experiences, I can bring my perspectives to the Board to help not only what type of issues should be pursued, but also identify value-added deliverables to assist the MSPB's varied stakeholders.

3. It is important that the Board fulfill its role to review Office of Personnel Management regulations. How will you ensure the Board does this and how will you approach situations when the Board disagrees with an OPM regulation?

Response:

The MSPB must continue its oversight authority over OPM and maintain open lines of communication with OPM so it can issue-spot concerns prior to OPM's publication of regulations or guidance. Based on the many years on the CHCO Council and working inside OPM for almost nine years, I have maintained strong relationships with many of the policy experts within OPM. Thus, I believe I can identify and help to preemptively correct any issues that would arise but nonetheless would steadfastly expect the Board would challenge OPM on its regulations if necessary. The Board also enjoys jurisdiction over OPM's employment practices, pursuant to 5 CFR 300.104, and this is another avenue to ensure OPM is meeting its regulatory requirements. While at OPM, I also litigated employment practices and can identify issues when warranted.

It is also noteworthy that since its creation in 1979, OPM has taken on significant responsibilities and is now facing a Federal workforce that is dramatically different today. I believe the Board should also review the recent [NAPA Study](#) (*Recommendations to Strengthen and Modernize OPM*, dated March 17, 2021) that evaluated numerous OPM structural and leadership challenges and advanced numerous recommendations to improve its efficacy. Those findings could also inform the Board's oversight of OPM as well.



700 12th St NW Ste 700PMB 95968
 Washington, DC 20005
 o: 202-793-6262
 f: 888-396-6975
 e: ncastro@shawbransford.com
 w: www.promanager.org

September 20, 2021

The Honorable Gary Peters, Chairman
 The Honorable Rob Portman, Ranking Member
 Committee on Homeland Security and Governmental Affairs
 Washington, D.C. 20510

RE: Professional Managers Association Letter Regarding the Nominations for the Merit Systems Protection Board

Dear Chairman Peters, Ranking Member Portman, and Members of the Committee:

On behalf of the Professional Managers Association – the non-profit professional association that has, since 1981, represented professional managers, management officials, and non-bargaining unit employees at the Internal Revenue Service (IRS) – I write regarding the urgent need to confirm President Biden's nominees to the Merit Systems Protection Board (MSPB).

All three nominees, Cathy Harris, Raymond Limon, and Tristan Leavitt are exceptionally qualified candidates with experience in the federal sector and defending employee rights.

In July, I expressed my sincere confidence in Harris and Limon in a [letter](#) urging the Senate to restore a quorum to the MSPB. Now, with the nomination of Tristan Leavitt, the Senate has the chance to go even further and fill all Board positions for the first time in over four years. This must be done, and it starts with passage of the nominees through this Committee.

As PMA has consistently reminded lawmakers, the MSPB is the primary adjudicative body for adverse personnel actions for IRS managers and non-collective bargaining unit employees. Without the MSPB, our employee rights are in a constant state of risk. With a backlog of over 3,000 cases, this issue surely impacts agencies across the Executive Branch and must be addressed with haste.

Additionally, the IRS has no clear finality on its personnel actions. Supervisors are therefore left in a state of limbo waiting years to determine when these cases will be resolved. If they are found in favor of the employee at the Board level, the agency will be required to pay years of backpay for the time spent waiting for a final decision.

The current state of the MSPB and its impact on employees and managers goes widely against best practices for human capital management and the maintenance of employee rights and protections.

Luckily, the Senate is faced with a simple solution: confirm the present nominees to the Board.

President Biden's final nominee, Tristan Leavitt, has widespread support across the political spectrum and federal community. He is a veteran of MSPB operations having served as acting chief executive and administrative officer since March 2019. Leavitt has served within the Office of Special Counsel and on Capitol Hill. In both positions he supported employee rights and effectively handled workforce policy issues.

With Harris, Limon, and Leavitt, the MSPB can finally function again and function successfully for both agencies and taxpayers.

Finally, the time for a functioning MSPB is now and the matter is urgent. It is also the simplest way to avoid potential constitutional challenges which may deeply and irreparably damage the Board's existence.

