



governmentattic.org

"Rummaging in the government's attic"

Description of document: Merit Systems Protection Board (MSPB) Questions For the Record (QFR) and agency QFR responses to Congress 2017-2020

Requested date: 23-May-2020

Release date: 06-July-2020

Posted date: 26-October-2020

Source of document: FOIA Request
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419
Fax: (202) 653-7130
Email: mspb@mspb.gov
[FOIAonline](#)

The governmentattic.org web site ("the site") is a First Amendment free speech web site, and is noncommercial and free to the public. The site and materials made available on the site, such as this file, are for reference only. The governmentattic.org web site and its principals have made every effort to make this information as complete and as accurate as possible, however, there may be mistakes and omissions, both typographical and in content. The governmentattic.org web site and its principals shall have neither liability nor responsibility to any person or entity with respect to any loss or damage caused, or alleged to have been caused, directly or indirectly, by the information provided on the governmentattic.org web site or in this file. The public records published on the site were obtained from government agencies using proper legal channels. Each document is identified as to the source. Any concerns about the contents of the site should be directed to the agency originating the document in question. GovernmentAttic.org is not responsible for the contents of documents published on the website.



U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Clerk of the Board

1615 M Street, N.W.

Washington, D.C. 20419-0002

Phone: 202-653-7200; Fax: 202-653-7130; Email: foiahq@mspb.gov

July 6, 2020

SENT VIA E-MAIL

RE: First Interim Release for Request MSPB-2020-000152

This is the first interim release to the Freedom of Information Act (FOIA) request to the U.S. Merit Systems Protection Board (MSPB) dated May 23, 2020, and received May 26, 2020. In your request you seek the following:

A copy of the Questions For the Record (QFR) and agency QFR responses to Congress responding to QFRs during calendar years 2017, 2018, 2019 and 2020 to date, for the Merit Systems Protection Board. These records are likely found in the MSPB office that handles legislative affairs/congressional relations.

We have contacted the departments most likely to have records responsive to your request. The departments conducted a comprehensive search of their electronic files and a partial search of hardcopy files for records responsive to your request. After a careful review, we have determined that the following records can be released in full.

- Chairman Ron Johnson Post-Hearing Questions for the Record Submitted to Mr. Dennis Kirk;
- Senator Claire McCaskill Post-Hearing Questions for the Record Submitted to Mr. Dennis Kirk;
- Senator Gary Peters Post-Hearing Questions for the Record Submitted to Mr. Dennis Kirk;
- Chairman Ron Johnson Post-hearing Questions for the Record Submitted to Mr. Andrew F. Maunz;
- Senator Claire McCaskill Post-Hearing Questions for the Record Submitted to Mr. Andrew F. Maunz;
- Senator Gary Peters Post-Hearing Questions for the Record Submitted to Mr. Andrew F. Maunz;
- Senator Heidi Heitkamp Post-Hearing Questions for the Record Submitted to Mr. Andrew F. Maunz;

- Senator Kamala Harris Post-Hearing Questions for the Record Submitted to Andrew F. Maunz;
- Chairman Ron Johnson Post-Hearing Questions for the Record Submitted to The Honorable Julia A. Clark;
- Senator Claire McCaskill Post-Hearing Questions for the Record Submitted to The Honorable Julia A. Clark;
- Senator Gary Peters Post-Hearing Questions for the Record Submitted to The Honorable Julia A. Clark;
- Senator Heidi Heitkamp Post-Hearing Questions for the Record Submitted to The Honorable Julia A. Clark;
- Senator James Lankford Post-Hearing Questions for the Record Submitted to The Honorable Julia A. Clark;
- Ranking Member Gary C. Peters Post-Hearing Questions for the Record Submitted to B. Chad Bungard.

Portions of the following record are being withheld in part pursuant to FOIA Exemption 6. See 5 U.S.C. § 552(b)(6).

- Senator Heidi Heitkamp Post-Hearing Questions for the Record Submitted to Mr. Dennis Kirk.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

In response to the Coronavirus (COVID-19) pandemic and the national emergency, MSPB is maximizing telework for its employees at all locations until further notice. We remain committed to continue processing all FOIA requests and will perform adequate searches, however, in some instances, we are unable at this time to conduct a physical search of hardcopy records. If after your review you determine that the released records satisfy your request, please let us know and we will issue you a final response and afford you appeal rights.

If you wish to contact the FOIA Public Liaison, you may do so via email to foiahq@mspb.gov or telephone at (202) 254-4475. You may also access MSPB's press releases regarding the implementation of mandatory telework for all MSPB employees at <https://www.mspb.gov/coronavirus/>.

If you wish to appeal the determination in this interim release, we ask that you hold your appeal until after our final disposition letter, at which time we will provide you with full notice of your administrative appeal rights.

Sincerely,

//signed//

Karin Kelly
Government Information Specialist
U.S. Merit Systems Protection Board



U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Clerk of the Board

1615 M Street, N.W.

Washington, D.C. 20419-0002

Phone: 202-653-7200; Fax: 202-653-7130; Email: foiahq@mspb.gov

September 25, 2020

SENT VIA E-MAIL

RE: Final Response for Request MSPB-2020-000152

This is the final response to your Freedom of Information Act (FOIA) request to the U.S. Merit Systems Protection Board (MSPB) dated May 23, 2020, and received May 26, 2020. In your request you sought the following:

A copy of the Questions For the Record (QFR) and agency QFR responses to Congress responding to QFRs during calendar years 2017, 2018, 2019 and 2020 to date, for the Merit Systems Protection Board. These records are likely found in the MSPB office that handles legislative affairs/congressional relations.

For the first interim release, dated and sent to you on July 6, 2020, we conducted a comprehensive search of the electronic files and a partial search of hardcopy files of the departments most likely to have records responsive to your request. You received the following records which were released in full.

- Chairman Ron Johnson Post-Hearing Questions for the Record Submitted to Mr. Dennis Kirk;
- Senator Claire McCaskill Post-Hearing Questions for the Record Submitted to Mr. Dennis Kirk;
- Senator Gary Peters Post-Hearing Questions for the Record Submitted to Mr. Dennis Kirk;
- Chairman Ron Johnson Post-hearing Questions for the Record Submitted to Mr. Andrew F. Maunz;
- Senator Claire McCaskill Post-Hearing Questions for the Record Submitted to Mr. Andrew F. Maunz;
- Senator Gary Peters Post-Hearing Questions for the Record Submitted to Mr. Andrew F. Maunz;
- Senator Heidi Heitkamp Post-Hearing Questions for the Record Submitted to Mr. Andrew F. Maunz;

- Senator Kamala Harris Post-Hearing Questions for the Record Submitted to Andrew F. Maunz;
- Chairman Ron Johnson Post-Hearing Questions for the Record Submitted to The Honorable Julia A. Clark;
- Senator Claire McCaskill Post-Hearing Questions for the Record Submitted to The Honorable Julia A. Clark;
- Senator Gary Peters Post-Hearing Questions for the Record Submitted to The Honorable Julia A. Clark;
- Senator Heidi Heitkamp Post-Hearing Questions for the Record Submitted to The Honorable Julia A. Clark;
- Senator James Lankford Post-Hearing Questions for the Record Submitted to The Honorable Julia A. Clark;
- Ranking Member Gary C. Peters Post-Hearing Questions for the Record Submitted to B. Chad Bungard.

Portions of the following record were withheld in part pursuant to FOIA Exemption 6. See 5 U.S.C. § 552(b)(6).

- Senator Heidi Heitkamp Post-Hearing Questions for the Record Submitted to Mr. Dennis Kirk.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

As part of the interim release, we explained that in response to the Coronavirus (COVID-19) pandemic and the national emergency, MSPB was, and still is, maximizing telework for its employees at all locations until further notice. While we remain committed to continue processing all FOIA requests and performing adequate searches, in some instances, we are unable at this time to conduct a comprehensive physical search of hardcopy records.

On September 25, 2020, you spoke with MSPB's FOIA Public Liaison, Fon Muttamara, on the telephone. She reiterated that MSPB is still maximizing telework for its employees and that while we have not been able to complete our search of all of the possible hardcopy files, we are confident that the search that was conducted was reasonable and yielded all of the records responsive to your request. Because of this explanation, you agreed that the records sent to you in the first interim release have satisfied your request and that we may close this request.

As such, if you have any questions regarding this request, or if you disagree with this disposition, in whole or part, you have the right to seek assistance from the FOIA Public Liaison,

appeal the determination, or contact the Office of Government Information Services to participate in dispute resolution services.

If you wish to contact the FOIA Public Liaison, you may do so via email to foiahq@mspb.gov or telephone at (202) 254-4475. If you wish to participate in dispute resolution services, you may contact the Office of Government Information Services (OGIS). The contact information for OGIS is as follows:

Office of Government Information Service
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
E-mail at ogis@nara.gov
Telephone at 202-741-5570
Toll free at 1-877-684-6448
Facsimile at 202-741-5769

If you wish to appeal the determination, you may do so by submitting your appeal through FOIAonline or by mailing your appeal to:

Chairman, c/o Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street, NW
Suite 500
Washington, DC 20419

Your appeal should be identified as a "FOIA Appeal" on both the letter and the envelope, if applicable. It should include a copy of your original request, a copy of this letter and your reasons for appealing this decision. You may also submit your appeal by email to foiahq@mspb.gov or by fax at (202) 653-7130. Your appeal must be filed within ninety (90) days from the date of this letter.

Please be advised that we continue to operate under our Coronavirus/COVID – 19 guidelines and our offices are not consistently staffed. As such, there may be a delay in receiving any mailed or faxed appeals. For faster delivery, we recommend emailing your appeal or any correspondence. You may also choose to submit an appeal directly to FOIAonline. For more information on our Coronavirus/COVID – 19 guidelines, please visit <https://www.mspb.gov/coronavirus/>.

Sincerely,

//signed//
Karin Kelly
Government Information Specialist
U.S. Merit Systems Protection Board

**Chairman Ron Johnson
Post-Hearing Questions for the Record
Submitted to Mr. Dennis Kirk**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District
of Columbia
Thursday July 19, 2018**

Do you think it is appropriate to withhold in MSPB opinions the identity of an employee who is found to have committed a prohibited personnel practice? If so, please explain the reasons you believe the identity should be withheld.

No. I understand that, while the Board may withhold the identity of an appellant or a respondent by granting anonymous "John Doe" status, such status is granted very rarely. A party seeking anonymity must overcome the presumption that parties' identities are public information. Anonymity is granted only in unusual circumstances, such as to prevent a clearly unwarranted invasion of a third party's privacy, to preserve the appellant's physical safety, or when the matters involved are of a highly sensitive or personal nature.

**Senator Claire McCaskill
Post-Hearing Questions for the Record
Submitted to Mr. Dennis Kirk**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District of
Columbia
Thursday July 19, 2018**

Whistleblower Protections

The MSPB is one of several entities -- including Inspectors General and the Office of Special Counsel (OSC) -- that play a role in protecting whistleblowers from retaliation, and ensuring that whistleblowers are made whole if they experience prohibited personnel practices

Congress has passed numerous laws to protect whistleblowers since the very founding of this country. Most recently, and most relevant to MSPB, are the Whistleblower Protection Enhancement Act (WPEA) and the recent enacted All Circuit Review Act. It is important to emphasize that Congress keeps passing laws and expanding protections because we believe whistleblowers are important and should be protected. Yet, sometimes the institutions charged with protecting whistleblowers do not heed this intent. We need to make sure that these institutions are operating on principles of transparency, accountability, and fairness.