As the Supreme Court continues to question the legitimacy of agencies making final decisions without Senate-confirmed leadership, the MSPB is at severe risk of having its decisions deemed unconstitutional. In FY 2020, administrative judges at the MSPB affirmed agency decisions in 100 percent of Department of Treasury cases. The lack of Senate-confirmed Board Members to conduct appellate review of these cases leaves the decisions subject to constitutional challenge. It is critical the Senate confirm a quorum to ensure the MSPB Administrative Judge's security from these challenges. Further dysfunction at the MSPB would severely undermine employee protections and create a breeding ground for government abuse.

For the reasons outlined above, it is imperative the Senate swiftly advance and confirm all three MSPB nominees. Thank you for your consideration of PMA's perspective. Please contact PMA Washington Representative Natalia Castro (ncastro@shawbransford.com) if we can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Chad Hooper'.

Chad Hooper
Executive Director
Professional Managers Association



The voice of career federal executives since 1980

4829 West Lane • Bethesda, MD 20814 • 202.971.3300 • seniorexecs.org

September 20, 2021

The Honorable Gary Peters, Chairman
 The Honorable Rob Portman, Ranking Member
 Committee on Homeland Security and Governmental Affairs
 Washington, D.C. 20510

Dear Chairman Peters, Ranking Member Portman, and Members of the Committee:

On behalf of the Senior Executives Association (SEA) – which represents the interests of career federal executives in the Senior Executive Service (SES), those in Senior Level (SL), Scientific and Professional (ST) and equivalent positions and other senior career federal leaders – I write to urge the immediate advancement and confirmation of the three qualified nominees for members of the Merit Systems Protection Board (MSPB).

The MSPB has lacked a quorum for over four years and has lacked a single Senate-confirmed Member for over two years. The negative impacts of these vacancies are far reaching for federal employees, agencies, and taxpayers alike.

The Committee now has three extremely well-qualified and universally commended nominees to serve on the Board. We urge the committee to bring these nominees forward as soon as possible. It is past time for the Senate to act and restore a quorum to the Board.

Specifically, President Biden's final nominee, Tristan Leavitt, is a long-time partner of SEA in pursuit of stronger employee rights and more efficient agency operations. During his time on the Hill, Leavitt worked closely with SEA to promote good government reforms that balance employee protections and taxpayer accountability. These initiatives garnered broad bipartisan and stakeholder support. Leavitt's nomination has similarly garnered broad bipartisan and stakeholder support. SEA emphatically supports Leavitt's nomination, as well as those of Cathy Harris and Raymond Limon.

As SEA has consistently articulated, each day the Board remains member-less, the backlog of cases grows. Today, over 3,000 cases remain unresolved. This means, in over 3,000 cases, the agency lacks finality for their personnel actions and employee rights are unenforced. As the backlog grows, so does the amount of backpay agencies will be required to provide reinstated employees. In over 80 percent of cases, the MSPB affirms the agency's decision. In the other nearly 16 percent of cases, employees are reinstated, and taxpayers must pay to rectify the agency's mistake. As the backlog grows and cases are pushed into further delay, this cost grows.

Once confirmed, the Board Members President Biden has nominated can immediately begin whittling down this backlog. With three qualified, competent, and widely praised nominees, it is fiscally irresponsible to continue allowing the backlog to grow.

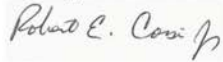
Further, as constitutional challenges mount regarding the legitimacy of federal adjudicative bodies without Senate-confirmed members, the Board faces a serious and valid risk of being inoperable soon. At that point, Congress has no plan for how to address the situation. Congress has no plan for how to protect federal employee rights. Most importantly, Congress has no plan for how to protect the merit-based civil service system. More than likely, these cases will be moved to federal courts where Department of Justice attorneys will be adjudicating questions of administrative employment law, rather than focusing their efforts on their core mission. As champions for good government on this committee, this should be unacceptable.

Cathy Harris, Raymond Limon, and Tristan Leavitt are extremely qualified, capable, and well-respected in the federal community. With such urgent and critical issues at hand as outlined above, there is no reason for further delay.

Federal employees, agencies, and taxpayers need a functioning MSPB. American taxpayers deserve an accountable government. We urge the Committee and the full Senate to advance and confirm the nominees.

Thank you for your consideration of SEA's perspective. Please have your staff contact SEA Director of Policy and Outreach Jason Briefel (jason.briefel@seniorexecs.org; 202-971-3300) for further information.

Sincerely,



Robert E. Corsi, Jr.
President

CC: Senate Majority Leader Chuck Schumer
Senate Minority Leader Mitch McConnell