Q. Under oath, will you commit that federal employees will continue to have access to all the avenues of appeal available to them if you are confirmed?

I can only commit to the avenues of appeal available to Federal employees at the MSPB, to the extent they exist under law, rule or regulation.

Q. What will you do to ensure that the MSPB fosters a reputation for being an institution that is fair to whistleblowers?

MSPB's job is to fairly, impartially and expeditiously adjudicate whistleblower claims consistent with both statutory provisions and controlling case law from Courts of competent jurisdiction. Without speaking for my possible future colleagues, I believe this will be a high priority for the Board once a quorum is restored.

Q. MSPB's significant case backlog, soon to reach 1,300 petitions for review, can lead to continuing injustice for whistleblowers. What will you do to address this backlog?

As I testified at the July 19, 2018 confirmation hearing, addressing the backlog will be my most important priority. During the nomination and confirmation process, I have

come to know and learn to respect the two individuals whom I hope will become my colleagues. I believe we will be able to work collegially to set priorities and begin to issue cases.

- Q. Do you believe that the Administrative Judges hearing cases have sufficient training in whistleblower protection laws to ensure that rulings are not contrary to the law? What will you do to ensure that all employees within MSPB have a proper understanding of whistleblower protections?

I believe in the importance of career development training and note that most attorneys have annual continuing legal education requirements. I do not have specific knowledge of what types of training MSPB employees, including administrative judges, have access to during their careers. But, if confirmed, I will work to ensure that administrative judges and all other MSPB employees have access to all of the training they need on whistleblower protections and all other topics.

We have seen troubling instances where there has been burden shifting onto the whistleblowers, where the law is clear that the agency bears the responsibility to show by clear and convincing evidence that there was no prohibited personnel practice.

- Q. Do you have concerns with burden shifting, and, if so, what should be done to address this? What additional efforts should be made to ensure that there is not improper burden shifting?

Without context of the particular situations in which burden shifting might be an issue, I cannot answer this question.

- Q. Burden shifting is a key issue in cases where certain employees, like auditors and investigators, are reporting concerns in the course of their duties. OSC has argued that MSPB has wrongly determined that these employees had a higher evidentiary burden than the law required. What are your views of this argument? Does MSPB need to look more closely at this issue?

If confirmed, the issues and concerns raised by the Office of Special Counsel are matters that could come before me in existing or future cases that I will adjudicate. As such, it would be inappropriate for me to comment on this now.

**Senator Gary Peters
Post-Hearing Questions for the Record
Submitted to Mr. Dennis Kirk**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District
of Columbia
Thursday July 19, 2018**

1. During this morning's hearing, you stated that you have not had the opportunity to review the proposed Modern Employment Reform, Improvement, and Transformation Act (MERIT Act), H.R. 599, which would significantly reduce the time it takes to fire a federal worker accused of poor performance or misconduct. The bill reduces the time for an employee to appeal firing decisions, or for the U.S. Merit Systems Protection Board (MSPB) to intervene on their behalf, and extends new employee probationary periods to two years. It would also allow agencies to avoid negotiated grievance procedures, reduce benefits of workers who are convicted of a felony and fired, and rescind bonuses or other cash awards deemed to be wrongly paid. On Tuesday, July 17, 2018, the nation's largest federal union, the American Federation of Government Employees, AFL-CIO (AFGE) signaled its strong opposition to The MERIT Act, arguing that the legislation would make it easier to fire federal employees and would give agencies alternative mechanisms for the punishment of federal workers. **After reviewing the legislation, do you believe it will support or undermine the due process system that provides federal workers with a meaningful opportunity to defend themselves when treated unfairly? How would the legislation impact the ability of the MSPB to review the appeals of employees who feel they have been wrongly terminated in a timely manner? Would eliminating or shortening processes for federal workers to challenge firing decisions of agencies, and empowering agencies to take-back bonuses or garnish benefits, improve federal employment practices?**

MSPB staff has reviewed the language of H.R. 599, the Modern Employment Reform, Improvement, and Transformation (MERIT) Act, as passed by the House Oversight Committee on July 17, 2018, and advised me that they do not believe the legislation addresses any issues of jurisdiction, procedure, substantive case law or any other matter concerning Board operations. MSPB staff does not currently believe that this legislation would negatively impact the Board's ability to review the appeals of employees who are the subject of an agency adverse action over which the Board has jurisdiction to adjudicate. As long as any statutory process is consistent with Constitutional due process, the length of the

appeals process and any other associated issues is a question of policy better addressed by policy makers in Congress. And it should be noted that whether any new process is consistent with Constitutional due process is an issue likely to be raised before the Board in the first instance. As such, it would be inappropriate for me to form an opinion in advance.

2. The House of Representatives Committee on Oversight and Government Reform recently voted to approve a five year reauthorization for the MSPB after more than a decade since its last authorization expired in 2007. Included in the reauthorization legislation was language that would allow MSPB members to issue summary judgments, reduce the burden of proof for agencies to justify adverse personnel actions from “a preponderance of the evidence” to “substantial evidence,” and it would require federal workers to pay a filing fee to appeal adverse personnel actions. The bill reduces the time to seven days for employees to respond to a notice of proposed discipline; require the agency to make a final decision within 15 days afterward; and allow only seven days, rather than 30, for the employee to appeal to the MSPB. **In your opinion, do you believe it is too hard currently to fire federal employees? Do you believe reducing the burden of proof to justify adverse agency decisions is appropriate? Should you be confirmed, how would you ensure that federal employees are treated fairly?**

This is a policy question not relevant to the Board’s jurisdiction or its operations. But in my personal opinion, no, it is not too hard currently to fire Federal employees. The process might be time consuming, but if current law, rules and regulations governing adverse actions are followed, a Federal employee may be separated for either performance issues or conduct. I will ensure that federal employees are treated fairly by adjudicating their cases based on the Constitution, Statutes, the Code of Federal Regulations, and the rules and procedures of the MSPB.

3. As noted in some of your questionnaires, the MSPB last published its research agenda in 2015, which expires in 2018. In order to develop the agenda, the previous MSPB took numerous steps to solicit input from stakeholders, including the heads of federal agencies, major federal employee unions, and professional associations with expertise in federal workforce issues. **What is your plan to develop an updated research agenda? What would you change from the outreach approach taken by the MSPB in 2015? Who would you consider to be important stakeholders in MSPB’s research agenda? How will you analyze the feedback from stakeholders in order to make decisions about research topics? How will you decide which topics to prioritize?**

The current research agenda was adopted by the previous Board in 2015 to last for a period of 3-5 years. I understand there are several research projects awaiting

review by a new quorum. It will be up to the new quorum to set a research agenda. I am not familiar with Board history on how research agendas previously have been adopted, including the most recent one in 2015. I anticipate that, if confirmed, we will reach out to stakeholders both inside the government, including Congress, employee representatives in both management and labor, and outside the government, including academia, and good government groups, to get suggestions for research which would lead to broadly beneficial studies. Not being currently familiar with this process, I do not know how stakeholder feedback is analyzed or how final decisions are ultimately made.

**Senator Heidi Heitkamp
Post-Hearing Questions for the Record
Submitted to Mr. Dennis Kirk**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District
of Columbia
Thursday July 19, 2018**

- What is an experience or situation from your life that shaped your outlook on the critical federal employee issues that MSPB considers and decides? Why did that situation impact you in the way that it did?

In (b) (6), my niece (b) (6) wed (b) (6) in the (b) (6).
(b) (6) My brother (b) (6) was stationed at the U.S. Embassy and we were treated graciously by the Embassy civil servants. A year later, (b) (6) had a son, (b) (6).

A soldier in the 5th Special Forces, (b) (6) was a hero many times over. After 9/11, in 2001, he was severely injured in the bombing of the Fort at (b) (6) Afghanistan, while he and his team tried to rescue (b) (6), a civil servant trapped inside. (b) (6) had several surgeries at Walter Reed Army Hospital, and the incredibly brilliant civilian and military doctors, nurses, and staff were amazing to him and our family while he was there. With their help, he recovered and returned to his service to our country.

In April 2004, (b) (6) had a daughter, (b) (6); and (b) (6) got a short leave home to see his new child before he returned for the last month of his tour of duty.

In (b) (6), (b) (6) was killed in (b) (6) Iraq, by enemy mortar fire. He is buried in (b) (6) Arlington National Cemetery. He was given full military honors at the services by Acting Secretary of the Army, Les Brownlee; arranged by the wonderfully kind and gentle ANC staff.

That placed a sharp focus on my life. I again answered the call of duty to my country, and went into the Department of the Army Office of General Counsel. Service in the Office of General Counsel during two regional wars was a life-shaping series of phenomenal events due to the amazing men and women in civilian federal and military service in all the branches and areas where I was privileged to work and interact. Our work included: the Department of Defense-wide Quadrennial Defense Review;

overseeing Army-wide deployment of *Lean Six Sigma*; and the modernization teams of civilian and military folks deployed to reshape Army legal services.

These Army and Department of Defense folks fought from the Pentagon to keep safe and protect our fellow Americans in their everyday lives as citizens. They volunteered countless off-the-clock hours as they strove to excel and be inspirational. I was able to achieve results with their support. With my Defense Department and Army teams of public servants, we modernized the current military and civilian forces by shaping creative, innovative, and lasting enterprise operations; literally saving the Defense Department and the Army millions of dollars of taxpayer money.

For that service, I received decorations, medals, and a hefty cash award. In honor of civil servants, such as (b) (6) I donated the cash to the Secretary of the Army's Gift Fund, designated for the use of the 5th Special Forces Command. That Commander deployed it into the Morale, Welfare & Recreation funds at Ft. Campbell, and it funded such things as a base-wide picnic for families of soldiers stationed at the fort.

That is why I am thrilled to be called again to work with our federal civil servants; this time, in the merit systems protection functions of the MSPB.

- What role should previous MSPB decisions or other relevant precedents play in how an MSPB board member decides cases or makes decisions?

Precedent plays an important role in judicial and administrative decision-making. If confirmed, I will carefully consider all relevant precedents, including whether a previous MSPB decision was correct, and arguments raised by the parties in deciding cases that come before the Board.

- If you are confirmed and you come across a case where there is clear precedent, but, when you look at the case closely, you begin to question if that previous decision was decided correctly.
 - How should a MSPB board member go about determining when a precedent needs to be changed?

An adjudicator's job is to apply the law to a given set of facts unique to the case in question. If confirmed, I will carefully consider all relevant precedents and arguments about those precedents raised by the parties in deciding cases that come before the Board, and question precedent when it is appropriate and necessary to do so.

- What role does the federal workforce play in the United States, and what do the American people need from the federal workforce?
 - How should MSPB board members use their authority and decide cases to ensure those goals come to pass?

The question of what role the Federal workforce plays in the U.S. and the needs of the American people are policy questions better addressed by policy makers in Congress. However, to assist the policy makers in their considerations, the Board owes it to them and the American people to provide fair, timely and impartial decisions on matters brought to it for adjudication.

- What changes need to be made to MSPB, its jurisdiction or its authority?

I'm not currently aware of any needed changes to Board jurisdiction or its authority.

- Many federal employee and federal employee groups feel that recent Executive Orders from this administration on issues such as making it easier to let go of poor performing federal employees or curbing the use of official time are direct assaults on federal employees and their long-held civil service rights.

- What is your opinion of these executive orders?

While I have not reviewed these executive orders in great detail, opinions on their content is a policy question not within the Board's jurisdiction.

- How do you feel that these executive orders will impact your potential work at MSPB?

See response above.

- What are your plans to use your role on MSPB to protect the rights of federal employees?

The Board protects Constitutional and Title 5 due process rights of Federal employees challenging agency actions by fairly, timely and impartially adjudicating its case load.

- Do you feel that the May 25 Executive Order, which addressed how agencies should deal with poor-performing federal employees, can work in concert with the statutory protections that federal employees are provided?

As discussed above, this is a policy question not within the Board's jurisdiction.

- What is MSPB's role in determining how to balance the directives to agency heads in that executive order with the statutory protections which are the foundation of the civil service code?

The question whether there are any conflicts between provisions of Title 5 and the May 25, 2018 executive order might arise in cases that come before the Board. As such, it would be inappropriate for me to form an opinion at this point.

Additional questions below

Administrative Law Judges (ALJs) have unique statutory protections from unlawful removals. 5 U.S.C. §7521 generally states that an ALJ can only be removed after good cause to do so was established and determined by the MSPB on the record after opportunity for a hearing. The recent Executive Order that moved ALJ hiring from the competitive service to the excepted service does not impact the 5 U.S.C. §7521 protections.

- In your opinion, is it important to have specific protections against the unlawful removal of ALJs in federal statute?
 - Why or Why not?

Yes. It is important to have specific protections against the unlawful removal of administrative law judges in Federal statute. The protections contained in 5 U.S.C. § 7521 and elsewhere ensure that adverse actions against administrative law judges are taken solely for performance or conduct reasons and not in retaliation for decisions rendered against an agency.

- If confirmed, what steps would you take to examine a case where an agency claimed good cause to fire an ALJ to ensure the agency claim was correct?

If confirmed, I will consider all relevant legal authorities and arguments raised by the parties in cases before the Board, including any cases involving dismissal of an administrative law judge.

- In your opinion, does 5 USC §7521 require that MSPB determine if the good cause threshold to remove an ALJ has been met, or does it just require that MSPB determine only if there is sufficient evidence to prove an agency's determination of "good cause"?
 - Please explain the reasoning behind your answer.

If confirmed, I will consider all relevant legal authorities and arguments raised by the parties in cases before the Board, including arguments concerning 5 U.S.C. § 7521, which states that actions may be taken against administrative law judges "only for good cause established and determined by the" MSPB.

- In recently published news articles (<https://www.reuters.com/article/us-otc-dojmemo/in-confidential-memo-to-agency-gcs-doj-signals-aggressive-stand-on-firing-aljs->

idUSKBN1KD2BB) about Department of Justice guidance to agencies on how to navigate ALJ issues in the wake of the recent *Lucia v. SEC* Supreme Court decision, DOJ argued that MSPB should be suitably deferential to the determinations of agency heads when it comes to the removal of ALJs.

- What role should MSPB play in safeguarding the president's power to supervise the executive branch?

The MSPB's role is to apply the law in cases that come before it. If confirmed, I will decide cases within MSPB's jurisdiction fairly and in accordance with applicable law.

- How would you define "suitably deferential" in terms of MSPB's responsibilities to safeguard and protect federal employees from unlawful removals?

To my knowledge, "suitably deferential" is not a standard currently contained in Title 5, Board case law, or other binding precedent. To the extent the concept could arise in the context of Board consideration of a matter before the Board, it would be inappropriate for me to form an opinion prematurely.

- What role can MSPB play in ensuring that ALJs are not removed for any invidious reasons or to influence a particular outcome?

5 U.S.C. § 7521 states that an adverse action against an administrative law judge may be taken "only for good cause established and determined by the Merit Systems Protection Board." The Board can ensure this provision is enforced by fair, impartial and timely adjudication of any such actions.

- As mentioned earlier, the recent Executive Order on ALJs recently moved ALJs into the excepted service. That means ALJs will be excepted service employees, giving agencies greater flexibility to hire ALJs as they see fit. However, the ALJs will continue to have significant merit system protections against removal or other significant employment punishment without good cause?

- What challenges to a member of the MSPB are presented when federal employees are both excepted employees and have significant merit system protections?

I am not currently aware of any such challenges. Most excepted service Federal employees have had appeal rights to the Board since passage of the civil service due process amendments, P.L. No. 101-376 (Aug. 17, 1990).

- In your opinion, what responsibility do MSPB members have to ensure that ALJs follow agency policies, procedures or instructions?

The MSPB's role is to apply all applicable laws in cases coming before the Board, including cases involving adverse actions against administrative law judges, as discussed in 5 U.S.C. § 7521. In examining whether there is good cause, the MSPB has at times examined whether an administrative law judge has followed lawful agency policies, procedures, or instructions.

I, Dennis Dean Kirk, hereby state that I have read the foregoing Post-Hearing Questions for the Record and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

D. D. Kirk

(Signature)

This 25th day of July, 2018

**Chairman Ron Johnson
Post-Hearing Questions for the Record
Submitted to Mr. Andrew F. Maunz**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District
of Columbia
Thursday July 19, 2018**

Do you think it is appropriate to withhold in MSPB opinions the identity of an employee who is found to have committed a prohibited personnel practice? If so, please explain the reasons you believe the identity should be withheld.

No. I understand that, while the Board may withhold the identity of an appellant or a respondent by granting anonymous "John Doe" status, such status is granted very rarely. A party seeking anonymity must overcome the presumption that parties' identities are public information. Anonymity is granted only in unusual circumstances, such as to prevent a clearly unwarranted invasion of a third party's privacy, to preserve the appellant's physical safety, or when the matters involved are of a highly sensitive or personal nature.

**Senator Claire McCaskill
Post-Hearing Questions for the Record
Submitted to Mr. Andrew F. Maunz**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District of
Columbia
Thursday July 19, 2018**

Whistleblower Protections

The MSPB is one of several entities -- including Inspectors General and the Office of Special Counsel (OSC) -- that play a role in protecting whistleblowers from retaliation, and ensuring that whistleblowers are made whole if they experience prohibited personnel practices

Congress has passed numerous laws to protect whistleblowers since the very founding of this country. Most recently, and most relevant to MSPB, are the Whistleblower Protection Enhancement Act (WPEA) and the recent enacted All Circuit Review Act. It is important to emphasize that Congress keeps passing laws and expanding protections because we believe whistleblowers are important and should be protected. Yet, sometimes the institutions charged with protecting whistleblowers do not heed this intent. We need to make sure that these institutions are operating on principles of transparency, accountability, and fairness.

Q. Under oath, will you commit that federal employees will continue to have access to all the avenues of appeal available to them if you are confirmed?

I can only commit to the avenues of appeal available to Federal employees at the MSPB, to the extent they exist under law, rule or regulation.

Q. What will you do to ensure that the MSPB fosters a reputation for being an institution that is fair to whistleblowers?

MSPB's job is to fairly, impartially and expeditiously adjudicate whistleblower claims consistent with both statutory provisions and controlling case law from Courts of competent jurisdiction. Without speaking for my possible future colleagues, I believe this will be a high priority for the Board once a quorum is restored.

Q. MSPB's significant case backlog, soon to reach 1,300 petitions for review, can lead to continuing injustice for whistleblowers. What will you do to address this backlog?

Addressing the backlog quickly, while still providing high-quality decisions, will be one of my top priorities if I serve on the MSPB. I believe that my fellow nominees and I will

be able to work well together to establish a plan to decide cases quickly and accurately to bring down this backlog as soon as possible.

- Q. Do you believe that the Administrative Judges hearing cases have sufficient training in whistleblower protection laws to ensure that rulings are not contrary to the law? What will you do to ensure that all employees within MSPB have a proper understanding of whistleblower protections?

I believe that all employees should receive the training they need to perform their jobs to the best of their abilities. I do not have specific knowledge of what types of training MSPB employees, including administrative judges, have access to during their careers. If confirmed, I will ensure that administrative judges and all other MSPB employees have access to all of the training they need on whistleblower protections and all other topics.

We have seen troubling instances where there has been burden shifting onto the whistleblowers, where the law is clear that the agency bears the responsibility to show by clear and convincing evidence that there was no prohibited personnel practice.

- Q. Do you have concerns with burden shifting, and, if so, what should be done to address this? What additional efforts should be made to ensure that there is not improper burden shifting?

Without context of the particular situations in which burden shifting might be an issue, I cannot answer this question.

- Q. Burden shifting is a key issue in cases where certain employees, like auditors and investigators, are reporting concerns in the course of their duties. OSC has argued that MSPB has wrongly determined that these employees had a higher evidentiary burden than the law required. What are your views of this argument? Does MSPB need to look more closely at this issue?

If confirmed, the issues and concerns raised by the Office of Special Counsel are matters that could come before me in existing or future cases that I will adjudicate. As such, it would be inappropriate for me to comment on this now.

**Senator Gary Peters
Post-Hearing Questions for the Record
Submitted to Mr. Andrew F. Maunz**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District
of Columbia
Thursday July 19, 2018**

1. During this morning's hearing, you stated that you have not had the opportunity to review the proposed Modern Employment Reform, Improvement, and Transformation Act (MERIT Act), H.R. 599, which would significantly reduce the time it takes to fire a federal worker accused of poor performance or misconduct. The bill reduces the time for an employee to appeal firing decisions, or for the U.S. Merit Systems Protection Board (MSPB) to intervene on their behalf, and extends new employee probationary periods to two years. It would also allow agencies to avoid negotiated grievance procedures, reduce benefits of workers who are convicted of a felony and fired, and rescind bonuses or other cash awards deemed to be wrongly paid. On Tuesday, July 17, 2018, the nation's largest federal union, the American Federation of Government Employees, AFL-CIO (AFGE) signaled its strong opposition to The MERIT Act, arguing that the legislation would make it easier to fire federal employees and would give agencies alternative mechanisms for the punishment of federal workers. **After reviewing the legislation, do you believe it will support or undermine the due process system that provides federal workers with a meaningful opportunity to defend themselves when treated unfairly? How would the legislation impact the ability of the MSPB to review the appeals of employees who feel they have been wrongly terminated in a timely manner? Would eliminating or shortening processes for federal workers to challenge firing decisions of agencies, and empowering agencies to take-back bonuses or garnish benefits, improve federal employment practices?**

MSPB staff has reviewed the language of H.R. 599, the Modern Employment Reform, Improvement, and Transformation (MERIT) Act, as passed by the House Oversight Committee on July 17, 2018, and advised me that they do not believe the legislation addresses any issues of jurisdiction, procedure, substantive case law or any other matter concerning Board operations. MSPB staff does not currently believe that this legislation would negatively impact the Board's ability to review the appeals of employees who are the subject of an agency adverse action over which the Board has jurisdiction to adjudicate. As I mentioned at the hearing, the Supreme Court has provided clear guidance on when due process

rights for public employees attach and what pre-termination steps must be taken to satisfy due process requirements. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-46 (1985). As long as any statutory process is consistent with these due process requirements, the length of the appeals process and any other associated issues is a question of policy better addressed by policy makers in Congress. And it should be noted that whether any new process is consistent with Constitutional due process is an issue likely to be raised before the Board in the first instance. As such, it would be inappropriate for me to form an opinion in advance.

2. The House of Representatives Committee on Oversight and Government Reform recently voted to approve a five year reauthorization for the MSPB after more than a decade since its last authorization expired in 2007. Included in the reauthorization legislation was language that would allow MSPB members to issue summary judgments, reduce the burden of proof for agencies to justify adverse personnel actions from “a preponderance of the evidence” to “substantial evidence,” and it would require federal workers to pay a filing fee to appeal adverse personnel actions. The bill reduces the time to seven days for employees to respond to a notice of proposed discipline; require the agency to make a final decision within 15 days afterward; and allow only seven days, rather than 30, for the employee to appeal to the MSPB. **In your opinion, do you believe it is too hard currently to fire federal employees? Do you believe reducing the burden of proof to justify adverse agency decisions is appropriate? Should you be confirmed, how would you ensure that federal employees are treated fairly?**

This is largely a policy question not relevant to the Board’s jurisdiction or its operations. I believe that if the MSPB issues clear, understandable decisions that are within the bounds of the law, current law gives sufficient tools to agencies to hold employees accountable. Issues such as burdens of proof are best left to policy makers in Congress to decide. If confirmed, I would ensure that federal workers are treated fairly by reviewing every case with an open mind and making my decision based on the facts and relevant legal authorities.

3. As noted in some of your questionnaires, the MSPB last published its research agenda in 2015, which expires in 2018. In order to develop the agenda, the previous MSPB took numerous steps to solicit input from stakeholders, including the heads of federal agencies, major federal employee unions, and professional associations with expertise in federal workforce issues. **What is your plan to develop an updated research agenda? What would you change from the outreach approach taken by the MSPB in 2015? Who would you consider to be important stakeholders in MSPB's research agenda? How will you analyze the feedback from stakeholders in order to make decisions about research topics? How will you decide which topics to prioritize?**

The current research agenda was adopted by the previous Board in 2015 to last for a period of 3-5 years. I understand there are several research projects awaiting review by a new quorum. It will be up to the new quorum to set a research agenda. I am not familiar with Board history on how research agendas previously have been adopted, including the most recent one in 2015. I anticipate that, if confirmed, we will reach out to stakeholders both inside the government, including Congress, employee representatives in both management and labor, and outside the government, including academia, and good government groups, to get suggestions for research which would lead to broadly beneficial studies. Not being currently familiar with this process, I do not know how stakeholder feedback is analyzed or how final decisions are ultimately made.

**Senator Heidi Heitkamp
Post-Hearing Questions for the Record
Submitted to Mr. Andrew F. Maunz**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District
of Columbia
Thursday July 19, 2018**

- What is an experience or situation from your life that shaped your outlook on the critical federal employee issues that MSPB considers and decides? Why did that situation impact you in the way that it did?

I have worked in the federal government as a career employee since 2008. While working in the government, I have seen what an important role the MSPB plays in ensuring that our government operates efficiently for the American people and that federal employees are treated fairly. My exposure to the inner workings of the federal government has given me great insight into what a positive force for “good government” the MSPB can be.

- What role should previous MSPB decisions or other relevant precedents play in how an MSPB board member decides cases or makes decisions?

Precedent plays an important role in judicial and administrative decision-making. If confirmed, I will carefully consider all relevant precedents, including whether a previous MSPB decision was correct, and arguments raised by the parties in deciding cases that come before the Board.

- If you are confirmed and you come across a case where there is clear precedent, but, when you look at the case closely, you begin to question if that previous decision was decided correctly.
 - How should a MSPB board member go about determining when a precedent needs to be changed?

An adjudicator’s job is to apply the law to a given set of facts unique to the case in question. If confirmed, I will carefully consider all relevant precedents and arguments about those precedents raised by the parties in deciding cases that come before the Board and question precedent when it is appropriate and necessary to do so.

- What role does the federal workforce play in the United States, and what do the American people need from the federal workforce?
 - How should MSPB board members use their authority and decide cases to ensure those goals come to pass?

The question of what role the Federal workforce plays in the U.S. and the needs of the American people are policy questions better addressed by policy makers in Congress. However, to assist the policy makers in their considerations, the Board owes it to them and the American people to provide fair, timely and impartial decisions on matters brought to it for adjudication.

- What changes need to be made to MSPB, its jurisdiction or its authority?

I'm not currently aware of any needed changes to Board jurisdiction or authority.

- Many federal employee and federal employee groups feel that recent Executive Orders from this administration on issues such as making it easier to let go of poor performing federal employees or curbing the use of official time are direct assaults on federal employees and their long-held civil service rights.

- What is your opinion of these executive orders?

Opinions on the content of the Executive Orders is a policy question not within the Board's jurisdiction.

- How do you feel that these executive orders will impact your potential work at MSPB?

The Executive Orders do not make any direct requirements on the MSPB's adjudication process, but issues discussed in the Executive Orders may be raised by litigants before the MSPB.

- What are your plans to use your role on MSPB to protect the rights of federal employees?

The Board protects the rights of federal employees by fairly, timely and impartially adjudicating its case load.

- Do you feel that the May 25 Executive Order, which addressed how agencies should deal with poor-performing federal employees, can work in concert with the statutory protections that federal employees are provided?

As discussed above, this is a policy question not within the Board's jurisdiction.

- What is MSPB's role in determining how to balance the directives to agency heads in that executive order with the statutory protections which are the foundation of the civil service code?

The question whether there are any conflicts between provisions of Title 5 and the May 25, 2018 executive order might arise in cases that come before the Board. As such, it would be inappropriate for me to form an opinion at this point.

Additional questions below

Administrative Law Judges (ALJs) have unique statutory protections from unlawful removals. 5 U.S.C. §7521 generally states that an ALJ can only be removed after good cause to do so was established and determined by the MSPB on the record after opportunity for a hearing. The recent Executive Order that moved ALJ hiring from the competitive service to the excepted service does not impact the 5 U.S.C. §7521 protections.

- In your opinion, is it important to have specific protections against the unlawful removal of ALJs in federal statute?
 - Why or Why not?

Yes. It is important to have specific protections against the unlawful removal of administrative law judges in Federal statute. The protections contained in 5 U.S.C. § 7521 ensure that adverse actions against administrative law judges are taken solely for performance or conduct reasons and not an effort to interfere with an administrative law judge's qualified decisional independence.

- If confirmed, what steps would you take to examine a case where an agency claimed good cause to fire an ALJ to ensure the agency claim was correct?

If confirmed, I will consider all relevant legal authorities and arguments raised by the parties in cases before the Board, including any cases involving dismissal of an administrative law judge.

- In your opinion, does 5 USC §7521 require that MSPB determine if the good cause threshold to remove an ALJ has been met, or does it just require that MSPB determine only if there is sufficient evidence to prove an agency's determination of "good cause"?
 - Please explain the reasoning behind your answer.

If confirmed, I will consider all relevant legal authorities and arguments raised by the parties in cases before the Board, including arguments concerning 5 U.S.C. § 7521, which states that actions may be taken against administrative law judges "only for good cause established and determined by the" MSPB.

- In recently published news articles (<https://www.reuters.com/article/us-otc-dojmemo/in-confidential-memo-to-agency-gcs-doj-signals-aggressive-stand-on-firing-aljs->

idUSKBN1KD2BB) about Department of Justice guidance to agencies on how to navigate ALJ issues in the wake of the recent *Lucia v. SEC* Supreme Court decision, DOJ argued that MSPB should be suitably deferential to the determinations of agency heads when it comes to the removal of ALJs.

- What role should MSPB play in safeguarding the president's power to supervise the executive branch?

The MSPB's role is to apply the law in cases that come before it. If confirmed, I will decide cases within MSPB's jurisdiction fairly and in accordance with applicable law.

- How would you define "suitably deferential" in terms of MSPB's responsibilities to safeguard and protect federal employees from unlawful removals?

To my knowledge, "suitably deferential" is not a standard currently contained in Title 5, Board case law, or other binding precedent. To the extent the concept could arise in the context of Board consideration of a matter before the Board, it would be inappropriate for me to form an opinion prematurely.

- What role can MSPB play in ensuring that ALJs are not removed for any invidious reasons or to influence a particular outcome?

5 U.S.C. § 7521 states that an adverse action against an administrative law judge may be taken "only for good cause established and determined by the Merit Systems Protection Board." The Board can ensure this provision is enforced by fair, impartial and timely adjudication of any such actions.

- As mentioned earlier, the recent Executive Order on ALJs recently moved ALJs into the excepted service. That means ALJs will be excepted service employees, giving agencies greater flexibility to hire ALJs as they see fit. However, the ALJs will continue to have significant merit system protections against removal or other significant employment punishment without good cause?

- What challenges to a member of the MSPB are presented when federal employees are both excepted employees and have significant merit system protections?

I am not currently aware of any such challenges. Most excepted service Federal employees have had appeal rights to the Board since passage of the Civil Service Due Process Amendments, P.L. No. 101-376 (Aug. 17, 1990).

- In your opinion, what responsibility do MSPB members have to ensure that ALJs follow agency policies, procedures or instructions?

The MSPB's role is to apply all applicable laws in cases coming before the Board, including cases involving adverse actions against administrative law judges, as discussed in 5 U.S.C. § 7521. In examining whether there is good cause, the MSPB has at times examined whether an administrative law judge has followed lawful agency policies, procedures, or instructions.

**Senator Kamala Harris
Post-Hearing Questions for the Record
Submitted to Andrew F. Maunz**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and Carmen G.
McLean to be an Associate Judge of the Superior Court of the District of Columbia**

Thursday July 19, 2018

Ability to Appear Fair and Uninterested

While in law school you contributed to a sports blog – “Where have you gone Marge Schott?” – named after the former Cincinnati Reds owner who made racist, homophobic, and anti-Semitic remarks. The blog includes writing that is demeaning to people with disabilities, LGBTQ people, people of color, and women; some of the posts are by you and some of them are by other contributors.

For instance, you wrote: “Yet when I turn on my T.V. all I hear about is how great this team is, or how terrible this other one is. I mean for christ sakes John Clayton is slobbering on more knobs than Paris Hilton at a Greek shipping heir convention.” (Citation: <http://wherehaveyougonemargeschott.blogspot.com/>)

In response to a committee staff question about that comment, you stated that you could not have misogynistic attitudes or gender bias because you have female family members that you love and respect. This further raises concerns, as it suggests a lack of understanding as to why it raises concerns. Nor did you actually address the substance of your comments.

The MSPB is tasked with protecting federal employees from Prohibited Personnel Practices, including hearing appeals in which an employee alleges discrimination on the basis of race, religion, national origin, orientation, sexual orientation, or disability. These comments, along with others written on a blog named after Marge Schott, raise concerns that you may not be able to serve as a fair adjudicator of discrimination claims.

1. How can women, people of color, LGBTQ people, or people with disabilities be confident that you would be an impartial adjudicator of their cases considering your comments and the content of that blog?

I am an open-minded person who believes in treating every person I encounter with dignity and respect. I choose to live in a diverse neighborhood in the city of Baltimore. My community contains people of different races, ethnicities, religions, and sexual orientations. For example, my neighbors are two gay African American men with whom my family has exchanged gifts on several occasions. On a daily basis, both in my personal and professional lives, I encounter people of various backgrounds. I treat everyone as I would like to be treated myself, and I teach my children to do the same. The FBI and this Committee have thoroughly investigated my background. No incidents of bigotry or bias were found because none exist.

I believe in viewing people as individuals and not prejudging them. I will bring this approach to deciding cases at the MSPB. I will approach every case with an open mind, and my decision will be driven by the facts of the case and the law. Every person will be able to receive justice from the MSPB, if I am a member.

Regarding the blog, when I voluntarily disclosed its existence to the Committee, I pointed to the three posts for which I was responsible. The Committee staff read from several posts I did not write. The only language they read that was from something I wrote is the above quoted language about Paris Hilton. I had no editorial control over what anyone else wrote on the site.

2. Do you believe that having female family members means that one cannot show gender bias?

No.

3. If not, then please explain your response to that blog post?

In the interview with staffers, I did address the substance of my comments. I said the language was crude and inappropriate, I disavowed it and said I would not use that language today, and said that if I had the opportunity, I would apologize to Paris Hilton. I mentioned the many women I love and respect in my life to give insight into who I am. I have been surrounded by strong, independent women my entire life. My wife is a lawyer, my sister is a doctor, my mother is an incredibly independent person, and I am raising my daughters to be the same. I celebrate all of their accomplishments.

I, Andrew F. Maunz, hereby state that I have read the foregoing Post-Hearing Questions for the Record and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Andrew F. Maunz
(Signature)

This 26th day of July, 2018

**Chairman Ron Johnson
Post-Hearing Questions for the Record
Submitted to The Honorable Julia A. Clark**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District
of Columbia
Thursday July 19, 2018**

Do you think it is appropriate to withhold in MSPB opinions the identity of an employee who is found to have committed a prohibited personnel practice? If so, please explain the reasons you believe the identity should be withheld.

No. I understand that, while the Board may withhold the identity of an appellant or a respondent by granting anonymous "John Doe" status, such status is granted very rarely. A party seeking anonymity must overcome the presumption that parties' identities are public information. Anonymity is granted only in unusual circumstances, such as to prevent a clearly unwarranted invasion of a third party's privacy, to preserve the appellant's physical safety, or when the matters involved are of a highly sensitive or personal nature.

**Senator Claire McCaskill
Post-Hearing Questions for the Record
Submitted to The Honorable Julia A. Clark**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District of
Columbia
Thursday July 19, 2018**

Whistleblower Protections

The MSPB is one of several entities -- including Inspectors General and the Office of Special Counsel (OSC) -- that play a role in protecting whistleblowers from retaliation, and ensuring that whistleblowers are made whole if they experience prohibited personnel practices

Congress has passed numerous laws to protect whistleblowers since the very founding of this country. Most recently, and most relevant to MSPB, are the Whistleblower Protection Enhancement Act (WPEA) and the recent enacted All Circuit Review Act. It is important to emphasize that Congress keeps passing laws and expanding protections because we believe whistleblowers are important and should be protected. Yet, sometimes the institutions charged with protecting whistleblowers do not heed this intent. We need to make sure that these institutions are operating on principles of transparency, accountability, and fairness.

Q. Under oath, will you commit that federal employees will continue to have access to all the avenues of appeal available to them if you are confirmed?

I can only commit to the avenues of appeal available to Federal employees at the MSPB, to the extent they exist under law, rule or regulation.

Q. What will you do to ensure that the MSPB fosters a reputation for being an institution that is fair to whistleblowers?

MSPB's job is to fairly, impartially and expeditiously adjudicate whistleblower claims consistent with both statutory provisions and controlling case law from Courts of competent jurisdiction. Without speaking for my possible future colleagues, I believe this will be a high priority for the Board once a quorum is restored.

Q. MSPB's significant case backlog, soon to reach 1,300 petitions for review, can lead to continuing injustice for whistleblowers. What will you do to address this backlog?

As I testified at the July 19, 2018 confirmation hearing, addressing the backlog will be my most important priority. During the nomination and confirmation process, I have

come to know and learn to respect the two individuals whom I hope will become my colleagues. I believe we will be able to work collegially to set priorities and begin to issue cases.

- Q. Do you believe that the Administrative Judges hearing cases have sufficient training in whistleblower protection laws to ensure that rulings are not contrary to the law? What will you do to ensure that all employees within MSPB have a proper understanding of whistleblower protections?

I believe in the importance of career development training and note that most attorneys have annual continuing legal education requirements. I do not have specific knowledge of what types of training MSPB employees, including administrative judges, have access to during their careers. But, if confirmed, I will work to ensure that administrative judges and all other MSPB employees have access to all of the training they need on whistleblower protections and all other topics.

We have seen troubling instances where there has been burden shifting onto the whistleblowers, where the law is clear that the agency bears the responsibility to show by clear and convincing evidence that there was no prohibited personnel practice.

- Q. Do you have concerns with burden shifting, and, if so, what should be done to address this? What additional efforts should be made to ensure that there is not improper burden shifting?

Without context of the particular situations in which burden shifting might be an issue, I cannot answer this question.

- Q. Burden shifting is a key issue in cases where certain employees, like auditors and investigators, are reporting concerns in the course of their duties. OSC has argued that MSPB has wrongly determined that these employees had a higher evidentiary burden than the law required. What are your views of this argument? Does MSPB need to look more closely at this issue?

If confirmed, the issues and concerns raised by the Office of Special Counsel are matters that could come before me in existing or future cases that I will adjudicate. As such, it would be inappropriate for me to comment on this now.

**Senator Gary Peters
Post-Hearing Questions for the Record
Submitted to The Honorable Julia A. Clark**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District
of Columbia
Thursday July 19, 2018**

1. During this morning's hearing, you stated that you have not had the opportunity to review the proposed Modern Employment Reform, Improvement, and Transformation Act (MERIT Act), H.R. 599, which would significantly reduce the time it takes to fire a federal worker accused of poor performance or misconduct. The bill reduces the time for an employee to appeal firing decisions, or for the U.S. Merit Systems Protection Board (MSPB) to intervene on their behalf, and extends new employee probationary periods to two years. It would also allow agencies to avoid negotiated grievance procedures, reduce benefits of workers who are convicted of a felony and fired, and rescind bonuses or other cash awards deemed to be wrongly paid. On Tuesday, July 17, 2018, the nation's largest federal union, the American Federation of Government Employees, AFL-CIO (AFGE) signaled its strong opposition to The MERIT Act, arguing that the legislation would make it easier to fire federal employees and would give agencies alternative mechanisms for the punishment of federal workers. **After reviewing the legislation, do you believe it will support or undermine the due process system that provides federal workers with a meaningful opportunity to defend themselves when treated unfairly? How would the legislation impact the ability of the MSPB to review the appeals of employees who feel they have been wrongly terminated in a timely manner? Would eliminating or shortening processes for federal workers to challenge firing decisions of agencies, and empowering agencies to take-back bonuses or garnish benefits, improve federal employment practices?**

I am informed that MSPB staff has reviewed the language of H.R. 599, the Modern Employment Reform, Improvement, and Transformation (MERIT) Act, as passed by the House Oversight Committee on July 17, 2018, and advised me that they do not believe the legislation addresses any issues of jurisdiction, procedure, substantive case law or any other matter concerning Board operations. MSPB staff does not currently believe that this legislation would negatively impact the Board's operational ability to review the appeals of employees who are the subject of an agency adverse action over which the Board has jurisdiction to adjudicate. As long as any statutory process is consistent with Constitutional due

process, the length of the appeals process and any other associated issues is a question of policy better addressed by policy makers in Congress. And it should be noted that whether any new process is consistent with Constitutional due process is an issue likely to be raised before the Board in the first instance. As such, it would be inappropriate for me to form an opinion on the Constitutional question in advance.

As I stated in my responses to the Committee's initial policy questions, I commit to respond to Congressional inquiries, if confirmed. However, I presently do not have access to information or data on which this proposed legislation is based and believe it would be inappropriate and ill-advised to offer an opinion at this time. I simply wish to reiterate my response to this question as it was posed during the hearing. Based on my decades of experience as both an employee representative and federal manager, current law and policy has, in my professional opinion, allowed me to fully represent not only the employees' interest but also the federal agency's and the public's interest in a merit-based civil service system.

2. The House of Representatives Committee on Oversight and Government Reform recently voted to approve a five year reauthorization for the MSPB after more than a decade since its last authorization expired in 2007. Included in the reauthorization legislation was language that would allow MSPB members to issue summary judgments, reduce the burden of proof for agencies to justify adverse personnel actions from "a preponderance of the evidence" to "substantial evidence," and it would require federal workers to pay a filing fee to appeal adverse personnel actions. The bill reduces the time to seven days for employees to respond to a notice of proposed discipline; require the agency to make a final decision within 15 days afterward; and allow only seven days, rather than 30, for the employee to appeal to the MSPB. **In your opinion, do you believe it is too hard currently to fire federal employees? Do you believe reducing the burden of proof to justify adverse agency decisions is appropriate? Should you be confirmed, how would you ensure that federal employees are treated fairly?**

This is a policy question not relevant to the Board's jurisdiction or its operations. But in my personal opinion, no, it is not too hard currently to fire Federal employees. The process requires an appropriate investment of time and resources but if current law, rules and regulations governing adverse actions are followed, a Federal employee can be lawfully and efficiently separated for either performance issues or conduct, consistent with federal agencies' and the public's interest in ensuring that removal actions are taken consistent with merit system principles. As stated in response to the previous question, in my professional opinion, current law and policy allows federal employees and federal agencies to fully and appropriately represent both their interests and the public's interest in a

merit-based civil service system. Should I be confirmed, I will ensure that federal employees are treated fairly by adjudicating cases that come before the Board in a fair, impartial and expeditious manner consistent with the law as written and binding precedent.

3. As noted in some of your questionnaires, the MSPB last published its research agenda in 2015, which expires in 2018. In order to develop the agenda, the previous MSPB took numerous steps to solicit input from stakeholders, including the heads of federal agencies, major federal employee unions, and professional associations with expertise in federal workforce issues. **What is your plan to develop an updated research agenda? What would you change from the outreach approach taken by the MSPB in 2015? Who would you consider to be important stakeholders in MSPB's research agenda? How will you analyze the feedback from stakeholders in order to make decisions about research topics? How will you decide which topics to prioritize?**

The current research agenda was adopted by the previous Board in 2015 to last for a period of 3-5 years. I understand there are several research projects awaiting review by a new quorum. It will be up to the new quorum to set a research agenda. I am not familiar with Board history on how research agendas previously have been adopted, including the most recent one in 2015. I anticipate that, if confirmed, we will reach out to stakeholders both inside the government, including Congress, employee representatives in both management and labor, and outside the government, including academia, and good government groups, to get suggestions for research which would lead to broadly beneficial studies. Not being currently familiar with this process, I do not know how stakeholder feedback is analyzed or how final decisions are ultimately made.

**Senator Heidi Heitkamp
Post-Hearing Questions for the Record
Submitted to The Honorable Julia A. Clark**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District
of Columbia
Thursday July 19, 2018**

- What is an experience or situation from your life that shaped your outlook on the critical federal employee issues that MSPB considers and decides? Why did that situation impact you in the way that it did?

As a labor organization attorney, I assisted a local affiliate in representing bargaining-unit employees during a reduction in force at a naval shipyard. This experience shaped my outlook on federal employee merit system issues because I was able to witness the application of merit system principles to a large-scale personnel action. Neither the labor organization nor the shipyard command had the power or authority to alter the reduction-in-force decision. Nevertheless, labor and management worked collaboratively to apply the federal merit system law, rules and regulations to ensure that once the reduction in force was completed, employee retention was fully compliant with merit system principles. This process required diligent efforts by both labor and management representatives and employees to ensure that the retention register, on which the reduction in force-based personnel actions were taken, accurately reflected each employee's retention status. While there were a few disputes that could not be resolved in a bi-lateral manner, nearly all issues were resolved through open dialogue based upon merit system principles. This experience allowed me to witness firsthand the public benefit of ensuring that federal personnel actions are based strictly on merit system law, rule and regulation.

- What role should previous MSPB decisions or other relevant precedents play in how an MSPB board member decides cases or makes decisions?

Precedent plays an important role in judicial and administrative decision-making. If confirmed, I will carefully consider all relevant precedents, including whether a previous MSPB decision was correct, and arguments raised by the parties in deciding cases that come before the Board.

- If you are confirmed and you come across a case where there is clear precedent, but, when you look at the case closely, you begin to question if that previous decision was decided correctly.

- How should a MSPB board member go about determining when a precedent needs to be changed?

An adjudicator's job is to apply the law to a given set of facts unique to the case in question. If confirmed, I will carefully consider all relevant precedents and arguments about those precedents raised by the parties in deciding cases that come before the Board and question precedent when it is appropriate and necessary to do so.

- What role does the federal workforce play in the United States, and what do the American people need from the federal workforce?
 - How should MSPB board members use their authority and decide cases to ensure those goals come to pass?

The question of what role the Federal workforce plays in the U.S. and the needs of the American people are policy questions better addressed by policy makers in Congress. However, to assist the policy makers in their considerations, the Board owes it to them and the American people to provide fair, timely and impartial decisions on matters brought to it for adjudication.

- What changes need to be made to MSPB, its jurisdiction or its authority?

I'm not currently aware of any needed changes to Board jurisdiction or authority.

- Many federal employee and federal employee groups feel that recent Executive Orders from this administration on issues such as making it easier to let go of poor performing federal employees or curbing the use of official time are direct assaults on federal employees and their long-held civil service rights.

- What is your opinion of these executive orders?

While I have not reviewed these executive orders in great detail, opinions on their content is a policy question not within the Board's jurisdiction.

- How do you feel that these executive orders will impact your potential work at MSPB?

See response above.

- What are your plans to use your role on MSPB to protect the rights of federal employees?

The Board protects Constitutional and Title 5 due process rights of Federal employees challenging agency actions by fairly, timely and impartially adjudicating its case load.

- Do you feel that the May 25 Executive Order, which addressed how agencies should deal with poor-performing federal employees, can work in concert with the statutory protections that federal employees are provided?

As discussed above, this is a policy question not within the Board's jurisdiction.

- What is MSPB's role in determining how to balance the directives to agency heads in that executive order with the statutory protections which are the foundation of the civil service code?

The question whether there are any conflicts between provisions of Title 5 and the May 25, 2018 executive order might arise in cases that come before the Board.

As such, it would be inappropriate for me to form an opinion at this point.

Additional questions below

Administrative Law Judges (ALJs) have unique statutory protections from unlawful removals. 5 U.S.C. §7521 generally states that an ALJ can only be removed after good cause to do so was established and determined by the MSPB on the record after opportunity for a hearing. The recent Executive Order that moved ALJ hiring from the competitive service to the excepted service does not impact the 5 U.S.C. §7521 protections.

- In your opinion, is it important to have specific protections against the unlawful removal of ALJs in federal statute?
 - Why or Why not?

Yes. It is important to have specific protections against the unlawful removal of administrative law judges in Federal statute. The protections contained in 5 U.S.C. § 7521 and elsewhere ensure that adverse actions against administrative law judges are taken solely for performance or conduct reasons and not in retaliation for decisions rendered against an agency.

- If confirmed, what steps would you take to examine a case where an agency claimed good cause to fire an ALJ to ensure the agency claim was correct?

If confirmed, I will consider all relevant legal authorities and arguments raised by the parties in cases before the Board, including any cases involving dismissal of an administrative law judge.

- In your opinion, does 5 USC §7521 require that MSPB determine if the good cause threshold to remove an ALJ has been met, or does it just require that MSPB determine only if there is sufficient evidence to prove an agency's determination of "good cause"?
 - Please explain the reasoning behind your answer.

If confirmed, I will consider all relevant legal authorities and arguments raised by the parties in cases before the Board, including arguments concerning 5 U.S.C. § 7521, which states that actions may be taken against administrative law judges "only for good cause established and determined by the" MSPB.

- In recently published news articles (<https://www.reuters.com/article/us-otc-dojmemo/in-confidential-memo-to-agency-gcs-doj-signals-aggressive-stand-on-firing-aljs-idUSKBN1KD2BB>) about Department of Justice guidance to agencies on how to navigate ALJ issues in the wake of the recent Lucia v. SEC Supreme Court decision, DOJ argued that MSPB should be suitably deferential to the determinations of agency heads when it comes to the removal of ALJs.

- What role should MSPB play in safeguarding the president's power to supervise the executive branch?

The MSPB's role is to apply the law in cases that come before it. If confirmed, I will decide cases within MSPB's jurisdiction fairly and in accordance with applicable law.

- How would you define "suitably deferential" in terms of MSPB's responsibilities to safeguard and protect federal employees from unlawful removals?

To my knowledge, "suitably deferential" is not a standard currently contained in Title 5, Board case law, or other binding precedent. To the extent the concept could arise in the context of Board consideration of a matter before the Board, it would be inappropriate for me to form an opinion prematurely.

- What role can MSPB play in ensuring that ALJs are not removed for any invidious reasons or to influence a particular outcome?

5 U.S.C. § 7521 states that an adverse action against an administrative law judge may be taken "only for good cause established and determined by the Merit Systems Protection Board." The Board can ensure this provision is enforced by fair, impartial and timely adjudication of any such actions.

- As mentioned earlier, the recent Executive Order on ALJs recently moved ALJs into the excepted service. That means ALJs will be excepted service employees, giving agencies greater flexibility to hire ALJs as they see fit. However, the ALJs will continue to have

significant merit system protections against removal or other significant employment punishment without good cause?

- What challenges to a member of the MSPB are presented when federal employees are both excepted employees and have significant merit system protections?

I am not currently aware of any such challenges. Most excepted service Federal employees have had appeal rights to the Board since passage of the civil service due process amendments, P.L. No. 101-376 (Aug. 17, 1990).

- In your opinion, what responsibility do MSPB members have to ensure that ALJs follow agency policies, procedures or instructions?

The MSPB's role is to apply all applicable laws in cases coming before the Board, including cases involving adverse actions against administrative law judges, as discussed in 5 U.S.C. § 7521. In examining whether there is good cause, the MSPB has at times examined whether an administrative law judge has followed lawful agency policies, procedures, or instructions.

**Senator James Lankford
Post-Hearing Questions for the Record
Submitted to the Honorable Julia A. Clark**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and
Carmen G. McLean to be an Associate Judge of the Superior Court of the District
of Columbia
Thursday July 19, 2018**

1. While you were General Counsel of the Federal Labor Relations Authority (FLRA) what was your approved protocol when, after investigation of an unfair labor practice charge, the FLRA would find no merit to the charge? Would the charge be dismissed or would the charging party be offered an opportunity to withdraw the charge?

The protocol I followed for handling unfair labor practice charges, which, after investigation, were determined by the FLRA Regional Director to lack merit can be found in the FLRA's Unfair Labor Practice Case Handling Manual. That Manual implemented FLRA regulations with respect to withdrawal of unfair labor practice charges (*see* 5 CFR § 2423.11(a)). The Manual is publicly available through the FLRA website at:

https://www.flra.gov/system/files/webfm/OGC/Manuals/ULP_Case_Handling_Manual/ULP%20Case%20Handling%20Manual%20july%202016.pdf. As the FLRA website states, this is the Manual that FLRA agents follow when processing unfair labor practice cases. It describes the procedures for handling and investigating unfair labor practice charges, including those, which, after investigation, are found to lack merit. The Unfair Labor Practice Case Handling Manual does allow agents, under appropriate circumstances, to offer the charging party an opportunity to withdraw an unfair labor practice charge that lacks merit. The withdrawal-of-charge protocol has been in effect since the FLRA commenced operations in 1978.

- a. If the protocol allowed for the opportunity for the charging party to withdraw the charge then how would these discussions take place? By letter, by telephone, by e-mail or other electronic forms of communication?

The Unfair Labor Practice Case Handling Manual provides that this communication can include oral discussions (in-person or by telephone) but must always include a written confirmation, which could be transmitted electronically as well as by U.S. mail.

- b. Would the charge party be a party to those discussions or would the conversation solely be conducted between the charging party and the FLRA?

An agent's communication with the charging and charged parties—including those related to withdrawal of charges—would typically be conducted separately. This is because the agent is performing delegated investigatory responsibilities pursuant to 5 U.S.C. § 7104(f)(2)(A) to determine whether to prosecute an unfair labor practice pursuant to 5 U.S.C. § 7104(f)(2)(B). As such, the agent must treat as confidential certain investigatory and deliberative information, unless and until an enforcement decision is made.

- c. If the charging party is offered a “side deal” to withdraw the charge to avoid receiving a negative decision, what affect do you think that has on the appearance of impartiality of the FLRA?

Under the protocol set forth in the above-cited Unfair Labor Practice Case Handling Manual, charging parties were not offered a “side deal” but were informed that their charge would be dismissed absent withdrawal and given a reasonable opportunity to withdraw. This long-standing protocol is available to the public. Consequently, the logical inference to be drawn from a post-investigation withdrawal is that the FLRA Regional Director determined that the charge lacked merit. I retained this long-standing protocol, because, in my professional opinion and experience, it served to expeditiously resolve unfair labor practice charges and to support effective and efficient labor-management relations in the federal service.

2. As a Member of the Merit Systems Protection Board, would you find such ex parte conversation(s) with one side or the other to be appropriate?

The roles of the General Counsel at FLRA and a Member of the MSPB are completely different. The Office of General Counsel at FLRA has investigation and prosecution responsibilities. The MSPB adjudicates matters before it. As impartial adjudicators, ex parte communications with parties to the specific matter before the Board are allowed only in limited circumstances. Title 5 does provide that any single member of the Board may seek advisory opinions from OPM. *See* 5 U.S.C. 1204(e). And the Board has in the past solicited amicus briefs from non-parties on issues of wider significance.

In addition, at both the administrative judge and Board levels, MSPB prohibits oral and written ex parte communications on the merits of matters before it between decision-making officials of the Board and an interested party to a proceeding. *See* 5 C.F.R. 1201.102. Ex parte communications must be made a matter of record, the other party must be provided a chance to respond, and sanctions appropriate to the situation

may also be imposed. The parties may waive the rule against ex parte communications to allow an administrative judge to discuss settlement outside the presence of the other party.

If confirmed to be a MSPB Member, I would adhere strictly to these prohibitions and restrictions on ex parte communications.

I, Julia Atkins Clark, hereby state that I have read the foregoing PostHearing Questions for the Record and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

JA Clark
(Signature)

This 26 day of July, 2018

**Ranking Member Gary C. Peters
Post-Hearing Questions for the Record
Submitted to B. Chad Bungard**

**Nominations of Chad F. Wolf to be Under Secretary of Strategy, Policy, and Plans, U.S. Department of Homeland Security; Jeffrey C. Byard to be Administrator of the Federal Emergency Management Agency, U.S. Department of Homeland Security; Troy D. Edgar, to be Chief Financial Officer, U.S. Department of Homeland Security; John M. Barger, to be a Governor, United States Postal Service; and B. Chad Bungard to be a Member, Merit Systems Protection Board
Wednesday, June 12, 2019**

1. Whistleblowers are critical to uncovering waste, fraud, and abuse in government. Unfortunately, all too often when a whistleblower comes forward, they may face career-ending retaliation. During our meeting, I appreciated that you committed to evaluating each whistleblower retaliation case on its merits. In your view, what should government be doing to ensure whistleblowers are able to come forward without fear of reprisal, and what is the role of the MSPB among those efforts?

The MSPB is the guardian of the merit system principles. It is a merit system principle to protect employees from reprisal for the lawful disclosure of information that the employee reasonably believes evidences a violation of law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. It is also a prohibited personnel practice to retaliate against an employee for exercising these rights. If confirmed, it will be my responsibility to protect the merit system principles and promote a workplace free of prohibited personnel practices through my statutory responsibilities.

It is my understanding that according to the 2018 Federal Employee Viewpoint Survey only 66 percent of Federal employees believe they “can disclose a suspected violation of any law, rule or regulation without fear of reprisal.” This is a disturbing statistic.

The MSPB conducts studies of the Executive Branch workforce to ensure that Federal personnel management is implemented consistent with the merit system principles and free from prohibited personnel practices. 5 U.S.C. § 1204(a)(3) states that the MSPB shall: “(3) 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.”

If confirmed, I will work with the MSPB Chairman and the other Board member to ensure that the MSPB conducts studies and research to help improve how the Federal government can do better to ensure a safe place for whistleblowers so that employees are able to come forward without fear of reprisal and to look for ways to incentivize and encourage Federal employees to report fraud, waste, or abuse and ways to improve service for the American people.

2. Administrative Judges (AJs) hear cases before they ever reach the full Board, but many AJs do not have a background or training in whistleblower issues, which may impact rulings in cases involving whistleblowers.

- a. If confirmed, what steps will you take to ensure that AJs receive appropriate information and training on whistleblower issues?

If confirmed, I will work with the MSPB Chairman and the other Board member to ensure that the Board takes all appropriate steps to ensure that MSPB Administrative Judges receive appropriate information and training on whistleblower issues.

- b. If confirmed, would you be willing to engage with governmental and non-governmental experts on whistleblower issues regarding this issue?

If confirmed, I will work with the MSPB Chairman and the other Board member to ensure that the Board takes all appropriate steps to ensure that MSPB Administrative Judges receive appropriate information and training on whistleblower issues. I believe that receiving input from governmental and non-governmental experts on the issue can be quite valuable. For example, when I served as the Whistleblower Protection Ombudsman (WPO) for the Social Security Administration, to ensure that SSA's WPO website met the concerns of the whistleblower community, I met with a whistleblower expert (i.e., I met with the Government Accountability Project (GAP) Legal Director Tom Devine) and added additional language to the SSA WPO website based on GAP's suggestions.

3. Given your experience, do you believe the public interest in a civil service free of prohibited personnel practices is being adequately protected? If not, please explain what more needs to be done.

I believe that the Federal Employee Viewpoint Survey (FEVS) serves as a good indicator of the top challenges facing the Federal workforce today. I believe the 2018 FEVS has revealed that more work needs to be done to address these top Federal workforce challenges.

It is my understanding that according to the 2018 FEVS, only 66 percent of Federal employees believe that they "can disclose a suspected violation of any law, rule or regulation without fear of reprisal." It is a merit system principle to protect employees from reprisal for the lawful disclosure of information that the employee reasonably believes evidences a violation of law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. It is also a prohibited personnel practice to retaliate against an employee for exercising these rights.

It is also my understanding that the 2018 FEVS revealed that only 56 percent of Federal employees agree that "[a]rbitrary action, personal favoritism and coercion for partisan political purposes are not tolerated." It is a merit system principle that Federal

employees should be protected from arbitrary action, political coercion and favoritism; these are all potential prohibited personnel practices.

It is also my understanding, according to the 2018 FEVS, that approximately 32 percent of Federal employees believe managers deal effectively with poor performers. It is a merit system principle to retain Federal employees “on the basis of adequacy of performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.”

It is also my understanding according to the 2018 FEVS that only approximately 25 percent of Federal employees think pay raises are based on performance. It is a merit system principle that “appropriate incentives and recognition should be provided for excellence in performance.”

Among other things, it is a prohibited personnel practice to take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles. In other words, in addition to the enumerated PPPs, any other action that violates any law, rule, or regulation implementing, or relating to, the merit system principles also constitutes a prohibited personnel practice.

The MSPB is central to the application of the merit system principles to the Federal workforce. The nine merit principles focus generally on: (1) ensuring recruitment, retention, pay and other conditions of employment are determined solely on the basis of relative ability, knowledge, skills, and performance; (2) ensuring that employees maintain high standards of integrity, conduct, and concern for the public interest; (3) ensuring that employees are free from arbitrary action, personal favoritism, and reprisal for protected disclosures; and (4) ensuring employees are adequately trained, and that the federal workforce is used efficiently and effectively.

The merit principles are essential to the maintenance of an effective and efficient federal workforce. The Federal government has a unique role. The business of Government is to serve the American people. We must have a Federal workforce that the American people can count on, and key to that is protecting merit system principles and promoting a workplace free of prohibited personnel practices. If confirmed, it will be my responsibility to protect the merit system principles and promote a workplace free of prohibited personnel practices.

The MSPB conducts studies of the Executive Branch workforce to ensure that Federal personnel management is implemented consistent with the merit system principles and free from prohibited personnel practices. 5 U.S.C. § 1204(a)(3) states that the MSPB shall: “(3) 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.” If confirmed, I will work with the MSPB Chairman and the other Board member to ensure that the MSPB conducts studies and

research to help improve how the Federal government can do better to ensure that the public interest in a civil service free of prohibited personnel practices is being adequately protected.

4. Part of MSPB's mandate is to conduct studies and issue recommendations to Congress and the President through reports. Without a quorum, the Board has not been able to vote on release of these recommendations since January 2017. As a member of the Board, what issues would you examine for potential policy recommendations, with the goal of improving and protecting the federal merit system?

I believe that the Federal Employee Viewpoint Survey (FEVS) serves as a good indicator of the top challenges facing the Federal workforce today. If confirmed, I will work with the Chairman and the other Board member to ensure that the MSPB conducts studies and research to address the top challenges facing the Federal government that is revealed in the FEVS, including the items listed in response to question 3. I believe it is also important to seek input from Congress, the public, and other Federal agencies, including OPM.

5. Some federal employees appear *pro se* before AJs and the Board. Many do not know what their rights are or how to even file a complaint. What actions can MSPB take – and, if confirmed, what actions would you take – to educate employees on their rights, the process, and other relevant issues so that individuals are able to effectively navigate the system, including when they appear in a *pro se* capacity?

*If confirmed, I commit to working with the Chairman and the other Board member on ways to enhance the education of employees on their rights, the process, and other relevant issues so that individuals are able to effectively navigate the system, including exploring ways to enhance the Board's website (to ensure it educates *pro se* litigants in a comprehensive, plain-English manner), enhance the appeals process, effectively train AJs to effectively deal with *pro se* litigants in accordance with the Judges' Handbook (and update such Handbook as necessary) and increase the use of *pro bono* attorneys at the MSPB stage, among other things.*

The MSPB Administrative Judges' Handbook currently states the following:

*The MSPB's policy is to make special efforts to accommodate *pro se* appellants. These efforts may include the following: the A[dm]inistrative J[udge] [(AJ)] may schedule a status conference early in the process to explain what will be required of the *pro se* appellant and to advise that the *pro se* appellant may contact the R[egional] O[ffice] or F[ield] O[ffice] with questions regarding procedural matters. Generally, the AJ should not reject filings by *pro se* appellants for failing to comply with technical requirements, unless the violations are repeated after a clear warning. The AJ ordinarily should not impose sanctions for failing to comply with an order unless the record establishes that the *pro se* appellant received instructions that a reasonable person, unfamiliar with Board procedures, would have understood. The AJ may allow greater latitude to the *pro se**

appellant in questioning witnesses and in giving testimony. The AJ may allow some leading questions, and may need to instruct the pro se appellant regarding the correct method of questioning. The Board has stated, in this regard, that AJs “should provide more guidance to pro se appellants and interpret their arguments in the most favorable light.”
Miles v. Department of Veterans Affairs, 84 M.S.P.R. 418, 421 (1999).

6. The MSPB has had a completely vacant board since March 1st. As a result, the Board has been unable to issue stays for over three months. Stays give the Office of Special Counsel more time to investigate alleged retaliation against whistleblowers and other improper actions. The MSPB’s inability to issue stays could have deleterious effects on OSC investigations, as well as on the livelihoods of whistleblowers.

- a. How will you account for the ways in which the inability to extend or issue stays since March has potentially damaged whistleblower cases?

If confirmed, I commit to working with the MSPB Chairman and the other Board member to account for the ways in which the inability to extend or issue stays since March has potentially damaged whistleblower cases.

- b. In your opinion, what, if anything, can a fully operational MSPB do to mitigate this damage?

If confirmed, I commit to working with the MSPB Chairman and the other Board member to find ways to explore the potential problem and examine the best ways to mitigate any potential damage.

If confirmed, I also commit to working with the MSPB Chairman and the other Board member to tackle the backlog. As set forth in my policy questionnaire, I have a demonstrated record of success of taking on difficult challenges (including a backlog) and taking all necessary and appropriate steps to achieve significant results for the American people in a short period of time. I have a strong belief in ensuring that cases are adjudicated in a timely manner and that high quality decisions are issued. MSPB’s current backlog is an immediate challenge for the Board members to tackle. As I stated at the hearing, without having a quorum for a very long time, if confirmed, I would work with the Chairman and the other Board Member to reduce that as quickly as possible while ensuring quality of the decisions.

7. I understand that as General Counsel at MSPB, you primarily handled compliance issues for the agency. However, during your time as General Counsel, did you ever serve in an informal advisory role to the Chairman, or the Board-at-large?

When I served as the MSPB General Counsel from 2006 – 2010, I had many responsibilities, only one of which was overseeing the preparation of draft petition for enforcement decisions (also known as compliance decisions) for the Board. I served as the chief legal advisor and chief legal representative of the MSPB. I supervised fourteen full-time employees in the Office of General Counsel (OGC). I provided advice to the

Board and its organizational components on matters of law arising in day-to-day operations.

I provided high-quality legal (formal and informal) advice on complex legal issues to the Chairman, the Board members, the Board, and the Board's organizational components on a variety of topics, with the goal of ensuring that MSPB met its mission by providing the requesting official with the full range of options available within the bounds of the law. Specifically, I issued more than two dozen internal advisory opinions at the MSPB during my tenure on a variety of issues, including federal information law, federal fiscal law, federal procurement law, contract law, intellectual property law, performance management, the Trade Secrets Act, internal-labor management and employment issues, tort law, and ethics matters, among many other issues.

Further, as previously stated, I oversaw the preparation of proposed decisions for the Board on assigned cases, including the petition for enforcement decisions. I was responsible for managing the MSPB's heavy litigation docket in the United States district courts and courts of appeals in approximately 80 cases annually in appeals from Board decisions. I represented the MSPB in personnel litigation and provided advice in such matters. I coordinated the MSPB's legislative policy and congressional relations and coordinated responses to requests for information from the White House and Congress. I oversaw the development of MSPB regulations, as needed. I served as the MSPB's Designated Agency Ethics Official (DAEO) and conducted the MSPB's ethics program. I also planned and directed internal MSPB investigations pursuant to the Inspector General Act of 1978, as amended. I also communicated with the media and reviewed the reports and studies completed by the Office of Policy Evaluations before they were finalized for a legal review, among other duties.

a. If so, what types of cases would this have involved?

As stated above, I have issued more than two dozen internal advisory opinions on a variety of issues as the MSPB General Counsel, including federal information law, federal fiscal law, federal procurement law, contract law, intellectual property law, performance management, the Trade Secrets Act, internal-labor management and employment issues, tort law, and ethics matters, among many other issues. I also provided guidance/training to the Board members on the Sunshine Act and provided Hatch Act training to all MSPB personnel. There were a few times where I believe the advice of the Office of General Counsel was requested by a particular Board member or Board members related to a particular case. Advisory topics during my tenure that I have a recollection of working on related to the adjudication of a particular case (requested by a single Board member or members) involved a request regarding whether the Trade Secrets Act restricted the disclosure of particular details in a published Board decision and a request related to the Board's review of agencies' national security determinations in light of the Supreme Court case Dept. of Navy v. Egan.

- b. How would the General Counsel's influence differ from that of a Chief Counsel to an individual Board member?

It is my understanding that the Chief Counsel to an individual Board member has a limited role, which is to mainly assist the Board Member by reviewing case records, performing legal research, and preparing proposed decisions and orders for their particular Board Member. The Office of the General Counsel (OGC), as legal counsel to MSPB, has a much broader role.

The Office of the General Counsel advises the Board and MSPB's organizational components on matters of law arising in day-to-day operations. The OGC prepares proposed decisions for the Board on assigned cases and represents MSPB in litigation and employment and labor relations matters. The office also coordinates MSPB's legislative policy and Congressional relations functions, responds to certain requests for information, develops regulations, and conducts MSPB's ethics program. It is also responsible for MSPB's investigative functions under the Inspector General Act of 1978.

More specifically, according to MSPB's Organization Functions & Delegations of Authority, functions delegated to OGC include:

- *Assist the Board by reviewing case records, performing legal research, and preparing proposed decisions and orders for the Board in the following matters:*
 - a. Cases referred to the Board for enforcement upon a finding by a judge that a party is not in compliance with a final decision or order of the Board;*
 - b. Reviews of an OPM regulation or implementation of an OPM regulation by an agency upon the request of an interested person or OSC, or on the Board's own motion (5 C.F.R. Part 1203);*
 - c. Court remands (when a determination has been made that a court remand should be processed by OGC; such cases are reviewed initially by OGC and either retained in OGC, transferred to OAC, or remanded to a regional or field office);*
 - and d. Other cases as assigned by the Board, including petitions by the OPM Director that the Board reopen or reconsider a final decision in an appeal which OGC prepared the decision for the Board;*
- *Recommend changes in policy and/or regulations on matters related to adjudication in the office;*
- *Provide legal opinions and advice to the Chairman, the Board Members, and MSPB offices;*
- *Represent MSPB in litigation, monitor litigation pertaining to MSPB that is being handled by the Department of Justice, and advise the Board and affected MSPB offices on the effect of court decisions;*
- *Seek enforcement under 5 U.S.C. § 1204(c) of subpoenas issued by a Board Member, judge, or other employee designated by the Board, or by OSC;*
- *Coordinate the development of MSPB adjudicatory regulations and approval of such regulations by the Board; Initiate changes, as required, to 5 C.F.R. Part 1200, "Board Organization;"*
- *Review administrative regulations prepared by other offices;*
- *Coordinate MSPB submissions for the Unified Agenda of Federal Regulations;*

- *Conduct liaison activities with the Equal Employment Opportunity Commission (EEOC) with respect to mixed cases and with the Federal Labor Relations Authority (FLRA) with respect to labor relations matters;*
 - *Represent MSPB in labor-management matters including coordination of internal employee relations work with the Human Resources (HR) Director;*
 - *Represent MSPB in internal matters, including MSPB employee appeals and complaints;*
 - *Coordinate requirements under the Ethics in Government Act of 1978;*
 - *Review FOIA and Privacy Act appeals and prepare proposed decisions for the Chairman;*
 - *Perform legislative counsel, legislative policy, and Congressional relations functions; respond to inquiries from the White House and Congress; oversee MSPB responses to Congressional inquiries, as appropriate, to ensure information consistency; coordinate transmittal of reports and other information to Congress by or on behalf of other agency program offices;*
 - *Receive and process allegations of waste, fraud, abuse, and gross mismanagement directly or by referral from the telephone hotline maintained on behalf of the Board by another Inspector General's Office through a cooperative agreement;*
 - *Conduct MSPB's Petition for Review settlement program; and*
 - *Enter appropriate data into the case management system.*
8. Since the Board has been vacant for over three months, the MSPB faces an unprecedented backlog in cases. As a member of the Board, how will you work to address this backlog in an efficient way without harming due process?

While efficiently addressing the case backlog is a priority, it can never outweigh the importance of protecting the due process rights of appellants before the Board. Title 5 of the United States Code and the MSPB's regulations establish procedures that provide the notice and opportunity to be heard that due process requires. Employees are guaranteed due process rights both prior to an agency's taking an adverse action, and again at the hearing stage of an MSPB appeal. At the MSPB appellate stage, Board members must ensure through a thorough review of the record of each case that appellant due process rights have been protected both at the agency level and at the hearing level. If confirmed, my knowledge and experience in Federal civil service law will enable me to undertake that review efficiently and effectively.

With regard to tackling the backlog, as set forth in my policy questionnaire, I have a demonstrated record of success of taking on difficult challenges (including a backlog) and taking all necessary and appropriate steps to achieve significant results for the taxpayer in a short period of time. I have a strong belief in ensuring that cases are adjudicated in a timely manner and that high quality decisions are issued. MSPB's current backlog is an immediate challenge for the Board members to tackle. As I stated at the hearing, without having a quorum for a very long time, if confirmed, I would work with the Chairman and the other Board Member to reduce that as quickly as possible while ensuring quality of the decisions.

9. A completely vacant MSPB has the potential to undermine the agency's effectiveness as well as its employee morale. If confirmed, how will you prioritize employee retention and morale?

If confirmed, I will work with the Chairman and the other Board Member to improve employee morale and ensure MSPB employees fully understand and appreciate MSPB's mission and how important their work is to the American people.

If confirmed, I will also abide by several principles that in my experience promote a healthy and happy work environment. First, I will act with complete integrity and act with complete professionalism in the way that I carry out my responsibilities. Along similar lines, I aim to ensure that I abide by the highest ethical standards. Second, I will treat everyone fairly and equally – always acting in an honest and impartial manner. Third, I will treat everyone with respect and dignity. Fourth, I strongly believe in collaboration – especially dealing with significant change. Getting employee buy-in is extremely important to me, not necessarily trying to reach consensus, but aiming to ensure that everyone impacted by potential change has a chance to be heard and that I take those concerns seriously before making a policy decision. Fifth, I will work to ensure that all employees remain mission-focused, work to achieve the highest level of efficiency and effectiveness for the taxpayers, and that all employees understand no matter what level they serve at in the agency, they clearly know how their work impacts the mission of the agency. Sixth, I believe in complete and open communications (to the extent it does not fall within a confidential category) both up and down. Finally, I strongly encourage and promote, through individual training plans, professional development to ensure alignment with office goals and individual desires (to the extent possible). I believe living by these principles and if confirmed, I commit to working with the Chairman and the other Board Member to work on improving employee morale.

10. In the wake of the Administration's Executive Orders last May, the Social Security Administration moved to restrict its employee unions – severely cutting official time, evicting unions from office space, and refusing to reimburse union members for negotiation-related travel. Though you arrived at SSA only last August, after the Executive Orders were issued, there have been reports of ongoing hostility towards unions at SSA.

- a. As Deputy Commissioner for Analytics, Review, and Oversight, what role do you play in the agency's relations with the federal workforce?

I have a large workforce that are members of a union. But, it is the Office of Labor-Management and Employee Relations that is directly responsible to the Deputy Commissioner for Human Resources for managing the SSA labor management relations program, including the development and evaluation of the program and the formulation of SSA-wide labor management relations policy.

- a. Have you had any role in the decisions to change agency policy with respect to unions?

No, not that I recall. I do not believe that I have had any direct role in the decisions to change agency policy with respect to the unions.

- b. Have you played any role in the negotiations process between SSA and unions?

No. I have not had any direct role in the negotiations process between SSA and the unions.

- c. How do you view the recent attempts to curtail union effectiveness?

I am not quite sure on what you are referring to in this question. Separate from the Executive Order, since I have arrived, I am not aware of any attempts to curtail union effectiveness.

- d. Please expound upon your views on unions and collective bargaining rights, as well as the relationships that you have had with unions throughout your career.

I have had great working relationships with unions throughout my career – by getting union members and officials involved early and often on matters affecting the unionized workforce. Getting input from impacted employees is the way I implement change effectively regardless of whether such employees are unionized. I believe that agencies and unions should be working together to help agencies effectively and efficiently fulfill their statutory mission through healthy labor-management relations.